

No. \_\_\_\_\_

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## Supreme Court of the United States

9th Cir. Case No. 21-16838  
In re Gary Victor Dubin, *Petitioner.*

9th Cir. Case No. 21-16839  
Gary Victor Dubin, *Petitioner,*  
vs.  
Office of Disciplinary Counsel, et al., *Respondents.*

9th Cir. Case No. 21-16863  
Gary Victor Dubin, et al., *Petitioners,*  
vs.  
Hawaii State Supreme Court, et al., *Respondents.*

On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Ninth Circuit

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### SUPPLEMENTAL APPENDIX TO JOINT PETITION FOR WRIT OF CERTIORARI

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H. ORDER OF DISBARMENT,  
DATED SEPTEMBER 30, 2021  
UNITED STATES DISTRICT COURT

In the MATTER of Gary ) No. 20-00419  
Victor Dubin, Respondent, ) D. Hawaii  
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)

Leslie E. Kobayashi, U.S. District Judge

The Hawai'i Supreme Court disbarred Respondent Gary Victor Dubin ("Respondent"), effective November 9, 2020. In these proceedings, the Court determines whether reciprocal discipline should be imposed upon Respondent. After considering Respondent's submissions, the record before the Hawai'i Supreme Court, and Respondent's arguments at oral argument, the Court finds that reciprocal discipline is appropriate and HEREBY DISBARS Respondent from practicing law in this district court.

## **BACKGROUND**

### **A. Factual History**

#### **1. Disciplinary Proceedings**

By way of background, Hawaii's attorney disciplinary proceedings commence when the Office of Disciplinary Counsel ("ODC") learns of alleged attorney misconduct through a complaint or otherwise. See Rules of the Supreme Court of Hawai'i ("RSCH") Rules 2.6(b)(1), 2.7(a). ODC investigates the matter and makes a recommendation—ranging from dismissal to formal disciplinary proceedings—to a member of the Disciplinary Board of the Hawai'i Supreme Court ("Disciplinary Board"). See RSCH Rule 2.7(a). If formal disciplinary proceedings are approved, ODC petitions the Disciplinary Board. See RSCH Rule 2.7(c). Thereafter, a hearing officer or committee conducts an evidentiary hearing and submits a report including findings and recommendations and record to the Disciplinary Board. *See id.* In the event the Disciplinary Board determines that discipline greater than an informal admonition or reprimand is warranted, it submits a report with findings and recommendations and record to the Hawai'i Supreme Court. *See RSCH Rule 2.7(d).* In rendering its decision, the Hawai'i Supreme Court may consider briefs or oral argument and has the discretion to issue opinions or orders, or "adopt and publish the findings and conclusions contained in the written report of the [Disciplinary] Board." *Id.*

### **a. Petition for Discipline**

ODC initiated formal disciplinary proceedings against Respondent on January 4, 2017, filing a Petition for discipline with the Disciplinary Board. ECF No. 52-3. On January 9, 2017, ODC filed an Amended Petition for discipline.

ECF No. 52-4. The Amended Petition addressed four cases: (1) ODC Case No. 16-0-151 (Joe Smith, Complainant)- Misrepresentations on Licensing Application (Failure to Report Criminal Conviction); (2) ODC Case No. 16-0-147 (Robert Andia, Complainant) - Signing Clients' Names on Settlement Check Without Permission; (3) ODC Case No. 16-0-213 (Hawai'i Intermediate Court of Appeals ("ICA") Complainant) -Filing of Briefs Not in Compliance with Court Rules, Failure to Timely File, Incompetence; and (4) ODC Case No. 16-0-326 (Robert Kem, Complainant)-Failure to Account for \$45,000 Retainer, Removal of Retainer from Trust Without Notice or Being Earned. *id.*

ODC Case No. 16-0-151 concerned Respondent's submission of a mortgage solicitor's license application in 2008 without disclosing his federal criminal conviction for failure to file federal income tax returns (*United States v. Dubin, Crim. No. 93-01434 MLR*). *Id.* at 3-4. The Department of Commerce and Consumer Affairs revoked Respondent's mortgage solicitor's license due to his misrepresentation on his application. *Id.* at 4-5.

The Circuit Court of the First Circuit, State of Hawai'i, affirmed, as did the ICA, which found Respondent's misrepresentations to be material. *Id.* at 5.

ODC found violations of the Hawai'i Rules of Professional Conduct ("HRPC") 8.4(a) (pre-2014 version) (prohibiting lawyers from violating or attempting to violate the rules of professional conduct, or knowingly assisting or inducing another to do so, or doing so through the acts of another) and 8.4(c) (pre-2014 version) (prohibiting lawyers from engaging in dishonesty, fraud, deceit or misrepresentation). *Id.* at 5-6.

ODC Case No. 16-0:141 involved Respondent's overcharging of clients Robert and Carmelita Andia (collectively, "the Andias") and his unauthorized endorsement of their settlement check. The Andias retained Respondent in February 2012, and their legal services agreement outlined hourly rate ranges for senior and associate attorneys. *Id.* at 6. On November 3, 2015, Respondent received a \$132,000.00 settlement check made out to the Andias and did not notify them. *Id.* at 6-7. He signed their names on the check without their authorization and deposited the proceeds into his client trust account. *Id.* at 7. Respondent did not provide the Andias with their first billing statement until November 7, 2015, which included charges for two associates at a \$385.00 hourly rate, well in excess of the \$180.00 to \$250.00 hourly rate range in the retainer agreement established for associate attorneys. *Id.* at 7. To cover the \$78,202.87 bill, minus the

\$16,500.00 initially paid by the Andias, Respondent took \$61,702.87 from the settlement proceeds. *Id.*

ODC determined that Respondent violated: (1) HRPC 8.4(c) by signing the Andias' names on the settlement check; (2) HRPC 1.4(a)(3) by failing to both immediately notify the Andias that he received the settlement check and provide a bill for over three-and a-half years; (3) HRPC 8.4(c) and 1.5(a) by billing an hourly rate that exceeded both the agreed upon rate and a reasonable rate for recently admitted attorneys; (4) HRPC 1.5(b) by failing to inform the Andias that the hourly rate had changed; and (5) HRPC 8.4(a) for engaging in the foregoing. *Id.* at 8-9.

ODC Case No. 16-0-213 concerned Respondent's repeated violations of the Hawai'i Rules of Appellate Procedure and the issuance of sanctions against him in multiple appeals filed on behalf of his clients between 2012 and 2014. *Id.* at 9-14. ODC found that by repeatedly failing to timely file briefs and documents and failing to comply with brief preparation requirements, Respondent violated HRPC (pre- and post-2014) 1.1 (requiring that counsel provide competent representation to a client); 3.4(e)(prohibiting a lawyer from knowingly disobeying an obligation under the rules of a tribunal); 3.2 (requiring a lawyer to make reasonable efforts to expedite litigation consistent with a client's legitimate interests); 3.1 (prohibiting a lawyer from bringing or defending a proceeding, or asserting an issue therein, unless there is a non-frivolous basis for doing so); and 8.4(a). *Id.* at 15.

ODC Case No. 16-0-32-6 regarded Respondent's failure to account for a retainer and his removal of the retainer from the trust account without notice. *Id.* At 15. Respondent represented Michael Harkey ("Harkey") in cases in Washington and Nevada. Harkey transferred \$20,000.00 and \$25,000.00 into Respondent's client trust account in January and April 2016, respectively. *Id.* at 15-17. Respondent then withdrew from Harkey's Nevada action. *Id.* at 18. Respondent promised to provide Harkey with an accounting but never did. *Id.*

In May 2016, Harkey hired Robert Kern ("Kern"), an attorney, to obtain the \$45,000.00 retainer remitted to Respondent. *Id.* at 19. Kem reached out to Respondent at the end of May, requesting an accounting of the authorized work he performed and to return of the balance of the funds. *Id.* Between May and the end of August, Kem made repeated requests for the accounting and Respondent offered many excuses for failing to provide it, while assuring Kem it was forthcoming. *Id.* at 19-20.

Kem submitted a complaint to ODC in September 2016 for failure to return the retainer or provide an accounting. *Id.* at 21. Respondent responded on September 23, 2016 with a "Client Trust Log" showing that he removed the \$20,000.00 January transfer on March 7, 2016, and the \$25,000.00 April transfer on April 18, 2016. *Id.* ODC followed up, asking Respondent four questions, with questions three and four being: (3) whom he informed about the fund disbursements, how he informed them, and to provide supporting

documentation, and (4) to furnish ODC with the billing or accounting he provided to Kem or Harkey. *Id.* Respondent did not meet the response deadline and despite a reminder from ODC, never responded to the aforementioned inquiries. *Id.* at 21- 22.

ODC identified violations of multiple rules: (1) HRPC 1.15(d) and 1.4(a)(4) for failing to provide an accounting of the \$45,000.00 retainer; (2) HRPC 1.15(a) and (d) for withdrawing \$45,000.00 from the trust account without earning it; (3) HRPC 1.15(d) and 1.4(a)(3) for failing to tell Harkey or Kern that the \$45,000.00 had been removed from Respondent's client trust account; (4) HRPC 8.4(g) for failing to respond to ODC's questions; and (5) HRPC 8.4(a) for engaging in the foregoing conduct. *Id.* at 22-23.

ODC requested that the matter be assigned to a hearing committee or hearing officer, that proceedings be commenced to provide a recommendation to the Disciplinary Board regarding appropriate discipline to impose upon Respondent, and that Respondent be required to take the Multistate Professional Responsibility Examination. *Id.* at 23.

### **b. Service and Answer**

Respondent was served with the Petition and Amended Petition on January 20, 2017. ECF No. 52-5. He requested an extension of time to file an answer. ECF No. 52-6. The Disciplinary Board granted Respondent's request. ECF No. 52-7. On

March 13, 2017, Respondent filed a Verified Answer to Amended Petition, vigorously denying the allegations against him and characterizing them as frivolous and false. ECF No. 52-8. He also asserted numerous affirmative defenses and requested the following relief: (1) remand of the Amended Petition to ODC so the charges are properly investigated before the initiation of formal proceedings; (2) dismissal of the Amended Petition; (3) bifurcation of the four complaints for hearing; (4) appointment of a three-member hearing panel for each complaint; (5) exoneration from the frivolous and false charges; (6) the right to confront and examine and/or cross-examine any adverse witnesses; (7) preservation of state and federal due process rights; and (8) additional time to secure counsel. *Id.* at 27.

### **c. Hearings**

At the prehearing conference on May 15, 2017, Respondent objected to Hearing Officer Roy Hughes("Hughes") participation in the proceedings based on an inactive case with Respondent in which Hughes' office represented the opposing party on appeal. ECF No. 54-5 at 2. Respondent claimed that the case was open, despite the fact that it had been remanded eight years prior with no subsequent action. *Id.* at 2:19-25, 7:4-9. He also raised a number of due process violations and represented that he planned to file a motion to disqualify Hughes, a motion for a three-examiner panel, a motion to dismiss, and a motion for fees and costs; to seek relief in the Hawai'i Supreme Court based on procedural due process violations; to potentially seek relief in federal court based on

federal due process violations; and to take his case to the State Bar, and to run for Director of the State Bar on the platform that ODC has become the enemy of the Bar. *Id.* at 10:25-11:13. Hughes opted to proceed with the hearing because its only purpose was to set dates and deadlines and did so "on the understanding that [Respondent] will be bringing a motion [to disqualify] and the dates may be moved." *Id.* at 5:7-7:19.

As explained below, Respondent did not file a motion to disqualify Hughes until nearly two years later - after Hughes had issued the Findings of Fact and Conclusions of Law.

Evidentiary hearings were held on November 13, 14, 20, 21, 22, 27, and 28, 2017. ECF Nos. 52-46 to 52-49, 53-1 to 53-3. Following multiple extensions of time at the parties' requests, ODC filed its Proposed Findings of Fact, Conclusions of Law, and Recommended Discipline on March 22, 2018. ECF No. 53-19. On April 6, 2018, Respondent untimely filed his Proposed Findings of Fact and Conclusions of Law and Recommended Disposition.<sup>1</sup> ECF No. 53-21.

**d. Findings of Fact and Conclusions of Law**

On April 12, 2018, Hughes issued a Findings of Fact, Conclusions of Law, and Recommended Discipline ("FOFCOL"). ECF No. 53-24. The

FOFCOL addressed in detail the testimonial and documentary evidence presented at the hearing to support the four ODC cases. *Id.* Hughes applied the ABA Standards for Imposing Lawyer Sanctions (2015) in determining the appropriate level of discipline and considered the following factors: (1) the duty violated; (2) the lawyer's mental state; (3) the potential or actual injury caused by the misconduct; and (4) the existence of aggravating or mitigating circumstances. *Id.* at 34 (¶¶ 165-66) (citations omitted).

Duties violated - Hughes found that Respondent: (1) failed to preserve Harkey's property; (2) lacked diligence with Harkey and the Andias; (3) lacked competence by failing to meet deadlines and comply with rules before the ICA; (4) lacked candor in submitting his mortgage solicitor application, signing the Andias' names on their settlement check, billing the Andias at an hourly rate that exceeded the amount agreed to without their consent and that exceeded a reasonable rate for recently admitted attorneys, and failing to inform the Andias that the hourly rate had changed; (5) failed to maintain integrity by neglecting to disclose material information on the mortgage solicitation application, signing the Andias' names on their settlement check without their permission, and charging the Andias an hourly rate exceeding the agreement; (6) violated other duties owed as a professional by billing the Andias an excessive rate for recently admitted attorneys and failing to inform them that the rate had changed; (7) abused the legal process by repeatedly failing to timely file briefs and other

documents and to comply with briefing requirements, and failing to respond to ODC questions three and four regarding the Kern matter; and (8) violated the pre-2014 HRPC. *Id.* at 34-39 (¶¶ 167-85).

Respondent's Mental State --- Hughes concluded that Respondent acted "'knowingly' or 'intentionally'" at all relevant times. *Id.* at 39.

Actual or Potential Injury - Hughes found that the Andias and Harkey suffered actual injury, the judicial system suffered injury, and the public and the profession suffered injury as a result of Respondent's conduct. *Id.* at 40 (¶¶ 190-91). He also found that "Respondent's conduct caused actual and potential injury to the public and the legal system." *Id.* at 41 (¶ 193).

Disbarment as the Presumptive Discipline  
Applying ABA Standards, Hughes determined - without yet accounting for aggravating and mitigating factors—that disbarment was the appropriate sanction for many of the duties breached by Respondent, such as failure to preserve client funds, lack of diligence, lack of competence, lack of candor, failure to maintain personal integrity, and abuse of legal process. *Id.* at 41-44 (¶¶ 194—99).

Aggravating Factors — In aggravation, Hughes found the following factors to be proven by clear and convincing evidence: (1) prior disciplinary offenses in California and Hawai'i; (2) dishonest or

selfish motive; (3) pattern of misconduct; (4) multiple offenses; (5) refusal to acknowledge the wrongful nature of conduct; and (6) substantial experience in the practice of law. *Id.* at 44-46 (¶¶ 200-06).

Mitigating Factors - Hughes concluded that Respondent failed to prove mitigating factors by clear and convincing evidence. *Id.* at 46 (¶ 207).

Hughes ultimately determined:

211. Based on the clear and convincing evidence presented at the hearing, the Hearing Officer finds that Respondent knowingly and intentionally violated the Hawai'i Rules of Professional Conduct as set forth in the Petition and hereby recommends that Respondent is **DISBARRED**; that Respondent be ordered to pay restitution to the Andias in the sum of \$19,885.00; and that Respondent reimburse the Petitioner for all costs it incurred in this matter pursuant to RSCH 2.3(c).

*Id.* at 47.

Following the issuance of the FOFCOL, Respondent filed a Notice to the Chairperson of the Disciplinary Board of Respondent's Appeal to the Board of the Hearing Officer's Cavalier Adoption Verbatim of the Petitioner's Proposed Findings of Fact and Conclusions of Law and Recommended Disposition, and Respondent's Timely Disciplinary Board Rule 23(c) Request for Permission to Submit Briefs and to Present Oral Argument to the Board. ECF No. 53-25.

## e, Disciplinary Board Review

The parties submitted briefing and the Disciplinary Board held a hearing on December 13, 2018. ECF Nos. 53-32 to 54-8.

On February 13, 2019, the Disciplinary Board issued a Decision, adopting and accepting the FOFCOL. ECF No. 54-14 at 1. It recommended that the Hawai'i Supreme Court: (1) issue an order disbarring Respondent; (2) order restitution to the Andias in the amount of \$19,885.00; and (3) order Respondent to pay the costs of the proceedings to the Disciplinary Board. *Id.* at 2.

On April 2, 2019, Respondent filed requests for the Disciplinary Board to withdraw its recommendations due to Hughes' conflict and the Board's conflict in light of board member Peter Horovitz's ("Horovitz") role as opposing counsel on an appeal Respondent filed. ECF Nos. 54-18 to 54-19; ECF No. 54-20 at 2-3. On April 3, 2019, he filed a Motion to Disqualify the Disciplinary Board and Its Appointed Hearing Examiner, Setting Aside Both the February 13, 2019 "Decision of the Disciplinary Board" (DBF-104) and the Hearing Officer's April 12, 2018 Reported Findings, Conclusions, and Recommendations (DBF-71), Based upon Conflicts of Interest and the Appearance of Impropriety, in Violation of Respondent's Right to Due Process of Law. ECF No. 54-20; see also ECF Nos.

54-21 (memorandum in support), 54-22 (supplemental memorandum).

On April 25, 2019, the Disciplinary Board held a hearing on Respondent's motion. ECF No. 54-34. At the start of the hearing, Horovitz explained his decision not to recuse from the earlier proceedings and provided details about the pending appeal in which both he and Respondent were counsel. *Id.* at 3:19-9:22. He then recused himself from the hearing and deliberation on the motion. *Id.* at 9:23-10:1. On April 30, 2019, the Disciplinary Board denied the motion, "finding no new evidence in support of a renewed motion for recusal of Hearing Officer Hughes and finding waiver by Respondent and no abuse of discretion as to recusal of Disciplinary Board Member Peter Horovitz." ECF No. 54-33 at 2.

## **2. Hawai'i Supreme Court Proceedings**

### **a. Disciplinary Board Report, Findings, and Recommendation for the Imposition of Discipline**

On August 8, 2019, the Disciplinary Board filed a Report, Findings, and Recommendation for the Imposition of Discipline ("Report") with the Hawai'i Supreme Court. ECF No. 52-2. The Disciplinary Board evaluated the disciplinary cases against Respondent based on the most egregious conduct: (1) overcharging the Andias by \$19,885.00 for his associates and by falsifying legal research expenses; and forging their signatures on their

settlement check, depositing it into his client trust account, and withdrawing a substantial portion of the funds for himself without their knowledge; and (2) failing to provide a requested timely accounting to Kem (for Harkey), paying himself unearned fees from a client trust account, and billing for 30 hours in a single day. *Id.* at 7 (citations omitted).

The Disciplinary Board adopted paragraphs 167 to 186 of the FOFCOL regarding duties violated and concluded that Respondent violated the duties imposed by HRPC 1.15(a), (c), (d) (preserving identity of funds and property of a client or third person); 1.4(a) (communication); 8.4(a), (g) (misconduct); and 1.5(a), (b) (fees). *Id.* at 7-9. It also found that Respondent acted intentionally and knowingly at all times and that his "conduct caused actual financial and emotional injury to his clients and to the profession." *Id.* at 9 (citations omitted). Finally, it adopted Hughes' finding that there are no mitigating factors and accepted the factors in aggravation: dishonest or selfish motive, pattern of misconduct, multiple offenses, bad faith obstruction of the disciplinary process, refusal to acknowledge the wrongful nature of conduct, substantial experience in the practice of law, and prior disciplinary offenses. *Id.* at 10-11 (citations omitted).

The Disciplinary Board recommended disbarment as the appropriate discipline. *Id.* at 11. It further recommended that Respondent make restitution in the amount of \$19,885.00 to the Andias and to pay the costs of the proceedings. *Id.*

## b. Briefing and Motions

Before the Hawai'i Supreme Court, Respondent filed a motion to disqualify Assistant Disciplinary Counsel Charlene Norris ("Norris"), all attorney staff of ODC and the Disciplinary Board, and to dismiss the petition. ECF No. 57-16. He averred that Norris previously represented him in ODC proceedings for similar charges. *Id.* at 2 (¶ 3) (citation omitted). Respondent also sought disqualification of ODC and Disciplinary Board attorneys, arguing that Norris' conflict was imputed to them. *Id.* at 4 (¶ 6). He further contended that dismissal was warranted by the ethical violations, or alternatively, that attorneys from the Department of the Attorney General replace ODC's counsel to ensure impartial review. *Id.* at 4-5 (¶10).

The Hawai'i Supreme Court disqualified Norris and ODC, concluding that her consultation with Respondent "in 2006 implicated a substantially related matter." ECF No. 57-37 at 2 (citation omitted). It required an outside attorney to appear on the briefings and submissions in the proceedings.<sup>2</sup> *Id.*

Respondent subsequently filed a motion to dismiss, requesting dismissal of the Report because it was different from the Decision and was written by Norris, who was disqualified from the proceedings. ECF No. 58-15 at 3 (¶¶ 6-7, 10). The

motion was denied. ECF No. 58-29.

### **c. Order of Disbarment**

On September 9, 2020, the Hawai'i Supreme Court issued an Order of Disbarment ("Disbarment Order"), finding and concluding that Respondent engaged in the following misconduct by clear and convincing evidence:

ODC Case No. 16-0-156-violation of HRPC8.4(c)(1994)by knowingly misrepresent-ing the truth on a government form which he certified was true. ECF No. 61-5 at 1-2.

ODC Case No. 16-0-147 - (1) violation of HRPC 8.4(c) (2014) by signing in his clients' names on a \$132,000.00 settlement check made out exclusively to them, without their permission, and depositing the check in his client trust account, thereby gaining control over those funds; and (2) violation of HRPC 1.5(a), 1.5(b), 8.4(c), and 1.4(a)(3) (2014) by: (a) failing to immediate notify his clients that he received the check, and (b) neglecting to provide an update of the clients' account for more than three years, then issuing an invoice for \$69,702.87 based on a \$385.00 hourly rate for associates—exceeding by \$115.00 the rate established in the retainer agreement and applying it to an associate who was not licensed to practice law in Hawai'i when the work was completed - and doing so without consulting the clients regarding an amendment of the agreed-upon rate, which resulted in an overcharge of at least \$19,885.00. *Id.* at 2—3.

ODC Case No. 16-0-326 -(1) violation of HRPC 1.15(a) and (d) (2014) for withdrawing \$3,500.00 of client funds when he had yet to earn them; (2) violation of HRPC 1.15(d) (2014) for failing to inform his client when he fully disbursed the client's \$45,000.00 from the firm's client trust account; and (3) violation of HRPC 8.4(g) (2014) for failing to respond to ODC's inquiries about the matter. *Id.* at 3.

The Hawai'i Supreme Court determined that Respondent's "conduct, in ODC Case Nos. 16-0-147 and 16-0-326, inflicted actual, serious, injury upon the clients and upon the profession and, in ODC Case No. 16-0-151, inflicted injury on the public at large and the integrity of the profession." *Id.* At 3. It also deemed unmeritorious Respondent's allegations of due process violations throughout the disciplinary process, having thoroughly reviewed the record and his arguments. *Id.* As final considerations, the Hawai'I Supreme Court noted:

We also find, in aggravation, that Respondent Dubin has two prior disciplines, evinced a dishonest or selfish motive, demonstrated a pattern of misconduct, committed multiple offenses, refused to acknowledge the wrongful nature of his conduct, and has substantial experience in the practice of law. In mitigation, the record contains many positive comments from clients, and Dubin has contributed positively to the development of the law.

*Id.* at 4. The Hawai'i Supreme Court disbarred Respondent, effective 30 days after the entry of the Disbarment Order, and ordered him to pay \$19,885.00 in restitution to the Andias and to bear the costs of the disciplinary proceedings. *Id.* at 4-5.

**d. Post-Disbarment Order Proceedings**

Respondent sought reconsideration of the Disbarment Order, asserting insufficiency of proof of misconduct, denial of due process, and defective conclusions. ECF No. 61-7. He asked "to suspend the Rules," to stay all deadlines pending a decision on the motion, to possibly present oral argument to clarify the record, and to stay all deadlines if the motion was denied so as to facilitate an orderly transition. *Id.* at 52. The Hawai'i Supreme Court denied the motion and requests for relief but extended the effective date of Respondent's disbarment to November 9, 2020. ECF No. 61-23.

Respondent then moved to stay the Disbarment Order. ECF No. 63-9. He argued in part that a stay was wanted because while reciprocal discipline is "normally almost immediately granted," this Court and the Ninth Circuit granted stays pending his efforts to obtain stays and relief in other courts. *Id.* at 2-4 (¶¶ 4-9). The Hawai'i Supreme Court denied the motion to stay and retained the November 9, 2020 effective date for disbarment. ECF No. 63-26.

Persisting in his efforts to undo his disbarment, Respondent sought to dismiss the Disbarment Order, or alternatively, to grant permission to conduct discovery—including deposing ODC staff and the Disciplinary Board—and stay the effective date of his disbarment beyond November 9, 2020. ECF Nos. 64-1 to

64-8, 64-11, 64-13. Respondent requested this relief based on his theory that the Disbarment Order was the result of unconstitutional *ex parte* disclosures between ODC/Disciplinary Board and the Hawai'i Supreme Court. ECF No. 64-11. The Hawai'i Supreme Court held:

Finally, we find and conclude that this court's September 9, 2020 order of disbarment was based solely and exclusively upon the disciplinary petitions and resulting record arising from the four ODC cases listed in the caption of the September 9, 2020 order, that were heard by the Hearing Officer, considered by the Disciplinary Board, and reviewed *de nova*, exhaustively and carefully, by this court, which, after full consideration of Respondent Dubin's numerous due process arguments, concluded the record fully warranted disbarment.

ECF No. 64-21 at 2. It consequently denied Respondent's requests for relief. *Id.* at 3.

Respondent filed another motion for

reconsideration, insisting that the Disbarment Order issued as a result of ex parte communications and "secret" information, in violation of his due process rights. ECF Nos. 64-25, 64-27. The Hawai'i Supreme Court denied this motion as well, ECF No. 64-37 at 3, and explained:

Upon consideration of the November 6, 2020 motion for reconsideration filed by Respondent Gary Dubin and the exhibits and declaration accompanying it, alleging this court has improperly relied upon an ex parte record to impose disbarment upon him and seeking an order dismissing these disciplinary proceedings, and the November 8, 2020 appearance and motion for an extension of Respondent Dubin's November 9, 2020 effective disbarment date filed by attorney Keith M. Kiuchi, we reiterate that the disposition of this matter was based solely and exclusively upon the record of the four cases from the Office of Disciplinary Counsel listed in the caption of the disbarment order, a record which provided ample evidence supporting Respondent Dubin's disbarment, and expressly state that no ex parte communications or exchanges of any variety occurred in the disposition of this matter.

*Id.* at 1-2.

Judgment entered on December 2, 2020.  
ECF No. 65-30.

## **B. Procedural History**

On September 15, 2020, the Court issued an Order to Show Cause, requiring Respondent to file a response within 14 days why he should not be disbarred in accordance with Local Rule 83.4(b). ECF No. 1 at 1. Respondent timely filed an Answer on September 29, 2020.<sup>3</sup> ECF No. 2.

The Court stayed the proceedings while Respondent sought relief from the Hawai'i Supreme Court and the United States Supreme Court. ECF No. 5. After Respondent exhausted all avenues of relief, the Court lifted the stay on April 14, 2021. ECF No. 22.

On April 16, 2021, Keith Kiuchi ("Kiuchi") entered an appearance on Respondent's behalf. ECF No. 24.

On July 9, 2021, the Court issued an Order Regarding Reciprocal Discipline Proceedings, explaining that it would not hold an evidentiary hearing<sup>4</sup> nor expand the scope of evidence unless a review of the record before the Hawai'i Supreme Court revealed the need for additional information. ECF No. 37.

On July 11, 2021, the Court, exercising its discretion under Local Rule 83.4, requested that Chief Judge J. Michael Seabright appoint a three-

judge panel. ECF No. 38. Chief Judge Seabright appointed U.S. District Judges Leslie E. Kobayashi and Jill A. Otake, and U.S. Magistrate Judge Kenneth J. Mansfield,<sup>5</sup> to the panel. ECF No. 39.

On August 25, 2021, Respondent filed an Urgent Ex Parte Request under Oath to the Honorable J. Michael Seabright, Chief Judge, to Amend his July 12, 2021 "Order Appointing Three-Judge Hearing Panel" [Doc. 39], requesting consolidation of this case and another pending case in which he is a plaintiff (Civil No. 21-00175 JAO-KJM), as well as a three-judge panel comprised of judges who are not presiding over one of his cases currently pending in district court or on appeal. ECF No. 45; see also ECF No. 45-1. The Court denied the request because Respondent did not provide authority, nor could he: entitling him to a three-judge panel comprised of judges having no ties to his cases. ECF No. 47.

The Court also concluded that Respondent failed to properly seek consolidation and that consolidating this reciprocal discipline case with his other civil case would be inappropriate in any event. *Id.*

On August 30, 2021, Respondent filed a Motion for Reconsideration. ECF No. 49. This motion and the underlying request were improperly filed by Respondent himself. He was previously admonished on multiple occasions that he may not act on his own behalf if he is represented by counsel.

*See, e.g.*, ECF No. 27 ("Although Mr. Kiuchi has entered an appearance as co-counsel, ECF No. 24, Mr. Dubin is reminded that because he' is represented by an attorney, [he] may not act on his or her own behalf in the action unless an order of substitution shall first have been made by the court.' Local Rule 83.5(a). In other words, Mr. Dubin may represent himself or Mr. Kiuchi may represent him, but not both. As long as Mr. Kiuchi remains counsel of record, Mr. Dubin cannot act on his own behalf." (alteration in original)). As a result, the Court disregarded the motion and deemed it withdrawn. ECF No. 50.

On September 7, 2021, the eve of oral argument, Kiuchi filed a Declaration representing that he is unable to comply with the Court's September 3, 2021 Entering Order requiring that references to the underlying record be made pursuant to the corresponding CM/ECF citations. ECF No. 66 at 2—3 (¶¶ 2, 5-6). He complained that the Court's docketing of the Hawai'i Supreme Court record resulted in renumbered, redesignated, and voluminous CM/ECF internal descriptions. *Id.* at 2 (¶ 3). In fact, the Hawai'i Supreme Court record was painstakingly docketed in a manner to mirror that docket (with corresponding docket numbers and document titles), and in some cases the underlying disciplinary records were separated (versus attached in clusters) so that it is even easier to navigate. Respondent and Kiuchi should be familiar with the Hawai'i Supreme Court docket, having participated in those proceedings (Respondent in full and Kiuchi in part), and anyone with minimal familiarity could readily identify the

CM/ECF references that correspond to the Hawai'i Supreme Court docket.

On September 8, 2021, the Court conducted oral argument. ECF No. 68.

Later in the day, Respondent filed a Supplemental Post-Hearing Declaration, or in the Alternative, Offer of Proof Pending Appeal Submitted to the Panel in the Interests of Justice. ECF No. 69. The unauthorized Declaration, replete with misrepresentations, was stricken. ECF No. 70.

On September 15, 2021, Respondent filed a document titled "Local Rule 60.1 Motion for Reconsideration Based on Mistake and Newly Discovered, Hidden Evidence to Correct Manifest Error (Doc. No. 70), or in the Alternative, Offer of Proof Pending Appeal, Submitted to the Panel in the Interests of Justice." ECF No.71. The Court denied the motion, finding that it was "a transparent and misguided effort to supplement the record without authorization and/or to needlessly clutter the docket by filing duplicate portions of the state court record that are already part of this record and which the Court has reviewed." ECF No. 72. The Court also struck the exhibits attached to the motion. *Id.*

## **LEGAL STANDARD**

Federal courts are not conclusively bound by a state court's disciplinary action. *See In re*

*Kramer*, 282 F.3d 721, 723 (9th Cir. 2002) ("*Kramer II*") (citations omitted). They have the "authority to supervise and discipline the conduct of attorneys who appear before them." *Id.* (internal quotation marks and citation omitted). A federal court may properly impose "reciprocal discipline on a member of its bar based on a state's disciplinary adjudication... unless an independent review of the record reveals: (1) a deprivation of due process; (2) insufficient proof of misconduct; or (3) grave injustice which would result from the imposition of such discipline." *Id.* at 724 (citations omitted); *see Selling*, 243 U.S. at 50-51; *see also In re Rosenthal*, 854 F.2d 1187, 1188 (9th Cir. 1988) (per curiam) ("[T]he state court determination is entitled to great deference and recognition absent the following conditions: (1) the state procedure did not provide adequate notice and an opportunity to be heard; (2) the proof of facts establishing the' want of fair private and professional character' were so infirm that the court should not accept the state court's decision; or (3) some other grave reason existed that should prevent the court from recognizing the state court's determination." (citation omitted)). The disciplined attorney bears the burden of establishing at least one of these elements by clear and convincing evidence. *See Kramer II*, 282 F.3d at 724-25 (citations omitted).

Although "federal courts generally lack subject matter jurisdiction to review the state court decisions," they "may" examine a state court disciplinary proceeding if the state court's order is offered as the basis for suspending or disbarring an attorney from practice before a federal court.

"*Kramer I*, 193 F.3d at 1132-33 (footnote and citation omitted). In examining the state court record "to determine whether any of the *Selling* infirmities exist," courts "must accord a presumption of correctness to the state court factual findings." *Rosenthal*, 854 F.2d at 1188 (citation omitted); see *Gadda v. Ashcroft*, 377 F.3d 934,943 (9th Cir. 2004) (citations omitted). Doing otherwise would draw the court "into an extensive inquiry requiring it to sit in review of a [state supreme court] judgment." *Rosenthal*, 854 F.2d at 1188.

Local Rule 83.4(b) governs reciprocal discipline proceedings in this district:

(b) When it comes to the attention of the court that a member of the bar of this court, or other person authorized to practice in this court, has been disbarred or suspended from practice by any other court, has been found guilty of a crime that is a felony or involves dishonesty or false statement, or fails to satisfy any of the court's present requirements for admission, a notice shall be mailed to such person's last known residence and business addresses, requiring that person to show cause within fourteen (14) days after the mailing of such notice why disbarment or suspension before this court should not occur.

If the person files a timely response contesting suspension or disbarment, the

district judge to whom the matter is assigned shall determine whether suspension or disbarment is nonetheless appropriate and the extent to which further investigation or process is warranted. In conjunction with that determination, the person shall promptly comply with any informational or evidentiary request made by the district judge. *Id.*

## DISCUSSION

Respondent argues that reciprocal discipline should not be imposed because the record proves by clear and convincing evidence that all three *Selling* elements are met. ECF No. 2 at 6-7 (¶ 17). In particular, Respondent points to purported due process violations that occurred during the disciplinary proceedings, erroneous charges, and conflicts of interest. *Id.* at 4-7. He also complains that the disbarment Order was "written in a manner considerably below the judicial scholarly workmanship of this Court, lacking in both detail and in consideration of all relevant facts, notwithstanding the severity of the punishment." *Id.* at 4 (¶ 10).

Respondent incorporates by reference his motion for reconsideration filed in (and denied by) the Hawai'i Supreme Court "as if fully set forth herein and as his factual and legal basis for opposing reciprocal discipline." ECF No. 2 at 5 (¶ 13). However, the Court does not consider arguments and filings incorporated by reference

beyond their existence in the disciplinary record. *See Swanson v. US. Forest Serv.*, 87 F.3d 339, 345 (9th Cir. 1996) ("[T]he incorporation of substantive material by reference is not sanctioned by the federal rules at issue, and the district court did not abuse its discretion in striking the incorporations."); *Williams v.*

*County of Alameda*, 26 F. Supp. 3d 925, 947 (N.D. Cal. 2014) ("[T]he Court will not consider the arguments that Plaintiff improperly seeks to incorporate by reference. This Court only considers arguments that are specifically and distinctively raised by the parties in their briefs." (citing *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003)); *Seto v. Thielen*, Civil No. 10-

00351 SOM-BMK, 2010 WL 2612603, at \*3 (D. Haw. June 28, 2010) ("Plaintiffs may not incorporate by reference facts and arguments previously made.").

In any event, the bulk of Respondent's motion for reconsideration substantively challenged the findings that resulted in his disbarment. The sole issue before this Court is whether reciprocal discipline should be imposed; the Court does not sit in appellate review of the Hawai'i Supreme Court's decision. In reciprocal discipline cases, "an attorney's misconduct has already been adjudicated by another court or disciplinary agency. Thus, a court seeking to impose reciprocal discipline engages in a function far different from a court seeking to impose discipline in the first instance." *Kramer II*, 282 F.3d at 725. To impose reciprocal discipline, the

Court "need only conduct a deferential review of the proceedings that resulted in the initial discipline imposed to satisfy itself that the discipline was not inappropriate under one or more of the *Selling* factors." *Id.* (citation omitted).

After comprehensive review of the Hawai'i Supreme Court record (which includes the underlying disciplinary proceedings), Respondent's submissions, and the arguments presented at the hearing, the Court finds that Respondent has not carried his burden of establishing by clear and convincing evidence a lack of due process, infirmity of proof of misconduct, or that grave injustice would result if reciprocal discipline is imposed. The Court accords a presumption of correctness to the Hawai'i Supreme Court's factual findings.

## A. Due Process

Respondent asserts that his due process rights were violated throughout the course of his disciplinary proceedings, citing the following examples: biased investigation of charges, charges dating back more than 10 years,<sup>6</sup> hidden penalties not disclosed with the charges, adjudication of four cases simultaneously, mixing witness testimony during hearings, the conflicted hearing officer's refusal to recuse, inability to cross-examine material witnesses whose testimony was admitted, wholesale adoption of ODC's proposed findings by the hearing officer, the Disciplinary Board's adoption of the hearing officer's findings,

intentional concealment of a board member's conflict by the Chairperson, secrecy of the Board vote, delayed issuance of the Board Report to the Hawai'i Supreme Court, a changed Board Report; and drafting of the Report by a staff member with a conflict of interest. ECF No. 2 at 4-5 (¶12). But baldly characterizing the foregoing as due process violations do not make them so. Many have no bearing on due process protections and others are directly contradicted by the record.<sup>7</sup>

In assessing due process, the Court focuses on whether the disciplinary proceedings afforded Respondent adequate notice and an opportunity to be heard.<sup>8</sup> *See Rosenthal*, 854 F.2d at 1188; *Rosenthal v. Justs. of the Sup. Ct. of Cal.*, 910 F.2d 561, 564 (9th Cir. 1990) ("The lawyer subject to discipline is entitled to procedural due process, including notice and an opportunity to be heard." (citations omitted)). Additional protections include calling witnesses and cross-examining them, receiving a written decision, and having an opportunity for judicial review. *See Justs. of the Sup. Ct. of Cal.*, 910 F.2d at 564 (citation omitted); *Scheer v. Kelly*, 817 F.3d 1183, 1189 (9th Cir. 2016); cf *Casumpang v. ILWU Loc.* 142,108 Hawai'i 411, 423-24, 121 P.3d 391, 403-04 (2005) ("[D]ue process is not a fixed concept requiring a specific procedural course in every situation. Rather, due process is flexible and calls for such procedural protections as the particular situation demands' and...'the basic elements of procedural due process of law require

notice and an opportunity to be heard at a meaningful time and in a meaningful manner."(brackets and citation omitted)).

Here, Respondent received notice and had ample opportunity to be heard in the disciplinary proceedings and before the Hawai'i Supreme Court.

## 1. Disciplinary Board

Respondent filed extensive briefing addressing the allegations against him, participated in seven days of formal hearings before Hughes, presented witnesses and evidence, and participated in hearings before the Disciplinary Board. See generally ECF Nos. 52-56 (record of disciplinary proceedings). He also availed himself of various mechanisms to challenge findings and decisions, and raised conflict issues in the disciplinary proceedings. See ECF Nos. 53-25, 53-27, 53-33, 53-35, 54-5, 54-8, 54-18 to 54-22, 54-27, 54-34. That he obtained an adverse ruling from the Disciplinary Board regarding his discipline and the purported conflicts of interests does not mean he was deprived of due process. ECF No. 54-33. Indeed, the fact that he raised and was heard on the subject issues demonstrates that he received due process.

Regarding the alleged conflicts of interest, the record supports the Disciplinary Board's and the Hawai'i Supreme Court's determinations that

neither Hughes nor Horovitz had conflicts that undermined the proceedings. Moreover, Horovitz recused himself before the Disciplinary Board issued its Report.

Respondent therefore has not met his burden of establishing by clear and convincing evidence that any bias, prejudice, or conflict infected the proceedings.

*See In re Trask*, 46 Haw. 404, 420, 380 P.2d 751, 760 (1963) ("A fair trial by an impartial tribunal is essential to due process." (citation omitted)).

The record instead reveals a troubling pattern of asserting conflicts and pressing the issue only after a tribunal renders an unfavorable decision, which the Hawai'i Supreme Court has held amounts to a waiver of any conflict. *See ODC v. Au*, 107 Hawai'i 327, 339, 113 P.3d 203, 215 (2005) (holding a party waives a conflict by "waiting to see whether they win and if they lose moving to disqualify a judge who voted against them" (internal quotation marks and citation omitted)).

For example, at the May 15, 2017 prehearing conference before Hughes, Respondent disclosed his intention to file a motion to disqualify Hughes but never did prior to his multi-day hearing in November 2017. ECF No. 54-5 at 10:24-25. He waited nearly *two years* -following the issuance of the FOFCOL on April 12, 2018 and the Disciplinary Board's Decision on February 13, 2019 -to seek

Hughes' disqualification. ECF Nos. 54-20 to 54-22. He concurrently requested disqualification of the Disciplinary Board and to set aside the FOFCOL and Decision based on conflicts of interest and the appearance of impropriety in violation of his due process rights. ECF Nos. 54-20 to 54-22.

Meanwhile, Respondent revived and re-engaged in the case in which Hughes was opposing counsel *after* the issuance of the FOFCOL and Decision, respectively, to point out active conflicts. ECF No. 54-34 at 3:19-10:1, 23:10- 26:15; ECF Nos. 54-18, 54-19. In the case involving Hughes, inactive since 2012, Respondent suddenly reached out to Hughes in January 2019, offering a settlement and then relying on their email communications to demonstrate that the case was "open." ECF Nos. 54-18, 54-34 at 23:10-14, 23:21-24:1.

## **2. Hawai'i Supreme Court**

Respondent raised the same due process violations arguments before the Hawai'i Supreme Court that he raises now.<sup>9</sup> ECF Nos. 60-1, 61-7.<sup>10</sup> Although not specifically addressed in the Disbarment Order, the Hawai'i Supreme Court rejected all contentions that the disciplinary proceedings were defective. It also conducted a *de novo* review of Respondent's motion for reconsideration and the entire record, and denied the motion with the exception of a 31-day extension of the effective date of Respondent's disbarment.

ECF No. 61-23. And in its subsequent order denying Respondent's motion to dismiss the Disbarment Order and a subsequent motion for reconsideration, the Hawai'i Supreme Court expressly rejected Respondent's due process arguments:

Finally, we find and conclude that this court's September 9, 2020 order of disbarment was based solely and exclusively upon the disciplinary petitions and resulting record arising from the four ODC cases listed in the caption of the September 9, 2020 order, that were heard by the Hearing Officer, considered by the Disciplinary Board, and reviewed *de novo*, exhaustively and carefully, by this court, which, after full consideration of Respondent Dubin's numerous due process arguments, concluded the record fully warranted disbarment.

ECF No. 64-21 at 2. Respondent therefore had three additional opportunities to be heard on these issues.

Although Respondent did not raise this argument in his Answer, his other submissions contain allegations that inappropriate ex parte communications occurred between the Chair of the Disciplinary Board and the Hawai'i Supreme Court that influenced the decision to disbar him.<sup>11</sup> ECF No. 35 at 5 (¶ 2)

("Comments were made, whether they were on the record or off the record, that certainly left [Respondent] with the impression that there was a communication between the chair of the Disciplinary Board of the Hawai'i Supreme Court and the Hawai'i Supreme Court that amounted to an *ex parte* communication."); ECF No. 32 at 6-10. Respondent believes that because he received complaints from former clients before the issuance of the Disbarment Order, additional complaints must have been shared with the Hawai'i Supreme Court that influenced its decision to disbar him, thereby depriving him of due process. ECF No. 32 at 6. This theory is purely speculative and without basis. Throughout the record, the four ODC cases at issue are clearly identified. The FOFCOL and Decision address only those four cases. ECF Nos. 53-24, 54-14. The Disbarment Order expressly disbars Respondent based on his conduct in three of the cases.

Like his other arguments, Respondent sought reconsideration before the Hawai'i Supreme Court and the court squarely addressed his theory:

[W]e reiterate that the disposition of this matter was based solely and exclusively upon the record of the four cases from the Office of Disciplinary Counsel listed in the caption of the disbarment order, a record which provided ample evidence supporting Respondent Dubin's disbarment, and expressly state that no *ex parte* communications or exchanges of any variety

occurred in the disposition of this matter.

ECF No. 64-37 at 1-2. Moreover, having conducted an independent review of the entire record, the Court finds that there is *no evidence* in the record or otherwise to support Respondent's conjecture, much less clear and convincing evidence.

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Respondent's final argument concerns Norris, who he claims authored the Disciplinary Board's Report<sup>12</sup> despite her conflict of interest, having represented him previously. ECF No. 2 at 5 (¶ 12). Respondent filed a motion to disqualify Norris, all attorney staff of ODC and the Disciplinary Board, and to dismiss the petition. ECF No. 57-16. He contended that Norris successfully represented him in prior ODC proceedings for "similar false ethical charges" and without his consent "unethically chose[] to represent the ODC against [him]." *Id.* at 2 (if 3) (citation omitted). As a result, Respondent sought disqualification of ODC and Disciplinary Board attorneys on the basis that Norris' conflict was imputed to them. *Id.* at 4 (¶ 6). He further argued that dismissal was warranted by the ethical violations, or alternatively, that attorneys from the Department of the Attorney General replace ODC's counsel to ensure impartial review.<sup>13</sup> *Id.* at 4-5 (¶ 10). Norris countered that she was retained solely to review files and records related to a 2006 ODC case against Respondent, and never represented

him nor provided legal advice. ECF No. 57-20 at 11-12 (¶ 6.A-B). Respondent later conceded that Norris did not formally represent him while continuing to argue here that she represented him. ECF No. 57-30 at 3 ¶,6).

The Hawai'i Supreme Court disqualified Norris and ODC, concluding that her consultation with Respondent "in 2006 implicated a substantially related matter." ECF No. 57-37 at 2 (citation omitted). It required an outside attorney to appear on the briefings and submissions in the proceedings. *See id.* Because Respondent obtained partial relief, his remaining dispute appears to be that Norris' participation in the drafting of the Report deprived him of due process.

Respondent raised this argument in his motion to disqualify and again in his subsequent motion to dismiss. ECF Nos. 57-16, 58-15. Norris did not draft the Report. ECF No. 58-19. Because the Court has determined the underlying proceedings before Hughes and the Disciplinary Board were not tainted, challenges to the Report's reliance on the FOFCOL necessarily fail. Most importantly, these arguments were thoroughly considered and rejected by the Hawai'i Supreme Court. ECF No. 58-29; ECF No. 64-21.

For these reasons, there are no due process violations—and certainly none established by clear and convincing evidence -precluding the imposition of reciprocal discipline.

## B. Proof of Misconduct

To satisfy the relevant standard, Respondent must show that "the proof of facts establishing the' want of fair private and professional character' were so infirm that the court should not accept the state court's decision." *Rosenthal*, 854 F.2d at 1188 (citation omitted). He has failed to do so.

Notwithstanding Respondent's insistence that the allegations against him were erroneous and refuted by the evidence, the record contains significant proof of misconduct in the three ODC cases. ECF No. 53-24. Hughes, the Disciplinary Board, and the Hawai'i Supreme Court relied upon this proof in recommending and ultimately imposing disbarment. Respondent's repudiation of the allegations consists of deflection and finger pointing, not evidence. And when he references evidence, it does not stand for the proposition for which it is cited. Findings are not insufficient or untrue merely because they do not comport with Respondent's narrative.

For example, in his motion for reconsideration filed with the Hawai'i Supreme Court, Respondent insists that the Disbarment Order incorrectly relies on two prior disciplines as aggravating factors and he disputes the existence of prior discipline. ECF No. 61-7 at 4 ("It was therefore fundamental prejudicial error for this Court to adopt in aggravation the ODC's accusation of prior discipline....

There are two possible explanations for this mistake."). Yet he acknowledges that he was previously disciplined by the California Bar Court and ODC.<sup>14</sup> *Id.* at 4-6. He attempts to explain away the discipline, going so far as to recast the California discipline—a *public reproof*—as an "approval." *Id.* at 5 ("[T]he California Bar Court, of whose Bar Respondent has been a Member since 1964, conducted their similar investigation, the Bar Court Settlement Judge agreeing with the ODC, nevertheless within his limited authority gave Respondent the minimum public reproof which when published read like approval and not reproof[.]"). But Respondent's wordsmithing cannot transform this prior discipline into an endorsement of his conduct. ECF No. 55-11 at 80-91.

Based on its review of the extensive record, the Court finds no infirmities in the proof that warrants disregarding the Disbarment Order.

### **C. Grave Injustice**

Respondent calls his disbarment a "death sentence." ECF No. 2 at 8.

Understandably, taking away one's license to practice law has serious ramifications for a lawyer's personal and professional life. Reciprocal discipline here involves disbarment and it is not a decision made lightly or without disregard for the personal and professional pain that will likely result.

However, Respondent confuses the painful repercussion from reciprocal discipline itself (i.e., disbarment) with the legal standard of whether imposing reciprocal discipline would result in grave injustice because the discipline was improperly imposed. Where, as here, the record supports the discipline imposed and does not reveal a lack of due process, there is simply no reason "that should prevent the court from recognizing the state court's determination." *Rosenthal*, 854 F.2d at 1188 (citation omitted).

Respondent cannot engage in conduct warranting disbarment then cite the consequences that flow from that disbarment as bases to avoid reciprocal discipline.

In sum, Respondent has not established by clear and convincing evidence that any exceptions precluding the imposition of reciprocal discipline apply here. There is no evidence of due process violations, insufficient proof, or grave injury. Accordingly, the Court imposes reciprocal discipline and disbars Respondent from the practice of law before it.

## CONCLUSION

For the reasons stated herein, Respondent Gary Victor Dubin is HEREBY DISBARRED from practicing in the U.S. District Court for the District of Hawaii pursuant to Local Rule 83.4(b), effective on the date of this Order. The Court directs the clerk's office to provide copies of this Order to the Clerk of the United States Supreme Court, the Clerk of the United States Court of Appeals for the Ninth Circuit, and the Clerk of the Hawai'i Supreme Court.

n.1 Respondent's request for an extension of the March 22, 2018 deadline was denied. ECF No. 53-17. In his request, Respondent "guaranteed" that he would submit his proposed findings by April 2, 2018, but did not meet that untimely date. He even encouraged ODC to disregard the March 22, 2018 deadline and submit proposed findings on April 2, 2018. ECF No. 53-18.

n2 Eventually, Hamilton Fox, III, was permitted to appear pro hac vice and Special Assistant Disciplinary Counsel for ODC Matthew Kohm served as local counsel. ECF No. 59-22.

n.3 The Ninth Circuit has determined that under *Selling v. Radford*, 243 U.S. 46 (1917), due process is satisfied with the issuance of an order to show cause and a review of the state court record. *See In re Kramer*, 193 F.3d 1131, 1133 (9th Cir. 1999) ("*Kramer I*") (citations omitted); *In re Kay*, 481 F. App'x 407,408 (9th Cir. 2012) ("Kay's contention that the district court violated his due process rights when

it did not conduct an evidentiary hearing is unpersuasive because the district court proceedings met due process requirements." (citing Kramer, 193 F.3d at 1133)); see also *In re Sanai*, CASE NO. RD13-76MJP, 2013 WL 12185783, at \*2 (W.D. Wash. Dec. 18, 2013), *aff'd sub nom. Sanai*, 653 F. App'x 560 (9th Cir. 2016).

n.4 The Court authorized Respondent to submit a declaration from former Governor John Waihee, who served as Respondent's counsel in his disciplinary proceedings. ECF No. 37. Notwithstanding the three-week window to do so, Respondent waited until the close of business on the deadline to request an extension of time to file the declaration. ECF No. 40. Respondent cited his inability to personally draft Waihee's declaration due to health issues and competing deadlines as the basis for an extension of time. *Id.* The Court partially granted the request, extending the deadline by two days, but expressed concern that Respondent was drafting Waihee's declaration. ECF No. 41. Respondent moved for reconsideration, presenting a number of facts that were not included in the initial request. ECF No. 43. Contradicting the bases for his request for an extension, he also claimed that he never intended to draft Waihee's declaration and that he needed additional time because his counsel planned to meet with Waihee on the deadline. *Id.* The Court denied the motion because Respondent raised arguments not presented in his original request and he demonstrated that he had not even attempted to comply with the original deadline. ECF No. 43.

n.5 Judge Otake and Magistrate Judge

Mansfield were already assigned to this case upon the filing of the Answer. ECF Nos. 3, 4.

n.6 It is unclear why Respondent advances this argument when *none* of the allegations against him preceded the ODC's Amended Petition by 10 years. With the exception of the charges pertaining to his mortgage solicitation application, the complaints against him involved conduct occurring in 2012 or later.

n.7 Respondent has repeatedly argued that his rights were violated by the Disciplinary Board's delay in issuing the Report to the Hawai'i Supreme Court. But after the Disciplinary Board entered its Decision, any delay was due to Respondent's attempts to set aside the FOFCOL and Decision, which required additional proceedings. ECF Nos. 54-18 to 54-33. Respondent has also persistently suggested that the Disciplinary Board improperly "changed" its Report. He is mistaken. See ECF No. 58-19 at 2. The Decision is a distinct document from the Report presented to the Hawai'i Supreme Court. See RSCH

Rule2.7(d) (distinguishing between affirmation or modification of the report of the hearing committee or officer and the report—containing the Disciplinary Board's findings and recommendations -submitted to the Hawai'i Supreme Court).

n.8. ‘An opportunity to be heard, however, does not necessarily include an opportunity to present one's arguments orally.” *Partington v. Gedan*, 961 F.2d 852, 865 (9th Cir. 1992).

n.9 Respondent also asserted these arguments (and more) in his Petition for Writ of Certiorari submitted to the U.S. Supreme Court. ECF No. 16-1.

n.10 Respondent presented the same arguments in other filings as well. *See*, e.g., ECF Nos. 57-16, 57-30.

n.11 In the present case, Respondent similarly attempted to manufacture a conflict based on communications from Bradley Tamm *sent to the clerk's office*. ECF No. 49 at 3 ("Judge Otake, although having received Mr. Tamm's *ex parte* documents, has responded that the *ex parte* materials addressed to her were provided instead to the clerk's office, *albeit* presumably for her[.]"). Respondent's presumptions—and nothing more—are incorrect. He complained that "to this day [he] does not know what Mr. Tamm gave Judge Otake, only that she thereafter following [sic] being provided by Mr. Tamm with constant' updates,' she [sic] tore into Respondent unfairly (Doc. 19)." Id. at 3-4n.4. The Court has never stated that "constant" updates were provided, and it disclosed that updates concerned the status of public filings - in other words, nothing bearing on the substance of any matters in this case. ECF Nos. 18, 46. And Respondent's claim that he was "tor[n] into" is belied by the record. ECF No. 19 ("Respondent is ordered to explain, by 4/13/21, why he has not informed the Court about the 4/5/21 denial of his petition for writ of certiorari. *See* [https://www.supremecourt.gov/orders/courtorders/040521zor\\_3204.pdf](https://www.supremecourt.gov/orders/courtorders/040521zor_3204.pdf). In his 3/31/21 Status Report,

Respondent represented that he would notify the Court when the Supreme Court ruled upon his petition. ECF No. 17. The Court has cautioned, on multiple occasions, that Respondent's failure to apprise the Court within one (1) business day of filings and developments in other proceedings that may bear up on [sic] this case may result in the imposition of reciprocal discipline. ECF Nos. 5, 7."). Respondent even took it a step further, arguing that the Court's entering order requiring him to explain his failure to comply with a prior order prejudiced the proceedings and denied him briefing of issues. ECF No. 49 at 5. Not only was the order unrelated to briefing, but Respondent also had a full opportunity to present his arguments in his Answer, and has, without authorization, asserted additional arguments in other filings. So, no deprivation has occurred.

n.12 ODC disputed Norris' involvement with the drafting, editing, or other participation in the preparation of the Report. ECF No. 58-19 at 3.

n.13 This is another tactic employed here. ECF No. 49 at 9 (requesting that Chief Judge *Seabright* ask the Chief Judge of the Ninth Circuit to appoint out-of-district judges to preside over this case and his civil action).

n.14 The FOFCOL clearly identifies the California State Bar and ODC disciplinary offenses as the pertinent prior discipline. ECF No. 53-24 at 33, 44. Therefore, it is not a bare accusation by ODC.

## **IT IS SO ORDERED**

**Jill A. Otake, U.S. District Judge**  
**Kenneth J. Mansfield, U.S. Magistrate Judge**

I. ORDER DISMISSING ACTION,  
DATED OCTOBER 13 2021

UNITED STATES DISTRICT COURT

Gary Victor Dubin, ) No. 21-00392  
Plaintiff ) D. Hawaii  
v. )  
Office of Disciplinary )  
Counsel, et al., Defendants. )  
\_\_\_\_\_  
)

Jill A. Otake, U.S. District Judge

On September 20, 2021, Plaintiff Gary Victor Dubin ("Plaintiff") filed a Verified Complaint to Directly Set Aside the Hawaii State Supreme Court's Order Disbarring Plaintiff in Violation of the Due Process Fair Hearing Guaranty of the Fifth and Fourteenth Amendments to the United States Constitution Resulting from the Defendants Having Committed Extrinsic Fraud in Its Procurement, and for Actual and Punitive Civil Rights Damages against the Individual Defendants Involved ("Complaint"). For the following reasons, the Court sua sponte DISMISSES this case for lack of subject matter jurisdiction.

"Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (citation omitted); see *Allstate Ins. Co. v. Hughes*, 358 F.3d

1089, 1093 (9th Cir. 2004) (noting the court's obligation to consider sua sponte whether it has subject matter jurisdiction). Federal courts are presumed to lack subject matter jurisdiction, and Plaintiff bears the burden of establishing that subject matter jurisdiction is proper. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). If the Court lacks subject matter jurisdiction, an action must be dismissed. See Fed. R. Civ. P. 12(h)(3).

When a dismissal is for lack of subject matter jurisdiction, a party is not "entitled to notice and an opportunity to respond." *Scholastic Ent., Inc. v. Fox Ent. Grp., Inc.*, 336 F.3d 982, 985 (9th Cir. 2003) (citations omitted). The power to dismiss under these circumstances is not unlimited but briefing or a hearing is neither required nor would it be beneficial here because Plaintiff already preemptively addressed the basis for dismissal (the *Rooker-Feldman* doctrine) in the Complaint. *See id.* (concluding that the sua sponte dismissal did not surprise or unfairly prejudice the defendant, as the parties had previously briefed subject matter jurisdiction and "additional briefing would have been duplicative and unnecessary"); *see also* Local Rule 7.1(c) ("Unless specifically required, the court may decide all matters, including motions, petitions, and appeals, without a hearing.").

## BACKGROUND

On September 9, 2020, the Hawai'i Supreme Court issued an Order of Disbarment ("Disbarment

Order"), finding and concluding that Plaintiff engaged in misconduct in three Office of Disciplinary Counsel of the Hawai'i Supreme Court ("ODC") cases by clear and convincing evidence. Civil No. 20-00419 JAO-KJM, ECF No. 61-5.<sup>1</sup> Since then, Plaintiff has continuously engaged in state and federal court litigation to stay, undo, and/or set aside the Disbarment Order. See generally Civil No. 20-00419 JAO-KJM; Civil No. 21-00175 JAO-KJM. Throughout the course of his various proceedings, Plaintiff has accused Defendants Bradley R. Tamm ("Tamm") and Clifford Nakea ("Nakea") and others of misconduct that ultimately caused his disbarment. Tamm is ODC's Chief Disciplinary Counsel and Nakea is the Chair of the Disciplinary Board of the Hawai'i Supreme Court ("Disciplinary Board").

On September 30, 2021, Plaintiff was disbarred from practicing in this district. *See In re Dubin*, Civil No. 20-00419 JAO-KJM, 2021 WL 4496948, at \*1 (D. Haw. Sept. 30, 2021). His civil action challenging Hawaii's disciplinary system and process and his disciplinary proceedings was dismissed. *See Dubin v. Sup. Ct. of Haw.*, Civil No. 21-00175 JAO-KJM, 2021 WL 4496946, at \*1 (D. Haw. Sept. 30, 2021).

## DISCUSSION

In this action, Plaintiff yet again challenges his disbarment and expressly asks the Court to set aside the Disbarment Order. He has already

challenged his disbarment in *In re Dubin*, Civil No. 20-00419 JAO-KJM, and *Dubin v. Supreme Court of Hawaii*, Civil No. 21-00175 JAO-KJM. This case is founded upon Plaintiff's theory—expressed many times before—that Tamm and Nakea engaged in ex parte communications with the Hawai'i Supreme Court regarding client complaints during the pendency of Plaintiff's disciplinary proceedings, which the Hawai'i Supreme Court then relied upon to disbar him. ECF No. 1(Compl.) ¶¶ 18-20.

By Plaintiffs admission, "[t]his lawsuit directly seeks to set aside [his] disbarment" because Tamm and Nakea procured his disbarment through extrinsic fraud. *Id.* ¶ 14.

Plaintiff asserts two claims: (1) his disbarment should be set aside due to extrinsic fraud, "in defense of the Fifth and Fourteenth Amendments" (Count One), and (2) he should be awarded actual and punitive fraud damages (Count Two). *Id.* ¶¶ 27-33. Although Count Two is labeled as a standalone claim for damages, it alleges that Tamm engaged in ex parte communications with Nakea, the Hawai'i Supreme Court, and others, while encouraging individuals to file grievances against Plaintiff under the false pretense that the individuals would be reimbursed. *Id.* ¶ 30. Count Two also claims that Nakea hid a conflict of interest of a Disciplinary Board member from Plaintiff and the Disciplinary Board, and that the member participated in disciplinary deliberations. *Id.* ¶ 31. Plaintiff's claims implicate the *Rooker-Feldman* doctrine.

"The *Rooker-Feldman* doctrine is a well-established jurisdictional rule prohibiting federal courts from exercising appellate review over final state court judgments." *Reusser v. Wachovia Bank, NA.*, 525 F.3d 855, 858-59 (9th Cir. 2008) (citations omitted). "Under *Rooker-Feldman*, lower federal courts are without subject matter jurisdiction to review state court decisions, and state court litigants may therefore only obtain federal review by filing a petition for a writ of certiorari in the Supreme Court of the United States." *Mothershed v. Justs. of the Sup. Ct.*, 410 F.3d 602, 606 (9th Cir. 2005) (citations omitted). District courts are barred from not only direct appeals of state court decisions, "but also over the' de facto equivalent' of such an appeal." *Cooper v. Ramos*, 704 F.3d 772, 777 (9th Cir. 2012) (citation omitted). Courts "pay close attention to the *relief* sought by the federal-court plaintiff in determining whether an action is a de facto appeal. *Id.* at 777-78 (internal quotation marks and citation omitted). A de facto appeal is found "when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of that court." *Id.* at 778 (internal quotation marks and citations omitted); *see also Henrichs v. Valley View Dev.*, 474 F.3d 609, 613 (9th Cir. 2007) (explaining that a plaintiffs claims must arise from the state court judgment, not merely "when a party fails to obtain relief in state court" (citation omitted)); *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 (9th Cir. 2003) (explaining that *Rooker-Feldman* precludes adjudication of claims when the redress sought by the plaintiff is an 'undoing" of the prior state court judgment).

Plaintiff's allegations regarding Tamm's and Nakea's purported misconduct, and their corresponding influence on the decision to disbar him, fall squarely within *Rooker-Feldman*. Where, as here, Plaintiff complains that Tamm and Nakea committed legal wrongs during the state disciplinary proceedings and he asks to set aside the Disbarment Order,<sup>2</sup> the case is a *de facto* appeal of the Disbarment Order. These allegations arise out of Plaintiff's state disciplinary proceedings and are premised on purported infirmities that contributed to his disbarment.<sup>3</sup> That is, they "constitute a particularized challenge to [Hawaii's] disciplinary proceedings' results." *Mothershed*, 410 F.3d at 608; *see id.* at 605-08 (affirming the district court's determination that the plaintiff's claims—raised under 42 U.S.C. § 1983 for due process and other constitutional violations, as well as state law tort claims—relating to procedural shortcomings in his Arizona and Oklahoma disciplinary proceedings, were barred by *Rooker-Feldman*). This is true even as to monetary damages because an award of any damages would require a finding that there was error with the disciplinary process and/or Disbarment Order. *See Cooper*, 704 F.3d at 782 ("Cooper's prayer for relief in the form of monetary and punitive damages, although distinct from his prayer for a declaratory judgment that he is entitled to DNA testing, is contingent upon a finding that the state court decision was in error."); *Henrichs*, 474 F.3d at 616.

Plaintiff fares no better characterizing the misconduct as extrinsic fraud. In an effort to avoid *Rooker-Feldman's* bar, Plaintiff alleges that

Tamm's and Nakea's purported *ex parte* communications "constitute extrinsic fraud as a matter of law" and that "state court judgments obtained by extrinsic fraud may be set aside on constitutional grounds notwithstanding the Rooker-Feldman Doctrine, rendered thereby inapplicable." Compl. ¶ 27 (citing *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140-41 (9th Cir. 2004)). Indeed, extrinsic fraud—defined as "conduct which prevents a party from presenting his claim in court"—on a court is "not an error by that court." *Kougasian*, 359 F.3d at 1140-41 (citation omitted).

Rather, because extrinsic fraud is "a wrongful act committed by the party or parties who engaged in the fraud," *Rooker-Feldman* "does not bar subject matter jurisdiction when a federal plaintiff alleges a cause of action for extrinsic fraud on a state court and seeks to set aside a state court judgment obtained by that fraud." *Id.* at 1141.

Plaintiff's reliance on *Kougasian v. TMSL, Inc.* is misplaced, as he can only avoid *Rooker-Feldman* if Defendants' alleged *ex parte* communications with the Hawai'i Supreme Court prevented him "from presenting his claim in court." Reusser, 525 F.3d at 859 (citation omitted). Even when misconduct rises to the level of extrinsic fraud, district courts lack jurisdiction to review a claim of extrinsic fraud if it was separately litigated in state court. *See id.* at 860 (citing *Taylor v. Fed. Nat'l. Mortg. Ass'n*, 374 F.3d 529, 533-34 (7th Cir. 2004)).

Plaintiff *already unsuccessfully* litigated this issue before the Hawai'i Supreme Court in his disciplinary proceedings.<sup>4</sup> *See, e.g., id.* at 859-60 ("The hitch in both contentions [regarding extrinsic fraud], however, is that they *already* have been litigated in Oregon state court.... The state court denied the *Reussers'* motion and therefore left the default judgment intact."). Plaintiff sought dismissal of the Disbarment Order, or alternatively, to grant permission to conduct discovery and stay the effective date of his disbarment beyond November 9, 2020. Civil No. 20-00419 JAO-KJM, ECF Nos. 64-1 to 64-8, 64-11, 64-13. Plaintiff argued that the Disbarment Order was the result of unconstitutional *ex parte* disclosures between ODC/Disciplinary Board and the Hawai'i Supreme Court. *Id.*, ECF No.64-11. The Hawai'i Supreme Court held:

Finally, we find and conclude that this court's September 9, 2020 order of disbarment *was based solely and exclusively upon the disciplinary petitions and resulting record arising* from the four ODC cases listed in the caption of the September 9, 2020 order, that were heard by the Hearing Officer, considered by the Disciplinary Board, and reviewed *de novo*, exhaustively and carefully, by this court, which, after full consideration of Respondent Dubin's numerous due process arguments, concluded the record fully warranted disbarment.

*Id.*, ECF No. 64-21 at 2 (emphasis added). It consequently denied Plaintiff's requests for relief. *Id.*, ECF No. 64-21 at 3. Plaintiff then sought reconsideration, insisting that the Disbarment Order issued as a result of *ex parte*

communications and "secret" information, in violation of his due process rights. *Id.*, ECF Nos. 64- 25, 64-27. The Hawai'i Supreme Court denied this motion as well, *see id.*, ECF No. 64-37 at 3, and explained:

Upon consideration of the November 6, 2020 motion for reconsideration filed by Respondent Gary Dubin and the exhibits and declaration accompanying it, alleging this court has improperly relied upon an *ex parte* record to impose disbarment upon him and seeking an order dismissing these disciplinary proceedings, and the November 8, 2020 appearance and motion for an extension of Respondent Dubin's November 9, 2020 effective disbarment date filed by attorney Keith M. Kiuchi, we *reiterate that the disposition of this matter was based solely and exclusively upon the record* of the four cases from the Office of Disciplinary Counsel listed in the caption of the disbarment order, a record which provided ample evidence supporting Respondent Dubin's disbarment, *and expressly state that no ex parte communications or exchanges of any variety occurred in the disposition of this matter.*

*Id.*, ECF No. 64-37 at 1-2 (emphases added). Therefore, not only has Plaintiff presented the claim that is the subject of this action to the Hawai'i Supreme Court, but that court also unequivocally disclaimed the existence of ex parte communications or an ex parte record. In disbarring Plaintiff, it only considered the ODC cases that Plaintiff had an opportunity to challenge; to wit, there was no extrinsic fraud.

Accordingly, even drawing all inferences in Plaintiffs favor,

*Rooker-Feldman* bars Plaintiff's claims and this case is DISMISSED for lack of subject matter jurisdiction. *See Qin Zhang v. Google, Inc.*, 609 F. App'x 459,460 (9th Cir. 2015) (affirming dismissal of federal claims *sua sponte* for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine).

## CONCLUSION

For the reasons stated herein, the Court DISMISSES this action without prejudice.

n.1. Respondent's request for an extension of the March 22, 2018 deadline was denied. ECF No. 53-17. In his request, Respondent "guaranteed" that he would submit his proposed findings by April 2, 2018, but did not meet that untimely date. He even encouraged ODC to disregard the March 22, 2018 deadline and submit proposed findings on April 2, 2018. ECF No. 53-18.

n.2. Eventually, Hamilton Fox, III, was permitted to appear pro hac vice and Special Assistant Disciplinary Counsel for ODC Matthew Kohm served as local counsel. ECF No. 59-22.

n.3. The Ninth Circuit has determined that under *Selling v. Radford*, 243 U.S. 46 (1917), due process is satisfied with the issuance of an order to show cause and a review of the state court record. *See*

*In re Kramer*, 193 F.3d 1131, 1133 (9th Cir. 1999) ("*Kramer I*") (citations omitted); *In re Kay*, 481 F. App'x 407,408 (9th Cir. 2012) ("Kay's contention that the district court violated his due process rights when it did not conduct an evidentiary hearing is unpersuasive because the district court proceedings met due process requirements." (citing *Kramer*, 193 F.3d at 1133)); see also *In re Sanai*, CASE NO. RD13-76MJP, 2013 WL 12185783, at \*2 (W.D. Wash. Dec. 18, 2013), *aff'd sub nom. Sanai*, 653 F. App'x 560 (9th Cir. 2016).

n.4. The Court authorized Respondent to submit a declaration from former Governor John Waihee, who served as Respondent's counsel in his disciplinary proceedings. ECF No. 37. Notwithstanding the three-week window to do so, Respondent waited until the close of business on the deadline to request an extension of time to file the declaration. ECF No. 40. Respondent cited his inability to personally draft Waihee's declaration due to health issues and competing deadlines as the basis for an extension of time. *Id.* The Court partially granted the request, extending the deadline by two days, but expressed concern that Respondent was drafting Waihee's declaration. ECF No. 41. Respondent moved for reconsideration, presenting a number of facts that were not included in the initial request. ECF No.43. Contradicting the bases for his request for an extension, he also claimed that he never intended to draft Waihee's declaration and that he needed additional time because his counsel planned to meet with Waihee on the deadline. *Id.* The Court denied the motion because Respondent raised arguments not presented in his original request and

he demonstrated that he had not even attempted to comply with the original deadline. ECF No. 43.

n.5. Judge Otake and Magistrate Judge Mansfield were already assigned to this case upon the filing of the Answer. ECF Nos. 3, 4.

n.6. It is unclear why Respondent advances this argument when *none* of the allegations against him preceded the ODC's Amended Petition by 10 years. With the exception of the charges pertaining to his mortgage solicitation application, the complaints against him involved conduct occurring in 2012 or later.

n.7. Respondent has repeatedly argued that his rights were violated by the Disciplinary Board's delay in issuing the Report to the Hawai'i Supreme Court. But after the Disciplinary Board entered its Decision, any delay was due to Respondent's attempts to set aside the FOFCOL and Decision, which required additional proceedings. ECF Nos. 54-18 to 54-33. Respondent has also persistently suggested that the Disciplinary Board improperly "changed" its Report. He is mistaken. See ECF No. 58-19 at 2. The Decision is a distinct document from the Report presented to the Hawai'i Supreme Court. See RSCH Rule2.7(d) (distinguishing between affirmance or modification of the report of the hearing committee or officer and the report—containing the Disciplinary Board's findings and recommendations -submitted to the Hawai'i Supreme Court).

n.8. ‘An opportunity to be heard, however, does not necessarily include an opportunity to present

one's arguments orally." *Partington v. Gedan*, 961 F.2d 852, 865 (9th Cir. 1992).

n.9. Respondent also asserted these arguments (and more) in his Petition for Writ of Certiorari submitted to the U.S. Supreme Court. ECF No. 16-1.

n.10. Respondent presented the same arguments in other filings as well. *See*, e.g., ECF Nos. 57-16, 57-30.

n.11. In the present case, Respondent similarly attempted to manufacture a conflict based on communications from Bradley Tamm *sent to the clerk's office*. ECF No. 49 at 3 ("Judge Otake, although having received Mr. Tamm's *ex parte* documents, has responded that the *ex parte* materials addressed to her were provided instead to the clerk's office, *albeit* presumably for her[.]"). Respondent's presumptions—and nothing more—are incorrect. He complained that "to this day [he] does not know what Mr. Tamm gave Judge Otake, only that she thereafter following [sic] being provided by Mr. Tamm with constant' updates,' she [sic] tore into Respondent unfairly (Doc. 19)." Id. at 3-4n.4. The Court has never stated that "constant" updates were provided, and it disclosed that updates concerned the status of public filings - in other words, nothing bearing on the substance of any matters in this case. ECF Nos. 18, 46. And Respondent's claim that he was "tor[n] into" is belied by the record. ECF No. 19 ("Respondent is ordered to explain, by 4/13/21, why he has not informed the Court about the 4/5/21 denial of his petition for writ of certiorari. *See*

[https://www.supremecourt.gov/orders/courtorders/040521zor\\_3204.pdf](https://www.supremecourt.gov/orders/courtorders/040521zor_3204.pdf). In his 3/31/21 Status Report, Respondent represented that he would notify the Court when the Supreme Court ruled upon his petition. ECF No. 17. The Court has cautioned, on multiple occasions, that Respondent's failure to apprise the Court within one (1) business day of filings and developments in other proceedings that may bear up on [sic] this case may result in the imposition of reciprocal discipline. ECF Nos. 5, 7."). Respondent even took it a step further, arguing that the Court's entering order requiring him to explain his failure to comply with a prior order prejudiced the proceedings and denied him briefing of issues. ECF No. 49 at 5. Not only was the order unrelated to briefing, but Respondent also had a full opportunity to present his arguments in his Answer, and has, without authorization, asserted additional arguments in other filings. So, no deprivation has occurred.

n.12. ODC disputed Norris' involvement with the drafting, editing, or other participation in the preparation of the Report. ECF No. 58-19 at 3.

n.13. This is another tactic employed here. ECF No. 49 at 9 (requesting that Chief Judge *Seabright* ask the Chief Judge of the Ninth Circuit to appoint out-of-district judges to preside over this case and his civil action).

n.14. The FOFCOL clearly identifies the California State Bar and ODC disciplinary offenses as the pertinent prior discipline. ECF No. 53-24 at 33, 44. Therefore, it is not a bare accusation by ODC.

J. ORDER GRANTING DEFENDANTS' MOTION  
TO DISMISS WITH PREJUDICE VERIFIED  
COMPLAINT FOR DECLARATORY RELIEF AND  
FOR ACTUAL AND CIVIL RIGHTS DAMAGES,  
DATED SEPTEMBER 30, 2021

UNITED STATES DISTRICT COURT

Gary Victor Dubin, et al.,	) No. 21-00175
Plaintiffs,	) D. Hawaii
v.	)
Supreme Court of the State	)
of Hawaii, et al.,	)
Defendants.	)
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Jill A. Otake, U.S. District Judge

In this putative class action, Plaintiffs Gary Dubin ("Dubin"), an attorney, and nearly 200 of his former clients ("Client Plaintiffs") (collectively, "Plaintiffs"), challenge the constitutionality of Hawaii's attorney disciplinary process, and as related to the disciplinary proceedings against Dubin. Defendants the Hawai'i Supreme Court ("RSC"), Chief Justice Mark E. Recktenwald, Associate Justices Paula A. Nakayama, Sabrina S. McKenna, Michael D. Wilson (collectively, the "Justices"), and Associate Judge Katherine S. Leonard ("Judge Leonard");<sup>1</sup> and the Office of

Disciplinary Counsel of the RSC ("ODC"), the Disciplinary Board of the HSC ("Disciplinary Board") (collectively, the "Disciplinary Entities"), Bradley R. Tamm ("Tamm"), Clifford Nakea ("Nakea"), Roy F. Hughes ("Hughes"), Charlene M. Norris ("Norris"), and Andrea R. Sink ("Sink") (collectively, the "Disciplinary Individuals") seek dismissal of the Complaint on jurisdictional and immunity grounds. ECF No. 10. Defendant the Lawyers' Fund for Client Protection of the HSC ("Lawyers' Fund")<sup>2</sup> substantively joins in the request for dismissal and alternatively asks the Court to abstain. ECF No. 11.

For the following reasons, the Court GRANTS the Motion to Dismiss with Prejudice Verified Complaint for Declaratory Relief and for Actual and Punitive Civil Rights Damages ("Motion" or "Motion to Dismiss") and the Substantive Joinder in Defendants' Motion ("Joinder").

## **BACKGROUND**

### **I. Factual History**

#### **A. The Parties**

##### **1. Dubin and the Client Plaintiffs**

Dubin was admitted to the Hawai'i Bar in 1982, and disbarred by HSC on September 9, 2020,

with an effective date of October 9, 2020, later extended to November 9, 2020.<sup>3</sup> Compl.¶ 6; ECF Nos. 10-5, 10-7. The Client Plaintiffs claim to have been harmed by the loss of Dubin's legal representation and services in state court. Compl.¶ 10. They comprise approximately half of Dubin's clients who were affected by his disbarment. *Id.*¶ 11. Dubin expects additional clients to seek to join the lawsuit on his and their behalf "once the harmful acts and conduct challenged below become also known to and experienced by them." *Id.*

## 2. HSC

The Hawai'i Constitution established the State judiciary, including HSC. Section 1 of Article VI provides: "The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish."

Haw. Const. Art. VI, § 1. HSC is authorized "to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law," and "consist[s] of a chief justice and four associate justices." *Id.* §§ 2, 7; *see also* Hawai'i Revised Statutes ("HRS") § 602-11 ("The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of

law."). HSC also has "the sole power to revoke or suspend the license of any" practitioner it examines, admits, or reinstates. HRS § 605-1(a); *see also* Rules of the Supreme Court of Hawai'i ("RSCH") Rule 2.1 ("Any attorney admitted to practice law in this state... is subject to the exclusive disciplinary jurisdiction of the supreme court and the Board hereinafter established.").

### **3. ODC and Disciplinary Board**

ODC and the Disciplinary Board "are creatures of [HSC], created pursuant to [HSC's] inherent and constitutional authority to regulate the practice of law." In *re Disciplinary Bd. of the Haw. Sup. Ct.*, 91 Hawai'i 363, 368, 984 P.2d 688, 693 (1999) (citations omitted). RSCH Rule 2.4(a) governs HSC's appointment of the Disciplinary Board, consisting of 18 members, at least one-third of whom shall not be attorneys. The Disciplinary Board in turn has the authority (1) "[t]o employ, supervise, and terminate a Chief Disciplinary Counsel, hereinafter Chief Counsel, a Deputy Chief Disciplinary Counsel, Assistant Disciplinary Counsel, and staff employees, and to appoint volunteers to assist the Board in the exercise of its duties" and "delegate to Chief Counsel the authority to employ and supervise the Deputy Chief Counsel and Assistant Counsel, to employ, supervise and terminate staff, and to appoint volunteers"; (2) "[t]o appoint Special Assistant Disciplinary Counsel when Chief Disciplinary Counsel and all full time Assistant Disciplinary Counsel are disqualified"; and (3) to appoint "and establish the terms of office of, an appropriate

number of persons to serve as hearing committee members and officers." RSCH Rule 2.4(e)(2)-(4). Pertinent here, the Disciplinary Board is tasked with investigating attorney disciplinary or incapacitation matters, adopting procedural rules governing the Disciplinary Board and hearing committees and officers, and adopting and publishing advisory opinions interpreting the Hawai'i Rules of Professional Conduct. *See* RSCH Rule 2.4(e)(1), (6)-(7). RSCH Rule 2.5 addresses hearings conducted by the hearing committee in disciplinary proceedings and petitions for reinstatement of suspended or disbarred attorneys.

The Disciplinary Individuals are associated with the Disciplinary Board or ODC. Nakea is the Chair of, and Hughes is a hearing officer for, the Disciplinary Board. ECF No. 10-1 at 11 n.5. Tamm is ODC's Chief Disciplinary Counsel, Norris is Senior Disciplinary Counsel, and Sink is a former investigator. *Id.*

#### **4. Lawyers' Fund**

"The purpose of the Lawyers' Fund... is the reimbursement, to the extent and in the manner provided by these rules, of losses caused by the dishonest conduct of members of the bar of this State and any attorney specially admitted by any court of this State." RSCH Rule 10.1(a). The Lawyers' Fund is comprised of five trustees—three lawyers and two nonlawyers appointed by HSC. RSCH Rule 10.1(b). The trustees adopt rules, subject to the Hawai'i State Bar's review

and HSC's approval, "governing the administration of the Fund, the procedures for the presentation, consideration and payment of claims, and the exercise of their investment powers." RSCH Rule 10.1(d). Plaintiffs allege that Tamm was also heading the Lawyers' Fund during Dubin's disciplinary proceedings. Compl. ¶ 19.

## 5. Factual Allegations

Plaintiffs claim that ODC targeted the Hawai'i foreclosure defense bar— and eventually Dubin — leading to suspensions and disbarments. Compl. ¶ 67.

According to Plaintiffs:

Dubin became raw meat for the ODC, who subjected him to procedures that likely would have even made the Judges of the English Star Chamber blush, affording him through the entire process of his disbarment procedures none of the thirteen DCCA protections given members of other professionals [sic]... a virtual orgy of deprivations, also in violation of written yet unenforced Hawaii Supreme Court and Board Rules[.]

*Id.* ¶ 70. Plaintiffs identify a host of perceived deficiencies with the disciplinary process, including conflicts of interest; fishing expeditions in search of ethical violations; consolidation of unrelated complaints; untimely disclosure of the nature of

discipline sought; ODC staff's lack of training and frequent turnover; ex parte communications with members of HSC regarding additional complaints about Dubin, which purportedly prejudiced his disciplinary proceedings; denial of the opportunity to cross-examine a complainant; adoption of ODC's recommendation without any changes; issuance of new findings by HSC; ODC's lack of knowledge about foreclosure defense; and animosity toward Dubin. *Id.* at 75-82. Plaintiffs allege that despite ODC's efforts to create a false record of misconduct by committing due process violations, its petition for discipline was not supported by a preponderance of the evidence, much less clear and convincing evidence. *Id.* ¶

72. In the end, the Disciplinary Board recommended, and HSC ordered, Dubin's disbarment. *Id.* ¶ 73.

Plaintiffs refute each finding issued by HSC with extensive facts and arguments, concluding that they have "proven" the falsity of the findings. *Id.* at 82-137. Plaintiffs represent that Dubin's disbarment caused him to lose his remaining associates and nearly all of his remaining staff, and harmed his clients who were left without legal counsel in the midst of litigation at various stages of the proceedings. *Id.* ¶ 2

## **II. Procedural History**

Plaintiffs commenced this action on April 9, 2021, asserting nine causes of action:

- Counts One (Dubin) and Two (Client Plaintiffs) against the State Defendants for declaratory relief - unconstitutional exercise of legislative authority: HSC and the disciplinary system are without jurisdiction to regulate attorneys for conduct outside the courtroom because the authority rests with the legislature, which has never delegated it to HSC. *Id.* ¶¶ 277-78, 283, 292-93, 298.
- Counts Three (Dubin) and Four (Client Plaintiffs) against the State Defendants for declaratory relief - unconstitutional violation of equal protection: Without the authority to do so, HSC regulates the legal profession differently in disciplinary proceedings from how the legislature regulates other professions and occupations within the state, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* ¶¶ 307-08, 313, 322-23, 328.
- Counts Five (Dubin) and Six (Client Plaintiffs) against the State Defendants for declaratory relief - unconstitutional violation of due process: HSC and its attorney discipline procedures as promulgated and/or as applied deny targeted attorneys evidentiary and appellate rights in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* ¶¶ 337-38, 343, 352-53, 358.

- Counts Seven (Dubin) and Eight (Client Plaintiffs) against the Disciplinary Defendants for actual and punitive damages unconstitutional violation of due process: The Disciplinary Defendants individually or together conspired to target Dubin, hiding disqualifying conflicts of interest and exculpating evidence, and providing false information to RSC through hidden false *ex parte* communications, designed to disbar Dubin, in violation of his Fourteenth Amendment due process rights. *Id.* ¶¶ 367-70, 376-79.
- Count Nine (Dubin) against the Disciplinary Defendants for actual and punitive damages - unconstitutional violation of free speech: The Disciplinary Defendants engaged in the due process violations outlined in Counts Seven and Eight in order to cancel his radio show, in violation of the First Amendment. *Id.* ¶¶ 385-89.

Plaintiffs request: (1) a declaration that HSC's attorney disciplinary structure violates the U.S. Constitution as promulgated and/or applied and is unconstitutional pursuant to the Hawai'i Constitution, *id.* ¶ 394; (2) actual and punitive damages, *id.* ¶¶ 395-96; and (3) attorneys' fees and costs. *Id.* ¶ 397.

The State Defendants, the Disciplinary Entities, and the Disciplinary Individuals filed the

present Motion on June 17, 2021. ECF No. 10. The Lawyers' Fund substantively joined in the Motion. ECF No. 11. Plaintiffs filed an Opposition on July 26, 2021.<sup>4</sup> ECF No. 19. Defendants filed their Reply on August 2, 2021. ECF No. 24. On the eve of the hearing, Plaintiffs filed joint submissions of supplemental authority signed exclusively by Dubin. ECF Nos. 27-29. These submissions<sup>5</sup> violate the Court's July 30, 2021 Entering Order, which stated: "*Plaintiffs may file joinders to the extent they are permitted by the Local Rules, but the Court will not accept a single filing as a consolidated filing on behalf of all Plaintiffs* given that the plaintiff groups have different counsel." ECF No. 23 (emphasis added); *see also* ECF No. 22 ("[I]f Mr. Kiuchi is representing Mr. Dubin, Mr. Dubin may not act on his own behalf." (citing Local Rule 83.S(a))).

The Court held a hearing on August 18, 2021. ECF No. 30.

## **LEGAL STANDARDS**

### **I. Rule 12(b)(1)**

Under Federal Rule of Civil Procedure ("FRCP") 12(b)(1), a district court must dismiss a complaint if it lacks subject matter jurisdiction to hear the claims alleged in the complaint.<sup>6</sup> *See Fed.*

R. Civ. P. 12(b)(1). A jurisdictional attack pursuant to FRCP 12(b)(1) may be facial or factual. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citation omitted). A facial attack challenges the sufficiency of the allegations contained in a complaint to invoke federal jurisdiction, while a factual attack "disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.*

## II. Rule 12(b)(6)

FRCP 12(b)(6) authorizes dismissal of a complaint that fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). On a Rule 12(b)(6) motion to dismiss, "the court accepts the facts alleged in the complaint as true," and "[d]ismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged." *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)) (alteration in original). However, conclusory allegations of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000) (citation omitted). Furthermore, the court need not accept as true allegations that contradict matters properly subject to judicial notice. *See Sprewell*, 266 F.3d at 988.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The tenet that the court must accept as true all of the allegations contained in the complaint does not apply to legal conclusions. *See id.* As such, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679 (citing Fed. R. Civ. P. 8(a)(2)) (some alterations in original). If dismissal is ordered, the plaintiff should be granted leave to amend unless it is clear that the claims could not be saved by amendment. *See Swartz v. KPMG LLP*, 476 F.3d 756, 760 (9th Cir. 2007) (citation omitted).

## DISCUSSION

Defendants seek dismissal on the following grounds: (1) lack of jurisdiction over disciplinary proceedings; (2) *Rooker -Feldman* doctrine; (3) Eleventh Amendment immunity; (4) the Client

Plaintiffs' lack of standing; and (5) judicial/ quasi-judicial immunity. ECF No. 10-1.<sup>7</sup> The Lawyers' Fund alternatively moves for abstention. ECF No. 11.

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As a preliminary matter, Plaintiffs' Complaint violates FRCP 8(a)'s requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>8</sup> Fed. R. Civ. P. 8(a)(2). Nevertheless, the Court has waded through it and addresses Defendants' grounds for dismissal. For the reasons detailed below, *Rooker-Feldman* bars Plaintiffs' claims. Dismissal is further warranted because: (1) the Eleventh Amendment bars (a) Counts One through Six and (b) Seven through Nine as to the Disciplinary Entities; (2) the Client Plaintiffs lack third party standing to assert their claims (Counts Two, Four, Six, and Eight); (3) judicial or legislative immunity bars the claims against the Justices and Judge Leonard; and (4) quasi-judicial and/or prosecutorial immunity bars the claims against the Disciplinary Individuals.

## I. *Rooker-Feldman Doctrine*

Defendants argue that the Court lacks jurisdiction over Plaintiffs' claims under the *Rooker-Feldman* doctrine. Plaintiffs counter that *Rooker-Feldman* is inapplicable because they do not seek reversal of the HSC's factual findings, nor are their claims inextricably intertwined with

disciplinary proceedings. ECF No. 19 at 32. They also contend that the Client Plaintiffs are not subject to *Rooker-Feldman*, as they were not parties to the disciplinary proceedings. *Id.*

"Under *Rooker-Feldman*, lower federal courts are without subject matter jurisdiction to review state court decisions, and state court litigants may therefore only obtain federal review by filing a petition for a writ of certiorari in the Supreme Court of the United States." *Mothershed v. Justs.* of the Sup. Ct., 410 F.3d 602, 606 (9th Cir. 2005) (citations omitted). District courts are barred from not only direct appeals of state court decisions, "but also over the 'de facto equivalent' of such an appeal." *Cooper v. Ramos*, 704 F.3d 772, 777 (9th Cir. 2012) (citation omitted). Courts "pay close attention to the *relief* sought by the federal-court plaintiff in determining whether an action is a de facto appeal. *Id.* at 777-78 (internal quotation marks and citation omitted). A de facto appeal is found "when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of that court." *Id.* at 778 (internal quotation marks and citations omitted); *see also Henrichs v. Valley View Dev.*, 474 F.3d 609, 613 (9th Cir. 2007) (explaining that a plaintiffs claims must arise from the state court judgment, not merely "when a party fails to obtain relief in state court" (citation omitted)); *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 (9th Cir. 2003) (explaining that *Rooker-Feldman* precludes adjudication of claims when the redress sought by the plaintiff is an "undoing" of the prior state court judgment).

*Rooker-Feldman* does not "prohibit a plaintiff from presenting a generally applicable legal challenge to a state statute in federal court, even if that statute has previously been applied against him in state court litigation." *Mothershed*, 410 F.3d at 606. However, district courts lack jurisdiction "over challenges to state- court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional," "which may only be reviewed by the Supreme Court. *Id.* at 607 (citations omitted). As-applied constitutional claims are barred because they are de facto appeals of state court decisions. *See Scheer v. Kelly*, 817 F.3d 1183, 1186 (9th Cir. 2016).

When a case "is, in part, a forbidden de facto appeal from a judicial decision of a state court," a federal court "must refuse to hear the forbidden appeal." *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003). "As part of that refusal, it must also refuse to decide any issue raised in the suit that is 'inextricably intertwined' with an issue resolved by the state court in its judicial decision." *Id.* Claims are "inextricably intertwined" "where' the relief requested in the federal action would effectively reverse the state court decision or void its ruling. "*Cooper*, 704 F.3d at 779 (some internal quotation marks and citation omitted).

Applying this framework, the Court finds that this action is barred by *Rooker-Feldman*. Plaintiffs attempt to characterize this lawsuit as a contesting HSC's jurisdiction, not an effort to reverse HSC's factual findings. ECF No. 19 at

32. At the hearing, Dubin promoted the lawsuit as an endeavor to overhaul the entire attorney discipline system. When confronted with the explicit challenges to his personal disciplinary proceedings, which comprises a significant portion of the Complaint, Dubin dismissed the allegations as mere examples of the system's existing flaws. The Complaint contains **56pages** of arguments to "prove" that HSC's factual findings were false and **eight pages** of the purported improprieties that occurred during ODC's investigation against Dubin. Compl. at 75-137. In their Opposition, Plaintiffs state:

Pages 82 through 130 contain a complete, detailed factual identification of the numerous grave due process abuses Plaintiff Dubin experienced *in his disbarment* proceedings incorporated herein by this reference, from the faulty drafting of the Petition for Discipline omitting many of the allegations which he was later found without prior notice to be supposedly guilty of, while hiding the seriousness of the sanctions being sought until the hearing, to the concealment of exculpatory evidence by the ODC prosecutor, to the outright falsification of alleged disbarment evidence, together with disqualifying conflicts of interest among the investigator, the Hearing Officer, and the Disciplinary Board (in that instance admitted under oath on the record by the Board Chairperson no less as intentionally concealed from Plaintiff Dubin), and the concealed receipt of

prejudicially false evidence by the Court before his disbarment was even ordered.

None of that detailed list of Kangaroo Court mischief is even once disputed by the Defendants within their thirty-page moving memorandum, who instead would have this Court believe nonetheless despite such admissions that it is powerless to protect federal civil liberties, in this instance the right to a fair trial/hearing.

And for purposes only of this proceeding those uncontested facts are presumed admitted and to be true.

ECF No. 19 at 17-18 (emphasis added). This demonstrates that despite the manner in which they attempt to cast their claims, Plaintiffs are, at bottom, contesting Dubin's disciplinary proceedings.<sup>9</sup> So even though they assert some claims targeting the disciplinary system in general, and avoid expressly asking to overturn the Disbarment Order, avoidance of that order is the outcome they effectively seek.<sup>10</sup> Indeed, while maintaining that he is not trying to set aside his disbarment, Dubin concedes that such an outcome "would arguably result once the entire Hawaii bar is freed from the specter of the federal constitutional abuses he experienced in abundance." *Id.* at 25 n.3. The Court finds disingenuous Dubin's representation at the hearing that he is only requesting prospective relief, which he could not reconcile with the aforementioned

concession, and which is directly contradicted by the Complaint.

Plaintiffs not only seek damages for alleged constitutional violations, but also declaratory remedies that are designed to undo Dubin's disbarment. See Comp. ¶ 1394 (seeking a declaration that HSC's attorney discipline structure violates the Fourteenth Amendment's due process and equal protection guarantees as promulgated and/or as applied, and is unconstitutional pursuant to the Hawai'i Constitution). Notwithstanding Plaintiffs' calculated efforts to frame some claims as general challenges to the disciplinary system, they are in fact objecting to Dubin's disbarment. To be clear, the Court acknowledges that general constitutional challenges to Hawaii's discipline process are permissible, but Plaintiffs' filings, coupled with their recent efforts to consolidate this case with Dubin's reciprocal discipline proceedings, reveal that their primary—if not exclusive—motivation is to challenge Dubin's disbarment.<sup>11</sup> This suit is therefore barred by *Rooker-Feldman* for the reasons that follow.

#### **A. Due Process Claims - Counts Five (as Applied), Six (as Applied), Seven, and Eight**

In particular, the due process challenges articulated in Counts Five and Six (as applied to Dubin) and Counts Seven and Eight, are de facto

appeals of the Disbarment Order because Plaintiffs complain of legal wrongs committed during the course of Dubin's disciplinary proceedings and they seek relief from the Disbarment Order, even if indirectly. Counts Five (by Dubin) and Six (by the Client Plaintiffs<sup>12</sup>) against the State Defendants allege that HSC and its disciplinary procedures as applied violate the Due Process Clause of the Fourteenth Amendment by denying targeted attorneys constitutionally protected evidentiary and appellate rights. Compl. ¶¶ 337, 352. Counts Seven (by Dubin) and Eight (by the Client Plaintiffs) accuse the Disciplinary Defendants of individually or together conspiring to target Dubin; hiding conflicts of interest and exculpating evidence; providing false information to HSC through ex parte communications, designed to result in Dubin's disbarment; and denying Dubin the right to a fair hearing, all in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* ¶¶ 367, 376. These claims all arise out of Dubin's state disciplinary proceedings and are premised on purported infirmities that contributed to his disbarment. That is, they "constitute a particularized challenge to [Hawaii's] disciplinary proceedings' results." *Mothershed*, 410 F.3d at 608; see *id.* at 605-08 (affirming the district court's determination that the plaintiff's claims—raised under 42 U.S.C. § 1983 for due process and other constitutional violations, as well as state law tort claims relating to procedural shortcomings in his Arizona and Oklahoma disciplinary proceedings,

were barred by *Rooker-Feldman*).<sup>13</sup> Dubin already presented at least some of these arguments to HSC in a motion for reconsideration and it rejected them. ECF No. 10-6.

Moreover, Plaintiffs request a declaration that HSC's attorney discipline structure violates the Fourteenth Amendment's Due Process Clause, and they seek monetary damages. Without disbarment, Dubin would have suffered no injury.

Such a declaration would undercut the disciplinary process employed against Dubin and any damages would require a finding that there was error with the process and/or Disbarment Order. *See Cooper*, 704 F.3d at 782 ("Cooper's prayer for relief in the form of monetary and punitive damages, although distinct from his prayer for a declaratory judgment that he is entitled to DNA testing, is contingent upon a finding that the state court decision was in error."); *Henrichs*, 474 F.3d at 616. Accordingly, this portion of the lawsuit is a de facto appeal and is consequently barred by *Rooker-Feldman*.

Having determined that this case is in part a de facto appeal, the Court must ascertain whether the remaining claims "are ""inextricably intertwined" with an issue resolved by the state court judicial decision from which the forbidden de facto appeal is taken." *'Cooper*, 704 F.3d at 781 (quoting *Noel*, 341 F.3d at 1165).

As a practical matter, the "inextricably intertwined" test. is likely to apply primarily in cases in which the state court both promulgates and applies the rule at issue - that is, to the category of cases in which the local court has acted in both legislative and a judicial capacity—and in which the loser in state court later challenges in federal court both the rule and its application.

Noel, 341 F.3d at 1158. This category of cases includes those "involving litigation and attorney disciplinary rules." *Id.* (citation omitted).

## **B. Unconstitutional Exercise of Legislative Authority- Counts One and Two**

Counts One (by Dubin) and Two (by the Client Plaintiffs) asserted against the State Defendants—claim that HSC and the state attorney discipline system have no jurisdiction to regulate attorneys outside of the courtroom because the Hawai'i Constitution confers the Hawai'i legislature with the authority, and the legislature has not delegated said authority to HSC. Compl. ¶¶ 277, 292. In other words, Plaintiffs attempt to undo Dubin's disbarment by claiming that, under the Hawai'i Constitution, the State Defendants lacked jurisdiction to discipline him. Were the Court to grant relief on this claim by declaring that the State Defendants violated the Hawai'i Constitution and lacked jurisdiction, the Disbarment Order would be voided. As such, Counts One and Two are

"inextricably intertwined" with the Disbarment Order. Adjudicating these claims "would undercut the state ruling or require" the Court "to interpret the application of state laws or procedural rules." *Bianchi*, 334 F.3d at 898. The Court must therefore dismiss the claims for lack of subject matter jurisdiction. See *id.*

### **C. Equal Protection Claims-Counts Three and Four**

Counts Three (by Dubin) and Four (by the Client Plaintiffs) aver that the State Defendants violate the Equal Protection Clause of the Fourteenth Amendment based on HSC's disparate regulation of the legal profession, compared to the legislature's regulation of other professions and occupations, which are afforded greater rights.<sup>14</sup> Compl. ¶¶ 307, 322. Plaintiffs frame these claims as a general challenge to a purported lack of rights afforded in the disciplinary process.<sup>15</sup> But this is a transparent effort to complain about the protective measures that Dubin believes he was deprived of in his disciplinary proceedings. Like Counts One and Two, Counts Three and Four are "inextricably intertwined" with the Disbarment Order. A declaration that HSC's attorney discipline structure violates the Fourteenth Amendment's equal protection guarantees would undercut and/or void the Disbarment Order.

## **D. Due Process Claims -Counts Five and Six (as Promulgated)**

The balance of Counts Five (by Dubin) and Six (by the Client Plaintiffs) allege that HSC and disciplinary procedures as promulgated violate the Due Process Clause of the Fourteenth Amendment by denying targeted attorneys constitutionally protected evidentiary and appellate rights. Compl. ¶¶ 337,352. Challenges to the promulgation of HSC and disciplinary procedures concern their general validity, not their application, so they are not ordinarily barred by *Rooker- Feldman*. Insofar as Plaintiffs' requested relief would have the same practical effect on the Disbarment Order as the "as applied" portion of these claims, however, the "as promulgated" aspect of these claims are "inextricably intertwined" with the issues in the state court proceedings.

## **E. First Amendment Claim - Count Nine**

In Count Nine, Dubin avers that the Disciplinary Defendants engaged in the conduct alleged in Counts Seven and Eight for the purpose of cancelling his radio show, in violation of the First Amendment. *Id.* ¶¶ 385-87. Because this claim is predicated on the Disciplinary Defendants' allegedly improper actions relating to his disciplinary process and would not have occurred but for Dubin's disbarment, the Court finds that it too is "inextricably intertwined" with the disciplinary proceedings and is directly tied to conduct from

those proceedings.

For these reasons, a portion of this action is a de facto appeal of the Disbarment Order and the balance of the claims are "inextricably intertwined" with that order and Dubin's disciplinary proceedings. Plaintiffs' claims must accordingly be dismissed under *Rooker-Feldman*.

## II. Eleventh Amendment

If Plaintiffs' claims were not barred by *Rooker-Feldman*, they would be subject to dismissal pursuant to the Eleventh Amendment. "The Eleventh Amendment shields unconsenting states from suits in federal court," *K. W. v. Armstrong*, 789 F.3d 962,974 (9th Cir. 2015) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996)), and bars individuals from bringing lawsuits against a state or an instrumentality of a state for monetary damages or other retrospective relief. *See Ariz. Students'Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858,865 (9th Cir. 2016). It "applies regardless of the nature of relief sought and extends to state instrumentalities and agencies." *Krainski v. Nevada ex rel. Bd. of Regents of the Nev. Sys. of Higher Educ.*, 616 F.3d 963,967 (9th Cir. 2010) (citing *Papasan v. Allain*, 478 U.S. 265, 276 (1986)). Suits against state officials in their official capacities are likewise barred because they constitute suits against the state itself. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). State law claims asserted in federal court against states, state agencies, and state officials

acting in their official capacities are barred by the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Cent. Rsrv. Life of N Am. Ins. Co. v. Struve*, 852 F.2d 1158, 1160-61 (9th Cir. 1988).

Eleventh Amendment immunity is not absolute, however. Congress may abrogate a state's immunity, or a state may waive immunity. *See Clark v. California*, 123 F.3d 1267, 1269 (9th Cir. 1997). In addition, under the *Ex parte Young* exception to Eleventh Amendment immunity, "private individuals may sue state officials in federal court for prospective relief from ongoing violations of federal law, as opposed to money damages, without running afoul of the doctrine of sovereign immunity." *Koala v. Khosla*, 931 F.3d 887, 895 (9th Cir. 2019) (citing *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254-55 (2011)). *Ex parte Young* is based on the proposition "that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Office for Prot. & Advocacy*, 563 U.S. at 255. It does not apply "when 'the state is the real, substantial party in interest.' *Id.* (some internal quotation marks and citation omitted). "A state is deemed to be the real party in interest where 'the judgment sought would... interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Cent. Rsrv.*, 852 F.2d at 1161 (alteration in original) (some internal quotation marks and citation omitted).

Here, Defendants have not consented to suit. Therefore, the Eleventh Amendment would bar Counts One and Two, as they allege a violation of the Hawai'i Constitution.<sup>16</sup> Nor has Congress abrogated immunity for 42 U.S.C. § 1983 claims.<sup>17</sup> *See Will*, 491 U.S. at 66-67. Counts Three through Nine would consequently be barred against (1) HSC, as an instrumentality of the state, *see Yamana v. Haw. Judiciary*, 765 F. App'x 198, 199 (9th Cir. 2019) ("The district court properly dismissed Yamano's claim against defendant State of Hawaii Judiciary because her claim is barred by the Eleventh Amendment." (citations omitted)); *Yamana v. Haw. Judiciary*, Civ. No. 18-00078 SOM-RLP, 2018 WL 3431921, at \*4 (D. Haw. July 16, 2018) (deeming the State of Hawaii Judiciary an instrumentality of the state); Haw. Const. Art. 1, § 1 (conferring the Hawai'i state courts with the judicial power of the State); *Simmons v. Sacramento Cnty. Superior Ct.*, 318 F.3d 1156, 1161 (9th Cir. 2003) (barring claims under the Eleventh Amendment against state courts and their employees, as arms of the state (citations omitted)); (2) the Disciplinary Entities, as creatures of HSC, *see In re Disciplinary Bd.*, 91 Hawai'i at 368, 984 P.2d at 693 (ODC and Disciplinary Board); RSCH Rule 10 (Lawyers' Fund); and (3) the Justices and Judge Leonard, who are sued in their official capacities, to the extent retrospective declaratory relief is sought. *See, e.g., Rapp v. Disciplinary Bd. of the Haw. Sup. Ct.*, 916 F. Supp. 1525, 1531 (D. Haw. 1996)

(applying Eleventh Amendment to the Disciplinary Board of HSC and to the Justices of HSC).

### III. Third-Party Standing

Even if the claims asserted by the Client Plaintiffs (Counts Two, Four Six, and Eight) were not dismissed for the reasons set forth above, they are subject to dismissal because the Client Plaintiffs lack third-party standing.<sup>18</sup> The "[s]tanding doctrine involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. The constitutional aspect inquires whether the plaintiff has made out a case or controversy between himself and the defendant within the meaning of Article III by demonstrating a sufficient personal stake in the outcome." *McCollum v. Cal. Dep't of Corr. & Rehab.*, 647 F.3d 870, 878 (9th Cir. 2011) (internal quotation marks and citation omitted). It is well established that notwithstanding the allegation of a sufficient injury to meet Article III's "case or controversy" requirement, a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1118 (9th Cir. 2015) (internal quotation marks, citation, and footnote omitted). "As the prohibition against third-party standing is prudential, rather than constitutional, the Supreme Court has recognized exceptions to

this general rule."<sup>19</sup> *Coal. of Clergy v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002). Litigants may bring claims on behalf of third parties if three requirements are met: (1) "[t]he litigant must have suffered an' injury in fact,' thus giving him or her a' sufficiently concrete interest' in the outcome of the issue in dispute"; (2) "the litigant must have a close relationship with the third party"; and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.*

### **A. Injury in Fact**

Here, the Complaint generally identifies the denial of Dubin's legal representation as the Client Plaintiffs' harm:

9. Not only has Dubin as alleged below been unfairly harmed by the acts and conduct complained of herein, but his clients have also been similarly grievously harmed as also explained below, having their cases and their legal rights and their lives disrupted and their investment in Dubin's legal services threatened and/or lost by the unconstitutional and abusive manner in which he has been treated.

10. And as a result, hundreds of Dubin's clients, above-named, having standing as victims also to complain,

have therefore volunteered to join him in this lawsuit collectively and individually as Client Plaintiffs, being separately denied unfairly and prejudicially his continuing and/or his future legal services in state courts in Hawaii and his legal advice, as well as subjecting Dubin to pending reciprocal discipline in other jurisdictions.

Compl. ¶¶ 9-10. But their actual claims are identical to Dubin's claims. Compare Compl. ¶¶ 277, 307, 337, 367 with *id.* ¶¶ 292, 322, 352, 376. Because the claims either challenge Dubin's disciplinary proceedings or the disciplinary system in Hawai'i - in which only Dubin or attorneys have a stake - the Client Plaintiffs cannot assert the requisite injury in fact.

First, the only party to potentially suffer a direct injury with respect to disciplinary proceedings is the subject attorney. *See Doyle v. Okla. Bar Ass'n*, 998 F.2d 1559, 1567 (10th Cir. 1993) ("The fact is that the only one who stands to suffer direct injury in a disciplinary proceeding is the lawyer involved. Doyle has no more standing to insert himself substantively into a license-based discipline system than he has to compel the issuance of a license."); *cf Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

Even if the Client Plaintiffs were harmed by

Dubin's disbarment in that they could no longer receive his legal services, that is not a legally protected interest. *See Spokeo, Inc. v. Robins*, 578 U.S. 856, 136 S. Ct. 1540, 1548 (2016) ("To establish injury in fact, a plaintiff must show that he or she suffered' an invasion of a legally protected interest' that is 'concrete and particularized' and' actual or imminent, not conjectural or hypothetical.'" (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). There is no right to counsel in civil proceedings, including foreclosure proceedings. *See Adir Int'l, LLC v. Starr Indem. & Liab. Co.*, 994 F.3d 1032, 1038-39 (9th Cir. 2021) ("[T]here is 'no constitutional right to counsel in a civil case.'" (citation omitted)); *Hawai'i v. Stone*, Case No. 19-cv-00272-DKW-RT, 2020 WL 1643856, at \*2 (D. Haw. Apr. 2, 2020) ("[I]n a civil case, such as foreclosure, there is no right to representation by a lawyer." (citing *Nicholson v. Rushen*, 767 F.2d 1426, 1427 (9th Cir. 1985)), aff'd, 830 F. App'x 964 (9th Cir. 2020). In any event, at least some of Dubin's former clients—it is unclear whether the Client Plaintiffs are among these clients—are not without counsel in foreclosure proceedings because Kiuchi is representing them pro bono. *See In re Dubin*, Civil No. 20-00419 JAO-KJM, ECF No. 42 ¶ 4; see also ECF No. 10-6 at 2 (noting the transfer of Dubin's law practice to Mr. Kiuchi).

Although courts have "generally acknowledged a civil litigant's Fifth Amendment due process right to retain and fund the counsel of their choice," this right applies "only in extreme scenarios where the government substantially interferes with a party's ability to communicate with his or her

lawyer or actively prevents a party who is willing and able to obtain counsel from doing so." *Adir Int'l*, 994 F.3d at 1039--40 (citation omitted). The Client Plaintiffs' inability to utilize Dubin does not fall within these limited circumstances because Dubin's disbarment prohibits his participation in Hawai'i state court proceedings. And again, they do not assert distinct claims from Dubin regarding any deprivation of counsel; they instead challenge HSC's and the disciplinary system's jurisdiction, as well as the constitutionality of the disciplinary process (generally and as applied to Dubin).

Second, to the extent that the Client Plaintiffs challenge the constitutionality of disciplinary system generally, it is not an injury because it "no more directly and tangibly benefits [them] than it does the public at large." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (internal quotation marks and citation omitted).

## **B. Dubin's Ability to Protect His Interests**

Neither are the Client Plaintiffs able to show that Dubin, the aggrieved party, is impeded from asserting his own claims. *See McCollum*, 647 F.3d at 879 (citation omitted). Dubin is a party to this action and presents the *same claims* as the Client Plaintiffs. Therefore, the Client Plaintiffs fail to meet this element for third party standing.

Because the Client Plaintiffs have not identified an injury in fact, nor demonstrated that Dubin is hindered in his ability to protect his

interests, third party standing is lacking<sup>20</sup> and is an additional basis to DISMISS the Client Plaintiffs' claims (Counts Two, Four, Six, and Eight).

## IV. Immunity

The Justices, Judge Leonard, and the Disciplinary Individuals would also be entitled to judicial, legislative, prosecutorial, or quasi-judicial immunity if Plaintiffs' claims were not otherwise dismissed.

### **A. The Justices and Judge Leonard Are Entitled to Judicial and Legislative Immunity**

"Judicial immunity is a common law doctrine developed to protect judicial independence" and "[i]t bars suits against judges, and other officials who exercise 'discretionary judgment' similar to that of judges, when the plaintiffs suit is predicated on actions taken in the judge's judicial capacity." *Moore v. Urquhart*, 899 F.3d 1094, 1103 (9th Cir. 2018) (citations omitted). This "immunity applies 'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.'" *Cleavenger v. Saxner*, 474 U.S. 193, 199-200 (1985) (citation omitted). Common law judicial immunity bars suits for money damages but does not preclude an award of declaratory or injunctive relief. *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001) (citing *Mireles v. Waco*, 502 U.S. 9,

9-10 (1991)); *Moore*, 899 F.3d at 1104 (citing *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984)). However, Congress amended § 1983 in 1996, expanding the scope of judicial immunity and limiting "the circumstances in which injunctive relief may be granted against judges." *Moore*, 899 F.3d at 1104. Section 1983 states that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983.

Judicial immunity only covers judicial acts, not non-judicial acts such as "'the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform.'" *Lund v. Cowan*, 5 F.4th 964, 971, 2021 WL 2965447 (9th Cir. 2021) (citation omitted). These factors are relevant to the determination of whether an act is judicial: "(1) the precise act is a normal judicial function; (2) the events occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the events at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity." *Id.* (citation omitted).

The actions taken by the Justices and Judge Leonard that related to Dubin's disciplinary proceedings were part of HSC's review of attorney disciplinary issues and adjudication thereof. Thus, they are entitled to

judicial immunity, *see Hirsh v. Justs. of the Sup. Ct. of Cal.*, 67 F.3d 708, 715 (9th Cir. 1995) (per curiam) ("The justices of the California Supreme Court have absolute immunity for their role in reviewing the recommendations of the Bar Court." (citation omitted)), even as to declaratory relief.<sup>21</sup> *See Craig v. Villicana*, 676 F. App'x 716, 716 (9th Cir. 2017) (affirming application of judicial immunity to state court judge and noting the extension of judicial immunity to declaratory and other equitable relief (citation omitted)).

With respect to the "as promulgated" portion of Plaintiffs' due process challenges to HSC rules and disciplinary procedures (Counts Five and Six), the Justices and Judge Leonard would be "entitled to absolute legislative immunity for actions relating to the promulgation of disciplinary rules." *Hirsh*, 67 F.3d at 715 (citing *Sup. Ct. of Va. v. Consumers Union of the US, Inc.*, 446 U.S. 719, 734 (1980)).

## **B. The Disciplinary Individuals Are Entitled to Prosecutorial and/or Quasi-Judicial Immunity**

Quasi-judicial immunity extends judicial immunity to "certain others who perform functions closely associated with the judicial process." *Duvall*, 260 F.3d at 1133 (citation omitted). "When judicial immunity is extended to officials other than judges, it is because their judgments are 'functionally comparable' to those of judges—that is, because

they, too, 'exercise a discretionary judgment' as a part of their function." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429,436 (1993) (brackets and citations omitted). These nonexclusive factors are considered to determine whether a state officer's role is "functionally comparable" to a judge:

"(a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal."

*Buckwalter v. Nev. Bd. of Med. Exam'rs*, 618 F.3d 737, 740 (9th Cir. 2012) (citation omitted). "Administrative law judges and agency prosecuting attorneys are entitled to quasi-judicial immunity so long as they perform functions similar to judges and prosecutors in a setting like that of a court." *Hirsh*, 67 F.3d at 715 (citation omitted).

The foregoing factors apply to the Disciplinary Individuals based on the functions of ODC and the Disciplinary Board, the entities for which they volunteer or work. ODC "performs [an] investigative and prosecutorial role," and "[i]n effect, ODC, the Disciplinary Board, and the committees appointed pursuant to Rule 2,

function as [HSC's] special masters to carry out [its] authority to investigate, prosecute, dispose of, or make recommendations about attorney disciplinary matters." *In re Disciplinary Bd.*, 91 Hawai'i at 368-69 & n.12, 984 P.2d at 693-94 & n.12 (citation omitted). Hence, the Disciplinary Individuals are entitled to quasi-judicial and/or prosecutorial immunity. *See Hirsh*, 67 F.3d at 711, 715 (holding that judges and prosecutors of the State Bar Court, an administrative agency affiliated with the California State Bar Association that handled attorney discipline matters, had quasi-judicial immunity from monetary damages); *Clark v. Washington*, 366 F.2d 678, 681 (9th Cir. 1966) ("As an arm of the Washington Supreme Court in connection with disciplinary proceedings, the Bar Association is an 'integral part of the judicial process' and is therefore entitled to the same immunity which is afforded to prosecuting attorneys in that state." (footnote omitted)).

In sum, the Court concludes that *Rooker-Feldman* bars Plaintiffs' claims and subject matter jurisdiction is therefore lacking. Alternatively, Plaintiffs' claims are subject to dismissal under the Eleventh Amendment (Counts One through Six; Counts Seven through Nine as to the Disciplinary Entities), for lack of third party standing (Counts Two, Four, Six, and Eight), for judicial or legislative immunity (Counts One through Six as to the Justices and Judge Leonard), and for quasi-judicial and/or prosecutorial immunity (Counts Seven through Nine as to the Disciplinary Individuals). The Court accordingly DISMISSES WITHOUT

PREJUDICE the Complaint.<sup>22</sup> Insofar as amendment would be futile, the Court declines to grant leave to amend. *See Gordon v. City of Oakland*, 627 F.3d 1092, 1094 (9th Cir. 2010).

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## **CONCLUSION**

For the reasons stated herein, the Court GRANTS the Motion to Dismiss and Joinder. ECF Nos. 10, 11.

Civil No. 21-00175 JAO-KJM, Dubin, et al. v. The Supreme Court of the State of Hawaii, et al.;  
ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE VERIFIED  
COMPLAINT FOR DECLARATORY RELIEF AND FOR ACTUAL AND PUNITIVE CIVIL RIGHTS DAMAGES

n.1 Judge Leonard is on the Hawai'i Intermediate Court of Appeals. Judge Leonard, the Justices, and HSC are collectively referred to as the "State Defendants." The Justices and Judge Leonard are sued in their official capacities.

n.2 The Disciplinary Entities, the Disciplinary Individuals, and the Lawyers' Fund are collectively referred to as the "Disciplinary Defendants." The Disciplinary Individuals are sued in their individual capacities.

n.3 Dubin subsequently filed two motions for reconsideration, both of which HSC denied. ECF Nos. 10-5, 10-6. He also filed an application for an emergency stay and a Petition for Writ of Certiorari with the United States Supreme Court. They, too, were denied. ECF Nos. 10-3, 10-4; *In re Gary Victor Dubin*, Civil No. 20- 00419 JAO-KJM, ECF Nos. 11-1, 13.

n.4 Plaintiffs improperly filed a single opposition, signed exclusively by Dubin, in violation of Local Rule 83.5(a): "When a party is represented by an attorney, the party may not act on his or her own behalf in the action[.]" As such, Keith Kiuchi was required to file documents on Dubin's behalf, as Dubin's counsel.

n.5 It is unclear why Plaintiffs filed these in any event. None of the cases have precedential value and one is a California *state court* order, upon which Plaintiffs oddly rely for its interpretation of *federal law*.

n.6 *Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 927 n.2 (9th Cir. 2017) ("A sovereign immunity defense is' quasi-jurisdictional' in nature and may be raised in either a Rule 12(b)(1) or 12(b)(6)

motion." (citations omitted)); *see White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (holding that mootness is properly raised in a motion to dismiss pursuant to FRCP 12(b)(1) because it pertains to a court's subject matter jurisdiction (citations omitted)).

n.7 The Court takes judicial notice of the documents attached to Defendants' filings. Under Federal Rule of Evidence 201, a court may take judicial notice of facts "not subject to reasonable dispute" that either "(I) [are] generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)-(c)(1). A court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244,248 (9th Cir. 1992) (internal quotation marks and citations omitted); *see Bykov v. Rosen*, 703 F. App'x 484, 487 (9th Cir. 2017) (holding that the district court did not abuse its discretion by taking judicial notice of state court proceedings). Courts may "consider certain materials -documents attached to the complaint, documents incororated by reference in the complaint, or matters of judicial notice -without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (citations omitted).

n.8 The Complaint consists of **181 pages and 397 paragraphs**, and a significant portion is devoted to self-promotion. Twenty-eight pages contain cherry-

picked testimonials from clients. Compl. at 44-71.

n.9 Plaintiffs lay bare their true intentions in their Joint Submission of Dubin's Urgent Ex Parte Request under Oath to the Honorable J. Michael Seabright, Chief Judge, to Amend his July 12, 2021 "Order Appointing Three-Judge Hearing Panel" in Related Civil No. 20-00419 JAO [Doc. 39] to Include this Case and to Consolidate the Two Cases. ECF No. 31. In it, they request consolidation of this case and Dubin's pending reciprocal discipline case (*In re Dubin*, Civil No. 20- 00419 JAO-KJM) because "many if not most of the underlying issues are the same." ECF No. 31-¶10. Plaintiffs also request a three-judge panel excluding any district judge presiding over one of Dubin's cases currently pending in district court or on appeal. *Id.* Plaintiffs' effort to consolidate this supposedly "independent" litigation with reciprocal discipline proceedings addressing Dubin's disbarment evidences the actual purpose of this litigation. Notably, in *In re Dubin*, Dubin's counsel, Keith Kiuchi ("Kiuchi"), also recently identified the claims here as grounds to avoid reciprocal discipline. *See* Civil No. 20-00419 JAO-KJM, ECF No. 66 at 8.

n.10 Notably, in Dubin's Petition for Writ of Certiorari—the only avenue for directly challenging his disbarment -he raised the *same* claims included in this litigation. ECF No. 10-3. This lends support to the view that this case, disguised in part as a general constitutional challenge to the attorney discipline system in Hawai'i, is actually an effort to overturn Dubin's disbarment. Moreover, Plaintiffs state in the Complaint that additional former clients will seek leave to join this action "*once the harmful acts and*

*conduct challenged below* become also known to and experienced by them." Compl. ¶ 11 (emphasis added).

n.11 Most recently, Dubin filed another lawsuit against ODC, Tamm, and Nakea, seeking to set aside the Disbarment Order due to alleged constitutional violations and extrinsic fraud. *See Civil No. 21-00392 JAO-KJM*, ECF No. 1.

n.12 The Court acknowledges that *Rooker-Feldman* is generally limited to parties from the state court proceedings. *See Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994). As a result, the claims asserted by the Client Plaintiffs - who were not parties to the disciplinary proceedings - should not be barred by *Rooker-Feldman*. However, Dubin's claims and the Client Plaintiffs' claims are identical in every respect, with the exception of Count Nine. Counts One, Three, Five, and Seven (asserted by Dubin) are the same as Counts Two, Four, Six, and Eight (asserted by the Client Plaintiffs), so there are really only four claims among these eight counts. If *Rooker-Feldman* bars Dubin from asserting the claims, there is no basis for the Client Plaintiffs to litigate them, especially because these claims arise out of Dubin's disciplinary proceedings. Even if the Client Plaintiffs' claims are not barred by *Rooker-Feldman*, they are subject to dismissal for the additional grounds discussed below.

n.13 In *Mothershed v. Justices of the Supreme Court*, the plaintiff, an attorney licensed to practice in Oklahoma, lived and practiced in Arizona. See 410 F.3d at 605. The Arizona disciplinary board alleged that he unlawfully practiced there. *See id.* The

plaintiff then sought dismissal of the complaint on the basis that he did not receive a summons. *See id.* After the hearing officer denied the motion, the plaintiff refused to participate in the disciplinary proceedings, which resulted in the entry of default judgment against him. *See id.* The Supreme Court of Arizona then entered an order censuring the plaintiff "for engaging in the unauthorized practice of law." *See id.* (citation omitted). The Oklahoma Bar Association subsequently initiated disciplinary proceedings against the plaintiff. *See id.* A three-member trial panel concluded that he practiced law unlawfully in Arizona, and the Supreme Court of Oklahoma disbarred him. *See id.* (citation omitted).

n.14 This is the crux of the claim even though Plaintiffs also lump in their lack of jurisdiction allegations from Counts One and Two.

n.15 The Court acknowledges that if not for the fact that these claims are "inextricably intertwined," general constitutional challenges to the disciplinary process would not be barred by *Rooker-Feldman*.

n.16 Counts One and Two cannot be excepted from the Eleventh Amendment bar even if Plaintiffs seek prospective relief because the *Ex Parte Young* exception is limited to suits for prospective relief for ongoing violations of *federal law*. *See Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147, 1153 (9th Cir. 2018) (explaining that the *Ex Parte Young* "exception does not apply when a suit seeks relief under state law, even if the plaintiff names an individual state

official rather than a state instrumentality as the defendant" (citation omitted)).

n.17 Plaintiffs only invoke § 1983 (improperly identifying the Title as 28) in Counts Seven through Nine. Compl. ¶¶ 368,377,387. However, § 1983 is the vehicle by which to present the constitutional violations asserted in Counts Three through Six as well. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 978 (9th Cir. 2004).

n.18 Defendants argue that the Client Plaintiffs lack Article III standing. ECF No. 10-1 at 25—26. The Client Plaintiffs offer no substantive arguments regarding their standing, except to say that "the continual injuries to [the] individual clients are all ongoing and brutal" and they were "prejudicially injured" by Dubin's disbarment in the middle of their cases. ECF No. 19 at 31. Even assuming the Client Plaintiffs have Article III standing—which is questionable based on their alleged injury—they do not have prudential standing for the reasons detailed below.

n.19 "In recent years, the Supreme Court has cast some doubt on prudential standing rules as being' in some tension' with a federal court's 'virtually unflagging' obligation to 'hear and decide cases within its jurisdiction.'" *Meland v. WEBER*, 2 F.4th 838, 848 n.5 (9th Cir. 2021) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014)). However, third party standing "continues to remain in the realm of prudential standing." *Id.* (quoting *Ray Charles*, 795 F.3d at 1118 n.9).

Prudential standing "is not a requirement of jurisdiction," *Hilton v. Hallmark Cards*, 599 F.3d 894, 904 n.6 (9th Cir. 2010) (citation omitted), but the Court may raise prudential standing issues *sua sponte*. *See City of Los Angeles v. County of Kern*, 581 F.3d 841, 845-46 (9th Cir. 2009).

n.20 Insofar as the Client Plaintiffs failed to satisfy two requirements, the Court need not discuss the parties' relationship.

n.21 Plaintiffs have not alleged that "a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983.

n.22 Dismissals for lack of subject matter jurisdiction should be without prejudice. *See Kelly v. Fleetwood Enters., Inc.*, 377 F.3d 1034, 1036 (9th Cir. 2004).

**IT IS SO ORDERED.**