

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MEDISON AMERICA, INC.,)	
a California Corporation)	
)	
Plaintiff,)	
)	
v.)	No. 05-2390-V
)	
PREFERRED MEDICAL SYSTEMS, LLC,)	
a Tennessee Limited Liability)	
Company, JERRY K. MCGUIRE, and)	
GREGG REED,)	
)	
Defendants.)	

ORDER DENYING PLAINTIFF'S MOTION TO ABSTAIN

Before the court is the July 6, 2007 motion of the plaintiff, Medison America, Inc. ("Medison"), for the court to abstain from exercising jurisdiction in the instant case. The defendants, Preferred Medical Systems, LLC ("Preferred Medical"), Jerry K. McGuire, and Gregg Reed, (collectively the "Preferred Medical defendants") oppose the motion on the grounds that the court is bound to adjudicate this matter, Medison has waived any abstention rights, the requirements for abstention have not been met, and prudential concerns favor resolution of the case in this court. The parties have consented to a trial before the U.S. Magistrate Judge. For the following reasons, the motion to abstain is denied.

FACTUAL AND PROCEDURAL HISTORY

Medison sells ultrasound equipment in the United States. The Preferred Medical defendants are manufacturer representatives for ultrasound equipment manufactured by General Electric ("GE") that competes with Medison in the area of OB/GYN practices. On May 26, 2005, Medison filed a complaint, and subsequently its First Amended Complaint, against the Preferred Medical defendants seeking \$28,000,000 and permanent injunctive relief for claims under the Lanham Act and various state laws. (Defs.' Mem. in Opp'n 1-2; 1st Am. Compl., Doc. No. 2, July 25, 2005.) Medison also named GE, Mike Butchko, and Brian Keith (collectively the "GE defendants") as defendants, but the complaint was dismissed with prejudice as against the GE defendants on May 22, 2007. (Order, Doc. No. 86, May 22, 2005.) Medison alleges that the Preferred Medical defendants made allegedly false and disparaging statements about Medison to its potential customers. During the interim of more than two years since the filing of the complaint, Medison and the Preferred Medical defendants have conducted extensive discovery and participated in multiple disputed motions which were resolved by this court. (Defs.' Mem. in Opp'n 2.)

On April 16, 2007, a company named BioCore filed a complaint against the Preferred Medical defendants in the Chancery Court for Shelby County, Tennessee (BioCore, Inc. v. Preferred Medical

Systems, LLC, No. CH-07-0770)("BioCore Case"), setting forth similar claims as the instant case, including the Lanham Act claim, against the Preferred Medical defendants. (Pl.'s Mot. to Abstain 2-4.) On May 8, 2007, Medison also filed a complaint in the Chancery Court for Shelby County, Tennessee against the Preferred Medical defendants (*Medison America, Inc. v. Preferred Medical Systems, LLC.*, No. CH-07-1334-3)("Medison Chancery Case"), asserting claims identical to those in its May 26, 2005 complaint in the instant federal case. (Defs.' Mem. in Opp'n 2.) Medison states that it filed the Medison Chancery Case in order to include claims for actionable conduct that occurred in March 2007, i.e., claims that could not be added to the First Amended Complaint in the instant case. (Mem. in Supp. of Pl.'s Mot. to Abstain 6.) On July 6, 2007, Medison then filed the present Motion to Abstain requesting this court to abstain from jurisdiction and/or dismiss the complaint without prejudice so that the Chancery Court for Shelby County, Tennessee can adjudicate both the BioCore case and the Medison Chancery Case with its new claims from March 2007. (Defs.' Mem. in Opp'n 2.) Medison subsequently filed an amended complaint in the Medison Chancery Case on July 24, 2007. (*Id.*)

Medison argues that the doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), which requires courts to abstain from exercising properly attached subject matter and in personam

jurisdiction under certain circumstances (the "*Younger* doctrine"), applies in this case. (Mem. in Supp. of Pl.'s Mot. to Abstain 1-2.) Specifically, *Medison* argues that the *Medison Chancery Case* and *BioCore Case* were pending prior to the present motion being filed, and that state court proceedings must only be pending prior to the federal abstention, not prior to the initial federal filing. (*Id.* 2-3.) Additionally, *Medison* contends that the three prerequisites set out in the *Younger* doctrine are alternative prerequisites, meaning that the court may abstain even if all three are not satisfied. (*Id.* 3.)

Medison states, however, that the core of its argument is not the *Younger* abstention doctrine but that of prudential concerns which require the court to abstain in this case. (Pl.'s Reply to Defs.' Mem. in Opp'n 1.) *Medison* argues that most of the issues involve important state interests and state laws, and that there would be no resulting time delays if the court grants the instant motion. (Mem. in Supp. of Pl.'s Mot. to Abstain 5.) Furthermore, *Medison* relies on the principle that because the *BioCore Case* and the *Medison Chancery Case* will require proof of the same acts and omissions as the present case, prudential considerations require this court to abstain from exercising jurisdiction. (*Id.*) *Medison* contends that prudential considerations demand abstention to prevent both this court and the state court from having to read and

digest overlapping proof and because Medison's calculation of damages depends on proving lost sales experienced by BioCore. (Pl.'s Reply to Defs.' Mem. in Opp'n 4-5.)

In opposition to the Motion to Abstain, the Preferred Medical defendants argue that this court is bound to adjudicate this case and that abstention is not warranted. (Defs.' Mem. in Opp'n 4.) The Preferred Medical defendants contend that Medison waived any abstention claims when it voluntarily filed this case in federal court, and that even if there was no waiver, the three requirements for abstention under the *Younger* doctrine must all be met, and Medison has failed to meet them. (*Id.* 5, 8-9.) Specifically, the Preferred Medical defendants argue that the Medison Chancery Case does not constitute ongoing state judicial proceedings for the purpose of abstention and that Medison cannot show that important state interests are implicated in the present case. (*Id.* 9, 11.) Furthermore, the Preferred Medical defendants urge this court to award costs incurred by them in responding to the present Motion to Abstain, arguing that Medison has vexatiously and unreasonably multiplied the proceedings. (*Id.* 14-15.)

The Preferred Medical defendants insist that, contrary to Medison's position, the prudential concerns involved favor keeping the present case in federal court. (Defs.' Sur-Reply Mem. in Opp'n 4.) The Preferred Medical defendants argue that the state court

has not assumed jurisdiction over any res or property, the federal forum is equally convenient, and the federal case has progressed well beyond the *Medison Chancery Case*, making abstention improper. (*Id.* 3.) Additionally, the Preferred Medical defendants argue that considerations of efficient judicial administration demand that the present case be resolved in federal court because there has already been over two years of litigation and trial is only a few months away. (*Id.* 4.) Lastly, the Preferred Medical defendants contend that *Medison* is simply forum shopping. (*Id.* 6.)

ANALYSIS

A. Abstention Under the *Younger* Doctrine

Under normal circumstances, "abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). The doctrine of abstention is "an extraordinary and narrow exception to the [court's duty] to adjudicate a controversy properly before it." *Id.* That duty is a "virtually unflagging obligation" to exercise jurisdiction when it validly exists. *Id.* at 817. However, the notion of comity between the states and the federal government "mandates application of *Younger* abstention . . . when certain civil proceedings are pending . . . if the State's interests in the proceeding are so important that exercise of the federal judicial power" would disregard that comity. *Pennzoil Co.*

v. Texaco, Inc., 481 U.S. 1, 11 (1987). Using the following three-prong test, a court is required to exercise abstention from jurisdiction under the *Younger* doctrine when a "state proceeding (1) is currently pending, (2) involves an important state interest, and (3) affords the plaintiff an adequate opportunity to raise constitutional claims." *Armco, Inc. V. United Steelworkers of Am.*, 280 F.3d 669, 681 (6th Cir. 2002) (quoting *Carroll v. City of Mount Clemens*, 139 F.3d 1072, 1074 (6th Cir. 1998)) ("*Younger* test").

1. *Currently Pending State Proceedings*

In order to determine if a state proceeding is currently pending, the court must "look to see if the state court proceeding was pending at the time the federal complaint was filed." *Tesmer v. Granholm*, 333 F.3d 683, 689 (6th Cir. 2003) (citing *Zalman v. Armstrong*, 802 F.2d 199, 204 (6th Cir. 1986)). If the state court proceeding was pending when the federal complaint was filed, then the first prong of the *Younger* test is satisfied. *Fed. Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962, 969 (6th Cir. 1991). An exception to this prong allows abstention to still be exercised when the state proceeding is filed after the federal complaint *if* the federal action is in its initial stages and has not contained any proceedings of substance on the merits. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984).

In the present case, both the BioCore Case and the Medison

Chancery Case were filed almost two years after the initial filing of the present federal action. Medison originally filed the complaint in this case in May of 2005, and the relevant state proceedings were not initiated until April and May of 2007, respectively. The court finds that no exception applies to the *Younger* test requirement that the state action be pending prior to the filing of the federal complaint. The present case has certainly progressed beyond the initial stages, with both parties having engaged in extensive discovery and participated in numerous motions and hearings involving the merits of the case. As a result, the court finds that the first prong of the *Younger* test has clearly not been satisfied.

2. *Implication of Important State Interests*

The second prong under the *Younger* test requires that the state proceedings implicate important state interests. *Armco*, 280 F.3d at 681. The courts must consider the "substantiality of a State's interest in its proceedings" by not looking "narrowly to its interest in the *outcome* of a particular case . . . [but to] the importance of the generic proceedings to the State." *GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469, 482 (6th Cir. 1997) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 365 (1989)). The Supreme Court has found that regulation of utilities, governing of attorney's professional conduct, and

elimination of prohibited sex discrimination are all important state interests. *Air Evac EMS, Inc. v. Robinson*, 486 F. Supp. 2d 713, 719 (M.D. Tenn. 2007) (citations omitted). Further, the Sixth Circuit has applied *Younger* to important state interests such as "the regulation of doctors, insurance companies, dentists, electric utilities, and [waste disposal on] railroads." *Id.*

The appropriate inquiry in this case is not whether Tennessee has an interest in regulating the type of conduct alleged to have been committed by the Preferred Medical defendants but whether the state of Tennessee has an important state interest in regulating allegedly false and misleading remarks about products and competitors in the commercial arena engaged in interstate commerce activities. Madison had not provided the court with any decisions that would support the finding of an important, substantial state interest that would satisfy the *Younger* test's second prong, nor has the court discovered any. While Tennessee may have an interest in regulating such conduct by businesses operating within its borders, Tennessee does not have an overwhelming interest in regulating statements and representations about commercial products and competitors beyond its borders so as to justify abstention at this late stage in the federal process. There are no questions presented that bear on important state policy. Thus, the second prong of the *Younger* test has not been met.

3. *Adequate Opportunity to Raise Constitutional Claims*

With both the first and second prongs of the *Younger* test unsatisfied in the instant case, this court need not address any concerns over the third prong and its application here. Failure of one prong alone is enough to compel denial of abstention based on the *Younger* doctrine. See *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982) (stating that the test to determine whether to abstain in *Younger* cases is threefold)).

B. Prudential Concerns

Federal courts continue to have a "virtually unflagging obligation" to exercise the jurisdiction that is given them. *Colorado River*, 424 U.S. at 817. The court may, however, decline to exercise jurisdiction, under "exceptional circumstances," in cases for prudential "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)) (internal quotations omitted)). When deciding to abstain based on the concurrent jurisdiction of a state court, a district court should consider the eight factors identified by the Supreme Court in *Colorado River* and its progeny. *PaineWebber, Inc. v. Cohen*, 276 F.3d 197, 206 (6th Cir. 2001) (citing *Romine v. Compuserve Corp.*, 160 F.3d 337, 340-41 (6th Cir. 1998)). These factors include:

(1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; ... (4) the order in which jurisdiction was obtained [;] ... (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction.

Id. (citations omitted). When considering the factors, no single one is determinative, and before abstaining, "both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise" must be considered. *Colo. River*, 424 U.S. at 218.

1. *Jurisdiction Over Any Res or Property*

Because no property is at issue in the state action, the first factor supports federal jurisdiction. *PaineWebber*, 276 F.3d at 207. In both the BioCore Case and the Medison Chancery Case, the state court has not assumed any jurisdiction over res or property, and therefore the first factor weighs against abstention.

2. *Convenience of Federal Forum*

The second factor looks to the geographic considerations involved. *Id.* The BioCore Case, Medison Chancery Case, and the instant federal case are all pending in courthouses located in the same city, Memphis, TN. When this is the case, the second factor counsels against abstention and in support of federal jurisdiction.

Id.

3. *Avoidance of Piecemeal Litigation*

When concurrent jurisdiction exists, there is no bar against both matters proceeding because “[e]ach court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court.” *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922). Even though the potential exists for inconsistent results, when “a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by application of the principles of res adjudicata.” *Id.* “[D]isjointed or unreconcilable results . . . [are] not the threat of piecemeal litigation with which *Colorado River* was concerned.” *Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 465 (4th Cir. 2005). The simple threat that the BioCore Case, Medison Chancery Case, and the instant case may proceed simultaneously is not enough to support abstention under this factor.

4. *Order in Which Jurisdiction Was Obtained*

The present federal action was filed almost two years prior to the filing of the BioCore Case and the Medison Chancery Case. This fact weighs heavily in favor of retaining jurisdiction.

5. *Whether Source of Governing Law is State or Federal*

Although there are several state law claims at issue in the present case, “the presence of federal-law issues must always be a

major consideration weighing against surrender." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983). Furthermore, because state law provides the substantive rule of decision in all diversity cases, only the presence of rare or novel state law issues would promote surrendering federal jurisdiction. *Bethlehem Contracting Co. v. Lehrer/McGovern, Inc.*, 800 F.2d 325, 328 (2nd Cir. 1986). Because there are federal law claims under the Lanham Act in the present case and no novel state law issues, this factor weighs in favor of retaining jurisdiction.

6. *Can State Action Protect Federal Plaintiff's Rights*

In both the BioCore Case and the Medison Chancery Case, the state court has jurisdiction to fully and adequately protect the plaintiffs' rights under the federal Lanham Act claim. This factor would thus weigh in favor of abstention.

7. *Relative Progress of State and Federal Proceedings*

The instant case was filed almost two years before the BioCore Case and the Medison Chancery Case. The parties have participated in vast discovery and numerous motions and hearings on the merits. Trial in the federal action is set to begin in only a few months, while the state court actions have progressed little beyond the filing of the complaints and answers. Accordingly, this factor weighs heavily in favor of retaining jurisdiction.

8. *The Presence or Absence of Concurrent Jurisdiction*

As previously indicated, the state court has concurrent jurisdiction over the identical claims alleged in the BioCore Case, Medison Chancery Case, and the instant case. Thus, this factor weighs in favor of abstention.

9. *Summary*

After carefully examining the factors, and determining that the balance is weighted heavily towards the exercise of jurisdiction, this court finds that abstention for prudential reasons is not warranted in this case. Six out of the eight factors weigh in favor of this court exercising its proper jurisdiction. It is the conclusion of this court that its obligation to exercise jurisdiction is not outweighed by "exceptional circumstances" or considerations that would urge abstention.

C. Waiver of Younger Abstention

Because this court has determined that Medison does not meet the three-prong test required for abstention under the Younger doctrine, it need not reach the issue of whether abstention was waived when Medison voluntarily filed its initial complaint in the federal forum.

CONCLUSION

Accordingly, for the reasons stated herein, the plaintiff's

motion to abstain is denied. Each party is to bear its own costs and fees.

IT IS SO ORDERED this 18th day of September, 2007.

s/ Diane K. Vescovo _____
DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE