UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 17-24103-Civ-COOKE/GOODMAN

TIKD SERVICES LLC,

Plaintiff,

vs.

THE FLORIDA BAR, MICHAEL J. HIGER, JOHN F. HARKNESS, LORI S. HOLCOMB, et al.,

Defendants.
_____/

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AGAINST THE FLORIDA BAR DEFENDANTS AND MEMORANDUM IN SUPPORT

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff TIKD Services LLC hereby requests entry of a preliminary injunction against Defendants The Florida Bar, Michael J. Higer, John F. Harkness, Lori S. Holcomb, and Jacquelyn P. Needelman ("the Florida Bar Defendants"), and in support thereof would respectfully show as follows:

I. Introduction and summary.

This unfortunate lawsuit became necessary because The Florida Bar has failed to acknowledge its significantly narrowed role – mandated by a recent U.S. Supreme Court decision – in enforcing the boundaries of its members' monopoly on providing legal services. The Florida Bar continues to act as if the Supreme Court in *North Carolina Board of Dental Examiners v. Federal Trade Commission* had not rejected its claim of immunity from federal antitrust law.

Rather than keep within its narrowed authority to investigate and file suit (if warranted by the facts and law), the Florida Bar has given, and apparently continues to give, public and private "opinions" that Plaintiff TIKD is engaged in illegal activity and that the

lawyers representing TIKD's customers are violating ethical rules by associating with TIKD.

The Florida Bar has no authority under state law to issue "opinions" that a party is engaged in the unlicensed practice of law. Even if the Bar did have such authority, its "opinions" constitute a concerted refusal to deal, are *per se* anticompetitive, and violate the Sherman Antitrust Act. The Florida Bar Defendants enjoy no immunity for these acts.

Despite repeated demands, The Florida Bar has refused to retract its unauthorized "opinions." Worse, the Bar is countenancing public and private statements by competitors that the Bar has decided TIKD is engaged in illegal activity, and that the Bar shortly will be "enjoining" TIKD from doing business – something utterly outside the Bar's power.

The Florida Bar's actions have caused and are causing TIKD enormous harm. TIKD is not seeking in this motion a federal injunction stopping the Bar's internal processes. However, TIKD seeks to enjoin further harmful and unauthorized public and private communications by the Bar to third parties, and an affirmative correction that the Bar has not, and cannot, decide whether TIKD's actions are illegal. This will help reduce (if not fully repair) the irreparable harm being caused by the Bar's actions.

II. *North Carolina Board of Dental Examiners v. FTC* changed the landscape for professional associations that enforce their members' monopoly.

TIKD's claims against the Florida Bar Defendants are based directly on *North Carolina Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015) ("*Dental Examiners*"). *Dental Examiners* was a watershed case that denied antitrust immunity to a state agency – like the Florida Bar – composed of and controlled by active participants in the market the agency regulates. The Florida Bar participated in *Dental Examiners* as *amicus curiae*, but it has ignored that case's lesson: professional associations that enforce their members' monopolies are now subject to rigorous examination for anticompetitive activities. As one commentator colorfully put it, after *Dental Examiners*, "[s]tate bar associations were left like bleeding seals in shark-infested waters."[1] A detailed look at *Dental Examiners* is warranted.

[1] LegalZoom Kicks off Antitrust Battle Against State Bar Associations, Antitrust Law Source, June 9, 2015 (available at https://www.antitrustlawsource.com/2015/06/legalzoom-kicks-off-antitrust-battle-against-state-bar-associations/) (last accessed Nov. 17, 2017).

A. The *Dental Examiners* case.

The North Carolina State Board of Dental Examiners is "'the agency of the State for the regulation of the practice of dentistry.'" *Dental Examiners*, 135 S. Ct. at 1107 (quoting N.C. Gen. Stat. § 90-22(b)). The Board has broad authority over licensed dentists, but its authority over nondentists is restricted to filing suit to enjoin a person from "unlawfully practicing dentistry." *Id.* Six of the Board's eight members must be licensed dentists, elected by other licensed dentists. *Id.* at 1108. When nondentists started providing teeth-whitening services in North Carolina, competing with licensed dentists, the Board "opened an investigation." *Id.* It issued "cease and desist" letters to nondentists that "warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes 'the practice of dentistry.'" *Id.* The Board persuaded the state's Board of Cosmetic Art Examiners to warn cosmetologists not to do teeth whitening, and it sent letters to mall operators stating that kiosk teeth whiteners were violating the law, advising them to expel violators. *Id.* "These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina." *Id.*

The Federal Trade Commission (FTC) filed an action against the Board. *Dental Examiners*, 135 S. Ct. at 1109. An administrative law judge (ALJ) found that "the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition." *Id.* On appeal, the FTC affirmed the ALJ's denial of the Board's motion to dismiss and sustained the finding that "the Board had unreasonably restrained trade in violation of antitrust law." *Id.* The FTC ordered the Board to stop sending cease and desist letters and "other communications that stated nondentists may not offer teeth whitening services and products." *Id.* It also ordered the Board to issue notices of its "proper sphere of authority… ." *Id.* The FTC rejected the Board's claim of state-action immunity because, even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, its anticompetitive acts were not actively supervised by the state. *Id.* The Fourth Circuit affirmed the FTC in all respects. 717 F.3d 359, 370 (2013).

In the Supreme Court, the Board attempted to escape liability by claiming it was immune under *Parker v. Brown*, 317 U.S. 341 (1947), because it was acting in the state's "sovereign capacity." *Dental Examiners*, 135 S. Ct. at 1110. However, the Court soundly

rejected the Board's claim that "its members were invested by North Carolina with the power of the State and that, as a result, the Board's actions are cloaked in *Parker* immunity:"

> A nonsovereign actor controlled by active market participants – such as the Board – enjoys *Parker* immunity only if it satisfies two requirements: first that the challenged restraint … be one clearly articulated and affirmatively expressed as state policy, and second that the policy … be actively supervised by the State. … Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

Id. (quotations omitted).

The Supreme Court emphasized that federal "antitrust law is a central safeguard for the Nation's free market structures." *Dental Examiners*, 135 S. Ct. at 1109. Antitrust law "is as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *Id*. (quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)). "The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market." *Id*.

While the Court has conferred immunity "on anticompetitive conduct by the States when acting in their sovereign capacity," immunity is not automatic; it "is disfavored." *Id*. at 1109-10. The "fact that [a] State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *Id*. (quoting *Goldfarb v. Virginia State Bar*, 412 U.S. 773, 791 (1975)).

> Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult for even market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.

Id. at 1111. "Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy." *Id*.

> [I]mmunity requires that the anticompetitive conduct of nonsovereign actors, especially those entrusted by the State to regulate their own profession, result from procedures that suffice to make it the State's own. The question is not whether the challenged conduct is efficient, well-functioning or wise. Rather it is whether anticompetitive conduct engaged in by nonsovereign actors should be deemed state action and thus shielded from the antitrust laws.

Id. at 1111 (citations omitted).

To warrant immunity, a defendant must show "first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct." *Dental Examiners*, 135 S. Ct. at 1112 (quoting *FTC v. Ticor Title Ins. Co*, 504 U.S. 621, 631 (1992)). In *Dental Examiners*, the parties and the Court assumed the first element had been met. But the Court emphasized that "[w]hen a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest." *Id*. at 1114. In a holding squarely applicable here, the Court ruled that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy" the "active supervision requirement in order to invoke state-action antitrust immunity." *Id*.

In *Dental Examiners*, the Board's anticompetitive actions had not been actively supervised: "the Board relied on cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official;" there was no evidence "of any decision by the State to initiate or concur with the Board's actions against the nondentists." *Id*. at 1116.

As shown below, the same is true as to The Florida Bar Defendants' actions sought to be enjoined.

B. The Florida Bar participated in *Dental Examiners*, but lost.

Realizing the case's significant, the Florida Bar filed an *amicus* brief in *Dental Examiners*, urging reversal. Ex. 1, attached. The Bar admitted that it is controlled by market participants: "The Florida Bar … regulates the practice of law through a governing body composed primarily of lawyers" "elected by other lawyers licensed to practice in the state." *Id*. at 2. The Bar then argued that if the Fourth Circuit's decision was not reversed, it would

> expose those charged by the state with regulating professionals – and their board or council members – to antitrust claims (and, potentially, to awards of treble damages and attorney fees, as well as to criminal liability).

Id. at 3. "If the Fourth Circuit's decision stands," the Bar argued, it would face Sherman Act liability "simply because" the state populates its regulatory agency "with practicing lawyers as the regulators." *Id*. at 6. The Bar correctly understood the "active supervision" requirement would require changes in how states regulate markets for legal services:

> Absent such supervision, no action of a state body run by elected professionals would appear to be reliably protected by state action immunity, even if the conduct is mandated by state statute or state constitution.

Id. at 11. The Bar recognized that the Fourth Circuit's decision, if upheld, would preclude it from sending unsupervised "cease and desist letters to inform individuals that they are practicing law without a license or in an authorized manner," without risking antitrust liability. *Id*. at 17.

Although the Supreme Court rejected the Bar's arguments and affirmed the Fourth Circuit, the Bar has not adjusted its actions to comport with *Dental Examiners*. As shown below, it continues anticompetitive actions with no active supervision.

C. The implications of *Dental Examiners*.

Commentators and *some* bar associations have recognized the implication of *Dental Examiners*. The North Carolina State Bar – lead amicus on the brief the Florida Bar joined – sponsored legislation that would require the state attorney general to actively supervise and approve its enforcement of unauthorized practice of law rules.[2] The Washington Bar Association recognized the anticompetitive effect "advisory opinions" can have on the market for legal services and stopped issuing them.[3] The Florida Bar did not.

As Justice Craig Enoch of the Texas Supreme Court observed, "[w]ith the stringent standards set out in *Dental Examiners*, we can expect to see the anticompetitive actions of licensing boards curtailed and subject to increased scrutiny."[4] Indeed, lawsuits have been filed by innovative service providers stymied by regulatory agencies captured by market participants. LegalZoom sued the North Carolina State Bar for refusing to allow its legal service contracts from being sold in the state.[5] Online medical service provider Teladoc sued the Texas Medical Board and its members under the Sherman Act for adopting an

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[2] *See* Senate Bill 353, North Carolina General Assembly (filed March 32, 2105); Ronald L. Gibson, *An Update on Legislation and Litigation*, N.C. State Bar J. at 7-8 (Summer 2015).

[3] *See* Washington Bar Suspects Ethics Opinions, Cites Antitrust Fears, Bloomberg BNA News, December 17, 2015 (available at https://www.bna.com/washington-bar-suspends-n57982065288/) (last visited October 24, 2017).

[4] Hon. Craig T. Enoch, John J. Vay, North Carolina Board of Dental Examiners v. FTC: The High Court Increases Scrutiny of Professional Licensing Boards, 28 App. Advoc. 235, 251 (2016).

[5] LegalZoom Kicks off Antitrust Battle Against State Bar Associations, Antitrust Law Source, June 9, 2015 (available at https://www.antitrustlawsource.com/2015/06/legalzoom-kicks-off-antitrust-battle-against-state-bar-associations/) (last accessed Nov. 17, 2017).

"emergency" rule that required physical examinations of patients before prescribing medicine. *Teladoc, Inc. v. Texas Medical Board*, 112 F. Supp. 3d 529 (W.D. Tex. 2015). In *Teladoc*, the Court recognized that, under *Dental Examiners*, the Texas Medical Board now lacks antitrust immunity, despite being a state agency, because its rule-making is not actively supervised. *Teladoc, Inc. v. Texas Medical Board*, No. 1-15-CV-343 RP, 2015 WL 8773509 (W.D. Tex. Dec. 14, 2015). The Court refused to dismiss Teladoc's lawsuit on immunity grounds and it granted a preliminary injunction preventing enforcement of the Medical Board's anticompetitive rule. *Teladoc, Inc.*, 112 F. Supp. 3d at 535-45.

The Florida Bar may try to deny it has a duty to comply with federal antitrust law by claiming it is "an arm of the Supreme Court of Florida." *See* Bar Rule 1-8.2. However, after *Dental Examiners*, a much more careful examination must be made into the actual practices of a state agency controlled by market participants. The Florida Bar – as it tacitly admitted in its amicus brief – fails the *Dental Examiners* test.

III. The relevant facts.

A. TIKD.

TIKD owns and operates a website at http://www.tikd.com. Ex. 2 (Declaration of Christopher Riley) ¶ 3. Through its website, TIKD provides a set of services to persons who have received traffic tickets. *Id.* A driver who receives a ticket can upload an image of the ticket to TIKD's website. *Id.* If TIKD is able to provide its services as to that ticket, it will offer its services at a fixed charge, a discount based on the fine imposed by the ticket. *Id.* For that single charge, TIKD's customers obtain access to an independent attorney to defend the ticket, and TIKD provides a financial guarantee that the customer will not have to pay any additional fines or costs, regardless of the outcome of the ticket. *Id.*

TIKD and its employees do not provide legal advice or representation. Ex. 2 ¶ 4. All legal services for TIKD customers are provided by independent, licensed attorneys, without TIKD's participation or control. *Id.* The attorney and ticketed driver enter into direct attorney-client relationships, at the driver's option, in which TIKD does not participate. TIKD pays the lawyer a flat rate per representation. *Id.*

A. The Florida Bar is investigating TIKD for "unlicensed practice of law."

The Florida Bar began an investigation of TIKD in December 2016, in response to a newspaper article favorably comparing TIKD's services to an established traffic ticket

defense law firm, The Ticket Clinic. Ex. 2 ¶¶ 5-6; Ex. 2-B. The Bar claimed, in a letter addressed only to TIKD, that it was investigating TIKD for "the unlicensed practice of law." Ex. 2-C.

Although the Bar's investigation was not public, The Ticket Clinic then filed its own complaint against TIKD with the Bar. Ex. 2-D. The two-sentence, hand-written complaint was signed by Defendant Ted L. Hollander, a Ticket Clinic lawyer. *Id.* The complaint cited no statute, rule, or case law; it simply claimed TIKD "seemed to be" engaged in the unlicensed practice of law. *Id.* The complaint failed to state that the legal services TIKD customers receive come from independent, licensed Florida attorneys. *Id.*

TIKD and its CEO, Christopher Riley, have fully cooperated with the Bar's investigation, which has now gone on for eleven months – the entire life of TIKD's business. The Bar took Riley's deposition in April 2017. Ex. 2 ¶ 8. He made changes to TIKD's business model based on what appeared to be concerns raised during his deposition; his counsel then confirmed those changes to the Bar in detail. *Id.* ¶ 9; Ex. 2-E. The Bar has never – to this day – responded or explained the grounds for its UPL investigation or what it alleges TIKD is doing that violates Florida law. Ex. 2 ¶ 9.

B. The Florida Bar is making private and public statements that TIKD is engaged in illegal conduct.

Rather than conduct its investigation in private and avoid adverse consequences to TIKD, the Bar has engaged in a series of communications, private and public, conveying, expressly and impliedly, that TIKD is engaged in illegal activity.

Based on the Bar's statements, lawyers affiliated with The Ticket Clinic contacted numerous attorneys who were representing TIKD customers, told those attorneys that The Florida Bar had determined TIKD was engaged in UPL, and told the attorneys to call the Bar's UPL Counsel, Jacquelyn Needelman, for confirmation. *See* Ex. 2 ¶¶ 10-13; Ex. 3 (Declaration of Jeremy Simon) ¶¶ 5-13; Ex. 4 (Declaration of Julia McKee) ¶¶ 4-6; Ex. 5 (Declaration of Christopher White) ¶ 4; *see also* Ex. 2-G.

On or around September 27, 2017, attorney Jeremy Simon, who was representing TIKD customers, called Needelman to ask if there had been a finding by The Florida Bar that TIKD was engaged in unlicensed practice of law. Ex. 3 ¶ 11. Needelman told Simon that a Bar Circuit Committee had "determined" that TIKD was engaged in unlicensed

practice of law, and that this "determination" needs "some other approvals" before it would be "finalized." *Id.* Based on Needelman's statements, Simon concluded that the Bar had affirmatively determined TIKD was engaged in unlicensed practice of law, and any additional "approval" was just a formality. *Id.*

Also on September 27, 2017, attorney Julia McKee, a lawyer who had covered cases for Simon, called Needelman and asked if The Florida Bar had issued a letter saying TIKD was engaged in UPL, as McKee had been told by lawyers affiliated with The Ticket Clinic. Ex. 4 ¶ 7. Needelman did not deny that such a letter had been issued, leaving McKee with the impression that such a determination may, in fact, have been made by the Bar. *Id.*

That same day, Defendant Lori Holcomb, another Bar staff attorney, told undersigned counsel, Ramón Abadin, that TIKD was engaging in UPL. Holcomb cited no applicable authority; despite repeated requests by TIKD for authority supporting Holcomb's statement, none has been provided.

On September 28, 2017, Christopher White, another attorney who represented TIKD customers, called Needelman and asked if the Bar had determined that TIKD was engaged in UPL, as he had been told by Ticket Clinic lawyer Ted Hollander. Ex. 5 ¶¶ 4-6. Needelman told White to "read the letter" he had been given by Hollander, which was a letter from Needelman to Hollander stating that a Bar committee had recommend further proceedings in connection with the Bar's investigation of TIKD. *Id.* ¶ 6. From Needelman's statement, White understood Needelman was telling him the Bar considered White's representation of TIKD customers to be improper. *Id.*

C. The Florida Bar issued a mysterious and unauthorized "staff opinion" designed to accuse TIKD of engaging in illegal conduct.

In addition to oral statements by Bar staff, the Bar has issued a mysterious "staff opinion" dated August 29, 2017. Ex. 2-F. The staff opinion describes a company suspiciously like TIKD, and raises "concerns" on various issues. *Id.* The staff opinion is not signed. *Id.* It does not state who, if anyone, requested the opinion. *Id.* It gives no explanation of its provenance. *Id.* The staff opinion clearly is designed to give the impression that TIKD is violating the law and that any lawyer who represents TIKD's customers is violating the Florida Rules of Professional Responsibility. *Id.*

The staff opinion was not formally published by the Bar, but somehow it was obtained by The Ticket Clinic. Ex. 2 ¶ 12; Ex. 3 ¶¶ 13-14; Ex. 4 ¶ 5; Ex. 5 ¶ 7. The Ticket Clinic lawyers then circulated the staff opinion in a campaign to drive attorneys away from providing services to TIKD's customers. *Id.*

D. The Florida Bar's actions and silences have encouraged third parties to claim the Bar has "found" that TIKD is engaging in illegal conduct.

As described above, Bar staff members have directly stated that TIKD is engaged in illegal activity. Bar staff members have likewise made statements, or failed to clarify prior statements, that the Bar has concluded that TIKD is engaged in illegal conduct. *See, e.g.,* Ex. 3 ¶ 11. The Bar's statements and strategic silences have allowed and encouraged The Ticket Clinic lawyers to wage a verbal campaign to drive lawyers away from serving TIKD customers.

Defendant Hollander told the press he was "confident that the Bar will take the necessary steps to end [TIKD's] service." Ex. 2-L. After this suit was filed, Defendant Gold told the press that TIKD is powerless "to stop the inevitable injunction that we expect to come done from the Bar at any moment," Ex. 2-K, even though the Bar has no authority to issue injunctions.

E. The Florida Bar has ignored repeated requests to correct its actions.

TIKD, through counsel, has repeatedly requested the Bar to comply with its own limitations and correct false statements being made in its name.

TIKD's counsel asked in writing on September 28, 2017, that The Florida Bar confirm, publicly, it had not reached a conclusion or made a finding about TIKD. Ex. 2-G. The Bar has failed to make any such statement, allowing the impression that it has prejudged TIKD to remain. Ex. 2 ¶ 16.

TIKD also requested, though counsel, that it be allowed to appear before the Bar's UPL Standing Committee when it considered the Bar's investigation of TIKD at its meeting on October 13, 2017. *Id.* ¶ 17. The Bar refused, without explanation, stating in a one-sentence email that TIKD "will not be able to participate." *Id.* ¶ 18; Ex. 2-I.

Denied the right to appear in person, TIKD provided a 9-page, single-spaced explanation of its business and its compliance with Florida law to the Standing Committee members. Ex. 2-A. TIKD received no response to this submission. Ex. 2 ¶ 19.

Finally, TIKD requested, through counsel, to meet with Bar leadership to discuss the public and inaccurate statements being made by the Bar and attributed to the Bar about TIKD. *Id.* ¶ 20. The Bar rejected TIKD's request in a one-sentence letter on November 7, 2017. Ex. 2-J.

Faced with a brick wall, TIKD filed this lawsuit. The Ticket Clinic continued to publicly misrepresent the Bar's authority. Its founder, Mark Gold, told the *Miami Herald* the Bar would be entering an injunction against TIKD "at any moment," and suggested the Bar might even be making arrests, when it of course has no such power. Ex. 2-K. TIKD, through counsel, asked the Bar to correct these false statements in the media about the Bar's powers:

> This is an example of the problem that forced TIKD to file suit in federal court. Mr. Gold is falsely describing the Bar's actions and authority. As we know, the Bar has no authority over TIKD or Mr. Riley, and it has no authority to issue injunctions, let alone make arrests, as Mr. Gold falsely claims. The Bar's silence and failure to refute Mr. Gold's and other Ticket Clinic lawyers' false statements make it appear that the Bar is in league with The Ticket Clinic, or at a minimum agrees with their false claims.
>
> In an effort to mitigate the harm these statements are causing TIKD and Mr. Riley, we ask The Florida Bar to immediately issue a public statement clarifying that it has no authority to issue injunctions or make arrests, and that only the Florida Supreme Court can decide whether a person or company is engaged in the unlicensed practice of law in Florida.
>
> We are not asking the Bar to comment on a pending investigation or lawsuit, but rather to correct public misstatements being made about its authority.
>
> We look forward to your response.

Ex. 2-M. The Florida Bar did nothing. Hence, TIKD requests injunctive relief from this Court.

IV. TIKD seeks a limited preliminary injunction to minimize the irreparable harm being caused by the Florida Bar's actions.

The Florida Bar Defendants are likely to respond to this motion by claiming TIKD wants a federal court to interfere with its investigation of TIKD and pending ethics complaints filed by The Ticket Clinic. Not true. At this stage, TIKD seeks limited injunctive relief focused upon the immediate cause of irreparable harm, relief which the Bar should have no legitimate objection to being granted.[6]

[6] In its claim for damages, TIKD will seek relief from broader actions taken by the Florida Bar Defendants and the Ticket Clinic Defendants, including but not limited to the filing and prosecution of bad faith claims of unauthorized practice of law and ethics violations, as well as other efforts to

TIKD does not seek to enjoin the Florida Bar from completing its internal UPL investigation. TIKD expects the Board of Governors will direct the Bar to close its UPL investigation of TIKD during its December 2017 meeting, because TIKD is in full compliance with Florida law. In the meantime – and if the Board does not close the investigation – TIKD requests injunctive relief against the Bar's and Bar staff's interim and unnecessary actions that are causing TIKD imminent harm:

- Public and private statements that the Bar, Bar committees, and/or Bar staff have "ruled" or "decided" or "found" that TIKD is engaged in the unlicensed practice of law, when in fact no such decision has been made, and the Bar has no power to make rulings or findings;
- Public and private statements that the Bar, Bar committees, and/or Bar staff have issued an "opinion" that TIKD is engaged in the unlicensed practice of law, or that lawyers who represent TIKD clients are violating ethics rules because TIKD is engaged in the unlicensed practice of law, or that such lawyers are engaged in "fee-splitting" with TIKD;
- Further release or circulation of the August 2017 Bar staff opinion;
- The failure to correct public statements attributing to the Bar the authority to make arrests, issue injunctions, or otherwise enforce the law against nonlawyers.

V. TIKD is entitled to the preliminary injunction it seeks.

A plaintiff is entitled to injunctive relief if it shows (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damages the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *Siegel v. LePore*, 234 F. 3d 1163, 1176 (11th Cir. 2000).

A. TIKD is likely to succeed on the merits.

(1) The Florida Bar's acts sought to be enjoined were neither actively supervised nor taken pursuant to a clearly articulated state policy.

There can be little debate that *FTC v. North Carolina Board of Dental Examiners* removed the Florida Bar Defendants' ability to claim immunity for unsupervised anticompetitive actions. The Bar cannot deny it must satisfy *Dental Examiners*, having admitted to the Supreme Court that it "regulates the practice of law" through a governing

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monopolize and attempt to monopolize the Relevant Market and to boycott TIKD and its cooperating attorneys.

body composed of lawyers, elected by other lawyers. *See* Section II.B., above. The Florida Bar meets neither of *Dental Examiners*' requirements for immunity.

First, to be "actively supervised," a politically accountable "supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it." *Dental Examiners*, 135 S. Ct. at 1118. "[T]he supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy." *Id.* "The mere potential for state supervision is not an adequate substitute for a decision by the State." *Id.* "Further, the state supervisor may not itself be an active market participant." *Id.* Beyond these "constant requirements," "the adequacy of supervision otherwise will depend on the circumstances of a case." *Id.*

Here, the Bar and its staff were not supervised, let alone actively, by any non-market participant supervisor. Bar staff answer to the Bar's executive officers, who answer to the Board of Governors. All are market participants; none are politically accountable to the citizens of Florida. Just as the members of the North Carolina Board of Dental Examiners were not actively supervised when they sent cease-and-desist letters and otherwise stifled competition by nondentists, the Florida Bar Defendants were not actively supervised when they made the public and private statements at issue, released the staff opinion attacking TIKD,[7] and failed to correct public misstatements about the Bar's legal authority.

Second, the Bar's challenged actions were not taken pursuant to a "clearly articulated and clearly expressed state policy to displace competition" that bans TIKD's services as "unlicensed practice of law" or prohibits lawyers from representing TIKD's customers. The Florida Supreme Court has exclusive jurisdiction over what constitutes the practice of law in Florida. Fla Const. art. 5 § 15. *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905, 907 (Fla. 2010) (no private cause of action for UPL may be brought unless "this Court has ruled the activities are the unauthorized practice of law"). That Court has made no ruling as to TIKD's business model, or any business remotely like it.

[7] The Florida Supreme Court has adopted a procedure by which advisory opinions from the Standing Committee on the Unlicensed Practice of Law may be reviewed and approved by that Court. *See* Rules Regulating the Florida Bar 10-0.1(b). The Florida Bar Defendants did not use this procedure when the staff opinion was issued, and the Florida Supreme Court has not reviewed, let alone approved, that staff opinion.

The Florida Bar's role is, at most, to investigate complaints and bring cases for the Supreme Court to decide. *See* Bar Rules, Chapter 10. Neither the Bar, its staff, UPL circuit committees, nor its UPL Standing Committee are authorized to make "decisions," "findings," or "conclusions" about the legality of a nonlawyer's actions, let alone issue "orders" or "injunctions" against nonlawyers. *See* Bar Rule 10-3.2 (duties of standing committee); Bar Rule 10-4.1(e) (duties of circuit committee). The Bar committees may resolve cases by agreement, but otherwise may only forward cases internally with recommendations to bring actions to be decided by the Florida Supreme Court. *Id.* Bar Rule 10-7.1. They may not "rule" or "decide," let alone "enjoin" or "*arrest*." *Id.*

The Bar Defendants' actions challenged in this motion, therefore, were not actively supervised by the State nor done pursuant to a clearly articulated State policy. Under *Dental Examiners*, they have no immunity defense.

(2) The acts sought to be enjoined are anticompetitive and illegal.

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade … is declared to be illegal." 15 U.S.C. § 1. "[P]rivate suits are an important element of the Nation's antitrust enforcement effort." *Am. Soc. of Mech. Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 573 (1982). Horizontal arrangements among competitors – including members of learned professions – are classic restraints of trade within the meaning of the Sherman Act. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422 (1990) (agreement among criminal defense counsel to refuse court appointments *per se* illegal).

Professional associations that issue anticompetitive "advisory" opinions to their members can be held liable under the Act. *Am. Soc. of Mech. Engineers, Inc.*, 456 U.S. at 571-72 (1982); *see also Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679 (1978) (holding unlawful as a *per se* violation an engineering association's canon of ethics that prohibited competitive bidding by its members); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (concerted refusal of members of voluntary dental association to submit x-rays to dental insurers for use in benefits determinations, based on association's "work rule," was illegal restraint of trade).

> A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an

> agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them.

Indiana Federation of Dentists, 476 U.S. at 459.

Concerted refusals to deal – even if based on the excluded party's alleged unlawful practice – violate the Act. *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 468 (1941) (agreement among manufacturers not to deal with retailers who sold unregistered garments violated federal law, even if the alleged "style copying" "were an acknowledged tort under the law of every state"). "That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it." *Indiana Fed'n of Dentists*, 476 U.S. at 465 (citing *Fashion Originators*). "Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the State." *Id*.

The Florida Bar's actions complained of here are remarkably similar to those of the North Carolina Board of Dental Examiners found to violate the Sherman Act. The North Carolina Board, empowered only to investigate and file suit, instead declared nondentists were engaged in "unlicensed practice of dentistry." *Dental Examiners*, 135 S. Ct. at 1108. The Florida Bar, long before its "investigation" has concluded, told TIKD's undersigned counsel that TIKD was engaged in the "unlicensed practice of law." The Board warned third parties not to do business with nondentist teeth whiteners, and suggested they be evicted from their premises. *Dental Examiners*, 135 S. Ct. at 1108. The Bar warned lawyers not to do business with TIKD or face ethical charges. Ex. 3 ¶¶ 7, 11; Ex. 4 ¶ 7; Ex. 5 ¶ 6. The Board issued "cease and desist" letters stating that nondentist teeth whiteners were violating state law. *Dental Examiners*, 135 S. Ct. at 1108. The Bar issued a "staff opinion" that conveyed the same message about TIKD. Ex. 2-F. Neither the Board nor the Bar's actions were supervised by a politically accountable State actor. In both cases, the results were predictably the same: competition in the relevant market regulated by the captured state agency evaporated or was significantly reduced. *Dental Examiners*, 135 S. Ct. at 1108; Ex. 2 ¶¶ 26-27.

Dental Examiners held such actions impermissible: "the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina

constituted an anticompetitive and unfair method of competition." 135 S. Ct. at 1109. The same is true here, which is why TIKD is likely to succeed on the merits of its claim.

B. TIKD is suffering irreparable harm.

As shown above and set out in detail in Christopher Riley's declaration, the Bar's actions are causing TIKD enormous harm by disrupting its relationships with attorneys who serve TIKD's customers. Ex. 2 ¶¶ 11-14, 23-27. The Bar's anticompetitive actions have driven attorneys away from serving TIKD's customers, which is reducing options for consumers, eliminating innovation, and reducing competition among lawyers who provide traffic ticket defense. *Id.* ¶¶ 27-28.

The Bar's actions have caused TIKD reputational harm and interfered with its existing, ongoing and future relationships with attorneys willing to represent its customers. Ex. 2 ¶¶ 32-33. Interference with business relations that results in lost sales constitutes irreparable harm. *E.g.*, *Zimmerman v. DCA at Welleby, Inc.*, 505 So. 2d 1371, 1372-73 (Fla. 4th DCA 1987). Likewise, past and ongoing reputational damage is considered irreparable harm warranting injunctive relief, because of the difficulty in measuring lost sales and profits. *Id*. *See also McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1309 (11th Cir. 1998) (recognizing that damage to company's reputation constitutes irreparable injury).

The damages TIKD will suffer absent injunctive relief are difficult to calculate, which is further evidence of irreparable harm. *See Nat'l Auto Lenders, Inc. v. SysLOCATE, Inc.*, 753 F. Supp. 2d 1233, 1236–37 (S.D. Fla. 2010) ("A plaintiff may establish irreparable injury where the total damages associated with plaintiff's losses would be difficult to calculate."). The combination of services TIKD offers to consumers is innovative, and TIKD's business is in its early stages with plans to expand. Ex. 2 ¶ 28. TIKD's market entry also comes at a time when consumers are embracing technologies provided by companies that radically alter the provision of professional services. *Id.* This combination of technological advancement and consumer acceptance has driven exponential growth in the use of innovative services like TIKD's. *Id.* These factors – TIKD is (i) a young company (ii) offering unique services in a rapidly changing market (iii) with the potential for rapid, national growth – make it difficult to predict with accuracy how much revenue TIKD has lost and will continue to lose if injunctive relief is not granted. *Id.*; *see also Teladoc, Inc.*, 112

F. Supp. 3d at 542-43 (fact that telehealth industry was in early stages indicated that growth would be difficult to estimate).

TIKD also faces threats to its funding sources in the absence of injunctive relief. Ex. 2 ¶ 31. Like other innovators, TIKD relies on private capital to continue operating. *Id.* If TIKD continues to lose market share in Florida due to the Bar's actions, it risks losing funding, jeopardizing TIKD's business nation-wide, not just in Florida. *Id.*

If the Bar's actions continue, and if TIKD continues to lose attorneys as a result, TIKD could be forced to close in Florida entirely. Ex. 2 ¶ 27. Even if it is not forced to close, further loss of attorneys in Florida will require TIKD to reduce operations and staff, advertising, and investment in research and development. *Id.* ¶ 30. Such harm to a company's business is a "recognized" source of irreparable harm. *See Teladoc, Inc.*, 112 F. Supp. 3d at 541-42 (citing and applying cases from two circuits).

C. The Florida Bar Defendants will suffer no harm from the relief requested.

The requested injunctive relief does not interfere with the Florida Bar's *legitimate* interests in investigating complaints. The Bar can continue its interminable investigation of TIKD and either close it or proceed to the next step. The Bar, however, has no obligation or authority to be making public statements or issuing staff opinions in the meantime accusing TIKD of illegal conduct; indeed, an injunction prohibiting The Florida Bar Defendants would help keep the Bar within the boundaries of its limited authority to regulate the market for legal services, post-*Dental Examiners.* It would be completely consistent with the Bar's rules for it to retract an unsigned, mysterious staff opinion that should not have been issued, and for the Bar to correct the public confusion caused by its statements and the amplification and distortion of those statements by The Ticket Clinic Defendants.

D. The injunction sought would not harm the public interest.

The limited injunction sought against the Florida Bar Defendants would not harm the public, even assuming the public's interest is being advanced by the Bar's 11-month "investigation" of TIKD and the Ticket Clinic's false claims about the Bar's actions and authority. The Bar's investigation would not be hampered, and the public would not be subject to confused, false and unauthorized claims during the course of that investigation

suggesting the Bar has prejudged TIKD – and has the authority to "judge" TIKD in the first place.

VI. Request for Hearing

TIKD requests a hearing in accordance with Local Rule 7.1(b)(2). A hearing would be helpful to the Court. While the attached evidence provides sufficient ground to grant TIKD's motion, TIKD intends to offer live testimony to shed further light on the merits of TIKD's claims and the irreparable continuing, harm TIKD faces in the absence of injunctive relief. TIKD estimates it will require three hours for argument and presentation of testimony and evidence.

VII. Conclusion.

For these reasons, Plaintiff TIKD Services LLC, respectfully requests that the District Court enter a preliminary injunction against The Florida Bar Defendants enjoining them, and any persons acting in concert with them with knowledge of the order, from:

- Making any public and private statements that the Bar, Bar committees, and/or Bar staff have "ruled" or "decided" or "found" that TIKD is engaged in the unlicensed practice of law, when in fact no such decision has been made, and the Bar has no power to make rulings or findings;
- Making any public and private statements that the Bar, Bar committees, and/or Bar staff have issued an "opinion" that TIKD is engaged in the unlicensed practice of law, or that lawyers who represent TIKD clients are violating ethics rules because TIKD is engaged in the unlicensed practice of law, or that such lawyers are engaged in "fee-splitting" with TIKD;
- Making any further release or circulation of the August 2017 Bar staff opinion;
- Failing to correct public statements attributing to the Bar the authority to make arrests, issue injunctions, or otherwise enforce the law against nonlawyers.

Plaintiff further requests such other and further relief to which Plaintiff may show itself justly entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF TIKD SERVICES LLC

EXHIBITS IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

1. Amicus brief filed by Florida State Bar in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.
2. Declaration of Christopher Riley, with Exhibits 2-A through 2-M.
    - Ex. 2-A October 11, 2017 letter from TIKD counsel to UPL Committee.
    - Ex. 2-B December 15, 2016 *Miami Herald* article.
    - Ex. 2-C December 28, 2016 letter from Needelman to TIKD counsel.
    - Ex. 2-D February 27, 2017 Bar complaint filed by Hollander.
    - Ex. 2-E May 26, 2017 letter from TIKD counsel to Needelman.
    - Ex. 2-F August 29, 2017 Bar Staff Opinion.
    - Ex. 2-G September 28, 2017 letter from TIKD counsel to Holcomb.
    - Ex. 2-H September 28, 2017 letter from TIKD to UPL Committee.
    - Ex. 2-I October 5, 2017 email from UPL Committee Chair to TIKD.
    - Ex. 2-J November 7, 2017 letter from Bar President to TIKD counsel.
    - Ex. 2-K November 9, 2017 *Miami Herald* article.
    - Ex. 2-L August 23, 2017 *Miami Herald* article.
    - Ex. 2-M November 10, 2017 email from TIKD counsel to Bar counsel.
3. Declaration of Jeremy Simon, with Exhibits 3-A through 3-D.
    - Ex. 3-A Text messages between Simon and a coverage attorney.
    - Ex. 3-B Text messages between Simon and second coverage attorney.
    - Ex. 3-C Text messages between Simon and fifth coverage attorney.
    - Ex. 3-D October 6, 2017 email to Simon attaching Staff Opinion.
4. Declaration of Julia McKee.
5. Declaration of Christopher White, with Exhibits 5-A through 5-B.
    - Ex. 5-A June 30, 2017 letter from Needelman to Hollander.
    - Ex. 5-B August 29, 2017 Bar Staff Opinion.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing has been served on the counsel of record identified below in a manner authorized by the Federal Rules of Civil Procedure on the 22nd day of November, 2017:

Jerome Hoffman
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/s/ Ramón A. Abadin
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