UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

TIKD SERVICES LLC,

Plaintiff,

vs.

THE FLORIDA BAR, *et al.*,

Defendants.
_____/

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AGAINST FLORIDA BAR DEFENDANTS AND MEMORANDUM IN SUPPORT

Defendants The Florida Bar ("TFB"), Michael J. Higer, John F. Harkness, Lori S. Holcomb, and Jacquelyn P. Needelman (collectively the "Bar Defendants"), hereby file this Response in Opposition to Plaintiff TIKD Services LLC's ("TIKD") Motion for Preliminary Injunction Against the Florida Bar Defendants and Memorandum in Support ("PI Motion"), and state as follows:

INTRODUCTION

Plaintiff seeks to use this Court to disrupt a regulatory process promulgated by the Florida Supreme Court ("FSC") to, among other things, investigate the Unlicensed Practice of Law ("UPL"). At bottom, TIKD seeks to improperly obtain an injunction from this Court to protect its private and pecuniary interests and to change (not preserve) the status quo pending its efforts to upend the FSC's long-established rules and procedures that control TFB's UPL investigations, communications and ethics advice to its members.

In addition, Plaintiff's PI Motion fails to satisfy the four established prerequisites for determining entitlement to injunctive relief. In short, the motion should be denied for the reasons set forth in the Bar Defendants' Motion to Dismiss (Doc. 17). In particular, TFB is immune under the Eleventh Amendment from suits in federal court seeking injunctive relief. The Bar Defendants are also immune from the federal and state antitrust laws under the state

action doctrine, the *Noerr-Pennington* doctrine and Section 542.20, Florida Statutes. In addition, this Court should decline to exercise jurisdiction in this matter under the *Younger v. Harris* abstention doctrine.

LEGAL STANDARDS

A "preliminary injunction is an extraordinary and drastic remedy" which should not "be granted unless the movant clearly carries the burden of persuasion as to the four prerequisites." *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1519 (11th Cir. 1983) (internal quotation marks and citation omitted); *see also Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974) ("The burden of persuasion on all of the four requirements for a preliminary injunction is at all times upon the plaintiff."). It is an abuse of discretion for a court to grant an injunction where the movant has not proven all four prerequisites. *See Zarudi-Quintana*, 768 F.2d 1213, 1216 (11th Cir. 1985). To be entitled to an injunction, TIKD must show (1) a substantial likelihood of success on the merits; (2) that TIKD will suffer irreparable injury unless the court grants the injunction; (3) that the threatened injury to TIKD outweighs whatever damage TIKD's requested injunction may cause the Bar Defendants; and (4) that the injunction would not be adverse to the public interest. *Id*.

Furthermore, because TIKD is also seeking a mandatory injunction, which requires affirmative action by the Bar Defendants, TIKD "faces a particularly heavy burden of persuasion." *Winmark Corp. v. Brenoby Sports, Inc.*, 32 F. Supp. 3d 1206, 1218 (S.D. Fla. 2014) (internal quotation marks and citation omitted). Instead of proving all four prerequisites by a preponderance of the evidence, TIKD must demonstrate a "clear" showing on each of the four prerequisites. *FHR TB, LLC v. TB Isle Resort, LP*, 865 F. Supp. 2d 1172, 1192 (S.D. Fla. 2011); *see also Caron Found. of Fla., Inc. v. City of Delray Beach*, 879 F. Supp. 2d 1353, 1360 (S.D. Fla. 2012) ("'A mandatory injunction . . . especially at the preliminary stage of proceedings, should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party.'" (quoting *Miami Beach Fed. Sav. & Loan Ass'n v. Callendar*, 256 F.2d 410, 415 (5th Cir. 1958))). Here, neither the facts or the law support TIKD's position.

ARGUMENT

I. TIKD HAS FAILED TO SHOW A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

For the same reasons already explained in the Bar Defendants' Motion to Dismiss, TIKD cannot demonstrate a substantial likelihood of success on the merits. For starters, the Bar Defendants are an arm of the FSC delegated by the FSC to carry out its mandated duties. As such, they are immunized from suit as described below.

Eleventh Amendment Immunity

In order to show a substantial likelihood of success on the merits of its claims, TIKD will need to overcome the Eleventh Amendment, which it cannot do. The Eleventh Amendment makes clear that TFB, as an arm of the FSC, is immune from TIKD's claims. *Kaimowitz v. Fla. Bar*, 996 F.2d 1151, 1155 (11th Cir. 1993). This immunity also applies to equitable claims. *Uberoi v. Supreme Court of Fla.*, 819 F.3d 1311, 1313 (11th Cir. 2016). Eleventh Amendment immunity can also extend to state officers. *See Hobbs v. Roberts*, 999 F.2d 1526, 1528 (11th Cir. 1993). In this case, TIKD has pled no facts sufficient to establish any exception to Eleventh Amendment immunity that would allow it to obtain injunctive relief against the individual Bar Defendants.[1]

State Action Immunity

TIKD must also overcome TFB's immunity under *Parker v. Brown*, 317 U.S. 341 (1945), which it has not done. "Federal courts have routinely denied attempts to bring a Sherman Act cause of action against a state, state bar, or state Supreme Court," including TFB. *Ramos v. Tomasino*, No. 16-cv-80681-BLOOM/Valle, 2016 WL 8678546, at *2 (S.D. Fla. Aug. 25, 2016), *aff'd in pertinent part, remanded in part on other grounds*, No. 16-15890, 2017 WL 2889472 (11th Cir. July 7, 2017); *Otworth v. Fla. Bar*, 71 F. Supp. 2d 1209, 1220 (M.D. Fla. 1999). Recognizing this barrier, TIKD incorrectly argues that TFB is no longer entitled to state action immunity in the wake of *North Carolina State Board of Dental Examiners v. Federal Trade Commission,* 135 S. Ct. 1101 (2015) ("*Dental Examiners*"). The Bar Defendants' Motion to Dismiss explains in detail why TIKD's reliance on *Dental Examiners* is misplaced.

[1] For the reasons stated in the Bar Defendants' Motion to Dismiss (Doc. 17)—which is incorporated herein by reference—TIKD's allegations against the individual Defendants are non-existent or bare bones at best and provide no basis for TIKD to assert there is a substantial likelihood of success on the merits against these individuals.

Notably, in another recent Sherman Act case against TFB, originating in this District, the Eleventh Circuit affirmed dismissal under Rule 12(b)(6) because of state action immunity – and did so *two years* after *Dental Examiners* was decided. *Ramos,* 2017 WL 2889472, at *4 (11th Cir. July 7, 2017) (applying *Parker* immunity after finding, among other things, that "the Florida Bar is '*an official* arm of [the Florida Supreme] Court,' acting at all times under the supervision and control of the Court" (emphasis in original) (quoting *Dade-Commonwealth Title Ins. Co. v. N. Dade Bar Ass'n*, 152 So. 2d 723, 726 (Fla. 1963))). Similarly, an October 2015 decision from this District dismissed Sherman Act claims against TFB after rejecting an argument based on *Dental Examiners*. *Rosenberg v. State of Florida*, No. 15-22113-CIV-Lenard/Goodman, 2015 WL 13653967, at *7 (S.D. Fla. Oct. 14, 2015) (holding that *Dental Examiners* "is not applicable to Rosenberg's claims against The Florida Bar because The Florida Bar is an arm of the state (a sovereign entity)—not a non-sovereign actor that is authorized by the State to regulate its own profession"). TIKD simply does not have a substantial likelihood of obtaining a different answer than these very recent, post-*Dental Examiners* cases.

Noerr-Pennington Immunity

Noerr-Pennington immunity also bars TIKD's claim because the *Noerr-Pennington* doctrine protects the Bar Defendants' First Amendment rights to express their non-binding opinions on, among other things, what constitutes UPL. The Bar Defendants also have the right to assemble and petition the FSC to determine if a particular business practice constitutes UPL. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-37 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965); *SilverHorse Racing, LLC v. Ford Motor Co.*, No. 6:16-CV-53-ORL-22KRS, 2016 WL 7137273, at *3 (M.D. Fla. Apr. 27, 2016). Furthermore, *Noerr-Pennington* applies to activities both before and after litigation is actually filed with the FSC, including pre-litigation communications and other activities incident to litigation. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 934 (9th Cir. 2006); *McGuire Oil Co. v. Mapco, Inc.,* 958 F.2d 1552, 1160 (11th Cir. 1992). Not only does TIKD fail to show a substantial likelihood of overcoming *Noerr-Pennington* immunity, but TIKD's requested injunctive relief directly contradicts the important First Amendment rights that *Noerr-Pennington* immunity was established to preserve.

Immunity Under Section 542.20, Florida Statutes

TIKD also has no substantial likelihood of success of avoiding the mandate of Section 542.20, Florida Statutes, which provides, "[a]ny activity or conduct exempt under Florida statutory or common law or exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter." Pursuant to this statute, the immunity discussed above also requires dismissal of the state antitrust claims in Counts III and IV. *Duck Tours Seafari, Inc. v. City of Key West*, 875 So. 2d 650, 653 (Fla. 3d DCA 2004).

Florida's Anti-SLAPP Statute

In addition, this litigation is designed to interfere with TFB's administration of the Rules Regulating the Florida Bar, including UPL investigations. As such, it is a prohibited SLAPP suit ("Strategic Litigation Against Public Participation"). § 768.295, Fla. Stat. TIKD's request for preliminary injunctive relief against TFB and its employees is meant to interrupt and discourage TFB and its employees' participation in a FSC-ordered and currently pending process in order to influence an outcome favorable to TIKD. A simple review of the Complaint and exhibits makes plainly clear TIKD's objective in this matter. TIKD's failure to seek injunctive relief against the other named co-Defendants in this matter -- along with the fact that TIKD has not served all such co-Defendants and has agreed to extensions of time for those who have been served (Doc. 19), underscores and proves the point. The PI Motion simply seeks to constrain the Bar Defendants from carrying out their FSC-required duties with respect to providing information about the proceedings or even providing advisory ethics opinions that are related to the ongoing proceedings. In this light, there is very little likelihood of success on the merits of TIKD's claims.

Federal Abstention Related to Pending State Actions

Perhaps most importantly, Florida has an important interest in ensuring that persons who are not licensed to practice law do not engage in legal representation or mislead persons as to their ability to engage in such practice. Consequently, the FSC has created detailed and comprehensive rules and regulations relating to the investigation of UPL. In addition, TFB has been delegated with the responsibility of administering such rules and regulations pursuant to a process that provides extensive due process protections and an adequate opportunity to raise federal constitutional issues before an independent referee during an evidentiary hearing and upon review by the Florida Supreme Court.

Moreover, the investigative process regarding UPL is well underway. In fact, TIKD's displeasure with that investigative process forms the basis of its claims in this Court. As such, this Court should abstain from exercising jurisdiction in this case based on *Younger v. Harris*, 401 U.S. 37 (1971). The doctrine of abstention announced in *Younger v. Harris* requires a federal district court to abstain from assuming jurisdiction to render declaratory or injunctive relief that would interfere with pending state proceedings. *Thompson vs. Fla. Bar*, 526 F. Supp. 2d 1264, 1272, 1282 (S.D. Fla. 2007); *see also Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 437 (1982) (holding that federal action seeking injunctive relief from ongoing bar disciplinary proceedings was barred by doctrine of *Younger* abstention); *see also Berger v. Cuyahoga Cnty. Bar Ass'n*, 983 F.2d 718, 724 (6th Cir. 1993) (approving *Younger* abstention where federal challenge included antitrust claims); *Sibley v. Fla. Supreme Court*, No. 4:07CV331 RH/WCS, 2007 WL 2698278, at *1 (N.D. Fla. Sept. 11, 2007); *Mason v. Fla. Bar*, No. 6:05-CV-627-28JGG, 2005 WL 3747383, at *7 (M.D. Fla. Dec. 16, 2005), *R&R adopted*, No. 6:05CV627ORL28JGG, 2006 WL 305483 (M.D. Fla. Feb. 7, 2006); *Pelfresne v. Vill. of Rosemont*, 952 F. Supp. 589, 593 (N.D. Ill. 1997) (granting motion to dismiss on the grounds of *Younger* abstention and noting that party could raise its federal antitrust issues in the state proceeding).

TIKD's Proffered Evidence Provides No Basis for Injunctive Relief

Putting aside the legal principles discussed above, the factual support provided by TIKD also fails to provide any basis for injunctive relief.

1. TIKD's protestations that it is not engaged in UPL are immaterial

TIKD's opening factual recitation is really an argument disputing that it is engaged in UPL: "TIKD and its employees do not provide legal advice or representation." (Doc. 12 at 7.) "All legal services for TIKD customers are provided by independent, licensed attorneys, without TIKD's participation or control." (*Id.*) These defenses to the UPL proceeding, assuming it moves forward beyond the investigative stage, are immaterial to the PI Motion and, in fact, demonstrate that TIKD's real intent is simply to have this Court usurp the FSC's exclusive authority to determine UPL and to decide the merits of a pending UPL investigation.

2. TIKD's criticisms of the UPL investigation are immaterial

In the same vein, TIKD's criticisms of the UPL investigation are a collateral attack on that investigation. For instance, TIKD alleges that the investigation was improperly initiated or maintained because the UPL complaint received by TFB was only "hand-written" in "two sentences" and "cited no statute, rule, or case law." (Doc. 12 at 8.) Allegations that TIKD has cooperated with the investigation, and made changes to its business as a result of the investigation, provide no basis for the preliminary injunctive relief requested. In any event, if this matter reaches the FSC, TIKD will have an opportunity to address those substantive issues there, when they may be material. Until then, they have no relevance here.

3. TIKD's allegations about TFB staff opinion are unfounded

TIKD complains about an unpublished written staff opinion (the "Bar Staff Opinion") and asserts that TFB "intended that its Bar Staff Opinion would be mispresented as an official 'opinion' or 'finding' by TFB that TIKD's business was illegal and that any attorney representing TIKD attorneys would be violating Florida ethics rules." (Doc. 12 at 9; Doc. 1 ¶ 61.) These assertions are baseless speculation. TIKD also complains that this Bar Staff Opinion was touted by the Ticket Clinic (not TFB) to persuade attorneys not to affiliate with TIKD. (*Id.* ¶ 63.) TIKD further alleges that the Ticket Clinic cited TFB Staff Opinion "as proof that TFB had concluded TIKD's business was illegal." (*Id.*) These allegations have no bearing on TFB's alleged intent or conduct and provide no basis for relief against TFB.[2] Moreover, the plain wording of TFB Staff Opinion and TFB's rules show that TIKD's allegations are simply wrong.[3] For instance, the introductory section of the opinion in question reads,

> Florida Bar ethics counsel are authorized by the Board of Governors of The Florida Bar to issue informal advisory ethics opinions to Florida Bar members who inquire regarding their own contemplated conduct. Advisory opinions necessarily are based on the facts as provided by the inquiring attorney. Opinions are not rendered regarding past conduct, questions of law, hypothetical questions or the conduct of an attorney other than the inquirer. *Advisory opinions are intended to provide guidance to the inquiring attorney and are not binding; the advisory opinion process is not designed to be a substitute for a judge's*

[2] Oddly, TIKD has not sought injunctive relief against the non-Bar Defendants who allegedly compete against TIKD, despite the factual allegations that statements by these competitors about the UPL investigation are the real source of harm, if any, to TIKD. Indeed, TIKD has granted the other Defendants who have been served an extension until January 4, 2018 to respond to the Complaint.

[3] *See also* Ex. A, Holcomb Declaration at ¶ 6 ("Florida Bar Staff Opinion 37603, dated August 29, 2017, was prepared and disseminated in a manner consistent with the Rules Regulating the Florida Bar and the Florida Bar Procedures for Ruling on Questions of Ethics.").

> *decision or the decision of a grievance committee.* The Florida Bar Procedures for Ruling on Questions of Ethics can be found on TFB's website at www.floridabar.org.
>
> A member of The Florida Bar has requested an advisory ethics opinion regarding accepting cases from a lay company that offers to resolve traffic tickets. The inquirer states that the nonlawyer owned company offers to resolve traffic tickets. The company charges eighty percent of the cost of the fine and part of the fee collected is used to hire a lawyer to go to court for the client. The company guarantees that if the case is lost the company will pay the customer's fine.
>
> The inquirer asks whether accepting cases from the company is a violation of ethics rules and whether it is lawful for a nonlawyer to provide such a service.

(Doc. 12-2 at 28, Ex. 2F, at 1 (emphasis added).)

Similarly, the opinion concludes,

> [I]t appears that participating in the program raises ethical concerns regarding fee splitting with a nonlawyer, solicitation, indirect attorney client relationships, the unlicensed practice of law and financial assistance to clients. *Finally, whether it is lawful for the company to provide the services as described is a legal question, beyond the scope of an ethics opinion.*

(*Id.* at 30, Ex. 2F at 3 (emphasis added).) All of this is entirely consistent with TFB's rules and procedures, which make clear that staff opinions are "advisory only and are not the basis for action by grievance committees, referees, or the board of governors except on the application of the respondent in disciplinary proceedings." Rule 1, Fla. Bar Procedures for Ruling on Questions of Ethics. Importantly, an ethics opinion is only provided to a member of TFB in good standing concerning that member's own contemplated conduct, consistent with the statement in TFB Staff Opinion quoted above. Rule 2(a)(1), Fla. Bar Procedures for Ruling on Questions of Ethics. Furthermore, written staff ethics opinions are public documents that may be requested by any member of the public. R. Regulating Fla. Bar Rule 2-9.4(d) ("Each advisory opinion issued by Florida Bar ethics counsel shall be identified as a 'staff opinion' and shall be available for inspection or production."). A written staff opinion is disclosed to the public upon formal request only after identifying details are removed, and it is not published by TFB. Rule 3(a)(2), (c), Fla. Bar Procedures for Ruling on Questions of

Ethics. Oral staff opinions are treated confidentially. Rule 3(a)(1), Fla. Bar Procedures for Ruling on Questions of Ethics.

As such, the evidence TIKD offers in its motion cannot be objectively reconciled with TIKD's bold allegation that the advisory opinion was intended to be used as a statement by anyone, including TFB, that TIKD's "business was illegal" or that TFB had made such finding or rendered such an opinion.

4. TIKD's allegations about TFB's "strategic silences" are frivolous

TIKD next argues TFB has engaged in "strategic silences" which have allowed and encouraged one of TIKD's competitors to use such silence to misstate TFB's power or intent to take action against TIKD. In essence, TIKD is taking the curious position that TFB has a duty to speak out and actually take sides in a dispute between competitors. This of course is contrary to TIKD's overall assertion that only the FSC, not TFB, is empowered to make a public declaration of what constitutes UPL. Moreover, with very few exceptions, there can be no liability for silence and nowhere does TIKD provide a legal basis why TFB must monitor and correct contested statements by third parties (i.e., 20 million Floridians). In addition to being impossible, there is no duty that requires TFB to engage in heated dialogue or exchanges amongst competitors. *See, e.g., Trianon Park Condo. Ass'n v. City of Hialeah,* 468 So. 2d 912, 918 (Fla. 1985) ("[T]here is not now, nor has there ever been, any common law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals. In addition, there is no common law duty to prevent the misconduct of third persons.").

5. TIKD's allegations about TFB's public and private statements provide no basis for preliminary injunctive relief overseeing TFB's speech

TIKD alleges that the "Bar has engaged in a series of communications, private and public, conveying, expressly and impliedly, that TIKD is engaged in illegal activity." Even assuming the accuracy of TIKD's characterization of such alleged statements, which Bar Defendants dispute (as shown below), such do not provide any basis for the relief requested.

(1) The only statement by any of the Bar Defendants which could even remotely be characterized as a "public" statement squarely contradicts TIKD's allegations. A *Miami*

Herald article dated August 23, 2017 and cited by the Complaint (Doc. 1 ¶ 55, n. 17) "quoted" Ms. Needelman and explained,

> The Florida Bar is exploring the matter. First, a standing committee within the Bar needs to approve proceeding with the litigation, a process that could take months, said Jacquelyn Plasner Needelman, counsel for the … Florida Bar's Unlicensed Practice of Law Department. If approved, a petition could then be filed in the Florida Supreme Court by the Florida Bar. The case could be resolved or could go to trial; there are a lot of unknowns. "This is at the beginning of the process," she said.

This statement is a truthful, objective explanation of the process. It reaches no conclusions. To the contrary, it reports a "lot of unknowns" and further advises that any final resolution requires petitioning the FSC.

(2) Declarant Jeremy Simon states he was "left with the *impression* that The Florida Bar had affirmatively 'determined' that TIKD was engaged in the unlicensed practice of law, and that this determination was subject to additional approvals only as a formality. (Doc. 12-2 at 3 ¶ 11 (emphasis added).) However, one person's inferential "impression" cannot support entry of an injunction. Moreover, Mr. Simon's "impression" is contrary to the process delineated in Chapter 10 of the Rules Regulating the Florida Bar. As such, Mr. Simon's declaration provides TIKD no meaningful assistance in this endeavor to obtain injunctive relief.

(3) Similarly, Julia McKee declares she called to ask if TFB had issued a letter that stated TIKD was engaged in UPL. Ms. McKee states that Ms. Needelman would not answer the question. (Doc. 12-4 at 2 ¶ 7.) The fact that Ms. Needelman did not deny it, however, "le[ft] McKee with the *impression*, that such a determination *may*, in fact, have been made by TFB." (*Id.* (emphasis added).) Ms. McKee's "impression" based on Ms. Needelman's failure to admit or deny provides no basis for the extraordinary injunctive relief TIKD seeks against the Bar Defendants.

(4) Declarant Christopher White states that he asked Ms. Needelman about the status of the UPL investigation against TIKD and that Ms. Needelman told him to "read the letter" he had been given by Mr. Hollander regarding the UPL investigation in question. (Doc. 12-5 at 2 ¶ 6.) The letter in question plainly states,

> This will confirm that the Eleventh Judicial Circuit [UPL] Committee "B" has recommended further proceedings in this matter pursuant to Rule 10-7.1 of the

> Rules Regulating the Florida Bar. This recommendation will proceed for formal approval pursuant to Rule 10-6.3(a) of the Rules Regulating the Florida Bar.

(Doc. 12-5 at 3.) Mr. White states that he somehow "*understood* Ms. Needelman to be telling him that the Florida Bar considered [his] representation of TIKD customers to be improper." (*Id.* (emphasis added).) Again, Mr. White's subjective "understanding" provides no objective basis or evidentiary ground for injunctive relief.

(5) Plaintiff provides no sworn verification for the statement on page 9 of its Motion that "Defendant Lori Holcomb, another Bar staff attorney, told [TIKD's] counsel, Ramón Abadin, that TIKD was engaging in UPL." (Doc. 12 at 9.) Not only does Ms. Holcomb deny this allegation, (Holcomb Declaration, Ex. A ¶ 4),[4] but Mr. Abadin's contemporaneous correspondence memorializing the conversation fails to include any reference to Ms. Holcomb's alleged statement and in fact belies such assertion,

> As discussed above, *you confirmed the Bar has not issued any such opinions or made any such findings*. Rather, a UPL complaint brought by attorney Ted Hollander from The Ticket Clinic is being investigated by the Bar's UPL committee system, and has been forwarded from a local circuit committee to the UPL Standing Committee for consideration in October. We all agree that only The Florida Supreme Court has the authority to decide if Tikd's business model is the practice of law.

(Doc. 1-3 at 2, Ex. 3 to Compl. (emphasis added).) Moreover, Mr. Abadin, a recent President of TFB (*see* Doc. 18-1 at 2) undoubtedly understands Bar Rules relating to UPL investigations. It is highly unlikely that he was misled by Ms. Holcomb about the investigative process; and indeed he was not, based on his letter quoted above. Regardless, such "statement" provides no basis for injunctive relief. According to TIKD's motion, Ms. Holcomb did not make this statement publicly; nor did she make it to any lawyers working as coverage counsel for TIKD, unless of course, Mr. Abadin is also coverage counsel for TIKD. Otherwise, TIKD is the one who made the allegation public by asserting it in this lawsuit.

[4] *See also* Declaration of Elizabeth C. Tarbert, Ex. B ¶ 4; Declaration of William A. Spillias, Ex. C ¶ 4.

6. TIKD's allegations that TFB has ignored its repeated requests for a private audience or special treatment provides no basis for injunctive relief.

TIKD next alleges that TFB has failed to accede to or grant TIKD's numerous requests and demands throughout the investigation.[5] This, too fails as a basis for injunctive relief. Rather than allowing the UPL investigatory process to run its course, TIKD demands special treatment, originally from TFB, and now from this Court. TIKD equates the lack of special treatment with being "faced with a brick wall." (Doc. 12 at 11.) As TIKD concedes, however, the *investigation* is only a step toward a potential petition to the FSC where TIKD would have its day in court like any other respondent, including a full opportunity to make its argument after full rights to discovery and due process. (*Id.* at 13-14.) Moreover, TIKD's allegations that TFB should have affirmatively responded to quotes in the press by TIKD's competitors is also improper. As stated above, TFB has no role in intervening on either side's behalf in a public war-of-words. Rather, TFB's duty is to use the procedures set forth by the FSC, including investigating UPL proceedings when appropriate, communicating about and disclosing such proceedings to the extent required in the Rules, and issuing ethics advisory guidance as set forth in those rules.[6] As noted above, while TIKD demands that the Court order the Bar Defendants to correct alleged misstatements by TIKD's competitors, it seeks no injunctive relief against those competitors. In fact, it has not yet served all of the other non-Bar defendants and has agreed to an extension to respond to the Complaint for those who have been served. (Doc. 19.) Again, this reveals that the purpose of TIKD's lawsuit is not to stop the alleged harm to TIKD from a mischaracterization of TFB's investigation, but

[5] Some of TIKD's demands have included: 1) TFB making public statements about TIKD; 2) TFB making public statements about the ongoing investigation; 3) Allowing TIKD's lawyers to appear before TFB's UPL Standing Committee; 4) TFB responding to TIKD's "9-page, single-spaced explanation of its business and compliance with Florida law" written to the UPL Standing Committee; and 5) requesting to meet with Bar leadership outside of the normal UPL process.

[6] TIKD's allegations that the Bar did not respond to various requests is immaterial, but also belied by the evidence. TIKD itself attaches some of the letters from TFB responding to TIKD's requests and indeed complains of their brevity. (Doc. 12-2 at 37, 38.) TIKD received those responses, but simply did not like the answer. Moreover, TIKD repeatedly argues and alleges that TFB has never provided it with any citation or legal authority concerning UPL in response to its requests, but TIKD itself admits in the correspondence attached to its PI Motion that TFB did provide TIKD with legal authority, but that TIKD simply disagreed it was applicable. (Doc. 12-2, Ex. 2A at 5.)

instead to derail or redirect that investigation. TIKD's motion is nothing more than a tactic to achieve that end and should be denied.

II. TIKD WILL NOT SUFFER IRREPARABLE HARM

A. TIKD Cannot Prove Irreparable Harm Based on Past Alleged Violations Alone

An injunction's purpose is to prevent future violations. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953); *see also United States v. Or. State Med. Soc.*, 343 U.S. 326, 333 (1952) ("The sole function of an action for injunction is to forestall future violations."); *Sec. & Exch. Comm'n v. Graham*, 823 F.3d 1357, 1361 (11th Cir. 2016) ("[I]njunctions regulate future conduct only; they do not provide relief for past injuries already incurred and over with." (internal quotation marks and citation omitted)).

"Thus, a preliminary injunction is completely at odds with a sanction for past conduct that may be addressed by adequate remedies at law." *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1133 (11th Cir. 2005) ("[T]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held . . . ." (internal quotation marks and citation omitted)). In fact, "[w]here the harm to the movant's interests has already occurred, that harm is neither imminent nor irreparable at law and is not the appropriate subject matter for injunctive relief." *Id.* at 1134.

Here, TIKD's complaints concern alleged past actions of the Bar Defendants. When describing the Bar Defendant's alleged current and future actions, TIKD uses words like "*apparently* continues" (PI Motion at 1), and "*[i]f* the Bar's actions continue" (*id.* at 17 (emphasis added)). These allegations are insufficient to demonstrate ongoing and future violations that will cause TIKD irreparable harm. Moreover, any alleged future effects based on the Bar Defendants' alleged past actions that have already occurred are irrelevant to the determination of irreparable harm based on current and future conduct. *See U.S. Army Corps. of Eng'rs*, 424 F.3d at 1134.

B. TIKD's Alleged Damages Are Quantifiable And Adequately Addressed By Law

TIKD's Complaint contradicts its PI Motion and establishes that TIKD has an adequate remedy at law, thereby precluding its need for injunctive relief. First, TIKD's Complaint for Damages and Injunctive Relief unequivocally asserts "TIKD has lost at least $3,800,000 in revenue" and that TIKD is seeking "treble damages under federal law of at least $11,400,000." (Doc. 1 at 5.) TIKD further states its "damages are increasing each day, and

it will seek to recover all *additional damages it incurs during the pendency of this lawsuit*." (*Id.* at 31 (emphasis added); *see also id.* at 31-32 (noting that TIKD will seek increased treble damages based on the "*additional damages it incurs during the pendency of this lawsuit*" (emphasis added)).)

By contrast, when seeking injunctive relief a mere two weeks after filing its Complaint, TIKD now claims that its damages "are difficult to calculate." (Doc. 12 at 16.) Putting aside such self-impeachment, "difficult to calculate damages" do not constitute irreparable harm. Instead, such assertion establishes that TIKD has the ability to seek (and is in fact seeking) damages for the very same alleged conduct alleged in both the Complaint and the PI Motion. This precludes TIKD's request for injunction. *See, e.g.*, *FHR TB, LLC*, 865 F. Supp. 2d at 1212 ("The ability of a plaintiff to recover money damages as an adequate remedy for losses suffered precludes a finding of irreparable harm.").

Furthermore, TIKD has already calculated the reduction in revenue it asserts it has lost. (Doc. 12-2 at 5 ¶ 26 ("Due to a lack of available attorneys, TIKD was forced to reject willing customers and refund payments to others. TIKD's weekly revenue dropped from a high of $75,000.00 to a low of around $20,000.00. Today, TIKD is able to operate in only 4 Florida counties, down from 18 in May 2017").) Thus, although TIKD cites cases involving reputational harm and lost sales, these authorities are inapposite because TIKD very clearly can and has calculated its alleged financial losses.

TIKD has also claimed that its damages would be difficult to calculate because calculating lost profits for a new business is too speculative. (Doc. 12 at 16.) However, the Eleventh Circuit has rejected such an argument. *See Cunningham v. Adams*, 808 F. 2d 815, 822 (11th Cir. 1987) (noting that lost profits could be reasonably demonstrated by comparing to the profits earned by the new business's competitors).

Finally, TIKD claims that it *might* lose access to capital from private sources. (Doc. 12 at 16.) Rank speculation as to possible loss of capital financing without any evidentiary support cannot serve as a basis for injunctive relief. *Med. & Chiropractic Clinic, Inc. v. Oppenheim*, No. 8:16-CV-1477-T-36TBM, 2016 WL 6093223, at *5 (M.D. Fla. Oct. 19, 2016) ("Plaintiff's contention regarding future financial harm is too speculative to merit the issuance of a preliminary injunction."). Further, TIKD undoubtedly knows the amount of private capital it has already received and how much more it needs in order to continue its current

and future business model. Based on the foregoing, it is clear that TIKD has failed to show sufficient evidence of irreparable harm.

III. THE THREATENED INJURY TO THE BAR DEFENDANTS OUTWEIGHS ANY INJURY TO TIKD

In a single conclusory paragraph, TIKD dismisses the idea that a mandatory and prohibitory injunction would have any negative effect on the Bar Defendants whatsoever. In fact, the injunctive relief sought by TIKD would cause the Bar Defendants great harm, and certainly more harm than any alleged harm TIKD asserts as a result of the Bar Defendants' alleged actions.

First, TIKD's injunction would override the FSC-created regulatory process governing Bar investigations related to UPL. It is no coincidence that TIKD comes to this Court seeking mandatory and prohibitory injunctions at a time when the Bar's investigation into TIKD's conduct is still pending. Interfering with that process now, especially for the reasons stated, would significantly disrupt the FSC's regulatory process and undermine the FCS's authority to make its rules and carry out its constitutional duty of determining what constitutes UPL.

Second, TIKD's proposed injunctive relief seeks to drastically transform the FSC's regulations governing the process of providing ethics opinions to licensed bar members who request them. R. Regulating Fla. Bar R. 2-9.4(d) ("The board of governors shall adopt rules of procedure governing the manner in which opinions on professional ethics may be solicited by members of The Florida Bar, issued by the staff of The Florida Bar or by the professional ethics committee, circulated or published by the staff of The Florida Bar or by the professional ethics committee, and appealed to the board of governors of The Florida Bar."). As explained above, contrary to TIKD's baseless allegations, the "mysterious" staff opinion is neither mysterious nor unlawful. It very clearly identifies that it is nonbinding and not a final decision by a Bar committee, the Bar, or the FSC. It was also disclosed in strict accordance with the FSC's rules requiring limited disclosure. Thus, TIKD's request to prohibit the release of the August 2017 Bar Staff Opinion would effectively dismantle these rules outside the province of the FSC.

Third, the Bar Defendants have no duty to monitor and police the public statements of third parties in order to correct those statements to protect TIKD's profit margins. *See*

Trianon, 468 So. 2d at 918.[7] Nor does TIKD describe how this possibly could be accomplished. Monitoring the public statements of 20 million Floridians (or even 100,000 licensed attorneys) and then "correcting" such statements is virtually impossible and would require immense amounts of time and money. Disputes over the contents of such "corrections" would undoubtedly foster more litigation. Draining the FSC and TFB of its resources for these purposes without question outweighs any damage or harm asserted by TIKD.

Fourth, TIKD's requested injunction violates the Bar Defendants' constitutional rights to free speech, assembly, and petitioning for redress before various governmental institutions, as protected by the federal and Florida constitutions. TFB is delegated by the FSC to investigate, to facilitate the assembly of committees for purposes of deliberating and freely expressing opinions on the unlicensed practice of law, to instruct and advise its leadership (for example, presentations by Bar staff to Bar committees or the Board of Governors), and to petition the FSC as warranted. TIKD's alleged economic harm does not warrant an injunction from this Court that impairs the Bar Defendants' First Amendment rights and delegated duties.

TIKD's request for injunction seeks to intimidate Bar Defendants, and change the operations of the Bar by forcing Bar Defendants to act in a manner contrary to the rules and regulations promulgated by the FSC. Such would serve only to generate confusion within the Bar itself about the nature and scope of any injunction entered by this Court, as well as the Bar's capacity to carry forward with its investigatory role and its duty to provide ethics opinions to members in good standing.

IV. TIKD'S REQUESTED INJUNCTION IS CONTRARY TO THE PUBLIC INTEREST

TIKD's conclusory two-sentence argument about the public interest confirms that TIKD has no legitimate argument on this point. In fact, TIKD's requested injunction not only fails to serve the public interest—it runs contrary to it. To be sure, TIKD's injunction seeks only to serve its private interest—to continue its business which it asserts is not UPL.

[7] Rule 10-8.1(g) of the Rules Regulating the Florida Bar *allows* TFB in its discretion to correct false statements *of fact* made in the course of otherwise confidential UPL proceedings. Consistent with *Trianon,* the rule does not *require* TFB to make any statement. Further, the rule does not require TFB to address opinions expressed by others. Here, the gravamen of TIKD's complaint relies upon the opinions allegedly expressed by others.

The public interest is not served by granting TIKD injunctive relief in what is nothing more than a SLAPP suit designed to open a new battleground in TIKD's efforts to undermine the current UPL investigation of its activities. SLAPP suits such as this one are not in the public interest. *Fla. Fern Growers Ass'n, Inc. v. Concerned Citizens of Putnam Cnty.*, 616 So. 2d 562, 570 (Fla. 5th DCA 1993) ("SLAPP suits are characterized by an effort to punish political opponents for past behavior, an attempt to preclude their future effectiveness, the desire to warn others that political opposition will be punished, the use of the judicial system as a part of an economic strategy, or some combination of the above attributes." (internal citation omitted)).

In addition, the Bar Defendants have a duty to adhere to the Rules Regulating the Florida Bar and the Bar's Procedures for Ruling on Questions of Ethics and to assist the FSC in administering those rules so that the FSC may enforce them. This includes actively investigating UPL complaints. As such, these rules and the administration of such unquestionably serves the public interest. Bending, ignoring or declaring that they do not apply to TIKD serves no public purpose. Moreover, TIKD's injunctive relief would harm the public interest by prohibiting the Bar from providing ethics opinions and guidance to members of the Bar per such rules. The ability of an attorney in good standing to contact TFB and request an opinion about contemplated conduct is crucial to safeguarding the public from ethical violations. In short, the FSC rules in question are designed to protect attorneys and the public from potential missteps in the practice of law. TIKD complains about the confidentiality of these procedures, but this confidentiality is crucial to encouraging attorneys to come forward and receive answers. TIKD's proposed injunction would dissuade attorneys from seeking guidance and asking questions. It would also prohibit TFB from answering such questions. In such a scenario, attorneys are left to guess what the ethical choice is, which unnecessarily increases the risk of harm to the very public TFB and FSC is sworn to protect.

Finally, TIKD touts its business model as being an important new way to provide legal services to the public. (Doc. 1 ¶ 1.) In so doing, it compares itself to an insurance company that provides coverage for losses and pays for a legal defense. (*Id.* ¶ 27.) TIKD, however,

does not appear to be licensed to sell insurance in Florida, yet that is apparently what it does.[8] If true, Florida's public interest in regulating its insurance industry is not well served by the presence of unlicensed insurers. Furthermore, the selective[9] coverage it provides (paying its customers' fines for breaking the traffic laws) is against public policy. *See, e.g.*, *Blocker v. First Nonprofit Ins. Co.*, No. 6:14-CV-882-ORL-31, 2015 WL 4646052, at *3 (M.D. Fla. Aug. 5, 2015) ("Finally, First Nonprofit argues that Florida public policy prohibits allowing parties to insure against their own intentional and criminal acts, for fear that this would encourage the commission of such acts. Therefore, even assuming arguendo that Clinton was an "Insured" and that the exclusions described above did not bar coverage for his acts, the Policy and Umbrella Policy would not be enforceable." (citing *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005, 1007 (Fla. 1989) (stating that it is "axiomatic in the insurance industry that one should not be able to insure against one's own intentional misconduct" and holding that public policy prohibited indemnification for a loss resulting from an intentional act of religious discrimination))); *State Farm Fire and Cas. Co. v. Tippett*, 864 So. 2d 31, 36 (Fla. 4th DCA 2003) ("public policy dictates against insuring for losses from intentional or criminal acts. If such insurance were available, the financial burden of the loss would shift from the wrongdoer to the insurer"). For the reasons stated, an injunction in favor of TIKD will not serve the public's interest.

CONCLUSION

WHEREFORE, the Bar Defendants ask that this Court to deny TIKD's PI Motion.

Respectfully submitted on December 6, 2017.

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[8] *See, e.g., Nat'l Motorists Ass'n v. Office of the Comm'r of Ins.*, 655 N.W. 2d 179 (Wis. App. 2002) (approving Wisconsin insurance regulator's finding that motorists association's pre-paid traffic ticket program constituted insurance business).

[9] TIKD explains that it agrees to offer its services for only certain types of traffic offenses. For instance, it does not take alcohol or drug related offenses, tickets involving texting, or criminal citations. This is further evidence of insurance underwriting practices.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on December 6, 2017, via the Court's CM/ECF system to:

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