UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 17-24103-CIV-COOKE

TIKD SERVICES, L.L.C.,
Plaintiff,
v.
THE FLORIDA BAR, *et al.*,
Defendants.
_____/

DEFENDANT TED L. HOLLANDER'S MOTION TO DISMISS

Defendant, Ted L. Hollander ("Hollander"), files this Motion to Dismiss (Rules 12(b)(1), (b)(6), and (b)(7)), and states:

BACKGROUND

Plaintiff (which is not a law firm and its sole officer—Christopher Riley—is a non-lawyer) filed a Complaint against Defendants (The Ticket Clinic, which is a law firm, various lawyers who work for The Ticket Clinic, and The Florida Bar (an arm of the Supreme Court of Florida which is a state agency as it is the judicial branch of the State of Florida) which contains 5 Counts (Counts I-IV are against all Defendants and Count V is against Hollander, The Ticket Clinic, and other individuals Defendants associated with The Ticket Clinic): 1) Count I – combination and conspiracy in unreasonable restraint of trade in violation of § 1 of the Sherman Act; 2) monopolization and attempted monopolization and combination and conspiracy to monopolize in violation of § II of the Sherman Act; 3) combination and conspiracy in unreasonable restraint of trade in violation of *Florida Statutes* § 542.18 (Florida's functional equivalent of § I of the Sherman Act); 4) monopolization and attempted monopolization and combination and conspiracy to monopolize in violation of *Florida Statutes* § 542.19 (Florida's functional equivalent of § II of the Sherman Act); and 5) the common law tort of tortious interference with business relationships. [D.E.1]. Plaintiff's Complaint has a remedies provision that seeks declarations that the Defendants are allegedly in violation of the statutory provisions in Counts I-IV, an injunction stopping the Defendants from continuing their alleged violations of Counts I-IV (the prosecution of a UPL investigation) and making them affirmatively do certain things, and treble damages. The courts have a long history of dismissing claims brought against The Florida Bar and attorneys, which suits for years were brought under § 1983, see, *e.g.*, *Kaimowitz v. Fla. Bar*, 996 F.2d 1151, 1155 (11th Cir. 1993) (dismissing § 1983 action brought against The Florida Bar), but more recently have been bought under RICO, see, *e.g.*, *Watson v. The Florida Bar*, 2017 WL 3218163 (S.D. Fla.)

(dismissing action brought under RICO and other statutes) (Cooke, J.), and/or anti-trust statutes, see, *e.g.*, *Rosenberg v. State of Florida, the Supreme Court of Florida, and The Florida Bar,* 2015 WL 13653967, at *7 (S.D. Fla.) (dismissing action brought by a lawyer Erwin Rosenberg).

Moreover, here (see *Complaint* ¶ 50), Hollander simply made a complaint to The Florida Bar concerning what he thought may be unethical/illegal conduct (unlicensed practice of law, hereinafter "UPL") and is thus entitled to absolute immunity (*Affidavit of Hollander* ¶ 1, attached as Exhibit 1) under the common law privilege that protects litigants, witnesses, and judges from prosecution/liability for any actions taken in a judicial or quasi-judicial context. *Imbler v. Pachtman*, 424 U.S. 409, 439 (1976) (noting that the absolute litigation privilege affords immunity to attorney, parties, witnesses, and judges from any liability arising out of statements made in connection with the litigation); *Fridovich v. Fridovich*, 598 So. 2d 65, 66–67 (Fla. 1992).

In essence, as set forth fully below, Plaintiff is attempting to bring an anti-trust action to try to legitimize what appears to be its own UPL. In sum, the Complaint is completely without merit because: 1) even after *North Carolina Bd. of Dentistry*, the courts are holding that The Florida Bar and lawyers in Florida are not subject to anti-trust actions (*when those actions are brought by lawyers*), see, *e.g.*, *Rosenberg v. The State of Florida, the Supreme Court of Florida, and The Florida Bar,* 2015 WL 13653967, at *7 (S.D. Fla.) (dismissing action brought by a lawyer); 2) The Florida Bar and its officers are not subject to suit because The Florida Bar is an arm of the State of Florida and has been held to by the Eleventh Circuit even after *Manders v. Lee* was decided, citing and applying *Manders v. Lee* in so determining and holding that the *Kaimowitz* holding that The Florida Bar is an arm of the State of Florida survives *Manders v. Lee*, *Nichols v. Alabama State Bar*, 815 F.3d 726 (11th Cir. 2016) (acknowledging that The Florida Bar is an arm of the State of Florida after *Manders v. Lee*); *Ramos v. Tomasino*, 701 F. App'x 798, 805 (11th Cir. 2017) (same); and 3) under a *Twombly*/*Iqbal* analysis, Plaintiff is unable to nudge the allegations in its Complaint to the plausible from the conceivable given it is not a law firm and wants to compete with law firms in the provision of legal services to consumers charged with traffic offenses (it arguably cannot even state a claim that is conceivable because of UPL laws—even if it could, there is no anti-trust liability because The Ticket Clinic has not raised its prices in the last few years and thus there is no anti-competitiveness to the consumer. It should be evident to the Court that a non-lawyer can never be in competition with a law firm for the provision of legal services in the State of Florida (at least with the current prohibitions on UPL), and that if the Plaintiff wants to so compete Mr. Riley should simply go obtain a law degree, and assuming that the remainder of the structure of his business

passes Bar scrutiny (though that is questionable given the manner in which Plaintiff pays fines for its clients), may be able to lawfully compete against The Ticket Clinic with or without some changes. *The Florida Bar v. Schramek*, 616 So.2d 979, 982-83 (Fla. 1993) (rejecting the constitutional claims under the antitrust laws made by the petitioner regarding the Supreme Court's ability to regulate UPL and noting that "the unauthorized practice of law constitutes contempt of court" and "Florida has a substantial interest in regulating the practice of law and the attending power to prevent the unauthorized practice of law"). Many law firms in Florida (hundreds) hold themselves out as providing traffic ticket offense representation and there is no evidence that The Ticket Clinic and these hundreds of other law firms in conjunction or not in conjunction with The Florida Bar are engaging in anti-competitive conduct, much less anti-competitive conduct that is so damaging to the consumer that an anti-trust violation has occurred. (*Affidavit of Hollander* ¶ 1, attached as Exhibit 1). Any Florida lawyer who desires to provide traffic ticket defense as a practice area is free to do so. The fact The Ticket Clinic reported what it thought might be unethical and illegal activity is *commendable*, not actionable through the antitrust laws by the non-lawyer entity committing the unethical and illegal UPL. The attorneys who reported the conduct to The Florida Bar had both a legal duty (to refrain from misprision of a felony) and an ethical duty to do so—the Rules Regulating The Florida Bar require an attorney to report unethical conduct. 8 U.S.C. § 4 (criminalizing misprision of a felony); Rule Regulating the Florida Bar 4-8.3 (requiring reporting of unethical conduct); Rule Regulating the Florida Bar 4.5.5(b) ("a lawyer shall not assist a nonlawyer in the unlicensed practice of law").

Because this Motion contains arguments that the Court is without subject matter jurisdiction to hear the claims brought, at least as applied, this Court is free to entertain matters outside the four corners of the Complaint regarding jurisdiction. *Lawrence v. Dunbar*, 919 F.2d 1525 (11th Cir. 1990). There are numerous facts that this Court should consider outside the four corners of the Complaint that, beyond cavil, demonstrate that there is no subject matter jurisdiction (and no standing) that this Court should exercise over any of these Defendants under the theories pled, as set forth below in great detail. There are also several facts that the Court should either take judicial notice of or agree are true, such as that the representation of alleged traffic offenders in front of courts in the State of Florida requires an attorney and constitutes the practice of law (at least to do it legally); 2) a non-lawyer cannot operate or manage a law firm in Florida; and 3) a non-lawyer cannot be the main financial beneficiary from the performance of legal work. Additionally, 1) on February 28, 2017, Jacquelyn Needelman wrote to Alan Aronson, Esq., Chairman of the 11th Circuit

Committee on UPL issues, requesting that he open a file and investigate what may by UPL by Plaintiff and its officer Christopher Riley (*Aff. of Hollander* ¶ 4) (citing (*Letter from Needelman to Aronson*, dated Feb. 28, 2017, attached thereto as Exhibit 1); 2) on June 30, 2017, Alan Aronson, Esq. forwarded to the Standing Committee Defendant Hollander's complaint (which forwarded it to the Florida Bar's Board of Governors—"recommended further proceedings"), *id.* (citing *Letter from Needelman to Hollander*, dated June 30, 2017, attached thereto as Exhibit 2); and 3) at the Florida Bar's Board of Governors' meeting on December 8, 2017, the Board of Governors determined that Hollander's Complaint regarding Plaintiff's possible UPL be forwarded to the Supreme Court of Florida. *Id.* (citing *Email from Algeisa Vazquez to Hollander*, dated Dec. 12, 2017, attached as Exhibit 3) (stating that "The Board of Governors accepted the recommendation of the Standing Committee on UPL to file litigation with the Supreme Court of Florida to determine whether the conduct of TIKD constitutes the unlicensed practice of law."). A reading of the Complaint makes it clear that Plaintiff desires to legitimize, through the antitrust statutes, what may be its UPL by hijacking both ongoing state court proceedings and the Supreme Court's process that it has put in place via its delegation to The Florida Bar to determine whether someone is committing or has committed UPL and if so to forward that to The Supreme Court of Florida for disposition. An applicable analogy is that *an attorney no longer licensed to practice has no standing to challenge actions taken against his former clients* (because of the lack of the license), and this reasoning applies here. *Petrano v. Polston*, 2015 WL 5004911 (N.D. Fla.) (dismissing case for lack of standing because attorney lost his license). Chapter 10 of the Rules Regulating the Florida Bar set forth in great detail the regulation by The Florida Bar and Supreme Court of Florida of UPL, as delegated to the Bar from the Supreme Court. *State v. Palmer*, 791 So.2d 1181, 1186 (Fla. 1st DCA 2001); *Dade Commonwealth Title v. N. Dade Bar Ass'n*, 152 So. 2d 723 (Fla. 1963) (holding The Florida Bar as the official arm of the Supreme Court is exclusively vested with authority to prosecute UPL). UPL warrants an injunction until such time as the non-lawyer becomes a licensed attorney in Florida. *The Florida Bar v. Snapp*, 472 So.2d 459 (Fla. 1985). UPL is criminal in Florida. *Florida Statutes* § 454.23. Florida has a broad definition of what constitutes UPL, and if a lawyer comes across same in his practice, his concerns "should properly be addressed to the standing committee on the unauthorized practice of law of The Florida Bar." *Florida Op. Atty. Gen.* 075-129 (May 5, 1975). That is what Hollander did. (*Aff. of Hollander* ¶ 1). Once a formal complaint of UPL is filed by the Bar (as here against Plaintiff), control of the cases passes to the Supreme Court, and the Bar is to inform the Court if the person named is being considered for

admission. *In re Florida Bd. of Bar Examiners*, 278 So. 2d 266 (Fla. 1973). UPL in Florida occurs when a company makes its profit through attorneys, establishes the amount of the fee charged, and required that fees and costs be paid in advance. *The Florida Bar v. Consolidated Bus. And Legal Forms, Inc.*, 386 So. 2d 797 (Fla. 1980). Fee splitting is also illegal in Florida. *Turner v. Secretary of Air Force*, 944 F.2d 804, 808 (11th Cir. 1991). The Florida Supreme Court closely scrutinizes and regulates "all regulations tending to limit competition in the delivery of legal services to the public, and to determine whether or not such regulations are truly in the public interest." *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1189 (Fla. 1978).

The most important facts from the Complaint are that: 1) Plaintiff is not a law firm and it is not managed by an attorney (*Complaint* ¶¶ 1-2); 2) The Ticket Clinic is a law firm and Hollander is an attorney, *id.* ¶¶ 5, 16, 30; 3) The Florida Bar began an unlicensed practice of law ("UPL") investigation into Plaintiff in December 2016 based on a newspaper article, *id.* ¶ 49; 4) Hollander provided a written complaint to The Florida Bar on February 27, 2016 which stated that Plaintiff seemed to be offering legal services, but it is operated by non-lawyers and would seem to violate UPL rules, *id.* ¶ 50; 5) The Ticket Clinic sued Plaintiff in state court for engaging in UPL, *id.* ¶ 53; 6) Plaintiff sued The Ticket Clinic in state court for tortious interference with business relations, *id.* ¶ 54; 7) Plaintiff and The Ticket Clinic resolved their litigation which resulted in a settlement agreement on or about August 10, 2017 which contained the material term that Plaintiff and Gold and Associates, P.A. agreed to cease all litigation on these issues between them until either 8 months lapsed or The Florida Supreme Court ruled on whether TIKD was engaged in UPL, whichever occurred sooner, and so far neither has occurred, *id.* ¶ 55; and 8) Plaintiff seeks injunctive relief attempting to force The Florida Bar to do certain things and refrain from doing other things and ordering that only the Supreme Court of Florida can decide certain things (in contravention to the delegation given The Florida Bar by the Supreme Court of Florida) and to force The Ticket Clinic Defendants to do certain things and refrain from doing other things. There is no reason (and in fact the law—federalism concerns—prohibits it) for a federal court to get involved in state UPL issues. The suit is meritless as it is based on a complete false assumption, that a federal court will halt an ongoing state administrative and judicial proceeding with regard to whether Plaintiff is engaged in UPL and award damages to a non-lawyer attempting to compete against lawyers via UPL.

The issue framed by this Motion is whether federal and state anti-trust claims and a tortious interference claim are plausible per *Twombly*: 1) when the Plaintiff is not a law firm and its

principal is not a lawyer; 2) when the Defendants are a State Bar Association and a law firm that practices that traffic ticket defense. There is no restraint of trade, because Plaintiff cannot engage lawfully in the trade and there is no monopoly or attempt to monopolize as hundreds of attorneys engage in traffic ticket defense and The Ticket Clinic has not raised its prices in years (in other words, did not raise prices, due to any alleged lack of competition from Plaintiff).

MEMORANDUM OF LAW

I. THE LEGAL STANDARDS FOR GRANTING A MOTION TO DISMISSAL UNDER RULE 12.

Federal Rule of Civil Procedure 12(b)(6) provides that a complaint is to be dismissed if it fails to state a claim upon which relief can be granted. Years ago, a complaint would not be dismissed for failure to state a claim under Rule 12(b)(6) unless it appeared beyond doubt that the plaintiff could prove no set of facts that support a claim for relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and in reviewing a motion to dismiss, the courts were required to view the complaint in the light most favorable to the plaintiff. *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 838 F. Supp. 572, 573 (M.D. Fla. 1993). Back then, only those allegations that were "well pleaded" needed to be taken as true by the Court upon ruling on a motion to dismiss. *Gonzalez v. McNary*, 980 F.2d 1418, 1419 (11th Cir. 1993). A court did not have to accept conclusory allegations or legal conclusions masquerading as factual allegations. *Fernandez-Montez v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). To survive a motion to dismiss, a plaintiff could not merely "label" his or her claims. *Id.* (citing *Blumel v. Mylander*, 919 F. Supp. 423, 425 (M.D. Fla. 1996)). The Court did not have to accept factual claims that were internally inconsistent, facts which run counter to facts of which the Court can take judicial notice, conclusory allegations, unwarranted deductions, or legal conclusions. *Campos v. I.N.S.*, 32 F. Supp. 2d 1337, 1343 (S.D. Fla. 1998).

The law pertaining to motions to dismiss has changed dramatically in the last few years. Actions may now be dismissed if they fail to be "plausible on their face" or if they fail "to raise a right to relief above the speculative level." *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010). In *Cigna Corp.*, the Eleventh Circuit held that in *Twombly* (*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)), "the Supreme Court expressly 'retired' the 'no set of facts' pleading standard established in *Conley v. Gibson*", and held that *Twombly* requires that complaints contain "factual allegations [that] must be enough to raise a right to relief above the speculative level." *Id.* "[A] complaint must now contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). The

Court noted that "when plaintiffs 'have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.'" *Id.* (quoting *Twombly*, 550 U.S. at 570).

In *Cigna Corp.*, the Eleventh Circuit held that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* The Eleventh Circuit noted that the Supreme Court has recently suggested a two-prong approach to resolving motions to dismiss: "1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *Id.* Importantly, the Eleventh Circuit held that "courts may infer from the factual allegations in the complaint obvious alternative explanations, which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the Court to infer." *Id.* Under Rule 12(b)(1), the party seeking the court's jurisdiction bears the burden of proving that the court has jurisdiction.

Here, the Plaintiff's claims should be dismissed because there is no standing given that the Plaintiff is not a law firm and Riley is not a lawyer, there is immunity that all Defendants have for simply either reporting what was believed to be something unethical and illegal (The Ticket Clinic Defendants) and investigating those claims (The Florida Bar Defendants). Right now, the UPL case against Plaintiff is before the Supreme Court of Florida, and thus not ripe. *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1383–84 (7th Cir. 1992).

II. THERE IS NO SUBJECT MATTER JURISDICTION OVER THIS CASE, WHICH REQUIRES DISMISSAL AND NO CLAIM STATED.

Courts are especially chary about allowing antitrust cases to go to discovery because of the high cost. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007) (an anti-trust case wherein the Court held was to be dismissed on remand and noted that "the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"). In antitrust cases, specific evidence of an actual conspiracy must be in the complaint—it is not here. *Id.* at 557. There are merely some allegations that the Defendants were in contact with one another after a UPL complaint was made. There must be specific allegations of an intent to monopolize, *Larry Pitt & Assocs. v. Lundy Law, LLP*, 57 F. Supp. 3d 445, 453 (E.D. Pa. 2014), and there are none here, as there are none that demonstrate any of the Defendants are interfering with any licensed attorney's ability or intention to practice traffic defense if they desire.

A. There Is No Article III Standing.

The "irreducible constitutional minimum of standing" contains three requirements. *Lujan v. Defenders of Wildlife,* 112 S.Ct., at 2136. First, there must be alleged (and ultimately proved) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas,* 110 S.Ct., at 1723 (quoting *Los Angeles v. Lyons,* 461 U.S. 95, 101–102 (1983)). Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41–42 (1976). And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury. *Id.,* at 45–46; *see also Warth v. Seldin,* 422 U.S. 490, 505 (1975). This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence. *See FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231 (1990).

Here, the Plaintiff, admittedly a non-law firm, does not have standing to sue a law firm (The Ticket Clinic) under the antitrust statutes or for related torts because Plaintiff cannot practice law legally in Florida, Mr. Riley cannot own and operate a law firm or business that has as its main source of income fees from legal representation. The injury is conjectural, if Plaintiff were to become a legal law firm in Florida and the Defendants responded to it as they have here, there may be an action. The injury is not traceable to Defendants, but to Plaintiff's failure to have obtained a law license. There is no redressability, because the Florida Supreme Court determines UPL matters, not federal courts. Not only does this require the conclusion that there is no Article III standing but also that the Complaint cannot state a claim upon which relief can be granted.

B. The Eleventh Amendment Provides Immunity to Defendant Hollander Indirectly, Because it Immunizes The Florida Bar Defendants, and § 1 Claims Require Concerted Action and, Alternatively, §§ 1 and 2 Claims Are Barred by *Parker* Immunity as Extended by *Hoover*.

Courts have held that *Kaimowitz's* holding that The Florida Bar is an arm of the state survives *Manders v. Lee*, have acknowledged that panel decisions of the Eleventh Circuit have so held, and that after these cases have been decided, such as *Nichols v. Alabama State Bar*, 815 F.3d 726 (11th Cir. 2016), have noted that "argument that the Florida Bar is not an arm of the state bespeaks sanctionable conduct. *See* Fed. R. Civ. P. 11(b)(2) (requiring certification that a party's 'legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law')." *Henry v. The Florida Bar*, 2016 WL 9632944 (M.D. Fla.),

aff'd, 701 Fed. Appx. 878 (11th Cir. 2017). More is expected out of a past president of The Florida Bar. [D.E. 31 at pp.3-5 & n.1]. To the extent that Plaintiff may argue that *Ramos v. Tomasino*, 701 Fed. Appx 798, 805 (11th Cir. 2017) and other cases relied on by Hollander are not binding authority, see [D.E. 31 at p.3 n.1], district courts routinely find that the fact that an Eleventh Circuit "decision was unpublished is irrelevant; the Court did not rely on *Watson* as binding authority—instead, the Court cited it as persuasive authority, *i.e.*, a panel of the Eleventh Circuit interpreting binding case law." *Henry v. The Florida Bar*, 2016 WL 9632944 (M.D. Fla.), *aff'd*, 701 Fed. Appx. 878 (11th Cir. 2017). *Nichols*, *Ramos*, *Kaimowitz*, and *Henry* demonstrably show that the Eleventh Amendment immunizes The Florida Bar and individual Defendants related to The Florida Bar from suit, and because they are immune, so, too, is Hollander, *Bonollo Rubbish Removal, Inc. v. Town of Franklin*, 886 F. Supp. 955, 965 (D. Mass. 1995) (finding that state action immunity applies to private actors in antitrust cases), and also on the ground that antitrust claims (at least under § 1) require concerted action, not unilateral conduct, and if the Bar Defendants are immune, there is no concerted action. *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns. Inc.*, 376 F.3d 1065, 1071 (11th Cir. 2004) (noting that § 1 of the Sherman Act "applies only to agreements between two or more businesses; it does not cover unilateral conduct."). Even if the Bar is not immune, it is not a business, and hence there can be no § 1 claim. There is no standing for a § 2 claim either (there is *Noerr-Pennington* doctrine immunity, set forth below) and even if there was standing and the *Noerr-Pennington* doctrine did not apply, it is *not ripe* because the Florida Supreme Court has not completed its determination of the matter. *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1383–84 (7th Cir. 1992) ("Even if the Illinois State Bar Association had issued an opinion that it believed certain types of conduct to be violative of the Illinois Rules of Professional Conduct, that opinion could have no anticompetitive effect unless the Illinois State Supreme Court or the Northern District agreed with the ISBA's assessment.").

If this Court had jurisdiction over Plaintiff's claims, its pursuit of those remaining claims is nonetheless barred by state action immunity. The Sherman Act is a federal antitrust law enacted in 1890 to prohibit combinations and conspiracies in restraint of trade (§ 1), and to regulate monopolies (§ 2). 15 U.S.C. §§ 1-2. In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court established a general immunity from antitrust liability for state entities and officials acting pursuant to state law, a concept known as "*Parker* immunity" or "state action immunity." *Danner*, 608 F.3d at 812-13. The Supreme Court has applied *Parker* immunity to state supreme courts acting in a lawyer-discipline capacity. *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984). *Hoover* addressed

Parker's application to the challenged conduct of four members of Arizona's bar admissions committee. *Id.* at 560, 571-72. Under the Arizona Constitution, the Arizona Supreme Court had plenary authority to regulate bar admissions, and in an exercise of that authority, it created the admissions committee to carry out certain responsibilities. *Id.* at 561-62. It reserved, however, the ultimate authority to grant or deny admission. *Id.*

All of this is set forth in *Ramos v. Tomasino*, 701 Fed. Appx 798, 805 (11th Cir. 2017) (affirming dismissal of Sherman Act case against The Florida Bar and others). *Hoover* squarely held that *Parker* immunity barred the Sherman Act claims at issue in that case. *Id.* at 581-82. In so holding, the Supreme Court focused on "the incontrovertible fact that under the law of Arizona only the State Supreme Court had authority to admit or deny admission to practice law." *Id.* at 581. While the Sherman Act claims involved the committee and its actions, they were really claims against the state. *Id.* at 572-73. Notably, the Supreme Court declined to apply the test for antitrust immunity articulated in *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which requires the challenged restraint to be "clearly articulated" and affirmatively "expressed as state policy", and the policy to be actively supervised by the state itself, *id.* at 106.[1] *Hoover* said *Midcal* only applied when private actors sought *Parker* immunity for their conduct. 466 U.S. at 568-69. Where the conduct at issue is in fact that of the state, the inquiry stops, and *Midcal* need not be addressed. *Id.* The reasoning behind this was that in dealing with a state supreme court "the danger of unauthorized restraint of trade does not arise." *Id.* at 569. All Hollander need show is that The Florida Bar "exercise[d] ultimate control over the challenged anticompetitive conduct." *Patrick v. Burget*, 486 U.S. 94 (1988). Hollander can do that here because state statutes and rules demonstrate the Supreme Court of Florida has delegated responsibility over UPL to The Florida Bar, as set forth above. In *Hoover*, the Court rejected the argument that *Parker* immunity only applies if "the sovereign acted wisely after full disclosure from its subordinate officers." *Id.* at 574. The sole requirement, instead, "is that the action be that of 'the State acting as a sovereign.'" *Id.* (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 (1977) (applying *Parker* immunity to the disciplinary actions of the State Bar of Arizona, under rules expressly adopted by the Arizona Supreme Court, concerning the advertisement of legal services)).

[1] Hollander and The Ticket Clinic Defendants can nevertheless demonstrate the *Midcal* factors here because it is beyond cavil that the challenged restraint (laws against UPL) is something that both the legislature and the Supreme Court of Florida have expressed a clear articulation that UPL is not proper in Florida and that UPL (and The Florida's investigations into same) are actively supervised by the Supreme Court of Florida itself. Alternatively, this requires dismissal of Hollander.

The Eleventh Circuit has applied *Parker* immunity to the actions of the Alabama State Bar in disciplining attorneys for violations of advertising rules. *Foley v. Ala. State Bar*, 648 F.2d 355, 358-59 (5th Cir. Unit B June 1981). There, the court noted that the case was "not appreciably distinguishable from *Bates*," because the disciplinary rules of the Alabama State Bar were effectively the rules of the Supreme Court of Alabama. *Id.* at 359. Moreover, the State Bar was a component of the judiciary and subject to the supervision of the Alabama Supreme Court. *Id.* Since the challenged actions were those of the State of Alabama, *Parker* prohibited the claims under the Sherman Act. *Id.* The Eleventh Circuit also applied *Parker* to the claims against the president and general counsel of the Alabama State Bar, noting that the *Parker* "shield of immunity, of course, is not limited to governmental agencies alone but extends as well to officers or agents of the State." *Id.* (quotation omitted). Applied here, this means that 1) The Florida Bar Defendants are immune and 2) Hollander, as an agent of the state—a Florida Bar member and individual who complained to the State regarding unethical and illegal conduct (UPL)—is an agent of the state, and thus immune, as well. Alternatively, if he is not immune directly under *Parker/Hoover*, the § 1 claims are still dismissable because no concerted action, and he has immunity under a *Midcal*, analysis.

The Florida Supreme Court has "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Fla. Const. art. V, § 15. The Florida Bar is "*an official* arm of [the Florida Supreme] Court," acting at all times under the supervision and control of the Court. *Dade-Commonwealth Title Ins. Co. v. N. Dade Bar Ass'n*, 152 So.2d 723, 726 (Fla. 1963). The Rules Regulating the Florida Bar provide that the Florida Bar is subject to the authority, continued direction, and supervision of the Florida Supreme Court. R. Reg. Fla. Bar. 2-3.2(a). Further, the Florida Supreme Court has the authority "to prescribe standards of conduct for lawyers, to determine what constitutes grounds for discipline of lawyers, to discipline for cause attorneys admitted to practice law in Florida, and to revoke the license of every lawyer whose unfitness to practice law has been duly established." R. Reg. Fla. Bar. 3-1.2.

Indeed, because the Florida Supreme Court retains plenary authority over the actions of the Florida Bar, it retains the ultimate power to make admissions and disciplinary decisions and UPL determinations. *Compare with Goldfarb v. Va. State Bar*, 421 U.S. 773, 776, 791-92 (1975) (declining to apply *Parker* immunity to claims against *a private Virginia county bar association* that was "prompted," but not compelled, by the Virginia Supreme Court to adopt certain fee schedules for legal services that appeared to be price-fixing). *Parker* immunity applies not only to the entity defendants, but also to the individual defendants who were acting as officers of those

agencies. *Foley*, 648 F.2d at 359. And because the conduct at issue was in fact that of the State of Florida, the *Midcal* test does not apply in this case, *Hoover*, 466 U.S. at 568-69, but, if it does, as set forth above, Hollander can satisfy the two-pronged test, as Florida has clearly articulated UPL is unlawful, expressed it as state policy (its prohibition is in statutes, rules and disciplinary measures).

A third major application of *Parker* immunity has been in the preservation of unauthorized practice rules. The plaintiff, in *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1383–84 (7th Cir. 1992), challenged Rules 5.4(b) and 5.5(b) of the ABA Model Rules of Professional Responsibility, which prohibited UPL in Illinois. The Illinois Supreme Court adopted both as part of the Illinois Rules of Professional Conduct. The United States Bankruptcy Trustee reported to the Illinois Supreme Court's Attorney Registration and Disciplinary Commission that paralegals at Lawline were giving legal advice to debtors and, later, tried to enjoin Lawline from practicing law in bankruptcy cases, Lawline filed suit alleging a conspiracy between the courts and the organized bar to monopolize the practice of law (which is essentially the claim made by Plaintiff here). The district court dismissed the complaint, and the Seventh Circuit affirmed. The challenged rules had been adopted by the Illinois Supreme Court. While the Illinois State Bar Association, a voluntary bar, had issued opinions under those rules, those opinions had no force unless the courts agreed with them, and the rest of the defendants were all federal and state officials. Thus, all of the conduct against all defendants was exempt from Sherman Act liability. The court in affirming dismissal held:

> It is because of their adoption by these two governmental bodies that plaintiffs are supposedly restrained from practicing law. As the Supreme Court held in *Noerr*, "Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." 365 U.S. at 136. It is immaterial that these rules were prompted by the defendant bar associations, because *Noerr* also decided that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive [here the judiciary acting in a legislative capacity] to take particular action with respect to the law that would produce a restraint or monopoly." *Id.* It is immaterial too that the bar associations encouraged the adoption of these rules because *Allied Tube & Conduit Corporation v. Indian Head, Inc.*, 486 U.S. 492, 499 decided that "those urging the governmental action enjoy absolute immunity for the anticompetitive restraint."
>
> The plaintiffs [like the instant case with Plaintiff TIKD] also challenge as anticompetitive certain ethical opinions promulgated by the defendant bar associations. However, this Court has held that "when a trade association provides information" (by giving its approval in that case, its disapproval in this case) "but does not constrain others to follow its recommendations, it does not

> violate the antitrust laws." *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989) (citing *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284 (5th Cir. 1988)). This is so even where the organization at issue has a towering reputation. *Id.* Even if the Illinois State Bar Association had issued an opinion that it believed certain types of conduct to be violative of the Illinois Rules of Professional Conduct, that opinion could have no anticompetitive effect unless the Illinois State Supreme Court or the Northern District agreed with the ISBA's assessment. It is Illinois' and the Northern District's promulgation and enforcement of the challenged ethics rules and not private parties' interpretation of those rules that restrains competition.

Lawline v. Am. Bar Ass'n, 956 F.2d 1378, 1383–84 (7th Cir. 1992). This is precisely the case here. The Supreme Court of Florida will determine whether to bring charges against Plaintiff for UPL. *Lawline* teaches that the claim is not ripe until the Florida Supreme Court makes that decision.

This is so even though Lawline staunchly denied it was engaging in UPL. The court declined to address whether or not it was engaged in UPL finding that it did not matter for purposes of dismissal. *See id.* at 1381, 1382 n.2, 1384; *see also Green v. State Bar*, 27 F.3d 1083 (5th Cir. 1994) (granting *Parker* immunity to state committee members' unauthorized practice of law in the face of allegations of a conspiracy to exclude lay claims adjusters from competing with lawyers); *Lender's Service, Inc. v. Dayton Bar Ass'n*, 758 F. Supp. 429, 434 (S.D. Ohio 1991) (holding that even when the conduct of an unauthorized practice committee cannot be considered conduct of the state supreme court, the committee's activity can be "clearly articulated and affirmatively expressed as state policy" and even if incorrect as a matter of law, committee members have *Parker* protection against antitrust liability); *Turner v. ABA*, 407 F. Supp. 451 (N.D. Tex. 1975) (rejecting a claim that litigants have the right to be represented by unlicensed lay counsel); *Virginia State Bar v. Surety Title Ins. Agency, Inc.*, 571 F.2d 205 (4th Cir. 1978) (allowing the *Parker* exemption to the Virginia State Bar unauthorized practice of law committee). State action immunity can be decided on a Rule 12(b)(6) motion. *See Hoover*, 466 U.S. at 565-67.

The § 2 claims are subject to dismissal because with The Florida Bar Defendants out of the case, unilateral conduct of The Ticket Clinic is all that remains, and the allegations of the Complaint do not demonstrate actual or threatened monopolization, and the Complaint could never be amended to allege that because there are so many lawyers practicing traffic ticket defense in the State of Florida (Aff. of Hollander). *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (emphasizing that the Sherman Act distinguishes between unilateral and concerted conduct;

while concerted conduct is subject to sanction if it merely restrains trade, unilateral conduct is subject to sanction only if it either actually monopolizes or threatens monopolization). *See also Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 541 (9th Cir. 1991). Indeed, the antitrust laws tolerate both efficient monopolies and natural monopolies. *See Foremost,* 703 F.2d at 543. The Sherman Act has not been interpreted to penalize efficient monopolies because they meet consumer demand without raising the price and gaining a monopoly profit. *Syufy Enterprises,* 903 F.2d at 668; *see also Berkey,* 603 F.2d at 294. The Sherman Act also has not been interpreted to penalize natural monopolies. A firm that creates a valued service or product should not be punished with treble damages and criminal sanctions merely because the firm finds itself to be the holder of a natural monopoly. *Aluminum Co. of Am.,* 148 F.2d at 429–30 (reasoning that those who hold a natural monopoly should not be subject to Sherman Act sanctions). Government regulation, as opposed to treble damages and criminal liability under the Sherman Act, is generally thought to be the appropriate remedy for the difficulties posed by natural monopolies. *See* Jones, *Government Price Controls and Inflation: A Prognosis Based on the Impact of Controls in the Regulated Industries,* 65 Cornell L.Rev. 303, 304 (1980). "[J]udicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission. We would be wise to decline that function unless Congress clearly bestows it upon us." *Berkey Photo,* 603 F.2d at 294.

This is all mentioned here because The Ticket Clinic's pricing has not changed since Plaintiff began its UPL and there are hundreds of firms who offer the service. The allegations that The Ticket Clinic has the biggest market share demonstrate nothing other than The Ticket Clinic has been around a long time and has in 30+ years developed quite a bit of market share.

The Court should keep in mind that even if the Supreme Court of Florida ultimately decides in favor of Plaintiff, there still is no antitrust liability because "actions otherwise immune [under the state action doctrine] should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law." *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985). This "applies to errors of law, fact, or judgment, [and] errors of either substance or procedure." *Davis v. Southern Bell Tel & Tel. Co.*, 755 F. Supp. 1532, 1541 (S.D. Fla. 1991). Accordingly, all these allegations that The Bar did not follow certain rules, or issued opinions to the wrong people, by the wrong people, or for some improper purpose are all irrelevant for antitrust liability. This is all up to the state tribunal to handle. Further, with Hollander in particular, as noted by the Tenth Circuit, "there should be a defense [to antitrust liability] for those reasonably relying

on the appearance of legality when a state agency's exercise of power is unauthorized." *Lease Lights, Inc.*, 849 F.2d at 1334.

C. The *Noerr-Pennington* Doctrine Immunizes Hollander from *any* Antitrust Liability.

The *Noerr-Pennington* doctrine is important because if the Court finds that none of the above-outlined protections apply to Hollander, Hollander, as a private individual, is immune from antitrust liability under the *Noerr-Pennington* doctrine. *Bonollo Rubbish Removal, Inc. v. Town of Franklin,* 886 F. Supp. 955, 965 (D. Mass. 1995) *(although a municipal ordinance preventing competition in the waste disposal industry violated the Commerce Clause, the private defendants that had contracted with the municipality did not have antitrust liability; they were entitled to state action immunity and to protection under the Noerr-Pennington doctrine).* A Seventh Circuit case right on point (plaintiff sought to strike down UPL rules) where individuals petitioned the Illinois Bar the court affirmed the dismissal as to all defendants noted this, as well. *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1383–84 (7th Cir. 1992).

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Supreme Court determined that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Pennington,* 381 U.S. at 670. Under the *Noerr–Pennington* doctrine, therefore, "the federal anti-trust laws do not regulate the conduct of private individuals in seeking anti-competitive action from the government." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991). Concerted action that would ordinarily constitute a conspiracy violative of the Sherman Act does not do so if such action is directed toward influencing governmental bodies. *Coastal States Marketing, Inc. v. Hunt,* 694 F.2d 1358, 1366 (5th Cir.1983) ("the Sherman Act, as interpreted by *Noerr,* simply does not penalize as an anti-trust violation the petitioning of a government agency"). Although the Court initially created *Noerr–Pennington* immunity in the context of efforts to influence administrative or legislative officials, it later extended the doctrine to immunize from anti-trust liability attempts to influence adjudicative bodies. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972). *Mid–Texas Communications v. AT & T,* 615 F.2d 1372, 1382 (5th Cir. 1980); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1558–59 (11th Cir.), *certified question answered,* 612 So. 2d 417 (Ala. 1992).

The source of the *Noerr–Pennington* doctrine is mixed. On the one hand, the immunity from antitrust liability granted to petitioners of governmental bodies stems from the judicial recognition that "the antitrust laws, tailored as they are for the business world, are not at all appropriate for application in the political arena." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. (quoting *Noerr*, 365 U.S. at 141). Thus, *Noerr–Pennington* immunity can be said to spring directly from a construction of the Sherman Act. *See Coastal States Marketing*, 694 F.2d at 1364–1365. On the other hand, the Court in *California Motor Transport* recognized the First Amendment underpinnings of the doctrine, stating that:

> it would be destructive of rights of association and petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors.

404 U.S. at 510–511. *See also Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 542 (5th Cir. 1979) ("[T]he First Amendment right of competitors to join in petitioning courts and administrative bodies entails the right to band together for purposes of supporting litigation.").

On its face, Plaintiff's Sherman Act claims are barred by the *Noerr–Pennington* doctrine: the *raison d'etre* of Defendants' alleged conspiracy according to the Complaint was to threaten and ultimately initiate quasi-judicial proceedings with the Supreme Court of Florida against Plaintiff under Florida's UPL rules, evidently to monopolize the traffic ticket defense business and to fix prices charged to consumers. A recent Eleventh Circuit case, *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1559–60 (11th Cir.), *certified question answered*, 612 So. 2d 417 (Ala. 1992), decided this issue *holding immunity applied*. In that case, the party (Mapco) asserting Sherman Act violations contended that the *Noerr–Pennington* doctrine did not apply because not only did plaintiffs file a lawsuit against Mapco, they also "used the threat of litigation repeatedly with a number of competitors as a method of coercing anti-competitive pricing." Thus, Mapco contended that plaintiffs are not entitled to *Noerr–Pennington* immunity because (a) they acted with an anti-competitive purpose and (b) they prefaced their initiation of litigation against Mapco with threats of litigation, and have threatened other competitors with similar litigation. Immunity still applied.

The Eleventh Circuit noted that courts have developed an exception to *Noerr–Pennington* immunity to address "situations in which a publicity campaign, ostensibly directed toward influencing government action, is a mere sham to cover what is actually nothing more than an

attempt to interfere directly with the business relationships of a competitor." *Noerr,* 365 U.S. at 144. This so-called "sham" exception subjects to anti-trust liability "a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all, *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 500 n. 4 (1988), not one 'who "genuinely seeks to achieve his governmental result, but does so through improper means,"' *Id.* at 508, n.10." *City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. at. *See also Coastal States Marketing,* 694 F.2d at 1372 ("[L]itigant should enjoy immunity from the antitrust laws so long as a genuine desire for judicial relief is a significant motivating factor underlying the suit"); *Video Intern. Production v. Warner Amex Cable Com.,* 858 F.2d 1075, 1082 (5th Cir. 1988) (noting that sham exception "comes into play where the party petitioning the government is not at all serious about the object of that petition, but engages in the petitioning activity merely to inconvenience its competitors"). The court held that the burden remains on Mapco to establish that plaintiffs' actions fall within the "sham" exception. *See id.* n.8*; Hospital Building Co. v. Trustees of Rex Hosp.,* 791 F.2d 288, 292 (4th Cir. 1986).

The court found that Mapco's arguments against attaching *Noerr–Pennington* immunity to plaintiffs' actions did not justify application of the "sham" exception. Regarding Mapco's claim that plaintiffs acted with an anti-competitive purpose, it is axiomatic that actions taken with an anti-competitive purpose or intent remain insulated from antitrust liability under the *Noerr–Pennington* doctrine. *Pennington,* 381 U.S. at 670. *See St. Joseph's Hospital v. Hospital Corp. of America,* 795 F.2d 948, 955 (11th Cir. 1986); *Coastal States Marketing,* 694 F.2d at 1363. Regarding Mapco's claim that plaintiffs' concerted and repeated threats of litigation constituted a violation of the antitrust laws, it is clear that such threats, no less than the actual initiation of litigation, do not violate the Sherman Act:

> [g]iven that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation. The litigator should not be protected only when he strikes without warning. If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute.

Coastal States Marketing, 694 F.2d at 1367. *St. Joseph's Hosp.,* 795 F.2d at 955; P. Areeda and H. Hovenkamp, *supra,* at § 203.5. The court found there was no indication from the record that plaintiffs did not bring their lawsuit against Mapco to win, or that their goal was anything but a favorable decision from the courts. *See City of Columbia,* 499 U.S. at. *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1559–60 (11th Cir.), *certified question answered*, 612 So. 2d 417 (Ala. 1992).

Under the Sherman Act, *Noerr–Pennington* immunity is not merely an affirmative defense. Rather, "the antitrust plaintiff has the burden of establishing that the defendant restrained trade unreasonably, which cannot be done when the restraining action is that of the government." P. Areeda and H. Hovenkamp, *Antitrust Law,* § 203.4c (1990 supp.). Thus, the burden falls on Plaintiff in this case to allege facts sufficient to show that *Noerr–Pennington* immunity did not attach to Hollander's actions. *Mapco, Inc.*, 958 F.2d at1558–59 n.9.

The "sham" petitioning is that which *both*: (1) is objectively baseless in the sense that no reasonable petitioner could realistically expect success on the merits; and (2) conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process—as opposed to the outcome of that process—as an anti-competitive weapon. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.,* 508 U.S. 49, 60–61 (1993). When reviewing a claim of "sham" petitioning, a court must apply the two parts in succession. Only if a suit or petitioning activity is found to be objectively baseless, does the court proceed to examine the litigant's subjective intent. *Id.*

Plaintiff bases part of its Sherman Act claims upon (1) the filing of a previous lawsuit that was settled and (2) Hollander's contacts with various government agencies that investigated and are currently investigating Plaintiff for UPL. Both sets of activities are protected by *Noerr–Pennington* immunity. *In re Circuit Breaker Litig.*, 984 F. Supp. 1267, 1273 (C.D. Cal. 1997). The lawsuit was no objectively unreasonable, as it was settled. The complaints to The Florida Bar were not either, as they were received, processed, accepted, and initially found to have merit and forwarded to the Supreme Court for ultimate determination. The actions do not constitute "sham" litigation in that they are not "objectively baseless in the sense that no reasonable petitioner could realistically expect success on the merits." *See Professional Real Estate Investors, Inc.*, 508 U.S. at 60–61.

To the extent that Plaintiff claims that bar charges against individual lawyers or communications to those lawyers directly or to third persons that UPL was occurring or other unethical conduct constitutes Sherman Act violations, *Noerr–Pennington* shields all communications with the government; a party's immunity for its efforts to influence public officials is lost only if it engages in "sham" petitioning. *USS–POSCO Indus.*, 31 F.3d at 810. In order to deprive Defendants' of immunity for their contacts with government entities, Defendants' contacts must be objectively baseless in the sense that no reasonable petitioner could realistically expect success on the merits. *Professional Real Estate Investors, Inc.*, 508 U.S. at 60–61. Furthermore, under *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499–500 (1988), and *Boone*

v. Redevelopment Agency of the City of San Jose, 841 F.2d 886, 894 (9th Cir. 1988), *Noerr–Pennington* even precludes antitrust liability based on the use of false statements to persuade the government to act. *In re Circuit Breaker Litig.*, 984 F. Supp. 1267, 1273 (C.D. Cal. 1997). In *In re Circuit Breaker Litigation*, the court found that contacts with governmental agencies accusing one o the parties of wrongdoing were immune from antitrust liability under *Noerr–Pennington.* In essence, to prevail, Plaintiff must present evidence that its purported competitive injuries resulted from Hollander's non-protected activities. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983) ("If a plaintiff has suffered financial loss from the lawful activities of a competitor, then no damages may be recovered under the antitrust laws. It is a requirement that an antitrust plaintiff must prove that his damages were caused by the *unlawful* acts of the defendant."). There are no allegations contained in the Complaint that constitute activity not protected by the doctrine or not protected by litigation immunity.

D. As Hollander Is Immune From Antitrust Liability, He is Also Immune From the Tort Claim (Count V) Based on an Antitrust Violation.

The federal district courts rely on various opinions from the circuit courts to hold that the *Noerr-Pennington* doctrine applies to claims outside of Sherman Act claims themselves, meaning, to tort claims, particularly intentional or tortious interference with business relations. *See, e.g.*, *Pers. Dep't, Inc. v. Prof'l Staff Leasing Corp.*, 297 Fed. Appx. 773, 778–79 (10th Cir. 2008); *SilverHorse Racing, LLC v. Ford Motor Co.*, 2016 WL 7137273, at *3 (M.D. Fla.); *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 301–02 (9th Cir. 1994) (where a party is shielded from liability under *Noerr–Pennington* for certain conduct, it cannot be liable for intentional interference with prospective economic advantage for that same behavior); *In re Circuit Breaker Litig.*, 984 F. Supp. 1267, 1282–83 (C.D. Cal. 1997). In *SilverHorse Racing*, the Court noted that the Tenth Circuit has been favorable to applying *Noerr-Pennington* immunity outside the realm of antitrust because of the doctrine's roots in the right to petition:

> Rather, in non-antitrust cases, immunity derives solely from the First Amendment right to petition. *Id.* Thus, as we determined in *Scott*, we apply *Noerr-Pennington* immunity to cases outside the antitrust context with caution. *Scott*, 216 F.3d at 914. Yet, as we acknowledged in *Cardtoons, L.C.*, 208 F.3d at 889, and *Scott*, 216 F.3d at 914, numerous federal and state courts have applied *Noerr-Pennington*-like immunity to state tort claims. Imposing tortious interference liability pursuant to state law could very well impinge a defendant's First Amendment rights to petition the government for redress. *See Scott*, 216 F.3d at 914 ("'[I]t is hard to see any reason why, as an abstract matter, ... common

> law torts ... might not in some of their applications be found to violate the First Amendment.' " (quoting *Whelan v. Abell*, 48 F.3d 1247, 1254 (D.C. Cir. 1995))). Accordingly, ProLease was entitled to plead and prove that it was immune from liability under the First Amendment for its [alleged] tortious interference.

SilverHorse Racing, LLC v. Ford Motor Co., 2016 WL 7137273, at *3 (M.D. Fla.) (quoting *Pers. Dep't, Inc. v. Prof'l Staff Leasing Corp.*, 297 Fed. Appx. 773, 778–79 (10th Cir. 2008)).

Moreover, regarding tortious interference with advantageous business relationships, the elements comprising this tort are: 1) the existence of a business relationship under which the claimant has rights; 2) the defendant's knowledge of the relationship; 3) an intentional and unjustified interference with the relationship; 4) by a third party; and 5) damages to the claimant caused by the interference. *Tamiami Trail Tours, Inc. v. Cotton*, 463 So.2d 1126, 1127 (Fla. 1985). If a competitor proves that the interference was lawful competition he will not be found to have committed the tort. *Unistar Corp. v. Child*, 415 So.2d 733, 734-35 (Fla. 3d DCA 1982).

Here, the Plaintiff has no right to provide legal services as it is not a lawyer or law firm. Concerning the second element, Hollander was aware that Plaintiff was attempting to offer and was providing those services (though he believed it was unlawful). Concerning the third element, the Plaintiff can never establish it because not only was there no unjustified interference but also Hollander was ethically required to report Plaintiff's perceived misconduct. The claim is frivolous.

III. THE LITIGATION PRIVILEGE APPLIES BARRING PLAINTIFF'S CLAIMS AGAINST HOLLANDER AND THE *IN PARI DELICTO* DOCTRINE BARS PLAINTIFF'S CLAIMS.

Here (see *Complaint* ¶ 50), Hollander simply made a complaint to The Florida Bar concerning what he thought may be unethical/illegal conduct (UPL) and is thus entitled to absolute immunity under the common law privilege that protects litigants, witnesses, and judges from prosecution/liability for any actions taken in a judicial or quasi-judicial context. *Imbler v. Pachtman*, 424 U.S. 409, 439 (1976) (noting that the absolute litigation privilege affords immunity to attorney, parties, witnesses, and judges from any liability arising out of statements made in connection with the litigation); *Fridovich v. Fridovich*, 598 So. 2d 65, 66–67 (Fla. 1992). The rest of the Complaint is filled with allegations of The Ticket Clinic and its employees (such as, Hollander) vis-à-vis their discussions and further ethical complaints against Plaintiff's lawyers. All of this activity stems from the initial written complaint to The Florida Bar and some of it constitutes additional complaints regarding individual lawyers.

Our own Supreme Court has stated that "indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship" and reporting criminal activity is a "deeply rooted social obligation." *Roberts v. United States*, 445 U.S. 552, 557-58 (1980). Further, our Supreme Court has stated that "the common law recognized a duty to raise the 'hue and cry' and report felonies to the authorities. . . . It is apparent from this statute [18 U.S.C. § 4 (prohibiting misprision of a felony)], as well as from our history and that of England, that concealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium." *Branzburg v. Hayes*, 408 U.S. 665, 696-97 (1972) (citations omitted). Yet, this is what the Plaintiff asks this Court to do, and fails to inform the Court of the December 8, 2017 finding of the Board of Bar Governors requesting that the Supreme Court of Florida prosecute Plaintiff for UPL.

It is a disgrace to the Court to allow a plaintiff that comes before the Court having engaged in illegal misconduct to prosecute a cause of action, much less be awarded anything by the Court system. The courts have authored opinions that apply to the facts of this case, which disallowed a plaintiff from so prosecuting an action, *Neiman v. Provident Life & Accident Ins. Co.*, 217 F. Supp. 2d 1281 (S.D. Fla. 2002) (Moreno, J.) (disallowing a party who was illegally practicing law from suing under an insurance contract to recover disability benefits), including the Eleventh Circuit. *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145 (11th Cir. 2006) (disallowing a party engaged in illegal conduct to prosecute a RICO cause of action; holding the defense of *in pari delicto* applies to actions at law).

In *Neiman*, the court framed the issue as being "whether Neiman can enforce the policy to recover disability benefits despite his illegal occupation." *Neiman*, 217 F. Supp. 2d at 1286. The court held that Neiman "is precluded from doing so." *Id.* The court observed that to allow Neiman, who had been practicing law without a license, "to proceed to trial to obtain benefits that would indemnify the loss of his illegal income would . . . legitimize his conduct". *Id.* at 1283. The court noted that Judge Middlebrooks referred Neiman to the United States Attorneys' Office for criminal investigation (which the court should do here for both immigration and tax violations). *Id.* at 1284. The court reasoned that parties to an agreement are generally free to contract out of or around federal or state law, but they may not enter a contract that is void as a matter of public policy. *Id.* at 1286. To be void as a matter of public policy the agreement must have a bad tendency or contravene the established interests of society, and to determine that courts look "primarily to statutes". *Id.* Other courts have so held. *Nisselson v. Lymont*, 469 F.3d 143 (1st Cir. 2006) (allowing *in pari delicto* defense to bar the bringing of a securities fraud cause of action); *In re*

Today's Destiny, Inc., 388 B.R. 737 (S.D. Tex. 2008) (noting that the defense is not limited to contract causes of action, but applies to all causes of action); *Decatur Ventures, L.L.C. v. Stapleton Ventures, L.L.C.*, 2006 WL 1367436 (S.D. Ind.) (noting that the Seventh Circuit has held that Federal Rule of Civil Procedure 2, which blends law and equity claims and defenses, allows for the *in pari delicto* defense (or unclean hands defense) to apply to legal causes of action and remedies).[2]

IV. IF THE COURT FINDS THAT THERE IS SUBJECT MATTER JURSDICTION, AND NONE OF THE IMMUNITIES APPLY, THE COURT SHOULD DISMISS THE COMPLAINT BECAUSE IT FAILS TO STATE A CLAIM UNDER RULE 12(b)(6).

As stated above, the Complaint should be dismissed under *Twombly*, an antitrust case, because the suit is based on the ridiculous notion that a non-law firm can compete to provide and make money on the provision of legal services, particularly when coupled with the fact laws prohibit this. Because the Plaintiff here has not nudged its claims across the line from conceivable to plausible, its Complaint must be dismissed. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation—for example, identifying a written agreement or even a basis for inferring a tacit agreement, . . . but a court is not required to accept such terms as a sufficient basis for a complaint". *Id.* at 557, 553-54. Here, there is no evidence supporting an allegation that there was a conspiracy to intentionally violate antitrust between or among any of the Defendants. Untold numbers of federal courts have dismissed antitrust actions based on *Twombly*. *See, e.g.*, *Rosenberg v. State of Florida, the Supreme Court of Florida, and The Florida Bar*, 2015 WL 13653967, at *7 (S.D. Fla.). This is partly because antitrust claims require proof of either a horizontal agreement (between two competitors) or vertical agreement among two supply-chain entities and "[c]ircumstances must reveal a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Id.* (quoting *Monsanto*, 465 U.S. at 764).[3] Under the circumstances, there is no claim antitrust motivated Hollander.

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[2] These courts note that the *in pari delicto* defense typically applies to parties that are both involved in illegal activity, that the court will leave such parties as it finds them. Here, however, there are no allegations that the Defendants were involved in illegal conduct. Thus, the Defendants assert that this is not a case in which both parties come before the Court with dirty hands, but only the Plaintiff has unclean hands.

[3] Antitrust standing "involves more than the 'case or controversy' requirement that drives constitutional standing." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991). It requires "an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws. ... Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws." *Id.* The Eleventh Circuit employs a two-pronged test

If the Court does not dismiss on that plausibility ground, it should dismiss on substantive antitrust grounds. "Antitrust laws are for the protection of competition, not primarily for the protection of individual competitors." *St. Petersburg Yacht Charters*, 457 So.2d 1028, 1047 (Fla. 2d DCA 1984). A complaint which does not allege a *per se* violation must in sum contain three elements: a) a specifically defined market, *L.A. Draper & Sons v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 422 (11th Cir. 1984); b) an allegation that defendants possessed the ability to affect price or output; and c) an allegation that plaintiff's exclusion from the market did affect or was intended to affect the price or supply of goods in that market. It is not enough to allege that plaintiffs were injured; there must be an allegation of harm to competition in general. *Manufacturing Research Corp. v. Greenlee Tool Co.*, 693 F.2d 1037, 1043 (11th Cir. 1982); *Sutlift, Inc. v. Donavan Cos.*, 727 F.2d 648, 655 (7th Cir. 1984). The *Sutlift* court affirmed the dismissal of an antitrust complaint stating that the plaintiff failed to allege injury in the antitrust sense because the complaint failed to show how weakening, or even destroying, plaintiff's business would injury the market "as distinct from the prosperity of the two sellers." *Id.* at 655.

A careful reading of the instant complaint demonstrates no allegations of injury to the market. Indeed, The Ticket Clinic's prices are the same now as they were during Plaintiff's business as they were before Plaintiff began. This failure to allege specific injury to the traffic ticket defense market, as opposed to Plaintiff's practice, is fatal to this cause of action. *See Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir. 1980) (to state a claim under the Sherman Act it is necessary to allege the market-wide anti-competitive effects of defendant's acts).

Regarding the § 2 claims (monopolization), it is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). The mere possession of monopoly power, and the concomitant charging of

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to determine whether a plaintiff has antitrust standing. *See Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp.*, 604 F.3d 1291, 1299 (11th Cir. 2010). "[F]irst, the plaintiff must have alleged an antitrust injury." *Id.* An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977). Second, "the plaintiff must be an efficient enforcer of the antitrust laws." *Palmyra*, 604 F.3d at 1299. The "efficient enforcer" requirement ensures that a "particular plaintiff will efficiently vindicate the goals of the antitrust laws." *Todorov*, 921 F.2d at 1452. Plaintiff is not such a plaintiff here, because it cannot lawfully compete and The Ticket Clinic has not raised its prices in years. (*Aff. of Hollander*).

monopoly prices, is not only not unlawful; it is an important element of the free-market system (no allegation here that Hollander is charging monopoly prices). The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). The Sherman Act is indeed the "Magna Carta of free enterprise," *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972), but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition. *Id.* at 415-16.

Although Hollander has averred that his motives were pure in reporting Plaintiff to the authorities, had his specific intent been to monopolize, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945); *Brooke Grp. Ltd. v. Brown & Williamson Corp.*, 509 U.S. 209, 225 (1993).

V. PLAINTIFF'S CLAIMS MUST BE DISMISSED BECAUSE THEY VIOLATE THE DOCTRINE AGAINST SPLITTING CAUSES OF ACTION AND THE AFFIRMATIVE DEFENSE OF RELEASE.

As stated above, the Plaintiff and The Ticket Clinic had previously sued each other for torts arising out of the very thing that is at the heart of this suit, Plaintiff's attempt to practice law/manage a law firm in Florida and The Ticket Clinic's reaction to that. It was settled. (*Settlement Agreement*, attached as Exhibit 2). Thus, any suit now (the instant one) arising out of the same core of operative facts must be dismissed, and because the former suit was settled, there is also a release issue.

As the first ground for dismissal, Plaintiff's claims are barred by the doctrine of impermissible claims-splitting. Pursuant to the rule against claim-splitting, a court may dismiss a duplicative claim if the subsequently filed suit involves the same parties or their privies and arises from the same transaction or series of transactions as the initial suit. *Khan v. H & R Block E. Enterprises, Inc.*, 2011 WL 3269440, at *2 (S.D. Fla. July 29, 2011). In the case of *Greene v. H &*

R Block E. Enterprises, Inc., this Court summarized the doctrine of claim-splitting, including its history and purpose, as follows:

> It is well settled that a plaintiff may not file duplicative complaints in order to expand their legal rights. Such a policy ensures that a plaintiff may not "split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which relief is sought, and leave the rest to be presented in a second suit, if the first fails. The effect of this restriction is twofold: to ensure fairness to litigants and to conserve judicial resources. According to the Second Circuit, a district court has authority as part of its inherent power over its docket administration to stay or dismiss a suit that is duplicative of another case then pending in federal court. To determine whether such duplicative claim-splitting has occurred, courts borrow from the doctrine of claim preclusion and permit the later-filed suit to be dismissed if it 1) involves the same parties or their privies; and 2) arises out of the same transaction or series of transactions as the first suit.

Greene v. H & R Block E. Enterprises, Inc., 727 F. Supp. 2d 1363, 1367 (S.D. Fla. 2010). Furthermore, the Supreme Court unequivocally reiterated the general principle that federal district courts must avoid duplicative litigation when plaintiffs possess multiple, similar claims that are pending. *Khan v. H & R Block E. Enterprises, Inc.*, 2011 WL 3269440, at *6 (S.D. Fla.). The first factor in determining whether impermissible claim splitting has occurred is easily satisfied here, as the instant case involves the same parties Plaintiff TIKD and Defendant The Ticket Clinic and its officers—the only exception is the addition of The Florida Bar. Further, Plaintiff expressly references the former action and the settlement. As such, the first element of claims splitting is clearly satisfied as evidenced from the face of the Complaint, as both lawsuits involve the same parties and/or their privies. The Court must then determine whether the claims in the two cases arise out of the same transactions or series of transactions. *See Greene*, 727 F. Supp. 2d at 1367. To determine whether two claims are part of the same transaction, courts "make a fact-based inquiry into whether the cases are based on the same factual predicate or came from the same nucleus of operative fact." *Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265, 1270 (11th Cir. 2002). Here, the claims came from the same nucleus of operative fact, as the claims involve (in both the state court suits and this one) from Plaintiff's UPL and The Ticket Clinic's attempts to stop it, which requires dismissal they either should have been brought in Plaintiff's previous suit or as a compulsory counterclaim to The Ticket Clinic's suit. (*See Lawsuits*, attached as Exhibit 3 and 4). If anything, a supplemental complaint or an amended complaint could have taken care of any other claims Plaintiff had. These claims were also released by Plaintiff. Since the defense appears on the face of the Complaint, it may be dismissed. *Hofer v. Ross,* 481 So.2d 939 (Fla. 2d DCA 1985).

Here, that occurred as the Complaint notes that the previous resulted in a settlement, but Plaintiff is unhappy with the result, which leaves Plaintiff in the position of having renegotiate the agreement or sue of breach of it, not to bring another, successive lawsuit.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 2, 2018, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record (David King, Peter Kennedy, and Ramon Abadin, Esq.) or *pro se* parties identified on the attached service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel of parties who are not authorized to receive electronically Notices of Electronic Filing.

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