

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

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

TIKD SERVICES LLC,

Plaintiff,

vs.

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

Defendants

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**PLAINTIFF TIKD SERVICES, LLC'S RESPONSE TO  
THE TICKET CLINIC DEFENDANTS' MOTIONS TO DISMISS**

Plaintiff TIKD Services LLC ("TIKD") hereby responds to the Rule 12 motions filed by Defendant Ted L. Hollander (Doc. 43) and Defendants Gold and Associates, P.A., Robert Azcano, Jeffery R. Lotter, and Robert R. Willhoit (Doc. 47). Because the two motions are virtually identical, TIKD responds with a combined response, and refers to the movants collectively as "The Ticket Clinic" or "Defendants," unless otherwise noted.

**I. Introduction and summary.**

The first five pages of Defendants' motion is a near stream-of-consciousness section entitled "Background" which, although not raising any substantive grounds for dismissal, is replete with inaccurate statements and mischaracterizations that need to be addressed.

Defendants claim that TIKD filed this lawsuit because The Ticket Clinic "simply made a complaint to The Florida Bar." Mot. at 2. Not at all. TIKD has alleged The Ticket Clinic, aided by The Florida Bar, has waged an anticompetitive misinformation campaign aimed at convincing lawyers representing TIKD customers and the public at large that The Florida Bar had already "determined" that TIKD is engaged in UPL, and that it has authority to enjoin TIKD's operations. Comp. ¶¶ 56-69. Defendants waged this campaign, in part, by obtaining an unauthorized and misleading "Staff Opinion" from The Bar, which

The Ticket Clinic misrepresented to attorneys representing TIKD customers as an official “finding” by the Bar that TIKD’s business was illegal. *Id.* ¶ 61. Over and over, The Ticket Clinic falsely told attorneys that the Bar had determined TIKD was illegal and pressured attorneys to stop representing TIKD customers. *Id.* ¶¶ 63-66, 68-69, 76, 80. Numerous lawyers stopped representing TIKD customers after getting “the call” from Defendant Hollander and fearing they would be “blackballed” by the Ticket Clinic. *Id.* ¶ 80.

Defendants claim TIKD “is attempting to bring an anti-trust action to try to legitimate what appears to be its own UPL.” Mot. at 2. Not true. TIKD is confident that its business is in full compliance with Florida law. *See* Comp. ¶¶ 2, 24-28. It is not asking this Court to determine that question of state law. Rather, TIKD filed this lawsuit to stop, preliminarily and permanently, the harm from Defendants’ anticompetitive conduct, alone and in combination with the Florida Bar. Defendants’ unproven allegation that TIKD is engaged in the “unlicensed practice of law” does not give it license to violate the Sherman Act, any more than the North Carolina Board of Dental Examiners had the right to exclude teeth whitening companies from the state based on its unproven claim of “unlicensed practice of dentistry.” *See N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2014).

Defendants attempt to convince this Court that TIKD is engaged in UPL. This ignores the facts alleged, which are to be taken as true. TIKD carefully designed its services to comply with Florida law. Comp. ¶ 2. TIKD is given authority by its customers to retain an independent attorney to defend their traffic ticket. *Id.* ¶ 24. This is legal under Florida law, which permits attorneys to receive payments from third parties as long as the attorneys remain independent. *Id.* ¶ 27. All legal services for TIKD customers are provided by independent, licensed attorneys, without TIKD’s participation or control. *Id.* ¶ 28. TIKD and its employees do not provide any legal advice or representation. *Id.*

TIKD is not asking “a federal court to get involved in UPL issues.” Mot. at 5. Just the opposite. TIKD brought this lawsuit to *preserve* the Florida Supreme Court’s right and power to determine what constitutes the practice of law in Florida—a power The Florida Bar and The Ticket Clinic have been attempting to usurp.

## **II. This Court has subject matter jurisdiction.**

### **A. TIKD has Article III standing.**

The Ticket Clinic argues that TIKD's injury is "conjectural" because TIKD "cannot practice law legally in Florida." Mot. at 8. In other words, under the guise of a "standing" argument, The Ticket Clinic asks this Court to hold that TIKD is engaged in UPL, contrary to the allegations in the Complaint.

TIKD is not practicing law, and need not to allege injury caused by Defendants' anticompetitive conduct. TIKD and The Ticket Clinic compete against each other in the market for providing access to legal services. Comp. ¶ 85. Indeed, customers switch from The Ticket Clinic to TIKD. *Id.* ¶ 47. The Ticket Clinic is trying to exclude TIKD from this market because TIKD poses a competitive threat to its business, particularly given The Ticket Clinic's plan to develop a "platform that's . . . more web-based and app-based." Comp. ¶ 32. Defendants' self-preservation explains why The Ticket Clinic is "trying to get [TIKD] shut down." *Id.* ¶ 48. There is nothing "conjectural" about the injury caused by The Ticket Clinic's actions aimed at excluding TIKD from this market. The Ticket Clinic's and the Florida Bar's campaign to drive attorneys away from TIKD has denied TIKD the ability to offer its services to consumers. *Id.* ¶¶ 79-82. This has directly injured TIKD (to the tune of over \$3.8 million), and it has injured competition in the market by reducing output of a highly desired service and reducing consumer choice. *Id.* ¶¶ 2, 7, 90.

The Ticket Clinic's unfounded assertion that TIKD is engaged in UPL contradicts TIKD's well-pled facts, and echoes the false messaging that gave rise to TIKD's lawsuit in the first place. The Ticket Clinic, aided by The Florida Bar, has waged an anticompetitive campaign aimed at convincing lawyers representing TIKD customers and the public at large that The Florida Bar had already "determined" that TIKD is engaged in UPL, and that it has the authority to enjoin TIKD's operations. *See* Comp. ¶¶ 56-69. There has been no such determination, and neither the Bar nor The Ticket Clinic has power to make such a determination.

Moreover, whether TIKD has engaged in UPL does not relieve The Ticket Clinic's liability under the Sherman Act, and it is irrelevant to TIKD's standing. "That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it." *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 465 (1986).

The Ticket Clinic similarly argues that TIKD's injury is "not traceable to Defendants, but to Plaintiff's failure to have obtained a law license." Mot. at 8. Again, this argument ignores the facts pled in the Complaint establishing that TIKD is not practicing law, but rather is facilitating the provision of legal services by licensed attorneys to customers, while providing an administrative and financial service. Comp. ¶¶ 24-28. As *Dental Examiners* made clear, even quasi-government agencies face antitrust liability when trying to exclude competitors from a market based on unproven claims of illegality under state law. 135 S. Ct. at 1108-09. The Ticket Clinic, as a private party seeking to shut down a competitor, has directly inflicted harm on TIKD and on competition more generally.

Contradicting its arguments on "injury" and "traceability," The Ticket Clinic claims TIKD's antitrust claims are not "redressable" because "the Florida Supreme Court determines UPL matters, not federal courts." Mot. at 8. TIKD agrees that the Florida Supreme Court decides what constitutes the practice of law in Florida. TIKD does not ask this Court to adjudicate UPL. Rather, TIKD seeks redress for the antitrust injuries caused by Defendants' campaign to drive attorneys away from TIKD prior to, and independent of, any determination by any Florida court whether TIKD's services are compliant with Florida law.

**B. The Ticket Clinic is not "indirectly" immune under either the Eleventh Amendment or under state action immunity.**

**i. Immunity for one entity does not make concerted action with other parties "unilateral."**

The Ticket Clinic does not claim direct Eleventh Amendment or "state action" immunity. Instead, it makes a derivative argument—namely, "if the Bar Defendants are immune, there is no concerted action" between The Ticket Clinic and the Bar Defendants. Mot. at 9. The Ticket Clinic cites no case law supporting this novel theory, and it is legally baseless, because even if The Bar Defendants were immune, this would not transform The Ticket Clinic's concerted actions with The Bar into "unilateral" and therefore innocent actions.

TIKD's Complaint describes how The Ticket Clinic conspired with the Bar Defendants to exclude TIKD from the relevant market. *See, e.g.*, Comp. ¶¶ 61-62 (explaining how the Bar and The Ticket Clinic conspired to distribute the unauthorized Bar Staff Opinion); *id.* ¶ 64 (describing Defendant Hollander's instruction to call Defendant

Needelman to confirm The Ticket Clinic’s false statements); *id.* ¶ 78 (describing improper information sharing between Needelman and Hollander).

Immunity does not erase The Bar Defendants’ presence in these concerted actions. Private actors who conspire with government officials are not entitled to any absolute or qualified immunity defenses possessed by those governmental actors. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 168 (1992); *Dennis v. Sparks*, 449 U.S. 24, 31-32 (1980). Instead, the avenue for private actors to claim protection based on the acts of government officials is to demonstrate *their own* anticompetitive acts fall within the ambit of state action immunity. *Cf. Patrick v. Burget*, 486 U.S. 94, 100 (1988). As explained below, The Ticket Clinic’s acts do not qualify for state action immunity.<sup>1</sup>

Further, the Ticket Clinic Defendants took concerted action *among themselves* to exclude TIKD from the market. Comp. ¶¶ 65-68 (describing detailed coordination between Ticket Clinic attorneys to threaten attorney working for TIKD customers). The Ticket Clinic also conspired with non-Ticket Clinic attorneys who elected to cease working for TIKD customers rather than face continued harassment from The Ticket Clinic. *Id.* ¶ 80; *see also United States v. Paramount Pictures*, 334 U.S. 131, 161 (1948) (“[A]cquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.”); *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.*, 62 F.3d 967, 973 (7th Cir. 1995) (collecting cases holding that a Section 1 violation is not negated by the fact a co-conspirator acted only in response to coercion).<sup>2</sup>

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<sup>1</sup> The Ticket Clinic erroneously claims that “the Bar . . . is not a business, and hence there can be no § 1 claim.” This unsupported assertion is contrary to the multitude of Supreme Court cases holding that professional organizations like the Bar must comply with the Sherman Act. *Dental Examiners*, 135 S. Ct. at 1110; *F.T.C. v. Indiana Fed’n of Dentists*, 476 U.S. 447 (1986); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975). It is also contrary to the plain language of the Sherman Act, which is not limited to businesses. 15 U.S.C. § 1.

<sup>2</sup> In a single sentence, unsupported by any authority, The Ticket Clinic says it is immune “as an agent of the state.” Mot. at 11. While this statement hints at the level of coordination between The Ticket Clinic and the Bar, no facts alleged in TIKD’s Complaint support a conclusion that The Ticket Clinic or its attorneys are “agents of the state.” To the contrary; those defendants are all alleged to be non-state actors practicing law in competition with the attorneys who represent TIKD’s customers. Comp. ¶¶ 30-32. The Ticket Clinic is not part of any state agency given authority to regulate commerce. The Ticket Clinic cites no case holding that a private party can be entitled to state action immunity; indeed, a prerequisite to such immunity is the defendant be a state actor.

**ii. The Bar Defendants are not immune.**

The Ticket Clinic’s “indirect” immunity argument also fails because the Bar Defendants are not immune, as explained in TIKD’s response to The Bar Defendants’ motion to dismiss. *See* Doc. 31, at 3-9.

The Bar Defendants’ Eleventh Amendment immunity argument relies on an outdated “arm of the state” analysis perfunctory applied in *Kaimowitz v. The Florida Bar*, 996 F.2d 1151 (11th Cir. 1993). *Kaimowitz’s* analysis was abrogated in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc). When the correct factors are used—as defined in *Manders*—it is clear that the Florida Bar’s anticompetitive actions are not entitled to sovereign immunity. *See* Doc. 31, at 4-5. Further, TIKD is entitled to injunctive relief against The Florida Bar officials in their official capacity under *Ex Parte Young*, 209 U.S. 123 (1908), regardless of Eleventh Amendment immunity. *See id.* at 5.

The Bar Defendants’ “state action” immunity argument fails to recognize the Supreme Court’s ruling in *Dental Examiners*, 135 S. Ct. 1101. After *Dental Examiners*, the Bar Defendants have no state action immunity unless their challenged conduct satisfies the two-part test of *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). *See* Doc. 31, at 6. *Midcal* requires the Bar’s conduct be “actively supervised” by a politically accountable state official and taken pursuant to a “clearly articulated and clearly expressed state policy to displace competition.” The Bar Defendants’ anticompetitive actions challenged here were not part of their internal UPL investigation. *Id.* at 6-8. Those actions were strikingly similar to the culpable conduct found in *Dental Examiners*. *Id.* The two cases the Bar Defendants (and now The Ticket Clinic) cite involved the Bar’s regulation of its members, not the enforcement of its monopoly on legal services; they did not apply *Midcal*; and they do not apply here. The first, *Ramos v. Tomasino*, 701 Fed. App’x 798 (11th Cir. 2017) (unpublished) is a non-binding pro se case brought by a serial vexatious litigant complaining about the Bar’s destruction of old disciplinary proceeding records, not actual anticompetitive conduct. The second, *Rosenberg v. State of Florida*, 15-22113-CIV, 2015 WL 13653967 (S. D. Fla. Oct. 14, 2015), declined to even apply *Midcal*, because the plaintiff did not even “attempt to explain what acts violated the Sherman Act.”

The Bar Defendants argue (unconvincingly) that their anticompetitive conduct satisfies *Midcal*, but The Ticket Clinic tellingly makes no similar effort. Instead, The Ticket

Clinic claim that *Midcal's* limitations on immunity should *never* apply to either The Bar Defendants or to The Ticket Clinic Defendants, and both can violate the Sherman Act with impunity. After *Dental Examiners*, this is not the law, if it ever was. *Dental Examiners*, 135 S. Ct. at 1110 (“A nonsovereign actor controlled by active market participants . . . enjoys *Parker* immunity only if it satisfies [the] two [*Midcal*] requirements . . .”); *see also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) (“The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.”).

The Ticket Clinic cites *Hoover v. Ronwin*, 466 U.S. 558 (1984), but *Hoover* involved denial of an application to the Arizona Bar, a decision ultimately made *by the Arizona Supreme Court*. This direct action of the Arizona Supreme Court was entitled to state action immunity. *Id.* at 578; *see also Dental Examiners*, 135 S. Ct. at 1110-12 (explaining distinction between action of state supreme court in *Hoover*, which is not subject to *Midcal*, and action of state agency, which is). TIKD is not challenging Florida’s UPL rules or a ruling from the Florida Supreme Court. Instead, TIKD is challenging the coordinated misconduct of a state agency and a private law firm aimed at excluding a competitor from a market. The Bar’s conduct undoubtedly is subject to *Midcal's* requirements. *Dental Examiners*, 135 S. Ct. at 1111 (“State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity.”) (citing *Goldfarb v. Virginia State Bar*, 421 U.S. at 791).

The Ticket Clinic takes the extreme position that it has complete license to violate antitrust laws, because it knows its own anticompetitive actions cannot possibly meet either requirement of *Midcal*. The Ticket Clinic launched a campaign of systematic threats to private attorneys representing TIKD customers aimed at convincing those attorneys that The Florida Bar had decided TIKD was “illegal,” even though The Florida Bar had no authority to make that decision. Comp. ¶¶ 56-69. The purpose of this conduct was to drive TIKD out of business. *Id.* ¶¶ 3, 48, 84. This anticompetitive conduct was not “actively supervised” by a politically accountable state official or taken pursuant to a “clearly articulated and clearly expressed state policy to displace competition.”

The only thing The Ticket Clinic claims is “actively supervised” is Florida’s “laws against UPL.” Mot. at 10 n.1. This observation is unremarkable and irrelevant, because

TIKD does not challenge Florida's UPL laws. Instead, the Complaint challenges The Ticket Clinic's unauthorized attempt to act as the private enforcer of what it decides is UPL.

Accordingly, the out-of-circuit case quoted at length by The Ticket Clinic, *Lawline v. Am Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1992), does not apply. In *Lawline*, the plaintiffs sought to invalidate ethics rules adopted by the Illinois Supreme Court. *Id.* at 1381. Indeed, the *Lawline* plaintiffs sued the Illinois Supreme Court itself. TIKD's lawsuit does not target the Florida Supreme Court or its adopted rules. *There is no rule* allowing the Bar and the Ticket Clinic to represent to private attorneys that TIKD is "illegal," and, in fact, such activity is directly contrary to Bar rules. *See* TIKD's Response to Florida Bar Defendants' Motion to Dismiss (Doc. 31), at 6-8.

**C. The Ticket Clinic is not entitled to *Noerr-Pennington* immunity.**

*Noerr-Pennington* provides "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (emphasis added).

Like the Bar Defendants, The Ticket Clinic's *Noerr-Pennington* argument depends on mischaracterizing TIKD's Complaint. The Ticket Clinic's wrongful action was *not* "to threaten and ultimately initiate . . . proceedings with the Supreme Court of Florida," as The Ticket Clinic falsely contends. Mot. at 16. The wrongful action was the communication of false information to private-practice lawyers to coerce them to cease "representing TIKD customers and thereby competing with The Ticket Clinic." Comp. ¶ 61. These communications succeeded in driving attorneys away from TIKD and harming TIKD's business. *Id.* ¶¶ 62-68, 79-80. This anticompetitive action was not directed at, or intended to influence public officials.

Like the Bar Defendants, The Ticket Clinic's *Noerr-Pennington* argument relies on *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1559 (11th Cir. 1992). In *McGuire Oil Co.*, the court held that plaintiffs' threats of litigation against a defendant, followed by the plaintiffs' filing of a lawsuit against the defendant, were protected under *Noerr-Pennington*. *Id.* at 1559. This uncontroversial application of *Noerr-Pennington* has no relevance here. TIKD's Complaint does not target litigation threatened or initiated by The Ticket Clinic against TIKD, nor does it challenge The Ticket Clinic's UPL or ethics complaints filed with the



Bar.<sup>3</sup> Instead, the Complaint targets The Ticket Clinic's propaganda campaign aimed at convincing attorneys that The Florida Bar had determined TIKD was engaged in UPL.

In a single sentence, The Ticket Clinic claims these false communications are immune because "*Noerr-Pennington* shields all communications with the government." Mot. at 18. But The Ticket Clinic's communications to these private lawyers were *not* "communications with the government," but to private lawyers. These communications sought to convince these attorneys to cease "representing TIKD customers and thereby competing with The Ticket Clinic." Comp. ¶ 61.

Further, because those statements were false, Comp. ¶¶ 61, 64, 66, they are not entitled to *Noerr-Pennington* immunity regardless of to whom they were made. *See Kinsman v. Winston*, 615CV696ORL22GJK, 2015 WL 12839267, at \*7 (M.D. Fla. Sept. 15, 2015) ("*Noerr-Pennington* does not immunize petitioning activity consisting of false statements made to the government.").

The Ticket Clinic also seeks to evade TIKD's tortious interference claim under *Noerr-Pennington*. Like its antitrust claims, TIKD's tortious interference claim arises from The Ticket Clinic's false statements to independent lawyers aimed at coercing those lawyers to end their business relationship with TIKD. As explained above, those false statements are not protected by *Noerr-Pennington*.

### III. The "litigation privilege" and the *in pari delicto* doctrine are inapplicable.

The Ticket Clinic's claim to "absolute immunity" under the common law litigation privilege is premised on the falsehood that TIKD's lawsuit is based solely on the fact that The Ticket Clinic "simply made a complaint to The Florida Bar." Mot. at 20. As noted above, TIKD's claims are far more extensive than that, and are based on an extended course of conduct of both The Ticket Clinic and the Florida Bar. In fact, TIKD's complaint is express in *not* relying on acts taken by The Ticket Clinic prior to August 11, 2017. Comp. ¶ 87.

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<sup>3</sup> Further discovery may prove, however, that The Ticket Clinic's formal complaints were intended to interfere with TIKD's business, without any regard to the merits of the complaints' allegations. As such, not even this petitioning activity would escape antitrust scrutiny. *See Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993). TIKD's Complaint adequately alleges that these complaints were a sham, *see* Comp. ¶¶ 50-53, 75, and TIKD reserves the right to pursue this claim, if needed, after further discovery.

Defendants' attempt to assert this affirmative defense on a Rule 12 motion to dismiss also fails procedurally, because the Complaint does not allege facts sufficient for this Court to draw the conclusion that this state-law privilege applies to a UPL complaint made to The Florida Bar. *See Gills v. Armfield*, 8:10-CV-895-T-27TBM, 2011 WL 13175840, at \*4 (M.D. Fla. Mar. 30, 2011) (denying dismissal because complaint did not allege facts sufficient to show litigation privilege applied to the filing of an ethics complaint). And this defense fails substantively, because state common-law privileges cannot provide a party immunity for its violation of federal antitrust law. *Lightfoot v. Henry Cty. Sch. Dist.*, 771 F.3d 764, 771 (11th Cir. 2014).

Like its Article III standing argument, The Ticket Clinic's *in pari delicto* argument ignores TIKD's well-pled facts based on an unsupported assertion that TIKD has "engaged in illegal misconduct." TIKD's business fully complies with Florida law. Comp. ¶ 27. Further, the very case cited by The Ticket Clinic refutes its argument: "the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action." *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1153 (11th Cir. 2006) (quoting *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 140 (1968)).

#### **IV. TIKD has adequately stated Sherman Act claims.**

"Rule 12(b)(6) dismissals are particularly disfavored in fact-intensive antitrust cases." *Omni Healthcare, Inc. v. Health First, Inc.*, 6:13-CV-1509-ORL, 2015 WL 275806, at \*12 (M.D. Fla. Jan. 22, 2015) (quoting *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1070 (11th Cir.2004)). The Ticket Clinic's three pages of scatter-shot arguments for 12(b)(6) dismissal, Mot. at 22-24, are contrary to TIKD's well-pled facts, which must be accepted as true.

##### **A. TIKD competes with The Ticket Clinic.**

Echoing its Article III standing argument, The Ticket Clinic leads by claiming it is "ridiculous" to think TIKD "can compete" with The Ticket Clinic in connection with "the provision of legal services." Mot. 22. While The Ticket Clinic may wish TIKD was not a competitor, this competition is alleged in the Complaint, Comp. ¶ 32, and cannot be wished away. The competition between the companies is demonstrated by the fact that customers switch from The Ticket Clinic to TIKD. *Id.* ¶ 47. TIKD's method of providing access to

legal services is innovative, and attorneys working with TIKD customers gain a competitive advantage over attorneys who do not. *Id.* ¶ 29. The Ticket Clinic knows technologically innovative companies like TIKD are disrupting the traditional market of providing access to legal services, and The Ticket Clinic has plans to mimic these innovations in an effort to retain its sizeable market share. *Id.* ¶ 32. The Ticket Clinic knows TIKD poses a direct competitive threat to its current business and its future business plans, which is why it is “trying to get [TIKD] shut down.” *Id.* ¶ 48.

The Ticket Clinic repeats its unfounded and irrelevant claim that TIKD cannot compete because TIKD is unlawful. Mot. at 22. TIKD’s business fully complies with Florida law. Comp. ¶ 27; *see also Indiana Fed’n of Dentists*, 476 U.S. at 465 (“That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it.”).

**B. TIKD has alleged facts showing a conspiracy in restraint of trade.**

The Ticket Clinic claims “[t]here is no evidence supporting an allegation that there was a conspiracy.” Mot. at 22. This ignores TIKD’s Complaint, which describes in detail The Ticket Clinic’s and The Florida Bar’s coordinated, “multi-pronged campaign aimed at putting TIKD out of business.” Comp. ¶ 48.

The Complaint alleges a lengthy list of specific concerted actions aimed at excluding TIKD from the market by sabotaging TIKD’s relationships with attorneys representing TIKD customers. *See id.* ¶ 47 (Florida Bar decided to launch investigation of TIKD in response to news article reporting how customers were choosing TIKD over The Ticket Clinic); *id.* ¶ 58-62 (Florida Bar provided The Ticket Clinic a copy of the deliberately misleading Bar Staff Opinion in order to facilitate The Ticket Clinic’s anticompetitive use of the Opinion); *id.* ¶¶ 64, 66 (Defendants instructed attorney working for TIKD customers to call Defendant Needelman to confirm The Ticket Clinic’s false statements); *id.* ¶ 65-68 (coordinated efforts of Ticket Clinic attorneys to pressure independent attorney to stop doing business with TIKD); *id.* ¶ 78 (improper information sharing between Needelman and Hollander to bolster Hollander’s complaint against attorney working for TIKD customers); *id.* ¶ 77 (Bar knew about The Ticket Clinic’s false, anticompetitive statements, but refused to correct them); *id.* ¶¶ 80 (The Ticket Clinic successfully drove many attorneys away from

TIKD through direct communication of false information and threats, including the threat of being “blackballed” by The Ticket Clinic).

These allegations, which must be accepted as true, show concerted action between The Florida Bar and The Ticket Clinic, between The Ticket Clinic’s attorneys, and between The Ticket Clinic attorneys and independent attorneys who decided to cease working with TIKD as a result of The Ticket Clinic’s pressure campaign. Any one of those levels of concerted action, standing alone, requires denial of The Ticket Clinic’s motion.

**C. TIKD has alleged antitrust injury.**

Antitrust injury is “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).

Presumably referring to antitrust injury, The Ticket Clinic claims TIKD’s complaint contains “no allegations of injury to the market.” Not true. The Complaint alleges well-recognized antitrust injuries stemming from The Ticket Clinic’s unfortunately successful efforts to exclude TIKD from the market. The Complaint alleges TIKD provides an innovative service that makes it easier for the general public to access legal services to defend traffic tickets. Comp. ¶ 2. TIKD is enormously popular with Floridians. *Id.* Attorneys who work with TIKD customers gain a competitive edge over attorneys who do not, thereby broadening competition in the market and lowering prices for consumers. *Id.* ¶ 29. By intentionally seeking to exclude TIKD from this market by sabotaging TIKD’s relationships with attorneys, The Ticket Clinic’s anticompetitive conduct has not merely inflicted direct damage on TIKD (although it has certainly done that, *id.* ¶ 82). The Ticket Clinic’s exclusionary tactics have “harmed competition in the Relevant Market by depriving customers access to competitors’ services, depriving customers of a more efficient service, reducing innovation in the Relevant Market, and increasing prices by reducing output of legal services.” *Id.* ¶ 109; *see also id.* ¶ 107 (conduct “deprived Florida consumers access to convenient, low-cost, and efficient legal services.”).

TIKD’s allegations of less competition, higher prices, fewer consumer choices, lower quality services, and harm to innovation are well-accepted types of antitrust injury. *See Palmyra Park Hosp. Inc. v. Phoebe Putney Mem’l Hosp.*, 604 F.3d 1291, 1303 (11th Cir. 2010) (“less competition . . . higher prices and fewer choices for consumers” “is precisely the type

of harm that we allow plaintiffs to vindicate through the antitrust laws”); *Cobb Theatres III, LLC v. AMC Entm’t Holdings, Inc.*, 101 F. Supp. 3d 1319, 1335 (N.D. Ga. 2015) (“[A]nticompetitive effects include, but are not limited to, reduction of output, increase in price, or deterioration in quality.” (quoting *Jacobs v. Tempur–Pedic Int’l, Inc.*, 626 F.3d 1327, 1333 (11th Cir.2010))); Areeda & Hovenkamp, *Antitrust Law*, ¶ 2234b, at 432 (“[A]ntitrust injury can refer to loss of technical progressiveness, or innovation, just as much as loss of competitive pricing.”).

The Ticket Clinic tries to contradict TIKD’s well-pled facts by offering its own facts. Relying on conclusory affidavits, The Ticket Clinic alleges its “prices are the same now,” and TIKD can therefore prove no antitrust injury. Mot. at 23. The Ticket Clinic’s attempt to offer evidence contradicting the facts alleged in TIKD’s Complaint is improper, and it tellingly does not claim its prices would not be *lower* if it had not succeeded in chasing away lawyers representing TIKD. TIKD has easily stated a claim for antitrust injury. *See Glob. Candle Gallery Licensing Co. v. Nabozny*, 8:08-CV-2532-T-30TGW, 2009 WL 3852794, at \*3 (M.D. Fla. Nov. 18, 2009) (crediting allegation that actions “wrongly suppressed competition in the relevant market,” and denying motion to dismiss); *Cobb Theatres III, LLC*, 101 F. Supp. 3d at 1335 (“Defendants may be able disprove Plaintiffs’ allegations regarding harm to competition after discovery, but, at the very least, this dispute cannot be resolved on a motion to dismiss.”).

Further, even if TIKD had not alleged higher prices as a result of The Ticket Clinic’s anticompetitive actions, an increase in prices is not a prerequisite to antitrust injury. “The quintessential harm is not higher prices; [r]ather, consumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman act.” *Id.* (internal quotation marks omitted) (alteration in original).

**D. TIKD has alleged unlawful monopoly power.**

The Ticket Clinic acknowledges that it “has in 30+ years developed quite a bit of market share.” Mot. at 14. The Complaint similarly alleges monopoly power. Comp. ¶ 31. The Ticket Clinic states that its “mere possession” of monopoly power is not “unlawful unless it is accompanied by an element of anticompetitive conduct.” TIKD’s Complaint easily satisfies this requirement by alleging a deliberate campaign by The Ticket Clinic to drive attorneys away from TIKD in order to put TIKD out of business. *Id.* ¶¶ 56-69, 73-82.

**E. TIKD has adequately pled tortious interference.**

Buried within its immunity arguments, The Ticket Clinic alleges TIKD has failed to state a claim for tortious interference. Mot. at 20. The Complaint alleges that The Ticket Clinic deliberately sabotaged TIKD's business relationships with attorneys working for TIKD customers in an effort to eliminate TIKD from the market. Comp. ¶¶ 56-69, 73-82. The Ticket Clinic does not deny that these facts, accepted as true, establish the elements of tortious interference. The Ticket Clinic's assertions that TIKD is "illegal" and that TIKD "can never establish" that The Ticket Clinic's interference was unjustified contradict the facts of the Complaint, and are no grounds for dismissal at this stage. TIKD's business complies with Florida law. *Id.* ¶ 27. The Ticket Clinic's purpose in driving attorneys away from TIKD was to exclude a competitor from the market, not to meet an "ethical" duty. *Id.* ¶¶ 61, 79, 84.

**V. TIKD's claims do not implicate claim-splitting and are not barred by the affirmative defense of release.**

The Ticket Clinic argues that TIKD's Complaint is barred by the doctrine of claim-splitting because, in April 2017, The Ticket Clinic and TIKD sued each other in Florida state court. Those claims were dismissed without prejudice in August 2017, months before TIKD filed its Complaint in federal court alleging antitrust violations. Comp. ¶¶ 54-55.

As the very case relied on by The Ticket Clinic states, "a district court has the 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.*" *Greene v. H & R Block E. Enterprises, Inc.*, 727 F. Supp. 2d 1363, 1367 (S.D. Fla. 2010) (emphasis added). Accordingly, long-dismissed state lawsuits do not implicate the claim-splitting doctrine for two reasons: They are not "pending" and they are not "in federal court." TIKD's Complaint also does not arise out of the same transactions giving rise to the state court lawsuits. The prior lawsuits were premised on conduct occurring before August 10, 2017. Comp. ¶¶ 53-54. TIKD's Complaint is not based on "any acts taken by [The Ticket Clinic] prior to August 11, 2017." *Id.* ¶ 87. The anticompetitive conduct giving rise to TIKD's antitrust and tortious interference claims all occurred after the state lawsuits were settled. *Id.* ¶ 56-82.

In two sentences, The Ticket Clinic argues that TIKD's claims against them were "released" in a settlement of state court lawsuits filed between TIKD and the Ticket Clinic. Mot. at 25-26. Nothing in TIKD's Complaint alleges that TIKD released any claims. It is therefore improper for The Ticket Clinic to raise the affirmative defense of release in a motion to dismiss. *See Perkins ex rel Estate of Perkins v. Ottershaw Investments Ltd.*, 04-22869-CIV, 2005 WL 3273747, at \*3 (S.D. Fla. Sept. 30, 2005) ("[T]he issue of whether there was a release is an affirmative defense which cannot be determined from the face of the complaint and therefore, it is not appropriate for this Court to consider this issue on a motion to dismiss.").

Even if the Court considers the settlement agreement attached to The Ticket Clinic's motions, it will see that the agreement contains no release of any claims. *See* Doc. 43-2. Rather, the agreement provides that for eight months from its effective date, August 10, 2017, "lawsuits with the same subject matter" will not be refiled by the parties. *Id.* at 2. The agreement does not "prevent any party from filing a lawsuit against the other party based on new or different conduct that may give rise to a cause of action against the other party." *Id.*

TIKD described the agreement in its Complaint, noting that TIKD "believed it had bought peace with the Ticket Clinic until the Florida Bar completed its UPL investigation," but that after the settlement was signed, "The Ticket Clinic and the Florida Bar actually *accelerated* their campaign to put TIKD out of business." Comp. ¶ 55 (emphasis in original). The agreement does not bar TIKD's claims against The Ticket Clinic in this lawsuit because this case does not cover the "same subject matter" of the state lawsuit – it is a federal antitrust action that could not even have been filed in state court. *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985). Moreover, TIKD limited its claims against The Ticket Clinic to "new or different conduct," that is, acts committed by The Ticket Clinic and its lawyers after August 10, 2017. *See* Comp. ¶¶ 87, 91, 98, 101 ("Plaintiff does not base claims against The Ticket Clinic or its lawyers on any acts taken by them prior to August 11, 2017."). The Ticket Clinic's claim of "release" is baseless.

#### **VI. The Ticket Clinic's remaining conclusory arguments are baseless.**

Scattered throughout its "main" arguments, The Ticket Clinic postulates other unbriefed, conclusory side-arguments. These arguments are addressed summarily below.

*Intent to monopolize:* The Ticket Clinic suggests TIKD has not adequately pled “intent to monopolize.” TIKD addressed this argument in response to the Bar Defendants’ motion to dismiss. *See* Doc. 31, at 16. TIKD’s allegations of The Ticket Clinic’s exclusionary conduct itself sufficiently alleges intent. *See Volvo N. Am. Corp. v. Men’s Intern. Prof’l Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988) (“Proof of the first element of an attempted monopolization claim, anticompetitive or exclusionary conduct, may be used to infer the second element, specific intent to monopolize ...”). TIKD has expressly alleged The Ticket Clinic’s intent to monopolize. Comp. ¶ 92 (Defendants engaged in “willful acquisition, maintenance, and/or enhancement of monopoly power”); *id.* ¶ 61 (describing The Ticket Clinic’s deliberate misuse of the Bar Staff Opinion “to deter lawyers from representing TIKD customers and thereby competing with The Ticket Clinic”); *id.* ¶ 84 (“The Ticket Clinic’s anticompetitive actions seek to prevent TIKD from expanding nationally, thereby facilitating its own expansion.”).

*Actual or threatened monopolization:* The Ticket Clinic claims “the allegations of the complaint do not demonstrate actual or threatened monopolization.” This argument flatly contradicts The Ticket Clinic’s admission elsewhere that it “has in 30+ years developed quite a bit of market share.” Mot. at 14. In any case, the Complaint adequately alleges The Ticket Clinic’s monopoly power. Comp. ¶ 31. Further, regardless of the market power held by The Ticket Clinic alone, the concerted action at issue is between The Ticket Clinic and the Florida Bar. The Florida Bar unquestionably holds market power, because “the Bar’s membership is comprised of all persons admitted . . . to practice law in the state.” Comp. ¶ 33; *see also* TIKD’s Response to Bar Defendants’ Motion to Dismiss (Doc. 31), at 15.

## **VII. Conclusion.**

For these reasons, Plaintiff TIKD Holdings, LLC respectfully requests the Court deny The Ticket Clinic’s Motions to Dismiss and grant such other and further relief to which it may be justly entitled.



Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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