IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC18-149

THE FLORIDA BAR,
Petitioner,

L.T. Case Nos.: 20174035(11B) and 20174045(11B)

vs.
TIKD SERVICES LLC, A Foreign Limited Liability Company,

and

CHRISTOPHER RILEY, individually and as Founder of, TIKD SERVICES LLC,
Respondents.
_____/

ERWIN ROSENBERG'S MOTION FOR JUDICIAL NOTICE OF THE FLORIDA BAR'S RESPONSE TO THE DEPARTMENT OF JUSTICE'S STATEMENT OF INTEREST IN *TIKD SERVICES LLC v. THE FLORIDA BAR ET. AL.*, US DIST. CT. SO. FLA. CASE NO. 1:17-cv-24103-MGC

F.S. 90.202(6) says as follows:

> Matters which may be judicially noticed.—A court may take judicial notice of the following matters, to the extent that they are not embraced within s. 90.201:
> . . .
> (6) Records of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States.

F.S. 90.203 says as follows:

> Compulsory judicial notice upon request.—A court shall take judicial notice of any matter in s. 90.202 when a party requests it and:
> (1) Gives each adverse party timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare to meet the request.
> (2) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

In my motion for leave to file an amicus brief in support of Respondents I filed a copy of the U.S. Department of Justice Antitrust Divvision (DOJ)'s Statement of Interest in *TIKD*

Services LLC v. The Florida Bar et. al., U.S. Dist. Ct. So. Fla. Case No. 1:17-cv-24103-MGC. I would like this Court to take judicial notice of the Response that The Florida Bar filed to the DOJ's Statement of Interest. See Exhibit "A." I ask this Court to notice in particular page 10 footnote 11 where The Florida Bar implies that the DOJ's interpretation of active market participants may disqualify this Court from providing the active supervision required by State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015) because employed staff attorneys and clerks of this Court would be considered active market participants. Wherefore I move for judicial notice of The Florida Bar's response to the Department of Justice's Statement of Interest in *TIKD Services LLC v. The Florida Bar et. al*., U.S. Dist. Ct. So. Fla. Case No. 1:17-cv-24103-MGC.

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2020 I served a copy hereof on all registered persons via Portal Filing.

Respectfully,

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EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

TIKD SERVICES LLC,

Plaintiff,

vs.

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

Defendants.
_____/

BAR DEFENDANTS' RESPONSE TO DEPARTMENT OF JUSTICE'S STATEMENT OF INTEREST (Doc. 115)

Through its Statement of Interest ("SOI"), the Department of Justice ("DOJ") comments on one limited legal principle,[1] contained in one of the Bar Defendants' multiple grounds for dismissal of Plaintiff's complaint.[2] The DOJ's commentary—which reads like a dissenting opinion to the only directly applicable case law from this Circuit—is predicated on a mistaken premise and misunderstanding of the facts in this case. Without doubt, Plaintiff's Complaint concedes that The Florida Bar ("TFB") was, at all times material to this

[1] At the outset, it is important to note that the DOJ addresses *only* the legal requirements the Court should apply to determine the issue of state action immunity. (SOI at 4 n.1.) Notwithstanding its position that The Florida Bar should be subjected to further requirements, the DOJ "takes no position now on whether the Bar Defendants have satisfied those requirements." (*Id.*) The DOJ also "takes no position . . . on any other issue in the case." (*Id.*)

[2] The Bar Defendants' other defenses include Eleventh Amendment immunity, qualified immunity, *Younger* abstention, *Noerr-Pennington* immunity, immunity under Supreme Court rules and Florida statutes, TIKD's failure to allege any facts on which relief can be granted, and TIKD's violation of Florida's Anti-SLAPP statute. These other defenses supply numerous grounds for dismissal without even considering the state action immunity defense. In other words, the Court can dismiss this case without ever commenting, or ruling, upon the state action defense and without regard to the propriety or accuracy of the SOI.

dispute, engaged in the authorized implementation of state policy—the investigation of possible unlicensed practice of law ("UPL"). And the policy that TFB strictly followed is one clearly articulated by the Florida Legislature and the Florida Supreme Court ("FSC") pursuant to FSC (not TFB) rules, as well as the Florida Constitution. Further, the operative facts contained in Plaintiff's Complaint establish that the acts about which Plaintiff complains—even if accepted as true—were not taken by or controlled by "active market participants." The DOJ also fails to acknowledge that this is not a case where "a State empowers a group of active market participants to decide who can participate in its market." (SOI at 6 (quoting *N.C. State Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 1101 (2015)).) To the contrary, the Complaint clearly recognizes that *only* the FSC decides if one is engaged in UPL and, similarly, whether one is permitted to practice law in the State of Florida.

This case involves a complaint about the FSC's investigative arm (TFB) performing its legally-mandated and specifically delegated duties resulting in its petition to the FSC for determination of whether TIKD is engaged in UPL. Thus, notwithstanding the DOJ's disagreement with the pertinent decisions of this Circuit,[3] TFB's motion to dismiss is due to be granted regardless of whether or not the Court finds that TFB must satisfy both *Midcal* tests for state action immunity. In addition to all of the other grounds raised in the Motion to Dismiss—on which the DOJ takes no position—TFB meets both *Midcal* tests.

I. Eleventh Circuit law establishes The Florida Bar is a sovereign arm of the Florida Supreme Court entitled to antitrust immunity in carrying out the Court's rules.

Ramos v. Tomasino, 701 F. App'x 798 (11th Cir. 2017), and *Rosenberg v. Florida,* No.

[3] Indeed, the DOJ's "interest" in this litigation is tenuous, at best. It cites *United States v. Borden Co.*, 347 U.S. 514, 518 (1954), in support of its stated interest. (SOI at 1.) However, *Borden* was a civil enforcement action by the United States in which the district court had refused to enter an injunction for the government because an injunction prohibiting the same conduct had already been entered in a private action. Here, where the United States has neither intervened nor conducted its own investigation, it is not clear it possesses any interest in this litigation justifying any statement on its part. *See United States v. Salus Rehab.*, No. 8:11–cv–1303–T–23TBM, 2017 WL 1495862, at *2 (M.D. Fla. Apr. 26, 2017). Second, *Borden* was an appeal of a district court order. By contrast, the DOJ filed its statement of interest before the Court has ruled on the state action issue, an issue that this Court may never reach inasmuch as there are several other grounds for dismissal. In any event, the Court is not obligated to follow the DOJ's commentary, nor is the Court required to accept the SOI at all. *Id.*

15-22113-CIV-Lenard/Goodman, 2015 WL 13653967 (S.D. Fla. Oct. 14, 2015), both of which were decided after *Dental Examiners*, directly address the application of state action immunity to TFB. These decisions, which arose from this District, explicitly recognize that TFB is immune under the state action doctrine as an arm of the FSC carrying out the FSC's rules. Moreover, *Rosenberg* specifically acknowledges *Dental Examiners*, but explains that "the immunity analysis set forth in *Parker* and recently applied again by the Supreme Court in [*Dental Examiners*] is not applicable to Rosenberg's claims against [TFB] because [TFB] is an arm of the state (a sovereign entity)—not a non-sovereign actor that is authorized by the State to regulate its own profession." *Rosenberg*, 2015 WL 13653967, at *7. The Bar Defendants are aware of no other cases addressing the application of state action immunity to TFB since *Dental Examiners*. Tellingly, the DOJ has not identified any such cases either. Confronted with this authority, the DOJ argues that *Ramos* and *Rosenberg* are distinguishable, unpersuasive, or erroneous. The DOJ's arguments and proffered distinctions, however, are inconsistent with the record of those cases or immaterial here.

(A) As in *Ramos*, the rules at issue in TIKD's Complaint were "created and approved" by the Florida Supreme Court.

In *Ramos*, the Eleventh Circuit affirmed dismissal of an antitrust complaint against the TFB and three of its individual employees (including Mr. Harkness), as well as the FSC, the Clerk of Court, and others.[4] The DOJ argues *Ramos* "is distinguishable because Ramos challenged the substance of a Florida Rule of Judicial Administration, which expressly authorized destruction of his Bar disciplinary proceedings records, as anti-competitive." (SOI at 8-9.) Thus, according to the DOJ, the Eleventh Circuit "properly treated Ramos' suit as directed against the Florida Supreme Court itself, because the Florida Supreme Court had created or approved that rule." (*Id.* at 9.) But the rules at issue in this case—which expressly authorized issuance of ethics advice and conduct of UPL proceedings—were also "created and approved" by the FSC. Although the particular rules addressed in *Ramos* relate to

[4] The DOJ argues that the presence of other defendants in *Ramos*, including the FSC, requires a different result than in this case. But just because Mr. Ramos sued additional immune defendants does not mean that that case would have been decided differently if he had sued only TFB and its agents. If TFB were not immune under the state action doctrine, then the court in *Ramos* certainly could have dismissed claims against the FSC and let them stand against TFB. It did not do so.

different subject matters (i.e., rules related to document retention, rather than UPL or ethics advice), all such rules are nevertheless rules authorized by the FSC, and the DOJ's attempted distinction is one without a difference.

The DOJ's acknowledgment that *Ramos* was treated by the Eleventh Circuit as a suit against the FSC itself concedes a critical point. The FSC is clearly a sovereign, and it acts through TFB to carry out certain functions, including investigating and prosecuting UPL and providing ethics advice. Thus, just as in *Ramos*, TIKD's claims against the sovereign arm of the FSC in carrying out its UPL and ethics rules are no different than claims against the FSC for the FSC's document retention rules. TIKD's claims here are against the FSC itself, involve the FSC's own rules, and should be dismissed.

(B) The allegations in *Ramos* are not materially distinguishable.

The DOJ also mistakenly argues *Ramos* is distinguishable because TIKD "alleges instead that the Bar improperly *enforced* its rules and abused its authority, and that its improper enforcement had anti-competitive effects." (SOI at 9 (emphasis in original).) But Mr. Ramos *did* allege that improper enforcement of the rules led to anticompetitive effects. Indeed, Mr. Ramos explicitly asserted that TFB and others "illegally destroyed his attorney disciplinary records," and thus perpetrated acts of "illegal, non-discretionary, concealment, spoliation and destruction" of those records.[5] In fact, notwithstanding the DOJ's opposite characterization, the primary issue framed by Mr. Ramos on appeal was "whether the Appellees[,] having illegally destroyed the appellant's attorney disciplinary records[,] may avoid Sherman Act liability under the pretense of state action immunity."[6] The Eleventh Circuit addressed this argument directly:

> [E]ven if the destruction of records somehow violated that rule [i.e., Fla. R. Jud. Admin. 2.430(c)(3)(B)], *Parker* immunity has never required a sovereign to act "wisely after full disclosure from its subordinate officers." *Id.* *Hoover* specifically indicates that the "only requirement is that the action be that of the State acting as a sovereign," which this clearly is.

Ramos, 701 F. App'x at 804 (internal citation omitted). This is particularly instructive. A plaintiff should not be able to pierce state action immunity simply through conclusory

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5 Appellant Brief in *Ramos*, 2016 WL 5871395, at *2, *13 (Oct. 6, 2016).

6 *Id.* at *2.

allegations that the state acted inconsistently with its rules, whether the FSC itself or TFB as its arm.

Notably, the SOI refers to an allegation that TFB improperly enforced "its rules." (SOI at 9.) But it is without dispute that the rules in question are those of the FSC, not TFB, and that the FSC maintains absolute authority over activities of TFB, including the ability to modify or overturn any of its actions. *See* R. Regulating Fla. Bar 1-4.2(c) ("The Supreme Court of Florida may at any time ratify or amend action taken by the board of governors under these rules, order that actions previously taken be rescinded, or otherwise direct the actions and activities of The Florida Bar and its board of governors.").

Moreover, the DOJ, in blindly accepting TIKD's allegations of "improper enforcement" and "abuse," ignores the Bar Defendants' analysis of how TIKD's allegations fail to demonstrate anything anti-competitive, improper, or inconsistent with the FSC's rules. (Doc. 17 at 8-14; Doc. 40 at 1-3.) Even on a motion to dismiss, the Court need not accept conclusory allegations that belie incontestable facts. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In *Ramos*, for instance, the Eleventh Circuit properly rejected Mr. Ramos' conclusory allegations when they were nullified by a plain reading of the rules:

> [T]he records in Ramos's disbarment cases were properly destroyed pursuant to the Florida Rules of Judicial Administration, which specifically allow for the destruction of records related to cases disposed without opinion after 10 years. Fla. R. Jud. Admin. 2.430(c)(3)(B).

701 F. App'x at 804. This Court should not accept TIKD's conclusory allegations either.

The DOJ also overlooks or ignores the analysis by the District Court in *Ramos* that "[i]n *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court held that the Sherman Act does not apply to the anticompetitive conduct of states acting as sovereigns."[7] After collecting numerous authorities, the District Court held that "[i]n light of this overwhelming precedent, Mr. Ramos's Sherman Act claims against state-entity Defendants The Florida Bar [and others] must be dismissed with prejudice." *Ramos*, 2016 WL 8678546, at *3.

(C) *Ramos* did not need to distinguish *Dental Examiners* because *Dental Examiners* on its face was inapplicable.

[7] *Ramos v. Tomasino*, No. 16-cv-80681-BLOOM/Valle, 2016 WL 8678546, at *2 (S.D. Fla. Aug. 25, 2016) (internal quotation marks omitted), *aff'd in pertinent part, remanded in part on other grounds*, No. 16-15890, 2017 WL 2889472 (11th Cir. July 7, 2017).

The DOJ's next argument, that *Ramos* is unpersuasive or was erroneously decided because it does not mention *Dental Examiners*, is misplaced because the analysis in *Ramos* makes clear why *Dental Examiners* did not apply in that case, and accordingly why it should not apply here. An arm or specifically authorized agency of the FSC that carries out the Court's public duties, subject at all times to oversight, scrutiny, and rescission of its actions, is cloaked with the Court's immunity when implementing state policy.

To reinforce its argument that *Ramos* should have considered *Dental Examiners*, the DOJ argues that *Dental Examiners* itself relied on the decision of *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 776, 791-92 (1975). In the DOJ's mistaken view, "the Court in *Dental Examiners* indicated, by its reliance on quotations from *Goldfarb*, that state bars should be treated like the North Carolina Board of Dental Examiners and not as equivalent to a state supreme court." (SOI at 10.) What the DOJ fails to acknowledge, however, is that *Ramos* itself addressed and distinguished *Goldfarb* on grounds fully compatible with the reasoning of *Dental Examiners*:

> [T]he Florida constitution expressly grants the Florida Supreme Court the authority to regulate bar admissions . . . . Both the Florida Bar and the Board of Bar Examiners were created by the Florida Supreme Court, and both are subject to the direct control and supervision of that court. Because the Florida Supreme Court retains plenary authority over the actions of the Florida Bar and the Board of Bar Examiners, it retains the ultimate power to make admissions and disciplinary decisions. *Compare with Goldfarb v. Va. State Bar*, 421 U.S. 773, 776, 791-92, 95 S.Ct. 2004, 44 L.Ed.2d 572 (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).

Ramos, 701 F. App'x at 804 (citations omitted, emphasis added).

Thus, *Goldfarb* is distinguishable from *Ramos* for the same reason it is distinguishable here. In *Goldfarb*, a county bar association created a minimum fee schedule for title searches, which the U.S. Supreme Court ultimately held to be anticompetitive price-fixing. 421 U.S. at 782. The county bar association was not an arm of the Virginia State Bar or subject to its plenary authority; the minimum fee schedules were not authorized by the state acting as a sovereign nor were the fee schedules reviewed and approved by the Virginia Supreme Court. *Id.* at 790-91. Although the Virginia State Bar had not compelled the fee schedules, it had

nonetheless condoned them and suggested that habitual violation of them could reflect misconduct. *Id.* at 791-92. Because minimum fees schedules were not addressed by the Virginia Supreme Court's rules, the Virginia State Bar appropriately did not receive state action immunity in *Goldfarb*.[8]

In *Ramos*, on the other hand, the FSC directly authorized document retention rules. Likewise in this case, the FSC has directly authorized the rules governing UPL proceedings and issuance of ethics advisory opinions, and has the power to rescind or modify any actions taken pursuant to those rules. R. Regulating Fla. Bar 1-4.2(c). In stark contrast to the orphaned minimum fee schedule at issue in *Goldfarb*, the Bar Staff Opinion challenged here plainly addresses ethics rules authorized by the FSC. (*See* Doc. 12-2 at Ex. 2-F.)[9] Contrary to the DOJ's interpretation, *Goldfarb* itself emphasized that its holding was not intended to limit a state's proper authority to regulate the profession of law pursuant to its rules. 421 U.S. at 792 ("The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and . . . . we intend no diminution of the authority of the State to regulate its professions."). Accordingly, as in *Ramos*, TFB is entitled to state action immunity.

(D) *Rosenberg* directly addresses *Dental Examiners* and applies here.

The DOJ does not attempt to distinguish *Rosenberg* other than asserting that it, "like *Ramos*, overlooks the fact that the Court in *Dental Examiners* applied its concern about the risks posed by state agencies controlled by active market participants directly to state bars, using *Goldfarb* as an example." (SOI at 10.) But for the reasons explained above, reliance on *Goldfarb* does not change the fact that *Dental Examiners* does not apply to TIKD's claims. All of the activities at issue in *Rosenberg* (as in *Ramos*, and as in this case) were authorized by the FSC's rules and subject to its plenary authority.

(E) The amicus brief TFB joined in *Dental Examiners* did not concede TFB no longer acted as a sovereign arm of the Florida Supreme Court.

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[8] Had the fee schedule been compelled by the Legislature or Virginia Supreme Court in its rules, the result would surely have been different. *See, e.g.*, *id.* at 781, 790. Here, the policy in question is both directed by the Florida Legislature and the FSC. *See infra* § II (A).

[9] The Opinion has been incorporated by reference in the Complaint and attached by TIKD to its Motion for Preliminary Injunction (Doc. 12-2.) *See also* Doc. 17 at 10 n.5.

The DOJ's argument that TFB cannot "credibly claim now that it is sovereign for purposes of state action" (SOI at 8) simply misreads the plain language used in an amicus brief joined by TFB in 2013. The statement, "[s]tate bars will have to defend expensive antitrust actions" (SOI at 7), is not an "admission" that a ruling against the State Board of Dental Examiners would strip TFB of its state action immunity as an arm of the FSC. Concern about how a decision potentially complicating the applicability of state action immunity would provoke expensive and frivolous litigation was the point, notwithstanding the ardent advocacy of both Plaintiff and the DOJ. And that concern was justified. Just as predicted—and despite the numerous material distinctions between this case and *Dental Examiners* (*see* Doc. 17 at 4-12)—TFB is now being sued by a plaintiff who is attempting (as in *Rosenberg*) to stretch the inapposite holding of *Dental Examiners* into an antitrust claim against TFB in its capacity as a sovereign arm of the FSC.

II. The Bar Defendants also enjoy state action immunity even if the Court must analyze whether there is a clearly articulated policy and active supervision.

TFB acts as an arm of the FSC following rules created and approved by the FSC designed to carry out the Florida Legislature's prohibition against UPL. Its actions are ultimately subject to review, modification, or rescission by the FSC. Thus, the *Midcal* test does not apply here, and the Court need not address the clearly articulated policy and active supervision tests. However, even if the Court chooses to follow the DOJ's suggested path, the result is no different. As the Bar Defendants have already explained, there is a clearly articulated policy and active supervision here, which requires dismissal with prejudice. (*See* Doc. 17 at 7-12; Doc. 40 at 6.)

(A) "Clearly articulated policy"

The clearly articulated policy for UPL investigations is set forth in Chapter 10 of the Rules Regulating the Florida Bar. (*See* Doc. 17 at 7-9.) The clearly articulated policy underlying the FSC's regulation of UPL is explained in its own decisions. *See, e.g., The Fla. Bar v. Consol. Bus. & Legal Forms, Inc.*, 386 So. 2d 797 (Fla. 1980). Moreover, the Florida Legislature has declared the state's public policy in prohibiting the unlawful and unlicensed practice of law. Fla. Stat. § 454.23 (2017). Notwithstanding the DOJ's promotion for competition through the "mobile device revolution and the 'app' business culture it enabled" (SOI at 2), the FSC is mandated under the Florida Constitution to regulate the practice of law.

R. Regulating Fla. Bar 10-1.1. Among other things, this duty includes considerations of the "inherent danger of the intervention of lay persons or organizations in the attorney-client relationship," the need to "balance service to the public against the need to show a profit," and "the old admonition that one cannot serve two masters." *Consol. Bus. & Legal Forms*, 386 So. 2d at 798, 801. Whatever "interest" the DOJ has in promoting the virtues of modern technology as a boon to competition, it does not override the FSC's duty to enforce laws which are designed to protect the citizens of Florida against the unlicensed and unregulated practice of law by non-attorneys. There is also a "clearly articulated policy" for communications about the status of a UPL investigation, in Chapter 10 of the Rules Regulating the Florida Bar. (Doc. 17 at 9; R. Regulating Fla. Bar 10-8.1(d) ("Disclosure of Information") & 10-8.1(e) ("Response to Inquiry").) The "clearly articulated policy" for ethics opinions is set forth in Rule 2-9.4. (Doc. 17 at 9-11.)

(B) "Active supervision"

The active supervision of the activities in question of TFB by the FSC is also set forth in Chapter 10 of the Rules Regulating the Florida Bar (addressing UPL proceedings) and Chapter 2 of the Rules Regulating the Florida Bar (addressing ethics opinions). (Doc. 17 at 7-12.) Moreover, the FSC "may at any time ratify or amend action taken by the board of governors under these rules, order that actions previously taken be rescinded, or otherwise direct the actions and activities of The Florida Bar and its board of governors." R. Regulating Fla. Bar 1-4.2(c). Further evidencing active supervision here, the FSC has already entered an order to show cause to TIKD in the proceedings initiated by TFB. (Doc. 105.) With respect to the ethics advisory opinion from TFB staff, the Bar Staff Opinion itself expressly states that it is advisory only and non-binding and cannot offer an opinion on UPL, but rather directs the inquirer to the rule for obtaining UPL advisory opinions under Chapter 10. (Doc. 12 at Ex. 2-F.)[10] To be sure, the seven sitting members of the FSC do not personally perform every function subject to their ultimate authority and review, but *Dental Examiners* itself made clear that "[a]ctive supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision." 135 S. Ct. at 1116. Suggesting

[10] That provision, Rule 10-9-1, also provides a process for obtaining an opinion on UPL that can be directly reviewed by the FSC. *See* R. Regulating Fla. Bar 10-9.1(g).

otherwise would impose an impossible and unreasonable burden on seven sitting justices and overlooks why TFB and other administrative arms of the Court (such as the Florida Board of Bar Examiners) were created, especially in a state with over 20 million inhabitants.

III. The Florida Supreme Court is not composed of active market participants, nor is The Florida Bar staff named in the Complaint.

The DOJ also argues that "the Complaint alleges that the Florida Bar is controlled by active market participants." (SOI at 10.) But conclusory allegations do not change the fact that TFB is controlled by the FSC, particularly with respect to carrying out the UPL functions at issue here. In short, the entire process is controlled by the FSC, quite unlike the board of six dentists, a hygienist, and a consumer in *Dental Examiners*. Although trained in the legal profession, the members of the FSC are plainly not active market participants. Moreover, the only conduct alleged in the Complaint about which TIKD complains (as opposed to a description of the various committees and persons involved in some elements of the overall process) was allegedly perpetrated not by active market participants, but by employed staff of TFB: Ms. Holcomb, Ms. Needelman, and the staff that wrote the Bar Staff Opinion.[11]

IV. Conclusion

If this Court addresses the state action immunity defense, the Bar Defendants ask that the Court adhere to the reasoning of the decisions in *Ramos* and *Rosenberg*, which are entirely consistent with *Dental Examiners*. The Bar Defendants further ask that, even if this Court adopts the DOJ's position that TFB is not a sovereign arm of the FSC and must meet the two-pronged *Midcal* test for private actors, the Court find that the Bar Defendants meet the *Midcal* standard and are entitled to state action immunity.

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[11] Under the "occupational" definition of "active market participant" advanced by the DOJ, any attorney (including employed staff attorneys and clerks of the FSC) would be considered "active market participants." Such a definition would implausibly expand the principles set forth in *Dental Examiners.* In this instance, if the definition of the term "active market participant" is expanded to include anyone whose "occupation" is attorney, then employment of attorneys by any sovereign agency, including for example, the legislature, the Attorney General's office, or the Governor's office could negate the sovereign agency's state action immunity. Importantly, the activities about which TIKD complains were clearly not carried out by active market participants and Plaintiff's Complaint contains no operative facts showing otherwise.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on March 23, 2018, via the Court's CM/ECF system, or by U.S. mail and electronic mail as noted, to:

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