NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICARE MEDSERVICES, INC., Plaintiff-Appellant, v. CITY OF ANAHEIM; et al., Defendants-Appellees.	No. 17-55565. D.C. No. 8:16-cv-01703-JLS-AFM MEMORANDUM* (Filed Aug. 27, 2018)

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

Argued and Submitted August 7, 2018
Pasadena, California

Before: HAWKINS and CHRISTEN, Circuit Judges, and HOYT,** District Judge.

AmeriCare MedServices, Inc. appeals the dismissal of its antitrust and declaratory-relief claims. We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo, *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1068 n.5 (9th Cir. 2018) (citing *City of Los Angeles v. AECOM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Kenneth M. Hoyt, United States District Judge for the Southern District of Texas, sitting by designation.

Servs., Inc., 854 F.3d 1149, 1153 (9th Cir. 2017)), we affirm.

Dismissal was appropriate because appellees are immune from antitrust liability.[1] *See Parker v. Brown*, 317 U.S. 341, 350–51 (1943). Municipalities enjoy state-action antitrust immunity when acting "pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition.'" *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 (2013) (quoting *Community Commc'ns Co. v. Boulder*, 455 U.S. 40, 52 (1982)). The city appellees did just that; California law specifically authorizes cities "to maintain control of the [emergency medical] services they operated or contracted for in June, 1980" and "make decisions as to the appropriate manner of providing those services."[2] *County of San Bernardino v. City of*

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[1] We decline to adopt either an active-state-supervision requirement or a market-participant exception. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985) ("[A]ctive state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party."); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1058 n.5 (9th Cir. 1987) (suggesting that a government entity is not a market participant when performing "integral operations in areas of traditional governmental functions" (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 n.10 (1980))).

[2] Whether § 1797.201 properly applies to each city appellee is a question for California courts—not us. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372 (1991) (applying "a concept of authority broader than what is applied to determine the legality of the municipality's action under state law"); *Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514, 522 (9th Cir. 1987) ("Where ordinary errors or abuses in exercise of state law . . . serve[] to strip the city of state authorization,

San Bernardino, 938 P.2d 876, 890 (Cal. 1997); *see* Cal. Health & Safety Code § 1797.201 (preserving the pre-1980 status quo by allowing cities to continue "providing [emergency medical] services" until reaching an agreement with the county). Further, since many cities had entered into exclusive agreements prior to 1980, an "anticompetitive effect was the 'foreseeable result[.]'"[3] *Phoebe Putney*, 568 U.S. at 227 (quoting *Eau Claire*, 471 U.S. at 42). And because the city appellees are immune from antitrust liability, CARE Ambulance Service, Inc. ("CARE") is as well. *See Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 878 (9th Cir. 1987) (immunizing "state action, not merely state actors").

CARE is also immune under the *Noerr–Pennington*[4] doctrine, which shields private actors "from antitrust liability for petitioning the government, even when the private actors' motives are anticompetitive." *Sanders v. Brown*, 504 F.3d 903, 912 (9th Cir. 2007). CARE's efforts to obtain or maintain

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aggrieved parties should not forego customary state corrective processes . . . in favor of federal antitrust remedies." (citations omitted)).

[3] *See also* Cal. Health & Safety Code § 1797.6 (providing "for state action immunity under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed functions"); *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755, 758 (9th Cir. 1986) (concluding pre-*Phoebe Putney* that California's Emergency Medical Services Act "has a foreseeably anti-competitive effect").

[4] *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

exclusive contracts with the city appellees falls squarely within the scope of *Noerr–Pennington*. *See id.* ("*Noerr–Pennington* immunity protects private actors when they . . . enter contracts with the government." (citations omitted)).[5]

AFFIRMED.

[5] California Emergency Medical Services Authority's (Doc. 53) and Emergency Medical Services Administrators Association of California's (Doc. 54) motions to become amicus curiae are **GRANTED**. CARE's motion to take judicial notice (Doc. 77) is **DENIED**.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL JS-6

Case No. 8:16-cv-1703-JLS-AFMx (LEAD CASE) Date: April 21, 2017
Title: AmeriCare MedServices, Inc. v. City of Anaheim, et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANTS:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS (Doc. 32)

Before the Court is a Motion to Dismiss filed by Defendant CARE Ambulance Service, Inc. (Mot., Doc. 32.) Plaintiff AmeriCare MedServices, Inc. opposed, and CARE replied.[1] (Opp., Doc. 36; Reply, Doc. 44.) Having taken the matter under submission and

[1] The Court DENIES AmeriCare's Motion to Strike CARE's arguments raised in CARE's Reply. (MTS, Doc. 48.) Upon reviewing CARE's Reply, the Court finds that the arguments raised are responsive to points raised in AmeriCare's Opposition and are proper subjects of a reply brief.

considered the parties' briefs, the Court GRANTS CARE's Motion.

I. BACKGROUND

This action arises out of claims for relief under the Sherman Act by AmeriCare against CARE and twelve Orange County cities. (Anaheim FAC 7144-91, Doc. 19.)[2] AmeriCare and CARE are private companies that provide emergency ambulance services. (*Id.* ¶¶ 5, 7, 26–28, Doc. 19.) AmeriCare's Sherman Act claims against CARE are based on exclusive contracts between CARE and eight Orange County cities for CARE's provision of emergency ambulance services within those cities' geographic areas. (*Id.* ¶ 28; La Habra FAC ¶ 27; Fullerton FAC ¶ 27; Fountain Valley FAC ¶ 27; Costa Mesa FAC ¶ 29; Garden Grove FAC ¶ 28; Buena Park FAC ¶ 27; San Clemente FAC ¶ 28.) The details of AmeriCare's factual allegations regarding how CARE entered into these exclusive contracts with these eight cities, and AmeriCare's efforts to be placed into the emergency ambulance rotation for those cities, are set forth in the Court's previous order

[2] (*See also* La Habra FAC, 8:16-cv-01759-JLS-AFM, Doc. 19; Fullerton FAC, 8:16-cv-01765-JLS-AFM, Doc. 19; Fountain Valley FAC, 8:16-cv-01795-JLS-AFM, Doc. 16; Costa Mesa FAC, 8:16-cv-01804-JLS-AFM, Doc. 16; Garden Grove FAC, 8:16-cv-01806-JLS-AFM, Doc. 18; Buena Park FAC, 8:16-cv-01832-JLS-AFM, Doc. 18; San Clemente FAC, 8:16-cv-01852-JLS-AFM, Doc. 17; Huntington Beach FAC, 8:16-cv-01596-JLS-AFM, Doc. 14; Orange FAC, 8:16-cv-01680-JLS-AFM, Doc. 18; Newport Beach FAC, 8:16-cv-01724-JLS-AFM, Doc. 14; Laguna Beach FAC, 8:16-cv-01817-JLS-AFM, Doc. 15.)

granting the City Defendants' motions to dismiss. (*See* MTD Order at 2–6, Doc. 47.)

The Court granted the City Defendants' motions to dismiss on the ground that *Parker* immunity protects the City Defendants from AmeriCare's Sherman Act claims. (*Id.* at 20.) CARE now moves to dismiss AmeriCare's Sherman Act claims on similar grounds—*Parker* immunity and the *Noerr-Pennington* doctrine.[3] (Mot., Doc. 32.)

II. LEGAL STANDARD

In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all "well-pleaded factual allegations" in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Furthermore, courts must draw all reasonable inferences in the light most favorable to the non-moving party. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). However, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"

[3] AmeriCare's claims for declaration of rights and declaratory judgment are pleaded against only the City Defendants and not against CARE. (*See* Anaheim FAC ¶¶ 92–107; La Habra FAC ¶¶ 89–104; Fullerton FAC ¶¶ 90–105; Fountain Valley FAC ¶¶ 89–104; Costa Mesa FAC ¶¶ 90–105; Garden Grove FAC ¶¶ 90-105; Buena Park FAC ¶¶ 90–105; San Clemente FAC ¶¶ 91–106.)

Iqbal, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

III. DISCUSSION

CARE raises several arguments in favor of dismissal of AmeriCare's Sherman Act claims. (*See* Mem., Doc. 32-1.) Because the Court finds that *Parker* immunity and the *Noerr-Pennington* doctrine completely foreclose AmeriCare's claims against CARE, it is unnecessary to address CARE's other arguments for dismissal.

A. *Parker* Immunity

Parker immunity provides that the Sherman Act does not apply to the actions of a state or the actions of a state's officers or agents as directed by the state's legislature. (MTD Order at 11 (citing *Parker v. Brown*, 317 U.S. 341, 350–51 (1943)).) In dismissing AmeriCare's claims against the City Defendants, the Court found that the City Defendants' actions fell within the scope of *Parker* immunity. (*Id.* at 20.) However, CARE is neither a state agency nor a state officer or agent. Rather, it is a private company that provides emergency medical services. (*See* Anaheim FAC ¶ 7.) Nonetheless, where a private company's monopoly arises from state authorization of anticompetitive conduct, *Parker* immunity extends to the private company as

well. In *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, a taxi fleet operator in Hawaii sued a competing taxi company and Hawaii's Department of Transportation on the theory that their exclusive contract restrained trade and unlawfully monopolized the airport and hotel taxi market in violation of the Sherman Act. 810 F.2d 869, 872 (9th Cir. 1987). After holding that the Department of Transportation had *Parker* immunity to grant the defendant taxi company an exclusive franchise, the Ninth Circuit held that the taxi company also enjoyed *Parker* immunity. *Id.* at 878. "To hold otherwise, would allow the *Parker* doctrine to be circumvented by artful pleading: 'A plaintiff could frustrate any [*Parker* protected state plan] merely by filing suit against the regulated private parties, rather than the state officials who implement the plan.'" *Id.* (quoting *Southern Motor Carriers Rate Conference, Inc. v. U.S.*, 471 U.S. 48, 56 (1985)).

Consequently, *Parker* immunity extends to CARE in this action. Like the private taxi company in *Charley's Taxi*, CARE was granted exclusive contracts with the City Defendants pursuant to the City Defendants' legislative authorization to engage in anticompetitive conduct. In light of this Court's holding that the City Defendants have *Parker* immunity, to not extend that immunity to CARE would frustrate the purposes of *Parker* immunity.

AmeriCare's primary argument against the application of *Parker* immunity mirrors its opposition to the City Defendants' motions to dismiss. Namely, AmeriCare argues that *Charley's Taxi* and the other

out-of-circuit cases cited by CARE are no longer good law after *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 (2013), and *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015). (Opp. at 19 n.3, Doc. 36.) However, these arguments address the proper standard for determining whether a state policy has been "clearly and affirmatively expressed" and how that standard should be applied. (*See* Opp. at 16–19.) Here, the Court has already determined that there is a clearly and affirmatively expressed state policy. (MTD Order at 11–16.)

AmeriCare also makes arguments regarding the scope of *Parker* immunity. However, its arguments fail to directly address why *Parker* immunity would not apply to a private party to a contract when the other contracting party is a state actor shielded by *Parker* immunity. Instead, AmeriCare argues broadly of the limited scope of *Parker* immunity; how it covers only state actors acting in a regulatory capacity, how market participants are not immunized, and how CARE lacks the active state supervision necessary to enjoy *Parker* immunity. (*See* Opp. at 20-28.) With respect to the scope of *Parker* immunity and the existence of any market participant exception, the Court already addressed those arguments in its earlier MTD order. (MTD Order at 16–20.) As for the active state supervision requirement, that requirement concerns situations where the state policy empowers private parties to exercise anti-competitive power over the very markets in which they participate. *See NC Dental*, 135 S. Ct. at 1107 (concerning a state regulatory board, a

majority of whose members were engaged in the active practice of the profession it regulated); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc*., 445 U.S. 97, 99 (1980) (concerning price schedules set by private wine producers, wholesalers, and rectifiers). Here, it is the City Defendants who are empowered to act anti-competitively under the California EMS Act, and CARE's monopoly is simply a byproduct of the City Defendants' actions pursuant to this power. In this situation, the active state supervision requirement does not apply to CARE. *See Charley's Taxi*, 810 F.2d at 878 (finding private company shielded by *Parker* immunity without additional analysis of whether there was sufficient state supervision).

Therefore, *Parker* immunity extends to CARE with respect to its exclusive contracts with the City Defendants and CARE's actions pursuant to those contracts.

B. ***Noerr-Pennington*** **Doctrine**

AmeriCare also alleges in its FACs that CARE makes campaign contributions to members of city government "with the mutual understanding that the contributions secure CARE's continued role" as an exclusive ambulance service provider. (Anaheim FAC ¶ 35; La Habra FAC ¶ 33; Fullerton FAC ¶ 34; Fountain Valley FAC ¶ 33; Costa Mesa FAC ¶ 34; Garden Grove FAC ¶ 34; Buena Park FAC ¶ 34; San Clemente FAC ¶ 35.) To the extent AmeriCare alleges that this, or any other alleged action by CARE to secure an

exclusive contract, violates the Sherman Act, such claims are barred by the *Noerr-Pennington* doctrine.

The *Noerr-Pennington* doctrine protects the right of private entities to petition the government. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 145 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) ("Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."). As *Parker* immunity stands for the proposition that the Sherman Act does not restrain a state actor from acting within its governmental capacity, the *Noerr-Pennington* doctrine stands for the proposition that the Sherman Act "do[es] not regulate the conduct of private individuals in seeking anticompetitive action from the government." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379–80 (1991). The *Noerr-Pennington* doctrine is broad; it "protects petitions to all departments of the government." *Sanders v. Brown*, 504 F.3d 903, 912 (9th Cir. 2007) (citations omitted). This includes protecting private actors when they enter into contracts with the government. *Id.* Moreover, "*Noerr-Pennington* immunity protects a private party from liability not only for the petition, but also for any injuries that result 'directly' from valid government action taken on the petitioner's behalf." *Id.* at 914 (citing *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 299 (9th Cir. 1994)).

There is a "sham" exception to *Noerr-Pennington* that applies when the petitioning activity "is actually nothing more than an attempt to interfere directly

with the business relationships of a competitor." *Omni*, 499 U.S. at 380. However, this exception is confined to "situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id.* "A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." *Id.* (citing *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)). "A 'sham' situation involves a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all." *Id.* (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988)). It does not involve a situation where the defendant "genuinely seeks to achieve his governmental result, but does so *through improper means.*" *Id.* (quoting *Allied Tube*, 286 U.S. at 508 n.10). For example, denying meaningful access to the "appropriate city administrative and legislative fora" may constitute improper or even unlawful lobbying, but it does not necessarily constitute a "sham." *Id.* at 381.

Here, any conduct by CARE to petition the City Defendants to grant it an exclusive contract plainly falls within the scope of *Noerr-Pennington* immunity. There are no allegations that CARE did not genuinely seek these exclusive contracts with the City Defendants, nor can AmeriCare credibly make such allegations considering that CARE currently provides emergency ambulance services to the City Defendants with which it has contracts. (*See* Anaheim FAC ¶ 31;

La Habra FAC ¶ 27; Fullerton FAC ¶ 30; Fountain Valley FAC ¶ 27; Costa Mesa FAC ¶ 29; Garden Grove FAC ¶ 28; Buena Park FAC ¶ 27; San Clemente FAC ¶ 28.) It also bears noting that AmeriCare's allegations of harm mostly arise out of CARE's exclusive contracts with the City Defendants rather than the process CARE used to procure those contracts. For the sham exception to apply, AmeriCare has to point to the ways in which CARE has used the *process* of obtaining the contracts anti-competitively (and not for the purpose of obtaining the contracts). *See Omni*, 499 U.S. at 380. AmeriCare's only allegation on this point is that CARE makes campaign contributions to members of city government to secure its contractual relationships with the City Defendants. (Anaheim FAC ¶ 35; La Habra FAC ¶ 33; Fullerton FAC ¶ 34; Fountain Valley FAC ¶ 33; Costa Mesa FAC ¶ 34; Garden Grove FAC ¶ 34; Buena Park FAC ¶ 34; San Clemente FAC ¶ 35.) Such actions, without more, do not fall under the sham exception to *Noerr-Pennington*. *See Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886, 895 (9th Cir. 1988) ("Payments to public officials, in the form of . . . campaign contributions, is a legal and well-accepted part of our political process."). Moreover, to the extent AmeriCare is suggesting that CARE is engaging in a conspiracy with the City Defendants to perpetuate a monopoly and restrain trade, no such "conspiracy" exception to *Noerr-Pennington* exists. *Omni*, 499 U.S. at 383. Finally, that CARE's efforts have resulted in exclusive contracts with eight City Defendants does not preclude application of *Noerr-Pennington*. *See Sanders*, 504 F.3d at 914

(acknowledging that "*Noerr-Pennington* immunity protects a private party from liability not only for the petition, but also for any injuries that result 'directly' from valid government action taken on the petitioner's behalf").

AmeriCare argues that *Noerr-Pennington* does not apply here because CARE is engaging in market conduct rather than petitioning activity. (Opp. at 28–29.) In support, AmeriCare cites to cases stating that the scope of the immunity depends on the "source, context, and nature of the anticompetitive restraint at issue," *Allied Tube*, 486 U.S. at 499, and the "degree of political discretion exercised by the government agency," *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1062 (9th Cir. 1998). (*Id.* at 29.) The Court finds neither case applicable here. *Allied Tube* addressed whether *Noerr-Pennington* applies to the efforts of a private party to affect the product standard-setting process of a private association, whose standards were being widely adopted into law by state and local governments. *Allied Tube*, 486 U.S. at 495. Here, CARE directly petitioned the City Defendants, not some private third-party that might itself affect state action.

As for *Kottle*, that case addressed the scope of the sham exception in the administrative context. 146 F.3d at 1062. In doing so, *Kottle* noted that the scope of the sham exception "depends on the branch of government involved." 146 F.3d at 1061. The exception is "extraordinarily narrow" for the legislative branch, but it can become broader when the executive or judicial branch is involved. *Id.* The court acknowledged that the scope

of the sham exception "has not always been clear," but that "the scope of immunity depends on the degree of political discretion exercised by the government agency." *Id.* at 1062. Here there is no question as to the scope or degree of political discretion available to the City Defendants—they are empowered to grant exclusive contracts for the provision of emergency ambulance services under the EMS Act. (*See* MTD Order at 16.) Contrary to AmeriCare's contention, a finding that *Noerr-Pennington* applies in this case does not amount to the immunization of any private party who petitions and obtains a monopoly contract from a municipality. It is the legislature's grant of power to the City Defendants through the EMS Act that makes CARE's petitioning activity valid.

Therefore, *Noerr-Pennington* immunity applies to any conduct by CARE to obtain or maintain an exclusive contract with the City Defendants.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS CARE's Motion to Dismiss. Because the Court finds that AmeriCare cannot amend its complaint to state a viable Sherman Act claim, the Court DISMISSES AmeriCare's Sherman Act claims WITH PREJUDICE.

Initials of Preparer: tg

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMERICARE MEDSERVICES, INC., Plaintiff, vs. CITY OF ANAHEIM and CARE AMBULANCE SERVICE, INC., Defendants.	Lead Case No. 8:16-cv-1703-JLS-AFMx **ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS** (Filed Mar. 28, 2017)
AMERICARE MEDSERVICES, INC., Plaintiff, vs. CITY OF HUNTINGTON BEACH, Defendant.	Consolidated With Case No. 8:16-cv-1596-JLS-AFMx
AMERICARE MEDSERVICES, INC., Plaintiff, vs. CITY OF ORANGE, Defendant.	Consolidated With Case No. 8:16-cv-1680-JLS-AFMx

AMERICARE MEDSERVICES, INC., Plaintiff, vs. CITY OF NEWPORT BEACH, Defendant.	Consolidated With Case No. 8:16-cv-1724-JLS-AFMx
AMERICARE MEDSERVICES, INC., Plaintiff, vs. CITY OF LA HABRA and CARE AMBULANCE SERVICE, INC., Defendants.	Consolidated With Case No. 8:16-cv-1759-JLS-AFMx
AMERICARE MEDSERVICES, INC., Plaintiff, vs. CITY OF FULLERTON and CARE AMBULANCE SERVICE, INC., Defendants.	Consolidated With Case No. 8:16-cv-1765-JLS-AFMx

AMERICARE MEDSERVICES, INC., Plaintiff, vs. CITY OF FOUNTAIN VALLEY and CARE AMBULANCE SERVICE, INC., Defendants.	Consolidated With Case No. 8:16-cv-1795-JLS-AFMx
AMERICARE MEDSERVICES, INC., Plaintiff, vs. CITY OF COSTA MESA and CARE AMBULANCE SERVICE, INC., Defendants.	Consolidated With Case No. 8:16-cv-1804-JLS-AFMx
AMERICARE MEDSERVICES, INC., Plaintiff, vs. CITY OF GARDEN GROVE and CARE AMBULANCE SERVICE, INC., Defendants.	Consolidated With Case No. 8:16-cv-1806-JLS-AFMx

AMERICARE MEDSERVICES, INC., Plaintiff, vs. CITY OF LAGUNA BEACH, Defendant.	Consolidated With Case No. 8:16-cv-1817-JLS-AFMx
AMERICARE MEDSERVICES, INC., Plaintiff, vs. CITY OF BUENA PARK and CARE AMBULANCE SERVICE, INC., Defendants.	Consolidated With Case No. 8:16-cv-1832-JLS-AFMx
AMERICARE MEDSERVICES, INC., Plaintiff, vs. CITY OF SAN CLEMENTE, and CARE AMBULANCE SERVICE, INC., Defendants.	Consolidated With Case No. 8:16-cv-1832-JLS-AFMx

I. INTRODUCTION

Before the Court are twelve separate actions filed by Plaintiff AmeriCare MedServices, Inc. against

twelve Orange County cities.[1] In each action, the City Defendant filed a Motion to Dismiss.[2] Plaintiff AmeriCare MedServices, Inc. opposed each Motion,[3] and each of the City Defendants replied. Having taken the matter under submission and considered the parties' briefs and oral arguments, the Court GRANTS the City Defendants' Motions.

II. BACKGROUND

The nature of AmeriCare's action against each City Defendant is substantively the same. AmeriCare seeks relief from the City Defendants under the Sherman Act for each City's alleged abuse of its police and

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[1] In some of these actions, AmeriCare also included CARE Ambulance Service, Inc. as a Defendant.

[2] The City Defendants are the Cities of Huntington Beach, Orange, Anaheim, Newport Beach, La Habra, Fullerton, Fountain Valley, Costa Mesa, Garden Grove, Laguna Beach, Buena Park, and San Clemente.

[3] To support AmeriCare's Oppositions, Richard A. Narad, a professor of Health Services Administration at California State University Chico, has filed motions for leave to file amicus briefing in this matter. An amicus brief is normally allowed only when (1) "a party is not represented competently or is not represented at all," (2) "the amicus has an interest in another case that may be affected by the holding in the present case," or (3) "the amicus can present unique information that can help the court in a way that is beyond the abilities the lawyers for the parties are able to provide." *Gabriel Techs. Corp. v. Qualcomm Inc.*, No. 08CV1992 AJB (MDD), 2012 WL 849167, at *4 (S.D. Cal. Mar. 13, 2012) (citing *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)). Because the Court finds that Professor Narad fails to establish any of these bases, the Court DENIES his motions for leave to file amicus briefing.

regulatory powers in designating a single provider of emergency ambulance service in its geographical area. Because the history of each City's provision of emergency ambulance service is relevant to this case, the Court relates that history for each City as alleged in AmeriCare's amended complaints.

Huntington Beach. Starting in the 1960s, the City of Huntington Beach had a de facto, unwritten agreement with Seals Ambulance Services, Inc. to provide emergency ambulance service within Huntington Beach city limits. (Huntington Beach FAC ¶ 23, 8:16-cv-1596-JLS-AFMx, Doc. 14.)[4] In 1986, Huntington Beach entered into a contract with Orange County in which the County would provide for the licensing and regulation of ambulance service within Huntington Beach. (Huntington Beach FAC, Ex. A, 8:16-cv-1596-JLS-AFMx, Doc. 14-1.) Seals continued to operate exclusively within Huntington Beach until 1993. (Huntington Beach FAC ¶ 27.) In 1993, Huntington Beach ceased using its existing provider and began providing emergency ambulance service itself. (*Id.* ¶ 29.)

Orange. In 1972, the City of Orange had a de facto, unwritten agreement with Morgan Ambulance Service, Inc. to provide emergency ambulance service

[4] For ease of reference, citations to the parties' filings will identify the City Defendant involved in the action. Thus, "Huntington Beach FAC" refers to AmeriCare's First Amended Complaint against Huntington Beach. Here, the relevant filing can be found on the docket for the Huntington Beach Action, Case No. 8:16-cv-1596-JLS-AFM, at ECF No. 14.

within Orange city limits. (Orange FAC ¶ 23, 8:16-cv-1680-JLS-AFM, Doc. 18.) In 1979, Orange entered into a contract with Orange County in which the County would provide for the licensing and regulation of ambulance and convalescent transport services within Orange. (Orange FAC, Ex. A, 8:16-cv-1680-JLS-AFM, Doc. 18-1.) That contract was renewed in 1980, and then amended in 1986. (*Id.*) Morgan (which later became Medix Ambulance Service) continued to operate exclusively within Orange until 1995. (Orange FAC ¶¶ 23, 27.) In 1995, Orange ceased using its existing provider and began providing emergency ambulance service itself. (*Id.* ¶ 29.)

Anaheim. As of June 1, 1980, the City of Anaheim had a de facto, unwritten agreement with Southland Ambulance to provide emergency ambulance service within Anaheim city limits. (Anaheim FAC ¶ 26, 8:16-cv-1703-JLS-AFM, Doc. 19.) Southland was purchased in 1993 and subsequently passed through several corporate owners before merging with its successor, American Medical Response, Inc. ("AMR"). (*Id.* ¶ 27.) AMR served as the ambulance service provider within Anaheim until 1998. (*Id.*) In 1998, Anaheim ceased using its existing provider and granted an exclusive contract to CARE Ambulance Service, Inc. (*Id.* ¶ 28.)

Newport Beach. From the 1960s into the early 1990s, the City of Newport Beach had a de facto, unwritten agreement with Schaefer Ambulance Service, Inc. and Seals to provide emergency ambulance service within Newport Beach city limits. (Newport Beach FAC ¶ 23, 8:16-cv-1724-JLS-AFM, Doc. 14.) In 1994,

Newport Beach entered into an exclusive contract with MedTrans to provide emergency ambulance service in Newport Beach. (*Id.* ¶ 25.) MedTrans did so until 1996, when Newport Beach ceased their relationship and began providing emergency ambulance service itself. (*Id.* ¶¶ 25, 27.)

La Habra. From 1979 until 1995, the City of La Habra had a de facto, unwritten agreement with Emergency Ambulance Service, Inc. to provide emergency ambulance service within La Habra city limits. (La Habra FAC ¶¶ 25–26, 8:16-cv-1759-JLS-AFM, Doc. 19.) In 1995, La Habra initiated a city-operated emergency ambulance service program which was operated by its municipal fire department. (*Id.* ¶ 26.) On June 27, 2005, La Habra disbanded its fire department and transferred its ambulance service to its municipal police department. (*Id.*) In 2008, La Habra granted an exclusive contract for emergency ambulance service to CARE. (*Id.* ¶ 27.)

Fullerton. As of June 1, 1980, the City of Fullerton had a de facto, unwritten agreement with Southland to provide emergency ambulance service within Fullerton city limits. (Fullerton FAC ¶ 26, 8:16-cv-1765-JLS-AFM, Doc. 19.) Southland eventually merged with AMR, which continued to provide emergency ambulance service in Fullerton until 2003. (*Id.*) In November 2003, Fullerton ceased using its existing provider and granted an exclusive contract to CARE for the provision of emergency ambulance service. (*Id.* ¶ 27.)

Fountain Valley. As of June 1, 1980, the City of Fountain Valley had a de facto, unwritten agreement with Seals to provide emergency ambulance service within Fountain Valley city limits. (Fountain Valley FAC ¶ 26, 8:16-cv-1795-JLS-AFM, Doc. 16.) In 1998, Fountain Valley granted an exclusive contract to CARE, which it has renewed every year since. (*Id.* ¶ 27.)

Costa Mesa. As of June 1, 1980, the City of Costa Mesa had a de facto, unwritten agreement with Schaefer and Seals to provide emergency ambulance services within Costa Mesa city limits. (Costa Mesa FAC ¶ 26, 8:16-cv-1804-JLS-AFM, Doc. 16.) On August 1, 1981, Costa Mesa entered into a contract with Orange County to administer emergency response ambulance service within Costa Mesa. (*Id.* ¶ 27.) Schaefer and Seals continued to operate in Costa Mesa without a contract until the mid-1990s. (*Id.* ¶ 28.) In October 2000, Costa Mesa awarded an exclusive agreement for all emergency ambulance service within city limits to Schaefer. (*Id.*) That agreement was extended until September 2008. (*Id.*) In 2008, Costa Mesa granted an exclusive contract to CARE. (*Id.* ¶ 29.)

Garden Grove. As of June 1, 1980, the City of Garden Grove had de facto, unwritten agreements with several ambulance services, including Schaefer, Southland (later acquired by AMR), and Medix, to provide emergency ambulance services within its city limits. (Garden Grove FAC ¶ 26, 8:16-cv-1806-JLS-AFM, Doc. 18.) In 1994, CareLine, a successor to Southland, was awarded an exclusive contract to provide emergency

ambulance service in Garden Grove. (*Id.* ¶ 27.) In 2000, Garden Grove granted an exclusive contract to CARE. (*Id.* ¶ 28.)

Laguna Beach. As of June 1, 1980, the City of Laguna Beach had de facto, unwritten agreements with several ambulance services, including Wind Ambulance, Inc., Scudders Ambulance Service, Inc., and Life Care Ambulance (later acquired by AMR), to provide emergency ambulance services within its city limits. (Laguna Beach FAC ¶¶ 24–25, 8:16-cv-1817-JLS-AFM, Doc. 15.) In 1996, Laguna Beach granted an exclusive contract to Doctor's Ambulance Service for emergency ambulance service. (*Id.* ¶ 26.)

Buena Park. As of June 1, 1980, the City of Buena Park did not have a written agreement in effect with its designated private emergency ambulance service provider. (Buena Park FAC ¶ 26, 8:16-cv-1832-JLS-AFM, Doc. 18.) In 1999, Buena Park granted an exclusive contract to CARE, which it has regularly extended to the present. (*Id.* ¶ 27.)

San Clemente. As of June 1, 1980, the City of San Clemente utilized multiple private ambulance services such as Doctor's, Life Care, Medix, and Scudders, to provide emergency ambulance services within its city limits. (San Clemente FAC ¶¶ 26–27, 8:16-cv-1852-JLS-AFM, Doc. 17.) At the time, San Clemente did not have a written agreement in effect with its providers. (*Id.* ¶ 26.) In 2015, San Clemente granted an exclusive contract to CARE for the provision of emergency ambulance service. (*Id.* ¶ 28.)

On February 25, 2015, AmeriCare submitted a written request to the Orange County Emergency Medical Services Authority ("OCEMS") to be placed on rotation for emergency ambulance services within the geographical area of each of the City Defendants. (City Defendants FACs.)[5] OCEMS replied on March 18, 2015, directing AmeriCare to contact the city manager for each City Defendant. (*Id.*) AmeriCare submitted its written request to each City Defendant on March 19, 2015, explaining its correspondence with OCEMS and requesting that either the City Defendant arrange for AmeriCare to be placed into the emergency ambulance service rotation or state a position that it does not have responsibility for the administration of prehospital emergency medical services. (*Id.*) The City Defendants refused AmeriCare's request. (*Id.*)

AmeriCare then filed the instant actions against the City Defendants. AmeriCare asserts the following claims against all City Defendants: (1) monopolization and attempted monopolization under Section 2 of the Sherman Act; (2) declaration of rights under Section 1060 of the California Code of Civil Procedure; and (3) declaratory judgment under 28 U.S.C. § 2201. (City Defendants FACs.) In nine of the twelve actions, AmeriCare asserts the following additional claims: (1) conspiracy to monopolize under Section 2 of the

[5] To avoid citing to each FAC every time a fact common to each action is recited by the Court, the Court cites generally to all the FACs. Pincites are omitted because the relevant information is not necessarily alleged on the same page or paragraph of each FAC.

Sherman Act; and (2) conspiracy to restrain trade under Section 1 of the Sherman Act. (Anaheim FAC ¶¶ 71–91; La Habra FAC ¶¶ 68–88; Fullerton FAC ¶¶ 69–89; Fountain Valley FAC ¶¶ 68–88; Costa Mesa FAC ¶¶ 69–89; Garden Grove FAC ¶¶ 69–89; Laguna Beach FAC ¶¶ 63–81; Buena Park FAC ¶¶ 69–89; San Clemente FAC ¶¶ 70–90.)

The City Defendants now move to dismiss AmeriCare's claims against them.

III. LEGAL STANDARD

A. Rule 12(b)(1)

"A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). In other words, a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) can be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* "Dismissal for lack of subject matter jurisdiction is appropriate if the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-985 (9th Cir. 2008). "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke

federal jurisdiction." *Meyer*, 373 F.3d at 1039. "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.* When a motion is made pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff has the burden of proving that the court has subject matter jurisdiction. *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001) *overruled on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

B. Rule 12(b)(6)

In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all "well-pleaded factual allegations" in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Furthermore, courts must draw all reasonable inferences in the light most favorable to the non-moving party. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). However, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

IV. DISCUSSION

A. Interstate Commerce Requirement

Three of the City Defendants raise the argument that AmeriCare's Sherman Act claims must be dismissed for lack of subject matter jurisdiction because AmeriCare fails to plead that City Defendants' conduct has any effect on interstate commerce. (Orange Mem. at 3, Doc. 24; Buena Park Mem. at 4, Doc. 24; San Clemente Mem. at 2, Doc. 23.) Section 1 of the Sherman Act makes unlawful "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States." 15 U.S.C. § 2. In *McLain v. Real Estate Board of New Orleans, Inc.*, the Supreme Court declared that "jurisdiction may not be invoked under [the Sherman Act] unless the relevant aspect of interstate commerce is identified." 444 U.S. 232, 242 (1980). Therefore, a plaintiff must allege a relationship between the defendant's conduct and interstate commerce in the pleadings. *McLain*, 444 U.S. at 242. The Ninth Circuit has interpreted *McLain* to mean that the relationship to interstate commerce "is not only an element of the alleged antitrust offense, but also a necessary jurisdictional requirement." *U.S. v. ORS, Inc.*, 997 F.2d 628, 629 (9th Cir. 1993).

To meet this requirement, the Ninth Circuit initially stated that a plaintiff must identify a relevant

aspect of interstate commerce and show "as a matter of practical economics" that the defendant's activities have a "not insubstantial effect on the interstate commerce involved." *Palmer v. Roosevelt Lake Log Owners Ass'n, Inc.*, 651 F.2d 1289, 1291 (9th Cir. 1981) (quoting *McLain*, 444 U.S. at 246) (internal quotation marks omitted). The Ninth Circuit has more recently stated, however, that a plaintiff must show that the defendant's conduct has a "substantial effect on interstate commerce." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1143 (9th Cir. 2003) (quoting *McLain*, 444 U.S. at 242) (internal quotation marks omitted); *see also Cherrone v. Florsheim Development*, No. CIV. 2:12-02069 WBS CKD, 2012 WL 4891743, at *2 (E.D. Cal. Oct. 12, 2012) (applying the "substantial effect" standard).

AmeriCare's pleadings fail under either standard. AmeriCare pleads only that the City Defendants have "attempted and succeeded at maintaining an illegal monopoly in restraint of interstate commerce." (City Defendants FACs.) There is no allegation of a substantial effect on interstate commerce.[6] (*See id.*) There is no identification of any aspect of interstate commerce that

[6] Even if AmeriCare included such an allegation, the bare allegation alone would not be enough. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (noting that "a formulaic recitation of the elements of a cause of action will not do" and that "[f]actual allegations must be enough to raise a right to relief above the speculative level"); *see also McLain*, 444 U.S. at 242 ("[I]t is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce.")

was affected by the City Defendants' conduct, nor any allegations from which the Court can reasonably infer that, "as a matter of practical economics," the City Defendants' conduct had a substantial (or not insubstantial) effect on interstate commerce.

Accordingly, the Court concludes that dismissal of AmeriCare's Sherman Act claims against the City Defendants is appropriate on this basis. Typically, when a deficiency in the plaintiff's complaint is of a type that can be cured by amendment, the Court will dismiss the complaint with leave to amend. *See Doe v. U.S.*, 58 F.3d 494, 497 ("[A] district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.") However, for reasons stated below, the Court finds that granting leave to amend would be futile and inappropriate because even if AmeriCare were to adequately plead substantial effects on interstate commerce, its Sherman Act claims would incurably fail on other grounds.

B. ***Burford*** **Abstention**

Seven of the City Defendants urge the Court to invoke *Burford* abstention and decline to hear this case. (Orange Mem. at 9–11; La Habra Mem. at 19–20, Doc. 28; Fullerton Mem. at 18–19, Doc. 28; Costa Mesa Mem. at 19–20, Doc. 25; Garden Grove Mem. at 15–16, Doc. 25; Buena Park Mem. at 15–17; San Clemente Mem. at 10–12.) *Burford* abstention allows a court to

"decline to rule on an essentially local issue arising out of a complicated state regulatory scheme." *U.S. v. Morros*, 268 F.3d 695, 705 (9th Cir. 2001). Its purpose is to protect complex state administrative processes from undue federal interference. *See New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 362 (1989). In the Ninth Circuit, invocation of *Burford* abstention requires (1) "that the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court"; (2) "that federal issues could not be separated easily from complex state law issues with respect to which state courts might have special competence"; and (3) "that federal review might disrupt state efforts to establish a coherent policy." *Id.* (quoting *Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982)).

None of these requirements are met here. There is no showing that California has chosen to concentrate suits challenging municipal actions in a particular court. At least one of the City Defendants outright admits that the first factor is not met. (Buena Park Mem. at 15–16 ("[T]he first *Morros* factor is apparently absent (there seems to be no special tribunal for claims relating to EMS exclusion). . . .").) Nor is this a case in which the federal issues cannot easily be separated from state law issues or in which federal review might disrupt state efforts to establish a coherent policy. The mere possibility that exercise of federal jurisdiction over federal antitrust claims might lead to a conflict with a state court decision is not enough to require abstention. *See Turf Paradise, Inc. v. Arizona Downs*, 670

F.2d 813, 820 (9th Cir. 1982). As the Supreme Court has stated, *Burford* abstention represents an "extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (citation and internal quotation marks omitted). Exercise of jurisdiction is particularly important here because "federal courts have exclusive jurisdiction over federal antitrust claims." *Turf Paradise*, 670 F.2d at 821.

The Court therefore declines to apply *Burford* abstention to this case.

C. ***Parker* Immunity**

All City Defendants raise the defense of *Parker* immunity to AmeriCare's Sherman Act claims. (*See* City Defendants Mems.) In *Parker v. Brown*, the Supreme Court held that the Sherman Act does not apply to the actions of a state or the actions of its officers or agents as directed by its legislature. 317 U.S. 341, 350–51 (1943). However, state agencies or subdivisions of a state are not exempt from the Sherman Act "simply by reason of their status as such." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978). Rather, *Parker* immunity exempts anticompetitive conduct "engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413. With respect to local governmental entities, their activities are protected by

Parker immunity "if they are undertaken pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition."[7] *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1011 (2013) (quoting *Cmty. Commc'ns Co. v. Boulder*, 455 U.S. 40, 52 (1982)). It is unnecessary for a state legislature to "expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." *Id.* (quoting *Town of Hallie v. Eau Claire*, 471 U.S. 34, 43 (1985)). A state policy has been clearly articulated and affirmatively expressed "if the anticompetitive effect was the 'foreseeable result' of what the State authorized." *Id.* (quoting *Hallie*, 471 U.S. at 42). An anticompetitive effect is foreseeable if it is "the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Id.* at 1012–13.

With these principles in mind, the Court analyzes whether a state policy of anticompetitive conduct exists here.

1. California Government Code § 38794

Section 38794 of the California Government Code states that "[t]he legislative body of a city may contract for ambulance service to serve the residents of the city

[7] "[U]nlike private parties, such entities are not subject to the 'active state supervision requirement' because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1011 (2013) (quoting *Town of Hallie v. Eau Claire*, 471 U.S. 34, 46–47 (1985)).

as convenience requires." Cal. Gov't Code § 38794. Over thirty years ago, the Ninth Circuit relied on Section 38794 to hold that cities providing or contracting for ambulance service were entitled to *Parker* immunity. In *Springs Ambulance Service, Inc. v. City of Rancho Mirage*, a private ambulance company brought suit under the Sherman Act after three California cities decided to provide free municipal ambulance services through Riverside County (which in turn engaged the California Department of Forestry to provide the ambulance service). 745 F.2d 1270, 1271 (9th Cir. 1984). In concluding that the exclusion of the private ambulance company did not run afoul of the Sherman Act, the court referred to Section 38794 of the California Government Code. *Springs Ambulance*, 745 F.2d at 1273 (citing Cal. Gov't Code § 38794). Even though the statute does not explicitly authorize cities to abolish competition from private ambulance companies, the court concluded that "the exclusion of private ambulance companies is a necessary or reasonable consequence of providing subsidized municipal ambulance service, and was surely within the contemplation of the legislature when it enacted Gov't Code § 38794." *Id.* In doing so, the court noted that "[w]here the residents of a city pay taxes to make emergency ambulance service available, it would be anomalous to require that the city also dispatch a private for-hire service with, or in alternation with, its own." *Id.* "To do so would, in effect, force citizen users to pay twice for the same service." *Id.*

Although *Springs Ambulance* has not been expressly overruled, the validity of its reasoning is in question following the Supreme Court's decision in *Phoebe Putney*. In *Phoebe Putney*, the FTC filed an antitrust suit against the Hospital Authority of Albany-Dougherty County to enjoin the hospital authority from acquiring a second hospital in Dougherty County. 133 S. Ct. at 1008. Acquisition of the hospital would have resulted in the hospital authority owning the only two hospitals in Dougherty County. *Id.* The question before the Court was "whether a Georgia law that creates special-purpose public entities called hospital authorities and gives those entities general corporate powers, including the power to acquire hospitals, clearly articulates and affirmatively expresses a state policy to permit acquisitions that substantially lessen competition." *Id.* at 1007. In holding that the Georgia law did not express such a policy, the Court rejected the Eleventh Circuit's application of a "reasonably anticipated" test for determining whether an anticompetitive effect was foreseeable. *Id.* at 1009. Rather, the anticompetitive effect had to be "the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Id.* at 1012–13.

In applying that standard to the facts before it, the Supreme Court concluded that the Georgia law empowering hospital authorities to acquire hospitals did not clearly articulate and affirmatively express a state policy for hospital authorities to make acquisitions that would substantially reduce competition. *Id.* at 1012. The Court distinguished the Georgia law from

previous decisions finding an anticompetitive policy in other contexts. "For example, in *Hallie* [*v. Eau Claire*], the Wisconsin statutory law regulating the municipal provision of sewage services expressly permitted cities to limit their service to surrounding unincorporated areas." *Id.* at 1013 (citing *Hallie*, 471 U.S. at 41). In *City of Columbia v. Omni Outdoor Advertising, Inc.*, the clear articulation test was "easily satisfied" because "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." *Id.* (quoting *Omni*, 499 U.S. 365, 373 (1991)).

"By contrast, 'simple permission to play in a market' does not 'foreseeably entail permission to roughhouse in that market unlawfully.'" *Id.* (citation omitted). "[T]he power to acquire hospitals . . . does not ordinarily produce anticompetitive effects." *Id.* at 1014. The fact that a reasonable legislature could anticipate the possibility of anticompetitive conduct fell "well short of clearly articulating an affirmative state policy to displace competition with a regulatory alternative." *Id.* Moreover, the fact that the state legislature intended to improve access to affordable health care to all Georgia residents did not "logically suggest" that the legislature intended the hospital authorities to create hospital monopolies. *Id.* at 1015.

In light of the Court's reasoning in *Phoebe Putney*, the Ninth Circuit's analysis of Government Code

Section 38794 no longer appears valid.[8] Nothing in Section 38794 explicitly confers on city governments the authority to act anti-competitively. Nor does the power to enter into contracts with ambulance service providers inherently restrict competition between those providers. A city could, after all, engage in a competitive bidding process to choose an ambulance service provider and regularly open bids for better contracts. As the Supreme Court noted, "[w]hen a State grants some entity general power to act . . . it does so against the backdrop of federal antitrust law." *Phoebe Putney*, 133 S. Ct. at 1013 (citing *FTC v. Ticor Title Ins.*

[8] The City Defendants point to *United National Maintenance, Inc. v. San Diego Convention Center, Inc.*, 766 F.3d 1002 (9th Cir. 2014), to argue that *Springs Ambulance*'s interpretation of Section 38794 is still valid. *United National* addressed whether the San Diego Convention Center was empowered to hire cleaning staff internally to the exclusion of outside cleaning companies. The Ninth Circuit held that Sections 37506 and 37505 of the Government Code granted San Diego the authority to not just "play in the market," but to act anti-competitively with respect to its convention center. *United Nat'l*, 766 F.3d at 1010–11. In doing so, the court relied on the words "manage its use" in Section 37506 and Section 37505's requirement that funds from the convention center first pay for the center before being applied to the benefit of the municipality. *Id.* The court considered "managerial authorization" to be distinct from a general grant of corporate authority. *Id.* at 1010.

The Court does not find that *United National* conclusively affirms the holding in *Springs Ambulance.* The two cases examine different sections of the Government Code that prescribe different powers to municipalities. Moreover, Section 38794 does not address managerial authorization or any other factors that the Ninth Circuit relied on in *United National* to find state authorization of anti-competitive conduct.

Co., 504 U.S. 621 (1992)). Just because the California legislature could reasonably anticipate that a city government could use its Section 38794 powers in anticompetitive ways does not mean that the California legislature expressed an affirmative state policy that cities do so. *See id.* at 1014. Finally, to the extent Section 38794 furthers critical state interests in the public peace, health, and safety, *see* Cal. Health & Safety Code § 13801, these interests do not logically suggest a state policy permitting anticompetitive conduct in furtherance of those interests. *See Phoebe Putney*, 133 S. Ct. at 1015. Accordingly, Government Code Section 38794 by itself does not appear to clearly articulate and affirmatively express a state policy to displace competition in the emergency ambulance services market.

2. The California EMS Act

However, Section 38794 is not the only California statute relevant to this issue. In 1980, the California legislature enacted the Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act (the "EMS Act"). *County of San Bernardino v. City of San Bernardino*, 15 Cal. 4th 909, 913, 915 (1997). The EMS Act created a comprehensive system governing virtually every aspect of prehospital emergency medical services in California. *Id.* at 915. The Act created a two-tiered system of regulation consisting of the Emergency Medical Services Authority at the state level and local EMS agencies at the county level. *Id.* at 915–16. The original draft of the EMS Act afforded no particular role for cities, but the version

that was ultimately enacted included a provision allowing cities that already provided prehospital emergency medical services to continue doing so. *Id.* at 916. That provision stated, in relevant part, as follows:

> Upon the request of a city . . . that contracted for or provided, as of June 1, 1980, prehospital emergency medical services, a county shall enter into a written agreement with the city . . . regarding the provision of prehospital emergency medical services for that city. . . . Until such time that an agreement is reached, prehospital emergency medical services shall be continued at not less than the existing level, and the administration of prehospital EMS by cities . . . presently providing such services shall be retained by those cities. . . .

Cal. Health and Safety Code § 1797.201. The California Supreme Court later interpreted Section 1797.201 as permitting eligible cities to continue administering prehospital emergency medical services[9] indefinitely. *See County of San Bernardino*, 15 Cal. 4th at 922–24.

In 1982, the Supreme Court issued its opinion in *Community Communications Co., Inc. v. City of Boulder*, where for the first time a majority of the Court adopted the clear articulation test for extending *Parker*

[9] "Emergency medical services" are defined as "the services utilized in responding to a medical emergency." Cal. Health and Safety Code § 1797.72. Emergency ambulance service plainly falls within that definition.

immunity to municipal activities.[10] 455 U.S. 40, 51 (1982). In response, the California legislature amended the EMS Act in 1984, declaring that California's policy of "ensur[ing] the provision of effective and efficient emergency medical care" had been hindered by the Supreme Court's holding. *See* Cal. Health and Safety Code § 1797.6(a). Accordingly, the legislature explicitly stated its intention "to prescribe and exercise the degree of state direction and supervision over emergency medical services as will provide for state action immunity under federal antitrust laws for activities undertaken by local governmental entities carrying out their prescribed functions under this division." Cal. Health and Safety Code § 1797.6(b). "[T]his division" includes Section 1797.201. Given that the EMS Act (1) contemplates the provision of prehospital emergency medical services by cities; and (2) contains a clear and express intention by the state to immunize from antitrust liability local government conduct in furtherance of the EMS Act, the Court concludes that *Parker* immunity extends to the City Defendants in this action.

3. The City Defendants' Compliance with the EMS Act

Americare raises a number of arguments against this conclusion. First, AmeriCare contends that the EMS Act contemplates anticompetitive conduct only in

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[10] The clear articulation test first appeared in *City of Lafayette*, but only a plurality of the Court joined that portion of Justice Brennan's opinion. *See* 435 U.S. 389.

limited circumstances, none of which apply here. (*See* AmeriCare Opps.) Specifically, AmeriCare argues that (1) pursuant to Section 1797.224, only county EMS agencies can create "exclusive operating areas" for emergency ambulance services; and (2) pursuant to Section 1797.201, cities can exclusively contract for or provide emergency ambulance services only to the extent they contracted for or provided those services as of June 1, 1980. (*Id.*) AmeriCare asserts that none of the City Defendants meet this requirement under Section 1797.201. (*Id.*)

The Court does not find that Section 1797.224 precludes anticompetitive actions by cities in furtherance of the EMS Act. Section 1797.224 explicitly states that "[n]othing in this section supersedes Section 1797.201." Therefore, Section 1797.224 does not limit in any way a city's authority to maintain a monopoly emergency ambulance service under Section 1797.201 if that was the city's arrangement as of June 1, 1980. Moreover, the California legislature broadly declared its intention to extend state action immunity to "local governmental entities" carrying out their prescribed functions under the EMS Act. Cal. Health & Safety Code § 1797.6(b). Had the California legislature intended to limit state action immunity to only county EMS agencies, or to exclude city governments from state action immunity, it could easily have drafted Section 1797.6 to reflect that intention.

As for the City Defendants' actual compliance with Section 1797.201, that issue is irrelevant to determining whether *Parker* immunity applies to their

actions. "The relevant question is whether the *state* intended the authorizing statute to have anticompetitive effects. Thus, what the *city* does to implement that statute, rightly or wrongly, reveals nothing about the state's intent." *Traweek v. City and County of San Francisco*, 920 F.2d 589, 593 (9th Cir. 1990). For purposes of determining whether *Parker* immunity applies to a city government, it is sufficient that the state law authorizes the city to act anti-competitively. *See Omni*, 499 U.S. at 371–72 (rejecting the contention that a municipality needs to be in compliance with the state law authorizing anticompetitive conduct for *Parker* immunity to apply).

4. Market Participant Exception

Next, AmeriCare urges the Court to recognize a market participant exception to *Parker* immunity. (AmeriCare Opps.) The Supreme Court has indicated that a "possible market participant exception" might exist where state sovereigns act "not in a regulatory capacity but as a commercial participant in a given market." *Omni*, 499 U.S. at 374–79. *Omni* did not shed much light on when exactly a state acts as a market participant rather than as a regulator. The only example given was *Union Pacific Railroad Co. v. United States*, 313 U.S. 450 (1941), in which the Court held unlawful certain rebates and concessions made by Kansas City, Kansas, in its capacity as the owner and operator of a wholesale produce market. *Omni*, 499 U.S. at 375. The Court has not elaborated on the subject since *Omni*, and it has not yet held that a market

participant exception to state action immunity exists. *See Phoebe Putney*, 133 S. Ct. at 1010 n.4. Although other circuits have discussed the issue[11], the Ninth Circuit has not yet ruled on the matter.

The Court declines to recognize a market participant exception here. First, as a general matter an inquiry into whether a city is acting as a market participant would be in tension with the Supreme Court's holding that a city is entitled to *Parker* immunity so long as there is a state law authorizing anticompetitive conduct in furtherance of a state regulatory scheme. *See Omni*, 499 U.S. at 371–72.

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[11] Contrary to AmeriCare's assertions, it is unclear whether any circuit has in fact recognized a market participant exception. The Federal Circuit mentioned the market participant exception once in *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993), *abrogated on other grounds by Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), and never discussed the issue again. The Third Circuit once mentioned the exception in a footnote in *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239, 265 n.55 (3d Cir. 2001), but district courts in the Third Circuit have not construed the footnote as holding that a market participant exception to *Parker* immunity exists in the Third Circuit. *See Edinboro College Park Apartments v. Edinboro Univ. Foundation*, No. 15-121 Erie, 2016 WL 6883295, at *4 (W.D. Pa. Mar. 1, 2016); *Wheeler v. Beard*, No. Civ. A. 03-4826, 2005 WL 1217191, at *6 (E.D. Pa. May 19, 2005). Similarly, the Sixth Circuit suggested in *VIBO Corp., Inc. v. Conway*, 669 F.3d 675, 687 (6th Cir. 2012), that a market participant exception might exist, but a district court that later considered *VIBO* did not consider it to definitively recognize a market participant exception in the antitrust context, *Wooster Industrial Park, LLC v. City of Wooster*, 55 F. Supp. 3d 990, 999 (N.D. Ohio, 2014).

Moreover, in the present case, the City Defendants' provision of emergency ambulance services does not implicate the exception. Emergency ambulance services are far removed from the example given in *Omni* of a city acting in the capacity of an owner and operator of a wholesale produce market. *See* 499 U.S. at 375 (citing *Union Pacific R. Co. v. United States*, 313 U.S. 450, (1941)). Even other courts that have addressed a possible market participant exception have found that the exception does not apply if a state entity is performing its traditional governmental functions. *See*, *e.g.*, *Wooster*, 55 F. Supp. 3d at 1000 (finding that the city defendant was not a market participant when it contracted to build a new cell tower for use by its safety services); *Edinboro*, 2016 WL 6883295, at *4 (finding that a market participant exception would not apply where the alleged injuries stem from a public university's obligations to provide education and housing); *Wheeler*, 2005 WL 1217191, at *6 (finding that the Pennsylvania Department of Corrections was acting in its governmental capacity in operating prison commissaries).

Here, the California legislature has expressly declared that the local provision of emergency medical services, including ambulance services, is "critical to the public peace, health, and safety of the state." Cal. Health & Safety Code § 13801. In enacting the EMS Act, the legislature declared its intent "to promote the development, accessibility, and provision of emergency medical services to the people of the State of California." Cal. Health & Safety Code § 1797.5. The Act

reflects the recognition that "one of the preeminent functions of government in an organized society is the protection of the life and health of its citizens." *Ma v. City and County of San Francisco*, 95 Cal. App. 4th 488, 508 (2002), *disapproved of on other grounds by Eastburn v. Regional Fire Protection Authority*, 31 Cal. 4th 1175 (2003). "Along with fire suppression and crime prevention, the provision of emergency medical assistance to persons faced with imminent life-threatening conditions joins with them to form a triage of public services considered at the core of vital civic functions." *Id.* Here, the State of California and the City Defendants are operating emergency ambulance services as a quintessential governmental function. Therefore, even if there were a market participation exception to *Parker* immunity, it would not apply.

Accordingly, the Court concludes that *Parker* immunity applies to the City Defendants in this action and that dismissal of AmeriCare's Sherman Act claims against the City Defendants is appropriate. Because a finding of *Parker* immunity conclusively decides AmeriCare's Sherman Act claims, the Court finds it unnecessary to address the City Defendants' arguments regarding the Local Government Anti-trust Immunity Act or whether AmeriCare suffered an antitrust injury.

D. Other Remaining Claims

Having dismissed AmeriCare's Sherman Act claims, no federal claims remain to be adjudicated.

AmeriCare's remaining claims are for declaratory judgment under California Code of Civil Procedure Section 1060 and 28 U.S.C. § 2201 declaring that the City Defendants (1) lack authority to create an exclusive operating area under California Health and Safety Code Section 1797.224, and (2) repudiated any rights they once had under California Health and Safety Code Section 1797.201. (*See* AmeriCare FACs.) Both of these claims are state law claims. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950) (explaining that Congress did not impliedly repeal or modify the requirements of subject matter jurisdiction when it passed the Declaratory Judgment Act). Given the early stage of litigation, the Court declines to exercise supplemental jurisdiction over these claims. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) ("[W]hen the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.").

V. CONCLUSION

For the foregoing reasons, the Court GRANTS the City Defendants' Motions to Dismiss. Because the Court finds that AmeriCare cannot amend its complaint in a way that would overcome the City Defendants' *Parker* immunity, AmeriCare's Sherman Act claims against the City Defendants are DISMISSED WITH PREJUDICE. AmeriCare's claims for declaratory judgment against the City Defendants are

DISMISSED WITHOUT PREJUDICE for AmeriCare to file in state court.

DATED: March 28, 2017

/s/ Josephine L. Staton
JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICARE MEDSERVICES, INC., Plaintiff-Appellant, v. CITY OF ANAHEIM; et al., Defendants-Appellees.	No. 17-55565 D.C. No. 8:16-cv-01703-JLS-AFM Central District of California, Santa Ana ORDER (Filed Oct. 10, 2018)

Before: HAWKINS and CHRISTEN, Circuit Judges, and HOYT,* District Judge.

Judge Christen has voted to deny the petition for rehearing en banc, and Judges Hawkins and Hoyt have recommended denying Appellant's en banc petition. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing en banc is DENIED.

The Request to Publish filed by Amicus Curiae California Fire Chiefs Association, Inc., is DENIED.

* The Honorable Kenneth M. Hoyt, United States District Judge for the Southern District of Texas, sitting by designation.

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

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15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

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§ 1797.1. Legislative findings and declarations

The Legislature finds and declares that it is the intent of this act to provide the state with a statewide system for emergency medical services by establishing within the Health and Welfare Agency the Emergency Medical Services Authority, which is responsible for the coordination and integration of all state activities concerning emergency medical services.

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§ 1797.102. Assessment of service areas

The authority, utilizing regional and local information, shall assess each EMS area or the system's service area for the purpose of determining the need for additional emergency medical services, coordination of emergency medical services, and the effectiveness of emergency medical services.

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§ 1797.201. Contracts with cities or fire districts for prehospital emergency medical services

Upon the request of a city or fire district that contracted for or provided, as of June 1, 1980, prehospital emergency medical services, a county shall enter into a written agreement with the city or fire district regarding the provision of prehospital emergency medical services for that city or fire district. Until such time that an agreement is reached, prehospital emergency medical services shall be continued at not less than the existing level, and the administration of prehospital EMS by cities and fire districts presently providing

such services shall be retained by those cities and fire districts, except the level of prehospital EMS may be reduced where the city council, or the governing body of a fire district, pursuant to a public hearing, determines that the reduction is necessary.

Notwithstanding any provision of this section the provisions of Chapter 5 (commencing with Section 1798) shall apply.

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§ 1797.224. Exclusive operating areas; creation; local EMS plan

A local EMS agency may create one or more exclusive operating areas in the development of a local plan, if a competitive process is utilized to select the provider or providers of the services pursuant to the plan. No competitive process is required if the local EMS agency develops or implements a local plan that continues the use of existing providers operating within a local EMS area in the manner and scope in which the services have been provided without interruption since January 1, 1981. A local EMS agency which elects to create one or more exclusive operating areas in the development of a local plan shall develop and submit for approval to the authority, as part of the local EMS plan, its competitive process for selecting providers and determining the scope of their operations. This plan shall include provisions for a competitive process held at periodic intervals. Nothing in this section supersedes Section 1797.201.
