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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

AmeriCare MedServices, Inc., *Plaintiff*, vs. City of Newport Beach, *Defendant*.	Case No.: 8:16-cv-01724-JLS (AFM) **Plaintiff's Opposition to Defendant City of Newport Beach's Motion to Dismiss** Date: March 3, 2017 Time: 2:30 p.m. Courtroom: Hon. Josephine L. Staton

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The city has it exactly upside down: it seeks to take a thirty-year-old transitional exception to a comprehensive state policy that was designed to foster competition in the EMS market and argue that the state clearly articulated a policy that cities shall exclude all competition from the ambulance markets except for themselves. Putting aside the technical discussion of whether a particular city is eligible under Section .201—and all of them seem to think they are—the policy and purpose of the EMS Act was and is procompetitive, not one intended to displace competition. The tail does not wag the dog.

The city asks this Court to hold that the EMS Act creates a policy that allows the cities to violate federal antitrust laws. But the EMS Act isn't even about them: it is about improving ambulance service and availability for the people through competition, as implemented by ***county*** EMS authorities.

AmeriCare MedServices, Inc. urges this Court to deny the city's motion to dismiss.

- ***First***, the city never qualified under Section .201 and thus does not meet its heavy burden of showing that it is entitled to the state-action immunity from the antitrust laws by acting pursuant to a clearly articulated state policy to displace competition.
- ***Second***, as a nonstate actor actively participating in the market—rather than purely regulating—the city must also show that it was actively supervised by the state itself. It isn't supervised by the state at all and, in fact, the state agency

charged with supervising the EMS system disapproves of the city's conduct.

- ***Third***, even if this Court finds that the state-action immunity does apply, it should formally recognize that market participants are not immunized. Though the circuits are currently split on this exception and the U.S. Supreme Court has expressly left the question open, this case shows exactly why the market-participant exception must exist.
- ***Fourth,*** Congress has precluded any inquiry into the question whether competition is good or bad because it is, in fact, good under federal law. The city's argument that prehospital EMS is somehow special and exempt from this fundamental tenet of the antitrust laws is out of step with both U.S. Supreme Court precedent and the EMS Act itself. More importantly, its argument is a matter of substantive antitrust law and is irrelevant to the state-action immunity analysis.

STATEMENT OF FACTS

Willfully ignoring state law, the city has excluded all competitors and acted as the sole market participants in the market for prehospital EMS in Newport Beach, imposing supracompetitive prices for inferior service. Am. Compl. (Dkt. 14), ¶¶ 26, 41–42. The city has refused to allow AmeriCare to compete in the market despite its eligibility and requests to do so. *Id.*, ¶¶ 33–34, 37.

In June 2013, the California State Emergency Medical Services Authority determined that the area comprising Newport Beach (AO15) did not qualify as an exclusive operating area. *Id.*,

¶¶ 28–29. The city, by contrast, asserts that it has "201 rights," but it is plainly ineligible: Newport Beach did not provide for or have a contract for prehospital EMS services June 1, 1980. *Id.*, ¶ 22. And prior to 1996, the city was not an ambulance service provider. *Id.*, ¶ 26. Further, it is not one of the three cities in Orange County that EMSA has determined ***are*** eligible for .201 status.

Newport Beach receives monopoly rents for providing EMS services. Customers of prehospital EMS in AO15 pay the city's monopoly prices for their prehospital EMS transport, which is nearly twice the rates as other private providers in Orange County. *Id.*, ¶ 27.[1]

THE CITY IS NOT ENTITLED TO STATE-ACTION IMMUNITY

The federal antitrust laws are the "Magna Carta of free enterprise." *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972). Congress has consistently reaffirmed the "national policy in favor of

1. The city claims "AmeriCare concedes that from and after June 1, 1980, Newport Beach has either entered into exclusive arrangements with ambulance companies or provided such services itself" and that AmeriCare "does not challenge the validity or interpretation" of the act. Mot. (Dkt. No. 22) at 6. The amended complaint states the city has entered into relationships with providers and that it did not ***contract*** for prehospital EMS services as of that date. Moreover, the city admits in this assertion that it has not continuously provided or contracted for ambulance service. The amended complaint and this opposition also state that the city is ineligible under state court interpretations of Section .201 and the California Emergency Medical Services Authority, the agency entrusted by the state as sovereign to oversee the EMS Act, also disagrees that the city is eligible under Section .201.

competition" embodied in the Sherman Act for more than a century. *Cal. Retail Liquor Dealers Assn' v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). This policy is so important to our nation's interests that Congress has entrusted its adjudication to the federal courts alone.

Because of our dual federalist system, the Sherman Act does not "bar States from imposing market restraints 'as an act of government.' " *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (quoting *Parker v. Brown*, 317 U.S. 341, 352 (1943)). But the state-action immunity is a cost of federalism that is ***narrowly*** circumscribed; like all antitrust exemptions, it is strictly limited and "disfavored." *Id.* (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)). And it functions ***only*** to prevent the antitrust laws from imposing an "impermissible burden on the States' power to ***regulate***." *N.C. Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015) (emphasis added).

Municipalities are not sovereign, and they do not independently qualify for any immunity from the antitrust laws. *See id.* at 1110–11 ("For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself."); *see also Kay Elec. Coop. v. City of Newkirk*, 647 F.3d 1039, 1041 (10th Cir. 2011) (U.S. Supreme Court Nominee Gorsuch, J.) ("When a city acts as a market participant it generally has to play by the same rules as everyone else. It can't abuse its monopoly power or conspire to suppress competition."). Nor can a state simply grant them a free pass to commit antitrust violations—

the states' "power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act." *N.C. Dental*, 135 S. Ct. at 1111; *see also Parker*, 317 U.S. at 351 (states cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it").

Courts must apply exacting scrutiny to ensure that nonstate actors are faithfully acting pursuant to a "clearly articulated and affirmatively expressed state policy" and "actively supervised by the state itself." *Midcal*, 445 U.S. at 105; *see also Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) ("It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."). The Supreme Court has excused municipalities acting in a purely regulatory capacity from the active-supervision requirement. *See N.C. Dental*, 135 S. Ct. at 1112–13 (*Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), creates a "narrow exception"), 1114 (analysis not "derive[d] from nomenclature alone" and "the need for supervision is manifest" where states empower active market participants).

The city asks the Court to ignore this backdrop by arguing that the State of California granted it a free pass to monopolize the market for prehospital EMS, glossing over a clear and unambiguous statutory scheme that (a) favors competition and allows ***only*** county EMS agencies, with oversight and approval from California's Emergency Medical Services Authority, to designate exclusive, noncompetitive service areas in exceptional circumstances, and (b)

disfavors municipal meddling with the state EMS system except under ***limited circumstances*** not applicable here. And it requests that this Court sweepingly defer to its misplaced desires and grant it a strictly limited and disfavored immunity that neither Congress, the State of California, nor county EMS authorities intended under these circumstances.

California's EMS Policy Favors Competition

California enacted the EMS Act in 1984 as a comprehensive statutory scheme that is supposed to regulate and supervise the provision of prehospital EMS throughout the state to ensure all California citizens receive the prehospital EMS to which they are entitled. Prior to the EMS Act, there was no comprehensive state plan for emergency services—"the 'patchwork' city-by-city dispatch of ambulances frequently failed to supply patients with the closest available ambulance [and made] coordination of medical response difficult." Bryan K. Toma, *The Decline of Emergency Medical Services Coordination in California: Why Cities are at War with Counties over Illusory Ambulance Monopolies*, 23 Sw. U. L. Rev. 285, 285–296 (1994). The autonomy allowed cities "to seek to optimize themselves" while "harm[ing] efforts to optimize the whole system." Richard Narad, *Coordination of the EMS System: An Organizational Theory Approach*, Prehospital Emergency Care 2:145–152, at 152 (1998). With the EMS Act, the State of California rejected the scattered municipal-based policy that Newport Beach and other cities urge this Court to create.

Under the act, local EMS authorities in ***county*** government develop a plan for submission to the California Emergency Medical Services Authority for approval or disapproval. ***County*** EMS authorities delineate functional zones for ambulance services and determine whether each zone should be either a non-exclusive operating area, which is always open to competing providers or exclusive operating areas subject to competitive bidding. *See* Cal. Health & Safety Code § 1797.224. OCEMS designated, and EMSA approved, AO15 as non-exclusive. *See* Dkt. 14, ¶¶ 28–29.

The legislature recognized two limited sets of circumstances where reliance interests justified forestalling its comprehensive scheme on a case-by-case basis. The first exception applies where the local EMS agency "develops or implements a local plan that continues the use of existing providers operating within [the] area in the manner and scope in which the services have been provided without interruption since January 1, 1981." Cal. Health & Safety Code § 1797.224. The second exception applies to municipalities who were "contracting or providing for" prehospital EMS as of June 1, 1980. Cal. Health & Safety Code § 1797.201. In those circumstances, a city could continue its contract with its provider or, if it provided EMS itself, it could continue to provide it. *See id.* Like grandfathering, this exception is expressly contemplated in Section 1797.224. For both exceptions, the intent of the legislature was to not completely ***upset the apple cart*** by voiding contracts and suddenly jeopardizing existing municipal programs with its ambitious new coordinated, statewide plan in ***one fell swoop***. Its

intent was ***not***, as the city seems to suggest, to broadly grant municipalities a home-rule authority or a presumption of local control to perpetually disrupt an otherwise coordinated statewide plan managed at the county and state level; it merely allowed a city to continue what it was doing to allow it to preserve the status quo, and even then, it only intended the exception to be, as the California Supreme Court explained, "transitional." *County of San Bernardino v. City of San Bernardino*, 15 Cal. 4th 909, 944 (1997).

The city argues the EMS Act itself is an affirmatively expressed policy to displace competition. To be sure, the statute does allow ***certain*** entities to restrain competition in ***limited*** ways under ***certain limited*** circumstances, as explained above. But the EMS Act is a policy that favors and mandates competition under ***all other*** circumstances. It is a pro-competitive policy: prehospital EMS services are to be provided on an open, nonexclusive basis except where, through an EMSA approved plan, the county EMS agency creates exclusive operating areas. *See* Cal. Health & Safety Code § 1797.224; *see also Kay Elec.*, 647 F.3d at 1044 (Gorsuch, J.) ("The Oklahoma legislature has spoken with specificity to the question whether there should be competition for electricity services in annexed areas. And it has expressed a clear preference for, not against, competition."). And the local EMS can ***only*** designate an exclusive operating area where "a ***competitive*** process is utilized to select the provider or providers," or where an existing provider has provided the services "without interruption since January 1, 1981" or Section .201 applies. Cal. Health & Safety Code § 1797.224

(emphasis added). Newport Beach does not qualify for these exceptions.

As the city notes, the EMS Act intends to provide antitrust immunity for local governments where they "carry[] out their prescribed functions" in accordance with the EMS Act. But the city disregarded and flouted the strictures of the EMS Act, and it was not carrying out any "prescribed function" when it excluded competition in violation of the Sherman Act.

The State of California ***itself*** flatly disagrees with the city's position. The California Supreme Court has expressly dispelled any notion "that cities . . . are to be allowed to expand their services, or to create their own exclusive operating areas." *San Bernardino*, 15 Cal. 4th at 932. And the State of California ***itself*** has determined that the zone encompassing the city is nonexclusive and therefore must be open to competing providers as it stated in its plans year after year through the disinterested state agency entrusted to oversee prehospital EMS throughout the state. Dkt. 14, ¶¶ 28–29.

The City Never Qualified Under Section .201

The city cannot claim Section 1797.201 as a basis for its assertion of the state-action immunity because it was never eligible in the first place. A city is eligible only if it meets each of the following criteria:

- Be a City or Fire District that existed on June 1, 1980.
- Be the same entity that existed on the date of the "1797.201" eligibility evaluation.

- Provided service on June 1, 1980, at one of these types: ALS, LALS, or emergency ambulance services.
- Operated, or directly contracted for the same type of service ***continuously*** since June 1, 1980.
- Has never entered into a written agreement with LEMSA for the type of service they were providing in 1980, including ALS, LALS, or emergency ambulance services.
- An eligible 1797.201 agency is entitled to retain, but not change (diminish or expand), its type of service.

California Emergency Medical Services Authority, EMS Sys. Coordination and HS 1797.201 in 2010, EMSA Pub. 310-01, at 11 (2010), attached as Exhibit 1 to the Declaration of Aaron Gott in Support of Plaintiff's Opposition to Defendant City of Newport Beach's Motion to Dismiss, filed concurrently.

AmeriCare alleges the city did not operate or directly contract for prehospital EMS services as of June 1, 1980. *See* Dkt. 14, ¶ 22. And prior to 1996, the city was not even an ambulance service provider. *Id.*, ¶ 26. Based on these facts alone, the Court should conclude that the city is ineligible under Section 1797.201 and therefore cannot be entitled to the state-action immunity.

The city asserts it is entitled to .201 "rights," because it has "historically administered its own emergency medical services systems since at least 1980." Mot. (Dkt. No. 22) at 3:12–13. As a

consequence, the city argues it is not required to enter agreements with a local EMS agency, and it retains all rights indefinitely. *Id.* at 5, n.19–21. There are three problems with this argument. First, it was not the intent of the California legislature. *See San Bernardino*, 15 Cal. 4th at 921 ("1797.201 is 'transitional' in the sense that there is a ***manifest legislative expectation*** that cities and counties will eventually come to an agreement with regard to the provision of emergency medical services.") (emphasis added). Second, the city wasn't eligible under Section 1797.201 in the first place—and thus could not have retained rights that it never had. The city ignores the allegations of the complaint that establish this: it did not provide *or* contract for ambulance service as of June 1, 1980. *See* Dkt. No. 14, ¶ 23. Third, even if the city's arrangement with various providers were a contract,[2] the city lost its .201 eligibility when it ceased using them.

The City Cannot Show that Its

Anticompetitive Conduct Is Sanctioned by State Law

The city argues that Sections 1797.6 and 1797.201 and Government Code Section 38794 provide it with a state-sanctioned,

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2. The word "contract" is not superfluous. *See G.L. Mezzetta, Inc. v. City of Am. Canyon,* 78 Cal. App. 4th 1087, 1093 (2000) (California law requires "contracts with the City be in writing, approved by the city council, approved as to form by the city attorney, and signed by either the mayor or the city manager."). Moreover, the Court must draw all reasonable inferences in favor of AmeriCare on a motion to dismiss—the *de facto* "agreement" (*see* Dkt. No. 14, ¶ 23) is not alleged to be a contract and the amended complaint compels the conclusion that it was not a contract. The city's attempted factual contest is not appropriate for a motion under Rule 12(b)(6).

carte blanche pass to exclude competition from the market for prehospital services, citing decades' old case law that (a) precedes the passage of the EMS Act, and (b) has been overruled by the U.S. Supreme Court. The city reads too much into each of these provisions; none contains a "clearly articulated and affirmatively expressed policy" to exclude competition. Even if they provided such a free pass, the state cannot simply authorize immunity from the antitrust laws; it must be part and parcel to a regulatory scheme. *Parker*, 317 U.S. at 351.

Section 1797.6—the preamble to the EMS Act—provides no safe harbor for the city. *See* Dkt. No. 22 at 8:12–14. The legislature specifically identifies Sections 1797.85 and 1797.224 as the provisions for which state-action immunity applies—provisions that concern the functions of local EMS agencies—***counties***, not cities. *See* Cal. Health & Safety Code § 1797.6. The statement merely states a truism: that the legislature's intent concerning those two sections is a clearly articulated policy to displace competition in limited ways identified in Sections 1797.85 and 1797.224. The plain meaning of the preamble counsels ***against*** the city's argument that Section 1797.201 provides it with immunity from the antitrust laws. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, the language [of a statute] must ordinarily be regarded as conclusive."). Moreover, the State of California can articulate a policy to displace competition, but it is for the federal courts alone to decide whether the policy is sufficient to immunize nonstate actors

from the antitrust laws. A state cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker*, 317 U.S. at 351.

Section 38794 authorizes cities to "contract for ambulance services to serve . . . residents." In *Springs Ambulance Serv., Inc. v. City of Rancho Mirage*, 745 F.2d 1270, (9th Cir. 1984), the Ninth Circuit held that this simple provision that merely allows cities to enter into a particular type of contract was enough for the state-action immunity. The case was decided before the State of California enacted the relevant provisions of the EMS Act, which substantially limit the circumstances under which a municipality could administer prehospital EMS.

Similarly irrelevant, *Mercy-Peninsula Ambulance, Inc. v. San Mateo County*, 791 F.2d 755, 786 (9th Cir. 1986), did not concern Section .201 or a ***city's*** rights or powers under the EMS Act. In that case, San Mateo ***County*** had awarded contracts through competitive bidding for certain EMS-related services, as it is expressly authorized to do as a ***county*** under specific provisions of the EMS Act. *See id.* at 758.

These cases the city argues "reflect an unbroken, consistent application" of the state-action immunity have also been overruled by U.S. Supreme Court's more recent pronouncements of the state-action immunity test—including a "new, higher bar for the clear articulation prong under *Midcal*." Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 Va. L. Rev. 1387, 1390 (2016).

In *Phoebe Putney*, the U.S. Supreme Court considered a state law authorizing political subdivisions to provide healthcare services and to create public "hospital authorities" through which to provide those services. 133 S. Ct. at 1007. It declared hospital authorities provided "essential government functions" and were granted "all the powers necessary or convenient to carry out and effectuate" the law's purpose, including to establish rates, construct for-profit projects and, most importantly, to acquire hospitals. *Id.* A county and city jointly established such a hospital authority and acquired a hospital. When the hospital authority later sought to acquire the ***only*** other hospital in the local market, the FTC intervened. The Court held that the hospital authority was ***not*** entitled to state-action immunity because a general grant of authority is not sufficient; it "must also show that it has been delegated authority to act or regulate anticompetitively." *Id.* at 1012. Moreover, the entity must show that the displacement of competition is the "inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Id.* In short, *Phoebe Putney* reigned in the broad ***foreseeability*** standard of *Hallie*. *See Allensworth*, *supra*, at 1406. In *Phoebe Putney*, the Supreme Court rejected the lower court's holding that anticompetitive effects need only be "reasonably anticipated" by a state statute, a now-overruled holding that was consistent with the Court's previous rule that state authorizing language needed merely to "contemplate[]" anticompetitive regulation. 133 S. Ct. at 1009. All the Ninth Circuit state-action immunity cases cited by the city apply this overruled standard.

Like the hospital authority's general statutory authority to play in the market, neither Section 38794 nor 1797.201 contemplates the displacement of competition. *See id.* at 1012; *see also Kay Elec.*, 647 F.3d at 1044 (Gorsuch, J.). Section 38794 allows municipalities to "contract" for ambulance services, and Section .201 allows certain eligible municipalities to "administer" prehospital EMS. There is nothing inherently anticompetitive about operating or contracting for an ambulance service, or even administering prehospital EMS. Monopolization of the market is thus neither the "inherent, logical, or ordinary result" of either of these two provisions. *Phoebe Putney*, 133 S. Ct. at 101; *see also San Bernardino*, 15 Cal. 4th at 932 ("Nothing in this reference to section 1797.201 suggests that cities or fire districts are to be allowed to expand their services, or to create their own exclusive operating areas.").

The city's citations to Ninth Circuit cases that liberally applied this disfavored immunity without the rigorous analysis required by *Phoebe Putney* are thus entirely misplaced. But even without *Phoebe Putney*, the city would be unable to meet the broader foreseeability standard of *Hallie* because the California legislature has actually contemplated what types of anticompetitive conduct it is willing to endorse through the EMS Act. It chose to place the authority to exclude competition in the hands of the county EMS agencies rather than in the hands of the cities.

Immunity Does Not Apply

Even if the City Were Correct on State Law

The city asserts that if it's eligible under .201, then it is entitled to the immunity. But this argument ignores the fundamental precept of *Parker* that states cannot simply "give immunity to those who violate the Sherman Act by authorizing them to violate it." 317 U.S. at 351. The immunity limits the reach of the antitrust laws only insofar as they might infringe upon the States' power to ***regulate*** as sovereign. But the States' prerogative is limited to ***regulation***—it is not for the State of California to decide that it disagrees with Congress' frequent admonishments that competition is the national policy. *Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . [This] statutory policy precludes inquiry into the question whether competition is good or bad.").

Instead, the state-action immunity extends to respect only the State of California's power to ***regulate***. To be sure, the EMS Act regulates—but Section .201 goes a step too far if it means what the city claims it means: that it gives the city the power to exclude all competition except itself from the market for prehospital EMS within its boundaries, and for no good reason. Section .201 was not a necessary statute within the comprehensive EMS scheme.

In contrast, the legislature had good reason for allowing county EMS agencies to create exclusive operating areas:

> As the Legislature recognized, creating an EOA is an important administrative tool for designing an EMS system, for it allows these agencies to plan and implement EMS systems that will meet the needs of their constituencies and at the same time ensure that the EMS providers with which they contract have a territory sufficiently populated to make the provision of these services economically viable.

San Bernardino, 15 Cal. 4th at 931.

The same cannot be said for Section .201 if it means what the city argues it means: its only purpose is to allow a city to monopolize and/or confer a monopoly. In other words, it would be an impermissible free pass to violate the antitrust laws.

Active Supervision Is Required

Active supervision "is an essential condition of state-action immunity when a nonsovereign actor has an incentive to pursue [its] own self-interest under the guise of implementing state policies," *see N.C. Dental*, 135 S. Ct. at 1113, because the "first requirement—clear articulation—rarely will achieve that goal by itself." *Id.* at 1112. Active supervision avoids "resulting asymmetry . . . by requiring the State to review and approve interstitial policies made by the entity claiming immunity." *Id.* No longer can a municipality rely on "nomenclature alone" to qualify for *Hallie*'s "narrow exception." *Id.* at 1113–14.

The city's briefing only underscores the "high level of generality" that it seeks to exploit to rationalize and excuse its

anticompetitive conduct. The facts of this case couldn't better demonstrate the "resulting asymmetry." The state has ***not*** actively supervised the city's conduct and, in fact, has flatly indicated that it does not approve of it.

Market Participants Are Not Immunized

This case presents an opportunity for this Court, the Ninth Circuit, and the U.S. Supreme Court to vindicate, once and for all, the true values of federalism that underpin the state-action immunity, and to solidify existing case law by formally recognizing a market-participant exception to the state-action immunity on which other circuits are currently split.[3] The market-participant exception would apply where an entity that would otherwise be exempt from the antitrust laws under state-action immunity by acting as a regulator pursuant to a clearly articulated policy to displace

3. The Sixth, Third, and Federal Circuits have recognized the market-participant exception. *See, e.g.*, *VIBO Corp. v. Conway*, 669 F.3d 675, 687 (6th Cir. 2012) (state acting as "commercial participant in a given market" is not protected); *A.D. Bedell Wholesale Co.*, 263 F.3d 239, 265 n.55 (3d Cir. 2001) (declining to apply market-participant exception because state was not acting as buyer or seller); *Genentech, Inc. v. Eli Lilly Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993) (*Parker* extends only to "sovereign capacity" and not market participant conduct). The Eighth and Second Circuits have decided not to extend current law. *See, e.g.*, *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1312–13 (8th Cir. 1991 ("[T]he market participant exception is merely a suggestion and not a rule of law."); *Automated Salvage Trans., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 81 (2d Cir. 1998) (concurring with Eighth Circuit).

competition is not exempt because the entity is also itself a commercial market participant.[4]

The U.S. Supreme Court's state-action immunity cases have long recognized the fundamental difference between "States in their governmental capacities as sovereign regulators" from their capacity "as a commercial participant in a given market." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374–75 (1991); *see also Jefferson Cnty. Pharm. Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150, 154 n.6 (1983) (distinguishing traditional state-as-sovereign activity from state commercial activity and holding that the antitrust laws apply with full force against states when "they are engaged in proprietary activities" that are "not 'indisputably' an attribute of state sovereignty"). The former is the only purpose for which the state-action doctrine was designed and, indeed, the Court never contemplated that states and municipalities could use state-action immunity as a shield for their anticompetitive conduct when they are active market participants. Jarod M. Bona & Luke A. Wake, *The Market Participant Exception to State-Action Immunity from Antitrust Liability*, 23 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 156, 163 (2014).

4. The exception is conceptually different than the Court's analysis under *N.C. Dental*, which looks at the composition of a state entity to determine whether the ***influence*** of active market participants suggest it must be actively supervised. For the market-participant exception to apply, the entity itself must be a commercial participant.

Municipalities often pose danger in this regard because they tend to act "as owners and providers of services" while also possessing the power to exclude or punish competitors. This creates a "serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 408 (1978). More than that, they already enjoy certain advantages in commercial markets—they are subsidized. So even where they provide services that appear to benefit consumers through lower prices, they are merely "redistributing the burden of costs from the actual consumers to the citizens at large" through "lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation." *Jefferson Cnty.*, 460 U.S. at 158 n.17. To give them "a significant ***additional*** advantage" in commercial markets through exemption from the antitrust laws could even "eliminate marginal or small private competitors." *Id.*

Immunizing market-participant conduct from antitrust scrutiny negatively affects federal antitrust policy. First, state and local entities with a free pass to violate the antitrust laws have a financial incentive to participate in commercial markets in anticompetitive ways—and that conduct is often very profitable. *See* Bona & Wake, *supra* at 163. Indeed, profit is exactly why California municipalities have become commercial participants in the market for prehospital EMS services. *See Toma*, *supra* at 289

("Unfortunately, this revenue-enhancing agenda pits cities and fire districts in direct competition with private ambulance companies.").

The city claims that AmeriCare "has no factual support" to suggest the city is a market participant. This ignores the allegations of the complaint. *See* Dkt. 14, ¶¶ 27–28 (city ceased using private providers and established its own monopoly service).

The City's Attempts to Justify Special Treatment Are Fundamentally Flawed

The city's brief begins by explaining that this "case concerns a subject that is a matter of life or death every day to patients faced with acute medical conditions and needs." *See* Dkt. No. 22 at 1. AmeriCare wholeheartedly agrees. That is why it is of the utmost importance that the Court restore competition in the market for prehospital EMS in Newport Beach: so that these patients are properly served.

But this proposition is of absolutely no consequence to whether the city has met its heavy burden of showing that it is entitled to the state-action immunity. Its arguments that follow—that prehospital EMS is a "vital civic function[]", that it has a "special nature", and that competition would "compel [a] chaotic and life threatening consequence"—are not only issues reserved for substantive antitrust law, they are wholly combative to fundamental principles of those antitrust laws.

The city isn't the first to make this argument. The National Society of Professional Engineers tried to justify its anticompetitive behavior by asserting that "competition . . . was contrary to the

public interest" because it "would be dangerous to the public health, safety, and welfare." *See Prof'l Eng'rs*, 435 U.S. at 684–85. To the Supreme Court, this only "confirm[ed] rather than refute[d] the anticompetitive purpose and effect of its agreement." *Id.* at 693. Indeed, the Court "has never accepted such an argument," *id.* at 694, because:

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also **better goods and services**. "The heart of our national economic policy has long been faith in the value of competition." Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy ***precludes inquiry into the question whether competition is good or bad***.
>
> The fact that [the commerce] . . . significantly affect[s] the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. . . . The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges . . . .

Id. at 694–96 (emphasis added) (citation omitted).

The State of California also rejects the city's argument. It requires competition by default and outright assumes that private competitors will provide service; if the county EMS and EMSA

determine an area should be exclusive, the statute requires ***competitive*** bidding. The statutory scheme was ***designed*** to take the cities and their "patchwork" services out of the equation. *See Toma*, *supra* at 285. The city relies on a thirty-year-old transitional exception for which it was never eligible to assert an everlasting exemption from California's comprehensive scheme and from accountability through competition.

CONCLUSION

For the foregoing reasons, and the reasons stated in oppositions filed by AmeriCare in the related cases, this Court should deny the city's motion to dismiss.

Respectfully submitted,

DATED: February 10, 2017

Bona Law PC

s/ Jarod Bona

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PROOF OF SERVICE

I am employed in San Diego County. I am over the age of 18 and not a party to the within action. My business address is 4275 Executive Square, Suite 200, La Jolla, California 92037. On February 10, 2017 I caused to be served via CM/ECF a true and correct copy of **Plaintiff's Opposition to City of Newport Beach's Motion to Dismiss**.

The CM/ECF system will generate a "Notice of Electronic Filing" (NEF) to the filing party, the assigned judge and any registered user in the case. The NEF will constitute service of the document for purposes of the Federal Rules of Civil, Criminal and Appellate Procedure.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of February 2017 at San Diego, California.

Gabriela Hamilton