

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

MED-STAR PARAMEDIC AMBULANCE, INC., Plaintiff, vs. CITY OF SIOUX FALLS and SIOUX FALLS REGIONAL EMERGENCY MEDICAL SERVICES AUTHORITY, Defendants.	Civ. No. 15-4045 BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)
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Defendants City of Sioux Falls ("City") and Sioux Falls Regional Emergency Medical Services Authority ("REMSA"), by and through their counsel of record, submit the following Brief in Support of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6).

INTRODUCTION

This lawsuit smacks of sour grapes. The City publicly released a Request for Proposal for Surface Ambulance Services ("RFP"), and engaged in a fair, open and competitive proposal process to select the next exclusive ambulance services provider for the City. Four bidders competed for the contract, including Plaintiff. When the City awarded the exclusive contract to another bidder, Plaintiff retaliated by filing this lawsuit against the Defendants, alleging various antitrust, §§ 1983 and 1985, and tortious interference claims, and claiming that the very contract Plaintiff sought to enter into is illegal. Plaintiff's Complaint fails to state a claim upon which relief may be granted.

Plaintiff lacks standing to assert an antitrust claim because it has not suffered an antitrust injury, and its antitrust claims are barred by the state action immunity doctrine. Plaintiff's §§

1983 and 1985 claims likewise fail because Plaintiff has failed to allege facts which raise even a speculative right to relief on its substantive due process, equal protection and civil conspiracy claims. Finally, Plaintiff's tortious interference claims must fail because Plaintiff has failed to allege any improper act of interference by the Defendants. Additionally, Plaintiff's antitrust claims based on actions preceding February 4, 2011, and Plaintiff's §§ 1983 and 1985 and tortious interference claims premised on conduct preceding February 4, 2012, are time-barred by the applicable statute of limitations.

For all these reasons, and the additional reasons set forth herein, Plaintiff's Complaint must be dismissed.

ARGUMENT AND AUTHORITIES

Standard for a Motion to Dismiss

The standard for a motion to dismiss pursuant to Rule 12(b)(6) is well-established. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (internal citations omitted). The complaint must allege facts, which, when taken as true, raise more than a speculative right to relief. *Id.* at 1965. "Where the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate." *Benton v. Merrill Lynch & Co., Inc.*, 524 F.3d 866, 870 (8th Cir. 2008).

I. THE COMPLAINT FAILS TO STATE ANTITRUST CLAIMS AGAINST THE DEFENDANTS.

Counts 1 through 4 of Plaintiff's Complaint allege various federal and state antitrust claims against the Defendants. "SDCL ch. 37-1, Restraint of Trade, Monopolies and Discriminatory Trade Practices, is taken directly from the Sherman Act, 15 U.S.C. § 1 et seq." *Byre v. City of Chamberlain*, 362 N.W.2d 69, 73 (SD 1985). SDCL 37-1-22 permits this Court to use federal and other state court interpretations in its construction of SDCL ch. 37-1, provided those cases are based on similar antitrust statutes. *Id.* Therefore, this Court should apply the same analysis in considering Plaintiff's federal and state antitrust claims.

A. Plaintiff cannot establish that it suffered an antitrust injury, and therefore, lacks standing.

Plaintiff does not have standing to pursue its antitrust claims. Standing to maintain a private damages action under antitrust laws turns on the following factors: (1) the causal connection between the alleged antitrust violation and the harm to the plaintiff; (2) improper motive; (3) whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness between the injury and the market restraint; (5) the speculative nature of the damages; and (6) the risk of duplicative recoveries or complex damage apportionment. *Lovett v. General Motors Corp.*, 975 F.2d 518, 520 (8th Cir. 1992). Some courts have divided these factors into two prongs, requiring a plaintiff to show: (1) the plaintiff suffered antitrust injury; and (2) that he is a proper antitrust plaintiff, i.e., an efficient enforcer of the antitrust laws. *Davies v. Genesis Medical Center Anesthesia & Analgesia, PC*, 994 F.Supp. 1078, 1092 (S.D. Iowa 1998) (citations omitted) (dismissing federal antitrust claims because plaintiffs did not suffer an antitrust injury and thus lacked standing). Antitrust standing is a threshold, pleading-

stage inquiry and when a complaint by its terms fails to establish this requirement, the Court must dismiss it as a matter of law. *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007).

In antitrust cases, “[p]laintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be ‘the type of loss that the claimed violations ... would be likely to cause.’” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977); *see also Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir.1989) (quoting *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 103, 104 S.Ct. 2948, 2961, 82 L.Ed.2d 70 (1984)) (An antitrust injury is an “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.”). The antitrust laws were enacted “for the protection of competition not competitors[.]” *Id.* at 488 (quoting *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962)); *Midwest Commc’ns v. Minnesota Twins, Inc.*, 779 F.2d 444, 450 (8th Cir. 1985).

Because “antitrust law aims to protect competition, not competitors, [a court] must analyze the antitrust injury question from the viewpoint of the consumer.” *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 641 (3rd Cir. 1996). An antitrust plaintiff must prove that the challenged conduct affected the prices, quantity or quality of goods or services, and not just its own welfare. *Id.* The injury alleged must be palpable and distinct, rather than abstract, conjectural or hypothetical. *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1296 (7th Cir.1993) (citing *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984)); *Vakharia v. Little Co. of Mary Hosp. & Health Care Ctrs.*, 917 F.Supp. 1282, 1300 (N.D.Ill.

1996) “[I]f there is no showing of injury, or if the injury alleged or proven is not an ‘antitrust injury,’ the plaintiff does not have a claim cognizable under the antitrust laws.” *Midwest Commc’ns*, 779 F.2d at 450.

Plaintiff cannot establish an antitrust injury in this matter. “It is well established that competition among businesses to serve as an exclusive supplier should actually be *encouraged*.” *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 83 (3rd Cir. 2010) (emphasis in original). *See also Menasha Corp. v. News America Marketing In-Store, Inc.*, 354 F.3d 661 (7th Cir. 2004) (recognizing that competition to be an exclusive supplier “is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress”). Here, the Complaint acknowledges the existence of *competition* between various ambulance providers for the right to serve as the exclusive ambulance service provider for the City. In fact, paragraphs 38 and 39 of the Complaint assert that Plaintiff, along with three other companies, submitted proposals pursuant to the RFP to serve as the City’s exclusive ambulance service provider. Such competition is strongly encouraged by our antitrust laws.

Moreover, Plaintiff’s Complaint does not allege that the Defendants’ conduct affected the prices, quantity or quality of ambulance services. Instead, it merely alleges that Defendants’ actions caused damages *to the Plaintiff*. Thus, Plaintiff’s Complaint, by its own terms, fails to establish that it suffered the kind of antitrust injury that gives rise to an antitrust claim. On the contrary, the Complaint, in addition to identifying the competitive process by which the City conducted its RFP, makes clear on its face that Plaintiff had the clear opportunity to compete, and did compete, for the exclusive ambulance service contract with the City. Accordingly, this Court must dismiss the antitrust claim because Plaintiff lacks standing in the absence of an

antitrust injury. *See e.g. NicSand*, 507 F.3d at 456 (“When one exclusive dealer is replaced by another exclusive dealer, the victim of the competition does not state an antitrust injury.”).

B. The state action immunity doctrine bars Plaintiff’s antitrust claims.

Even if Plaintiff had standing, Defendants are immune from antitrust liability under the state action doctrine. States receive immunity from antitrust liability because “nothing in the language of the Sherman Act or in its history ... suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.” *Parker v. Brown*, 317 U.S. 341, 350-51, 63 S.Ct. 307, 314, 87 L.Ed. 315 (1943)). State action immunity also extends to nonstate actors that are “carrying out the State’s regulatory program.” *FTC v. Phoebe Putney Health System, Inc.*, 133 S.Ct. 1003, 1010, 185 L.Ed.2d 43 (2013).

The Supreme Court has articulated the following test to determine whether municipalities are entitled to state action immunity: The challenged restraint must be undertaken pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition. *Id.*, at 1011 (quoting *Community Communications Co. v. Boulder*, 455 U.S. 40, 52, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982)); *Byre*, 362 N.W.2d at 74. “[T]o pass the ‘clear articulation test,’ a state legislature need not ‘expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects.’” *Phoebe Putney*, 133 S.Ct. at 1011 (citing *Hallie v. Eau Claire*, 471 U.S. 34, 43, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985)). Rather, state action immunity applies if the anticompetitive effect was the “foreseeable result” of engaging in the authorized activity. *Id.* (citing *Hallie*, 471 U.S. at 42).

Under the “clear articulation test,” this Court must review the Defendants’ challenged anticompetitive action – entering into an exclusive contract with a private entity for the provision of ambulance services within the City of Sioux Falls – to determine whether it was the

foreseeable result of what the state has authorized. *Id.*; *Hallie, supra*; *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372-73, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991).

Defendants are entitled to the protection of state action immunity if they can demonstrate that they have “been delegated authority to act or regulate” in ways that are inherently anticompetitive. *Phoebe Putney*, 133 S.Ct. at 1012-13 (citing *Omni*, 499 U.S. at 372) (emphasis added); *Woolen v. Surtran Taxicabs, Inc.*, 615 F.Supp. 344 (N.D. Texas 1985) (dismissing antitrust claims against Cities and their Airport Boards based on state action immunity where Cities operated through Airport Boards to grant an exclusive airport taxicab franchise); *R. Ernest Cohn, D.C., D.A.B.C.O. v. Bond*, 953 F.2d 154 (4th Cir. 1991) (medical staff entitled to state action immunity where they were acting as agents of municipal hospital). A legislative intent to displace competition can be inferred from the statutory scheme because it is a necessary and reasonable consequence of engaging in the authorized activity. *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517, 522 (8th Cir. 1985).

In this case, the Defendants were operating under specific statutory authority that clearly articulates and affirmatively expresses a state policy to displace competition in the provision of ambulance services. Article III, Section 1 of the South Dakota Constitution empowers the state legislature to enact laws for the preservation of the public peace, health or safety. The South Dakota Legislature has enacted SDCL 9-29-1, which provides broad police powers to a municipality to protect the public peace, health and safety of its citizens. SDCL 9-34-1 also provides broad licensing authority to municipalities. Most importantly, SDCL 34-11-1 provides:

Any county or municipality may provide ambulance service and enter into agreements with other governmental subdivisions and with other persons for such services. Any county or municipality may appropriate funds for such purposes and may enter into an agreement with such other governmental subdivision or any

competent person to furnish funds for such purposes on an annual basis as may mutually be agreed upon. The funds shall be paid to such person or political subdivision when a claim has been duly filed, audited, and allowed by the county or municipality. Any county or municipality may license and regulate persons providing such services.

(emphasis added). ARSD 44:05:02:05 further provides that “[i]ssuance of a license by the [Department of Public Safety] does not authorize an ambulance service to locate its business within a county, municipality or authority which requires its own license to operate an ambulance service.”

While SDCL 34-11-1, arguably, does not *explicitly* grant municipalities the power to award exclusive ambulance services contracts, it clearly articulates and affirmatively expresses a state policy to displace competition. SDCL 34-11-1 authorizes municipalities to provide ambulance services themselves. The “foreseeable result” and necessary and reasonable consequence of a municipality exercising that statutory authority is the elimination of competition for the provision of ambulance services altogether. Thus, the State affirmatively contemplated and intended the displacement of competition by authorizing municipalities to provide ambulance services. *See e.g. Hallie, supra* (the city’s anticompetitive activities were protected by the state action doctrine because Wisconsin statutes authorized cities to provide sewage services, and thus, contemplated that a city may engage in anticompetitive conduct).

The State’s intent to displace competition is further evidenced by the SDCL 34-11-1 authorization for municipalities to license and regulate ambulance services, and to enter into agreements for the provision of ambulance services. In fact, this Court previously so held in *Caretraum, Inc. v. City of Sioux Falls, South Dakota, et al.* (Civ. 91-4073). Jay Masur, an owner of Med-Star who holds all of its corporate offices, asserted these same state antitrust claims against the City of Sioux Falls when he owned another ambulance provider known as Caretraum,

Inc. This Court granted summary judgment in favor of the City based on state action immunity, and specifically held that SDCL 34-11-1 sets forth a clearly articulated and affirmatively expressed state policy to displace free competition in the ambulance business. The Honorable John Jones noted in his Memorandum Opinion and Order that “[c]learly counties and municipalities have the authority to regulate ambulance services. Moreover, it is reasonably foreseeable that licensing and regulating ambulance service could have anticompetitive effects.” *See id.* [Doc. 70].

Previously, in *James R. Carlsen, d/b/a Federal Ambulance v. The City of Sioux Falls, et al.*, Civ. 84-4025, this Court likewise found that the South Dakota Legislature evinced its intent to displace competition for the provision of both emergency and non-emergency ambulance services in the State of South Dakota with regulation, and granted summary judgment in favor of the City of Sioux Falls on the plaintiff’s restraint of trade claims. This Court’s decisions in *Caretraum* and *Federal Ambulance* are well-reasoned and fully supported by decisions from other courts.

The state action immunity doctrine has, time and again, been applied to single franchise ambulance systems implemented by local governments pursuant to broad state statutory authority to regulate ambulance services. *See e.g. Gold Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983) (holding that the city, municipal trust and consultants they retained were shielded from federal and state antitrust liability under the state action doctrine because Missouri’s statutory scheme regulating ambulance service expressed a state policy to displace free competition in the ambulance business); *Springs Ambulance Service, Inc. v. City of Rancho Mirage, California*, 745 F.2d 1270 (9th Cir. 1984) (finding that statute providing that legislative body of city may contract for ambulance service to serve the residents

of the city as convenience requires provided a clear expression of state policy to displace competition with regulation); *Mercy-Peninsula Ambulance, Inc. v. San Mateo County*, 791 F.2d 755 (9th Cir. 1986) (county's award of contract to provide paramedic services, after competitive bidding, held subject to state action immunity from antitrust liability because exclusion of some qualified bidders was a foreseeable consequence of state policy directing counties to establish plans for provision and regulation of emergency medical services); *Forest Ambulance Service, Inc. v. Mercy Ambulance of Richmond, Inc.*, 952 F.Supp.296 (E.D. Va. 1997); *Central Ambulance Service, Inc. v. City of Dallas*, 631 F.Supp. 366 (N.D. Tex. 1986).

The Eighth Circuit specifically addressed the application of state action immunity to a single municipal franchise ambulance system in *Gold Cross*. In that case, Kansas City established a municipal ambulance system under which a municipal trust contracted with a single private operator to provide all of the ambulance service – both emergency and nonemergency – within the city. The plaintiffs challenged the ambulance system contending that it violated federal and state antitrust laws. In determining whether state action immunity applied, the Court reviewed the comprehensive regulatory scheme for the State of Missouri, and particularly noted that Missouri law permitted municipalities to impose their own restrictions on ambulance service in addition to those imposed by the State. *See Gold Cross*, 705 F.2d at 1011-12. Based upon Missouri's extensive regulation of the ambulance industry, the Court determined that it was evident that the State intended to displace competition with regulation. *Id.* at 1013. Kansas City was, therefore, immune from antitrust liability.

In analogizing this case to *Gold Cross*, it is evident that the Defendants are entitled to state action immunity. In *Gold Cross*, the Eighth Circuit Court of Appeals focused on the fact that a monopoly service is the logical consequence of the State's anticompetitive scheme for

regulating ambulance service in Missouri, which applied in addition to any municipal regulation. SDCL 34-11-1 permits cities to provide ambulance service to their citizens, to contract with operators to provide ambulance service and to promulgate rules and regulations concerning the provision of that service. Like Missouri municipalities, South Dakota cities can impose their own restrictions and regulations upon ambulance operators, in addition to the regulations on ambulance service set forth in state statutes. *See* ARSD 44:05:02:05 (the issuance of a state license does not authorize operation of an ambulance without a municipal license if that municipality has enacted an ordinance making it unlawful to do so); SDCL 34-11-1, *et seq.* Such regulation comports with an “anti-competitive scheme” for the regulation of the ambulance service in the State of South Dakota. The very purpose of the regulation is to displace unfettered and unregulated provision of ambulance service. The South Dakota Legislature has evinced its intent to displace competition in the ambulance industry with regulation, and therefore, Defendants are immune from antitrust liability under the state action doctrine.

It is also worth noting that similar statutory grants of regulatory authority in other contexts have likewise been found to contemplate an intent to displace competition. *See e.g. Hallie, supra* (holding that the city was exempt from the Sherman Act under the state action doctrine because its actions were taken pursuant to a clearly articulated state policy to replace competition in the provision of sewage services with regulation); *L & H Sanitation, supra* (holding that the state action immunity doctrine was applicable to the city’s award of an exclusive solid waste disposal franchise because municipalities were granted “broad authority [under the Arkansas Solid Waste Management Act] to regulate solid waste management and to enter into agreements to provide for solid waste management and disposal”); *Massengale v. City of Jefferson, Mo.*, 2011 WL 3320508 (W.D. Missouri 2011) (finding a legislative intent to

displace competition in Missouri statute granting municipalities broad authority to regulate solid waste management and to contract with private companies to provide for solid waste management and disposal); *Bloom v. Hennepin County*, 783 F.Supp. 418 (D. Minn. 1992) (holding that state action doctrine barred antitrust suit based on statutory grant of authority to provide health care services as deemed most appropriate, to establish rules and regulations for the management of the medical center, and to contract with private organizations to provide medical services); *Byre, supra*, (holding that city was immune from antitrust liability when providing for waste collection and disposal based on statutory grant of power to regulate waste removal).

Plaintiff's argument that SDCL 34-11-1 does not pass the "clear articulation" test because of the use of the words "agreements" and "persons" in that statute, rather than the singular words "agreement" or "person" or the phrase "one or more person," is a nonstarter. First, South Dakota's rules of statutory construction make clear that words used in the plural number include the singular. SDCL 2-14-6 ("Words used in the singular number include the plural, and the plural the singular, except where a contrary intention plainly appears."). Thus, the use of the plural word "agreements" in SDCL 34-11-1, includes the singular word "agreement." Likewise, the use of the word "persons," necessarily includes the word "person."

Moreover, Plaintiff's contention, in essence, seeks to impose a requirement of explicit and specific articulation of a legislative intent for the delegated action to have anticompetitive effects. That argument runs counter to controlling authority. The Supreme Court has repeatedly rejected the contention that the "clear articulation" test can be met only if the delegating statute *explicitly* permits the displacement of competition. *See Phoebe Putney*, 133 S.Ct. at 1011 ("[T]o pass the 'clear articulation' test," a state legislature need not "expressly state in statute or its

legislative history that the legislature intends for the delegated action to have anticompetitive effects.”); *Gold Cross*, 705 F.2d at 1012 (“The Supreme Court has made clear that ‘a specific, detailed legislative authorization’ of monopoly service need not exist to infer the necessary state intent.”). Instead, the Supreme Court has made clear that state-action immunity applies if suppression of competition is the “foreseeable result” of what the State statute authorized. *Id.*

As has been recognized by this Court for more than 30 years, the displacement of competition in the provision of ambulance services is a foreseeable result of the City engaging in the actions authorized by SDCL 34-11-1. *See Caretraum, supra; Federal Ambulance, supra.* There can be no question that the statute’s authorization for municipalities to provide ambulance services themselves, to enter into agreements for ambulance services, and to license and regulate the provision of ambulance services within the City evinces a clear legislative intent to displace competition in the ambulance industry with regulation. Consequently, state action immunity insulates the Defendants from antitrust claims. *See Phoebe Putney*, 133 S.Ct. at 1012; *Gold Cross, supra.*

Defendants anticipate that Plaintiff will argue that the Supreme Court’s recent decision in *Phoebe Putney, supra*, dictates a different outcome in this case. In *Phoebe Putney*, the Federal Trade Commission, along with the State of Georgia, brought an action to enjoin a hospital authority’s acquisition of a second hospital, alleging that the acquisition would substantially reduce competition in violation of federal antitrust laws. The Supreme Court determined that the hospital authority was not entitled to state-action immunity because the Georgia law that granted those entities general corporate powers did not clearly articulate and affirmatively express a state policy to displace competition in the market for hospital services.

Phoebe Putney is factually distinguishable from this case. In *Phoebe Putney*, the hospital authorities merely had general corporate powers that mirrored the powers possessed by private corporations. The hospital authority had not been delegated any regulatory authority. Unlike the hospital authorities in *Phoebe Putney*, the Defendants in this case have been granted the power to license and regulate the provision of ambulance services within the City, as well as the power to provide the ambulance services within the City themselves. The Supreme Court's opinion in *Phoebe Putney* specifically recognizes that "substate governmental entities do receive immunity from antitrust scrutiny when they act 'pursuant to state policy to displace competition with regulation or monopoly public service.'" Indeed, the Supreme Court goes on to reaffirm its prior decisions in *Hallie* and *Omni*, in which the Court found a "clear articulation" of a State's intent to displace competition with regulatory authority. This case clearly falls within the scope of the foreseeability standard applied in *Hallie* and *Omni*. Therefore, the recent *Phoebe Putney* decision lends further support for the application of state action immunity in this case.

C. The Local Government Antitrust Act bars Plaintiff's antitrust claims for damages.

Plaintiff's antitrust claims for treble damages and other money damages against the Defendants are barred by the Local Government Antitrust Act. *See* 15 U.S.C. §§ 34-36. Under that Act, "[n]o damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government[.]" 15 U.S.C. § 35. Defendants clearly fall within the definition of "local government", which is defined by 15 U.S.C. § 34, in pertinent part, as:

- (A) A city, ...or other general function governmental unit established by State law, or
- (B) ...any other special function governmental unit established by State law in one or more States.

See SDCL 34-11B-1, *et seq.* (authorizing municipalities to establish a regional emergency medical services authority) (repealed in 1996); City of Sioux Falls Ordinances §§ 92.150-92.158 (creating the Sioux Falls Regional Emergency Medical Services Authority in 1993). Therefore, Plaintiff's antitrust claims for treble damages, money damages, costs and attorneys fees must be dismissed.

D. Plaintiff's antitrust claims based on Defendants' actions preceding February 4, 2011, are time-barred under the applicable four-year statute of limitations.

The governing statute of limitations for Plaintiff's federal and state antitrust claims is four years. See 15 U.S.C. § 15b ("Any action to enforce any cause of action under section 15, 15a, or 15 c of this title shall be forever barred unless commenced within four years after the cause of action accrued."); SDCL 37-1-14.4 ("An action under § 37-1-14.3 to recover damages is barred if it is not commenced within four years after the claim for relief accrues[.]"). "A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. Plaintiff filed its Complaint on February 4, 2015. Consequently, Plaintiff's antitrust claims premised on Defendants' actions prior to February 4, 2011 (e.g. enacting City Ordinance § 124.081 in 2007, entering into an exclusive contract with Rural/Metro in 2007, refusing to approve Med-Star's Mutual Aid Agreements with Rural/Metro in 2009), are time-barred.

In sum, Plaintiff's state and federal antitrust claims must be dismissed in their entirety. Plaintiff lacks antitrust standing, and Defendants are immune from antitrust liability under the state action doctrine. At a minimum, Plaintiff's federal antitrust claims for treble damages, monetary damages, costs and attorneys fees are barred by the Local Government Antitrust Act, and Plaintiff's state and federal antitrust claims premised on Defendants' actions preceding February 4, 2011, should be dismissed as time-barred.

II. PLAINTIFF'S §§ 1983 AND 1985 CLAIMS FAIL.

Counts 5 and 6 of Plaintiff's complaint allege § 1983 violations of Plaintiff's substantive due process and equal protection rights. Count 7 alleges that the Defendants engaged in a conspiracy for the purpose of depriving Plaintiff of its constitutional rights. To maintain a §1983 claim, Plaintiff must show (1) that the defendants acted under color of state law, and (2) that the alleged wrongful conduct deprived the plaintiff of a constitutionally protected federal right. *Zutz v. Nelson*, 601 F.3d 842, 848 (8th Cir. 2010). For there to be §1983 liability, "there must first be a violation of the plaintiff's constitutional rights." *Avalos v. City of Glenwood*, 382 F.3d 792, 802 (8th Cir. 2004); *see also Riley v. St. Louis County of Mo.*, 153 F.3d 627, 630 (8th Cir. 1998) ("Section 1983 relief is predicated on the denial of a right or interest protected by the Constitution."). "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144, n. 3, 99 S.Ct. 2689, 61 L.Ed. 433 (1979)). Therefore, "[t]he first step in any such claim is to identify the specific constitutional right allegedly infringed." *Id.*

As set forth in detail below, Plaintiff cannot establish a violation of a constitutionally protected federal right. Plaintiff's §§ 1983 and 1985 claims must, therefore, be dismissed.

A. No Substantive Due Process Claim Exists

The Due Process Clause of the Fourteenth Amendment prohibits governments from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. To establish a violation of a substantive due process right, Plaintiff must show (1) that Defendants violated one or more fundamental constitutional rights, and (2) that the conduct of the Defendants was shocking to the contemporary conscience. *Flowers v. City of*

Minneapolis, Minn., 478 F.3d 869, 873 (8th Cir. 2007). Plaintiff cannot establish either of those elements.

(1) Plaintiff has failed to establish a fundamental constitutional right.

Analysis of a substantive due process claim must begin with an examination of the interest allegedly violated. *Singleton v. Cecil*, 176 F.3d 419, 424 (8th Cir. 1999). A substantive due process claim “is cognizable only if there is a recognized liberty or property interest at stake.” *Carpenter Outdoor Advertising Co. v. City of Fenton*, 251 F.3d 686, 689 (8th Cir. 2001). “[T]he possession of a protected life, liberty, or property interest is ...a condition precedent’ to any due process claim.” *Singleton*, 176 F.3d at 424. Where no such interest exists, there can be no due process violation. *Id.* “Whether a substantive due process right exists is a question of law.” *Moran v. Clarke*, 296 F.3d 638, 643 (8th Cir. 2002).

The substantive component of “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation's history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” *Singleton*, 176 F.3d at 425. The protections of substantive due process have generally been limited to matters relating to a fundamental right, i.e., marriage, family, procreation, and the right to bodily integrity. *See Albright*, 510 U.S. at 272. The United States Supreme Court has, as a general rule, been unwilling to expand the concept of substantive due process beyond these core areas. *Peterson v. North Dakota ex rel. North Dakota University System*, 240 F.Supp.2d 1055, 1062 (D.N.D. 2003).

In its Complaint, Plaintiff complains that the Defendants violated its rights “to property, liberty, and/or the right to compete in business” by “executing and enforcing the Rural/Metro Contract; adopting and/or enforcing City Ordinance § 124.081; prohibiting Med-Star from

performing under the Avera contract or providing other ambulance services within the City limits; refusing to approve the 2009 Mutual Aid Agreement; and/or refusing to approve the 2012 Mutual Aid Agreement.” *See* Complaint ¶¶ 90-91. Clearly, Plaintiff has not asserted, and cannot establish, the deprivation of any fundamental constitutional right.

To be clear, Plaintiff does not have a property interest in providing ambulance services within the City of Sioux Falls. Property interests are created by existing rules or understandings that stem from an independent source, such as state law. *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716, 718 (8th Cir. 1995). “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) (holding that non-tenured teacher had no property interest in continued employment or reemployment); *see also Hill v. Group Three Housing Development Corp.*, 799 F.2d 385 (8th Cir. 1986) (holding that applicants possess no property interest in Section 8 housing benefits by virtue of membership in the class that Section 8 was intended to benefit because private owners had discretion to select their tenant). Here, Plaintiff cannot demonstrate a legitimate claim of entitlement to the securing of a municipal license to operate an ambulance service within the City. Plaintiff has a desire for a municipal ambulance license, and nothing more. Indeed, SDCL 34-11-1 makes clear that Plaintiff possessed no entitlement or legitimate expectation of a municipal ambulance license, as that statute authorizes municipalities to license and regulate ambulance services. “There is no absolute right to contract free of state regulation under the police power.” *See Gold Cross*, 705 F.2d at 1015. Therefore, Plaintiff has no federally protected

property interest in a municipal ambulance license, or to contract for the provision of ambulance services free from regulation by the City.

Likewise, Plaintiff cannot establish a deprivation of a federally protected right or liberty interest that warrants substantive due process protection. Plaintiff's interest in a municipal ambulance license is not so "fundamental" as to be protected by substantive due process. *See e.g. Gold Cross*, 705 F.2d at 1015 (holding that challenged ordinance establishing a single-operator city ambulance system did not involve fundamental right or suspect class). Indeed, none of the Courts' previous recognitions of substantive due process, e.g. marriage, family, procreation, and the right to bodily integrity, come close to the right asserted by Plaintiff. Plaintiff's substantive due process claim is devoid of merit because of the complete absence of a violation or deprivation of a fundamental constitutional right.

(2) The Defendants' conduct was not egregious or shocking to the contemporary conscience.

To establish a substantive due process violation, Plaintiff must also demonstrate that Defendants' conduct shocks the conscience. *Folkerts v. City of Waverly, Iowa*, 707 F.3d 975, 980 (8th Cir. 2013). "Only in the rare situation when the state action is 'truly egregious and extraordinary' will a substantive due process claim arise." *Strutton v. Meade*, 668 F.3d 549, 557 (8th Cir. 2012). Whether conduct shocks the conscience is a question of law. *Folkerts*, 707 F.3d at 980.

Here, Plaintiff has failed to allege conscience-shocking conduct on the part of the Defendants. By no stretch of the imagination could the Defendants' actions of "executing and enforcing the Rural/Metro Contract; adopting and/or enforcing City Ordinance § 124.081; prohibiting Med-Star from performing under the Avera contract or providing other ambulance services within the City limits; refusing to approve the 2009 Mutual Aid Agreement; and/or

refusing to approve the 2012 Mutual Aid Agreement” be considered “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *See County of Sacramento v. Lewis*, 523 U.S. 833, 847 n. 8, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). This is particularly true here, where the City has the authority to license and regulate the provision of ambulance services within the City. Plaintiff’s substantive due process claim must, therefore, be dismissed.

B. Plaintiff’s Equal Protection claim fails

“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)). The Equal Protection Clause protects “fundamental rights” and against “suspect classifications,” such as race, and it also protects citizens from “arbitrary and irrational state action.” *Batra v. Board of Regents of Univ. of Neb.*, 79 F.3d 717, 721 (8th Cir.1996). Because Plaintiff is not a member of a suspect class and its claims do not involve a fundamental right, its equal protection claim is subject to rational basis review. *Ganley*, 491 F.3d at 747.

“In general, the Equal Protection Clause requires that state actors treat similarly situated people alike.” *Ganley v. Minneapolis Park and Recreation Bd.*, 491 F.3d 743, 747 (8th Cir. 2007). Plaintiff must, as a threshold matter, demonstrate that the Defendants treated it differently than similarly situated persons. *Id.* If it satisfies this threshold inquiry, Plaintiff must then demonstrate intentional or purposeful discrimination. *Central Airlines, Inc. v. U.S.*, 138 F.3d 333, 335 (8th Cir.1998).

Here, Plaintiff's Complaint fails to allege any facts establishing that it is "similarly situated" to anyone who received more favorable treatment. Nor has Plaintiff alleged facts evidencing any unlawful, intentional or purposeful discrimination by the Defendants. Instead, Plaintiff's Complaint merely alleges a bare recitation of the elements of an equal protection claim. Such bare allegations are insufficient to state a claim for relief under the equal protection clause that is plausible on its face. See *Twombly*, *supra*. This Court's inquiry can end here.

Moreover, under the applicable rational basis standard, this Court must presume legislation is valid and sustain it if the classification drawn by the statute is rationally related to a legitimate state interest. *Chance Management, Inc. v. State of SD*, 97 F.3d 1107, 1114 (8th Cir. 1996). The statutory classification "need not be drawn so as to fit with precision the legitimate purposes animating it." *Id.* Instead, the Plaintiff has the burden of proving that the classification is so attenuated to its asserted purpose that the distinction it draws is wholly arbitrary and irrational. *Id.* Moreover, a party challenging the legislation must negate "every conceivable basis which might support it." *Id.*, 97 F.3d at 1114-15. Plaintiff cannot meet its burden. There are numerous factors justifying the Defendants' regulation of the provision of ambulance services within the City of Sioux Falls, the most important of which is the continued provision of high quality ambulance care in the City of Sioux Falls. The proposed City of Sioux Falls Ordinance attached as Exhibit A to the Complaint demonstrates, on its face, the Defendants' interest in promoting the public health, safety and welfare through its regulation of surface ambulance services within the City. That fact alone provides the "rational basis" for the regulation of the ambulance industry.

Defendants would note that in *Caretraum*, *supra*, Jay Masur's previous ambulance service company made a similar equal protection claim against the City of Sioux Falls. This

Court granted the City's motion for summary judgment in that case, and specifically found that a rational basis existed for having a single-operator ambulance system within the City. *See also Gold Cross, supra* (dismissing equal protection claim against Kansas City because a rational basis exists for the ordinance providing for a single-operator ambulance system). Thus, the facts make clear that the Defendants' actions were rationally related to a legitimate state interest.

For all these reasons, Defendants' motion to dismiss the equal protection claim must be granted.

C. Defendants are Incapable of Entering into a Conspiracy

First and foremost, the law presumes that municipalities are incapable of entering into conspiracies. *See Stone v. City of Hot Springs, Ark.*, 2006 WL 1310394 (W.D. Ark. 2006) (*citing Benningfield v. City of Houston*, 157 F.3d 369 (5th Cir. 1998)); *Hudson v. Jones County*, 2011 WL 4625428 (S.D. Mississippi 2011) (dismissing § 1985 claim because a municipality is "incapable of entering into a conspiracy"); *Batiste v. City of Beaumont*, 421 F.Supp.2d 969, 986 (E.D. Texas 2005) ("The law presumes that municipalities are incapable of entering into conspiracies. ... Hence, municipalities cannot be liable in actions brought pursuant to Section 1985."). Therefore, Defendants cannot be liable in actions brought pursuant to § 1985. *Id.* On this basis alone, Plaintiff's § 1985 claim must be dismissed.

Even if that were not the case, Plaintiff's Complaint also fails to state a claim for conspiracy under § 1985. Plaintiff must prove four elements to recover on its § 1985 conspiracy claim: (1) the existence of a civil conspiracy; (2) that the purpose of the conspiracy was to deprive Plaintiff either directly or indirectly of its civil rights; (3) that Defendants did an act in furtherance of the object of the conspiracy; and (4) damages, shown by demonstrating either

injury to person or property or the deprivation of a civil right. *Mettler v. Whitley*, 165 F.3d 1197, 1206 (8th Cir.1999).

The first element “requires evidence of specific facts that show a ‘meeting of minds’ among conspirators.” *Barstad v. Murray Cnty.*, 420 F.3d 880, 887 (8th Cir.2005). A meeting of the minds require at least two persons. *Id.* “Speculation and conjecture are not enough to prove a conspiracy exists.” *Mettler*, 165 F.3d at 1206. Mere allegations of conspiracy without stating sufficient facts about a mutual understanding or meeting of the mind does not state a claim under § 1985. *Cabal v. U.S. Dep’t of Justice*, 980 F.2d 734, 1992 WL 336447 (8th Cir., Nov. 18, 1992) (unpublished decision) (citing *Snelling v. Westhoff*, 972 F.2d 199, 200 (8th Cir.1992) (conspiracy claim requires allegation of specific facts showing meeting of minds)), *cert. denied*, 510 U.S. 831, 114 S.Ct. 101 (1993); *Rogers v. Bruntrager*, 841 F.2d 853, 856 (8th Cir.1988) (conspiracy claim requires allegations of specific facts showing “meeting of minds” among alleged conspirators).

Under this standard, and even under the liberal pleading standards, nothing in the Complaint could be construed as alleging a “meeting of the minds” between the Defendants. Plaintiff has made only conclusory allegations that a conspiracy existed, and cannot show a “meeting of the minds” as required. Mere allegations of conspiracy without stating sufficient facts about a mutual understanding or meeting of the mind do not state a claim under § 1985. *Cabal, supra*; *Snelling, supra*; *Fletcher v. Tom Thumb, Inc.*, 2001 WL 893913 at *3-4 (D.Minn., Aug. 7, 2001) (“plaintiff asserting a claim under 42 U.S.C. § 1985(3) must allege that there was a meeting of minds between two or more individuals to deprive the plaintiff of [its] civil rights”, and “bald allegation of conspiracy” coupled with factual allegations of incident is not enough).

Indeed, Plaintiff's Complaint contains only conclusory allegations of a conspiracy. *See* Complaint ¶¶ 103-107. There are no allegations in the Complaint that could be construed as alleging the existence of a civil conspiracy, or that the purpose of any such conspiracy was to deprive Plaintiff of its civil rights. Plaintiff has failed to demonstrate any underlying constitutional violations. *See supra*. A plaintiff must allege facts, not conclusory allegations, to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim pursuant to 42 U.S.C. § 1985. *See Twombly, supra*. Consequently, Plaintiff's civil conspiracy claim under § 1985 fails and must be dismissed.

D. Plaintiff's §§ 1983 and 1985 claims premised on actions predating February 4, 2012 are time-barred.

South Dakota's statute of limitations applies to Plaintiff's claims under 42 U.S.C. §§ 1983 and 1985. *See Montoya v. City of Flandreau*, 2010 WL 1812891 (D.S.D. 2010) (citing *Strandlund v. Hawley*, 532 F.3d 741, 746 (8th Cir. 2008) ("[t]he statute of limitations for claims brought under 42 U.S.C. § 1983 is generally the applicable state law period for personal injury torts."); *Housley v. Erwin*, 325 Fed. Appx. 474, 475-76 (8th Cir. 2009) (state's general statute of limitations applies to a 42 U.S.C. § 1985 claim)). SDCL § 15-2-15.2 provides that "[a]ny action brought under the federal civil rights statutes may be commenced only within three years after the alleged constitutional deprivation has occurred."

This action was commenced on February 4, 2015. *See supra*. Therefore, Plaintiff's §§ 1983 and 1985 claims premised on events that allegedly occurred prior to February 4, 2012, are time-barred and must be dismissed.

III. PLAINTIFF'S STATE LAW TORTIOUS INTERFERENCE CLAIMS ALSO FAIL.

A. *Defendants have not committed any improper act of interference.*

Counts 8 through 10 of Plaintiff's complaint allege state law causes of action for tortious interference with a business relationship, business expectancy, and contractual relations. These claims likewise fail. To prevail on its claims for tortious interference, Plaintiff must prove the following essential elements:

- 1) the existence of a valid business relationship or expectancy;
- 2) knowledge by the interferer of the relationship or expectancy;
- 3) an intentional and unjustified act of interference on the part of the interferer;
- 4) proof that the interference caused the harm sustained; and
- 5) damage to the party whose relationship or expectancy was disrupted.

Dykstra v. Page Holding Co., 2009 SD 38, ¶ 39, 766 N.W.2d 491, 499 (citing *Table Steaks v. First Premier Bank, N.A.*, 2002 SD 105, ¶ 19, 650 N.W.2d 829, 835 (quoting *Landstrom v. Shaver*, 1997 SD 25, ¶ 73, 561 N.W.2d 1, 16)). “The intentional and unjustified act of interference on the part of the interferer must be improper.” *Dykstra*, 2009 SD at ¶ 39, 766 N.W.2d at 499 (affirming summary judgment in favor of defendants, finding “trial court did not err when it concluded as a matter of law that there was no improper conduct”) (citing *Gruhlke v. Sioux Empire Federal Credit Union*, 2008 SD 89, ¶ 16, 756 N.W.2d 399, 408) (emphasis added).

For purposes of this tort, improper means are those that are independently wrongful such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade or any other wrongful act recognized by statute or the common law. *See e.g. Harman v. Heartland Food Co.*, 614 N.W.2d 236, 241 (Minn. Ct. App. 2000); *Birdsong v. Bydalek*, 953 S.W.2d 103, 113 (Mo. Ct. App. 1997). When a party has a legal right to act, it may do so with impunity, regardless of

motive. *See e.g. Harman*, 614 N.W.2d at 242 (citing *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996)).

Here, Plaintiff's Complaint fails to establish any improper act of interference by the Defendants. As set forth in detail above, the Defendants had a legal right to regulate ambulance services within the City, and to enter into an exclusive contract for the provision of ambulance services. *Supra*. Their doing so cannot, therefore, create a cause of action for Plaintiff. There are simply no allegations in the Complaint that would support a finding of tortious interference by improper means. Plaintiff's Complaint fails to state a tortious interference claim against these Defendants. Counts 8 through 10 must, accordingly, be dismissed.

B. Plaintiff's tortious interference claims premised on actions predating February 4, 2012 are time-barred.

The applicable statute of limitations for Plaintiff's tortious interference claims is three years. *See* SDCL § 15-2-14(3). Because Plaintiff's action was not commenced until February 4, 2015, Plaintiff's tortious interference claims based on actions that precede February 4, 2012, are time-barred.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss all claims against the Defendants pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Dated this 30th day of March, 2015.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type volume limitation of 12,000 words. Based upon the word and character count of the word processing program used to prepare this brief, the body of the brief contains 7,745 words.

/s/ William C. Garry

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send an e-mail notification of such filing to the following counsel at their respective last known e-mail addresses:

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