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6 IN THE OFFICE OF ADMINISTRATIVE HEARINGS

7 In the Matter of:

8 RBR Management LLC dba Community  
Ambulance

9 Applicant.

Docket No. 2017-EMS-0104-DHS  
(EMS No. 0283)

**RESPONSE TO THE MOTION  
FOR ORDER ALLOWING  
REPLY IN SUPPORT OF THE  
AMR CON HOLDERS'  
MOTION FOR INTERVENING  
PARTY STATUS...AND  
ALLOWING ORAL  
ARGUMENT ON THE  
MOTION**

(Assigned to the Honorable  
Tammy Eigenheer)

16 Applicant, through undersigned counsel, hereby responds to the Motion for Order  
17 Allowing Reply in Support of the AMR CON Holders' Motion for Intervening Party  
18 Status...and Allowing Oral Argument on the Motion (the "AMR Motion for Order").

19 This response is supported by the following Memorandum of Points and  
20 Authorities, as well as all matters of record herein.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 As noted in the AMR Motion for Order, "AAC R2-19-106(D)(addressing  
23 motions), allows responses to motions (if timely made), but does not provide for the  
24 moving party to submit a supportive reply." Counsel for the AMR CON holders  
25 (collectively, "AMR") makes the assumption that a reply must be permissible if allowed  
26 by the assigned Administrative Law Judge ("ALJ"). Ms. Fickbohm does not cite any  
27 applicable law that supports her arguments as to why a reply must be permissible when  
28 the applicable regulations do not provide for such a reply.

1           Worse, counsel for AMR requests permission to reply but instead of waiting for a  
2 ruling by the ALJ, proceeds with her reply in numbered paragraphs 1-9 anyway. As the  
3 rules make plain, AMR is not entitled to file a reply under the applicable law, and  
4 Applicant respectfully requests the ALJ deny AMR's application to file any reply and  
5 entirely disregard numbered paragraphs 1-9.

6           In the event the ALJ determines a reply is necessary, Applicant hereby requests  
7 the ALJ consider the Motion for Order as AMR's reply and not allow Ms. Fickbohm the  
8 opportunity to argue her clients' position twice.

9           AMR was aware of the contract with Dignity Health and cannot now claim  
10 ignorance as part of their reasoning for why an order granting a reply is necessary.  
11 Given the broad, plain and unambiguous language of Section 18 of the Customer  
12 Agreement, which AMR negotiated and the Arizona Department of Health Services  
13 approved, as well as the information provided to AMR before it entered into the  
14 contract, AMR and its counsel cannot pretend the issues raised in Applicant's Response  
15 to Motion for Intervening Party Status came out of thin air. Section 18 plainly provides:

16  
17                   Provider **[AMR]** shall not do anything or cause any other  
18                   person to do anything that interferes with Customer's  
19                   **[Dignity Health]** efforts to engage any other person or entity  
20                   for the provision of some or all of the Services, or interferes  
21                   in any way with any relationship between Customer and any  
22                   other person or entity who may be engaged to provide some  
23                   or all of the Services to Customer, and shall not initiate legal  
24                   action or take any other action to challenge the right of  
25                   Customer to enter into a services agreement with another  
26                   organization, or to develop its own capability or authority to  
27                   provide Services to its patients.  
28

25           Because this language is not reasonably susceptible to AMR's interpretation, and  
26 the parties agreed that the Customer Agreement "constitutes the entire agreement  
27 between the Parties with respect to the subject matter hereof, superseding all prior oral  
28 or written agreements with respect thereto," there is no occasion for the ALJ to consider

1 parole evidence. However, if the Court invites further discussion at an oral argument,  
2 Applicant reserves its right to call witnesses to offer testimony, for the purpose of  
3 explaining the parties' intentions in agreeing to Section 18 of the Customer Agreement.  
4 *See Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 154, 854 P.2d 1134, 1140  
5 (1993). And, should the Court permit such intent evidence, Applicant further reserves  
6 its right to object to any testimony AMR offers beyond the scope of explaining the  
7 parties' intentions, and that would vary or contradict the meaning of the written words,  
8 because such evidence would necessarily run afoul of the parole evidence rule. *Id.* at  
9 1139.

10 Because the Motion for Order wrongfully includes arguments and statements  
11 appropriate for AMR's reply (assuming it was granted), Applicant is compelled to  
12 respond to the Motion for Order and the improperly included numbered paragraphs 1-9.  
13 The numbered responses are responsive to the corresponding numbered paragraphs in  
14 AMR's Motion for Order.

15 1. In response to Paragraph 1 in AMR's Motion for Order: While the  
16 Customer Agreement at issue is between Dignity Health and AMR, the contract clearly  
17 provides that Dignity Health is permitted to enter into contracts or arrangements with  
18 third parties or to self-provide and develop its own capability to provide the services to  
19 its patient population. The Community Ambulance joint venture is clearly within the  
20 scope of Section 18 of the Customer Agreement given the extremely broad language of  
21 Section 18.

22 2. In response to Paragraph 2 in AMR's Motion for Order: See Paragraph 1  
23 above.

24 3. In response to Paragraph 3 in AMR's Motion for Order: The  
25 characterization of Applicant's interpretation of the Customer Agreement is completely  
26 misstated. AMR knew that Dignity Health did not hold a CON in Maricopa County to  
27 self-perform the services. AMR also knew Dignity Health would be required to get a  
28

1 CON if it determined to self-perform the services, either directly or indirectly through a  
2 joint venture partner like Applicant. AMR's intervention in either CON process is a  
3 breach of Section 18 of the Customer Agreement. Applicant's interpretation of the  
4 Customer Agreement is that Dignity Health has the ability to contract with third parties,  
5 including Applicant, to self-perform the services and AMR is prohibited from  
6 interfering with that process. The interpretation offered by AMR and its counsel is  
7 somehow even broader than the already broad language. AMR's proposed  
8 interpretation is a *reductio ad ridiculum* of Section 18 of the Customer Agreement.

9 4. In response to Paragraph 4 in AMR's Motion for Order: According to the  
10 Restatement of Contracts, "a waiver is a voluntary relinquishment of a known right."  
11 Section 18 is by its terms a waiver of AMR's right to intervene in this CON process  
12 involving Applicant and, indirectly, Dignity Health. Dignity Health relied on AMR's  
13 promise in Section 18 of the Customer Agreement when entering into that agreement  
14 and now AMR should be barred from intervening based on waiver/promissory estoppel.

15 5. In response to Paragraph 5 in AMR's Motion for Order: The number of  
16 inter-facility transports ("IFTs") proposed in Applicant's proposed CON corresponds  
17 with the number of IFTs provided to or from a Dignity Health facility and includes  
18 additional transports as a result of proposed changes to patient placement, facility  
19 utilization, and throughput by Dignity Health at its Maricopa County facilities.

20 6. In response to Paragraph 6 in AMR's Motion for Order: AMR's  
21 arguments that this CON proceeding does not involve Dignity Health negotiating or  
22 entering into a service agreement with a certificated ambulance transport company  
23 completely ignores the broad language of Section 18 of the Customer Agreement. AMR  
24 attempts to narrow Section 18 without pointing to any language that justifies doing so.  
25 Section 18 does not require Dignity Health to enter into agreements with only  
26 certificated providers. Contrary to AMR's statement in Paragraph 6, Dignity Health is  
27 attempting to develop its own capability and authority to provide ambulance transports  
28 to its patients. Section 18 does not prohibit Dignity Health from self-performing the

1 services through a third party such as Applicant. AMR's arguments in this regard  
2 contradict the plain and unambiguous language of the Customer Agreement contradicts  
3 AMR's arguments in this regard.

4 7. In response to Paragraph 7 in AMR's Motion for Order: Contrary to  
5 AMR's arguments in Paragraph 7, this CON process does not have to be construed as an  
6 attempt by Dignity Health to enter into a third party contract to perform the services to  
7 bar AMR from intervening. The CON process, which AMR knew would have to be  
8 undertaken, is simply a part of the overall contract or self-performance process. In this  
9 instance and based on the facts, the CON process would be impossible to avoid. Based  
10 on AMR's argument, AMR would be permitted to intervene even if Dignity Health  
11 applied for a CON on its own because the CON process would not be deemed part of the  
12 process of self-performing the services. As mentioned several times already, the broad  
13 language of Section 18 contemplates and covers this CON proceeding.

14 8. In response to Paragraph 8 in AMR's Motion for Order: As noted above,  
15 Applicant requests the ability to call witnesses and introduce evidence to show the ALJ  
16 that AMR knew the reasoning behind Section 18 when it entered into the Customer  
17 Agreement. AMR's contention that such a reading would have made the subject  
18 contract voidable is not supported by the facts surrounding the negotiation of that  
19 provision.

20 9. In response to Paragraph 9 in AMR's Motion for Order: AMR again  
21 makes legal conclusions about Dignity Health's breach of the Customer Agreement  
22 based on the implied duty of good faith and fair dealing. The implications of Paragraphs  
23 8 and 9 would apply to AMR based on the true facts surrounding Section 18. Section 18  
24 was specifically negotiated to contemplate the indirect self-performance of the services  
25 by Dignity Health. AMR's Motion for Order bases its arguments and justifies its need  
26 to reply using unsupported facts.

27 The facts and circumstances of Section 18 should be determined in the context of  
28 an oral argument if necessary. Allowing AMR further ability to set forth written

1 arguments without any requirement for actual evidence and testimony is unnecessary  
2 especially in light of the improper arguments AMR already made in its Motion for  
3 Order.

4 RESPECTFULLY SUBMITTED THIS 6th day of July, 2017.

5 **The Meyerson Law Firm, PLC**

6  
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