

1 Andrew S. Gordon (003660)
2 Scott M. Bennett (022350)
3 COPPERSMITH BROCKELMAN PLC
4 2800 North Central Avenue, Suite 1200
5 Phoenix, Arizona 85004
6 Telephone: (602) 381-5460
7 Facsimile: (602) 224-6020
8 agordon@cblawyers.com
9 sbennett@cblawyers.com
10 *Attorneys for Dignity Health*

11 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

12 In the Matter of:
13 RBR Management LLC, dba Community
14 Ambulance,
15 Applicant.

No. 2017-EMS-0104-DHS

**DIGNITY HEALTH'S
MOTION TO INTERVENE**

16 Dignity Health moves to intervene in order to address issues relating to the contract
17 between Dignity Health and AMR. The ALJ should allow Dignity Health to intervene
18 because it is a party to that contract, and any decision regarding that contract could affect
19 Dignity Health's legal rights.

20 As to the interpretation of the contract, ADHS (and by extension OAH), is an
21 administrative agency that has only the powers that the legislature has expressly granted by
22 statute. ADHS and OAH lack the statutory authority to interpret the contract between
23 Dignity Health and AMR. The ALJ should decline to interpret that agreement, and instead
24 allow Dignity Health and AMR to resolve that issue in superior court.

25 **A. Dignity Health's Interest – Factual Background**

26 Without getting deeply into the merits of the dispute between Dignity Health and
AMR, it might be helpful to the ALJ to have some background. Dignity Health is a large,

1 nonprofit healthcare provider throughout the West. It has many hospitals and healthcare
2 centers, including facilities in the Las Vegas and Phoenix metropolitan areas.

3 Patients often require a transfer, by ground ambulance, from one Dignity Health
4 facility to another. For both patient care and economic reasons, Dignity Health helped to
5 form RBR Management in Nevada, for the purpose of providing ambulance transport
6 services for Dignity Health's facilities in the Las Vegas area. Dignity Health is the
7 majority owner of RBR Management.

8 Later, when Dignity Health was negotiating the contract that is at issue in this
9 dispute, it advised AMR that it was interested in exploring various options here in Arizona
10 similar to the ambulance service that Dignity Health created in Nevada. For that reason, as
11 a condition of providing AMR with the lucrative contract for the Phoenix area, Dignity
12 Health required AMR agree not to take any action that would interfere with Dignity
13 Health's ability to develop its own capability to provide these services. Dignity Health and
14 AMR documented that understanding in the non-interference provision of their written
15 contract (Section 18). That provision prohibits AMR from any interference with Dignity's
16 efforts to develop its own ambulance service, whether that interference is direct (such as by
17 attempting to intervene in this CON proceeding) or indirect (for example, by trying to
18 persuade other CON holders to intervene, or supporting the intervention of others).

19 Dignity Health believes AMR's opposition to RBR Management's CON application
20 is direct violation of the contract's non-interference provision. AMR, of course, disputes
21 that. The question is whether that contract dispute between Dignity Health and AMR
22 should be decided in superior court, or in this CON administrative proceeding.

23 **B. Dignity Health has a Right to Intervene**

24 The OAH procedural rules state that "[i]f a procedure is not provided by statute or
25 these rules, an administrative law judge may issue an order using the Arizona Rules of
26 Civil Procedure and related local rules for guidance." A.A.C. § R2-19-102(C). That is

1 why AMR, Maricopa Ambulance, and ABC Ambulance all relied on Rule 24 of the
2 Arizona Rules of Civil Procedure as the basis for their motions to intervene in this matter.

3 Under Rule 24, a court *must* allow intervention by any person or entity that “claims
4 an interest relating to the subject of the action, and is so situated that disposing of the
5 action in the person’s absence may as a practical matter impair or impede the person’s
6 ability to protect that interest, unless existing parties adequately represent that interest.”
7 Ariz. R. Civ. P. 24(a)(2). And a court *may* allow intervention by anyone who “has a claim
8 or defense that shares with the main action a common question of law or fact.” Ariz. R.
9 Civ. P. 24(b)(1)(B).

10 Dignity Health has a significant interest in the interpretation of its contract with
11 AMR. “Contract rights are traditionally protectable interests.” *Sw. Ctr. for Biological*
12 *Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001). In *Berg*, the court concluded that a
13 third-party beneficiary of a contract was entitled to intervene because there was a clear
14 connection between its interests and the claims at issue in the litigation. The *Berg* decision
15 also cited *Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996). In *Sierra Club*, the court
16 concluded that a party has a sufficient interest to intervene when a proceeding threatens the
17 party’s contracts. 82 F.3d at 109; *see also John’s Lone Star Distribution, Inc. v. Juice Bar*
18 *Concepts, Inc.*, No. CIV. 3:03-CV-2670-H, 2004 WL 632840, at *2 (N.D. Tex. Mar. 29,
19 2004) (granting motion to intervene because the action affected the validity of a contract to
20 which the intervenor was a party). Here, RBR Management and AMR have asked the ALJ
21 to interpret the non-interference provision of the contract between Dignity Health and
22 AMR.¹ As those pleadings make clear, AMR wants the ALJ to decide Dignity Health’s
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24 _____
25 ¹ See RMR’s Response to Motion for Intervening Party Status (Doc. No. 12), pp. 3-4; AMR’s
26 Motion for Order Allowing Reply . . . (Doc. No. 14), pp. 3-4; RBR’s Response to Motion for Order
Allowing Reply (Doc. No. 16), pp. 2-5.

1 rights under the AMR/Dignity Health contract. The ALJ’s resolution of that issue could
2 substantially affect Dignity Health’s rights under that agreement.

3 The existing parties to this proceeding do not adequately represent Dignity Health’s
4 interests in the contract. As AMR has pointed out in the briefing on its motion to
5 intervene, RBR Management is not a party to that agreement. The ALJ should not address
6 the issue of the proper interpretation of that agreement without the input of the parties to
7 the contract.

8 Finally, Dignity Health has a claim that shares with this proceeding a common
9 question of law. Dignity Health wants to enforce the non-interference provision in the
10 contract, in order to prevent AMR interfering with Dignity Health’s contractual right
11 “to enter into a services agreement with another organization, or to develop its own
12 capability or authority to provide Services to its patients.” That is a question of law that
13 has been raised in connection with AMR’s motion to intervene.

14 In sum, because Dignity Health’s contractual interests are affected by this
15 proceeding, Dignity is entitled to protect those interests by intervening. Note that Dignity
16 Health seeks to intervene for the limited purpose of addressing its contract with AMR.
17 Dignity Health is *not* asking to participate in the hearing on RBR Management’s
18 application for a CON.

19 **C. ADHS and OAH Lack Statutory Authority to Interpret the Contract**
20 **Between Dignity Health and AMR**

21 The ALJ lacks statutory authority to interpret the contract between Dignity Health
22 and AMR, and should decline to address that issue. That is matter for the superior court to
23 decide.

24 “Since the early days of statehood, it has been firmly established in Arizona that
25 inferior tribunals acting judicially have no powers other than those given them by the
26 legislature.” *Boyce v. City of Scottsdale*, 157 Ariz. 265, 267, 756 P.2d 934, 936 (App.

1 1988). “ ‘It is well settled in Arizona that the powers and duties of an administrative
2 agency are measured and limited by the statute creating it.’ ” *Id.* (quoting *Arkules v. Bd. of*
3 *Adjustment*, 151 Ariz. 438, 439-40, 728 P.2d 657, 658-59 (App. 1986)).

4 In *Boyce*, the court concluded that the legislature’s statutory grant of rulemaking
5 power to the board included the power to adopt rehearing procedures, which the board had
6 done, so it had authority to reconsider its own decisions. *Id.* In contrast, the court of
7 appeals has held that, in an administrative hearing on the issue of whether to suspend a
8 driver’s license after a DUI, the agency may not consider the legal question of the
9 constitutionality of the traffic stop leading to the arrest. That is because the enabling
10 legislation does not give the agency that authority. *Tornabene v. Bonine ex rel. Ariz.*
11 *Highway Dep’t*, 203 Ariz. 326, 333, 54 P.3d 355, 362 (App. 2002).

12 This situation is like that in *Tornabene*. The issue in this proceeding is whether the
13 Director of ADHS should grant RBR Management a CON to provide ground ambulance
14 transports. ADHS (and by extension OAH) has no statutory authority to interpret the
15 contract between Dignity Health and AMR.

16 Arizona statutes and regulations define both the information that an applicant for a
17 CON must submit, and what the Director of ADHS may consider. The information that an
18 applicant must submit is set out in A.A.C. § R9-25-902. As for what the Director must
19 consider, by statute, there are five issues relevant to the Director’s decision whether to
20 grant a CON. The primary two are whether “public necessity requires the service or any
21 part of the service proposed by the applicant,” and whether “the applicant is fit and proper
22 to provide the service.” A.R.S. § 36-2233(B)(2) and (3). (The others are whether the
23 applicant has registered at least one ambulance, paid the appropriate fees, and filed a surety
24 bond if required.)

25 The concepts of “public necessity” and “fit and proper” are specifically defined by
26 statute and regulation. Public necessity “means an identified population needs or requires

1 all or part of the services of a ground ambulance service.” A.A.C. § R9-25-901(33). A
2 regulation lays out the factors that the Director of ADHS “shall consider” in determining
3 whether there is public necessity for a CON. *See* A.A.C. § R9-25-903. State law also
4 specifically defines the meaning of fit and proper as whether “an applicant for a certificate
5 of necessity or a certificate holder has the expertise, integrity, fiscal competence and
6 resources to provide ambulance service in the service area.” A.R.S. § 36-2201(21).

7 In addition to defining the issues that may be considered in connection with a CON
8 application, Arizona law also establishes the process that OAH must follow in conducting
9 hearings on those applications, and making recommendations to the Director of ADHS.
10 Arizona law requires a hearing on “any proposed action related to . . . certificates of
11 necessity,” with limited exceptions. A.R.S. § 36-2234(A). That same statute provides that
12 CON hearing must be held in accordance with A.R.S. §§ 41-1092 through 41-1092.12,
13 which are the Uniform Administrative Hearing Procedures. *See* A.R.S. § 36-2234(B).

14 The Uniform Hearing Procedures require the agency – here ADHS – to prepare a
15 notice of hearing. By statute, that notice must include a statement about the relevant statute
16 and regulations, as well as “the matters asserted.” A.R.S. § 41-1092.05(D). That statute
17 makes it clear that the agency has an obligation to provide sufficient information to allow
18 the ALJ and the parties to understand the scope of the relevant issues. The statute
19 provides: “If the agency or other party is unable to state the matters in detail at the time the
20 notice is served, the initial notice may be limited to a statement of the issues involved.
21 After the initial notice and on application, a more definite and detailed statement shall be
22 furnished.” A.R.S. § 41-1092.05(D)(4).

23 Both the Uniform Hearing Procedures, and OAH’s procedural rules, emphasize that
24 the scope of the OAH proceeding is limited to matters that are relevant to the issues –
25 which clearly means the issues laid out in the notice of hearing. *See*:

- 1 • A.R.S. § 41-1092.07(D) (“All parties shall have the opportunity to respond
2 and present evidence and argument on all *relevant issues*.”) (emphasis
3 added);
- 4 • A.A.C. § R2-19-116(B) (“The administrative law judge shall begin the
5 hearing by reading the caption, *stating the nature and scope of the hearing*,
6 and identifying the parties, counsel, and witnesses for the record.”) (emphasis
7 added);
- 8 • A.A.C. § R2-19-115(A) (“A party may present testimony and documentary
9 evidence and argument with respect to *the issues* and may examine and
10 cross-examine witnesses.”) (emphasis added);
- 11 • A.A.C. § R2-19-116(F) (“ . . . The administrative law judge shall make
12 rulings necessary to prevent argumentative, repetitive, or irrelevant
13 questioning and to expedite the examination to the extent consistent with the
14 disclosure of all *relevant testimony and information*.”) (emphasis added).

15 In conclusion, the statutory and regulatory authority of ADHS (and OAH, on its
16 behalf) extends only to deciding whether the factors warranting a CON are present. There
17 is nothing in Arizona’s statutes or regulations that gives ADHS or OAH the authority to
18 decide the legal issue of the proper interpretation of a contract.

19 **D. Conclusion**

20 The ALJ should allow Dignity Health to intervene in this matter for the limited
21 purpose of addressing issues relating to the contract between Dignity Health and AMR, and
22 any additional issues that might arise in this CON proceeding that require Dignity Health’s
23 involvement to protect its own interests.

24 The ALJ lacks statutory authority to interpret that contract, and should therefore
25 decline to address that issue. This will allow Dignity Health to enforce its rights under the
26 non-interference provision of the AMR/Dignity Health Customer Agreement, namely to
 prohibit AMR from interfering or intervening in this CON process, and also allow AMR to
 respond to that issue in the proper forum, which is the superior court.

1 On the other hand, if the ALJ decides that ADHS and OAH somehow have the
2 statutory authority to interpret the contract, then Dignity Health requests an evidentiary
3 hearing where it can present evidence of the intent behind the non-interference provision,
4 and also requests an opportunity to brief the legal issue.
5

6 RESPECTFULLY SUBMITTED this 14th day of July, 2017.

7 **COPPERSMITH BROCKELMAN PLC**

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9 By /s/Andrew S. Gordon
10 Andrew S. Gordon
11 Scott M. Bennett
12 *Attorneys for Dignity Health*

13 **CERTIFICATE OF SERVICE**

14 ORIGINAL filed using the OAH electronic document filing system
15 <https://portal.azoah.com/oedf> this 14th day of July, 2017 with copies provided to all parties
16 on the approved mailing list this 14th day of July, 2017 by posting through the designated
17 OAH website at <https://portal.azoah.com/oedf/documents/2017-EMS-0104-DHS/index.html>.

18 /s/Georgina S. Hadley
19 Georgina S. Hadley
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