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15 dba Community Ambulance

16 **IN THE OFFICE OF ADMINSTRATIVE HEARINGS**

17 In the Matter of:

18 RBR Management, LLC dba Community
19 Ambulance,

20 Applicant.

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

**APPLICANT'S
REPLY IN SUPPORT OF
MOTION TO STAY**

**(Assigned to the Honorable
Tammy L. Eigenheer)**

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24 Applicant RBR Management LLC, dba Community Ambulance
25 (“Applicant” or “RBR”) replies in support of its motion requesting that the
26 Administrative Law Judge (“ALJ”) exercise her discretion and stay its Certificate
27 of Necessity (“CON”) Application proceeding pending the outcome of Dignity
28 Health’s request for preliminary injunction, which is now set for hearing on

1 September 28, 2017. See August 11, 2017 Minute Entry, *Dignity Health v. AMR*
2 *Holdco Inc, et al.*, CV2017-009481, at Tab 1. As discussed below, good cause
3 supports granting Applicant’s Motion to Stay (“Motion”).
4

5 **1. The ALJ has broad discretion to grant the Motion to Stay and**
6 **there is good cause to grant the stay request.**

7 The Arizona Department of Health Services (“ADHS”), AMR Holdco Inc.
8 (and its subsidiaries) (“AMR”), ABC Ambulance, LLC (“ABC”), and Maricopa
9 Ambulance, LLC (Maricopa Ambulance”) all agree the ALJ has broad discretion
10 to entertain Applicant’s Motion to Stay. See AMR Response (“Resp.”), at 1:18-19;
11 ADHS Resp., at 3:25-27; ABC Joinder; Maricopa Ambulance Joinder.¹

12 The ALJ would be well within the bounds of that discretion in granting the
13 Motion here, because good cause supports Applicant’s request. To be sure, the
14 parties involved in this CON proceeding have not argued they would be
15 prejudiced if the ALJ stays Applicant’s CON hearing. To the contrary, AMR
16 expressly agrees that it “would not be prejudiced by a stay” and ADHS effectively
17 concedes this point by not addressing prejudice in its response. Coupling the lack
18 of any prejudice with (1) the distinct possibility of inconsistent outcomes in the
19 interpretation of the Non-Exclusivity/Non-Interference covenant at ¶18 of the
20 AMR/Dignity Health Customer Agreement (the “Non-Interference Covenant”),
21 and (2) that substantial resources will be expended by the parties and the Office
22 of Administrative Hearings (“OAH”) in duplicative motion practice and an
23 evidentiary hearing on issues scheduled to be heard by the Superior Court on

24
25 ¹ Although all responses to Applicant’s Motion to Stay were to be filed on or before
26 August 15, 2017, ABC filed its Joinder on August 16, 2017 and Maricopa
27 Ambulance filed its Joinder on August 21, 2017. Therefore, the ALJ is well within
28 its discretion to strike both Joinders because no extension was sought or granted,
and neither Joinder was timely filed. See AAC R2-19-102(C); Ariz. R. Civ. P. 6(b),
and 7.1(f)(1).

1 September 28, 2017, granting a stay pending the outcome of Dignity Health's
2 injunction makes legal, practical, and economic sense.

3 This leaves the question of whether the ALJ even has jurisdiction to
4 engage in the threshold issues of interpreting the Non-Interference Covenant.
5 Not surprisingly, AMR continues to advocate its untenable position that the
6 Superior Court does not have jurisdiction to interpret the Non-Interference
7 Covenant. But, AMR has not always taken this view. Through its July 20, 2017
8 response to Dignity Health's Motion to Intervene, AMR *agreed* that the ALJ did
9 not have jurisdiction to resolve the contract dispute between AMR and Dignity
10 Health. During the hearing, AMR shifted its position 180 degrees to match
11 ADHS's view, withdrew its July 20 Response, and now seems to take the
12 incredible position that the Superior Court does not have jurisdiction to resolve a
13 contractual dispute between private parties.

14 ADHS, it appears, disagrees with this hardline stance, severely
15 undermining AMR's arguments. ADHS maintains that the ALJ has *concurrent*
16 jurisdiction with the Superior Court concerning the interpretation of the
17 Customer Agreement and concedes: (1) AMR's alleged breach of the Non-
18 Interference Covenant "**is only tangentially related to things like rates,**
19 **response times, and safety of transport vehicles**" and (2) Dignity Health's
20 breach of contract claim against AMR requires an assessment of whether AMR
21 committed a civil wrong, "**a task which courts of general jurisdiction are**
22 **especially well suited to handle and which are traditionally left to them.**"
23 ADHS Resp. at 3:16-23 (bold added). ADHS has made its position perfectly clear
24 that the Superior Court not only has jurisdiction over the interpretation of the
25 Customer Agreement, but that the ALJ is well within its discretion "to defer to
26 the Superior Court's expertise and grant Applicant's requested stay if she chooses
27 to do so." *Id.* at 3:25-27.
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2. The Superior Court has Exclusive Jurisdiction to resolve the contractual dispute between Dignity Health and AMR.

No one disputes the ALJ has the authority to rule on a motion to intervene. But before the ALJ can exercise that authority, the Superior Court – vested with exclusive jurisdiction – must first resolve the threshold contractual dispute concerning AMR’s agreement not to interfere in any way with Dignity Health’s efforts to develop its own capability to provide interfacility ambulance services to its patients. Through the Non-Interference Covenant, AMR agreed:

Provider [AMR] shall not do anything or cause any other person to do anything that interferes with Dignity Health’s efforts to engage any other person or entity for the provision of some or all of the Services, or interferes in any way with any relationship between Dignity Health and any other person or entity who may be engaged to provide some or all of the Services to Customer, and shall not initiate legal action or take any other action to challenge the right of Dignity Health to enter into a services agreement with another organization, or to develop its own capability or authority to provide Services to its patients.

As the Non-Interference Covenant plainly states, AMR very broadly agreed not to interfere with Dignity Health’s efforts to develop and obtain the authority to provide interfacility and convalescent transports to its patients. Through its application, RBR (the entity through which Dignity Health has elected to develop its own capability to provide ambulance services) applied to provide prescheduled interfacility and convalescent transports in Maricopa County, with RBR’s plain intent to provide transport services to Dignity Health patients.

For obvious reasons, Applicant believes the negotiated and bargained-for Non-Interference Covenant prohibits AMR from opposing or interfering in any way with Applicant’s CON Application. And, respectfully, the interpretation and enforcement of the Non-Interference Covenant is within the purview of the Superior Court, which the legislature has empowered to “determine[] any question

1 of construction or validity arising under the . . . contract, . . . and obtain a
2 declaration of rights, status or other legal relations [under the contract].” A.R.S. §
3 12-1832. The authority to issue declaratory relief is one that belongs exclusively
4 to the courts of this state.

5 Conversely, ADHS (and by extension the ALJ) is empowered only with the
6 authority the legislature has specifically conferred. *Boyce v. City of Scottsdale*,
7 157 Ariz. 265, 267, 756 P.2d 934, 936 (App. 1988) (“Since the early days of
8 statehood, it has been firmly established in Arizona that inferior tribunals acting
9 judicially have no powers other than those given them by the legislature.”);
10 *Arkules v. Bd. of Adjustment*, 151 Ariz. 438, 439-40, 728 P.2d 657, 658-59 (App.
11 1986) (“It is well settled in Arizona that the powers and duties of an
12 administrative agency are measured and limited by the statute creating it.”). At
13 the very most, Arizona’s ambulance statutes and regulations grant ADHS the
14 important, but limited, authority in this context to approve a CON application
15 (A.R.S. § 36-2233) and to review and either approve or reject an ambulance
16 service contract in Arizona. *See* A.A.C. § R9-25-1104 (Ground Ambulance Service
17 Contracts”). As ADHS recognizes, the scope of its authority to approve or deny
18 ground ambulance service contracts extends “to things like rates, response times,
19 and safety of transport vehicles.” ADHS Resp., at 3:17-18. And, the regulation
20 confirms that the scope of ADHS’s review is limited to assessing whether the
21 contracts comply with Arizona’s ambulance statutes and regulations. *See* A.A.C.
22 § R9-25-1104.

23 The ambulance statutes or regulations do not appear to grant ADHS the
24 authority to hear and resolve breach of contract disputes arising out of ground
25 ambulance service contracts. Otherwise, parties to an ambulance service
26 contract could file an action with ADHS to “determine[] any question of
27 construction or validity arising under the . . . contract, . . . and obtain a
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1 declaration of rights, status or other legal relations [under the contract].” A.R.S.
2 § 12-1832. That is a judicial power that belongs exclusively to the courts of this
3 state. *See Gen. Cable Corp. v. Citizens Utilities Co.*, 27 Ariz. App. 381, 385-86, 555
4 P.2d 350, 354-55 (App. 1976) (affirming decision of the Arizona Corporation
5 Commission to dismiss contractual dispute between parties to an electrical
6 supply contract; holding that “the construction and interpretation to be given to
7 legal rights under a contract reside solely with the courts and not with the
8 Corporation Commission.”).

9 Because ADHS is not empowered to grant the injunctive and declaratory
10 relief Dignity Health seeks through its Verified Complaint and Application for
11 Preliminary Injunction, the ALJ is well within its discretion to stay this CON
12 proceeding pending the outcome of the September 28, 2017 preliminary
13 injunction hearing.

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15 **3. Even if the Superior Court has Concurrent Jurisdiction, the**
16 **ALJ should defer to the Court’s Interpretation of the Non-**
17 **Interference Covenant.**

18 Although it is Applicant’s position that the Superior Court has exclusive
19 jurisdiction to resolve the contract dispute involving the Non-Interference
20 Covenant, it is not necessary for the ALJ to reach that issue considering ADHS’s
21 position that its authority (and by extension the ALJ’s authority) is concurrent
22 with the Superior Court’s jurisdiction. As ADHS argues, where the claims at
23 issue “are unrelated or attenuated from those matters over which the
24 [administrative tribunal] has express constitutional or statutory authority,” the
25 jurisdiction of the agency is at most concurrent with the superior court. *See*
26 *ADHS Resp.*, at 3:9-15, quoting *Campbell v. Mountain States Tel. & Tel. Co.*, 120
27 Ariz. 426, 432 (App. 1978). ADHS suggests (and RBR agrees) that the Superior
28 Court is likely better suited to resolve the claims at issue in Dignity Health’s

1 litigation against AMR, stating that “while the claimed wrong – breach of
2 contract – stems from an ambulance service contract, the supposed breach is only
3 ***tangentially related to things like rates, response times, and safety of***
4 ***transport vehicles.***” ADHS Resp., at 3:16-18 (emphasis added.) ADHS further
5 argues that “a breach of contract claim is one that requires analysis of whether a
6 civil wrong was committed. The case law is clear that this is a task which courts
7 of general jurisdiction are especially well suited to handle, and which is
8 traditionally left to them.” *Id.* at 3:20-23.

9 ADHS’s candid assessment of its own authority bluntly contradicts AMR’s
10 contention that “[n]o one is better suited to determine what the Contract can or
11 cannot accomplish with regard to an ambulance regulatory proceeding than the
12 Director/DHS (and, by proxy, this Office.)” If, as AMR contends, ADHS is charged
13 with implementing and enforcing its own statutes and regulations, then AMR’s
14 argument that ADHS’s “regulatory power should be seen as exclusive, not
15 something held concurrently with the state courts” is now moot and must be
16 rejected. ADHS has assessed its own regulations and resolved that the contract
17 dispute at issue between Dignity Health and AMR is only tangentially related to
18 the purview of its regulatory powers.

19 Even without ADHS acknowledging that the Superior Court is probably
20 better suited to deal with the contract dispute, AMR is simply incorrect about the
21 nature of the relief Dignity Health seeks through the preliminary injunction action
22 and its relationship to ADHS’s regulatory authority. Dignity Health is not asking
23 the Superior Court to decide whether “AMR is an appropriate, or even a required,
24 participant in the RBR CON regulatory proceeding.” AMR Resp., at 9:4-8. Instead,
25 Dignity Health seeks a declaration and an injunction prohibiting AMR from
26 intervening in RBR’s CON Application proceedings because AMR contractually
27 agreed not to interfere with Dignity Health’s efforts to establish an ambulance
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1 service through the RBR CON Application proceeding. *See* Verified Complaint at
2 ¶¶42-46; Prayer for Relief, ¶3.

3 In this way, AMR’s reliance on *Simms v. Napolitano*, 205 Ariz. 500, 73 P.3d
4 631 (App. 2003) is misplaced because the relief sought by Dignity Health is
5 applicable only to AMR as parties to the Customer Agreement. *Simms* involved
6 an applicant who sought to enjoin the Arizona Department of Gaming from
7 denying the applicant’s request to withdraw his application for a certificate to
8 provide gaming services, after he was informed that the Department intended to
9 deny the application. *Id.*, at 501. The injunction sought in *Simms* would apply to
10 all gaming certificate applicants and would hamper the purpose of the relevant
11 “statutes to have thorough and fair regulation of gaming and to ward off
12 unsuitable individuals.” *Id.*

13 Unlike *Simms*, Dignity Health seeks only to enforce the Non-Interference
14 Covenant and require that AMR conform to the terms of its negotiated
15 agreement. As such, that injunction would not interfere with ADHS’s mandate
16 under the ambulance regulations to determine whether granting a CON to RBR
17 would affect other CON holders, including the AMR entities. *See* A.A.C. § R9-25-
18 903(B)(2) & (A)(6) (stating that in deciding whether to issue a CON, the director
19 of ADHS “shall consider,” among other factors, “the financial impact on certificate
20 holders” in the same service area, and “[o]ther matters determined by the
21 Director . . . to be relevant to the determination of public necessity.”).

22 While ADHS can certainly consider evidence of any potential impact on the
23 AMR entities, there is nothing in the regulation that mandates including AMR
24 in RBR’s CON Application hearing as a party – particularly when AMR has
25 contractually waived any such right. If there were, ADHS likely would not have
26 approved a Customer Agreement through which AMR expressly agreed not to
27 interfere in Dignity Health’s efforts to develop an ambulance service and
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1 expressly waived its right to oppose any such effort. Indeed, as ADHS confirmed,
2 the contract between Dignity Health and AMR was reviewed and approved by
3 ADHS. To approve the contract, ADHS was required to conclude that the entire
4 contract, including the Non-Interference Covenant, complied with Arizona's
5 ambulance statutes and regulations. *See* A.A.C. § R9-25-1104(A)(3) (stating that
6 a ground ambulance service contract must "[c]omply with A.R.S. §§ 36-2201
7 through 36-2246 and 9 A.A.C 25"), and 1104(A) & (B) (requiring ADHS to review
8 and approve every ambulance service contract before the contract is
9 implemented). Those statutes and regulations include A.A.C. § R9-25-903, which
10 is the regulation that requires the director of ADHS to consider the potential
11 impact on existing CON holders.

12 If ADHS had in fact believed that Arizona law requires that an ALJ allow
13 any CON holder to intervene in a CON proceeding, and if (as AMR suggests) the
14 right to intervene cannot be waived, then ADHS would have (and should have)
15 rejected the contract between Dignity Health and AMR as being against public
16 policy or otherwise violating Arizona's ambulance statutes and regulations. But
17 ADHS approved the entire Customer Agreement, including the Non-Intervention
18 Covenant. To the extent that AMR ever had a right to intervene and actively
19 oppose RBR's application, it expressly and intentionally waived that right
20 through the Customer Agreement. *See Arizona Bank & Tr. v. James R. Barrons*
21 *Tr.*, 237 Ariz. 401, 404, 351 P.3d 1099, 1102 (Ct. App. 2015), review denied (Oct.
22 27, 2015) ("Arizona law values the private ordering of commercial relationships
23 and seeks to protect bargained-for expectations," including contract terms that
24 expressly waive statutory rights and protections); *see also Comeau v. Ariz. State*
25 *Bd. of Dental Examiners*, 196 Ariz. 102, 108-09; 993 P.2d 1066, 1072-73 (App.
26 1999) (licensee may waive statutory right to formal hearing before an
27 administrative law judge).

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ORIGINAL filed this 28th day
of August, 2017 via the OAH
electronic document filing system
<https://portal.azoah.com/oedf>, with
copies provided to all parties on the
approved mailing list by posting
through the designated OAH website at
<https://portal.azoah.com/oedf/documents/2017-EMS-0104-DHS/index.html>,
in accordance with Case Management Order No. 1.

By: /s/ Brendan Murphy

TAB 1

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-009481

08/11/2017

HON. DANIEL G. MARTIN

CLERK OF THE COURT
J. Eaton
Deputy

DIGNITY HEALTH

ANDREW S GORDON

v.

A M R HOLDCO INC, et al.

PAUL J MCGOLDRICK

RONNA L FICKBOHM
JOHN C KELLY
SCOTT M BENNETT

MINUTE ENTRY

East Court Building – Courtroom 412

11:02 a.m. This is the time set for a telephonic Return Hearing on Plaintiff's August 2, 2017 Application for Preliminary Injunction. Plaintiff is represented by counsel, Scott M. Bennett and John C. Kelly. Defendants are represented by counsel, Paul J. McGoldrick and Ronna L. Fickbohm.

A record of the proceedings is made digitally in lieu of a court reporter.

Discussion is held regarding the pending motion and briefing schedules.

Further discussion is held on a briefing schedule to Defendants' Motion to Dismiss.

IT IS ORDERED that Plaintiff shall file its Response to the Motion to Dismiss **not later than August 15, 2017.**

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-009481

08/11/2017

IT IS FURTHER ORDERED that Defendants shall file their Reply in support of their Motion to Dismiss **not later than August 21, 2017**.

IT IS FURTHER ORDERED setting a telephonic Conference to address Defendants' Motion to Dismiss and set a further schedule for either argument or additional briefing for **August 28, 2017, at 9:30 a.m.** (time allotted: 15 minutes).

Counsel for Plaintiff shall initiate the call by arranging the presence of all parties and contacting this Division at 602-372-2925.

Pending the Court's ruling on Defendants' Motion to Dismiss,

IT IS FURTHER ORDERED setting an Evidentiary Hearing on Plaintiff's August 2, 2017 Application for Preliminary Injunction for **September 28, 2017, at 9:30 a.m.** (time allotted: 1 day).

Discussion is held regarding disclosure statements.

IT IS ORDERED that parties are to exchange disclosure statements not later than **September 15, 2017**.

LATER:

IT IS ORDERED counsel are to provide their exhibits for the Evidentiary Hearing, to the Division's Clerk for marking, **not later than 3:00 p.m. on September 21, 2017**.