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17 **BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**

	)	
	)	Docket 2017-EMS-0104-DHS
	)	(EMS No. 0283)
	)	
In the Matter of:	)	<b>NOTICE OF FILING</b>
	)	<b>MARICOPA COUNTY</b>
<b>RBR Management, LLC, dba</b>	)	<b>SUPERIOR COURT</b>
<b>Community Ambulance,</b>	)	<b>RULING DENYING DIGNITY'S</b>
	)	<b>APPLICATION FOR PRELIMINARY</b>
Applicant.	)	<b>INJUNCTION; REQUEST FOR ORDER</b>
	)	<b>APPROVING AMR CON HOLDERS'</b>
	)	<b>INTERVENING PARTY STATUS AND</b>
	)	<b>SETTING SCHEDULING</b>
	)	<b>CONFERENCE</b>

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22 The AMR CON holders (as specifically identified on p. 2 of their June 14,  
23 2017 Motion for Intervening Party Status) hereby notify the Court of the attached  
24 Minute Entry Order in which the Superior Court denied Dignity's Application for  
25 Preliminary Injunction. AMR's Motion to Intervene was argued before this Office,  
26

1 has been fully briefed, and remains at issue. Since the Superior Court's order  
2 denied Dignity's request for an order enjoining the AMR CON Holders from  
3 intervening, the following is requested: (1) that the ALJ accept the Superior  
4 Court's guidance and enter orders formalizing the prior verbal rulings granting the  
5 ABC and Maricopa Ambulance motions to intervene (as done during the July 26  
6 status and scheduling conference), (2) grant AMR CON Holders' motion to  
7 intervene, (3) deny Applicant's Motion to Stay as moot, and (4) set a scheduling  
8 conference to discuss a hearing date and prehearing deadlines.

9  
10 DATED this 13th day of October, 2017.

11 **Shorall McGoldrick Brinkmann**

**Fletcher Struse Fickbohm & Marvel PLC**

12 /S/Paul McGoldrick

/S/Ronna Fickbohm

13 Paul McGoldrick

Ronna L. Fickbohm

14 *Attorneys for AMR CON Holders*

*Attorneys for AMR CON Holders*

15  
16 Foregoing filed through the  
17 OAH website <https://portal.azoah.com/oedf/>,  
18 with copies provided to all parties on the  
19 approved mailing list by posting through  
20 the designated OAH website at  
<https://portal.azoah.com/oedf/documents/2017-EMS-0104-DHS/index.html>,  
21 in accordance with Case Management Order No. 1.

22 By: /s/Roselyn Mosbrucker

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2017-009481

10/11/2017

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

UNDER ADVISEMENT RULING

Pending before the Court is Plaintiff Dignity Health's ("Dignity") August 2, 2017 Application for Preliminary Injunction ("Application"). On September 29, 2017, the Court convened an evidentiary hearing. The parties submitted closing memoranda on October 5, 2017. Having considered the evidence presented, and the arguments of counsel, the Court enters its ruling denying the Application.

FACTUAL BACKGROUND

The Court adopts, as supported by the evidence, the following factual background as described in the Application:

Dignity Health is a nonprofit health system that operates a number of hospitals and other facilities throughout Maricopa County. Defendants are subsidiaries of American Medical Response ("AMR"), the largest private ambulance company in the United States.

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In 2015, Dignity Health entered into an agreement with one AMR subsidiary, American Medical Response of Maricopa, to provide ambulance transports to patients at Dignity Health facilities in Maricopa County (the “Agreement”). (*See* Complaint, Ex. 1) In February of 2017, at the request of AMR, the parties signed an amendment (the “Amendment”) to the Agreement. The Amendment expanded the definition of the AMR parties covered by the Agreement to cover “AMR Holdco, Inc. for and on behalf of” its subsidiaries and affiliates in the contractual service area, including “any . . . [ambulance company] acquired, owned, and/or operated by or under [AMR’s holding company] in the future.” (*Id.*, Ex. 2, p. 1) All other terms of the Agreement remained the same.

When the parties were negotiating the Agreement, Dignity Health added the following language, which AMR accepted:

[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 [Dignity Health], 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.*

(*Id.*, Ex. 1, p. 7, Section 18) (Emphasis added) (the “Non-Interference Provision”).

*See* Application, at 3-4.

In June 2016, Dignity, through a subsidiary (RBR Management LLC dba Community Ambulance), filed an application for a Certificate of Necessity (“CON”) from the Arizona Department of Health Services (“DHS”) to operate an ambulance service in Maricopa County. *See* Exhibit 9. DHS referred the matter to the Arizona Office of Administrative Hearings (“OAH”) to conduct a hearing and render a recommended decision to the DHS Director as to whether the CON should be granted. Thereafter, and in violation of the Non-Interference Provision, AMR sought to intervene in the administrative proceeding to contest Dignity’s CON application.<sup>1</sup> AMR’s attempt to intervene gave rise to the proceeding in this Court, and Dignity’s application for a preliminary injunction to enjoin AMR’s intervention.

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<sup>1</sup> The Court uses “Dignity” and “AMR” to refer not only to the primary corporate entities, but also to the various subsidiaries through which they conduct business.

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DISCUSSION

As Dignity correctly states in the Application, “[t]he criteria for granting temporary injunctive relief are: ‘(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if the requested relief is not granted, (3) a balance of hardships favoring that party, and (4) public policy favoring a grant of the injunction.’” *Ariz. Ass’n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12, 219 P.3d 216, 222 (Ct. App. 2009) (citing *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (Ct. App. 1990)). Application, at 6-7. The Court will assess each factor in turn. However, it is important to place the Court’s findings in context.

Applications for certificates of necessity are governed by statute and rule. The Director of DHS must determine, among other things, (1) whether public necessity requires the service or any part of the proposed service, and whether the service is in the public’s interest, (2) whether the applicant is fit and proper to provide the services proposed, and (3) whether the applicant’s service area is in the best interests of the public. *See, e.g.*, A.R.S. § 36-2232; *see also* A.A.C. R9-25-903. In order to reach an informed decision, the Director must have access to all relevant information, and such information is developed, in part, through the hearing process at the OAH. The Department takes the position in this case that “if the proposed service area of a new C.O.N. application overlaps the current service area of another C.O.N. holder [as is the case here with AMR], then that C.O.N. holder has a right to intervene [in the administrative proceeding].” *See* Exhibit 33. This position is consistent with the policy expressed by statute and rule that the assessment of public necessity requires that the Director have more data, not less.

Dignity’s position in this litigation is at odds with the broader process for determining whether a particular applicant should be granted a CON, as it seeks to exclude AMR from contributing information to that process. For the reasons developed at greater length below, the Court resolves this conflict in AMR’s favor on policy grounds, even while agreeing with Dignity that the parties entered into an agreement that on its face precludes AMR from challenging Dignity’s CON application.

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*Likelihood of Success on the Merits*

This factor favors Dignity. The Non-Interference Provision was the product of a negotiation between equally sophisticated parties, and is very broadly drafted. AMR urges that the scope of the provision is limited to certain Dignity facilities that are referenced in the opening recital to the Agreement; however, this narrow reading does not withstand close scrutiny. First, the reference to Dignity's Arizona facilities appears to be descriptive only, providing a contrast between Dignity's Arizona operations (which are subject to the Agreement), and its operations in California and Nevada (which are not subject to the Agreement). Second, and more important, the critical contractual term for purposes of determining the scope of the Non-Interference Provision is the term "Services" (defined on page 1), which does not contain any reference to any particular facilities, but instead identifies only the types of transports to be provided. If AMR wanted to limit the scope of the Agreement to just the facilities identified in the Recital, it easily could have done so. It did not.

AMR further contends that to the extent the Non-Interference Provision may be valid, it applies to Dignity only, and not to any of Dignity's subsidiaries. AMR reaches this conclusion by focusing on the term "Customer" as used in the Non-Interference Provision, which the Agreement defines on page 1 as Dignity. This argument, however, ignores the plain language of the Non-Interference Provision, which clearly allows Dignity to develop an ambulance service either itself or in conjunction with others.

In short, AMR agreed that it would not interfere with Dignity's efforts to develop its own ambulance service, but that is precisely what AMR is seeking to do. Given the language of the Agreement and AMR's actions in contravention of that language, there is a strong likelihood that Dignity would prevail on the merits on its claim for breach of the Agreement.

*Irreparable Injury*

This factor favors AMR. In the Application, Dignity asks this Court to presume irreparable injury, citing *Phoenix Orthopaedic Surgeons, LTD v. Peairs*, 164 Ariz. 54, 59, 790 P.2d 752, 757 (Ct. App. 1989), *overruled on other grounds by Valley Medical Specialists v. Farber*, 194 Ariz. 363, 982 P.2d 1277 (1999). Such a presumption might be appropriate in other circumstances, but the situation presented by this case is more fluid. Ultimately, the question becomes what, if any, impact AMR's intervention in the administrative proceeding may have on Dignity's success in obtaining a CON.<sup>2</sup> That determination, in turn, rests in the sound discretion of the DHS Director, acting on the Decision of the assigned Administrative Law Judge. The

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<sup>2</sup> As far as the Court is aware, the Administrative Law Judge has not yet ruled on AMR's motion to intervene, and could yet choose to deny that motion.

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suggestion that Dignity will be irreparably injured because it will be required to defend its CON application against opposing voices is not one addressed by any of the authorities cited by the parties, or with which the Court is otherwise familiar. Given the multiple potential outcomes of the CON application process, whether joined by AMR or not, the Court cannot determine whether Dignity will be injured by denial of the Application, much less whether such injury would be irreparable.

*Balance of Hardships*

This factor favors AMR. Dignity urges that the balance of hardships tips in its favor because if the Application is denied, it will lose the benefit of the bargain it struck with AMR, and possibly the opportunity to provide (through its subsidiary) ambulance services in Maricopa County. Stated more plainly, Dignity's argument is that it will suffer hardship because it will be deprived of the opportunity to minimize opposition to its CON application. The Court does not view the inability to minimize competition as a "hardship", and in fact the result of such "hardship" is the removal from the administrative process an additional source of information for the DHS Director's consideration.

*Public Policy*

This factor favors AMR. The evidence presented at hearing demonstrated that DHS's decision-making process benefits from a rigorous review of CON applications. While it is true that the rigor will exist with or without AMR's participation in the hearing, AMR is an additional source of information from which the Director's decision may benefit. The Court finds that public policy cuts in favor of the Director possessing such information.

CONCLUSION

Having considered all of the evidence and the relevant factors, the Court concludes that Dignity has not met its burden to show that a preliminary injunction should issue. Although the likelihood of success on the merits favors Dignity, the other three factors tilt against issuing a preliminary injunction. Accordingly,

IT IS ORDERED denying the Application.

/s/ Daniel G. Martin  
THE HON. DANIEL G. MARTIN  
JUDGE OF THE SUPERIOR COURT