

1 Ronna L. Fickbohm (SBN 010869)
2 **FLETCHER STRUSE FICKBOHM & WAGNER PLC**
3 6750 N. Oracle Road
4 Tucson, Arizona 85704
5 Telephone: (520) 575-5555
6 rfickbohm@tucsontrusts.com

7 and

8 Paul McGoldrick (SBN 010383)
9 **SHORALL MCGOLDRICK BRINKMANN**
10 1232 E. Missouri Ave.
11 Phoenix, AZ 85014-2912
12 paulmcgoldrick@smbattorneys.com

13 *Attorneys for AMR CON Holders*

14 BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

15 In the Matter of:)

16 **RBR Management LLC, dba**)
17 **Community Ambulance,**)

18 Applicant.)

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

21 **REPLY IN SUPPORT OF REQUEST**
22 **FOR ORDER**

23 The AMR CON Holders (as specifically identified on p. 2 of their June 14, 2017 Motion
24 for Intervening Party Status), having submitted their one paragraph "Notice of Filing Maricopa
25 County Superior Court Ruling Denying Dignity's Application for Preliminary Injunction; Request
26 for Order Approving AMR CON Holders' Intervening Party Status and Setting Scheduling
Conference" ("Notice and Request") on October 13, 2017; both Dignity Health and Applicant
RBR having filed their "Response[s]" to said Notice and Request on October 20, 2017; this
Office having stated (during the July 26, 2017 Prehearing Conference) its willingness to
entertain replies; and Dignity and RBR having presented the Superior Court Application for

1 Preliminary Injunction proceeding in a not entirely accurate manner, the AMR CON Holders
2 hereby submit their supportive reply.

3 In filing their Notice and Request, it was simply the AMR CON Holders' intent to notify
4 this Office of the Superior Court ruling, to confirm the status of their Motion to Intervene as fully
5 briefed but not yet ruled upon, to identify those matters that remained outstanding for this
6 Office's attention, and to request that it follow the Superior Court's guidance and enter its
7 rulings. However, Dignity and RBR apparently intend to further argue the AMR CON Holders'
8 Motion to Intervene, indirectly, by offering their "spin" on the Superior Court's ruling. To the
9 extent this Office will consider those arguments, the AMR CON Holders must state their
10 disagreements.
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12 Both Dignity and RBR imply that the Superior Court has already made a determination
13 that the AMR CON Holders have breached the subject contract with Dignity by attempting to
14 intervene in the RBR/Community Ambulance proceeding. While one could jump to that
15 conclusion based upon the language found at the bottom of p. 2 of the Court's Minute Entry,
16 where the factual background has been set forth, a thorough reading of the Court's discussion
17 demonstrates the offered implication is *not* consistent with the limited inquiries at issue during
18 the hearing on Dignity's Application for a Preliminary Injunction, and that no final determination
19 has yet been reached on Dignity's breach of contract claim. Only Dignity's request for an order
20 enjoining the AMR CON Holders from intervening in this proceeding was decided (denied).
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22 As the Superior Court details, beginning at the top of p. 3 of its ruling, the only issues
23 before it during the hearing on Dignity's Application for a Preliminary Injunction were whether
24 Dignity could offer proof of the four elements necessary for issuance of a preliminary
25 injunction: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable
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1 injury if the requested relief is not granted, (3) a balance of hardships favoring that party, and
2 (4) public policy favoring a grant of the injunction. See, Under Advisement Ruling attached to
3 the AMR CON Holders' October 13, 2017 Notice (hereafter "Under Advisement Ruling"), at p.
4 3.

5 Nothing in the Under Advisement Ruling, or even suggested by Dignity or RBR,
6 indicates that Dignity asked the Superior Court to consolidate the hearing on its Application for
7 a Preliminary Injunction with a trial on the merits. A preliminary injunction proceeding is an
8 accelerated, abbreviated proceeding (only one day was allowed here). Disclosure and
9 discovery regarding the causes of action Dignity has pled in its Complaint will help flesh out the
10 facts supporting the AMR CON Holders' various defenses to Dignity's breach of contract claim
11 and these AMR CON Holders are optimistic that they will ultimately prevail on the merits,
12 before the finder of fact, on Dignity's breach of contract claim.

14 Indeed, there are additional facts that the AMR CON Holders would have offered to
15 Judge Martin, during the hearing on the Application for a Preliminary Injunction, if that hearing
16 had been consolidated with a trial on the merits, but it was not and time was limited. As such,
17 contrary to both Dignity and RBR's propositions, the procedural status of the Superior Court
18 action is *not* such that there has been a final determination that the AMR CON Holders in fact
19 breached their contract with Dignity by attempting to intervene in the RBR CON Application
20 proceeding.

22 Next, Dignity incorrectly proposes that the AMR CON Holders waived their right to
23 intervene in the instant CON proceeding. This is wrong. Glenn Kasprzyk testified that AMR
24 agreed to not intervene if *Dignity* sought a CON *to serve the patients covered by the*
25 *subject contract*. See, Dignity's October 10, 2017 Response, Ex. A (transcript of Glenn
26

1 Kasprzyk's testimony, hereinafter "Kasprzyk Testimony") at 29:3 - 21; 32:23 - 34:14; 38:11 -
2 15; 48:20 - 49:1; 55:20 - 23. That contract is limited to five facilities/entities. See, Applicant's
3 June 22, 2017 Response to Motion for Intervening Party Status, Ex. A, Contract at p. 1,
4 opening paragraph. This is a far cry from the scope of the pending Application, which has
5 been submitted by an entity separate and distinct from Dignity Health, as acknowledged by
6 both Dignity and RBR in their filings with this Office. For example, RBR has avowed that
7 "Applicant and Dignity Health are very much distinct and separate legal entities," which
8 statement was offered as justification supporting Dignity's intervention in these proceedings.
9 See, Applicant's Response to Dignity Health's Motion to Intervene, at p. 2. Dignity Health also
10 argued, before this Office on July 26, 2017, the same theory – that it is a separate and distinct
11 entity from the Applicant. Further, as confirmed by the Notice of Hearing in this matter, RBR's
12 Application for a CON is not limited to just those patients covered by the Dignity contract.
13 Rather, RBR seeks a CON allowing it to provide any non-911 transport services anywhere in
14 Maricopa County (without limitation). See, Notice of Hearing, p. 1.

16 As Glenn Kasprzyk also testified to before the Superior Court, the AMR CON Holders
17 would never have agreed to waive their right to intervene in such a broadly stated Application
18 for CON Authority. See, Kasprzyk's Testimony at 30:6 - 31:13; and 42:18 - 22. Allowing an
19 entity to have such unlimited transport authority without at the same time having responsibility
20 to support the Maricopa County 911 system would serve a detrimental impact upon both the
21 existing 911 system providers (primarily the AMR CON Holders) and the public they serve. *Id.*,
22 31:14 - 32:22; 34:15 - 38:2; and 41:2 - 42:17.

24 Further, in RBR's response, it suggests that Judge Martin's concern about the public
25 policy implications of preventing the AMR CON Holders from participating in the RBR CON
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1 Application public hearing, as intervenors, can be satisfied via subpoena, or via the AMR CON
2 Holders providing that information through documents or testimony without intervening. This
3 proposition is also not supported by the Superior Court's ruling (and should not be supported
4 by this Office's experience in other CON application proceedings). This subject was a matter
5 that Glenn Kasprzyk addressed in his Superior Court testimony, detailing how the nature of
6 CON Applications is such that an application itself provides minimal information, and it is only
7 through participation in the public hearing held before OAH on the application that the detail
8 necessary to calculate the expected impact upon the public and upon the existing providers'
9 operations can be discerned, so that information regarding the same can be provided to the
10 Director. Kasprzyk Testimony, 8:19 – 9:20; 11:4 – 11; 38:11 – 41:1; 53:15 – 24; and 55:7 – 19.
11 Judge Martin found this relevant to the public policy consideration, stating that "AMR is an
12 additional source of information from which the Director's decision may benefit." Under
13 Advisement Ruling, p. 5. As such, the Court found that the public policy factor at issue during
14 the Preliminary Injunction hearing cut in favor of the Director possessing that information. *Id.*
15 This was one of the reasons the Judge denied the Application. *Id.* RBR's proposition that this
16 public policy concern can simply be addressed via subpoena power ignores the reality of the
17 evidence submitted to Judge Martin for consideration of the public policy issue, and the reality
18 of the public hearings OAH conducts for CON applications.
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21 Judge Martin's discussion of the balance of hardships is also relevant in this regard, as
22 he found that Dignity's desire to minimize opposition to RBR's CON Application is not a
23 "hardship," but instead would result in the removal from the administrative process of an
24 additional source of information for the DHS Director's consideration. *Id.* He also rejected the
25 suggestion that Dignity would be irreparably injured if the AMR CON Holders were allowed to
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1 intervene. In fact, Judge Martin could not even determine whether Dignity would be injured by
2 denial of the CON Application, much less whether such injury would be irreparable. *Id.*

3 Given the fact that Judge Martin found that the potential of irreparable injury was not
4 demonstrated by Dignity, that the balance of hardships tipped in the AMR CON Holders' favor,
5 and that the public policy factors also favored AMR, such that the Court would not enjoin AMR
6 from intervening in the RBR OAH proceeding, it is disingenuous of RBR and Dignity to suggest
7 that this Office simply look past Judge Martin's denial of Dignity's Application for a Preliminary
8 Injunction and enter its order prohibiting the AMR CON Holders from intervening.¹ The issue
9 of whether their intervention will ultimately be determined to be a breach of their contract with
10 Dignity and, if so, what damages (if any) that breach might have caused, is a matter far
11 separate and removed from the proceeding before this Office and should not enter into its
12 determinations. Those concerns will be fully addressed in the context of the Superior Court
13 proceeding on Dignity's Complaint. Instead, consistent with DHS/BEMSTS's position before
14 this Office (ADHS/BEMSTS' response submitted October 20, 2017), it is requested that this
15 Office enter its order allowing the AMR CON Holders intervening party status (as well as
16 addressing the other matters raised in the Notice and Request).
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19 RESPECTFULLY SUBMITTED THIS 26 day of October, 2017.

20 **SHORALL MCGOLDRICK BRINKMANN**

**FLETCHER STRUSE FICKBOHM &
WAGNER, PLC**

21 /S/PAUL MCGOLDRICK

/S/RONNA FICKBOHM

22 Paul McGoldrick

Ronna L. Fickbohm

23 *Attorneys for AMR CON Holders*

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25 ¹ The fact that this was not a trial on the merits is further reinforced by the fact that Judge Martin, having
26 found that Dignity did not prove all four factors necessary for issuance of a preliminary injunction, did not
include any ruling on whether or not Life Line and Canyon State (two of the AMR CON Holders) were
parties to the subject contract, a matter the AMR CON Holders offered unrebutted testimony on. *See,*
Kasprzyk Testimony, 42:23 – 43:10; 44:5 – 45:22.

1 Pursuant to Case Management
2 Order No. 1, electronic filing and
3 service of the foregoing through
4 <https://portal.azoah.com/oedf/>,
has been done this 26 day of
October, 2017

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6 By: /s/ Linda Clark
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