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7 **BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**

8 9 10 In the Matter of: 11 RBR Management LLC, dba 12 Community Ambulance 13 14 Applicant.	Docket No. 2017-EMS-0104-DHS (EMS No. 0283) ABC AMBULANCE'S RESPONSE TO APPLICANT'S "MOTION TO STRIKE ABC AMBULANCE'S LATE-FILED ADDITIONAL REQUEST FOR ISSUANCE OF SEVEN SUBPOENAS DUCES TECUM" (Assigned: The Hon. Tammy Eigenheer)
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16 ABC Ambulance, LLC ("ABC") respectfully requests that the Administrative Law
17 Judge deny the "Motion to Strike ABC Ambulance's Late-Filed Additional Request for
18 Issuance of Seven Subpoenas Duces Tecum" ("Motion to Strike") filed by Applicant, RBR
19 Management, LLC, dba Community Ambulance ("Applicant") on June 1, 2018, in response
20 to ABC's request for issuance of seven subpoenas against seven non-parties ("Subpoenas").
21 Applicant's only argument is that the Subpoenas are untimely. First, Applicant has no
22 standing to object to the Subpoenas (they are not directed to Applicant). Second, Applicant
23 suffers no prejudice whatsoever if the Subpoenas are issued because (1) they are not
24 directed to Applicant; (2) issuing the Subpoenas causes no delay because no subpoenas have
25 issued yet in these proceedings; and (3) Applicant itself originally proposed a subpoena
26 deadline of May 25, three days after ABC's request, based on the same trial dates. Third,
27 the Rules themselves impose no deadlines for the issuance of subpoenas, and in fact
28 envisage subpoenas being issued within five days of trial.

1 This response is supported by the attached Memorandum of Points and Authorities,
2 as well as all matters of record herein.

3 MEMORANDUM OF POINTS AND AUTHORITIES

4 A. Procedural Background

5 In Case Management Order No. 4 dated February 16, 2018, the Administrative Law
6 Judge herein ("ALJ") ordered a prehearing conference to be held on February 23, 2018.

7 Prior to the prehearing conference, on February 20, 2018, the parties met and
8 conferred to come up with a schedule for these proceedings. At that conference, the parties
9 discussed and agreed to a number of deadlines. Immediately after that conference,
10 Applicant's counsel drafted and circulated a draft scheduling order that included a deadline
11 for subpoenas of May 25, 2018. See draft Scheduling Order, attached hereto marked
12 **Exhibit A** ("Draft Schedule").

13 At the prehearing conference with the ALJ held on February 23, 2018, the parties
14 agreed to the proposed trial dates as set out in the Draft Schedule (with additional time set
15 aside). Undersigned counsel argued for a staggered disclosure schedule, unsupported by the
16 other parties, which the ALJ ultimately agreed to. As pointed out by Applicant in its Motion
17 to Strike, undersigned counsel did not write down all the dates mentioned during the oral
18 discussions at the prehearing conference, instead relying on her routine practice of waiting
19 for the issuance of a written case management order to forward to her firm's docketing
20 paralegals. Motion to Strike, p. 2:22-25. To date, no case management order has been issued
21 reflecting the deadlines discussed at the prehearing conference.

22 Late in the day on May 10, 2018, Applicant filed a request for four subpoenas (to
23 each of the Intervenors and to Dignity Health), Intervenor AMR filed a request for two
24 subpoenas (to Applicant and Dignity Health), and as did Intervenor Maricopa Ambulance.

25 On May 11, 2018, ABC requested issuance of subpoenas to Applicant and its
26 majority owner, Dignity Health.¹

27 _____
28 ¹ As noted by Applicant's counsel, undersigned counsel asked Applicant's counsel if they would object, and Applicant's
counsel courteously agreed to not object.

1 On May 22, 2018, ABC requested issuance of narrowly-tailored subpoenas to seven
2 entities ("Third Parties") that had supplied letters of recommendation to Applicant, which
3 letters included opinions relating to the current state of affairs of non-emergency ambulance
4 services in Maricopa County ("Letters of Recommendation"). For example, one author
5 states that the current providers are "overtaxed," and that "PFD has observed an unmet need
6 for additional non-emergency ambulance transportation."² Given the foundational nature of
7 these statements, ABC is requesting that the authors provide the documents they reviewed
8 in order to reach their conclusions, and their communications relating thereto.³

9 On June 1, 2018, although the Subpoenas are not directed to it, Applicant filed its
10 Motion to Strike, arguing *only* that the Subpoenas are untimely. Motion to Strike, p. 2:6, p.
11 3:7-21, p. 4-5.

12 **B. Legal Standard**

13 "The object of disclosure, as with all discovery, is to permit the opponent a
14 reasonable opportunity to prepare for trial or settlement-nothing more, nothing less." *Bryan*
15 *v. Riddel*, 178 Ariz. 472, 476, 875 P.2d 131, 135 (1994).

16 Arizona law dictates that disclosure rules must be interpreted to "maximize the
17 likelihood of a decision on the merits." *Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 287, 896
18 P.2d 254, 257 (1995).

19 With respect to delay in disclosure, the Arizona Supreme Court has stated as follows,
20 "[d]elay, standing alone, does not necessarily establish prejudice. Every late disclosure will
21 involve some delay, but *the relevant question must be whether it is harmful to the opposing*
22 *party or to the justice system.*" *O'Toole*, at 288 (emphasis added).

23 Applicant's reference to the legal standard laid out in Rule 16(i)(1)(A), *Arizona Rules*
24 *of Civil Procedure*,⁴ is inappropriate here. That Rule is expressly based on the fact that, after
25 any conference, any action taken or deadlines agreed to *must be reduced to a written court*

26 ² See ABC's Request for Issuance of Seven Subpoenas Duces Tecum filed on May 22, 2018, p. 2:9-10 (referring to
27 Applicant's Exhibit 111).

28 ³ If they reviewed no documents, and therefore have no documents to provide, that fact is materially important to
weighing this evidence submitted by Applicant.

⁴ Motion to Strike, p. 4:8-10.

1 order (the preceding subsection, Rule 16(h), requires that "after any conference held under
2 this rule, the court must enter an order reciting the action taken"). Therefore the drastic
3 sanction of disallowing a subpoena (as proposed by Applicant based on this Rule)
4 presupposes disobedience of a written court order, which has not occurred in the present
5 case.

6 **C. Legal Argument**

7 **1. Applicant lacks standing to object to the Subpoenas**

8 Applicant has no standing to object to the Subpoenas because they are not directed
9 to Applicant. The Subpoenas are directed to the Third Parties, that are not Applicant and
10 that are unrelated to Applicant. The issuance of the Subpoenas places no burden upon or
11 impacts Applicant whatsoever. They do not have to do anything to comply with the
12 Subpoenas, nor is it inconvenienced by the Subpoenas at all.

13 Applicant apparently recognizes this defect because it has styled its pleading as a
14 "motion to strike" pursuant to "A.A.C. R2-19-102 & 106," rather than as a motion to quash
15 or modify a subpoena - which is expressly permitted under A.A.C. R2-19-113(D) and (E).
16 In fact, Applicant makes no reference to these provisions and does not apply the standard
17 set out in these provisions.

18 The Third Parties are no doubt fully capable of defending themselves if they believe
19 the Subpoenas are unreasonable or overly burdensome, and have the right to make these
20 arguments to the ALJ under R2-19-113(D).

21 It is surprising that Applicant has spent time and money opposing the Subpoenas at
22 all. Applicant's objection is *not* that the information sought by ABC is irrelevant (it argues
23 only that the Subpoenas are untimely). Motion to Strike, p. 2:6, p. 3:7-21, p. 4-5. The
24 information sought by ABC is clearly relevant - the Letters of Recommendation express
25 opinions of the authors relating to statutory elements required to qualify for a CON that are
26 at the heart of these proceedings. The documents upon which those opinions are based, if
27 they exist, and whether the authors reviewed any documents at all, materially go to the
28

1 weight (and likely also the admissibility) of the Letters of Recommendation.⁵ Such
2 documents ensure that the ALJ has all material and relevant facts at her disposal to weigh
3 the evidence and assess the merits of the claims in these proceedings.

4 **2. Applicant suffers no prejudice if the Subpoenas are issued to the Third**
5 **Parties**

6 Applicant suffers no prejudice whatsoever if the Subpoenas are issued to the Third
7 Parties (nor does Applicant claim that it will be harmed).

8 First, as argued above, the Subpoenas are not directed at Applicant or anyone related
9 to Applicant, and Applicant does not have to do anything to comply with the Subpoenas.

10 Second, issuance of the Subpoenas causes no delay in these proceedings because *no*
11 subpoena against *any* party has been issued yet. Therefore issuing the Subpoenas against
12 the Third Parties will not delay any proceeding or deadlines in this case.

13 Finally, Applicant itself originally envisaged and agreed to a subpoena deadline *later*
14 *than* May 10 and, in fact, *later than* the date that ABC requested the Subpoenas (May 22) -
15 and that was based on the same trial dates. After the parties' meet-and-confer conference on
16 February 20, 2018, Applicant's counsel drafted and circulated a draft scheduling order in
17 which he proposed a deadline for subpoenas of May 25, 2018. See **Exhibit A** hereto. In
18 other words, Applicant itself originally envisaged, proposed and agreed to a deadline for
19 subpoenas of May 25. This was based on identical trial dates as those currently in place.
20 ABC filed its request for the Subpoenas on May 22, within the originally agreed-upon
21 deadline. It would be disingenuous for Applicant now to take the position that it is
22 prejudiced by the filing of a subpoena request *before* the date it originally proposed as an
23 appropriate deadline.

24 As a final point, Applicant *reverses* the prejudice analysis when it argues that ABC
25 would *not* be prejudiced by a *denial* of the Subpoenas, because ABC can "issue its own
26 public records request." Motion to Strike, p. 5:11.⁶ This argument fails. First, the appropriate

27 ⁵ ABC reserves the right to object to the admissibility of the Letters of Recommendation if no substantiating documents
28 are disclosed or discovered, and for other reasons.

⁶ Applicant seems to have insider knowledge of other public records requests apparently issued by the other Intervenors

1 prejudice analysis is whether ABC's conduct (in requesting the Subpoenas on May 22) was
2 "harmful to the opposing party" (*O'Toole, supra*), i.e. whether there is prejudice to
3 *Applicant*. The analysis is *not* whether ABC would be prejudiced if the Subpoenas are
4 disallowed. Second, in any event, ABC *would* be prejudiced if its Subpoenas are disallowed
5 on the basis that ABC *could* obtain this material information (establishing the weight to be
6 given to the Letters of Recommendation) by way of a general citizen's public records
7 request. ABC first became aware of the Letters of Recommendation on April 23, 2018,
8 when Applicant filed its Initial Witness and Exhibit List. It is unknown how long the Third
9 Parties would take to respond to a public records request, nor to what extent they would
10 take to comply with a public records request. However, a narrowly-tailored subpoena would
11 order the Third Parties to produce the documents in a short space of time (ABC requested
12 seven days in the Subpoenas). Having these documents permits the ALJ to "maximize the
13 likelihood of a decision on the merits" (*O'Toole, supra*) at the hearing scheduled for less
14 than two months away.

15 **3. R2-19-113 imposes no deadlines, and in fact envisages subpoenas within**
16 **5 days of trial**

17 A.A.C. R2-19-113 imposes no deadlines for the issuance of subpoenas, either for
18 parties or non-parties. Elsewhere in the A.A.C. such deadlines *are* in fact imposed on parties
19 at administrative hearings. *See*, for example, A.A.C. R6-3-1502(D)(3), which provides that
20 a party's subpoena "[a]pplication shall be submitted to [ADES] at least 5 calendar days
21 before the hearing to permit preparation and service of the subpoena before the hearing,"
22 quoted in *Strong v. Arizona Dep't of Econ. Sec.*, No. 1 CA-UB 17-0163, 2018 WL 1281868,
23 at *2 (Ariz. Ct. App. Mar. 13, 2018) (rejecting an untimely request for a subpoena filed
24 *after* that administrative law judge had already issued a decision). However, in stark
25 contrast, R2-19-113 is not only silent on subpoena deadlines, but in fact *envisages*
26 subpoenas filed *within five days of the trial*. *See* R2-9-113(D) (an "objection [to a subpoena]
27 shall be filed within 5 days after service of the subpoena, or at the outset of the hearing if

28 _____
in this case. ABC has no knowledge of this whatsoever.

1 the subpoena is served fewer than 5 days before the hearing"). The Rules themselves
2 therefore do not envisage that a subpoena *issued two months before the trial* would, on the
3 grounds of timeliness only, be considered prejudicial.

4 **D. Conclusion**

5 The ALJ is respectfully requested to deny Applicant's Motion to Strike, and issue the
6 narrowly-tailored Subpoenas to the Third Parties.

7 RESPECTFULLY SUBMITTED this 8th day of June, 2018.

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14 **CERTIFICATE OF SERVICE**

15 Original filed using the OAH electronic document filing system <https://portal.azoah.com/oedf>
16 this 8th day of June, 2018 with copies provided to all parties on the approved mailing list
17 this 8th day of June, 2018 by posting through the designated OAH website as
18 <https://portal.azoah.com/oedf/documents/2015A-EMS-0190-DHS/index.html> in accordance
19 with Case Management Order No. 1.

Exhibit A

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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)

**STIPULATION FOR CON
HEARING DATE AND PRE-
HEARING DEADLINES**

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

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24 In advance of the February 23, 2018 pre-hearing conference in this matter,
25 attorneys for RBR Management LLC (“RBR”), the AMR CON Holders, the
26 Arizona Department of Health Services (“ADHS”), Maricopa Ambulance
27 (“Maricopa”) and ABC Ambulance (“ABC”) telephonically conferred and reached a
28 tentative agreement with respect to potential hearing dates and case-related

1 deadlines. Subject to the Administrative Law Judge’s (“ALJ”) approval, the
2 parties, through undersigned counsel, hereby stipulate and agree to scheduling
3 the first week of the CON hearing for **July 30, 2018 through August 3, 2018**
4 (8:30 a.m. to 5:00 p.m.) and the second week for **August 20, 2018 through**
5 **August 24, 2018** (8:30 a.m. to 5:00 p.m.) in a conference room designated by the
6 Office of Administrative Hearings to consider the issues set forth in the original
7 Notice of Hearing dated June 8, 2017. Assuming the foregoing dates are
8 acceptable to the ALJ, the parties further stipulate to the following pre-hearing
9 deadlines:
10

11
12 Initial Witness/ Exhibit Filings (fair summary of witness expected
13 testimonies; exhibits, copies sent to opposing counsel) – **May 11, 2018**

14
15 Requests for Subpoenas – **May 25, 2018**

16
17 Final Witness/Exhibit Filings – **June 22, 2018**

18
19 Motions (if any) – **June 29, 2018**

20
21 Motion Responses (if any) – Five (5) court days after applicable motion
22 filing unless filed **June 29, 2018**, in which case the deadline is **July 6,**
23 **2018.**

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26 Pre-Hearing Memo in Lieu of Oral Opening – **July 16, 2018.**

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RESPECTFULLY SUBMITTED this day of February, 2018

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ORIGINAL filed this ___ day
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in accordance with Case Management Order No. 1.

By: /s/ Brendan Murphy