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14 **BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**

15 In the Matter of:)

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

18 Applicant.)

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

21 **AMR CON HOLDERS' PRE-**
22 **HEARING MEMORANDUM**

23 (Assigned: The Hon. Tammy)
24 Eigenheer))

25 Intervenors, American Medical Response of Maricopa, LLC dba . . . (CON 136);
26 R/M Arizona Holding, Inc. dba Canyon State Ambulance dba . . . (CON 58); Life Line
Ambulance Service, Inc. (CON 62); Rural/Metro Corp.-Maricopa dba . . . (CON 109);
and Professional Medical Transport, Inc. dba PMT Ambulance dba . . . (CON 71)

1 (“AMR CON Holders”), pursuant to Case Management Order No. 5, hereby submit
2 their Pre-Hearing Memorandum.

3 **Introduction**

4 This Office is charged with issuing a recommended decision and making a
5 record of those facts the Arizona Department of Health Services (“ADHS”), through its
6 Director, will require in order to determine whether RBR Management, LLC dba
7 Community Ambulance’s (“Applicant”) Application for a CON should be granted. The
8 Application is for non-911 (non-immediate) ALS and BLS authority covering *all* of
9 Maricopa County. Notice of Hearing, p. 1. This Office is to make recommendations as
10 to whether the Applicant is fit and proper, and whether public necessity requires the
11 proposed services, or any part of them, and is in the public’s best interest. *Id.*, p. 2
12 [Citing A.R.S. §36-2233(B)(2) and AAC R9-25-903]. The Applicant will be unable to establish
13 public necessity/public best interest. Instead, what the Applicant and its majority owner
14 (Dignity Health) propose to accomplish in Maricopa County is to build a silo around the
15 interfacility transports (“IFT”) related to Dignity facilities, pulling these more desirable
16 ambulance transports (as compared to the overall body of ambulance transports in Maricopa
17 County) out of the County system, to the detriment of existing CON holders and the public
18 they serve, and without any consideration as to how this might impact other healthcare
19 providers in Maricopa County. In fact, it is believed that ultimately the Applicant’s proposed
20 operations will negatively impact even the Dignity healthcare system.

21 This Office is familiar with the statutes and regulations governing an application for a
22 certificate of necessity (“CON”). Additionally, that body of law has been briefed by
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1 ADHS/BEMSTS. Perhaps the only “new” law is the Legislature’s recent amendment of Title
2 36 to limit these hearings to ten days, absent a written determination, made on the final day of
3 the hearing, of an extraordinary need for additional time. A.R.S. §36-2234(B)(5). Because of
4 the statutory change, this Office’s role in managing the hearing so that testimonies, etc. are
5 limited to what is relevant, and also of expediting and ensuring a fair hearing (which would
6 necessarily require the limitation of testimony to relevant topics) will be critical. See, AAC R2-
7 19-115 (A) and R2-19-16(F).

8 Here, there are a number of evidentiary issues these Intervenors believe may arise and
9 may require this Office’s rulings in furtherance of these goals. Frankly, some of these issues
10 would have more appropriately been addressed by way of pre-hearing motions. However, the
11 Applicant and Dignity Health held their disclosures of hundreds, if not thousands, of pages of
12 documents – some filed as exhibits and others simply provided, as well as disclosure of
13 witnesses plainly available to RBR at the time of its deadline for initial disclosures, until the
14 time of or *after* the last possible exhibit/witness disclosure deadline. This has created a
15 circumstance where orderly resolution of certain evidentiary issues through pre-hearing
16 motions was essentially impossible (in addition to the fact that the last minute “dumping” of
17 exhibits/documents/witnesses has absolutely impeded these Intervenors’ ability to prepare for
18 the hearing). As such, some of the anticipated evidentiary issues will be raised here, in order
19 to alert this Office to the same in advance of them being raised during the hearing.

22 **The Timing of AMR Maricopa’s Entry Into Maricopa County, and the AMR**
23 **Organization’s Authority to Manage and Control the Rural/Metro Affiliated CON Holders**
24 **are Important to the Relevancy Limits Herein**

25 AMR Maricopa was not authorized to provide ambulance transports in Maricopa
26 County until after issuance of the Director’s February 25, 2015 Decision (2014A-EMS-0305-

1 DHS). Likewise, the Maricopa County CON holders that were controlled and operated by the
2 Rural/Metro entity (including the other AMR CON Holders herein), became affiliated with the
3 American Medical Response family as the result of a stock sale in late 2015. However, the
4 AMR organization was not authorized to control and operate the Rural/Metro entity CON
5 holders (including Southwest, PMT, etc.) until January 26, 2016, when the Director's Final
6 Decision was entered (2016A-EMS-0145-DHS). Between the time of the technical
7 "purchase," and that authorization, all that local AMR affiliated employees/managers could do
8 was maintain the Rural/Metro status quo. Nevertheless, a number of the Applicant's identified
9 exhibits evidence its intent to offer evidence of pre-January 26, 2016 Rural/Metro matters into
10 evidence.
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12 **Evidence Relating to Dignity's Maricopa Urgent Care Facility is Irrelevant**

13 A substantial amount of the "last minute" exhibits disclosed by the Applicant (even after
14 the final exhibit deadline) relate to complaints Dignity Health's Maricopa Urgent Care facility
15 has about ambulance transports. This involves hundreds of pages of emails, as well as last
16 minute disclosure of the Urgent Care Center's Clinical Supervisor, Rebecca Haas, as a
17 witness. However, Dignity Health knew, at least in January 2015 (well before the June 2016
18 submission of RBR's Application), about Ms. Haas' complaints and knew that the Maricopa
19 Urgent Care is located in Pinal County. For example, see RBR/Community Ambulance's
20 Exhibits CA 230(F) and (G). RBR and Dignity Health's decision to exclude the Maricopa
21 Urgent Care facility from the instant Application must be viewed as deliberate. Any purported
22 "issues" that Dignity Health has with the ambulance transportation services available to the
23 Maricopa Urgent Care (which issues these Intervenor's submit are not well-founded, given the
24 non-urban location and low transport volume, as well as the integration of interfacility and
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1 emergency/911 transport resources in Pinal County), must be deemed irrelevant. Due to the
2 ten day presumptive limitation on hearings, discussion of the same during the pending
3 hearing would be an inappropriate use of allowed time.

4 **RBR Should Not Use This Hearing in Order to Litigate Matters at Issue in Dignity**
5 **Health's Superior Court Lawsuit Against the AMR CON Holders; Nor Should RBR be**
6 **Allowed to Suggest That the Superior Court's Ruling Denying Dignity's Application**
7 **for a Preliminary Injunction Constitutes a Final or Binding Determination That the**
8 **AMR CON Holders Breached the Dignity Services Contract**

9 Applicant has already evidenced its intent to rely upon the Maricopa County Superior
10 Court's order denying the preliminary injunction Dignity Health sought to suggest the Court
11 has already determined that the AMR CON Holders breached their services contract with
12 Dignity Health by attempting to intervene herein. For example, see Applicant's October 26
13 2017 Response. RBR has also included that order as one of its intended exhibits - CA 33.

14 The Court's ruling on Dignity's Application for a Preliminary injunction is not the "law of
15 the case" for that action. "Law of the case" will not be applied if the subject decision did not
16 actually decide the issue in question or address the merits. *Powell-Cerkoney v. TCR-*
17 *Montana Ranch Joint Venture*, 176 Ariz. 275, 279, 860 P.2d 1328, 1322 (Div. 1, 1993).
18 Unless a party seeking a preliminary injunction consolidates that hearing with a trial on the
19 merits, the court's determination at the preliminary injunction phase does not include authority
20 to reach a final decision on the merits. *Id.*, 176 Ariz. at 281, 860 P.2d at 1334. In *State v.*
21 *Neil*, 4 Ariz.App. 258, 419 P.2d 388 (1966), vacated on other grounds 102 Ariz. 110, 425 P.2d
22 842 (1967), Arizona adopted the general rule seen consistently in other jurisdictions – "that
23 findings of fact and conclusions of law made in granting or denying a request for preliminary
24 injunction do not constitute law of the case for purposes of trial . . . on the merits . . . [citations
25 omitted]." *Powell-Cerkoney, supra*, 176 Ariz. at 279, 860 P.2d at 1332.
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1 To determine otherwise would “effectively avoid the restriction[s] of Rule 65(a), Arizona
2 Rules of Civil Procedure” which prohibit a trial court from reaching “a final decision on the
3 merits in a preliminary injunction hearing unless the hearing has been properly consolidated
4 with a trial on the merits.” *Id.*, 176 Ariz. at 280-281, 860 P.2d at 1333-1334 (end citations
5 omitted). This is also supported by the fact that the applicable burden of proof will differ
6 between the two proceedings. *Id.*, 176 Ariz. at 281, 860 P.2d at 1334. It also must be noted
7 that judges may resolve factual issues when equitable relief is requested, but factual disputes
8 on the ultimate issue being tried typically go to a jury.

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10 **Applicant and Dignity Health’s Deliberate Withholding of Evidence and Facts Applicant**
11 **Apparently Intends to Offer Has and Will Continue to Impede the AMR CON Holders’**
12 **Preparation for the Hearing; This Strategy Should Merit Action by This Office (and**
13 **Ultimately DHS), Including but not Limited to a Possible Postponement of the Second**
14 **Week of Hearing and/or Evidentiary Rulings**

15 The nature of RBR/Community Ambulance’s Application underwent a remarkable
16 change after the Applicant and its majority owner, Dignity Health, were unsuccessful in their
17 attempts to preclude the AMR CON Holders from intervening. Both through the scope of
18 RBR’s requested subpoenas duces tecum (as is outlined in the AMR CON Holders’ Motion to
19 Quash the same, which is incorporated by this reference), and through RBR’s lack of good
20 faith compliance with this Office’s deadlines, Dignity Health and the Applicant have
21 demonstrated their intention to utilize the instant proceeding to try and “punish” the AMR CON
22 Holders, and to deny them a fair hearing. The deadlines set by this Office, pursuant to its
23 authority to expedite and ensure a fair hearing, *supra*, have been flouted by RBR, to the AMR
24 CON Holders’ detriment, which should not be allowed. In this regard, the following time line is
25 offered:
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1 **June 20, 2016** **RBR's initial Application is submitted.** With this, RBR
2 submitted a cover letter to explain the purpose (and apparently meet the "public necessity"
3 aspect) of its Application. It observed that the history of having multiple ambulance providers
4 competing to serve its facilities had "dwindled to only two ambulance providers owned by two
5 different companies." ADHS, Ex. 1-002. It proposed that more competition was needed (*id.*,
6 p. 4), noted Dignity Health has a joint venture agreement with RBR in Nevada, and stated that
7 "Dignity Health desires to expand the current partnership with Community Ambulance into the
8 Arizona market." *Id.* Dignity wants Community Ambulance's service in Arizona. *Id.*, p. 7. *No*
9 *suggestion of problems with existing services was made.*

10
11 **June 8, 2017 - The Notice of Hearing is posted.** Notably, between submission of the
12 Application and this Notice, there was significant back and forth between the Bureau and
13 RBR, in order to flesh out the bases for the Application, including supplementation. ADHS Ex.
14 2-16. Nowhere during any of this did RBR notify the Bureau that the reason for its submission
15 (the "public necessity") had changed or required supplementation.

16 **August 1, 2017 - Applicant files a Motion to Stay the OAH proceeds while Dignity**
17 **sought a Superior Court preliminary injunction prohibiting the AMR CON Holders from**
18 **intervening.**

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20 **October 13, 2017 – The AMR CON Holders file notice of the Superior Court's**
21 **ruling denying Dignity Health's application for a preliminary injunction.**

22 **February 16, 2018 - Case Management Order No. 4 sets a prehearing conference**
23 **for February 23, 2018.** *On February 23rd*, this Office ordered staggered initial disclosures:
24 *the Applicant was required to file its exhibits and witness, together with a fair summary of*
25 *expected testimonies, by April 23, 2018.* Intervenors and Bureau were to make theirs by April
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1 30, 2018. Presumably, this included the requirement that the submissions be done in good
2 faith, and would include the information that the Applicant was then in possession of, or would
3 have reasonable access to (including through its majority owner, Dignity Health), such that the
4 Intervenor would have a full and fair opportunity to consider the same before making their
5 initial disclosures and before their eventual supplements and final listings.

6 **April 23, 2018 – The Applicant files a perfunctory initial witness and exhibit list.**

7 *Nothing in the exhibits disclosed indicated any intent by RBR to expand the reasons for*
8 *submission of its Application/the basis for “public necessity” as stated in its Application.*

9 Additionally, none of these exhibits offered any detail regarding Applicant’s intended
10 operations in Maricopa County should it receive a CON. Instead, the exhibits consisted of the
11 Application and the fleshing out of that Application through communications with the Bureau
12 (see, Exhibits CA 1-11), certain corporate formalities and follow-up to that Bureau fleshing out
13 (Exhibits CA 12-17), exhibits left blank (CA 18-20), DHS general information and the Notice of
14 Hearing for this matter (CA 21-23), documents relating to the Dignity Superior Court litigation
15 (CA 24-33), the various Maricopa County CONs and information regarding recent Maricopa
16 County AMR CON consolidations (CA 34-43), historic ARCRs filed by the Intervenor and
17 reference to their pending 2017 submissions (CA 44-71), the AMR of Maricopa CON Decision
18 and 2014 hearing transcripts (CA 72-81), the Maricopa Ambulance CON Decision and
19 hearing transcripts (CA 82-96), Intervenor ABC’s CON Decision and hearing transcripts (CA
20 97-110), **eight letters of support for RBR’s Application** (CA 111-118), service area maps
21 for existing Maricopa County CON holders (CA 119–123), **witness Beery’s drive time**
22 **mapping** (CA 124), witness CVs and resumes (CA 125–136), certain news articles about
23 Intervenor or related entities going back to March 2014 (CA 137-144), exhibits left blank (CA
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1 145-149) and US Census data for Maricopa County (CA 150). Other than the eight letters of
2 support (CA 111-118) (which are part of ADHS' file) and witness Beery's drive time mapping
3 (CA 124) – bolded above, this was nothing more than generic information regarding the
4 existing Maricopa County CON coverage by Intervenors, the Dignity Superior Court litigation,
5 and those OAH proceedings leading to the Intervenors' current CONs.

6 RBR did its witness disclosure primarily by subject matter, as opposed to a fair
7 summary of expected testimony. Insofar as the same might relate to these intervening
8 parties, Dignity's Vice President, Jeff O'Malley, was identified to talk about Dignity Health's
9 experience with interfacility transports and providers, the need for an additional provider, the
10 litigation with AMR, and "substandard interfacility transport performance that Dignity Health
11 facilities have experienced by other CON holders." See, Docket No. 151, pp. 2-3. RBR
12 provided no summary of what type of "substandard performance,"¹ it intended to elicit
13 testimony as to or what "other CON holders" this would be attributed to. RBR's principal
14 Robert Richardson's disclosed testimony also offered no such detail. *Id.*, pp. 3-4. Dignity
15 Health's Senior Vice President of Operations, Linda Hunt, was also identified by subject
16 matter: she was offered for "Dignity Health's experience with interfacility transports and
17 providers. *Id.*, p. 4. Mike Evans was identified as a witness who would talk about "potential
18 financial impact on other CON holders" and other Dignity employees Brandon Hestand and
19 Delores Kells were identified by subject matter only, to talk about supposed negative patient
20 experiences, delays, and issues at urgent care centers. *Id.*, pp. 6-7. Nothing in this related
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24 ¹ "Substandard performance" is a term of art under the governing regulations. AAC
25 R9-25-901(46) defines this as non-compliance with the governing portions of Title
26 36 or with the Director's decisions and orders, with Title 36 requirements for
ambulance attendants, and/or with the regulatory requirements for ground
ambulances.

1 any of the potential evidence to any particular Intervenor, to any particular dates or locations,
2 much less any specific incidents or communications with any of the Intervenors. *Id.* *What is*
3 *now know is that RBR's majority owner, Dignity Health, was at that time apparently in*
4 *possession of specific facts that it did intend to have RBR rely upon, yet deliberately withheld*
5 *from the Intervenors in connection with this initial and mandatory deadline (as is detailed*
6 *below).*

7 **May 10, 2018 – To fulfill their obligation to exercise due diligence, the AMR CON**
8 **Holders requested issuance of subpoenas duces tecum (2) directed at the Applicant**
9 **and Dignity Health, including specific line items asking for not just financial and**
10 **operational impact information (such as detail about the Applicant's operation plans)**
11 **but information relating to any allegations of substandard service or substandard**
12 **performance, and all records and data relating to any calculations of Dignity affiliates'**
13 **"need" for the subject ambulance transport services.** Documents related to the testimony
14 of RBR's financial impact expert, Mike Evans, (as well as other "experts" such as Dr. David
15 Argue) were requested, as were any records or data relating to the supposed "negative
16 patient experiences," delays, and/or issues at urgent care centers that witness might testify to.

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19 **June 22, 2018 – The signed subpoenas duces tecum were posted.** By now, both
20 Dignity and RBR were plainly on notice that the AMR CON Holders required this information
21 to properly prepare.

22 **July 5, 2018 – Case Management Order No. 5 established a final exhibit and**
23 **witness disclosure deadline of September 13, 2018 and a motion deadline of September**
24 **20, 2018.**

1 **July 25, 2018 – In connection with the AMR CON Holders’ objections and motion**
2 **to quash RBR’s subpoenas duces tecum directed at them, they again pointed out that**
3 **the Applicant’s initial witness and exhibit disclosures did not identify what facts it**
4 **intended to proceed upon.**

5 **July 25, 2018 – The AMR CON Holders provide a substantial supplement to their**
6 **initial exhibit disclosures, including certain information requested in RBR’s subpoena.**
7 **See, First Supplemental Exhibit List, AMR Exhibits 12-38, including many subparts.**
8 *Notably, up to this juncture, and continuing through its “final” exhibit and witness disclosure,*
9 *RBR made no supplementation whatsoever to its intended exhibits or expected witness*
10 *testimonies.*

11 **July 25, 2018 – Pursuant to agreement between the parties, this was the date for**
12 **voluntary disclosures of information responsive to the outstanding subpoenas**
13 **(“SDT”).** On that date, RBR did not provide the emails and other records it has now revealed
14 it intends to use, nor anything else including the information these Intervenors were entitled to
15 in April! Instead, RBR produced nothing responsive to SDT items 1-3, 8-23, 28, 30, 33 or 34.
16 What it did provide included only the most minimal amount of “new” information. In response,
17 it basically regurgitated its entire initial Application, and the documents making up the back
18 and forth review and response process that ensued with the Bureau prior to the Notice of
19 Hearing. It included the letters of support that were part of its initial exhibit disclosure, a very
20 minimal amount of redacted emails relating to the letters of support (this was new) and other
21 information relating to the existing CON holders, such as their ARCRs and a news article, all
22 of which were part of their initial exhibit disclosure. As compared to what was ultimately
23 identified as exhibits, this response is telling. For example, in response to the SDT item
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1 requesting documents relating to the supposed “substandard performance” that had been
2 disclosed as a subject matter of witness O’Malley’s testimony (above), the Applicant labeled
3 this request “premature,” identifying only the already disclosed letters of support, when it is
4 now known that O’Malley had been accumulating emails regarding “service concerns” since
5 approximately 2015, which emails were not provided until *after* the final witness and
6 disclosure due date (below). Likewise, the request for documents relating to the expected
7 testimony of Applicant’s financial impact expert, Michael Evans, “expert” witnesses Beery and
8 Argue, and Dignity employees Brandon Hestan and Delores Kells, all yielded no documents,
9 and the same response, which is that the Applicant had nothing responsive, would eventually
10 supplement and disclose relevant documents “on a rolling basis” – something RBR failed to
11 do. For example, see, Applicant’s Objections to AMR CON Holders’ SDT at item 29, p. 23;
12 SDT item 31, p. 24; SDT item 32, p. 25; SDT item, pp. 25-26; and SDT item 34, pp. 26-27.

14 **July 25, 2018 – Also pursuant to agreement, Dignity Health provided certain**
15 **documents responsive to the SDT directed at it.** However, this was also minimal and did
16 not include those items ultimately disclosed, *en masse*, by RBR with its final witness and
17 exhibit disclosures. Instead, Dignity provided approximately 1,400 pages worth of AMR’s
18 contracting reporting to it (relating to the ambulance services contract), 44 pages of Dignity
19 policies on ambulance transports, and 5 redacted pages relating to the Arizona General
20 Hospital letter of support. That is it. See, Dignity’s July 25, 2018 Objections, Response and
21 Motion to Quash in Response to AMR CON Holders’ SDT.

23 **September 18, 2018 – The parties file their final lists of witnesses and exhibits**
24 **(the original due date was extended at ABC’s request and by consent of all parties).**
25 *For the first time*, Applicant disclosed its intent to offer Jeff O’Malley to testify regarding
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1 “insufficient” interfacility transport performance rather than “substandard” (which given the
2 regulatory definition, above, is a significant change). See, Applicant’s Final Witness and
3 Exhibit List at p. 3. **Seven new witnesses, most of whom are Dignity Health or RBR**
4 **employees, were added at this late juncture!** See, *id.*, beginning at p. 9. Applicant added
5 its COO - Brian Rogers and Dignity’s Senior VP of Operations in Nevada – Rod Davis – to
6 supposedly testify about AMR transport services to Dignity facilities **in Nevada**, and apparent
7 intending to contrast Community Ambulance’s services with AMR services there (which if
8 disclosed initially, would have certainly resulted in these Intervenors seeking significant follow-
9 up information). *Id.*, pp. 10-11. It added Matthew Karger, a Dignity Health employee who has
10 been identified as a witness for, among other things, “extended and unacceptable wait times
11 [a Dignity facility] experienced with AMR, and complaints made by [Dignity facility] patients
12 regarding AMR’s ambulance services,” as well as other testimony apparently intended to be
13 critical of AMR’s services. See, *id.*, pp. 11 and 12. This likewise would have resulted, had the
14 Applicant identified this witness and these topics initially or at any time reasonably in advance
15 of the final witness and exhibit disclosure due date, in follow-up and inquiries by AMR and
16 additional supplementation of its exhibits and witnesses. RBR also identified witnesses Will
17 Humble (former Director of ADHS), Dignity employee Rebecca Haas RN (to apparently
18 complain about ambulance transport services at the Dignity Health Urgent Care Center in
19 Maricopa, Arizona which likewise would have resulted in follow-up by these Intervenors had
20 this disclosure been done in a timely fashion, including a motion in limine). See, *id.*, pp. 13-14.
21 RBR also identified Dr. Swearingen, the Medical Director for Dignity Health Urgent Care
22 facilities in Maricopa (Pinal County) and Ahwatukee. Dr. Swearingen is also apparently
23 intended to offer testimony critical of existing services, which would have resulted in
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1 reasonable follow-up by these Intervenor had the disclosure been done in a timely fashion.
2 *Id.*, pp. 14-15. Finally, a Joseph Frazier, was added to apparently testify about 911
3 implications. See, *id.*, p. 16. There is no reason that every one of these witnesses could not
4 have been identified in Applicant's initial witness disclosures, which were **required**, to be
5 done April 23, 2018.

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7 The Applicant's supplementation of its intended exhibits was also substantial and for
8 the most part appears to consist of items Applicant could have provided in April 2018. This
9 includes the Applicant's purported operations plan (CA 149), disclosure of the Applicant's
10 intention (for the first time) to use AMR contract performance data (CA 179 and 180), an EMS
11 call log from the Maricopa Urgent Care (CA 181), significant mapping and drive time
12 calculations (CA 183-189), documents relating to Matt Karger' s testimony (CA 191—192), a
13 huge "Dignity Health Community Benefit Report" (CA 196), 20 email strings from 2015
14 through January 2018 (relating to Applicant's intended employees/Dignity employees
15 witnesses' testimonies)(*id.*, pp. 24-29), and a variety of other documents as well as the
16 "notice" that hundreds of pages of additional emails would be forthcoming (*id.*, pp. 29-30).

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18 **September 18, 2018 – Dignity Health, purportedly pursuant to RBR's subpoena,**
19 **discloses hundreds of pages of emails and related documents to RBR, emails that**
20 **apparently relate to RBR's intended witness testimonies from Dignity's Vice President,**
21 **Jeff O'Malley, Dignity employee Delores Kells, R.N., Dignity employee Brandon**
22 **Hestand, R.N. and Dignity employee Rebecca Haas, R.N.** These compilations were
23 identified at the end of RBR's "final" exhibit disclosure as intended exhibits that require
24 redaction, but were not provided.
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1 **September 18, 2018 – With the digital production of its “final” exhibits, RBR also**
2 **provides a file labeled “Evans Documents,” which were not identified as exhibits and**
3 **which appeared to be a voluntary response to the various Intervenors’ subpoena**
4 **requests for Mr. Evans’ file/documents behind any of his opinions, as well as any of his**
5 **reports.** A preliminary review revealed that this file contained just under 150 separate
6 documents, making up *thousands* of pages. The undersigned have not yet been able to
7 complete their review of this file.

8 **October 2, 2018 – Two weeks later, RBR files its amended final witness and**
9 **exhibit list adding over 100 pages worth of what is identified as emails produced by**
10 **Dignity witnesses Haas (CA 230 series), 20 pages of emails produced Dignity employee**
11 **Hestand (CA 231 series), 69 pages of emails produced by Dignity employee Kells (CA**
12 **232) and 115 pages of emails produced by Dignity Vice President Jeffrey O’Malley (CA**
13 **233 series).** This totals over 300 pages! All of these purportedly relate to “AMR service
14 issues” and they cover a span in time from December 2015 through January 2018 (Haas),
15 December 2015 through October 2017 (Hestand), September 2017 through May 2018 (Kells -
16 plus two undated EMS “call logs” that the undersigned had to request the relevant dates for),
17 and June 2015 through May 2018 (O’Malley).

18 **October 4, 2018 – More than two weeks after the final exhibit and witness**
19 **disclosure deadline, Applicant supplements with Mike Evans’ “financial impact**
20 **analysis” (CA 235).**

21 **October 9, 2018 – Applicant provides most relevant dates for the two “EMS**
22 **Logs” it filed as exhibits October 2nd.** These contain well over 100 service entries. These
23 Intervenors are still working through the EMS logs.
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1 **October 12, 2018 – Applicant provides another large “data” disclosure,**
2 **identifying for the first time the documents relied upon by David Argue in reaching his**
3 **conclusions.**

4 Given the dates of the documents that RBR “dumped” en masse into evidence at the
5 final deadline, it is obvious that RBR, had it acted diligently and in good faith, could have
6 provided the majority of the same with its initial witness and exhibit disclosures **in April**. The
7 same is true for the Dignity witnesses it added at the last minute. RBR may argue that it is a
8 separate entity from Dignity Health, and Dignity Health did not give it the majority of these
9 items until the same date as final witness and exhibit disclosures were due (which cannot be
10 a coincidence). However, that is not a legitimate excuse.

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12 In the months leading up to the final witness and exhibit disclosure due date, Dignity
13 did reach out to the parties in an attempt to obtain agreement to an order to protect patient
14 health information (HIPAA protected information), which order was never finalized. Instead,
15 Dignity ultimately took the position that agreement to entry of that this order and/or this
16 Office’s issuance of the subpoenas directed at Dignity (in and of itself) allowed its disclosure
17 of protected information to RBR. Accepting Dignity’s logic, it could have provided this
18 information to RBR on June 22, 2018, when the signed subpoenas duces tecum were posted.
19 Further, if Dignity always intended that RBR (which it controls as the majority interested
20 holder) would rely upon these untimely disclosed witnesses/records and the facts they
21 purportedly represent, nothing prevented RBR from subpoenaing this information from Dignity
22 Health shortly after the Notice of Hearing was posted in June 2017, immediately following the
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1 February 23, 2018 Prehearing Conference in this matter, or at any time thereafter. In fact,
2 Dignity Health and RBR could have stipulated to an order issuing a subpoena directed at
3 Dignity Health's "protected health information" records if these were really important to RBR's
4 case-in-chief, so that RBR could have complied in good faith with the initial witness and
5 exhibit deadline. Likewise, upon examination of the documents belatedly submitted by RBR,
6 very little redaction was required; Dignity Health could have simply redacted the items and
7 provided them to RBR months in advance of the initial witness and exhibit deadlines.

8 This last minute dumping of such a massive quantity of information is "sandbagging" at
9 its most obvious, done at a time when in addition to carrying out their regular every day
10 duties, and undersigned counsel working on other matters in their offices, the AMR CON
11 Holder representatives and their counsel should be making final hearing preparations, rather
12 than scrabbling to try and review such a massive amount of information, and to then try and
13 follow-up on the same. This deliberate strategy should not allow RBR to obtain an unfair
14 advantage during the hearing. Thus far, undersigned counsel have yet to work their way
15 through all of this copious documentation.

16 For all of these reasons, appropriate evidentiary rulings may be requested from this
17 Office, a postponement of the second week of hearing may be required (depending upon
18 RBR's use of the addressed items in its case-in-chief), and – at a minimum – the Applicant's
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1 approach as detailed herein and the impact of the same upon the AMR CON Holders'
2 evidentiary presentations should be considered by both this Office and ADHS in their review
3 of RBR's Application.
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5 DATED this 15th day of October, 2018.

6 **SHORALL MCGOLDRICK BRINKMANN**

**FLETCHER STRUSE FICKBOHM &
7 WAGNER, PLC**

8 /S/PAUL MCGOLDRICK

/S/RONNA FICKBOHM

9 Paul McGoldrick
10 *Attorneys for Intervenors-
AMR CON Holders*

Ronna L. Fickbohm
*Attorneys for Intervenors-
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13 Pursuant to Case Management
14 Order No. 1, electronic filing and
15 service of the foregoing through
16 <https://portal.azoah.com/oedf/>,
has been done this 15th day of October, 2018.

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19 By: /S/ Linda Clark
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