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**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**

<p>In the Matter of:</p>  <p><b>RBR Management LLC, dba Community Ambulance</b></p> <p>Applicant.</p>	<p>Docket No. 2017-EMS-0104-DHS (EMS No. 0283)</p> <p><b>ABC AMBULANCE'S OBJECTION AND MOTION TO EXCLUDE PREVIOUSLY WITHHELD FINANCIAL DOCUMENTS</b></p> <p>(Assigned: The Hon. Tammy L. Eigenheer)</p>
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Pursuant to Arizona Administrative Code R2-19-106(A) and A.R.S § 41-1092.07(D), ABC Ambulance, LLC ("ABC") respectfully objects to, and moves the Administrative Law Judge ("ALJ") to exclude, **Exhibit B** attached to the Response to Intervenors' Closing Argument filed by Applicant on February 21, 2019 ("Response to Closing"). Applicant attempts to introduce **new evidence** (purportedly its 2016, 2017 and 2018 audited financial statements from its Nevada operations) that **it refused to provide** in response to ABC's subpoena *duces tecum* in July 2018 (saying they were "**irrelevant**"), then failed to introduce **before the disclosure deadline** in September 2018, then **failed to introduce during the nine-day hearing** in October and November 2018, and, when no other party is able to challenge or question the information contained therein and **without any foundation**, attempts (*without any explanation as to why it is so late*) to introduce in

1 its *response* to closing argument. The prejudice to the other parties at the hearing is so great,  
2 and the lateness (not to mention the about-face) so unreasonable, that Exhibit B and its  
3 associated argument must be excluded. This motion is supported by the attached  
4 Memorandum of Points and Authorities, as well as all matters of record herein.

## 5 **MEMORANDUM OF POINTS AND AUTHORITIES**

### 6 **A. FACTURAL AND PROCEDURAL BACKGROUND**

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8 Ahead of the nine-day evidentiary hearing due to begin on October 22, 2018, the  
9 parties were ordered to **disclose** to each other the exhibits upon which they intended rely by  
10 **September 13, 2018**. *See* Case Management Order No. 5 dated July 5, 2018, p. 2.

11  
12 Ahead of the disclosure deadline, in **early May 2018**, the parties all requested to  
13 serve **subpoenas duces tecum** on each other. In its subpoena addressed to Applicant (filed  
14 on May 11, 2018), ABC requested Applicant to produce its financial data from Nevada,  
15 arguing that “because of Applicant's reliance on the Nevada entity's business model and  
16 experience to show that it is ‘fit and proper,’ **the financial and other records of the**  
17 **Nevada's entity's business** are relevant to these proceedings.”<sup>1</sup>

18  
19 In response, Applicant **refused to provide its Nevada financial data**, arguing (in  
20 **July 2018**) that “[t]here is no such obligation in the statutes or regulations that requires  
21 Community Ambulance to prepare an ARCR, and produce documents to support that  
22 ARCR for its out-of-state operations. Community Ambulance further objects to the extent  
23 Request No. 21 calls for the production of documents that are **not relevant** or **reasonably**  
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<sup>1</sup> ABC Ambulance’s Request for Issuance of Subpoena Duces Tecum filed on May 11, 2018, p. 2:13-16 (emphasis  
28 added). For example, in Request No. 21, ABC requested “any and all documents required to complete each line item  
[of its *pro forma* ARCRs] as it pertains to Your operations in Nevada.”

1 **calculated to lead to the discovery of admissible evidence.”<sup>2</sup>**

2 In its Final Witness and Exhibit List filed on September 18, 2018, Applicant **failed**  
3 **to disclose any documents that constituted financial statements of its Nevada**  
4 **operations.**<sup>3</sup>

5 During the **nine days of evidentiary hearing**, held between October 22, 2019 and  
6 November 8, 2018, Applicant **failed to introduce any documents that constituted the**  
7 **financial statements of its Nevada operations.**<sup>4</sup>

8 Applicant **waived its rebuttal case** after the Intervenors presented their evidence,  
9 and thus chose yet again to withhold its financial records to rebut evidence introduced by  
10 Intervenors.  
11

12 Even in its Written Closing Argument filed on January 28, 2019, Applicant  
13 (correctly so) did not attempt to introduce this new evidence (although it did ask the ALJ to  
14 consider its “strong margins” in Nevada, to which ABC argued that no such evidence exists  
15 in the absence of Applicant’s *withheld* Nevada financial statements).<sup>5</sup>  
16

17 Now, astonishingly, at the **very end** of these long proceedings, when no party has  
18 the opportunity to compare Applicant’s Application and *pro forma* ARCRs based on **actual**  
19 **data from Nevada**, Applicant airily and without any regard for the rules and regulations  
20 governing these proceedings, **without any foundation**, in a last-ditch (and possibly pre-  
21 meditated) effort to make up for the gaping holes in its evidentiary presentation to the ALJ  
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26 <sup>2</sup> Applicant’s Objections and Responses to ABC Ambulance’s Subpoena Duces Tecum to RBR Management dba  
27 Community Ambulance, filed on July 25, 2018, p. 13:21-27, p. 14:1-2 (emphasis added).

28 <sup>3</sup> See pages 17-30.

<sup>4</sup> See transcripts of hearings, pp. 1-2,394.

<sup>5</sup> Applicant’s Closing, p. 56:7-8; ABC’s Response, p. 9:13-22.

1 and the Department, attempts to introduce into evidence the very documents that ABC  
2 requested from it in **May 2018** and which it **refused to produce as irrelevant**.

3 The new evidence that Applicant wishes the ALJ to consider in Exhibit B is:

- 4 1. The 2015 reviewed financial statements of RBR Management LLC dba  
5 Community Ambulance, sent to Applicant on **May 23, 2016**;
- 6 2. The 2016 audited financial statements of RBR Management LLC dba  
7 Community Ambulance, sent to Applicant on **April 26, 2017**; and
- 8 3. The 2017 audited financial statements of RBR Management LLC dba  
9 Community Ambulance, sent to Applicant on **April 18, 2018**.

10 The argument that accompanies this **newly-introduced evidence** is that “these  
11 financial statements show quite clearly that Community Ambulance is a profitable  
12 [footnoted: These financials also show Bad Debt, further proving Intervenors’ cherry-  
13 picking theory is just plain false] and well financed ambulance service with sufficient  
14 financial capacity and resources to operate its proposed services successfully as proposed  
15 under the revised ARCR.”<sup>6</sup>

17 **Note that Applicant was in possession of all these financial statements in April**  
18 **2018**, when ABC Applicant asked for them, and certainly by the time of the evidentiary  
19 hearing **in October and November 2018**. Applicant cannot argue that this new evidence is  
20 newly-discovered evidence.

21 Note also that Dignity’s representative on the Board, Mr. Jeff O’Malley himself,  
22 testified during the hearing that, since he has been on the Applicant’s Board, **no outside**  
23 **auditor had been asked to review Applicant’s financials.**<sup>7</sup> The newly-introduced exhibits  
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28 <sup>6</sup> Response to Closing, p. 25:11-14.

<sup>7</sup> Transcript Vol. 2, p. 420:23-25, p. 421:1-6.

1 clearly reveal this testimony to be false. Mr. O'Malley has been on the board since March  
2 2017.<sup>8</sup>

3 **B. LEGAL AUTHORITY**

4 A.R.S § 41-1092.07(D) states that “**the administrative law judge may exclude**  
5 **evidence** if its probative value is outweighed by the danger of **unfair prejudice**, by  
6 confusion of the issues or **by considerations of undue delay**, waste of time or needless  
7 presentation of cumulative evidence.” (Emphasis added.)

9 A.R.S § 41-1092.07(D) also provides that “All parties shall have the opportunity to  
10 **respond** and present **evidence** and argument on all relevant issues.”

12 Arizona Administrative Code (“A.A.C.”) R2-19-115(B) states that a “party shall  
13 have all witnesses, documents and **exhibits available on the date of the hearing**”  
14 (emphasis added).

15 A.A.C. R2-19-116(G) states that “**when all evidence has been received**, parties  
16 shall have the opportunity to present closing oral argument ...” (emphasis added).

18 The “record” in an administrative hearing, for purposes of judicial review to a  
19 superior court, is defined by statute as including “**Any exhibits admitted as evidence at**  
20 **the administrative hearing.**” A.R.S § 12-904(3). In other words, to be part of the record,  
21 an exhibit must have been submitted **at the hearing.**

23 “Late disclosure will **prejudice** the opposing party if there is insufficient time to  
24 investigate fully and prepare rebuttal before the date for final supplementation of  
25 disclosures. **Prejudice is also inherent** when a trial must be continued after the parties have  
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<sup>8</sup> *Id.*, p. 286:14-17.

1 spent time and resources in preparation. The rule requires full, early and continuous  
2 disclosure. **Gamesmanship at any stage of the proceedings should be addressed**  
3 **strongly.**” *Link v. Pima County*, 972 P.2d 669, ¶ 10 (App. 1998) (internal citations omitted,  
4 emphasis added).

5  
6 “The purpose of disclosure is ... to give each party adequate notice of what  
7 arguments will be made and what evidence will be presented at trial.” *Clark Equip. Co. v.*  
8 *Arizona Property & Cas. Ins. Guar. Fund*, 189 Ariz. 433, 440, 943 P.2d 793, 800 (App.  
9 1997).

10  
11 No procedural rule permits Applicant to submit evidence after the hearing without  
12 leave of this tribunal.

13 **C. APPLICANT’S DISCLOSURE WAS PURPOSEFULLY WITHHELD, IS**  
14 **GROSSLY LATE, AND ITS LATE INTRODUCTION MATERIALLY**  
15 **PREJUDICES THE OTHER PARTIES**

16 First and foremost, Applicant has taken the position (until last week Thursday) that  
17 its Nevada financial statements are “**not relevant or reasonably calculated to lead to the**  
18 **discovery of admissible evidence**”<sup>9</sup> and on that basis deliberately withheld them  
19 throughout these proceedings. They were requested so that other parties could verify  
20 Applicant’s claims that its operations in Nevada were “successful” and to verify the  
21 information contained in its ARCRs. **Applicant refused.** Now (when no one can respond)  
22 Applicant has apparently **reversed course** and seeks to treat these documents as though  
23 they are **relevant**. If they are relevant, they should have been (1) produced in response to  
24 ABC’s subpoena, (2) included in Applicant’s Final Exhibit and Witness List before the  
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28 <sup>9</sup> Applicant’s Objections and Responses to ABC Ambulance’s Subpoena Duces Tecum to RBR Management dba  
Community Ambulance, filed on July 25, 2018, p. 13:21-27, p. 14:1-2 (emphasis added).

1 hearing, and (3) submitted at the hearing. **Applicant chose not.** Applicant cannot change  
2 course now.

3         Second, this disclosure is **grossly late.** If Applicant wanted to rely on the information  
4 contained in its Nevada financial statements, it was obliged (by Case Management Order  
5 No. 5) to include them in its Final Exhibit and Witness List before the hearing. **It failed to.**  
6 And if, during the hearing, Applicant realized its mistake in not disclosing them and decided  
7 that it needed these documents, it should at least have attempted to introduce them **at the**  
8 **hearing.** This is the time set aside for each party to present its evidence, attest to the  
9 authenticity and foundation for its documents, and allow other parties to question and  
10 challenge such evidence. **It not only failed to do this in its case-in-chief, but it waived**  
11 **its rebuttal case.**

12         Now, in the very last brief permitted in these proceedings, without any foundation,  
13 and without allowing any other party to challenge anything relating to the documents or  
14 their contents or how they in fact contradict the testimony already on the record, Applicant  
15 tries to augment its record by adding new evidence that it has had from May 2016 to April  
16 2018.

17         Its failure to introduce the evidence at the hearing not only violates Case  
18 Management Order No. 5 (the ALJ's order to disclose exhibits by September 13, 2018), but  
19 also A.A.C. R2-19-115(B) (a party shall have all its **exhibits "available on the date of the**  
20 **hearing"**). Moreover, its delay is inexcusable (and in fact Applicant has made no attempt  
21 whatsoever to excuse it). The ALJ has the authority to exclude the evidence under A.R.S §  
22 41-1092.07(D).

1 Third, this late introduction of documents materially prejudices the other parties. The  
2 ALJ may also exclude this evidence for unfair prejudice because permitting the admission  
3 of these documents at the very end of the proceedings violates A.R.S § 41-1092.07 (which  
4 gives the other parties the right to **respond to evidence at the hearing**). The other parties  
5 are clearly unable to get into the record the inconsistencies between these documents and  
6 Applicant’s *pro forma* ARCRs, nor the inexcusable inconsistencies between these  
7 documents and Applicant’s witnesses’ testimony.<sup>10</sup> In fact, they are unable to cross-examine  
8 anyone on anything pertaining to these documents. This is the very definition of a failure  
9 of due process, the underlying purpose of all evidentiary hearings.<sup>11</sup>  
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12 **D. CONCLUSION**

13 The ALJ is requested to exclude **Exhibit B** and the associated language that  
14 references Exhibit B at **Response to Closing, p. 25, lines 8-14**.

15 RESPECTFULLY SUBMITTED this 27th day of February, 2019.

16  
17 HOFMEYR LAW PLLC  
18 By /s/ Adriane J. Hofmeyr  
19 Adriane J. Hofmeyr  
20 *Attorney for ABC Ambulance, LLC*  
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24 <sup>10</sup> By way of example only, and without waiving our objections (but only to illustrate the sorts of substantive issues  
25 that would have been addressed *had* these documents been offered and admitted at the hearing and thus subject to  
26 cross-examination), testimony would have been elicited to show that these audited financial statements appear to  
27 confirm that RBR **does lease its ambulances from AMG** (pages 10, paragraphs 6 of each of the 2016 and 2017  
28 audited financial statements); and that Mr. O’Malley’s testimony that, since he has been on the board of Applicant,  
no audited financial statements were produced, is untrue.

<sup>11</sup> Also because there were not introduced “at the administrative hearing,” they cannot be included in the evidentiary  
record should judicial review be sought in superior court of a decision herein. Statute clearly anticipates that “the  
record” is what is introduced **during** an administrative hearing.



**CERTIFICATE OF SERVICE**

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Original filed using the OAH electronic document filing system <https://portal.azoah.com/oedf> this 27th day of February, 2019 with copies provided to all parties on the approved mailing list by posting through the designated OAH website as <https://portal.azoah.com/oedf/documents/2015A-EMS-0190-DHS/index.html> in accordance with Case Management Order No. 1.