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

and

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

Attorneys for Intervenors – AMR CON Holders

BEFORE THE DIRECTOR OF THE
ARIZONA DEPARTMENT OF HEALTH SERVICES

In the Matter of: **RBR Management LLC, dba Community Ambulance** Applicant.	Docket 2017-EMS-0104-DHS (EMS No. 0283) **AMR CON HOLDERS' RESPONSE TO APPLICANT'S MOTION FOR REVIEW**

The AMR affiliated intervening parties hereto ("AMR CON Holders") submit this response to the Applicant's Motion for Review. The Motion seems to ignore Applicant's burden of proof and the parameters appropriate for the Motion. It relies upon inaccurate propositions of law. It misstates and exaggerates the underlying factual record, and it ignores the vast evidentiary submissions - including in cross-examination and contrary evidence - calling into question or outright disproving the evidence it proposes the Administrative Law Judge ("ALJ") should have accepted. It seems to suggest an ALJ (and then the Director) is required to accept all of an applicant's evidentiary submissions at face value, without consideration of witness demeanor while testifying, witness credibility, cross-examination, or the other parties' evidentiary submissions. It fails to provide citations to all of the specific

portions of the subject Decision it apparently intends to call into question. In great part, this Motion is nothing more than an argument that the Applicant's evidence was "better" than contrary evidence offered by the intervening parties and the Bureau.[1] For all of these reasons, the Motion should be denied.[2]

Applicant Ignores Applicable Motion for Review Standards

Pursuant to R9-1-103(C), the Director may review the final administrative decision for any one of seven reasons "materially affecting the requesting party's rights . . ." Here, the Applicant does not bother to either state which of the seven choices it might be relying upon or attempt to correlate its presentations to the same. Although it should not be this Office's job, or the intervening parties' job, to discern the Applicant's intentions, it appears to be relying upon item No. 1 (irregularity in the proceedings or abuse of discretion depriving Applicant of a fair hearing), No. 6 (errors of law), and/or No. 7 (that the Decision is not supported by the evidence or is contrary to law).

Additionally, pursuant to R2-19-119(B)(3), the proponent of a motion such as this **shall** establish the grounds to support the Motion. It is not the opposing parties' job to disprove Applicant's unsupported contentions. *See* also, A.R.S. §41-1092.07(G)(1).

The Applicant Has Not Identified Any Errors of Law in the Decision

As best as can be discerned, Applicant's claimed errors of law, and the reasons why the Applicant is wrong to allege such errors, are as follows:

- In Applicant's introduction, it contends the Decision "sets aside well settled precedent." This would seem to relate to the numerous places where Applicant asks this Office to utilize prior decisions made by the Director in different CON

[1] This inclusion of BEMSTS in particular pertains to the rates and charges finding.

[2] The fact that the Motion is 68 pages full of factual inaccuracies but relatively short on citations to the subject Decision and underlying record, combined together with the 15 days allowed for a response [R9-1-103(B)], makes it essentially impossible to address all the erroneous factual contentions the Motion is based upon. In the event that the Director does feel that the Applicant has raised any legitimate evidentiary issues, the AMR CON Holders would request a reasonable opportunity to file supplemental memoranda. *Id*. Fully addressing every factually inaccurate statement that the Applicant has made would take at least twice as many pages as Applicant has submitted, and at least twice as much time as is allowed by the governing rule. And because of the lack of citations, especially to the Decision itself, this would essentially turn the burden of proof on its head.

applications, submitted years ago under different factual circumstances and seeking a different scope of CON authority. Applicant offers numerous references to the Director's Decisions in the Maricopa Ambulance and the AMR Maricopa CON applications. What is lacking, however, is reference to any case law, statute, or regulation citation in support of the implicit proposition that these prior decisions have appellate court-like value, in particular with regard to factual conclusions based upon then existing circumstances. No authority establishes the ALJ's failure to apply, or this Office's failure to adopt, any conclusion from those decisions as establishing a required precedent here.

- Next, in the Motion, at p. 3, one of RBR's supposed examples of "serious errors" in the Recommended Decision does cite to the Decision (RD, 29:7-10), challenging the finding that RBR did not request any interfacility transport arrival times, and correctly noting that the Guidance Document in existence at that time did not require this. However, Applicant mischaracterizes the Decision. Nothing prohibited the Applicant from proposing that the CON it was applying for include arrival times (for example, AMR Maricopa did that when it applied, despite the lack of any requirement). In the portion of the cited Decision, the ALJ simply noted that the Application did not include this request. That is not an error of law. Nowhere does the Decision say this was required. Further, at no point during the hearing or the post hearing process did the Applicant identify what specific IFT arrival times it might be able to comply with, and would therefore be willing to commit to.
- Then, at pp. 3-4, Applicant proposes the ALJ should have applied to the Superior Court in order to enforce the Applicant's subpoenas duces tecum. Again, no legal authority is cited in support of this unique proposition. This was not a legal error made by the ALJ. It was the Applicant who chose to not avail itself of any rights or remedies it might have had through a Superior Court proceeding. For example, *see* A.R.S. §41-1092.07(C).
- In its introduction, and in other places throughout the Motion (for example at pp. 6 and 25), the Applicant accuses the ALJ (and then this Office) of following outdated, corporation commission era, standards of "unmet need" and "right of first refusal." Notably, not a single paragraph of the subject Decision is cited to support this

notion. None of the findings of fact or conclusions of law are referenced. At p. 6, the Motion argues that a conclusion that the existing providers can handle current Dignity transports (the transports Applicant proposes to do) is the equivalent of applying these old standards, rather than a simple observation of fact. This is unfair to the ALJ, and illogical. It is also contrary to R9-25-903(B)(3) (itemizing the need for additional transports as a factor to be considered in evaluating public necessity).

- At pp. 5-6, Applicant also appears to argue it was an error of law for the ALJ to consider the fact that Applicant's ARCR indicated it would not charge for supplies as a factor in evaluating its request to participate in the Phoenix Uniform Rate Group. Given the fact that the **Uniform** Rate Structure does include charges for supplies, the ALJ's concern as to how the Applicant could be "uniform" when it would not charge for supplies was a legitimate one. Additionally, the Applicant's discussion seems to confuse what the supplies it was going to use would cost it (its purchase cost, as indicated on its ARCR) with what it would be charging patients transported.
- Applicant proposes the Decision is contrary to the public policy established by the HB 2569 amendments to A.R.S. §32-43020 (Motion, p. 8). Typographical error aside, Applicant makes little effort to overcome the fact that A.R.S. Title 32 does not apply to ambulance transport regulatory matters.
- At pp. 22-23, the Applicant seems to argue that the Decision should have applied a "this will put existing providers out of business" standard in analyzing financial impact. No law or policy statement issued by DHS supports this (and none is offered by Applicant).
- At pp. 39-40, the Applicant argues there has been "appealable error" because the ALJ found that the Applicant was required to do a Needs Assessment, citing to the ALJ's Decision at 25:1-4; 104:21-23. Applicant is correct that it was not ***required*** to submit a Needs Assessment. However, the portion of the Decision cited does not impose that requirement. Instead, it is simply a summary of witness Jeff O'Malley's testimony about why RBR did not do a Needs Assessment (because he knows what the needs are, and Dignity is the primary customer). The fact that a Needs Assessment is not required does not mean a CON applicant cannot do one and

submit it to this Office. This testimony (of O'Malley) is simply one fact that was considered, not a legal conclusion.

- At pp. 47-48, the Applicant argues the Decision holds Messrs. Rogers and Richardson to an inappropriate fit and proper (legal) standard of having to memorize Arizona's ambulance regulations and statutes. Notably, no portion of the Decision imposing that supposed requirement is cited. Certainly, the fact that both showed up for the hearing apparently having made little to no effort to familiarize himself with the Arizona statutes and regulations governing an ambulance transport business in this State was one of many factors the ALJ was entitled to consider in making her findings and recommendations. The Applicant cites no law to the contrary.

Applicant Does Not Identify Any Irregularity or Abuse of Discretion Meriting Review

The Applicant does not argue that the ALJ erred in admitting or rejecting evidence. There are no overt accusations of misconduct. Instead, the "irregularities" or "abuse of discretion" that Applicant perhaps intends to submit are likely one of two complaints: (1) the ALJ utilized the Intervenors' Proposed Findings of Fact (Motion, p. 2), and (2) it was error for the ALJ to not enforce Applicant's subpoenas duces tecum (*id*., p. 3). With regard to the first, at the conclusion of the hearing, the ALJ asked all of the parties to submit proposed findings of fact in an editable form (so that she could use them). All parties except Applicant submitted their proposed findings of fact with record citations. Applicant's offered no record citations. The ALJ then obviously utilized those various proposed findings of fact she found to be accurate. No supportive authority holds that an ALJ (or a Superior Court judge for that matter) cannot use a party's proposed findings of fact or proposed conclusions of law.

With regard to the subpoenas duces tecum complaint, the Applicant makes no attempt to argue that its several subpoenas duces tecum, directed at all the Intervenors, were enforceable as written. In fact, under the governing regulatory standards and state law protecting proprietary information, they were not. *See*, OAH Docket No. 78, AMR CON Holders' Objections to and Motion to Quash . . . For example, compliance by the AMR CON Holders would have required them to mount a heroic, if not impossible, effort to retrieve and then disclose every piece of data and every shred of paper related to any business conducted

by any of the AMR CON Holders back to the beginning of time, regardless of relevancy or the proprietary nature of the information contained. This would have been unreasonable and oppressive. *Id*. When the inappropriate scope of the various subpoenas duces tecum were raised by the intervening parties, Applicant's attorneys made no real effort to try and modify those directed at the AMR CON Holders in order to make them compliant with either the regulations or state law protecting proprietary information. The fact that these subpoenas were unenforceable as written means there is no way that the ALJ's failure to rule on the objections could have materially affected the Applicant's rights. This fact is amplified by the Applicant's own failure to try to seek any type of enforcement itself. It is further amplified by the Applicant's withdrawal of its "substandard performance" contention prior to the hearing starting. *See*, OAH Docket No. 110, Applicant's Amended Final Witness and Exhibit List, p. 3, l. 7; *see* also, OAH Docket No. 121, Applicant's Prehearing Memo, p. 20:8-9 and testimony of Jeff O'Malley acknowledging the withdrawal, RT, 326:13-327:2.

Applicant Mostly Fails to Cite to Those Paragraphs of the Decision It Assigns Error To

Despite bearing the burden of proof, Applicant fails to identify the specific portions of the Decision it proposes are in error, with very limited exception (5 citations).

At p. 5 (fn 10), and p. 35 (fn 110), the Applicant does identify one error (at RD, 33:29-30). Matthew Karger did testify to five to ten complaints per month per facility, and the "per facility" was left out of the Decision's recitation. However, this cannot be considered material. Karger lumped together complaints about billing and ambulance arrival times, when billing complaints did not serve as a basis for this Application. RT, 640:2-12. Likewise, the Decision carefully spelled out all of the specific incidents relating to ambulance transports that Karger testified to as problematic (ALJ Decision, starting at p. 33, ¶34). His itemization was of an episodic nature, as compared to the volume of transports done, and did not come close to 50-100 **per month**. *Id*. Given his overall testimony (*id*.), any finder of fact could easily have found his generalizations to lack credibility. The lack of materiality is also demonstrated by the fact that Dignity itself receives complaints, including complaints that it is taking too long to process patients, "probably every day," but this does not mean that Dignity is doing a bad job (according to its employees). RT, 622:19-623:13.

The other four citations to the ALJ's Decision do not demonstrate any errors, much less a material error. The first citation is in the Motion at p. 26, fn 76, where Applicant unfairly characterizes the Decision as containing no detailed evidence about Dignity's issues with AMR. This is untrue (as demonstrated by the overall Decision) and the portion of the Decision cited (RD 19:22-20:5) simply contains an accurate recitation of the lack of specific knowledge held by one witness – Jeff O'Malley.

Next, p. 40, fn 130 is where the Applicant proposes that the Decision is based upon Applicant's lack of a Needs Assessment (discussed above). As is detailed above, this was simply an accurate comment on the facts, not a legal conclusion.

Next, at p. 51, fn 178, Applicant criticizes p. 6 of the Decision as inappropriately making a fiscal competence conclusion. Applicant has apparently offered another typographical error. It probably intended to refer to the Decision at p. 106:15-20, where fiscal competence is addressed. There, the ALJ simply observed that while proof of Applicant's principal's Nevada operation's fiscal health was not required, that information would have been relevant to help establish the fiscal competence of the individuals involved with Applicant. That is not an error. It's simply logic.

Last, at p. 64, fn 209, Applicant cites a paragraph of the Decision (RD at 68:13-17), which contains an accurate summary of Roy Ryals' testimony (*see*, RT, 1812:4-10) not the ALJ's ultimate conclusion, as seems to be proposed.

Beyond these few citations to the Decision, the bulk of the Motion relies upon inaccurate or mischaracterized and inflammatory allegations about the Decision, without even identifying which portion of the lengthy Decision Applicant intends to reference.

The Motion Does Not Demonstrate That the Decision is Unsupported by the Evidence

This nine day hearing involved a multitude of exhibits and a wealth of witness testimony, including very pointed cross-examinations. The facts testified to by Applicant's witnesses were frequently called into question under cross-examination as well as by exhibits and testimonies offered by Intervenors. It was the ALJ's job to judge witness credibility, and to weigh the competing evidence. Her recommended Decision is rich with record citations. In this Motion, the Applicant basically argues that the ALJ should have accepted the evidence it submitted, or its creative or wishful spin on the evidence (including its own). It does not, nor can it, argue that the specific findings of fact made by the ALJ are unsupported by the record

citations given (with perhaps the one non-material exception noted above).

The Applicant's unmerited attack upon both the ALJ and the AMR CON Holders should be seen for what it is: a desperate attempt to reargue the competing evidence submitted, to mischaracterize the evidence, or to make statements that are flat out wrong. As was noted above, given the length of the Motion, the vast number of "facts" offered (many with no record citation), and the fifteen days for response limitation, it is impossible for the AMR CON Holders to reasonably address all of the factual inaccuracies. And it should not be their burden to show how each of the ALJ's proposed findings of fact are indeed supported by the record or how Applicant's claimed facts were contrary to or outweighed by different evidence. Applicant is the moving party.

A few compelling examples of Applicant's false statements (or "facts" it seems to propose were undisputed) are as follows:

- AMR allegedly believes ADHS should shut the door to more CONs in Maricopa County (the citation is to Glenn Kasprzyk's simple statement that there are three private providers – RT, 2064:21-25; from the AMR CON Holders' overall evidentiary presentation, it should have been obvious to RBR that AMR's main concerns about RBR's Application relate to RBR's IFT/convalescent only "Dignity-silo" business model, including the cream-skimming and denigration of the overall Maricopa County ambulance transport system that will result from that model).
- AMR allegedly is responsible for the concerns that led Linda Hunt to initially reach out to Jeff O'Malley (which is contrary to the time line involved – *see*, RT, 206:12–212:22; *see* also, O'Malley's admission that these were not AMR caused problems – RT, 228:11-16).
- AMR supposedly did something wrong by not providing five dedicated ambulances under its contract with Dignity (but O'Malley admitted he was told this would be illegal – RT, 234:23-235:9).
- O'Malley's request for "turned call" information was purportedly a "data failure" that supported the Application (however, the timeline shows this request was made after RBR filed its Application and Dignity sued AMR – *see* RT, 241:2-7; further, RBR presented no evidence to prove that Dignity ever approved any alternative provider in advance, to whom calls might be "turned," as required by the contract – CA-24, p. 10,

¶28b; had RBR questioned Glenn Kasprzyk about this, it would have learned Dignity never completed that contractual prerequisite).

- O'Malley was allegedly told by AMR representatives that if AMR cannot handle a call, it just calls 911 (note the three lines after the citation given show this was not the real answer, O'Malley was told "no, not really." RT, 241:16-18).
- Applicant implies that all "data" O'Malley wanted was required under the AMR – Dignity contract (but this is contrary to the contract terms – CA-24, p. 11).
- Supposedly inaccurate reporting allegations – O'Malley was simply wrong about some of his report interpretations, including his construing model patient surveys as actual reporting (RT, 2255:9-2257:21), and offered no proof the urgent transport response information was wrong. The overall evidence indicated O'Malley was mistaken about some of these issues (for example, RT, 397:10-24, 425:20-428:1).
- Employee complaints about AMR service to O'Malley allegedly led to the RBR Application. Note all of the exhibits and transcript citations that are given involve limited / sporadic customer service issues dated *after* the Application was submitted and *after* the AMR CON Holders moved to intervene.
- Dignity employee Hestand's testimony was also mischaracterized. He only testified to rare and isolated concerns, offered no evidence AMR was not meeting its contractual 90% compliance mark, and gave no testimony regarding any long existing and substantial issues with the AMR CON Holders, despite his résumé showing he had been in his position since 2015 (CA-128). His cited testimony regarding the single "impella pump" incident failed to include evidence that air transport was not appropriate for that patient or that RBR will have impella pumps on all of its ambulances, and he admitted that patients who require this unique equipment are rare and sick, and air transport is often the most appropriate method (RT, 603:9-605:11).
- Supposed "transport delay" and "dispatch issues" were actually related to an incident involving Dignity employees simply not wanting to follow dispatch protocols (CA-233R).
- David Argue's testimony purportedly implied that Dignity was falling behind Banner and Honor Health with regard to services offered patients. Argue did not say this and RBR offered no such evidence.

- Glenn Kasprzyk allegedly agrees adding another provider to the Wickenburg area would be beneficial to the public. This ignores the entire discussion, where Kasprzyk clearly did not agree with this (RT, 2068:13-2070:12); it also ignores John Valentine's testimony to the contrary (RT, 2360:21-2362:9), which testimony RBR chose to not attempt to rebut.
- Applicant continues to rely upon Maricopa County population growth to try and prove that ambulance transport volume is currently growing and will continue to grow into the future. It relies upon AMR's exhibit summarizing total ambulance transports by year (AMR-84) to support this. Again, this is a mischaracterization. AMR-84 shows growth from 2013 through 2015, but after that the transport growth is flat. The numbers show only the slightest change and John Valentine's testimony that in the ambulance transport world this trend is basically flat (RT, 2352:8-2353:5) was consciously unrebutted by the Applicant. This discussion by Applicant also ignores Valentine's testimony regarding trends showing that ambulance transport numbers have been impacted by changes in how people access healthcare, and higher insurance deductibles. RT, 2352:19-2353:5.

The Applicant Inappropriately Tries to Negotiate a Different CON

In the Motion, starting at p. 12, Applicant states it would be "willing to accept" a CON containing restrictions, bargaining by using the threat of an appeal. This is entirely inappropriate. It not only is begging for something it did not apply for (which might have caused the hearing to involve different issues and evidence), but it is asking to be given something that its witnesses actually insisted, during the hearing, was not possible (a limited CON). For example, Applicant now suggests that it might only transport Dignity patients. During the hearing, Mr. Richardson denied that kind of a limitation would even be possible. RT, 1177:19-1178:19. Further, nothing in the standards for a motion to review contemplates this type of negotiation at this stage of the proceedings.

CONCLUSION

For all of the above stated reasons, the Motion for Review should be denied. The Applicant has not met its burden of proof, either through adherence to the governing standards for the Motion or through offering this Office and the parties the specific record citations and Decision citations one would normally expect to see accompanying a motion such as this. Instead, the Applicant has decided to make false claims of legal error and to reargue the evidence, putting the best possible spin on it for itself, or even mischaracterizing or misstating the evidence. The ALJ already weighed the evidence, apparently rejecting some of that which the Applicant now relies upon. The Decision correctly denies a CON application that, if granted, would have been contrary to the public's best interests and that was not demonstrated to be supported by public necessity.

DATED this 2nd day of July, 2019.

SHORALL MCGOLDRICK BRINKMANN

/S/PAUL MCGOLDRICK
Paul McGoldrick
Attorneys for Intervenors-AMR CON Holders

FLETCHER STRUSE FICKBOHM & WAGNER, PLC

/S/RONNA FICKBOHM
Ronna L. Fickbohm
Attorneys for Intervenors-AMR CON Holders

Copy mailed this
2nd day of July, 2019 to:

Dr. Cara M. Christ
Director
Arizona Department of Health Services
150 North 18th Avenue
Phoenix, Arizona 85007

COPY emailed this 2nd day
of July, 2019 to:

ACR@azdhs.gov

COPIES emailed and mailed this
2nd day of July, 2019 to:

Kevin Ray
Assistant Attorney General
Office of the Attorney General
2005 N. Central Ave.
Phoenix, AZ 85004
Attorney for ADHS/BEMSTS
Kevin.ray@azag.gov

Adriane J. Hofmeyr
Hofmeyr Law PLLC
31 N. 6th Ave., Ste 105-466
Tucson, Arizona 85701
Attorney for ABC Ambulance, LLC
adraine@hofmeyrlaw.com

James Belanger
J. Belanger Law PLLC
P.O. Box 447
Tempe, Arizona 85280
Attorney for Maricopa Ambulance, LLC
jjb@jbelangerlaw.com

Brendan Murphy
HENDRICKS MURPHY, PLLC
3101 North Central Avenue, Suite 970
Phoenix, Arizona 85012
Attorney for Applicant
brendan@hendricksmurphy.com

Jeffrey Meyerson
RADIX Law
15205 N. Kierland Blvd, Suite 200
Scottsdale, AZ 85254
Meyerson@radixlaw.com

By: ____/S/ Linda Clark_____