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**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT**

AMERIGROUP KANSAS, INC.

Petitioner,

vs.

KANSAS DEPARTMENT OF
ADMINISTRATION, and KANSAS
DEPARTMENT OF HEALTH AND
ENVIRONMENT, and KANSAS
DEPARTMENT OF AGING AND
DISABILITY SERVICES

Respondents.

Case No.: _____

VERIFIED PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION

COMES NOW Petitioner, Amerigroup Kansas, Inc. (“Amerigroup”), by and through counsel, and pursuant to the Kansas Act for Judicial Review and Civil

Enforcement of Agency Actions, K.S.A. 77-601 *et seq.* (KJRA), files this Verified Petition for Judicial Review of Agency Action to challenge the procurement activities and determinations made by the State of Kansas, through the agency of Respondents, in connection with Request for Proposal EVT0005464 KanCare 2.0 Medicaid & CHIP Capitated Managed Care.

FACTUAL BACKGROUND

The Parties

1. Petitioner, Amerigroup, is a Kansas corporation in good standing. Amerigroup's mailing address is 9225 Indian Creek Parkway, Building 32, Suite 400, Overland Park, Kansas 66210.

2. Respondent Kansas Department of Administration ("KDOA") is a cabinet-level administrative agency of the State of Kansas. KDOA is headed by, and administered under the direction and supervision of, the Secretary of Administration, currently Sarah Shipman. KDOA may be served with process through Secretary Shipman at 1000 S.W. Jackson, Suite 500, Topeka, Kansas 66612.

3. The Office of Procurement and Contracts ("OPC") is a subordinate division of the KDOA. The OPC is responsible for soliciting bids and negotiating and entering into contracts with vendors on behalf of the State of Kansas. The current director of the OPC is Tracy Diel. The OPC's mailing address is 900 S.W. Jackson, Rm. 451, Topeka, Kansas 66612.

4. Respondent Kansas Department of Health and Environment (“KDHE”) is a cabinet-level administrative agency of the State of Kansas. KDHE is headed by, and administered under the direction and supervision of, the Secretary of Health and Environment, currently Jeff Anderson. KDHE may be served with process through Secretary Anderson at 1000 S.W. Jackson, Suite 500, Topeka, Kansas 66612.

5. Respondent Kansas Department of Aging and Disability Services (“KDADS”) is a cabinet-level administrative agency of the State of Kansas. KDADS is headed by, and administered under the direction and supervision of, the Secretary for Aging and Disability Services, currently Tim Keck. KDADS may be served with process through Secretary Keck at 503 S. Kansas Ave., Topeka, Kansas 66603.

The KanCare 1.0 Program

6. KanCare is an integrated managed care program through which the State of Kansas implements and administers Medicaid and the Children’s Health Insurance Program (“CHIP”). The KanCare program provides medical, behavioral, and long-term care delivery systems and covers mandatory and optional services under the approved Medicaid State Plan. More than 400,000 Kansas residents are currently receiving services under the KanCare program.

7. KanCare is jointly administered by KDHE and KDADS. KDHE is responsible for administration and supervision of the Kansas Medicaid and CHIP programs through its Division of Health Care Finance. KDHE also formulates

eligibility policy. KDADS manages behavioral healthcare for non-CHIP populations, Home and Community Based Services (“HCBS”) Waivers, nursing facilities, intermediate care facilities for individuals with intellectual and developmental disabilities, and the Program for All-Inclusive Care for the Elderly (“PACE”).

8. The KanCare program is implemented and administered by the State of Kansas under federal guidelines, rules and regulations promulgated by CMS, including guidelines, rules and regulations governing managed care contract procurements.

9. Three private managed care organizations (“MCOs”) are currently under contract with the State of Kansas to serve the KanCare program. The three incumbent MCOs are Amerigroup, Sunflower Health Plan, and United Healthcare. The incumbent MCOs have been providing uninterrupted managed care services to Kansas Medicaid recipients since 2013 under the State’s current Medicaid managed care program, known as “KanCare 1.0”.

10. The incumbent contracts for the KanCare 1.0 program are scheduled to expire on December 31, 2018.

The KanCare 2.0 Program

11. On November 2, 2017, KDOA issued Request for Proposal EVT0005464 KanCare 2.0 Medicaid & CHIP Capitated Managed Care (the “KanCare 2.0 RFP”) on behalf of KDHE and KDADS to solicit vendor bids for managed care services under a new KanCare program known as KanCare 2.0.

12. The Event Description for the KanCare 2.0 RFP states: “Request for proposal (RFP) to establish a contract or contract(s) with qualified managed care organizations for KanCare 2.0 Medicaid and CHIP Capitated Managed Care Services for Kansas Department of Health and Environment (KDHE) and Kansas Department for Aging and Disability Services (KDADS).”

13. The KanCare 2.0 RFP calls for many material changes to the current KanCare 1.0 program. Such changes include a work requirement, a lifetime cap on benefits for certain recipients, increased care coordination and case management, mandatory and increased staffing requirements, and elevated oversight standards.

14. On January 4, 2018, Amerigroup and five other vendors timely submitted proposals in response to the KanCare 2.0 RFP. The other responding bidders were United Healthcare, Inc., Sunflower Health Plan, Well Care, AmeriHealth Caritas, and Aetna Better Health.

15. The KanCare 2.0 procurement was conducted under the “negotiated procurement” procedure prescribed by K.S.A. 75-37,102, which required final evaluations and awards to be made by a Procurement Negotiation Committee (“PNC”) consisting of the following officials, or their designees: (1) Secretary of Department of Administration; (2) Director of Purchases, Department of Administration; and (3) Head of the contracting agency. The KanCare 2.0 PNC members were Jon Hamdorf (KDHE designee), Brad Ridley (KDOA designee), and Aubrey Waters (OPC designee).

16. Initial evaluations of vendor proposals were conducted by twelve “KanCare 2.0 evaluation” teams comprised of staff from KDHE and KDAD. Valuation tools developed by the KanCare 2.0 evaluation teams were then sent to a Management Review Team, which made recommendations for vendor oral presentations meetings with the PNC.

17. The Management Review Team recommended four vendors for oral presentations to the PNC: Amerigroup, United Healthcare, Sunflower Health Plan, and Aetna Better Health. Oral presentations were held May 10 and 11, 2018.

***The Intervening KanCare
Omnibus Budget Legislation***

18. During the 2018 legislative session, and soon after the vendors had submitted their proposals in response to the KanCare 2.0 RFP, bills were introduced in both houses of the Kansas Legislature to address mounting concerns about the planned KanCare 2.0 changes to the existing KanCare 1.0 program design.

19. On January 24, 2018, then-Kansas Governor Sam Brownback announced in a press release his plans to “stop KanCare 2.0” and instead “make improvements to the current KanCare program.” A true and correct copy of the press release from the Office of the Governor is attached hereto as Exhibit A.

20. On May 4, 2018, while the final stages of the KanCare 2.0 procurement process were ongoing, the Kansas Legislature passed House Substitute for Senate Bill No. 109 (the “Omnibus Budget Bill”). The Omnibus Budget Bill contained provisions

reflecting the Legislature's concerns about proceeding with implementation of KanCare 2.0 or substantially changing the direction of the KanCare program. This included a provision in Section 118 of the Omnibus Budget Bill directing that agencies were only to implement a KanCare program reflective of the program as it existed on January 1, 2018 (without any of the KanCare 2.0 requirements specified in the KanCare 2.0 RFP), and further directing that the KanCare 2.0 RFP be altered by Respondents in order to negotiate for contracts with the bidders that would be in compliance with the legislative directive that the KanCare 2.0 program be halted. Specifically, Section 118 of the Omnibus Budget Bill provided in relevant part:

“During the fiscal years ending June 30, 2018, and June 30, 2019, notwithstanding any other provision of law to the contrary, no state agency shall expend any moneys appropriated from the state general fund or from any special revenue fund or funds for fiscal year 2018 or 2019 by chapter 104 of the 2017 Session Laws of Kansas, this or any other appropriation act of the 2018 regular session of the legislature to submit or maintain to the United States centers for medicare and medicaid services any request to administer or provide state medicaid services under the Kansas medical assistance program using a capitated managed care delivery system in any manner that is substantially different than the manner in which state medicaid services under the Kansas medical assistance program were provided on January 1, 2018, including, but not limited to, imposing any new eligibility requirements or limitations to receive such services, without express prior authorization by an act or appropriation act of the legislature: *Provided, That* no state agency shall enter into any contract for the administration and provision of state medicaid services using a capitated managed care delivery system in violation of this section without express prior authorization by an act or appropriation act of the legislature: *Provided further, That* the department of health and environment, the Kansas

department for aging and disability services and the department of administration shall negotiate for contracts to administer state medicaid services using a capitated managed care delivery system that comply with this section, including altering the request for proposal identified by the department of administration as bid event 0005464, opened on October 27, 2017, and closed on January 5, 2018, limited to persons who have submitted a bid in response to bid event 0005464.”

2018 S.B. 109, sec. 118 (emphasis added).

21. Other provisos in the 2018 Omnibus Budget Bill created additional requirements, including certain allowances for additional behavioral health and telemedicine services for the KanCare program.

22. The current Governor of Kansas, Jeff Colyer, signed the Omnibus Budget Bill into law on May 16, 2018 (the “Omnibus Budget Law”). *See* L. 2018, ch. 109, sec. 118, attached hereto as Exhibit B.

23. The Omnibus Budget Law plainly requires Respondents to implement a KanCare program using a capitated managed care delivery system substantially similar to the system in place on January 1, 2018, *i.e.*, Respondents’ authority to proceed with KanCare 2.0 contracts was revoked. The Omnibus Budget Law also plainly requires Respondents to alter the terms of the KanCare 2.0 RFP to negotiate with the vendors who had responded to the KanCare 2.0 RFP and to award contracts based on the requirements mandated in the Omnibus Budget Law.

24. Yet, despite these statutory mandates, Respondents did not revise the KanCare 2.0 RFP. In fact, after the Legislature revoked Respondents’ authority to

implement KanCare 2.0, Respondents never amended the KanCare 2.0 RFP, never solicit revised bids based on the new requirements, and never even met with vendors to discuss the modified KanCare program design now mandated by law.

25. Respondents failed to take these necessary steps despite knowing, weeks before the Omnibus Budget Law was enacted, that the Legislature would likely revoke Respondents' authority to proceed with the KanCare 2.0 procurement.

26. In January 2018, Respondents began tracking Senate Bill No. 300, a measure introduced under the short title "Prohibiting substantial change to the Kansas medical assistance program without prior legislative approval." Both KDOA and KDHE filed written testimony on January 30, 2018, in opposition to the bill.

27. Substantially all of the KanCare provisos in the Omnibus Budget Law were taken from Senate Bill No. 300, as amended and reported out of Committee on February 15, 2018. A true and correct copy of Senate Bill No. 300, as amended, is attached hereto as Exhibit C.

28. In a February 23, 2018 email exchange, Health Care Finance Director Hamdorf and OPC Procurement Officer Waters discussed the consequences of legislative intervention in the KanCare 2.0 procurement process. Waters was attempting to get answers to questions posed to her by OPC Director Diel:

[Diel] If the Legislature passes legislation which in essence takes the procurement back to the specifications of the previous contract, how would that effect (sic) the current review?

[Hamdorf] It would require us to work with D of A to cut the pieces out of the RFP which are new services or existing services to new populations. Then the bidders would have a chance to change their responses and bids.

[Diel] Could we complete the review and then take out parts that will not be allowed?

[Hamdorf] We could, but the bidders would still need to have the opportunity to change their responses and financial bid.

[Diel] How are the new specifications different from the old contract?

[Hamdorf] Many new services and many existing services to new populations. It would be a long process identifying everything we would need to remove.

[Diel] Would it be easier to go back an (sic) forth with each vendor and permit them to modify their current proposal or would we need to ask the vendors to submit a completely new technical and then a new cost proposal?

[Hamdorf] We would have to go back and forth. Doing a whole new proposal would be extremely costly to the bidders.

A true and correct copy of Hamdorf's and Waters' February 23, 2018 email exchange is attached hereto as Exhibit D. (Emphasis added).

29. Based on the public record and documents available as of the date of this filing, it is evident Respondents were aware that legislative measures to halt implementation of KanCare 2.0 were imminent and that such measures would require Respondents to amend the KanCare 2.0 RFP to "cut pieces out of the RFP which are new services or existing services to new populations" and thereafter ensure that the

bidders had “the opportunity [to] change their responses and financial bid” in light of the new requirements. *See* Exhibit D.

30. As anticipated, in May 2018, these legislative measures were instituted, in the form of Section 118 of the Omnibus Budget Law, while the KanCare 2.0 RFP was still being evaluated. However, despite the non-discretionary mandates enjoined upon Respondents by the Omnibus Budget Law, and despite Respondents’ earlier acknowledgement of what needed to be done to address those mandates, Respondents (1) never altered by amendment the provisions of the KanCare 2.0 RFP; (2) never solicited revised or updated bids from vendors based on the new requirements; and (3) never discussed any of the new or revised requirements with vendors during vendor oral presentations.

31. Instead, Respondents simply awarded contracts based on the evaluations and vendor presentations done under the un-altered terms of the KanCare 2.0 RFP. By failing to alter the KanCare 2.0 RFP to make it consistent with the Omnibus Budget Law and failing to provide an opportunity for bidders to respond to an altered RFP, Respondents failed to follow the procedure required by law, and executed unauthorized contracts under the un-altered KanCare 2.0 RFP that exceeded their legal authority.

32. This unlawful decision was documented internally on June 18, 2018, when the KanCare 2.0 PNC issued a letter to OPC Director Tracy Diel directing that contracts under the unaltered KanCare 2.0 RFP be awarded to Aetna Better Health of

Kansas, Sunflower State Health Plan, and United Healthcare. A true and correct copy of the June 18, 2018 letter is attached hereto as Exhibit E.

33. Respondents did not, however, immediately announce their award decision publicly, or provide notices of their intent to award to the other vendors. Instead, Respondents proceeded to execute contracts with Aetna Better Health of Kansas, Sunflower State Health Plan, and United Healthcare, effective June 19, 2018, to provide managed care services to the State of Kansas under the un-altered KanCare 2.0 RFP.

34. Respondents waited until June 22, 2018, to publicly announce and issue notices of their intent to award the (already-executed) KanCare 2.0 contracts, which they did in violation of Section 6.6(c)(4) of the KanCare 2.0 RFP. Section 6.6(c)(4) requires that only “[o]nce a Notice of Intent to Award has been issued, the CONTRACTOR(S) shall execute the final CONTRACT.” A true and correct copy of the Notice of Intent to Award issued to Amerigroup is attached hereto as Exhibit F.

35. In addition, the contracts that were executed by Respondents also violated the Omnibus Budget Law because they included a scope of services that substantially differs from that which existed under the KanCare program as of January 1, 2018, contrary to the Omnibus Budget Law, and because they provide on their face that the period of the contract is from January 1, 2019 to December 31, 2023, which exceeds the requirement in Section 118 of the Omnibus Budget Law that the contracts “shall be for a term of three years”, and may include two one-year options. *See* Exhibit B.

The contracts awarded and executed by Respondents under the un-altered KanCare 2.0 RFP exceed statutory authority, and are therefore unlawful.

The Agency-Level Bid Protest

36. On June 29, 2018, shortly after receiving Respondents' Notice of Intent to Award, Amerigroup filed a written bid protest ("Bid Protest") in accordance with a document published on KDOA's website titled "Vendor Bid Protest Procedure." A true and correct copy of Amerigroup's Bid Protest is attached hereto as Exhibit G. A true and correct copy of the Vendor Bid Protest Procedure is attached hereto as Exhibit H.

37. Although the KanCare 2.0 RFP was issued by KDOA, out of an abundance of caution Amerigroup also submitted a second protest letter to KDHE expressing its desire to avail itself of any administrative remedies provided within KDHE. The agency has confirmed that the Vendor Bid Protest Procedure administered by KDOA is the only agency-level appeal procedure available for this procurement.

38. In its Bid Protest, Amerigroup requested that any and all procurement or contract implementation and readiness activities in connection with the KanCare 2.0 RFP be immediately stayed in accordance with Section 3 of the KDOA Vendor Bid Protest Procedure, which provides a self-executing, automatic stay of procurement activities pending administrative review by the agency. Amerigroup also cited K.S.A.

77-528 as an alternative basis for staying the effectiveness of the KanCare 2.0 award decision.

39. Amerigroup also filed requests for public records with each Respondent under the Kansas Open Records act (“KORA”), K.S.A. 45-215 *et seq.* True and correct copies of the KORA request letters are attached hereto as Exhibit I. Each Respondent acknowledged receipt of Amerigroup’s KORA requests; however, as of the date of this filing, complete responses to all requests have not been received.

40. Because Respondents failed even to acknowledge the automatic stay required under the Vendor Bid Protest Procedure, or Amerigroup’s request for stay pursuant to K.S.A. 77-528, on July 3, 2018, Amerigroup submitted letters to KDOA and KDHE requesting that Respondents provide a written determination, on or before July 13, 2018, addressing Amerigroup’s stay request. True and correct copies of these letters are attached hereto as Exhibit J.

41. As of the date of this filing, none of the Respondents have addressed, in writing or otherwise, the automatic stay provided under the Vendor Bid Protest Procedure or the stay request Amerigroup made pursuant to K.S.A. 77-528. Indeed, for nearly a month, Respondents have ignored the automatic stay relief mandated by their own written procedure without articulating an explanation or justification for overriding the stay.

42. Instead, over Amerigroup's repeated objections, Respondents persist in moving forward with transition and readiness activities to implement the unauthorized KanCare 2.0 program.

ENTITLEMENT TO JUDICIAL REVIEW

43. Each Respondent is a state agency, as defined by K.S.A. 77-602(a), whose actions are subject to judicial review under the KJRA. None of the Respondents is exempt from judicial review under the KJRA or any other provision of Kansas law.

44. The agency action under challenge is Respondents' award decision in connection with the KanCare 2.0 RFP and all prior and subsequent actions by Respondents, singularly or in combination, or by Respondents' agents, designees or representatives, in connection with execution of or performance under the KanCare 2.0 contracts, including without limitation Respondents' failure to abide by the automatic stay relief prescribed by the KDOA Vendor Bid Protest Procedure (the "Agency Action").

45. Amerigroup received notice of the Agency Action on June 22, 2018. *See* Notice of Intent to Award, Exhibit F.

46. Amerigroup has complied with K.S.A. 77-613(b) by timely filing this petition for judicial review within thirty days of the Agency Action.

47. The Agency Action is a final agency action subject to immediate judicial review under K.S.A. 77-607. In the alternative, the Agency Action is a non-final agency action subject to interlocutory judicial review under K.S.A. 77-608, because the Agency Action, though ostensibly preliminary, will ultimately be subject to judicial review and postponement of judicial review would result in an inadequate remedy and cause irreparable harm, both to Amerigroup and the public.

48. Venue is proper in the District Court of Shawnee County, Kansas, under K.S.A. 77-609(b), because the Agency Action was executed in Shawnee County.

49. Amerigroup has exhausted, or may be relieved from exhausting, all available administrative remedies both within and without the Respondent agencies. The Agency Action is ripe for judicial review because: (a) seeking agency-level reconsideration is not required by statute or formal rule; (b) the Agency Action was void ab initio as it was executed wholly outside the limited powers conferred upon Respondents by statute; (c) the continued pursuit of uncertain administrative remedies would result in prejudicial delay and cause irreparable harm both to Amerigroup and the public; and (d) the continued pursuit of uncertain administrative remedies would be futile, as demonstrated by Respondents' failure to abide by the automatic stay prescribed by their own bid protest procedure.

50. Amerigroup has standing to challenge the Agency Action under K.S.A. 77-611 because: (a) Amerigroup is a person to which the Agency Action was specifically directed and (b) Amerigroup was a party to the agency proceedings that

led to the Agency Action. Amerigroup also has common-law standing because it has sustained, and will continue to sustain, actual injury as a direct result of the Agency Action.

ENTITLEMENT TO RELIEF

51. Based on the limited records made available as of the date of this filing and on the facts more specifically alleged above, Amerigroup has identified the following grounds for relief under K.S.A. 77-621(c):

- (a) Respondents acted outside the bounds of the statutory authority conferred by the Kansas Legislature. K.S.A. 77-621(c)(2).
- (b) The Agency Action was executed under an erroneous interpretation or application of Kansas law. K.S.A. 77-621(c)(4).
- (c) Respondents engaged in an unlawful procedure or otherwise failed to follow prescribed procedure. K.S.A. 77-621(c)(5).
- (d) The Agency Action was based on a determination of fact not supported by substantial competent evidence. K.S.A. 77-621(c)(7).
- (e) The Agency Action is otherwise unreasonable, arbitrary, or capricious. K.S.A. 77-621(c)(8).

***Relief under K.S.A. 77-621(c)(2)
and K.S.A. 77-621(c)(4)***

52. As subordinate agencies of the State of Kansas, Respondents are authorized to exercise only those powers that are expressly, or by clear implication, conferred by the Kansas Legislature.

53. Respondents acted ultra vires of their delegated powers, and contrary to the rule of law, by ignoring the clear legislative mandates enjoined upon them by the Omnibus Budget Law. Respondents conducted negotiations for, and entered into contracts under, the KanCare 2.0 RFP in the face of a statute expressly revoking Respondents' authority to execute such administrative acts. Thus, the Agency Action is unlawful, and was void at its inception.

54. To the extent the Agency Action was executed intra vires of Respondents' delegated authority the action is nonetheless invalid as it is based on an erroneous interpretation or application of Kansas law. By its plain language the Omnibus Budget Law requires Respondents to perform certain specified acts in a prescribed manner. Although by necessary implication the law provides Respondents with limited discretion to determine the most effective means of carrying out their public charge, the law does not authorize Respondents to change the substance of that charge. Respondents have no discretion to solicit, negotiate for, or execute a contract that is not authorized by law or supported by an authorized appropriation.

Relief under K.S.A. 77-621(c)(5)

55. Within the framework of the applicable statutes and regulatory guidelines governing negotiated procurements in Kansas, the KanCare 2.0 RFP is the document that provided the procedural requirements for all procurement activities conducted in connection with the KanCare 2.0 contracts. Respondents were required to follow the procedural requirements prescribed by the KanCare 2.0 RFP without material deviation.

56. Respondents failed to follow the procedural requirements prescribed by the KanCare 2.0 RFP, including but not limited to failing to adhere to the requirement that notices of intent to award be issued before contracts were executed.

56. Within the framework of the applicable statutes and regulatory guidelines governing negotiated procurements in Kansas, the KDOA Vendor Bid Protest Procedure is the document that provides the procedure for conducting agency-level protests in connection with non-courtesy-bid procurements administered by the OPC.

57. Respondents failed to adhere to the KDOA Vendor Bid Protest Procedure by moving forward with transition and readiness activities despite the automatic stay relief mandated in that procedure and without giving an explanation or justification for a stay override.

***Relief under K.S.A. 77-621(c)(7)
and K.S.A. 77-621(c)(8)***

58. The Agency Action is based in material part on determinations that do not have substantial evidential support and were arrived at through unreasonable, arbitrary or capricious decision-making. Relief on these grounds is appropriate because, among other things, Respondents (a) engaged in inadequate, unfair, and/or misleading discussions or exchanges of information; (b) disregarded mandatory or material requirements of the solicitation; (c) failed to follow the specified evaluation criteria and/or used unstated evaluation considerations; (d) failed to perform an even-handed price-realism evaluation; (e) failed to perform a meaningful and consistent evaluation of past performance; and (f) failed to adequately document findings and justifications for award recommendations and determinations.

PRAYER FOR RELIEF

Emergency Relief from Agency Action

Amerigroup requests emergency injunctive relief staying the effectiveness of the Agency Action and suspending any and all performance on, or implementation of, the unauthorized contracts negotiated and executed under the KanCare 2.0 RFP, including without limitation any and all activities related to transition, readiness, or transfer of work in connection with those contracts. Emergency injunctive relief is necessary in light of the exigent circumstances because:

- (a) It is apparent on the face of this pleading that there is a reasonable probability Amerigroup will prevail in its challenge, as the Agency Action was executed ultra vires of Respondents' delegated authority and in a manner expressly proscribed by law.
- (b) The only meaningful remedy for Amerigroup's lost opportunity to participate in a fair and open competitive bidding process is injunctive relief, and the denial of immediate injunctive relief could result in the potential mootness of Amerigroup's challenge. If Amerigroup is compelled to divest, demobilize and transition away from its position as an MCO in the KanCare program, at some point its present ability to continue providing quality services to KanCare beneficiaries under the mandates of current law will be compromised, thereby potentially rendering moot the relief to which Amerigroup is entitled if Respondents are not required to return to the status quo ante pending final determination of this action by the Court.
- (c) Amerigroup has already suffered, and will continue to suffer tangible irreparable harm due to Respondents' refusal to abide by the automatic stay prescribed by their own bid protest procedure, an essential agency-level remedy that should have afforded Amerigroup immediate relief the moment the Bid Protest was filed on June 29, 2018. Since Respondents announced its intent to award the new KanCare contracts, Amerigroup's

ability to negotiate and arrange for services through its plan has been impaired, which has negatively affected the expansion of its networks and the range of services available to its members. Respondents' actions have also impaired Amerigroup's ongoing negotiations with a number of its largest providers. This has hindered Amerigroup's ability to secure favorable rates and realize cost savings for Kansas taxpayers.

- (d) If immediate injunctive relief is not granted there is an imminent threat of irreparable harm, both to Amerigroup and the public, through lost goodwill, increased costs and expenses, disruption of public services, and other monetary and nonmonetary burdens. In order to continue providing services to KanCare beneficiaries under the mandates of current law, Amerigroup must re-contract for certain services, including health home services, telemedicine services, and behavior health services, and must commence negotiations to obtain such contracts within weeks. There has been a noticeable spike in member attrition since Respondents' announcement as well as increased reports of member abrasion, confusion and uncertainty. In one instance, for example, members notified Amerigroup that providers were requiring them immediately to execute a change in plan providers. Increased erosion of employee goodwill is also evident. Amerigroup already has lost a number

of key employees, and it has been unable to find acceptable candidates to fill at least two key positions.

- (e) Respondents have no legitimate grounds to assert the State of Kansas would suffer irreparable harm if the effectiveness of the Agency Action were suspended during the pendency of judicial review. Indeed, Respondents cannot be heard to complain about irreparable harm at all, because any and all harm that might arise in this case is directly traceable to Respondents' own illegal actions, and because the new unlawful contracts do not go live until January 1, 2019, and the status quo may be maintained by Respondents simply extending the current incumbent MCO contracts if necessary to maintain services to the numerous Kansas citizens served under the KanCare program.
- (f) Staying the effectiveness of the Agency Action would serve the public interest by protecting the integrity of Kansas' procurement system and medical assistance program.

Final Relief from Agency Action

In addition to the emergency injunctive relief requested herein, Amerigroup requests that the Court enter final orders: (a) setting aside the contracts executed under the KanCare 2.0 RFP and restoring the procurement to the status quo ante Respondents' unauthorized acts and omissions; (b) directing Respondents to exercise

their official discretion in keeping with Kansas law; and (c) providing any other or additional relief authorized and appropriate under the circumstances.

Reservation of Right to Amend

Amerigroup reserves the right to amend this Petition with additional factual assertions and legal contentions after it has received and has had a fair opportunity to review all relevant public records from all Respondents.

CONCLUSION

Based on the foregoing, Amerigroup has established it is entitled to judicial review of the challenged agency action and therefore requests that the Court grant its Petition.

Dated: July 19, 2018

Respectfully submitted,

MORRIS, LAING, EVANS, BROCK
& KENNEDY, CHTD.

/s/ Trevor C. Wohlford

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VERIFICATION


STATE OF KANSAS)
)
COUNTY OF JOHNSON)

I, Frank Clepper, being first duly sworn under oath, deposes and says that he is President and Chief Executive Officer of Amerigroup Kansas, Inc.; that he is authorized to make this verification on behalf of Petitioner; that the foregoing Petition is true to his own knowledge, except as to those matters stated thereon in information and belief, and as to those matters he believes to be true.



Frank Clepper

SUBSCRIBED AND SWORN to before me, a Notary Public, by the said Frank Clepper, this 19th day of July, 2018.



NOTARY PUBLIC

My commission expires:

July 31, 2018

