UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARK MURPHY, Individually and on behalf of A class of others similarly situated, Plaintiff, v. AIR METHODS CORPORATION, and ROCKY MOUNTAIN HOLDINGS, LLC Defendants.	Case No. _____

CLASS ACTION COMPLAINT

Plaintiff brings this action individually and on behalf of a class of others similarly situated,[1] against affiliated Defendants Air Methods Corporation and Rocky Mountain Holdings, LLC, for Declaratory Judgment under the Declaratory Judgments Act, 28 U.S.C. §2201. This case involves the intersection of the Airline Deregulation Act of 1976's ("ADA") preemption provision, 49 U.S.C. §41713(b)(1), with the Defendants' practice of charging patients for emergency, medical air transportation rates when no express or implied-in-fact contract exists between them and the patient for such transportation. Plaintiff seeks a declaration of rights, obligations and relationship between Plaintiff, the Class and the Defendants relating to Defendants claimed entitlement to payment for its emergency air transportation services.

INTRODUCTION

1. Plaintiff brings this proposed class action on behalf of himself and all others similarly situated who have been charged by Defendants for the transportation of patients by air ambulance as a result of a healthcare provider's determination under the Emergency Medical Transportation and Labor Act 42 USC §1395dd (EMTAL) that the patients suffered from an "emergency medical condition" requiring immediate air transportation to an accepting medical facility capable of providing appropriate care. Defendants only provide emergency air transportation when requested by a healthcare provider certifying that air transport is medically necessary.

[1] For simplicity, rather than reciting "and the Class," each time "Plaintiff" is mentioned, this pleading will refer to "Plaintiff." Such usage includes the class that Plaintiff seek to represent.

2. When a first responder or emergency room physician (collectively "healthcare provider") determines that a patient suffers from an emergency medical condition requiring treatment unavailable at the initial facility, or under emergent circumstances, and that immediate transportation by air is necessary for appropriate healthcare to be provided, the healthcare provider contacts an appropriate receiving hospital, and upon their acceptance, contacts Defendants, and only Defendants to provide the necessary transport to that hospital. [2]

3. The need for emergency transportation is acute in every instance. As a condition of transport, the Defendants require completion of certification of necessity (Ex. 1) from the treating healthcare provider. The transported patient does not engage in any aspect of the air transportation, and Defendants do not enter into any contract, nor any negotiations with the patient. The patient does not, and cannot make the request for transport; has no choice in the transport provider; and, has no choice in whether to accept the transport other than to refuse necessary and urgent medical treatment. The transportation is not a voluntary undertaking by Plaintiff, but rather under the influence of, and is a direct consequence of an emergency medical condition requiring immediate medical care. Defendants do not engage in any discussion, nor negotiation of the terms under which transportation will be provided. Given the dire circumstances, express or informed consent or negotiation of essential terms does not occur. The patients are frequently unconscious, and in all instances incapable of giving meaningful express or informed consent, or otherwise voluntarily assenting to the transportation by the Defendants. Once requested, Defendants transport the patient as directed by the healthcare provider and do so without any agreement from the patient.

4. This case is brought on behalf of patients transported under the emergent medical circumstances above described. By virtue of the circumstances, no enforceable contractual relationship is formed prior to transport between the Plaintiff and the Defendants. Defendants do not disclose the amounts they intend to charge for such transportation.

[2] "Emergency Medical Condition" is defined in EMTAL as: "a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical treatment could reasonably result in (i) placing the health of the individual (or with respect to a pregnant woman, the health of the woman or unborn child) in serious jeopardy, (ii) serious impairment to bodily function, or (iii) serious dysfunction of any bodily organ or part".

5. Defendants are air carriers and as such subject to the Airline Deregulation Act of 1978, and in particular its pre-emption provision, 42 USC §41713(b)(1)

6. Plaintiffs have no legal obligation to pay the Defendants, and Defendants have no legal entitlement to receive the price they charge for services, absent an express or implied-in-fact contract and one may not be imposed them by state law by virtue of the ADA pre-emption provision: "[A] state ... may not enact or enforce a law, regulation, or other provision having the forced and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." Federal law imposes no legal entitlement to receive payment, and no obligation on the transported patient to pay.

7. Defendants know that the amounts they charge patients far exceed the amount that third party health insurers pay as the reasonable value of the transportation services they provide. Defendants' own executives admitted in a television interview that the "fair charge" for Defendants' services would be, on average, around $12,000, but Defendants routinely charge four times that amount and more.

8. Upon information and belief, Defendants know that health insurer payors will not pay the amounts Defendants charge. As a result, Defendants seek to directly negotiate network agreements with health care insurers and other third-party payors (hereinafter collectively "third-party payors") to assure payment for their emergency air transportation charges. Under these network agreements, third-party payors agree to pay negotiated amounts, far lower than Defendants' charge Plaintiff, and the Class, and in exchange, Defendants agree not to balance bill the insured patient for any amount over the network-negotiated amount. To enhance their negotiating position, Defendants use the threat of crushing medical charges imposed on out of network insured to leverage more favorable terms from the network. Defendants refuse to reduce their charged amounts to out of network patients to preserve their negotiation leverage. The amounts Defendants charge out of network patients is not the product of a competitive market place, and the amounts Defendants charge is the without limitation of "reasonableness" otherwise imposed under State common law principles. In short, the only real marketplace for Defendants' rates is the negotiated price between third party payors and Defendants, and not the marketplace of Defendants and their patients. As such, the prices Defendants charge are not the product of any competitive market place.

9. Absent a network agreement, Defendants first seek payment from the patients' third-party payors through the use of a form Assignment of Benefits ("AOB") wherein the Plaintiff and the Class assign all legal rights for reimbursements from their third-party payors to the Defendants. Under the AOB Defendants "stand in the shoes" of the Plaintiff and the Class to enforce their contractual rights under the insurance coverage, including the right to sue for the reasonable value of the transportation services provided. Defendants submit their Claim, together with supporting documentation, to the patient's third-party payor for reimbursement of their entire charged amount. When the third-party payor declines a portion of Defendants charged amount as unreasonable, Defendants "balance bill" Plaintiff and the Class for all unreimbursed amounts even though the charged amounts were never agreed to.

10. It is also Defendants' practice to seek assistance from the patient in recovering their charged amounts by having the patient send requests for reconsideration of any partial denial to their third-party payors so as to induce increased reimbursement to Defendants. The "assistance" is in the form of documents, drafted by the Defendants, for the patients to sign and send to their third-party payors. These documents are what Defendants calls, its' "UCR" package.

11. Defendants' sole business is the transportation of critically injured patients at the request of healthcare provider seeking transfers under EMTALA. There is no contract between the patient and Defendants prior to transfer, regarding the terms or price of that transfer, and no agreement between the certifying healthcare provider and the patient to contract for the terms and conditions of transfer, in particular no agreement to bind the patients to any contract with Defendants.

12. Defendants know prior to transport the services they will provide and the price they will charge for those services. Defendants provide only transportation services and do not provide, nor bill for any medical treatment. At the time of transport Defendants know, but do not disclose their pricing.

13. Defendants arrogate to themselves the right to bill Plaintiff whatever Defendants, in their sole discretion, determine. Defendants assert that there is no limit on the amount they can charge and that their charged amount is not subject to any limitation for reasonableness.

14. Defendants present Authorization & Consent ("A&C") at the time of transport. Both the A&C and the subsequent Assignment of Benefits (AOB) forms are prepared by the Defendants purport to impose financial responsibility obligations on the patients that do not

lawfully exist. These financial obligations are contained in a Financial Responsibility provision that purports to hold the patient liable for whatever Defendants charge, without limitation, and include rights to lien assets, charge interest, attorney fees and costs of collection. The financial terms are presented to the patient, or on behalf of the patient, while the patient suffering from an emergency medical conditions, without any opportunity to negotiate its terms and without disclosing the price Defendants charge for their transportation services. The financial responsibility terms are embedded in form documents (A&C and AOB) which discuss multiple, other unrelated issues relating to the terms of transport. The form documents are presented to the patient on a "take it or leave it" basis, and reasonably presumed by the patient as necessary conditions to transport.

15. Neither the A&C, nor the AOB are legally enforceable contracts to pay whatever Defendants charge, nor do they extinguish Defendants obligation to charge only reasonable rates.

16. Defendants send their charged amount as a demand for payment to patients and affiliated third-party payors and when not paid in full, Defendants then balance bill the patient.

17. As is customary in healthcare, patients routinely assign their insurance benefits (AOB) to the healthcare provider so the provider may file claims with third-party insurers to obtain payment benefits. Defendants use the assignment to file claims directly with third-party payors to obtain payment asserting that their services were for necessary, emergency medical transportation. The third-party payors make coverage determinations and issue an "explanation of benefits" (an "EOB") detailing the charged amounts and the reasons for their coverage determinations. This is followed by an appeal process which Defendants may, and frequently do initiate.

18. As part of their predatory scheme, Defendants, post transportation, have Plaintiff sign Assignment of Benefits Form ("AOB Form") prepared by Defendants without negotiation nor modification. The AOB like the pre-transport A&C forms, do not disclose the prices Defendants charge for their services, which in fact the Defendants never disclose, and seek to bind Plaintiff to pay whatever Defendants charge. These documents are not voluntary agreements, do not disclose essential terms, are not the product of mutual assent, and are unenforceable.

19. In all cases the third-party payors determined that the Defendants services were for emergent and medically necessary, and paid an amount determined by the insurance company to be reasonable charges for the services provided. When the amount paid is less that the amount

charged by the Defendants, Defendants enlist the assistance of the Plaintiff in the claim process and provide form documents for the Plaintiff to sign and transmit to their third-party insurers.

20. None of the Plaintiffs' insurers or third-party payors had network agreements with the Defendants. As such Defendants "balance bill" the Plaintiff the difference between third-party payor reimbursement, and Defendants' charged amount. The balance billing process also initiates collection efforts, including dunning letters, telephone calls seeking payment, threats to turn the bills over to collection agencies, coercing payment plans, imposing medical liens against third party recovery, turning the unpaid amounts over to collection agencies, report the balance bills as bad debt, make claims against the estates of deceased patients, imposes cost of collection, attorney's fees and interest on unpaid amounts, and, in some instances, filing state-court breach of contract claims and other suits against patients.

21. The Defendants' charges are so exorbitant that almost no third-party payor pays them in full because they exceed an amount deemed reasonable for the services Defendants provide frequently leaving a staggering amount to be balance billed. Because the Defendants' balance bills are so high, frequently in the $10,000s, almost no Plaintiff can pay them and Defendants' actual collection rates for these receivables low. Yet Defendants repeatedly create stress on Plaintiff and the Class in order to create leverage in negotiations with third-party payors.

22. After appeals for third-party payment are exhausted, Defendants proceed with collection efforts against the Plaintiff. In spite of having an Assignment of Benefits from the patient, Defendants do not initiate litigation against third-party payors to contest those payors reasonableness determinations. Defendants have acknowledged that they do not pursue litigation against third-party payors because "they have more lawyers than the patients."

23. Upon information and belief Defendants engage in this practice to:

a. increase the economic pain on the Plaintiff to give themselves leverage against third party payors to increase reimbursement rates;

b. threaten Plaintiff with harsh collection efforts to coerce them into negotiated payment plans; and

c. to gain negotiating leverage in obtaining terms more favorable to them in network agreements with third party payors.

24. Defendants' billing practices as stated are predatory, unconscionable, and intended to inflict severe economic pain on critically injured Plaintiff and their families solely for the benefit of the Defendants.

25. When a patient contests the charges, Defendants assert that the ADA vests them with plenary power to set whatever price they choose for transportation of patients in extremis who have no ability to assent voluntarily to the transportation, or to pay the exorbitant amounts Defendants charge. Behind the shield of the ADA preemption provision Defendants claim the unfettered right to charge any amount, and this Court, and all other courts, can only act as collection agencies for their charged amounts.

26. The ADA, 49 U.S.C. § 41713(b) (1) provides:

> [A] State, political subdivision of a State...may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

27. Contrary to the Defendants' claims, ADA pre-emption applies equally to Plaintiff and Defendants, patients and air transportation providers. There is no federal law mandating payment for air carrier services. Applying the ADA preemption provision to the Defendants, means they cannot employ or enforce any State law having the force and effect of law "related to price, route or service of an air carrier." Three United States Supreme Court cases, *Northwest, Inc. v Ginsburg*, 572 U.S. 273, 280 (2014); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); and *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992) construct the provision broadly, excluding only privately order obligations. "[T]he terms and conditions airlines offer and passengers accept, are privately ordered obligations and thus do not amount to a State's enactment or enforcement of any law, rule, regulation, standard, or other provision having the force and effect of law within the meaning of the ADA pre-emption provision." None of these holding found that Defendants may apply to state common law to establish a legal right to entitlement otherwise pre-empted under the ADA. Many circuit court and district court rulings are in accord. Recently, the 10th Circuit Court of Appeals in *Scarlett v. Air Methods*, 922 F. 3d 1053 (10th Cir. 2019) and the 6th Circuit in *Byler v. Air Methods*, 2020 WL 4581252 (6th Cir. August 10, 2020) have held that a Defendants must establish either an express contract or an implied-in-fact contract in order to have a legal entitlement to recover payment for their services; and that a suit under the Declaratory Judgment Act to declare whether such contract exists, and the respective rights of the parties vis a

vis the ADA pre-emption are not themselves pre-empted by the ADA. Because the Defendants' legal entitlement to payment can only be premised upon express or implied-in-fact contracts to which both Defendants and the patient mutually assent, the facts establish that Defendants practices are uniform and lack the necessary mutuality of assent required. In view of ADA preemption, the routine state common law implying an obligation to pay the reasonable value of services provided, in the absence of an express or implied-in-fact contract, are pre-empted by the ADA.

28. Defendants have admitted that every patient they transport:

a. is suffering from an emergency medical condition under EMTAL determined by a qualified healthcare provider;

b. there are no negotiations regarding financial responsibility due to the emergency circumstances;

c. The only financial terms are those contained in the A&C and the AOB;

d. That the financial responsibility provisions of the A&C and the AOB are without negotiation, without modification, and offered on a take it or leave it basis;

e. Defendants fail to disclose that the patient transport will occur regardless of any agreement with the patient to pay, occurs at the request of the certifying healthcare provider, and not the patient, and that they patient will be transported irrespective of signing any forms;

f. That the only service Defendants provide is transportation as directed by certifying health care providers under EMTAL;

g. No consent to transport is requested, nor required from the patient;

h. That Defendants have an independent obligation to transport the patient under EMTAL;

i. That the transportation of the patient is not a voluntary undertaking by the patient; and

j. That the rates charged by the Defendants are fixed at a uniform “base rate” and per mileage rates, for transport only, and not for the provision of medical services in route.

29. Plaintiff and the Class include all those who patients or their representatives who were balanced billed for emergency air transportation by the Defendants for emergency air transportation.

30. After the transportation is complete, Defendants send a statement for the transportation showing a "base rate" and a "mileage" charge (collectively "charged amount") and demand payment from Plaintiff. The only services charged by Defendants are for transportation of the patient, not for the provision of any medical care. The rate that will be charged by Defendants for the "base charge" and "mileage" is known to Defendants prior the transportation, but it is not published on their web site nor otherwise disclosed to Plaintiff prior to transport. The refusal by Defendants to disclose prices is consistent with their longstanding argument that their pricing is some sort of trade secret. The legal impact, however, is that Defendant seeks to impose a unilateral price term on critically injured Plaintiff who have never voluntarily contracted with the Defendants.

31. Because the air transportation services provided by the Defendants occur under a medical emergency, the patients transported, in fact and law, suffer from the duress of a medical emergency making them incapable of entering any voluntary undertaking with the Defendants.

32. Acertainability of the patients transported, and the identity of all Plaintiffs can be determined from Defendants' records. Defendants track every transport, and all related collection efforts. Defendants employ a standard form documents including the A&C and AOB forms. These forms are executed irrespective of whether the transported patients are capable of assent. If the patient cannot execute the A&C, a crew member of Defendants will sign the Authorization. All conduct of the patient relating to any contract formation is recorded, if there is any.

33. The Class includes the person(s) billed for transportation, usually the patient transported, the legal representative of the patient (in the case of spouses or children), the estate of a deceased patient, or any person Defendant has billed demanding payment for emergency air transport. For each transport, Defendants maintain detailed records with a unique identifier containing the identity of the patient transported and all claims by Defendants for payment.

34. In this action, Plaintiff, on behalf of himself, seeks declarations with respect to Defendants' legal entitlement to payment from Plaintiff in light of the pre-emption provision of the ADA pre-empting all state common law implying price terms, and the nature and extent of any

legal entitlement in Defendants to receive payment in the absence of a non-pre-empted contract claim.

35. Defendants send a statement for the charged amount to the Plaintiff and demand payment for prices that the Plaintiff and Class never agreed to pay. In the absence of payment, Defendants initiate collections, report the amount charged as an unpaid bill to credit reporting agencies, engage in collection efforts, seek to enforce liens, charge interest and attorney's fees, and initiate lawsuits in state courts, or otherwise seek to enforce state law related to the price or services they provide. Defendants demand payment, initiate collection efforts, and threaten suit in state court for judgments based upon prices never disclosed, nor agreed upon prior to the transportation.

PARTIES

36. Defendant Air Methods Corporation is incorporated under the laws of Delaware with a principal place of business in Englewood, Colorado.

37. Defendant Rocky Mountain Holdings, LLC, is a limited liability company organized under the laws of Delaware with a principal place of business in Cincinnati, Ohio. On information and belief, Defendant Rocky Mountain Holdings, LLC, regularly conducts business in Colorado. On information and belief, Defendant Rocky Mountain Holdings, LLC, is a wholly owned subsidiary of Defendant Air Methods Corporation.

38. Plaintiff Mark Murphy is a citizen of New Hampshire residing in Sullivan County.

PLAINTIFF'S FACTS

39. On July 15, 2020, Mark Murphy fell from a 20-foot-tall ladder onto a concrete slab while he was at work in Hawley, Massachusetts.

40. The local fire department responded to the 911 call, but decided it was not equipped to move Plaintiff Murphy, so he was transported by Defendants from the scene of the accident to Bay State Medical Center in Springfield, Massachusetts.

41. Plaintiff Murphy does not recall whether he signed any documents from Defendants prior to transport, because he had just experienced a traumatic injury. Murphy did not consent to transport, and there was no negotiation regarding the terms of the transport.

42. Following the transport, Defendants billed Plaintiff $64,442.66, which included a "base" charge of $48,415.81 and an additional $16,026.85 for mileage. The trip was roughly 40 miles, making the charge per mile $400.67.

43. Plaintiff Murphy was insured through Veterans Affairs, which has not paid any portion of the bill. *See* Exhibit 1. This has left him with a crippling balance of $64,442.66. This is in stark contrast to the coverage of his hospital expenses. Baystate Medical Center billed him a total of $14,180.72, which Veterans Affairs paid, leaving him with zero out-of-pocket liability. These facts tend to indicate not that Plaintiff Murphy's insurance company was unreasonable, but rather that the amount billed by Defendants was unreasonable.

JURISDICTION AND VENUE

44. This Court has original jurisdiction pursuant to 28 U.S.0 § 1331. Further, the amount in controversy, exclusive of interest and costs, exceeds the sum or value of $5,000,000 and is a class action in which Plaintiff and members of the Class are citizens of states different from Defendants. This Court also has federal question jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 and the ADA, 49 U.S.C. § 41713(b) (I).

45. This Court has personal jurisdiction over Defendants because they are authorized to do business and are conducting business throughout the United States, including Massachusetts; Defendants have sufficient minimum contacts with the various states of the United States, and the Commonwealth of Massachusetts; and/or sufficiently avail themselves of the markets of the various states of the United States, including Massachusetts, to render proper the exercise of jurisdiction by this Court.

46. Venue is proper in this District under 28 U.S.C. § 1391(b) (2) because a substantial portion of the acts or omissions complained of occurred in this District.

47. Venue is also proper because: (a) Defendants are authorized to conduct business in this District and have intentionally availed itself of the laws and markets within this District; (b) Defendants do substantial business in this District; and (c) are subject to personal jurisdiction.

DEFENDANTS' PRIOR STATE COURT LITIGATION

48. On information and belief. Defendants have, without any legal entitlement to payment:

a. filed multiple state-court breach-of-contract suits in multiple states to collect their charges, both by direct actions against a transported person and by way of making claims in interpleader actions;

b. filed proof of claims in multiple bankruptcy cases asserting a right to be paid based on state-law breach-of-contract theories;

c. filed claims in estate cases to recover their charges for transportation of a deceased person in multiple cases;

d. sought more compensation from Medicare, Medicaid and Tricare insureds than is allowed under the relevant payment schedule for providers that accept assignment of benefits from Medicare, Medicaid and Tricare patients;

e. sought compensation from patients with commercial insurance, employer-sponsored health benefits plan, and other non-governmental third-party payers with no enforceable contract;

f. coerced class members to enter payment plans to pay their full billed amount in monthly installments paid over decades with interest; and

g. enforced, or sought to enforce, subrogation claims or liens against personal injury claims or recoveries seeking their full-billed amounts.

49. Defendants' collection efforts against Plaintiff were ongoing at the time this action was filed, and Defendants will continue efforts to collect their improperly billed amounts in the absence of relief granted by the Court in this action.

50. There is a live, ongoing and actual controversy between Plaintiff and Defendants.

OTHER FEDERAL LITIGATION

51. On August 28, 2019, several cases against Defendants in the District Court for the District of Colorado were consolidated under the caption *Jeremy Scarlett, et. al. v. Air Methods Corporation, et. al.,* Case No. 16-cv-02723-RBJ. Early on, the District Court granted a motion to dismiss the *Scarlett* Plaintiffs' claims, which decision was appealed to the Court of Appeals for the10th Circuit. The 10th Circuit reversed and remanded. *Scarlett v. Air Methods Corp*., 922 F.3d 1053, 1069 (10th Cir. 2019) (*citing Eaglemed, LLC v. Cox*, 868 F.3d 903, 904 (10th Cir. 2017). The 10th Circuit described air ambulance billing as "warped" and indicated a desire for Congress to correct the resulting problems. On remand, the District Court granted Plaintiffs' summary

judgment, finding that they owed nothing to Defendants. *See* Exhibit 2, May 11, 2021 order granting summary judgment to plaintiffs.

52. Another case against Defendants was originally filed in Georgia, *Dearborn v. Air Methods Corporation, et. al.*, but was transferred to the District of Colorado in October of 2020 at Defendants' request. The Colorado District Court refused to consolidate *Dearborn* with the *Scarlett* case.

53. On May 7, 2021, the District Court for the District of South Carolina Charleston Division, *Dyer v. Air Methods et. al.*, Case No. 9:20-cv-2309-DCN, refused to grant a Motion to Strike Class Allegations by Defendants. *See* Exhibit 3. Judge David C. Norton indicated that the Plaintiffs should be allowed to engage in further discovery before he could determine whether the class allegations could survive. This order followed an earlier motion by Defendants to dismiss *Dyer's* claims, which motion was denied.

54. There are also cases in Vermont (*Ballou v. Air Methods Corporation et. al.*, Case No. 2:20-cv-00077-cr), New Mexico (*Kiser v. Air Methods Corporation et. al.,* Case No. 1:20-cv-00801-JB-JHR) and Florida (*Epler et al. v. Air Methods et. al.,* Case No. 21-CV-00461-BGB-DCI) with pending motions to dismiss or transfer filed by Defendants.

55. Another case filed in Ohio was appealed to the Circuit Court for the 6th Circuit and resulted in a ruling generally in accord with the 10th Circuit's decision in *Scarlett*. **Compare** *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1069 (10th Cir. 2019) (citing *Eaglemed, LLC v. Cox*, 868 F.3d 903, 904 (10th Cir. 2017) **with** *Byler v. Air Method Corp.*, 823 Fed. Appx 356, 364 (8th Cir. 2020) ("courts have been unanimous in the view that implied-in-law contract claims and claims related to unjust enrichment are preempted by the ADA").

CLASS ACTION ALLEGATIONS

56. This action is brought and may be maintained as a class action pursuant to Fed. R. Civ. P. 23. The requirements of Fed. R. Civ. P. 23 are met with respect to the Classes defined as follows: All persons billed by Defendants for air ambulance transportation from a location in Massachusetts.

57. Excluded from the Class are Defendants, any entity in which Defendants have a controlling interest or which have a controlling interest of Defendant, and Defendants' legal

representatives, assigns and successors. Also excluded are the judge to whom this case is assigned and any member of the judge's immediate family.

58. Plaintiff expects to seek certification of the Class under FRCP 23(b)(1), (b)(2), (b)(3), and (c)(4) (related to certification with respect to "particular issues").

59. The Class will include only persons having viable claims under the applicable statute of limitation. However, the Class claims the benefit of *American Pipe* tolling because of previous class cases filed against Defendants. See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

60. Rule 23 permits Plaintiff the right to redefine the Class prior to class certification.

61. The members of the Class are so numerous that joinder of all members is impracticable. The exact number of Class Members is unknown as such information is in the exclusive control of Defendants. However, due to the nature of the trade and commerce involved, Plaintiff believe the Proposed Class consists of thousands of Class Members. Defendants themselves claim that they transport more than 100,000 patients each year, operating out of more than 300 bases in the 48 contiguous states. See: https://www.airmethods.com/about-us.

62. Common questions of law and fact affect the rights of each Class Member and a common relief by way of declaratory judgment and injunction, including at least the following:

a. Did the Plaintiff enter into any voluntary agreement to pay the Defendants their charged amounts?

b. Did Defendants disclose the prices, including, but not limited to their fixed mileage price and "helicopter rotor base" price for the transportation to Plaintiff prior to transportation?

c. Were Defendants' services for the emergency air transportation of critically injured Plaintiff/patients?

d. Did the critically injured patients, including the Plaintiff, or a legally authorized representatives, voluntarily agree to pay Defendants whatever Defendants charged without any right on behalf of the patient or Plaintiff to contest those charges?

e. Does the A&C and/or AOB create an express or implied-in-fact contract with the patient, and what are the terms of that contract?

f. Can a patient needing emergent medical air transportation voluntarily assent to an enforceable contract for that transportation where the price terms is left to

Defendants' sole discretion, and the ADA prevents the Court from supplying a price?

g. What is the contractual relationship between Defendants and the Plaintiff, if any?

h. Does the ADA preempt Defendants from collecting any amount from Plaintiff and Class Members for transport?

i. What is Defendants' legal entitlement to payment from the Plaintiff or from third party payors on behalf of the Plaintiff under Massachusetts law?

j. Whether the Court should grant injunctive relief to Plaintiff who did not engage in any voluntary undertaking with the Defendants for their transportation prevent collection efforts by Defendants for their charged amounts?

k. Whether Plaintiff who paid or had a third-party payor pay some or all of the charges entitled to restitutionary relief for payment where there is no obligation to pay?

l. Whether Defendants should be enjoined from seeking to collect amounts not agreed to by the parties? and

m. Whether Defendants are entitled any payment from Plaintiff and, if so, the proper mechanism to determine the amount owed?

63. The claims and defenses of the named Plaintiff are typical of the claims and defenses of the Class. Defendants sought to collect an alleged debt for which they have no valid basis for collection since any efforts to impose a price by any court would be preempted under the ADA.

64. Plaintiff will fairly and adequately assert and protect the interests of the Class. Specifically, Plaintiff has hired attorneys who are experienced in prosecuting class action claims and will adequately represent the interests of the Class. Neither the named Plaintiff nor putative class counsel have a conflict of interest that will interfere with the maintenance of this class action.

65. A class action provides a fair and efficient method for the adjudication of this controversy for the following reasons:

a. The Class is so numerous as to make joinder impracticable but not so numerous as to create manageability problems;

b. Prosecution of separate actions by individual members of the Class would create a risk of inconsistent and varying adjudications against Defendant when confronted with incompatible standards of conduct;

c. Adjudications with respect to individual members of the Class could, as a practical matter, be dispositive of any interest of other members not parties to such adjudications, or substantially impair their ability to protect their interests;

d. Defendant has acted or refused to act on grounds that apply generally to the Class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the Class as a whole;

e. There are no unusual legal or factual issues which would create manageability problems; and

f. Class adjudication is superior to individual adjudication of the claims at issue in this case.

66. In this action, Patients, on behalf of themselves and the Proposed Class, seek:

a. to enjoin Defendants from engaging in any collection of their charged amounts;

b. for Declarations regarding the respective legal rights of the parties with respect to Patients' obligation to pay, and Defendants' legal right to receive payment in the absence of an express contract;

c. for Declarations as to whether any contract exists between Defendants and Patients, and if so, the terms of their bargain;

d. for Declarations regarding the legal rights of the Defendants to receive payment from any Patient;

e. for Declarations as to the right of Defendants to initiate and pursue collection efforts with respect to Balance Billed charges under the circumstances; and,

f. for Declarations the legal rights of the parties with respect to the application of the ADA, 49 U.S.C. § 41713(b) (1) upon the legal right of Defendants to charge and the legal obligation of the Patients to pay.

CAUSES OF ACTION

For a First Cause of Action

Injunctive and Declaratory Relief Pursuant to 28 U.S.C. § 2201

67. Plaintiff incorporates the previous paragraphs outside of this Count as though set forth herein.

68. 28 U.S.0 §2201 provides as follows:

> In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not

further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

69. Prior to the provision of services, no negotiation of contract terms regarding the price of Defendants' transportation services took place and Plaintiff, the Class and Defendants did not enter into any voluntary agreement to pay Defendants' charged amounts for transport services.

70. Defendants have engaged in and threatened collection efforts to recover, accumulated interest and fees on the unpaid balance, reported the unpaid charged amount as Bad Debt to credit reporting agencies, and ultimately filed suit in state court for the amounts charged, or for the purpose of coercing Patients in compromise payments that they do not owe.

71. In the course of collecting its charged amounts, especially when sued by those charged, Defendants assert that all state law is preempted by the ADA, denying Patients notice and an opportunity to be heard on critical questions of Defendants' entitlement to payment, including but not limited to whether there is an agreement between the parties to pay Defendants charged amount, and whether any mutual assent was manifest prior to the transportation of the patient.

72. Plaintiff seeks injunctive and declaratory relief for the purposes of determining questions of actual controversy between the Patients and Defendants.

73. Defendants have acted in a uniform manner in (a) failing to enter into express agreements with respect to their charged amount for transportation services before rendering those services, (b) seeking payment from third party payors, (c) balance billing Patients in the event the charged amounts are not paid, (d) reporting unpaid balances as bad debt, (e) engaging in collection efforts, including suit in state court, or under state law, and (f) coercing compromise payments that are not legally owed.

74. Defendants have acted or refused to act on grounds that apply generally to Patients such that declaratory relief to determine (a) whether Defendants' Patients have an enforceable agreement for the amount charged, (b) the amount to which Defendants are entitled in the absence of an agreement for payment, and (c) whether and to what extent the ADA pre-empts the employment of the common law of contracts to these factual circumstances, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the Proposed Class as a whole within the meaning of Fed. R. Civ. P. 23.

75. There is an actual dispute and controversy between Patients and Defendants as to whether Defendants can (a) demand payment for services with respect to which the price term is

silent, (b) engage in collection efforts where no legally enforceable contract exists, (c) impose interest and costs of collection on Plaintiff and the Class, (d) attempt to collect the amounts charged under the circumstances, and (e) seek and receive third party payment for the legal obligations of plan beneficiaries beyond the amount determined by third party payors.

76. Defendants have demanded payment from Plaintiff, and initiated collection efforts claiming that the unpaid amounts demanded are bad debts and referred the demands to collection thereby adversely affecting Plaintiff' credit.

77. Plaintiff has no adequate remedy at law.

78. Plaintiff seeks declarations to determine their rights and the rights of the Proposed Class Members, in particular:

a. The Court finds that Defendants and Plaintiff, and the Class did not enter into any contract, either express or implied-in-fact, for Plaintiff and the Class to pay the amounts charged by the Defendants for the transportation services it provided;

b. The Court finds that Defendants have engaged in collection efforts against s and the Class for amounts that the Plaintiff and the Class did not contractually agree to pay;

c. The Court finds that Defendants have engaged in collection efforts against Plaintiff and the Class for amounts concerning which there was no mutual assent manifest by the Plaintiff and the Class prior to the rendering of the services charged;

d. The ADA pre-empts the imposition of any state common law contract principles that impose terms upon Plaintiff which those parties did not expressly assent to prior to the air medical transportation services provided to them;

e. The Court finds that the emergency medical circumstances of Defendants' medical air transportation were such that patients transported cannot be implied to have entered into any contract for transportation, and in particular any agreement to pay whatever Defendants charged;

f. The Court finds that ADA pre-empts application of state law imposing or implying any agreement upon Plaintiff to pay Defendants charged amounts; and

g. The Court finds that Defendants' collection of any sums, absent an enforceable contract with the Plaintiff charged, was unlawful and the sums received by Defendants disgorged.

79. Plaintiff and the Proposed Class further seek a prospective order from the Court requiring Defendants to: (1) cease all balance billing and collection efforts with respect to

outstanding bills for air medical transportation service until this Court determines Defendants' legal entitlement to payment of its charged amounts; and (2) account for all sums collected for air medical transportation services provided to Plaintiff.

80. Defendants' collection efforts damage the credit of Plaintiff and the Class, have caused, and continue to cause Plaintiff and those in the Plaintiff' Class anxiety, embarrassment and humiliation; have caused them to incur legal fees and litigation expenses; exposed Plaintiff and the Class to claims for interest on unpaid Defendants' charges and vexing and harassing collection efforts. Because of Defendants' practices as described above, Plaintiff and the Proposed Class have suffered, and will continue to suffer, irreparable harm and injury.

81. Accordingly, Plaintiff and Members of the Proposed Class respectfully ask the Court to issue an injunction ordering Defendants to (1) cease and desist their practice of filing third-party reimbursement claims absent an enforceable contract to collect their charged amount; (2) provide for an accounting of all sums received by Defendants during the last 10 years, where Defendants submitted a claim to third-party payors payment without basing that claim on a contract with the transported party; and (3) such other necessary and proper relief that may be appropriate following the determination of the declarations made.

PRAYER FOR RELIEF

82. **THEREFORE**, Plaintiff, individually and on behalf of the Class of persons described herein, prays for an Order as follows:

a) Entering an order certifying the Class designating Plaintiff as the class representatives, and designating the undersigned as class counsel;

b) Awarding Plaintiff all costs and disbursements, including attorneys' fees, experts' fees, and other class action related expenses;

c) Imposing a constructive trust, where appropriate, on amounts received by Defendants from third-parties, or Plaintiff in the absence of a contract with the transported party;

d) Issuing appropriate declaratory and injunctive relief, as requested in the Complaint, including to declare the whether the parties have an enforceable contract for the payment of Defendants' services together with the terms of that contract; the respective rights and obligations under the contract; and, the impact of the Air Line Deregulation Act preemption provisions have on the party's respective rights and obligations under that contract;

e) Awarding pre-judgment and post-judgment interest; and

f) Granting such further relief as the law allows and the Court deems just.

Plaintiff hereby demand a trial by jury on all claims and issues.

DATED May 28 2021.

RESPECTFULLY SUBMITTED

ATTORNEYS FOR PLAINTIFF

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daryan@edwhitelaw.com

8242037_5:14332-00001

EXHIBIT 1

VA CCN
CORRESPONDENCE
PO BOX 202118
FLORENCE SC 29502-2118

OPTUM VA CCN EXPLANATION OF BENEFITS

This is a statement of the action taken on your VA CCN claim.
Keep this notice for your records.

OPTUM
UnitedHealthcare
VA Community Care Network

MARK MURPHY
224 NORTH MAIN ST
NEWPORT NH 03773

955794 000623
0002 of 0003

Benefits were payable to:

BAYSTATE MEDICAL CENTER
PO BOX 3353
BOSTON MA 02241

Claim Number: [redacted]

Services Provided By/ Date of Services	Services Provided	Amount Billed	VA CCN Approved	See Remarks
BAYSTATE MEDICAL CENTER				
06/15/2020	100 Pharmacy (also see 063x, an (0255)	74.00	0.00	1
06/15/2020	001 Laboratory,1,chemistry (0301)	36.00	0.00	1
06/15/2020	001 Laboratory,1,chemistry (0301)	246.00	0.00	1
06/15/2020	001 Laboratory,1,chemistry (0301)	28.00	0.00	1
06/15/2020	001 Laboratory,1,chemistry (0301)	20.00	0.00	1
06/15/2020	001 Laboratory,1,chemistry (0301)	15.00	3.93	2
06/15/2020	001 Laboratory,1,chemistry (0301)	16.00	0.00	1
06/15/2020	001 Laboratory,2,immunology (0302)	104.00	0.00	1
06/15/2020	001 Laboratory,2,immunology (0302)	115.00	0.00	1
06/15/2020	001 Laboratory,2,immunology (0302)	56.00	0.00	1
06/15/2020	001 Laboratory,5,hematology (0305)	26.00	0.00	1
06/15/2020	001 Laboratory,5,hematology (0305)	20.00	0.00	1
06/15/2020	001 Laboratory,5,hematology (0305)	25.00	0.00	1
06/15/2020	001 Radiology - diagnostic,0,gen (0320)	311.00	0.00	1
06/15/2020	001 Radiology - diagnostic,0,gen (0320)	326.00	0.00	1
06/15/2020	001 Radiology - diagnostic,0,gen (0320)	345.00	0.00	1
06/15/2020	001 Radiology - diagnostic,4,che (0324)	219.00	92.84	2
06/15/2020	001 Ct scan,1,head scan (0351)	1,005.00	536.50	2
06/15/2020	001 Ct scan,2,body scan (0352)	1,219.00	0.00	1

THANK YOU FOR YOUR SERVICE AND COMMITMENT

EOF 7760 (05/19)

VA CCN
CORRESPONDENCE
PO BOX 202118
FLORENCE SC 29502-2118

OPTUM
UnitedHealthcare
VA Community Care Network

OPTUM VA CCN EXPLANATION OF BENEFITS

This is a statement of the action taken on your VA CCN claim.
Keep this notice for your records.

Claim Number: [redacted]

Services Provided By/ Date of Services	Services Provided	Amount Billed	VA CCN Approved	See Remarks
06/15/2020	001 Ct scan,2,body scan (0352)	1,122.00	0.00	1
06/15/2020	001 Ct scan,2,body scan (0352)	1,277.00	0.00	1
06/15/2020	001 Ct scan,2,body scan (0352)	1,776.00	0.00	1
06/15/2020	001 Ct scan,2,body scan (0352)	2,556.00	0.00	1
06/15/2020	001 Emergency room,0,general cla (0450)	282.00	213.75	2
06/15/2020	001 Emergency room,0,general cla (0450)	1,659.00	586.91	2
06/15/2020	001 Pharmacy-extension of 25x,6, (0636)	17.72	0.00	1
06/15/2020	001 Trauma response,1,level i (0681)	1,285.00	0.00	1
Totals:		**14,180.72**	**1,433.93**	

Claim Summary

Amount Billed:	14,180.72
VA CCN Approved:	1,433.93
Non-covered:	12,746.79
Paid by Veteran:	0.00
Other Insurance:	0.00
Paid to Provider:	1,433.93

Veteran Liability Summary

Veteran Responsibility:	0.00

VA Office of community care
PO Box 30780
Tampa FL 33630

THANK YOU FOR YOUR SERVICE AND COMMITMENT

100009665769

THIS IS NOT A BILL

4

Department of Veterans Affairs
Financial Services Center
Financial Healthcare Service

October 5, 2020

F8468-0000645 P001 T00003 00000645 1 MB 0.439
MARK JOHN MURPHY
224 N MAIN ST
NEWPORT, NH 03773-3026

Claim ID#: [redacted]
Program: 1728

THIS IS NOT A BILL

Provider: ROCKY MOUNTAIN HOLDINGS, LLC
Patient Control Number: [redacted]
Claim Dates: 06/15/2020 - 06/15/2020
Authorized Dates:

The above listed claim has been administratively and clinically reviewed by the Department of Veterans Affairs to determine eligibility for payment of authorized medical care under Title 38 United States Code §1728. Please refer to the table below for details.

From Date	To Date	Service Code	Billed Charges	Amount Paid	Explanation(Please find remarks section at the bottom for detailed description)
06/15/2020	06/15/2020	A0431	$48,415.81	$0.00	
06/15/2020	06/15/2020	A0436	$16,026.85	$0.00	
06/15/2020	06/15/2020	**Entire Claim**	$64,442.66	$0.00	73020

By Federal regulation, VA is the primary and exclusive payer for medical care it authorizes, except in the case of community emergency, non-service connected care. As such, the Veteran or any other party may not be billed for any portion of the care authorized by VA. Payment made by the Veterans Health Administration indicates payment in full for the approved dates of service. You may be responsible for charges related to services provided outside the VA approved dates of service, including copays and deductibles for community emergency, non-service connected related care.

If you do not agree with this decision, you have the right to appeal. On November 9, 2000, the Veterans Claims Assistance Act (VCAA) was enacted requiring VA to assist Claimants who are denied medical benefits in due process by providing a Veterans Claims Assistance Act Notice (VCAA); VA Form 10-0998, Your Right To Seek Further Review Of Our Healthcare Benefits Decision. Please read the information provided carefully so that you will clearly understand your procedural and appeal rights in connection with any denied services. For questions or concerns

100009665769

THIS IS NOT A BILL

regarding the primary basis for this denial decision, please contact https://www.va.gov/health/appeals/index.asp.

If you have any questions or concerns, please contact us at:

(877)881-7618
150 S Huntington Avenue (136F)
Jamaica Plain, MA 02130

Attachments: VA Form 10-0998, Your Right To Seek Further Review Of Our Healthcare Benefits Decision

Remarks:

73020 - Claim Denied - Ambulance Claim Did Not Meet All Required Criteria.The Non-Va Facility Must Be Approved And Paid Before Payment Can Be Made For Emergency Transportation.

100010762721

THIS IS NOT A BILL

4

Department of Veterans Affairs
Financial Services Center
Financial Healthcare Service

November 6, 2020

F8984-0211970 P007 T00440 00211970 1 AB 0.419
MARK JOHN MURPHY
224 N MAIN ST
NEWPORT, NH 03773-3026

Claim ID# [redacted]
Program: 1728

THIS IS NOT A BILL

Provider: ROCKY MOUNTAIN HOLDINGS, LLC
Patient Control Number: [redacted]
Claim Dates: 06/15/2020 - 06/15/2020
Authorized Dates:

The above listed claim has been administratively and clinically reviewed by the Department of Veterans Affairs to determine eligibility for payment of authorized medical care under Title 38 United States Code §1728. Please refer to the table below for details.

From Date	To Date	Service Code	Billed Charges	Amount Paid	Explanation(Please find remarks section at the bottom for detailed description)
06/15/2020	06/15/2020	A0431	$48,415.81	$0.00	
06/15/2020	06/15/2020	A0436	$16,026.85	$0.00	
06/15/2020	06/15/2020	**Entire Claim**	$64,442.66	$0.00	33002, 73020

By Federal regulation, VA is the primary and exclusive payer for medical care it authorizes, except in the case of community emergency, non-service connected care. As such, the Veteran or any other party may not be billed for any portion of the care authorized by VA. Payment made by the Veterans Health Administration indicates payment in full for the approved dates of service. You may be responsible for charges related to services provided outside the VA approved dates of service, including copays and deductibles for community emergency, non-service connected related care.

If you do not agree with this decision, you have the right to appeal. On November 9, 2000, the Veterans Claims Assistance Act (VCAA) was enacted requiring VA to assist Claimants who are denied medical benefits in due process by providing a Veterans Claims Assistance Act Notice (VCAA); VA Form 10-0998, Your Right To Seek Further Review Of Our Healthcare Benefits Decision. Please read the information provided carefully so that you will clearly understand your procedural and appeal rights in connection with any denied services. For questions or concerns

regarding the primary basis for this denial decision, please contact https://www.va.gov/health/appeals/index.asp.

If you have any questions or concerns, please contact us at:

(877)881-7618
150 S Huntington Avenue (136F)
Jamaica Plain, MA 02130

Attachments: VA Form 10-0998, Your Right To Seek Further Review Of Our Healthcare Benefits Decision

Remarks:

73020 - Claim Denied - Ambulance Claim Did Not Meet All Required Criteria.The Non-Va Facility Must Be Approved And Paid Before Payment Can Be Made For Emergency Transportation.
33002 - Claim Denied - The claim was submitted for a patient who is not enrolled in a VA Health Care System

100010858134

THIS IS NOT A BILL

4

Department of Veterans Affairs
Financial Services Center
Financial Healthcare Service

November 7, 2020

F8984-0211971 P007 T00440 00211971 1 AB 0.419
MARK JOHN MURPHY
224 N MAIN ST
NEWPORT, NH 03773-3026

Claim ID#: [redacted]
Program: 1703

THIS IS NOT A BILL

Provider: ROCKY MOUNTAIN HOLDINGS, LLC
Patient Control Number: [redacted]
Claim Dates: 06/15/2020 - 06/15/2020
Authorized Dates: 06/15/2020 - 07/15/2020

The above listed claim has been administratively and clinically reviewed by the Department of Veterans Affairs to determine eligibility for payment of authorized medical care under Title 38 United States Code §1703. Please refer to the table below for details.

From Date	To Date	Service Code	Billed Charges	Amount Paid	Explanation(Please find remarks section at the bottom for detailed description)
06/15/2020	06/15/2020	A0431	$48,415.81	$0.00	
06/15/2020	06/15/2020	A0436	$16,026.85	$0.00	
06/15/2020	06/15/2020	**Entire Claim**	$64,442.66	$0.00	73024. 73020

By Federal regulation, VA is the primary and exclusive payer for medical care it authorizes, except in the case of community emergency, non-service connected care. As such, the Veteran or any other party may not be billed for any portion of the care authorized by VA. Payment made by the Veterans Health Administration indicates payment in full for the approved dates of service. You may be responsible for charges related to services provided outside the VA approved dates of service, including copays and deductibles for community emergency, non-service connected related care.

If you do not agree with this decision, you have the right to appeal. On November 9, 2000, the Veterans Claims Assistance Act (VCAA) was enacted requiring VA to assist Claimants who are denied medical benefits in due process by providing a Veterans Claims Assistance Act Notice (VCAA); VA Form 10-0998, Your Right To Seek Further Review Of Our Healthcare Benefits Decision. Please read the information provided carefully so that you will clearly understand your procedural and appeal rights in connection with any denied services. For questions or concerns

100010858134 THIS IS NOT A BILL

regarding the primary basis for this denial decision, please contact https://www.va.gov/health/appeals/index.asp.

If you have any questions or concerns, please contact us at:

(877)881-7618
150 S Huntington Avenue (136F)
Jamaica Plain, MA 02130

Attachments: VA Form 10-0998, Your Right To Seek Further Review Of Our Healthcare Benefits Decision

Remarks:

73020 - Claim Denied - Ambulance Claim Did Not Meet All Required Criteria.The Non-Va Facility Must Be Approved And Paid Before Payment Can Be Made For Emergency Transportation.
73024 - Claim Denied - The Claim Was Submitted For A Patient Who Is Not Enrolled In A Va Health Care System.38 Cfr 17.1002 (D)

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 16-cv-02723-RBJ
Consolidated Cases: 17-cv-00485; 17-cv-00502; 17-cv-00509; 17-cv-00667; 17-cv-791; 19-cv-01771; and 19-cv-01951

JEREMY LEE SCARLETT, on behalf of himself and all others similarly situated,

Plaintiff,

v.

AIR METHODS CORPORATION and
ROCKY MOUNTAIN HOLDINGS, LLC,

Defendants.

ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on remand from the Tenth Circuit, which asked me to address a single issue: whether an express or implied-in-fact contract exists between the parties. Before the Court are two pending motions for summary judgment filed by separate plaintiff groups. ECF Nos. 181, 185. For the following reasons, I GRANT plaintiffs' motions for summary judgment and find that no contracts were formed.

I. FACTUAL BACKGROUND

This is a putative class action brought on behalf of patients, their legal custodians, or the estates of deceased patients, who allege that they were charged exorbitant fees by defendants for medical transport by helicopter.

A. The parties

Air Methods Corporation and Rocky Mountain Holdings, LLC ("defendants") provide helicopter transport to individuals that are suffering from emergency medical conditions. Both entities are incorporated in Delaware. Rocky Mountain Holdings owns Air Methods Corporation, and defendants jointly collect all service fees. There are two groups of plaintiffs in this case. The first group ("Cowen plaintiffs") includes Randall and Ashley Cowen, who live in Missouri; Lana and Grif Hughes, who also live in Missouri; Kenneth Kranhold and Jonathan Armato, who live in Arizona; and Yolanda O'Neale, who lives in Alabama. The second group ("Dequasie plaintiffs") includes six individuals from Oklahoma: Richard Dequasie, Dwain Patillo, Kathleen Pence, Kara Ridley, Sandra Saenz, and Miranda Taylor.

B. Air Methods' Protocols

Defendants provide medical transport via helicopter to patients experiencing medical emergencies. Defendants do not self-dispatch—they only provide medical transport if a physician, qualified first responder, or other qualified medical provider determines that air transport is medically necessary and recommends that the patient be air transported. ECF No. 181-1 at 149:8-10. Because defendants are governed by the Emergency Medical Treatment and Labor Act ("EMTALA") they are prohibited from considering a patient's ability to pay prior to transport. *Id*. at 114:20–115:2. Instead, irrespective of a patient's ability to pay, they must transport the patient if a physician deems it medically necessary. *Id*. The only circumstance in which transport is deemed medically necessary but does *not* occur is when the patient refuses transport. *Id*. at 147:8-10. If a patient refuses transport, the patient must sign a document that codifies that refusal and releases defendants from all liability.

Defendants require completion of three documents for each patient: the authorization and consent form ("A&C"), the assignment of benefits form ("AOB"), and the physicians' certification statement ("PCS"). ECF No. 204 at 2. The PCS is completed by the doctor and confirms that air transport is medically necessary. *Id*. at 86:7-11. The A&C is signed, usually by a patient's family member, prior to transport. The AOB is completed and signed following transport. ECF No. 182-1.

The A&C and AOB forms contain a financial responsibility provision that reads

> I acknowledge that many insurers will only pay for services that they determine to be medically necessary and that meet other coverage requirements. . . . If my insurer determines that the Services, or any part of them, are not medically necessary or fail to meet other coverage requirements, the insurer may deny payment for those Services. Notwithstanding any other provision herein, I agree that if my insurer denies all or any part of my provider's charges for any reason, or if I have no insurance, I will be personally and fully responsible for payment of provider's charges.

ECF Nos. 182, 182-1. Air Methods requires its employees to ensure that the A&C is signed for every flight at the time of transport. ECF No. 181-1 at 67:5-13. The employees make every attempt to get the patient to sign the form directly. However, depending on the nature of the patient's medical emergency, that may be impossible. In cases where a patient cannot sign, a spouse or another representative typically signs the A&C on the patient's behalf. If there is no family representative to sign, then an Air Methods employee signs the form. *Id*. at 239:11-15.

Defendants unilaterally set the price for their services and do not determine price based on any health-related services provided by EMTs while patients are in the ambulance. Instead, they use two numbers to determine the cost of each flight. These numbers differ depending on where the flight occurs. The first is the base charge or "lift fee," which the plaintiffs will be charged regardless of the number of miles they travel. *Id*. at 232:6-13. The lift rate is around

$30,000.00 across all geographical areas related to this case. ECF No. 182-5. The second is the mileage rate, and this amount depends on the number of miles traveled. The mileage rate is approximately $300.00 per mile. *Id*. Following each flight, Air Methods bills the patient for its services based on these numbers.

Neither the A&C form nor any other document provided to patients or their representatives prior to transport mentions the price or how price will be determined. ECF No. 181-1 at 33:25-34:2. Defendants and patients, patient representatives, or healthcare providers do not negotiate the service price or any of the terms in the A&C and AOB forms prior to transport. Patients are frequently unconscious at the time of transport, and they are therefore physically unable to sign the A&C form, much less haggle over its terms. Furthermore, because Air Methods responds to medical emergencies, time is of the essence, and there would typically be no time to negotiate. *Id*. at 83:7-11. The financial responsibility provision itself cannot quickly be edited by the patients or their representatives at the time of signing. It reads "[a]ny revisions, strikethroughs, handwritten language or other changes to the typewritten text cannot be made except by another mutually signed agreement. Any such modification without a mutually signed agreement is null and void and non-enforceable." ECF No. 186 at 1. Thus, for patients or their representatives to object to the terms of the forms they would need to renegotiate an entirely new form and get it signed by defendants—a feat that is impossible, practically speaking, given the emergency nature of the situation.

C. The individual plaintiffs' circumstances

1. Cowen plaintiffs

Ashley and Randal Cowen required medical transport for their minor son, J. Cowen, who suffered a puncture wound to the neck when he fell on his scooter's handlebars. ECF No. 181-3 at 22:1-4. A ground ambulance initially transported him to a local hospital. However, the emergency room physician determined that J. Cowen had received potentially life-threatening injuries that required specialized pediatric care. *Id*. at 35:4-10. The treating physician requested air transport from defendants and signed the PCS form. Ashley Cowen signed the A&C form prior to transport. *Id*. at 73:15-20. According to Mr. Cowen there was no discussion of the form, no negotiations, and no communication with the flight crew. *Id*. at 87:16-17. Following the incident Randal Cowen received the AOB form in the mail. *Id*. at 100:22-24. He assumed that it was part of the insurance process and signed and returned the form. *Id*. Air Methods charged the Cowens $42,172.53, and their insurance company covered only $4,955.77 of that amount. ECF No. 182-5.

On November 14, 2015 Keith Kranhold, an eighty-two-year-old man, fell at his Arizona home and lost consciousness. ECF No. 181 at 6. Mr. Kranhold never regained consciousness. He died on November 18, 2015. Prior to his death, Mr. Kranhold was transported by ground ambulance to a hospital in Prescott, Arizona, where he was diagnosed with a left temporal lode hematoma. Air Methods subsequently transported him to a hospital that was better equipped to treat Mr. Kranhold's condition. Prior to the transport, his eighty-six-year-old wife Ellen von Brentano signed the A&C form. Ms. von Bretano suffered from Parkinson's Disease and Lewy bodies with dementia. ECF No. 181-1 at 54:5-8. Defendants charged Mr. Kranhold $54,999.00. Their insurance paid $12,612.25, leaving a balance of $42,386.75. ECF No. 182-7.

On August 17, 2014 Yolanda O'Neale collapsed while at work in Alabama. A ground ambulance arrived, and the E.M.T. determined that Ms. O'Neale had suffered a stroke and had "altered levels of consciousness." ECF No. 182-8 at 1. The emergency medical services team requested air transport at the scene and signed the PCS form. An Air Methods crew member signed Ms. O'Neale's A&C form. Ms. O'Neale states that she did not voluntarily go on the helicopter, and that had she been able to talk, she would have communicated that she did not want to fly. ECF No. 181-4 at 34:19-22. Following the flight Ms. O'Neale signed the AOB form that defendants mailed to her. *Id*. at 26:25–27:2. Ms. O'Neale's medical transport cost a total of $39,312.38, and Ms. O'Neale's insurance covered $6,166.35. ECF No. 182-10. Defendants billed her personally for the $33,146.03 balance for the twenty-two-mile flight. *Id*.

On January 13, 2019 Jonathan Armato had a seizure at his parents' home and lost consciousness. ECF No. 181-5 at 9:17–10:15. During the seizure Mr. Armato bit through his tongue and significant swelling and bleeding resulted. *Id*. A ground ambulance transported him to the local hospital, and hospital personnel determined that he was experiencing a significant medical emergency that required air transport. *Id*. at 11:9-13; ECF No. 181-6 at 19:14-20. Defendants transported him to Las Vegas Medical Center. Carl Armato, Jonathan Armato's father, was present throughout the entire emergency. According to Carl Armato, the air transport was not presented as an option. It was instead "what we've got to do, and we are moving forward because it was a life-threatening event according to the doctor." ECF No. 181-6 at 20:7-11. Defendants charged $69,999.00, only $13,115.60 of which was paid by insurance. Jonathan Armato was billed the balance of $56,883.40. ECF No. 182-13.

On November 6, 2016 Grif and Lana Hughes were notified that their fifteen-year-old son had consumed excessive amounts of alcohol, lost consciousness, and became unresponsive. ECF No. 181-7 at 9:1-17. A ground ambulance took him to the nearby emergency room. ECF No. 181-7 at 10:12-15. The emergency room physician told the Hughes that the hospital was not equipped to handle pediatrics, and that he needed to be transported by air to a pediatric hospital. The emergency room physician executed the PCS. ECF No. 183-2 at 2. The Hughes' insurance did not cover any part of this transport due to an alcohol exclusion in their policy. Defendants charged the Hughes $52,743.63.

2. Dequasie plaintiffs

On July 1, 2014 Richard Dequasie's daughter, H. Dequasie, suffered a traumatic brain injury that rendered her unresponsive. The paramedics ultimately decided that air transport was necessary. Mr. Dequasie agreed because he felt that he did not have any other choice. ECF No. 193-6 at 21:5-12. Mr. Dequasie was not told how much the transport would cost at that time, nor did defendants discuss price with him. *Id*. at 32:21–33:2. Defendants charged Mr. Dequasie $43,165.30 to transport his daughter sixty-four miles. ECF No. 185-1 at 1. Prior to the lawsuit against Air Methods, Mr. Dequasie sued his insurance company for not paying the full amount that Air Methods billed him. ECF No. 193-6 at 36:13-22.

On October 15, 2015 Kara and Andrew Ridley's daughter experienced respiratory distress that caused severe complications. ECF No. 193-7 at 3:1-7. Dr. Rutter, her treating physician, stated that she needed to be air lifted to another hospital to receive a certain type of medication. When asked whether he agreed to the transport, Andrew Ridley stated he was only concerned with the best interests of his child. *Id*. at 4:10-12. The Ridleys did not discuss price

with the doctor or defendants' employees prior to transportation *Id*. at 4:22–5:14. A med-flight nurse approached Mrs. Ridley and handed her the A&C form for transport, which she signed. ECF No. 198-8 at 23:4-10; *see also* ECF No. 193 at 7, ¶28. Defendants charged the Ridley's $51,798.96 for the flight. ECF No. 185-1 at 5.

On November 19, 2015 E. Ramer was eight years old when defendants transported him due to complications arising from undiagnosed asthma. ECF No. 193-4 at 4:2-10. Medical professionals told Miranda Taylor, E. Ramer's mother, that air transport was necessary because a ground ambulance would not get E. Ramer the care he needed in time. *Id*. at 4:17-20. A nurse told Ms. Taylor that she would need to sign the A&C for him to be transported, but no discussion of its terms or price occurred. *Id*. at 4:20-25. E. Ramer was intubated, and the hospital expressed the need for urgency, so Ms. Taylor signed the form. Ms. Taylor was charged $37,870.86. Blue Cross paid approximately $8,000.00 of the bill. Her then-husband, Mr. Ramer, entered into a private settlement agreement with defendants whereby he would pay them $17,834.50. ECF No. 193-5 at 20:17-20. Ms. Taylor was required to pay thirty-eight percent of that amount according to their divorce decree. ECF No. 193-4 at 2:16-22.

On April 30, 2016 Dwain Pattillo suffered a heart attack and required emergency care. Emergency room medical providers attempted to contact Mr. Patillo's cardiologist but could not do so. Despite this, they decided to administer a medication that would stop the heart attack. After administering the drug the healthcare providers determined it was medically necessary to transfer Mr. Patillo to an Oklahoma City hospital by air transport. ECF No. 193-9 at 3:4-8. Mr. Patillo signed the A&C form before defendants transported him to a hospital in Oklahoma City. ECF No. 193-9 at 45:10-17. Defendants charged Mr. Patillo $47,335.54. ECF No. 185-1 at 2.

Mr. Patillo filed a claim with his insurance company, but the company did not pay the full amount that his policy purported to cover. He participated in his insurance company's administrative appeal process in an attempt to have them cover more of the bill. ECF No. 193-9 at 69:13–70:16.

On June 9, 2016 Sandra Saenz was involved in a serious car accident and sustained a head injury. ECF No. 193 at 7, ¶35. Ms. Saenz was unresponsive following the accident, and she therefore did not sign the A&C form prior to transport. Defendants billed Ms. Saenz $35,415.84, and Medicaid paid $3,592.15. Ms. Saenz owes the balance to defendants. ECF No. 185-1 at 6.

On November 16, 2016 at 10:44am Kathleen Pence delivered her newborn son, P. Pence. Dr. Bielfeld, her physician, notified her at 8:30pm that evening that her infant needed to transferred immediately to treat a rare heart condition called coarctation of the aorta. ECF No. 193-10 at 27:5-12. Defendants airlifted P. Pence to another hospital. ECF No. 193 at 7, ¶37. Defendants charged $59,999.00. The Pences filed a claim with their insurance, and the insurance company underpaid on that claim. They have an outstanding balance of $40,285.00.

II. PROCEDURAL BACKGROUND

This case was initially filed on November 4, 2016. ECF No. 1. In the subsequent years several similar cases were filed in this district against defendants, and the Court consolidated this case with seven others. ECF No. 38. On August 21, 2017 defendants filed a motion to dismiss. This Court granted the motion on May 25, 2018. ECF No. 90. Plaintiffs appealed that decision, and the Tenth Circuit affirmed in part, reversed in part, and remanded in part. ECF Nos. 99, 100, 111. The Tenth Circuit ordered this Court to consider a single issue on remand—whether the

parties entered into an express or implied contract for defendants' emergency air transport services. ECF No. 111.

On September 3, 2020 the Cowen plaintiffs filed a motion for summary judgment on the single issue before the Court. ECF No. 181. Defendants filed their response on October 13, 2020, and plaintiffs replied on November 10, 2020. ECF Nos. 194, 204. On September 4, 2020 the Dequasie plaintiffs also filed a motion for summary judgment. ECF No. 184. Defendants responded on October 13, 2020, and plaintiffs replied on November 10, 2020. ECF Nos. 193, 206. Both the Cowen and Dequasie plaintiffs also filed motions to certify a class. ECF Nos. 179, 183. Defendants responded to both class certification motions on October 13, 2020. ECF Nos. 194, 196. The Cowen and Dequasie plaintiffs filed their consolidated reply on November 10, 2015. ECF No. 205. The four motions are ripe for review.

III. STANDARD OF REVIEW

A court may grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The moving party has the burden to show that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmoving party must "designate specific facts showing that there is a genuine issue for trial." *Id*. at 324. A fact is material "if under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The court will examine the factual record and make reasonable

inferences in the light most favorable to the party opposing summary judgment. *See Concrete Works of Colo., Inc. v. City and Cty. of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994).

IV. ANALYSIS

To provide a framing for the motions, I summarize the parties' overarching positions here. Summary judgment turns on whether there is an express or implied-in-fact contract. Defendants argue that there is, while plaintiffs argue that there is not. Because of the narrow issue on remand, however, each parties' position is a bit peculiar.

With respect to both groups of plaintiffs, defendants urge the Court to accept the following scenario as legally reasonable: A person suffers a life-threatening emergency that requires medical air transport. The person is either taken to a local hospital or EMS arrives on the scene, and a healthcare provider determines that it is medically necessary for the patient to be air lifted to another hospital. As the patient suffers through a medical emergency, time is of the essence. If the person is unconscious and is not accompanied by a family member, then Air Methods signs the A&C form and transports the patient. If the individual is accompanied by family members, then the family member is effectively told "you must sign this form if you want your loved one to get the care they need," and the person signs the form. Neither the cost of the transport nor an opportunity to negotiate is ever presented to either the patient or their family representative.

Despite this, defendants contend that plaintiffs have entered into a contract the moment defendants begin to air lift the patient, and that the contract requires plaintiffs to pay any amount that defendants charge. Thus, even though material terms, such as price, are never discussed prior to transport, and even though the contracting party may or may not be unconscious,

defendants insist that a contract has been formed. Should the Court accept defendants' position, it would necessarily have to accept that an incapacitated person is capable of entering into a contract, or that a contract is possible without offer, acceptance, or mutual assent. From the outset, then, defendants position directly contradicts the most basic of contract principles.

On the other hand, plaintiffs also urge the Court to adopt a position that runs counter to common sense. They ask the Court to find that no express or implied-in-fact contract exists. If the Court rules this way, the outcome is that defendants do not receive any compensation for the lifesaving transport they provided to plaintiffs or their family members. The Court thus finds itself in the peculiar position of electing between two seemingly illogical results. With the parties' opposing positions in mind, the Court addresses the pending motions.

A. <u>The Cowen plaintiffs' motion for summary judgment</u>

The Court has repeatedly stated that this case reads like a Contracts 101 hypothetical on a law school examination. The central issue is whether a reasonable jury could conclude that either an express or implied-in-fact contract exists. The Cowen plaintiffs argue that they are entitled to a declaratory judgment that no contract exists. ECF No. 181. Defendants contend that there is sufficient evidence for a reasonable jury to find that plaintiffs entered into either an express or implied-in-fact contract. ECF No. 194.

The Cowen plaintiffs are from Alabama, Arizona, and Missouri, and the contract laws of these states govern plaintiffs' claims. Although a different state's laws apply to each set of claims, general contract principles are consistent across the three states. For instance, Alabama, Arizona, and Missouri all agree that an implied-in-fact contract requires the same elements as an express contract. *See Ex parte Jackson Cty. Bd. of Educ.*, 4 So. 3d 1099, 1104 (Ala. 2008) ("A

contract implied in fact requires the same elements as an express contract, and differs only in the method of expressing mutual assent. Implied contracts normally arise in situations where there is a bargained-for exchange . . . ."); *Westerhold v. Mullenix Corp.*, 777 S.W.2d 257, 263 (Mo. Ct. App. 1989) ("When the parties express their promises in explicit oral or written words, the contract is labeled: express. . . .When they manifest their promises by language or conduct which is not explicit, the contract is labeled implied in fact. The only difference. . . the manner of manifesting mutual assent."); *Pyeatte v. Pyeatte*, 135 Ariz. 346, 661 P.2d 196, 201 (Ct. App. 1982) ("An implied-in-fact contract is a true contract, differing from an express contract only insofar as it is proved by circumstantial evidence rather than by express or written terms.").

All three states also require offer, acceptance, consideration, and mutual assent for a contract to be legally binding and enforceable. *See Mantiply v. Mantiply*, 951 So. 2d 638, 656 (Ala. 2006) (explaining that "no contract, whether express or implied-in-fact, is formed without an offer, an acceptance, consideration, and mutual assent to terms essential to the contract."); *Rogus v. Lords*, 804 P.2d 133, 135 (Ariz. Ct. App. 1991) (explaining that offer, acceptance, consideration, and mutual assent are necessary for an enforceable contract to exist); *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. 2014) (same).

Plaintiffs argue that no legally enforceable contract exists because essential contract elements are missing. Defendants argue that a reasonable jury could find that plaintiffs entered into a valid contract—either express or implied-in-fact—for four separate reasons. First, defendants contend that there is sufficient evidence that the plaintiffs agreed to be bound by the contract. ECF No. 194 at 10. Second, defendants claim that the alleged contract was unilateral, and "defendants' consent to contract is shown by [their] performance." *Id.* at 11. Third,

defendants argue a jury could find in their favor because there is sufficient evidence of consideration. *Id.* Fourth, and finally, defendants claim that the lack of a final price term does not preclude the jury from finding that a legally binding contract exists. *Id*. at 12. I address each argument in turn.

1. Whether there is sufficient evidence of agreement between the parties

Plaintiffs claim that they never agreed to contract with defendants, and that there was no mutual manifestation of assent. Meanwhile, defendants contend that they can establish assent under several theories, such as: (1) the medical professionals who requested air transport were the patients' agents and therefore agreed to the contract on their patients' behalf; (2) the plaintiffs consented to the terms of the contract when they signed either the A&C form, the AOB form, or both; (3) plaintiffs consented when they agreed to the air transport; and (4) several plaintiffs attempted to resolve their balance with defendants through their insurance company, which indicates their intent to contract.

a. Whether the medical providers acted as the patients' agents

Defendants first contend that a reasonable jury could conclude that plaintiffs agreed to contract with defendants because the medical providers—those who recommended air transport—were the patients' agents. ECF No. 194 at 10, 15, 18. According to defendants, because an agency relationship existed between the providers and the patients, the providers had the authority to enter the patients into binding, enforceable contracts. I disagree.

The Restatement (Second) of Agency ("the Restatement") applies to all three states. The Restatement states that "[a]gency is the fiduciary relation which results from the *manifestation of consent by one person to another* that the other shall act on his behalf and subject to his control,

and consent by the other to so act." Restatement (Second) of Agency § 1 (1958) (emphasis added). The Restatement goes onto state that "[a]n agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent to so act." *Id*. at § 15. Thus, in the same way that mutual assent is required to form a binding contract, a "sufficient manifestation of consent" is necessary for an agency relationship to exist. *Id.*

i. Alabama plaintiff

As to Ms. O'Neale, the sole Alabama plaintiff, defendants cite a single case—*Treadwell Ford, Inc. v. Courtesy Auto Brokers, Inc.*—to establish that an agency relationship existed between Ms. O'Neal and the EMT employee who requested her air transport. ECF No. 194 at 15. *Treadwell Ford* involved plaintiffs' suing a car sales company for a commission payment it allegedly owed plaintiffs. The issue before the court was whether the individual who promised to pay the commission was an agent who had the authority to bind Treadwell Ford into a contract. The *Treadwell Ford* court held that "whether any agency relationship exists is a question of fact for the trial court . . . ." *Treadwell Ford, Inc. v. Courtesy Auto Brokers, Inc.*, 426 So. 2d 859, 861 (Ala. Civ. App. 1983). Based on this holding defendants contend that whether an agency relationship exists between Ms. O'Neale and her EMT is a question that must go to the jury. I disagree.

The *Treadwell Ford* facts are easily distinguishable from those in this case. In upholding the trial court's determination that an agency relationship potentially existed, the court noted that it did so because "there is evidence, if believed, that would establish an agency relationship

existed between Mr. Kirby and Treadwell Ford. Testimony by Mr. Kirby and Mr. Treadwell indicated it was part of Mr. Kirby's job to buy used cars for Treadwell Ford." *Id*.

Unlike *Treadwell Ford*, there is no "evidence, if believed, that would establish an agency relationship" between Ms. O'Neale and the EMT. *Id.* In fact, the deposition testimony provided to this Court supports the opposite conclusion—Ms. O'Neale did not confer authority on anyone to enter into a contract with defendants on her behalf. First, Ms. O'Neale was unconscious at the time EMS personnel arrived on scene, and when she regained consciousness, she was unable to talk. She thus never even spoke to the EMT who was supposedly her agent, much less communicated that she consented to his acting on her behalf. Nor did she communicate consent to him by her actions or by any written document. Second, in her deposition she stated, "If I was able to talk before I got on the airplane, I would have told them that I did not want to fly" because she "wouldn't have known how much the flight would have cost." ECF Nos. 181-4 at 33:7–34:25. Based on this evidence there was no "manifestation by [Ms. O'Neale] to [the EMT] that the agent may act on [her] account." Restatement (Second) of Agency § 15 (1958). The Court thus finds that no reasonable jury could conclude an agency relationship existed.

ii. Arizona plaintiffs

As to the Arizona plaintiffs, defendants again cite to one factually distinguishable case to support their proposition that the medical providers were the Arizona plaintiffs' agents. *Bartell* involved a youth soccer coach who required his team to carpool together and follow his car to practice. *Bartell ex rel. Hoesel v. Mesa Soccer Club, Inc.*, No. 1 CA-CV 08-0024, 2010 WL 502993 (Ariz. Ct. App. Feb. 11, 2010) (unpublished). He led his team to an intersection that had a "no left turn" sign. *Id.* at 1. He turned right at the sign but then did an immediate U-turn to go

in the same direction he would have gone had he turned left. *Id.* One of his teammates, who had other teammates in her car, attempted to follow him by doing an illegal left-hand turn. *Id.* at 2. She collided with a motorcyclist who sustained serious injuries. *Id.* One of the issues before the *Bartell* court was whether the teammate who made the illegal left-hand turn was the soccer club's agent. *Id.*

Defendants contend that *Bartell* holds that whether an agency relationship exists is a question of fact that must go to the jury. ECF No. 194 at 10. While *Bartell* does state that "[g]enerally, agency is a question of fact to be determined by the jury," the court also wrote, "[i]f the facts are not in dispute, however, or if the facts viewed most favorably to the non-moving party are insufficient to establish agency, it is a question of law for the court." *Bartell ex. Rel Hoesel*, at *3. Here, defendants again point to no evidence supporting their assertion that plaintiffs Kranhold and Armato formed an agency relationship with their healthcare providers. There is no evidence in the record that either Kranhold or Armato manifested consent for their medical providers to enter them into a contract with defendants that required them to pay whatever amount defendants deem reasonable.

Accordingly, the Court finds that "the facts viewed most favorably to [plaintiffs Kranhold and Armato] are insufficient to establish agency," and the issue is therefore "a question of law for the court." *Id.* No reasonable jury could conclude, based on the evidence—or rather, lack of evidence—presented, that the medical providers were their patients' agents.

iii. Missouri plaintiffs

For the Missouri plaintiffs, defendants again cite a single factually distinguishable case. The case involved a bounty hunter who strangled and suffocated an individual while pursuing

him. *West v. Sharp Bonding Agency, Inc.*, 327 S.W.3d 7 (Mo. Ct. App. 2010). The issue was whether an agency relationship existed between the bounty hunter company and the bail company. *Id.* The Missouri Court of Appeals held that while the existence of an agency relationship "is generally a factual question for the jury . . . this relationship is a question of law for the court to determine when the material facts are not in dispute, and only one reasonable conclusion can be drawn from the materials facts." *Id.* at 11.

At the risk of sounding redundant, I note that here too defendants have cited nothing from the record supporting their conclusion that an agency relationship existed between the Cowens, Hughes, and their medical providers with respect to payment for transportation services. Thus, the Court finds that only one "reasonable conclusion can be drawn from the material facts:" namely, that no agency relationship existed. *Id.*

Defendants' argument as to all of the Cowen plaintiffs is that the physician-patient relationship is traditionally an agency relationship. But defendants present no law, nor could this Court find any, that suggests this is true. Nowhere do they discuss whether the medical providers had actual, apparent, or implied authority, nor *how* the patients conferred such authority on their medical providers. Instead defendants rely on conclusory statements that agency relationships existed for each plaintiff without pointing to any evidence in the record. This is not enough. The Court therefore concludes that defendants' agency argument fails as a matter of law.

b. Whether plaintiffs' signing the A&C or AOB forms or agreeing to be air lifted indicates their consenting to a contract

Defendants next claim that plaintiffs showed their intent to contract when they signed the A&C and AOB forms. As mentioned above, the A&C form is signed prior to every transport.

Of the Cowen plaintiffs, Ashley Cowen is the only plaintiff who unquestionably signed the A&C form prior to the helicopter's taking off. Each of the other plaintiffs did *not* sign—instead a family member or Air Methods crew member signed. Mr. Kranhold's wife, Ellen von Bretano, signed the form on behalf of her husband. The parties dispute who signed Mr. Armato's A&C form. Finally, an Air Methods crewmember signed Ms. O'Neale's and Mr. Hughes' A&C forms. As for the AOB form, it is delivered to patients several weeks after the transport. Randall Cowen signed the AOB form on September 17, 2016. Ellen von Bretano, Mr. Kranhold's wife, signed his AOB form. Mrs. O'Neale signed her own AOB form on September 3, 2015, when Air Methods contacted her and asked her to sign it.

Defendants claim that the identical financial responsibility provision contained in the A&C and AOB forms are important on the question of assent. That provision reads, in pertinent part, "I agree that if my insurer denies all or any part of my provider's charges for any reason, or if I have no insurance, I will be personally and fully responsible for payment of provider's charges." ECF No. 194-3 at 7. According to defendants, a patient's signing either form proves their intention to form a valid, binding contract. I disagree.

A contract is not valid without mutual assent. Section 17(1) of the Restatement (Second) of Contracts explains that "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." Defendants heavily emphasize the financial responsibility provision to support its position that the patients manifested assent to the contract when they signed the A&C form. ECF No. 194 at 18. But the evidentiary record does not support the conclusion that there was a manifestation of mutual assent.

In addition to conceding that the parties never had an opportunity to negotiate or reach a meeting of the minds, defendants' own representative admitted that who signs the A&C form is immaterial, because it is the delivery of care, not the A&C form, that actually forms the contract. Also, the form can be signed by anyone, regardless of whether they are a valid representative of a patient (and thus able to bind them contractually) or not. Further the lack of negotiation raises a red flag in terms of whether the parties mutually assented to the contract and understood their rights and obligations under the contract. It is undisputed that the A&C is a standardized form, and that patients are not given an opportunity to negotiate its contents. The form is therefore meaningless as to the question of a patient's consent to pay whatever amount defendants charge.

Mr. Kranhold and Mr. Armato were unconscious at the time the A&C form was signed. The Cowens signed the A&C form at the request of medical professionals, but they did not know what it entailed and were not under the impression that it was a contract to pay any amount that defendants deem reasonable. Others—the Hughes and Ms. O'Neale—never signed the A&C form. Instead, Air Methods' employees signed the document for these patients. The Court will not accept that a form often signed by defendants' employees—and one that defendants themselves admit does not create the contract—can bind plaintiffs to pay whatever amount defendants charge.

c. Whether submitting the bill to insurance indicates an agreement to contract

Defendants next argue that because some plaintiffs attempted to settle and appeal insurance claims, they clearly understood they were bound to pay the full amount that Air Methods billed them. The Court rejects this argument. I will not punish plaintiffs' good faith efforts to pay defendants through insurance. At most plaintiffs' attempts to go through insurance

shows that plaintiffs understand that defendants deserve some compensation for their lifesaving services. But it does not constitute manifestation of assent to pay literally whatever price defendants name, however unreasonably high.

The Court finds that defendants have not demonstrated a genuine issue of material fact as to whether the plaintiffs consented to a contract. In addition to the above reasons, defendants' arguments as to consent further fail because any supposed contract did not include a material element, i.e., a price term. The Court further discusses the lack of a price term in Part IV.A.4, *infra*.

2. Whether the alleged contract was unilateral

Defendants next claim that the contract is unilateral, and that the contract was formed when defendants performed their obligations. ECF No. 194 at 11. Because the law does not deviate substantially across Alabama, Arizona, and Missouri on this issue, I address the plaintiffs from all three states together.

Most contracts involve an exchange of promises, i.e., one party promises to pay money in exchange for the other party's promise to perform a certain service. These are known as bilateral agreements. However, some agreements are unilateral. The Restatement (Second) of Contracts explains a unilateral contract as follows: "[w]here an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it." Restatement (Second) of Contracts § 45 (1981). Comment (b) explains that "[t]he rule of this Section is designed to protect the offeree in justifiable reliance on the offeror's promise . . . ." *Id.* § 45 cmt. b.

Alabama, Arizona, and Missouri treat unilateral contracts similarly. In Alabama, "a unilateral contract results from an exchange of a promise for an act; a bilateral contract results from an exchange of promises." *SouthTrust Bank v. Williams*, 775 So. 2d 184, 188 (Ala. 2000). In Arizona "[i]n the unilateral or at-will context, once the offer is accepted by commencement of performance, the terms cannot be changed" because the contract is final once performance begins. *Demasse v. ITT Corp.*, 194 Ariz. 500, 984 P.2d 1138, 1144, n.3 (1999). In Missouri, "an offer to make a unilateral contract is accepted when the requested performance is rendered." *Cook v. Coldwell Banker*, 967 S.W.2d 654, 657 (Mo. Ct. App. 1998).

Defendants' argument that the contract is unilateral is premised on the idea that plaintiffs—some of whom were unconscious—made an offer to pay for their air transport services that could only be accepted by defendants' performance. Interestingly, defendants do not address when or how plaintiffs made this offer, nor do they cite to any evidence in the record to support their conclusion that plaintiffs made an offer. As already discussed above, defendants' own representative admitted that a person's signing the A&C agreement could not be such an offer because it is immaterial who signs the form, and often defendants' employees themselves sign it. After a review of the record in its entirety, the Court cannot find any evidence that suggests plaintiffs made an offer that could only be accepted by performance. The Court is therefore not persuaded by defendants' argument that a unilateral contract exists.

3. Whether there is sufficient evidence of consideration

Defendants next contend that the jury could find either an express or implied-in-fact contract because there is sufficient evidence of consideration. ECF No. 194 at 11–12.

According to defendants, because the defendants conferred a benefit upon the plaintiffs—by providing lifesaving care and air transport—consideration exists.

Under the most basic contract principles, consideration is a bargained-for exchange. The Restatement (Second) of Contracts states:

> (1) to constitute consideration, a performance or a return promise *must be bargained for;*
> (2) a performance or returned promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

§ 71 (emphasis added). Alabama, Arizona, and Missouri law reflect this general contract principle. *See Baker*, 450 S.W.3d at 774 (explaining that "[t]he essential elements of any contract, includ[e]. . . bargained for consideration . . . . Consideration consists of either of a promise (to do or refrain from doing something) or the transfer of giving up of something of value to the other party."); *Turken v. Gordon*, 224 P.3d 158, 166 (Ariz. 2010) ("The term consideration has a settled meaning in contract law. It is a performance or return promise that is bargained for in exchange for the promise of the other party."); *Smith v. Wachovia Bank, N.A.*, 33 So. 3d 1191, 1197 (Ala. 2009) (explaining that "the formation of a contract requires a bargain in which there is consideration . . . . To constitute consideration, a performance or a return promise must be bargained for.").

While defendants indisputably conferred a benefit on plaintiffs, there is no evidence that any bargained-for exchange took place. Here, plaintiffs did not bargain for anything. Some were unconscious and woke up in a hospital in a different city only to learn they had been air lifted there. Others were told to sign a standardized form that by its terms effectively precludes signatories from amending it, as defendants themselves admit. While it is true that time is of the

essence in these emergency medical situations, that fact does not alter the requirements of a binding contract. A binding contract requires consideration, and valid consideration requires more than the conferral of a benefit—there must be a bargained-for exchange.

The Court again notes the peculiar situation in which it finds itself. The facts of this case are a primary example of unjust enrichment or restitution. Unjust enrichment is an equitable remedy in which a court finds that a person is entitled to compensation for the conferral of a benefit on another. Section 370 of the Restatement (Second) of Contracts states that "[a] party is entitled to restitution . . . only to the extent that he has conferred a benefit on the other party by way of part performance or reliance." The comments to the Restatement further explain that "[a] party's restitution interest is his interest in having restored to him any benefit that he has conferred on the other party." Restatement (Second) of Contracts § 370 cmt. a (1981). Under the unjust enrichment doctrine, it is unjust for one party to retain a benefit that another party conferred on them without compensation. Under normal circumstances, therefore, I would find that plaintiffs would be unjustly enriched if they did not pay defendants the reasonable, fair market value for the air transport defendants provided.

These are not normal circumstances, however. The Tenth Circuit remanded the case to this Court on a narrow issue and directed this Court to "examine each of the Cowen plaintiffs' allegations under the applicable state law to determine whether an express or implied-in-fact contract was formed." *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1068 (10th Cir. 2019). The Tenth Circuit held, as had this Court in its initial order, that the Airline Deregulation Act preempts an equitable remedy such as contract implied at law or unjust enrichment. *Id.* at 1065–68. Thus, the Court's only power here is to determine whether the facts and evidence in the

record support either an express or implied-in-fact contract. Defendants have proffered no evidence of bargained-for consideration, and thus their argument fails.

4. Whether lack of a final price term negates contract formation

Plaintiffs argue that they are entitled to summary judgment because the price term, a material element of the contract, was not disclosed prior to transport. Defendants contend that summary judgment is inappropriate because "the lack of a final price term before transport does not prevent a finding that there was a contract between plaintiffs and defendants." ECF No. 194 at 12, 16, 19. Defendants rely heavily on *Centura Health Corp.*, a Colorado case, that found an enforceable contract despite the lack of a clear price term. *Centura Health Corp. v. French*, 2020 COA 85, *cert. granted in part sub nom. Lisa Melody French, v. Centura Health Corp. & Cath. Health Initiatives Colorado, d/b/a St. Anthony N. Health Campus.*, No. 20SC565, 2021 WL 1554193 (Colo. Apr. 19, 2021). I therefore address it even though Colorado law is not binding on any party to this case.

In *Centura Health*, the plaintiff was scheduled to undergo spinal surgery that would cost approximately $55,000. *Id*. at *2. She signed multiple documents before the surgery that stated that she would pay "all charges" in the event her insurance didn't pay, and that she understood that her insurance may not cover the surgery. *Id.* She experienced post-surgery complications that resulted in her spending five days in the hospital. Plaintiff argued that no valid contract existed because there was no certain price term, as the phrase "all charges" was vague. The Court of Appeals found for defendant. *Id*. at *6. The court held that "all charges" was reasonably certain in the hospital context because the costs came from the chargemaster billing pay schedule, a comprehensive line-item list of what hospitals charge for every service they

provide. It noted that in this specific healthcare context the term "all charges" was sufficiently definite to render the contract enforceable. *Id*. at *6.

In so holding, the court reasoned that (1) hospitals cannot always accurately predict what services a patient will need; (2) while the contract did not explicitly reference chargemaster prices, the price term "all charges" was nonetheless sufficiently definite because the chargemaster rates were predetermined; (3) it would be impractical for a court to attempt to resolve the complexity of the healthcare system by imposing a reasonableness requirement; and (4) Colorado law provides some public transparency for the hospital's chargemaster rates. *Id*. at 5–6.

First, I note again that this case is not binding on the issues before this Court because it applies Colorado law, instead of law from Alabama, Arizona, or Missouri. But even if it were applicable, it deals with significantly different facts and is thus unpersuasive. Air Methods is not in the same position as a hospital that cannot reasonably predict what services a patient will need. While a hospital provides medical care, Air Methods provides transportation. Indeed, Uhlman, the defendant representative, states that Air Methods only charges for transportation. There is a base rate and a mileage rate. The base rate is determined based upon what Air Methods states is the cost to operate a 24/7 emergent business in that area. They do not charge for any healthcare provided to the patients while in the ambulance. ECF 194-1 at 41. Therefore, the price is not determined by what services Air Methods may have to provide each individual patient; it is based on the amount of travel. In fact, defendant admits it would cost a patient $32,081 to fly one mile because the price is only based on the mileage and the base rate, and

nothing else. *Id*. at 40. Thus, defendants *can* "accurately predict what services a patient will need" at the time of transport. *Centura Health Corp*., at *6.

The Court will not apply an exception carved out for the healthcare industry when defendants do not charge for healthcare. I therefore find that *Centura Health* and other cases that discuss the hospital chargemaster theory of billing are not relevant to the Court's analysis. No such chargemaster theory of billing took place here, and defendant is not in a position where it cannot reasonably estimate the amount of its services.

To overcome summary judgment, defendants next claim that price was immaterial to some plaintiffs because they were unconcerned with the price at the time of transport. According to defendants, this indicates that there is a factual dispute as to whether plaintiffs agreed to contract around the price term. For instance, to prove that price was immaterial to Mr. Cowen, defendant points to a section of his deposition where he admits that he did not consider the price because he was too concerned about whether his son was going to live or die. That part of the deposition reads,

> Q: Did you ask hospital employees . . . how much air ambulance transportation was going to cost?
> A. No.
> Q: Why not?
> A. It really, I guess at the time, wasn't a concern. They were stressing the importance of getting there, getting him there as soon as possible. You know, I—we have insurance for a reason. I didn't think this would come about.

ECF No. 194-5 at 29:9-18. In another section of his deposition, Mr. Cowen answers the question of whether he would have negotiated the price had he been given the opportunity. He responds,

> I just don't even know how to handle that. I mean, that's – I think it's kind of – I don't know – we're talking about possibly losing my son, you know. I was in a situation where I don't know. You know, if – I honestly don't know how to answer this question. I don't want to lose my son that's for certain.

Id. at 69:1-14.

The defendants also contend that price was immaterial to the Armatos. They cite to both Jonathan and Carl Armato's deposition testimony. When asked whether price would have been significant to him at the time of transport, Jonathan Armato responded, "I mean the answer to that question again would be you can't put a price on like life or death. So I really can't answer that question. I mean, at that point I want [sic] to live." ECF No. 194-10 at 35:4-12. Similarly, in Carl Armato's deposition, the following exchange took place:

> Q: Had the doctor said that the price of this air transport would be $13,115.60 and Jonathan's insurance will cover that entire amount, would that – would that have changed your mind in terms of whether you consented to the – to the air transport or not?
> A: Very hard to answer a hypothetical. Under those circumstances, there was a lot of stress involved and I was concerned about my son's life, and nobody discussed, you know, if it costs this, would you agree to it, or if it costs this would you not agree to it. So it's a hypothetical I cannot answer I'm sorry.
> Q: That's okay. And is that because – am I correct to say – is it correct if I were to say that that's because price wasn't a concern at that point in time for you?
> A: Yeah, sure, it wasn't, because it was an emergency situation, and Jonathan—I knew Jonathan had insurance, and at that point it was –he wasn't a self-pay, so it's our belief that the insurance company would negotiate that with all providers and come to a reasonable amount for whatever services are provided, whatever they would call reasonable and customary.

ECF No. 194-11 at 69:24–70:1-23.

Defendants use this deposition testimony to suggest that plaintiffs agreed that price was not a material part of the alleged contract with defendants. I am unpersuaded by this manipulation of the deposition testimony. A father's unwillingness or inability to put a price on his son's life—or a person's unwillingness or inability to put a price on their own life—does not translate to his being bound to pay whatever amount defendants say the price is. Plaintiffs knew they or their family members were receiving a service—life-saving medical transport—that

would cost *some* amount of money, presumably a reasonable price. It would be absurd for them to have believed that the service was free, i.e. that neither them nor their insurance company would pay anything. But defendant's own refusal to name a price rendered any potential agreement invalid and unenforceable. More importantly, the fact that plaintiffs would have paid a price, potentially even a high price, for defendants' services, does not alter contract law—there is still no enforceable contract if no certain price was established. The Court therefore finds that no reasonable jury could conclude that there is a material factual dispute as to whether plaintiffs agreed to contract around the price term.

For the above reasons, the Court finds that the Cowen plaintiffs did not enter into an express or implied-in-fact contract. The Cowen plaintiffs' motion is thus GRANTED.

B. The Dequasie plaintiffs' motion for summary judgment

The Dequasie plaintiffs move for summary judgment against defendants on three grounds: (1) the undisputed facts demonstrate that any contracts which may exist between plaintiffs and defendants are correctly characterized as implied-in-law contracts, and are therefore preempted and unenforceable under the Airline Deregulation Act; (2) even if the Court finds that express or implied-in-fact contracts exist, they are not enforceable; and (3) if the Court finds that express or implied-in-fact contracts exist and are enforceable, Oklahoma law compels a finding that the defendants can only charge plaintiffs for the reasonable value of services rendered. ECF No. 185

Defendants argue that the Dequasie plaintiffs "offer a confusing Motion untethered from the limits of the Tenth Circuit's remand" because "the only remaining declaration pending before the Court is whether any express or implied-in-fact contract exists between defendants and

Dequasie plaintiffs." ECF No. 193 at 1. I agree with defendants. The Court can only determine the existence or non-existence of a contract. It cannot determine a reasonable price for defendants' services.

Defendants present identical arguments to those presented in Part IV.A of this order against the Cowen plaintiffs. They argue that a genuine dispute of fact exists as to whether the parties entered into an express or implied-in-fact contract under the following theories: (1) there is sufficient evidence of defendants' consent and intent; (2) the contracts were unilateral and therefore defendants' consent is evidenced by defendants' performance; (3) there is sufficient evidence of consideration; and (4) lack of a final price term is immaterial to whether a contract exists in this context.

I begin my analysis with a discussion of basic contract principles under Oklahoma law. I then turn to each of defendants' arguments. "A contract is an agreement to do or not to do a certain thing." *Nat'l Outdoor Advert. Co. v. Kalkhurst*, 418 P.2d 661, 664 (Okl. 1966). Contracts can be either express or implied. "An express contract is one, the terms of which are stated in words. An implied contract is one, [t]he existence of which is manifested by conduct." *Wattie Wolfe Co. v. Superior Contractors, Inc.* Additionally, a valid, enforceable contract requires capacity, consent, a lawful object, and sufficient cause or consideration. *National Outdoor Advertising Co.*, 418 P.2d at 664.

1. Whether there is sufficient evidence of the Dequasie plaintiffs' intent and consent

Defendants contend there is sufficient evidence that the Dequasie plaintiffs agreed to a contract with defendants. Defendants raise similar arguments to those raised in Part IV.A.1 of this order. Defendants argue there is sufficient evidence of consent because (1) the medical

providers were the plaintiffs' agents; (2) several plaintiffs agreed with their providers' opinion that air transport was medically necessary; (3) some plaintiffs signed the A&C form; and (4) some plaintiffs submitted defendants' bill to insurance and attempted to make payments.

Prior to addressing defendants' arguments, the Court first notes that "it is an elementary rule of law in [Oklahoma] that in order to constitute a contract there must be an offer on the part of one and an acceptance on the part of the other." *Id.* (citing *Hartzell v. Choctaw Lumber Co of Delaware et al.*, 22 P.2d 387 (Okla. 1933)). However, for a person to accept, or show consent to a contract, they must have capacity to do so. The Oklahoma Uniform Jury Instructions state that "[l]ack of capacity at the time a contract is made relieves a party of the duty to perform the contract. A person lacks capacity if [they are] unable to understand the nature of the contract and the consequences of [their] agreement." *In re Amending & Revising Oklahoma Unif. Jury Instructions-Civ.*, 2009 OK 26, 217 P.3d 620, 624. Thus, a person without capacity cannot consent to a contract. Here, plaintiff Sandra Saenz was involved in a severe car accident and was unresponsive at the time medics arrived on scene. She did not and could not have consented to a contract as a matter of Oklahoma law when she was unconscious because she did not have the capacity to do so. Summary judgment is GRANTED as to her claim on that basis alone. I thus address defendants' arguments with respect to the five remaining Dequasie plaintiffs.

I begin with defendants' argument that the medical professionals were the patients' agents. "Agency is generally a question of fact to be determined by the trier." *Thornton v. Ford Motor Co.*, 297 P.3d 413, 418 (Okla. App. 2012). However, whether an agency relationship exists is a question of law when "facts relied upon to establish the existence of the agency are undisputed and conflicting inferences cannot be drawn." *Id.* Oklahoma's agency law is thus

consistent with Alabama's, Arizona's, and Missouri's. I therefore incorporate my analysis from Part IV.A.1.a. Again, defendants have presented no legal authority that establishes the physician-patient relationship is typically considered an agency relationship. Nor have they pointed to evidence showing that plaintiffs conferred agency authority on their healthcare providers. The Court concludes that defendants have not presented a genuine dispute of material fact as to whether an agency relationship existed between the Dequasie plaintiffs and their healthcare providers.

Defendants next contend that because several plaintiffs signed an A&C form and agreed that air transport was necessary, they are bound to pay whatever price defendants charge. The Court finds, as it did in IV.A.1.b, that the A&C form alone did not create a contract between the parties. The defendants themselves admit that the A&C form does not create a contract between the parties, and that who signs the form is irrelevant. Instead, they contend it is the delivery of care that creates a binding contract. The Court will not find that the A&C form evidences plaintiffs' agreeing to a contract because defendants themselves acknowledge that the signing of the A&C form is immaterial. While plaintiffs agreed that air transport was necessary to save either their lives or the lives of their loved ones, there has been no evidence presented that they consented to enter into a contract with defendants to pay whatever amount they charge.

The Court is also unpersuaded by defendants' argument that plaintiffs clearly consented to a contract because they attempted to resolve their balance with defendants through their insurance companies. As mentioned in Part IV.A.1.c, this Court will not hold plaintiffs' good faith attempts to resolve their balance with defendants against them. Nor does the Court find this

fact relevant in its analysis of whether the parties entered into an express or implied-in-fact contract.

For the above reasons, the Court holds that defendants have not demonstrated a genuine dispute of material fact as to whether the Dequasie plaintiffs agreed to the contract.

2. Whether the alleged contracts are unilateral

Oklahoma law mirrors that of Alabama, Arizona, and Missouri on the issue of unilateral contracts. "Unilateral contracts contemplate an offer which is accepted by performance rather than a promise of performance." *Landon v. Saga Corp.*, 569 P.2d 524, 527 (Okla. App. 1976). Mutuality of obligation is required to form a contract, and this is true in unilateral contracts as well. In the unilateral contract context mutuality of obligation can be satisfied "where the performance is executed by the party who has not given a promise." *Id.* (citing *Henry Keep Home v. Moore*, 176 P.2d 1016 (1947)).

The Court has previously addressed this issue under Alabama, Arizona, and Missouri law in Part IV.A.2, and I adopt that reasoning and analysis here. A unilateral contract cannot be formed without an offer. Here, defendants have presented no evidence that the Dequasie plaintiffs presented defendants with an offer that could only be accepted by performance. No unilateral contract was formed, and this argument of defendants' also fails.

3. Whether there is sufficient evidence of consideration

While the Restatement (Second) of Contracts and Arizona, Alabama, and Missouri law all require a "bargained-for exchange" for consideration to exist, Oklahoma law does not. Under Oklahoma law, "[a]s a general rule, consideration exists as long as there is a benefit to the promisor or a detriment to the promisee." *Thompson v. Bar-S Foods Co.*, 174 P.3d 567, 574

(Okl. 1966). Here, defendants contend that a reasonable jury could find that consideration exists because the defendants conferred a benefit on the Dequasie plaintiffs. Under Oklahoma law, I agree. However, while consideration is necessary for a contract to exist, it is not sufficient. There must also be capacity and consent. Thus, because I have already found that there is no genuine dispute as to whether the parties consented, and that some plaintiffs lacked capacity, I need not analyze defendants' consideration argument any further. My conclusion for defendants on this point is not enough to establish that plaintiffs entered into contracts.

4. Whether the lack of a final price term precludes a finding of a contract

Defendants cite to the same Colorado court of appeals case, *Centura Health Corp. v. French*, to argue that the lack of a final price term does not preclude the jury's finding a valid contract exists. Defendants also similarly contend that price was immaterial to plaintiffs because they were not concerned with the price at the time of transport. I incorporate my analysis from Part IV.A.4 and conclude that *Centura Health Corp*. is distinguishable, and a person's unwillingness to put a price on their own life does not translate to their agreeing to pay whatever amount defendants charge. The lack of a price term defeats any potential contracts here.

For the above reasons, the Court finds that no express or implied-in-fact contracts exist between the parties and GRANTS the Dequasie plaintiffs' motion.

ORDER:

1. The Cowen plaintiffs' motion for summary judgment, ECF No. 181, is GRANTED.

2. The Dequasie plaintiffs' motion for summary judgment, ECF No. 185, is GRANTED.

3. The Cowen plaintiffs' motion to certify a class, ECF No. 179, is MOOT.

4. The Dequasie plaintiffs' motion to certify a class, ECF No. 183, is MOOT.

DATED this 11th day of May, 2021.

BY THE COURT:

R. Brooke Jackson
United States District Judge

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

VAUGHN DYER, *individually and on behalf of others similarly situated,* Plaintiff, vs. AIR METHODS CORPORATIONS and ROCKY MOUNTAIN HOLDINGS, LLC, Defendants.	No. 9:20-cv-2309-DCN **ORDER**

The following matter is before the court on defendants Air Methods Corporations ("Air Methods") and Rocky Mountain Holdings, LLC's (collectively, "defendants") motion to strike class allegations, ECF No. 42. For the reasons set forth below, the court denies the motion.

I. BACKGROUND

Air Methods provides emergent air ambulance services to patients across the United States. Rocky Mountain Holdings is a limited liability company that, according to the complaint, owns and operates Air Methods. On November 17, 2018, plaintiff Vaughn Dyer's ("Dyer") wife and minor child were involved in an accident with an EMS vehicle in Beaufort County, South Carolina. An Air Methods helicopter airlifted Dyer's wife and child from the scene of the accident to a hospital in Savannah, Georgia. For the 40-mile transport, Air Methods billed Dyer $53,224.96. Dyer alleges that to collect its fee, Air Methods engages in a practice called "balance billing," under which it collects a portion of the charged fee from patients' insurance companies and seeks payment of the outstanding balances by hiring or threatening to hire debt collectors and filing breach-of-

contract lawsuits against delinquent patients in state courts. It is unclear whether Air Methods has sought payment from Dyer through such means. According to Dyer, Air Methods charges patients, on average, around four times the fair market value of its services.

On June 18, 2020, Dyer filed this declaratory judgment action on behalf of himself and others who have similarly been billed for Air Methods' emergency services in South Carolina. ECF No. 1, Compl. The complaint defines the proposed class as, "All persons billed by Defendants, or who paid a bill from Defendants, for air medical transport that Defendants carried out from a location in South Carolina." Id. ¶ 38. Dyer seeks declaratory and injunctive relief on behalf of himself and the proposed class, and specifically requests that the court make the following declarations:

> [1.] Defendants and Plaintiff, and the Class did not enter into any contract, either express or implied-in-fact, for Plaintiff and the Class to pay the amounts charged by the Defendants for the transportation services it provided;
> [2.] Defendants have engaged in collection efforts against Plaintiff and the Class for amounts that the Plaintiff and the Class did not contractually agree to pay;
> [3.] Defendants have engaged in collection efforts against Plaintiff and the Class for amounts concerning which there was no mutual assent manifest by the Plaintiff and the Class prior to the rendering of the services charged for;
> [4.] The Airline Deregulation Act pre-empts the imposition of any state common law contract principles that impose terms upon Plaintiff which those parties did not express assent prior to the air medical transportation services provided to them;
> [5.] [T]he emergency medical circumstances of Defendants medical air transportation were such that patients transported can be presumed not entered into any contract for transportation, and in particular no agreement to pay whatever Defendants charged;
> [6.] [S]ince the Airline Deregulation Act pre-empts application of state law imposing or implying any agreement to pay Defendants charged amounts [sic];

> [7.] Plaintiff'[s] third party payors' determinations of the reasonable value of the Defendants' services provided is prima facie evidence of reasonableness; and
> [8.] Defendants['] collection of any sums greater than the amount determined as reasonable by objective, and typically applied formula, was unlawful, unjustly enriched Defendants, and should be disgorged.

Id. ¶ 58. As further relief, the complaint seeks

> a prospective order from the Court requiring Defendants to: (1) cease all balance billing and collection efforts with respect to outstanding bills for air medical transportation service until this Court makes a determination of the methodology for determining their reasonable value; and (2) account for all sums collected for air medical transportation services provided to Plaintiff.

Id. ¶ 59.

On September 14, 2020, defendants filed a motion to change venue, dismiss, or stay proceedings, ECF No. 19, which the court denied on December 17, 2020, ECF No. 34. There, the court grouped Dyer's proposed declarations into two categories: (1) declarations that Air Methods and plaintiffs did not enter into express or implied-in-fact contracts for air ambulance services, and (2) declarations that the ADA would preempt a court from imposing implied-in-law contracts or other similar quasi-contractual obligations onto plaintiffs and defendants.[1] The court found that both categories present

[1] The court also included a third group, comprised of the declarations Dyer lists in his complaint as "g" and "h." With respect to those declarations, the court found:

> These proposed declarations ask the court to declare whether certain remedies are appropriate. At this stage, it is only appropriate for the court to "declare the rights and [ ] legal relations" of the parties. 28 U.S.C. § 2201(a). It would be inappropriate at this time for the court to consider "further necessary or proper relief" that might be available to Dyer under § 2202 of the Declaratory Judgment Act. Id. at § 2202. As such, the court construes Dyer's final two proposed declarations as prayers for further relief and declines to consider their dismissal here.

ECF No. 34 at 23 n.9.

cognizable declarations for the court's consideration and resolved to exercise its discretion to so consider them under the Declaratory Judgment Act, 28 U.S.C. § 2201.

On April 1, 2021, defendants filed a motion to strike the complaint's class allegations. ECF No. 42. On April 15, 2021, Dyer responded, ECF No. 45, and on April 22, 2021, defendants replied, ECF No. 48. The court held a hearing on the matter on May 4, 2021. As such, the motion is now ripe for review.

II. STANDARD

Fed. R. Civ. P. 23(d)(1)(D) provides, "In conducting an action under this rule, the court may issue orders that . . . require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly[.]" Courts in this circuit have found that Rule 23(d)(1)(D) authorizes a district court to dismiss or strike class allegations "where the pleading makes clear that the purported class cannot be certified and no amount of discovery would change that determination." Waters v. Electrolux Home Prod., Inc., 2016 WL 3926431, at *4 (N.D. W. Va. July 18, 2016).[2] A motion to strike class allegations asserts that "certification is precluded as a matter of law" and "thus requires that the [c]ourt apply the standard applicable to a motion to dismiss under Rule 12(b)(6)." Bryant v. Food Lion, Inc., 774 F.

[2] Many courts find authority to strike class allegations in Fed. R. Civ. P. 12(f), which provides that "the court may strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." See, e.g., Cty. of Dorchester, S.C. v. AT & T Corp., 407 F. Supp. 3d 561, 565 (D.S.C. 2019). The Fourth Circuit has implied that a court's authority to strike class allegations is grounded in Rule 23(d)(1)(D), not Rule 12(f). Scott v. Fam. Dollar Stores, Inc., 733 F.3d 105, 111 n.2 (4th Cir. 2013) (noting that an order striking class allegations "is the functional equivalent of denying a motion to certify the case as a class action"). From wherever the authority derives, it seems clear that the court possesses such authority, and courts universally apply the same standard to resolve motions to strike class allegations, meaning that the dispute is mostly academic and has no practical effect on the court's resolution of defendants' motion.

Supp. 1484, 1495 (D.S.C. 1991). As this court has explained, a motion to strike class allegations presents an "unusual" request because it requires a court to resolve the question of certification on the face of the complaint alone, without the benefit of any class discovery. Id.

> As a general matter, a ruling on class certification should normally be based on "more information than the complaint itself affords," Doctor v. Seaboard Coast Lines R.R. Co., 540 F.2d 699, 707 (4th Cir. 1976), and it should be made only "after 'a rigorous analysis' of the particular facts of the case[,]" In re A.H. Robins Co., 880 F.2d 709, 728 (4th Cir. [1989]), cert. denied sub nom. Anderson v. Aetna Casualty & Surety Co., 493 U.S. 959 [] (1989).

Id. at 1495–1496.

Because "it is essential that a plaintiff be afforded a full opportunity to develop a record containing all the facts pertaining to the suggested class and its representatives," the Fourth Circuit has noted that "[i]t is seldom, if ever, possible to resolve class representation questions from the pleadings." Int'l Woodworkers of Am., AFL-CIO, CLC v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1268 (4th Cir. 1981). Accordingly, a defendant requesting that the court strike class allegations shoulders a "heavy burden." Bryant, 774 F. Supp. at 1495; Mungo v. CUNA Mut. Ins. Soc., 2012 WL 3704924, at *4 (D.S.C. Aug. 24, 2012). "To prevail, the defendants have the burden of demonstrating from the face of [the] complaint that it will be impossible to certify the class[] alleged by the plaintiff[] regardless of the facts the plaintiff[] may be able to prove." Id. Put another way, striking class allegations prior to class discovery is inappropriate where "Rule 23 could be met[.]" Banks v. Wet Dog, Inc., 2014 WL 4271153, at *4 (D. Md. Aug. 28, 2014)).

III. DISCUSSION

Defendants' motion asks the court to strike Dyer's class allegations under Fed. R. Civ. P. 23(d)(1)(D), arguing that "[b]ased on the allegations in the Complaint, even if true, Dyer's requested declarations cannot be made on a class-wide basis[.]" ECF No. 42-1 at 2. Class certification is governed by Rule 23, under which a proposed class must both satisfy the prerequisites for certification outlined in Rule 23(a) and constitute one of the permissible "types of class actions" under Rule 23(b). Defendants contend that it would be impossible for Dyer's proposed class to satisfy either Rule 23(a) or Rule 23(b), meaning that the court should strike the class allegations. The court discusses the plausibility of Dyer's proposed class under Rule 23(a) and then turns to Rule 23(b). Because certification is conceivable on both fronts, the court must deny the motion.

A. Rule 23(a)

Rule 23(a) provides that one or more members of a class may sue as representative parties on behalf of all if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P 23(a). "The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011) (internal quotation marks omitted). Were a motion for class certification before the court, Dyer would bear the burden of demonstrating the class's compliance with Rule 23(a). To reiterate, that is not the case on a motion to strike class allegations,

which preemptively asserts that the proposed class cannot be certified—ever—as a matter of law. Because the Rule 23(a) inquiry is before the court on their motion to strike class allegations, defendants bear the heavy burden to demonstrate that "it will be impossible" for Dyer's proposed class to satisfy Rule 23(a). Bryant, 774 F. Supp. at 1495. Defendants fall short on that burden.

The crux of the court's inquiry—as it was for the Supreme Court in Dukes—is commonality. 564 U.S. at 349. To review, plaintiffs have proposed the following class: "All persons billed by Defendants, or who paid a bill from Defendants, for air medical transport that Defendants carried out from a location in South Carolina." Compl. ¶ 38. On behalf of this class, Dyer seeks a declaration that, to put it simply, no contracts exist between defendants and the proposed class members for the emergency transportation services rendered. Defendants contend that the proposed class's claims are hopelessly dissimilar based on a few of theories. To begin, defendants argue that Dyer cannot be an adequate representative of the class for two reasons. First, "Dyer's class purports to include both (a) patients, like Dyer, who did not sign any written agreements prior to the transport, and (b) patients who, unlike Dyer, signed written agreements before or after transport." ECF No. 42-1 at 4. Dyer cannot be an adequate representative, defendants conclude, because he falls within group "a" and some unknown number of class members fall into group "b." The court disagrees.

The complaint gives no indication that the proposed class members' claims are dissimilar from Dyer's. In fact, it clearly alleges the opposite: "[Proposed class members] are patients, the parents of minors transported, and representatives of the estates of deceased patients, transported by Defendants in emergent situations where

there was no contractual relationship and no agreement with respect to the transport." Compl. ¶ 1. Defendants point to a sole allegation in the complaint, arguing that it renders the proposed class's claims dissimilar as a matter of law. That allegations states: "Defendants employ a standard form documents [sic] including Assignment of Benefits, and Authorization and Consent forms. These forms are executed irrespective of whether the transported patients are capable of signing." Compl. ¶ 22. It does not follow from this allegation, as defendants contend, that a significant number of class members signed enforceable contracts prior to their transport and Dyer did not. Instead, the allegation merely notes that defendants executed paperwork related to the transport of each individual. Therefore, this allegation certainly does not give the court grounds to find that a significant portion of the class signed valid and enforceable writings, rendering their claims impermissibly distinct from Dyer's.

Without the benefit of an evidentiary record, the court cannot discern how many, if any at all, of the proposed class members signed "Authorization and Consent" forms, nor can it assess the substance of such documents to determine their relevance to Dyer's claims. Discovery may reveal that a significant portion of the proposed class members in fact signed valid, enforceable, and legally consequential contracts prior to their transport, meaning that Dyer, who did not sign a contract, would be an inadequate representative. Of course, discovery may well reveal exactly the opposite—that no proposed class member signed a contract of any kind, making Dyer's claim unquestionably common and his representation clearly adequate. In this way, defendants' argument exposes precisely why a limited discovery period prior to certification is so commonly necessary. The court cannot properly assess the validity of the proposed class under Rule 23(a) without

it. Standing alone, the allegations of the complaint in no way render a showing of Dyer's adequacy as a representative an impossibility. Therefore, he is entitled to discovery on the question before the court considers certification.

Second, defendants argue that Dyer will not be able to show his adequacy as a class representative because "the proposed class also would include commercial and government payors," and "Dyer cannot fairly and adequately represent all class members because he is likely to have conflicts of interest with the putative class members who are commercial or government payors." ECF No. 42-1 at 4. Unfortunately, defendants' argument ends there, without giving the court any explanation as to how different categories of payors possess incompatible interests or how those supposedly incompatible interests render Dyer an inadequate representative. Dyer's claim is that no enforceable contracts exist between the proposed class members and Air Methods, meaning that the class members have no obligation to pay Air Methods. It seems common sense that any payor—regardless of category—would have an interest in no longer being obligated to pay. Defendants fail to demonstrate otherwise. Based on the allegations of the complaint, there is certainly a possibility that Dyer will satisfy Rule 23(a)'s adequacy requirement. Accordingly, neither of defendants' arguments give the court a reason to strike the class allegations.

Alternatively, defendants argue that the proposed class cannot pass muster under Rule 23(a) because its members' claims are not sufficiently common or typical. Commonality and typicality are closely related and often overlapping requirements. Under the former, the class must be united by a "common contention" that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve

an issue that is central to the validity of each one of the claims in one stroke." Dukes, 564 U.S. at 350. Similarly, "[t]he premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 340 (4th Cir. 1998) (quoting Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998)).

Defendants contend that the individualized circumstances of each patient's transport render their claims too dissimilar and atypical for class certification. Defendants illustrate these differences by listing a series of questions which, they posit, are material to the proposed class's claims and require individualized treatment. See ECF No. 42-1 at 5–6. For example, defendants note that resolving the class's claims will require the court to determine whether the patient was conscious prior to transport, whether the patient manifested assent to the transport through conduct and/or statements, whether the patient signed an Authorization and Consent form, and whether a parent or guardian signed an Authorization and Consent form on behalf of the patient. To be sure, if the proposed class's claims required the court to answer these questions with respect to each and every member, there would be no commonality. But once again, the complaint gives the court no grounds to conclude that commonality is lacking. It states:

> For individuals like Plaintiff, first responders or medical personnel determine whether a patient needs emergency helicopter transport, contact the Defendants and arrange for the emergency transportation. The need for emergency transportation is acute in every instance. The transported patient does not engage in any negotiation with Defendants, and the transportation is not a voluntary undertaking, but rather under the duress of life-threatening or other serious medical conditions requiring immediate treatment at a hospital. Given the dire circumstances, express or informed consent or negotiation of essential terms does not occur. The patients are frequently unconscious, and in all instances incapable of giving meaningful express or informed consent, or otherwise voluntarily assenting to the transportation by the Defendants.

Compl. ¶ 2 (emphasis added). In other words, the complaint alleges that each proposed class member, whether because of unconsciousness or extreme injury, was incapable of manifesting voluntary assent to the transport. Again, without the benefit of discovery, the court cannot determine the extent to which resolving the proposed class's claims will involve individualized inquiries. Discovery may reveal that the proposed class members suffered from injuries of varying seriousness and that many who were conscious outwardly manifested assent to the transport. However, discovery again could reveal the opposite—that the vast majority of proposed class members were unconscious or critically injured and without the capacity to consent. The complaint, on which the court must rely for the purposes of this motion, indicates that the proposed class members were "in all instances incapable of giving meaningful . . . consent." Id. Taking that allegation as true, as it must, the court has no problem concluding that the proposed class could possibly share a "common contention" "capable of classwide resolution[.]" Dukes, 564 U.S. at 350.

Defendants list a number of other potentially individualized circumstances underlying the claims of the proposed class but fail to explain how those circumstances are material to the class's claims. For example, defendants note that the court will have to determine whether each proposed class member made any payments to Air Methods, who the various insurance carriers are, and whether any proposed class members negotiated his or her bill after receiving it. But defendants do not explain how these questions have any bearing on the proposed declarations, and, as far as the court can tell, none do. As discussed above, the critical issue the court must resolve is whether the proposed class members entered into contracts with defendants prior to their transport.

Defendants have failed to explain why any of the events that took place after the patients' transport would have a bearing on whether the patients and Air Methods entered into enforceable contracts, and the court can think of no satisfactory explanation.[3]

Therefore, taking the allegations of the complaint as true, there is a clear possibility, at the very least, that the proposed class will satisfy the commonality and typicality requirements of Rule 23(a). Certainly, the proposed class's ability to satisfy Rule 23(a) is far from impossible. Accordingly, the law does not permit the court to divest Dyer of his "essential" right to "be afforded a full opportunity to develop a record containing all the facts pertaining to the suggested class and its representatives." Int'l Woodworkers, 659 F.2d at 1268. Thus, the court rejects defendants' argument.

B. Rule 23(b)

Defendants also contend that Dyer's proposed class is destined to fail under Rule 23(b). For a proposed class to be certified, it must fit comfortably within one of the permissible "types of class actions" under Rule 23(b), of which there are three. Because he has not moved to certify, Dyer has not indicated which type of class action he seeks to certify. Rule 23(b)(1) authorizes a class action where:

> prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

[3] To the extent that an Air Methods' patient's post-transport conduct is relevant to the issue of damages, the law is clear that "the potential need for some individualized damages determinations" does not destroy the Rule 23(a) requirements of commonality or typicality. DeGidio v. Crazy Horse Saloon & Rest., Inc., 2017 WL 5624310, at *12 (D.S.C. Jan. 26, 2017). "In fact, Rule 23 explicitly envisions class actions with such individualized damage determinations." Gunnells v. Healthplan Servs., 348 F.3d 417, 423 (4th Cir. 2003).

> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests[.]

Fed. R. Civ. P. 23(b)(1). Rule 23(b)(2) authorizes class certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). Finally, Rule 23(b)(3) permits certification where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Again, defendants' argument reveals the prematurity of their request. As the court explained above, the complaint clearly alleges facts common to the proposed class that "predominate over any questions affecting only individual members." Id. Defendants, nevertheless, argue that individualized circumstances—like the patients' conduct prior to transport or their signing of consent forms—predominate over the proposed class's common claims. But again, without any evidence to consider, the court cannot probe beyond the complaint to assess the alleged individuality of the underlying circumstances. Class discovery serves that very purpose. After the parties undergo discovery, the court can ascertain the nature of the underlying circumstances and the extent to which they differ to determine whether the proposed class fits within one of Rule 23(b)'s authorized classes. Without more, the court cannot say the proposed class

will not fit within Rule 23(b) as a matter of law. Therefore, the court has no grounds to strike the class allegations.

In asserting their arguments, defendant rely heavily on Scarlett v. Air Methods Corp., 2020 WL 2306853, at *1 (D. Colo. May 8, 2020). The court has discussed Scarlett at length before in its resolution of the defendants' motion to dismiss. See ECF No. 34. By way of review, Scarlett is a consolidation of several individually filed class actions against Air Methods, initiated by Air Methods patients-cum-debtors and premised upon the same—or in some cases similar—legal theories upon which Dyer proceeds here. Air Methods recently filed a motion to strike class allegations in Scarlett, and the Colorado District Court there granted the motion in part. Specifically, the court denied the motion with respect to the plaintiffs' allegations that the parties did not form express contracts but granted the motion "with respect to whether or not an implied-in-fact contract was formed." Id. at *12. The court granted the Air Methods' motion with respect to the implied-in-fact contract issue for two reasons, the first of which does not apply here and the second of which the court finds unconvincing.

First, the district court noted that determining whether an implied-in-fact contract exists with respect to each class member will require the application of distinct bodies of law. The proposed class in Scarlett contains members from various different states, who experienced injuries in different states, and who were transported by Air Methods within different states. Because the determination of whether a contract exists calls for the application of state law, the court found that "merely determining which law will apply to a given class member illustrates the difficulty of class-wide resolution." Id. at * 11. In other words, the individualized circumstances within the proposed class in Scarlett would

require the court to apply often-competing laws of various states. This, the court found, "preclude[d] effective class resolution." Id. Those clear individualized circumstances—apparent from the face of the complaints in Scarlett—do not exist here. Dyer brings his claims on behalf of a state-wide class, meaning that resolution of the implied-in-fact contract issue will require the exclusive use of South Carolina substantive law.

Second, the court in Scarlett found that the proposed claim members' claims were "factually distinct in important ways as well." Id. The court explained that some facts "vary widely from member to member." Id. For example, "Some patients were conscious when defendants arrived, some were not. Some were with family members who spoke with defendants, some were not. Some patients, family members, or patients' employees signed forms prior to transport, some did not." Id. (internal citations omitted). To be sure, defendants argue that precisely the same factual distinctions preclude class certification here. Nevertheless, this court reaches a different conclusion than the court in Scarlett. For one, the court does not share the Colorado District Court's confidence that "[a]ll these factual issues will require individualized resolution to determine whether contracts existed in each case between defendants and a particular class member." Id. As the court has expressed ad nauseum, it is without any evidence that might support such a conclusion. Further, the court cannot say for sure that no legal theory would resolve the claims of the proposed class in one fell swoop, irrespective of minor discrepancies within their circumstances. For example, the court may determine that the parties' failure to mention a price term prior to transportation belies any theory that a contract existed. Rose Elec., Inc. v. Cooler Erectors of Atlanta, Inc., 794 S.E.2d 382, 385

(S.C. Ct. App. 2016) (In South Carolina, "[c]ertain terms, such as price, . . . are considered indispensable and must be set out with reasonable certainty.").

More fundamentally, Fourth Circuit law leaves no room for Scarlett's result. Based on the allegations of the complaint and without the benefit of discovery, the court cannot conclude that "it will be impossible to certify the class[] alleged by the plaintiff[] regardless of the facts the plaintiff[] may be able to prove." Bryant, 774 F. Supp. at 1495. Dyer, through discovery, could easily prove facts that demonstrate his adequacy as a representative and the class's satisfaction of Rules 23(a) and 23(b). Because Dyer "could" make theses showings, the court must deny the motion to strike class allegations. Int'l Woodworkers, 659 F.2d at 1268 ("[I]t is essential that a plaintiff be afforded a full opportunity to develop a record containing all the facts pertaining to the suggested class and its representatives. It is seldom, if ever, possible to resolve class representation questions from the pleadings . . . .").

IV. CONCLUSION

For the foregoing reasons the court **DENIES** the motion.

AND IT IS SO ORDERED.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

May 7, 2021
Charleston, South Carolina

JS 44 (Rev. 10/20)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Mark Murphy

(b) County of Residence of First Listed Plaintiff Sullivan, NH
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

Stephen Soule, Paul Frank + Collins, PC, PO Box 1307, Burlington, Vermont 05402-1307 and Edward White,

DEFENDANTS

Air Methods Corporation and Rocky Mountain Holdings,

County of Residence of First Listed Defendant Arapahoe, CO
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☒ 2	☒ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☒ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
28 U.S.C. §2201

Brief description of cause:
Class action for Declaratory Judgment regarding charges for air transportation of patients by air carrier.

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

**DEMAND $** >$,000,000

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE May 28, 2021

SIGNATURE OF ATTORNEY OF RECORD /s/ Stephen Soule BBO 659428

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. **Title of case (name of first party on each side only)** Mark Murphy v. Air Methods Corporation

2. **Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).**

☐ **I.** **160, 400, 410, 441, 535, 830*, 835*, 850, 880, 891, 893, R.23, REGARDLESS OF NATURE OF SUIT.**

☑ **II.** **110, 130, 190, 196, 370, 375, 376, 440, 442, 443, 445, 446, 448, 470, 751, 820*, 840*, 895, 896, 899.**

☐ **III.** **120, 140, 150, 151, 152, 153, 195, 210, 220, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 367, 368, 371, 380, 385, 422, 423, 430, 450, 460, 462, 463, 465, 480, 485, 490, 510, 530, 540, 550, 555, 560, 625, 690, 710, 720, 740, 790, 791, 861-865, 870, 871, 890, 950.**

***Also complete AO 120 or AO 121. for patent, trademark or copyright cases.**

3. **Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.**

4. **Has a prior action between the same parties and based on the same claim ever been filed in this court?**

YES ☐ **NO** ☑

5. **Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)**

YES ☐ **NO** ☑

If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?

YES ☐ **NO** ☐

6. **Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?**

YES ☐ **NO** ☑

7. **Do all of the parties in this action, excluding governmental agencies of the United States and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).**

YES ☐ **NO** ☑

A. **If yes, in which division do all of the non-governmental parties reside?**

Eastern Division ☐ **Central Division** ☐ **Western Division** ☐

B. **If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?**

Eastern Division ☐ **Central Division** ☐ **Western Division** ☐

8. **If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)**

YES ☐ **NO** ☐

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Stephen Soule (BBO 659428)

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TELEPHONE NO. 802.658.2311