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10 **SUPERIOR COURT OF ARIZONA**

11 **COUNTY OF MARICOPA**

12 DEBORAH WIGAND, an individual;
EDMUND RODDY, an individual;
13 WILLIAM BRADLEY, an individual;
ELIZABETH FUSS, an individual; RUBY
14 TORRES, an individual, on behalf of
themselves and all others similarly situated,

15 Plaintiffs,

16 v.

17 SCOTTSDALE HEALTHCARE
18 HOSPITALS, an Arizona corporation;
DIGNITY HEALTH, a California corporation;
19 BANNER HEALTH, an Arizona corporation,

20 Defendants.

Case No. CV2016-017027

**FIRST AMENDED
CLASS ACTION COMPLAINT**

**(Declaratory Judgment)
(Breach of Contract)
(Class Action Claims)**

(Assigned to the Honorable Karen Mullins)

21 Plaintiffs Deborah Wigand, Edmund Roddy, William Bradley, Elizabeth Fuss, and Ruby
22 Torres, by and through their counsel, allege as follows:

23 **I. NATURE OF THE ACTION**

24 1. This matter concerns unlawful “balance billing” by Defendants Scottsdale
25 Healthcare Hospitals (“SHC”), Dignity Health (“Dignity”) and Banner Health Network
26 (“Banner”) of a class of plan participants enrolled in health plans provided pursuant to the Federal

1 Employee Health Benefit Act (“FEHBA”), 5 U.S.C. § 8901, *et seq.*, in violation of federal law
2 and the express terms of the applicable health plan contracts.

3 2. “Balance billing” generally refers to an amount billed by a healthcare provider
4 representing the difference between the amount the healthcare provider charges for a service and
5 the sum of the amount the patient’s health insurer (here, the FEHBA plan) will pay for the service
6 plus any allowable cost-sharing by the patient, *e.g.*, copays, deductibles and/or coinsurance.

7 **A. The Federal Employee Health Benefits Act**

8 3. FEHBA is a 66-year old federal health insurance program providing health and
9 welfare benefits to federal employees. *See* 5 U.S.C. § 8901, *et seq.* The Office of Personnel
10 Management (“OPM”), an independent agency of the United States government responsible for
11 managing civil service employees, administers the Federal Employee Health Benefits Program
12 (“FEHB”).

13 4. The FEHB currently insures over 8 million Federal employees, retirees, former
14 employees, family members, and former spouses. *See* [https://www.opm.gov/healthcare-](https://www.opm.gov/healthcare-insurance/healthcare/reference-materials/fehb-handbook)
15 [insurance/healthcare/reference-materials/fehb-handbook](https://www.opm.gov/healthcare/reference-materials/fehb-handbook). FEHB currently offers over 200 health
16 plan choices, generally grouped into either fee-for-service plans or Health Maintenance
17 Organization (“HMO”) plans.

18 5. Private health insurance companies, after being approved as a “qualified carrier”
19 and entering into Standard Contracts with OPM, create FEHBA plans to provide health and
20 welfare benefits to plan participants. OPM, in turn, pays “subscription charges” to the private
21 health insurance companies.

22 6. OPM, however, remains responsible for preparing and distributing the “benefits
23 brochure which details benefits, limitations, and premium rates for all participating plans.” *See*
24 48 CFR 1603.7001(a). In addition, the “officially approved plan brochure is the sole contractual
25 statement of benefits, limitations and exclusions.” *See* 48 CFR 1603.7002(c).

26 7. As a condition of participation, FEHBA plans must “compl[y] with the terms of the

1 FEHB contract, regulations and statutes.” *See* 48 CFR 1609.7001(b)(3).

2 8. In addition, the terms of any FEHB Standard Contract, and benefits brochure—
3 included as part of the FEHB Standard Contract—“which relate to the nature, provision or extent
4 of coverage (*including payments with respect to benefits*) shall supersede and preempt any State
5 or local law, or any regulation issued thereunder, which relates to health insurance or plans.” 5
6 U.S.C. § 8902(m)(1) (emphasis added).

7 **B. FEHBA Standard Contract and Officially Approved Brochure**

8 9. In 2008, BCBS entered into a “Standard Contract for Fee-For-Service Carriers” with
9 OPM to provide health and welfare benefits to Federal employees pursuant to FEHBA. *See* 2008
10 Contract No. CS1039, attached hereto as Exhibit A. Thereafter, BCBS executed annual
11 amendments to Contract No. CS1039 extending the carrier’s contract as a participating plan. *See*
12 2012 Standard Contract Amendment for Fee-For-Service Carriers, attached hereto as Exhibit B;
13 2014 Standard Contract Amendment for Fee-For-Service Carriers, attached hereto as Exhibit C;
14 2015 Standard Contract Amendment for Fee-For-Service Carriers, attached hereto as Exhibit D;
15 2016 Standard Contract Amendment for Fee-For-Service Carriers, attached hereto as Exhibit E.

16 10. Contract No. CS1039 specifically incorporates Chapters 1 and 16 of title 48, Code
17 of Federal Regulations, including but not limited to 48 CFR 1603.7001, 48 CFR 1603.7002, and
18 48 CFR 1609.7001. *See* Exhibit A at Section 1.4, Bates Labeled 2008_CS1039_00009.

19 11. Contract No. CS1039 incorporates the approved Benefit Brochure as part of the
20 contract at Appendix A. *See* Exhibit A at Appendix A, Bates Labeled 2008_CS1039_00099; *see*
21 *also* Exhibit A at Section 2.5, Bates Labeled 2008_CS1039_00031; *see also* Exhibit B at
22 Appendix A, Bates Labeled 2012_CS1039_Amendment_00035; Exhibit C at Appendix A, Bates
23 Labeled 2014_CS1039_Amendment_00023; *see also* Exhibit D at Appendix A, Bates Labeled
24 2015_CS1039_Amendment_00038; *see also* Exhibit E at Appendix A, Bates Labeled
25 2016_CS1039_Amendment_00037.

26 12. Plaintiff Deborah Wigand was enrolled in the Blue Cross and Blue Shield Service

1 Benefit Plan in 2014. The terms of the BCBS Service Benefit Plan, including the statement of
2 benefits, limitations and exclusions, are outlined in the 2014 BCBS Service Benefit Plan Brochure
3 (“2014 BCBS Brochure”), attached hereto as Exhibit F. Section 1 of the 2014 BCBS Brochure
4 provides:

5 **PPO Providers.** PPO (Preferred) providers have agreed to accept a
6 specific negotiated amount as payment in full for covered services
7 provided to you.

8 **Participating Providers.** Some Local Plans also contract with other
9 providers that are not in our Preferred network. . . . They have agreed
10 to accept a different negotiated amount than our Preferred Providers
11 as payment in full. . . . They have agreed not to bill you for more than
12 your applicable deductible, and coinsurance or copayments, for
13 covered services.

14 *See Exhibit F at Section 1, p. 13 Bates Labeled 2014_Brochure_00013 (emphasis in original).*

15 **Note:** In Local Plan areas, Preferred providers and Participating
16 providers who contract with us will accept 100% of the Plan
17 allowance as payment in full for covered services.

18 *See Exhibit F at Section 1, p.14 Bates Labeled 2014_Brochure_00014 (emphasis in original).*

19 Similarly, Section 4 of the 2014 BCBS Brochure provides:

20 Providers that have agreements with this Plan are Preferred or
21 Participating and will not bill you for any balances that are in excess
22 of our cost allowance for covered services.

23 *See Exhibit F at Section 4, p. 28 Bates Labeled 2014_Brochure_00028.*

24 13. Plaintiff Edmund Roddy was enrolled in the 2015 Blue Cross Blue Shield Service
25 Benefit Plan. The terms of the BCBS Service Benefit Plan, including the statement of benefits,
26 limitations and exclusions, are outlined in the 2015 BCBS Service Benefit Plan Brochure (“2015
BCBS Brochure”), attached hereto as Exhibit G. Section 1 of the 2015 BCBS Brochure provides:

PPO Providers. PPO (Preferred) providers have agreed to accept a
specific negotiated amount as payment in full for covered services
provided to you.

1 **Participating Providers.** Some Local Plans also contract with other
2 providers that are not in our Preferred network. . . . They have agreed
3 to accept a different negotiated amount than our Preferred Providers
4 as payment in full. . . . They have agreed not to bill you for more than
your applicable deductible, and coinsurance or copayments, for
covered services.

5 *See* Exhibit G at Section 1, p. 13 Bates Labeled 2015_Brochure_00013 (emphasis in original).

6 **Note:** In Local Plan areas, Preferred providers and Participating providers
7 who contract with us will accept 100% of the Plan allowance as payment
8 in full for covered services.

9 *See* Exhibit G at Section 1, p. 14 Bates Labeled 2015_Brochure_00014 (emphasis in original).

10 Similarly, Section 4 of the 2015 BCBS Brochure provides:

11 Providers that have agreements with this Plan are Preferred or
12 Participating and will not bill you for any balances that are in excess
of our cost allowance for covered services.

13 *See* Exhibit G at Section 4, p. 27 Bates Labeled 2015_Brochure_00027.

14 14. Plaintiff William Bradley was enrolled in the 2016 Blue Cross Blue Shield Service
15 Benefit Plan. The terms of the BCBS Service Benefit Plan, including the statement of benefits,
16 limitations and exclusions, are outlined in the 2016 BCBS Service Benefit Plan Brochure (“2016
17 BCBS Brochure”), attached hereto as Exhibit H. Section 1 of the 2016 BCBS Brochure provides:

18 **PPO Providers.** PPO (Preferred) providers have agreed to accept a
19 specific negotiated amount as payment in full for covered services
provided to you.

20 **Participating Providers.** Some Local Plans also contract with other
21 providers that are not in our Preferred network. . . . They have agreed
22 to accept a different negotiated amount than our Preferred Providers
23 as payment in full. . . . They have agreed not to bill you for more than
your applicable deductible, and coinsurance or copayments, for
covered services.

24 *See* Exhibit H at Section 1, p. 13 Bates Labeled 2016_Brochure_00013 (emphasis in original).

25 **Note:** In Local Plan areas, Preferred providers and Participating providers
26 who contract with us will accept 100% of the Plan allowance as payment
in full for covered services.

1 See Exhibit H at Section 1, p. 14 Bates Labeled 2016_Brochure_00014 (emphasis in original).

2 Similarly, Section 4 of the 2016 BCBS Brochure provides:

3 Providers that have agreements with this Plan are Preferred or
4 Participating and will not bill you for any balances that are in excess
5 of our cost allowance for covered services.

6 See Exhibit H at Section 4, p. 28 Bates Labeled 2016_Brochure_00028.

7 15. Plaintiff Elisabeth Fuss was enrolled in the 2012 Blue Cross Blue Shield Service
8 Benefit Plan. The terms of the BCBS Service Benefit Plan, including the statement of benefits,
9 limitations and exclusions, are outlined in the 2012 BCBS Service Benefit Plan Brochure (“2012
10 BCBS Brochure”), attached hereto as Exhibit I. Section 1 of the 2012 BCBS Brochure provides:

11 **PPO Providers.** PPO (Preferred) providers have agreed to accept a
12 specific negotiated amount as payment in full for covered services
13 provided to you.

14 **Participating Providers.** Some Local Plans also contract with other
15 providers that are not in our Preferred network. . . . They have agreed
16 to accept a different negotiated amount than our Preferred Providers
17 as payment in full. . . . They have agreed not to bill you for more than
18 your applicable deductible, and coinsurance or copayments, for
19 covered services.

20 See Exhibit I at Section 1, p. 7 Bates Labeled 2012_Brochure_00009 (emphasis in original).

21 *Note:* In Local Plan areas, Preferred providers and Participating providers
22 who contract with us will accept 100% of the Plan allowance as payment
23 in full for covered services.

24 See Exhibit I at Section 1, p. 8 Bates Labeled 2012_Brochure_00010 (emphasis in original).

25 Similarly, Section 4 of the 2012 BCBS Brochure provides:

26 Providers that have agreements with this Plan are Preferred or
Participating and will not bill you for any balances that are in excess
of our cost allowance for covered services.

See Exhibit I at Section 4, p. 21 Bates Labeled 2012_Brochure_00023.

16. Plaintiff Ruby Torres was enrolled in the 2015 Blue Cross Blue Shield Service
Benefit Plan. The terms of the BCBS Service Benefit Plan, including the statement of benefits,
limitations and exclusions, are outlined in the 2015 BCBS Service Benefit Plan Brochure (“2015

1 BCBS Brochure”), attached hereto as Exhibit G. Section 1 of the 2015 BCBS Brochure provides:

2 **PPO Providers.** PPO (Preferred) providers have agreed to accept a
3 specific negotiated amount as payment in full for covered services
4 provided to you.

4 **Participating Providers.** Some Local Plans also contract with other
5 providers that are not in our Preferred network. . . . They have agreed
6 to accept a different negotiated amount than our Preferred Providers
7 as payment in full. . . . They have agreed not to bill you for more than
8 your applicable deductible, and coinsurance or copayments, for
9 covered services.

8 *See Exhibit G at Section 1, p. 13 Bates Labeled 2015_Brochure_00013 (emphasis in original).*

9 **Note:** In Local Plan areas, Preferred providers and Participating providers
10 who contract with us will accept 100% of the Plan allowance as payment
11 in full for covered services.

12 *See Exhibit G at Section 1, p. 14 Bates Labeled 2015_Brochure_00014 (emphasis in original).*

13 Similarly, Section 4 of the 2015 BCBS Brochure provides:

14 Providers that have agreements with this Plan are Preferred or
15 Participating and will not bill you for any balances that are in excess
16 of our cost allowance for covered services.

16 17. *See Exhibit G at Section 4, p. 27 Bates Labeled 2015_Brochure_00027.*

17 **C. FEHBA Provider Contracts**

18 18. BCBS, as a participating plan, is required to “compl[y] with the terms of the FEHB
19 contract, regulations and statutes.” *See* 48 CFR 1609.7001(b)(3).

20 19. The 2012 BCBS Service Benefit Plan was subject to the 2008 Contract No. CS1039,
21 the 2012 CS1039 Amendment and the applicable approved brochure for 2012.

22 20. The 2012 BCBS Benefit Brochure, prepared and approved by OPM, required BCBS
23 to enter into provider contracts requiring Preferred and Participating providers to accept the plan’s
24 cost allowance as payment in full. *See Exhibit I at Section 1.*

25 21. Pursuant to 5 U.S.C. § 8902(m)(1), the terms of Contract No. CS1039, as well as
26 the 2012 BCBS Benefit Brochure, preempt any State or local law, and/or regulation permitting a

1 Preferred or Participating provider to ignore the payment in full restrictions of the 2012 BCBS
2 Benefit Brochure.

3 22. Upon information and belief, SHC entered into a Preferred or Participating provider
4 contract with the 2012 BCBS Service Benefit Plan.

5 23. Upon information and belief, the contract between SHC and the BCBS Service
6 Benefit Plan provided, in relevant part:

7 **Blue Cross Blue Shield-Current Managed Care Contract dated**
8 **8/10/2011**

9 9.11 Other Sources of Payment. Provider may be entitled to recover
10 the difference between primary and secondary payments and billed
11 charges from another source, not currently subject to [Coordination of
12 Benefits], such as liability insurance, pursuant to A.R.S. § 33-931, if
13 applicable, and not prohibited by the Subscriber's Benefit Plan or
14 other applicable law. Provider and Subscriber shall resolve any
15 billing or recovery from those other sources without intervention or
16 involvement of BCBSAZ.

17 24. The 2014 BCBS Service Benefit Plan was subject to the 2008 Contract No. CS1039,
18 the 2014 CS1039 Amendment and the applicable approved brochure for 2014.

19 25. The 2014 BCBS Benefit Brochure, prepared and approved by OPM, required BCBS
20 to enter into provider contracts requiring Preferred and Participating providers to accept the plan's
21 cost allowance as payment in full. *See* Exhibit F at Section 1.

22 26. Pursuant to 5 U.S.C. § 8902(m)(1), the terms of Contract No. CS1039, as well as
23 the 2014 BCBS Benefit Brochure, preempt any State or local law, and/or regulation permitting a
24 Preferred or Participating provider to ignore the payment in full restrictions of the 2014 BCBS
25 Benefit Brochure.

26 27. Upon information and belief, SHC entered into a Preferred or Participating provider
contract with the 2014 BCBS Service Benefit Plan.

28. Upon information and belief, the contract between SHC and the BCBS Service
Benefit Plan provided, in relevant part:

1 **Blue Cross Blue Shield-Current Managed Care Contract dated**
2 **8/10/2011**

3 9.11 Other Sources of Payment. Provider may be entitled to recover
4 the difference between primary and secondary payments and billed
5 charges from another source, not currently subject to [Coordination of
6 Benefits], such as liability insurance, pursuant to A.R.S. § 33-931, if
7 applicable, and not prohibited by the Subscriber's Benefit Plan or
8 other applicable law. Provider and Subscriber shall resolve any
9 billing or recovery from those other sources without intervention or
10 involvement of BCBSAZ.

11 29. The 2015 BCBS Service Benefit Plan was subject to the 2008 Contract No. CS1039,
12 the 2015 CS1039 Amendment and the applicable approved brochure for 2015.

13 30. The 2015 BCBS Benefit Brochure, prepared and approved by OPM, required BCBS
14 to enter into provider contracts requiring Preferred and Participating Providers to accept the plan's
15 cost allowance as payment in full. *See* Exhibit G at Section 1.

16 31. Pursuant to 5 U.S.C. § 8902(m)(1), the terms of Contract No. CS1039, as well as
17 the 2015 BCBS Benefit Brochure, preempt any State or local law, and/or regulation permitting a
18 Preferred or Participating provider to ignore the payment in full restrictions of the 2014 BCBS
19 Benefit Brochure.

20 32. Upon information and belief, SHC entered into a Preferred or Participating provider
21 contract with the 2015 BCBS Service Benefit Plan.

22 33. Upon information and belief, the contract between SHC and the BCBS Service
23 Benefit Plan provided, in relevant part:

24 **Blue Cross Blue Shield-Current Managed Care Contract dated**
25 **8/10/2011**

26 9.11 Other Sources of Payment. Provider may be entitled to recover
the difference between primary and secondary payments and billed
charges from another source, not currently subject to [Coordination of
Benefits], such as liability insurance, pursuant to A.R.S. § 33-931, if
applicable, and not prohibited by the Subscriber's Benefit Plan or
other applicable law. Provider and Subscriber shall resolve any

1 billing or recovery from those other sources without intervention or
2 involvement of BCBSAZ.

3 34. The 2016 BCBS Service Benefit Plan was subject to the 2008 Contract No. CS1039,
4 the 2016 CS1039 Amendment and the applicable approved brochure for 2016.

5 35. The 2016 BCBS Benefit Brochure, prepared and approved by OPM, required BCBS
6 to enter into provider contracts requiring Preferred and Participating providers to accept the plan's
7 cost allowance as payment in full. See Exhibit H at Section 1.

8 36. Pursuant to 5 U.S.C. § 8902(m)(1), the terms of Contract No. CS1039, as well as
9 the 2016 BCBS Benefit Brochure, preempt any State or local law, and/or regulation permitting a
10 Preferred or Participating provider to ignore the payment in full restrictions of the 2016 BCBS
11 Benefit Brochure.

12 37. Upon information and belief, SHC entered into a Preferred or Participating provider
13 contract with the 2016 BCBS Service Benefit Plan.

14 38. Upon information and belief, the contract between SHC and the BCBS Service
15 Benefit Plan provided, in relevant part:

16 **Blue Cross Blue Shield-Current Managed Care Contract dated**
17 **8/10/2011**

18 9.11 Other Sources of Payment. Provider may be entitled to recover
19 the difference between primary and secondary payments and billed
20 charges from another source, not currently subject to [Coordination of
21 Benefits], such as liability insurance, pursuant to A.R.S. § 33-931, if
22 applicable, and not prohibited by the Subscriber's Benefit Plan or
23 other applicable law. Provider and Subscriber shall resolve any
24 billing or recovery from those other sources without intervention or
25 involvement of BCBSAZ.

26 **D. Arizona Healthcare Provider Lien Statute**

39. Arizona has healthcare provider lien statutes at A.R.S. § 33-931 through -936.
These statutes are not in violation of federal law on their face, because they do not make any
statement or give any indication they can be used to bill a FEHBA plan participant more than Plan

1 Allowance approved by the FEHBA plan. They can, of course, be preempted by Federal law or
2 regulations. *See* 5 U.S.C. § 8902(m)(1). In addition, parties can voluntarily enter into agreements
3 waiving optional rights to balance bill under the healthcare provider lien statute.

4 40. In this case, the healthcare provider lien statute is preempted as applied to FEHBA
5 plan participants inasmuch as it purports to permit healthcare providers, including but not limited
6 to Defendants SHC, Dignity and Banner, to attempt collect more than the approved Plan
7 Allowance, which under the terms and conditions of FEHBA plans is required to be accepted as
8 payment in full. *See* 5 U.S.C. § 8901(m)(1) (preempting any State or local law relating to the
9 extent of coverage, including payment of benefits).

10 41. In addition, and notwithstanding Federal law and regulations, Defendants SHC,
11 Dignity and Banner entered into a Preferred or Participating provider contract expressly
12 prohibiting asserting healthcare provider liens in violation of the terms of a FEHBA plan
13 participant's Benefit Plan or applicable law.

14 **E. SHC's Unlawful Balance Billing**

15 42. Defendant SHC routinely engages in balance billing FEHBA plan participants in
16 violation of Federal law, the applicable Benefit Brochures, and the terms of the Preferred and/or
17 Participating provider contracts with FEHBA plans. *E.g., Scottsdale Healthcare Hospitals v.*
18 *Allstate Insurance Co.*, CV2016-004788, Maricopa County Superior Court.

19 43. Attached as Exhibit J is a letter sent by Defendant SHC (HonorHealth Scottsdale
20 Osborn Medical Center) to a FEHBA plan participant. Under Section 9.11 of its provider contract
21 with BCBS, as well as Section 1 of the 2014 BCBS Brochure, Defendant SHC is not entitled to
22 assert a balance bill against Plaintiff Deborah Wigand. In Exhibit J, however, Defendant SHC is
23 asserting a lien of \$94,505.28 against Plaintiff Wigand. Plaintiffs allege, upon information and
24 belief, that this is a routine practice for Defendant SHC.

25 44. Attached as Exhibit K is a letter sent by Defendant SHC (HonorHealth John C.
26 Lincoln Medical Center) to a FEHBA plan participant. Under Section 9.11 of its provider contract

1 with BCBS, as well as Section 1 of the 2015 BCBS Brochure, Defendant SHC is not entitled to
2 assert a balance bill against Plaintiff Roddy. In Exhibit K, however, Defendant SHC is asserting
3 a lien of \$40,280.89. Plaintiffs allege, upon information and belief, that this is a routine practice
4 for Defendant SHC.

5 **F. Dignity's Unlawful Balance Billing**

6 45. Attached as Exhibit L is a lien filed and recorded by Defendant Dignity (Chandler
7 Regional Medical Center) asserting a healthcare provider lien against any personal injury recovery
8 obtained by William Bradley. Under the terms of its provider contract with BCBS, as well as
9 Section 1 of the 2016 BCBS Brochure, Defendant Dignity is not entitled to assert a balance bill
10 against Plaintiff Bradley. In Exhibit L, however, Defendant Dignity is asserting a lien in the
11 amount of \$110,634.60. Plaintiffs allege, upon information and belief, that this is a routine
12 practice for Defendant Dignity.

13 46. Attached as Exhibit M is a lien filed and recorded by Defendant Dignity (Chandler
14 Regional Medical Center) asserting a healthcare provider lien against any personal injury recovery
15 obtained by William Bradley. Under the terms of its provider contract with BCBS, as well as
16 Section 1 of the 2016 BCBS Brochure, Defendant Dignity is not entitled to assert a balance bill
17 against Plaintiff Bradley. In Exhibit M, however, Defendant Dignity is asserting a lien in the
18 amount of \$3,322.72. Plaintiffs allege, upon information and belief, that this is a routine practice
19 for Defendant Dignity.¹

20
21 ¹ On January 12, 2017, Plaintiffs sought leave to amend to add Defendant Dignity as a party to
22 this class action, providing a copy of the motion to Defendant SHC's attorneys (who also represent
23 Dignity). As SHC had done after this lawsuit was initially filed, five days after the motion to
24 amend was filed and pending, Dignity voluntarily recorded lien releases for William Bradley. As
25 a result, Plaintiffs submit this complaint should relate back to the date the motion to amend was
26 filed. *See Scott v. McCluskey, et al.*, 972 N.E.2d 626 (Oh.App. 2012) (amended complaint is
deemed filed as of the date a motion to amend is filed seeking permission to file the amended
complaint); *see also* Plaintiffs' Response to Motion to Dismiss. This is especially necessary in
class action practice to prevent continuing abuses, such as those alleged herein. *E.g., Blankenship*
v. HEW, 587 F.2d 329, 333 (6th Cir. 1978); *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975); *U.S.*

1 **G. Banner’s Unlawful Balance Billing**

2 47. Attached as Exhibit N is a lien filed and recorded by Defendant Banner (Banner
3 Thunderbird Medical Center) asserting a healthcare provider lien against any personal injury
4 recovery obtained by Elisabeth Fuss. Under the terms of its provider contract with BCBS, as well
5 as Section 1 of the 2016 BCBS Brochure, Defendant Banner is not entitled to assert a balance bill
6 against Plaintiff Fuss. In Exhibit N, however, Defendant Banner is asserting a lien in the amount
7 of \$1,461.69. Plaintiffs allege, upon information and belief, that this is a routine practice for
8 Defendant Banner.

9 48. Attached as Exhibit O is a lien filed and recorded by Defendant Banner (Banner
10 Desert Medical Center) asserting a healthcare provider lien against any personal injury recovery
11 obtained by Ruby Torres. Under the terms of its provider contract with BCBS, as well as Section
12 1 of the BCBS Brochure, Defendant Banner is not entitled to assert a balance bill against Plaintiff
13 Torres. In Exhibit O, however, Defendant Banner is asserting a lien in the amount of \$4,091.34.
14 Plaintiffs allege, upon information and belief, that this is a routine practice for Defendant Banner.²

15 **II. THE PARTIES**

16 **A. Defendants**

17 49. Defendant SHC is an Arizona corporation with its primary place of business at 8125
18 North Hayden Road, Scottsdale, Arizona. It owns and operates HonorHealth John C. Lincoln
19

20 *Parole Comm’n v. Geraghty*, 445 U.S. 388, 404 (1980); *Wilkerson v. Bowen*, 828 F.2d 117, 121
21 (3rd Cir. 1987); *White v. Mathews*, 559 F.2d 852, 857 (2nd Cir. 1977); *Williams v. Schweiker*, 541
22 F.Supp. 1360, 1366 (E.D. Mo. 1982).

23 ² Like Defendant Dignity, thirteen days after Plaintiffs sought leave to amend to add Banner as a
24 party to this class action, Defendant Banner recorded a lien release for Elisabeth Fuss. Thereafter,
25 SHC withdrew its opposition to Plaintiffs’ motion for leave to amend and stipulated to allow
26 Plaintiffs to file the amended complaint and add an additional plaintiff (whose name had not been
disclosed). Plaintiff Ruby Torres is the additional plaintiff and, of course, no release has been
recorded in connection with her healthcare provider lien as of yet. Nonetheless, with respect to
Plaintiff Fuss, the complaint should relate back to the date Plaintiffs’ sought leave to amend.

1 Medical Center, HonorHealth Deer Valley Medical Center, HonorHealth Scottsdale Osborn
2 Medical Center, HonorHealth Scottsdale Shea Medical Center, and HonorHealth Scottsdale
3 Thompson Peak Medical Center.

4 50. Defendant Dignity is a California corporation with its primary place of business in
5 California. It owns and operates Chandler Regional Medical Center and Mercy Gilbert Medical
6 Center.

7 51. Defendant Banner Health is an Arizona corporation with its primary place of
8 business at 1441 North 12th Street, Phoenix, Arizona. It owns and operates Banner – University
9 Medical Center Phoenix, Banner Behavioral Health Hospital, Banner Estrella Medical Center,
10 Banner Thunderbird Medical Center, Banner Desert Medical Center, Cardon Children’s Medical
11 Center, Banner Boswell Medical Center, Banner MD Anderson Cancer Center, Banner Gateway
12 Medical Center, Banner Del E Webb Medical Center, Banner Baywood Medical Center, Banner
13 Heart Hospital, Banner Goldfield Medical Center, Banner Ironwood Medical Center, Banner Casa
14 Grande Medical Center, Banner Payson Medical Center, Diamond Children’s Medical Center,
15 Banner – University Medical Center Tucson, Banner – University Medical Center South, and Page
16 Hospital.

17 **B. Plaintiffs**

18 52. Plaintiff Deborah Wigand is an Arizona resident and, at all relevant times, was
19 enrolled in a FEHBA plan offered by BCBS. Defendant SHC (HonorHealth Scottsdale Osborn
20 Medical Center) is presently asserting a balance billing lien in the amount of \$94,505.28 against
21 her proceeds from a personal injury recovery in violation of federal law, the terms of the applicable
22 approved Benefit Brochure, and the terms of the Preferred and/or Participating provider agreement
23 with BCBS.

24 53. Plaintiff Edmund Roddy is an Arizona resident and, at all relevant times, was
25 enrolled in a FEHBA plan offered by BCBS. Defendant SHC (HonorHealth John C. Lincoln
26 Medical Center) is presently asserting a balance billing lien in the amount of \$40,280.89 against

1 his proceeds from a personal injury recovery in violation of federal law, the terms of the applicable
2 approved Benefit Brochure, and the terms of the Preferred and/or Participating provider agreement
3 with BCBS.

4 54. Plaintiff William Bradley is a U.S. Citizen residing in Barbados and, at all relevant
5 times, was enrolled in a FEHBA plan offered by BCBS. Defendant Dignity (Chandler Regional
6 Medical Center) is presently asserting two balance billing liens in the amount of \$110,634.60 and
7 \$3,322.72 against his proceeds from a personal injury recovery in violation of federal law, the
8 terms of the applicable approved Benefit Brochure, and the terms of the Preferred and/or
9 Participating provider agreement with BCBS.

10 55. Plaintiff Elisabeth Fuss is an Arizona resident and, at all relevant times, was enrolled
11 in a FEHBA plan offered by BCBS. Defendant Banner (Banner Thunderbird Medical Center) is
12 presently asserting a balance billing lien in the amount of \$1,461.69 against her proceeds from a
13 personal injury recovery in violation of federal law, the terms of the applicable approved Benefit
14 Brochure, and the terms of the Preferred and/or Participating provider agreement with BCBS.

15 56. Plaintiff Ruby Torres is an Arizona resident and, at all relevant times, was enrolled
16 in a FEHBA plan offered by BCBS. Defendant Banner (Banner Desert Medical Center) is
17 presently asserting a balance billing lien in the amount of \$4,091.34 against her proceeds from a
18 personal injury recovery in violation of federal law, the terms of the applicable approved Benefit
19 Brochure, and the terms of the Preferred and/or Participating provider agreement with BCBS.

20 **III. JURISDICTION AND VENUE**

21 57. Venue in this Court is proper pursuant to A.R.S. § 12-401.

22 58. This Court has personal jurisdiction over the parties.

23 59. This Court has subject matter jurisdiction under § 14(1) and § 14(3) of Article 6 of
24 the Arizona Constitution and A.R.S. § 12-123.

25 **IV. CLASS ALLEGATIONS**

26 60. Plaintiffs bring this action pursuant to Rule 23 of the Arizona Rules of Civil

1 Procedure (“ARCP”). All Plaintiffs bring this action on their own behalf and on behalf of all class
2 plaintiffs pursuant to Rule 23(a) and 23(b)(2), ARCP. The class consists of Individuals:

- 3 a. Who are or were enrolled in a FEHBA plan;
- 4 b. Who incurred charges for medical care or treatment at a Defendant healthcare
5 provider;
- 6 c. Where the healthcare provider billed the individual’s FEHBA plan for the
7 medical care or treatment;
- 8 d. Where the healthcare provider, or its agent, has asserted a lien or otherwise
9 recorded a lien pursuant to A.R.S. § 33-931, *et seq.*, against the individual’s proceeds recovered
10 from a third-party or their insurer related to the injury giving rise to the medical care or treatment
11 (in excess of any allowable cost-sharing) in violation of Federal law, the applicable approved
12 Benefit Brochure, and the Preferred and/or Participating provider contracts.

13 61. The requirements of Rules 23(a), 23(b)(2) and 23(b)(3), ARCP, are met as set forth
14 below.

15 **A. Numerosity**

16 62. Arizona published cases on numerosity are few and give little guidance. For that
17 reason, among others, Arizona courts look to Federal cases construing Rule 23 as illustrative. *See*
18 *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 98 n. 2, 50
19 P.3d 844 (App. 2002). Under federal law, more than forty class members satisfies the numerosity
20 requirement. 1 NEWBERG ON CLASS ACTIONS, § 3.05 at 3-25 (3rd Ed. 1992); MOORE’S FEDERAL
21 PRACTICE, § 23-22(3)(a) (Bender 3rd Ed. 1999); *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3rd
22 Cir. 2001; *Perez v. First American Title Ins.*, 2009 WL 2486003 at *2 (D.Ariz. 2009) (“Generally,
23 40 or more members will satisfy the numerosity requirement.”).

24 63. With regard to the standard of proof necessary to satisfy class numerosity
25 requirements, “[i]t is not necessary that the members of the class be so clearly identified that any
26 member can be presently ascertained. [cite omitted]. The court may draw a reasonable inference

1 of the size of the class from the facts before it.” *Sherman v. Griepentrog*, 775 F.Supp. 1383, 1389
2 (D.Nev. 1991).

3 64. Upon information and belief, Defendants SHC, Dignity and Banner routinely
4 engages in balance billing attempting to collect amounts in excess of the Plan Allowance after
5 billing a FEHBA plan, and the numerosity requirement is easily satisfied with respect to the Class.

6 **B. Commonality**

7 65. The commonality element “requires simply that there exist questions of law or fact
8 common to the class.” *Lennon v. First National Bank of Arizona*, 21 Ariz.App. 306, 309, 518
9 P.2d 1230 (1974). “The existence of shared legal issues with divergent factual predicates is
10 sufficient, as is a common core of salient facts coupled with disparate legal remedies within the
11 class.” *Parra v. Bashas’, Inc.*, 536 F.3d 975, 978 (9th Cir. 2008).

12 66. The legal and factual issues here are not just shared, they are virtually identical.
13 With regard to legal issues, Class members are individuals receiving treatment at an Arizona
14 hospital and Defendants are hospitals operating in Arizona. All events occurred in Arizona. One
15 state statute of limitations applies on each cause of action. Only Arizona affirmative defenses
16 apply. The only legal issue is whether Defendants SHC, Dignity and Banner are violating Federal
17 law, the applicable Benefit Brochure, and/or the Preferred and/or Participating provider contracts.
18 Likewise, the factual issues—with the exception of the amount claimed on the lien—are virtually
19 identical.

20 **C. Typicality**

21 67. There is little Arizona case law discussing specific criteria regarding typicality.
22 Federal law provides: “[U]nder the rule’s permissive standards, representative claims are ‘typical’
23 if they are reasonably coextensive with those of absent class members; they need not be
24 substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *Staton*
25 *v. Boeing*, 327 F.3d 938, 957 (9th Cir. 2003).

26 68. Class representatives are in a factual and legal posture identical to the Class

1 members. All have received medical care or treatment from an Arizona healthcare provider,
2 namely Defendant SHC, Dignity and/or Banner. All were enrolled in a FEHBA plan. In each
3 instance, Defendant SHC, Dignity, and/or Banner billed the FEHBA plan. In each instance,
4 Defendant SHC, Dignity, and/or Banner asserted and/or recorded a healthcare provider lien
5 pursuant to A.R.S. § 33-931, *et seq.*, in violation of Federal law, the applicable Benefit Brochure,
6 and/or the Preferred and/or Participating provider contracts.

7 **D. Adequacy**

8 69. Under Arizona law, Plaintiffs' attorneys must be qualified, experienced and
9 reasonably capable. Lead Plaintiffs must not collude with the defendants and must not have
10 interests that are obviously antagonistic to the interests of the class they seek to represent. *See*
11 *Lennon, supra*, at 309. The burden of proving inadequacy is on the defendant. *See Lewis v.*
12 *Curtis*, 671 F.2d 779, 788 (3rd Cir. 1982).

13 70. To determine whether obvious antagonism of interests exists, Federal courts look to
14 whether (1) a lead plaintiff is a spouse, family member or employee of counsel; (2) if any counsel
15 is a class member; (3) if there are unusual bonus fees for lead plaintiffs which could create a
16 conflict with class members; (4) whether lead plaintiffs will promptly move for certification. *See*
17 *Lyon v. State of Arizona*, 80 F.R.D. 665, 667-68 (D.Ariz. 1978).

18 71. Plaintiffs' counsel are not members of the Class and no lead plaintiff is a spouse,
19 family member or employee of counsel.

20 72. Lead Plaintiffs will promptly move for class certification.

21 73. No bonus fees or incentives have been promised to Lead Plaintiffs.

22 74. Plaintiffs' counsel are also qualified, experienced and reasonably capable, having
23 litigated successfully in this area of law, and having been lead counsel in similar certified class
24 actions.

25 **E. Rule 23(B)(2)**

26 75. Rule 23(b)(2) certification is appropriate if "the party opposing the class has acted

1 or refused to act on grounds generally applicable to the class, thereby making appropriate final
2 injunctive relief or corresponding declaratory relief with respect to the class as a whole.”
3 Ariz.R.Civ.P. 23(b)(2).

4 76. Federal law provides: “[I]n order to permit certification under this rule, the claim
5 for monetary damages must be secondary to the primary claim for injunctive relief or declaratory
6 relief.” *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003). A Rule 23(b)(2) claim is not limited
7 solely to declaratory and injunctive relief, but such relief must predominate. *See id.*

8 77. Defendants SHC, Dignity and Banner have acted on grounds with general
9 application to the class: they have asserted or filed healthcare provider liens against Class
10 members’ personal injury recoveries and/or claims after billing a FEHBA plan for the medical
11 care or treatment provided to the Class members. All of the healthcare provider liens are asserted
12 and/or filed in violation of Federal law, the applicable Benefit Brochure, and/or the Preferred
13 and/or Participating provider contracts.

14 78. The Class meets the requirements set forth in *Molski*, as the Class seeks
15 predominately declaratory and injunctive relief.

16 **F. Rule 23(B)(3)**

17 79. Rule 23(b)(3) certification is appropriate if “questions of law or fact common to the
18 members of the class predominate over any questions affecting only individual members, and . . .
19 a class action is superior to other available methods for the fair and efficient adjudication of the
20 controversy.” Ariz.R.Civ.P. 23(b)(3).

21 80. With respect to predomination, the Court should certify a Class even in cases where
22 there is a large factual variance between class members if “questions of law common to all class
23 members” lie at the heart of the case. *See Godbey v. Roosevelt School District*, 131 Ariz. 13, 17-
24 18, 638 P.2d 235 (App. 1981).

25 81. Common questions of law (*i.e.*, may Defendants SHC, Dignity and Banner assert
26 healthcare provider liens to collect amounts in excess of the Plan Allowance against FEHBA plan

1 participants after billing a FEHBA plan) lie at the heart of this matter and can be adjudicated with
2 respect to all class members.

3 82. With respect to superiority, Rule 23(b)(3) directs the Court to consider (1) the
4 desirability of concentrating claims in this forum; (2) difficulties of management; (3) current
5 claims by class members; (4) class members' interest in controlling their individual claims. *See*
6 *Ariz.R.Civ.P. 23(b)(3)*.

7 83. Arizona courts are the only desirable forum as all Class Members received medical
8 care or treatment in Arizona, and Defendants SHC, Dignity and Banner are Arizona healthcare
9 providers asserting rights pursuant to Arizona's healthcare provider lien statute.

10 84. The difficulty in managing the Class is minimal as all Defendants and Plaintiffs are
11 predominately located in one state, Arizona, the facts are remarkably uniform and the case turns
12 on a few issues of law.

13 85. With respect to the Class members' claims and individual interests in controlling
14 the claims, Arizona courts consider "whether there is so much pre-existing litigation that a class
15 [action] would be unproductive." *ESI, supra*, at 98. With the exception of one known case,
16 *Scottsdale Healthcare Hospitals v. Allstate Insurance Co.*, CV2016-004788, Maricopa County
17 Superior Court, there is no preexisting litigation. In addition, there is "no additional advantage in
18 individual members controlling the prosecution of separate action. There would be less litigation
19 or settlement leverage, significantly reduced resources and no greater prospect for recovery."
20 *Hanlon, supra*, at 1023.

21 **COUNT ONE**

22 **(Declaratory and Injunctive Relief)**

23 86. Plaintiffs reallege all previous allegations as though specifically set forth herein.

24 87. All members of the Class have legal rights, legal status and/or legal relationships
25 affected by a Federal law (as set forth above) and the construction of the applicable Preferred
26 and/or Participating provider contract with the FEHBA plan. *See* A.R.S. § 12-1832. The member

1 of the Class can seek injunctive and declaratory relief even if it is determined no breach of the
2 applicable Preferred and/or Participating provider contract occurred as to them. *See* A.R.S. § 12-
3 1833. The provisions of A.R.S. § 12-1841 do not apply because no municipal ordinance is at
4 issue and no claim of unconstitutionality is asserted.

5 88. Plaintiffs respectfully move the Court to hold asserting healthcare provider liens (in
6 excess of applicable cost-sharing) against FEHBA plan participants after billing the FEHBA plan
7 is a violation of federal law as set forth above, a breach of the applicable approved Benefit
8 Brochure, and a breach of the Preferred and/or Participating provider contract established in
9 compliance with Federal law and must be enjoined.

10 **COUNT TWO**
11 **(Breach of Contract)**

12 89. Plaintiffs reallege all previous allegations as though specifically set forth herein.

13 90. Applicable Preferred and/or Participating provider contracts, as well as the
14 applicable approved Benefit Brochure, explicitly prohibit Defendants SHC, Dignity and Banner
15 from “balance billing” or otherwise asserting healthcare provider liens against FEHBA plan
16 participants in amounts in excess of the Plan Allowance.

17 91. Plaintiffs have standing to sue as third party beneficiaries under the applicable
18 Preferred and/or Participating provider contracts, as well as the applicable approved Benefit
19 Brochure, if they can show a FEHBA plan and the Preferred and/or Participating provider
20 recognized the primary purpose of the balance billing prohibition was to confer a direct benefit
21 upon the Class of which Plaintiffs are members. *See Nahom v. Blue Cross*, 180 Ariz. 548, 885
22 P.2d 1113, 1117-18 (App. 1994).

23 92. The only purpose of the balance billing prohibition is to benefit the Class. The
24 FEHBA plan collects the same amount of money with or without balance billing as it is merely
25 paid a “subscription charge” for providing the health and welfare benefits to Federal employees.
26 The Preferred and/or Participating providers do not benefit from the balance billing prohibition;

1 they collect less money. The contracting parties clearly recognized the prohibition was intended
2 to confer a substantial benefit on the Class.

3 93. Defendant SHC entered into valid and binding contracts.

4 94. Defendant SHC breached the Preferred and/or Participating provider contracts, as
5 well as federal law, by asserting unlawful balance billing liens pursuant to the healthcare provider
6 lien statute.

7 95. As a direct and proximate result of the breach, Plaintiffs have suffered damages,
8 including but not limited to access to settlement proceeds rightfully belonging to the Class
9 members, but required to be withheld due to assertion of the unlawful healthcare provider lien
10 asserted by Defendant SHC.

11 96. Defendant Dignity entered into valid and binding contracts.

12 97. Defendant Dignity breached the Preferred and/or Participating provider contracts,
13 as well as federal law, by asserting unlawful balance billing liens pursuant to the healthcare
14 provider lien statute.

15 98. As a direct and proximate result of the breach, Plaintiffs have suffered damages,
16 including but not limited to access to settlement proceeds rightfully belonging to the Class
17 members, but required to be withheld due to assertion of the unlawful healthcare provider lien
18 asserted by Defendant Dignity.

19 99. Defendant Banner entered into valid and binding contracts.

20 100. Defendant Banner breached the Preferred and/or Participating provider contracts, as
21 well as federal law, by asserting unlawful balance billing liens pursuant to the healthcare provider
22 lien statute.

23 101. As a direct and proximate result of the breach, Plaintiffs have suffered damages,
24 including but not limited to access to settlement proceeds rightfully belonging to the Class
25 members, but required to be withheld due to assertion of the unlawful healthcare provider lien
26 asserted by Defendant Banner.

1 **PRAYER FOR RELIEF**

2 **WHEREFORE**, Plaintiffs on behalf of themselves and the Class pray for judgment against
3 Defendants as follows:

- 4 A. Certify this case as a class action, pursuant to Rules 23(a), 23(b)(2) and 23(b)(3) of
5 the Arizona Rules of Civil Procedure;
- 6 B. For breach of contract;
- 7 C. Award pre- and post-judgment interest;
- 8 D. Declare, pursuant to A.R.S. § 12-1838, the healthcare provider lien statute, A.R.S.
9 § 33-931, *et seq.*, as applied to FEHBA plan participants is preempted by 5 U.S.C.
10 § 8902(m)(1) and the terms of the applicable FEHBA plans;
- 11 E. Declare, pursuant to A.R.S. § 12-1838, healthcare provider liens filed or recorded
12 by Defendants pursuant to A.R.S. § 33-931, *et seq.*, or claims otherwise asserted by
13 Defendants against proceeds belonging to or recovered by FEHBA plan participants
14 are void and/or unenforceable pursuant to applicable provider contracts and/or
15 federal law, regulations, and/or administrative guidelines;
- 16 F. Enjoin Defendants, pursuant to A.R.S. § 12-1838, from further filing, recording,
17 enforcing, charging, collecting or attempting to collect healthcare provider liens
18 pursuant to A.R.S. § 33-931, *et seq.*, or otherwise asserting claims against proceeds
19 belonging to or recovered by FEHBA plan participants in violation of applicable
20 provider contracts and/or federal law, regulations, and/or administrative guidelines;
- 21 G. Order Defendants, pursuant to A.R.S. § 12-1838, to release any healthcare provider
22 liens filed or recorded pursuant to A.R.S. § 33-931, *et seq.*, or claims otherwise
23 asserted against proceeds belonging to or recovered by FEHBA plan participants in
24 violation of applicable provider contracts and/or federal law, regulations and/or
25 administrative guidelines;
- 26 H. Award costs and attorneys' fees pursuant to, among other things, A.R.S. § 12-

1 341.01, A.R.S. § 33-934, and the private attorney general doctrine; and

2 I. Provide such other relief as the Court deems just and proper.

3
4 DATED this 2nd day of March, 2017.

5 **LEVENBAUM TRACHTENBERG, PLC**

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