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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

David Newman,	)	No. CV-08-583-TUC-CKJ-DTF
Plaintiff,	)	
vs.	)	<b>REPORT &amp; RECOMMENDATION</b>
Lifeline Systems, Co.,	)	
Defendant.	)	

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Pending before the Court is Plaintiff’s November 14, 2008 Request for Remand. (Dkt. 6.) Defendant filed an opposition and Plaintiff filed a reply. (Dkts. 7, 8.) As directed by the Court, Defendant also filed a sur-reply. (Dkt. 19.) Pursuant to the Rules of Practice in this Court, the matter was assigned to Magistrate Judge Ferraro for a report and recommendation. The Magistrate Judge granted a request for oral argument, which was held on April 16, 2009. The Magistrate recommends the District Court, after its independent review of the record, enter an order granting Plaintiff’s Request for Remand.

**FACTUAL AND PROCEDURAL BACKGROUND**

On October 3, 2008, Plaintiff David Newman, as the surviving beneficiary of William Newman, filed a complaint in Pima County Superior Court against Lifeline Systems, Co., dba as Lifeline Systems, Inc., alleging wrongful death. (Dkt. 1-3 at 3.) The Complaint alleges Defendant had a contract with Pima County to provide emergency services to qualified elderly and disabled persons. (*Id.*) Plaintiff alleges William Newman was provided such services, but it took five hours for anyone to respond when he triggered his emergency alert. (*Id.* at 3-4.) Plaintiff further alleges William Newman died due to Defendant’s

1 negligence and Plaintiff has suffered as a consequence. (*Id.* at 4.)

2 On October 28, 2008, Defendant filed a Notice of Removal, removing the action to  
3 this Court under 28 U.S.C. § 1332. Defendant simultaneously filed an Answer. (Dkt. 2.)

#### 4 **DISCUSSION**

5 Plaintiff contends the Court should remand this action because Defendant waived its  
6 right to remove through a forum selection clause in its contract with Pima County.  
7 Defendant argues the forum selection clause does not apply to this case and removal was  
8 proper. Before reaching the parties' dispute over waiver and the forum clause, the Court  
9 must first assess whether it has subject matter jurisdiction.

#### 10 **Federal Jurisdiction**

11 The district courts have original jurisdiction of cases in which the amount in  
12 controversy exceeds \$75,000, and the parties are citizens of different states. 28 U.S.C.  
13 § 1332(a)(1). A corporation is "a citizen of any State by which it has been incorporated and  
14 of the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1). The legal  
15 representative of a decedent's estate is treated as a citizen of the same state as the decedent.  
16 28 U.S.C. § 1332(c)(2). Title 28 U.S.C. § 1441(a) provides that "any civil action brought in  
17 a State court of which the district courts of the United States have original jurisdiction, may  
18 be removed by the defendant."

19 Plaintiff did not contest this Court's jurisdiction over the action in his briefs nor at oral  
20 argument.<sup>1</sup> Plaintiff (as the representative of decedent) is a citizen of Arizona and Defendant  
21 is a citizen of Massachusetts; the amount in controversy exceeds \$75,000. Further, Plaintiff  
22 does not contend Defendant violated any of the procedural requirements for removal set forth  
23 in 28 U.S.C. § 1446 – the Court's review indicates removal was timely and Defendant

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25 <sup>1</sup> Plaintiff's motion to remand focuses almost entirely on his contention that the state  
26 courts of Arizona have personal jurisdiction over Defendant. (Dkt. 6.) That issue is not in  
27 dispute; at oral argument, Defendant stated it did not contest personal jurisdiction in Arizona  
28 (RT 4/16/09 at 13). Further, Plaintiff agreed at oral argument that personal jurisdiction was  
not a basis for remand, rather it showed jurisdiction would be proper if the case were  
remanded. (*Id.* at 5.)

1 complied with the statutory requirements. (Dkt. 1.) It is Defendant’s burden upon removal  
2 to demonstrate the Court has federal subject matter jurisdiction and it has satisfied that  
3 burden. *See Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (noting the presumption  
4 against removal jurisdiction).

5 **Waiver of Removal**

6 Plaintiff contends Defendant waived its right to remove this case by agreeing to a  
7 forum selection clause in the Emergency Alert System and Monitoring Services Agreement  
8 between Defendant and Pima County (“Agreement”). Plaintiff bears the burden of  
9 demonstrating that Defendant waived its right to remove. *Ferrari, Alvarez, Olsen &*  
10 *Ottoboni v. Home Ins. Co.*, 940 F.2d 550, 554 (9th Cir. 1991). Forum selection clauses are  
11 presumed valid and enforceable absent specific circumstances Defendant has not raised in  
12 this case – enforcement is shown to be unreasonable or the clause was obtained through fraud  
13 or overreaching. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). Thus, the Court  
14 should remand a case over which it has jurisdiction when it is not the forum selected by the  
15 parties. *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 (9th Cir.  
16 1984).

17 Plaintiff’s argument raises two questions necessary to resolution of this motion:  
18 (1) was William Newman a third-party beneficiary entitled to enforce the Agreement; and  
19 (2) does the forum selection clause apply to a wrongful death negligence action?

20 **Third-party Beneficiary Status**

21 Under Arizona law, to establish third-party beneficiary status, a person or class of  
22 persons must be indicated as a beneficiary in the contract:

23 For a third party to maintain an action on a contract, the contract must have  
24 been entered into for the express benefit of the third party; the party cannot be  
25 merely an incidental beneficiary. The benefit must be both intentional and  
26 direct, and “it must definitely appear that the parties intend to recognize the  
27 third party as the primary party in interest.”

28 *Araiza v. U.S. West Bus. Res., Inc.*, 904 P.2d 1272, 1278, 183 Ariz. 448, 454 (Ct. App. 1995)  
(quoting *Norton v. First Fed. Sav.*, 624 P.2d 854, 856, 128 Ariz. 176, 178 (1981)); *see also*

1 *Lake Havasu Resort, Inc. v. Comm. Loan Ins. Co.*, 678 P.2d 950, 956, 139 Ariz. 369, 375 (Ct.  
2 App. 1983) (recognizing that contract can benefit class of which third party is a member).  
3 The third-party must be the “real promisee”; “[t]he promise must be made to him in fact  
4 although not in form,” and the contract must evidence that the parties intended him to be  
5 privy to the promise. *Basurto v. Utah Constr. & Mining Co., Inc.*, 485 P.2d 859, 863, 15  
6 Ariz. App. 35, 39 (1971).

7 Here, the Agreement including its attachments evidences that the parties intended to  
8 directly benefit a class, of which William Newman was a member. Accordingly, Mr.  
9 Newman was a third-party beneficiary. Most critical to this assessment is the fact that the  
10 purpose of the Agreement was for Defendant (for consideration) to provide emergency alert  
11 services to eligible elderly and physically disabled individuals, defined as “Members” (Dkt.  
12 19-2 at 4-5, 10); Members were “**entitled** to receive services pursuant to th[e] Agreement”  
13 (*id.* at 29 (emphasis added)) and are mentioned repeatedly throughout (*id.* at 1-53). Thus,  
14 Members were promised an entitlement and the Agreement indicated an intention to provide  
15 a benefit to Members. Defendant was obligated to provide Members continuity of care, to  
16 not bill Members for covered services, and to provide Members prompt services at  
17 acceptable professional standards and in accordance with the law. (*Id.* at 10, 11, 43.)  
18 Further, Defendant was required to make a reasonable effort to obtain awareness of and  
19 incorporate Members’ cultural customs into treatment and to provide Members interpretive  
20 services. (*Id.* at 52.)

21 Attachment B to the Agreement sets forth with specificity the services Defendant was  
22 obligated to provide and Members were entitled to receive. The stated service goals were  
23 to aid Member’s self-sufficiency and well-being. (*Id.* at 21.) Persons providing the services  
24 had to have training regarding elderly and physically disabled populations. (*Id.*) Further,  
25 most of Defendant’s sixteen listed tasks were direct service to Members: providing  
26 information and training about the service, installing the units, developing emergency plans  
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1 specific to each Member, as well as monitoring, testing, and responding to emergency alerts.<sup>2</sup>  
2 (*Id.* at 21-22.) Defendant’s payment was based on the installation, maintenance, and  
3 monitoring of a unit per individual Member. (*Id.* at 21, 23.) All of these contractual  
4 provisions make clear that Members, a group to which William Newman belonged, were  
5 direct, intended beneficiaries of the Agreement.

6 This case is analogous to *Nahom v. Blue Cross and Blue Shield of Arizona, Inc.*, 885  
7 P.2d 1113, 180 Ariz. 548 (Ct. App. 1994). In *Nahom*, an insured sued a hospital alleging he  
8 was entitled to enforce a fixed fee contractual agreement between the hospital and the  
9 insurer, Blue Cross. The court found the insured was a third-party beneficiary of the contract  
10 because the fixed fee arrangement was an intentional and direct benefit to the subscriber, and  
11 the insured was the “primary party in interest.” Although the hospital and the insurer also  
12 benefitted from the agreement, the focus of the limited fee provision was to benefit the  
13 insured. Similarly, Members were primary parties in interest under the Agreement, which  
14 provided them direct benefits and entitlement to services. Further, in *Nahom*, the court noted  
15 that the defined class of “subscribers” were mentioned throughout the contract, just as  
16 Members are referenced repeatedly in the Agreement.

17 To support its position that William Newman was merely an incidental beneficiary,  
18 Defendant analogies this case to *Basurto v. Utah Constr. & Mining Co., Inc.*,<sup>3</sup> which

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20 <sup>2</sup> In Defendant’s Reply to the motion and at oral argument, Defendant asserted Pima  
21 County enrolled the members, provided the equipment, and installed the units. Defendant  
22 indicated its only role was to provide the electrical software and receive incoming calls;  
23 “[o]ther than a responsibility to handle incoming alert calls, Lifeline had no relationship with  
24 Plaintiff.” (Dkt. 7 at 3.) These assertions, while they may be accurate, do not alter the terms  
25 of the Agreement or Defendant’s contractual obligations to Members.

26 <sup>3</sup> Defendant relies on two other cases holding that persons who benefit from government  
27 contracts are assumed to be incidental beneficiaries with no entitlement to enforce the  
28 contract. *See County of Santa Clara v. Astra USA, Inc.*, 540 F.3d 1094, 1101 (9th Cir. 2008);  
*Smith v. Cent. Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1035 (9th Cir. 2005). These  
cases do not control because they are based on federal law and involve federal contracts.  
Further, the assumption under federal law is overcome if there is “clear intent” to benefit a  
third-party; the standard for establishing “clear intent” under federal law, and thereby third-

1 involved a contract for construction work at a mining site. 485 P.2d 859, 15 Ariz. App. 35.  
2 Basurto, an employee of the construction company, was injured on the site and he sought to  
3 recover under the contract as a third-party beneficiary. *Id.* at 863, 15 Ariz. App. at 39. In  
4 evaluating Basurto’s relationship to the contract, the court relied on a paragraph captioned  
5 “Protection of the Public, and Work, and Property”:

6       The Contractor shall provide and maintain all necessary watchmen, barricades,  
7       red lights and warning signs and take all necessary precautions for the  
8       protection and safety of employees on the work, of all other persons and  
9       adjacent private and public property. The Contractor at all times shall  
      maintain adequate protection of the work from damage and shall protect the  
      Owner’s property and all persons thereon from injury, damage or loss by  
      reason of any act or omission of the Contractor or any Subcontractor.

10 *Id.* at 862, 15 Ariz. App. at 38. The court held this provision created a duty upon which a tort  
11 could be premised. *Id.* at 863, 15 Ariz. App. at 39. However, it did not confer contractual  
12 third-party beneficiary status on employees because the relevant terms were about the  
13 relationship between the parties and protecting the owner from failures by the contractor.  
14 *Id.* at 864, 15 Ariz. App. at 40.

15       Drawing a parallel with *Basurto*, Defendant contends that “[o]verall, the Agreement  
16 governs the business relationship between Pima County and Defendant,” and only one  
17 section of the Agreement, paragraph III.5, appears to benefit Members:

18       COMPANY agrees to ensure that all Covered Services provided by  
19       COMPANY shall be instituted as promptly as is practicable, and in accordance  
20       with accepted community professional standards. COMPANY shall provide  
      professional services in accordance with all laws, rules and regulations of all  
      governmental authorities having jurisdiction.

21 (Dkt. 19-2 at 11.) Defendant argues the purpose of this provision was to protect Pima  
22 County from any failures by Defendant and to give the County a right of indemnity against  
23 Defendant. This argument is undermined by a review of the Agreement as a whole. The  
24 quoted paragraph is in the section captioned “Quality Management Provisions,” and does not  
25 mention “protection” or “acts or omissions,” which might intimate the intent is

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27 party beneficiary status, is similar to the Arizona third-party standard set forth above. *See*  
28 *Santa Clara*, 540 F.3d at 1101-02; *Smith*, 418 F.3d at 1035.

1 indemnification. Further, there is a separate paragraph of the Agreement captioned  
2 “Indemnification,” in which Defendant agrees to indemnify the County for actions arising  
3 out of any failures by Defendant. (*Id.* at 8.)

4 More importantly, Defendant’s argument patently ignores the purpose of the  
5 Agreement and the many other express provisions setting forth the benefits intended for  
6 Members. The purpose of the contract in *Basurto* was not to benefit employees but to  
7 complete construction work, which incidentally included employee safety. The Agreement  
8 at issue here was created to provide direct services to “Members”; therefore, William  
9 Newman was not just an incidental beneficiary.

10 At oral argument, in response to the Court’s question concerning what more was  
11 required to make William Newman a third-party beneficiary under the Agreement, the  
12 Defendant averred:

13 [U]nder the case law, they would have to have asserted [sic] a clause within  
14 the contract indicating that all members who participate with this service are  
15 third party beneficiaries and the primary party in interest to the special services  
and that they would then be entitled to stand inside the shoes of Pima County  
to enforce agreement.<sup>4</sup>

16 (RT 4/16/09 at 16.) Although the Arizona standard is stringent, the caselaw does not  
17 establish the bright-line test advocated by Defendant. In *City of Phoenix v. Daly*, No. CV07-  
18 110, 2007 WL 3046758 (D. Ariz. Oct. 17, 2007), relied upon by Defendant to support its  
19 narrow view, the court did not require the kind of language identified by Defendant. Instead,  
20 in a section captioned “Third Party Beneficiary,” the parties explicitly provided that the  
21 contract should **not** be construed to give benefits or rights to anyone other than the  
22 contracting parties and the contract was for the sole benefit of the named parties. *Id.* at \*2.  
23 Thus, the *Daly* case undermines, rather than supports Defendant’s narrow view. Had Pima

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25 <sup>4</sup> In follow-up questioning, Defendant confirmed its position that there is a black-and-  
26 white rule applicable to third-party beneficiary status. Counsel agreed that “if there isn’t a  
27 specific paragraph that says this is a third party beneficiary contract written to benefit the  
28 members of plan, that [the contracting parties] could have said almost anything else and it  
still wouldn’t have been under Arizona law [a] third-party beneficiary contract.” (RT  
4/16/09 at 16-17, 23-24.)

1 County and Defendant intended Members to be merely incidental beneficiaries, thereby  
2 limiting liability to third-parties, according to *Daly*, they could have explicitly provided for  
3 this in the Agreement. Without such a provision in the Agreement, it does “definitely appear  
4 that the parties intended to recognize the third party [Members] as the primary party in  
5 interest.” *Araiza v. U.S. West Bus. Res., Inc.*, 904 P.2d at 1278, 183 Ariz. at 454.

6 Application of the Forum Selection Clause to this Negligence Action

7 The Agreement’s forum selection clause provides: “Any action relating to this  
8 Agreement shall be brought in a court of the State of Arizona in Pima County.” (Dkt. 19-2  
9 at 7.) Defendant argues the forum selection clause does not encompass this tort action.  
10 Plaintiff counters that the language of the clause is broad enough to encompass the wrongful  
11 death action and this tort claim relates to Defendant’s duties under the Agreement.

12 The Court assesses the applicability of a forum selection clause under federal law,  
13 rather than state law. *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th  
14 Cir. 1988). “Whether a forum selection clause applies to tort claims depends on whether  
15 resolution of the claims relates to interpretation of the contract.” *Id.* at 514.

16 In *Manetti-Farrow* the forum selection clause provided: “For any controversy  
17 regarding interpretation or fulfillment of the present contract, the Court of Florence [Italy]  
18 has sole jurisdiction.” *Id.* at 511. *Manetti-Farrow* maintained its causes of action did not  
19 relate to “interpretation” or fulfillment” of the contract, but were “pure” tort claims  
20 independent of the contract. *Id.* at 514. Ultimately, the Court concluded the tort claims –  
21 alleging a price squeeze, fraudulent use of business information, wrongful neglect of  
22 delivery, and abrogation of the contract – “related in some way to rights and duties  
23 enumerated in the exclusive dealership contract”; therefore, the claims related to  
24 interpretation of the contract and the forum selection clause governed. *Id.*

25 To prove negligence, Arizona law requires: (1) a duty recognized by law to exercise  
26 a standard of care; (2) defendant’s failure to conform to the standard; (3) causal connection  
27 between conduct and injury; and (4) actual damage. *Ontiveros v. Borak*, 136 Ariz. 500, 504,  
28 667 P.2d 200, 204 (1983). The scope of Defendant’s duty to provide emergency response,



1 and alleged breach thereof, necessary to establishing negligence directly relates to the rights  
2 and duties set forth in the Agreement. Indeed, Defendant admits in its Answer that “it  
3 entered into an arrangement with Pima Community Services Program to provide emergency  
4 response services to people within their homes.” (Dkt. 2 at 2.) In its brief and at oral  
5 argument, Defendant also acknowledged it undertook a duty to William Newman based upon  
6 the Agreement (Dkt. 19 at 5; RT 4/16/09 at 19, 22). *See Hugel v. Corp. of Lloyd’s*, 999 F.2d  
7 206, 207, 209 (7th Cir. 1993) (finding a forum selection clause, which designates a forum  
8 for “any dispute” “arising out of or relating to” the contract, governs a tort action “if the duty  
9 arises from the contract”).

10       Significantly, the relationship between Plaintiff and Defendant came into existence  
11 solely because of the Agreement. Further, the Agreement defined the duties owed by  
12 Defendant to William Newman, i.e., installing the units, developing emergency plans  
13 specific to each Member, as well as monitoring, testing, and responding to emergency alerts.  
14 As in *Manetti-Farrow*, Plaintiff’s claim relates in some way to the rights and duties  
15 enumerated in the Agreement; thus, it is within the bounds of the forum selection clause.

16       This conclusion is reinforced by the plain language of the forum selection clause –  
17 covering any actions “relating to” the Agreement – which is broader than the language at  
18 issue in *Manetti-Farrow*, 858 F.2d at 510 (“regarding interpretation or fulfillment of the  
19 contract”). *See Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (instructing that  
20 courts first look to the plain language of the contract and give terms their ordinary meaning);  
21 *see also Mediterranean Enter., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983)  
22 (finding a clause that uses “relating to” broad); *Prima Paint Corp. v. Flood & Conklin Mfg.*  
23 *Co.*, 388 U.S. 395, 406 (finding language “arising out of or relating to” broad). Because the  
24 parties’ relationship arises out of the Agreement and the alleged negligence is connected to  
25 the contracted services, this action “relates to” the Agreement. Oxford American Dictionary  
26 762 (Heald Colleges Ed. 1980) (defining “relate” as to have “connection with”).

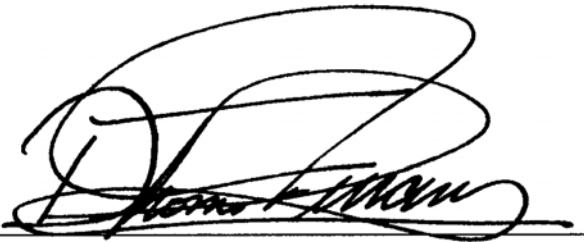
27       In sum, the broad language of the Agreement’s forum selection clause encompasses  
28 Plaintiff’s negligence action.

1 **CONCLUSION**

2 The Court’s review of the governing law and the Agreement reveal that Plaintiff is a  
3 third-party beneficiary entitled to enforce the forum selection clause, which encompasses this  
4 wrongful death action because it “relates to” the Agreement. Plaintiff is entitled to have the  
5 action heard in Pima County Superior Court. Therefore, the Magistrate Judge recommends  
6 the District Court, after its independent review of the record, enter an order GRANTING  
7 Plaintiff’s Motion for Remand (Dkt. 6).

8 Pursuant to 28 U.S.C. § 636(b), any party may serve and file written objections within  
9 10 days of being served with a copy of this Report and Recommendation. If objections are  
10 not timely filed, they may be deemed waived. If objections are filed, the parties should use  
11 the following case number: **CV-08-0583-TUC-CKJ**.

12 DATED this 1st day of May, 2009.

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20 D. Thomas Ferraro  
21 United States Magistrate Judge  
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