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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

AMBER WINTERS, et al., on behalf of themselves and all others similarly situated, Plaintiffs, vs. BANNER HEALTH NETWORK, et al., Defendants.	**Case No. CV2012-007665** **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT** **(The Honorable J. Richard Gama)**

Plaintiffs hereby respectfully respond to Defendants' Motion for a New Trial pursuant to Rule 59(L)(8), Ariz.R.Civ.Proc. (the "Motion"). Defendants' Motion should be denied since the Court's Judgment comports with federal law and related regulations.

In addition, contemporaneous with their Motion, Defendants' counsel have already begun to boldly misrepresent this Court's Judgment to representatives of AHCCCS patients and engaged in conduct that, but for a procedural exception, would be

the subject of an order to show cause regarding contempt. Defendants' counsel should be warned not to continue misrepresenting the Court's Judgment and, as a penalty, should be ordered to provide a copy of the Judgment and this Court's warning to any AHCCCS patient or their representative in connection with the assertion of a healthcare provider lien unless and until that Judgment is ever overturned.

ARGUMENT

I. The Judgment Should Not be Altered or Amended to Allow Defendants To Delete the Word "Any" Which was Specifically Ordered by this Court and is Required by Federal Law and Applicable Regulations.

Through a seemingly innocuous Motion, Defendants seek to entirely nullify the Court's Judgment and win back all that the Court explicitly refused to give them through extensive briefing on (i) the cross-summary judgment motions and related oral argument; (ii) extensive briefing on the form of judgment and related oral argument; and (iii) yet another round of briefing and oral argument on the same topic in the context of fixing attorneys' fees. The Court has thoroughly plowed this field and Defendants' inexplicable need to reiterate the same unsupported arguments is astounding.

Specifically, Defendants cite two purely hypothetical situations, neither supported by any preexisting or new evidence, wherein Defendants would receive reimbursement for only a small portion of total billed charges from AHCCCS, because AHCCCS chooses not to cover certain things. (Motion at pp. 2-3). Solely on this basis, they then ask the Court to allow them to retain full rights to assert balance billing liens beyond "the extent of the covered services for which Defendant has received any payment from AHCCCS." (*Id.* at 1:20-21). Leaving aside the fact that Defendants' desired wording is so broad as to impose no practical limits on Defendants whatsoever, the proposed change is contrary to law.

In *Olszewski v. Scripps Health*, 135 Cal.Rptr.2d 1, 69 P.3d 927 (Cal. 2003), the providers agreed to refund all money received from Medicaid and take nothing for limited rights to go after indigent Medicaid patients with their state law balance billing liens. *Id.* at 14. The California Supreme Court held this was still a violation of federal law, because "the Secretary clearly intended to bar a health care provider from recovering from a Medicaid beneficiary any amount exceeding the cost-sharing charges allowed under the state plan." *Id.* at 18.

In *Evanston Hosp. v. Hauck*, 1 F.3d 540 (7th Cir. 1993), the providers agreed to refund all money received from Medicaid and take nothing, for limited rights to go after indigent Medicaid patients with their state law balance billing liens. *Id.* at 542. The Seventh Circuit held this was still a violation of federal law, stating: "[b]y opting for reimbursement from Medicaid, Evanston Hospital bought certainty. It purchased a guarantee of partial payment in lieu of possibly full payment or possibly no payment at all." *Id.*

In *Public Health Trust v. Dade County School*, 693 So.2d 562 (Fla.App. 1996), the providers agreed to refund all money received from Medicaid and take nothing, for limited rights to go after indigent Medicaid patients with their state law balance billing liens. *Id.* at 563-64. The court held this was still a violation of 42 C.F.R. § 447.15. *Id.* at 567.

All of this, of course, was noted by the Arizona Court of Appeals in this case who observed:

> [B]y 2010, the law in the federal system was . . . unanimous that hospitals or healthcare providers are not entitled to collect against third-party payers [or] tortfeasors on lien claims. Once they've accepted a Medicaid dollar, they can't go back. If they've accepted a Medicaid dollar, they have been paid in full and they cannot either go against the lien claim and they can't retract and say, "Oh, too bad; I'd like to now give you back that Medicaid dollar."

Transcript of *Abbott v. Banner Health Network*, Case No. 1 CA-CV 13-0259 (April 10, 2014) ("Transcript") at 29:5-13 attached as Exhibit 1 to Plaintiffs' Response to Defendants' Motion for a New Trial (filed concurrently herewith).

Defendants herein, however, are not so generous. After illegally collecting tens of millions of dollars from indigents over thirty years and not yet having to refund a dime, they argue for a vague and extraordinarily broad right to continue asserting balance billing liens, while keeping all monies Defendants receive from AHCCCS, on the hypothetical that in some cases the sum received from AHCCCS may be only a small portion of total charges. Defendants offer no new evidence and have already had this same argument rejected by this Court three times. There is no reason that the Court not reject it a fourth time, as it is a violation of federal law to allow Defendants to assert balance billing liens against indigent Medicaid patients beyond "the extent of the covered services for which Defendant has received any payment from AHCCCS." *Olszewski, supra*; *Public Health Trust, supra*; *Evanston Hosp., supra*.

II. Defendants' Counsel Are Already Engaging in Contemptuous Conduct and Should be Warned That Further Misconduct Will be Sanctioned.

Though Defendants' counsel personally assured this Court that his clients were no longer attempting to collect from AHCCCS patients using healthcare provider liens, Defendants' counsel wrote a letter, just yesterday, attempting to do just that and stating:

> The injunction . . . bars hospitals from enforcing liens *only to the extent that AHCCCS made a payment for the care at issue*. The injunction does not apply if AHCCCS did not pay for particular treatment, whether because of the patient's ineligibility, coverage limits, lack of medical necessity, or any other reason.

Exhibit 1, attached hereto (emphasis added). This is, of course, a bald-faced

misrepresentation. It is especially egregious considering Defendants' own Motion states: "The Judgment enjoins Defendants from enforcing a health care provider lien after accepting '*any*' payment from AHCCCS for a patient's care." Motion at 1:17-19 (emphasis in original). And that's only in the *second sentence* of the Motion. The rest of the Motion makes it clear that Defendants' counsel understands that this Court did indeed enjoin the very type of misconduct that the Defendants' counsel continue to engage in on behalf of their clients. *E.g.*, Motion at 2:20-21 ("[T]he Judgment, as presently worded, could bar the hospital from enforcing a lien *even for care for which AHCCCS did not pay*.") (emphasis in original).

The only reason this is not coming before the Court on a motion for an order to show cause regarding contempt is because this instance involved collection by Maricopa Medical Center who was not a party to this action. Still, one would think that Arizona hospitals and their identical lawyers would not be so picayune in following federal law that clearly applies to *any* hospital. Accordingly, this Court should warn the Defendants' counsel about continued infractions and order that they provide a copy of the Court's Judgment and the Court's warning to any AHCCCS patient or AHCCCS patient representative from whom they intend to collect via a healthcare provider lien unless and until that Judgment is ever overturned.

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RESPECTFULLY SUBMITTED this 23rd day of December, 2014.

LEVENBAUM TRACHTENBERG, PLC

/s/ Geoffrey M. Trachtenberg
Geoffrey M. Trachtenberg (#19338)

THE ENTREKIN LAW FIRM

/s/ B. Lance Entrekin
B. Lance Entrekin (#16172)

Attorneys for Plaintiffs

ORIGINAL of the forgoing e-filed via TurboCourt
And **COPIES** mailed this 23rd day of December, 2014, to:

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EXHIBIT 1

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DECEMBER 22, 2014

PLEASE DELIVER TO:	1) Grant Woods	FACS NO.	602-258-5070
	2) Patrick McGroder	FACS NO.	602-530-8500
FROM:	Richard B. Burnham	FACS NO.	(602) 256-4475
		DIRECT	(602) 256-4489
		FILE NO.	5575-5

TOTAL PAGES INCLUDING COVER SHEET: 3

MESSAGE:

The original of this facsimile message will be sent to the recipient via the U.S. Postal Service.

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December 22, 2014

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Grant Woods
Grant Woods Law
40 North Central Avenue, Suite 2250
Phoenix, AZ 85040

Via Facsimile and Mail: 602-258-5070

Re: Our Client: Maricopa Medical Center
Patient: Jessica Carlson
Account No.: 4194415

Dear Grant:

Responding to your letter of December 16, 2014, Maricopa Medical Center ("MMC") was not a party to the *Winters* litigation, making the injunction in that case inapplicable.

Even if the injunction applied to MMC, it does not prohibit lien enforcement to collect amounts owing for care for which AHCCCS did not pay. The injunction is grounded in the Court's declaration that federal law prohibits so-called "balance billing" and preempts Arizona law that allowed hospitals to enforce liens after accepting payment from AHCCCS. The "balance-billing" prohibition *always* turns on the hospital receiving payment from the Medicaid agency for the care at issue. See *Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273, 284 (5th Cir. 2008) ("[T]he limitations on a health care provider's ability to obtain reimbursement for the services it provides a Medicaid-eligible patient are not triggered until a provider bills and accepts payment from Medicaid ***for those services.***" (emphasis added)). Lien enforcement can never constitute "balance billing" if the Medicaid agency did not pay for the care.

The injunction therefore bars hospitals from enforcing liens only to the extent that AHCCCS made a payment for the care at issue. The injunction does not apply if AHCCCS did not pay for particular treatment, whether because of the patient's ineligibility, coverage limits, lack of medical necessity, or any other reason.

In this case, the patient was hospitalized for 71 days, with charges totaling nearly $2.3 million. AHCCCS, however, limited inpatient hospital coverage to 25 calendar days. A.A.C. R9-22-204(C). In other words, the patient was covered by AHCCCS for the first 25 days of her hospitalization, but uninsured for the remaining 46 days. AHCCCS therefore paid $53,110.27 for the first 25 days of treatment and nothing for the remaining 46 days. I should note that MMC

believes it was underpaid by AHCCCS for those 25 days and is seeking additional payment. If those efforts are successful the AHCCCS lien will increase.

MMC did not lose *all* of its lien rights by accepting payment from AHCCCS for the first 25 days of treatment. Rather, MMC may enforce a health care provider lien to collect amounts owing for the 46 days that AHCCCS did not cover. Construing the judgment otherwise would effect a forfeiture, which the law abhors. *First Fed. Sav. & Loan Ass'n of Phoenix v. Ram*, 135 Ariz. 178, 180, 659 P.2d 1323, 1325 (App. 1982). The charges owing for the non-covered days equal $931,844.49.

I look forward to working with you to bring this matter to a successful resolution.

Very truly yours,

GAMMAGE & BURNHAM, P.L.C.

By
Richard B. Burnham

RBB/pjg
cc: Patrick J. McGroder