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14 SUPERIOR COURT OF ARIZONA

15 MARICOPA COUNTY

16 AMBER WINTERS, *et al.*, on behalf of  
17 themselves and all others similarly situated,

18 Plaintiffs,

19 vs.

20 BANNER HEALTH NETWORK, *et al.*,

21 Defendants.

22 **Case No. CV2012-007665**

23 **RESPONSE TO MOTION TO  
24 STRIKE PART I OF PLAINTIFFS'  
25 REPLY IN SUPPORT OF MOTION  
26 FOR NEW TRIAL RE BREACH  
OF CONTRACT**

**(The Honorable J. Richard Gama)**

27 Plaintiffs respectfully respond to Defendants' Motion to Strike Part I of Plaintiffs'  
28 Reply in Support of Motion for New Trial re Breach of Contract ("Motion").

29 Defendants are not being deprived of an opportunity to respond to anything. No  
30 new arguments were raised in the Reply; Plaintiffs merely requested the Court treat their  
31 motion as a Rule 60 motion.

1           The Court has the inherent authority to construe the Rule 59 motion as a Rule 60  
2 motion pursuant to *Welsh v. McClure*, 123 Ariz. 161, 165, 598 P.2d 980, 984 (1979)  
3 (Supreme Court concluding that “the court may treat [an] untimely [Rule 59] motion as  
4 one for relief under Rule 60, which has a much longer time limit, [i]f the facts alleged in  
5 the motion warrant relief under the latter rule.”) (citations omitted).  
6

7           Contrary to Defendants’ assertions, the grounds for such relief are referenced in  
8 the relevant moving papers and are plainly met by the circumstances in this case—  
9 namely, the intervening Court of Appeals opinion in *Abbott* that is the “law of the case.”  
10 Moreover, Defendants’ have admitted that the *Abbott* opinion is contrary to the Court’s  
11 earlier holding relative to Plaintiffs’ breach of contract claims.

12           “Law of the case” is the “judicial policy of refusing to reopen questions previously  
13 decided in the same case by the same court or a higher appellate court.” *Flood Control*  
14 *Dist. of Maricopa County v. Paloma Inv. Ltd. Partnership*, 230 Ariz. 29, 40 ¶ 31, 279  
15 P.3d 1191, 1202 ¶ 31 (App. 2012). Stated somewhat differently, but just as powerfully,  
16 “law of the case” is “a rule of general application that the decision of an appellate court  
17 in a case is the law of that case on the points presented throughout all the subsequent  
18 proceedings in the case in both the trial and the appellate courts.” *State v. King*, 180  
19 Ariz. 268, 278, 883 P.2d 1024, 1034 (1994) (quoting *In re Monaghan’s Estate*, 71 Ariz.  
20 334, 336, 227 P.2d 227, 228 (1951)).  
21

22           As recognized in *Welsh*, this Court has the authority to construe Plaintiffs’ motion  
23 for new trial as a motion under Rule 60 and, in light of the “law of the case” doctrine,  
24 respectfully, it would be an abuse of discretion to deny relief from the judgment in light  
25 of the *Abbott* opinion.  
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RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of January, 2015.

**LEVENBAUM TRACHTENBERG, PLC**

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**ORIGINAL** of the forgoing e-filed via TurboCourt  
And COPIES mailed this 30<sup>th</sup> day of January, 2015, to:

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