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11 SUPERIOR COURT OF ARIZONA
12 MARICOPA COUNTY

13 AMBER WINTERS, et al.,

14 Plaintiffs,

15 vs.

16 BANNER HEALTH INC., et al.,

17 Defendants.

No. CV2012-007665

**RESPONSE TO PLAINTIFFS'
MOTION FOR NEW TRIAL**

18 The Court should summarily deny Plaintiffs' Motion for New Trial ("Motion") as
19 untimely. Even if the Motion is timely, Plaintiffs failed to show that they are entitled to
20 attorneys' fees under A.R.S. § 12-341.01.¹

21 **I. The Motion is untimely.**

22 Rule 59(d) imposes an unusually strict time limit on motions for new trial: such
23 motions must be filed "not later than 15 days after entry of the judgment." The judgment
24 was entered on November 14, 2014. Any motion for new trial was thus due not later than
25 November 29. The Motion here was filed exactly one month too late, on December 29.

26 ¹ Plaintiffs argue that the recent opinion in the closed lien prong of this litigation compels
judgment in their favor on their contract claim. Defendants have moved to stay this case,
including a ruling on the Motion, until the Supreme Court rules on their Petition for Review.

1 **II. Rule 6(b) precludes this Court from extending the time limit.**

2 Plaintiffs address the untimeliness of the Motion with a blithe comment that the
3 Court can simply extend the governing time limit under Rule 6(b). But that Rule says
4 just the opposite: it *forbids* an extension of the deadline to move for new trial unless the
5 Court finds “(a) that a party entitled to notice of the entry of judgment or order did not
6 receive such notice from the clerk or any party within 21 days of its entry, and (b) that no
7 party would be prejudiced.” Both prongs must be met—it is not enough to argue that the
8 extension would not prejudice any party.

9 Plaintiffs do not qualify for an extension. They obviously received the judgment
10 within 21 days of its entry; indeed, they make no argument to the contrary.² The question
11 of prejudice is thus irrelevant. The Motion can be summarily denied: it was filed a
12 month late and the Court has no power to extend the deadline.

13 **III. Plaintiffs failed to establish their entitlement to fees under A.R.S. § 12-341.01.**

14 Plaintiffs ask for a ruling that the Court’s prior award of attorneys’ fees under the
15 private attorney general doctrine is “concomitantly supported” by A.R.S. § 12-341.01.
16 Mot. at 3. They say nothing more.

17 A party is not entitled to attorneys’ fees simply by prevailing on a claim for breach
18 of contract. Rather, a party may recover fees under § 12-341.01 only if (1) the action is
19 contested, (2) the action arises out of contract, and (3) the factors set forth in *Associated*
20 *Indemnity Corp. v. Warner*, 143 Ariz. 567, 569, 694 P.2d 1181, 1183 (1985), counsel for
21 an award of fees.

22 Plaintiffs failed to show that this action arose out of contract or evaluate the
23 *Warner* factors, and they may not do so in reply. It is not up to Defendants to *disprove*
24 Plaintiffs’ entitlement to fees—Plaintiffs bear the burden to prove that § 12-341.01

25 _____
26 ² Even if the Clerk of the Court neglected to send Plaintiffs the judgment, Plaintiffs certainly
had *actual notice* of the judgment within 21 days of its entry. Defendants moved to stay the
judgment’s fee award on November 17, and Plaintiffs filed their response on November 20.

1 supports a fee award. *Woerth v. City of Flagstaff*, 167 Ariz. 412, 419, 808 P.2d 297, 304
2 (App. 1990). They did not do so. The Court should thus deny Plaintiffs' request.

3 **IV. Conclusion.**

4 The Court should deny the Motion as untimely. Even if the Court hears the
5 Motion, Plaintiffs failed to show their entitlement to fees under A.R.S. § 12-341.01.
6 Thus, the Court should deny Plaintiffs' request to bootstrap that statute onto the Court's
7 prior fee award.

8 RESPECTFULLY SUBMITTED this 20th day of January, 2015.

9
10 GAMMAGE & BURNHAM, P.L.C.

11
12 By /s/ Christopher L. Hering

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18 FILED electronically with the Clerk of the Court this 20th day of January, 2015 and
19 COPIES mailed this 20th day of January, 2015 to:

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/s/Brenda J. St. Clair