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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

AMBER WINTERS, et al., Plaintiffs, vs. BANNER HEALTH, INC., et al., Defendants.	NO. CV2012-007665 **RESPONSES TO PLAINTIFFS' ADDITIONAL STATEMENT OF FACTS AND DEFENDANTS' RESPONSES TO PLAINTIFFS' OBJECTIONS TO DEFENDANTS' STATEMENT OF FACTS** (Assigned to the Honorable J. Richard Gama)

I.

Defendants first respond to the additional facts proffered by the Plaintiffs ("PSOF"):

8. Not disputed, but irrelevant. The memorandum speaks for itself—Defendants dispute the Plaintiffs' characterizations of its contents.

9. This "fact" is really a series of statements that construe, interpret and opine as to the legal effect of Attachment 4.19-A. They are therefore legal conclusions, not facts. *Powell v. Washburn*, 211 Ariz. 553, 555-56 ¶ 8, 125 P.3d 373, 375-76 (2006)

(construction and interpretation of contracts is a question of law). As such, they are inappropriate for a statement of facts and require no response. *See Williams v. Campbell*, 20 Ariz. App. 136, 137, 510 P.2d 766, 767 (App. 1973).

10. First objection: The contents of Young's email are inadmissible hearsay. *See* Rule 802; *S.E.C. v. Internet Solutions for Bus. Inc.*, 509 F.3d 1161, 1167 (9th Cir. 2007) ("unsworn emails" are "rank hearsay"). The out-of-court statements from Young's email are offered for the truth of the assertion that Attachment 4.19-A does not permit lien enforcement. Plaintiffs lay no foundation that would support admitting any of the email's contents under an exception to the hearsay rule, including Rule 803(8).

Second objection. The email recites statements allegedly made by Mark Wong and Brian Zolynas, which are inadmissible hearsay within hearsay. *See* Rule 805. Wong and Zolynas' statements are offered for the truth of the assertion that Attachment 4.19-A "does not provide a waiver of balance billing to providers." Plaintiffs lay no foundation that would support admitting Wong and Zolynas' statements under any exception to the hearsay rule.

Third objection: Young may not give her opinion as to the proper interpretation of Arizona's Medicaid Plan or of federal law, be it a lay opinion or an expert opinion. *See Williams*, 20 Ariz. App. at 137, 510 P.2d at 767. Courts do not consider even sworn witness testimony on "both what the law is and how it should be applied to the facts of a case."[1] Those are issues decided by the Court as a matter of law, not based on evidence or testimony.

Fourth objection: Young lacks personal knowledge about CMS's official interpretations of federal law or Arizona's Plan. Plaintiffs lay no foundation whatsoever

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[1] *Pinal Creek Grp. v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042-44 (D. Ariz. 2005) (courts "exclude[] legal expert testimony concerning both what the law is and how

as to Young's identity. Is she a CMS employee? Is she a current CMS employee? What is her job title? What are her responsibilities? Is she a policymaker? Does she review state plans? Plaintiffs state that Young is the "Regional Administrator for the Centers for Medicare and Medicaid Services." Response at 3. But the Court must disregard that statement—Plaintiffs introduce *no evidence* in support.[2] Thus, even if the email can somehow substitute for sworn testimony, the Plaintiffs have not laid sufficient foundation to establish that Young knows how CMS would interpret federal law and Arizona's Plan. *See* Rule 602.

Fifth objection: Plaintiffs lay no foundation establishing that Young is authorized to speak on behalf of CMS and set forth the agency's official interpretations of federal law or of Arizona's Plan. Courts will not consider ***a sworn affidavit*** from a ***current employee*** of an agency as to the legal interpretation or effect of a regulation, even when the ***agency itself*** proffers that affidavit.[3] Here, the email is an ***unsworn statement*** from a person who may or may not be a current employee of CMS. Further, Plaintiffs have not established (i) that she has authority to speak on CMS' behalf and (ii) that her views of federal law and Arizona's Plan are, in fact, the official positions taken by CMS.

11. This fact is supported by only the affidavit of Thomas Barker. Defendants objected to that affidavit's admissibility in their responses to the Plaintiffs' initial statement of facts. *See* Resp. to Pl.'s SOF & SOF in Supp. Of Defs.' Cross-Mot. For

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it should be applied to the facts of a case"); *accord Baker v. Leight*, 91 Ariz. 112, 119, 370 P.2d 268, 273 (1962) (opinions on legal issues are not admissible).

[2] *GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990) ("As a general rule, an unsworn and unproven assertion is not a fact that a trial court can consider in ruling on a motion for summary judgment.").

[3] *Carmona v. Div. of Indus. Safety*, 530 P.2d 161, 167 (Cal. 1975); *Juneau Cnty. v. Courthouse Employees, Local 1312, AFSCME, AFL-CIO*, 585 N.W.2d 587, 592-93 (Wis. 1998).

Summ. J., Objections to PSOF ¶¶ 2, 6, pp. 1-3, 5 (Aug. 19, 2013). Plaintiffs reincorporate those objections by this reference as if fully set forth herein.

Additionally, Plaintiffs lay no foundation establishing that Barker is authorized to speak on behalf of CMS and set forth the agency's official interpretations of federal law or of Arizona's Plan. Courts will not consider a sworn affidavit from a ***current employee*** of an agency as to the legal interpretation or effect of a regulation, even when the ***agency itself*** proffers that affidavit.[4] Here, Barker is a ***former employee*** of CMS, and the Plaintiffs have not established (i) that he has authority to speak on CMS' behalf, and (ii) the views set forth in his affidavit are, in fact, the official positions taken by CMS.

Plaintiffs also suggest that Barker can testify about "the Young/Zolynas letter" as a basis for his opinions under Rule 703.[5] Plaintiffs, however, failed to make a showing that "experts" in Mr. Barker's field[6] would form an opinion about CMS' interpretation of Arizona's Plan by reviewing an email from an unknown individual whose email address happens to have a cms.gov domain. The email is between Plaintiffs' counsel and Cheryl Young—Mr. Barker himself had no dialogue with CMS. The more sensible approach to ascertaining CMS' views on a particular legal issue is to review the official regulatory guidance issued by the agency, such as the 1997 Policy Statement.

12. Defendants do not dispute the admissibility of Plaintiffs' Exhibit 7. The remainder of this "fact" is, in reality, a variety of assertions about the legal effect of CMS 10130. These are plainly inappropriate for a statement of facts and require no response. *Williams*, 20 Ariz. App. at 137, 510 P.2d at 767.

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[4] *Id.*

[5] It is unclear whether the "Young/Zolynas letter" is the same document as the email from Cheryl Young that the Plaintiffs attempt to introduce in PSOF ¶ 10.

[6] Barker's precise field of expertise is unknown.

13. Disputed. The only evidence offered in support of this statement is a declaration from David Botsko. Paragraphs 4-8 state legal conclusions as to the interpretation, construction and legal effect of 42 C.F.R. § 447.15.[7] The Court should strike those paragraphs for three reasons.

First, courts do not consider legal conclusions included in affidavits. *Williams,* 20 Ariz. App. at 137, 510 P.2d at 767. Courts exclude witness testimony on the construction and interpretation of federal law, be that testimony expert or lay.[8]

Second, Botsko already testified that he retired in June 2011. He lacks personal knowledge of—and thus cannot testify to—AHCCCS' current position on whether the Defendants' liens comply with federal law. *See* Rule 602; *Wells-Stewart Const. Co.*, 10 Ariz. App. at 593, 461 P.2d at 101 (court should not consider affidavit that is not based on personal knowledge).

Finally, the Plaintiffs laid no foundation suggesting that Botsko is authorized to speak on AHCCCS' behalf and set forth the agency's official interpretations of federal law or Arizona's Plan. Courts will not consider an affidavit from a ***current employee*** of an agency as to the legal interpretation or effect of a regulation, even when the ***agency itself*** proffers that affidavit.[9] Here, Botsko is a ***former employee*** of AHCCCS. Further,

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[7] *See Guminski v. Ariz. State Veterinary Med. Examining Bd.*, 201 Ariz. 180, 182, ¶ 10, 33 P.3d 514, 516 (App. 2001) (construction and interpretation of an administrative regulation is a question of law).

[8] *E.g., U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131, 1150-51 (10th Cir. 2009); *Wildearth Guardians v. Pub. Serv. Co. of Colorado*, 853 F. Supp. 2d 1086, 1090 (D. Colo. 2012); *CFM Commc'ns, LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229, 1234-35 (E.D. Cal. 2005).

[9] *Carmona v. Div. of Indus. Safety*, 530 P.2d 161, 167 (Cal. 1975); *Juneau Cnty. v. Courthouse Employees, Local 1312, AFSCME, AFL-CIO*, 585 N.W.2d 587, 592-93 (Wis. 1998).

Plaintiffs have not established (i) that Botsko has authority to speak on behalf of AHCCCS or (ii) that his views are, in fact, the official positions taken by AHCCCS.

14. Not disputed, but irrelevant—Plaintiffs have not established that lien enforcement is "balance billing" of the patient.

15. *See* response to PSOF ¶ 13, incorporated herein by this reference.

16. Not disputed, but irrelevant—Plaintiffs have not established that lien enforcement is "balance billing" of the patient.

II.

Defendants next respond to the Plaintiffs' objections to and grounds for dispute of their statement of facts in support of their cross-motion for summary judgment ("DSOF"):

1. This fact is undisputed and must be accepted as true.

2. This fact is undisputed and must be accepted as true.

3. This fact is undisputed and must be accepted as true. Plaintiffs' "objection" goes to the passage's legal effect, which is not appropriate for discussion in a statement of facts. *See Williams v. Campbell*, 20 Ariz. App. 136, 137, 510 P.2d 766, 767 (App. 1973).

4. This fact is undisputed and must be accepted as true.

5. This fact is undisputed and must be accepted as true.

6. This fact is undisputed and must be accepted as true.

7. This fact is undisputed and must be accepted as true.

8. Plaintiffs' grounds for dispute are not well taken. Plaintiffs do not dispute the accuracy of the excerpt as reproduced, but, rather, simply wish to add another sentence from the same authority. Accordingly, this fact is undisputed and must be accepted as true.

9. This fact is undisputed and must be accepted as true.

10. This fact is undisputed and must be accepted as true.

11. This fact is undisputed and must be accepted as true.

12. *See* response to DSOF ¶ 8, incorporated herein by this reference.

13. This fact is undisputed and must be accepted as true.

14. This fact is undisputed and must be accepted as true.

15. This fact is undisputed and must be accepted as true.

16. Plaintiffs' grounds for dispute are not well taken. HCFA specifically called this document a "policy clarification." And regardless of whether one labels the document a "Policy Statement" or simply a letter, Plaintiffs do not dispute that the document sets forth HCFA's views. Further, the Plaintiffs' contentions that (1) the Policy Statement does not "authorize[]" lien enforcement, (2) courts owe the Policy Statement no deference, and (3) the Policy Statement "explicitly forbids what Defendants are doing" are all legal conclusions that are not appropriate for discussion in a statement of facts. *See Williams,* 20 Ariz. App. at 137, 510 P.2d at 767.

17. This fact is undisputed and must be accepted as true.

18. This fact is undisputed and must be accepted as true.

19. This fact is undisputed and must be accepted as true. Plaintiffs' "dispute" relates to the legal effect of the Plan, which is not appropriate for discussion in a statement of facts. *See Williams,* 20 Ariz. App. at 137, 510 P.2d at 767.

20. *See* response to DSOF ¶ 19, incorporated herein by this reference.

21. *See* response to DSOF ¶ 19, incorporated herein by this reference.

22. *See* response to DSOF ¶ 19, incorporated herein by this reference.

23. This fact is undisputed and must be accepted as true. Plaintiffs appear to "deny" that the Defendants are in compliance with the third-party liability statutes. To the extent that this assertion is made as a matter of fact, the Court must disregard it because the Plaintiffs have failed to produce any evidence in support. *GM Dev. Corp. v.*

Cmty. Am. Mortgage Corp., 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990) ("As a general rule, an unsworn and unproven assertion is not a fact that a trial court can consider in ruling on a motion for summary judgment."). To the extent that this assertion is made as a matter of law, it is inappropriate for discussion in a statement of facts. *See Williams*, 20 Ariz. App. at 137, 510 P.2d at 767.

24. *See* response to DSOF ¶ 19, incorporated herein by this reference.

25. *See* response to DSOF ¶ 23, incorporated herein by this reference.

26. *See* response to DSOF ¶ 19, incorporated herein by this reference.

27. *See* response to DSOF ¶ 19, incorporated herein by this reference.

28. Plaintiffs' grounds for dispute are not well taken. First, their assertion that the Motion to Publish "is moot" is a legal conclusion that is not appropriate for discussion in a statement of facts. *See Williams*, 20 Ariz. App. at 137, 510 P.2d at 767. Second, the Plaintiffs' claim that the court rules do not prohibit citation to unpublished district court opinions is not only wrong,[10] but also inappropriate for a statement of facts. *Id.* Further, the District Court's denial of the motion to publish is what is binding, not what Shepard's says.

29. Plaintiffs' grounds for dispute are not well taken. Page 16 of the transcript does *not* include an argument that *Lizer* was published or an argument that *Lizer* is good law. Rather, counsel argued that a separate U.S. Supreme Court decision, *Super Tire Engineering v. McCorkle*, was "[g]ood law today." *See* DSOF ¶ 29, Ex. N (Tr. 01/09/12 at 16:15-17).

30. This fact is disputed, but resolution of this disputed issue is not necessary for the Court to decide this case.

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[10] *E.g.*, *Kriz v. Buckeye Petroleum Co., Inc.*, 145 Ariz. 374, 377, 701 P.2d 1182, 1185 (1985) ("We will treat memorandum decisions from the federal district court the same as memorandum decisions of our state courts.").

31. Plaintiffs concede that the Court need not resolve whether Mr. Ullman conceded to the Arizona Legislature that hospitals could not lawfully enforce healthcare-provider's liens after accepting payment from AHCCCS.

RESPECTFULLY SUBMITTED this 26th day of September, 2013.

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