

1 B. Lance Entrekin (#16172)
2 **THE ENTREKIN LAW FIRM**
3 One East Camelback Road, #710
4 Phoenix, Arizona 85012
(602) 954-1123
Email: lance@entrekinlaw.com
Attorney for Plaintiffs

5 Geoffrey M. Trachtenberg (#19338)
6 **LEVENBAUM TRACHTENBERG, PLC**
7 362 North Third Avenue
8 Phoenix, Arizona 85003
(602) 271-0183
Email: gt@LTinjurylaw.com
Attorney for Plaintiffs

9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

10 **IN AND FOR MARICOPA COUNTY**

11 AMBER WINTERS, et al.,
12 on behalf of themselves and all others
13 similarly situated,

14 Plaintiffs,

15 v.

16 BANNER HEALTH NETWORK, et al.,

17 Defendants.

Civil Case No. CV2012-007665

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' STATEMENT OF
FACTS AND PLAINTIFFS'
STATEMENT OF FACTS IN
SUPPORT OF PLAINTIFFS'
RESPONSE TO DEFENDANTS'
CROSS-MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF
PLAINTIFFS' MOTION**

(Assigned to the Hon. J. Richard Gama)

18 Plaintiffs hereby submit their Response to Defendants' Statement of Facts and
19 Plaintiffs' Statement of Facts in Response to Defendants' Cross Motion for Summary
20 Judgment and in support of Plaintiffs' Motion.

21 Part One asserts Plaintiffs' facts in response to Defendants' Cross-Motion for Summary
22 Judgment and in Support of Plaintiffs' Motion for Summary Judgment. Part Two responds to
23 Defendants' "objections" to Plaintiffs' initial statement of facts in support of Plaintiffs' Motion
24 for Summary Judgment. Part Three responds to Defendants' statement of facts in support of
25 their Cross-Motion for Summary Judgment.

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1 **PART ONE**

2 **PLAINTIFFS' STATEMENT OF FACTS IN SUPPORT OF**
3 **PLAINTIFFS' RESPONSE TO DEFENDANTS' CROSS-MOTION**
4 **AND IN SUPPORT OF PLAINTIFFS' MOTION**

5 8. After *Lizer* held that balance billing a Medicaid patient was illegal under 42 C.F.R.
6 § 447.15, Defendants' counsel started claiming that Attachment 4.19-A in Arizona's State
7 Medicaid Plan gave them a special exemption to balance bill Medicaid patients and that *Lizer*
8 had misinterpreted the language of the Plan. **Exhibit 5** hereto (2004 memorandum of
9 Defendants openly circulated to Medicaid patients and counsel thereto).

10 9. Attachment 4.19-A concerns the "method" for establishing "payment rates" by
11 AHCCCS for certain fee for service payments for "off reservation Indian Health Service
12 members, Emergency Services only populations and special cases." It says nothing about 42
13 C.F.R. § 447.15, personal injury settlements, liens, the lien statutes, balance billing or
14 substitute billing and is not an authorization of any kind. *See*, Defendants' Statement of Facts,
15 Exhibit I.

16 10. The "language in the Arizona State Medicaid Plan, Attachment 4.19-A, page 3,
17 under 'Prospective Rates,' does not provide a waiver of balance billing to providers." Arizona
18 has never obtained a necessary balance billing waiver. *E.g.*, Exhibit 2 to initial Statement of
19 Facts at ¶7; **Exhibit 6** attached hereto, written communication from Cheryl Young and
20 affidavit of Lance Entrekin, pursuant to Rule 56, ARCP.

21 11. Nothing in the Arizona State Medicaid Plan, at Section 4.19, Attachment A or
22 anywhere else, gives Arizona providers permission to "supplement AHCCCS payments
23 through lien recoveries." *E.g.*, Exhibit 2 to initial Statement of Facts at ¶7.

24 12. The Notice known as CMS 10130, found in the Federal Register at 70 FR 25578-
25 02 (May 13, 2005), reaffirms the Departments' "no balance billing Medicaid patients without a
26 waiver" policy. That Notice states that "[c]onsistent with 42 CFR § 447.15, Medicaid
27 payments will be considered payment in full and providers are only allowed to submit a
28 request for section 1011 reimbursement for the deductible, coinsurance or co-payment not paid
by the individual." **Exhibit 7** attached hereto.

1 13. AHCCCS' policy is and has always been that the hospitals cannot balance bill
2 Medicaid patients without a waiver from HHS and that the Defendant hospitals did not have
3 such a waiver. *E.g.*, Exhibit 3 to initial Statement of Facts at ¶2; **Exhibit 8**, Declaration of
4 David Botsko attached hereto.

5 14. AHCCCS currently states on its own web site that balance billing a Medicaid
6 patient in Arizona constitutes "fraud." **Exhibit 9**, attached hereto (AHCCCS website page on
7 balance billing medicaid patients).

8 15. Botsko has testified that there were no enforcement mechanisms in place for this
9 practice. Exhibit 3 to initial Statement of Facts at ¶3.

10 16. The AHCCCS web site section on balance billing actually asks providers to self
11 report and to report their peers. **Exhibit 9**, attached hereto.

12 PART TWO

13 **PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS**

14 1. Admitted by Defendants.

15 2. **First bullet point:** Barker's affidavit not only establishes that he played a key role
16 in every major policy initiated from 2001-08, *e.g.*, ¶2, it also establishes that he currently
17 works closely with HHS as a partner in the Washington D.C. office of Foley Hoag. This easily
18 meets the personal knowledge requirements for an expert witness and Defendants cite nothing
19 to the contrary.

20 **Second, fourth and fifth bullet points:** ¶¶ 6-24 make no legal assertions. Most simply
21 lay foundation and describe the current policy of HHS, which Defendants place at issue for
22 more than 10 pages in their Cross-Motion.

23 **Third bullet point:** A copy of the e-mail and the affidavit pursuant to Rule 56(e),
24 ARCP are attached hereto as **Exhibit 6**. Barker is entitled to rely upon the written statement
25 pursuant to Rule 703, Ariz.R.Evid.

26 3. Admitted by Defendants.

27 4. **First sentence:** **Exhibit 9** attached hereto is the page from the AHCCCS website
28 which states that AHCCCS considers balance billing a Medicaid patient to be "fraud." The

1 Court may take judicial notice of the publicly disclosed policies and reports of governmental
2 bodies. *Mack v. South Bay Beer Dist.*, 798 F.2d 1279, 1282 (9th Cir. 1986); *Interstate Natural*
3 *Gas v. So. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953). **Exhibit 8** attached hereto is an
4 affidavit from David Botsko stating that balance billing a Medicaid patient is illegal in
5 Arizona.

6 **Second sentence:** See **Exhibit 3** to Plaintiffs' initial Statement of Facts. Further,
7 Botsko retired as Inspector General within the last two years and continues to consult in this
8 field, he easily meets the personal knowledge standard.

9 5. Defendants have not responded, this fact should be deemed admitted.

10 6. Defendants have not responded, this fact should be deemed admitted.

11 7. Resolution of this disputed issue is unnecessary to a determination of the issues
12 before the Court.

13 **PART THREE**

14 **PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF FACTS**

15 1. Admitted.

16 2. Stipulate the text of the letter, which applied solely to nursing homes in the 1970's,
17 by its own terms. As the letter states, participation in the Medicaid program is limited to
18 providers who accept, as "payment in full," the amount paid by the agency.

19 3. The passage is reproduced accurately, but it does not support the statement for
20 which it is cited, Defendants' Response and Cross-Motion at 10:7-11, in the slightest. It only
21 addresses co-pays and deductibles and Defendants stipulated that co-pays and deductibles are
22 not at issue here.

23 4. Statement of Facts No. 4 is not cited in the Defendants' Response and Cross-
24 Motion. The excerpt is accurately reproduced.

25 5. Admitted, but as clearly stated in its follow-up entry at 55 Fed.Reg. 1423-02, p.
26 1428 (Defendants' Exhibit F), the provider may not collect any amount from a patient outside
27 of a co-pay, coinsurance or deductible, none of which are at issue here.

1 6. Admitted, but as clearly stated in its follow up entry at 55 Fed.Reg. 1423-02, p.
2 1428 (Defendants' Exhibit F), the provider may not collect any amount from a patient outside
3 of a copay, coinsurance or deductible, none of which are at issue here.

4 7. Admitted.

5 8. Disputed. This entry discusses "the responsibility of Medicaid recipients for
6 copayments and deductibles" in certain situations. It also refers to this as "the cost sharing
7 amount for which the recipient is responsible" under state copayment statutes. No one
8 contends copayments and deductibles are at issue here.

9 9. Admitted.

10 10. Admitted.

11 11. Admitted, but as clearly stated in its follow up entry at 55 Fed.Reg. 1423-02, p.
12 1428 (Defendants' Exhibit F), the provider may not collect any amount from a patient outside
13 of a copay, coinsurance or deductible, none of which are at issue here.

14 12. Disputed. This ignores the next sentence, which states: "This final rule prohibits
15 the provider from seeking to collect from the Medicaid recipient any amount that exceeds the
16 amount, if any, allowed" under 42 C.F.R. § 447.20. Section 447.20 concerns coinsurance,
17 copayments and deductibles, which no one contends are at issue here.

18 13. Admitted, but as clearly stated in its follow up entry at 55 Fed.Reg. 1423-02, p.
19 1428 (Defendants' Exhibit F), the provider may not collect any amount from a patient outside
20 of a copay, coinsurance or deductible, none of which are at issue here.

21 14. Admitted, but as clearly stated in its follow up entry at 55 Fed.Reg. 1423-02, p.
22 1428 (Defendants' Exhibit F), the provider may not collect any amount from a patient outside
23 of a copay, coinsurance or deductible, none of which are at issue here.

24 15. Admitted, but as clearly stated in its follow up entry at 55 Fed.Reg. 1423-02, p.
25 1428 (Defendants' Exhibit F), the provider may not collect any amount from a patient outside
26 of a copay, coinsurance or deductible, none of which are at issue here.

27 16. Disputed. The "statement" is not a policy statement, it is a letter from the acting
28 director of the Medicaid Bureau of the Health Care Financing Administration. See,

1 Defendants' Statement of Facts at Exhibit G. Moreover, three different courts have considered
2 whether this letter authorizes balance billing Medicaid patients and all three have concluded
3 that it does not. In *Spectrum*, the Court held that the letter was entitled to no deference
4 whatsoever, because it did not appear to represent agency policy and also was not subject to
5 any public notice and comment. Barely a month ago, *Taylor* also held that this same letter was
6 entitled to no deference. *Olszewski* held that the letter was entitled to some deference, but
7 made the more salient point that the letter itself expressly forbids what Defendants herein are
8 doing.

9 In the second paragraph, the letter specifically discusses situations where a State has a
10 waiver. In the fourth paragraph, the letter then states that if a state has a waiver, the state may
11 "seek to bill that third party payer after refunding the Medicaid payment to the state agency."

12 Defendants do not have a waiver, Plaintiffs' initial Statement of Facts at ¶2, **Exhibit 2**,
13 and to be sure, they never refund "the Medicaid payment to the state agency." As alleged in
14 the Complaint and as Defendants admit, they pocket *both* the Medicaid payment and the
15 money they receive from the Medicaid patient. This, even if this letter were relevant to the
16 present matter, it explicitly forbids what Defendants are doing.

17 17. Admitted.

18 18. Admit that this certification is made.

19 19. Admitted that it was approved, but Plaintiffs dispute that this in any way addresses
20 balance billing.

21 20. Admitted, although this has nothing to do with balance billing Medicaid patients.

22 21. Admitted, although this has nothing to do with balance billing Medicaid patients.

23 22. Admitted, although this has nothing to do with balance billing Medicaid patients.

24 23. Admitted, but deny that Defendants are in compliance.

25 24. Admitted, although this has nothing to do with balance billing Medicaid patients.

26 25. Admitted, but deny that Defendants are in compliance.

27 26. Admitted, although this has nothing to do with balance billing Medicaid patients.

28 27. Admitted, although this has nothing to do with balance billing Medicaid patients.

1 28. Disputed. *Lizer* is published at 308 F.Supp.2d 1006. The Motion to Publish that
2 was apparently denied is moot because the opinion had already gone for publication.
3 Moreover, unlike Courts of Appeal, there are absolutely no court rules governing the
4 publication of District Court opinions in the District of Arizona. *Cf. Payne v. Pauley*, 337 F.3d
5 767, 780 (7th Cir. 2003) (noting that, “[a]s there is no rule in the Northern District of Illinois
6 barring citations to unpublished opinions . . . nothing would prohibit a litigant from citing these
7 unpublished district court opinions in this Court.”). All decisions of the District Court carry
8 the same weight – namely, they are persuasive but not binding, even upon courts in the same
9 District. *E.g., Carmichael Lodge No. 2103, Benevolent and Protective Order of Elks of the*
10 *United States of Am. v. Leonard*, 2009 WL 1118896 (E.D.Cal., Apr.23, 2009) (“[T]here is no
11 prohibition in citing “unpublished” district court opinions (unless a local rule so provides).
12 They are either persuasive to the issue at bar, or they are not. District court opinions,
13 published or not, do not set binding precedent for other cases . . . Circuit court cases are, of
14 course, differently viewed.”). Shepard’s confirms *Lizer* is good law, with no negative
15 authority. *Lizer* was cited a month ago as the leading case in the country on this issue by a
16 federal judge. It has been similarly cited by two federal Circuit Courts.

17 29. Disputed. Plaintiffs’ counsel joked with Judge Bolton that “we now discover *Lizer*
18 was published accidentally . . .” Defendants’ Statement of Facts, Exhibit O at p. 15. Counsel
19 then argued that this was in fact *not* the case and *Lizer* was good law (*Id.* at p. 16), as counsel
20 has argued in every hearing and every pleading for over two years, including the Complaint
21 and the Motion for Summary Judgment herein.

22 30. Disputed. Plaintiffs cannot speak for every member of the AHCCCS
23 administration, nor can Defendants. The Inspector General of AHCCCS, however, was not
24 aware of Defendants balance billing activities, Plaintiffs’ initial Statement of Facts at ¶4,
25 **Exhibit 3**, and AHCCCS’ website states the practice is “fraud.” **Exhibit 9** attached hereto.

26 31. Disputed. Plaintiffs’ initial Statement of Facts at ¶7, **Exhibit 4**, but resolution of
27 this disputed issue is unnecessary to a determination of the issues before the Court.
28

1 RESPECTFULLY SUBMITTED this 6th day of September, 2013.

2 By: /s/ Geoffrey Trachtenberg
3 Geoffrey Trachtenberg (#19338)
4 **LEVENBAUM TRACHTENBERG PLC**
362 North Third Avenue
Phoenix, Arizona 85003

5 By: /s/ Lance Entekin
6 B. Lance Entekin (#16172)
7 **THE ENTREKIN LAW FIRM**
One East Camelback Road, #710
Phoenix, Arizona 85012

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9 COPY OF THE FOREGOING
10 SENT BY FIRST CLASS MAIL
11 THIS 6th DAY OF SEPTEMBER,
2013, TO:

12 Christopher Hering, Esq.
13 Cameron C. Artigue, Esq.
14 Gammage & Burnham PLC
Two North Central Avenue, 15th Floor
Phoenix, Arizona 85004
Attorney for Defendants

15 L. Eric Dowell, Esq.
16 Kerry S. Martin, Esq.
17 Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
2415 East Camelback Road, Suite 800
Phoenix, Arizona 85016
Attorney for Defendants

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19 By: /s/ Lisa Balbini
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