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12 SUPERIOR COURT OF ARIZONA
13 MARICOPA COUNTY

14 AMBER WINTERS, et al.,

15 Plaintiffs,

16 vs.

17 BANNER HEALTH, INC., et al.,

18 Defendants.

NO. CV2012-007665

**RESPONSE TO PLAINTIFFS'
FIRST AMENDED STATEMENT
OF FACTS**

(Assigned to the Honorable J. Richard Gama)

19 Defendants respond as follows to Plaintiffs' First Amended Statement of Facts
20 ("PSOF"):

- 21 1. Not disputed.
- 22 2. Not disputed, but the provider agreements speak for themselves.
- 23 3. Not disputed, but the provider agreements speak for themselves.
- 24 4. Not disputed, but the provider agreements speak for themselves.
- 25 5. Disputed. The only evidence offered in support of this statement is Thomas
26 Barker's affidavit. The Court should, however, strike the Barker Affidavit because it is
defective for at least two reasons:

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- Plaintiffs lay no foundation establishing (i) that Barker is authorized to speak on behalf of HHS, (ii) that Barker is authorized to set forth HHS’ official position on any matter relating to the provider agreements, and (iii) that Barker’s statements are, in fact, the official positions taken by HHS on the issues set forth in his affidavit.
- Barker is not currently employed by HHS. Accordingly, Barker has no personal knowledge of—and thus cannot testify to—HHS’s *current* position on the issues set forth in his affidavit. *See* Rule 602, Ariz. R. Evid.; *Wells-Stewart Const. Co. v. Gen. Ins. Co. of Am.*, 10 Ariz. App. 590, 593, 461 P.2d 98, 101 (App. 1969) (court should not consider affidavit that is not based on personal knowledge) *disapproved of on other grounds by Zuckerman v. Transamerica Ins. Co.*, 133 Ariz. 139, 650 P.2d 441 (1982).

6. Disputed. *See* Response to PSOF ¶ 5.

7. This “fact” is a series of statements opining that Medicaid patients are third-party beneficiaries of the provider agreements. But whether a person is a third-party beneficiary of a contract is a question of law, not of fact. *Basurto v. Utah Const. & Min. Co.*, 15 Ariz. App. 35, 39, 485 P.2d 859, 863 (1971). As such, these statements are legal conclusions that 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). Further, Plaintiffs support this “fact” with legal conclusions from Thomas Barker’s affidavit, but courts do not consider legal conclusions contained in affidavits. *Id.* Moreover, the Barker Affidavit should be stricken for the reasons specified in Response to PSOF ¶ 5.

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RESPECTFULLY SUBMITTED this 7th day of March, 2014.

GAMMAGE & BURNHAM, P.L.C.

By /s/ Christopher L. Hering
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