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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KARI LAKE,

Contestant/Petitioner,

vs.

KATIE HOBBS, et al.,

Defendants.

No. CV2022-095403

**MARICOPA COUNTY DEFENDANTS'
REPLY IN SUPPORT OF THEIR
MOTION TO DISMISS**

(Expedited Election Matter)

(Honorable Peter Thompson)

1 Pursuant to Rule 7.1, Ariz. R. Civ. P., and this Court’s May 8, 2023 Minute Entry
2 Order, the Maricopa County Defendants respectfully submit this Reply in Support of their
3 Motion to Dismiss.

4 **ARGUMENT**

5 **I. Lake’s signature verification claim fails as a matter of law because she has not**
6 **identified with specificity any ballots that should not have been counted.**

7 Count III of Plaintiff’s Complaint alleges one statutory ground for her signature
8 verification claim—misconduct under A.R.S. § 16-672(A)(1). [See Compl. ¶¶ 149-55
9 (citing A.R.S. §§ 16-550 and 16-672(A)(1)).] Accordingly, on this remand, Lake is confined
10 to proving by clear and convincing evidence that Maricopa County election officials engaged
11 in misconduct that led to a conclusion “that the outcome would plausibly have been
12 different,” rooted in a “competent mathematical basis.” *Lake v. Hobbs*, 525 P.3d 664, 668
13 at ¶ 11 (Ariz. Ct. App. 2023).

14 Throughout this litigation, Lake’s signature verification claim has been a moving
15 target. In the Complaint, she stated a challenge to some of the Recorder’s early ballot
16 affidavit signature verification determinations. Lake alleged that “a material number of early
17 ballots cast in the November 8, 2022 general election were transmitted in envelopes
18 containing an affidavit signature that the Maricopa County Recorder or his designee
19 **determined** did not match the signature in the putative voter’s ‘registration record.’ The
20 Maricopa County Recorder nevertheless accepted a material number of these early ballots
21 for processing and tabulation.” *Lake v. Hobbs*. No. CV-23-0046-PR, Order, at 3 (Ariz. Sup.
22 Ct. Mar. 22, 2023) (quoting Compl. ¶ 151) (emphasis added).

23 Now, Lake attempts to amend her pleading, stating that she does not actually intend
24 to challenge any of the Recorder’s signature determinations. [Lake’s Response in
25 Opposition to Defendants’ Motions to Dismiss, May 10, 2023 (“Resp.”) at 9.] Instead, Lake
26 asserts that Maricopa County “simply did not perform” signature verification. [Resp. at 9;
27 *see also id.* at 10 (asserting that the County “skip[ped] signature verification [because] it
28 bec[ame] too burdensome.”)] To be clear, Lake did not assert in her Complaint that the

1 Recorder failed to perform signature verification. So far as the Maricopa County Defendants
2 can tell, Lake asserts if for the very first time in her Response.

3 There is no evidence in the record for *either* of Lake’s theories, neither of which are
4 correct. That is: contrary to Lake’s false allegations, the Recorder never determined that
5 signatures were inconsistent with the voters’ registration records but accepted those
6 signatures as if they were consistent anyway. And the Recorder did, in fact, conduct
7 signature review and make signature verification determinations. But regardless of which
8 of these allegations forms the basis of Lake’s claim, they are insufficient to state a claim for
9 relief and Count III should be dismissed pursuant to Ariz. R. Civ. P. 12(b)(6).

10 Because election contests are purely statutory proceedings, Lake was required to set
11 forth in her Statement of Contest the basis for her signature verification claim. A.R.S. § 16-
12 673(A)(4). Unlike plaintiffs in other types of litigation, election contest plaintiffs cannot
13 amend their complaints to conform them to new theories. *Grounds v. Lawe*, 67 Ariz. 176,
14 186-87 (1948) (stating that “[t]here is no section [in the election contest statutes] relating to
15 amendments” and denying contestant’s request to amend the contest to conform to evidence
16 adduced at trial). Accordingly, Lake is bound to her claim that the Recorder conducted
17 signature review, determined that certain signatures were inconsistent with the signatures in
18 the voters’ registration records, but accepted them anyway, sending those ballots to
19 tabulation.

20 The support for this claim—which amounts to an allegation that dozens of Maricopa
21 County employees engaged in wide-ranging, concerted action to violate state law—is
22 woefully insufficient to survive a motion to dismiss. Indeed, the facts in Lake’s Complaint
23 and supporting declarations are the type of “inferences or deductions that are not necessarily
24 implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from
25 such facts, or legal conclusions alleged as facts[,]” and so this Court must **not** accept them
26 as true for purposes of deciding the Defendants’ Motions to Dismiss. *Jeter v. Mayo Clinic*
27 *Ariz.*, 211 Ariz. 386, 389 ¶ 4 (App. 2005).

28 Lake asks this Court to follow a long chain of inference that is wholly unwarranted.

1 She essentially argues that some level one signature reviewers (her three signature reviewer
2 declarants) estimated how many signatures they reviewed that were not consistent with the
3 limited number of signature exemplars available to them, to which they might compare the
4 signatures they were reviewing. These three declarants were then surprised by the number
5 of ballots ultimately sent for tabulation after review by the level two and level three signature
6 reviewers. Of course, level two and level three reviewers have access to more signature
7 exemplars than the level one reviewers, which all three declarants admitted. [See Meyers
8 Decl., ¶ 8 (admitting that level 2 reviewers are allowed to see additional images of the
9 signatures in the voter registration record); Nystrom Decl., ¶ 7 (same); Onigkeit Decl., ¶ 8
10 (same).] And, as explained on pages 2 through 3 of the Maricopa County Defendants’
11 Supplement to Their Motion to Dismiss, voters whose early ballots are determined by level
12 two or three to have inconsistent or missing signatures have an opportunity to cure their
13 signatures; and, if they do, their ballots are sent to tabulation.

14 Nonetheless, the number of ballots sent for tabulation was higher than the three
15 declarants expected. From these allegations, Lake asserts that the Complaint reveals
16 “consistent and improper counting of non-verified early ballots[.]” [Resp. at 5] But what
17 this in fact reveals is that the declarants, who are admittedly the least experienced
18 participants in the signature verification process, had knowledge of only part of the process
19 and the end results did not meet their expectations. It certainly does not identify the ballots
20 that Lake alleges should not have been counted.

21 In the alternative, Lake offers another equally tortured line of inferences. She argues
22 that this Court should determine that 2022 early ballots should be thrown out—
23 disenfranchising hundreds of thousands of Maricopa County voters—based on a post hoc
24 analysis of **2020** early ballot affidavit signatures. Notably, Lake asserts that this Court
25 should not rely on the judicial determination that the Recorder’s 2020 signature review
26 processes and determinations were lawful and accurate. See *Ward v. Jackson*, No. CV2020-
27 015285 (Maricopa Cnty. Super. Ct., December 4, 2020), *affirmed* No. CV-20-0343-AP/EL
28 (Ariz. S. Ct., December 8, 2020). Instead, she asks the Court to rely on the analysis

1 conducted by We the People Arizona Alliance (“WTPAA”) of 2020 early ballot affidavits
2 and derive a percentage of 2022 ballots to discard based on that analysis.¹ Lake then asks
3 this Court to use the percentage of signature verifications on which WTPAA disagreed with
4 the Recorder’s 2020 signature verification determinations to throw out hundreds of
5 thousands of 2022 early ballots. This does not meet the Plaintiff’s burden to specifically
6 identify ballots that should not have been counted.

7 The law requires more. An election contestant bears the burden of **specifically**
8 **identifying** the ballots that she challenges. *Grounds*, 67 Ariz. at 189. It is not enough that
9 a contestant in an election contest allege, “upon information and belief,” that some ballots
10 were improperly counted (or, that some signature determinations were improperly made).
11 Rather, as the *Grounds* Court explained, “[t]he duty of specifying and pointing out the
12 alleged illegal irregularities and insufficiencies is a task that should be undertaken by
13 litigants and their counsel.” *Id.* So in that case, when the contestant alleged that seventy-
14 one absentee ballots were illegal, but did not identify *which* ballots, no relief was available
15 to the contestant. *Id.* In that particular case, the Supreme Court apparently had concerns
16 that it was possible that “illegal absentee ballots were cast and of sufficient number to change
17 the results of the election.” *Id.* Despite that, the Court said it was “constrained” to deny the
18 requested relief, because the contestant had not identified the ballots to be considered.

19 Such is the case here. Lake has not identified *any* ballots that were illegally counted,
20 nor has she identified any affidavit signatures that should not have been credited as
21 consistent with the signatures in the voters’ registration records. She has simply alleged that
22 there are “a material number” of such ballots and signatures. [Compl., ¶ 151.] But as the
23 *Grounds* Court said, that allegation is insufficient to sustain her contest.

24 Hoping to avoid this outcome, Lake incorrectly suggests that this Court should

25 ¹ Lake asserts that she is not challenging the County’s individual signature determinations,
26 and thus does not run afoul of the procedures for challenging early ballots in A.R.S. § 16-
27 552. But the WTPAA analysis is in essence such a challenge. WTPAA identified a
28 percentage of 2020 early ballots for which it disagreed with the Maricopa County
Recorder’s signature comparison determination. This is not a basis to discard early ballots
under Arizona law.

1 “strike” ballots “proportionately” from each candidate, as the *Grounds* Court did with other
2 ballots that it considered (not the seventy-one just discussed). [Resp. at 13-15.] But the
3 contestant in *Grounds* had actually identified fifteen voters who had cast ballots but were
4 not lawfully allowed to vote. *Grounds*, 67 Ariz. at 178-79, 184. Because it was impossible
5 to know for whom they had voted, fifteen votes were struck from the total votes cast, with
6 each candidate’s vote total reduced by a proportional amount. *Id.* at 184-85.

7 Unlike in *Grounds*, Lake’s Complaint and its supporting declarations do not
8 sufficiently identify the number of ballots that were tabulated (allegedly) without being
9 verified according to A.R.S. § 16-550. For this reason, as well as the reasons stated in the
10 three Supplemental Motion to Dismiss Memoranda filed by the Maricopa County
11 Defendants, Governor Hobbs, and the Secretary of State on May 9, 2023, Lake’s Count III
12 cannot state a claim upon which relief may be granted. This Court should dismiss it.

13 **II. Lake’s new version of Count III contradicts her own evidence and therefore**
14 **does not state a claim for relief.**

15 Even if the Court permits Lake to pursue Count III as reformulated in her
16 Response—filed nearly five months after the deadline to file her election contest—her claim
17 must fail because it is directly contradicted by her own declarants, who assert that they
18 participated in the signature verification process. In what is surely an attempt to create a
19 factual scenario that resembles the one in *Reyes v. Cuming*, 191 Ariz. 91, 92 (App. 1997), in
20 her Response, Plaintiff asserts that Maricopa County simply abdicated its legal duty to
21 conduct signature verification. [Resp. at 9-10] But there is already testimony in the record,
22 as well as the declarations of Lake’s three signature verification witnesses, that flatly
23 contradicts this new assertion.

24 In *Reyes*, “[t]he trial court found that the County Recorder had not compared any of
25 the signatures on the outside of the absentee ballots with the registration lists, as required by
26 statute. 191 Ariz. at 92 (citing A.R.S. § 16-550(A)). The court then concluded that the
27 appropriate remedy would be to set aside the election. *Id.* at 94. There was no need for the
28 contestant to identify which particular ballots were illegal: they all were; that is, *all* of the

1 signatures were unverified.

2 Perhaps because Lake cannot demonstrate that election officials' misconduct
3 affected votes "in sufficient numbers to alter the outcome of the election" by a "competent
4 mathematical basis," her factual claims have now morphed to allege that the Maricopa
5 County Recorder did in 2022 what the Yuma County Recorder had done in 1996—that is,
6 failed to compare signatures at all. But Lake's own witnesses belie this brand new allegation.
7 Andrew Myers, Yvonne Nystrom, and Jacqueline Onigkeit all asserted in their declarations
8 that they participated in the signature verification process. [See Meyers Decl., ¶¶ 6-12
9 (describing participation in the signature verification for the 2022 general election); Nystrom
10 Decl., ¶¶ 1-12 (same); Onigkeit Decl., ¶¶ 4-14 (same).]

11 Moreover, during the December 2022 trial in this case, Maricopa County Director of
12 Elections Rey Valenzuela testified briefly about the signature verification process that
13 occurred for the 2022 general election. [Dec. 22, 2022 Tr., at 160:12-161:3.] This Court
14 should not credit Lake's new claim that the County did not conduct signature comparisons.
15 See *Emmons v. Teleflex Inc.*, No. 1 CA-CV 19-0678, 2020 WL 6286304, at *4 (Ariz. Ct.
16 App. Oct. 27, 2020) ("Parties are bound by their pleadings and evidence may not be
17 introduced to contradict or disprove what has been admitted or asserted as fact in their
18 pleadings, and a party may not introduce evidence in contradiction of express allegations of
19 [her] complaint.") (quoting *Armer v. Armer*, 105 Ariz. 284, 288 (1970) and citing *Bank of*
20 *Am. Nat'l Tr. & Sav. Ass'n v. Maricopa County*, 196 Ariz. 173, 176, ¶ 11 (App. 1999)
21 ("Judicial admissions bind a party in a case to the allegations made in its pleading, absent an
22 amendment to the pleading[.]")).

23 All of this means that the situation before this Court is nothing like the situation
24 facing the court in *Reyes*, where the Yuma County Recorder had not performed *any* signature
25 verification for early ballot affidavit signatures. Despite Lake's attempts to reframe her
26 theory by alleging, in her Response for the first time, that the Maricopa County Recorder did
27 not verify any signatures, her own evidentiary submissions demonstrate that is not true. The
28 *Reyes* case is therefore inapposite and of no help to Lake.

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CONCLUSION

For the reasons stated in this Reply as well as in the three Supplemental Motion to Dismiss Memoranda filed by the Maricopa County Defendants, Governor Hobbs, and the Secretary of State on May 9, 2023, Lake’s Count III cannot state a claim upon which relief may be granted. This Court should dismiss it with prejudice.

RESPECTFULLY SUBMITTED this 11th day of May, 2023.

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