Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-095403 05/15/2023

HONORABLE PETER A. THOMPSON

CLERK OF THE COURT
I. Ostrander
Deputy

KARI LAKE

BRYAN JAMES BLEHM

v.

KATIE HOBBS, ET AL.

CRAIG A MORGAN
THOMAS PURCELL LIDDY

JUDGE THOMPSON

UNDER ADVISEMENT RULING

The Court has considered the filings of the parties: Governor Katie Hobbs Renewed Motion to Dismiss, the Maricopa County Defendants' Memorandum of Law Supplementing Their Motion to Dismiss, and Secretary of State Adrian Fontes' Supplemental Memorandum in Support of Motion to Dismiss, along with the associated response and replies. The Court has also considered Plaintiff Kari Lake's Motion for Relief from Judgment, along with the associated responses and reply. The Court has considered the arguments of the parties at the hearing on May 12, 2023.

The Court considers each request for relief in turn.

BACKGROUND

This case was returned on remand from the Arizona Supreme Court. This Court's dismissal of Counts I, II, and IV – X were affirmed, and this Court's dismissal of Count III on the ground of laches was vacated and remanded. The mandate of the Arizona Supreme Court, as relevant here, states:

> It is further ordered remanding to the trial court to determine whether the claim that Maricopa County failed to comply with A.R.S. § 16-550(A) fails to state a claim pursuant to Ariz. R. Civ. P. 12(b)(6) for reasons other than laches, or, whether Petitioner can prove her claim as alleged pursuant to A.R.S. § 16-672 and establish that "votes [were] affected 'in sufficient numbers to alter the outcome of the election'" based on a "competent mathematical basis to conclude that the outcome would plausibly have been different, not simply an untethered assertion of uncertainty.

(alterations in original) (quoting *Lake v. Hobbs*, 525 P.3d 664, 668, ¶ 11 (App. 2023)). It is with this mandate in mind that the Court proceeds.

I. Motions to Dismiss

This Court will grant a motion to dismiss based on a Plaintiff's failure to state a claim upon which relief can be granted when, as a matter of law, the Plaintiff is not "entitled to relief under any interpretation of the facts susceptible of proof." *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 8 (2012). In determining whether a complaint states a claim, the Court must assume all well-plead allegations are true and "indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient." *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 130, ¶ 7 (2020) (citation omitted).

A Plaintiff need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Ariz. R. Civ. P. 8. Arizona follows a notice pleading standard, meaning that the opponent need only be given "fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 6 (2008).

Defendants raise problems with Count III that broadly fall into three (loosely) defined areas. First, Defendants challenge the form of the allegations. The Secretary raises the issue of whether the verification of the Complaint was proper. This argument was waived by not being raised on the initial motion to dismiss and by proceeding to trial in December. *Michael Weller, Inc. v. Aetna Cas. & Sur. Co.*, 126 Ariz. 323, 326 (App. 1980). After a full trial and appeals process, Defendants cannot now raise the issue of a defective verification for the first time on remand.

Similarly, the Governor argues that Lake fails to allege that any specific mail-in ballots were illegally counted. This argument fails first because Arizona is a notice pleading state, as noted above, and the Complaint generally alleges a violation of the EPM and A.R.S. § 16-550 by

failure to cure or reconcile signatures. In her Response to the Motion to Dismiss, Plaintiff concedes that she is not contesting the signature verification process for specific ballots. Lake now clarifies for the first time that, under the widest possible reading of Count III, she is contending that election officials failed to comply with the EPM and A.R.S. § 16-550 by not performing ANY steps to comply with level 2 or level 3 screening or notification of electors to cure ballots where level 1 screeners found signatures were inconsistent. Lake argues those ballots were counted in sufficient numbers to affect the outcome of the election. While the wording of Count III does not state this allegation clearly, it can be read broadly enough that Lake's argument fits under notice pleading requirements. The response and oral argument have further narrowed this claim sufficient for the Defendants to be on notice as to what violation Lake is arguing.

The second area Defendants attack is the legal sufficiency of the allegations. Maricopa County makes the compelling argument that Lake's challenge to signatures on mail-in ballot envelopes seeks relief beyond that which the legislature has provided. Simply put, the County argues that because a party representative can challenge ballot signature reconciliation as it is taking place, the legislature has provided an exclusive remedy for the challenge that Lake brings. *See* A.R.S. § 16-552. It is true that where the legislature has provided for a right "and also provides a complete and valid remedy for the right created the remedy thereby given is exclusive." *Valley Drive-In Theatre Corp. v. Super. Ct. In and For Pima Cnty.*, 79 Ariz. 396, 400 (1955). The Court agrees with the County that the legislature statutorily limited a party's recourse for challenging individual signatures for consistency – which would otherwise completely cripple the election system. But this relief at the level of individual ballots does not preclude a claim that the County Recorder failed entirely to perform ANY level 2 or level 3 signature verification on ballots where level 1 screeners found signatures were not similar. *See Reyes v. Cuming*, 191 Ariz. 91 (App. 1997). This is in sharp contrast to an allegation that the Recorder or designee improperly exercised his or her discretion within the policy.

Additionally, the Governor argues that it is now simply too late to litigate Count III because Governor Hobbs has been in office for five months. But A.R.S. § 16-676 imposes no time limit on when, assuming all other procedural requirements are timely met, the Court may grant relief. Granted, the statute as written does not appear to take into consideration a fulsome appeals process resulting in a trial on remand – but the Court must give effect to each word of the statute as written. *See McCaw v. Ariz. Snowbowl Resort*, 254 Ariz. 221, 226, ¶ 16 (App. 2022). Subsection (C) states simply that if the court determines "that a person other than the contestee has the highest number of legal votes, the court shall declare that person elected" and further nullify the certificate of election of the person whose office is contested. The Court sees no requirement that appeal and remand take place within a certain time for Lake to be eligible for this relief, and cannot read such a requirement into the statute so as to expand its provisions. *City of Tempe v. Fleming*, 168 Ariz. 454, 457 (App. 1991); *see also Lake*, 525 P.3d at 667, ¶ 5 ("We are not permitted to read into the election contest statute what is not there.") (quoting *Grounds v. Lawe*, 67 Ariz. 176, 187 (1948)).

In this second area, Maricopa County argues that because Lake does not simultaneously allege both misconduct *and* illegal vote grounds under Count III that she cannot prevail. *See* A.R.S. § 16-672(A)(1), (4). But this argument is not persuasive. If Maricopa County is right, any challenger under Section 16-672 would be required to double-up and allege (A)(4) grounds whenever they bring any challenge under (A)(1), (A)(3), or (A)(5) as these grounds rest on the assumption that some number of ballots were illegally placed in or out of the correct column. The Court reads the statute as providing five discrete reasons that a challenger may seek relief. It may have been more prudent to allege more than one ground for each set of facts that Lake brings in her complaint, but the Court will not dismiss the Count on the grounds that her failure to do so leaves Defendants lacking notice as to what her claims are. Indeed, her complaint at Paragraph 151 specifically notes that "[t]o be *lawful and eligible for tabulation*, the signature on the affidavit accompanying an early ballot must match the signature featured on the elector's registration record." A.R.S. § 16-550. This is sufficient to put Maricopa County on notice of Lake's objections.

The third and last area focuses on the substance or completeness of the allegations. The Secretary objects that Lake has not stated in her complaint exactly how many ballots were improperly admitted. But Lake is not required to do so in her complaint: Arizona is a notice pleading state, and the Court finds that while she must raise the nature of the violation of election rules for which she seeks relief, she does not need to plead a precise number of ballots. Put another way, Lake must prove a competent mathematical basis to win at trial, but she need not plead a specific number of votes in her complaint under notice pleading. *See Verduzco v. Amer. Valet*, 240 Ariz. 221, 225, ¶ 9 (App. 2016) ("Under Arizona's notice pleading rules, 'it is not necessary to allege the evidentiary details of plaintiff's claim for relief.'") (quoting Daniel J. McAuliffe & Shirley J. McAuliffe, Arizona Civil Rules Handbook at 21 (2015 ed.)).

The Defendants also argue that these claims are at least in part based on reports and allegations related to the 2020 election. This is an evidentiary argument for trial rather than a basis to dismiss Plaintiff's claim wholesale. Any expert opinions based on the 2020 election analysis must be based upon adequate foundation for not only their reliability but their relevance to the 2022 election. Even where admitted at trial, such opinions would only be entitled to the weight deemed appropriate based upon their foundation.

In her response and at oral argument, Lake conceded that she is not challenging the process of signature review as to any specific ballot(s), whether any given signature matches a voter's record, or that the process was effective. She is instead alleging misconduct by the Maricopa County Defendants through a wholesale failure at the "higher-tier signature verification process" to reconcile non-conforming signatures, or to cure signatures pursuant to A.R.S. § 16-550. She alleges that Maricopa County entirely failed to perform the signature matching required by statute. As Lake put it in her response, she "brings a *Reyes* claim, not a *McEwen* claim. She challenges

Maricopa's failure to act, not its action on any particular ballot." (citing *McEwen v. Sainz*, No. CV-22-163 (Santa Cruz Super. Ct. Aug. 8, 2022)). Taking Lake's concession, she has stated a claim.

As was said in this Court's order of December 19, 2022, whether Maricopa County complied with the EPM and statutes governing elections is a question of fact. Lake has narrowed her claim to that complained of in *Reyes*, and she must demonstrate at trial pursuant to her concessions that Maricopa County's higher level signature reviewers conducted no signature verification or curing and in so doing had systematically failed to materially comply with the law. This is, of course, in addition to the requirement that she prove that this alleged complete failure to conduct signature verification resulted in a change in the outcome of the gubernatorial election proven by "competent mathematical basis." All of this must be done by clear and convincing evidence. *Lake*, 525 P.3d at 668, ¶ 10.

The renewed motions to dismiss as to Count III are denied.

II. Motion for Relief from Judgment

Lake moves for Rule 60 relief as to Counts II, V, and VI on grounds of newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)(1), fraud on the court, and the catch-all "any other reason justifying relief." Ariz. R. Civ. P. 60(b)(2), (3), (6).

To the extent that the civil rules can apply without contradiction to an election challenge, they do apply. This includes Rule 60. The Court will not rehash arguments going back to the motion to dismiss order. While, admittedly, the election challenge statutes do not show a great deal of consideration for post-trial rules of civil procedure, had the legislature wanted to abrogate or accelerate the rules for an election challenge so as to preclude Rule 60 relief they would have done so. The Court finds the motion is timely.

However, the merits of the motion are another matter. The dismissed Count II alleged that "[t]he [Ballot on Demand] *printers* involved in the tabulator problems . . . are not certified and have vulnerabilities that render them susceptible to hacking . . . ." Lake attempts to rescue Count II by arguing that evidence now shows that Maricopa County reinstalled software on memory cards used in the ballot *tabulators* without performing logic and accuracy testing. Assuming that this evidence could not have been discovered before trial, it goes to a completely different set of election day processes than that alleged in Count II – suggesting that the tabulators were maliciously configured to not *read* ballots is different in kind from alleging that the printers could not *write* the ballots correctly. The time to amend a complaint is before the matter goes to trial, not after. In fact, the law does not permit amendments of election contest complaints at any time after the contest filing deadline has passed, even to conform to the evidence. *See Kitt v. Holbert*,

30 Ariz. 397, 406 (1926) (holding "a statement of contest in an election contest may not be amended, after the time prescribed by law for filing such contest has expired" to fix the failure to allege the contestant was a proper elector).

While the difference between a tabulator-based claim and a printer-based claim may seem like a subtle distinction, it is not. Count II was fully litigated at trial and this Court's disposition was affirmed by both the Court of Appeals and Arizona Supreme Court. This is not newly discovered evidence that goes to the claim as presented to the Court in December and reviewed on appeal, it is a wholly new claim, and therefore Count II remains unrevived.

Lake also takes issue with the testimony of Scott Jarrett, who testified that the voting center difficulties faced on election day were minor in scope. Lake, needless to say, disagrees, and offers additional evidence in an attempt to demonstrate fraud or misconduct. Lake took this same position at trial and even recalled Scott Jarrett in her case in chief. But evidence that is merely cumulative that would not have changed the result is not sufficient to revive a claim under Rule 60. *Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, 595, ¶ 17 (App. 2007). Nor is it enough to disagree with a witness or find evidence contradicting a witness to prevail under Rule 60. Scienter – a knowing falsehood – is what is required to find fraud. *See Est. of Page v. Litzenburg*, 177 Ariz. 84, 94 (App. 1993) (affirming Rule 60 grant on basis of "conspicuous inference that [non-movant] engaged in knowing or deliberate misconduct"). Mere contradiction is not enough to prevail on grounds of fraud or misrepresentation, and this is all Lake offers now.

The allegation of fraud also leaps over a substantial gap in the evidence presented. The Court notes that counsel's representation of what the McGregor report would show is 180 degrees from what the report actually says. Rather than demonstrating that Mr. Jarrett lied, it actually supports his contention that the machine error of the tabulators and ballot printers was a mechanical failure not tied to malfeasance or even misfeasance. At trial in December 2022, Plaintiff presented the purely technical evaluation of Clay Parikh which found the only possible cause of the malfunctions on election day could be willful and intentional systemic manipulation to create the errors encountered. However, those conclusions were undermined completely by the very next witness at trial, David Betencourt. The testimony of Mr. Betencourt, who was called by Plaintiff, was summarized previously by this Court:

> "Mr. Betencourt testified that there were, in fact, multiple technical issues experienced on election day. He testified that these were solved by means such as: 1) taking out toner and/or ink cartridges and shaking them, 2) cleaning the corona wire, 3) letting the printers warm up, 4) cleaning the tabulators, and 5) adjusting settings on the printer. It is of note that, apart from 5), none of these solutions implicates the ballot in a manner suggesting intent. Mr. Betencourt testified that each of these on-site actions were successful to varying degrees, with shaking the

> toner cartridge being the most effective. It is worth repeating that ballots that could not be read by the tabulator immediately because of printer settings – or anything else – could be deposited in Door 3 of the tabulator and counted later after duplication by a bipartisan adjudication board.
>
> Mr. Betencourt testified that, not only did he lack knowledge of any T-Tech (or anyone else) engaging in intentional misconduct, but further testified that the T-Techs he worked with diligently and expeditiously trouble-shot each problem as they arose, and they did so in a frenetic Election Day environment. Plaintiff's own witness testified before this Court that the BOD printer failures were largely the result of unforeseen mechanical failure."

Interestingly, months later after extensive review, testing, and evaluation of the equipment involved under secure conditions, the report by Former Arizona Supreme Court Chief Justice Ruth McGregor came to the same conclusions. Plaintiff now seeks to allege fraud based upon the same type of purely technical evaluations presented in the first trial. This is not evidence of fraud, but additional evidence offered to support the view that error codes can prove intent and state of mind, exclusive of all other theories. The Court is not required to accept that premise, especially on remand after a full trial and appeal.

Ignoring Defendants' view of the testimony and taking all inferences in favor of Plaintiff, even if Lake may have demonstrated that Mr. Jarrett was mistaken on the first day of trial, that is not sufficient for Rule 60 relief. Even Mr. Parikh conceded that ballots which were not read by tabulators at the voting centers were transposed to new ballots and counted at Maricopa County's downtown central facility later.

Additionally, the Court notes that counsel's representation in the Motion to the effect that the Parikh Declaration supports a finding that 8,000 ballots "maliciously misconfigured to cause a tabulator rejection, *were not counted"* is not supported by a Declaration that 8,000 ballots were "affected" by an error. The oral arguments presented on May 12, 2023, clarified that error codes do not correspond to votes not counted. Counsel cannot leap a gap in proof with unsupported bare assertions.

Finally, the Court notes with respect to Lake's request to reconsider dismissal of Counts V and VI – pertaining to alleged equal protection and due process violations – the motion does not grapple at all with the reason the Court dismissed those claims in its December 19, 2022, minute entry. These counts are simply bootstrapped constitutional arguments "tak[ing] the verified statement beyond the remedies provided by the election contest statute, which is impermissible." (citing *Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978)). The reply's suggestion that the "issues"

be revived independent of the "counts" does not remedy this issue. Reconsideration of them is not warranted.

This is a claim which was fully litigated at trial and on appeal over seven months since the November 8, 2022, election. The evidence presented falls far below what is needed to establish a basis for fraud. It is important to remember that this is an election challenge and focuses on votes affected which would change the outcome of the election. Plaintiff has not established a basis for relitigating the previously adjudicated counts.

IT IS THEREFORE ORDERED denying Plaintiff's Motion for Relief from Judgment.

IT IS FURTHER ORDERED reaffirming the trial dates set forth in this court's May 8, 2023, minute entry setting the matter for trial on Count III.

IT IS FURTHER ORDERED denying the Motion to File Amicus Curae Brief submitted by a third party and opposed by all parties to this litigation.

The Court notes the Amicus Brief is essentially a refiling of the Amicus Curae Briefs filed at the Arizona Court of Appeal and Arizona Supreme Court. Those issues have been ruled upon by those courts.