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15 **ARIZONA SUPERIOR COURT**
16 **MARICOPA COUNTY**

17 MARK FINCHEM, in his individual capacity,) No. CV2022-053927
18 Contestants/Plaintiffs,)
19 v.) **ARIZONA SECRETARY OF**
20 ADRIAN FONTES officeholders-elect; and) **STATE KATIE HOBBS' REPLY IN**
21 KATIE HOBBS, in her official capacity as the) **SUPPORT OF MOTION TO**
22 Secretary of State; et al.,) **DISMISS PLAINTIFF'S FIRST**
23 Contestees/Defendants.) **AMENDED VERIFIED**
24) **STATEMENT OF ELECTION**
25) **CONTEST**

26) (Assigned to Hon. Melissa Iyer Julian)

Introduction

As the Secretary outlined in her Motion to Dismiss, Plaintiff's First Amended Verified Statement of Election is little more than a "sour grapes" campaign press release and fails to state a claim upon which relief can be granted. The Secretary did not engage in "misconduct" nor were "illegal votes" cast because of Plaintiff's disproven conspiracy theory that certain Arizona voting equipment is not properly certified under federal and state law. And the Secretary did not

1 commit “misconduct” under the election contest statutes by (1) not recusing herself from her
2 constitutional and statutory duties, (2) acting to compel other elections officials to comply with
3 their own such duties, and (3) flagging election misinformation for a private entity.

4 In response to the Secretary’s Motion, Plaintiff spends 10 of his 18 pages (a length which
5 itself violates Rule 7.1(a)(3), Ariz. R. Civ. P.) arguing – sometimes in all capital letters – that a
6 motion to dismiss cannot be filed in an election contest. Never mind, of course, that the Arizona
7 Supreme Court held more than 60 years ago that election contests are subject to dismissal if they
8 fail to state a claim (*Griffin v. Buzard*, 86 Ariz. 166, 168 (1959)), and held just 16 years ago that
9 an election contest is subject to the notice pleading requirements of Rule 8(a), Ariz. R. Civ. P.
10 (*Hancock v. Bisnar*, 212 Ariz. 344, 348 ¶ 17 (2006)). That Plaintiff has no good-faith response
11 to the Secretary’s motion is not a reason that it can’t be filed or should be stricken.

12 Once Plaintiff finally addresses the merits, his response fares no better. Plaintiff ignores
13 (1) that laches bars his claims about machine certification, (2) the scores of public records and
14 public statements from the Election Assistance Commission (“EAC”) that disprove his
15 conspiracy-theory laden claims, and (3) all the Secretary’s substantive arguments about why her
16 actions, both pre- and post-election, are nowhere near the sort of “misconduct” contemplated by
17 the election contest statutes.

18 At bottom, Arizona courts apply “all reasonable presumptions” in “favor [of] the validity
19 of an election,” *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986). Because Plaintiff’s wild
20 allegations with no basis in either fact or law come nowhere near rebutting those strong
21 presumptions, Plaintiff’s First Amended Verified Statement of Election Contest should be
22 dismissed with prejudice, and without leave to amend.

23 **Argument**

24 **I. Arizona’s Vote Tabulation Machines are Properly Certified.**

25 The Secretary does not wish to burden the Court with this matter any more than it has
26 already been, and thus incorporates by reference the discussion of vote tabulation machine

1 certification set forth in her Motion [at 3-9]. In a few words, however, the equitable doctrine of
2 laches bars Plaintiff's claims on this issue, and he does not dispute that he knew (or should have
3 known) about them long before the 2022 General Election. And "[b]y filing [his] complaint after
4 the completed election," Plaintiff "essentially ask[s] [the Court] to overturn the will of the
5 people, as expressed in the election." *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 11 (2002).
6 The Court should thus reject Plaintiff's attempt to "subvert the election process by intentionally
7 delaying a request for remedial action to see first whether they will be successful at the polls."
8 *McComb v. Superior Court In & For Cty. Of Maricopa*, 189 Ariz. 518, 526 (App. 1997)
9 (quotation omitted).

10 Plaintiff also fails to grapple in any meaningful way with the Secretary's long recitation
11 of facts and public records from the EAC [Motion at 6-8] that disprove this entire legal theory.
12 The Secretary appreciates that Plaintiff and his so-called "expert" disagree with the EAC, but
13 the Help America Vote Act vests the EAC with the authority to accredit voting systems testing
14 laboratories, 52 U.S.C. § 20971(b), and the EAC has made clear that the lab at issue (SLI)
15 "remained in good standing with the requirements of [the EAC's] program and retained their
16 accreditation," that the "lack of generating a new certificate does not indicate that [SLI was] out
17 of compliance," and that "[a]ll certifications during this period remain valid as does the lab
18 accreditation." EAC, *VSTL Certificates and Accreditation*, July 22, 2021¹; see also EAC
19 Memorandum, *SLI Compliance EAC VSTL Accreditation*, Jan. 27, 2021 ("Due to the outstanding
20 circumstances posed by COVID-19, the renewal process for EAC laboratories has been delayed
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26 ¹ https://www.eac.gov/sites/default/files/voting_system_test_lab/files/VSTL%20Certificates%20and%20Accreditation_0.pdf

1 for an extended period. While this process continues, SLI retains its EAC VSTL
2 accreditation.”).²

3 Finally, Plaintiff does not (and cannot) respond to the Secretary’s argument [Motion at 9]
4 that even if Plaintiff’s claims about voting equipment certification had even a shred of truth (they
5 don’t) and the Secretary somehow committed “misconduct” related to that equipment (she
6 didn’t), Plaintiff nowhere alleges how this would change the results of the election as to the race
7 at issue. Nor could Plaintiff possibly prove that, particularly given the massive margin of victory
8 in his race. This is a necessary – and here, missing – element of Plaintiff’s election contest
9 because he doesn’t allege that any Defendant or other person committed fraud. *See Moore v.*
10 *City of Page*, 148 Ariz. 151, 159 (App. 1986) (requiring “a showing of fraud or . . . a showing
11 that had proper procedures been used, the result would have been different”); *see also See People*
12 *ex rel. B.J.B. v. Ducey*, No. CV-21-0114-SA, 2021 WL 1997667, at *1 (Ariz. May 11, 2021)
13 (collecting authority for the proposition that a plaintiff is required to prove that the outcome of
14 the election would have been different). Dismissal of Plaintiff’s machine certification claims is
15 thus required.

16 **II. The Secretary’s Actions Before and After the 2022 General Election Were Not**
17 **“Misconduct.”**

18 Plaintiff’s only other claims are that the Secretary committed actionable “misconduct” –
19 and that millions of Arizonans should be disenfranchised – because she (1) did not recuse herself
20 when no statute required her to, (2) took appropriate legal and other action to hold other elections
21 officials to their constitutional and statutory duties, and (3) reported election misinformation on
22 social media. Here again, Plaintiff does not respond in any meaningful way to the Secretary’s
23 arguments on each of these fronts [Motion at 9-14]. The only issue Plaintiff spends any time
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https://www.eac.gov/sites/default/files/voting_system_test_lab/files/SLI_Compliance_Accreditation_Renewal_delay_memo012721.pdf

1 discussing is his apparent disagreement with the Secretary’s definition of “misinformation”
2 [Resp. at 16], and his dismay with Twitter’s decision to remove certain posts that it found in
3 violation of the platform’s terms of service because they contained “misinformation.” The
4 Secretary, of course, does not and did not run Twitter. This should go without saying, but
5 Plaintiff’s disagreements with that social media platform’s content moderation decisions are not
6 a ground on which to invalidate an election and disenfranchise Arizona voters.

7 **Conclusion**

8 For the past four years, the Secretary has proudly served as Arizona’s Chief Elections
9 Officer, and has worked to oversee safe, secure, and accurate elections. During that time,
10 misleading, false, and conspiratorial information about elections have exploded, largely because
11 they’ve been embraced by public officials – like Plaintiff – with a captive constituency. Plaintiff
12 sought to replace the Secretary and lost resoundingly. The Secretary believes that the will of the
13 people in choosing another candidate must be respected, and that this case must be dismissed.
14 And though it is Plaintiff’s prerogative to say whatever he wants about the election process on
15 social media, this is not Twitter or Truth Social; it’s a court of law. Rule 11, Ariz. R. Civ. P., and
16 A.R.S. § 12-349 police what lawyers and litigants can say and do, and they should be enforced
17 here so that the Court does “not condone litigants . . . furthering false narratives that baselessly
18 undermine public trust at a time of increasing disinformation about, and distrust in, the
19 democratic process” and also “send[s] a message to those who might file similarly baseless suits
20 in the future.” *Lake v. Hobbs*, No. CV-22-00677-PHX-JJT, 2022 WL 17351715, at *17 (D. Ariz.
21 Dec. 1, 2022) (sanctioning Plaintiff’s attorneys in a different baseless lawsuit).

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1 Respectfully submitted this 15th day of December, 2022.

2 **COPPERSMITH BROCKELMAN PLC**

3 By /s/ D. Andrew Gaona

4 D. Andrew Gaona

5 **STATES UNITED DEMOCRACY CENTER**

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8 *Katie Hobbs*

9 ORIGINAL efiled and served via electronic
10 means this 15th day of December, 2022, upon:

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12 Maricopa County Superior Court
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