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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KARI LAKE FOR ARIZONA, an Arizona political committee, Plaintiff, v. STEPHEN RICHER, in his official capacity as the Maricopa County Recorder; REY VALENZUELA, in his official capacity as the Maricopa County Director of Elections for Election Services and Early Voting; SCOTT JARRETT, in his official capacity as the Maricopa County Director of Elections for Election Day and Emergency Voting; BILL GATES, CLINT HICKMAN, JACK SELLERS, THOMAS GALVIN, AND STEVE GALLARDO, in their official capacities as members of the Maricopa County Board of Supervisors; and MARICOPA COUNTY; Defendants.	No. CV2022-015519 **RESPONSE TO MOTION FOR JUDGMENT ON THE PLEADINGS** (Assigned to the Honorable Scott Blaney)

Plaintiff urges this Court to deny the County Defendants' Motion for Judgment on the Pleadings, for the reasons stated in the Memorandum of Points and Authorities below.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The County Defendants' Motion for Judgment on the Pleadings is without merit. To begin with, such a motion is generally poorly suited to a public records request lawsuit. As the Court noted in its minute entry, the government entity has the burden of establishing that its responses were prompt. *See Phoenix New Times, LLC v. Arpaio*, 217 Ariz. 533, 538-39 (App. 2008). It may not be accurate to say that a properly pled public records request lawsuit should never be dismissed on a Motion for Judgment on the Pleadings, but given *Phoenix New Times*, such a motion would hardly be favored.

The Defendants are essentially asking this Court to develop a *per se* rule that would set a certain amount of days outside of which a response to a public records request lawsuit could never be legally untimely. That is, the County Defendants effectively argue that a public records request, at least of any breadth, can never be untimely if not responded to within eight business days. This Court should avoid embracing this position. The Legislature used the word "promptly" for a reason. The Verified Complaint that was filed is sufficient, and there are no grounds for dismissing this matter now.

As the body of response demonstrates, there is hardly agreement between the County Defendants and the Plaintiff on a number of the material facts. The existence of a question of fact precludes a finding for the proponent of a Motion for Judgment on the Pleadings. *See, e.g., Corporation Com'n v. Consolidated Stage Co.*, 63 Ariz. 257, 263 (1945)(holding that a motion for judgment on the pleadings was properly granted where there was no question of fact).

This Court must deny the Motion for Judgment on the Pleadings.

II. THE RELEVANT FACTS

The County Defendants are correct that the question of whether the County Defendants' response is "sufficiently prompt will ultimately depend on the facts and circumstances of each request." *Phoenix New Times*, 217 Ariz. at 538 ¶ 14. As stated above, *Phoenix New Times* also tells us that the burden of demonstrating facts and circumstances indicating that the County has been prompt falls on the County Defendants. The County is not entitled to have everything it alleges be accepted as true at this stage—that is a benefit reserved for the non-moving party on a Motion for Judgment on the Pleadings. *See e.g., Colonial Life & Accident Ins. v. State*, 184 Ariz. 533, 535, (App. 1995).

Despite this, the County makes numerous factual assertions in its Motion that are simply not proper for a Motion for Judgment on the Pleadings. The only matter that should be discussed in such a motion is why, even if the Court accepts every single fact alleged in Plaintiff's Complaint as true, as it must, and drawing all reasonable inferences in Plaintiff's favor, Plaintiff is not entitled to relief. *Id.*

Despite this long-articulated legal principle, much of the County Defendants' Motion involves the County's characterization of matters occurring after this lawsuit was filed. Plaintiff disputes the characterization, as Lake has tried to work in good faith to minimize the burden on the County. But the County even takes this a step further in discussing a November 29, 2022 public records request from Kari Lake. (Motion at 4:14-

16). This is irrelevant, as are any records not requested in the November 15 and 16 requests, which form the basis of the suit.

The parties could argue about whether the records discussed in subsequent emails were part of the original request. But it is true that if they were not, then this suit does not pertain to that public record. At the same time it is also true that the December 1, 2022, 3:40 p.m. letter from Plaintiff's counsel contains what Plaintiff believes are a significantly more precise descriptionS of the documents that are requested as a priority. That is probably why it seemed to initially be greeted with more optimism by the County—complaints in the Motion for Judgment on the Pleadings about this not being a genuine narrowing were news to the Plaintiff. (Exhibit A).

III. THIS COURT HAS JURISDICTION TO HEAR THIS COMPLAINT

As part of its claim of a lack of jurisdiction, the County Defendants ask this Court to effectively embrace a *per se* rule that a lawsuit filed eight business days after public records are sought is not ripe, and the Court thus lacks jurisdiction under A.R.S. § 39-121.02(A). This Court should decline this entreaty in favor of the review of the "facts and circumstances" inquiry that Arizona courts have long directed. *West Valley View, Inc. v. Maricopa County Sheriff's Office,* 216 Ariz. 225, 230, ¶ 21, 165 P.3d 203, 208 (App.2007) (quoting *Webster's New World Dictionary* 1137 (2d ed.1980)); *Phoenix New Times*, 217 Ariz. at 538, ¶ 14.

The County Defendants also cite language in *Phoenix New Times* where "the court of appeals explained that a response that occurred 143 days after the request was made might have been considered prompt if the government entity had provided a legally

sufficient rationale for the delay." (Motion 8:15-18). This is a nonsequiter, as the County Defendants do not claim delay, and do not (and could not at this Motion for Judgment on the Pleadings stage) claim a justification for the delay.

The County Defendants also cite *Phoenix New Times* to try to bolster its claim that this lawsuit is predicated on "Lake's subjective interest in the records". (Motion 9:24-25). To that end, they quote *Phoenix New Times*: "an agency may not justify its failure to provide records by claiming that it assumed that the person requesting the records would no longer be interested in them under certain circumstances, at least without asking the person making the request, for it is well-established that the requestor's need, good faith, or purpose is entirely irrelevant to the disclosure of public records." *Id.* at 544 (emphasis added). This is a distortion of *Phoenix New Times*. What *Phoenix New Times* said was that no requirement may be imposed that a requestor show a "need" (or good faith or a purpose). *Phoenix New Times* did not hold that matters of significant public concern, with very strict timetables applicable to that public concern, can never form the basis of the "facts and circumstances" that apply to the inquiry as to whether a public agency has responded "promptly" to a public records request.

The County Defendants' reliance on *McKee v. Peoria Unified School Dist.* is also misplaced. 236 Ariz. 254, 259 (App. 2014). The County claims that "the requester's preferred timeline for production is immaterial" and cites *McKee*, 236 Ariz. at 259, ¶ 20 for this assertion. This mischaracterizes Lake's argument, and it misstates *McKee*. *McKee*, and specifically ¶ 20 of *McKee*, simply do not support the County Defendants' assertion.

In *McKee*, the high school teacher facing termination, McKee, sought records on an

expedited basis because of imminent administrative termination proceedings. *Id.* at 257. The District produced the bulk of the records on September 16, 2010. *Id.* McKee's termination proceeding began on October 4, 2010. *Id.* The McKee court did note that "although the District mistakenly omitted portions of the file in its initial disclosures, the District immediately corrected the mistake when McKee's counsel asked about missing documents." *Id.* at 259.

What the above summary of *McKee* tells us is that McKee did not and could not have made the same arguments as to the issue being one of great public concern, or even that his own personal needs could be a factor because the bulk of the public records request was fulfilled long before his termination hearing, with limited documents omitted by pure mistake.

In contrast, Plaintiff argues that the "circumstances" here, to borrow a word used by the *McKee* Court, are of significant public concern, and the Legislature used a fairly elastic word, "promptly" for a reason. And the reason goes beyond the complexity of the public records sought. This word is elastic enough to accommodate that some public records requests involve interests of great public concern and are highly time sensitive. The circumstances here are different than the circumstances in *McKee*, where an individual sought records he deemed necessary for McKee's own imminent administrative termination hearing.

V. PLAINTIFF HAS STANDING, AND IF PLAINTIFF DOES NOT HAVE STANDING THIS CAUSE OF ACTION CAN BE AMENDED TO ADD A PLAINTIFF WITH STANDING

The County Defendants claim that the Plaintiff lacks standing under A.R.S. § 39-

121.02(A). The Court need not give this argument much attention because the County Defendants admit that undersigned counsel would have standing. Undersigned counsel could and would simply join this lawsuit as a plaintiff if necessary. In point of fact, under normal, non-expedited circumstances, that issue could have been resolved at the good faith consultation. Ariz. R. Civ. P. 7.1(h) and 12(j) (a good faith consultation is required before making a motion for judgment on the pleadings).

When, as would be the case under the above scenario, multiple plaintiffs seek non-monetary relief, courts "consider only whether at least one named plaintiff satisfies the standing requirements." *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). Because it is undisputed that undersigned counsel has standing under A.R.S. § 39-121 et. seq., the question of the Plaintiff's standing would be superfluous. *See Poder in Action v. City of Phoenix*, 506 F. Supp. 3d 725, 728 (D. Ariz. 2020) ("[I]t is unnecessary to address the standing of each plaintiff in a multi-plaintiff case, at least where all plaintiffs seek the same form of relief, so long as one of the plaintiffs has standing.")

As it is, the County is also wrong on the law on this point. What the County Defendants ignore is that A.R.S. § 39-121.02(A) represents an expansion of, not limitation on, common law standing rules. *See Arpaio v. Citizen Publ'g Co.*, 221 Ariz. 130, 133 n.4, (Ct. App. 2008) (A.R.S. § 39-121.02(A) contemplates that "persons or organizations other than the requestor and custodian could be parties to an action under our public records law."), *Pawn 1st, Ltd. Liab. Co. v. City of Phx.*, 231 Ariz. 309, 313 n.3 (Ct. App. 2013) (*citing Heffernan v. Missoula City Council*, 2011 MT 91, 360 Mont. 207,

255 P.3d 80, 92, ¶ 34 (Mont. 2011) (legislature may "expand" standing by statute to those that would otherwise lack it under prudential policy considerations).

In the case of special actions, the rules themselves are not simply procedural rules but are grounded in rights under the Arizona Constitution, to wit, the right to seek writs of prohibition, mandamus and certioriari. Arizona Constitution, Art. VI, Sec. 18 ("The superior court or any judge thereof may issue writs of mandamus, quo warranto, review, certiorari, prohibition…") Arizona courts have held repeatedly that these rights have essentially been codified and implemented through the Rules of Procedure for Special Actions: "The common law writs of certiorari, mandamus, and prohibition are now obtained by 'special action'." *Hull v. Albrecht*, 192 Ariz. 34, 36 (1998)(quoting Rule 1, Ariz. R.P. Spec. Act., 17B Arizona Revised Statutes ("A.R.S.") (1997).

That these constitutional rights originated as a common law rights, and cannot be infringed by the Legislature, is confirmed by *Batty v. Arizona State Dental Bd.*, 112 P.2d 870, 875, 57 Ariz. 239, 250 (Ariz. 1941)[1]. Obviously, Kari Lake for Arizona is every bit as beneficially interested as anyone in obtaining these records.

The County Defendants also ignore the numerous conversations that undersigned counsel had with the County Defendants as the counsel for Kari Lake and Kari Lake for Arizona. Indeed, in Arizona, when a party seeks public records for a non-commercial

[1] The question, though, next arises as to whether the writ of certiorari may be used to review the exercise of the 'quasijudicial' powers which are conferred upon such a board. The right to issue the writ of certiorari conferred upon superior courts by section 6, article 61F , of our Constitution is obviously the common-law right, and the legislature, therefore, may not limit or circumscribe such power by any statute.

purpose, as Plaintiff does, the request is not even required to be in writing, much less take any specific form. *Compare* A.R.S. § 39-121.03(A) (written statement required for requests for records for commercial purposes) *with* A.R.S. § 39-121.01(D)(1) (containing no such requirement when request made for non-commercial purpose). As the Arizona Ombudsman has explained:

> The public records law does not require requesters to fill out specific forms or make written requests in order to access public records. Similarly, the public records law does not grant public bodies or officers the authority to restrict access to public records by requiring a request be made via a specific form or in writing. Absent any specific statute or rule to the contrary, a public body or officer cannot require a requester to make a request via particular form or in writing. A public body may ask the requestor for additional information (eg. name, phone number, email address, home address, or reason for the request); however, if the requestor refuses to provide this information, it cannot be used as grounds to deny the request. If the requestor refuses to make a written request and insists on making a verbal request, the absences of a written request cannot be the basis for denial.[2]

At a minimum, the issue raised by the County Defendants is easily mooted, and would require a factual inquiry at any rate into who would constitute the requester under the particular facts and circumstances of this cause of action. That precludes granting the County's Motion for Judgment on the Pleadings.

VI. CONCLUSION

For the foregoing reasons, the Plaintiffs ask that this Court deny the Motion for Judgment on the Pleadings.

[2] Arizona Public Records Law Booklet (2020), THE ARIZONA OMBUDSMAN, pg. 45 (available at: https://www.azoca.gov/wp-content/uploads/Public-Records-Law-Booklet-2020.pdf).

RESPECTFULLY SUBMITTED this 6th day of December, 2022.

By: */s/ Timothy A. La Sota*

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ORIGINAL of the foregoing E-FILED this 6th day of December 2022 with AZTURBOCOURT, and copies e-served/emailed to:

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EXHIBIT A

Joseph Branco (MCAO) <brancoj@mcao.maricopa.gov>

To:

- tim timlasota.com

Cc:

- Joseph LaRue (MCAO) <laruej@mcao.maricopa.gov>

+2 others

Thu 12/1/2022 3:54 PM

Tim,

Thank you. I have sent this list along to my client. We will be in touch with you tomorrow.

Joe

Joe Branco
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From: tim timlasota.com <tim@timlasota.com>
Sent: Thursday, December 1, 2022 3:41 PM
To: Joseph Branco (MCAO) <brancoj@mcao.maricopa.gov>; Thomas Liddy (MCAO) <liddyt@mcao.maricopa.gov>
Cc: Joseph LaRue (MCAO) <laruej@mcao.maricopa.gov>
Subject: narrowed list of necessary records

Joe, pursuant to our conversation and the Judge's request the PRR be narrowed if possible, below is the list of records that we believe are the most necessary to be received as soon as possible. I believe this is a significant reduction, and we have omitted documents where we think we can obtain the information that we wanted to glean from the document from another source, thereby alleviating as much work as possible.

- Cast Vote Record Files (precinct and central tabulator)
- Tabulator Logs (precinct and central tabulators)
- VM55 or equivalent records of voters who voted by method
- All Early Voting Ballot Transport Statements
- All Maricopa County Inbound – Receipt of Delivery Forms
- Official Ballot Report from every vote center

Best, Tim