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15 **ARIZONA SUPERIOR COURT**

16 **MARICOPA COUNTY**

17 KARI LAKE,

18 Contestant/Plaintiff,

19 v.

20 KATIE HOBBS, personally as Contestee and
21 in her official capacity as the Secretary of
22 State; et al.,

23 Defendants.

24) No. CV2022-095403
25)
26)

27 **PLAINTIFF KARI LAKE'S
28 RESPONSE TO DEFENDANT
29 SECRETARY OF STATE KATIE
30 HOBBS' MOTION TO QUASH
31 SUBPOENA FOR APPEARANCE
32 AT HEARING**

33) (Assigned to Hon. Peter Thompson)
34)
35)

36 **INTRODUCTION**

37 Plaintiff Kari Lake ("Plaintiff") brought this election contest under A.R.S. § 16-672
38 against Secretary of State Katie Hobbs in her individual and official capacities and against
39 various Maricopa County officials over the chaotic election administered there. Secretary Hobbs
40 is involved here not only for her official role in administering and certifying the election but also

1 because she is Plaintiff’s primary rival for the contested office of Governor of Arizona. On
2 December 16, 2022, Plaintiff served Ms. Hobbs a subpoena to appear at the hearing on December
3 19, 2022, in this action. Citing an “apex doctrine” that Arizona has not recognized, Ms. Hobbs—
4 in her official capacity—moved to quash the subpoena on December 17, 2022. As part of that
5 motion, defense counsel make a series of unsworn claims that this Court should disregard. But
6 even if the Court were to accept the unsworn statements of defense counsel as evidence, the
7 motion to quash does not address all of the issues on which either Secretary Hobbs or candidate
8 Hobbs would address as a witness. With regard to Secretary Hobbs, therefore, the Court should
9 deny the motion to quash. But even if the Court were inclined to grant Secretary Hobbs’ motion
10 to quash, that would not allow Ms. Hobbs—in her personal capacity—to ignore a valid subpoena.
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12
13

14 **ARGUMENT**

15 **I. Applicable Legal Standards.**

16 Secretary Hobbs bases her motion on the “undue burden or expense” provisions of Ariz.
17 R. Civ. P. 45(e)(2)(A)(iv), as well as on the “Apex Doctrine” that other jurisdictions have
18 adopted with respect to discovery of apex officers in corporate or governmental parties: “It
19 would be unreasonable to permit a plaintiff to begin discovery by deposing, for instance, the
20 chief executive officer of a major automobile manufacturer when suing over a design flaw in a
21 brake shoe[.]” *Liberty Mut. Ins. Co. v. Superior Court*, 10 Cal.App.4th 1282, 1287 (Ct. App.
22 1992).
23

24 Courts rely on the Apex Doctrine when the information sought "can be obtained from
25 some other source that is more convenient, less burdensome, or less expensive." *Apple Inc. v.*
26

1 *Samsung Elecs. Co.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012) (internal quotation marks omitted).

2 A party seeking to prevent an apex officer’s testimony carries a heavy burden to show why
3 discovery should be denied; it is unusual for a court to prohibit taking a deposition altogether,
4 absent extraordinary circumstances. *Id.* For example, discovery of apex official is typically
5 allowed “where the official has first-hand knowledge related to the claim being litigated.” *Bogan*
6 *v. Cty. of Boston*, 489 F.3d 417, 423 (1st Cir. 2007).
7

8 **II. Factual Background**

9 Plaintiff requires Ms. Hobbs’ attendance at the hearing in both her official and her
10 individual capacities. The testimony that Plaintiff seeks from her include the following:
11

- 12 • The scope of the social-media censorship program in which her office participated.
- 13 • The extent to which she was aware of the social-media censorship program in which
14 her office participated.
- 15 • Although Ms. Hobbs’ individual-capacity motion to dismiss (at 1) describes the
16 17,117-vote margin dividing the candidates as “insurmountable” and justifying
17 summary dismissal, Secretary Hobbs in her official capacity could provide
18 information on the much smaller vote shift that would be required for this Court to
19 deny the motions to dismiss because the margin between the candidates would trigger
20 an automatic recount under A.R.S. § 16-661(A).
- 21 • Under *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180, 877 P.2d
22 277, 279 (1994), “non-compliance may or may not invalidate the vote depending on
23 its effect” on the election, and Secretary Hobbs in her official capacity could provide
24
25
26

1 information on the extent to which non-compliance with the election-law provisions
2 violated here (*e.g.*, chain of custody, logic and accuracy testing) affected the election.
3

4 Quashing the subpoena of Secretary Hobbs would be reversible error, and this matter should
5 proceed expeditiously to resolve the election contest—together with appeals—as soon as
6 possible.

7 Some of the information that Plaintiff seeks is uniquely in Ms. Hobbs' possession. In any
8 event, due to the expedited nature of this election contest, Plaintiff has not had resort to more
9 flexible forms of discovery—such as requests for admissions or interrogatories—that would
10 attend other types of litigation. Similarly, the expedited nature of this election contest precludes
11 Plaintiff's attempting to gain some of the information sought—which others in the Secretary of
12 State's office might possess—from those lower-tier employees before seeking it from Secretary
13 Hobbs.
14
15

16 **III. This Court Should Deny the Motion to Quash.**

17 This Court should deny Secretary Hobbs' motion to quash because Arizona does not
18 recognize the Apex Doctrine on which she relies, and she does not establish her entitlement to
19 relief under that doctrine as a matter of either evidence or law.
20

21 **A. Arizona Has Not Recognized the Apex Doctrine, and this Election Contest**
22 **Would Be an Inappropriate Vehicle for Making New Law.**

23 As evidenced by the divergent authorities that Secretary Hobbs cites, no Arizona appellate
24 court has adopted the Apex Doctrine. For that reason alone, this Court should deny the motion
25 to quash.
26

1 But even if this Court were inclined to think that Arizona courts should adopt the Apex
2 Doctrine in an appropriate case, this is not that case. The doctrine may make sense when liberal
3 discovery rules and flexible litigation schedules allow alternate means of discovery that is less
4 intrusive on apex officers. The apex doctrine makes *no sense*, however, in an expedited election
5 contest, which lacks the liberal alternate means of discovery of civil litigation.
6

7 **B. Secretary Hobbs Has Not Carried a Movant’s Evidentiary Burden.**

8 As the movant, Secretary Hobbs bears the burden of proving the “undue burden” that
9 underlies her motion to quash. Because her motion did not include any actual evidence, she has
10 not carried that burden, and a reply—if any—is too late to make the initial evidentiary showing
11 that her motion required.
12

13 **1. Secretary Hobbs Has Not Met the Evidentiary Burden She Bears as a**
14 **Movant.**

15 As the movant, Secretary Hobbs bears the evidentiary burden of establishing her
16 entitlement to the relief she seeks: “The party asserting a fact has the burden to establish the
17 fact.” *Prairie State Bank v. IRS*, 155 Ariz. 219, 221 n.1A, 745 P.2d 966, 968 (Ct. App. 1987).
18 “The party who asserts a fact has the burden to establish the fact.” *Yeazell v. Copins*, 98 Ariz.
19 109, 116, 402 P.2d 541, 546 (1965). As explained in this Section, she has not met that burden.
20

21 **2. The Unsworn Statements of the Secretary’s Private Counsel Are Not**
22 **Evidence.**

23 For states that recognize the Apex Doctrine, the apex officer moving to quash must submit
24 evidence that he or she lacks relevant information: “The motion should be supported by the
25 official's affidavit denying any knowledge of relevant facts.” *In re Celadon Trucking Servs., Inc.*,
26

1 281 S.W.3d 93, 97 (Tex. App. 2008). Secretary Hobbs submits nothing but the unsworn
2 statements of her private¹ counsel. “Unsworn and unproven assertions of counsel in memoranda
3 are not facts admissible in evidence.” *Woerth v. Flagstaff*, 167 Ariz. 412, 420, 808 P.2d 297, 305
4 (Ct. App. 1990).

6 **3. The Secretary’s Reply Cannot Seek to Make Evidentiary Showings**
7 **that Her Initial Motion Was Required to Make.**

8 While Secretary Hobbs may file a reply that includes rebuttal evidence, Ariz. R. Civ. P.
9 7.1(a), she cannot submit evidence in a reply brief in a belated attempt to make the initial
10 showing that her motion required. *See IMH Special Asset NT 168, Ltd. Liab. Co. v. Aperion*
11 *Cmtys., LLLP*, 2016 Ariz. App. Unpub. LEXIS 1624, at *12-13 (Ct. App. Dec. 27, 2016) (Nos.
12 1 CA-CV 13-0131, 1 CA-CV 14-0432, 1 CA-CV 15-0182, 1 CA-CV 15-0413, 1 CA-CV 15-
13 0474, 1 CA-CV 15-0475, 1 CA-CV 15-0514, 1 CA-CV 15-0615); Michael D. Moberly & John
14 M. Fray, *Squandering the Last Word: The Misuse of Reply Affidavits in Summary Judgment*
15 *Proceedings*, 15 SUFFOLK J. TRIAL & APP. ADVOC. 43, 54-55, 65 (2010) (discussing federal
16 law). If this matter were not an expedited proceeding, the Court could consider allowing a sur-
17 reply, but that would not be appropriate here. *See Squandering the Last Word*, 15 SUFFOLK J.
18 TRIAL & APP. ADVOC. at 77-78 (a surreply risks significantly expanding the time and resources
19 required to resolve summary-judgment motions). With an expedited election contest, the risk of
20 expanding the proceedings becomes even greater.
21
22
23

24 _____
25 ¹ Whatever deference this Court may give counsel from Office of the Attorney General
26 when representing a state official, that deference is not due to private counsel from Secretary
Hobbs’ private counsel.

1 **C. The Apex Doctrine Would Not Justify Quashing the Subpoena, Even if**
2 **Arizona Recognized an Apex Doctrine.**

3 Even if this Court decides to recognize the Apex Doctrine, Secretary Hobbs' unique
4 knowledge and the lack of a less-intrusive way for Plaintiff to get that testimony would justify
5 denying the motion to quash.

6 **1. Secretary Hobbs Has Unique Knowledge.**

7 Only Secretary Hobbs knows the extent to which she herself was aware of her office's
8 social-media censorship program. Similarly, she is the state officer with the authority to answer
9 Plaintiff's questions about the 2022 election.
10

11 **2. This Election Contest Does Not Provide Less-Intrusive Means to**
12 **Obtain the Information.**

13 The expedited nature of an election contest does not provide time or process for Plaintiff
14 to begin less-intrusive discovery from lower-tier officials with the Secretary of State's office. As
15 such, even if Arizona would recognize the Apex Doctrine in civil litigation generally, that
16 doctrine would not apply here.
17

18 **IV. Even if this Court grants the Secretary's Motion to Quash, the Subpoena Remains**
19 **Valid as to Ms. Hobbs in her personal capacity.**

20 Katie Hobbs is both an official-capacity defendant and an individual-capacity defendant.
21 She has moved to quash the subpoena only in her official capacity. Insofar as the two capacities
22 are entirely different juridical persons,² a successful motion by one does not inure to the other.
23

24
25 _____
26 ² Ariz. R. Civ. P. 25(d), Katie Hobbs would cease to be an official-capacity defendant if she left the Secretary of State's office. She would remain an individual-capacity defendant.

1 Even if this Court grants Secretary Hobbs' motion to quash, Ms. Hobbs still would be duly
2 subpoenaed in her individual capacity.

3 **IV. Conclusion.**

4
5 The Court should deny Secretary Hobbs' motion to quash. Even if the Court grants the
6 motion as to Secretary Hobbs in her official capacity, that would not justify quashing the
7 subpoena of Ms. Hobbs in her individual capacity.

8 DATED this 18th day of December 2022.

9
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