

1 RACHEL H. MITCHELL
2 MARICOPA COUNTY ATTORNEY

3 By: THOMAS P. LIDDY (Bar No. 019384)
4 JOSEPH J. BRANCO (Bar No. 031474)
5 JOSEPH E. LA RUE (Bar No. 031348)
6 KAREN J. HARTMAN-TELLEZ (Bar No. 021121)
7 JACK. L. O'CONNOR (Bar No. 030660)
8 SEAN M. MOORE (Bar No. 031621)
9 ROSA AGUILAR (Bar No. 037774)
10 Deputy County Attorneys
11 liddy@mcao.maricopa.gov
brancoj@mcao.maricopa.gov
laruej@mcao.maricopa.gov
hartmank@mcao.maricopa.gov
oconnorj@mcao.maricopa.gov
moores@mcao.maricopa.gov
aguilarr@mcao.maricopa.gov
12 Deputy County Attorneys
13 MCAO Firm No. 0003200

12 CIVIL SERVICES DIVISION

13 225 West Madison Street
14 Phoenix, Arizona 85003
15 Telephone (602) 506-8541
16 Facsimile (602) 506-4316
17 ca-civilmailbox@mcao.maricopa.gov

18 Emily Craiger (Bar No. 021728)
19 emily@theburgesslawgroup.com
20 THE BURGESS LAW GROUP
21 3131 East Camelback Road, Suite 224
22 Phoenix, Arizona 85016
23 Telephone: (602) 806-2100

24 *Attorneys for Maricopa County Defendants*

25 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

26 **IN AND FOR THE COUNTY OF MARICOPA**

27 KARI LAKE,

28 Contestant/Petitioner,

29 vs.

30 KATIE HOBBS, et al.,

31 Defendants.

No. CV2022-095403

**MOTION IN LIMINE REGARDING
LAKE'S RULE 807 NOTICE**

(Expedited Election Matter)

(Honorable Peter Thompson)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Introduction

Defendants Katie Hobbs, in her official capacity as Arizona Secretary of State, Stephen Richer, Bill Gates, Clint Hickman, Jack Sellers, Thomas Galvin, Steve Gallardo, Scott Jarrett, and the Maricopa County Board of Supervisors jointly move *in limine* to exclude Contestant Kari Lake’s proposed hearsay statements addressed in Lake’s December 20, 2022 Rule 807 Notice (“the December 20, 2022 Notice”). The “declarations” lack any guarantee of trustworthiness and are inadmissible under Rule 807. Lake’s December 20, 2022 Notice fails to comply with Rule 807(b). The following Memorandum of Points and Authorities supports this Motion.

Memorandum of Points and Authorities

Introduction

The residual hearsay exception under Arizona Rule of Evidence 807 is not “one weird trick” to admit over 800 pages of hearsay in time-compressed proceedings. *See Jacobs v. Alam*, No. 15-10516, 2020 WL 3064435, at *3 (E.D. Mich. June 9, 2020) (“[A] party cannot use Rule 807 to avoid calling live, available witnesses.”).

To qualify for the exception, the statement “must be so trustworthy that adversarial testing would add little to its reliability.” *Idaho v. Wright*, 497 U.S. 805, 806 (1990).

Here, the residual exception to hearsay is inapplicable. Lake waited until the day before trial to file a purported notice under Rule 807(b) seeking to introduce over 800 pages of hearsay spread across over 220 declarants. Under the circumstances of a fast-paced election contest, Defendants are unable to determine the veracity of these statements—particularly because the “declarations” fail to satisfy the traditional indicia of reliability.

Overturing a free and fair election deserves more than cursory and unsupported reliance on the residual hearsay exception to flood the court with paper. This Court should preclude these hearsay statements.

Argument

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and is presumptively inadmissible. *See Ariz. R. Evid.* 801(c), 802. Under Arizona Rule of

1 Evidence 807(a), a hearsay statement qualifies for the residual exception if:

2 (1) the statement is supported by sufficient guarantees of trustworthiness--
3 after considering the totality of circumstances under which it was made and
4 evidence, if any, corroborating the statement; and

5 (2) it is more probative on the point for which it is offered than any other
6 evidence that the proponent can obtain through reasonable efforts.

7 Further, “[t]o be admissible under the residual hearsay exception, the declarant must be
8 unavailable and his out-of-court statement must have circumstantial guarantees of
9 trustworthiness equivalent to the traditional exceptions.” *State v. Valencia*, 186 Ariz. 493,
10 497–98 (App. 1996). The trial court must consider the totality of the circumstances that
11 surround the statement’s declaration and the declarant’s trustworthiness. *Id.* at 498. “When
12 deciding if a statement is trustworthy,” a court considers “the spontaneity, consistency,
13 knowledge, and motives of the declarant . . . to speak truthfully, among other things.” *State*
14 *v. Burns*, 237 Ariz. 1, 20, ¶ 69 (2015) (internal quotation marks omitted).

15 **1.** Here, as an initial matter, Lake’s December 20, 2022 Notice failed to comply
16 with Rule 807(b). The Rule establishes:

17 The statement is admissible only if the proponent gives an adverse party
18 reasonable notice of the intent to offer the statement --including its substance
19 and the declarant’s name--so that the party has a fair opportunity to meet it.
20 The notice must be provided in a writing filed with the court before the trial
21 or hearing—or in a filing during the trial or hearing in the court, for good
22 cause, excuses a lack of earlier notice.

23 Regarding the “declarations” attached to Exhibit B of the Complaint, Lake failed to
24 give Defendants “reasonable notice of the intent” to offer these statements at trial by
25 providing one day’s worth of notice. To be sure, these “declarations” were attached to the
26 Complaint and Rule 807(b) contemplates raising the admission of hearsay statements as late
27 as at trial. But under the circumstances, providing notice that 800 pages of obvious hearsay
28 statements made by upwards of 220 declarants the day before trial is not “reasonable notice
29 . . . so the party has a fair opportunity to meet it.”

30 Regarding the “voice message from Betty, an employee of the Maricopa County
31 Election’s [*sic*] Department” about a “Freedom of Information Act Request [*sic*] issued by

1 counsel for Plaintiff [*sic*] Kari Lake,” the December 20, 2022 Notice fails to identify (a) the
2 substance of the statement and (b) the full name of “Betty.” It does not even address when
3 the message occurred. Indeed, it is not clear that Lake even disclosed the message among
4 the thousands of pages of exhibits. Lake’s failure to follow Rule 807(b) is fatal to her effort
5 to introduce these hearsay statements.

6 **2.** Setting procedural concerns aside, these hearsay statements lack indicia of
7 reliability. Many were made for purposes of litigation. “Precedent teaches that courts
8 typically should not admit documents made in anticipation of litigation as they lack
9 sufficient guarantees of trustworthiness to be excepted from the hearsay rule.” *Stolarczyk*
10 *ex rel. Estate of Stolarczyk v. Senator Int’l Freight Forwarding, L.L.C.*, 376 F. Supp. 2d
11 834, 841 (N.D. Ill. 2005) (internal punctuation omitted); *see also Spencer v. Garden*, 322
12 F. Supp. 3d 1205, 1213 (D. Utah 2018) (“This was a document created in anticipation of
13 litigation, affecting Maguire’s motivation to be completely truthful.”).

14 None of the “declarations” or “Election Complaint Forms” were spontaneous—
15 many were drafted long after election day. *Cf. Burns*, 237 Ariz. at 20, ¶ 70 (“Burns’
16 statements did not have circumstantial guarantees of trustworthiness. The statements were
17 not spontaneous but were made in response to police questioning two days after Jackie’s
18 disappearance.”). And a review of the 800 pages of “declarations” indicates that “[m]ost of
19 the statements were speculative, emotionally charged, inconsistent or muddled, and based
20 on second-hand information.” *See State v. Scott*, No. 1 CA-CR 21-0024, 2022 WL 552055,
21 at *2, ¶ 13 (Ariz. Ct. App. Feb. 24, 2022), *available without charge at* Exh. A. These flaws
22 are dispositive under Rule 807(a).

23 Ultimately, these concerns point to the broader issue: Lake seeks to admit numerous
24 instances of hearsay without subjecting the contents of those statements to cross-
25 examination as to their veracity. “When a declarant’s testimony can be tested through cross-
26 examination, the ‘concern with circumstantial guarantees of reliability is lessened.’” *State*
27 *v. Thompson*, 167 Ariz. 230, 233 (App. 1990) (quoting *United States v. Frazier*, 678 F.
28 Supp. 499, 504 (E.D. Pa. 1986)). That is not the case here.

1 RESPECTFULLY SUBMITTED this 20th day of December, 2022.

2 RACHEL H. MITCHELL
3 MARICOPA COUNTY ATTORNEY

4 BY: /s/ Joseph J. Branco
5 Thomas P. Liddy
6 Joseph J. Branco
7 Joseph E. La Rue
8 Karen J. Hartman-Tellez
9 Jack L. O'Connor
10 Sean M. Moore
11 Rosa Aguilar
12 Deputy County Attorneys

13 THE BURGESS LAW GROUP

14 BY: /s/ Emily Craiger
15 Emily Craiger

16 *Attorneys for Maricopa County Defendants*

17 **COPPERSMITH BROCKELMAN PLC**

18 By /s/ D. Andrew Gaona (w/ permission)
19 D. Andrew Gaona

20 **STATES UNITED DEMOCRACY CENTER**

21 Sambo (Bo) Dul

22 *Attorneys for Defendant Arizona Secretary of*
23 *State Katie Hobbs*

24 ORIGINAL of the foregoing E-FILED
25 This 20 day of December 2022 with
26 AZTURBOCOURT, and copies e-served / emailed to:

27 HONORABLE PETER THOMPSON
28 MARICOPA COUNTY SUPERIOR COURT
Sarah Umphress, Judicial Assistant
Sarah.Umphress@JBAZMC.Maricopa.Gov

Bryan J. Blehm
BLEHM LAW PLLC

1 10869 North Scottsdale Road Suite 103-256
2 Scottsdale Arizona 85254
3 bryan@blehmlegal.com

4 Kurt Olsen
5 OLSEN LAW, P.C.
6 1250 Connecticut Ave., NW, Suite 700
7 Washington, DC 20036
8 ko@olsenlawpc.com

9 *Attorneys for Contestant/Plaintiff*

10 D. Andrew Gaona
11 COPPERSMITH BROCKELMAN PLC
12 2800 North Central Avenue, Suite 1900
13 Phoenix, Arizona 85004
14 agaona@cblawyers.com

15 Sambo Dul
16 STATES UNITED DEMOCRACY CENTER
17 8205 South Priest Drive, #10312
18 Tempe, Arizona 85284
19 bo@statesuniteddemocracycenter.org
20 *Attorneys for Defendant*
21 *Arizona Secretary of State Katie Hobbs*

22 Daniel C. Barr
23 Alexis E. Danneman
24 Austin C. Yost
25 Samantha J. Burke
26 PERKINS COIE LLP
27 2901 North Central Avenue Suite 2000
28 Phoenix, Arizona 85012-2788
DBarr@perkinscoie.com
ADanneman@perkinscoie.com
AYost@perkinscoie.com
SBurke@perkinscoie.com
DocketPHX@perkinscoie.com

Christina Ford
Elena A. Rodriguez Armenta
ELIAS LAW GROUP LLP
250 Massachusetts Ave, Suite 400
Washington, D.C. 20001

1 cford@elias.law
2 erodriguezarmenta@elias.law

3 *Attorneys for Defendant/Contestee Katie Hobbs*

4 James E. Barton II
5 BARTON MENDEZ SOTO PLLC
6 401 West Baseline Road Suite 205
7 Tempe, Arizona 85283
8 James@bartonmendezsoto.com

9 E. Danya Perry (pro hac vice forthcoming)
10 Rachel Fleder (pro hac vice forthcoming)
11 Joshua Stanton (pro hac vice forthcoming)
12 Lilian Timmermann (pro hac vice forthcoming)
13 PERRY GUHA LLP
14 1740 Broadway, 15th Floor
15 New York, NY 10019
16 dperry@perryguha.com
17 *Attorneys for Amici Curiae*
18 *Helen Purcell and Tammy Patrick*

19 */s/D. Shinabarger*

20 S:\CIVIL\CIV\Matters\EC\2022\Lake v. Hobbs 2022-3388\Pleadings\Word\Defs FINAL MIL re R 807 Notice.docx

RETRIEVED FROM DEMOCRACYDOCKET.COM

21
22
23
24
25
26
27
28