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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'S RESPONSE TO**
28) **DEFENDANTS' MOTION IN LIMINE**
29) **UNDER RULE 807**

30) (Assigned to Hon. Peter Thompson)
31)

32 **INTRODUCTION**

33 Defendants' motion to *in limine* to exclude testimony offered by Plaintiff in the form of
34 Declarations from witnesses concerning their observations during the 2022 general election in
35 Maricopa County, and charts derived from such Declarations, attached to Plaintiff's Complaint
36

1 through Mr. Sonnekler's Declaration, attached as Exhibit B to the Plaintiff's Complaint filed
2 December 9, 2022. Plaintiff properly filed Rule 807 Notice on the early morning of December
3 20th within hours of the Court's ruling on Defendants' motion to dismiss.
4

5 The issue here is straightforward, when there were printer/tabulator problems at 132 vote
6 centers and long lines at least 64 vote centers, it is not possible for Plaintiff to prove her case at
7 a 5-hour trial without introducing her evidence via Rule 807. The reason there are so many
8 declarations is not that Plaintiff wanted to overburden the Defendants at trial, but rather because
9 there were 223 vote centers and Plaintiff needed to cover as many of them as possible to make
10 the case to this Court regarding how widespread this issue was. Indeed, if Plaintiff had more
11 time before the deadline for filing this election contest, Plaintiff would have obtained even more
12 declarations about printer/tabulator issues at even more than 132 vote center and long lines at 64
13 vote centers. Plaintiff simply had no other way to prove her case in such a short trial.
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16 **SUMMARY OF ARGUMENT**
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- 18 1. Defendant has had access to Plaintiff's list of Declarants since the date of Complaint filing
19 on December 9th, 2022. The assertion that the names and volume of Plaintiff's Declarants
20 is a surprise to Defendants is not well founded.
21
22 2. As to the reliability of Plaintiff's Declarants, as Plaintiff stated in the Rule 807 Notice, all
23 declarants swore under penalty of perjury. A large portion of which did so to the sitting
24 Attorney General of Arizona's office.
25
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- 1 3. Rule 807(a)(1): all of the 219 declarations corroborate what Declarant Sonnenklar saw
2 with his own eyes at the 10 vote centers he visited on election day “out of court statement
3 must have circumstantial guarantees of trustworthiness equivalent to the traditional
4 exceptions.” *State v. Valencia*, 186 Ariz. 493, 497 (App. 1996).
- 5
- 6 4. Rule 807(a)(2): Given the 5-hour length of this trial, there is no other way to introduce
7 evidence of how widespread the problems were at such a large quantity of vote centers.
8 It is impossible for all declarants to testify, and they are therefore unavailable. Plaintiff
9 is willing to bring all of the declarants to court to testify, because that would give Plaintiff
10 a better opportunity to convey how detrimental the problems were to the election day
11 vote, but Plaintiff is prohibited from doing so by time constraints on this trial. “[T]o be
12 admissible under the residual hearsay exception; the declarant must be unavailable, and
13 his out-of-court statement must have circumstantial guarantees of trustworthiness
14 equivalent to the traditional exceptions.” *State v. Valencia*, 186 Ariz. 493, 497–98 (App.
15 1996).
- 16
- 17
- 18 5. Defendants’ argument that this evidence should be excluded because of this Court’s order
19 narrowing the issues makes no sense because this Court is still considering the claim of
20 the tabulation issues on Election Day, and how those issues disenfranchised between at
21 least 15,603 -- 29,257 Republican voters. The egregious wait times places on voters on
22 Election Day is highly relevant to this claim.
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BACKGROUND

The Maricopa County Elections Department Post-Election Report demonstrated many problems for voters in the conduct of the November 2022 General Election at Maricopa County’s 223 polling centers that on election day were visited by 540,000 voters. According to a post-election report, 49 voting centers “had a confirmed printer issue” and in 62 centers the longest reported wait-time was 31 minutes to over an hour. The county reported that seven locations experienced a wait time between 80 (one hour and 20 minutes) and 115 minutes (one hour and 55 minutes). The county found it necessary to issue 6,915 provisional ballots in November 2022.

The County admits that poll workers began reporting problems around 6:20 am. One of the problems was caused by “ballot-on-demand printers” which had to be used at all “Vote Anywhere Vote Centers” because there were over 12,000 “ballot styles” used in Maricopa County for the 2022 General Election. The County admitted that “the Oki B432 printer experienced an issue affecting the ability of the on-site tabulators to accept the ballot,” causing 16,724 ballots to be deposited in a ballot box termed “Door 3” to be later counted at “Central Count.” That problem it is claimed was with the fuser causing timing marks to be printed too lightly. The county states 71 sites were “impacted” by this problem — 31 percent of the 223 Vote Centers on election day.

Additionally, nearly 1,600 of the 16,724 Door 3 ballots had a problem with the way in which ballots were marked or the presence of stray marks. It was obviously essential that the Door 3 ballots would be kept separated from those already tallied, and the county reports only

1 with a divider within a box: “Door 3 ballots are segregated from the ballots read by the tabulator
2 by a divider within the ballot box.”
3

4 PLAINTIFF’S DECLARATIONS AND AFFIDAVITS

5 To establish its claims about the prevalent nature of the problems associated with the
6 conduct of the election in Maricopa County, Plaintiff’s Complaint was supported by the
7 Declaration of Mark Sonnenklar and the Declaration of Kurt Olsen to which were appended a
8 total of 223 affidavits or declarations which demonstrate that Maricopa County experienced
9 other problems, consistent with the problems already admitted in that report, at far more vote
10 centers than the County admitted in the Elections Center Post-election report.
11

12 Declarant Sonnenklar had served as a roving attorney on behalf of the Republican
13 National Committee’s Election Integrity program in Arizona. As such he “visited ten different
14 vote centers in Maricopa County [and] collected and reviewed witness declarations and
15 affidavits from numerous voters, observers, roving attorneys, and poll workers who participated
16 in the November 8, 2022 Maricopa County general election. *See* Sonnenklar Declaration at 1-
17 2.
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20 To the Sonnenklar Declaration were appended 220 declarations or affidavits
21 demonstrating 132 centers reported Printers/Tabulators Breakdowns; 34 vote centers with
22 Printer/Tabulators Breakdowns after 3:00 PM on election day; 16 vote centers with reported
23 commingling of untabulated Box 3 ballots with tabulated ballots; 64 vote centers with reported
24 long lines; 24 election centers with reported long lines on election day after 3:00 PM; and 16
25 vote centers with reported voters leaving the vote centers without voting. *See* Sonnenklar
26

1 Declaration at 2; Attachments A-1 to A-220. To the Sonneklar Declaration, was appended as
2 Exhibit I a summary chart of those witness declarations, termed the Maricopa County vote center
3 issues map.
4

5 Declarant Sonnenklar will be present at trial to testify. This Motion in Limine seeks the
6 admission into evidence of the above-specified declarations and affidavits appended to the
7 Sonneklar and Olsen declarations under Arizona Rule of Evidence: Rule 803(1) (Present Sense
8 Impression), Rule 803(8) (Public Records) and 807 (Residual Exception). Additionally,
9 Plaintiffs seek the admission into evidence if the summary chart appearing as Sonnenklar
10 Declaration Exhibit I under Arizona Rule of Evidence 1006 (Summaries to Prove Content), and
11 another summary chart entitled Selected Wait Times derived from the same declarations
12 attached hereto as Exhibit A.
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15 **STATUTORY CONSTRAINTS ON COURT’S ABILITY TO HEAR TESTIMONY**

16 As an additional reason to admit the specified declarations and affidavits into evidence,
17 plaintiffs suggest that no other approach is feasible under Arizona election law. This contest
18 under Arizona Code section 16-672 is based on three of the grounds stated in section 16-672A:
19 1. misconduct of election boards; 2. illegal votes; and 5. erroneous count. Under section 16-
20 676A, “the court shall set a time for the hearing of the context, not later than ten days after the
21 date on which the statement of contest was filed. Under section 16-676B, “The court shall
22 continue in session to hear and determine all issues arising in contested elections. After hearing
23 the proofs and allegations of the parties, and within five days after the submission thereof, the
24 court shall file its findings and immediately thereafter shall pronounce judgment, either
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1 confirming or annulling and setting aside the election.” Under section 16-676C, “If in an election
2 contest it appears that a person other than the contestee has the highest number of legal votes,
3 the court shall declare that person elected and that the certificate of election of the person whose
4 office is contested is of no further legal force or effect.”

5
6 The Court has acted expeditiously under these narrow time constraints, setting aside two
7 days for a trial to hear the testimony of witnesses for both plaintiff and defendant. Obviously, it
8 will be impossible for the Court during those two days of trial to hear from each persons
9 submitting affidavits and declarations, but the Arizona Rules of Evidence authorize the Court to
10 admit those affidavits and declarations into evidence as exceptions to the hearsay rule on the
11 bases.
12

13 ARIZONA RULE OF EVIDENCE 803

14
15 Of the 220 Affidavits and Declarations appended to the Sonnenklar, 86 were originally
16 submitted to the Office of the Attorney General of Arizona. As part of its effort to monitor the
17 conduct of the election, including to facilitate monitoring of election problems and respond in
18 real time, the Arizona Attorney General’s Election Integrity Unit created and publicized a portal
19 at which complaints could be submitted, termed “Election Complaint Form.” The complainant
20 was asked to “State, in your own words, what exactly transpired” giving details of what was
21 observed. These statements were submitted under the following oath:
22

23 **I declare under penalty of perjury** that the facts and statements contained in this
24 declaration, including any attached materials, are true, correct, and based upon my
25 personal knowledge. I understand that this declaration and any supporting
26 materials are **public records** and may be disclosed as required by law. I
understand that, depending on the nature of the allegation, my complaint may be

1 referred to another state or local agency for enforcement. By choosing to submit
2 this form electronically, I certify and agree that by entering my name in the space
3 below, I bind and legally obligate myself to the same extent as I would by signing
my name on a printed paper version of this form. [Emphasis added.]

4 **Rule 803(8).** Thus, the declarations that were submitted to the Arizona Attorney
5 General's office, which have become incorporated into its post-election report, are public records
6 under Rule 803(8). Under subsection (A)(iii), "in a civil case" they are "factual findings from a
7 legally authorized investigation." Under subsection (B), the only question for the Court would
8 be whether at trial the defendant can demonstrate "that the source of information or other
9 circumstances indicate a lack of trustworthiness," which would seem highly unlikely, as they
10 were submitted under penalty of perjury, and are consistent with the admissions contained in the
11 post-election report of Maricopa County.
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14 **Rule 803(1).** Additionally, at least those declarations which were submitted to the
15 Attorney General's office on election day reflect "present sense impressions" under Rule 803(1):
16 "A statement describing or explaining an event or condition made while or immediately after the
17 declarant perceived it." Thus, the present sense impression provides an exception to the hearsay
18 rule for a statement made while a declarant not just when observing an event but also
19 "immediately after." In this case, the declaration submitted to the Attorney General's officer
20 were made often the day of the election while the events were fresh in the observation of the
21 declarant; were short and direct, briefly describing the errors or flaws in what was observed;
22 were made under penalty of perjury; and even have timestamps evidencing how recently the
23 statements were submitted to the AG's office. For example, one declaration was submitted at
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1 11:35 A.M. on election day, within a minimal amount of time after the declarant was at the
2 polling place. See Exhibit A-59, Declaration of Sharon Elzinga. Although present sense
3 impressions need not be in writing, or under oath, all the complaints submitted here were both
4 in writing and submitted under penalty of perjury and generally consistent with prior admissions
5 of Maricopa County.
6

7 **ARIZONA RULE OF EVIDENCE 807**
8

9 In addition to the two subsections of Rule 803, all declarations are admissible under the
10 Residual Exception which applies to statements. Under that rule:

- 11 (a)(1) the statement is supported by sufficient guarantees of trustworthiness – after
12 considering the totality of circumstances under which it was made and evidence,
13 if any, corroborating the statement; and
14 (2) it is more probative on the point for which it is offered than any other evidence
15 that the proponent can obtain through reasonable efforts.

16 Here, the declarations and affidavits are corroborated in three ways. First, they were
17 submitted under oath, under penalty of perjury, even though the rule would allow statements not
18 made under oath to be admitted if they meet the other requirements. Second, they are consistent
19 with each other by demonstrating similar problems at different election voting centers. Third,
20 they are consistent with election day irregularities already admitted to by Maricopa County, and
21 many are redundant of vote centers from independent declarants providing consistent testimony.
22 All three of these circumstances demonstrate trustworthiness. There certainly is no reason to
23 believe that these Arizonians were submitting false information under oath.
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1 The filing of the Motion meets the requirement in Arizona Rule of Evidence Rule 807(b)
2 that notice be given of an intent to offer the statement, providing both the substance of the
3 statement and the declarant's name, and that notice be filed in court.
4

5 While no Arizona authorities have been identified, there are federal cases applying the
6 comparable federal rule. In *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282 (D. Minn. 1985),
7 the district court granted the FTC's motion in limine requesting that consumer affidavits be
8 admitted into evidence at trial to demonstrate the total financial injury suffered by various
9 victims of a financial fraud. The Court explained: "unless the affidavits are admitted into
10 evidence, there will be only limited proof of total injury suffered.... Accordingly, the interests
11 of justice are best served by admitting the 15 consumer affidavits into evidence." *Id.* at 1295.
12 Also, affidavits were admitted to demonstrate recoverable legal fees in *Keyes v. School District*,
13 439 F. Supp. 393 (D. Colo. 1977). In neither case were the statements made under oath.
14
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16 Not only written affidavits by bank cardholders, but also oral statements made by such
17 cardholders to banks, as to fraud that had been observed in the use of their cards, was admitted
18 under the residual exception. In *United States v. Ismoila*, 100 F.3d 380 (5th Cir. 1996), the Fifth
19 Circuit sanctioned the district court's admission of both statements. The court concluded that
20 the statements were "sufficiently material, probative, and in the interests of justice." *Id.* at 393.
21

ARIZONA RULE OF EVIDENCE 1006

22 Under Arizona Rule of Evidence 1006:
23

24 The proponent may use a summary chart ... to prove the content of voluminous
25 writings ... that cannot be conveniently examined in court. The proponent must
26 make the originals or duplicates available for examination or copying or both by

1 other parties ast a reasonable time and place. And the court may order the
2 proponent to produce them in court.

3 By having appended this summary chart as Exhibit A to the Sonnenklar Declaration, and
4 providing all of the underlying affidavits and declarations as appendices to the Sonnenklar and
5 Olsen Declarations, Plaintiff has met the procedural requirements of this rule.
6

7 To demonstrate the widespread nature of election problems, Plaintiffs have offered the
8 two summary charts referenced above, demonstrating at exactly which election centers problems
9 occurred, linking the problem back to the declaration or affidavit.

10 Use of such charts was authorized in an Illinois vote fraud case. In *United States v.*
11 *Howard*, 774 F.2d 838 (7th Cir. 1985), “a chart that summarized the government’s evidence
12 concerning the forged ballot applications ... listed in separate columns” relevant information to
13 the charges. The Seventh Circuit found no abuse in admitting the chart.
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1 **CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests the court to admit into evidence
3 the specified declarations and affidavits appended to the Sonnenklar Declaration appended to
4 the complaint, and the summary chart appended as Exhibit I to the Sonnenklar Declaration, and
5 the summary chart attached hereto as Exhibit A.
6

7 DATED this 21st day of December 2022.
8

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EXHIBIT A

SELECTED WAIT TIMES

Declarant's Name	Vote Center	Paragraph Number (if applicable)	Comment regarding wait time/line
Ariane Buser (A-29)	Cave Creek Town Hall	¶ 8 & 9	90-minute wait
Gary Lasham (A-100)	Dove of the Desert United Methodist	¶ 7	120-minute wait
Earl Shafer (A-181)	First United Methodist Church of Gilbert	Page 3	120-minute wait
Mary Ziola (A-219)	Happy Trails Resort	¶ 7	120-minute wait
Claire Morgan (A-134)	Mesquite Groves Aquatic Center	No ¶ numbers	120-minute wait
Peggy Weiman (A-206)	Outlets at Anthem	¶ 7	2-3 hour, 350-400 people in line
Roie Bar (A-220)	Radiant Church Sun City	¶ 13	120-minute wait for most of the day
Erinn Tatom (A-195)	Sunland Village East	¶ 6	90-minute wait
Jeffrey W. Crockett (A-44)	ASU Sun Devil Fitness Center	¶ 26	More than 200 people; at least a two-hour wait
Jeffrey W. Crockett (A-44)	Avondale City Hall	¶ 14	97 people in line
Duane Schooley (A-178)	Buckeye City Hall	¶ 6(a) & (b)	35-75 people in line
Kathryn Baillie (A-11)	Cactus High School	¶ 25	200 people in line
Michael Brenner (A-25)	Compass Church	¶ 10	60+ minutes wait for most of day
Mark Sonnenklar	Copper Canyon School	¶ 34	100 people in line
Tabatha LaVoie (A-101)	El Dorado Community Center	¶ 28	At times, hour long wait
Kristine Moss (A-136)	First United Methodist Church of Gilbert	¶ 29	80 people in line
Keith Evanson (A-60)	First United Methodist Church of Gilbert	¶ 7 & 8(a)	120 people in line

Mark Sonnenklar	Fountain Hills Community Center	¶ 10	150 people in line
Kevin Beckwith (A-15)	Glendale Community College –North	¶ 14	100-120 people in line
Aaron Ludwig (A-115)	Happy Trails Resort	¶ 27	200 people in line
Mary Ziola (A-219)	Happy Trails Resort	¶ 7	2-hour wait
Tabatha LaVoie (A-101)	Indian Bend Wash Visitor Center	¶ 35	1.25 hour wait
Kathryn Baillie (A-11)	Journey Church	¶ 35	“very long” wait
Tabatha LaVoie (A-101)	Messinger Mortuary	¶ 31	60 people in line
Aaron Ludwig (A-115)	Mountain Vista Club/Vistancia	¶ 22	100-120 people in line
Aaron Ludwig (A-115)	Radiant Church Sun City	¶ 30	100-120 people in line
Christian Damon (A-46)	San Tan Village	¶ 14	“a long line of voters”
Aaron Ludwig (A-115)	Sheriffs Posse of Sun City West	¶ 16	80-100 people in line
Aaron Ludwig (A-115)	Surprise City Hall	¶ 10	200 people in line
Kristine Moss (A-136)	Tumbleweed Recreation Center	¶ 21	Between 250-500 people in line
Mark Sonnenklar	Venue 8600	¶ 32	“line extending outside the building”
Mark Sonnenklar	Via Linda Senior Center	¶ 21	150 people in line
Kathryn Baillie (A-11)	Worship & Word Church	¶ 9, 14 & 16	80-100 people in line
Ken Mettler (A-131)	Worship & Word Church	¶ 5	100-125 people in line and 1.0-1.5 hour wait
Inspector Harold Darcangelo (A-47)	Church of Jesus Christ of LDS—Southern	¶ 1	120-minute wait, 275 people in line
Clerk Debbie Gillespie (A-67)	Desert Hills Community Church	¶ 3	120-minute wait

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