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16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE DISTRICT OF ARIZONA**

18 Tyler Bowyer, Michael John Burke, Nancy
19 Cottle, Jake Hoffman, Anthony Kern,
20 Christopher M. King, James R. Lamon,
21 Sam Moorhead, Robert Montgomery,
22 Loraine Pellegrino, Greg Safsten,
23 Salvatore Luke Scarmardo, Kelli Ward,
24 and Michael Ward,

25 Plaintiffs,

26 v.

27 Doug Ducey, in his official capacity as
28 Governor of the State of Arizona, and
Katie Hobbs, in her official capacity as the
Arizona Secretary of State

Defendants.

NO. CV20-02321-PHX-DJH

**MARICOPA COUNTY
INTERVENORS'
MOTION TO DISMISS**

AND

**RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

1 Pursuant to Federal Rule of Civil Procedure 9(b), the Maricopa County Board of
2 Supervisors and Maricopa County Recorder Adrian Fontes (“Maricopa County
3 Intervenors”) respectfully request that this Court dismiss Plaintiffs’ Complaint with
4 prejudice because it utterly fails to “state with particularity the circumstances constituting
5 fraud.” Because Plaintiffs will not succeed on the merits and fail to raise “serious
6 questions” with their woefully deficient fraud Complaint, this Court should deny the
7 request for a temporary restraining order that would cause irreparable harm to the
8 Maricopa County Intervenors. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20
9 (2008) (discussing elements for preliminary equitable relief); *All. for the Wild Rockies v.*
10 *Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). The following Memorandum of Points
11 and Authorities supports this Motion.

12 Memorandum of Points and Authorities

13 **Introduction**

14 Plaintiffs’ Complaint is a textbook example of why Federal Rule of Civil Procedure
15 9(b) exists. Nearly one month after the November 3, 2020 General Election, this is the
16 best that Plaintiffs could put together: (1) declarations from partisan elections observers
17 that do not allege fraud and are demonstrably confused about Arizona’s voting laws and
18 Maricopa County’s practices, (2) “statistical” reports from “experts” who based their
19 analyses on their subjective expectations of voter behavior, and (3) conspiracy-theory
20 laden, unsigned, redacted declarations making wild accusations about Maricopa County’s
21 elections equipment vendor.

22 “When an entire complaint, or an entire claim within a complaint, is grounded in
23 fraud and its allegations fail to satisfy the heightened pleading requirements of Rule 9(b),
24 a district court may dismiss the complaint or claim.” *Vess v. Ciba–Geigy Corp. USA*, 317
25 F.3d 1097, 1107 (9th Cir. 2003). This Court should dismiss the Complaint under Rule 9(b)
26 to avoid “squander[ing] enormous judicial resources resolving complex (and arguably
27 novel) questions where nothing in Plaintiff[s]’ submissions give the Court any assurances
28 that this is not a ‘fishing expedition for the discovery of unknown wrongs’ of the precise

1 sort that Rule 9(b) is designed to smoke out.” *California ex rel. Heryford v. Citigroup Inc.*,
2 No. 216CV00469TLNEFB, 2018 WL 3197905, at *2 (E.D. Cal. June 26, 2018) (quoting
3 *Verizon Delaware, Inc. v. Covad Commc ’ns Co.*, 377 F.3d 1081, 1092 (9th Cir. 2004).

4 **Argument**

5 **I. The Court should dismiss this Complaint under Rule 9(b).**

6 “A motion to dismiss a complaint or claim ‘grounded in fraud’ under Rule 9(b) for
7 failure to plead with particularity is the functional equivalent of a motion to dismiss under
8 Rule 12(b)(6) for failure to state a claim.” *Vess*, 317 F.3d at 1107. Thus, as in the Rule
9 12(b)(6) context, this Court should assume the truth of well-pleaded factual allegations in
10 the Rule 9(b) context. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). That
11 assumption does not apply to “legal conclusions” or “conclusory statements.” *Id.* Even
12 under Rule 8(a)’s less-demanding standard, “only a complaint that states a plausible claim
13 for relief survives a motion to dismiss.” *Id.* at 679. And “where the well-pleaded facts do
14 not permit the court to infer more than the mere possibility of misconduct, the complaint
15 has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’ ” *Id.* (quoting
16 Fed. Rule Civ. Proc. 8(a)(2)).

17 “But Rule 9(b) clearly imposes an *additional* obligation on plaintiffs: the statement
18 of the claim must *also* aver with particularity the circumstances constituting the fraud.” *In*
19 *re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir. 1994). “Rule 9(b) requires
20 particularized allegations of the circumstances *constituting* fraud.” *Id.* “To satisfy Rule
21 9(b), a pleading must identify the who, what, when, where, and how of the misconduct
22 charged[.]” *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011);
23 *see also Donohue v. Bd. of Elec. of State of N.Y.*, 435 F. Supp. 957, 966 (1976) (“It is
24 necessary, first of all, to plead and prove specific acts of misconduct, including the time,
25 place and circumstances of the alleged deprivation of the right to vote.” (Citing Fed. R.
26 Civ. P. 9(b)).

27 Rule 9(b) serves not only to give notice to defendants of the specific
28 fraudulent conduct against which they must defend, but also ‘to deter the
filing of complaints as a pretext for the discovery of unknown wrongs, to

1 protect [defendants] from the harm that comes from being subject to fraud
2 charges, and to prohibit plaintiffs from unilaterally imposing upon the court,
3 the parties and society enormous social and economic costs absent some
4 factual basis.’

5 *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001).

6 To start, Plaintiffs’ Complaint asserts alleged “violations” of Arizona elections law.
7 (Doc. 1, ¶¶ 48–53). Notably, none of Plaintiffs’ declarants allege fraud. (*See id.*; *see also*
8 Doc. 1-10 at 18–40 (Exhs. 20–23)). They are the only declarants offered by Plaintiffs with
9 any first-hand observation of Maricopa County’s election administration. The allegation
10 that “[t]he [voting] machines make determinations on what ballots to invalidate or validate
11 based on an algorithm that operates offshore before tallying the votes locally,” does not
12 find support in the declaration. (*Compare* Doc. 1, ¶ 49 *with* Doc. 1-10 at 18–24). At most,
13 these declarants offer perceived irregularities with election administration. (Doc. 1-10 at
14 18–40).

15 Plaintiffs next offer allegations based on “expert witness testimony.” (Doc. 1, ¶¶
16 54–62). These allegations do not plead with particularity the circumstances constituting
17 the alleged fraud. For example, the Briggs Report comes to the conclusion that over
18 300,000 Arizona ballots are “troublesome” based on an unexplained methodology applied
19 to a multi-state phone survey—the “Braynard survey” with its own methodology that no
20 declarant explains and for which the Briggs Report does not vouch. (*See* Doc. 1-2 at 14–
21 17 (“I assume survey respondents are representative and the data is accurate.”); *see also*
22 Doc. 1-2 at 52 (providing tweets from Braynard instead of a signed declaration that does
23 not address the “survey,” but appears to address the alleged out-of-state voters)). Further,
24 the allegations in this section are filled with qualifiers—“indicative of voter fraud,”
25 “predictive model”—and **fail to identify any defendant** that committed the alleged fraud.
26 The allegations merely assert that certain ballots “*could have* been filled out by anyone
27 and then submitted in the name of another voter,” “*could be* filled in by third parties to
28 shift the election to Joe Biden,” “were either lost or destroyed (consistent with allegations

1 of Trump ballot destruction)^[1] and/or were replaced with blank ballots filled out by
2 election workers, Dominion or other third parties.” (Doc. 1, ¶¶ 54–58 (emphasis added);
3 *see also* Doc. 1-4 at 1–17 (analysis of “momentum” based on alleged voter registration
4 trends)).

5 Similarly, the allegations based on the Ramsland Report produce qualifiers instead
6 of particularity: “*likely* fraudulent”; “*could* have been manufactured,” and—the best of the
7 bunch—“*possibly* impossible.” (*See* Doc. 1, ¶¶ 59–60 (emphasis added)). And Ramsland’s
8 analysis is based on his subjective expectation of voter behavior at the precinct level, not
9 first-hand evidence of voter fraud.

10 Taken together, the Briggs Report, Ramsland Report, and Braynard tweetstorm
11 conjure a number of “illegal votes” out of thin air. These fantastic allegations have no
12 connection whatsoever to any allegation made by the Arizona-based declarants. These
13 reports cannot satisfy Rule 9(b).

14 Finally, the bulk of Plaintiffs’ allegations attack the integrity of Dominion Voting
15 Systems, one of Maricopa County’s voting equipment vendors. (*See* Doc. 1, ¶¶ 63–102;
16 *see also id.* at ¶¶ 5–13)). These attacks are largely based on conspiracy theories in
17 unsigned,² redacted declarations. (*See, e.g.,* Doc. 1-2 at 5–12; Doc. 1-3 at 2–6; Doc. 1-5
18 at 1–56). They also draw on observations about Dominion voting equipment in other states
19 without any allegation that Maricopa County uses the same equipment or that the County’s
20 elections officials committed fraud in this or any other election. (*See, e.g.,* Doc. 1-4 at 48–
21 50; Doc. 1-3 at 23–69). Plaintiffs brazenly attempt to justify their flouting of Rule 9’s
22

23 ¹ Note: the Complaint does not appear to substantiate this conclusory allegation about
24 ballot destruction at any point with a citation to any of the more than 300 pages of exhibits.

25 ² Courts routinely reject the sufficiency of unsigned declarations. *See, e.g., West v.*
26 *Higgins*, 346 F. App’x 423, 426 (11th Cir. 2009) (“Federal law does provide an alternative
27 to making a sworn statement, but requires that the statement include a handwritten
28 averment, signed and dated, that the statement is true under the penalties of perjury.”);
Alleva v. New York City Dep’t of Investigation, 696 F. Supp. 2d 273, 278 (E.D.N.Y. 2010)
 (“[T]he lack of a signature renders [the declarations] invalid under 28 U.S.C. § 1746, which
 requires the signature of the declarant.”).

1 requirements by telling this Court that the system is set up to make fraud undetectable.
2 (*See, e.g.*, Doc. 1, ¶ 8.) But that is not how Rule 9 works.

3 All told, Plaintiffs' Complaint does not "state with particularity the circumstances
4 constituting fraud." *See* Fed. R. Civ. P. 9(b). At most—and it is surely a stretch—the
5 Arizona-based declarants have alleged "garden variety election irregularities." *Griffin v.*
6 *Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978).

7 The federal court is not equipped nor empowered to supervise the
8 administration of a local election. If every election irregularity or contested
9 vote involved a federal violation, the court would be thrust into the details of
10 virtually every election, tinkering with the state's election machinery,
11 reviewing petitions, registration cards, vote tallies, and certificates of
election for all manner of error and insufficiency under state and federal
law."

12 *Id.* at 1077.

13 Here, Plaintiffs request the extraordinary relief of decertifying Arizona's election
14 by claiming "fraud" but fail to offer *any* evidence to support their claims. Because "the
15 pleading could not possibly be cured by the allegation of other facts," *Bly-Magee*, 236
16 F.3d at 1019, this Court should dismiss with prejudice.

17 **II. The Court should deny the request for preliminary equitable relief.**

18 A movant can obtain preliminary equitable relief as a temporary restraining order
19 or preliminary injunction by showing that (1) it is "likely to succeed on the merits," (2) it
20 is "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance
21 of equities tips in [its] favor," and (4) "an injunction is in the public interest." *Winter*, 555
22 U.S. at 20. A preliminary injunction may also be appropriate if a movant raises "serious
23 questions going to the merits" and the "balance of hardships . . . tips sharply towards" it,
24 provided that the movant satisfies the second and third *Winter* factors. *See All. for the Wild*
25 *Rockies*, 632 F.3d at 1134–35.

26 Here, as explained above, Plaintiffs' woefully deficient Complaint ensures that it
27 cannot succeed on the merits and does not raise "serious questions going to the merits."
28 Further, given the purposes that animate Rule 9(a)—"to deter the filing of complaints as

1 a pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that
2 comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally
3 imposing upon the court, the parties and society enormous social and economic costs
4 absent some factual basis,” *Bly-Magee*, 236 F.3d at 1018—the balance of hardships under
5 these circumstances tips sharply in favor of the Maricopa County Intervenors, not
6 Plaintiffs. The Maricopa County Intervenors will suffer irreparable harm if the Court
7 grants Plaintiffs’ preliminary equitable relief and orders “all servers, software, voting
8 machines, tabulators, printers, portable media, logs, ballot applications, ballot return
9 envelopes, ballot images, paper ballots, and all election materials related to the November
10 3, 2020 Arizona election s[e]ized and impounded for forensic audit and inspection by the
11 Plaintiffs.” (Doc. 2 at 11).

12 First, the County will not be able to perform important post-election tasks,
13 including service and maintenance of the voting equipment and performing accounting
14 and inventory duties. Second, the Maricopa County Intervenors have an upcoming
15 election to administer in March, and the proposed fishing expedition threatens their
16 preparations. All of this together threatens the right of citizens of Maricopa County to
17 exercise their constitutional right to vote. In addition, members of the legislature,
18 including the chairman of the committee with jurisdiction over election procedures, have
19 requested the County to perform an “election day demonstration” of the County’s voting
20 equipment in early to mid-December in order to determine what changes to Arizona
21 election law, if any, should be considered when the time comes to file bills in early
22 January. The order the Plaintiffs request would frustrate the legislators’ important
23 objective to continue to improve elections and voting in Arizona.

24 Moreover, Plaintiffs’ request for access to the software is incongruent with their
25 absurd allegation about “the software’s ability to hide its manipulation of votes from *any*
26 *audit*,” underscoring their Rule 9(b) deficiencies. (*See* Doc. 1, ¶ 8 (emphasis added)).
27 Under these circumstances, Plaintiffs cannot satisfy *Winter*.

28 //

Conclusion

For these reasons, this Court should dismiss this Complaint under Rule 9(b) and deny Plaintiffs’ motion for preliminary equitable relief.

RESPECTFULLY submitted this 4th day of December, 2020.

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I hereby certify that on December 4th, 2020, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

/s/ V. Sisneros

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