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15 *Attorneys for Maricopa County Intervenors*

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’
REPLY IN SUPPORT OF MOTION
TO DISMISS**

Pursuant to Federal Rule of Civil Procedure 9(b), the Intervenor-Defendants
Maricopa County Board of Supervisors and Maricopa County Recorder Adrian Fontes

1 (“Maricopa County Intervenors”) respectfully reply in support of their motion to dismiss
 2 Plaintiff’s Complaint (the “Motion”).¹ Plaintiffs’ response to the Motion misrepresents
 3 Arizona case law and misstates the applicable standard under Federal Rule of Civil
 4 Procedure 9(b). Most importantly, the Response fails to cite to a single allegation *at all*,
 5 much less one that could even remotely support a finding of fraud. Because Plaintiffs fail
 6 to “state with particularity the circumstances constituting fraud,” as required by Federal
 7 Rule of Civil Procedure 9(b), this action must be dismissed.²

8 **I. Plaintiffs allege fraud.**

9 Plaintiff’s entire claim is grounded in an assertion—a baseless one—of widespread
 10 election fraud. (*See* Doc. 1, ¶¶ 1-5, 10, 11, 19, 21, 44, 45, 49, 53, 54, 57-59, 61, 67, 92,
 11 98, 108, 117, 126, 128, 129, 136, and 138-141). The word fraud, or some derivative
 12 thereof, is stated 56 times throughout the Complaint. The first sentence of the Complaint
 13 states, “this civil action brings to light a massive election fraud” and Plaintiffs request a
 14 declaration of fraud from this court. (*Id.* at ¶ 1 and *Prayer for Relief* ¶¶ 7-8). Likewise,
 15 their Response unequivocally states this case alleges, “ballot fraud,” and that all the claims
 16 set forth in the complaint are “part of a *larger scheme of election fraud* that affected the
 17 result.” (Doc. 44 at 23, 24 (*emphasis added*)). Yet, Plaintiffs now inexplicably assert that
 18 a showing of fraud is not necessary to prevail and, therefore, Rule 9(b)’s clear dictates
 19 need not apply. Plaintiffs are incorrect.

20 **A. A party asserting election fraud must prove fraud to prevail.**

21 The Response sets out the ludicrous proposition that in a case alleging “ballot

22 ¹ If the Court holds argument, as it indicated in its most recent Order that it would, (Doc.
 23 51), the Maricopa County Intervenors will participate. However, they believe the motions
 24 to dismiss could be decided without argument, on the submitted papers, if the Court is
 inclined to do so.

25 ² At the telephonic hearing on December 3, 2020, the Court asked whether the election
 26 materials used in the November 3, 2020, election (such as the software, tabulators,
 27 printers, logs, etc.) are preserved. They are. The County preserves the software, logs, and
 28 ballots cast for two years, in accordance with state law. The tabulators and printers are
 stored in the Maricopa County Tabulation and Elections Center until they are used in the
 next election.

1 fraud” the Arizona Supreme Court has ruled that “a showing of fraud is not necessary.”
2 (Doc. 44 at 23). The Arizona Supreme Court issued no such ruling. In *Miller v. Picacho*
3 *Elementary School District Number 33*, 179 Ariz. 178, 180 (Ariz. 1994), the only case
4 Plaintiffs cite, the court ruled that if one does not allege fraud in a challenge to ballot
5 procedures, one need not prove fraud to prevail. *Id.* Here, Plaintiff’s entire complaint is
6 based in allegations of fraud.

7 Moreover, the Response completely misrepresents long-standing Arizona
8 precedent with respect to claims of election fraud. In *Hunt v. Campbell*, the Arizona
9 Supreme Court held that claims of election fraud must be made with “sufficient proof to
10 establish (the) charge,” going on to state that “no court . . . is permitted to found its
11 judgment upon mere suspicion and conjecture of wrongdoing, but, unless there be
12 satisfactory evidence to the contrary, to look upon the acts of public officials with a
13 presumption of their rectitude and good faith.” 19 Ariz. 254, 264 (Ariz. 1917).

14 **B. The Federal Rules of Civil Procedure apply in Federal Court.**

15 To the extent Plaintiffs are asserting that the Federal Rules of Civil Procedure do
16 not apply to this election contest, they are mistaken. Although Plaintiffs sprinkle citations
17 to state law throughout their Complaint, it raises claims under § 1983 based on the U.S.
18 Constitution’s Fourteenth Amendment and the Elections and Electors Clauses. Plaintiffs
19 do not address why they think the federal rules do not apply to federal claims in federal
20 court.

21 Further, it is well-established that Rule 9(b)’s particularity requirement also applies
22 to state-law causes of action. “It is well-settled that the Federal Rules of Civil Procedure
23 apply in federal court, irrespective of the source of the subject matter jurisdiction, and
24 irrespective of whether the substantive law at issue is state or federal.” *Kearns v. Ford*
25 *Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (internal quotation marks omitted).
26 “[W]hile a federal court will examine state law to determine whether the elements of fraud
27 have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the
28 *circumstances* of the fraud must be stated with particularity is a federally imposed rule.”

1 *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985) (emphasis in original); *see also*
2 *Jenkins v. Commonwealth Land Title Ins. Co.*, 95 F.3d 791, 796 (9th Cir.1996) (applying
3 Rule 9(b) to pleading of state-law cause of action); *Minger v. Green*, 239 F.3d 793, 800
4 (6th Cir.2001) (same); *Roberts v. Francis*, 128 F.3d 647, 650–51 (8th Cir.1997) (same).

5 Finally, even if the Arizona Rules of Civil Procedure apply, which they do not, the
6 same Rule 9(b) standard applies. Arizona Rule of Civil Procedure 9(b) states: “In all
7 averments of fraud or mistake, the circumstances constituting fraud or mistake shall be
8 stated with particularity.” This is the same whether fraud is claimed as a basis of an action
9 for damages or as a defense. *Wilson v. Byrd*, 79 Ariz. 302 (Ariz. 1955). Similar to the
10 Federal rules, bare allegations that a thing is “fraudulent” are insufficient to comply with
11 the rule. *In re Cassidy’s Estate*, 77 Ariz. 288 (1954); *cf. Bender v. Bender*, 123 Ariz. 90,
12 94 (Ariz. Ct. App. 1979) (“Fraud is never presumed, but must be alleged; therefore the
13 party who seeks fraud as a defense must plead it with particularity.”) (citing *Hunt v.*
14 *Campbell*, 19 Ariz. 254 (Ariz. 1917)).

15 **II. Plaintiffs pled no facts to support a finding of election fraud.**

16 As is the case here, and addressed at length in the Motion, “[w]hen an entire
17 complaint, or an entire claim within a complaint, is grounded in fraud and its allegations
18 fail to satisfy the heightened pleading requirements of Rule 9(b), a district court may
19 dismiss the complaint or claim.” *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1107
20 (9th Cir. 2003). Plaintiffs’ Response does not cite a single fact alleged in the Complaint
21 to support their fraud claims and instead reasserts broad, conclusory statements with no
22 factual support.

23 Plaintiffs request the extraordinary relief of setting aside the results of the election
24 based on blanket assertions of fraud for which, more than a month after the election, they
25 have no factual basis. This is the sixth lawsuit in which Maricopa County’s elections
26 practices have been called into question; all six of these cases were either voluntarily
27 dismissed or dismissed by the courts, and yet Plaintiffs continue to assert claims of
28 wrongdoing with absolutely no factual support alleged. These repeated attacks continue

1 to cause significant harm to the election process and to the dedicated election employees
2 who have worked tirelessly day after day in support of this Country’s vital electoral
3 process. Defendant is hard-pressed to find an instance where the requirements of Rule 9(b)
4 could be more necessary and consequential. As the *Bly-McGee* court aptly stated,

5 Rule 9(b) serves not only to give notice to defendants of the specific
6 fraudulent conduct against which they must defend, but also ‘to deter the
7 filing of complaints as a pretext for the discovery of unknown wrongs, to
8 protect [defendants] from the harm that comes from being subject to fraud
9 charges, and to prohibit plaintiffs from unilaterally imposing upon the court,
the parties and society enormous social and economic costs absent some
factual basis.’

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

11 For these reasons, this Court should dismiss this Complaint with prejudice under
12 Rule 9(b).

13 **RESPECTFULLY** submitted this 6th day of December, 2020.

14 ALLISTER ADEL
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CERTIFICATE OF SERVICE

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I hereby certify that on December 6th, 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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