

1 ALLISTER ADEL
2 MARICOPA COUNTY ATTORNEY

3 Thomas P. Liddy (019384)
4 Emily Craiger (021728)
5 Joseph I. Vigil (018677)
6 Joseph J. Branco (031474)
7 Joseph E. LaRue (031348)
8 Deputy County Attorneys
liddyt@mcao.maricopa.gov
craigere@mcao.maricopa.gov
vigilj@mcao.maricopa.gov
brancoj@mcao.maricopa.gov
laruej@mcao.maricopa.gov

9 CIVIL SERVICES DIVISION
10 225 West Madison Street
11 Phoenix, Arizona 85003
12 Telephone (602) 506-8541
13 Facsimile (602) 506-4317
14 ca-civilmailbox@mcao.maricopa.gov

15 *Attorneys for Maricopa County Defendants*

16 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

17 IN AND FOR THE COUNTY OF MARICOPA

18 Laurie Aguilera, a registered voter in
19 Maricopa County, Arizona; Donovan
20 Drobina, a registered voter in Maricopa
21 County, Arizona; DOES I-X;

22 Plaintiffs,

23 v.

24 Adrian Fontes, in his official capacity as
25 Maricopa County Recorder; Clint
26 Hickman, Jack Sellers, Steve Chucuri, Bill
27 Gates, and Steve Gallardo, in their official
28 capacities as members of the Maricopa
County Board of Supervisors; Maricopa
County, a political subdivision of the State
of Arizona;

Defendants.

NO. CV2020-014562

**MARICOPA COUNTY
DEFENDANTS'
MOTION IN LIMINE TO
EXCLUDE WITNESSES**

(Honorable Margaret Mahoney)

1 There are two Plaintiffs in this case: Laurie Aguilera and Donovan Drobina. They
2 filed this lawsuit asserting that they do not believe their votes were properly counted.
3 However, in preparing for this hearing, Plaintiffs want to call witnesses that will provide
4 testimony wholly unrelated to the claims and facts asserted by the Plaintiffs. And though
5 Plaintiffs’ counsel has vouched to this Court and the parties that their claims are not really
6 about Sharpies,¹ a number of the witnesses listed intend to testify that they were given a
7 sharpie to vote and somehow they believe their vote did not count.

8 Under Arizona Rule of Evidence 401: “Evidence is relevant if: (a) it has any
9 tendency to make a fact more or less probable than it would be without the evidence; and
10 (b) the fact is of consequence in determining the action.” Under Rule 402, “Irrelevant
11 evidence is not admissible.” And under Rule 403, this Court has discretion to “exclude
12 relevant evidence if its probative value is substantially outweighed by a danger of one or
13 more of the following: . . . confusing the issues, . . . undue delay, wasting time, or
14 needlessly presenting cumulative evidence.”

15 The following testimony and evidence is irrelevant to the claims brought by the
16 two Plaintiffs; even if it is remotely relevant, it should be excluded because it confuses the
17 issues, wastes time and resources, causes undue delay, and is needlessly cumulative.

- 18 **1.** The testimony of witnesses with no firsthand knowledge of Plaintiffs voting:
19 • Testimony of Michael Long: Long’s declaration, included in Exhibit E of
20 the Complaint, is a fill-in-the-blank declaration like all of the others. Long does not
21 state that he knows Plaintiffs, saw Plaintiffs vote or knows that Plaintiffs vote was
22 or was not counted. Instead, Long states that he was given a sharpie and then on
23 his declaration he checked an “x” to indicate that his ballot was rejected and then

24
25 ¹ See Plaintiffs’ Notice of Non-Opposition to Defendants’ Motion to Reassign Case,
26 November 15, 2020, at 2 (stating that “Named Plaintiffs in Aguilera I were also much more
27 focused on whether the use of Sharpies had caused the issues complained of. . . . In contrast,
28 in Aguilera II, Plaintiffs largely contend that the problems they encountered with
Defendants’ tabulators constitute violations of the law regardless of the source of the
problem”).

1 put in a special pile. Long therefore has no relevant knowledge as to the specific
2 facts of Plaintiffs' claims. To the extent that the Plaintiffs seek Long's testimony
3 to show that the reader was not "perfect," that testimony confuses the issues,
4 promotes undue delay, wastes time, and is part of a pattern of needlessly cumulative
5 evidence. Long's testimony, as asserted in his declaration, runs afoul of Rules 402
6 and 403.

7 • Courtney Ann Childers: Childers' declaration, included in Exhibit E to the
8 Complaint, is a fill-in-the-blank declaration like all of the others. In her declaration,
9 Childers does not state that she knows Plaintiffs, saw Plaintiffs vote, or knows that
10 their vote was or was not counted. Instead, Childers states that she was given a
11 sharpie and then on her declaration she checked an "x" to indicate that the ballot
12 was rejected and then put in a special pile. Childers therefore has no relevant
13 knowledge as to the specific facts of Plaintiffs' claims. To the extent that the
14 Plaintiffs seek Childers' testimony to show that the reader was not "perfect," that
15 testimony confuses the issues, promotes undue delay, wastes time, and is part of a
16 pattern of needlessly cumulative evidence. Further, Childers does not assert that
17 her vote was not actually counted. Childers' testimony, as asserted in her
18 declaration, runs afoul of Rules 402 and 403.

19 • Rebecca Novicki: Novicki's declaration, included in Exhibit E to the
20 Complaint, is another fill-in-the-blank declaration like the rest. In her declaration,
21 Novicki does not state that she knows Plaintiffs, saw Plaintiffs vote, or know that
22 their vote was or was not counted. Instead, she states that she was given a sharpie
23 and then on her declaration she checked an "x" in the box that says her ballot was
24 rejected and she wasn't given the option of submitting another ballot. It is uncertain
25 what this testimony is supposed to support; it is not relevant to the claims at hand.
26 This testimony runs afoul of Rules 402 and 403, and she should be excluded from
27 testifying in this case.

28 • Joshua D. Banko: Banko should be excluded from testifying as his

1 testimony is similarly not relevant to the experience of the Plaintiffs. Banko's
2 declaration indicates that he was a clerk on election day at the Paradise Valley Mall
3 vote center. This is not the same vote center as Drobina, who indicated in his
4 declaration that he voted at Arrowhead Town Center; and there is no indication that
5 Aguilera voted at the Paradise Valley Mall vote center or that Mr. Banko has any
6 firsthand information related to Aguilera. Additionally, his declaration and his
7 testimony is believed to be based on his perception of the impact sharpies may have
8 had on the reading of ballots. This is an issue that Plaintiffs' counsel has indicated
9 is not at issue in this case and also they have indicated that this case is not a class
10 action. Yet, they are attempting to present a testimony inapposite to what they
11 claim their case is about. Mr. Banko's testimony should be excluded consistent
12 with Rules 402 and 403.

13 **2.** In addition to excluding the testimony of these witnesses, the declarations
14 listed in Plaintiffs list of exhibits at numbers 1, 6, 8-10, 13-15 should be excluded. This
15 Court has already informed the parties that any declarations not supported by live
16 testimony would be excluded. These declarations fail to meet the standards of Rules 402
17 and 403. Further, these proposed exhibits are hearsay under Rules 801 and 802 for which
18 no exception under Rules 803 and 804 applies. Rule 807 provides that evidence not
19 otherwise admissible under Rules 803 or 804 may be admissible if:

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

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

25 "The residual hearsay exception require[s] the out of court statement to have equivalent
26 circumstantial guarantees of trustworthiness, and absent such guarantees, self-serving
27 hearsay is inadmissible." *State v. Burns*, 237 Ariz. 1, 20 ¶ 69 (2015) (internal quotation
28 marks omitted). "When deciding if a statement is trustworthy," a court considers "the

1 spontaneity, consistency, knowledge, and motives of the declarant . . . to speak truthfully,
2 among other things.” *Id.* (internal quotation marks omitted).

3 Here, the guarantees of trustworthiness are sorely lacking. “Precedent teaches that
4 courts typically should not admit documents made in anticipation of litigation as they lack
5 sufficient guarantees of trustworthiness to be excepted from the hearsay rule.” *Stolarczyk*
6 *ex rel. Estate of Stolarczyk v. Senator Int’l Freight Forwarding, L.L.C.*, 376 F. Supp. 2d
7 834, 841 (N.D. Ill. 2005) (internal punctuation omitted). Beyond that, the “paint-by-
8 numbers” nature of these “declarations” raise additional trustworthiness concerns. This
9 Court should exclude these exhibits.

10 Plaintiffs filed this third iteration of this case not as a “sharpie” case (according to
11 them)² and this is not a class action (according to them).³ The expansive list of witnesses
12 and exhibits tell a different story. Having the full complement of listed witnesses listed
13 testify does not lend any credence to Plaintiffs claims nor would their testimony help this
14 Court reach a decision relating to Plaintiffs claims.

15 As such, this Court should exclude the testimony of the witnesses listed herein and
16 require the Plaintiffs to focus on Plaintiffs case and not unreasonably expand the claims
17 being asserted, especially given the urgency and time within which this matter is to be
18 decided.

19 //
20 //
21 //
22 //
23 //

24 ² *See* n.1, *supra*.

25 ³ *See* Plaintiffs’ Notice of Non-Opposition to Defendants’ Motion to Reassign Case,
26 November 15, 2020, at 2 (stating that “Aguilera I was brought as a class-action on behalf
27 of all Maricopa County voters who experienced issues having their ballots read on election
28 day. . . . Aguilera II has been brought only on behalf of individual voters Laurie Aguilera
and Donovan Drobin”).

1 **RESPECTFULLY** submitted this 19th day of November 2020.

2 ALLISTER ADEL
3 MARICOPA COUNTY ATTORNEY

4 BY: *s/ Emily Craiger*

5 Emily Craiger
6 Emily Craiger
7 Joseph I. Vigil
8 Joseph J. Branco
9 Joseph E. LaRue
10 *Attorneys for Maricopa County Defendants*

11 ORIGINAL of the foregoing e-filed with
12 AZTurboCourt this 19th day of November 2020
13 with electronic copies e-served to:

14 Honorable Margaret R. Mahoney
15 Jennifer Sommerville, Judicial Assistant
16 Jennifer.Sommerville@jbazmc.maricopa.gov
17 Ana Meza, Courtroom Assistant
18 Ana.Meza@JBAZMC.Maricopa.Gov
19 East Court Building
20 101 W. Jefferson Street, Courtroom 411
21 Phoenix, Arizona 85003-2202

22 Alexander Kolodin
23 Christopher Viskovic
24 KOLODIN LAW GROUP PLLC
25 3443 N. Central Ave. Ste. 1009
26 Phoenix, Arizona 85012
27 Alexander.Kolodin@KolodinLaw.com
28 CViskovic@KolodinLaw.com
Attorneys for Plaintiffs

Sue Becker
PUBLIC INTEREST LEGAL FOUNDATION
32 E. Washington Street, Suite 1675
Indianapolis, IN 46204
sbecker@publicinterestlegal.org
Attorney for Plaintiffs

1 Sarah R. Gonski
2 PERKINS COIE LLP
3 2901 N. Central Avenue, Suite 2000
4 Phoenix, Arizona 85012-2788
5 SGonski@perkinscoie.com
6 *Attorneys for the Arizona Democratic Party*

7 Roy Herrera
8 Daniel A. Arellano
9 BALLARD SPAHR LLP
10 1 East Washington Street, Suite 2300
11 Phoenix, Arizona 85004-2555
12 HerreraR@ballardspahr.com
13 ArellanoD@ballardspahr.com
14 *Attorneys for the Arizona Democratic Party*

15 /s/ V. Sisneros

16 S:\CIVIL\CIV\Matters\EC\2020\Aguilera v. Fontes 11.13.20\Caption.docx