

1 Roopali H. Desai (024295)
2 D. Andrew Gaona (028414)
3 Kristen Yost (034052)
4 **COPPERSMITH BROCKELMAN PLC**
5 2800 North Central Avenue, Suite 1900
6 Phoenix, Arizona 85004
7 T: (602) 381-5478
8 rdesai@cblawyers.com
9 agaona@cblawyers.com
10 kyost@cblawyers.com

11 James E. Barton II (023888)
12 Jacqueline Mendez Soto (022597)
13 **BARTON MENDEZ SOTO PLLC**
14 401 W. Baseline Road, Suite 205
15 Tempe, Arizona 85253
16 T: (480) 550-5165
17 james@bartonmendezsoto.com
18 jacqueline@bartonmendezsoto.com
19 *Attorneys for Plaintiffs*

20 **ARIZONA SUPERIOR COURT**
21 **MARICOPA COUNTY**

22 ARIZONA DEMOCRATIC PARTY, an
23 Arizona political party and political action
24 committee; and STEVE GALLARDO, a
25 qualified elector,

26 Plaintiffs,

v.

KAREN FANN, in her official capacity as
President of the Arizona Senate; WARREN
PETERSEN, in his official capacity as
Chairman of the Senate Judiciary Committee;
KEN BENNETT, in his official capacity as
the liaison of the Arizona Senate; and CYBER
NINJAS, INC., a Florida corporation,

Defendants.

) No.:

) **MOTION FOR TEMPORARY**
) **RESTRAINING ORDER (WITH**
) **NOTICE) AND PRELIMINARY**
) **INJUNCTION**

) - AND -

) **ORDER TO SHOW CAUSE WHY**
) **DECLARATORY JUDGMENT**
) **SHOULD NOT BE ENTERED**
) **EXPEDITIOUSLY**

) **(Expedited Consideration Requested)**

1 Pursuant to Rule 65 and 57 of the Arizona Rules of Civil Procedure, Plaintiffs Arizona
2 Democratic Party and Steve Gallardo seek the entry of a temporary restraining order (“TRO”)
3 prohibiting Defendants Karen Fann, Warren Petersen, Ken Bennett, and Cyber Ninjas, Inc.
4 (“CN”) from proceeding with their planned “audit” of 2020 General Election ballots from
5 Maricopa County in violation of Arizona law.

6 Defendants’ planned actions, unless immediately restrained or remedied by this Court,
7 will cause irreparable harm to (1) the integrity of Arizona’s election systems and (2) the privacy
8 and confidentiality that Arizona law promises to Arizona voters once they cast their ballot and
9 entrust it to elections officials. Beginning tomorrow morning, the private information of
10 Maricopa County voters will be in the hands of untrained agents of a company operated by a
11 known conspiracy theorist as part of an election “audit” funded by other conspiracy theorists and
12 unknown third parties intent on finding fault with the outcome of an election with which they
13 disagree.

14 Defendants Fann and Petersen gained access to Maricopa County’s vote tabulation
15 machinery, voters’ personal information, and more than 2.1 million ballots cast by Maricopa
16 County residents through legislative subpoenas that this Court found were legal in part because
17 there were some assurances those legislators – sworn to uphold the Arizona Constitution and
18 Arizona law – would protect those ballots and voters’ information. Yet those assurances are now
19 illusory because Defendants Fann and Petersen have abdicated entirely their responsibility and
20 oversight of the “audit,” and have handed it over to an inexperienced third party with clear bias.

21 **Background**

22 This lawsuit is brought by the Arizona Democratic Party, a political party committee with
23 members and constituents in Maricopa County, and Steve Gallardo, a registered voter in
24 Maricopa County who also serves as a member of the Maricopa County Board of Supervisors.
25 [Verified Complaint (“Compl.”) ¶¶ 1-2)] Plaintiffs seek to prevent the Defendants from carrying
26 out a self-proclaimed, needless, and politically-driven “audit” of the 2020 General Election

1 results in Maricopa County. In the alternative, Defendants should be required at all times to
2 comply with the law.

3 On January 12, 2021, President Fann and Senator Peterson, on behalf of the Arizona
4 Senate and the Senate Judiciary Committee, served legislative subpoenas on the Maricopa
5 County Board of Supervisors, the Maricopa County Recorder, and the Maricopa County
6 Treasurer (the “Subpoenas”). [Compl. ¶ 9] The Subpoenas requested extensive materials,
7 including physical voted ballots and ballot envelopes, scanned images of voted ballots, voter
8 registration records, ballot tabulation equipment, and electronic voting systems. [*Id.* ¶ 10] The
9 County and the Senators litigated the validity of the Subpoenas, and on February 25, 2021, the
10 Maricopa County Superior Court found that the Subpoenas were valid legislative subpoenas. [*Id.*
11 ¶ 11] In making that finding, Judge Timothy Thomason specifically noted concerns regarding
12 ballot security and confidentiality:

13 This is not to say that the Court does not have concern about the confidentiality of
14 the subpoenaed ballot information. The Elections Procedures Manual has carefully
15 delineated provisions providing for the security of ballots. The Manual, however,
16 simply cannot be reasonably read to prevent production of subpoenaed material to
government officials, particularly State legislators who are constitutionally
charged with ensuring election integrity.

17 [*Id.* ¶ 12] The next day, the County informed the Senate that it was ready to deliver the materials
18 requested in the Subpoenas, including 2.1 million physical voted ballots, 360 small tabulation
19 machines, 9 large counting center tabulation machines, and other voting equipment. [*Id.* ¶ 13]

20 The Senate responded by asking the County not to deliver the materials until the Senate
21 could arrange to receive them. Then, on March 3, 2021, Secretary of State Katie Hobbs sent a
22 letter to President Fann and Senator Peterson “to express [her] ongoing concern about the
23 legislative subpoenas issued to the Maricopa County Board of Supervisors for the production of
24 election equipment and ballots from the 2020 General Election and the unspecified audits you
25 intend to conduct.” [*Id.* ¶ 16] As Secretary Hobbs explained,
26

1 Judge Thomason’s ruling makes clear that you are obligated to maintain the
2 security and confidentiality of the materials turned over to you. If your goal is truly
3 to rebuild public confidence in our democracy, it is imperative that you establish
4 and abide by clear procedures and parameters for the security and confidentiality
of the ballots and election equipment while in your custody and ensure
independence and transparency should you proceed with any further audit.”

5 [Id. ¶ 17] Secretary Hobbs – as Arizona’s chief elections officer – went on to provide a number
6 of suggestions to President Fann and Senator Petersen to ensure that any “audit” complied with
7 Arizona law. [Id. ¶ 18]

8 Rather than assume custody and control over the materials it demanded, the Senate
9 decided to allow private third parties to accept the materials, and announced on March 31, 2021
10 that it has selected a group of private auditors, led by CN, to conduct the “audit.” [Id. ¶ 20]
11 President Fann announced that the “audit will validate every area of the voting process,” that it
12 will be “done in a transparent manner with the cooperation of Maricopa County,” and that the
13 Senators “will not be directly involved” in the Audit. [Id. ¶¶ 21-22] Thus, on information and
14 belief, the Senate plans to give CN full unsupervised authority to conduct the Audit, the Senate
15 will abdicate any responsibility or participation in the Audit, and neither the Senate nor any other
16 government official will participate in the audit to ensure security and confidentiality of the
17 ballots, voter registration files, or voting equipment. [Id. ¶ 23]

18 On April 1, 2021, Secretary of State Katie Hobbs wrote to the County expressing her
19 concerns regarding the Audit, and in particular, the Senate’s selection of CN to conduct the audit.
20 [Id. ¶ 24] As Secretary Hobbs wrote,

21 Unfortunately, yesterday’s announcement made it clear that the Senate has no
22 intention of conducting an independent audit or ensuring the ongoing security
23 and confidentiality of Maricopa County’s ballots and voting equipment. As you
24 know, the Senate has confirmed its hiring of Cyber Ninjas Inc. This firm’s CEO
25 not only harbors conspiratorial beliefs about the 2020 election, but has shared
26 conspiracies about Dominion election equipment, the exact equipment he has
been hired to audit. Moreover, Jovan Hutton Pulitzer confirmed yesterday that he
too would be involved in this audit. To be sure, Mr. Pulitzer is also a known,
and frequently debunked, conspiracy theorist (to say nothing of “failed treasure

1 hunter” or inventor of one of the “25 worst tech products of all time”). To
2 compound the concerning nature of these revelations, the Statement of Work
3 signed by the Senate indicates that these “auditors” plan to visit Maricopa County
4 voters at their home to inquire about their registration and voting history. And if
5 all that were not concerning enough, the Senate President’s press release states
6 that the Senate “leadership will not be directly involved [in the audit], and
7 members do not expect to comment on any of the processes of the audit until the
8 report is issued.” In other words, the Senate intends to give free reign to Cyber
9 Ninjas, Inc. and will abdicate any responsibility or engagement in the audit
process to ensure the security and confidentiality of the ballots and voting
equipment or the integrity of the process. In addition to being dangerous and
irresponsible, this abdication appears contrary to Judge Thomason’s assumption
that the Senate will ensure any third parties will handle the subpoenaed materials
appropriately.

10 [Id. ¶ 25] In addition, the Senate engaged former Arizona Secretary of State Ken Bennett to serve
11 as the Senate’s “liaison” to the Private Auditors. [Id. ¶ 26] There’s no evidence that either CN
12 or Mr. Bennett have experience in conducting an election audit. [Id. ¶¶ 27-28]

13 To make matters worse, CN’s CEO, Doug Logan, is a proud supporter of the “Stop the
14 Steal” movement and has retweeted numerous posts on Twitter claiming that the 2020 General
15 Election was rigged against Donald Trump. [Id. ¶ 29] He also “drafted a document for U.S.
16 senators who planned to object to the certification of the election results on Jan. 6 promoting
17 various disproven or baseless conspiracy theories about the election, including claims against
18 the company whose ballot tabulation machines he’ll [be] tasked with inspecting.” [Id. ¶ 30] And
19 his activities post-retention by the Arizona Senate make clear that he has no relevant experience.
20 [Id. ¶ 32]

21 Despite President Fann’s initial statements that the audit would be conducted “with the
22 cooperation of Maricopa County,” the County has expressly renounced any association with the
23 “audit,” and declined to allow CN to use its facilities for purposes of the “audit.” [Id. ¶¶ 33-34]
24 Indeed, the County wants nothing to do with the “audit,” and rightfully so; we’ve learned over
25 the past few weeks that known conspiracy theorists such as Lin Wood and far-right media outlet
26 One America News host Christina Bobb have raised nearly \$150,000 to help subsidize the

1 “audit.” [Id. ¶¶ 35-38] The Senate ultimately directed the County to deliver the materials
2 requested in the Subpoenas to the Arizona Veterans Memorial Coliseum, where the Private
3 Auditors plan to perform the Audit. [Id. ¶ 39] On April 21, 2021, the County delivered tabulators
4 and central counting machines to the Coliseum as requested by the Senate. [Id. ¶ 40] On April
5 22, 2021, the County is expected to deliver 2.1 million voted ballots to the Coliseum as requested
6 by the Senate. [Id. ¶ 41] On information and belief, there are not sufficient safeguards or security
7 in place to prevent access to or tampering with the equipment or ballots at the Coliseum. [Id. ¶
8 42] The Audit is scheduled to begin on April 23, 2021. [Id. ¶ 43]

9 On April 19, 2020, ADP’s executive director and counsel conferred with Defendant
10 Bennett by telephone to ask about the planned procedures for conducting the Audit. [Id. ¶ 44]
11 According to Defendant Bennett, CN has hired staff to, among other things, (1) review tabulation
12 machines and other voting equipment; (2) machine-tabulate 2.1 million ballots and conduct a
13 hand count of those same ballots; and (3) compare ballot affidavit signatures with signatures in
14 voters’ registration records. [Id. ¶ 45] On information and belief, Defendants have no policies
15 and procedures in place for performing these tasks or for preserving the integrity of the process,
16 including but not limited to:

- 17 • Policies and procedures for ensuring a secure and documented chain of custody
18 for the ballots and election equipment;
- 19 • Policies and procedures for ensuring the physical security of the ballots and
20 physical, data, and cyber security of election equipment so that they are not
21 tampered with, stolen, or mishandled or compromised;
- 22 • Policies and procedures for ensuring that markings on ballots are not altered or
23 added while in Defendants’ custody;
- 24 • Policies and procedures for ensuring that the handling, inspection, and counting of
25 ballots and equipment is performed by bipartisan teams including at least two
26 members of different political parties;

- Policies and procedures for the security of hardware and other components of electronic voting systems.

In addition, Defendants have not publicly disclosed any policies or training materials relating to the Audit’s procedures. [*Id.* ¶ 46] They also have not publicly disclosed any information about the staff who will conduct the Audit, including the number of workers, their credentials, their political party affiliations, or the training they have received. [*Id.* ¶ 48]

On information and belief, the Audit workers who perform signature comparison are planning to use voter registration records, including the voter’s signature, date of birth, address, political party affiliation and other personally identifying information. [*Id.* ¶ 49] The Audit workers who will perform signature comparison are not trained in signature comparison or verification techniques. [*Id.* ¶ 50] And all of this untrained work will not be subject to meaningful observation procedures; Defendant Bennett has stated that observers will be allowed to observe the Audit, but only for six-hour shifts at a time. [*Id.* ¶ 51] Tellingly, he has also rejected observation requests from various nonpartisan, nonprofit organizations that exist to ensure open and transparent elections, including The Elections Group. [*Id.* ¶ 52] And according to Defendant Bennett, approximately 70% of individuals who have applied for observation shifts are Republicans, and the remaining 30% are Libertarians, Independents, or Democrats. [*Id.* ¶ 53] Achieving any semblance of bipartisanship is thus a near impossibility.

Argument

A party seeking a TRO must show: (1) a likelihood of success on the merits; (2) the possibility of irreparable harm if relief is not granted; (3) a balance of hardships favoring the moving party; and (4) public policy weighing in favor of injunctive relief. *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). “The critical element in this analysis is the relative hardship to the parties.” *Id.* Courts apply a sliding scale to assess these factors. *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, 410-11 ¶¶ 9–10 (2006). This requires “either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious

1 questions and the balance of hardships tips sharply in his favor.” *TP Racing, L.L.L.P. v. Simms*,
2 232 Ariz. 489, 495 ¶ 21 (App. 2013) (quotation marks omitted). The stronger the likelihood of
3 success on the merits, the less irreparable harm is necessary (and vice versa). *Smith*, 212 Ariz. at
4 411 ¶ 10. All four factors weigh in favor of granting relief here.

5 **I. Plaintiffs Are Entitled to a Temporary Restraining Order.**

6 **A. Success on the Merits.**

7 First, Plaintiffs are likely to succeed on the merits of their claim for declaratory and
8 permanent injunctive relief related to the Audit’s threatened noncompliance with a host of
9 Arizona laws.

10 Under Arizona law, certain components of a voter’s registration records, including date
11 of birth, signature, and country of birth, may not be viewed, accessed, reproduced, or disclosed
12 to a member of the public who is not an authorized government official. *See* A.R.S. § 16-168(F);
13 Election Procedures Manual (“EPM”¹) Ch. 1 § X.C.I. There’s no question that CN and its
14 unknown, unidentified agents are not authorized to review confidential voter registration
15 records.

16 In addition, only election officials, postal workers, and certain family members and other
17 authorized individuals may “gain possession or control” of voted early ballots. A.R.S. § 16-
18 1005(H). Again, CN and its unknown, unidentified agents are not authorized to handle the 2.1
19 million ballots that were intended to be provided to the Arizona Senate.

20 Next, Under Arizona law,

21 [a]ll persons taking part in the actual processing and counting of ballots, including
22 the employees of a jurisdiction conducting an election, must be appointed in
23 writing and take an oath provided by the Board of Supervisors (or designee) that
24 they will faithfully and impartially perform their duties. Any person who has not
been appointed in writing or taken the oath shall, under no circumstances, be

25 ¹ The EPM – promulgated by the Secretary of State and approved by the Governor and
26 Attorney General – has the force and effect of law. *Arizona Pub. Integrity All. v. Fontes*, 250
Ariz. 58 ¶ 16 (2020); A.R.S. § 16-452(C).

1 permitted to touch any ballot, computer, or counting device used in processing
2 ballots.

3 EPM Ch. 10 § I.A. There is no evidence that CN’s unknown, unidentified agents have been
4 appointed in writing or have taken the oath required by the EPM, meaning that they are not
5 authorized to touch any ballot, computer, or counting device. Relatedly, the EPM requires “that
6 staff performing the signature verification are properly trained.” EPM Ch. 6 § II.C. There is no
7 evidence that CN’s unknown, unidentified agents have been properly trained in signature
8 verification.

9 The EPM also requires election officers to “develop and implement a training plan to
10 ensure that elections staff (and any temporary workers) understand and comply with all security
11 procedures applicable to the electronic voting system.” EPM Ch. 4 § III. It further requires that
12 hardware components of the electronic voting system are, among other things:

- 13 (1) “stored in a locked, secured location that prevents unauthorized access”; (2)
14 “sealed with tamper-resistant or tamper-evident seals once programmed”; (3)
15 “safeguarded from unauthorized access when being moved, transferred, serviced,
16 programmed, or temporarily stored”, (4) “accessed by elections staff only to the
17 extent necessary to perform their authorized task”; and (5) “witnessed by two or
more election staff members (of different political parties if possible) when being
moved or transferred, which includes an inventory of the equipment and chain of
custody before and after the move or transfer.”

18 EPM Ch. 4 § III.A. Beyond that, components of the electronic voting system “may not be
19 connected to the internet, any wireless communications device, or any external network (except
20 for e-pollbooks),” and “must be observed by the officer in charge of elections or a designee if
21 the election program (or any software or firmware) is updated or modified.” EPM Ch. 4 § III.B.
22 There is no evidence that Defendants have adopted or implemented training plans or security
23 measures required by EPM Ch. 4 § III.

24 Lastly, Arizona law requires security of official ballots, including requirements that
25 ballots: (1) “may be accessed by elections staff only to the extent necessary to perform their
26 authorized task; (2) “must be stored in a locked, secured location that prevents unauthorized

1 access”; and (3) “must be witnessed by two or more election staff members (of different political
2 parties if possible) when being moved or transferred, which includes an inventory of the ballots
3 before and after the move or transfer.” EPM Ch. 8 § V.E. Election officials also “must implement
4 security procedures to ensure that official ballots are properly secured prior to distribution to
5 voting locations.” *Id.* Yet again, there is no evidence that Defendants have adopted or
6 implemented security procedures required by EPM Ch. 8 § V.E.

7 In short, the contemplated “audit” will plainly run afoul of all the provisions described
8 above, all of those provisions apply to the Defendants as they carry out this “audit,” and Plaintiffs
9 are thus likely to succeed on those claims.

10 **B. Irreparable Harm.**

11 Second, Plaintiffs – and indeed, Maricopa County residents at large – will suffer
12 irreparable harm absent the entry of a temporary restraining order. At the heart of Arizona’s
13 election laws are protections of both the integrity of the process and the security of voters’ private
14 information, including information about how a particular voter may have voted. Yet both are
15 threatened by an apparently procedure-less audit that will be conducted by a biased company
16 that will lead a legion of unknown and untrained employees who have sworn no oath to uphold
17 Arizona law.

18 **C. Balance of Hardships & Public Policy.**

19 Finally, both the balance of hardships and public policy favor the strict enforcement of
20 Arizona’s election laws intended to protect the integrity of the process and voters’ personal
21 information. These critical concerns heavily outweigh any interest Defendants may have in
22 conducting a partisan “audit” of an election already shown to have been conducted with the
23 utmost integrity by career elections officials.

24 . . .

25 . . .

26 . . .

1 **Conclusion**

2 As set forth in the Verified Complaint and above, Plaintiffs request that the Court enter a
3 temporary restraining order barring Defendants from conducting the Audit in violation of
4 Arizona law.

5
6 RESPECTFULLY SUBMITTED this 22nd day of April, 2021.

7 **COPPERSMITH BROCKELMAN PLC**

8 By s/ Roopali H. Desai

9 Roopali H. Desai
10 D. Andrew Gaona
11 Kristea Yost

12 **BARTON MENDEZ SOTO PLLC**

13 James E. Barton II
14 Jacqueline Mendez Soto

15 *Attorneys for Plaintiffs*

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