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10 SUPERIOR COURT OF ARIZONA

11 MOHAVE COUNTY

12 JEANNE KENTCH, et al.,

No. S8015CV202201468

13 Plaintiffs/Contestants,

14 v.

**REPLY IN SUPPORT OF MOTION FOR
ATTORNEYS' FEES**

15 KRIS MAYES,

(Assigned to the Hon. Lee F. Jantzen)

16 Defendant/Contestee,

17 and

18 ADRIAN FONTES, et al.,

19 Defendants
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1 In opposing Ms. Mayes's Motion for Attorneys' Fees, Plaintiffs perplexingly paint this
2 case, "like *Bush v. Gore*," as "the sort of standard, run of the mill post-election litigation that
3 went largely unremarked in close races prior to 2020." [Resp. at 3–4] But Plaintiffs don't stop
4 there. They "brought and litigated this case," they explain (at 4), simply "to encourage
5 confidence in Arizona's election results." Ms. Mayes, by comparison, is the one whose
6 arguments have been "patently absurd," "baseless and hyperbolic," Plaintiffs continue (at 7).

7 Plaintiffs' positions are wrong. And they further evince Plaintiffs' refusal (or inability) to
8 come to terms with the outcome of not only this election contest, but also the election that
9 occurred over three months ago. Sanctions are warranted here.

10 First, sanctions are warranted because Plaintiffs unreasonably expanded and delayed this
11 proceeding by forcing a trial on claims for which there was no evidence. Before trial began, Ms.
12 Mayes invited Plaintiffs to dismiss claims that they appeared to have abandoned. Plaintiffs
13 refused. But to the surprise of the parties (and, possibly, this Court), Plaintiffs then did not
14 present even a single piece of evidence on those three claims. In their Response, we now learn
15 that this surprise was no surprise at all. Plaintiffs intended to present no such evidence, they
16 admit, because they had come up emptyhanded through their inspection of thousands of ballots.
17 Forcing a trial on these groundless claims was unreasonable, and Plaintiffs therefore should pay,
18 at a minimum, the fees that they forced Ms. Mayes to incur for trial.

19 Second, sanctions are warranted also because, as we now know, Plaintiffs brought this
20 election contest without the evidence to support their claims. As Plaintiffs concede in their
21 Response (at 6), they knew they lacked sufficient evidence "to meet their burden at trial"—
22 unless that evidence was uncovered through discovery. That is the definition of a fishing
23 expedition brought in bad faith. This contest was never about "encourag[ing] confidence in
24 Arizona's election results," as Plaintiffs assure this Court. Rather, as expressed outside this

1 proceeding (*see infra* at 8–9), this contest was a vehicle for pushing Plaintiffs’ and their counsel’s
2 unsubstantiated views that “[i]t is indisputable that [Mr. Hamadeh] received the most votes” and
3 that “dirty lawyers” “hid[] votes to steal elections.”

4 Sanctions are warranted here. And they are warranted to dispel any notion that this
5 election contest is simply “the sort of standard, run of the mill post-election litigation.” That, and
6 that alone, will “encourage confidence in Arizona’s election results,” as Plaintiffs desire.

7 **Argument**

8 Under A.R.S. § 12-349(A)(1), (3), “the court shall assess reasonable attorney fees,
9 expenses and, at the court’s discretion, double damages of not to exceed five thousand dollars
10 against an attorney or party . . . if the attorney or party” either: “[u]nreasonably expands or delays
11 the proceeding,” or “[b]rings . . . a claim without substantial justification.” When either ground
12 is shown by “a preponderance of the evidence,” “the fee award is mandatory.” *Phx. Newspapers,*
13 *Inc. v. Ariz. Dep’t of Corrs.*, 188 Ariz. 237, 243–44 (App. 1997). Both grounds exist here.

14 **I. Plaintiffs “unreasonably expand[ed] or delay[ed] the proceeding.”**

15 As Ms. Mayes explains in her Motion (at 9–10), Plaintiffs “[u]nreasonably expand[ed] or
16 delay[ed] the proceeding,” A.R.S. § 12-349(A)(3), by forcing the parties and this Court to
17 proceed through trial. Because Plaintiffs knew, before trial, that “[they] would not be able to
18 meet their burden at trial”—as they concede in their Response (at 6)—they had an obligation not
19 to force the parties and this Court through a dead-end trial. But Plaintiffs forged ahead.

20 On the morning of trial, Ms. Mayes’s counsel asked Plaintiffs “to clarify” that “they have
21 abandoned Counts 1 through 3 of their complaint and that they are only seeking to provide
22 evidence of an erroneous count,” i.e., of Count 4. [12/23/2022 Bench Trial Tr. (“Tr.”) 17:20–24]
23 In response, Plaintiffs not only refused to dismiss those counts, but even doubled down on them,
24 stating: “We’re not abandoning our—we’re not abandoning those counts. We are—I would say

1 that we do not have further evidence to offer. . . . So yeah, I mean, that’s a mischaracterization
2 to say that we’re abandoning any counts.” [*Id.* 18:2–8] Then, to advance these claims they
3 refused to dismiss—alleging disqualification of ballots (Count 1), denial of provisional ballots
4 (Count 2), and ballot duplication errors (Count 3)—Plaintiffs offered only one witness and six
5 contested ballots as evidence of entirely different conduct: undervotes, as alleged in Count 4.
6 Plaintiffs did not offer any evidence to support Count 1, 2, or 3. And in their closing, Plaintiffs
7 conceded that their evidence “won’t actually be enough to sustain this particular contest.” [*Id.*
8 112:11; *see also id.* 108:14–15 (“I think we did show some errors. They were obviously not
9 substantial enough.”)]

10 Because Plaintiffs knew at the start of trial that they lacked sufficient evidence for their
11 claims—and were invited to dismiss them—Plaintiffs had an obligation “to dismiss claims
12 . . . found not to be valid.” A.R.S. § 12-350(2); *see Takieh v. O’Meara*, 252 Ariz. 51, 62–63
13 ¶¶ 41, 43 (App. 2021) (affirming an award of “attorneys’ fees under A.R.S. § 12-349” where
14 “[t]he superior court found that, in the end, [plaintiff] offered no admissible evidence [supporting
15 his claim], made no ‘effort to determine [facts relevant to this claim]’ before filing his amended
16 complaint, and failed ‘to withdraw his claim’ when confronted with his lack of evidence”).

17 In their Response (at 6), Plaintiffs surprisingly admit they knew—even before the
18 morning of trial—that “[they] would not be able to meet their burden at trial.” Specifically,
19 Plaintiffs concede (at 6, 12) two key points: (1) that, “[o]nce th[e] limited ballot inspection was
20 complete, it was clear that . . . Plaintiffs would not be able to meet their burden at trial,” and
21 (2) that their election contest failed in part because they did not “obtain expedited discovery,”
22 including of “the cast vote record.” In other words, Plaintiffs admit that they had *no evidence* to
23 support their claims—unless it was uncovered through discovery. That is the very definition of
24 a fishing expedition. *See Takieh*, 252 Ariz. at 62 ¶ 43 (awarding § 12-349 fees in part because

1 “[n]othing in the record suggests that [the plaintiff] had any admissible evidence to support his
2 defamation claim . . . at the time he filed his amended complaint”); *see also* A.R.S. § 12-350(1).
3 And based on this failed fishing expedition, Plaintiffs at a minimum had an obligation not to
4 proceed further—an obligation they ignored. *See Standage v. Jaburg & Wilk, P.C.*, 177 Ariz.
5 221, 230 (App. 1993) (“[Counsel] had an obligation as an attorney to review and reevaluate his
6 client’s position as the facts of the case developed and—although he should have known at the
7 outset that the claims were frivolous—if he did not know at the outset, as he became aware of
8 information that should reasonably lead him to believe there was no factual or legal bases for his
9 position, he was obligated to re-evaluate any earlier certification under Rule 11.”).

10 Next, Plaintiffs curiously contend (at 6–7) that, after the ballot inspection proved fruitless,
11 “[they] conferred and changed their entire trial strategy specifically to avoid unnecessarily delay
12 [sic],” by (apparently) deciding both to not offer any evidence for Counts 1 through 3 and to
13 offer only the six ballots and one witness for Count 4. Plaintiffs did so, they claim (at 8), “to
14 minimize the burden on everyone” involved in this trial on Friday, December 23, before a
15 holiday weekend. Because Plaintiffs knew they would offer *no* evidence for Counts 1 through 3
16 and legally insufficient evidence for Count 4, though, the only option was to “dismiss [those]
17 claims . . . found not to be valid,” A.R.S. § 12-350(c)—not to forge ahead. *See Standage*, 177
18 Ariz. at 230 (affirming sanctions where counsel “proceeded with complete disregard to whether
19 the claim is well grounded”).

20 For these reasons, Plaintiffs “[u]nreasonably expand[ed] or delay[ed] the proceeding.”
21 A.R.S. § 12-349(A)(3). This Court therefore should, at a minimum, award Ms. Mayes the fees
22 and expenses she incurred for trial and preparation the day before trial. *See id.*

1 **II. Plaintiffs brought their claims “without substantial justification.”**

2 Throughout this entire proceeding, Plaintiffs also prosecuted “a claim without substantial
3 justification.” A.R.S. § 12-349(A)(1). Under this statute, a claim lacks “substantial justification”
4 when it is “groundless and is not made in good faith.” A.R.S. § 12-349(F). A claim is groundless
5 “‘if the proponent can present no rational argument based upon the evidence or law in support
6 of that claim.’” *Rogone v. Correia*, 236 Ariz. 43, 50 ¶ 22 (App. 2014) (citation omitted).

7 **A. Plaintiffs’ five claims were all groundless.**

8 As Ms. Mayes explains in her Motion (at 6), Plaintiffs could “present no rational
9 argument based upon the evidence or law in support of th[eir] claim[s].” *Id.* (citation omitted).
10 These five claims centered on: (1) disqualification of ballots, (2) wrongful exclusion of
11 provisional voters, (3) inaccurate ballot duplications, (4) improper ballot adjudications, and
12 (5) unverified early ballots. [12/9/2022 Statement of Election Contest] Plaintiffs’ Response does
13 not address any claim individually. Doing so makes clear that they were groundless.

14 For Counts 1, 2, and 3, Plaintiffs presented no evidence, whatsoever, as Ms. Mayes argues
15 in her Motion (at 6–7). Plaintiffs decline to even respond to this argument.¹

16 For Count 4, relating to alleged undervotes, Plaintiffs claimed both “illegal votes” and an
17 “erroneous count of votes.” As to illegal votes—a claim Plaintiffs refused to dismiss before
18 trial—Plaintiffs previously portrayed this claim as a typo or “drafting matter,” “that was only a
19 heading anyway” and “wasn’t part of the body of the complaint.” [Tr. 108:20–109:1; *see id.* 108:
20 23–24 (“But I mean, that’s just the way it goes in these types of situations”)] Still now, in their
21 Response, Plaintiffs decline to defend this claim.

22
23 ¹ Plaintiffs (at 10–12) dispute “[they] had *no* evidence,” stating that “[they] reviewed over
24 2,000 complaints of Election Day irregularities, interviewed over 145 witnesses,” and “reviewed
numerous public record requests.” But none of that is evidence in the record. And if Plaintiffs
had wanted the Court to consider any of it, they could have presented it at trial. They did not.

1 As to Count 4's alleged erroneous count of undervotes, Plaintiffs' failed ballot inspection
2 proved that this count was groundless, as established above. *See* Ariz. Attorney's Fees Manual
3 § 5.4.3.1 ("[A] claim or defense may be considered groundless under A.R.S. § 12-349 once a
4 party or counsel realizes, or should realize, that there is no *admissible* evidence to support a
5 claim, even if there may be 'circumstantial' reasons for believing the claim to be true." (citing
6 *Takieh*, 252 Ariz. at 62 ¶¶ 40–42)). The only evidence Plaintiffs offered was (1) the brief
7 testimony of their ballot inspector for Maricopa County, and (2) six ballots that supposedly
8 should have been cast for Mr. Hamadeh.² In no world would Plaintiffs' proffered evidence have
9 been sufficient—as Plaintiffs conceded and this Court concluded. [*See* Tr. 112:8–13 (Plaintiffs
10 conceding, "[These contested votes] won't actually be enough to sustain this particular
11 contest[.]"); *id.* 115:25–116:9 (This Court concluding, "The bottom line is you [Plaintiffs] just
12 haven't proven you[r] case. You haven't met the burden. . . . I would[n]t even think there is
13 even slight information that something was done illegally or incorrectly.")]³

14 Plaintiffs do not even dispute that Count 5 was groundless. It was dismissed, as Ms.
15 Mayes observes (at 8), based on clear Supreme Court precedent. Plaintiffs' claim was not a
16 "debatable issue." *Ickes v. Bache Halsey Stuart Shields, Inc.*, 133 Ariz. 300, 303 (App. 1982).

17 For every claim above, Plaintiffs "can present no rational argument based upon the
18 evidence or law in support of that claim." *Rogone*, 236 Ariz. at 50 ¶ 22 (citation omitted). In
19 their Response, in fact, Plaintiffs do not attempt to do so. These claims thus were "groundless."
20 A.R.S. § 12-349(F).

21 ² The Maricopa County Elections Director, by comparison, testified that based on all
22 contested ballots in evidence Ms. Mayes would have received a net gain of three votes. [Tr.
23 85:17–21]

24 ³ Plaintiffs (at 7) cast Ms. Mayes's argument as "misleading or false" because "Plaintiffs
never conceded that their cause of action 'failed as a matter of law.'" But when a party "offer[s]
insufficient evidence as a matter of law to support" a claim—as Plaintiffs concede—that claim
fails "as a matter of law." *Scalia v. Green*, 229 Ariz. 100, 101 ¶ 1 (App. 2011).

1 **B. None of Plaintiffs’ arguments prove to the contrary.**

2 Rather than defending their specific claims based on the evidence at trial, Plaintiffs lump
3 together all five claims, arguing that none were groundless, for two reasons. Neither is correct.

4 First, Plaintiffs repeat (at 5 & 9 (citation omitted)) a distinguishable legal principle: “The
5 mere fact that a party is ultimately unable to sustain its claims . . . does not automatically equate
6 to a determination that the complaint itself was frivolous.” True. But that is not the problem here.
7 Plaintiffs were not just “ultimately unable to sustain [their] claims” (*id.*); as explained above,
8 Plaintiffs lacked *any* evidence to support Count 1, 2, or 3, their evidence as to Count 4 was
9 legally insufficient as a matter of law, and Supreme Court precedent foreclosed Count 5.

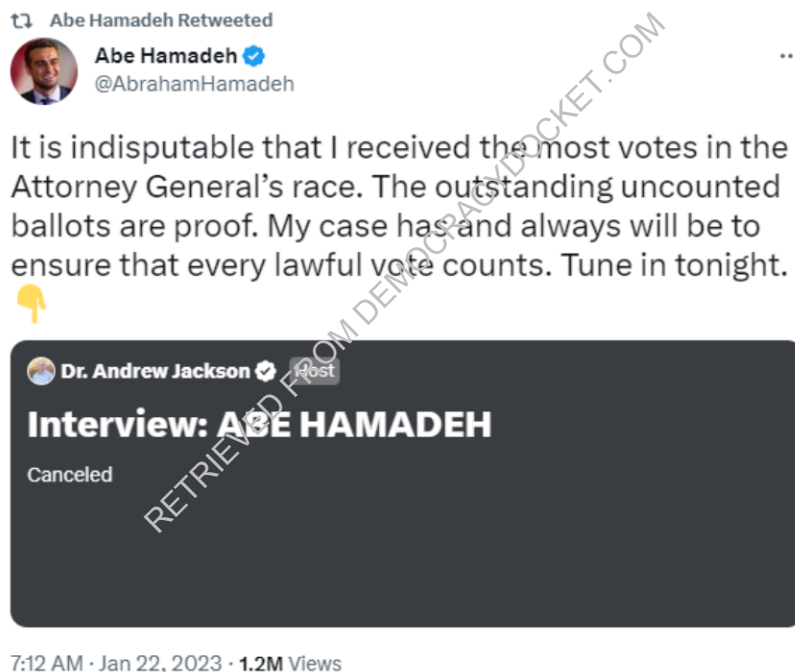
10 Second, Plaintiffs argue (at 9) that their claims were not groundless because their “contest
11 alleged in part that the results of the December 5 canvass were erroneous” and the “results of the
12 mandatory recount show they *were*.” As a threshold matter, though, the recount results were
13 announced *after* the trial and, thus, are immaterial to whether Plaintiffs’ claims were groundless
14 “at the time [Plaintiffs] filed [their] . . . complaint” or at the start of trial. *Takieh*, 252 Ariz. at 62
15 ¶ 43. Nor, in any event, do the recount results move the needle for Plaintiffs’ claims. The results
16 confirmed, again, that Ms. Mayes won the election; they would not establish, as Plaintiffs needed
17 to show, that she “did not in fact receive the highest number of votes.” A.R.S. § 16-672(A)(5).

18 **C. Plaintiffs’ claims were in “bad faith.”**

19 By continuing to pursue these groundless claims, Plaintiffs also prosecuted this case in
20 “bad faith.” A.R.S. § 12-350(5). As this Court knows, bad faith may be—and often is—based
21 on “inference[s]” drawn from facts. *Harris v. Reserve Life Ins. Co.*, 158 Ariz. 380, 383 (App.
22 1988) (finding that the facts “support[ed] an inference of bad faith” under § 12-349). Plaintiffs
23 thus are wrong in their argument (at 13) that bad faith cannot be based on “an insufficiently
24 grounded complaint.” *See Takieh*, 252 Ariz. at 63 ¶ 43 (upholding a finding of “bad faith” where

1 “[n]othing in the record suggests [the plaintiff] had any admissible evidence to support his
2 defamation claim against [a defendant] at the time [the plaintiff] filed his amended complaint”).

3 As Ms. Mayes also asserts in her Motion (at 8 (citation omitted)), Plaintiffs’ bad faith is
4 further evidenced by their multiple public statements criticizing the election as a “botched
5 election.” Since those statements, Plaintiffs and their counsel have doubled down (at least
6 publicly) on their claims of a botched election and (now) misconduct in this Court’s proceedings.
7 Mr. Hamadeh still claims, for example, “It is indisputable that [he] received the most votes”:



18 [Abe Hamadeh (@AbrahamHamadeh), Twitter (Jan. 22, 2023 7:12 AM),
19 [https://twitter.com/AbrahamHamadeh/status/1617163306216878081?s=20&t=uBikmInaywc3e](https://twitter.com/AbrahamHamadeh/status/1617163306216878081?s=20&t=uBikmInaywc3eEnsyFAAwQ)
20 [EnsyFAAwQ](https://twitter.com/AbrahamHamadeh/status/1617163306216878081?s=20&t=uBikmInaywc3eEnsyFAAwQ)] And Mr. Hamadeh and his (newest) counsel, Sigal Chattah, now allege that in
21 this case the former Secretary of State and her counsel “hid[] votes to steal elections”:
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1 Abe Hamadeh Retweeted



2 **Sigal Chattah**
@Chattah4Nevada

...

3 Candor towards the tribunal means nothing to dirty
4 lawyers who hide exculpatory evidence to obtain
5 convictions. Same goes for lawyers who hide votes to
steal elections. 🏴󠁧󠁢󠁥󠁮󠁧󠁿 #NewTrial #ElectionIntegrity



6 **Just the News** @JustTheNews · Jan 25

7 AZ election integrity: Hobbs allegedly withheld evidence in Hamadeh trial, AG
changes election unit | Just The News justthenews.com/politics-polic...

8 8:10 AM · Jan 25, 2023 · 29K Views

9 [Sigal Chattah (@Chattah4Nevada), Twitter (Jan. 25, 2023 8:10 AM),

10 <https://twitter.com/Chattah4Nevada/status/1618265123201875968?s=20&t=uBikmInaywc3eE>

11 [nsyFAAwQ](#). *But see* Resp. at 4 (“Plaintiffs brought and litigated this case to encourage
12 confidence in Arizona’s election results.”)]

13 This is not good faith; nor is consistent with Plaintiffs’ representations to this Court. [*See*
14 Resp. at 4 (“As the Court acknowledged, and contrary to Defendants’ claims, Plaintiffs have
15 emphasized that this case is not and was not about impugning election officials or undermining
16 confidence in Arizona’s elections[] To the contrary, Plaintiffs . . . have deliberately
17 refrained from making incendiary accusations about intentional misconduct in these
18 proceedings.”)]

19 In response, Plaintiffs fail to prove otherwise. They argue (at 15) that these public
20 statements (1) “are of highly limited value” because they “were sent after the conclusion of this
21 matter,” (2) “were made outside of the judicial proceedings, where rhetoric is often more heated
22 and less precise,” (3) “represent the views of one Plaintiff”—Mr. Hamadeh—only, and (4) do
23 not “suggest, let alone prove, that Plaintiff brought this election contest in bad faith.”
24

1 These arguments all fail. In considering a sanctions motion, this Court of course may
2 consider statements made after trial and outside the courthouse—and this evidence can be highly
3 probative (as it is here). *See Takieh*, 252 Ariz. at 62–63 (affirming finding of bad faith based on
4 party’s later filings, affidavits, and representations). Moreover, to the extent Plaintiffs point the
5 blame at Mr. Hamadeh only, all Plaintiffs and their counsel chose to not only challenge this
6 election, but also proceed to trial when they knew they lacked evidence.

7 Plaintiffs next attempt to absolve themselves of any bad faith by highlighting a statement
8 by counsel for Maricopa County, Joseph La Rue. Specifically, Plaintiffs repeatedly assert (at 6,
9 13, & 15) that “even counsel for Defendant Maricopa County acknowledged[] [that] Plaintiffs
10 have acted in good faith.” Mr. La Rue, however, did not say as much. He was, rather, responding
11 to Mr. La Sota’s statement—at the hearing on the ballot inspection, not at the trial—that, as to
12 “the question of who’s responsible for the fact that we have not had the inspection[,] I mean, I
13 think we’ve worked in good faith.” [12/22/2022 Emergency Hr’g Transcript 7:5–7] To which
14 Mr. La Rue, in response, agreed that “Mr. La Sota has acted in good faith and Maricopa County
15 has certainly acted in good faith, Mr. La Sota did not have the one offer that we could have done
16 that would have provided him inspection of the ballots.” [*Id.* 17:17–21] But Mr. La Rue’s
17 statement about the parties meeting and conferring on the *ballot inspection* does not equate to a
18 concession that Plaintiffs acted in good faith in prosecuting their claims, as Plaintiffs contend.

19 For these reasons, Plaintiffs have prosecuted this action in bad faith. Because Plaintiffs’
20 claims both were “groundless and [were] not made in good faith,” Plaintiffs brought these
21 “claim[s] without substantial justification.” A.R.S. § 12-349(A)(1), (F). Therefore, “the fee
22 award is mandatory.” *Phx. Newspapers, Inc.*, 188 Ariz. at 243–44.⁴

23 ⁴ Plaintiffs also try to limit any forthcoming fees award, arguing (at 3): “Plaintiffs
24 understand this Motion to refer to the proceedings that commenced with the filing of the
Statement of Contest on December 9 and ended with an order from the bench on December 23,

1 **Conclusion**

2 The Court should grant Ms. Mayes's Motion for Attorneys' Fees, awarding her the
3 attorneys' fees and expenses that she was forced to incur throughout this entire proceeding, as
4 well as double damages of not to exceed \$5,000. Alternatively, because Plaintiffs forced the
5 parties and this Court to proceed through trial even when Plaintiffs knew after the ballot
6 inspection that they lacked the evidence to succeed on their claims, this Court should award Ms.
7 Mayes the fees and expenses she incurred for trial and preparation the day before trial, allow Ms.
8 Mayes to file a fee application, and enter judgment immediately. And regardless of whether the
9 ultimate fees award covers the entire proceeding or just the trial, the Court should enter this
10 award against both Plaintiffs and their counsel, jointly and severally.⁵
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19 _____
20 2022." Not so. As Ms. Mayes asserts in her Response to Plaintiffs' Motion for a New Trial—
21 filed after Ms. Mayes moved for attorneys' fees—"this Court should also award fees to Ms.
22 Mayes for responding to [Plaintiffs'] Motion [for a New Trial], which Plaintiffs filed 'without
23 substantial justification' and to '[u]nreasonably expand or delay the proceeding.'" [Resp. to Mot.
24 for New Trial at 17 (third alteration in original) (quoting A.R.S. § 12-349(A)(1), (3))]

⁵ Ms. Mayes acknowledges that, as to Plaintiffs' counsel, some have abandoned ship
while others have recently jumped aboard. [See Resp. at 3 n.1 (detailing four of the six firms that
have represented Plaintiffs)] Thus, to the extent the Court sanctions Plaintiffs' former or new
counsel for their former or current involvement in this action, "[t]he court may allocate the
payment of attorney fees among the offending attorneys and parties, jointly or severally, and
may assess separate amounts against an offending attorney or party." A.R.S. § 12-349(B).

1 Dated: February 3, 2023.

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