Clerk of the Superior Court
*** Electronically Filed ***
M. De La Cruz, Deputy
12/28/2022 1:05:22 PM
Filing ID 15318680

LAW OFFICES
SHERMAN & HOWARD L.L.C.
2555 EAST CAMELBACK ROAD, SUITE 1050
PHOENIX, ARIZONA 85016
TELEPHONE: 602.240.3000
FAX: 602.240.6600
(AZ BAR FIRM NO. 00441000)
Craig Alan Morgan (Bar No. 023373)
(CMorgan@ShermanHoward.com)
Shayna Stuart (Bar No. 034819)
(SStuart@ShermanHoward.com)
Jake Tyler Rapp (Bar No. 036208)
(JRapp@ShermanHoward.com)
Attorneys for Secretary of State-Elect Adrian Fontes

SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

MARK FINCHEM, Contestant/Plaintiff, v. ADRIAN FONTES, officeholder-elect; and KATIE HOBBS in her official capacity as the Secretary of State, Contestees/Defendants	CASE NO. CV2022-053927 **SECRETARY OF STATE-ELECT ADRIAN FONTES' MOTION FOR SANCTIONS** **(Before the Hon. Melissa Iyer Julian)**

RETRIEVED FROM DEMOCRACYDOCKET.COM

Those who invoke our Courts must do so in good faith. We cannot allow a misguided political minority to weaponize our Courts to baselessly sow distrust in our election processes, malign our elected officials, push a rejected political agenda, and undermine our democracy – all for the purpose of trying to overturn the People's will and topple an election. Our democracy thrives because it demands, among other things, accountability. And principles of accountability dictate that those who misuse our judicial system to bring claims without substantial justification, for an improper purpose, or to cause delay or harass others must be held accountable for their actions. *See* Ariz. R. Civ. P. 11, A.R.S. § 12-349. Were it otherwise, then chaos would reign.

In direct response to questioning from this Court, Plaintiff's counsel Daniel McCauley said:

> I'm semi-retired. I am going to be out of the law. I took this because they needed somebody to do it and so you know I guess have the less least risk. I mean if I get into real trouble and get disbarred here, I'm 76 or 77 by the time they get to it.

AZFamily, *LIVE: Hearing underway on motion to dismiss election lawsuit filed by Mark Finchem* (December 16, 2022), https://tinyurl.com/bs2r9pew (start at 52:05). This statement illustrates why sanctions here are as justified as they are necessary. This statement shows that, to try and effectuate his personal coup and frustrate the lawful post-election transition of power, Mr. Finchem had to find legal counsel with "the … least risk," with nothing to lose, who would be willing to forego any duty of investigation and march into Court with Mr. Finchem's divisive (albeit unsubstantiated) narrative. Mr. McCauley took that mantle, and with Mr. Finchem, hastily cobbled together a lawsuit meant to overturn a lawful democratic election based on little more than conclusory speculation tinged with inflammatory rhetoric.

To defend any lawsuit, let alone one implicating our democracy and our elections, on an expedited basis requires significant resources. Secretary of State-Elect Fontes has dedicated his career to public service. Like many of us, he simply cannot afford, on a whim, to *personally* finance a proper defense to an expedited election challenge, even if the claims are meritless. Thankfully, through the grace and generosity of a third-party who has agreed to fund his personal defense of this action, he has been able to again successfully defend our democracy and our elections, and protect the People's vote.[1] Indeed, the threat of having to endure the financial impact alone of defending against meritless lawsuits as a candidate for office would deter honorable and highly-qualified Arizonans from seeking office for fear of being financially distressed. Very recent history teaches us this fear is well-founded; the nation is replete with costly sham election-related lawsuits much like this one. The fact that a career public servant was able to secure support to finance a defense, before taking office, should not serve to let those who would perpetuate baseless litigation "off the hook" for their sanctionable misconduct.

[1] Mr. Finchem and Mr. McCauley cannot successfully argue an award of attorneys' fees and costs as sanctions is not allowed if a third-party has agreed to reimburse the expenses at issue. A purpose of sanctions is to deter and remedy misconduct. *See* A.R.S. 12-349(A) (declining to limit sanctions to those a litigant actually pays themselves). This purpose is defeated should a justified sanction be disallowed merely because the victim of misconduct is reimbursed from a third party who has agreed to fund the victim's defense.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Accordingly, for the reasons that follow, this Court must sanction Mr. Finchem and Mr. McCauley pursuant to A.R.S. § 12-349, Arizona Rule of Civil Procedure 11, and this Court's inherent power over those who invoke its jurisdiction. Sanctions are necessary to both admonish Mr. Finchem and Mr. McCauley for prosecuting a baseless lawsuit and deter others from acting similarly in the future. To achieve that end, the sanctions levied should, at minimum, (1) hold Mr. Finchem and Mr. McCauley jointly and severally liable for the attorneys' fees and costs incurred to enable Secretary of State-Elect Fontes to defend this action, and (2) impose upon them a discretionary penalty of double damages of $5,000 as permitted by A.R.S. § 12-349.

I. THE FACTS

Mr. Finchem initiated this action by filing a Verified Statement of Election Contest (the "First Statement") on December 9, 2022. He verified his First Statement under oath, and he and Mr. McCauley signed the filing pursuant to Arizona Rule of Civil Procedure 11. The First Statement explicitly invoked A.R.S. § 16-672 and named as defendants (1) Secretary of State-Elect Fontes, (2) Congressman-Elect Ruben Gallego, and (3) Katie Hobbs in her official capacity as Arizona Secretary of State.

RETRIEVED FROM DEMOCRACYDOCKET.COM

On December 12, 2022, Mr. Gallego's counsel sent a letter to Mr. McCauley "pursuant to Rule 11(c)(2) of the Arizona Rules of Civil Procedure and A.R.S. § 12-349 to demand that [he] voluntarily dismiss the contest immediately and to request a good faith consultation with [him] regarding the same." **Exhibit 1**. Secretary of State-Elect Fontes sent a similar letter to Mr. McCauley. *See* **Exhibit 2**. So did Secretary Hobbs' counsel. *See* **Exhibit 3**. In response, Mr. McCauley wrote:

> Gentlemen,
>
> We e-filed a Motion for Recusal a short time ago. Judge Bachus' JA has informed our office that the Motion will be granted and the hearing originally scheduled for tomorrow has been vacated.
>
> We have also been told a Minute Entry to that effect will be filed shortly by Judge Bachus and will be forwarded once received.
>
> *Thank you for the offer to initiate a conference call, I will be perfectly happy to meet with defendants' counsel once the summons has been filed and the complaint has been served*. It's possible some of the correspondences I have received are unnecessary. As soon as I know, I will contact you and give you

some availability, most likely on Wednesday or Thursday.

Thank you,

Dan McCauley

See **Exhibit 4** (emphasis added). As of that letter he had not even had a summons issued or served on the parties.

Afterward, Mr. Finchem filed his First Amended Verified Statement of Election Contest (the "Amended Statement"). The Amended Statement was not verified and it omitted Mr. Gallego as a party (although it still sought relief against him). Again, Mr. Finchem and Mr. McCauley signed the Amended Statement pursuant to Arizona Rule of Civil Procedure 11.

During an expedited return hearing, this Court ordered Mr. McCauley to meet and confer with Defendants' counsel later that afternoon in anticipation of the remaining Defendants moving to dismiss this action. Mr. McCauley did not object to doing so or contend that the Arizona Rules of Civil Procedure, and their provision for moving to dismiss a proceeding, have no application to this action. That meeting occurred via Zoom. During that meeting, Mr. McCauley indicated that he could not withdraw the Amended Statement. When told motions to dismiss would be forthcoming, Mr. McCauley never indicated that he believed the procedural rules do not apply to this action.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The Defendants moved to dismiss this action. After briefing, a hearing was held. At that hearing, Mr. McCauley refused to concede that the Arizona Rules of Civil Procedure applied to this proceeding (despite seeking discovery under those rules in the mended Statement), only to state he would seek summary judgment were this case to proceed. And when the Court asked him very direct questions about the law and Mr. Finchem's allegations, Mr. McCauley was unable to meaningfully respond or distinguish the caselaw the Court identified as detrimental to Mr. Finchem's case. At one point, Mr. McCauley noted that he had not yet even read the exhibits supplied with the Defendants' motions to dismiss. Worse, Mr. McCauley could not explain exactly how Mr. Finchem's allegations altered the outcome of the 2022 General Election or why decades of well settled law should

be ignored so that this matter can move forward and an election be cast aside – a minimal threshold that must be met to state an election challenge.

The Court took the matter under advisement. That same day, the Court ruled, dismissed this action with prejudice, confirmed Secretary of State-Elect Fontes election as Secretary of State, and invited the parties to move for sanctions.

II. ARGUMENT

A. THE COURT SHOULD SANCTION MR. FINCHEM AND MR. MCCAULEY PURSUANT TO A.R.S. § 12-349(A)

1. A.R.S. § 12-349 GENERALLY

In Arizona, "in any civil action commenced … in a court of record in this state, the court *shall* assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party … if the attorney or party" either, among other things, "[b]rings or defends a claim without substantial justification," "[b]rings or defends a claim solely or primarily for delay or harassment," or "[u]nreasonably expands or delays the proceeding." A.R.S. § 12-349(A)(1)-(3) (emphasis added). The phrase "'without substantial justification' means that the claim … is groundless and is not made in good faith." A.R.S. § 12-349(F). In this regard, "[w]hile groundlessness is determined objectively, bad faith is a subjective determination." *Takieh v. O'Meara*, 252 Ariz. 51, 61, ¶ 37 (App. 2021), review denied (Apr. 7, 2022).

RETRIEVED FROM DEMOCRACYDOCKET.COM

An award under A.R.S. § 12-349 is mandatory where factually supported. *See Phoenix Newspapers*, *Inc. v Dep't. of Corr*., 188 Ariz. 237, 243 (App. 1997); *see also Democratic Party v. Ford*, 228 Ariz. 545, 548 ¶10 (App. 2012) (stating if party makes showing required by A.R.S. § 12-349, "the award of attorney fees becomes mandatory"); *City of Casa Grande v. Ariz. Water Co*., 199 Ariz. 547, 555 ¶27 (App. 2001) (noting A.R.S. § 12-349(A) "mandates an award of attorney's fees if a party" violates the statute).

Further, when awarding attorneys' fees under § 12-349, the Court must set forth the specific reasons for the award. *See* A.R.S. § 12-350. There is no such requirement for an award of double damages under § 12-349. *See id*. (making no reference to findings related to a damages award).

2. A.R.S. § 12-350 GENERALLY

By statute, "[i]n awarding attorney fees pursuant to [A.R.S. §] 12-349, the court shall set forth the specific reasons for the award." A.R.S. § 12-350. In doing so, the Court:

> … may include the following factors, as relevant, in its consideration:
>
> 1. The extent of any effort made to determine the validity of a claim before the claim was asserted.
>
> 2. The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid.
>
> 3. The availability of facts to assist a party in determining the validity of a claim or defense.
>
> 4. The relative financial positions of the parties involved.
>
> 5. Whether the action was prosecuted or defended, in whole or in part, in bad faith.
>
> 6. Whether issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict.
>
> 7. The extent to which the party prevailed with respect to the amount and number of claims in controversy.
>
> 8. The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

A.R.S. § 12-350. "Because the 'purpose of this requirement is to assist the appellate court on review[,] ... the findings need only be specific enough to allow an appellate court to test the validity of the judgment.'" *Takieh*, 252 Ariz. at 61, ¶ 38 (quoting *Bennett v. Baxter Group, Inc.*, 223 Ariz. 414, 421, ¶ 28 (App. 2010) (internal quotations and citations omitted)).

RETRIEVED FROM DEMOCRACYDOCKET.COM

3. SANCTIONS ARE WARRANTED BECAUSE THIS ACTION LACKED ANY, LET ALONE SUBSTANTIAL, JUSTIFICATION

First, "a valid election contest may not rely 'upon public rumor or upon evidence about which a mere theory, suspicion, or conjecture may be maintained. In such cases, fraud must be specifically alleged and 'ought never to be inferred.'" Under Advisement Ruling ("Ruling") at 2 (citations omitted). As this Court further noted, "Mr. Finchem's contest on the basis of 'illegal votes' is unsupported by any alleged fact and fails to state a claim under § 16-672(A)(4). Ruling at 8. Indeed, Mr. Finchem did "not allege that any of the votes cast were illegal," that unregistered voters in fact voted, or that a vote was cast and counted

in violation of a specific law. Ruling at 8. All Mr. Finchem relied on is (1) "speculation that votes *might* not have been counted," and (2) "anecdotal" hearsay alleging "the possibility of disenfranchisement based upon frustration with machine malfunctions, delays, and 'suspicions' that some votes may not have been counted." Ruling at 8 (emphasis in original). But the law is clear: such allegations cannot sustain an election challenge. *See Hunt v. Campbell*, 19 Ariz. 254, 263-64 (1917); *Findley v. Sorenson*, 35 Ariz. 265, 263-64, 269 (1929); *Moore v. City of Page*, 148 Ariz. 151, 155 (App. 1986). Yet Mr. Finchem and Mr. McCauley prosecuted their case nonetheless, either knowing the state of the law and choosing to ignore it, or without having bothered to even minimally review the applicable law and pressing forward anyway. Both scenarios are unacceptable and sanctionable.

Second, despite initiating this proceeding in this Court, and seeking an order allowing "*discovery under the Civil Rules,*" Mr. Finchem and Mr. McCauley forced the Defendants to brief, and this Court to address, the argument that the Arizona Rules of Civil Procedure do not apply to this proceeding. Amended Statement, Demand for Relief, ¶ B (emphasis added). As the Court aptly noted: "This argument is frivolous." Ruling at 3. The Court gave Mr. Finchem and Mr. McCauley every opportunity to abandon this silly position, but they would not relent. *See* AZFamily, *LIVE: Hearing underway on motion to dismiss election lawsuit filed by Mark Finchem* (December 16, 2022), https://tinyurl.com/bs2r9pew (start at 11:35). Dealing with this argument unreasonably expanded and delayed this action.

Third, the Amended Statement, replete with unsubstantiated allegations, fails to follow the legal requirements necessary to obtain the relief requested. For example, Mr. Finchem asked the Court to permit him to inspect ballots under A.R.S. § 16-667, but failed to provide the required bond or seek appointment of the required advisors. *See* Ruling at 2, n.1.

Mr. Finchem and Mr. McCauley also alleged numerous procedural matters that, had either of them taken the time to review the applicable law, they would have realized that *none* of those allegations can sustain an election contest given the delay in raising them.

RETRIEVED FROM DEMOCRACYDOCKET.COM

See Ruling at 5. For instance, the Court summarized why the arguments pertaining to the certification of the voting machines used in the 2022 General Election are meritless:

> Mr. Finchem alleges that the Secretary's certified vote count is inaccurate "because the electronic ballot tabulation machines were not certified and could not be certified as the laboratory engaged [to certify election equipment] was itself not certified." Mr. Finchem argues that because the Voting System Test Laboratory manual requires the certificate to be signed by the chair of the EAC, a certificate signed by the EAC's executive director nullifies the accreditation altogether.
>
> But the VSTL manual does not have the force of statute, and under HAVA the EAC not only retains the power to certify laboratories, but further provides that "the accreditation of a laboratory for purposes of this section *may not* be revoked unless the revocation is approved by a vote of the commission." 52 U.S.C. § 20971(c)(2) (emphasis added). Mr. Finchem did not allege that the *initial* accreditation of Pro V&V or SLI Compliance was defective – only the recertification in 2021. Consequently, even if the recertification was somehow irregular, federal law requires that the EAC vote to remove accreditation from a laboratory in order for the accreditation to be lost. It is not automatic. Mr. Finchem has not alleged that the EAC has voted to revoke either Pro V&V or SLI Compliance's accreditation, and therefore the two laboratories remain accredited for the purposes of the instant motions.
>
> Thus, taken as true for the purposes of a motion to dismiss, the allegation that the executive director rather than the chair of the EAC signed the certification does not give rise to a reasonable inference that the testing laboratories were not properly accredited.
>
> It bears noting that in his response and during oral argument, Mr. Finchem's counsel repeatedly referred to the election certificates as being "forged." This allegation appears nowhere in the Amended Statement and was asserted for the first time in response to the pending motions. This new allegation is wholly unsupported by the record.
>
> Indeed, even if the voting machines were incorrectly certified: what then? What, apart from a general pall of suspicion could result from such a conclusion? The law in Arizona does not permit an election challenge to proceed based solely upon a vague sense of unease. *See generally* A.R.S. § 16-672(A)(1)-(5). Mr. Finchem's Amended Statement draws no through-line from the lack of certification to a specific effect on the election results. There is no allegation that the Executive Director, rather than the Chair, signing the testing laboratory certificates caused any illegal vote to be cast. The EAC has affirmed that Pro V&V and SLI Compliance retain their testing certification. There was no misconduct stemming from this allegation. Consequently, assuming laches did not already bar these claims, this argument fails to state a meritorious challenge and must be dismissed.

Ruling at 6 (emphasis in original).

With regard to Mr. Finchem's "expert" and their challenges to machine certifications due to so-called technical issues, as the Court noted: "[a]s quickly as Mr. Finchem raises

RETRIEVED FROM DEMOCRACYDOCKET.COM

this issue, the court can reject it" because Mr. Finchem and Mr. McCauley offer no legal theory permitting the Court to invalidate a voting software certification after its conferral by an accredited testing laboratory. Ruling at 7 ("Neither federal nor state law permit this court to second guess the technical judgement of accredited laboratories. This argument also fails on its merits.").

As for allegations of illegal votes, Mr. Finchem and Mr. McCauley failed to allege their procedural challenges constitute fraud or articulate how the actions complained of would have yielded a different election outcome. *See* Ruling at 7. In fact, Mr. Finchem and Mr. McCauley did not allege *any* vote cast was illegal, and thus their "contest on the basis of 'illegal votes' is unsupported by *any* alleged fact and fails to state a claim under § 16-672(A)(4)." Ruling at 8 (emphasis added).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Likewise, their attempt to overturn an election on the basis of "misconduct" was doomed from the outset. As the Court noted, "[n]one of" the acts Mr. Finchem alleged "constitutes 'misconduct' sufficient to survive dismissal." Ruling at 9. Indeed, Mr. Finchem's conflict of interest-related allegations are "not well-pled facts; they are legal conclusions masquerading as alleged facts." Ruling at 9. His lab certification-related misconduct allegations fare no better. Mr. Finchem failed to "assert any facts explaining how the Secretary was responsible for determining who at the EAC signed the accreditation certificate" and focused instead on allegations unrelated to the canvass, which is the only activity related to which Secretary Hobbs can be sued in an election contest. Ruling at 10 (Given that the questioned signatures on the lab certificates occurred long before the challenged election, there can be no argument that the claimed certificate error could qualify as misconduct "in the canvas." *See Williams*, 2019 WL 3297254, at *3, ¶ 14 (affirming dismissal of "misconduct" claim based upon pre-canvass events). This is an independent basis for dismissal."); *see also* A.R.S. § 16-672(A)(1). Mr. Finchem and Mr. McCauley also proffered no factual or legal support for the allegation that Secretary Hobbs, by doing her duty and ensuring election officials follow the law, somehow engaged in misconduct sufficient to affect the outcome of the 2022 General Election. *See* Ruling at

11-12. The same is true with the allegations that Secretary Hobbs interfered with Mr. Finchem's use of Twitter®, because there is "no claim that these alleged Twitter misdeeds were 'fraudulent' or that they altered the outcome of the election." Ruling at 12.

The foregoing, taken as a whole, shows by a preponderance of the evidence that Mr. Finchem and Mr. McCauley brought this action without any justification, to harass the Defendants, undermine our democratic processes, and delay the peaceful transition of power after an otherwise valid and lawful election. This misconduct implicates A.R.S. § 12-350(1)-(3), (5)-(7), and thus, sanctions under A.R.S. § 12-349 are warranted.

B. The Court should sanction Mr. Finchem and Mr. McCauley pursuant to Arizona Rule of Civil Procedure 11

1. Arizona Rule of Civil Procedure 11 generally

RETRIEVED FROM DEMOCRACYDOCKET.COM

"Rule 11 requires that attorneys have a good faith belief, formed on the basis of . . . reasonable investigation, that a colorable claim exists." *Villa De Jardines Ass'n v. Flagstar Bank*, FSB, 227 Ariz. 91, 96, ¶ 14 (App. 2011) (quotation marks and citation omitted). An attorney has an obligation to "review and reevaluate [a] client's position as the facts of the case [are] developed." *Standage v. Jaburg & Wilk, P.C.*, 177 Ariz. 221, 230 (App. 1993). "[A]nd . . . if [they] did not know at the outset, as [they] became aware of information that should reasonably lead [them] to believe there was no factual or legal bases for [their] position, [they are] obligated to re-evaluate any earlier certification under Rule 11." *Id.*

"The good faith component of Rule 11 is not based on whether an attorney subjectively pursues claims in good faith, but instead is judged on an objective standard of what a professional, competent attorney would do in similar circumstances …." *Id.* (citation omitted). This analysis rejects any "pure heart and empty head" defense. *Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994) (internal citation and quotations omitted, analyzing Federal Rule of Civil Procedure 11).[2] Specifically, under Rule 11(b):

By signing a pleading, motion, or other document, *the attorney or party* certifies

[2] "Cases decided under Rule 11, Federal Rules of Civil Procedure . . . are helpful in determining the standard by which we may measure the reasonableness of an attorney's conduct." *Smith v. Lucia*, 173 Ariz. 290, 297 (App. 1992).

that to the best of that person's knowledge, information, and belief *formed after a reasonable inquiry*:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(emphasis added).

In our case, sanctions under Arizona Rule of Civil Procedure 11 against Mr. Finchem and Mr. McCauley – *both of whom signed the Amended Statement* – are appropriate for several reasons. First, "Rule 11, of course, deals with some of the same issues as A.R.S. § 12-349." *Harris v. Rsrv. Life Ins. Co.*, 158 Ariz. 380, 383 (App. 1988); *see also Goldman v. Sahl*, 248 Ariz. 512, 531, ¶ 68 (App. 2020) ("The basis for a sanction according to Civil Procedure Rule 11 is the same as A.R.S. § 12-349(A)(1)."), *rev. denied* (Aug. 25, 2020). Accordingly, sanctions are warranted under Arizona Rule of Civil Procedure 11 for the same reasons sanctions are warranted under A.R.S. § 12-349.

Second, both Mr. Finchem and Mr. McCauley signed the Amended Statement and presented filings "to harass, cause unnecessary delay, [and] needlessly increase the cost of litigation." Ariz. R. Civ. P. 11(b)(1). For example, by prosecuting this action, Mr. Finchem and Mr. McCauley forced Secretary of State-Elect Fontes to (1) analyze a confusing and conclusory filing complete with a lengthy (and at times nonsensical) set of exhibits, (2) file a motion to dismiss, (3) read, analyze, and reply to a frivolous response focusing largely on whether the rules of civil procedure apply to this proceeding (as opposed to addressing the merits of the Defendants' arguments for dismissal), and (4) participate in an oral argument. There was no reason for any of this, because this action should never have been filed under the facts at bar. Secretary of State-Elect Fontes was targeted because Mr. Finchem could not accept having been rejected by Arizona voters. This action was not about pursuit of

RETRIEVED FROM DEMOCRACYDOCKET.COM

meritorious claims. This action was about delaying the peaceful transfer of power and political grandstanding in the hope of overturning an election by inciting confusion, frustration, and chaos. Pursuing a lawsuit for these reasons is sanctionable.

Third, Mr. Finchem and Mr. McCauley prosecuted numerous frivolous arguments that ignored existing law, each of which are outlined above in Section II(A). *See* Ariz. R. Civ. P. 11(b)(2); *Boone v. Superior Court*, 145 Ariz. 235, 241 (1985) (A party violates Rule 11 by filing a pleading with a claim or defense that he should have known to be "insubstantial, groundless, frivolous, or otherwise unjustified."). This also independently warrants sanctions under Arizona Rule of Civil Procedure 11.

Fourth, Mr. Finchem and Mr. McCauley presented papers with "factual contentions [lacking] evidentiary support" throughout this matter. Ariz. R. Civ. P. 11(b)(3). Indeed, the Amended Statement is replete with unsubstantiated or outright meritless allegations. *See, e.g.*, Ruling at 2 n.1 (noting the amended pleading request to inspect ballots under A.R.S. § 16-677 despite failing to provide statutory bond or appropriately seek appointment of advisors), 5 (noting amended pleading alleged numerous procedural errors that were brought with unreasonable delay), 6 (noting lack of any allegations that show initial accreditation of Pro V&V or SLI Compliance were problematic), *id.* (no factual support or even an allegation that election certificates were forgeries), 7 (noting that the amended pleading "draws no through-line from the lack of certification to the specific election results."), *id.* (noting lack of legal theories to show voting software under HAVA may be thrown out after being certified by an accredited testing library), 8 (amended pleading lacks allegations of illegal votes despite bringing a claim under A.R.S. § 16-672(A)(4), *id.* (noting failure to even plead erroneous votes under A.R.S. § 16-672(A)(5)), 9-10 (no well-pled facts or authorities to support legal conclusion that Secretary of State Hobbs breached purported duty to recuse herself), 10 (no fact allegations on how Secretary of State Hobbs needed to ensure the "right person" at EAC signed the certificates), 11 (no support for assertion that Secretary of State Hobbs ensuring county election officials just follow the law is misconduct), 12 (no support for allegations that purported correspondence with

RETRIEVED FROM DEMOCRACYDOCKET.COM

Twitter® was either fraudulent or would have changed the outcome of the election).

Finally, given that the only evidence Mr. Finchem and Mr. McCauley possessed was attached to the Amended Statement, they cannot sincerely argue that their baseless contentions were likely to have evidentiary support later. *See* Ariz. R. Civ. P. 11(b)(3). And the absence of pleading the requisite facts needed to state a claim, when viewed in light of the well-settled law, only highlights the reality that there was no hope the "evidence" would close the gaps necessary to press ahead. There was simply no evidence whatsoever supporting an election contest. This, too, warrants sanctions.

C. THIS COURT SHOULD EXERCISE ITS INHERENT POWER TO SANCTION BOTH PLAINTIFF AND HIS COUNSEL

This Court "has the inherent power to sanction bad faith conduct during litigation independent of the authority granted by Rule 11." *Hmielewski v. Maricopa Cnty.*, 192 Ariz. 1, 4, ¶ 14 (App. 1997). Thus, to both remedy the costly chaos Mr. Finchem and Mr. McCauley caused, and deter future litigants and their counsel from unjustly wasting judicial and other resources with baseless litigation, this Court should exercise its inherent power to issue sanctions for the reasons discussed throughout this brief.

RETRIEVED FROM DEMOCRACYDOCKET.COM

III. CONCLUSION

We do not seek sanctions lightly. Debatable positions, close calls, or legitimate attempts to expand, modify or reverse existing law deserve judicial scrutiny. And those who choose to pursue those legitimate campaigns, but fail, should not be sanctioned merely for a failed effort. But those who cross the line into frivolity, ignore the existing facts, the applicable law, and the basic rules we all must follow, and force others to waste valuable finite resources to combat meritless allegations must be held accountable.

This case is not a close call. It does not present a debatable position. It is not an effort to vindicate a legitimate claim or interest. This case is a politically motivated weaponization of the legal process meant to perpetuate the dangerous narrative that our elections are unreliable, our elected leaders are corrupt, and our democracy is broken – all because Mr. Finchem lost the election. Merely losing an election, without actual evidence

of fraud or misconduct that actually caused that loss, is no basis upon which to pursue an election challenge. This has been the law in Arizona for a long, long time. And attempting to overturn an election with speculation and conspiracy theories only adds insult to injury.

Accordingly, for the reasons stated herein, this Court should sanction both Mr. Finchem and Mr. McCauley, jointly and severally, and (1) award the Defendants their attorneys' fees, costs, and double damages of $5,000, and (2) set a deadline for the Defendants to file an application for attorneys' fees and costs.

RESPECTFULLY SUBMITTED: December 28, 2022

SHERMAN & HOWARD L.L.C.

By /s/ *Craig A. Morgan*
Craig A. Morgan
Shayna Stuart
Jake T. Rapp
Attorneys for Secretary of State-Elect Adrian Fontes

RETRIEVED FROM DEMOCRACYDOCKET.COM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COPY of the foregoing filed via Turbo Court and sent via email and U.S. Mail on December 28, 2022 to:

Judge Melissa Iyer Julian
E-Mail: Jorge.Aguirre@JBAZMC.Maricopa.Gov

Daniel J. McCauley III
McCauley Law Offices, P.C.
6638 E. Ashler Hills Dr.
Cave Creek, AZ 85331-6638
E-mail: dan@mlo-az.com
Attorneys for Plaintiff

D. Andrew Gaona
Coppersmith Brockelman PLC
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004
E-Mail: agaona@cblawyers.com
Attorneys for Secretary of State Katie Hobbs

Sambo (Bo) Dul
STATES UNITED DEMOCRACY CENTER
8205 South Priest Drive, #10312
Tempe, Arizona 85284
E-Mail: bo@statesuniteddemocracy.org
Attorneys for Secretary of State Katie Hobbs

/s/ Ella Meshke

RETRIEVED FROM DEMOCRACYDOCKET.COM