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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

REPLY IN SUPPORT OF SECRETARY OF STATE-ELECT ADRIAN FONTES' MOTION TO DISMISS

“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (citation and quotations omitted). Plaintiff’s response fails spectacularly to justify continuing this action for a moment more, let alone voiding millions of lawfully cast votes. To the contrary, entertaining this action any further will only serve to erode the confidence in the integrity of our electoral process and fan the flames of conspiracy laden rhetoric meant to divide us and cast our democracy into an abyss of chaos.

To the extent we can decipher Plaintiff’s response, we will address it. But more critically, we will highlight the issues fatal to this contest which Plaintiff has ignored.

I. PLAINTIFF IS ASKING THIS COURT TO OVERTURN THE 2022 GENERAL ELECTION AS IT PERTAINS TO THE OFFICE OF SECRETARY OF STATE

Plaintiff argues this action is not an attempt to overturn the election. Response (“Resp.”) at 2:4-27. “Talk about chutzpah.” *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1159 (9th Cir. 2000) (Silverman, J., dissenting).

1 To overturn this election is precisely what Plaintiff seeks. *See* Amended Complaint
2 (“AC”), Demand for Relief at ¶¶ C (requesting court order that “the certificate of election
3 of Adrian Fontes . . . is of no further legal force or effected and that the election is annulled
4 and set aside”), E (requesting court order for a new state-wide election). And for the reasons
5 stated in Secretary of State-Elect Fontes Motion, that relief should be denied with prejudice.

6 **II. THIS ACTION IS SUBJECT TO ARIZONA RULE OF CIVIL PROCEDURE 12**

7 Deploying confused sophistry, Plaintiff argues that an election contest is initiated by
8 a “statement”, which is not a “complaint”, and therefore, the Arizona Rules of Civil
9 Procedure do not apply. Resp. at 6:7-23. Plaintiff then extrapolates from this conclusion
10 that, because a “statement” does not fit within the definition of a “pleading” under the
11 Arizona Rules of Civil Procedure, an election contest cannot be subject to those procedural
12 rules, and thus, a motion to dismiss. Response at 5:19-6:16. This argument fails for
13 several reasons.

14 First, the Arizona Rules of Civil Procedure apply in this action unless otherwise
15 restricted by law. One need look no further than Arizona Rule of Civil Procedure 1 to
16 confirm this truth: “These rules govern the procedure in all civil actions *and proceedings*
17 in the Superior Court of Arizona.” (Emphasis added). And this action is a “proceeding in
18 the Superior Court of Arizona.” Ariz. R. Civ. P. 1.

19 Second, Arizona’s appellate courts have had no problem affirming the dismissal of an
20 election contest under Arizona Rule of Civil Procedure 12. *See Burk v. Ducey*, No. CV-
21 20-0349-AP/EL, 2021 WL 1380620, at *1 (Ariz. Jan. 6, 2021) (mem. decision), *available*
22 *at* <https://tinyurl.com/y5m8nsfz>, *cert. denied*, 209 L. Ed. 2d 735, 141 S. Ct. 2600 (2021);
23 *Hancock v. Bisnar*, 212 Ariz. 344, ¶¶ 16-17 (2006); *Williams v. Fink*, No. 2 CA-CV 2018-
24 0200, 2019 WL 3297254, at *1, ¶ 1 (Ariz. App. July 22, 2019) (mem. decision), *available*
25 *at* <https://tinyurl.com/mr3vryj9> (affirmed dismissal of statement of contest for failing to
26 state a claim and applying Arizona Rule of Civil Procedure 12(b)(6)); *Camboni v. Brnovich*,
27 No. 1 CA-CV 15-0014, 2016 WL 388933, at *2, ¶ 6 (Ariz. App. Feb. 2, 2016) (mem.
28 decision), *available at* <https://tinyurl.com/2p93apz9> (affirmed trial court granting motion

1 to dismiss of statement of election).¹ This precedent is more than adequate to enable
2 Secretary of State-Elect Fontes to seek dismissal under Arizona Rule of Civil Procedure
3 12.

4 Third, Plaintiff waived this argument by not only failing to make it at the recent Return
5 Hearing, but by agreeing to an expedited briefing schedule. Indeed, when the Court ordered
6 the parties to meet and confer pursuant to Arizona Rules of Civil Procedure 7.1(h) and 12(j),
7 Plaintiff's counsel never raised this issue. And during that meeting, Plaintiff's counsel
8 never raised this issue. Plaintiff cannot sit silent only to spring out of the brush and cry foul
9 for an alleged error to which he freely acquiesced.

10 **III. PLAINTIFF IGNORES THE FATAL FLAW IN HIS STATEMENT OF CONTEST: HE**
11 **FAILED TO JOIN INDISPENSABLE PARTIES NECESSARY TO CONTEST AND**
12 **OVERTURN AND REDO AN ELECTION, LEAVING NO OPTION OTHER THAN**
13 **DISMISSAL**

14 A failure to address an otherwise meritorious basis for dismissal is a concession of the
15 argument's argument. *See* Ariz. R. Civ. P. 7.1(b)(1), (2).

16 Secretary of State -Elect Fontes argues that this action fails because Plaintiff did not
17 timely name indispensable parties to this action. Fontes Mot. Dismiss at 14:13-15:22.
18 Plaintiff has ignored the argument. His silence on this jurisdictional issue is deafening.

19 Plaintiff's requested relief targets votes cast in all fifteen Arizona counties. *See* AC,
20 Demand for Relief at ¶¶ B (seeks discovery of all ballots cast in the election and those in
21 the federal Congressional District 3 without any explanation of how the AC has any
22 allegations or law supporting such relief concerning a federal election), E (seeking "state-
23 wide special election, counted by hand, without the use of electronic vote tabulation . . . ,
24 no mail-in ballots supervised by a special master appointed by the court."). Each county's
25 Board of Supervisors is responsible for conducting elections in their respective counties,
26 including canvassing and certifying election results. *See, e.g.*, A.R.S. §§ 11-251(3), 16-

26 ¹ Speaking of statutory technicalities, one here is that an election contest must be verified.
27 Plaintiff's Amended Statement of Election Contest is not verified. So it must be dismissed
28 for this reason alone. *See* A.R.S. § 16-673(B); *Donaghey v. Att'y General*, 120 Ariz. 93,
95 (1978) ("The failure of a contestant to an election to strictly comply with the statutory
requirements *is fatal to his right to have the election contested.*" (emphasis added)).

1 449, -621, -622(A), -642, -645. Each County Recorder is responsible for facilitating
2 components of election administration in their respective counties, including signature
3 verification of early ballots so they can be processed and tabulated *See, e.g.*, A.R.S. §§ 16-
4 550, -551, -621. Each county’s Elections Director is the officer in charge of their respective
5 county’s elections and responsible for conducting login and accuracy testing on the
6 counting equipment, overseeing the processing and tabulating of votes, and conducting any
7 hand county ballot audits. *See, e.g.*, A.R.S. §§ 16-449, -602, -621. ***Not a single one of***
8 ***these public officials is a named defendant in the Complaint or AC, and none are***
9 ***mentioned in any allegation.*** And equally problematic is that Plaintiff gives no reason
10 why.

11 Given this failure, dismissal is the only option, because amending the pleadings to
12 cure this jurisdictional defect is not allowed in an election contest. *See* Fontes Mot. Dismiss
13 at 14:13-15:22; *see also Kitt v. Holbert*, 30 Ariz. 397, 406 (1926) (“statement of contest in
14 an election contest may not be amended, after the time prescribed by law for filing such
15 contest has expired, by adding thereto averments of a jurisdictional nature[.]”); *Young v.*
16 *Cordis*, 30 Ariz. 406, 406 (1926) (same); *Burk v. Ducey*, No. CV-20-0349-AP/EL, 2021
17 WL 1380620, at *2 (Ariz. Jan. 6, 2021) (mem. decision), *cert. denied*, 209 L. Ed. 2d 735,
18 141 S. Ct. 2600 (2021) (“[A]most a century ago this Court” issued its still standing ruling
19 in *Kitt v. Holbert*), available at <https://tinyurl.com/y5m8nsfz>.

20 **IV. PLAINTIFF ALSO IGNORES THE FACT THAT HIS “CLAMS” CONCERN PURELY**
21 **PROCEDURAL MATTERS, AND ASSERTING THEM IN AN ELECTION CONTEST IS**
22 **UNTIMELY**

23 Plaintiff does not really dispute that his allegations are of a procedural nature, or that
24 any alleged procedural violations in the election process “must be brought prior to the actual
25 election.” *Sherman v. City of Tempe*, 202 Ariz. 339, ¶ 9 (2002); *see also* Fontes Mot.
26 Dismiss at 6:12-19, 8:19-9:14, 13:17-14:12. Plaintiff’s decision to ignore this issue means
27 that he has no basis upon which to contest (let alone overcome) this point, which is fatal to
28 his claims.

1 **V. PLAINTIFF’S OTHER RAMBLING *NON-SEQUITURS* SUPPORT DISMISSAL**

2 Plaintiff peppers his response with various “arguments” that not only lack merit, but
3 actually support dismissal.

4 For example, Plaintiff spends a great deal of time complaining that Secretary of State
5 Hobbs’ efforts to enforce Arizona election law were wrong. Resp. at 8:10-22, 9:1-13. But
6 he cites no authorities to support his view. *Id.*

7 Next, Plaintiff vaguely gestures to A.R.S. § 16-676(B) as permitting this Court to
8 “hear and determine all issues arising in a contested election.” Resp. at 8:23-9:1. But an
9 election contest is permitted only under the grounds stated in A.R.S. § 16-672, and like all
10 filings before the Court, an election contest must be well pled. Plaintiff’s election contest
11 is not well pled for all the reasons stated in Secretary of State-Elect Fontes’ Motion, and
12 the conclusory statements wrapped in speculation Plaintiff alleges here are far from enough
13 to compel this Court to entertain an exercise in futility.

14 Then, Plaintiff boldly concludes that “uncertified machines” were used in the election,
15 but he does not respond to Secretary of State-Elect Fontes’ arguments that this assertion is
16 both meritless and irrelevant, or point to any facts actually showing there were, indeed,
17 “uncertified machines” that actually affected the outcome of the 2022 general Election.
18 Plaintiff merely restates that certificates related to voting labs were expired despite
19 Secretary of State-Elect Fontes’ motion to dismiss explaining exactly why that contention
20 is false and was known to be false as early as 2021. Resp. at 9:23-26; Fontes Mot. Dismiss
21 at 9:15-13:16.

22 Plaintiff argues that the wrong official signing a particular lab certification form
23 “renders [the election] uncertain.” Resp. at 14:22 (quoting *Findley v. Sorenson*, 35 Ariz.
24 265, 269 (1929)). No explanation is provided for why this is the case. *See id.* at 14:19-
25 15:10. Although Plaintiff references many emails attached to his statement of election
26 contest, none show any illegal votes were cast. Resp. at 15:8-10; AC, Ex. I (emails between
27 election officials and others on repairing issues during the election and ensuring vote count
28 was accurate).

1 Plaintiff also argues that somehow Secretary Hobbs has committed a felony by
2 committing. Resp. at 11:6-28. The alleged criminal act? *Just. Doing. Her. Job. Id.*
3 (citing A.R.S. § 16-1009, which states a failure of a public officer to do their job is a
4 misdemeanor). There are absolutely no allegations in Plaintiff’s amended statement of
5 election contest remotely suggesting that Secretary Hobbs has committed this crime and
6 invoking that statute in response to a Motion to Dismiss only amplifies this action’s
7 frivolity.

8 Plaintiff cites *Higgins v. Superior Court in and for the County of Navajo*, 163 Ariz.
9 348, 353-54 (1990), to support his attempt to state a claim under A.R.S. § 16-
10 672(A)(4). Resp. at 9:14-18. But *Higgins* involved an election where fifteen voters not
11 registered as Democrats and a felon cast votes in a primary election. 163 Ariz. 348, 349. In
12 our case, as explained in the motions to dismiss, Plaintiff fails to allege any facts under
13 A.R.S. §§ 16-672(A)(1), (4) to warrant this case surviving dismissal. Plaintiff being upset
14 that Secretary of State Hobbs told election officials to do their job does not count as
15 misconduct and Plaintiff cites no case or other law compelling a contrary
16 conclusion. Likewise, a different official signing a certificate in 2021 would not have
17 changed the outcome of the election, and critically there are no facts asserted in our case
18 that would allow a rational being to make such an extraordinary inference.

19 Plaintiff argues that Secretary Hobbs had a duty to recuse herself without citing any
20 authorities or engaging with Secretary of State-Elect Fontes’ argument that any such
21 argument is unsound. *See* Resp. at 11:17-28; Fontes Mot. Dismiss at 5:16-6:11
22 (demonstrating that A.R.S. § 38-503 does not require Secretary Hobbs to recuse herself
23 from the election while running for and winning the governorship). In fact, the response
24 does not even defend or substantiate Plaintiff’s allegation that Secretary Hobbs violated
25 A.R.S. § 38-503 because it does not mention that statute at all. *See generally* Resp. (not
26 offering any other legal authorities supporting this contention). Nowhere does Plaintiff
27 explain how an office is “proprietary” for purposes of the conflict-of-interest statutes when
28 Arizona law holds the exact opposite position. *Mecham v. Gordon*, 156 Ariz. 297, 302

1 (1988) (public offices are not proprietary). At best, Plaintiff’s contentions in this regard
2 are flights of fancy that, frankly, never take off.

3 Plaintiff cites A.R.S. § 16-672(A)(5) as a basis for his election contest, but that basis
4 is not pled in his amended statement of election contest. *See* Resp. at 15:4; AC, ¶¶ 61
5 (asserting claim under (A)(5)), 77 (asserting claim under (A)(4)). As the 5-day statutory
6 time has passed, so Plaintiff may not now seek relief under A.R.S. § 16-672(A)(5).

7 Finally, Plaintiff asserts that his amended statement of election contest not only
8 “alleges but shows that the voting systems and components were uncertified and widely
9 malfunctioned” during the election. Resp. at 14:1-3. But Plaintiff cites no allegations in
10 amended statement of election contest to support this falsehood. *See* Resp. at 14:1-16. This
11 is because there are none.² *Fontes* Mot. Dismiss at 7:20-13:16.

12 **VI. CONCLUSION**

13 Plaintiff’s highlights the reality that this action is one of several preposterous lawsuits
14 filed for the purpose of harassment under the farcical guise of promoting democracy.
15 Courts have routinely taken these preposterous lawsuits to task by sanctioning the parties
16 and their attorneys who seek to undermine our system of government for the sake of what
17 is essentially a gift. *See, e.g., Finchem v. Fernandez*, No. S1400CV2021-00146, Order re:
18 Attorney Fees/Costs (Yuma Cnty. Sup. Ct. Aug. 29, 2022); *Lake v. Hobbs*, No. CV-22-
19 00677-PHX-JJT, 2022 WL 17351715 (D. Ariz. Dec. 1, 2022). Dismissal with prejudice is
20 just the beginning. Sanctions are required to keep these grifters from clogging the courts
21 with baseless lawsuits seeking to bring our system of government into disrepute.

22 The Court should dismiss this action with prejudice, award Defendants their costs,
23 and either set a briefing schedule on attorneys’ fees and sanctions or award them if the
24 Court believes the record already justifies doing so.

25
26 _____
27 ² Plaintiff also asserts that Secretary of State-Elect Fontes is a proper party “under Title 16”
28 without any supporting authority. Even so, given the myriad of reason why this action
lacks merit, the argument made in Secretary of State Elect Fontes’ Motion at § II(A) is
withdrawn.

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RESPECTFULLY SUBMITTED: December 15, 2022

SHERMAN & HOWARD L.L.C.

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