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9  
10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
11 **IN AND FOR THE COUNTY OF MARICOPA**  
12

13 Mark Finchem, an individual,  
14  
15 Plaintiff/Contestant,  
16 v.  
17 Adrian Fontes, *et al.*,  
18 Defendants/Contestees.

Case No.: CV2022-053927

**MOTION FOR RECONSIDERATION  
OF UNDER ADVISEMENT RULING**

19 Now comes Election Contestant, Mark Finchem (“Contestant”), and his counsel  
20 undersigned, Daniel J. McCauley, pursuant to Arizona Rules of Civil Procedure (“ARCP”) 7.1(e)  
21 and 8, and request this Honorable Court reconsider and vacate its Under Advisement Ruling  
22 (“Ruling”) dated March 1, 2023, and electronically filed March 6, 2023, for the reasons stated  
23 herein below.

24 **INTRODUCTION**

**The Court’s Ruling**

The Court in its Ruling stated that Mr. Finchem’s *Verified Statement of Election Contest*  
(Expedited Election Proceeding Pursuant to Arizona Revised Statutes (“ARS”) § 16-672 *et seq.*)  
 (“SoEC”) was poorly grounded and concluded that it failed to present a justiciable claim. The

1 Court concluded “Mr. Finchem’s allegations, even if true, would not have changed the vote  
2 count enough to overcome the 120,000 votes he needed to affect the result of the election;” and  
3 further found that the “...lawsuit was groundless and not brought in good faith.”<sup>1</sup>

#### 4 **Mr. Finchem’s Brief Background**

5 Mark Finchem was/is the Republican nominee and candidate for Arizona Secretary of  
6 State (“SoS”) in the statewide election held on November 8, 2022. A native of Michigan,  
7 Contestant served in the Kalamazoo Department of Public Safety for 21 years as a fireman,  
8 paramedic and then public safety officer.

9 Upon moving to the Tucson area, Mr. Finchem was elected to the Arizona House of  
10 Representatives in 2014 and served until 2022. He ended his tenure in the State House to focus  
11 on his campaign for Arizona Secretary of State. During his time in the House he served on the  
12 Military Affairs and Public Safety Committee, Judiciary Committee, Natural Resources and  
13 Power and Water Committee. He introduced numerous proposed legislation including a code of  
14 ethics for teachers to protect children. He also proposed several election process related bills to  
15 try to preserve the public’s trust in the new age of computerized voting and tabulation.

#### 16 **The Election and Election Contest**

17 The 2022 election was managed by Katie Hobbs, the then-serving Democrat SoS. Ms.  
18 Hobbs at the same time was herself a candidate for Governor. Contestant allegedly lost the  
19 election to the democrat candidate, Adrian Fontes.

20 On or about December 9, 2022, Mr. Finchem filed a *Statement of Election Contest*, and  
21 on December 12, 2022, he filed his *First Amended Verified Statement of Election Contest*

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23 <sup>1</sup> Contrary to the Ruling, the SoEC was NOT a “lawsuit” but a statutory election contest pursuant to ARS § 16-  
672 *et seq.* an overview that tainted the entire contest.

1 (“SoEC”) under the expedited timeframe crafted into Title 16, Article 13 Contest of Elections of  
2 the Arizona Revised Statutes (“ARS”) by the Arizona legislature. The Legislature’s authority is  
3 based upon the Arizona Constitution Article 7, Section 10.

4 Mr. Finchem, as both a candidate and qualified elector, filed a requisite Statement of  
5 Election Contest, which he verified under penalty of perjury by statute to assure his constituents  
6 and the judiciary that his claims were grounded by sworn facts.

7 Arizona’s 2022 election has been recognized, not only statewide but nationally, as  
8 confused and chaotic. It took literally weeks and weeks for election results to be made public.

9 To this day, there are some counties which still have not finished tabulating their vote  
10 count and where cast votes cannot be reconciled. For example, as the Court may know, Mr.  
11 McCauley recently represented the Board of Supervisors in Cochise County, and on information  
12 and belief, as of a week ago it is believed that there were at least 5,000 uncounted votes in  
13 Cochise County alone. As a result, a broad spectrum of qualified electors state-wide are  
14 frustrated by the new computer ballot tabulation systems and still question the validity of the  
15 results. It is widely viewed that Arizona’s voting process was just as mismanaged as the 2020  
16 election. In fact, many Arizona voters are convinced the chaos was worse in 2022. (See Exhibit  
17 F to the SoEC). As a direct result of the election mismanagement numerous candidates across  
18 Arizona filed Election Contests, including all the candidates for statewide offices.

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20 **MEMORANDUM OF POINTS AND AUTHORITIES**  
21 **WITH ARGUMENT**

22 The Court justified sanctioning Mr. Finchem by ruling that his “lawsuit was groundless  
23 and not brought in good faith” (it was not a lawsuit but an election contest) and the election  
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1 contest was “without substantial justification” because the Court perceived he only disputed  
2 80,000 “potentially ‘missing votes’”. The Court ruled 80,000 missing votes were not “enough to  
3 overcome the 120,000 votes he needed to affect the result of this election.” Here, however, the  
4 Court failed to heed its own cited authority, which states in relevant parts that “[S]anctions  
5 should be imposed ‘with great reservation’”; that “[i]n election matters, the Court must consider  
6 the potential chilling effect a sanctions award may have on legitimate challenges in the future.”  
7 And, to consider denying sanctions in part “to avoid placing a chill on future petition challenges  
8 by private citizens.” Moreover, the Court failed to realize that there is no sanctions remedy  
9 available in the comprehensive statutory framework of Title 16 - which the Legislature could  
10 have easily included if that had been the legislative intent.

11 ARCP 2 states there is one form of action governed by the Civil Rules – a civil action.  
12 However, an Election Contest is by statute not a “civil action” nor a civil “procedure”. It is, by  
13 statute, a different animal with its own very specific rules clearly delineated by the legislature. A  
14 Statement of Contest, then an Answer, and then a hearing to decide the contest. Quick, to the  
15 point and in a sense following the precept of ARCP 1 which specifically calls for an inexpensive  
16 process but consciously disregards including governance by the Civil Rules.

17 A Statement of Election Contest is a “notice” document State v. McCarrell, 80 Ariz. 243,  
18 295 P.2d 1088, filed under very stringent and short timelines set forth in detail in Title 16. It  
19 must be filed no more than 5 days after election certification with an Answer due five days after  
20 the service of the Summons issued by the clerk of court; a timetable unique to election contests.  
21 (ARS 16-675 *et seq*). Then, the court is to set an expedited hearing no more than 10 days after  
22 the date on which the SoEC was filed (which is only allowed to be continued for 5 days for good  
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1 cause shown, se A.R.S. 16-676) to hear and determine all issues arising in the contest including  
2 proofs and allegations of the parties . A fast, short and sweet process that Contestants for local  
3 city and county offices could prepare and argue themselves. *See, Hancock v. Bisnar*, 132 P.3d  
4 283 (contests of county elections are made on the same grounds and in the same manner as  
5 statewide elections), where the contest was over the Mohave Irrigation and Drainage District.

6 It has long been recognized that “election contests are purely statutory, unknown to the  
7 common law, and are neither actions in law nor suits in equity, but are special proceedings”  
8 Griffin v. Buzzard, 342 P.2d 201, 201, with their own rules. The statutory requisite hearing is  
9 the proper venue for presenting evidence proving the exact number of votes to overturn the  
10 election not necessarily the “notice” SoEC. But, as outlined below, the expert testimony  
11 presented as exhibits, that by rule should have been considered true by the court at the MTD  
12 hearing, did question more than enough votes to overturn the election. In fact, attached hereto is  
13 an addendum and more comprehensive declaration by the forementioned expert, Michael Shafer  
14 referenced below, detailing his opinion that significantly more votes should be added to  
15 Finchem’s total or removed from Fontes’ to clearly overturn the election.

16 Moreover, it is black letter law in Arizona state and federal courts that when evaluating a  
17 Motion to Dismiss the court *must take the allegations of the non-moving party as true*. (Citation  
18 deemed unnecessary). That does not appear to have been the case in this Contest.

### 20 **The SoEC was Sufficient to Create a Justiciable Claim**

21 A statement of contest requires a qualified elector to contest upon the grounds set forth in  
22 ARS § 16-672 *et seq.* and even if, *arguendo*, the Superior Court Rules of Civil Procedure would  
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1 apply, (Mr. Finchem still contends they do not), ARCP 8 does not require more than “a short and  
2 plain statement of the claim showing the pleader is entitled to relief and demand for the relief.”

3 Not only is Arizona a “notice pleading” State but the Court was required and failed to view the  
4 facts stated as TRUE. Gurrero V. Cooper Queen Hospital, 112 Ariz. 104, 106-07 (In testing the  
5 complaint for a failure to state a claim, the test is whether enough is stated which would entitle  
6 the plaintiff to relief under some theory to be developed at trial). Here, we have just that.

7 Mr. Finchem attached an expert report of Michael Schafer as Exhibit D to his SoEC. Mr.  
8 Schafer specifically stated grounds upon which more than 500,000 votes must be disallowed  
9 which would have been far more than enough to have “....changed the vote count enough to  
10 overcome the 120,000 he needed to affect the result of this election” and force a second election.  
11 Mr. McCauley advised the Court during the MTD hearing of Mr. Schafer’s opinion that literally  
12 hundreds of thousands of votes, more than enough to overturn the election, were invalid. (*See*  
13 Exhibit A, page 24 line 18 through page 28 line 5). In a MTD hearing Schafer’s allegations  
14 should have been accepted as true, especially since there is no testimony in this Contest from  
15 either counterparty – only unproven Hobbs’ and Fontes’ lawyers’ talk. (*See* Exhibit A, page 18,  
16 lines 20-24). In direct breach of Title 16, we still do not have verified Answers setting forth  
17 disputing facts from either counterparty.

18 Contestant’s expert was specific about 80,000 but general about 420,000 more. Under  
19 long and well established caselaw the court was duty bound to take this uncontroverted expert  
20 opinion as true; which it failed to do. As stated above, Mr. Schafer has amended his initial  
21 opinion to be more specific about the illicit vote count and the reasons these votes must be  
22 reassessed. (*See* Exhibit B attached hereto; see also Exhibit F attached hereto, the AZ Chart-SLI  
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1 Compliance and Election Assistance Commission). Exhibit F presents the information in Mr.  
2 Schafer’s original Expert Opinion in more detail.

3 Also attached to the SoEC and overlooked were about 85 emails from election-day  
4 managers discussing among themselves the facts that the election process on November 8, 2022,  
5 was complete chaos throwing all of the votes in Pima County into question. Again, enough votes  
6 to militate the votes at issue and more than sufficient to not just “affect the results” but  
7 completely overturn the election.

8 Also, attached was the expert opinion of Danial LaChance, a retired U.S. Army signal  
9 corps officer who, after retirement worked for 5 years for the U.S. Department of Defense. Both  
10 careers focused almost exclusively on cyber warfare, cyber hacking, cyber encoding, etc... Mr.  
11 LaChance contends the entire computer voting system used in the November 2022 election was  
12 defective and the votes needed to be re-cast and counted by hand. He will testify in detail the  
13 reasons for the opinion but, here again are at least 500,000 defective votes, more than enough to  
14 “affect” the election contrary to the Ruling. This opinion must be deemed by the court as true  
15 and correct for purposes of the MTD.

16 **Appellate Courts Have Dispositively Ruled Against Fees & Costs in Election**  
17 **Contests**

18 Fees and costs in election contests are prohibited. One recent decision specifically  
19 rendered against the Arizona State Democrat Party is particularly on point. And, the attorneys in  
20 this case (who requested on the record they be allowed to apply for both fees and costs) had to  
21 have known about this case when they requested such an award from this Court. In, Democrat  
22 Party of Pinal County v. Ford, 269 P.3d 721, 228 Ariz. 545 (Div.2, 2012) the Democrat Party

1 appealed a denial of an award of fees and costs by the trial court. The appellate tribunal upheld  
2 the trial court in denying such an award. Going through a detailed analysis, the appellate court  
3 ruled that statutes allowing fees and costs (like this Court cited, ARS 12-341) are “general”  
4 statutes. Whereas, other statutes like election contest statutes under ARS Title 16, are  
5 “particular” statutes, *i.e.*, a form of “special action.” The appellate court ruled after a detailed  
6 analysis that if the Legislature wanted awards of fees and costs in an election contest it could  
7 have easily included such in Title 16. The legislature deliberately did not. And, because the  
8 Legislature chose not to do so and was silent on fees and costs they could not then be awarded,  
9 whether a court deemed an action frivolous under statutes like ARS 12-341 or not.

10 As presented to this Court in Mr. Finchem’s *Objection to the Motion for Sanctions*, our  
11 appellate courts have long issued similar rulings. He cited an appellate court case that  
12 overturned a lower court’s sanctions award in an election case award and ruled unequivocally  
13 “[S]ince there is no statutory provision for attorney’s fees in election contests we have no  
14 authority to grant attorney’s fees.” Moore v. City of Page, 148 Ariz. 151, 166 (1986). Proving  
15 beyond doubt again – if the legislature contemplated such awards it would simply have  
16 denominated same. (*Id.*)

17 Thus, the established rule in Arizona is that when a general statute is antithetical to a  
18 special action statute, the special action statute trumps. And, since silence in Title 16 is a  
19 deliberate act on the part of the legislature, this Court must reverse and vacate its sanctions ruling  
20 awarding costs. It must also deem it has no authority and rescinded its permission therein for  
21 Fontes and/or Hobbs to present Motions or Applications for Legal Fees.



1                   **Reconsideration is also Appropriate Because New Evidence Not Previously**  
2                   **Considered Has Surfaced Since the SoEC Was Filed.**

3                   Most important is the opinion of one of the foremost experts on abuse of the new  
4 electronic voting machine systems, Doug Gould. (*See* Exhibit C2 pages 137-138, CV of Expert  
5 Gould). Mr. Gould has extensive experience in computer systems and very recently prepared an  
6 exhaustive three volume report, hundreds of pages in length, for Mesa, Colorado's Dominion  
7 electronic voting system. (*See* Exhibit C1 & C2, Volumes 1 and 2 of the Report respectively).  
8 The report details his discovery of tampering via changing voting results in the Dominion  
9 electronic ballot tabulation machines used throughout Colorado. He believes the same tampering  
10 occurred here on the Dominion electronic ballot tabulation machines, especially in Maricopa  
11 County. His opinion is based on Dominion's equipment manuals and other similar data as well  
12 as hands on testing and examination of the machines themselves. Mr. Gould's opinion is that  
13 vastly improved standards and testing need to be conducted before, during, and after voting to  
14 insure correct results. If called to testify he will demonstrate the ease with which vote counts can  
15 be completely changed either on site or remotely within seconds by using at least one of three  
16 demonstrable methods. By analysis he will demonstrate in the courtroom how such  
17 manipulation occurred in Arizona. Should Mr. Gould, for some reason not be available to  
18 testify, his co-author, Mark Cook, will testify.

19                   Also, attached hereto is the Declaration of Shelby Busch filed in the Kerry Lake case.  
20 Ms. Busch will also be an expert witness in this case, testifying on vote count changes required  
21 due to voting machine manipulation and other irregularities that changed the vote count by  
22 hundreds of thousands of ballots. Plus 200,000 votes with atrociously different signature  
23 mismatches were counted contrary to the Elections Procedures Manual and applicable statute.

1 These as well must be removed from the vote total in her opinion. More than enough to overturn  
2 the election for Mr. Finchem. Ms. Busch was not known to Mr. Finchem until after the  
3 Statement of Election and the MTD hearing were fait accompli and is thus new evidence that  
4 must be considered to insure a fair evaluation of this Election Contest. (*See Exhibit D,*  
5 *Declaration of S. Busch as filed in the Lake case.*)

6 Expert, Clint Curtis, recently gave testimony before the Arizona Senate Election’s  
7 Committee, Mr. Finchem intends to call Expert Curtis as a witness. Based on his under-oath  
8 testimony to the Senate Committee, wherein he established that the Dominion voting machines,  
9 as well as other brands, used in the Arizona 2022 statewide election were corrupted and  
10 manipulated to the point that there must be a statewide re-vote, further establishing that Mr.  
11 Finchem can garner more than enough votes to overturn the 2022 election. (*See Exhibit E,*  
12 *Transcript of Curtis Testimony before the Arizona Senate Committee*).

13 A “whistleblower” at Runbeck, Denise Marie, a client of the undersigned, has come forth  
14 and will testify that she was working the night of the election and witnessed the vote counting  
15 process. She will testify that Runbeck received about 260,000 voted ballots from Maricopa  
16 County but returned 290,000 votes to Maricopa County. She will also testify there was no  
17 established “chain of custody” tracing the movement of the voted ballots from (1) polling places  
18 into Runbeck, (2) as the ballots moved through Runbeck, or (3) during their return to Maricopa.  
19 By statute, lack of an established and documented chain of custody vitiates all of the votes that  
20 went to and through Runbeck – about 290,000. Again, far more than enough to turn the election to  
21 Mr. Finchem’s favor.



1 Approached counsel were also fearful of the potential for extreme and caustic comments being  
2 made by opposing counsel and then having them appear in the press. In addition, each attorney  
3 further expressed concerns for potential issues with the State Bar being initiated by the  
4 opposition and, of course, the likelihood of the loss their clients who identified as Democrats,  
5 etc., etc...

6 As these attorneys predicted, during the *Motion to Dismiss* hearing, Fontes' counsel, in  
7 particular, made frequent obnoxious and groundless personal attacks on Mr. McCauley until Mr.  
8 McCauley had enough of it and castigated opposing counsel openly on the record. After doing  
9 so, the Court imposed a more courteous behavior on counsel.

10 In addition to the foregoing, the Ruling showed the Court misapprehended Mr.  
11 McCauley's decision to take on the case even when the other attorneys he talked with rejected  
12 getting involved; as if because he was retiring, he lacked the concerns expressed by younger  
13 attorneys. The Court incorrectly interpreted that the mention of his retirement somehow meant a  
14 more experienced litigator was needed (see above). As stated on the record, the real reason he  
15 took the case is because he was concerned about his own vote, his family was distressed about  
16 theirs, his clients and neighbors were also very apprehensive. In fact, he constantly received  
17 calls from citizens asking him to pursue this issue or that. And, of course he got the warnings  
18 and threats, lots of them, which he simply ignored. An associate was so concerned he offered a  
19 security team to protect his home and family. He declined. (*See* Mr. McCauley's real reason for  
20 taking this Contest as stated directly to the Court on the record, Transcript pages 38 lines 7-12,  
21 attached hereto as Exhibit A).

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## CONCLUSION

Based on the above, Mr. Finchem believes he has provided the Court with ample evidence, more than sufficient votes in controversy, to easily overturn the election. Certainly to prove his Contest as justified. No Answer has been filed in this Contest as statutorily required and as the Legislature intended. No ex parte hearing has been held as required pursuant to ARS 16-675. No declaration(s), affidavit(s), verifications, or anything of substance from either Hobbs or Fontes is yet before this Court. This is inapposite to Mr. Finchem's, as of yet, undisputed facts submitted in his Verified Statement of Election Contest. It is clear that based on the election chaos, other similar election contests, the vast number of questionable votes, expert opinions and evidence, Mr. Finchem's Contest was certainly not frivolous. Based on the misperception of the number of overturnable votes actually alleged in the SoEC and the new expert opinions, each stating independently and for different reasons why hundreds of thousands of votes must be overturned, which are now before the Court, the Under Advisement Ruling must be vacated.

Respectfully submitted this 16<sup>th</sup> day of March, 2023.

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1 A copy of the foregoing was e-filed on March 16, 2023.

2 A copy of the foregoing was emailed this 16<sup>th</sup> day of March 2023 to the following:

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15 /s/ Dan McCauley

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