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

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

Case No.: CV2022-053927

**OBJECTION AND OPPOSITION TO
ADRIAN FONTES' MOTION FOR
SANCTIONS AND APPLICATION FOR
ATTORNEYS' FEES**

18 Now comes Contestant, Mark Finchem, by and through his counsel undersigned, Daniel
19 McCauley III of McCauley Law Offices, P.C., and files this Objection and Opposition to Contestee
20 Adrian Fontes' ("Fontes") Application for Attorneys' Fees on the grounds that, *inter alia*, Fontes'
21 *Motion for Sanctions* was untimely and violated the Court's Order; he has admitted that he has
22 not incurred any Attorneys' Fees and as further argued herein below:

23 **MEMORANDUM AND AUTHORITIES**

- 24
1. Contestant has already filed with this Court and served the following:
 - A. *Opposition to Secretary of State Fontes' Motion for Sanctions* filed
January 5, 2023; and his

1 B. *Motion for Reconsideration of Under Advisement Ruling* (“*Motion for*
2 *Reconsideration*”) filed March 16, 2023.

3 In the interest of judicial economy, Finchem hereby restates and incorporates by reference, the
4 foregoing as if fully set forth herein, including but not limited to all the arguments, authorities,
5 and relief requested therein.

6 2. Contestant further amends his *Motion for Reconsideration* as follows:

7 3. Fontes’ purported *Motion for Sanctions* (“*Motion*”) was filed on 12/28/2023 when
8 the Court’s “UNDER ADVISEMENT RULING,” (“*Ruling*”) specifically ordered Fontes’
9 *Motion* to be filed within 10-days after “entry” which was “filed” on 12/16/2023 (“*Order*”),
10 therefore it was two days late and untimely, in clear violation of the Court’s *Ruling*;

11 4. Notwithstanding Finchem’s continued contention that the Ariz. R. of Civ. P.
12 (“*ARCP*”) do not apply to election contests, the Court also Ordered that it would rule upon “any
13 such motion” upon receipt of briefing and argument in accordance with Ariz. R. Civ. P. Rule 7.1
14 which Fontes’ “*Motion*” also failed to comply with. This was yet another violation of the Court’s
15 *Order*, to wit:

16 A. ARCP 7.1(a)(1) required Fontes’ *Motion* to, in relevant part, state with
17 particularity the grounds for granting the *Motion*, which it failed to do. Instead
18 the *Motion* provided 14 pages of obfuscations, incoherent ad hominem attacks
19 and vitriolic rhetoric;

20 B. ARCP 7.1(a)(2) requires any supporting memorandum (which was not provided
21 either) to include “...citations to the specific parts or pages of supporting
22 authorities and evidence;” which it did not comply with and also failed to state
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1 how the few authorities provided in the Motion had anything to do with the facts
2 of this election contest; and

3 C. It is also mandatory under ARCP 7.1(a)(3) that affidavits and other evidence be
4 filed (“must be filed”) with the motion or memorandum; which was not done
5 either.

6 For these reasons alone, the Court should have summarily denied Fontes’ *Motion* in the first
7 instance, for violating the Court’s Order and for failing to comply, substantially or otherwise, “in
8 accordance with” ARCP 7.1.

9 5. It should also be noted that ARCP 7.1(e) further provides for the filing of motions
10 for reconsideration of the Court’s Ruling, which Mr. Finchem is seeking and this is intended to
11 amend.

12 6. In pertinent part, as already presented to the Court, Arizona’s appellate courts
13 have consistently over the decades ruled that attorneys’ fees are not to be granted in Election
14 Contests. The courts have determined that fee awards are based upon general statutes such as the
15 statute cited by the Court as foundation for its prior Ruling regarding costs. Appellate courts
16 have also provided guidance and explained that when a specific statute like A.R.S. Title 16
17 governs a Contest that specific statutes controls. Therefore, since Title 16 does not provide for
18 an award of fees or costs such awards are impermissible. For example, in Democrat Party of
19 Pinal County v. Ford, 269 P.3d 721, 228 Ariz. 545 (Div.2, 2012) the Democrat Party appealed a
20 denial of an award of fees and costs by the trial court. The appellate tribunal upheld the trial
21 court in denying such an award. To avoid future confusion, the court provided guidance when it
22 made a painstaking a detailed analysis. It stated that statutes allowing fees and costs like the
23 court cited (ARS 12-349) are “general” statutes. Whereas, other statutes like the election contest
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1 statutes under ARS Title 16, are “particular” statutes, *i.e.*, a form of “special action.” The
2 appellate court reiterated prior courts pointing out that if the Legislature wanted awards of fees
3 and costs in an election contest it could have easily included such in Title 16. The Legislature
4 did not and its decision not to do so was deliberate. And, because the Legislature chose not to do
5 so and was silent on fees and costs they cannot then be awarded. Whether a court deemed an
6 action frivolous under statutes like ARS 12-349, that judicial determination is not determinative
7 nor a reason to superimpose a sanction contrary to the Legislature’s will. This is also elucidated
8 in the first sentence of ARS 12-349 sub-section A which states: “[e]xcept as otherwise provided
9 by, and **not inconsistent with another statute, in any civil action commenced or appealed in a**
10 **court of record in this state.**” First, **this is an election contest, not a “civil action”**. (emphasis
11 added) ARS 12-349 is inconsistent with ARS 16-672 and the Legislative intent of its codified,
12 comprehensive scheme.

13 **Attorney’s Fees are Not Applicable in this Contest Because Such an Award Would**
14 **Unjustifiably Enrich Fontes.**

15 7. In the Declaration accompanying Fontes’ “China Doll” application, paragraph 10
16 admits that Fontes is not obligated to pay, nor has he incurred any attorneys’ fees, costs, or
17 damages, stating that “pursuant to a written engagement agreement with Sherman & Howard, a
18 **third party has agreed to pay Sherman & Howard for its representation of Secretary Fontes** in
19 this action, at the aforementioned hourly rate.” (emphasis added)

20 8. First, Fontes has suffered no loss sufficient to support an award of attorneys’ fees
21 (even if such relief was available in an election contest – which it is not). In Addition, if such an
22 award was somehow granted, would Fontes get the money and profit financially in an amount as
23 great as \$67,000.00, more than the average Arizona Resident makes in a year? Will Sherman &
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1 Howard (“S&H”) just keep the award and become doubly compensated? There is no way for
2 this Court to know. If S&H misrepresented to this Court that Fontes has an attorney fee to pay
3 when he admittedly does not, what is to say S&H or Fontes will not misrepresent what ultimately
4 happens to it? Someone will be unjustifiably enriched which is what Fontes is attempting
5 pursuant to his *Motion* (and his *Motion to Dismiss*, see below).

6 9. Moreover, this is an issue between Fontes’ undisclosed benefactor and S&H or
7 possibly, but unlikely, between Fontes and said benefactor. But, according to his counsel, no
8 matter what, *Fontes has not paid one cent in attorneys’ fees* that he can recover. Mr. Finchem
9 therefore contends Fontes has misled this Court by filing not only his Motion for Attorneys’ Fees
10 which he never incurred; but also by filing his *Motion to Dismiss* which provided no authority
11 for its filing other than seeking attorneys’ fees under 12-349 which again, Fontes has not
12 incurred. (Note, on information and belief Mr. Finchem contends a similar contract also exists
13 between Contestee Hobbs’ counsel and this mystery third-party.)

14 10. It has been admitted that Fontes is not responsible for the fees or costs in this
15 contest. Yet, his law firm makes a claim for “his” legal fees when it knows there are none.

17 CONCLUSION

18 11. Based on the arguments and authorities cited in the two prior filings by Finchem
19 as well as the above argument and the fact that Fontes has not paid any attorneys’ fees, this Court
20 must dismiss Contestee’s *Application for Attorneys’ Fees* in full.

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Respectfully submitted this 27th day of March 2023.

/s/ Daniel J. McCauley III
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A copy of the foregoing was emailed this 27th day of March 2023 to the following:

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