Clerk of the Superior Court
*** Electronically Filed ***
T. Hays, Deputy
3/27/2023 10:14:51 AM
Filing ID 15730755

Daniel J. McCauley III, Bar No. 015183
**McCauley Law Offices, P.C.**
6638 E. Ashler Hills Drive
Cave Creek, AZ 85331
Dan@MLO-AZ.com
(480) 595-1378 office
*Attorney for Plaintiff/Contestant*

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

| | |
|---|---|
| Mark Finchem, an individual,<br><br>Plaintiff/Contestant,<br>v.<br>Adrian Fontes, *et al*.,<br><br>Defendants/Contestees. | Case No.: CV2022-053927<br><br>**OBJECTION AND OPPOSITION TO ADRIAN FONTES' MOTION FOR SANCTIONS AND APPLICATION FOR ATTORNEYS' FEES** |



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

**MEMORANDUM AND AUTHORITIES**

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

B. *Motion for Reconsideration of Under Advisement Ruling* ("*Motion for Reconsideration*") filed March 16, 2023.

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

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

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

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

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

B. ARCP 7.1(a)(2) requires any supporting memorandum (which was not provided either) to include "…citations to the specific parts or pages of supporting authorities and evidence;" which it did not comply with and also failed to state

**McCauley Law Offices, P.C.**
6638 E. Ashler Hills Drive
Cave Creek, AZ 85331

how the few authorities provided in the Motion had anything to do with the facts of this election contest; and

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

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

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

6. In pertinent part, as already presented to the Court, Arizona's appellate courts have consistently over the decades ruled that attorneys' fees are not to be granted in Election Contests. The courts have determined that fee awards are based upon general statutes such as the statute cited by the Court as foundation for its prior Ruling regarding costs. Appellate courts have also provided guidance and explained that when a specific statute like A.R.S. Title 16 governs a Contest that specific statutes controls. Therefore, since Title 16 does not provide for an award of fees or costs such awards are impermissible. For example, in Democrat Party of Pinal County v. Ford, 269 P.3d 721, 228 Ariz. 545 (Div.2, 2012) the Democrat Party appealed a denial of an award of fees and costs by the trial court. The appellate tribunal upheld the trial court in denying such an award. To avoid future confusion, the court provided guidance when it made a painstaking a detailed analysis. It stated that statutes allowing fees and costs like the court cited (ARS 12-349) are "general" statutes. Whereas, other statutes like the election contest

McCauley Law Offices, P.C.
6638 E. Ashler Hills Drive
Cave Creek, AZ 85331

statutes under ARS Title 16, are "particular" statutes, *i.e*, a form of "special action." The appellate court reiterated prior courts pointing out that if the Legislature wanted awards of fees and costs in an election contest it could have easily included such in Title 16. The Legislature did not and its decision not to do so was deliberate. And, because the Legislature chose not to do so and was silent on fees and costs they cannot then be awarded. Whether a court deemed an action frivolous under statutes like ARS 12-349, that judicial determination is not determinative nor a reason to superimpose a sanction contrary to the Legislature's will. This is also elucidated in the first sentence of ARS 12-349 sub-section A which states: "[e]xcept as otherwise provided by, and ***not inconsistent with another statute, in any civil action commenced or appealed in a court of record in this state***." First, ***this is an election contest***, ***not*** ***a "civil action"***. (emphasis added) ARS 12-349 is inconsistent with ARS 16-672 and the Legislative intent of its codified, comprehensive scheme.

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

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

8. First, Fontes has suffered no loss sufficient to support an award of attorneys' fees (even it such relief was available in an election contest – which it is not). In Addition, if such an award was somehow granted, would Fontes get the money and profit financially in an amount as great as $67,000.00, more than the average Arizona Resident makes in a year? Will Sherman &

McCauley Law Offices, P.C.
6638 E. Ashler Hills Drive
Cave Creek, AZ 85331

Howard ("S&H") just keep the award and become doubly compensated? There is no way for this Court to know. If S&H misrepresented to this Court that Fontes has an attorney fee to pay when he admittedly does not, what is to say S&H or Fontes will not misrepresent what ultimately happens to it? Someone will be unjustifiably enriched which is what Fontes is attempting pursuant to his *Motion* (and his *Motion to Dismiss*, see below).

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

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

**CONCLUSION**

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

**McCauley Law Offices, P.C.**
6638 E. Ashler Hills Drive
Cave Creek, AZ 85331

Respectfully submitted this 27th day of March 2023.

/s/ Daniel J. McCauley III
Daniel J. McCauley III,
Bar No. 015183
**McCauley Law Offices, P.C.**
6638 E. Ashler Hills Drive
Cave Creek, AZ 85331
Dan@MLO-AZ.com
(480) 595-1378 office
*Attorney for Contestant Mark Finchem*

A copy of the foregoing was emailed this 27th day of March 2023 to the following:

Craig A. Morgan
**Sherman & Howard, LLC**
2555 E. Camelback Road, Suite 1050
Phoenix, Arizona 85016
Ph: 602.240.3062
cmorgan@shermanhoward.com
*Attorney for Contestee Fontes, Individually*

Amy B. Chan
**General Counsel for the Secretary of State**
1700 W. Washington St., Floor 7
Phoenix, AZ 85007
Ph: 602.542.6167
achan@azsos.gov
*Attorney for Contestee Fontes, officially as SoS*

Andy Gaona
**Coppersmith Brockelman PLC**
2800 N. Central Ave., Ste. 1900
Phoenix, AZ 85004
Ph: 602.381.5486
agaona@cblawyers.com
*Attorney for Defendant Hobbs*

/s/ Dan McCauley_____
Dan McCauley

**McCauley Law Offices, P.C.**
6638 E. Ashler Hills Drive
Cave Creek, AZ 85331