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*Attorneys for Plaintiffs/Contestants*

**IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MOHAVE**

| | |
|---|---|
| JEANNE KENTCH, an individual; TED BOYD, an individual; ABRAHAM HAMADEH, an individual; and REPUBLICAN NATIONAL COMMITTEE, a federal political party committee<br><br>Plaintiffs/Contestants,<br><br>v.<br><br>KRIS MAYES,<br><br>Defendant/Contestee, | No. CV-2022-01468<br><br>**RESPONSE IN OPPOSITION TO MOTION FOR ATTORNEYS' FEES**<br><br>(Assigned to the Hon. Lee F. Jantzen) |

and

ADRIAN FONTES, in his official capacity as the Secretary of State; LARRY NOBLE, in his official capacity as the Apache County Recorder; APACHE COUNTY BOARD OF SUPERVISORS, in their official capacity; DAVID W. STEVENS, in his official capacity as Cochise County Recorder; COCHISE COUNTY BOARD OF SUPERVISORS, in their official capacity; PATTY HANSEN, in her official capacity as the Coconino County Recorder; COCONINO COUNTY BOARD OF SUPERVISORS, in their official capacity; SADIE JO BINGHAM, in her official capacity as Gila County Recorder; GILA COUNTY BOARD OF SUPERVISORS, in their official capacity; WENDY JOHN, in her official capacity as Graham County Recorder; GRAHAM COUNTY BOARD OF SUPERVISORS, in their official capacity; SHARIE MILHEIRO, in her official capacity as Greenlee County Recorder; GREENLEE COUNTY BOARD OF SUPERVISORS, in their official capacity; RICHARD GARCIA, in his capacity as the La Paz County Recorder; LA PAZ COUNTY BOARD OF SUPERVISORS, in their official capacity; STEPHEN RICHER, in his official capacity as the Maricopa County Recorder; MARICOPA COUNTY BOARD OF SUPERVISORS, in their official capacity; KRISTI BLAIR, in her official capacity as the Mohave County Recorder; MOHAVE COUNTY BOARD OF SUPERVISORS, in their official capacity; MICHAEL SAMPLE, in his official capacity as Navajo County Recorder; NAVAJO COUNTY BOARD OF SUPERVISORS, in their official capacity; GABRIELLA CAZARES-KELLY, in her official capacity as the Pima County Recorder; PIMA COUNTY BOARD OF SUPERVISORS, in their official capacity; DANA LEWIS, in her official capacity as the Pinal County Recorder;

PINAL COUNTY BOARD OF SUPERVISORS, in their official capacity; SUZANNE SAINZ, in her official capacity as the Santa Cruz County Recorder; SANTA CRUZ COUNTY BOARD OF SUPERVISORS, in their official capacity; MICHELLE M. BURCHILL, in her official capacity as the Yavapai County Recorder; YAVAPAI COUNTY BOARD OF SUPERVISORS, in their official capacity; RICHARD COLWELL, in his official capacity as the Yuma County Recorder; and YUMA COUNTY BOARD OF SUPERVISORS, in their official capacity,

Defendants.

Defendant/Contestee Kris Mayes' Motion for Attorneys' Fees pursuant to Arizona Revised Statute section 12-349, which has since been joined by Defendant Secretary of State Adrian Fontes (collectively, "Defendants"), is baseless and should be denied.[1] Through overwrought and politically charged language, Defendants seeks to turn this case into something it is not. This case, like *Bush v. Gore*[2], represents the sort of standard, run

[1] Based on the named counsel, Plaintiffs understand this Motion to refer to the proceedings that commenced with the filing of the Statement of Contest on December 9 and ended with an order from the bench on December 23, 2022. Plaintiffs are represented by different counsel of record in subsequent filings. For example, Plaintiffs are represented by Mr. La Sota and attorneys from the Davillier Law Group, LLC, in their motion for a new trial, while attorneys for the Dhillon Law Group and Wilenchick & Bartness, P.C. are not counsel of record on that Motion. Moreover, Plaintiffs note that, while Mr. Warrington and Mr. Lawkowski submitted applications to be admitted *pro hac vice* to the State Bar of Arizona, the State Bar of Arizona has not yet issued a Notice of Receipt of Complete Application, which is a predicate for a Motion to Associate Counsel Pro Hac Vice. As a result, a Motion has not yet been filed or approved, and is likely now moot.

[2] There are many close parallels between this case and post-election litigation concerning the 2000 presidential election. For comparison, the initial margin between Governor Bush and Vice President Gore was 1,784, or about 0.03%, which is similar to the initial margin in this race. That margin was significantly reduced as additional ballots

of the mill post-election litigation that went largely unremarked in close races prior to 2020.[3]

As the Court acknowledged, and contrary to Defendants' claims, Plaintiffs have emphasized that this case is not and was not about impugning election officials or undermining confidence in Arizona's elections: "Plaintiff [did] not alleg[e] political motives or fraud or personal agendas being pushed. [They] simply alleg[ed] misconduct by mistake, or omission by election officials, led to an erroneous count of votes and which if true could have led to an uncertain result." *Kentch v. Mayes*, CV-2022-01468 (Ariz. Supper. Ct. Dec. 20, 2022) (Court Order/Notice/Ruling). To the contrary, Plaintiffs brought and litigated this case to encourage confidence in Arizona's election results by ensuring that all legal votes were properly counted and have deliberately refrained from making incendiary accusations about intentional misconduct in these proceedings. The pervasive undisputed issues with the administration of the election, including long lines, misprinted ballots, and tabulation machines incapable of reading ballots, led to several lawsuits by the affected

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were examined. Moreover, *Bush v. Gore* began with a contest to the certification of of state election results under Florida's election contest statute, which was similar to Arizona's, with Vice President Gore alleging in part that the Florida's voting machines failed to properly count all the votes, resulting in unjustified undervotes. The 2000 Presidential Election in Florida generated substantial litigation, including two United States Supreme Court cases, *see also Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), not party or attorney sanctions, and was decided by 537 votes. *See* Federal Election Commission, 2000 Presidential General Election Results (Dec. 2001), https://web.archive.org/web/20120912083944/http://www.fec.gov/pubrec/2000presgeresults.htm.

[3] To wit, the firm representing Defendant Mayes in this action represented Al Franken in proceedings related to the 2008 Senate race that saw a 518-vote swing in the 2008 Minnesota Senate Race, which swung the election from Norm Coleman to Mr. Franken. *See In re Contest of General Election Held on November 4, 2008, for Purposes of Electing a United States Senator from the State of Minnesota*, 767 N.W.2d 453 (Minn. 2009).

campaigns. Of all such cases, this one was the most restrained in terms of its allegations and the conduct of its trial.

As the subsequent recount results revealed, the December 5 canvass results *were* erroneous. On December 5, Plaintiff Hamadeh was down by 511 votes. During the recount, Plaintiff Hamadeh picked up an additional 427 votes statewide, many of which were not previously counted due to human error. *See* Mary Jo Pitzl, Sasha Hupka and Tara Kavaler, *Kris Mayes Wins Attorney General Race Over Abe Hamadeh After Recount, But Margin Narrows*, Arizona Republic (Dec. 30, 2022), https://www.azcentral.com/story/news/politics/elections/2022/12/29/arizona-recount-results-due-thursday-in-ag-secretary-of-state-house-races/69763117007/.[4] "The mere fact that a party is ultimately unable to sustain its claims . . . does not automatically equate to a determination that the complaint itself was frivolous, unjustified, or put forth for an improper purpose." *Compassionate Care Dispensary v. Arizona Department of Health Services*, 244 Ariz. 205, 216 (App. 2018)); *see also Lake v. Hobbs*, CV 2022-095403 (Ariz. Super. Ct. Dec. 27, 2022) (Minute Entry) ("The fact that Plaintiff failed to meet the burden of clear and convincing evidence required for each element of A.R.S. § 16-672 does not equate to a finding that her claims were, or were not, groundless and presented in bad faith."). Contrary to Defendant's accusation, Plaintiffs' election contest was not groundless.

The accusation that a party or attorney acted in bad faith is incredibly serious. Here it is also completely unsupported by the facts. Plaintiffs brought this case because they

[4] Kris Mayes also gained 196 votes, resulting a new margin of 280 votes – down from 511 at the time the contest was initiated. *Id.*

believed in good faith that Plaintiff Hamadeh won the 2022 Attorney General's race and they would be able to prove it at trial. As even counsel for Defendant Maricopa County acknowledged, Plaintiffs have acted in good faith. *Kentch, et al. v. Mayes, et al.*, CV-2022-01468 (Ariz. Super. Ct. Dec. 22, 2022) (Emergency Hearing) (Emergency Hearing transcript 17: 8-13 "Your Honor, the final thing that I would like to say is I do believe Mr. La Sota has acted in good faith. He said the parties have. I completely agree. Election contests are hard. They are compressed. There's not enough time. Buts that's a question for the legislature.")

Despite continual efforts by Mr. Barr to try to mischaracterize this cause of action as alleging something nefarious on the part of election workers, it did not. The Court itself seemed to recognize this when it commented that:

> I really compliment the plaintiffs, in that regard, and I think I've done that before both in writing and on the record, this isn't one of those cases alleging political coercion, isn't alleging incompetence or anything like that. It's just saying some mistakes were made based on some of these processes and that some votes may or may not have been counted. This hasn't been the type of case that sometimes comes before the court on these kind of procedures.

(Transcript, 115: 15-19). That is an accurate summation of the case brought by Plaintiffs.

The limited ballot inspection granted by the Court in this matter concluded after 6:00 pm local time on December 22, less than 14 hours before the evidentiary hearing in this matter was scheduled to begin. Once that limited inspection was complete, it was clear that, under the constraints imposed, Plaintiffs would not be able to meet their burden at trial. As a result, Plaintiffs conferred and changed their entire trial strategy specifically to avoid unnecessarily delay, declining to call additional witnesses that Plaintiffs had prepared,

conceding that Plaintiffs would not be able to satisfy their burden under the relevant constraints, and preserving the parties' ability to appeal as necessary and appropriate.

This strategy is utterly irreconcilable with Defendants' accusation that the Plaintiffs' acted in bad faith or brought this case for improper reasons. After all, if Plaintiffs did not think they could win when they filed their contest, why would they concede that they could not satisfy their burden at trial? If Plaintiffs brought this case for improper motives, why did they not pursue those motives (whatever they allegedly were) through testimony at trial?

Finally, Defendants claim that Plaintiffs engaged in unreasonable delay and/or expansion of this litigation. These accusations are inconsistent with the record. The entirety of the proceedings at issue took place in less than 14 days, from the filing of the contest, through hearings on motions to dismiss and ballot inspection, and an evidentiary hearing. Typical litigants in standard cases get far longer just to issue summons, let alone complete the initial trial phase of litigation. The notion that there was unreasonable delay or expansion in this matter is patently absurd given this hyper-compressed schedule.

This contest was neither groundless nor brought and pursued in bad faith nor did Plaintiffs engage in unreasonable delay or expansion. Defendants' baseless and hyperbolic motion must be denied.

## I. Additional Factual Misstatements by the Defendants

In the Introduction and Background sections, the Defendants make a number of assertions that are misleading or false. To begin with, Plaintiffs never conceded that their cause of action "failed as a matter of law." (Motion 1:9-10). At the trial, Plaintiffs' counsel explained that, in the extremely short time periods involved, Plaintiffs simply were not able

to develop the evidence necessary to sustain the case. But Plaintiffs conceded no legal flaws in their cause of action.

In a similar vein, the Defendants complain that Plaintiffs unnecessarily expanded the proceedings and point to the short trial as evidence of this. Of course, the ballot inspection concluded the night before at approximately 6 p.m. That left very little time to digest the results and take stock of what the ballot inspection had shown.

As it was, Plaintiffs sent an email the morning before the trial, at the earliest possible moment it could, explaining that Plaintiffs' presentation would be brief, and Plaintiffs would take certain steps to ensure that the record was accurate. (Exhibit 1). This email was never mentioned by the Defendants. The hearing went as expeditiously as it could, and-Plaintiffs took steps to minimize the burden on everyone of this trial.

Despite these good faith efforts to not waste anyone's time, at the same time the Defendants attack the Plaintiffs for supposedly unnecessarily expanding the proceedings they also complain that the Plaintiffs' case was too short and limited in terms of exhibits offered. (Motion 4: 7-12).

Defendants' contention that Plaintiffs' counsel, after the ruling denying their motion to dismiss, "delayed" in conferring with counsel for Ms. Mayes" is also false. Plaintiffs' counsel contacted Maricopa County prior to the Court even ruling on the motion to dismiss in order to try to achieve an expeditious inspection of the ballots in the event the Court granted the petition to inspect ballots. (Exhibit 2).

## II. Plaintiffs' Contest was Not Groundless

Plaintiffs' election contest was not groundless. For purposes of A.R.S. § 12-349, "'[g]roundless' and 'frivolous' are equivalent terms." *Rogone v. Correia*, 236 Ariz. 43, 50 (App. 2014). "The mere fact that a party is ultimately unable to sustain its claims . . . does not automatically equate to a determination that the complaint itself was frivolous." *Compassionate Care Dispensary v. Arizona Department of Health Services*, 244 Ariz. 205, 216 (App. 2018); *see also Goldman v. Sahl*, 248 Ariz. 512, 531 (App. 2020) ("Even if [Plaintiff] believed his claim was a long shot, the five briefs submitted to assist this court with the issues presented yielded five distinct – but thoughtful, well-reasoned, and well-supported – positions on the law. Therefore, we cannot say that the abuse-of-process claim was 'insubstantial, frivolous, groundless, or otherwise unjustified.'" (quoting *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.,* 177 Ariz 316, 319 (App. 1993)).

The contest alleged in part that the results of the December 5 canvass were erroneous. The subsequent results of the mandatory recount show they *were*. During the recount, Plaintiff Hamadeh picked up an additional 427 votes statewide, many of which were not previously counted due to "human error." *See* Mary Jo Pitzl, Sasha Hupka and Tara Kavaler, *Kris Mayes Wins Attorney General Race Over Abe Hamadeh After Recount, But Margin Narrows*, Arizona Republic (Dec. 30, 2022), https://www.azcentral.com/story/news/politics/elections/2022/12/29/arizona-recount-results-due-thursday-in-ag-secretary-of-state-house-races/69763117007/.[5] In addition, the limited ballot inspection that occurred showed that there were legal votes that were not

[5] Kris Mayes also gained 196 votes, resulting a new margin of 280 votes – down from 511 at the time the contest was initiated. *Id.*

counted. While Plaintiffs were not able to meet their burden at the December 23 evidentiary hearing to prove that Plaintiff Hamadeh won the election, it is clear that the claim that the vote count was erroneous was not frivolous -- the count was in fact wrong and had Plaintiff been afforded time to complete a full ballot inspection that review would show that the current count is wrong, as even the limited review conducted on December 22, 2022 showed.

This conclusion does not depend on *ex post* reasoning. At the time the Statement of Contest was filed, the margin between candidates for Attorney General was 511 votes – or about 0.02%. That is (and was) an incredibly close margin, constituting of a small fraction of the margin that is considered sufficiently close to trigger an automatic recount under Arizona law. *See* A.R.S. § 16-661. It is also well within the margin of outcome determinative error. For example, in the 2000 presidential race, Vice President Gore picked up over 1,200 votes during the recount and subsequent litigation, while the 2008 Minnesota Senate race swung by a net total of 518 votes, changing the outcome of the race[6]. Thus, there were nonfrivolous grounds for believing that seemingly minor errors in vote counting would affect the result of the election or at least render it uncertain. *See generally Findley v. Sorenson*, 35 Ariz. 265 (1929).

There were also nonfrivolous grounds for believing that such errors occurred. Before filing this contest, Plaintiffs reviewed over 2,000 complaints of Election Day irregularities, interviewed over 145 witnesses, including local experts and fact

[6] *In re Contest of General Election Held on November 4, 2008, for Purposes of Electing a United States Senator from the State of Minnesota*, 767 N.W.2d 453 (Minn. 2009).

witnesses who were willing to prepare and submit affidavits in support of their claims. Witnesses and records showed that voting machines were not picking up certain types of undervotes, and that such undervotes would not be corrected through adjudication. In addition, Plaintiffs reviewed numerous public record requests, which raised serious concerns about potentially hundreds of Arizonians who had attempted to vote on Election Day but whose ballots were not counted. Throughout this litigation, Plaintiffs have been fighting to ensure that every legal vote that was properly cast was counted. Litigants are not required to be able to meet their burden of proof at the outset of a case, including at the outset of an election contest.

Litigants often reasonably rely on the discovery process to bolster their claims. To wit, the election contest statute explicitly contemplates that ballot inspection will be necessary to prepare for trial. *See* A.R.S. § 16-677. The unfortunate reality for any litigant is that one does not always get the time or information that one needs in discovery. This is particularly true in a case like this, where any claim must be brought within weeks of the election and tested in an evidentiary hearing almost immediately.

Perhaps the most telling indication of the lack of merit in Defendants' argument that the cause of action is groundless is A.R.S. § 16-677. If every shred of potentially relevant information were required to be known by a litigant prior to filing suit, then why would the Legislature have provided ballot inspection rights? By law, access to cast ballots is strictly controlled, so what might be gathered from physically inspecting a ballot is generally unknowable, with any certainty, prior to actually inspecting the ballots. That is why each major political party relies on experts, and vast Election Day Operations, including poll

watchers, to try to glean a sense of the types of issues that have arisen and could improperly sway the outcome of an election. That is exactly what Plaintiffs relied on in filing suit, and that is sufficient.

In this case, Plaintiffs were not able to obtain expedited discovery and had less time to inspect ballots than they sought. The result was that Plaintiffs were unable to meet their burden. But it does not follow that the Contest itself was groundless. Arizona Courts, including implicitly this Court, have ruled that that at least portions of the Arizona Rules of Civil Procedure apply to election contests. Accordingly, Plaintiffs had a reasonable, good faith basis for believing that limited discovery was possible in an election contest. Moreover, Plaintiffs had significantly less time to inspect ballots than they sought and were unable to utilize tools such as the cast vote record ("CVR") that would make ballot inspection more efficient. It was not clear at the outset of this litigation that these circumstances would come to pass, thus Plaintiffs had a reasonable, good faith basis for believing that there would be more ballot inspection, and that more ballot inspection would result in Plaintiffs satisfying their burden in this case.

Moreover, while not dispositive, it is significant that four out of five of Plaintiffs' claims survived a motion to dismiss in this case. At base, the Defendants keep attempting to relitigate the motion to dismiss that they lost.

The decision not to put on a longer presentation at the evidentiary hearing was out of respect for the Court and the other parties and in recognition that the evidence would not be sufficient to meet Plaintiffs' burden, not a concession that Plaintiffs had *no* evidence or

that the Contest itself was somehow groundless. Defendants' motion fails to meet its burden of proving that the Contest was groundless and should be denied.

### III. Plaintiffs' Contest was Brought and Litigated in Good Faith

Plaintiffs' contest was brought and litigated in good faith. "While groundlessness is determined objectively, bad faith is a subjective determination." *Takieh v. O'Meara*, 252 Ariz. 51, 61 (App. 2021) (citing *Rogone v. Correia*, 236 Ariz. 43, 50, ¶ 22 (App. 2014)). Moreover, since groundlessness and bad faith are both separate elements, *see* A.R.S. § 12-349(F), bad faith requires something more than just an insufficiently grounded complaint. It typically requires that an action be brought for improper motives. *See generally Compassionate Care Dispensary*, 244 Ariz. At 217 ¶ 43 (denying sanctions under A.R.S. § 12-349 because "[n]either party has proved the other's filings were frivolous or filed with an improper purpose.").

Defendants' discussion on the bad faith element is simply woeful. Defendants do not (and could not) allege that this case was brought for any improper motive. This case was brought because Plaintiffs believed that Plaintiff Hamadeh received more votes for Attorney General than his opponent and that a full count of all legal ballots would prove that to be true. Plaintiffs specifically disclaimed broader arguments questioning the legitimacy of the electoral process or alleging fraud or political motivations dictated the outcome of the race.

Plaintiffs have pursued these claims in good faith. As even counsel for Defendant Maricopa County acknowledged, Plaintiffs have acted in good faith, according to Maricopa Deputy County Attorney Joe LaRue: "Your Honor, the final thing that I would like to say

is I do believe Mr. La Sota has acted in good faith. He said the parties have. I completely agree. Election contests are hard. They are compressed. There's not enough time. Buts that's a question for the legislature." *Kentch, et al. v. Mayes, et al.*, CV-2022-01468 (Ariz. Super. Ct. Dec. 22, 2022) (Emergency Hearing transcript 17: 8-13

Defendants' discussion on this necessary element consists of a discussion of the first element of the inquiry, the alleged groundlessness of the claim, as well as a couple of innocuous tweets made by Mr. Hamadeh. But of course, the first element is its own distinct element—if proving that were enough, there would be no need for the second subjective bad faith element. See *Delgadillo v. Dunn*, Case No. CV2019-004938, (Ariz. Super. Ct. Oct. 17, 2019 and Nov. 26, 2019) (denying an application for attorney's fees in an election contest brought by a candidate that lost by an 88% to 12% margin because "[it]t was clear to the Court that Plaintiff believed he had a legitimate challenge and the action was not brought for delay or harassment…[t]he evidence at the hearing did not support Plaintiff's claims but the Court cannot conclude those claims were not made by Plaintiff in good faith…").

If there were any doubt that Plaintiffs were acting in good faith (and there should be none), they are dispelled by Plaintiffs' conduct at the December 23 hearing. If Plaintiffs were acting from improper motives or bad faith, what possible advantage could be gained by declining to call prepared witnesses and acknowledging at the outset that Plaintiffs would not be able to meet their burden of proof? Whatever Defendants think about the grounds for bringing this contest, Plaintiffs' conduct at the December 23 hearing is *only* consistent

with a party that is acting in good faith both in bringing its claims and in how they are presented.

As stated above, Defendants cite a series of tweets from one Plaintiff that were posted *after* the conclusion of trial in this matter. First, because these tweets were sent after the conclusion of this matter they are of highly limited value in assessing motives *during* these proceedings. Second, they were made outside of the judicial proceedings, where rhetoric is often more heated and less precise. Third, to the extent they are an accurate representation of anyone's views when presented in isolation, they represent the views of one Plaintiff, and may not be imputed to the other Plaintiffs nor Plaintiffs' counsel. Fourth, even if taken at face value, nothing in the cited tweets suggest, let alone prove, that Plaintiff brought this election contest in bad faith; to the contrary, they indicate that Plaintiff Hamadeh continues to believe that he won the election and that a full count of all legal votes would prove it.

Good faith is assessed subjectively. Even if Defendants are not persuaded, there is no indication that Plaintiffs did not believe in the claims they brought and that they would be able to prove them with sufficient discovery and ballot inspection.

**IV. Plaintiffs Did Not Unreasonably Expand or Delay the Proceedings**

This matter was filed, there was a return hearing, a hearing on a motion to dismiss, a hearing on inspection of ballots, an evidentiary hearing, and the Court ruled from the bench, all in less than 14 days – significantly less than the time than a Plaintiff typically has to *serve* a complaint under the Arizona Rules of Civil Procedure, let alone fully litigate a case. *See* Rule 4(i), Ariz. R. of Civ. P. Throughout this process, Plaintiffs were highly

active participants and, in several cases, the moving party. In light of this constant attention and activity directed at resolving this matter within the hyper-compressed timeframe necessitated by the election contest statute, Defendants' claims of "unreasonable delay" are completely meritless.

Likewise, Defendant's claim that Plaintiffs unreasonably expanded the litigation in the period at issue is baseless. Defendants seem to suggest that Plaintiffs unreasonably expanded or delayed the proceeding by proceeding to the trial date. However, proceeding to trial on the claims initially brought cannot be reasonably said to "expand" the proceeding, and reducing a trial scheduled for two days potentially to less than half a day by conceding that Plaintiffs cannot meet their burden of proof after creating a record for appeal cannot constitute unreasonable delay.

When not relitigating their unsuccessful motion to dismiss, Defendants focus on the fact that Plaintiffs did not dismiss counts at the beginning of the evidentiary hearing. But Defendants offer no argument (nor could they) for how this claim is distinct from Defendants' claim that this action should not have been brought.

Defendants suggest that there was some period between when Plaintiffs knew they would not be able to meet their burden and the trial. This argument ignores the compressed timeline for this matter. Plaintiffs learned the full results of the limited ballot inspection after 6 pm local time on December 22, the day before trial, and needed to analyze those results and communicate them to all of the Plaintiffs and Plaintiffs' counsels. Trial was scheduled to begin at 10:00 am on December 23. Plaintiffs informed Defendants of their revised trial strategy prior to evidentiary hearing on the morning of the 23rd. (Exhibit 1).

This prompt action, on a compressed schedule, was undertaken specifically to avoid unnecessary proceedings and cannot constitute a sanctionable offense.

Finally, Defendants focus on Plaintiffs' alleged failure to voluntarily dismiss claims after Plaintiffs' discovery motions were denied and ballot inspection was complete. Voluntarily dismissing these claims would prevent Plaintiffs from appealing any ruling regarding discovery and ballot inspection.

The result is what occurred at the evidentiary hearing: Plaintiffs acknowledged that they would not be able to meet their burden and declined to waste the Court's and the other parties' time with an insufficient presentation but sought to preserve any appeal options so that Plaintiffs could make an informed decision without prejudicing their legal rights. This was a reasonable, good faith approach to the situation that specifically sought to *avoid* any unnecessary delay or proceedings. Defendants' accusation to the contrary is baseless and should be rejected.

## V. Conclusion

Defendants' Motion for Fees is baseless and should be denied. Even though it was unsuccessful, there were grounds for filing Plaintiffs' contest. Plaintiffs have acted in good faith at every step in these proceedings. And Plaintiffs have taken steps to specifically avoid unnecessary expansion or delay.

RESPECTFULLY SUBMITTED this 23rd day of January, 2023.

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**Pro hac vice materials submitted to the Arizona State Bar but not Notice of Complete Application has issued*

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# EXHIBIT 1

## Re: Boyd, et al. v. Mayes and Hobbs, et al., (No. S8015202201468)

tim timlasota.com <tim@timlasota.com>
Fri 12/23/2022 8:17 AM

To: Andy Gaona <agaona@cblawyers.com>;Fitzgerald, Indy (PHX) <IFitzgerald@perkinscoie.com>;division4@mohavecourts.com <division4@mohavecourts.com>

Cc: Barr, Daniel (PHX) <DBarr@perkinscoie.com>;Eckstein, Paul (PHX) <PEckstein@perkinscoie.com>;Danneman, Alexis E. (PHX) <ADanneman@perkinscoie.com>;Yost, Austin C. (PHX) <AYost@perkinscoie.com>;Burke, Samantha (PHX) <SBurke@perkinscoie.com>;dwarrington@dhillonlaw.com <dwarrington@dhillonlaw.com>;bo@statesuniteddemocracy.org <bo@statesuniteddemocracy.org>;liddyt@mcao.maricopa.gov <liddyt@mcao.maricopa.gov>;emily@theburgesslawgroup.com <emily@theburgesslawgroup.com>;Joseph La Rue <laruej@mcao.maricopa.gov>

We wanted to give everyone an idea of what our presentation will look like today.

Our plan for today is hopefully stipulate to the admission of the Maricopa county (or other ballots) that a party wants admitted. We could also stipulate with no waiver of your apparent legal objection to production of any ballots in court. If no stipulation then we will ask County inspector to lay foundation for admission. The inspectors can give reports also but that may or may not be necessary. Our side will ask for a ruling on erroneous ballots, that is, to rule on any ballots improperly cast, which I assume you may object to.

Our side will renew its petition for inspection (which judge denied the other day) and motion for expedited discovery (which judge already denied), and then we will rest.

Thanks.

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**From:** Andy Gaona <agaona@cblawyers.com>
**Sent:** Friday, December 23, 2022 6:13 AM
**To:** Fitzgerald, Indy (PHX) <IFitzgerald@perkinscoie.com>; division4@mohavecourts.com <division4@mohavecourts.com>
**Cc:** Barr, Daniel (PHX) <DBarr@perkinscoie.com>; Eckstein, Paul (PHX) <PEckstein@perkinscoie.com>; Danneman, Alexis E. (PHX) <ADanneman@perkinscoie.com>; Yost, Austin C. (PHX) <AYost@perkinscoie.com>; Burke, Samantha (PHX) <SBurke@perkinscoie.com>; dwarrington@dhillonlaw.com <dwarrington@dhillonlaw.com>; tim timlasota.com <tim@timlasota.com>; bo@statesuniteddemocracy.org <bo@statesuniteddemocracy.org>; liddyt@mcao.maricopa.gov <liddyt@mcao.maricopa.gov>; emily@theburgesslawgroup.com <emily@theburgesslawgroup.com>; Joseph La Rue <laruej@mcao.maricopa.gov>
**Subject:** RE: Boyd, et al. v. Mayes and Hobbs, et al., (No. S8015202201468)

All:

Given the apparent events at yesterday's ballot inspections, the Secretary has identified another potential exhibit, which is the Secretary's Voter Oct. 2020 Voter Intent Guide (copy attached here). We are in the process of trying to upload it through the CaseLines system as well.

Thank you,

**Andy Gaona**

602.381.5486
agaona@cblawyers.com

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**From:** Fitzgerald, Indy (PHX) <IFitzgerald@perkinscoie.com>
**Sent:** Thursday, December 22, 2022 3:58 PM
**To:** division4@mohavecourts.com
**Cc:** Barr, Daniel (PHX) <DBarr@perkinscoie.com>; Eckstein, Paul (PHX) <PEckstein@perkinscoie.com>; Danneman, Alexis E. (PHX) <ADanneman@perkinscoie.com>; Yost, Austin C. (PHX) <AYost@perkinscoie.com>; Burke, Samantha (PHX) <SBurke@perkinscoie.com>; dwarrington@dhillonlaw.com; tim@timlasota.com; Andy Gaona <agaona@cblawyers.com>; bo@statesuniteddemocracy.org; liddyt@mcao.maricopa.gov; emily@theburgesslawgroup.com; Joseph La Rue <laruej@mcao.maricopa.gov>
**Subject:** Boyd, et al. v. Mayes and Hobbs, et al., (No. S8015202201468)

[EXTERNAL SENDER]

Dear Judge Jantzen and counsel,

Defendants have uploaded their joint exhibits, except for Ex. 19 which is too large. The link to this Exhibit can be found here:

https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf

**Indy Fitzgerald**
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# EXHIBIT 2

## Various

tim timlasota.com <tim@timlasota.com>

Tue 12/20/2022 6:45 AM

To: emily@theburgesslawgroup.com <emily@theburgesslawgroup.com>

Dear Ms. Craiger:

Obviously we will have to wait a little longer to see how the judge deals with the motions, but from my standpoint I need to proceed as if the contestants will be successful.

As such, I have a couple of questions and one other point to discuss.

1. Will you provide the list of provisional voters whose ballot was not counted?

2. Will you make Scott Jarrett or somebody of comparable qualifications in terms of vote tabulating duties available for the hearing on Friday? I would prefer to avoid a subpoena, if you agree that he (or someone else comparable will be made available.)

3. If the judge does order that Contestors may inspect the relevant ballots, I believe the best way to accomplish that expeditiously is to narrow the search by identifying the undervotes and adjudications from data that the county has, and start reviewing those as follows. I understand the County can run a search for all such ballots which will identify those ballots and where they can be located. That should make for a much more streamlined process.

Please let me know the County's position.

Thank you, Tim