Clerk of the Superior Court
*** Filed ***
12/16/2022 7:00 p.m.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV2022053927 12/16/2022

HONORABLE MELISSA IYER JULIAN

CLERK OF THE COURT
A. Delgado
Deputy

MARK FINCHEM, ET AL.

DANIEL J MCCAULEY III

v.

ADRIAN FONTES, ET AL.

CRAIG A MORGAN
DAVID ANDREW GAONA
SAMBO DUL

DOCKET CV TX
COURT ADMIN-CIVIL-ARB DESK
JUDGE JULIAN

UNDER ADVISEMENT RULING

Re: Order Granting Motions to Dismiss First Amended Verified Statement of Election Contest

The Court has considered the filings and arguments of the Parties, the relevant authorities and applicable law, as well as the entire record of the case, and—considering all facts and reasonable inferences therefrom in the light most favorable to the non-movant Contestant —hereby finds as follows regarding the Motions.

PROCEDURAL HISTORY

This case was initiated by Contestants Mark Finchem ("Mr. Finchem") and Jeff Zink ("Mr. Zink") with the filing of their Verified Statement of Election Contest, on December 9, 2022. As noted on the record during the December 13, 2022, return hearing, Mr. Zink stipulated with Contestee Ruben Gallego to the voluntary dismissal of his election challenge. (*See* 12/13/2022

Minute Entry at 2). Accordingly, and as set forth in the First Amended Verified Statement of Election Contest ("Amended Statement"), the only remaining contestant is Mr. Finchem, who filed suit pursuant to A.R.S. § 16-672 to contest the election of Contestee Adrian Fontes ("Mr. Fontes") as Arizona's Secretary of State following the November 8, 2022, election. On December 5, 2022, Secretary of State Katie Hobbs ("Ms. Hobbs" or the "Secretary") published the official canvas for the general election, identifying 1,200,411 votes for Mr. Finchem and 1,320,619 votes for Mr. Fontes.

Pending before this Court is Ms. Hobbs's Motion to Dismiss Plaintiff's First Amended Verified Statement of Election Contest, filed December 13, 2022, and Mr. Fontes's Motion to Dismiss, filed December 13, 2022. Mr. Finchem filed a combined response to both motions as ordered on December 14, 2022. Both Mr. Fontes's and Ms. Hobbs's reply briefs were filed December 15, 2022. This Court heard oral argument on the pending motions on December 16, 2022.[1]

ANALYSIS AND FINDINGS

The ire of political opponents following a contested election is not a new concept in the history of election jurisprudence in Arizona. Over one hundred years ago, the Arizona Supreme Court explained that individual judgment in election matters is "often tinctured . . . with party bias or with party prejudice," noting that "[i]n the fervor of political contests this must be expected." *Hunt v. Campbell*, 19 Ariz. 254, 263 (1917). *Hunt* further emphasized the important role of the judiciary in maintaining political neutrality when considering election contests. In fulfilling this role, trial courts must not be swayed by emotional entreaties, but should be guided instead by the fundamental purpose of election contests – to ensure Arizona's election results effectuate the will of its voters. *Territory ex rel. Sherman v. Bd. of Supervisors of Mohave Cnty.*, 2 Ariz. 248, 253 (1887) ("It is the object of elections to ascertain a free expression of the will of the voters.").

In keeping with that premise, this Court must apply "all reasonable presumptions" in "favor [of] the validity of an election." *Moore v. City of Page*, 148 Ariz. 151, 155 (Ct. App. 1986). "[H]onest mistakes or mere omissions on the part of election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain." *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929).

[1] The Court notes that the Amended Statement requested to inspect the ballots under A.R.S. § 16-677. Mr. Finchem did not file the required bond or seek the appointment of inspectors as the law requires. Furthermore, at oral argument, Mr. Finchem's counsel confirmed that he was not seeking to inspect the ballots, effectively withdrawing the request.

Further, a valid election contest may not rely "upon public rumor or upon evidence about which a mere theory, suspicion, or conjecture may be maintained." *Id.* at 263-64. In such cases, fraud must be specifically alleged and "ought never to be inferred." *Hunt*, 19 Ariz. at 264.

As explained in detail below, this Court has considered the merits of this election contest with these governing principles in mind.

A. Applicability of Civil Rules 8 and 12(b)(6)

At the outset, it appears necessary to explain why an election contest is subject to scrutiny under Rules 8 and 12(b)(6). In opposing dismissal, Mr. Finchem's counsel devotes the first ten pages of his response to the argument that "[a]n election contest is not a civil action" to which the Arizona Rules of Civil Procedure may be applied. Counsel continued to insist during oral argument that Mr. Finchem's election contest is not subject to evaluation as a pleading under Rule 8 and cannot be dismissed for the failure to state a claim under Rule 12(b)(6), while later suggesting that he should nevertheless be able to seek summary judgment under civil Rule 56. This argument is frivolous.

While an election contest is a "purely statutory" and "special proceeding," *Griffin v. Buzard*, 86 Ariz. 166, 168 (1959), the legislature has mandated that such actions be "brought in the superior court of the county in which the person contesting resides or in the superior court of Maricopa County." A.R.S. § 16-672(B). In turn, Arizona Rules of Civil Procedure "govern the procedure in all civil actions **and proceedings in the superior court of Arizona**." Ariz. R. Civ. P. 1 (emphasis added). An election contest is a "proceeding in the superior court of Arizona."

For this reason, Arizona appellate courts have repeatedly and consistently applied Rules 8 and 12(b)(6) in considering whether a statement of election contest contains sufficient facts to survive dismissal. *See, e.g., Griffin v. Buzard*, 86 Ariz. 166, 169-70 (1959) ("The ultimate issue raised by this appeal is whether the statement of contest filed herein states a claim upon which relief could be granted . . . ."); *Hancock v. Bisnar*, 212 Ariz. 344, 348, ¶ 17 (2006) (Evaluating election contest allegations "under the notice pleading requirements of Rule 8(a)."); *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 436, ¶ 17 (App. 2013) (motion to dismiss election contest was sufficient responsive pleading to avoid entry of default); *Burk v. Ducey*, No. CV-20-0349-AP/EL, 2021 WL 1380620, at *2 (Ariz. Jan. 6, 2021), *cert. denied*, 209 L. Ed. 2d 735, 141 S. Ct. 2600 (2021) (affirming dismissal of election contest); *Williams v. Fink*, No. 2 CA-CV 2018-0200, 2019 WL 3297254, at *1 (Ariz. App. July 22, 2019) (same); *Camboni v. Brnovich*, No. 1 CA-CV 15-0014, 2016 WL 388933, at *1 (Ariz. App. Feb. 2, 2016) (same).

This court can and should assess the validity of Mr. Finchem's election contest under Rules 8 and 12(b)(6). In so doing, this Court will "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008). Under Rule 12(b)(6), a motion to dismiss for failure to state a claim is properly granted if the plaintiff is not entitled to relief as a matter of law "under any interpretation of the facts susceptible of proof." *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 8 (2012) (quoting *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4 (1998)). Exhibits to the verified statement, or public records, are not outside the pleading and courts may consider such documents without converting a motion to dismiss into a motion for summary judgment. *Id.* at 356, ¶ 9.

The Court will not, however, "speculate about hypothetical facts that might entitle the plaintiff to relief." *Cullen*, 218 Ariz. at 420, ¶ 14. Nor will the Court "accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts." *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389, ¶ 4 (App. 2005).

Applying this standard, the court addresses the arguments in the order raised in the Secretary's pending motion.

B. Laches

The Secretary argues that the laches bars Mr. Finchem's claims as to voting machine certification. Laches is an equitable doctrine that precludes a claim when the plaintiff delays unreasonably in filing a suit, and the delay "results in prejudice to the opposing party," *League of Ariz. Cities and Towns v. Martin*, 219 Ariz. 556, 558, ¶ 6 (2009), or the public. *Prutch*, 231 Ariz. at 435, ¶ 13 (App. 2013).

A procedural challenge to an election filed after the election has taken place is particularly vulnerable under this doctrine. *See e.g., Allen v. State*, 14 Ariz. 458, 462 (1913). The Arizona Supreme Court as far back as *Allen* noted, in denying a post-election procedural challenge, "[t]imely appeal to the courts upon the questions now raised, if meritorious, would have settled the matter before the election was had," and noted the heightened prejudice to both voters and the public purse that arises from a later challenge. *Id.* Our courts continue to take this view. *See e.g., Kerby v. Griffin*, 48 Ariz. 434, 444 (1936) (*abrogated in part on other grounds by*, *Fann v. State*, 251 Ariz. 425, 441, ¶ 58 (2021)) ("It has been frequently determined that if parties allow an election to proceed in violation of the law which prescribes the manner in which it shall be held, they may not, after the people have voted, then question the procedure."); *Zajac v. City of Casa Grande*, 209 Ariz. 357, 360, ¶ 14 (2004) (citing various).

The challenge to voting machine certifications is a procedural challenge. "Election procedures generally involve 'the manner in which an election is held.'" *Sherman v. City of Tempe*, 202 Ariz. 339, 342, ¶ 10 (2002) (quoting *Tilson v. Mofford*, 153 Ariz. 468, 470 (1987)). It goes without saying that a challenge to the machines used to tabulate votes wholly implicates "the manner in which an election is held." Thus, Mr. Finchem's claims with respect to the certification of voting machines and software is subject to laches. In applying laches, this Court considers both the unreasonable delay and resulting prejudice caused by this post-election procedural challenge.

First, the court considers unreasonable delay. Mr. Finchem's proposed expert avers that the original Certificate of Accreditation for Pro V&V (which was issued in 2015) expired in 2017 and the purportedly defective certificate was issued on February 1, 2021. SLI's most recent certificate (according to Mr. Finchem) was issued that same day. Mr. Finchem was constructively on notice that – under their theory – the Pro V&V machines were not properly accredited *for five years* before this challenge. *See Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1993) (applying laches to election challenge based on publicly available documents). At the latest, the reissued certificate was issued twenty-two months before the election; and still Mr. Finchem did not object. Mr. Finchem offers no justification in their verified statement or in their response to the motions to dismiss for a delay of five years, a delay of twenty-two months, or for the decision to wait until after the election to raise these concerns. The court finds this delay unreasonable.

Second, the court considers prejudice. Because Mr. Finchem's certification challenges comes post-election, Mr. Finchem, like the challengers in *Sherman*, "essentially ask us to overturn the will of the people as expressed in the election." *Id.* at ¶ 11. This certainly prejudices the Secretary and Secretary-Elect given the enormous time and expense necessary to run a statewide election (as noted by *Allen, supra*). But it also prejudices the voting public, "imbued with the conviction that they were performing one of the highest functions of citizenship, and not going through a mere hollow form, we may assume, investigated the [candidates] and went to the polls and voted thereon." *Allen*, 14 Ariz. at 462. The court finds that the delay of five years greatly prejudices the parties and the public.

Mr. Finchem makes a perfunctory argument that the software certification of EVS 6.0.4.0 is also "irredeemably flawed." In support of this argument, Mr. Finchem points us to another purported expert report, which states that the allegedly deficient certification for the software was issued in 2019. Again, no explanation for the delay in bringing a procedural challenge to this software's use for a general election in 2022 is offered. This too, is barred by laches.

Because Mr. Finchem could have brought a challenge regarding the laboratory testing of voting machines anytime in the last five years (or minimally at any time since February 2021), Mr. Finchem's unjustifiable delay resulted in an election being conducted under conditions he belatedly finds objectionable. Thus, the court finds that laches bars Mr. Finchem's challenge as to

voting machine certification as a matter of law, but out of an abundance of caution, will consider whether Mr. Finchem states a claim on the merits.

C. Voting Machine Certification

Mr. Finchem argues that the voting machines used by the Secretary and Maricopa County in conducting the 2022 General Election were not properly certified under A.R.S. § 16-442(B) which requires that "[m]achines or devices used at any election for federal, state or county offices" must be "tested and approved by a laboratory that is accredited" under the Help America Vote Act ("HAVA"). *See generally* Pub. L. 107-252, 116 Stat. 1666 (2002) (codified as amended at 52 U.S.C. § 20901–21145). As the Secretary points out, Congress vested the Election Assistance Commission ("EAC") with the authority to "provide for the testing, certification, decertification, and recertification of voting system hardware and software," that states may then voluntarily adopt. 52 U.S.C. § 20971(a).

Mr. Finchem alleges that the Secretary's certified vote count is inaccurate "because the electronic ballot tabulation machines were not certified and could not be certified as the laboratory engaged [to certify election equipment] was itself not certified." Mr. Finchem argues that because the Voting System Test Laboratory manual requires the certificate to be signed by the chair of the EAC, a certificate signed by the EAC's executive director nullifies the accreditation altogether.

But the VSTL manual does not have the force of statute, and under HAVA the EAC not only retains the power to certify laboratories, but further provides that "the accreditation of a laboratory for purposes of this section *may not* be revoked unless the revocation is approved by a vote of the commission." 52 U.S.C. § 20971(c)(2) (emphasis added). Mr. Finchem did not allege that the *initial* accreditation of Pro V&V or SLI Compliance was defective – only the recertification in 2021. Consequently, even if the recertification was somehow irregular, federal law requires that the EAC vote to remove accreditation from a laboratory in order for the accreditation to be lost. It is not automatic. Mr. Finchem has not alleged that the EAC has voted to revoke either Pro V&V or SLI Compliance's accreditation, and therefore the two laboratories remain accredited for the purposes of the instant motions.

Thus, taken as true for the purposes of a motion to dismiss, the allegation that the executive director rather than the chair of the EAC signed the certification does not give rise to a reasonable inference that the testing laboratories were not properly accredited.

It bears noting that in his response and during oral argument, Mr. Finchem's counsel repeatedly referred to the election certificates as being "forged." This allegation appears nowhere in the Amended Statement and was asserted for the first time in response to the pending motions. This new allegation is wholly unsupported by the record.

Indeed, even if the voting machines were incorrectly certified: what then? What, apart from a general pall of suspicion could result from such a conclusion? The law in Arizona does not permit an election challenge to proceed based solely upon a vague sense of unease. *See generally* A.R.S. § 16-672(A)(1)-(5). Mr. Finchem's Amended Statement draws no through-line from the lack of certification to a specific effect on the election results. There is no allegation that the Executive Director, rather than the Chair, signing the testing laboratory certificates caused any illegal vote to be cast. The EAC has affirmed that Pro V&V and SLI Compliance retain their testing certification. There was no misconduct stemming from this allegation. Consequently, assuming laches did not already bar these claims, this argument fails to state a meritorious challenge and must be dismissed.

D. Voting Software Certification

As quickly as Mr. Finchem raises this issue, the court can reject it. Mr. Finchem objects to the certification of EVS 6.0.4.0 due to technical issues raised by his expert. But state law and HAVA vest the authority to certify software in accredited laboratories. To the extent this court can parse an unsworn PowerPoint presentation for a technical argument (that, for what it's worth, is nowhere discussed in the body of the Amended Statement), Mr. Finchem offers no legal theory under which the court can invalidate voting software certification under HAVA after it has been conferred by an accredited testing laboratory. *See* 52 U.S.C. § 20971(a)(2); A.R.S. § 16-442(B). Neither federal nor state law permit this court to second guess the technical judgement of accredited laboratories. This argument also fails on its merits.

E. Illegal Votes

Mr. Finchem argues that "tabulating machine failures" and a change in the estimated number of votes remaining to be counted on the Secretary of State website indicate that illegal votes were cast.

At the outset, this court notes that these allegations challenge, again, election procedures. As set forth above, a claimant seeking to challenge an election after it is conducted must allege either "fraud, or [allege that] had proper procedures been used, the result would have been different." *Moore*, 148 Ariz. at 159. "[E]ven though gross," procedural errors or omissions in the election process, without more, do not qualify as grounds for an election contest. *See Findley*, 35 Ariz. at 269.

Official election returns by an election board are prima facie evidence of the number of votes cast for the contestant. *Hunt*, 19 Ariz. at 276 (1917). Procedural irregularities as to some votes in a precinct is not sufficient cause to reject the remaining ballots. *Grounds v. Lawe*, 67 Ariz. 176, 185 (1948). An illegal vote is one that is cast in violation of a statute providing that non-compliance invalidates the vote, or cast by one who is not eligible to vote. *See Miller v. Picacho*

Elementary Sch. Dist. No. 33, 179 Ariz. 178, 180 (1994) (where a statute provides that non-compliance invalidates a vote, that vote is invalid); *Moore*, 148 Ariz. at 156-7 (inclusion of ineligible names on voter list was insufficient to demonstrate illegal votes where it was not established, ineligible persons actually voted).

Here, Mr. Finchem simply does not allege that any of the votes cast were actually illegal. He does not allege participation by non-registrants, or anyone else who ought not to have voted. He does not allege that a single ballot was cast in violation of a statute that invalidated that vote. What Mr. Finchem argues is a case of *missing* votes.

To the extent that Mr. Finchem argues that the use of Pro V&V or SLI Compliance for testing tabulators or software renders votes cast on them illegal; this court has already rejected those arguments. Mr. Finchem's contest on the basis of "illegal votes" is unsupported by *any* alleged fact and fails to state a claim under § 16-672(A)(4).

Although not alleged by Mr. Finchem's Original or Amended Statements, his counsel argued for the first time in response to the pending motions that his contest could proceed under subsection (A)(5). Subsection (A)(5) allows an election contest "by reason of erroneous count of votes." Given that it was not raised in either the Original or Amended Statements, this belated new challenge is untimely. *See Burk*, 2021 WL 1380620, at *2 (Ariz. Jan. 6, 2021) ("a statement of contest in an election contest may not be amended, after the time prescribed by law for filing such contest has expired.")

Even if subsection (A)(5) had been asserted as a ground for the contest, the Amended Statement never alleges that any legally cast vote was not counted; it only relays the speculation that votes *might* not have been counted. Similarly, the appendices to the Amended Statement (which consist of anecdotal, mostly unsworn hearsay statements) allege the "possibility" of disenfranchisement based upon frustration with machine malfunctions, delays, and "suspicions" that some votes may not have been counted. Under *Hunt* and its progeny, these kinds of allegations cannot sustain an election contest even if Mr. Finchem had timely asserted such a claim. *See Hunt*, 19 Ariz. at 264, 276.

F. Misconduct

Finally, Mr. Finchem contests the election under § 16-672(A)(1). That subsection permits election challenges "[f]or misconduct on the part of election boards or any members thereof in any of the counties of the state, or on the part of any officer making or participating in a canvas for a state election." As with illegal vote contests, a contest based on "misconduct" cannot survive dismissal if predicated only "upon public rumor or upon evidence about which a mere theory, suspicion, or conjecture may be maintained." *Hunt*, 19 Ariz. at 263-64. Errors and omissions in

the election process also cannot sustain a "misconduct" claim in the absence of fraud or allegations that the error affected the election result. *Findley*, 35 Ariz. at 269.

Mr. Finchem asserts that Ms. Hobbs engaged in the following instances of "misconduct" by:

(1) failing to recuse herself after her opponent expressed a "perceived a conflict of interest";

(2) failing to ensure proper certification of the ballot tabulating machines and software;

(3) "threatening county officials with criminal charges and indictment for failure to certify a defective election process."

(4) Flagging alleged misinformation posted by Mr. Finchem's Twitter account.

None of these alleged acts constitutes "misconduct" sufficient to survive dismissal.

1. Recusal/Perceived Conflict

Mr. Finchem first alleges that Ms. Hobbs "had an ethical duty to recuse herself" after her gubernatorial opponent "perceived a conflict of interest" and then "repeatedly and publicly called for Ms. Hobbs to recuse herself." The only authority cited in the Amended Statement is to A.R.S. § 38-503, which prohibits self-dealing by public employees.

These are not well-pled facts; they are legal conclusions masquerading as alleged facts. As such, this court is not obliged to assume their truth. *See Jeter*, 211 Ariz. 386, 389, ¶ 4. Further, and even as "legal conclusions," Arizona law does not support them.

Section 38-503 applies to public officers who have a "substantial interest in any contract, sale, purchase or service." A.R.S. § 38-503(A). Recusal is required only when a public officer or employee has a "nonspeculative pecuniary or proprietary interest, either direct or indirect, other than a remote interest." A.R.S. § 38-502(11). Put simply, "[p]ecuniary means money and proprietary means ownership." *Shepherd v. Platt*, 177 Ariz. 63, 65 (App. 1993). Seeking or holding a public office does not grant elected officials a financial or ownership interest in the job they hold or seek. To the contrary, "the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. Every public office is created in the interest and for the benefit of the people, and belongs to them." *Ahearn v. Bailey*, 104 Ariz. 250, 254 (1969) (citation omitted).

The plain terms of the self-dealing statute did not require the Secretary's recusal merely because she was seeking election at the same time, she carried out her election duties as a public officer. Arizona law does not recognize a "pecuniary or proprietary interest" in either the office she held or in the office she sought.

Mr. Finchem failed to cite any other rule, statute, or Arizona appellate decision that imposes an "ethical" or "legal" duty upon an election official to recuse herself from carrying out her official duties when she is also a candidate for re-election or election to a different public office. And there is no "presumption" under Arizona law that the Secretary committed misconduct in the election canvass merely because her opponent "perceived" an earlier conflict of interest.

2. Lab Certification

Next, the Amended Statement alleges the Secretary "negligently or intentionally" breached her "duty to enforce current rules and statutes related to Arizona elections" by failing to ensure proper certification of the ballot tabulating machines. Reframed as an allegation of "misconduct," this claim alleges the Secretary breached her official duties because the wrong executive from the EAC signed a certificate of accreditation for the accredited laboratory that conducted testing on Arizona's ballot tabulation machines.

The Amended Statement does not assert any facts explaining how the Secretary was responsible for determining who at the EAC signed the accreditation certificate, apart from a general reference to her statutory oversight duties. Even assuming misconduct could be implied by the existence of these duties, there is also no allegation that Ms. Hobbs's engaged in any fraud. And even if the certification process had one or more errors, the Amended Statement does not allege that Mr. Finchem would have prevailed in the election if a different EAC official had signed the lab's certificate of accreditation in February 2021, some 22 months before the 2022 general election took place. For these reasons, and as explained in detail above, Mr. Finchem's misconduct claim based upon the alleged certification errors fails as a matter of law.

Additionally, an election contest under subsection (A)(1) applies only to alleged misconduct "on the part of any officer *making or participating in a canvass for a state election*." A.R.S. § 16-672(A)(1) (emphasis added). Given that the questioned signatures on the lab certificates occurred long before the challenged election, there can be no argument that the claimed certificate error could qualify as misconduct "in the canvas." *See Williams*, 2019 WL 3297254, at *3, ¶ 14 (affirming dismissal of "misconduct" claim based upon pre-canvass events). This is an independent basis for dismissal.

3. Threats to Other County Officials

Next, Mr. Finchem asserts the Secretary engaged in misconduct by "threatening county officials with criminal charges and indictment for failure to certify a defective election process." [2] Specifically, the Amended Statement alleges that Ms. Hobbs's subordinate (Kori Lorick) sent a letter to the Mohave County Board indicating that the canvass or certification of the election was "not discretionary" and advising that "[if] Mohave County does not perform their ministerial duty to canvass your election results, we will have no other choice but to pursue legal action." The Amended Statement then references a post from https://twitter.com/KariLakeWarRoom for the proposition that two Mohave County supervisors "said they were voting to certify the election 'under duress'" as a "direct result of Ms. Hobbs threats." The Amended Statement refers to similar alleged threats made to Cochise County officials.[3]

Assuming these allegations are true, they still do not establish that Ms. Hobbs' engaged in "misconduct." As with the alleged "duty to recuse" allegations, Mr. Finchem cites no state law that prohibits the Secretary of State from communicating with other elected officials regarding their respective duties to canvass or barring her from conveying her interpretation of applicable state laws.

Although other county officials also have certain duties with respect to the canvass, the law does place the final burden on the Secretary to ensure the canvass and certification of a general election is completed within the statutorily prescribed timeframes. *See* A.R.S. § 16-648(A). It is not "misconduct" for the Secretary of State to communicate with other governing bodies to ensure the canvass and certification are completed.

Nothing in the verified statement reflects that the Secretary or her subordinates made any false or fraudulent statement regarding the applicable law in the cited communications to county officials. As Ms. Lorick's email pointed out, A.R.S. § 16-642(C) does permit canvass delays only where "the returns from any polling place . . . are found to be missing." Moreover, legal action to compel a county board to perform its canvassing duties "within the required time," is an appropriate remedy where there is evidence that the county board has not carried out its duties as state law requires. *Hunt*, 19 Ariz. at 279 (noting that mandamus writ is appropriate remedy for

[2] The Amended Statement also refers to emails between counsel regarding other lawsuits in different jurisdictions as support for the claim that Hobbs engaged in abusive conduct or intimidation. These emails between the parties' attorneys regarding the merits of other lawsuits are irrelevant to this election contest here and will not be considered.

[3] Counsel for Mr. Fontes also argues that all county election officials and supervisors are indispensable parties to this action and seek dismissal on that basis. Because the court finds that the claim fails independently, it need not address this argument.

unlawful canvass delays). Accordingly, communications from the Secretary's office regarding the consequences of a canvass delay and her threat to seek enforcement via litigation cannot be construed as "misconduct" for purposes of an election contest.

Moreover, this court is bound to apply a presumption that Ms. Hobbs acted in "good faith" in communicating with county officials regarding the canvass. *Hunt*, 19 Ariz. at 268 ("[T]he returns of the election officers are prima facie correct and free from the imputation of fraud."). Allegations that the Secretary communicated with other elections officers in an attempt to fulfill her canvass duties cannot, as a matter of law, amount to "misconduct."

4. Flagged/Suspended Twitter Account

Lastly, Mr. Finchem claims that it was "misconduct" for the Secretary of State's Office to flag for review two tweets from a Twitter account. This claim is also fatally flawed.

First, as with the other "misconduct" allegations analyzed above, the Amended Statement makes no claim that these alleged Twitter misdeeds were "fraudulent" or that they altered the outcome of the election.

Second, the emails appended to the complaint were from January 2021 and Mr. Finchem's account was alleged to be suspended in October 2022. These allegations do not relate at all to the Secretary's participation in the 2022 canvass. These allegations cannot, therefore, be construed as misconduct in the canvass, which is required to assert an election contest under subsection (A)(1).

Finally, Twitter's independent decision to suspend Mr. Finchem's account cannot create a valid basis for an election challenge under Arizona law, as Twitter is not an "election official." *See also O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1183 (N.D. Cal. 2022) (Twitter decision to suspend account with flagged tweets did not constitute "state action" by state government officials who relayed concerns about accuracy of information reported in account posts).

In summary, the misconduct allegations also fail to state a claim for relief. Dismissal of the Amended Statement is appropriate.

SANCTIONS REQUESTS

Both Ms. Hobbs and Mr. Fontes have requested leave to file applications for sanctions pursuant to A.R.S. § 12-349 and Rule 11 of the Arizona Rules of Civil Procedure. The Court has set a briefing schedule on those requests below. However, any such motion cannot delay entry of a final judgment as Arizona law requires this court to pronounce its judgment immediately to ensure the expedited appellate process can begin. Thus, this court will enter a final judgment

pursuant to Rule 54(b), to ensure any expedited appeal may be perfected in accordance with Rule 10 of the Arizona Rules of Civil Appellate Procedure.

IT IS THEREFORE ORDERED granting Defendant Arizona Secretary of State Katie Ms. Hobbs' Motion to Dismiss Plaintiff's First Amended Verified Statement of Election Contest, filed December 13, 2022, and Secretary of State-Elect Mr. Adrian Fontes' Motion to Dismiss, filed December 13, 2022.

IT IS FURTHER ORDERED dismissing with prejudice the First Amended Verified Statement of Election Contest, filed December 12, 2022.

IT IS FURTHER ORDERED confirming the election of Mr. Adrian Fontes as Arizona Secretary of State-Elect.

IT IS FURTHER ORDERED vacating the virtual status conference set for December 19, 2022, at 8:30 a.m. as moot in light of the ruling above.

IT IS FURTHER ORDERED that within **10 days** from the entry of this Order, Counsel for Ms. Hobbs and Mr. Fontes may file a motion for sanctions as requested. The court will thereafter rule upon any such motion upon receipt of briefing and argument in accordance with Rule 7.1.

THE COURT FINDS that, notwithstanding the parties' outstanding sanctions requests, there is no just reason for delay in the entry of this judgment.

IT IS THEREFORE ORDERED entering this as a final judgment in accordance with Rule 54(b) of the Arizona Rules of Civil Procedure.

Melissa A Julian

_____

HONORABLE MELISSA JULIAN
JUDICIAL OFFICER OF THE SUPERIOR COURT