No. 21-1442

**UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

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KEVIN O'ROURKE, et al.,

Appellants,

vs.

DOMINION VOTING SYSTEMS, INC., et al.,

Defendants-Appellees.

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On Appeal from the United States District court for the District of Colorado
Civil Action No. 1:20-cv-3747
U.S. Magistrate Judge N. Reid Neureiter

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# CORRECTED APPELLANTS' OPENING BRIEF

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Oral Argument is requested

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## INTRODUCTION

This is an appeal from a district court order awarding Appellees' attorney fees, pursuant to Fed.R.Civ.P. 11 (Rule 11), 28 U.S.C. § 1927, and court's inherent authority, against appellants, the attorneys representing the Plaintiffs in the above-referenced matter (Appellants), currently on appeal in 21-1161. The district court abused its discretion by sanctioning Appellants for filing a civil rights, class action lawsuit against a number of defendants. After finding the Plaintiffs lacked standing, the district court dismissed the case for lack of subject matter jurisdiction, and further found that amending the complaint would be futile. Afterwards, the district court granted Appellees' several motions for sanctions (*Sanctions Order*); and, issued a final order determining the amount (*Final Order*).

## JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§1331(a), (federal question), 1332 (diversity), and 1343(a) (civil rights). This Court has jurisdiction pursuant to 28 U.S.C. 1291. The attached *Sanctions Order* was issued on August 3, 2021. The attached *Final Order* was issued on November 22, 2021. Thereafter, Appellants filed a timely notice of appeal. App. V7 1572.

## ISSUES PRESENTED

I. Whether the district court abused its discretion in sanctioning Appellants, pursuant to Rule 11, after they made non-frivolous factual averments based upon referenced material, and legal claims based upon reasonable interpretation of the law.

II. Whether the district court abused its discretion in sanctioning Appellants, pursuant to 28 U.S.C. § 1927 by finding Appellants' motion for leave to amend and proposed amended complaint vexatiously multiplied the proceedings.

III. Whether the district court abused its discretion by sanctioning Appellants with its inherent authority by finding that the case was filed and forwarded in bad faith for an improper motive.

IV. Whether the district court's sanctions were reasonable.

V. Whether the district court infringed Appellants' rights to freedom of speech and due process.

## STATEMENT OF THE CASE

On April 28, 2021, the district court dismissed the Plaintiffs' complaint, without prejudice, for lack of subject matter jurisdiction, and denied Plaintiffs' motion to amend. App. V7 1536. Plaintiffs filed their notice of appeal the following day. App. V7 1572. The original complaint (*Complaint*) was brought by eight registered voters from five states. App. V1 19. Plaintiffs sued Appellees, Dominion Voting Systems, Inc. (*Dominion*), Meta Platforms, Inc., f/k/a Facebook, Inc. (*Facebook*), and Center for Tech and Civic Life (*CTCL*), for engaging in state action that substantially burdened their rights in the 2020 Presidential election.

Plaintiffs also sued Gretchen Whitmer and Jocelyn Benson, from Michigan (*Michigan Defendants*), and Tom Wolf and Kathy Boockvar, from Pennsylvania (*Pennsylvania Defendants*), in their respective, individual capacities for conduct performed under color of law in their respective states, in contravention of the Constitution of the United States of America (Constitution), to which those defendants all took an oath.[1]

The original Plaintiffs attached their affidavits to the *Complaint*. App. V1 105-143. They are all natural persons, citizens of the United States of America, and of their respective State, registered to vote, with a stake in the 2020 Presidential election. Later, the Plaintiffs filed a motion to amend, and attached a copy of their amended complaint, for filing (*Amended Complaint*), which included one hundred and sixty Plaintiffs from thirty eight states. App. V5 876. At all material times, Plaintiffs were represented by Appellants, who are experienced lawyers from Colorado and Michigan, with close to sixty years of experience between them.

After service, *Dominion*, *Facebook*, and *CTCL* filed motions to dismiss the *Complaint*. App. V2 242, 270, App. V4 737. Appellants, on behalf of the original

[1] Plaintiffs sued Mark Zuckerberg (*Zuckerberg*) and Pricilla Chan (*Chan*), who had not been served before the case was dismissed.

Plaintiffs, filed timely responses. App. V2 301, App. V4 711, App. V6 1321. These Appellees filed their replies, thereafter. App. V6 1187, 1204, and App. V7 1472.

In the interim, attorney generals from the State of Michigan (*Michigan*) and Commonwealth of Pennsylvania (*Pennsylvania*) entered their appearances on behalf of their respective governors and secretaries of state. Subsequently, both *Michigan* and *Pennsylvania* filed motions to dismiss (App. V4 790 and App. V6 1167), and separate objections to the Plaintiffs' motion to amend. App. V6 1233 and 1243. When *Michigan* filed its motion to dismiss, Plaintiffs filed a motion to strike. App. V6. 1246. The district court immediately denied the motion, and found that those defendants had the right to counsel of their choice. App. V6 1362. In light of that, when *Pennsylvania* filed its motion to dismiss, Appellants did not file a motion to strike. Instead, the same objections were raised in the Plaintiffs' response to the motion to dismiss. App. V6 1377. Shortly thereafter, the *Michigan Defendants* and *Pennsylvania Defendants* were dismissed, without prejudice. App. V7 1491, 1495.

The district court held a hearing on the motions to dismiss. App. V7 1625-1715. Before the hearing, on behalf of the Plaintiffs, Appellants filed a motion for judicial notice. App. V7 1525. In it, Appellants outlined the information relied upon by Appellants in forwarding their claims, which included the files of cases in

courts across the country, law review articles, letters, reports, documentaries, books, public records, and some media articles. At the hearing, the district court accused Appellants of sandbagging, and struck it from the record. App. V7 1668. The day after the hearing, the district court dismissed the case. App. V7 1536.

After dismissal, *Dominion*, *Facebook* and *CTCL* filed separate motions for sanctions against Appellants, pursuant to Rule 11, § 1927, and the court's inherent authority. App. V8 1716, 1748, and 1783. *Michigan* and *Pennsylvania* also filed motions to sanction Appellants under § 1927, and the court's inherent authority, as well. App. V8 1732, 1927. Appellants filed responses in objection to all of the motions for sanctions, which included the continued challenge of the standing of *Pennsylvania* and *Michigan*. App. V8 1947, 1970, App V9 1987, and 2088. After which, Appellees replied. App. V9 2012, 2046, 2065, 2075, and 2107.

After briefing, the district court held oral arguments on the motions for sanctions. App. V11 2452-2557. After which, the district court granted the motions, and ordered the parties to meet and confer with regard to an appropriate sanction. *Sanctions Order*, p. 67. Without conceding the righteousness of the district court's *Sanctions Order*, Appellants agreed that *Pennsylvania* and *Michigan's* request for $6,162.50 and $4,900.00, respectively, was reasonable. App. V11 2651, App. V12 2666.

The parties did not agree regarding the requests for attorney fees and costs made by *Dominion*, *Facebook* and *CTCL*. App. V11 2660, App. V12 2674, 2677 and 2681. Because of that, those Appellees submitted separate billing statements, wherein *Dominion* requested $78,944.00 (App. V12 2685); *Facebook* requested $50,000.00 (App. V12 2735), and *CTCL* requested $64,012.24 (App. V12 2763).

Before the district court issued its *Final Order*, Appellees filed a motion to reconsider, pursuant to Rule 59. App. V12 2814. The district court denied the motion, in part; but, granted Appellants' request to modify its finding to correctly state that *Michigan* had *not* filed a motion pursuant to Rule 11. App. V12 2930.

Ultimately, the district court granted Appellees' requests for attorney fees and costs, and further scolded Appellants for, among other things, slandering Appellees. *Final Order*, p. 20.

Appellants respectfully incorporate the arguments, citations, references and evidence presented to the district court, and in the briefing previously provided to this Court.[2]

[2] Appendix 14 contains the briefs and responses filed in 21-1161. Unfortunately, the citations to an appendix in those pleadings do not match the appendixes filed, herein. However, that record is available for review, if necessary.

## SUMMARY OF ARGUMENT

Plaintiffs have standing to pursue their claims for civil rights violations, as each has suffered a particularized injury from one or more completed violations of their fundamental rights, caused by the conduct of *Dominion*, *Facebook*, and *CTCL*. Plaintiffs never sued *Michigan* and *Pennsylvania*, and the latter have no standing to be a part of the case, nor this appeal. Thus, Appellants cannot be sanctioned for filing legitimate claims against the relevant Appellees.

Standing is a legal issue, reviewed de novo. To date, the issue has not been resolved by this Honorable Court, much less the highest court in the land. The conduct of *Dominion*, *Facebook*, and *CTCL* is outlined with specificity in the Plaintiffs' complaints.

Defendants, *Zuckerberg* and *Chan*, delivered over $300 million dollars to *CTCL*, the latter of which granted the money to municipalities and counties across the country, which had a substantial, and one-sided effect upon the 2020 Presidential election, in favor of one candidate.

The policies of the presidential candidates are irrelevant. Thus, when the Plaintiffs described a scheme in their proposed *Amended Complaint* involving a cabal of progressives, that's a simple fact. Their claims carry no judgment or condemnation of policy.

However, as registered voters and citizens of the United States, the Plaintiffs are vested in a presidential electoral process that is fundamentally fair. Due process means fair process. Moreover, Plaintiffs have a First Amendment right to political expression, which carries with it the right to cast a meaningful vote for president and vice-president, if so qualified. That right is not inalienable. It is granted, through the states. Once granted, the right to vote becomes a fundamental right, all of which are contingent upon fair elections.

The district court simply did not see the righteousness of the claims. From the beginning, the district court misunderstood the standing and legal positions of the Plaintiffs. Against that backdrop, the district court dismissed the case.

The district court's bias and predetermination were obvious, throughout, and the record speaks for itself, in that regard. In fact, the record clarifies every issue. It's not without irony that, as Appellants submit this brief, everything the Plaintiffs alleged has come true. How could the Plaintiffs be so smart? How would they know this was all going to happen? Answer: It was obvious. It didn't matter who the electors chose on January 6, 2021. It would have been worse if the incumbent, President Donald Trump (Trump), had somehow prevailed in the electoral college. By that time, the damage was done. The foreseeable results of elections that are

reasonably disputed include an ousted administration's cling to power, questions concerning the legitimacy of a new leader, coupled with public outrage.

Accordingly, it was imperative to file the *Complaint* before January 6, 2021. By filing the complaint on December 22, 2020, the Plaintiffs secured their claims for the violation of their constitutional rights, either way. The damage is ongoing, but, by that time, the violations of the Constitution, enforceable against Appellees by federal statutes, had been completed. No one had heard about the case before January 6, 2021— nor did Plaintiffs or Appellants broadcast it. Plaintiffs and Appellants had nothing to do with the insurrection at the Capitol. They predicted it.

By that time, also, it was clear that the lawsuits filed by attorneys Sidney Powell, Lin Wood, State of Texas, and others, were ill-fated. Federal courts were not going to enjoin any sovereign state from sending the electors those states so choose. In fact, in one of the jurisdictions, sanctions were imposed upon attorneys for filing a frivolous lawsuit, which is currently on appeal in the 6th Circuit.[3] Further, the dismissal of Lin Wood's cases has been confirmed by the 11th Circuit.[4]

However, to bang the drum again, the Plaintiffs' claims are different. These claims were brought for damages associated with an actual event. The Defendants

[3] *King v. Whitmer*, 21-1786 (6th Cir. 2021)
[4] *Wood v Raffensperger*, 981 F. 3d 1307 (11th Cir. 2020), *cert denied*; and, *Wood v Raffensperger*, 20-14813 (11th Cir. 2020), *cert denied*.

that were elected to serve their respective states were sued in their individual capacity. Thus, no states were sued. The claims against *Dominion*, *Facebook*, *CTCL*, *Zuckerberg* and *Chan* were based upon their conduct as state actors. They have no sovereign immunity. Elections are one of the few responsibilities of a state. Accordingly, when a private company performs a portion of that "public function," that private entity becomes a state actor—subjecting its personage to the limitations and requirements of the Constitution, enforceable by statute.

If that state action involves a presidential election, the conduct may be said to affect a voter's national right. A presidential election is the *only* national election potentially involving every registered voter from every state. In that regard, the Union is one. Actions in one state affecting this national right of a voter in another state, may be actionable, in both. The latter could travel to a defendant's home state. The foreign state actor may also avail him or herself to the jurisdiction of the distant state or federal court, by and through his or her conduct, or consent.

The *Michigan Defendants* and *Pennsylvania Defendants* took an oath to the Constitution, and were at all times material acting under color of authority. Their actions violated the rights of the Colorado Plaintiffs, and the other Plaintiffs, all of whom were willing to travel to the District of Colorado for relief.

Thus, those *Michigan Defendants* and *Pennsylvania Defendants* may have subjected themselves to the jurisdiction of the District of Colorado. Otherwise, those individuals could have consented to jurisdiction, but none of them appeared.

Conduct in one state that substantially burdens a plaintiff's right to meaningfully vote for president in another, not only burdens that right, but destroys it. Voters have no real right to vote for president if big media companies and their billionaire CEOs are going to strategically determine the outcome, in association with multiple other parties—many of whom are acting under color of official authority.

The district court called the case a conspiracy theory, but the Plaintiffs can prove their claims to a jury. At this stage, Plaintiffs were only required to plead plausible claims. Nonetheless, the district court was having none of it. The district court's *Sanctions Order* was based on other cases involving different parties, different claims, and different requests for relief. Even if this Court finds the Plaintiffs don't have standing, that is not dispositive of this appeal. If the Sixth Circuit affirms the sanctions imposed upon the attorneys in Michigan, referenced above, that should not affect the determination of this appeal.

Plaintiffs sued Appellees to vindicate their rights, not to create a narrative, or to improve the system. Plaintiffs sued for damages. As such, the Plaintiffs' legal

theory is different than any of the other "tsunami" of election cases that may have been filed and dismissed, regarding the 2020 Presidential election.

The district court erred by failing to follow the procedures required by Rule 11. Instead, the district court ignored Appellants' responses to the motions for sanctions, wherein those deficiencies were outlined. *Michigan* and *Pennsylvania* had no standing to be in the district court. They must be dismissed from this entire action, and the sanctions imposed by the district court requiring Appellants to pay into the general coffers of those States, must be reversed.

Similarly, the district court had no cause or jurisdiction to sanction Appellants, pursuant to § 1292, nor through its own inherent authority. As such, the district court abused its discretion, and has destroyed the reputation of Appellants—both of whom have been vilified by negative press, worldwide.

The right to determine the facts is a sovereign right, unless delegated to a state, or federal institution. Here, the Plaintiffs have a right to counsel and a jury trial. Instead, the district court decided the facts, even after dismissing the case for lack of subject matter jurisdiction. The district court found Appellants' evidence false, without an evidentiary hearing, and further chastised Appellants by finding that they had not spent the necessary time in preparing the complaints.

Appellants never grandstanded. The complaints and pleadings are extensively cited. No other case squarely precludes the Plaintiffs from pursuing their claims. In fact, many cases support the Plaintiffs' claims and are cited throughout the case. The record demonstrates the quality of work and research performed by Appellants. As such, no court should sanction and/or punish attorneys for attempting to protect the rights of their clients, unless caselaw already exists that foreclose their claims. In a potential class action, Appellants can construct a truthful website, and raise money for consultation fees, and other litigation costs and expenses. Of course, Appellants must remain in honor and protect the dignity of the courts. In that regard, the record establishes Appellants professionalism and diligence. Appellants have at all times acted in good faith, throughout the case and, before dismissal, did not request delay of any kind.

## ARGUMENT

### I. Standard of Review

This Court reviews a district court's decision to impose sanctions pursuant to Rule 11 and § 1927 for abuse of discretion. *Roth v. Green*, 466 F. 3d 1179, 1187 (10th Cir. 2006). A district court's decision to impose sanctions pursuant to its inherent power is also reviewed for abuse of discretion. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991).

A district court abuses its discretion when: (1) it fails to exercise meaningful discretion, such as acting arbitrarily, or not at all; (2) commits an error of law, such as applying an incorrect legal standard or misapplying the correct legal standard; or, (3) relies on clearly erroneous factual findings. *See Chamber of Commerce v. Edmondson*, 594 F.3d 742, 764 (10th Cir. 2010).

This Court reviews "de novo any statutory interpretation or other legal analysis underlying the district court's decision concerning attorneys' fees." *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1527 (10th Cir.1997).

## II. The District Court Erred by Sanctioning Appellants Pursuant to Rule 11

Rule 11 "focuses only on a challenged pleading or written motion." *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1223 (10th Cir. 2006). The "imposition of a Rule 11 sanction is not a judgment on the merits of an action." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990). "Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." *Id*. The standard for evaluating a Rule 11 motion is objective. The question is "whether a reasonable attorney admitted to practice before the district court would file such a document." *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir. 1988).

"[T]he award of Rule 11 sanctions involves two steps. *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988). "The district court first must find that a pleading violates Rule 11." *Id*. "The second step is for the district court to impose an appropriate sanction." *Id*. "Rule 11 imposes...an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing." *Collins v. Daniels*, 916 F. 3d 1302, 1320 (10th Cir. 2019).

This Court evaluates an attorney's "conduct under a standard of 'objective reasonableness—whether a reasonable attorney admitted to practice before the district court would file such a document.'" *Id*. (*quoting Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1182 (10th Cir. 2015), and *Adamson v. Bowen*, 855 F. 2d 668, 673 (10th Cir. 1988). "Because our adversary system expects lawyers to zealously represent their clients, [the Rule 11] standard is a tough one to satisfy; an attorney can be rather aggressive and still be reasonable." *Id*. "In short, Rule 11 requires that a 'pleading be, to the best of the signer's knowledge, well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and . . . not interposed for any improper purpose.'" *Predator Int'l, Inc.,* 793 F.3d at 1182 (*quoting Coffey v. Healthtrust, Inc.*, 1 F.3d 1101, 1104 (10th Cir. 1993)).

### A. The District Court Abused Its Discretion by Sanctioning Appellants Pursuant to Rule 11 for Averring Standing

The focus of the motions for sanctions was Appellees' argument that Plaintiffs' assertion of standing was not warranted by the facts, existing law, or a good faith argument for the extension of existing law. However, Plaintiffs "had no obligation to prove standing conclusively at the pleading stage." *Predator Intern., Inc.*, 793 F. 3d at 1194. Nonetheless, the district court simply found the Plaintiffs did not suffer a "particularized, concrete individual injury." *Sanctions Order*, p. 18.

There, the district court erred as a matter of law by concluding the Plaintiffs' case was barred by "binding Supreme Court precedent." *Id*. at 14 (*citing Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam). In *Lance*, four Colorado citizens sued the Colorado Secretary of State, in his official capacity, challenging the state's supreme court interpretation of a section of the Colorado Constitution as a violation of their rights under the Elections Clause. There, the Supreme Court identified a generalized grievance as when a plaintiff seeks to assert "only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted." *Id*. at 439 (*quoting Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)). Appellants respects the district court's decision, but respectfully disagrees with its conclusion that Plaintiffs claims constitute a generalized grievance.

The district court further stated:

> Plaintiffs' effort to distinguish this case from what I referred to as a "veritable tsunami" of adverse precedent [citation] was not just unpersuasive but crossed the border into the frivolous.

*Sanctions Order*, p. 16.

However, there are no similar cases involving these parties and claims. The Plaintiffs, here, are similar to Ms. Collins in her doomed case in New Mexico. *See Collins*, *supra*. The Plaintiffs, here, are the registered voters—which by the nature of their status as citizens of their respective states, and of the United States, authorizes them to petition the proper court for relief. Injury was pled. Thus, a disputed, material issue of fact exists as to whether the Plaintiffs suffered an injury-in-fact.

If the Plaintiffs had filed their complaint requesting the federal court ban and enjoin the general use of voting machines, *Dominion's* particular systems, *Facebook's* obvious censorship, and/or *CTCL* involvement with governments across the country, those claims might be considered a generalized grievance, or the assertion of an "institutional injury." *See Kerr v. Hickenlooper*, 824 F.3d 1207, 1214-1217 (10th Cir. 2016). However, the Plaintiffs, through counsel, here, instead focused on the injury-in-fact associated with the actual conduct of *Dominion*, *Facebook* and *CTCL*, and others, regarding the 2020 Presidential election.

That's not a generalized grievance.

The conduct is spelled out in the *Complaint* and *Amended Complaint*. *Dominion*, *Facebook* and *CTCL* do not have immunity. They subjected themselves to the jurisdiction of § 1983 through their inter-connection with the states, and each other, during the public function of administering the 2020 President election. That election, although conducted by the states, was national, thereby, a federal issue. It's the only election potentially involving every registered voter in the country.

With that, the Plaintiffs filed their case as a class action, but approached the federal courts in their own, individual capacity, as injured persons. Therefore, they are not, as in *Collins*, asserting the rights of others to gain standing, but are averring that there are others who are similarly situated. As to whether a right violation alleged causes compensational damage to trigger, the Supreme Court has held:

> In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law.

*Carey v. Piphus*, 435 U.S. 247, 258 (1978) (holding that the denial of procedural due process should be actionable for nominal damages without proof of actual injury).

Recently, the Supreme Court stated:

> That this rule developed at common law is unsurprising in the light of the noneconomic rights that individuals had at that time. *A contrary rule would have meant, in many cases, that there was no remedy at all for those rights, such as due process or voting rights, that were not readily reducible to monetary valuation*. [Emphasis added].

*Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800 (2021).

In their response brief in the substantive appeal, *Dominion*, *Facebook* and *CTCL* accuse Appellants of conflating the difference between an injury required for standing and the nominal damages that may be sought to redress the violation.

However, the two are interrelated. If a defendant violates a substantial or absolute right of a person, the latter has suffered an injury that, if for nothing else, is worth one dollar—but only if it can fairly be said that the defendant is a state actor. The district court never addressed the issue of state action in any of its orders. Further, the Plaintiffs referenced a request for nominal damages as the minimum damage incurred.

### B. The District Court Used the Wrong Standard

In its *Sanctions Order*, the district court spent pages referencing news articles that dispute Trump's allegation of voter fraud, culminating with a detailed description of the events at the Capital on January 6, 2021. *Sanctions Order*, pp. 42-46.

Plaintiffs and Appellants have nothing to do with any of that. Despite that, the district court stated:

> Given the volatile political atmosphere and highly disputed contentions surrounding the election both before and after January 6, 2021, circumstances mandated that Plaintiffs' counsel perform *heightened* due diligence, research, and investigation before repeating in publicly filed documents the inflammatory, indisputably damaging, and potentially violence-provoking assertions about the election having been rigged or stolen. [Emphasis added].

*Id*. at 47.

The district court relied upon the district court case of *Wisconsin Voters All. v. Pence*, 2021 WL 686359 (D.D.C. Feb. 19, 2021). There, a lawyer was referred for discipline after suing the Vice-President, the House of Representatives, the U.S. Senate, the Electoral College, and several governors and speakers of the House of Representatives from several states, all in their official capacity, to enjoin the counting of electoral votes. With slight alteration, the district court quoted that decision. *Sanctions Order*, p. 56. The actual language is:

> When any counsel seeks to target processes at the heart of our democracy, the Committee may well conclude that they are required to act with far more diligence and good faith than existed here.

*Wisconsin Voters All. v. Pence,* 2021 WL 686359 at *2. *See also Wisconsin Voters Alliance v. Harris, Court of Appeals,* 21-5056 (D.C.C. 2022) (dismissing the appeal because the district court's referral was not a final order).

That case represents the quintessential generalized grievance. Note the name change in the court of appeals case from *Pence* to *Harris*. Individuals weren't sued. There, the plaintiffs sued institutions and officers. Furthermore, that district court's finding did not "heighten" the standards, nor did it require the reasonable inquiry requirement to become "even more stringent." *See Sanctions Order*, p. 57. That court was simply noting that the disciplinary committee may conclude that counsel was "required to act with far more diligence and good faith than existed [t]here." *Wisconsin Voters All.,* 2021 WL 686359 at *2.

### C. The Record Establishes Appellants' Reasonable Inquiry

Pursuant to Rule 11, the district court found Appellants had not engaged in reasonable inquiry:

> Given the circumstances of this case, it was not enough to merely accept as true (or potentially true) what might be stated in the media, what had been pushed out over the Internet, or even what was included in other lawsuits filed around the country. Some effort at independent verification by the lawyers who signed the Complaint was required.

*Id*. at 31.

Similarly, the district court compared the Plaintiffs' case to lawsuits filed after the 2020 Presidential election that were "hoping to delay or stop the certification of certain states" results. For example, the district court noted the Plaintiffs' use of the Bill of Complaint filed in *Texas v. Pennsylvania*, 2020 WL

7229714. The district court accused Appellants of continuing "the theme of litigation by 'cut-and-paste,'" by citing "twelve paragraphs from the failed Georgia lawsuit filed by attorney Sidney Powell…" The district court then quoted from that complaint, not the Plaintiffs.

Much ink has been spilled by Appellants explaining their use of information gleaned from those cases, and others. As distinguished in the pleadings and previously filed Opening Brief (App. V14 3025), those cases contained a plethora of information, expert reports and affidavits, not all of which were adopted by the Plaintiffs and their counsel. Appellants used their years of trial and litigation experience to sift through this mountain of information to discern the truth. Conversely, although some of the information relied upon by Appellants were contained in other lawsuits, the Plaintiffs' case is not cut-and-paste, because it involves different claims for relief against defendants either not sued in those other cases, or serving in a different capacity, as outlined above.

The Plaintiffs' *Complaint* contains 74 footnotes, and numerous other citations, throughout the body of the pleading.[5] As argued by Appellees in their

[5] *See* App. V15 for a bibliography of the all the materials referenced in the complaints and pleadings, relied upon by Appellants, much of which was attached as reports and affidavits to the case files cited, therein.

motion for sanctions, some of the information was sourced from other court files, such as, *Texas v. Pennsylvania*, *supra*. The Supreme Court denied review for lack of standing, but the Bill was researched and filed by an attorney general, documented with an appendix of over a thousand pages, replete with affidavits and other evidence—upon much of which Appellants reasonably relied.

However, that was only one of multiple sources of information relied upon by Appellants in crafting the pleadings filed on behalf of their clients. As stated by Appellant, Attorney Ernest Walker, at the hearing on motions for sanctions:

> I did not speak with any of the affiants personally. However, I did do considerable investigation myself. I started with the contracts between the states and Dominion. And if anybody cares to read those contracts, they'll see that the involvement of Dominion was extensive, and covered essentially the entire administration of the election, and specifically the cybersecurity and security aspects of it. And so my purpose in those responsibilities, it was easy to see who was ultimately responsible for these activities. So then by reviewing the totality of the affidavits that were filed, it was easy…to connect the dots.
>
> And at this stage, we are still even at the beginning stage of this case. We haven't even gotten into discovery. Some of the statements that we have raised by government officials and so forth, none of that has been made under oath. Nobody has been subjected to cross-examination yet. That is all stuff that was planning to come out. So [co-counsel] and myself amassed considerable evidence to support our claims, although [co-counsel] and I agree that it's probable. And so we believe we had a righteous case to go forward.

> And I've done considerable research myself into the inner workings of Dominion's issues and how they work. I reviewed the inner workings of the Dominion machines and the information that was available on multiple sources on how the machines work, including direct video—not testimony, but presentations by Dominion employees to municipalities about how the machines work, and concluded that the totality of the circumstances agreed with the conclusion that was reached by that expert that said that only an intentional purpose could have concluded that these vulnerabilities in place was a purposeful intent to allow these machines to be vulnerable.
>
> And so the external resource, in addition to the research that that expert continued to parse out for conclusion and references to the evidence that it alludes to, and other experts. I mean, we've had multiple experts and Dominion staff all parroting the same message. It's pretty easy to agree, certainly to a level of probability, that Dominion intentionally set up their machines to be vulnerable.
>
> A prosecutor alleges intent, he's got evidence that doesn't necessarily prove it right then and there. But we have evidence, and I think once we go through the discovery process and are able to subject certainly -- subject them to cross-examination, we will have even further evidence to support our claims and our allegations. But, again, we're at the pleading stage. And so our allegation is that yes they intentionally set up their machines to be vulnerable, because that's the only logical reason for them leaving all of the vulnerabilities in place for the election.
> …
>
> I don't know that I've got anything to add, other than I think that we're entitled to rely on statements that are under oath. That's evidence that had been submitted to court, and we're entitled to rely on it just like anybody else would.

App. V11 2488-2492.

In its *Sanctions Order*, the district court remarked that the case was driven by Appellants. Yet, nothing could be further from the truth. The whole case was client driven. The complaints were not filed requesting federal court intervention in a presidential election. At its essence, the case has always been a damages case. As such, the injuries of Appellants' clients were the first concern—not an audit, or injunction. The case was and is about the injuries to the Plaintiffs, and others similarly situated voters across the country.

Appellants' cite the local district court case of *Baumann v. Federal Reserve of Kansas City*, 2013 WL 4757264 (Sept. 3, 2013), in which undersigned counsel represented the plaintiff—not for its precedential value, but to establish reasonable inquiry and the Plaintiffs' legal theory. App. V16 3244. There, the plaintiff was filming an arrest on a public side walk, outside the Federal Reserve Bank in Denver. A private security guard of the bank allegedly told Baumann to move back, and detained him, thereafter. The facts were in dispute, and the district court denied the bank's motion for summary judgment. Importantly, however, the district court found the private security guard to have, in the context of a motion for summary judgment, willfully participated in "joint action" with the Denver Police Department, who subsequently arrested and charged the plaintiff. The police weren't sued, nor was the City and County of Denver.

The bank and its security guards were sued for civil rights violations, based upon the joint action test. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); and, *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995). The same legal theory is used here. Like the security guard and bank, *Dominion*, *Facebook* and *CTCL* are private entities. However, when they engaged in joint action with the sub-divisions of states across the country, concerning the public function of a presidential election, they became state actors through their voluntarily conduct.

### D. The District Court Abused Its Discretion by Finding All of the Plaintiffs' Evidence False

The district court analysis of the evidence was clearly erroneous. In ruling upon a case pursuant to Fed.R.Civ.P. 12(b), courts generally "must accept as true all the allegations contained in a complaint . . ." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The allegations must be well-plead. *Id*. at 679. They must amount to more than legal conclusions or bare assertions that are "'a formulaic recitation of the elements' of a . . .claim." *Id*. at 681 (*quoting Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555 (2007). When "well-pleaded factual allegations" are within these bounds, a trial court must "assume their veracity" and proceed to the next step of the *Iqbal* analysis, i.e., "determin[ing] whether they plausibly give rise to an entitlement to relief." *Id*. at 681.

In his dissenting opinion in *Iqbal*, Justice Souter suggested that courts need not accept as true "allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel." *Id*. at 696.

Throughout the motions for sanctions the movants complained that the facts as stated by the Plaintiffs in their complaints are false. In the *Sanctions Order*, the district court accused Appellants of relying on media reports. At the same time, the district court repeatedly used media reports to discredit the Plaintiffs' evidence.

The district court "called into question" the expertise and credibility of the author of the ASOG Report, attached to Plaintiff's complaints. *Id*. at 41. App. V1 144. The district court repeated a press release from the Michigan Attorney General and articles from USA Today and Politifact. *Sanctions Order*, p. 41-42.

As a part of the *Complaint*, Appellants attached and relied upon parts of the *Navarro Report*. App. V1 167. The report is not inspired gospel, but fairly outlines a loosely documented list of election issues that took place in swing states in the 2020 Presidential election. The district court dismissed the report based upon a *Washington Post* article, calling it "the most embarrassing document" ever created by a White House staffer. *Sanctions Order*, p. 42, fn. 5.

In the hearing on the motions for sanctions, the district court questioned whether Appellants "might be being used, wittingly or unwittingly, as a propaganda tool for the ex-President to file this lawsuit and repeat his statements, and other people who are repeating statements in his favor?" App. V11 2486.

The district court consistently zeroed in on isolated paragraphs of the Plaintiffs' affidavits, and accused counsel of fostering insurrection in Washington D.C., on January 6, 2021. Yet, every original Plaintiff expressed their personal injury in their respective affidavits—not to mention those referenced in the complaint. Further, the facts, as alleged, were based on reasonable evidence, referenced throughout.

In reversing an order of sanctions for what a district court believed to be unsubstantiated allegations, the Fourth Circuit ruled:

> We conclude that plaintiffs did have a sufficient factual basis under Rule 11 for implicating Smith in the scheme. Many of the facts do not support the allegation that Smith was involved in the scheme. A factual basis for the allegation does exist, however...For Rule 11 purposes, the allegation merely must be supported by *some* evidence. Because we are unable to say that plaintiffs had *no* factual basis for their allegation, we cannot conclude that plaintiffs violated Rule 11's factual inquiry requirement. The district court abused its discretion by awarding sanctions to Smith as a result of the RICO count.

*Brubaker v. City of Richmond*, 943 F.2d 1363, 1377-78 (4th Cir. 1991) (emphasis in original).

Of course, facts may develop. As noted by the Supreme Court:

> Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

*Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 422 (1978).

In that regard, recently, a resolution was introduced in the Wisconsin State Assembly to reclaim the State's electoral ballots for the 2020 Presidential election.[6] App. V16 3277. The resolution was not passed, but outlines a series of facts regarding the activities of *Zuckerberg*, *CTCL*, *Dominion*, and others.

One of the multiple paragraphs states:

> Whereas, the Assembly Committee on Campaigns and Elections has collected nearly 3,000 documents and e-mails with connection to election manipulations by the CTCL in five of Wisconsin's largest cities, and there are five lawsuits in those cities against the Elections Commission.

Appellants cited some of those lawsuits in their responses to the motions for sanctions. App. V8 1947, 1970, App. V9 1987, and 2088. Those cases are against the Wisconsin Elections Commission, but nonetheless particularly describe the

[6] *2021 Assembly Joint Resolution 120*, Introduced by Representative Ramthun, Referred to Committee on Rules, January 25, 2022. https://docs.legis.wisconsin.gov/2021/related/proposals/ajr120.pdf

conduct of *CTCL*, as it relates to Wisconsin's general election. As alleged in Plaintiffs' complaints, this same conduct was exhibited in municipalities and counties across the country.

The Wisconsin Assembly also appointed a special counsel to investigate the integrity of 2020 election.[7] App. V16 3280. This report establishes that Appellants aren't just making things up. The *Special Counsel Report* opined that *CTCL* facially violated Wisconsin law prohibiting election bribery. *Special Counsel Report*, pp. 17-40. The report also states that the *CTCL* grants were impermissible and partisan. *Id*. at 41-43.

As a small example of the detailed 136 page report, *Special Counsel* states:

> CTCL's stated and implied conditions led to the Zuckerberg 5's municipal clerks and other staff to sometimes eagerly step aside, and other times to be pushed aside, to let CTCL and its private corporate partners engage in aspects of election administration—including exclusive free access to WisVote data not available to the public and not for free…CTCL and the private corporations, as revealed by the documents, had an ulterior motive in the WSVP to facilitate increased in-person and absentee voting in the Zuckerberg 5 and among their preferred racial groups.

*Id.* at 72.

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[7] Office of the Special Counsel, *Second Interim Investigative Report On the Apparatus & Procedure of the Wisconsin Elections System* (*Special Counsel Report*), March 1, 2022. https://legis.wisconsin.gov/assembly/22/brandtjen/media/1552/osc-second-interim-report.pdf

Additionally, in *Curling v. Raffensberger*, currently being litigated in the Northern District of Georgia, an expert report has been released regarding the reliability of *Dominion*'s voting system. App. V16. 3253. The 24 page declaration is a summary of an underling report by Dr. J. Alex Halderman, Professor of Computer Science at the University of Michigan, who states:

> Georgia's election system needs to evolve as well. Due to the critical vulnerabilities in Georgia's [Ballot Marking Devices] that are described in my expert report, Georgia voters face an extreme risk that BMD-based attacks could manipulate their individual votes and alter election outcomes. Even in the rare contests for which the State requires a risk-limiting audit, the scientific evidence about voter verification shows that attackers who compromise the BMDs could likely change individual votes and even the winner of a close race without detection. Georgia can eliminate or greatly mitigate these risks by adopting the same approach to voting that is practiced in most of the country: using hand-marked paper ballots and reserving BMDs for voters who need or request them. Absent security improvement such as this, it is my opinion that Georgia's voting system does not satisfy accepted security standards.

App. V16 3271

Declaration of J. Alex Halderman, *Curling, et al., v. Raffensperger, et al*., Civil Action File No. 1:17-cv-2989-AT (N.D. Ga.) (August 2, 2021).

### E. Plaintiffs' Counsel Did Not Have an Improper Motive

Appellees, *Facebook* and *CTCL*, claim in their motions for sanctions that Appellant filed the case for an improper purpose. As stated in Appellants' response, allegations regarding *CTCL's* violations of the Help America Vote Act

and National Voter Registration Act are averments in a complaint. These violations of those statutes form a *part* of the basis of Plaintiffs' § 1983 claims.

*CTCL* decries that Appellants misled the district court by citing cases that had been dismissed. However, Appellants drew attention to those cases through citation and footnotes. As stated in Appellants' combined response to *CTCL* and *Facebook's* motions for sanctions:

> There is nothing to hide, or be ashamed of, there. The facts as alleged are true. Further, the allegations were factual in nature, not legal. That case, again, was not against CTCL, but the City of Racine. The request was not for damages from CTCL to the Plaintiffs injured, but to enjoin a municipality. The Plaintiffs, here, are not moving to enjoin the City of Racine. Further, like the case cited by Plaintiff's counsel concerning a recent case filed against the WEC, and others: Although the claims and parties may be different, if the facts alleged are true, another set of parties are not precluded from making other claims based upon those facts against the actual party violating the Constitution, brought by those who were harmed.

App. V9 3271.

*CTCL* complains Appellants improperly questioned *CTCL's* legal capacity to enter into contracts outside of Illinois, and that it was gratuitous to challenge the deductibility of *Zuckerberg's* contributions and seek an investigation. These aren't "outrageous" or "defamatory claims." *CTCL* is organized as a non-profit organization. The public record reflects that *CTCL's* non-profit status requires that it not be for political purposes. App. V7 1530. The Plaintiffs allege that *CTCL's*

grants were made for a political purpose. *CTCL* can deny the allegations, but the facts indicate otherwise.

*CTCL* complained about the timing of the lawsuit, establishing its general misunderstanding of Plaintiffs' claims. The case was not for prospective relief, but retroactive relief. The case has never been about Trump, or one political party over another. The facts indicate that a very powerful billionaire, with other persons, conspired to unconstitutionally influence the outcome of the 2020 Presidential election, through interactions with multiple subdivisions of the several states, and *CTCL*. Accordingly, the case was not about advocating "politically inflammatory claims." To the contrary, Plaintiffs are attempting to hold Appellees responsible for the injuries caused—within the context of the over-whelming damage they have done to the integrity of our election process.[8]

*Facebook* also complained that Appellants constructed a website and took contributions. Appellants have a right to speak and accept contributions to cover costs. Neither is unethical or improper.[9] Appellants responded with regard to the

[8] The Editorial Board, *Zuckerberg Shouldn't Pay for Election*, Wall Street Journal, January 3, 2022 ("There are good questions about how CTCL spent money, and if Republicans take the House this year, maybe they'll ask. Yet even under the purest motives, private election funding is inappropriate and sows distrust.").

[9] After the case was dismissed, a 501(c)(4) was created to accept any further donations. The non-profit is operated by a board of directors, on which Appellants do not sit.

use of contributions for expenses, the lack of pressure or requirement that clients contribute, and the absence of any promises of enumeration. App. V9 2002.

As stated in Appellants' response to *Facebook* and *CTCL's* motions for sanctions:

> One of the best ways to communicate was through the website, email and by making short videos. All of this common practice in today's world, and there is nothing illegal or unethical about how Plaintiffs' counsel communicated with those interested in the suit and the general public at large.

App. V9 2002.

In this case, the original Plaintiffs qualified to be "one or more members of a class," pursuant to Fed.R.Civ.P. 23. The proposed *Amended Complaint* addressed the deficiencies in the *Complaint* concerning the class allegations. App. V5 920-925, ¶¶ 240-264. All of the necessary averments were truthfully made, concerning the creation of the class, as were all the other necessary allegations required.

Pursuant to Rule 23, "a court that certifies a class must appoint class counsel." Fed.R.Civ.P. 23(g)(1). In appointing counsel, the court must consider "the work counsel has done in identifying or investigating potential claims in the action." Fed.R.Civ.P. 23(g)(1)(A)(i). Accordingly, Appellants created a fair and truthful website to communicate with those interested. As stated in said response:

> Any interested party was welcome to send an under oath affidavit, with a photo identification, and a statement of their individual situation and

> damages, if any. From there, the parties' communication is protected by the attorney/client privilege. Suffice it say, Plaintiffs' counsel received an overwhelming response.

App. V9 2004.

### F. Dominion Failed to Follow the Procedure Required Under Rule 11

*Dominion* never served Appellants pursuant to Rule 5 with a copy of the motion for sanctions, before filing the motion in court, as required by Rule 11.

*Dominion's* motion for sanctions states:

> In compliance with Rule 11(c)(2), counsel for Dominion served this motion at the *email addresses* on file with the Court. Plaintiff's counsel did not respond within the twenty-one day safe harbor and have not otherwise responded since. [Emphasis added].

App. V8 1948.

Rule 11(c)(2) states:

> Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service…

Rule 5(b) states:

> Service: How Made.
>
> (1) *Serving an Attorney.* If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

> (2) *Service in General.* A paper is served under this rule by:
>
> (A) handing it to the person;
>
> (B) leaving it:
>
> (i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or
>
> (ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;
>
> (C) mailing it to the person's last known address—in which event service is complete upon mailing;
>
> (D) leaving it with the court clerk if the person has no known address;
>
> (E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or
>
> (F) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.
>
> Sending an email to the address in *Dominion's* file is insufficient.

*Dominion* did send Appellants a Rule 11 letter demanding that Plaintiffs immediately withdraw the *Complaint*. App. V8 1729. However, a letter is not

sufficient—a copy of the motion must be served on counsel, pursuant to Rule 5. *Roth v. Green*, 466 F.3d at 1192. Accordingly, Appellants were served with a copy of the motion when it was filed with the district court's electronic-filing system, after the case had been dismissed by the district court.

Even from the date of the email, the case was dismissed before the expiration of the twenty-one day "safe harbor" period. This failure to comply with the requirements of Rule 11 is fatal to *Dominion's* motion.

Regarding policy considerations in *Roth*, this 10th Circuit stated:

> The reason for requiring a copy of the motion itself, rather than simply a warning letter, to be served on the allegedly offending party is clear. The safe harbor provisions were intended to "protect litigants from sanctions whenever possible in order to mitigate Rule 11's chilling effects, formaliz[e] procedural due process considerations such as notice for the protection of the party accused of sanctionable behavior, and encourag[e] the withdrawal of papers that violate the rule without involving the district court...." 5A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1337.2, at 722 (3d ed.2004). Thus, "a failure to comply with them [should] result in the rejection of the motion for sanctions...." *Id.* at 723.

*Id*. at 1192.

### G. Facebook and CTCL Did Not Follow the Strict Requirements of Rule 11

The case was dismissed on April 28, 2021, and *Facebook* filed its motions for sanctions on May 21, 2021. In it, *Facebook* attached a letter mailed to Appellants on February 11, 2021, which included a copy of a motions for

sanctions. App. V8 1783. The motion included the original two page motion that it had previously served upon Appellants.

However, the filed motion was supplemented by additional fifteen page pleading, the over-whelming majority of which is focused on its request for sanctions, pursuant to Rule 11. The "plain language of subsection (c)(1)(A) requires a copy of the actual motion for sanctions to be served on the person(s) accused of sanctionable behavior at least twenty-one days prior to the filing of that motion." *Roth v. Green*, 466 F.3d at 1192.

*CTCL* filed its motions for sanctions on May 21, 2021, 23 days after dismissal. App. V8 1748. In it, *CTCL* attaches a copy of the proposed motion for sanctions, served on Appellants by Express Mail on April 12, 2021. Similarly, the motion served was not the motion filed, which included other substantial allegations, such as improper motive.

In general, the imposition of sanctions involve collateral issues that may be considered after the principal suit has been terminated. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990). However, there is 10th Circuit authority that intimates that a district court may not consider a Rule 11 motion filed after a case is dismissed. *Steinert*, 440 F.3d at 1223.

In *Steinert*, this Court stated:

> Although the Third Circuit has adopted a "supervisory rule" that sanctions issued under Rule 11 and the inherent power of the court must be decided before or concurrent to the final judgment, and hinted that the rule applies to § 1927, see *Prosser v. Prosser*, 186 F.3d 403, 405-06 (3d Cir.1999), we see no reason to extend such a rule to § 1927 in this circuit.

*Id*.

In *Prosser*, the Third Circuit quoted from a similar matter to this case:

> At the time that the court decided the motions for summary judgment and dismissal, it had before it the identical information that it relied upon three months later in imposing the sanctions. Nothing was to be gained by delay. If sanctions had truly been appropriate, the court should have imposed them at that time. Their imposition three months later was an abuse of discretion.

*Prosser v. Prosser*, 186 F.3d 403, 405-06 (3d Cir.1999) (*quoting Simmerman v. Corino,* 27 F.3d 58, 63-64 (3d Cir.1994)).

Here, the district court did not sanction Appellants at the time of the dismissal. Furthermore, *Dominion*, *CTCL* and *Facebook* had ample opportunity to serve and file their motions for sanctions, before the case was dismissed.

Other circuits have also found that "in determining the amount of attorney's fees to impose as a sanction, the court must consider whether the party to receive the award has acted promptly to bring a violation of Rule 11 to the court's attention." *Jackson v. Law Firm of O'Hara, Ruberg, et al.*, 875 F. 2d 1224, 1230 (6th Cir. 1989).

"A party who seeks attorney's fees as a Rule 11 sanction must mitigate damages by acting promptly and avoiding any unnecessary expenses in responding to papers that violate the rule." *Id*.

In fact, when on April 2, 2021, the district court set the matter for oral arguments on the several motions to dismiss to proceed twenty-five days later, on April 27, 2021, Appellees all knew that the case could be dismissed at any time, thereafter.

## III. The Magistrate Erred by Sanctioning Appellants Pursuant to § 1927

> Sanctions under § 1927 are appropriate when an attorney acts recklessly or with indifference to the law. They may also be awarded when an attorney is cavalier or bent on misleading the court; intentionally acts without a plausible basis; or when the entire course of the proceedings was unwarranted.

*Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1278 (10th Cir. 2005) (quotations and citations omitted).

§ 1927 sanctions are discretionary and are appropriate only when an "extreme standard" of conduct is met. *White v. Am. Airlines, Inc.*, 915 F.2d 1414, 1427 (10th Cir. 1990). An award of attorneys' fees and costs under § 1927 is appropriate "only in instances evidencing a serious and standard disregard for the orderly process of justice." *Id*. (quoting *Dreiling v. Peugeot Motors of Am., Inc*., 768 F.2d 1159, 1165 (10th Cir. 1985)).

The conduct must, when "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Id*. (*citing Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc)).

**A. Michigan and Pennsylvania Do Not Have Standing**

In its order of dismissal, the district court cited *Bognet v. Secretary Commonwealth of Pennsylvania*, wherein the 3rd Circuit stated:

> To bring suit, you—and you personally—must be injured, and you must be injured in a way that concretely impacts your own protected legal interests. If you are complaining about something that does not harm you—and does not harm you in a way that is concrete—then you lack standing.

980 F. 3d 336, 348 (3rd Cir. 2021), *cert granted and judgment vacated with instructions to dismiss as moot*. *Bognet v. Degraffenreid*, ___S.Ct.___(2021).

There, the plaintiff sued for injunctive relief against the Commonwealth by naming several state officials, all in their official capacity. Naming state officials in their official capacity is tantamount to suing the state.

Here, the Plaintiffs sued the *Pennsylvania Defendants* and *Michigan Defendants* in their respective, individual capacities for damages caused by their conduct performed under color of official authority. The Plaintiffs never sued a state. *See Ex Parte Young*, 209 U.S. 123 (1908). Twelve days before the Plaintiffs filed their Complaint, the U.S. Supreme Court reaffirmed that a person can sue a

state official under § 1983 in the latter's individual capacity. *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020).

Moreover, the respective attorney generals specifically filed their entries of appearance on behalf of said defendants in their official capacity. Their separate motions to dismiss were filed exclusively on behalf of the governors and secretaries of state of their respective State. In fact, when Defendant, Kathy Boockvar, resigned as Pennsylvania's Secretary of State, the *Pennsylvania* Attorney General changed the party on his entry to Ms. Boockvar's replacement, Veronica Degraffenreid, in her official capacity as Secretary of State for the Commonwealth of Pennsylvania. App. V2 299.

The *Michigan Defendants* and *Pennsylvania Defendants* never filed a responsive pleading and, as such, did not otherwise consent to the jurisdiction of the district court. The *Sanctions Orders* states that it "should have been as obvious to Plaintiffs' counsel as it would be to a first-year civil procedure student that there was no legal or factual basis to assert personal jurisdiction in Colorado for actions taken by sister states' governors, secretaries of state, or other election officials, in those officials' home states." *Id*. at 19. Appellants disagreed, and outlined their arguments in the Plaintiffs' responsive pleadings. App. V6 1380, App. V7 1462.

With that said, the district court failed to recognize that those defendants were sued in their individual capacity. In that regard, none of those defendants appeared, nor were they inconvenienced in any way. As argued, a person can always consent to jurisdiction. However, the attorney generals that entered their appearances did so specifically on behalf of the office holders of their state.

After *Michigan* filed it motion to dismiss, the Plaintiffs filed a motion to strike. App. V6 1346. The district court immediately denied the motions, finding that it "would be a strange world indeed if the plaintiffs in a lawsuit, merely by clever pleading in a complaint, could preclude a defendant from using the lawyer (or legal department) of his or her choice in defending against the allegations." App. 6 1365. Thereafter, when *Pennsylvania* filed its motion to dismiss, Appellants' arguments regarding the lack of standing were made in the Plaintiffs' corresponding response to *Pennsylvania's* motion to dismiss. App. V6 1377.

By that time, it was clear that the district court did not understand the nuances of the case, those individual defendants were not going to answer, and there was, admittedly, an issue over the Plaintiffs' ability to establish personal jurisdiction. Accordingly, those individual defendants were dismissed. App. V7 1489-1496.

The district court found that it was "inconceivable to have ever thought that state officials of Pennsylvania or Michigan would voluntarily waive personal jurisdiction and come to a Colorado federal court to answer charges about acts taken during the administration of Pennsylvania or Michigan elections." *Sanctions Order*, p. 22.

Yet, again, these individuals weren't sued in their capacity as "state officials" of those States. Nonetheless, the district court found that "[f]iling a lawsuit against an out-of-state defendant with no plausible good faith justification for the assertion of personal jurisdiction or venue is sanctionable conduct." *Id*.

### B. Appellants Never Unreasonably and Vexatiously Multiplied the Proceedings

Substantively, Plaintiffs filed a complaint and a motion for leave to amend, which were respectively dismissed and denied. With regard to the *Complaint*, § 1927 covers only the multiplication of the proceedings in a case. *Steinert v. Winn Group, Inc.*, 440 F. 3d 1214, 1224 (10th Cir. 2006).

"This unambiguous statutory language necessarily excludes the complaint that gives birth to the proceedings, as it is not possible to multiply proceedings until after those proceedings have begun." *Id*. at 1224-1225.

In that regard, the *Sanctions Order* states:

> [Appellants'] filing of a motion for leave to amend, without addressing the obvious fatal problems with standing and lack of personal jurisdiction, while attempting to add RICO claims based on a TIME magazine article that provided no support for such claims, was a violation of 28 U.S.C. § 1927 in that the attempt to amend unreasonably and vexatiously multiplied the proceedings.

*Sanctions Order*, p. 66.

Plaintiffs' proposed *Amended Complaint* outlines a scheme, some of which is based upon the TIME article. However, this is only a part of a broad foundation, constructed by many pieces of evidence that create a clear picture of abuse. Appellants only claimed RICO against *CTCL*, *Facebook*, *Zuckerberg* and *Chan*. Nonetheless, as the record reflects, the claims were well-plead and sufficiently supported by factual averments.

## IV. The District Court Erred by Sanctioning Appellants Pursuant To The Court's Inherent Authority

"Federal courts possess certain 'inherent powers,' not conferred by rule or statute, 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (*quoting Link v. Wabash R. Co.*, 370 U.S. 626, 630-631 (1962). That authority includes "the ability to fashion an appropriate sanction for conduct which

abuses the judicial process." *Id*. at 1186 (*quoting Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991)).

One permissible sanction is an assessment of attorney's fees against a party that acts in bad faith. *Id.* Thus, a "district court has broad discretion to calculate fee awards under that standard." *Id*. at 1184. However, "it may not impose an additional amount as punishment for the sanctioned party's misbehavior." *Id*. at 1186. With that, a sanction counts as compensatory only if it is calibrated to the damages caused by the bad-faith acts on which it is based. *Id*.

> This but-for causation standard generally demands that a district court assess and allocate specific litigation expenses — yet still allows it to exercise discretion and judgment. The court's fundamental job is to determine whether a given legal fee — say, for taking a deposition or drafting a motion — would or would not have been incurred in the absence of the sanctioned conduct. The award is then the sum total of the fees that, except for the misbehavior, would not have accrued.

*Id*. at 1187.

In exceptional cases, the but-for standard "permits a trial court to shift all of a party's fees, from either the start or some midpoint of a suit, in one fell swoop." *Id*. Thus, a "district court could reasonably conclude that all legal expenses in the suit 'were caused ... solely by [his] fraudulent and brazenly unethical efforts." *Id*. at 1188 (*quoting Chambers v. NASCO, Inc.*, 501 U.S. 32, 58 (1991)).

Inherent powers are the exception, not the rule, and their assertion requires special justification in each case. “Like all applications of inherent power, the authority to sanction bad-faith litigation practices can be exercised only when necessary to preserve the authority of the court." *Chambers*, 501 U.S. at 64. The “necessity predicate limits the exercise of inherent powers to those exceptional instances in which congressionally authorized powers fail to protect the processes of the court.” *Id*.

“Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.” *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980).

Here, Appellees have not argued that Appellants alleged wrongful conduct falls outside the scope of Rule 11 and/or 28 U.S.C. § 1927, which otherwise provide adequate protection against false statements and spurious legal claims.

Further, no evidence exists in the record that objectively demonstrates that Appellants acted improperly, or unprofessional. In fact, to the contrary, Appellants have filed well-researched and thoroughly documented complaints and other pleadings. Appellants have not unduly delayed the matter, or in any other way improperly prejudiced Appellees. The district court was offended by the Plaintiffs’ suit, but an objective court would not have had the same reaction.

## V. The District Court's Sanctions Were Unreasonable

Although the *Sanctions Order* fails to distinguish the amounts associated with the different authorities exercised by the district court, the sanction imposed was unreasonable. The amounts stipulated to between Appellants and *Michigan* and *Pennsylvania* were reasonable. However, the amounts Appellants were ordered to pay to *Dominion*, *Facebook* and *CTCL* are not.

A "lodestar" amount is generally reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Appellants accept opposing counsels' representations as to the hours expended, and the reasonableness of their hourly rate. However, requiring Appellants to pay over $180,000 in attorney fees is excessive and unreasonable. Sanctions under Rule 11 are penal in nature. However, Plaintiffs attempted to replace the *Complaint* through leave to amend. *Mink v. Suthers*, 482 F.3d 1244, 1254 (10th Cir. 2007) ("an amended complaint super[s]edes an original complaint and renders the original complaint without legal effect").

Normally, § 1927 covers only the multiplication of the proceedings in any case. This "unambiguous statutory language necessarily excludes the complaint that gives birth to the proceedings, as it is not possible to multiply proceedings until *after* those proceedings have begun. *Steinert*, 440 F. 3d at 1225 (emphasis in original).

As such, noting the district court's finding of bad faith from the start, the sanctions appear to have been imposed primarily based upon the district court's inherent authority. Referencing a district court's inherent authority, the Supreme Court has found that "if a plaintiff initiates a case in complete bad faith, so that every cost of defense is attributable only to sanctioned behavior, the court may…make a blanket award." *Goodyear Tire & Rubber Co.*, 137 S. Ct. at 1188.

In its *Final Order*, the district court stated:

> [The district court] conclude[s] that the repetition of defamatory and potentially dangerous unverified allegations is the kind of advocacy that needs to be chilled. Counsel should think long and hard, and do significant pre-filing research and verification, before ever filing a lawsuit like this again. As explained previously, this was a damages case with no need for urgency or immediate injunctive relief, and therefore there was no legitimate basis for filing suit without being certain about the claims. I do not believe that sanctioning these lawyers for this lawsuit threatens to chill appropriate legitimate legal advocacy in the future. I have also considered the degree of counsel's culpability, which is significant…I believe that rather than a legitimate use of the legal system to seek redress for redressable grievances, this lawsuit has been used to manipulate gullible members of the public and foment public unrest. To that extent, this lawsuit has been an abuse of the legal system and an interference with the machinery of government. For all these reasons, I feel that a significant sanctions award is merited. I also feel that the amounts awarded are to some degree consistent with the victim-centered . . . compensatory mechanism of sanctions anticipated under 28 U.S.C. § 1927.

*Final Order*, p. 19-20.

None of those findings are supported in the record. Plaintiffs are not "gullible members of the public," and Appellants' motives most certainly were not to foment unrest. Accordingly, the higher standard applied and sanctions imposed were calculated to not only discourage improper conduct, but to deter future lawyers from bringing constitutional right cases involving the 2020 Presidential election. No compelling interest is served by discouraging lawyers that seek to represents actual clients concerning the country's electoral process.

## VI. The District Court Infringed Appellants' Rights to Due Process and Freedom of Expression

The district court's *Sanctions Order* was designed to prevent Appellants and their clients from speaking about the 2020 Presidential election, because the district court disapproves of their case. This implicates the First Amendment, wherein Appellants and Plaintiffs have a right to speak and petition the government for redress of grievances. Litigants do *not* have a right to file lawsuits to ensure that government is conducted fairly and lawfully. That is a generalized grievance. However, plaintiffs injured by the acts or omission of persons acting under color of authority, should have an available remedy.

Both the *Sanctions Order* and *Final Order* are peppered with disdainful comments toward Appellants and the Plaintiffs. The end of the *Final Order* states:

> [Appellants] are experienced lawyers who should have known better. They need to take responsibility for their misconduct. Defendants have been significantly prejudiced, not just because they have had to incur legal fees to defend this pointless and unjustified lawsuit, but because they have been defamed, without justification, in public court filings.

*Final Order*, p. 20.

The comment is heart-felt, for sure, but seems to equate Appellants with criminal defendants that need to take responsibility for a lighter sentence. The district court's language also seems to suggest Appellants should stop arguing the case and drop their appeals. Space does not permit a full deconstruction of all the district court's one-sided criticisms of Appellants and their clients. Suffice it say, the district court gave its personal opinions the full weight of punitive sanctions. Its discussions are one-sided—citing only those who agree with its preferences, and wholly ignoring huge parts of the record that contradict its conclusions. All this, while accusing Appellants of engaging in the same behavior. The district court's analysis confuses standards and relies on inapplicable authorities. Thus, the Sanctions Order and Final Order employ a censorious, accusatory tone, contriving improper conduct where there is none.

Other circuit courts have also recognized that imposing attorney fees can often "create a disincentive to the enforcement of civil rights laws" and "have a chilling effect on a plaintiff who seeks to enforce his/her civil rights, especially

against a government official." *Riddle v. Egensperger*, 266 F.3d 542, 551 (6th Cir. 2001). *See also Dean v. Riser*, 240 F. 3d 505, 510 (5th Cir. 2001).

After oral arguments on the motions for sanctions, Appellants moved for an evidentiary hearing. App. V11 2558. However, the district court denied the request, finding that "train [has] left the station." App. V11 2563.

"The basic requirements of due process with respect to the assessment of costs, expenses, or attorney's fees are notice that such sanctions are being considered by the court and a subsequent opportunity to respond." *Braley v. Campbell*, 832 F. 2d 1504, 1514 (10th Cir. 1987).

In determining whether due process has been afforded, no bright-line rule applies because "[d]ue process is a flexible concept, and the particular procedural protections vary, depending upon all the circumstances." *Id*.

Here, noting the attack on Appellants' character and the allegations of deceit and impropriety, Appellants should have been afforded an opportunity to testify and present evidence. The matter was set "to hear arguments" between Appellants and the five Appellees. App. V9 2101. No orders were issued with regard to Appellants' ability to call witnesses, or present evidence. That could have been done at an evidentiary hearing. The district court's denial of the Appellants' request for such hearing for the presentation of evidence violates due process.

## CONCLUSION

For the reasons stated herein, the Appellants requests that this Court reverse the district court's orders granting Appellees' motions for sanctions, and set aside the district court's impositions of sanctions, as outlined in its *Final Order,* and for any further relief that this Court deems just and proper.

Respectfully submitted on April 7, 2022, by:

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## ORAL ARGUMENT STATEMENT

This appeal presents novel questions of both fact and law concerning the ability of voters to sue private entities for their public conduct without fear that their counsel will be sanctioned for filing a frivolous lawsuit. These questions concern the 2020 Presidential election, which is important. However, this appeal directly affects the livelihoods and reputations of Appellants, who now also have a stake in the outcome of this matter.

In light of Appellants' personal interests in this appeal, as well as the public's interest in the 2020 Presidential election, Appellants request oral arguments to ensure that Appellants receive procedural protection. Thus, this Court's decision-making process, and the public's interest in transparency, would be served significantly by oral argument.

## CERTIFICATE OF COMPLIANCE

As required by Fed. R. Ap. P. 32(a)(7)(B), I certify that this brief is proportionally spaced and contains 11,933 words. I relied on my word processor and its Word software to obtain this count. This brief also complies with the typeface and type-style requirements of Fed. R. Ap. P. 32(a)(5)-(6) because it was prepared using Microsoft Word in Times New Roman 14 point font, a proportionally spaced typeface. I certify that the information on this form is true and correct to the best of my knowledge and belief.

s/ Gary D. Fielder
Gary D. Fielder, #19757

**CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that (1) all required privacy redactions have been made; (2) any paper copies of this document submitted to the Court are exact copies of the version filed electronically; and (3) the electronic submission was scanned for viruses and found to be virus-free.

s/ Gary D. Fielder
Gary D. Fielder, #19757

## CERTIFICATE OF SERVICE

I hereby certify that I have on this 7th day of April, 2022, I electronically filed the foregoing APPELLANTS' OPENING BRIEF with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Gary D. Fielder
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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Tenth Circuit Local Rule 26.1, Appellants certify that they are natural persons and, thus, have no parent corporation and no publicly held corporation owns 10% or more of any stock.

Respectfully submitted on April 7, 2022, by:

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