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BY THE COURT:

DATE SIGNED: August 10, 2023

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

KHARY PENEBAKER, et al.,

Plaintiffs,

v. Case No. 22CV1178

ANDREW HITT, et al.,

Defendants.

DECISION AND ORDER
GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS

INTRODUCTION

In 2020, Wisconsin voters chose ten, and only ten, presidential electors to cast ballots in the United States Electoral College. Plaintiffs Khary Penebaker, Bonnie Joseph, and Mary Arnold are three of those electors. They allege that Andrew Hitt and nine other defendants (together, "Hitt") fraudulently pretended to be Wisconsin's electors as part of a conspiracy with attorneys James Troupis and Kenneth Chesebro.[1] Penebaker says this conspiracy damaged his reputation,

[1] For ease of reference, I refer to all of the plaintiffs as "Penebaker." I refer to the ten allegedly fraudulent electors, all of whom are jointly represented, as "Hitt." Alleged conspirators James Troupis and Kenneth Chesebro are not part of that group; Troupis has filed his own motion to dismiss. I refer to the individual defendants, when necessary, by their complete name.

caused a public nuisance, and usurped his office as elector. In response, Hitt and Troupis now move to dismiss Penebaker's complaint.[2]

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers, LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. "[T]he sufficiency of a complaint depends on substantive law that underlies the claim made …."*Id.* ¶31. What this means is that to defeat a motion to dismiss, all Penebaker had to do was "plausibly suggest [he] is entitled to relief." *Id.* Penebaker's complaint satisfies this minimum requirement of legal sufficiency because it alleges facts, which if true, state claims for civil conspiracy, public nuisance, and for quo warranto. The truth or falsity of those allegations—for now—does not matter.

At the threshold, I note that this is not the only lawsuit involving this alleged conspiracy. In an indictment for criminal conspiracy against former President Donald Trump, the United States Department of Justice alleges "fraudulent electors convened in sham proceedings in [Wisconsin] to cast fraudulent electoral ballots …." Indictment, ¶66, *United States v. Trump*, No. 1:23-cr-257-TSC, (D.D.C. August 1, 2023). Other state-level prosecutors have taken similar action. Complaint, *Michigan v. Berden*, No. 96-23900730-01, (Mich. Dist. Ct. 54-A, July 13, 2023) (alleging conspiracy to "utter and publish as true … [a] Certificate of Votes of the 2020 Electors from Michigan."). I emphasize that what other jurisdictions do, or do not do, has no bearing on the present application of Wisconsin's rules of civil procedure to Penebaker's complaint. All that matters, for now, is whether the complaint alleges violations of Wisconsin law that have injured Wisconsin citizens. As our chief justice has observed:

[2] I refer to Penebaker's operative pleading as his complaint. The actual pleading is titled "First Amended Complaint." Dkt. 107. That document is then further modified by an order striking one paragraph and other unnecessary explanatory notes. Decision and Order Striking Part of the Amended Complaint (Jun. 17, 2023), dkt. 218.

> While sometimes it may be difficult to undertake analysis of hot-button legal issues—as a good number of people will be upset no matter what this court does—it is our constitutional duty.

Trump v. Biden, 2020 WI 91, ¶111, 394 Wis. 2d 629, 951 N.W.2d 568 (Ziegler, J., dissenting).

I proceed to first summarize the allegations in the complaint. I then examine, in sequence, the legal claims and defenses the parties assert. After doing so, I conclude the complaint plausibly suggests Penebaker is entitled to relief for his civil conspiracy, nuisance, and quo warranto claims, but the complaint fails to state a claim under Wis. Const. art. I, § 9. Accordingly, I grant both motions to dismiss, in part.

I. BACKGROUND

On a motion to dismiss, courts must "accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Data Key,* 2014 WI 86, ¶19. However, courts do not accept legal conclusions as true. *Id*. In the following summary, I nevertheless cite various provisions of Wisconsin's election law, but this is only to frame what might otherwise be a meaningless set of allegations concerning various officials, dates, and times.

A. Penebaker casts his ballot as presidential elector.

Like the other States, Wisconsin must choose electors to vote for the President. U.S. Const. art. II, § 1. Wisconsin does this in a statewide election in which "a vote for the president and vice president named on the ballot is a vote for the electors of the candidates for whom an elector's vote is cast." Wis. Stat. § 5.10. The political parties that qualify for ballot access must nominate their electors in advance. Wis. Stat. § 8.18.

On October 6, 2020, the Democratic Party of Wisconsin nominated Khary Penebaker, Mary Arnold, Bonnie Joseph, and seven others as candidates for presidential elector. Amend. Compl., ¶¶60-61, dkt. 107. That same day, the Republic Party of Wisconsin nominated Andrew

Hitt, Robert Spindell, Bill Feehan, Kelly Ruh, Carol Brunner, Edward Grabins, Darryl Carlson, Pam Travis, and Mary Buestrin as candidates for presidential elector. *Id.* ¶63. Kathy Kiernan, who is also a defendant in this case, was not nominated by either party. *Id.* ¶136.

On November 3, Wisconsin held its 2020 presidential election. *Id.* ¶65. A preliminary canvass showed the Democratic Party of Wisconsin's candidate had won—that is, that Penebaker had been elected to serve as presidential elector. *Id.* ¶66. Two weeks later, on November 18, President Trump sought a partial recount. *Id.* ¶67. On November 30, the recount substantially confirmed the original canvass. *Id.* ¶68.

Wisconsin law requires the chairperson of the Wisconsin Elections Commission to "publicly canvass the returns and make his or her certifications and determinations on or before … the first day of December following a general election …." Wis. Stat. § 7.70(3). So, later in the day on November 30, WEC Chairperson Ann Jacobs certified that Penebaker and the other candidates chosen by the Democratic Party of Wisconsin were the duly elected presidential electors for the State of Wisconsin. Amend. Compl. ¶69.

Wisconsin's election statutes next required that "the governor shall sign, affix the great seal of the state, and transmit the certificate by registered mail …." Wis. Stat. § 7.70(5)(b). Governor Tony Evers immediately did this. Amend. Compl. ¶70.

After the governor certified the election results, President Trump sought judicial review of the election results. *Id.* ¶71. Time was now of the essence because electors had to cast their ballots on December 14. Wis. Stat. § 7.75(1) (Electors "shall meet at the state capitol following the presidential election at 12:00 noon the first Monday after the 2nd Wednesday in December."). On Friday, December 11, the circuit court affirmed the results of the partial recount. Amend. Compl. ¶73. The Wisconsin Supreme Court accepted an emergency petition for bypass and heard oral

arguments the next day, Saturday, December 12. *Id.* ¶73. Sometime in the morning of the following Monday, December 14, the supreme court affirmed the judgment of the circuit court. Amend. Compl. ¶74; *see Trump v. Biden*, 2020 WI 91 (the supreme court's published decision). By noon that day, any challenge to the election under Wisconsin law had been totally exhausted. At the time and place designated by statute, Penebaker and the other electors cast and transmitted their ballots. *Id.* ¶¶75-78.

B. Troupis and Chesebro formulate "our strategy" to defraud Wisconsin voters.

Penebaker alleges that while this electoral process unfolded, President Trump, along with Chesebro and Troupis, devised a plan "to override the will of the people with slates of fraudulent electors." *Id.* ¶¶85-87. Chesebro drafted memoranda regarding the fraudulent elector scheme that laid the plan's foundation. *Id.* ¶88. In particular, Chesebro sent Troupis a memo on December 9 in which "Chesebro acknowledged that none of the Republican candidates for the office of presidential elector in the targeted swing States were *currently* certified as having been elected …." *Id.* ¶93 (emphasis in original). Chesebro's December 9 memo outlined specific steps for Troupis and Hitt to follow.

> These included: meeting on December 14, 2020, in the same location that state law prescribed for the meeting of the duly elected presidential electors; filling any vacancies created by losing Republican candidates for the office of presidential elector who were unable or unwilling to participate in the scheme; casting votes for Trump for President and Pence for Vice President; preparing and signing certificates of those votes; and transmitting those certificates to the President of the Senate, the state Secretary of State, the National Archives, and the local federal district court.

Id. ¶99. Despite never having been elected, Hitt and the other unelected candidates "took each of these steps." *Id.* ¶100.

In this way, "Chesebro worked closely with Defendant Troupis—who … originally

connected Defendant Chesebro with the Trump campaign." *Id.* ¶117. For example, working alongside one other person, Troupis and Chesebro prepared an email titled "Proposed Jim Troupis Statement on Electors Meeting." *Id.* ¶118. That statement, later sent to defendant Andrew Hitt, "advised the Republican Party of Wisconsin to convene a separate Republican electors meeting and vote at the Wisconsin State Capitol on December 14." *Id.* In a December 7 email, Troupis told one of President Trump's campaign advisors how "our strategy" would work:

> "[T]he second [i.e., fraudulent] slate just shows up at noon on Monday [December 14] and votes and then transmits the results," and "[i]t is up to Pence on Jan 6 to open them." Defendant Troupis described this proposal as "*[o]ur strategy*, which we believe is replicable in all 6 contested states."

Id. ¶122 (first alteration added, other alterations and emphasis in original).

C. The fraudulent electors cast their ballots.

Early in the day on December 14—the day Penebaker cast his lawful ballot—Hitt and the other unelected candidates "assembled at a secret meeting place with armed security." *Id.* ¶130. Then, although COVID-19 restrictions had closed the Wisconsin Capitol to the public, Hitt and Chesebro "successfully arranged to be admitted to the building, and they were able to secure a room there for their meeting." *Id.* ¶131.

During the meeting, Chesebro, Hitt, and the other unelected candidates learned that the Wisconsin Supreme Court had affirmed the results of the partial recount …." *Id.* ¶138. Undeterred, they proceeded to act as though they had been elected. First, they appointed Kathy Kiernan as a replacement to fill the vacancy left by candidate Tom Schreibel, who did not participate in this meeting. *Id.* ¶¶143. The unelected candidates then "executed a document titled 'Certificate of the Votes of the 2020 Electors from Wisconsin.'" *Id.* ¶147. That document falsely represented the unelected candidates were "the duly elected and qualified Electors for President and Vice President

of the United States of America from the State of Wisconsin." *Id.* ¶148. The unelected candidates, having now fraudulently named themselves to be Wisconsin's presidential electors, cast Wisconsin's ten electoral votes for President Trump. *Id.* ¶149. Hitt then transmitted the fraudulent ballot to the Vice President, the Archivist of the United States, the Wisconsin Secretary of State, and the Chief Judge of the United States District Court for the Western District of Wisconsin. *Id.* ¶150.

On the morning the United States Congress planned to count the electoral ballots, January 6, 2021, Troupis tried to enlist Senator Ron Johnson to deliver a copy of the fraudulent ballots to the Vice President. *Id.* ¶153. The Vice President refused to accept the fraudulent ballots and, ultimately, counted Penebaker's and the other lawful ballots. *Id.* ¶154.

To summarize, the complaint alleges the Defendants were not Wisconsin's presidential electors, knew this fact, but fraudulently executed a certificate identifying themselves as "the duly elected and qualified Electors … from the State of Wisconsin." Amend. Compl. ¶143 and Ex. G.

Hitt (but not Troupis)[3] repeatedly offers his own interpretation of the allegedly fraudulent certificate. Having just summarized the allegations in the complaint, it makes the most sense to address Hitt's competing summary now, rather than to repeat the same analysis for each of Penebaker's below. However, as a threshold matter, Hitt's summary is not helpful because as I will often repeat, courts must "accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Data Key*, 2014 WI 86, ¶19. Anyway, according to Hitt:

> Regardless, there is no allegation that anything in the aforementioned Certificate [of the Votes of the 2020 Electors from Wisconsin] was false. The Certificate sent by the GOP Electors stated that they met at the State Capitol, voted for the Republican Party candidates, submitted their votes, and then

[3] Unlike Hitt, Troupis does not dispute the certificate contains at least one false statement. Troupis nevertheless also offers his own unhelpful interpretation of the allegations in the complaint. Troupis MTD Br., dkt. 191:15.

> signed the Certificate in their own names. All of that was certainly true. Nothing in the Certificate provides any basis for an allegation that they made a false statement ….

Hitt MTD Br., dkt. 186:24. In reply, Hitt adds to this summary by saying: "At all times, the GOP Electors were acting as the Republican Party presidential electors (even the Certificate that Plaintiffs take issue with is clearly set forth on Republican Party of Wisconsin letterhead." Hitt MTD Reply Br., dkt. 211:5.

The complaint attaches a copy of Hitt's certificate. Here is the first part:

CERTIFICATE OF THE VOTES OF THE
2020 ELECTORS FROM WISCONSIN

****

WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Wisconsin, do hereby certify the following:

Amend. Compl. Ex. G, dkt. 107:99. And here is the reverse page.

IN WITNESS WHEREOF, we, the undersigned, have hereunto, at the Capitol, in the City of Madison, in the State of Wisconsin, on this 14th day of December, 2020, subscribed our respective names.

Andrew Hitt, Chairperson

Id. at 100.

It should be plainly apparent that Hitt's summary is not consistent with the well-pleaded factual allegations in the complaint.[4] On a motion to dismiss, I may not consider his version of

[4] Hitt's summary of this certificate is both confusing and troubling.

- First, Hitt says there is no allegation that anything in the certificate was false. Hitt MTD Br., dkt. 186:24. However, the complaint alleges Hitt was not elected, Amend. Compl. ¶¶69-73, so the certificate falsely attests that Andrew Hitt and the nine other signatories were Wisconsin's "duly elected and qualified Electors."

events further. Accordingly, this decision will refer to Hitt as an "unelected candidate" for presidential elector up until the complaint alleges he committed fraud. Thereafter, because it is what the complaint alleges, this decision will refer to Hitt as a fraudulent elector.

D. Penebaker's alleged damages.

As a result of the fraudulent electors' actions, Penebaker alleges multiple injuries. These include Penebaker's injury as a taxpayer because of the public resources used by the fraudulent electors during their meeting in the capitol, *id.* ¶134, reputational damages caused by fraudulent electors casting doubt on his status as presidential elector, *id.* ¶267, and a general damage to Wisconsin's democracy, as evidenced by:

- A baseless "investigation" into the 2020 election by a former Wisconsin Supreme Court Justice. *Id.* ¶¶200-202 (the former Justice "laid out a roadmap in his report for how he believed decertification [of Wisconsin's 2020 election results] could take place.").

- Campaign statements in 2022 from a candidate for governor, who "publicly stated as late as August 2022 that he would consider attempting to decertify the election results." *Id.* ¶209.

- Polling data that showed voters lacked confidence in the outcome of the election. *Id.* ¶215.

- Second, Hitt says he only ever acted "as the Republican Party presidential electors …." I do not know what this means, but whatever it means, it is not alleged in the complaint. The United States Constitution assigns our state ten, and only ten, presidential electors. U.S. Const., art. II, § 1 cl. 2 ("Each State shall appoint … a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress …."). Wisconsin appoints its electors in an election. Wis. Stat. § 5.10. According to the complaint, Hitt was a losing candidate in that election. Candidates who lose elections generally do not refer to themselves by reference to the office they do not hold—Hitt is no more a "Republican Party presidential elector" than Mandela Barnes is Wisconsin's "Democratic Party senator." Of course, if Hitt wanted to label himself "Republican Party presidential elector," he could have done this as long as he committed no crimes under the auspices of his self-given title. But Hitt did not do this. The complaint alleges he signed and transmitted to the United States Senate a certificate identifying himself as one of Wisconsin's "duly elected and qualified Electors."

- Third, Hitt says the certificate appeared on Republican Party letterhead. Hitt MTD Reply Br., dkt. 211:5. The certificate contains no special headings.

Hitt's attorneys are reminded of their duties under Wis. Stat. § 802.05 and SCR 20:3.3.

To summarize, Penebaker alleges that "[t]he threat remains that antidemocratic actors will renew their calls for decertification …" such that "there is a significant probability that the Fraudulent Elector Defendants will be called upon again to falsely assume the office of presidential elector." *Id.* ¶¶218-19.

II. LEGAL STANDARD

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key,* 2014 WI 86, ¶19. "[T]he sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled. Plaintiffs must allege facts that plausibly suggest they are entitled to relief." *Id*. ¶31. Put another way, a complaint will be dismissed only "if it appears to a certainty that no relief can be granted under any set of facts that the plaintiff can prove in support of her allegations." *Strid v. Converse,* 111 Wis. 2d 418, 422, 331 N.W.2d 350 (1983); *Cattau v. Nat. Ins. Servs. of Wisconsin, Inc.,* 2019 WI 46, ¶8, 386 Wis. 2d 515, 926 N.W.2d 756.

III. DISCUSSION

Hitt and Troupis both move to dismiss Penebaker's complaint. Their motions seek the same result and significantly overlap. To avoid repetition, I look at each of Penebaker's claims in sequence and address both Hitt and Troupis' arguments as to why each claim should be dismissed.

A. Wisconsin lawyers are not licensed to impersonate public officials.

Before turning to Penebaker's claims, however, Troupis begins by seeking dismissal of any claims against himself because of two forms of immunity as an attorney. He first cites the common law rule that, because attorneys have a duty to advocate for their clients, attorneys generally are immune from tort liability to non-clients. Troupis MTD Br., dkt. 191:6.

1. Legal standard for an attorney's tort liability.

"[T]he immunity of an attorney who is acting in a professional capacity is qualified rather than absolute." *Strid,* 111 Wis. 2d at 429. Specifically, "an attorney is personally liable to a third party who sustains an injury in consequence of his wrongful act … where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act." *Id.* Indeed, the case on which Troupis primarily relies, *Auric v. Continental Cas. Co.*, stated this exception succinctly: "Where fraud has been involved, attorneys have been held liable to third parties." 111 Wis. 2d 507, 512, 331 N.W.2d 325 (1983) (citing *Scandrett v. Greenhouse,* 244 Wis. 108, 11 N.W.2d 510 (1943) and *Goerke v. Vojvodich,* 67 Wis. 2d 102, 108, 226 N.W.2d 211 (1975).); *Tensfeldt v. Haberman,* 2009 WI 77, ¶63, 319 Wis. 2d 329, 768 N.W.2d 641.

2. Troupis does not have conditional immunity because the complaint alleges he conspired to fraudulently impersonate public officials.

Troupis says this rule provides him immunity because he "was entitled to zealously advocate for his client and advise the [Trump] Campaign on how best to preserve its claims while courts considered and ruled on its case." *Id.* at 6-7. Later,[5] Troupis offers his own reading of the factual allegations in the complaint, from which Troupis infers his allegedly unlawful conduct "deceived no one" and was actually "widely discussed and accepted at that time." *Id.* at 14. Troupis further points to "Chesebro's well-researched work" and legal positions taken by other government agencies in other matters, from which Troupis concludes that "Wisconsin law does not prohibit an alternative set of electors from meeting." *Id.* at 15 (citing Fernholz Aff. Ex. C, dkt. 193).[6] To

[5] Troupis divides his conditional immunity argument between two different headings. Both sections rely on the same legal authorities to make what looks like the same legal argument. *Compare* Troupis MTD Br., dkt. 191:7 *with id.* at 10. I address both sections of Troupis' argument together.

[6] Troupis acknowledges that "normally a court reviewing a motion to dismiss is limited to the allegations in the complaint…." Troupis MTD Br., dkt. 191:3 n.1. He nevertheless appears to seek judicial notice of what, according to his attorney, is a "Wisconsin Department of Justice's Legal Opinion, dated February 9, 2022, to the Wisconsin

summarize, Troupis thinks he advised his clients in good faith, which advice other attorneys then vindicated with their own similar advice, and as a result he should be immune.

With these immunity principles in hand, I need only look to see whether Penebaker alleges Troupis was engaged in some fraud. Penebaker does allege Troupis was part of a fraudulent conspiracy—in fact, Penebaker says so outright. Amend. Compl. ¶20. Penebaker then follows up with a series of allegations from which Troupis' involvement in a conspiracy to impersonate Wisconsin's presidential electors could reasonably be inferred. *See e.g. id.* ¶¶99-102 (explaining Troupis' involvement in carrying the plan); *id.* ¶¶117-119 (explaining Troupis' involvement in drafting a statement "to convene a separate Republican electors meeting …."); *id.* ¶¶120-121 (Chesebro and Andrew Hitt both implicate Troupis); *id.* ¶122 (Troupis tells the Trump Campaign that unelected presidential elector candidates could "just show[] up … and vote[] and then transmit[] the results."); *id.* ¶¶122-128 (Troupis knew or should have known, even before the Wisconsin Supreme Court decided *Trump v. Biden,* that the plan was unlawful.).

In sum, I must "accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Data Key,* 2014 WI 86, ¶19. One reasonable inference from the complaint is that Troupis conspired to impersonate public officials. So, because Penebaker alleges this wrongful conspiracy caused him harm, Troupis has no qualified immunity.

3. Troupis has absolute liability for his statements made in judicial proceedings, but this does not matter.

Elections Commission." Fernholz Aff. ¶4, dkt. 193. Troupis says I can take notice of this document because it is a "publicly available document[] from government entities." Troupis MTD Br., dkt. 191:3 n.1. Hitt's briefing similarly contains a half-page summary of this document. Hitt MTD Br., dkt. 186:17 n.6.

Neither Hitt nor Troupis even attempt to show why the contents of this document are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Wis. Stat. § 902.01(4). This, ultimately, does not matter because the writings of an anonymous department of justice employee are immaterial to the sufficiency of a complaint. I deny both motions to take judicial notice as moot.

Troupis next argues that he has an absolute immunity from defamation because statements made in judicial proceedings are privileged. Troupis MTD Br., dkt. 191:8.[7] This form of privilege applies to statements "made in a procedural context which is recognized as affording absolute privilege, and it must be relevant to the matter being considered." *Hartman v. Buerger*, 71 Wis. 2d 393, 398, 238 N.W.2d 505 (1976). Immunity in this context "recognizes the social utility of encouraging the free flow of information in respect to certain occasions and persons, even at the risk of causing harm by the defamation." *Lathan v. Journal Co.*, 30 Wis. 2d 146, 152, 140 N.W.2d 417 (1966).

Penebaker does not dispute that any statements Troupis made in a judicial proceeding are privileged. However, Penebaker readily concedes that he "ha[s] not brought a defamation action." Penebaker MTD Resp. Br., dkt. 207:46. To the extent Penebaker must allege Troupis created a nuisance or participated in a conspiracy to perform a wrongful act, Penebaker does not rely on any privileged statements Troupis made in judicial proceedings or in any other context recognized as affording absolute privilege. I need not further consider whether Troupis might be immune from defamation claims no one has raised.

B. Penebaker alleges a civil conspiracy to impersonate public officials.

Troupis and Hitt, individually and/or together, next challenge each of claims Penebaker makes. Penebaker's first claim is for a civil conspiracy.

1. Legal standard for a civil conspiracy.

A civil conspiracy claim has three elements. First, a complaint must allege the formation

[7] Troupis' brief relies on *Neri v. Barber*, No. 2013AP181, unpublished slip op. (WI App Mar. 13, 2014) (per curiam). Troupis styles the decision as though it were a published decision of the court of appeals when it is an unpublished, per curiam decision of the court of appeals and cannot be cited in this state. Wis. Stat. § 809.23(3). I may not consider this citation.

of a conspiracy. *Onderdonk v. Lamb*, 79 Wis. 2d 241, 246, 255 N.W.2d 507 (1977). A conspiracy is "a combination of two or more persons acting together to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. The essence of a conspiracy is a combination or agreement to violate or disregard the law." WIS JI-CIVIL 2800; *Onderdonk*, 79 Wis. 2d at 246.

Second, a complaint must allege wrongful acts done pursuant to the conspiracy. *Onderdonk*, 79 Wis. 2d at 246. The acts of the conspirators "must be set out with the same certainty and particularity as in an ordinary civil action …." *Id.* at 248 (quoted source omitted).To satisfy this element, it is not necessary that the individual wrongful acts are a crime or even some lesser civil offense. *Radue v. Dill*, 74 Wis. 2d 239, 242, 246 N.W.2d 2d 507 (1976). Instead:

> It is only the existence of overt acts which is critical, in order that damages occur, not the actionability of the overt acts themselves. This court has consistently adhered to the rule that where the combination itself has for its purpose the doing of an unlawful act, the means, as regards whether they are in themselves actionable civilly or criminally, are not material.

Id. at 244; WIS JI-CIVIL 2806 ("Even lawful agreements, legal actions, and business activities may help make up a pattern of conduct that is unlawful.").

Finally, a complaint must allege "damage resulting from such act or acts." *Onderdonk*, 79 Wis. 2d at 246.

Stated together, "the complaint must allege: (1) The formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from such act or acts." *Onderdonk*, 79 Wis. 2d at 246; *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, ¶168, 285 Wis. 2d 236, 701 N.W.2d 523.

2. The complaint alleges the formation of a conspiracy.

The first element of a civil conspiracy is the formation of the conspiracy. Troupis does not

dispute the complaint alleges a combination of several persons acting together. Troupis MTD Br., dkt. 191:17.

Hitt does dispute this—he says the "Plaintiffs assert no facts demonstrating any of the foregoing elements [of a conspiracy]." Hitt MTD Br., dkt. 186:17. However, Hitt does not follow this blanket protest by specifically addressing the formation of a conspiracy, despite acknowledging that the first element of a conspiracy is "the formation and operation of a conspiracy." *Id.* at 16 (quoting *City of Milwaukee v. N.L. Indus., Inc.*, 2005 WI App 7, ¶25, 278 Wis. 2d 313, 691 N.W.2d 888).

In any event, the formation of a conspiracy is repeatedly satisfied by allegations in the complaint, for example, the allegation that Hitt and Chesebro met at the state capitol, Amend. Compl. ¶¶131-132, and that they had this meeting as part of a plan devised by Chesebro and Troupis. Amend. Compl. ¶¶120-128.

3. The complaint alleges wrongful acts done pursuant to the conspiracy.

The second element of a civil conspiracy is a wrongful act done pursuant thereto. Both Troupis and Hitt say the complaint fails to satisfy this element because they both say they violated none of the seven statutes Penebaker identifies in his complaint. Troupis MTD Br., dkt. 191:24; Hitt MTD Br., dkt. 186:17-21. By this logic, the driver who conspires with gunmen for the wrongful purpose of a robbery could suffer no liability from the victim, unless he exceeded the speed limit in making his getaway. That has never been Wisconsin's law. Instead, "where the combination itself has for its purpose the doing of an unlawful act, the means … are not material." *Radue*, 74 Wis. 2d at 244.

The complaint alleges Hitt and Troupis conspired to commit a wrongful act because it

alleges the conspiracy they formed had the wrongful purpose of impersonating a public official.[8] Impersonating public officials is wrongful because it is a crime. Wis. Stat. § 946.69. A person commits this crime if (1) the person "impersonates or represents himself or herself to be a public officer," and (2) the person does so "with the intent to mislead others into believing that he or she is actually a public officer." Wis. Stat. § 946.69(2)(c).

Accepting as true the allegations in the complaint, nobody disputes—at least within the meaning of this statute—that presidential electors are public officers of the State of Wisconsin. Wis. Stat. § 939.30 (defining public officer to include "any person … elected according to law"). Nor can there be any dispute that Hitt was never the public official he falsely claimed to be. Amend. Compl. ¶¶ 66, 139-140. However, Hitt and Troupis dispute that they *knowingly* impersonated any public official.

Hitt says he did not intend any wrongful act because he was doing what his attorney told him to do. Hitt MTD Br., dkt. 186:34. According to Hitt, the "undisputed facts establish a dispositive [advice of counsel] defense" so the complaint must be dismissed. *Id.* at 35.

"In order to establish an advice of counsel defense, a defendant must establish that:"

> (1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.

[8] Penebaker volunteers other theories to explain the wrongfulness of the conspiracy. I express no opinion about Penebaker's other theories because if the conspiracy violated even one statute, then it was wrongful. Put another way, whether the conspiracy acted lawfully under one statute would not remedy its wrongfulness under a second statute.

Specifically, Penebaker asserts the conspiracy had the wrongful purpose of violating seven different state and federal laws. Those laws are: Wis. Stat. §§ 5.10 (on selecting electors), 7.75 (on the electors' procedure), 939.05 (liability as a party to a crime) and 946.69 (impersonating a public officer.), plus 18 U.S.C. § 1512(c)(2), 494, and 371. Penebaker MTD Resp. Br., dkt. 207:17-24.

United States v. Cheek, 3 F.3d 1057, 1061 (7th Cir. 1993) (citing *Liss v. United States*, 915 F.2d 287, 298 (7th Cir. 1990).). Wisconsin adopted this five-part test in *State v. Ross*, 2003 WI App 27, ¶¶22-33, 260 Wis. 2d 291, 659 N.W.2d 122.[9]

I do not agree that the complaint establishes Hitt's advice of counsel defense. At trial or summary judgment, maybe Hitt can prove each of the five elements of that defense. But one reasonable inference from the complaint is that Hitt did not seek any advice in good faith, knew his actions were wrongful, but then continued anyways. For example, the complaint alleges:

> [Hitt and Troupis] learned that the process Wisconsin law expressly identifies as the exclusive mechanism for challenging the outcome of a presidential election in Wisconsin had been exhausted, and that Trump had lost.
>
> The Fraudulent Elector Defendants nevertheless conducted their meeting, at which they purported to exercise the powers assigned by law to the duly elected presidential electors for the State of Wisconsin.

Amend. Compl. ¶¶139-40. Accordingly, Hitt has not established an advice of counsel defense.

Troupis also asserts the complaint does not allege the necessary element of an intent to mislead others. According to Troupis, the fraudulent electors "could not know that they were not the official presidential electors because litigation was ongoing that had the potential of changing the outcome of the election …." Troupis MTD Br., dkt. 191:25. That litigation was a petition for a writ of certiorari Troupis filed with the United States Supreme Court. As I understand his argument, Troupis says state and federal law allowed him to file that petition, so therefore the fraudulent electors "could not—as a matter of law—have known they were not the lawful electors." *Id.* at 26.[10] In the same vein, Troupis points to a federal statute that requires governors

[9] *Ross* quotes this test, too, but in an apparent transcription error, its quotation swaps the position of "(5)" and the word "and." *See Ross*, 2003 WI App 27, ¶24.

[10] Hitt does not develop any similar argument. He instead argues I should not infer intent because Penebaker's complaint fails to plead particularized facts. I address Hitt's arguments, below.

credential ballots. *Id.* at 27 (citing 3 U.S.C. § 15). Without this credentialing, Troupis says the fraudulent electors "lodged their votes knowing they could not yet be counted …." *Id.* Thus, Troupis concludes I must find as a matter of law that he did not intend to mislead others and could not have violated § 946.69.

To accept Troupis' argument requires accepting each of its three premises: (1) his intent can be determined as a matter of law, (2) the doing of an act (i.e., filing a petition for a writ of certiorari) proves, as a matter of law, the intent in doing so, and (3) contrary inferences in the complaint are not accepted as true but instead discarded. All of these premises are false.

Troupis' first premise is false because a person's state of mind ordinarily may not be determined a matter of law. Instead, "intention is a mental process that necessarily must be proved through inferences drawn from the defendant's statements and actions." *Muller v. State,* 94 Wis. 2d 450, 473, 289 N.W.2d 570 (1980); *see e.g. Bush v. Gore,* 531 U.S. 98, 106 (2000) ("The law does not refrain from searching for the intent of the actor in a multitude of circumstances …."); *United States v. U.S. Gypsum Co.,* 438 U.S. 422 (1978) ("we hold that a defendant's state of mind or intent … must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption …."); *United States v. Coscia,* 866 F.3d 782, 795 (7th Cir. 2017) ("Recognizing that 'it is usually difficult or impossible to provide direct evidence of a defendant's mental state,' we allow for criminal intent to be proven through circumstantial evidence."); *State v. Smith,* 2012 WI 91, ¶30, 342 Wis. 2d 710, 817 N.W.2d 410 ("the trier of fact is free to choose among conflicting inferences of the evidence and may, within the bounds of reason, *reject that inference which is consistent with the innocence of the accused.*") (emphasis in original, quoting *State v. Poellinger,* 153 Wis. 2d 493, 506, 451 N.W.2d 752).); *Gouger v. Hardtke,* 167 Wis. 2d 504, 517, 482 N.W.2d 84 (1992) ("Where an individual's state of

mind is at issue … the trier of fact must be allowed to evaluate the individual's testimony in light of the credibility of the individual and other circumstantial evidence."); *Younger v. Rosenow Paper & Supply Co.*, 51 Wis. 2d 619, 629-30, 188 N.W.2d 507 (1971) ("where there is a dispute as to the intent of the parties … a fact issue is presented ….").

Properly considering intent as a factual question, the facts alleged in Penebaker's complaint *could* prove Hitt and Troupis knowingly intended to impersonate Wisconsin's lawful presidential electors. Such intent may be inferred from the allegations that Hitt and Troupis devised a plan to submit fraudulent ballots, that Hitt actually submitted those ballots, but that Hitt was never elected to do so and his ballots were never counted. Amend. Compl. ¶¶122, 147, 186. I must assume these allegations as true, so I must not assume Troupis' good intent.

But even if I accepted Troupis' first premise, for which he cites zero authority, I would next have to accept that the filing of a petition for a writ of certiorari with the United States Supreme Court proves that the conspiracy did not intend fraud. This second premise also fails because the mere fact that Troupis filed an appeal—which the supreme court effectively ignored altogether—neither proved his purpose in doing so nor entitled Troupis to any result: "An appellate court is not a performing bear, required to dance to each and every tune played on an appeal." *State v. Waste Mgmt. of Wisconsin, Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). In other words, one reasonable inference from the complaint is that the appeal did not seek to vindicate a legal right but was instead a delay tactic to further the conspiracy's wrongful aim.

Finally, even if I could determine intent as a matter of law, and even if Troupis' appeal proved that intent, I still could not accept Troupis' argument unless I also overlooked every contrary allegation in the complaint. I cannot do this because "[u]pon a motion to dismiss, we accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom."

Data Key, 2014 WI 86, ¶19. Given the chance to provide their own evidence, Troupis, Hitt, and Chesebro may each prove they did not intend to commit fraud. That is, any of the Defendants may explain why and/or whether they thought they could cast electoral ballots after the Wisconsin Supreme Court told him they could not; why and/or whether they relied on good faith advice of counsel; why and/or whether they thought the United States Supreme Court would review a state court's decision that, according to Troupis' petition, wrongly interpreted a state statute; *see* Petition for a Writ of Certiorari, pages i and 16-17, *Trump v. Biden*, No. 20-882 (U.S. Dec. 29, 2020), available online at https://www.supremecourt.gov/docket/docketfiles/html/public/20-882.html;[11] *but see Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("we will not review judgments of state courts that rest on adequate and independent state grounds …."); *see also Bush*, 531 U.S. at 103, 106 (a "standardless manual recount" violates the Equal Protection Clause because no one can "consider the 'intent of the voter'" by "interpret[ing] the marks or holes or scratches on an inanimate object, a piece of cardboard or paper …."); and why and/or whether they thought a remedy upon prevailing in the Supreme Court would have been "to strike indefinitely confined voters in Dane and Milwaukee Counties …" but not to strike any other similar voters in other counties, despite the fact this distinction "has no basis in reason or law; it is wholly without merit." *Trump*, 2020 WI 91, ¶8.

Maybe Troupis and Hitt will prove their good intent at trial or on summary judgment. But this is a motion to dismiss, so I look only to the allegations in the complaint and I conclude those allegations satisfy the second element of a conspiracy claim.

4. The complaint alleges damages resulting from the conspiracy's wrongful acts.

[11] The complaint does not allege the contents of Hitt's petition demonstrates his intent. The Court understands the contents of the petition are presumably privileged. *See* Part III.A.2.

The third and final element of a civil conspiracy is damages. Troupis argues the complaint fails to satisfy this element because it does not allege "real, legally cognizable injuries …." Troupis MTD Br., dkt. 191:17 (parentheticals omitted). Hitt also contends the complaint fails to plead damages, but his entire argument on this point is that "nothing is alleged that demonstrates Plaintiffs experienced damage from any conspiracy …." Hitt MTD Br., dkt. 186:17.

Troupis identifies two theories of damages alleged in the complaint. Troupis MTD Br., dkt. 191:17. According to Troupis, the first theory of damages arose when a state senator "reserved a room for the Fraudulent Elector Defendants to hold their meeting [in the capitol]," and this use of a room "required the allocation of resources," which harmed "[a]ll Wisconsin taxpayers." *Id.* (citing Amend. Compl. ¶¶133-135). Troupis says the second theory of Penebaker's damages arose when the Defendants "undermined" Penebaker's "claims to legitimacy as presidential electors." *Id.* (citing Amend. Compl. ¶267).

Penebaker offers a slightly different theory of his damages. He agrees with Troupis' characterization of damages arising from (1) his status as a taxpayer, Penebaker Resp. Br., dkt. 207:14, and (2) his professional reputation as one of the lawful presidential electors. Penebaker Resp. Br., dkt. 207:13. Penebaker also offers a third theory of damages, bottomed on the assertion that Penebaker—and every other Wisconsin voter—was damaged in his capacity to exercise the right to vote. *Id.*

The parties thus agree that the complaint alleges at least two theories of damages arising from the conspiracy: (a) to Penebaker's interest as a taxpayer and (b) to his reputation. I turn, next, to the parties' arguments about whether Wisconsin law recognizes those theories. Because the allegation of any recognized damages will sustain Penebaker's complaint, I do not proceed to

address his third theory—an injury to every Wisconsin citizen's right to vote—unless necessary.

a. The complaint fails to allege a conspiracy injured all taxpayers.

Troupis challenges Penebaker's first theory—that the alleged conspiracy caused an injury to all Wisconsin taxpayers—for three reasons. First, he says taxpayer damages are generally only allowed in a lawsuit against the government improperly using the tax. Troupis MTD Br., dkt. 191:18. Although Troupis' contributes his own boldface and italics to a statement he attributes to *Fabick v. Evers*, that case did not limit who taxpayers can sue. 2021 WI 28, ¶11, 396 Wis. 2d 231, 956 N.W.2d 856. What *Fabick* says is that, for standing as a taxpayer, "it must be alleged that the complaining taxpayer and the taxpayers as a class have sustained, or will sustain, some pecuniary loss." *Id.* (quoting *S.D. Realty Co. v. Sewerage Comm'n of the City of Milwaukee,* 15 Wis. 2d 15, 21, 112 N.W.2d 177 (1961).). The only other authority Troupis cites in support of this first argument is *Warnock v. NFL,* 356 F.Supp. 2d 535 (W.D. Pa. 2005), in which the plaintiff alleged "the NFL's antitrust violations forced [a Pennsylvania County] to pay money far more [sic] to build Heinz Field … than a marketplace free of those trade restraints would have demanded." *Id.* at 538. There, the district judge dismissed the complaint after surveying federal caselaw to conclude "a party may only assert municipal taxpayer standing if the party is (1) suing a governmental entity or representative; and (2) requesting equitable relief." *Id.* at 541 (collecting cases).

Unlike the Western District of Pennsylvania, Wisconsin does recognize taxpayer standing for suits against private entities. "Taxpayers may bring suits to recover property or money belonging to the municipality or to enforce any cause of action belonging to the municipality." *Coyle v. Richter,* 203 Wis. 590, 234 N.W. 906, 907 (1931). As an example of this, Penebaker points to *Schulz v. Kissling,* in which taxpayer William Schulz alleged the Four Wheel Drive Auto

Company "unlawfully received from the town of Menomonee, the sum of $3,490, which sum this plaintiff alleges should be repaid into the treasury of the town of Menomonee." 228 Wis. 282, 280 N.W. 388, 390 (1938). Faced with the same argument Troupis now makes, our supreme court held "it was proper for the plaintiffs to commence this action in behalf of themselves and all others similarly situated to compel restoration of this money to the city treasury." *Id.* at 391 (collecting cases and quoting *Wilcox v. Porth,* 154 Wis. 422, 143 N.W. 165 (1913) *overruled on other grounds, City of Milwaukee v. Firemen's Relief Ass'n,* 42 Wis. 2d 23, 30-31, 165 N.W.2d 384 (1969).).

However, Penebaker's reliance on *Schulz* does not save this theory of damages because Penebaker appears to claim damages for himself. Amend. Compl. dkt. 107:72. If this is what Penebaker seeks, any recovery must instead go to the public. *Schultz,* 280 N.W. at 392 ("If a recovery is had, the amount recovered will be restored to the town treasury ….). Compounding this problem, Penebaker fails to name as a party the allegedly damaged governmental entity. If Penebaker intends to pursue this theory of damages to make the injured agency whole, then the damaged governmental entity "must be a party." *Coyle,* 234 N.W. at 907 (1931). Accordingly, Penebaker fails to allege any taxpayer damages as a result of the alleged conspiracy.

Because I reject Penebaker's theory of taxpayer damages, Troupis' remaining challenges to that theory are moot. I discuss them briefly only to prevent any possible need for additional litigation. First, Troupis says the complaint fails to allege facts which show "that a small group's entry into a room in a public building caused an outlay of government money …." Troupis MTD Br., dkt. 191:19. I reject this argument because "[e]ven a loss or potential loss which is infinitesimally small with respect to each individual taxpayer will sustain a taxpayer suit." *Hart v. Ament,* 176 Wis. 2d 694, 699, 500 N.W.2d 312 (1993). The reasonable inference from the

complaint is that the fraudulent electors' meeting caused at least an "infinitesimally small" outlay of expenses. *See e.g.* Amend. Compl. ¶¶133-134 (Senator Scott Fitzgerald reserved a room for the Fraudulent Elector Defendants to hold their meeting … [which] required the allocation of resources from the Wisconsin Department of Administration ….). Troupis next says the complaint must "show that the government's expenditure is itself unlawful." Troupis MTD Br., dkt. 191:19 (citing *WMC v. Evers,* 2021 WI App 35, ¶30, 398 Wis. 2d 164, 960 N.W.2d 442, *aff'd* 2022 WI 38, 401 Wis. 2d 699, 977 N.W.2d 374.). That is not what *WMC* says, but in any event, the complaint does allege unlawful government action. The Wisconsin Department of Administration does not have authority to spend tax money on illegal conspiracies to change the outcome of Wisconsin's presidential elections. Wis. Stat. §§ 16.001(1)-(2); *Bush,* 531 U.S. at 104-105.

b. Reputational damages.

Penebaker's second theory for damages caused by the alleged conspiracy is to his reputation. He relies on *Singer v. Singer,* in which a wife alleged a civil conspiracy to "wickedly terminate" her marriage. 245 Wis. 191, 193, 14 N.W. 2d 43 (1944). Our supreme court examined the wife's complaint and concluded it stated a claim against the conspirators—her husband, her husband's mistress, and her husband's brother—because it contained "an allegation to the effect that the defendant on numerous occasions … did call the plaintiff vile names and wrongfully accused her of infidelity. This would seem to be slanderous and an injury to her character." *Id.* at 197-98. Penebaker says his complaint alleges similar reputational injuries because if Hitt claims to have been elected, then he must also wrongfully accuse Penebaker of having not been elected.

Troupis does not dispute that the complaint alleges a reputational harm. Instead, he points to Wis. Stat. § 134.01, a statute that creates criminal penalties for a conspiracy to "willfully or

maliciously injur[e] another in his or her reputation ….” Troupis says that a federal district court case has held “Section 134.01 preempts a common-law conspiracy claim.” Troupis MTD Br., dkt. 191:23 (citing *Medline Indus., Inc. v. Diversey, Inc.*, 563 F. Supp. 3d 894, 922-23 (E.D. Wis. 2021).). Based on *Medline,* Troupis concludes a civil conspiracy that causes reputational harm to its victim is not liable for that harm, unless the victim also satisfies any requirement under § 134.01.

Troupis’ argument is not persuasive because *Medline* says nothing about preemption. The opinion does not even contain the word “preempt” or any of its conjugations. But even if *Medline* said what Troupis thinks it says, Troupis does not explain why a Wisconsin court would adopt the nonbinding opinion of a federal district judge when, in this state, “[i]t is axiomatic that a statute does not abrogate a rule of common law unless the abrogation is clearly expressed and leaves no doubt of the legislature’s intent.” *Fuchsbruber v. Custom Accessories, Inc.*, 2001 WI 81, ¶25, 244 Wis. 2d 758, 628 N.W.2d 833. Nothing in Wis. Stat. § 134.01 “clearly expresse[s] and leaves no doubt” of some legislative intent to abrogate Wisconsin’s common law of conspiracies.

Accepting the well-pleaded factual allegations in the complaint as true, I conclude the conspiracy caused damage to Penebaker’s reputation. Accordingly, Penebaker pleads all of the elements of a civil conspiracy and I do not dismiss this claim.

5. The complaint alleges malice.

Finally, Troupis argues the complaint fails to state a claim for conspiracy because it does not allege actual malice. Troupis MTD Br., dkt. 191:32. Malice is not an element of a conspiracy. Instead, this argument springs from *New York Times Co. v. Sullivan,* which held that the First and Fourteenth Amendments required “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ ….” 376 U.S. 254, 279 (1964); *see Sidoff v. Merry,* No.

2022AP1871, unpublished slip op. ¶14 (WI App Aug. 3, 2023) (recommended for publication).[12] Although Penebaker explicitly disavows any defamation claim, Troupis argues the *New York Times* rule should apply here so Penebaker "may not bypass the strictures of the First Amendment" by pursuing other tort claims. Troupis MTD Br., dkt. 191:32 (quoted source omitted). In other contexts, courts have expanded the *New York Times* rule beyond defamation to similar torts "to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

However, I need not decide whether *New York Times* extends to civil conspiracies. Assuming it does, and further assuming Penebaker is a "public official,"[13] Troupis' argument still fails because the complaint does allege actual malice. A statement is made with actual malice if made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times,* 376 U.S. at 280. Penebaker's complaint satisfies this heightened standard because it alleges that after the Wisconsin Supreme Court affirmed the order dismissing President Trump's legal challenge to Wisconsin's election results, and after Hitt learned this fact, Hitt proceeded to impersonate the lawful electors anyways, and he did so as part of a conspiracy with Troupis. One reasonable inference from these allegations—perhaps the only reasonable inference—is that Hitt did this with the knowledge his statements ("we, the undersigned, being the duly elected and qualified Electors …") were false.

[12] Alternatively, Troupis argues actual malice is also required under Wis. Stat. § 134.01. Troupis MTD Br., dkt. 191:33 n.14. I have already rejected Troupis' argument that § 134.01 preempted common law conspiracy claims. Part III.B.4.b.

[13] Penebaker does not dispute he was a "public official." Penebaker MTD Br., dkt. 207; *see Pronger v. O'Dell,* 127 Wis. 2d 292, 295, 379 N.W.2d 330 (Ct. App. 1985) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).) (The "public official" label "applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.")

In sum, the complaint alleges all three elements of a civil conspiracy. It alleges Troupis, Chesebro, and Hitt formed a conspiracy, the conspiracy had as its purpose the wrongful act of impersonating a public official, and that Penebaker's reputation was damaged. Therefore, I do not dismiss this claim.

C. The complaint alleges a public nuisance.

Penebaker's second claim is for a public nuisance. Hitt and Troupis both seek to dismiss this claim.

1. Legal standard for a public nuisance.

"[A] public nuisance is an unreasonable interference with a right common to the general public." *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee,* 2005 WI 8, ¶28, 277 Wis. 2d 635, 691 N.W.2d 658. To determine whether a nuisance exists, courts consider factors like "the nature of the activity, the reasonableness of the use of the property, location of the activity, and the degree or character of the injury inflicted or right impinged upon." *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Corp.*, 2002 WI 80, ¶21, 254 Wis. 2d 77, 646 N.W.2d 777 (note and citations omitted).

To state a claim for a public nuisance, a complaint must allege four elements: (1) a public nuisance existed, (2) which resulted in significant harm to the plaintiff, (3) that the defendant caused the public nuisance, and (4) that the defendant's conduct in causing the nuisance was unreasonable. WIS JI-CIVIL 1932 (citing *Physicians Plus,* 2002 WI 80, ¶21 n.15 and Restatement (Second) of Torts, §§ 821, 825).

2. Penebaker may pursue this claim in the name of the state.

Before turning to the complaint to see if it alleges each of those four elements, I must address Penebaker's motion for leave to seek to enjoin the alleged nuisance in the name of the state. "An action to enjoin a public nuisance may be commenced and prosecuted in the name of

the state … upon the relation of a private individual … having first obtained leave therefor from the court." Wis. Stat. § 823.02.

Although the parties briefed this motion separately, no one explained any independent reasons why Penebaker should not have this leave. To be sure, Hitt and Troupis oppose the motion, but they predicate their opposition only on their arguments for why the complaint fails to allege *any* nuisance, regardless of whether Penebaker seeks to abate the nuisance for himself or on behalf of the state. Hitt Mot. for Leave Resp. Br., dkt. 220; Troupis Mot. for Leave Resp. Br., dkt. 219.

I grant Penebaker's motion for leave because, for the reasons discussed below, the complaint alleges each element of a public nuisance. Our legislature has already made the policy decision to allow private citizens to abate public nuisances in its name—as one of our justices recently noted: "A democratic state must … have the power to prevent all those practices which tend to subvert the electorate …." *Trump*, 2020 WI 91, ¶150 (R.G. Bradley, J., dissenting) (quoted source and original ellipsis omitted). I decline to develop arguments the parties have not made, or to insert my own judgment in an area where the legislature has already spoken: courts "must give effect to the legislature's choice." *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶26, 402 Wis. 2d 539, 976 N.W.2d 82 (quoting *State v. Yakich*, 2022 WI 8, ¶24, 400 Wis. 2d 549, 970 N.W.2d 12.).

3. The complaint alleges each element of a public nuisance.

Having concluded Penebaker may seek relief both in his name and in the name of Wisconsin, I return to the elements of a public nuisance claim. The first element is that a public nuisance existed. As I have already explained, the complaint alleges a conspiracy to impersonate public officials. Part III.B. A conspiracy to impersonate Wisconsin's presidential electors is a crime, Wis. Stat. § 946.69, and therefore is also a nuisance because repeated violation of criminal statutes constitutes per se a public nuisance." *State v. H. Samuels Co.*, 60 Wis. 2d 631, 638, 211

N.W.2d 417 (1973). The conspiracy allegedly repeated its crime at least ten times in quick succession as ten Defendants signed their name to a certificate fraudulently attesting each was a "duly elected and qualified Elector." Alternatively, participation in the electoral process is perhaps our most fundamental community activity. So, even if the conspiracy did not commit any crime, the impersonation of public officials central to the electoral process would still be a public nuisance because it "substantially or unduly interferes … with the activities of an entire community." *Physicians Plus,* 2002 WI 80, ¶21. Accordingly, the complaint alleges a nuisance existed.

The second element of a public nuisance is that it caused significant harm to the plaintiff. The plaintiff here is not only Penebaker, but also the State of Wisconsin, in whose name Penebaker has leave to seek to enjoin the nuisance. The complaint alleges both have suffered harm—to Penebaker because it allegedly damaged his reputation, Part III.B.4, and to the State because the nuisance interfered with the right to vote, "a right which the law protects and enforces …." *State v. Phelps,* 144 Wis. 1, 128 N.W. 1041, 1046 (1910).

Third, a complaint must allege the defendant caused the public nuisance. The complaint alleges Hitt and Troupis caused the nuisance by conspiring to impersonate public officials. Amend. Compl. ¶¶120-123, 138-140. The complaint further alleges that the nuisance continues to exist because the alleged conspirators continue to impersonate public officials. Amend. Compl. ¶221 ("the Fraudulent Elector Defendants have disavowed neither their false assumption of the office of presidential elector nor the actions that they took …."). In fact, Hitt continues to describe himself as Wisconsin's "duly elected and qualified Elector" in his submissions to this Court. Hitt MTD Br., dkt. 186:24.

The final element of a public nuisance is that the defendant's conduct was unreasonable. Nobody disputes that impersonating public officials in violation of Wisconsin's criminal statutes

is unreasonable.

Accordingly, the complaint alleges all four elements of a public nuisance claim. I therefore grant Penebaker leave to seek to enjoin the alleged public nuisance on behalf of the state and I do not dismiss this claim.

D. The complaint alleges a claim for quo warranto.

Penebaker's third claim is for a writ of quo warranto. Hitt, but not Troupis, seeks to dismiss this claim. Hitt MTD Br., dkt. 186:32; *see generally* Troupis MTD Br., dkt. 191:2.

1. Legal standard for quo warranto.

"Quo warranto actions 'test the ability of an individual to hold office.'" *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶13, 402 Wis. 2d 539, 976 N.W.2d 82 (alterations omitted, quoting *State ex rel. Shroble v. Prusener*, 185 Wis. 2d 102, 108-109, 517 N.W.2d 169 (1994).). Although typically brought by the attorney general, "[s]uch action may be brought in the name of the state by a private person on personal complaint when the attorney general refuses to act …." Wis. Stat. § 784.04(2). The burden for a private person to commence a quo warranto is to "show that he has sustained or is in danger of sustaining injury as a result of the challenged action … only a slight interest is necessary to qualify a person to apply for leave to prosecute the action." *City of Waukesha v. Salbashian*, 128 Wis. 2d 334, 349, 382 N.W.2d 52 (1986).

Quo warranto is appropriate in these circumstances:

> (a) When any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state; or ….

Wis. Stat. § 784.04. The remedy for a quo warranto action is limited. Courts determine the "right of the defendant as justice shall require," Wis. Stat. § 784.08, and if a defendant is adjudged to have unlawfully held office:

> [J]udgment shall be rendered that the defendant be excluded from the office, franchise or privilege and that the plaintiff recover costs against the defendant. The court may also, in its discretion, fine the defendant a sum not exceeding $2,000 ….

Wis. Stat. § 784.13.

2. The complaint alleges each element of a claim for quo warranto.

According to Hitt, the quo warranto claim must be dismissed because presidential elector is not a "public office," or assuming it is, because Penebaker fails to allege any special interest in that office. Hitt MTD Br., dkt. 186:32.

Hitt first claims quo warranto exists only to protect a "public office," which he defines to mean an office that "must possess sovereign power of the government, have permanency and continuity, and be entered upon by taking an oath, among other things." Hitt MTD Br., dkt. 186:32-33 (citing *Burton v. State Appeal Bd.,* 38 Wis. 2d 294, 156 N.W.2d 386 (1968).). No court has defined "public office" like this. Instead, Hitt's definition selectively borrows from "criterion to be considered" in determining whether an office is public. *Burton,* 38 Wis. 2d at 302. The focus of those criteria is "not with the panoply of the ceremonials by which the position is assumed but rather the nature of the power that devolves upon the position by virtue of the legislative delegation." *Id.* at 303 (citing *Martin v. Smith,* 239 Wis. 314, 1 N.W.2d 163 (1941).). Giving due weight to the nature of the power of presidential electors—the federal legislature's delegation of an extraordinary authority to elect the president—I conclude Wisconsin's presidential electors are public officers.[14]

[14] Although of limited persuasiveness to how Wisconsin defines its own public officers, my non-exhaustive survey shows the other states generally agree. *See Clayton v. West,* 489 P.3d 394, ¶12 (Ariz. 2021) ("we interpret the 'public office' … to be the office of presidential elector …."); *Mahoney v. Lomenzo,* 202 N.W.3d 371 (N.Y. 1964) ("presidential electors were candidates for election to public office …."); *State ex rel. Beck v. Hummel,* 80 N.E.2d 899 (Ohio 1948) ; *State v. Stewart,* 230 P. 366, 367 (Mont. 1924) ("there cannot be any question that one who is a candidate for presidential elector is a candidate for public office in this state."); *Hodge v. Bryan,* 148 S.W. 21, 23 (Ky. 1912);

Hitt next protests that the complaint fails to state a claim for quo warranto because it neither alleges the usurpation of a public office nor any injury to Penebaker. Hitt MTD Br., dkt. 186:33. Usurpation means "the unlawful seizure and assumption of another's position, office or authority." *Black's Law Dictionary* (11th ed. 2019). The complaint plainly alleges Hitt unlawfully assumed the office of presidential elector when he executed the false "Certificate of the Votes of the 2020 Electors" reproduced in Part I of this decision and the complaint plainly alleges Penebaker was injured because he was the lawful holder of that office.

Finally, Hitt argues this claim is moot. Hitt MTD Br., dkt. 186:33-34 (citing authority from Minnesota, Indiana, and Nebraska). Hitt does not discuss the mootness doctrine except to say he "no longer occup[ies] the position of presidential electors for the Republican Party …." Hitt MTD Br., dkt. 186:34. To be clear, Penebaker does not seek to remove Hitt from "the position of presidential elector for the Republican Party." Penebaker's claims are not moot because, accepting the allegations in the complaint as true, "there is a significant probability that the Fraudulent Elector Defendants will be called upon again to falsely assume the office of presidential elector." Amend. Compl. ¶219. Or, even if resolution of the quo warranto claim had no practical effect, I still would not grant Hitt's motion to dismiss because one "established exception" to mootness arises when "the issue is likely to arise again and should be resolved by the court to avoid uncertainty …." *Matter of Commitment of J.W.K.,* 2019 WI 54, ¶12, 386 Wis. 2d 672, 927 N.W.2d 509 (quoting *G.S. v. State,* 118 Wis. 2d 803, 805, 348 N.W.2d 181 (1984).).

To conclude, the complaint states a claim for quo warranto because it alleges Hitt and nine other defendants usurped the office of presidential elector. That claim is not moot because,

State ex rel. Blydenburgh v. Burdick, 46 P. 854, 857 (Wy. 1896); *see also Peabody v. Tucker,* 289 A.2d 438, 439 (Pa. 1972) and *Markham v. Bennion,* 252 P.2d 539, 542 (Utah 1953) (implicitly referring to electors as a public office).

accepting as true the facts alleged, its resolution will have the practical effect of preventing further usurpation.

E. The complaint fails to allege a claim for punitive damages.

Troupis and Hitt both argue the complaint fails to state a claim for punitive damages because, simply put, punitive damages are not a claim. Troupis MTD Br., dkt. 191:38; Hitt MTD Br., dkt. 186:32. I agree that "punitive damages are in the nature of a remedy and should not be confused with the concept of a cause action." *Brown v. Maxey*, 124 Wis. 2d 426, 431, 369 N.W.2d 677 (1985); *Wussow v. Commercial Mechanisms, Inc.*, 97 Wis. 2d 136, 293 N.W.2d 897 (1980) ("Compensatory, special, and punitive damages are all subsumed under the general category of the branch of remedies denominated as damages."). Penebaker does not dispute this theoretical distinction between claims and remedies.

I therefore dismiss any "claim" for punitive damages. Penebaker may instead pursue punitive damages as a remedy for his other claims consistent with the procedure in Wis. Stat. § 895.043.

F. The complaint fails to allege a claim under Wis. Const. art. I, § 9.

Troupis and Hitt next argue the complaint fails to state a claim arising under art. I, § 9 of the Wisconsin Constitution. Hitt MTD Br., dkt. 186:30; Troupis MTD Br., dkt. 191:39. That section provides, in relevant part: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character." Wis. Const. art. I, § 9.

I agree with Hitt and Troupis that the complaint fails to state any claim under this section because "art. I, § 9 confers no legal rights. Rather, art. I, § 9 applies only when a prospective litigant seeks a remedy for an already existing right." *Aicher ex rel. LaBarge v. Wisconsin Patients*

Compensation Fund, 2000 WI 98, ¶43, 237 Wis. 2d 99, 613 N.W.2d 849 (internal citations and quotation marks omitted,). More succinctly put, courts "cannot preserve a right to obtain justice where none in fact exists." *Id.* ¶54.

G. The complaint is not vague, does not ask a political question, and WEC does not have exclusive authority to prosecute civil conspiracies.

Hitt, but not Troupis, makes three final and relatively undeveloped arguments. According to Hitt, the complaint is impermissibly vague, Hitt MTD Br., dkt. 186:16, 21-25, the political question doctrine bars any relief, *id.* at 38, and WEC "has exclusive authority to determine what is lawful or unlawful under Wisconsin's election code." *Id.* at 25-27. I briefly address each of these arguments, in sequence.

1. The complaint is not vague.

Hitt begins with the argument that the complaint is impermissibly vague. He relies on the requirement that "the circumstances constituting fraud or mistake shall be stated with particularity." Wis. Stat. § 802.03(2). "'Particularity' means the 'who, what, when, where, and how.'" *Friends of Kenwood v. Green*, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271 (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990).). This rule is "designed to protect defendants whose reputation could be harmed by lightly made charges of wrongdoing involving moral turpitude, to minimize 'strike suits,' and to discourage the filing of suits in the hope of turning up relevant information during discovery." *Id.* Applying this rule, Hitt says the complaint "failed to plead particularized facts related to each of the GOP Electors' specific knowledge or awareness" of their alleged fraud. Hitt MTD Br., dkt. 186:23.

I disagree. To repeat, "intention is a mental process that necessarily must be proved through inferences drawn from the defendant's statements and actions." *Muller*, 94 Wis. 2d at 473. The

complaint submits ample information about the "who, what, when, where, and how" of the Defendants' statements and actions. From those allegations, a reasonable jury could infer their intent, and so the complaint satisfies the heightened pleading standard under Wis. Stat. § 802.03(2).

2. The complaint does not allege a political question.

Hitt then argues that all of Penebaker's claims must be dismissed under the political question doctrine. Hitt MTD Br., dkt. 186:38. In *Baker v. Carr,* the United States Supreme Court explained that courts defer to the political departments of government in cases that feature:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department;
>
> or a lack of judicially discoverable and manageable standards for resolving it;
>
> or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
>
> or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
>
> or an unusual need for unquestioning adherence to a political decision already made;
>
> or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 216 (1969) (formatting added); *see Johnson v. WEC,* 2021 WI 87, ¶40, 399 Wis. 2d 623, 967 N.W.3d 469. Hitt quotes this same section from *Baker*, but he does not explain which part renders Penebaker's complaint a political question. Instead, Hitt says the complaint "is nothing more than a political vehicle … and, accordingly, should be dismissed under the political question doctrine." Hitt MTD Br., dkt. 186:39. In reply, Hitt says the complaint must allege a political question because it requires passing "judgment upon almost the entirety of the Republican Party

and its actions with respect to the 2020 election." Hitt MTD Reply Br., dkt. 211:9.[15]

I do not understand why Hitt thinks this case will involve "the entirety of the Republican Party" or why that would present a political question. In the half-century since *Baker*, the doctrine has not stopped political parties from routinely suing and getting sued. *See e.g. Jefferson* [*& the Republican Party of Wisconsin*] *v. Dane Cnty.*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556; *Democratic Nat'l Cmte. v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423; *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *California Democratic Party v. Jones*, 530 U.S. 567 (2000). Here, Hitt does not attempt to connect the allegations in the complaint to anything in *Baker* or its progeny. In any event, Penebaker's complaint does not cast so wide a net, nor does *Baker* say all cases involving political parties are political questions. I will not further develop Hitt's argument for him because courts "do not step out of our neutral role to develop or construct arguments for parties; it is up to them to make their case." *Serv. Emps. Int'l Un., Local 1 v. Vos,* 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35.

3. WEC does not have exclusive authority to adjudicate civil conspiracy, nuisance, and quo warranto claims.

Finally, Hitt argues the complaint must be dismissed because only the Wisconsin Elections Commission can adjudicate these claims. Hitt MTD Br., dkt. 186:25-27. In support of this argument, Hitt relies on Wis. Stat. § 5.05(2m)(k), which reads: "The commission's power to initiate civil actions under this subsection for the enforcement of chs. 5 to 10 or 12 shall be the exclusive remedy for alleged civil violations of chs. 5 to 10 or 12."

I do not understand Hitt's argument because Penebaker does not allege civil violations of

[15] Hitt appears to ask me to take judicial notice of a volume of Senator Joseph McCarthy's speeches. Hitt MTD Reply Br., dkt. 211:10 fn.8. I deny Hitt's motion because a book of speeches is immaterial to the sufficiency of Penebaker's complaint.

chs 5 to 10 or 12. Penebaker alleges a common law civil conspiracy, a common law nuisance, and a quo warranto under Wis. Stat. ch. 783. The complaint plausibly suggests Penebaker may be entitled to relief for those claims. Accordingly, I deny the motions to dismiss those claims.

ORDER

For the reasons stated,

IT IS ORDERED that plaintiffs Khary Penebaker, Mary Arnold, and Bonnie Joseph's claim arising under Wis. Const. art. I, § 9 is dismissed.

IT IS FURTHER ORDERED that James Troupis' motion to dismiss the Amended Complaint is otherwise denied.

IT IS FURTHER ORDERED that Andrew Hitt, Robert Spindell, Bill Feehan, Kelly Ruh, Carol Brunner, Edward Grabins, Kathy Kiernan, Darryl Carlson, Pam Travis, and Mary Buestrin's motion to dismiss the Amended Complaint is otherwise denied.

This is NOT a final order for purpose of appeal.