STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 8

KHARY PENEBAKER; MARY ARNOLD; and BONNIE JOSEPH,

Plaintiffs,

v.

ANDREW HITT; ROBERT F. SPINDELL, JR.; BILL FEEHAN; KELLY RUH; CAROL BRUNNER; EDWARD SCOTT GRABINS; KATHY KIERNAN, DARRYL CARLSON; PAM TRAVIS; MARY BUESTRIN; JAMES R. TROUPIS; KENNETH CHESEBRO; and ABC DEFENDANTS,

Defendants,

and

STATE FARM FIRE AND CASUALTY COMPANY,

Intervenor.

Case No. 22CV001178

Case Code: 30106; 30701; 30956

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO COMPEL DISCOVERY FROM DEFENDANT JAMES R. TROUPIS, FOR AN *IN CAMERA* INSPECTION OF DOCUMENTS, and FOR ADDITIONAL RELIEF

Defendant Troupis is using a deficient privilege log to justify withholding nearly 5,000 documents that are otherwise responsive to Plaintiffs' outstanding discovery requests. In so doing, Troupis has failed to provide necessary discovery to Plaintiffs. Accordingly, by this motion, Plaintiffs seek the following relief:

1. An order of the Court compelling the immediate production to Plaintiffs of 320 documents ("Tranche A") that are responsive to Plaintiffs' outstanding discovery demands, but that Troupis has withheld, claiming protection of the work-product doctrine without meeting his burden to show that such protection is applicable;

2. An order of the Court requiring the production to the Court for *in camera* review of 303 additional documents ("Tranche B") that are responsive to Plaintiffs outstanding discovery demands, but that Troupis has withheld claiming both attorney-client privilege and work-product protection without meeting his burden to show that either is applicable. For the Tranche B documents (and for any Tranche A document not ordered immediately produced), Plaintiffs seek *in camera* review to determine whether any privilege is properly asserted or whether the crime-fraud exception vitiates any asserted privilege;

3. An order of the Court requiring Troupis to provide a revised and adequate privilege log sufficiently distinguishing those documents (or portions of documents) that relate to the recount litigation from those documents (or portions of documents) that relate to presidential electors and providing facts sufficient to demonstrate the applicability of each element of any privilege or protection claimed as to the latter category of documents, so that Plaintiffs and this Court may assess those claims; and

4. An order of the Court requiring Troupis to provide any document that he may use at trial but that he has refused to provide on the grounds of privilege or

work product protection, and to indicate whether he intends to rely on Legal and Official Proceeding Immunity at trial, and if so, to provide all withheld documents that pertain to the subject matter for which he claims immunity.

INTRODUCTION

"The right to discovery is an essential element of our adversary system" because "the purpose of discovery is identical to the purpose of our trial system—the ascertainment of truth." *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶¶18-19, 312 Wis. 1, 754 N.W. 2d 439 (citation and internal quotation marks omitted). "[O]verly broad claims of evidentiary privilege" pose a threat to a litigant's ability to ascertain such truth, and, accordingly, "privileges are the exception, not the rule." *Id.* ¶¶21-22 (citation and alternations omitted). "Evidentiary privileges . . . interfere with the trial's search for the truth, and must be strictly construed, consistent with the fundamental tenet that the law has the right to every person's evidence." *Id.* ¶21 (quoting *State v. Echols*, 152 Wis. 2d. 725, 736-37, 449 N.W.2d 320 (Ct. App. 1989)).

As the party asserting the objection to discovery, Troupis bears the burden to establish the existence of a privilege or the applicability of the work product doctrine. *See State v. Meeks*, 2003 WI 104, ¶20, 263 Wis. 2d 794, 666 N.W.2d 859; *State v. Hydrite Chem. Co.*, 220 Wis. 2d 51, 64, 582 N.W.2d 411, 416 (Ct. App. 1998) (citation omitted). He has failed to meet this burden. Troupis has produced a privilege log containing nearly 5,000 entries, but he has not made even the most basic showing necessary to support his claims of privilege as to the vast majority of the documents on the log. As explained in this memorandum:

- He has not explained his assertions of privilege or protection beyond bare conclusions and has provided few if any facts in support of his assertions.
- He has not provided sufficient detail about the nature of any document to demonstrate that it was prepared in anticipation of litigation, in order to support an assertion of the protection of the work-product doctrine.
- He has not provided sufficient detail about the nature of any document to demonstrate that it contains a client communication or legal advice, in order to support an assertion of the attorney-client privilege.
- He has not identified the individuals named as participants in communications with sufficient specificity to allow an assessment of whether they were within an attorney-client representation chain.
- He has not identified the individuals named as participants in communications with sufficient specificity to allow an assessment of whether their participation in a communication as a third-party waives the attorney-client privilege.
- He has not provided sufficient detail about the nature of any document to allow the Court to determine whether any privilege or protection has been vitiated by the crime-fraud exception.

In addition, although Troupis admits that he possesses documents that he plans to use in his defense at trial, he has claimed privilege as to these documents, has not identified them, and has refused to produce them.

Troupis's conclusory assertions of privilege or work-product protection are insufficient. Moreover, Troupis's failure to properly substantiate his sweeping claims of attorney-client privilege or work-product protection over thousands of documents has rendered it exceedingly difficult for Plaintiffs to evaluate the propriety of his withholdings, to assess their own need for the withheld documents relative to the purposes of the privilege, or to seek appropriate relief from this Court. Plaintiffs have no intention of burdening this Court with review of all 4,889 improperly withheld documents, and Plaintiffs are mindful of the discovery and motions schedule set in this case so that trial may proceed as planned in September. Accordingly, Plaintiffs seek the limited relief outlined in this motion, but reserve all rights to seek additional relief relating to Troupis's inadequate discovery response at a later date should it become necessary.

BACKGROUND

A. Procedural History

Plaintiffs filed suit against Troupis and others on May 17, 2022, for their involvement in the execution and transmission of fraudulent electoral votes for the loser of the 2020 election, former President Donald Trump. (Dkt. 13, Original Summons & Complaint). Plaintiffs filed an amended complaint on April 24, 2023. (Dkt. 107, First Amended Complaint ("FAC")). Count I of the FAC alleges that Troupis engaged in a conspiracy to violate, inter alia, the same federal laws, 18 U.S.C. § 371 (Conspiracy to Defraud the United States) and 18 U.S.C. § 1512(c)(2) (Obstruction of or Attempt to Obstruct an Official Proceeding), that Trump has been

charged with violating in the federal indictment filed by Special Counsel Jack Smith of the U.S. Department of Justice, in *United States v. Trump*, Case No. 1:23-cr-00257 (D.D.C.).

In his answer in this case, Troupis asserted that "[a]t all times material hereto, he was acting in his capacity as counsel for the Trump-Pence campaign…." (Dkt. 228 at 48, ¶3.a). He also asserted as an affirmative defense that he "is immune from the Plaintiffs' claims as he was, at all times material, acting in his capacity as an attorney and providing non-frivolous advice and representation and is thus entitled to Legal and Official Proceeding Immunity." (*Id.* ¶8). In an Order dated August 10, 2023, this Court denied in part Troupis's Motion to Dismiss Plaintiff's claims (Dkt. 226). Discovery is ongoing.

B. The Discovery Dispute

On August 14, 2023, Plaintiffs served discovery requests on Troupis seeking production of documents relating to the fraudulent elector scheme and its connection to the events of January 6, 2021, at the U.S. Capitol. (Affidavit of Scott B. Thompson ("Thompson Aff."), Ex. A). Troupis objected to the discovery, asserting that it seeks production of information protected by the attorney-client privilege and the work product protection doctrine. (Thompson Aff., Ex. B). On October 20, Troupis produced 2,794 pages of documents (largely consisting of filings made on the public record in litigation relating to a recount of votes in two Wisconsin counties following the 2020 presidential election and basic communications with opposing counsel regarding those filings) and a 281-page privilege log identifying

4,889 documents otherwise responsive to Plaintiffs' requests but asserting either attorney-client privilege (one document), work product protection (3,842 documents), or both (1,046 documents). (Thompson Aff., Ex. C).[1] Nearly 2,000 of these documents (1,856) identify co-Defendant Kenneth Chesebro as a sender or as a primary or secondary recipient.[2]

Despite Plaintiffs' good-faith efforts over the course of several months, the parties have been unable to resolve the dispute regarding the production of the withheld materials. (Thompson Aff., ¶¶9-24). On October 24, 2023, Plaintiffs' counsel emailed Troupis's counsel requesting that he produce the log in its native, Excel format, instead of the unsortable .pdf file that Troupis provided. (*Id.* ¶10 & Ex. D). He never responded. (*Id*. ¶11). Nearly three weeks later, on November 10, 2023, during an in-person meeting, Plaintiffs informed Troupis's counsel that the privilege log was overprotective of documents that should otherwise have been produced and again requested that the log be produced in native, or Excel, format. (*Id*. ¶¶12-14). During a second in-person meeting on November 30, 2023, Plaintiffs' counsel reiterated that Troupis's privilege log was: 1) unworkable because of its

[1] Exhibit C is filed in an altered form from that provided by Troupis. For ease of use, Plaintiffs' counsel has added a column assigning each document a unique document number. That column was not present on the version originally provided by Troupis.

[2] Troupis designated the privilege log as "Confidential" pursuant to the Stipulated Protective Order entered by the Court on October 18, 2023 (Dkt. 263, 265). Plaintiffs object to designation of the log as confidential and so advised Troupis's counsel by letter dated January 16, 2024. (Thompson Aff., Ex. G). Yet Troupis has maintained the confidential designation and further insisted that the privilege log—and by extension, this brief that summarizes and quotes from the log—be filed under seal. (Thompson Aff., Ex. H). Accordingly, as indicated on the Motion to Seal or Redact a Court Record filed contemporaneously herewith, and consistent with the Protective Order, Plaintiffs consent to sealing only on a temporary basis, until February 6, 2024, to provide Troupis an opportunity to seek appropriate relief from this Court. Otherwise, Plaintiffs object to the sealing of this brief and the privilege log and intend to oppose any motion that asks the Court to maintain these court records under seal.

format (.pdf rather than Excel); 2) insufficiently specific to afford Plaintiffs an opportunity to fairly respond to all privilege assertions; and 3) overprotective of materials that Troupis must produce. (*Id*. ¶15). During this conversation, and in conversations that followed, Plaintiffs' counsel again advised Troupis's counsel that many of the work-product assertions on the privilege log were insufficient and many seemed divorced from any anticipated litigation or trial. (*Id*.).

On December 8, 2023 (45 days and two in-person meetings later), counsel for Troupis produced the privilege log in a sortable, Excel format. (*Id*. ¶16). Just ten days later, Plaintiffs' counsel provided Troupis's counsel with a list of 326 "priority entries"—entries on the privilege log that appeared to be highly relevant to Plaintiffs' claims and for which the assertion of work-product protection was facially deficient. Plaintiffs' counsel indicated, when transmitting the list of priority entries, that the list "would be part (but not all) of a meet-and-confer discussion." (*Id*. ¶17 & Ex. E).

Over the following three weeks, Troupis provided no substantive response to Plaintiffs' list. On January 11, 2024, Plaintiffs' counsel sent Troupis's counsel a letter to conclude the attempt to resolve this dispute informally. That letter outlined in detail the deficiencies in the privilege log and requested a meeting on or before January 17. (*Id*. ¶¶20-23 & Ex. F). The parties met and conferred on January 17, 2024, and agreed that they had reached an impasse (*Id*. ¶24.) In a letter following up on this conference, counsel for Troupis confirmed the impasse, with two minor concessions: he provided a redacted Retainer Agreement between Troupis's office,

the Trump Campaign, and the Republican National Committee (although the agreement is unsigned as to the Republican National Committee), and he agreed to review some documents for the applicability of work-product protection (Thompson Aff., Ex. H). Troupis's belated agreement to review some documents (and no further response has been received) does not resolve the parties' impasse, although, of course, if Troupis produces anything that narrows the issues posed by this motion, Plaintiffs will promptly so advise the Court.

ARGUMENT

I. Hundreds of Documents Should Be Produced Immediately as Troupis Has Not Substantiated That They Are Protected Work Product.

Plaintiffs seek the immediate disclosure of 320 documents in Tranche A, identified in Exhibit I to Mr. Thompson's affidavit, over which Troupis has failed to substantiate work-product protection or any other basis for withholding.[3] These documents were identified based on the dates and times of the communications; the identified parties to the communications; the minimal descriptions provided; public information that has been made available as a result of the investigation of the House Select Committee to Investigate the January 6th Attack on the United States Capitol ("Select Committee"); the criminal indictments filed relative to the

[3] Exhibit I lists 326 documents that Plaintiffs' counsel previously identified to Troupis's counsel as improperly withheld. (See Thompson Aff., Ex. E). Exhibit I reflects the unique document number that was assigned by Plaintiffs' counsel to each document on the Privilege Log and codes the documents as discussed further herein. For the Court's convenience, Exhibit I is provided in two forms, one sorted by date and one sorted by code. Six of the 326 documents (coded "IN CAMERA" on Exhibit I) should be reviewed *in camera* to determine if they are entitled to work-product protection but Plaintiffs' seek immediate disclosure (without the need for *in camera* review) of the remaining 320 Tranche A documents for the reasons stated herein.

fraudulent electors scheme in the U.S. District Court for the District of Columbia, as well as in state courts in Georgia, Michigan, and Nevada; and general press reporting. As discussed below, Troupis should be ordered to produce these 320 Tranche A documents to Plaintiffs immediately.

As to all but two of the Tranche A documents, Troupis claimed only the protection of the work-product doctrine.[4] The work-product doctrine, codified at Wis. Stat. § 804.01(2)(c), provides qualified protection from discovery for matters prepared in anticipation of litigation or for trial. *Borgwardt v. Redlin*, 196 Wis. 2d 342, 353-54, 538 N.W.2d 581 (Ct. App. 1995); *see also Ranft v. Lyons*, 163 Wis. 2d 282, 298, 471 N.W.2d 254 (Ct. App. 1991); *State ex rel. Dudek v. Circuit Court*, 34 Wis. 2d 559, 150 N.W.2d 387 (1967). Documents are properly classified as work product when, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Borgwardt*, 196 Wis. 2d at 353. "The work-product doctrine is a qualified privilege." *Id.* at 353-54 (citations and internal quotation marks omitted). If the party seeking discovery can demonstrate a "substantial need of the materials in the preparation of the case" and cannot get the materials elsewhere without "undue hardship," then work-product protection gives way. Wis. Stat. § 804.01(2)(c)1; *see also Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶61, 251 Wis. 2d 68, 640 N.W.2d 788.

[4] The two documents for which attorney-client privilege is also claimed are identified in their respective categories below. Troupis has failed to substantiate either basis for refusing to disclose these two documents.

A. Troupis has failed to demonstrate that work-product protection applies to the Tranche A documents.

Troupis failed to demonstrate, through the sparse information provided on the privilege log as to the nature of the documents in Tranche A, that these materials were prepared in anticipation of litigation. The vast majority of the Tranche A documents (248 documents) are communications claimed as work product on which co-Defendant Chesebro is identified as a sender or recipient.[5] Chesebro was "central to the creation of the [fraudulent elector] plan." Final Report, Select Committee, H. Rep. 117-663, at 343 (Dec. 22, 2022) (hereinafter "Jan. 6 Rep.").[6] "Memos by Chesebro on November 18th, December 9th, and December 13th . . . laid the plan's foundation." *Id.*

But the fraudulent elector plan was not created in anticipation of litigation. The only litigation in which Troupis or Chesebro was involved had to do with vote recounts in two Wisconsin counties; that case raised no issues concerning presidential electors at all. *See Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568, *cert. denied*, 141 S. Ct. 1387 (2021). The plan to use fraudulent electors did not involve bringing or defending litigation; instead, it was about what might happen while litigation was pending or once litigation had concluded and was designed to "proceed without judicial involvement." *Eastman v. Thompson*, 594 F.

[5] For the Court's convenience, these documents are coded "Chesebro" on Ex. I to the Thompson Affidavit. Chesebro has provided no documents responsive to discovery and instead has chosen to plead his Fifth Amendment privilege against self-incrimination in response to all of Plaintiffs' discovery requests. Plaintiffs reserve the right to seek any appropriate relief as to Chesebro's discovery failures in a subsequent motion.

[6] Available at https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf.

Supp. 3d 1156, 1183 (C.D. Cal. 2022) (rejecting assertion of work-product protection made by another Trump attorney over documents related to electoral vote on January 6). The plan's goal was, at best, political action—either in the state legislature or in the U.S. Congress—not judicial relief. *See generally* Jan. 6. Rep. at 341-59; *cf. In re Grand Jury Subpoena dated March 9, 2001*, 179 F. Supp. 2d 270, 274 (S.D.N.Y. 2001) (work-product doctrine did not protect communications concerning a presidential pardon, where attorneys "were acting principally as lobbyists . . . ."); *see also id.* at 285 (doctrine does not protect material that is "directed not towards 'anticipated litigation but rather toward non-litigation means that could achieve the same results in lieu of litigation'") (quoting *P.B. Marina v. Lagrande*, 136 F.R.D. 50, 59 (E.D.N.Y. 1991), *aff'd mem.*, 983 F.2d 1047 (2d Cir. 1992)).[7] Troupis offers no explanation for why any communication relating to the fraudulent elector plan—whether about its legal basis, its logistics, its planning, its participants, or any other matter—constitutes protected attorney work product prepared in anticipation of litigation.

The descriptions relating to other documents in Tranche A are similarly deficient.[8] Fifty-one documents, dated January 6 or January 7, 2021, for example, are variously described as containing discussion of or relating to "logistics," "media appearance," "client," "event," or "media interview request," with no further

[7] Federal decisions construing the procedural counterparts to Wisconsin rules of civil procedure are persuasive. *See Meunier v. Ogurek*, 140 Wis. 2d 782, 788, 413 N.W.2d 155 (Ct. App. 1987) (citing *Wilson v. Continental Ins. Co.*, 87 Wis. 2d. 310, 316, 274 N.W.2d 679 (1979)).

[8] Many documents suffer from more than one deficiency and, for the Court's convenience, are coded accordingly on Ex. I to the Thompson Affidavit.

explanation.[9] Not only do these descriptions strongly suggest that they are not attorney work product, but the dates and times of the documents suggest that they lack any relationship to any pending or anticipated litigation in which Troupis represented a party. Indeed, public reporting makes clear that some of the documents identified as "work product," dated January 6, 2021, involving communications between Troupis, Wisconsin Senator Ron Johnson, and Senator Johnson's Chief of Staff Sean Riley (Doc. Nos. 4836, 4838, 4843, and 4854, described as "discussion of logistics" or "discussion regarding logistics") had to do with Troupis's attempt to transmit the Wisconsin fraudulent electoral certificates to Vice President Pence on the morning of the Joint Session of Congress on January 6.[10] Similarly, Plaintiffs reasonably assume that "discussion of events" (Doc. Nos. 4876, 4877, 4878, 4879, 4880, 4882, and 4844) on these dates has to do with the attack on the United States Capitol. None of this, however, has anything to do with Troupis's preparation for anticipated litigation involving his clients.

Forty-one additional documents in Tranche A relate to subjects variously described as "discussion regarding media strategy" or "media inquiry," or communications on "press statement," "press matter," "press comments," or regarding media appearances or interview requests.[11] As a general matter, "public

[9] For the Court's convenience, these documents are coded "JAN. 6" on Ex. I to the Thompson Affidavit.

[10] *See, e.g.,* Anthony Adragna, *Johnson-Kelly Split 1/6 Stories*, Politico Congress Minutes, (June 23, 2022), https://www.politico.com/minutes/congress/06-23-2022/johnsons-latest-16-story/.

[11] For the Court's convenience, these documents are coded as "MEDIA" on Ex. I to the Thompson Affidavit. The first of the two attorney-client documents, Doc No. 3735, falls within this category and is described as "Strategic communications on comments to the public." This description is insufficient to show that this document contains either a client communication or the legal advice required to justify the protection of the attorney-client privilege.

relations advice, even if it bears on anticipated litigation, falls outside the ambit of the so-called 'work-product' doctrine . . . . That is because the purpose of the rule is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of litigation on the client's customers, the media, or on the public generally." *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000); *accord Alabama Aircraft Indus., Inc. v. Boeing Co.*, 2016 WL 9781826, at *5 (N.D. Ala. 2016) (collecting cases). Nothing in the log supports Troupis's assertion that these documents constitute attorney work product.

Twenty-one documents in Tranche A are communications with an individual identified as Vicki McKenna, described as "discussion of state court comments" or "legal analysis."[12] Vicki McKenna is not further identified, but it appears that she is a radio personality/podcast host.[13] Similarly, in addition to the communications dated January 6, 2021, noted above, six additional documents in Tranche A are identified as communications with Senator Johnson, one is identified as a communication with a staffer in State Representative Tom Tiffany's office, and one is described as "Draft senate testimony."[14] No explanation is provided as to how

[12] For the Court's convenience, these documents are coded as "McKenna" on Ex. I to the Thompson Affidavit. In total, including the priority documents, 100 documents described as communications between Troupis and McKenna are included on the privilege log and claimed to be protected from disclosure under the work-product doctrine.

[13] *See, e.g.*, Daniel Bice, *Madison firm pulls funding for radio station after Vicki McKenna's rant on Kenosha protests*, Milwaukee J. Sentinal (Aug. 28, 2020), https://www.jsonline.com/story/news/2020/08/28/mckennas-rant-kenosha-protests-prompts-madison-firm-pull-ads/5659749002/.

[14] For the Court's convenience, these documents are coded "POLITICS" on Exhibit I to the Thompson Affidavit.

these communications constitute attorney work product done in anticipation of litigation.

Nearly a third (97) of the Tranche A documents are described as being about "logistics," occasionally with some sparse further description (e.g., "logistics of client / co-counsel contact" or "internal logistics communication about the legal team").[15] Another 11 Tranche A documents are described only as "Publication or website reference."[16] It is impossible to discern from these descriptions whether these communications reflect work done in anticipation of litigation.

Several Tranche A documents appear to be ones relating to the fraudulent elector scheme that are in the public domain or that have already been filed with this Court.[17] Document No. 911 ("legal analysis of election law issues") and Document No. 3003 ("draft legal documents"), for example, appear to be emails transmitting the November 18, 2020, and December 9, 2020, memoranda from Chesebro to Troupis, true and correct copies of which were attached as Exhibit B to the Affidavit of Kurt Goehre in Support of GOP Elector Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (Dkt. 187 at 104-115).[18] Troupis does

[15] For the Court's convenience, these documents are coded "LOGISTICS" on Exhibit I to the Thompson Affidavit. The second of the two attorney-client documents, Doc No. 4675, falls within this category and is described only as "logistics communication." This description is insufficient to show that this document contains either a client communication or the legal advice required to justify the protection of the attorney-client privilege.

[16] For the Court's convenience, these documents are coded "WEBSITE" on Exhibit I to the Thompson Affidavit.

[17] For the Court's convenience, these documents are coded "PUBLIC MEMO" on Exhibit I to the Thompson Affidavit.

[18] These documents are also available publicly; *see* https://int.nyt.com/data/documenttools/trump-electors-memo-december/eb149df1a68cc512/full.pdf (Dec. 9 Memo); https://int.nyt.com/data/documenttools/trump-electors-memo-november/6dfa71755c7d0879/full.pdf (Nov. 18 Memo).

not explain how work-product protection continues to apply to protect materials filed by his former co-defendants on the public record of this case.[19] Likewise, Document No. 2799 ("Internal research of election issues") appears to be another legal memo from Defendant Chesebro to Troupis regarding the fraudulent elector scheme that is publicly available.[20]

In sum, as to these documents (320 in all), Troupis has "shirk[ed his] responsibility to provide discovery by making 'blanket allegations' of privilege," *see Lane*, 2002 WI 28, ¶54, which he has failed to substantiate in even the most minimal fashion. Accordingly, he has forfeited any argument for *in camera* review, and this Court should categorically order these documents disclosed to Plaintiffs. *Cf. Holifield v. United States*, 909 F.2d 201, 204 (7th Cir. 1990) (outright rejecting claim of privilege where failure to provide substantiating facts would make district court review of the documents "nothing more than a waste of judicial time and resources"); *see also Meunier*, 140 Wis. 2d at 790 (requiring production of work product because "failure to provide [substantiating] information frustrates the objectives of pretrial discovery").

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[19] As discussed further below, moreover, at least one court has determined that these same documents are not privileged (although, to be clear, Troupis claims only work product protection and not attorney-client privilege as to these documents) because they fall within the crime-fraud exception. *Georgia v. Kenneth John Chesebro*, Indictment No. 23SC188947 (Sup. Ct. Fulton County), Order on Deft's Mot. to Exclude Communications (Oct. 18, 2023), available at https://www.justsecurity.org/wp-content/uploads/2023/10/Just-Security-Georgia-Trump-Clearinghouse-—-Order-denying-Chesebro-motion-to-exclude-his-legal-memos-based-on-attorney-client-privilege-Oct.-18-2023.pdf (attached as Thompson Aff., Ex. N).

[20] *See* https://www.documentcloud.org/documents/23939549-december-6-memo-from-kenneth-chesebro-to-james-troupis.

In the alternative, should the Court determine that it is unable to categorically order the production of the Tranche A documents, the Court should review these 320 documents *in camera* to assess whether they were improperly withheld on spurious assertions of work-product protection.[21] *See George v. Record Custodian*, 169 Wis. 2d 573, 582, 485 N.W.2d 460 (Ct. App. 1992) (where documents are withheld from discovery on the basis of attorney-client privilege or work-product protection, an *in camera* review is the appropriate mechanism by which to determine if those protections are properly asserted); *accord Lane*, 2002 WI 28, ¶56.

B. Plaintiffs have a substantial need for the documents and cannot obtain the equivalent without undue hardship.

The work-product doctrine, even if it does apply, is not absolute, and Plaintiffs' need for the documents outweighs any work-product protection. A party may obtain work-product materials "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Wis. Stat. § 804.01(2)(c)1.

Plaintiffs make such a showing here. First, documents withheld that relate to the fraudulent elector scheme are critical to Plaintiffs' claims, which are premised on the unlawfulness of that scheme and Troupis's role in furthering it. While some of those documents may be in the possession of third parties, it would be an undue

[21] Plaintiffs also seek *in camera* review of six documents (coded "IN CAMERA" on Exhibit I) that do not fall within the categories discussed above. These documents are: Doc. Nos. 3073 ("Strategic discussion of filings"); 3482 ("Circulation of legal decision"); 3484 ("Internal comments on decision"); 3487 ("Circulation among team of decision"); 4592 ("Communications on legal and strategic issues"); and 4770 ("Discussion regarding pending case").

hardship to require Plaintiffs to serve third-party subpoenas on the hundreds of individuals named in the privilege log when Troupis himself is admittedly in possession of the documents. Nor is there a "substantial equivalent" of Troupis's text messages with Chesebro or other players in the fraudulent elector scheme. These documents are indispensable to proving Plaintiffs' claims of conspiracy and nuisance, which rely, in part, on Troupis's and Chesebro's actions, communications, knowledge, and intent.

Moreover, Troupis himself has put these documents in issue by asserting in response to the Amended Complaint that he "is immune from the Plaintiffs' claims as he was, at all times material, acting in his capacity as an attorney and providing non-frivolous advice and representation and is thus entitled to Legal and Official Proceeding Immunity." (Dkt. 228 at 48). As discussed *infra* in Part IV, Troupis's assertion of this affirmative defense waives both attorney-client privilege and work-product protection and requires the disclosure of withheld information. Plaintiffs have an immediate and substantial need for any document upon which Troupis might rely to support this defense, whether it falls squarely within the work-product doctrine or not. As such, under Wis. Stat. § 804.01(2)(c)1, a substantial need for the documents identified in Tranche A exists, and they should be produced.

II. The Court Should Review Additional Documents *In Camera* To Assess Privilege and To Determine the Applicability of the Crime-Fraud Exception.

Plaintiffs seek *in camera* review of 303 additional documents (Tranche B) for the purposes of determining whether Troupis's claims to the protections of attorney-

client privilege or the work-product doctrine are appropriately asserted or whether they are overcome by the crime-fraud exception. Tranche B consists of 303 documents dated between December 11, 2020, and January 7, 2021,[22] on which Chesebro, Rudy Giuliani, Boris Ephsteyn, or Michael Roman—who are shown by the evidence to be Troupis's primary co-conspirators on the fraudulent elector scheme—is a principal party and for which attorney-client privilege is claimed. (See Thompson Aff., Ex. J (listing the documents in Tranche B)). In addition, as to any document in Tranche A as to which the Court determines work-product protection applies, Plaintiffs seek *in camera* review to assess whether it nonetheless should be produced under the crime-fraud exception.

The assertions of attorney-client privilege made with respect to the documents in Tranche B are as poorly substantiated as the claims of work-product protection with respect to the documents in Tranche A. Two dozen documents are described only as "discussion of logistics" or "logistics communications"; another two dozen are described only as pertaining to media, media strategy, or public statements; and yet another two dozen are described only as "Publication or website reference." The remainder of the documents are described vaguely as "discussion regarding recount evidence" (137 documents), "discussion regarding status of the case" (14 documents), or "discussion of legal issues" (4 documents). These descriptions are insufficient to show that the communications contained within the

[22]According to the Jan. 6 Committee, December 11 is the date on which "the Trump Campaign's senior legal staffers reduced their involvement in the fraudulent elector effort, apparently because there was no longer a feasible scenario in which a court would determine that President Trump actually won any of the States he contested." Jan. 6. Rep. at 347-48.

documents constituted legal advice (as opposed to discussion of political, strategic, media relations, or other non-legal matters), or that the materials contained client confidences. *See Holifield*, 909 F.2d at 204 (to establish attorney-client privilege, the party asserting the privilege must "at least identify the general nature of the document, the specific privilege he is claiming for each document, and *facts which establish all the elements of the privilege he is claiming*" (emphasis added; citation omitted)). Accordingly, Plaintiffs seek *in camera* review to determine whether the privilege is properly asserted as to the Tranche B documents. *See Hydrite Chem. Co.*, 220 Wis. 2d at 64 ("When determining whether a privilege exists, the trial court must inquire into the existence of the relationship upon which the privilege is based *and* the nature of the information sought." (citation omitted)).

More fundamentally, the Court should review the Tranche B documents (and any document in Tranche A as to which the Court finds work-product protection properly asserted) to determine if their disclosure is required under the crime-fraud exception. In Wisconsin, the crime-fraud exception is defined by statute. Under Wis. Stat. § 905.03(4)(a), "[t]here is no privilege" when "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." The crime-fraud exception extinguishes both the attorney-client privilege and the work-product doctrine. *See Borgwardt*, 196 Wis. 2d at 358; *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 769 (7th Cir. 2006). Accordingly, while Plaintiffs do not concede that Troupis has met his burden to establish the applicability of either

attorney-client privilege or work-product protection as to any document within Tranches A and B (and, indeed, as to many other documents on the privilege log besides, see Part III, *infra*), the crime-fraud exception requires the production of documents relating to the fraudulent elector scheme whether such privileges properly apply or not.

For Plaintiffs to trigger *in camera* review of documents believed to fall within the crime-fraud exception, the burden is "low." *Lane*, 2002 WI 28, ¶50. All Plaintiffs need to show is "reasonable cause to believe" that Troupis's "services were utilized in furtherance of the ongoing unlawful scheme." *Id.* (quotation omitted). This reasonable cause standard is less than a preponderance of evidence. *Id.* Overcoming the assertion of privilege, moreover, requires little more. On *in camera* review, if the Court determines that there is "'something to give colour to the charge'" of fraud, i.e., "'prima facie evidence that it has some foundation in fact,'" that finding is sufficient to "'drive the privilege away.'" *Dyson v. Hempe*, 140 Wis. 2d 792, 804, 413 N.W.2d 379, 384 (Ct. App. 1987) (quoting *Clarke v. United States*, 289 U.S. 1, 15 (1933)); *see also Lane*, 2002 WI 28, ¶49 (upholding finding of prima facie fraud when trial court relied only on "the allegations in the complaint and the limited evidence in the record").

Here, the allegations of the complaint, criminal indictments returned by grand juries in multiple courts after findings of probable cause, publicly available evidence, and prior court decisions are more than sufficient to establish reasonable cause to believe that 1) Troupis's client (the Trump campaign acting through

Trump) was engaged in an unlawful or fraudulent scheme, and 2) Troupis's services were used to further that scheme.

A. There is reasonable cause to believe Troupis's client was engaged in an unlawful or fraudulent scheme.

Donald Trump has now been indicted—twice—for (among other things) his efforts to further the fraudulent elector scheme. These indictments were returned following grand juries' findings of probable cause. *See Kaley v. United States*, 571 U.S. 320, 328 (2014) ("An indictment fair upon its face and returned by a properly constituted grand jury . . . conclusively determines the existence of probable cause to believe the defendant perpetrated the offense alleged" (internal quotations omitted)). The probable cause standard that was met to return those indictments is higher than the "low" "reasonable cause" threshold that triggers *in camera* review. *Lane*, 2002 WI 28, ¶50; *cf. United States v. Gorski*, 807 F.3d 451, 461 (1st Cir. 2015) ("[T]he indictment provides a reasonable basis to believe [Defendant] was engaged in criminal or fraudulent activity.").

On August 1, 2023, a federal grand jury in the District of Columbia returned a four-count indictment against Trump, alleging that he and his co-conspirators "organized fraudulent slates of electors" in Wisconsin and elsewhere. Indictment ¶10(b), Dkt. No. 1, *United States v. Trump*, Case No. 1:23-cr-00257 (D.D.C.).[23] That scheme involved "causing the fraudulent electors to meet on the day appointed by federal law on which legitimate electors were to gather and cast their votes; cast

[23] Available at https://www.justsecurity.org/wp-content/uploads/2023/09/Just-Security-Jan.-6-D.C.-Trump-Clearinghouse-—-Federal-Indictment-of-Donald-Trump-August-1-2023.pdf (attached as Thompson Aff. Ex. L).

fraudulent votes for the Defendant; [] sign certificates falsely representing that they were legitimate electors," and ultimately transmit these false certificates to government officials. *Id.* The indictment describes this scheme in detail and includes specific reference to the execution of the scheme in Wisconsin. *Id.* ¶¶47-69. The indictment names six unindicted co-conspirators, who are widely reported to include Chesebro (unindicted co-conspirator 5)[24] and Epshteyn (unindicted co-conspirator 6).[25]

Similarly, a state grand jury in Georgia returned an indictment against Troupis's client, Trump, and Chesebro, Giuliani, and Roman. Indictment, *Georgia v. Trump, et al.*, Case No. 23SC188947 (Fulton Superior Ct. Aug. 14, 2023).[26] The indictment alleges that Trump, Chesebro, and their conspirators "created false Electoral College documents and recruited individuals to convene and cast false Electoral College votes" in Georgia.[27] This effort was "[s]imilar" to "schemes . . . executed by members of the enterprise" in other states, including Wisconsin. *Id.* at p. 17; *see also id.* at pp. 29, 31-32, 35-38. In October 2023, Chesebro pleaded guilty in Fulton County to a felony count of conspiracy to commit filing false documents.

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[24] Kyle Cheney, *"Co-Conspirator 5": Ken Chesebro and the evolution of Donald Trump's Jan. 6 strategy*, Politico (Aug. 9, 2023), https://www.politico.com/news/2023/08/09/ken-chesebro-memos-trump-coconspirator-00110458.

[25] Maggie Haberman, Jonathan Swan, and Luke Broadwater, *Message Point to Identity of Co-Conspirator 6 in Trump Indictment*, N.Y. Times (Aug. 2, 2023), https://www.nytimes.com/2023/08/02/us/politics/boris-epshteyn-co-conspirator-6.html.

[26] Available at https://www.justsecurity.org/wp-content/uploads/2023/08/just-security-fulton-county-da-indictment.pdf (attached as Thompson Aff., Ex. M).

[27] Boris Epshteyn has been confirmed by media reports to be an unindicted co-conspirator in Georgia. *See* Elizabeth Stuart, Jeremy Herb and Zachary Cohen, *The identities behind the 30 unindicted co-conspirators in Trump's Georgia case*, CNN (Aug. 21, 2023), https://www.cnn.com/2023/08/17/politics/trump-georgia-30-unindicted-co-conspirators/index.html.

Georgia v. Kenneth Chesebro, No. 23SC188947 (Sup. Ct. Fulton County), Plea of Guilty (efiled, Oct. 20, 2023, 1:49 pm).[28] That guilty plea was predicated on the indictment's allegations of false electoral certificates in Georgia—a scheme that was identical in all key respects to the one in Wisconsin.

These indictments readily satisfy the "reasonable cause" burden of establishing that Troupis's client was engaged in an unlawful or fraudulent scheme by seeking to procure fraudulent elector certificates.

B. Troupis's assistance was related to and in furtherance of this criminal or fraudulent activity.

As alleged in the amended complaint, Troupis's work was "integral to" the fraudulent elector scheme in Wisconsin. (Dkt. No. 107, ¶ 87). In addition to providing reasonable cause to believe that the crimes charged were committed, the indictments also provide cause to believe that Trump's communications with his lawyers, including Troupis, were in furtherance of the conduct charged in the indictments. For example, the federal indictment against Trump expressly mentions both the Wisconsin fraudulent elector scheme and communications involving Troupis. *United States v. Trump*, Indictment ¶¶ 53-55, 57, 66-67, 69. The Georgia indictment similarly references communications between Chesebro and Troupis and describes how those communications were used to further the indicted conspiracy. *Georgia v. Trump, et al.*, Indictment at 29, 31.

[28] Available at https://www.justsecurity.org/wp-content/uploads/2023/10/Just-Security-Georgia-Trump-Clearinghouse-—-Kenneth-Chesebro-plea-of-guilty-statement-Oct.-20-2023.pdf (attached as Thompson Aff., Ex. O).

Other evidence confirms that Troupis was a central figure in the strategy to put forward a fraudulent slate of electors in Wisconsin. Troupis recruited Chesebro to assist the Trump campaign as a volunteer legal advisor. Select Committee, Deposition of Kenneth Chesebro 12-13 (Oct. 26, 2022).[29] Troupis advised the Republican Party of Wisconsin to "convene a separate Republican electors meeting and vote at the Wisconsin State Capitol on December 14." Hitt 000125-27 (email dated December 10, 2020, from Brian Schimming to Chesebro) (Thompson Aff., Ex. K). As the former Elector Defendants have stated publicly, they met and executed the electoral certificate on December 14, 2020, "in compliance with requests received from the Trump campaign and the Republican Party of Wisconsin."[30]

Similarly, widely available evidence suggests that, on January 6, Troupis attempted to convey the fraudulent elector certificates to Senator Johnson, with the apparent goal of trying to get the false documents to Vice President Pence.[31] Senator Johnson has acknowledged that he and his chief of staff communicated with Troupis on January 6 about the false elector certificates and disclosed that one such text from Troupis stated: "Need to get a document on Wisconsin electors to you and the VP immediately. Is there a staff person I can talk to immediately? Thanks, Jim." *Id.* Troupis, however, has refused to produce these communications with Senator Johnson and his staff, citing work-product protection, *see supra* at 13. This

[29] Available at https://www.govinfo.gov/content/pkg/GPO-J6-TRANSCRIPT-CTRL0000923618/pdf/GPO-J6-TRANSCRIPT-CTRL0000923618.pdf (attached as Thompson Aff., Ex. P).
[30] *See* Henry Redman, *Wisconsin's fake electors settle lawsuit, acknowledge Biden won in 2020*, Wis. Examiner (Dec. 6, 2023), https://wisconsinexaminer.com/2023/12/06/wisconsins-fake-electors-settle-lawsuit-acknowledge-biden-won-in-2020/.
[31] *See, e.g.,* Adragna, *supra* n. 10.

is all more than sufficient evidence for the Court to conclude that there is a prima facie showing that Troupis participated in the fraudulent elector scheme.

C. Other courts have applied the crime-fraud exception in similar fraudulent elector legal actions.

Two other courts have recently applied the crime-fraud exception to vitiate attorney-client privilege and work-product protection claims in cases arising out of the fraudulent elector scheme following the 2020 election—including with respect to some of the same documents withheld by Troupis.

First, the Fulton County Superior Court in Georgia denied Chesebro's motion seeking exclusion of certain memoranda and emails he wrote in what he claimed was furtherance of campaign legal strategy. Order on Def.'s Mot. to Exclude Communications, *Georgia v. Chesebro*, Indictment No. 23SC188947, at 1 (Super. Ct. Fulton County, Oct. 18, 2023).[32] The documents that Chesebro sought to exclude in that proceeding were: "(1) the November 18, 2020, memorandum to campaign lawyer Jim Troupis promoting a plan in which electors would cast votes for co-Defendant Donald Trump on December 14, 2020; (2) the December 9, 2020, memorandum to [Fulton County] co-Defendant David Shafer and others laying out details of the presidential elector plan in six states; (3) the December 13, 2020, email to co-Defendants Rudolph Giuliani and John Eastman contemplating a departure from the Electoral Count Act and advocating the 'President of the Senate strategy'; and (4) the January 1, 2021, email sent to Eastman and campaign attorney Boris Epshteyn outlining a plan to delay the joint session of Congress on

[32] *See supra* note 19 (attached as Thompson Aff., Ex. N).

the day for counting elector votes." *Id*. The court concluded that these communications fell within the crime-fraud exception. *Id*. at 2.[33]

A similar result was reached by the United States District Court for the Central District of California. The Court concluded that it was more likely than not that Trump and another Trump attorney, John Eastman, committed federal crimes as part of their effort to disrupt the counting of the lawful electoral votes on January 6, 2021. *Eastman*, 594 F. Supp. 3d at 1193 ("Based on the evidence, the Court finds it more likely than not that President Trump corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021"); *id*. at 1195 ("Based on the evidence, the Court finds that it is more likely than not that President Trump and Dr. Eastman dishonestly conspired to obstruct the Joint Session of Congress on January 6, 2021."). As a result, the Court found that neither attorney-client privilege nor work-product protection prevented disclosure of documents in furtherance of those crimes. *Eastman v. Thompson*, 636 F. Supp. 3d 1078, 1091 (C.D. Cal. 2022), *appeal dismissed*, No. 22-56013, 2022 WL 18492376 (9th Cir. Nov. 7, 2022), *cert. denied*, 144 S. Ct. 248 (2023). Fifty-three of the documents in Tranche B involve communications between Troupis and Eastman.[34]

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[33] The Fulton County Court employed the same standard articulated by the Court of Appeals in *Dyson v. Hempe*, *supra*: "To overcome a claim of privilege, proof of the existence of a crime or fraud is not required; rather, '[t]here must be something to give colour to the charge,' and the [party seeking to overcome the privilege] need only present prima facie evidence that the charges have 'some foundation in fact.'" Order at 3 (citing *Atlanta Coca-Cola Bottling Co. v. Goss*, 50 Ga. App. 637, 639 (1935)).

[34] Doc Nos. 3942, 3945, 3947-52, 3954-55, 3957, 3960-63, 3965-72, 3974-78, 3992, 3999, 4351, 4372, 4406-08, 4412, 4420, 4534, 4624, 4654-55, 4469, 4513-14, 4536, 4538, 4544-46, 4550, 4572, 4621, and 4477.

Plaintiffs have more than satisfied the low burden necessary to trigger *in camera* review of the documents identified in Tranche B. The public record demonstrates that there is reasonable cause to believe that crimes were committed in connection with the fraudulent elector scheme in Wisconsin and elsewhere. Moreover, there is significant evidence showing that Chesebro, Guiliani, Epshteyn, Roman, and Troupis all played roles in this scheme, rendering their communications critical evidence over which no privilege should apply. *See also generally* Jan. 6. Rep. at 341-72. The totality of this evidence shows that there is "some colour," *Dyson*, 140 Wis. 2d at 804, to the charge of fraud. This is sufficient to find that documents relating to the fraudulent elector scheme fall within the crime-fraud exception, thus vitiating any claim of protection or privilege and requiring their disclosure. No privilege or protection may be maintained over documents that relate to legal services rendered in furtherance of fraud.

III. The Court Should Require Troupis To Produce a Sufficient Privilege Log To Enable Review of the Remainder of the Withheld Documents.

Plaintiffs have identified the documents in Tranches A and B (totaling just 629 of the 4,889 documents on the privilege log) in an effort to obtain immediate satisfaction of their most pressing discovery requests and to suggest a reasonable number of documents for the Court's *in camera* review. But, as noted, their efforts to adequately review the entirety of Troupis's privilege log have been significantly hamstrung by the log's sparse descriptions of documents. As with the documents described above in Tranches A and B, large numbers of documents on the log suffer from similar deficiencies: the descriptions provided do not contain the elements

necessary to justify the attorney-client privilege or the work-product protection that is claimed.

Thus, for example, while Troupis's privilege log labels more than 1,000 documents and communications as attorney-client privileged, he does not provide sufficient facts from which to conclude that the communications were confined to the attorney-client chain; that the communications contained within the document constituted legal advice (as opposed to discussion of political, strategic, media relations, or other non-legal matters); or that the materials contained client confidences. *See Holifield*, 909 F.2d at 204 (to establish attorney-client privilege, the party asserting the privilege must assert "*facts which establish all the elements of the privilege he is claiming*") (emphasis added; citation omitted).

"Wisconsin, like most jurisdictions, has recognized only a narrow ambit to the communications included within the attorney-client privilege." *Dudek*, 34 Wis. 2d at 579. Specifically, the attorney-client privilege "only encompasses confidential communications from the client to the lawyer, and those communications from the lawyer to the client if their disclosure would directly or indirectly reveal the substance of the client's confidential communications to the lawyer." *State v. Boyd*, 2011 WI App 25, ¶20, 331 Wis. 2d 697, 797 N.W.2d 546 (citations and internal quotation marks omitted). A "mere showing that the communication was from a client to his attorney is insufficient to warrant a finding that the communication is privileged." *Jax v. Jax*, 73 Wis. 2d 572, 581, 243 N.W.2d 831 (1976).

In addition, the privilege does not extend beyond the substance of the attorney's confidential communications to the client. *Journal/Sentinel, Inc. v. School Bd. of Shorewood*, 186 Wis. 2d 443, 460, 521 N.W.2d 165 (Ct. App. 1994). It will not conceal everything said and done in connection with an attorney's legal representation of a client in a matter. Communications with attorneys are privileged only if the predominant purpose and content of the communication is to aid in the provision of legal advice, as opposed "to business advice." *First Wis. Mortg. Tr. v. First Wis. Corp.*, 86 F.R.D. 160, 174 (E.D. Wis. 1980). "When an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged." *See Scott v. Chipotle Mexican Grill, Inc.*, 94 F. Supp. 3d 585, 596 (S.D.N.Y. 2015).

The assertions of attorney-client privilege made in Troupis's privilege log do not meet these standards. For example, the log includes communications with individuals whose identities, titles, affiliations, and roles are undisclosed and who are not identified as Troupis's client or as other attorneys within the attorney-client representation chain.[35] These include, for example:

[35] In the course of the meet and confer with Plaintiffs' counsel, Troupis's counsel identified: Troupis, Stewart Karge, Christ T. Troupis, Brian Schimming, and Lou Esposito as counsel for the Trump Campaign pursuant to a retention agreement; Ronna McDaniel as the Chair of the Republic National Committee (although the retention agreement Troupis produced is unsigned as to the RNC); and Dan Kelly and sstencil@wisgop, as representatives of the Republican Party of Wisconsin, with which, counsel stated, the Trump Campaign shared a common interest. See Thompson Aff., Ex. H. Rod Wittstadt, Ken Chesebro, George Burnett, Mike Roman, Justin Clark (and his staff member Maddison (no last name provided)), and Boris Epstehyn were also identified by Defendant's counsel as either counsel to or representatives of the Trump Campaign. *Id.* Counsel provided no information as to the role or affiliation of any other person identified on the privilege log.

- 172 communications with former co-Defendant Andrew Hitt,[36] more than a third of which are described only as relating to logistics, media, or "publication or website reference";
- 123 communications to and from Reince Priebus,[37] nearly a third of which are described as relating to logistics, media, or "publication or website reference";
- Four communications with Andrew Giuliani (Doc. Nos. 719, 752, 755, 756), all described as "Discussion of logistics for call";
- Two communications identified only as from "The White House" (Doc. Nos. 614, 3562); and
- Additional communications with individuals identified only with an email address, including, but not limited to, justinbis2014@gmail.com (Doc. No. 8); jzsaxon@gmail.com (Doc. Nos. 549, 584, 589); christina@cgbstrategies.com (Doc. No. 3031, 3830); rabmoza@gmail.com (Doc. Nos. 664, 673); rtusler@tuslerlaw.com (Doc. No. 356); prestonhaliburton@gmail.com (Doc.

[36] Doc. Nos. 93-95, 98, 101, 109-11, 131-42, 149-50, 163, 166-67, 172-73, 195-97, 332, 349, 352, 355-56, 358-60, 374, 377-78, 408, 411-15, 436, 470, 472-75, 492-94, 496, 503, 512-16, 562, 558, 577, 579-82, 611, 617, 619, 622-23, 636-37, 648-49, 592, 700, 703-04, 709-10, 773, 775-75, 778, 783, 786-87, 802-08, 819-20, 824-25, 827-30, 833, 839-40, 858, 884, 887-88, 896, 920-23, 925-27, 932-43, 968-69, 972, 982-83, 1003, 1005-06, 1008, 1021-23, 1043, 1071, 1077-78, 1089, 1101, 1163, 1172-73, 1369-70, 2418, 2420, 2426, 2428, 2434-35, 2442, 2500, 2851, 2855-56, 2883, 3602, and 3604.

[37] Doc. Nos. 59, 461, 476-78, 481-88, 542, 547, 633, 659, 661-62, 674, 682-64, 687, 694, 712, 718, 721-23, 725-27, 729-30, 732-33, 740, 743, 753, 764, 767, 817, 846, 974-75, 977, 1134, 1204, 2117-20, 2123, 2357-58, 2389, 2392, 2499, 2503, 2522, 2851-52, 2883, 3379-80, 3461-62, 3464-67, 3479, 3560, 3572, 3574-75, 3582-84, 3595, 3712, 3840, 3843-44, 3867-68, 3881-84, 3886, 3889, 3898-99, 3922-29, 2959, 2964, 3982, 3985, 4147, 4281-82, 4304, 4305, 4565, 4567, 4717-19, and 4741-45.

No. 3830); mediaaffairs@donaldtrump.com (Doc. No. 2307); and teampress@donaldtrump.com (Doc. Nos. 786, 787, 1101).

Neither Plaintiffs nor this Court should be required to guess as to whether the dozens of individuals named in the privilege log actually fall within the attorney-client chain or whether, by being included on communications, their presence waived any applicable privilege. It is Troupis's burden to support his claim to privilege. He has failed to do so.

In addition, as with the documents in Tranche A and B discussed above, hundreds of additional documents are described too loosely to allow any conclusion that they meet the requirements of either the work-product doctrine or the attorney-client privilege. Over one thousand documents are described as about "logistics" with little additional explanation,[38] nearly 300 documents appear to relate only to media, press, interview requests, and the like,[39] and a total of 86 documents are described only as "Publication or website reference." To the extent Troupis was providing advice on political, media, or campaign strategy rather than law, the communications are not privileged. "Advice on political, strategic, or policy issues . . . would not be shielded from disclosure by the attorney-client privilege." *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998); *Md. Restorative Just. Initiative v. Hogan*, No. 16-01021, 2017 WL 4280779, at *3 (D. Md. Sept. 27, 2017) ("A claim of

[38] One hundred and forty-documents are described only as "Logistics communications," while 85 are described only as "Discussion of logistics," 55 are described only as "internal logistics communication," and 51 are described only as "Discussion regarding logistics." The remainder have bare bones descriptions, such as "Recount evidence and logistics" (32 documents) or "Draft legal documents and logistics" (46 documents).

[39] This includes 79 documents described only as "Discussion regarding media strategy."

attorney-client privilege is only legitimate where the client has sought the giving of *legal*, not *political*, advice."). And, as discussed above, such descriptions are insufficient to establish that these documents were prepared in anticipation of litigation to justify their protection under the work-product doctrine.

For all the reasons above, Troupis's privilege log is inadequate to meet his discovery obligations. Most fundamentally, the log is inadequate in distinguishing documents relating to the recount litigation that Troupis handled on behalf of his client from documents relating to the elector scheme, which is at the very heart of this case. Plaintiffs were entitled to documents relating to both subjects in discovery. Given the timing of summary-judgment motions under this Court's scheduling order, however, and the essential discovery that Plaintiffs must receive in order to ascertain the truth as to the matters at the center of this litigation, Plaintiffs now seek only limited relief. Specifically, Plaintiffs respectfully request that the Court order Troupis to provide a revised and adequate privilege log to allow them to identify the most critical documents as to which there remains a dispute about their discoverability.

The Court should order that log to sufficiently distinguish those documents (or portions of documents) that relate to the recount litigation from those documents (or portions of documents) that relate to presidential electors. As to the latter category, the Court should order Troupis to provide facts sufficient to demonstrate the applicability of each element of any privilege or protection he claims shields the documents from disclosure. Such information is critical to allow the Plaintiffs and

this Court to assess the claims and determine whether additional disclosure of critically important discovery information is required.

IV. Troupis May Not Assert Privilege or Work Product Regarding Documents He Will Use at Trial or Relating toto His Affirmative Defenses.

Troupis also improperly asserted attorney-client privilege and work-product protection over documents that support his affirmative defenses or that he otherwise intends to use at trial. Plaintiffs' Requests for Production Numbered 41 and 42 asked for all communications and other documents "that [Troupis] may rely upon in defense of this lawsuit" that otherwise were not turned over. In response, Troupis acknowledged that there were responsive documents but that that these "[a]dditional documents are withheld under the Work-Product and Attorney-Client Privilege, as set forth in the enclosed Privilege Log." *Id.* Thus, there exists a set of documents that Troupis may introduce as evidence in this case that he refuses to disclose as required by the rules. This is improper.

When a party introduces a document or information into evidence, he necessarily waives whatever privilege or protection might otherwise apply to the disclosed information. Wis. Stat. § 905.11; *see State v. Schmidt*, 2016 WI App 45, ¶41, 370 Wis. 2d 139, 884 N.W.2d 510. The ethics rules expressly allow Troupis to waive the privilege over documents he believes are necessary to defend himself in this lawsuit, even without the client's consent. Specifically, SCR 20:1.6(c)(4) allows an attorney to reveal privileged information "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was

involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." *See In re Disciplinary Proc. Against Thompson*, 2014 WI 25, ¶ 25, 353 Wis. 2d 556, 847 N.W.2d 793 (discussing application of this rule). Nothing in the language of the rule is limited to claims made by clients. Instead, it also applies where, as here, there is "a wrong alleged by a third person." Comment [10] to ABA Model Rule 1.6, in *In re Petition for Amend. to Sup. Ct. Chapter 20*, No. 04-07, 2007 WI 4, at 31-32 (Jan 5, 2007)[40]; *accord, e.g.*, Restatement (Third) of the Law Governing Lawyers § 64, comment g ("If a person other than a client asserts that a lawyer engaged in wrongdoing in the course of representing a client, this Section permits the lawyer to disclose otherwise confidential client information in self-defense, despite the fact that the client involved has not waived confidentiality or had any role in threatening or making the charges."); *id.* § 83, comment d.

Additionally, Troupis's affirmative defenses place privileged or protected communications at issue in the case, yet he has refused to provide the documents relevant to assertion of those defenses. When a party places otherwise privileged information "at issue" in the case, he waives application of the privilege. *E.g.*, *Hydrite Chem. Co.*, 220 Wis. 2d at 66; *Boyd*, 2011 WI App 25, ¶ 21. In response to the amended complaint, Troupis asserted that he "is immune from the Plaintiffs' claims as he was, at all times material, acting in his capacity as an attorney and providing non-frivolous advice and representation and is thus entitled to Legal and Official Proceeding Immunity." (Dkt. 228 at 48). This limited, qualified immunity

[40] Available at https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=27737.

(assuming it applies in this case) "does not apply when the attorney acts in a malicious, fraudulent or tortious manner which frustrates the administration of justice or to obtain something for the client to which the client is not justly entitled." *Strid v. Converse*, 111 Wis. 2d 418, 429-30, 331 N.W.2d 350 (1983). The attorney must show he is "free from any unlawful conspiracy" with the client." *Id.* at 429. If he is able to invoke that privilege, Troupis will need to prove that his efforts in furtherance of the fraudulent elector scheme were made in good faith and in pursuit of a legitimate goal of the client. Thus, if Troupis relies on his representation of a client to attempt to excuse himself from liability at trial, Troupis will have placed the details of that representation at issue in the case, waiving whatever privilege or protection would otherwise apply.

With his affirmative defenses and his response to Plaintiffs' Request for Production of Documents, Troupis has indicated he will waive attorney-client privilege or work-product protection over many documents by placing their contents at issue in the case or introducing them at trial. Troupis cannot refuse to cooperate in discovery based on claims of privilege, and then turn around and deploy the withheld evidence to his advantage at trial. *See, e.g.*, *Dudek*, 34 Wis. 2d at 586 (noting discovery rules "advance[] the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise" (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)). The discovery rules contemplate that Plaintiffs should have access to these documents *now*, not simply at trial.

Moreover, privilege is waived not only with respect to whatever specific documents Troupis relies upon but also over other documents on the "same subject matter" and those that "ought in fairness to be considered together." *See* Wis. Stat. § 905.03(5)(b). This rule is meant to prevent a party from deploying privileged information "in a selective, misleading and unfair manner." Wis. Sup. Ct. Order No. 12-03, at 12, 2012 WI 114.[41] Troupis cannot selectively disclose portions of privileged communications or work product, or give testimony favorable to himself, without a full and fair disclosure of other unfavorable portions of the privileged communications or work product relating to the same subject.

The danger of an unfair, selective waiver of privilege is particularly high in the circumstances presented by this case. By December 14, 2020, court losses drove top Trump Campaign lawyers to conclude that use of alternative electors was not legally viable. Trump Campaign General Counsel Matthew Morgan, Associate General Counsel Joshua Findlay, and high-level campaign lawyer Justin Clark all told the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol that by December 14 they had abandoned the idea of using alternative slates of electors after court losses made the strategy legally dubious. Jan. 6 Rep. at 347-48. Yet Troupis continued to push the scheme anyway. (Dkt. 107, ¶¶ 116-28.) Should Troupis assert an affirmative defense that he is immune as an attorney or otherwise attempt to use privileged documents to

[41] Available at https://docs.legis.wisconsin.gov/misc/sco/237.

defend this case, fairness requires that all documents covering the same subject matter be provided in discovery.

Because it would be unfair to allow Troupis to waive privilege at trial but not provide relevant information in response to Plaintiffs' discovery requests, Plaintiffs ask the Court to order Troupis to (1) provide the documents that he may use at trial but that he has refused to provide on the grounds of attorney-client privilege or work-product protection, and (2) indicate whether he intends to rely on Legal and Official Proceeding Immunity at trial, and if so, to provide all withheld documents that pertain to the subject matter for which he claims immunity.

CONCLUSION

For the reasons set forth above, the Court should grant the relief requested herein. Plaintiffs also respectfully request an award of expenses including attorneys' fees incurred in filing this motion, pursuant to Wis. Stat. § 804.12(1)(c)1.

Dated January 24, 2024

Respectfully submitted,

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