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CIRCUIT COURT
DANE COUNTY, WI
2022CV001178

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 8

DANE COUNTY

KHARY PENEBAKER; MARY
ARNOLD; and BONNIE JOSEPH,

Case No. 22CV001178

Plaintiffs,

Case Code: 30106; 30701; 30956

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.

**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO REQUIRE
IMMEDIATE PRODUCTION OF WITHHELD DOCUMENTS
FOR *IN CAMERA* INSPECTION**

Even as damning facts surrounding the fraudulent elector scheme have been revealed through the efforts of the House Select Committee to Investigate the January 6th Attack on the United States Capitol (“Select Committee”), federal and state prosecutors who have indicted scores of the schemers (and secured guilty pleas as to some), and the national media, Defendant James R. Troupis continues to try to hide his involvement. The privilege log he has produced in this case (Dkt. 372, Ex. C (“Troupis Privilege Log”)) is a master class in obfuscation as information showing his participation in the fraudulent electors scheme is hidden behind meaningless descriptions of

“logistics communications” or “media strategy” and shielded by specious assertions of attorney work-product protection and attorney-client privilege. Troupis’s failure to meaningfully participate in discovery has stymied Plaintiffs’ ability to litigate their case and forced them to file a Motion to Compel (Dkt. 370) seeking the production of documents wrongfully withheld. In an effort to resolve the issues raised by Plaintiffs’ Motion expeditiously, this Court should order Troupis to produce for the Court’s *in camera* inspection all documents identified on his privilege log before March 21, 2024, the date set for the hearing on Plaintiffs’ pending Motion.

I. Immediate Production of Documents for *In Camera* Review is Necessary to Facilitate the Court Ruling Expeditiously.

As set out in the pending Motion to Compel, Plaintiffs seek to compel Troupis to produce two categories of documents: Tranche A and Tranche B. As to Tranche A—which are withheld only under the attorney work-product doctrine¹—Plaintiffs seek to compel disclosure for four reasons:

1. Troupis has **failed to substantiate the claim of work-product** by only vaguely describing the documents and failing to meet his burden to set out every element supporting their protection, Dkt. 371 at 12-16;
2. Documents relating to the fraudulent elector scheme do not constitute attorney work-product because they were **not prepared in anticipation of litigation**, Dkt. 371 at 11-12;
3. Even if the documents are properly deemed work product, **Plaintiffs’ need for the documents outweighs Troupis’s qualified privilege**, Dkt. 371 at 17-18; and
4. Even if the documents are properly deemed work product, they cannot be withheld due to the operation of the **crime-fraud exception**. Dkt. 371 at 18-28.

As to Tranche B, which Troupis withheld under both the attorney work-product doctrine and the attorney-client privilege, Plaintiffs seek disclosure for all of the foregoing reasons, and also because Troupis has **failed to substantiate his claims of attorney-client privilege** by providing

¹ As noted in the brief supporting Plaintiffs’ Motion to Compel, attorney-client privilege is claimed—baselessly—over two documents in Tranche A. Dkt. 371 at 10 & n.4, 13 n.11, 15 n.15.

information sufficient to show that each withheld communication: (a) contains client confidences, (b) contains legal advice, and/or (c) remained confined within an attorney-client chain. Dkt. 371 at 19-20; see also *id.* at 28-34.²

While Plaintiffs maintain that the Court can order the documents in Tranche A disclosed without *in camera* review, see Dkt. 371 at 16, *in camera* review as to other withheld documents will be necessary. See *Lane v. Sharp Pkg. Sys., Inc.*, 2002 WI 28, ¶62, 251 Wis. 2d 68, 113-14, 620 N.W. 2d 788 (“*in camera* review is the proper procedure for determining whether the claimed privilege applies”). Ordering Troupis to provide the documents for the Court’s inspection in advance of the hearing will expedite the Court’s decision-making. It will also allow for a more effective use of the Court’s time at the hearing on Plaintiffs’ Motion as the Court will be able to review the documents being discussed in real time. In a case where this Court has repeatedly noted the need for expedition, Dkt. 315, Dkt. 347 at 18, Dkt. 394 at 6-7, streamlining this process benefits all involved.

This Court has the discretion to order *in camera* review of the documents identified on the Troupis Privilege Log. Cf. *Lane*, 2002 WI 28, ¶56 (“the decision to conduct an *in camera* review is a discretionary decision”). It may be that actual inspection of all of the withheld documents is not needed in the end, but the Court should preserve its ability to review whichever documents it eventually decides require its inspection without affording Troupis the benefit of additional delay. Accordingly, the Court should order Troupis to produce all 4,889 withheld documents to the Court for *in camera* inspection before March 21, 2024.

² In this regard, it is noteworthy that Troupis's witness list (Dkt. 415) is littered with the names of attorneys whose communications he has withheld under the attorney-client privilege. If Troupis intends to rely on these witnesses at trial, their relevant communications should be disclosed to Plaintiffs immediately. (Dkt. 371 at 34-38)

II. Information from Other Sources Demonstrates that Troupis's Claims of Privilege Are Specious.

Information uncovered by Plaintiffs in third-party discovery³ and recently published in the national media decisively demonstrates that Troupis is using overbroad and improper allegations of privilege to shield communications critical to illuminating facts at the heart of this case. These examples demonstrate that *in camera* review of withheld documents beyond those identified in Tranches A and B will likely be necessary to ensure that the discovery process in this case fulfills its fundamental purpose of allowing the Plaintiffs and this Court to ascertain the truth of the important matters at issue in this litigation. *See generally Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶¶18-22, 312 Wis. 1, 754 N.W.2d 439. Requiring the immediate production of all withheld documents to the Court furthers this goal.

Information now available to Plaintiffs demonstrates that Troupis's claims of privilege are specious in at least four ways. First, Troupis is withholding information that is **plainly not privileged**. For example, Troupis has claimed both attorney-client privilege and work-product protection for a document (Troupis Privilege Log, Doc. No. 2147), described as “strategic communications on comments to the public.” The actual document (Affidavit of Scott B. Thompson, Ex. A)—disclosed in response to a third-party subpoena—reveals that it was simply a published press release from Donald J. Trump for President, Inc., circulated to Troupis and others by a communications staff member with the note, “Release is out—please feel free to forward to

³ Plaintiffs note that, contrary to the letter and the spirit of the discovery rules, neither defendant remaining in this case has produced required discovery to Plaintiffs. As noted in Plaintiffs' pending Motion to Compel as to Defendant Kenneth Chesebro (Dkt. 418), Chesebro answered no interrogatories, produced no documents, and (apart from a handful) provided no adequate response to requests for admission; instead, he asserted his Fifth Amendment right against self-incrimination as to nearly every discovery request Plaintiffs made. Troupis, meanwhile, produced a few thousand pages of documents relating exclusively to the recount litigation and nearly nothing about his involvement in the fraudulent elector scheme. Plaintiffs, on the other hand, have produced more than 28,000 pages of documents responsive to Troupis's discovery requests, and both Plaintiffs have already sat for in-person depositions noticed by Troupis.

any you deem fit!” Even in the abstract, communications about media and public communications strategy constitute neither attorney work product prepared in anticipation of litigation nor legal advice protected by the attorney-client privilege, as Plaintiffs explained in their motion to compel. (Dkt. 371 at 13-14, 29). The actual content of this document emphatically lacks any colorable claim of privilege. Similarly, Troupis has claimed work-product protection over two emails with a communications staff member (Troupis Privilege Log, Doc. Nos. 4599 and 4609) (describing these as “Internal Communication regarding press matter”) that provide logistical information for an upcoming media interview. (Thompson Aff. Ex. B). While these particular documents are of limited relevance to Plaintiffs at this stage of the case, their continued withholding⁴ demonstrates the speciousness of Troupis’s claims of privilege.

Second, Troupis is withholding evidence corroborating that the **fraudulent elector scheme was not done in anticipation of litigation**, in direct contravention of his claims of work-product protection. As Plaintiffs noted in their Motion to Compel, the scheme for the fraudulent electors to meet on December 14, 2020, to sign the false electoral ballots, and then transmit those ballots to public officials did not involve bringing or defending litigation; instead, it was about what might happen while litigation was pending or once it had been completed. Newly revealed communications underscore Plaintiffs’ point.⁵ On December 8, 2020, Chesebro wrote to Troupis: **“Court challenges pending on Jan. 6 really not necessary. ... I think having the electors send**

⁴ In the meet and confer process preceding the filing of Plaintiffs’ Motion to Compel, on January 19, 2024, counsel for Troupis represented that “My client is willing to reconsider the designation of [materials with designations such as “media strategies,” “logistics,” or “interviews”] as privileged. ... Mr. Troupis will examine these designations in the privilege log to determine which ones may be disclosed without waiving attorney-client privilege.” Dkt. 372 Ex. H. More than a month has elapsed. Plaintiffs have received nothing.

⁵ These newly revealed communications were contained within a cache of documents that Chesebro apparently produced to prosecutors in Michigan. See Josh Kovensky, *The Legal Coup: New Documents Reveal How Trump Lawyers Sought ‘Chaos’ to Force SCOTUS, or Whoever Else, to Anoint Trump*, Talking Points Memo (Feb. 12, 2024), <https://talkingpointsmemo.com/feature/intro-chesebro-docs>. These documents are responsive to Plaintiffs’ outstanding discovery demands to Chesebro but he has refused to produce them to Plaintiffs. See Dkt. 419.

in alternate slates of votes on Dec. 14 can pay huge dividends **even if there is no litigation pending on Jan. 6**, and based on final litigation in the States, Biden is still above 270 electoral votes (or, at minimum, is still ahead of Trump, with perhaps one or more States up in the air).” (emphasis in original) (Troupis Privilege Log, Doc. No. 2886; Thompson Aff. Ex. C).⁶ The plan was for Congress to ignore the requirements of the Electoral Count Act and simply delay counting the electoral votes altogether, throwing the nation into limbo past January 20, 2021. Troupis responded: “This is an excellent summary of the end game. Thank you.” (Troupis Privilege Log, Doc. No. 2891; Thompson Aff. Ex. C). Troupis also took the idea and ran with it, calling Senator Johnson to see if he would help execute it. *Id.* This was not in anticipation of litigation; to the contrary, the plan depended on courts *not* intervening.

In a similar vein, as discussed briefly in the pending motion, Dkt. 371 at 13, Troupis is withholding as attorney work-product several documents (Troupis Privilege Log, Doc Nos. 4836, 4838, 4843, 4854) that are text messages between him and Senator Johnson and Senator Johnson’s Chief of Staff attempting to arrange the delivery of the fraudulent elector certificates to the Vice President, who refused to accept them. These texts are described as “Discussion of logistics” and “Discussion regarding logistics.” These texts have been published in the national media.⁷ (*See* Thompson Aff. Ex. D). Nothing about this text conversation was done in anticipation of litigation; the intent of the messages was clearly to get information to the Vice President, an executive officer, in his capacity as President of the Senate, a legislative body. Their continued withholding further demonstrates the lack of merit in Troupis’s claims.

⁶ The December 8, 2023, email is linked in Josh Kovensky, *Two Weeks of Chaos: Docs Obtained by TPM Show Trump Lawyers’ Plans to Make Jan. 6. Last for Days on End*, Talking Points Memo (Feb. 12, 2024), available at <https://talkingpointsmemo.com/feature/two-weeks-of-chaos>.

⁷ *See* <https://justthenews.com/government/jan-6-panels-ron-johnson-narrative-exposes-ills-one-sided-hearing>.

Third, Troupis is withholding evidence demonstrating his **direct participation in the fraudulent electors scheme**, including that he advised the fraudulent electors to meet on December 14, 2020, and that he directed and reviewed the drafting of the fraudulent electoral certificates and the supporting paperwork. Included with the documents Plaintiffs received from third parties are communications (including the communication withheld as Troupis Privilege Log, Doc. No 3154) (Thompson Aff. Ex. E), about a proposed press statement to be issued by Troupis about the fraudulent elector's meeting on December 14, 2020. This proposed statement, with Troupis's approved phrasing as edited by Chesebro, reads, *inter alia*, "As the legal proceedings arising from the November 3 presidential election continue to work their way through the Wisconsin court system, I have advised the Republican Party of Wisconsin to convene a separate Republican electors' meeting and have the Trump-Pence electors cast their votes at the Wisconsin State Capitol on December 14." The statement ultimately was not issued because the Trump Campaign "put[] out nationwide instructions to everyone and anyone organizing electors for Monday to **not** put out any press releases, statements, social media, etc. until the electors have concluded voting." (Thompson Aff. Ex. F) (emphasis in original).⁸

In addition, Troupis is hiding information showing that Troupis's role in this scheme was not limited to Wisconsin or connected to his role as a Wisconsin litigator. Instead, new evidence suggests that Troupis directed and reviewed the drafting of the fraudulent electoral certificates and the supporting paperwork for fraudulent electors not only in Wisconsin but in other states as well.

A recent news article describes an email exchange on December 9:

Epshteyn asked Troupis if he would be willing to prepare sample fake elector ballots for Wisconsin and, if he agreed, to do the same for six other states: Pennsylvania, Georgia, Michigan, Arizona, Nevada, and New Mexico.

⁸ Although Troupis appears as an addressee on this communication, and it is responsive to Plaintiffs' outstanding discovery requests, the document does not appear to be listed on Troupis's privilege log.

Troupis said yes, and forwarded Epshteyn’s email to Chesebro: could he or another Wisconsin attorney “do this for the other states?”

“Oh, absolutely!!!” Chesebro replied.

Josh Kovensky, *The Ideas Man: How Chesebro’s Most Radical Theories Entered Trump Campaign Planning for Pence and Jan. 6*, Talking Points Memo (Feb. 13, 2024).⁹ These emails appear to Troupis Privilege Log Doc. Nos. 3031, 3032, and 3037.

Documents produced in other discovery show that Troupis and Chesebro then schemed to do exactly that work. For example, Troupis claims work-product protection as to Troupis Privilege Log Doc. Nos. 3132 and 3137. These documents were produced in other discovery (Thompson Aff. Ex. G) and are communications showing that Troupis and Chesebro collaborated to draft the fraudulent elector certificates that are at issue in this litigation. The documents show that Troupis received the draft certificates from the Republican Party of Wisconsin. Troupis then forwarded the drafts to Chesebro, with the instruction “Please review.” Chesebro responded that he was editing the certificates and then provided re-drafts to Troupis, along with the information that he would adapt that language for use in other states. Later, in a document withheld as Troupis Privilege Log Doc. No. 3155 (Thompson Aff. Ex. E), Chesebro sent Troupis instructions to give to the electors, telling them that they should place the signed fraudulent certificates “in internal envelopes that would be sealed and labeled prominently on the front: **‘VOTES OF THE STATE OF WISCONSIN FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES.’**” *Id.* (emphasis in original).

By characterizing these critical documents showing Troupis’s direct involvement in the fraudulent elector conspiracy with the generic description “Draft legal documents”—which is applied to 325 documents on the privilege log—Troupis has essentially hidden this information

⁹ Available at <https://talkingpointsmemo.com/feature/chesebro-radical-ideas-trump-campaign-jan-6-pence>.

from discovery. (See Dkt. 371 at 28-34 (explaining why Troupis should be required to provide a more detailed privilege log)). As Plaintiffs explained in their motion to compel, nothing about the fraudulent elector scheme is attorney work product; no work done in connection with that scheme was done in anticipation of litigation, as these withheld documents demonstrate. (Dkt. 371 at 11-12). To the contrary, the scheme was a political alternative to litigation “designed to proceed without judicial involvement.” *Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1183 (C.D. Cal. 2022). Even if these sorts of materials might be deemed work product, these are exactly the sorts of documents where plaintiffs’ need for the information in litigation far outweighs any qualified protection afforded by the work-product doctrine. (Dkt. 371 at 17-18)

Finally, as these new documents underscore, Troupis is withholding information showing that the fraudulent elector documents were created not for litigation purposes but in **furtherance of fraud and criminal activity**. (Dkt. 371 at 18-28) *See also, e.g., United States v. Donald J. Trump*, 1:23-cr-00257 (D.D.C. Aug. 1, 2023), Indictment ¶54 (explaining that the fraudulent elector scheme “evolved over time from a legal strategy to preserve [Trump’s] rights to a corrupt plan to subvert the federal government function by stopping Biden electors’ votes from being counted and certified”) (Dkt. 372 Ex. L); *id.* ¶62 (noting that Chesebro “confirmed that the conspirators’ plan was not to use the fraudulent electors only in the circumstance that the Defendant’s litigation was successful in one of the targeted states—instead, the plan was to falsely present the fraudulent states as an alternative to the legitimate slates at Congress’s certification proceeding”); Interview of Justin Clark, Select Committee (May 17, 2022) at 116 (Trump campaign lawyer explaining that he decided the scheme was not “legal” when it no longer depended on ongoing litigation: “unless we have litigation pending like in these states, like I don't

think this is appropriate or, you know, this isn't the right thing to do ...").¹⁰ Indeed, for his part in implementing Troupis's instructions, Chesebro pleaded guilty to a felony for "unlawfully conspir[ing] to knowingly file, enter, and record a document titled 'CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA,' ... , having reason to know that said document contained [a] materially false statement." *State of Georgia v. Kenneth Chesebro*, No. 23SC188947 (Sup. Ct. Fulton County), Plea of Guilty (e-filed, Oct. 20, 2023, 1:49 pm) (Dkt. 373 Ex. M & O). And fraudulent electors in Georgia and Michigan have been indicted for signing and transmitting the fraudulent certificates that, the documents show, were created by Chesebro at Troupis's direction. *Georgia v. Trump, et al.*, Case No. 23SC188947, at 40-42 (charging electors with various crimes of fraud and forgery) (Dkt. 372 Ex. M); *Michigan v. Berden, et al.*, Case No. 2022-0343234-A, Affidavit in Support of Complaint;¹¹ *see also* Trump Indictment ¶ 10(b). Troupis may not hide his own wrongdoing behind assertions of privilege. (Dkt. 371 at 20-28). All information showing Troupis's direct participation in the fraudulent elector scheme should be reviewed by the Court for immediate disclosure to Plaintiffs.

These are just some of the documents that Plaintiffs have been able to obtain from other sources. No doubt many more documents have been improperly withheld by Troupis. Troupis's continued shenanigans should not be countenanced by this Court. Plaintiffs are entitled to their discovery, and Troupis has categorically refused to provide it in a timely fashion and, moreover, refused this court's suggestion of a special master that could have resolved these issues more expeditiously (Dkt. 386).

¹⁰ Available at <https://www.govinfo.gov/content/pkg/GPO-J6-TRANSCRIPT-CTRL0000083778/pdf/GPO-J6-TRANSCRIPT-CTRL0000083778.pdf>.

¹¹ Available at <https://www.michigan.gov/ag/-/media/Project/Websites/AG/releases/2023/July/Felony-Complaints-Redacted-combined.pdf>.

CONCLUSION

Plaintiffs can brook no more delay, and neither should this Court. To ensure timely decision-making on the viability of Troupis's privilege claims, the court should order Troupis to deliver the 4,889 documents identified on the Troupis Privilege Log for *in camera* review immediately.

Dated February 20, 2024.

Respectfully submitted,

Electronically signed by Scott B. Thompson

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