IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KHARY PENEBAKER,
MARY ARNOLD, and
BONNIE JOSEPH,

Plaintiffs,

v. Case No. 3:22-cv-00334

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 and KENNETH CHESEBRO,

Defendants.

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

Pursuant to this Court's Order of July 12, 2022, Defendants Andrew Hitt, Robert F. Spindell, Jr., Bill Feehan, Kelly Ruh, Carol Brunner, Edward Scott Grabins, Kathy Kiernan, Darryl Carlson, Pam Travis, and Mary Buestrin (the "Alternate Elector Defendants"), by and through their attorneys, the Law Firm of Conway, Olejniczak & Jerry, S.C., hereby submit their Memorandum in Opposition to Plaintiffs' Motion to Remand (Doc. No. 13).

INTRODUCTION AND BACKGROUND

On May 17, 2022, Plaintiffs filed their Complaint in this action in the Circuit Court of Dane Count, Wisconsin. (Doc. No. 4-1 ("Compl.")). Plaintiffs allege, among other things, that the Alternate Elector Defendants violated federal and state law

by submitting alternate slates of electors on December 14, 2020, as set forth in 3 U.S.C. §§ 6, 7, 11, and 15, and in relation to the 2020 Presidential Election. Plaintiffs assert the following causes of action: conspiracy to violate federal and state laws; public nuisance (two forms alleged); quo warranto; punitive damages; and a request for remedy under the Wisconsin Constitution.

In support of their allegations and claims, Plaintiffs expressly allege issues of federal law pursuant to the U.S. Constitution and the Electoral Count Act, such as the following:

- "The rules governing presidential elections are delineated in the U.S. Constitution, as well as in various federal and state laws";
- "[T]he President and Vice President are chosen by presidential electors, who are appointed by each State" pursuant to U.S. Const. Art. II, §1, cl. 2;
- "The Constitution provides that those electors will meet in their respective States and cast their votes for President and Vice President" pursuant to U.S. Const. amend. XII;
- "Congress has specified that the meeting of the electors must take place in every State on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature" pursuant to 3 U.S.C. § 7;
- "The United States Constitution" details what takes place during the meeting of presidential electors and transmission of any records from such meeting pursuant to U.S. Const. amend. XII;

- "Federal law" specifies how the electors must transmit their certificates and to whom pursuant to 3 U.S.C. § 11;
- "The U.S. Constitution specifies the procedures for counting the electoral votes" pursuant to U.S. Const. amend. XII;
- The counting of presidential elector votes by Congress takes place on "the sixth day of January" pursuant to 3 U.S.C. § 15; and
- The Vice President and President of the Senate has the responsibility "for opening the certificates of the votes of the presidential electors" on January 6, 2021 pursuant to U.S. Const. art. I, § 3, cl. 4;

(Compl. ¶¶ 22-23, 46-48, 51-55).

Plaintiffs generally assert that the Alternate Elector Defendants acted in violation of the above-referenced federal authorities and, in addition, specifically allege that "Defendants' actions . . . violated a host of state and federal laws." (Compl. at 5). For example, Plaintiffs specifically allege that the Alternate Elector Defendants "defrauded the United States" Congress by submitting their electoral votes to Congress in violation of 18 U.S.C. §§ 371, and 494. (Compl. ¶¶ 207, 210). Plaintiffs also specifically allege that the Alternate Elector Defendants attempted to obstruct, influence, or impede the counting of electoral votes on January 6, 2021 in violation of 18 U.S.C. § 1512(c)(2). (Compl. ¶ 203). Plaintiffs also generally suggest that Defendants conspired or "helped lay the groundwork for the events of January 6, 2021" apparently based, in part, on remarks that then President Donald J. Trump made. (Compl. at 3-4).

Plaintiffs ultimately request a declaration that the Alternate Elector Defendants engaged in a civil conspiracy and "pursuant to which [they] . . . violated . . . 18 U.S.C. §§371, 494, and 1512(c)(2)." (Compl. ¶ 216). Plaintiffs also request a declaration that requires Defendants to transmit a copy of "the final judgment in this matter to the President of the United States Senate, . . . the Archivist of the United States, and the Chief Judge of the United States District Court for the Western District of Wisconsin." (Compl. at p. 54, subsec. (11). This declaratory request emanates entirely from 3 U.S.C. § 11, which directs the mailing of certificates of electors to the President of United States Senate, the Secretary of State of Wisconsin, the Archivist of the United States, and the judge of the district in which the electors shall have assembled. (Compl. ¶ 52 ("Federal law" provides the requirements for transmitting certificates of the electors.))

Within thirty days after service, the Alternate Elector Defendants filed their Notice of Removal with this Court, and a Notice of Filing with the Dane County Circuit Court, on June 15, 2022, asserting that this Court "has jurisdiction over the action because it arises under the laws of the United States . . . 28 U.S.C. 1331 and 1441-1447." (Doc. No. 1, 1-2, and 1-3; Goehre Decl. ¶ 2). The Alternate Elector Defendants filed an Amended Notice of Removal with this Court on June 22, 2022. (Doc. No. 4, 4-2, and 4-3). At the time the Alternate Elector Defendants removed the case to Federal Court, the Alternate Elector Defendants had no indication that any other Defendant had been served and joined in the suit at the time of removal and, in order to preserve their right to remove, promptly removed the case to

Federal Court.[1] On July 8, 2022, Defendants Troupis and Chesebro consented to removal and disclosed that they were served on June 21, 2022 and June 18, 2022, respectively. (Doc. No. 10 ¶¶ 3-5).

ARGUMENT

In their Complaint, Plaintiffs assert violations of federal law and, at the very least, raise several federal issues in connection with the federal laws governing Presidential elections and federal criminal statutes. Although many of the allegations in the Complaint are not "well-pleaded" (as required by Rule 8), numerous portions of the Complaint make clear that Plaintiffs are asserting violations of federal laws (*i.e.,* alleging express violations of federal statutes for conspiracy and public nuisance claims) and requesting relief that depends on the resolution of a substantial question of federal law. As such, this Court has original jurisdiction pursuant to 28 U.S.C. § 1331.

I. PLAINTIFFS ASSERT VIOLATIONS OF FEDERAL LAW.

A claim arises under federal law within the meaning of 28 U.S.C. § 1331 "if a well-pleaded complaint establishes that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Empire Healthchoice Assur., Inc. v. McVeigh,* 547 U.S. 677, 690, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006) (quoting *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.,* 463 U.S. 1, 27–28, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). For example, a state action for declaratory judgment comes

[1] To this day, Plaintiffs have not filed a Certificate or Affidavit of Service, and have not provided counsel with any confirmation that Defendants Troupis and Chesebro have been served. Regardless, the consent to remove, Doc. No. 10, filed on July 8, 2022 provides that information.

within federal jurisdiction if the threatened coercive action raises a federal question. *See Franchise Tax Bd. of Cal.,* 463 U.S. at 20–21. Upon raising a federal question in the Complaint, the action is removable. 28 U.S.C. §§ 1441(a) and 1331.

The entire Complaint is rooted in federal law since it necessarily pertains to the rights, obligations, and procedure for the meeting of Presidential electors and the submissions of such votes to, among others, the United States Congress—including the submission of competing slates of electors. 3 U.S.C. §§ 1 – 15. In addition, Plaintiffs' allegation that Defendants conspired to violate federal law, put simply, alleges and raises direct questions of federal law. Plaintiffs expressly allege that the Alternate Elector Defendants "actions . . . violated a host of . . . federal laws" and that Plaintiffs seek to hold Defendants accountable under such laws. (Compl. at 5). Plaintiffs generally allege that the Alternate Elector Defendants "defrauded the United States" Congress by submitting their electoral votes to Congress in violation of 18 U.S.C. §§ 371 and 494. (Compl. ¶¶ 207, 210). Plaintiffs also allege that the Alternate Elector Defendants attempted to obstruct, influence, or impede the counting of electoral votes on January 6, 2021 in violation of 18 U.S.C. § 1512(c)(2). (Compl. ¶ 203). Plaintiffs also allege that Defendant Chesebro's suggestion that "'Congress' could recognize the losing Republican candidates for the office of presidential elector as duly elected presidential electors is contrary to state and federal law." (Compl. ¶ 94). Plaintiffs generally allege that Defendants conspired or "helped lay the groundwork for the events of January 6, 2021"

apparently based, in part, on remarks that then President Donald J. Trump made. (Compl. at 3-4).

Plaintiffs request, among other things, a declaration that the Alternate Elector Defendants engaged in a civil conspiracy and "pursuant to which [they] . . . violated . . . 18 U.S.C. §§371, 494, and 1512(c)(2)." (Compl. ¶ 216). Plaintiffs also request a declaration that requires Defendants to transmit a copy of "the final judgment in this matter to the President of the United States Senate, . . . the Archivist of the United States, and the Chief Judge of the United States District Court for the Western District of Wisconsin." (Compl. at p. 54, subsec. (11); *see also* Compl. ¶ 52 ("Federal law" provides the requirements for transmitting certificates of the electors.) This declaratory request emanates entirely from 3 U.S.C. § 11, which directs the mailing of certificates of electors to the President of United States Senate, the Secretary of State of Wisconsin, the Archivist of the United States, and the judge of the district in which the electors shall have assembled. (Compl. ¶ 52).

It is clear based on the Complaint that Plaintiffs have raised and asserted questions of federal law. Despite this, Plaintiffs attempt to downplay the allegations and argue that a conspiracy is a civil tort under state law. However, this argument misses the mark. "A conspiracy is not, itself, a tort. It is the tort, and each tort, not the conspiracy, that is actionable." *Cali v. Danek Med., Inc.*, 24 F. Supp. 2d 941, 949 (W.D. Wis. 1998) (citing *Segall v. Hurwitz,* 114 Wis.2d 471, 481, 339 N.W.2d 333 (Ct.App.1983). As such, Plaintiffs must establish all elements of the "underlying" violations alleged in the Complaint. *Id.*; *Taurus IP v.*

DaimlerChrysler Corp., 519 F. Supp. 2d 905, 928 (W.D. Wis. 2007), aff'd sub nom. *Taurus IP, LLC v. DaimlerChrysler Corp.,* 726 F.3d 1306 (Fed. Cir. 2013)("A civil conspiracy requires an underlying tort.") In other words, Plaintiffs will have to prove that Defendants violated 18 U.S.C. §§ 371, 494, and 1512(c)(2) in connection with their conspiracy claim as alleged. This puts the questions of federal law squarely within the Court's original jurisdiction.[2]

II. PLAINTIFFS' CLAIMS INVOLVE SUBSTANTIAL AND DISPUTED QUESTIONS OF FEDERAL LAW.

Removal of a case to federal court is still proper, even if the Complaint lacks an express federal claim, but raises a "federal issue, [that is] actually disputed and substantial." *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314, 125 S. Ct. 2363, 2368, 162 L. Ed. 2d 257 (2005). This is a "commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Id.* at 312. The Complaint raises federal issues that are both substantial and disputed.

Plaintiffs' Complaint is anchored in issues of federal law pursuant to the U.S. Constitution and the Electoral Count Act. This is because the "rules governing presidential elections are delineated in the U.S. Constitution, as well as in various federal and state laws." (Compl. ¶ 22). As a result, the core and disputed

[2] The other claims in the Complaint are based on the same underlying facts and allegations as the claims that expressly invoke federal law. As such, this Court has supplemental jurisdiction over the remaining claims. 28 U.S.C. § 1367(a).

contention of the Complaint (*i.e.*, that Defendants violated federal law(s) by submitting competing slates of electors) directly puts a substantial federal issue—submission of electoral votes and the manner such votes were submitted to Congress—into play for jurisdictional purposes. (*See* Compl. ¶¶ 22-23, 46-48, 51-55). For example, 3 U.S.C. § 15, which is raised in paragraph 54 of the Complaint, sets forth clear procedures for handling such a situation where competing slates of electoral votes exist:

> [A]nd in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted.

3 U.S.C. § 15. There is no doubt that challenges involving the submission and determination of Presidential electoral votes raises substantial questions of federal law.

Additionally, resolution of the civil conspiracy and public nuisance claims necessarily require interpretation of substantial and disputed federal issues, as noted above. Absent an actionable unlawful or tortious overt act performed in furtherance of the alleged common scheme between Defendants, Plaintiffs cannot maintain a claim for civil conspiracy. The alleged "unlawful

act" that Plaintiffs rely on, in part, is that Defendants violated 18 U.S.C. §§ 371, 494, and 1512(c)(2). As such, interpretation and application of federal law is central to Plaintiffs' civil conspiracy, as well as public nuisance, claims. Furthermore, the other state law claims over which this Court would exercise supplemental jurisdiction does not impair the fact that interpretation of federal law is a substantial and central question to all of the claims—all of which are vigorously disputed by the Alternate Elector Defendants. (*See* Doc No. 6).

The federal courts have a greater interest in resolving, and have a greater familiarity with, disputes concerning the submission, determination, and counting of Presidential electoral votes governed by federal law. Likewise, the removal of this case would not upset the balance between federal and state Courts. Certainly, the allegations raised are exceedingly rare in the context of elections, but the fact that the Complaint expressly pertains to the submission of Presidential electoral votes to Congress and alleges violations of federal statutes tips the scales in favor of jurisdiction in federal court. Even Wisconsin law makes clear that its rules governing the conduct of electors during the meeting of electors, and their duties therein, are governed by federal law. *See also* Wis. Stat. § 7.75 ("When all electors are present, or the vacancies filled, they shall perform their required duties under the constitution and laws of the United States.") As such, the foregoing establishes jurisdiction pursuant to 28 U.S.C. § 1331.

III. NO TECHNICAL DEFECT EXISTS AND, IN ANY EVENT, REMAND IS NOT PROPER.

Plaintiffs allege in passing that the Notice of Removal was defective because it did not indicate that Defendants Troupis and Chesebro consented to the removal and because there was an errant reference to § 1441(b). Both arguments are red herrings. First, the Notice of Removal specifically stated the Court has original jurisdiction pursuant to "28 U.S.C. § 1331" and described the various federal statutes at issue. Furthermore, the Amended Notice also specifically stated it was being removed pursuant to 28 U.S.C. § 1441(a)." There is no question that the notices indicated the grounds for removal.

Second, at the time the Alternate Elector Defendants removed the case to Federal Court, Defendants Troupis and Chesebro had yet to be served. (Doc. No. 10). In order to preserve their right to remove, the Alternate Elector Defendants promptly removed the case to Federal Court within their 30-day deadline. On July 8, 2022, Defendants Troupis and Chesebro consented to removal and disclosed that they were served on June 21, 2022 and June 18, 2022, respectively. (Doc. No. 10 ¶¶ 3-5).

Since the Alternate Elector Defendants had no indication that any other Defendants had been served at the time of their Notice and Amended Notice of Removal, they were the only Defendants in the case and the only Defendants required to consent to removal, which all did. (Goehre Decl. ¶ 2). Not knowing whether the other Defendants would be served, the Alternate Elector Defendants had to preserve their right to removal within the 30-day period or risk foreclosure of

that right. There is no requirement that defendants attempt to prophesize whether other defendants may be served and speculate to the same when they remove a case.

Furthermore, to the extent that the Alternate Elector Defendants were required to indicate that the other Defendants were not served at the time of removal or the Amended Notice (even though they were unaware of that fact), any such failure was rectified once Defendants Troupis and Chesebro were served and subsequently consented to removal on July 8, 2022. *Shekar v. Ocwen Loan Servicing, LLC*, 848 F. App'x 216, 218 (7th Cir. 2021) ("Only defendants who have been served need to consent to removal, and no evidence reflects that any other defendant had been served before the case was removed." (citing *City of Yorkville ex rel. Aurora Blacktop Inc. v. Am. S. Ins. Co.*, 654 F.3d 713, 716 (7th Cir. 2011)). There is nothing improper, as it relates to removal, about Defendants Troupis and Chesebro consenting to the prior removal by the Alternate Elector Defendants. 28 U.S.C. § 1446(2)(A)-(B) ("all defendants who have been properly joined and served must join in or consent to the removal" and "shall have 30 days after receipt by or service on that defendant" to remove.); *Smith v. Toreh*, No. 2:10-CV-0732-LDG-PAL, 2011 WL 776167, at *2 (D. Nev. Feb. 28, 2011) (When defendants are "properly served, [they] must have joined in, consented to, or had their absence explained[.]").

Additionally, Defendants Troupis and Chesebro independently asserted a right to remove to Federal Court. (Doc. No. 10 at 1). In order to avoid any doubt, the Alternate Elector Defendants filed a consent to the same on July 15, 2022

pursuant to 28 U.S.C. § 1446(b)(2)(C). (Doc. No. 24). As such, Plaintiffs arguments to the contrary fail to establish any defect in the removal process or this Court's jurisdiction that would warrant remand. Regardless, Defendants had an objectively reasonable basis to remove. *Martin v. Franklin Capital Corp.,* 546 U.S. 132, 136, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005) ("[A]bsent unusual circumstances, attorney's fees should not be awarded when the removing party has an objectively reasonable basis for removal."); *Lott v. Pfizer, Inc.,* 492 F.3d 789, 793 (7th Cir.2007) (a defendant has an objectively reasonable basis for removal "if clearly established law did not foreclose a defendant's basis for removal").

CONCLUSION

For the reasons set forth above, the Alternate Elector Defendants respectfully request that this Court deny Plaintiffs' Motion to Remand and retain jurisdiction over the claims alleged in Plaintiffs' Complaint.

Dated this 2nd day of August, 2022.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.
Attorneys for Defendants, Andrew Hitt, Robert F. Spindell, Jr., Bill Feehan, Kelly Ruh, Carol Brunner, Edward Scott Grabins, Kathy Kiernan, Darryl Carlson, Pam Travis and Mary Buestrin.

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