PLAINTIFF-APPELLANT-PETITIONER'S APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2021

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2020AP433 Cir. Ct. No. 2019CV172

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN EX REL. HEATHER HOLMES
C/O THE LAKELAND TIMES,

PLAINTIFF-APPELLANT,

V.

CITY OF RHINELANDER CITY COUNCIL, ANDREW LARSON,
DAVID HOLT, STEVE SAUER, RYAN ROSSING AND CHRIS FREDERICKSON,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Oneida County: MICHAEL H. BLOOM, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 SEIDL, J. Heather Holmes appeals from a judgment dismissing her complaint for failing to state a claim upon which relief could be granted. Holmes' complaint alleges that Rhinelander City Council members Andrew Larson,

David Holt, Steve Sauer, and Ryan Rossing (herein referred to as the "members") violated the Wisconsin Open Meetings Law, WIS. STAT. §19.83(1).[1] Specifically, Holmes alleges that through emails and personal meetings, those members formed a "walking quorum"—and thus they held a "meeting"—and took action to censure City Council president George Kirby without proper notice and a public hearing as required under § 19.83(1).

¶2 We conclude that Holmes' complaint fails to allege facts, as opposed to mere legal conclusions. In particular, the complaint does not allege sufficient facts to support Holmes' claim that the four members improperly conducted government business by agreeing to or voting on action to be taken regarding Kirby. Accordingly, the circuit court correctly determined that the complaint did not allege sufficient facts to show that the four members violated Wisconsin's Open Meetings Law, and we therefore affirm.

BACKGROUND

¶3 In July 2019, Holmes filed the instant lawsuit against the Council, and Chris Frederickson, Rhinelander's mayor. The following factual allegations are taken from Holmes' complaint. Holmes is an employee of the local Lakeland Times newspaper. The Council is a "body politic" that governs the City of Rhinelander, a Wisconsin municipality. At the time of the events at issue in this appeal, the Council had a total of seven elected members or alderpersons, four of whom were Larson, Holt, Sauer and Rossing.[2] As mayor, Frederickson was a

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] Although there were eight total aldermanic districts, there was a vacancy that was eventually filled by Lee Emmer who was not a council member at the time relevant to this appeal.

member of the Council for purposes of breaking tied votes, but was not counted when determining whether a quorum existed to conduct City business.

¶4 The allegations in Holmes' complaint flow from a January 28, 2019 Council meeting, in which Council member and president George Kirby refused to participate. Kirby was upset that the Council had failed to place an item on the agenda regarding office furnishings purchased by city administrator Daniel Guild without approval from the Council. Kirby's refusal to participate in the meeting resulted in the Council failing to meet the quorum required to conduct business.

¶5 Following the meeting, the members met in sub-quorum sized groups over the next several days to discuss Kirby's actions. Those meetings culminated in the delivery of a letter to Kirby, which was signed by the members in their individual capacities as "fellow Council members."

¶6 Prior to the filing of the complaint, but after the letter was delivered to Kirby, the Division of Criminal Investigation within the Wisconsin Department of Justice (DOJ) investigated the members' actions. As part of that investigation, all five of the letter's signatories subsequently gave interviews to law enforcement about the reasons for, and the events leading up to, the preparation of the letter. A report concerning the investigation and its outcome was attached to the complaint as Exhibit 2. The report contained the following facts that are relevant to Holmes' claims.

¶7 After the January 28, 2019 Council meeting, Holt discussed Kirby's actions with Frederickson. Holt stated that he "was upset with Kirby's actions and said something about 'why can't we work together.'" On January 28 or 29, Sauer, Rossing and Guild met to discuss "how to address Kirby" and what they would like Kirby to "know and think about." Either Guild or Rossing wrote down their

thoughts at the meeting; however, Holmes' complaint alleges no affirmative facts relating to the contents of that writing.

¶8 Later that week, Holt spoke with Sauer in which Holt "vented his frustrations" about Kirby, stating that the Council president should better support the Council and that Kirby's actions were "embarrassing and hypocritical." After the Council meeting, Holt asked Guild to add an item to the Council agenda regarding the president's position, although not specifically Kirby. However, Holt subsequently retracted this request.

¶9 On January 30, 2019, Sauer went to Frederickson's house to socialize, but at some point they began to discuss Kirby. While at Frederickson's house, Sauer received an email from Guild that contained a draft letter[3] to Kirby. Sauer and Frederickson discussed the letter and later invited Rossing over for further discussion. Sauer believes that Rossing called Guild to make a few modifications to the letter. When Sauer received a second copy of the letter, he went home to print it. Sauer then returned to Frederickson's house, and the three signed the letter. Sauer told Frederickson and Rossing that he asked Larson and Holt to also sign the letter.

¶10 The next day, Holt met with Sauer and signed the letter. On the same day, Guild sent an email to the members which attached an article from the "League of Municipalities" explaining how to remove a council president. Around the same date, Rossing called Larson and stated that he and others had drafted a letter regarding Kirby's actions. Larson later went to Sauer's house, read

[3] The author of the letter is unclear based on the record. Regardless of the original author, the letter was ultimately signed by Larson, Holt, Sauer, Rossing, and Frederickson.

the letter, and signed it. Thus, all four members and Frederickson signed the letter.

¶11 Holt subsequently hand delivered the letter—which was attached to Holmes' complaint as Exhibit 1—to Kirby. The entire letter reads as follows:

> Dear George,
>
> We are writing to address the incident which occurred this past Monday night at the Common Council meeting. We are struggling to understand your conduct when it appears to us there were so many preferable alternatives.
>
> From your public comments, we are aware of a disagreement between you and Administrator Daniel Guild. Our questions include wanting to know why did you not reach out to the Mayor, and/or your fellow Council members about your concerns prior to the meeting? Why did you choose not to seat yourself with us, allowing the official meeting to proceed, and then stating your concerns during public comment? Even after being compelled by the Council to take your seat and perform your duties, both on behalf of your constituents, and to us, your colleagues, you made a conscious decision not to be seated, knowing it could, potentially, affect our ability to convene and conduct the City's business.
>
> Some of us are still unclear as to the reason behind your course of action. You started to make a public statement, which we know you were not able to finish, due to the fact we were not convened into an official meeting. Since then, many of us have not heard from you regarding these concerns, nor have we had any suggestion of your wanting to work with us to resolve them. We have been able to read some [sic] your comments to local news reporters. Why are you able to talk with reporters and not us, your fellow Council members, about your concerns?
>
> It is our thought that the City of Rhinelander is bigger than any one City employee, or any one elected official. As a group, we have spoken about the expectations we have for each other as Council members. We have recently discussed the need for us to talk with each other, first, before we create unnecessary drama, which impacts the City's reputation and the community's perception of us as a governing body. Do you still agree with this principle?

> Should we not try to work together to solve problems and attend to the business of the City[?]
>
> Regardless of your motivations and intentions, this incident does not reflect the level of leadership we are looking for from a seasoned, experienced elected official, such as yourself. As our Council President, we look to you for that leadership and setting a standard of behavior and conduct for the rest of the Council. Some of us would like to inquire further if you feel you have the composure necessary to continue to serve as Council President. Given recent events, perhaps it would be more comfortable for you to not continue in this capacity?
>
> This forthcoming conversation may be uncomfortable. It is not our intention for it to be so. As we have learned, as individuals, we cannot act on our own on behalf of the City. Rather it is the Common Council, as a group of elected officials, together, which has the authority to address problems.
>
> It is our hope you would be willing to meet with us. It is our desire to resolve any issues swiftly and then return our attentions to the business of the City and moving the community forward.

¶12 Exhibit 2 to the complaint (the DOJ investigative report) further indicated that the signatories of the letter decided to sign it because it conveyed their concerns and questions and might "stir conversation" but did not "present a solution." The members reviewed guidelines prepared by the attorney general in order to ensure "there was no quorum" signing the letter and that there was no "pre-determined" or "expected" outcome from the letter apart from asking Kirby about his thoughts. The letter was intended "to ask Kirby questions," such as "[w]hat's going on?" and "how do we work together?" It represented an effort to try to get Kirby to discuss the situation with the Council members and "share his thoughts," and it was not asking Kirby to "step down." In short, the report stated that the signatories interpreted the letter as an "invitation" for Kirby to speak his

mind and recall prior agreements to "work together, and talk to each other," and "no decisions were made or addressed."

¶13 The members, Frederickson and the Council subsequently filed a motion to dismiss Holmes' complaint for failure to state a claim upon which relief could be granted, pursuant to WIS. STAT. § 802.06(2)(a)6. At a hearing on the motion, Holmes claimed the law enforcement interviews showed that the members met privately and considered matters concerning the "possible and actual censure and/or written reprimand" of Kirby and "potential further future action" against him.

¶14 The circuit court issued a written decision granting the defendants' motion. It concluded, as relevant to our opinion, that the investigatory reports did not support Holmes' allegations. The court reasoned that the facts alleged in Holmes' complaint did not establish: (1) "that the discussions among the defendants which culminated in their agreement to draft, sign and distribute the subject letter to Kirby were directed towards any proposition requiring a formal vote by the Common Council to implement"; (2) that the discussions "resulted in any agreement among the defendants to 'take a uniform course of action,' in their capacity as members of the Common Council, relative to any proposition requiring a formal vote by the Common Council to implement"; (3) "that the number of defendants that actually engaged in the discussions that culminated in the agreement to sign and distribute the letter to Kirby was sufficient to control formal Common Council action relative to same"; (4) "that the contents of the subject letter to Kirby addressed any proposition requiring a formal vote by the Common Council to implement"; and (5) "that the contents of the subject letter to Kirby manifested an agreement among the defendants to 'take a uniform course of action,' in their capacity as members of the Common Council, relative to any

proposition requiring a formal vote by the Common Council to implement." The court therefore concluded that Holmes' complaint failed to allege sufficient facts that, if true, would establish a violation of the open meetings law. This appeal follows.

DISCUSSION

¶15 Holmes argues that the circuit court erred because the complaint contains allegations sufficient to establish a violation of the open meetings law. Whether a complaint fails to state a claim upon which relief can be granted is a question of law that we review de novo. ***Doe v. Archdiocese of Milwaukee***, 2005 WI 123, ¶19, 284 Wis. 2d 307, 700 N.W.2d 180. We accept as true all well-pleaded facts in the complaint and the reasonable inferences drawn therefrom. ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. However, we do not accord any weight or truth to legal conclusions alleged in a complaint. ***Id.*** If documents are attached to the complaint, we must consider them as part of the complaint. ***Peterson v. Volkswagen of Am., Inc.***, 2005 WI 61, ¶15, 281 Wis. 2d 39, 697 N.W.2d 61. If the facts alleged in the complaint conflict with those contained in the attached documents, the contents of the attachments prevail over the complaint's averments. ***Id.***

¶16 There is no dispute that the Council is a "governmental body" within the meaning of WIS. STAT. § 19.82(1) and that the Council must provide public notice in advance of a meeting and hold that meeting in open session as required by WIS. STAT. § 19.83(1). The main dispute here is whether the emails and personal meetings between the members and Frederickson leading up to the

transmittal of the letter to Kirby constituted a meeting under the open meetings law.

¶17 The term "meeting" is defined in WIS. STAT. § 19.82(2):

> "Meeting" means the convening of members of a governmental body *for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body.* If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter, any gathering of the members of a town board for the purpose specified in s. 60.50(6), any gathering of the commissioners of a town sanitary district for the purpose specified in s. 60.77(5)(k), or any gathering of the members of a drainage board created under s. 88.16, 1991 stats., or under s. 88.17, for a purpose specified in s. 88.065(5)(a).

(Emphasis added.) In order to state a claim for an open meetings law violation, Holmes had to allege sufficient facts tending to show two elements: (1) "a purpose to engage in governmental business, be it discussion, decision or information gathering"; and (2) "the number of members present must be sufficient to determine the parent body's course of action regarding the proposal discussed." *See* ***State ex rel. Newspapers, Inc. v. Showers***, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). The ***Showers*** court, however, clarified that the legislature did not intend to trigger the open meetings law "by automatically applying the law to any deliberate meetings involving governmental business between two or more officials." *See* ***id.*** at 98.

¶18 In Holmes' brief, she contends the second part of the ***Showers*** test is met. In support of her argument, she relies on ***Showers*** and ***Lynch*** for the proposition that a gathering that constitutes a quorum is presumed to be a violation

of the open meetings law. ***Showers***, 135 Wis. 2d at 100; ***State ex rel. Lynch v. Conta***, 71 Wis. 2d 662, 685, 239 N.W.2d 313 (1976), *superseded on other grounds by statute*. We do not perceive Holmes as alleging that the presumption in WIS. STAT. § 19.82(2) applies to the "walking quorum" at issue in this case. Additionally, we need not decide the presumption's application as we conclude that, regardless, there was no "purpose to engage in governmental business." *See* ***Showers***, 135 Wis. 2d at 102.

¶19 In order to plead a business purpose for the meetings sufficient to survive a motion to dismiss, it is not enough to allege that there were communications between the members regarding their personal positions, or that they asked other members for their opinions. *See* ***State ex rel. Zecchino v. Dane Cnty.***, 2018 WI App 19, ¶12, 380 Wis. 2d 453, 909 N.W.2d 203. Nor is it enough to show that the members read and signed a pre-meeting resolution or document if the document does not "discuss [] policy matters pending before the [body]" and "expressly commit[] the signatories" to vote in a particular way. *See* Wis. Op. Att'y Gen. Huff at 3 (2008), https://www.doj.state.wi.us/sites/default/files/dls/ompr/20080115-huff.pdf. Instead, the complaint must plausibly suggest that: (1) the members purposefully engaged in discussions regarding a specific measure of governmental business; and (2) these discussions "were held between a sufficient number of … members so as to affect the vote." ***Zecchino***, 380 Wis. 2d 453, ¶11. An express or tacit agreement is required. ***Id.***, ¶¶10, 12.

¶20 Regarding the first prong of the ***Showers*** test, the definition of "governmental business" is embedded in the WIS. STAT. § 19.82(2) definition of "meeting"—that is, "the convening of members of a governmental body *for the purpose of* exercising the responsibilities, authority, power or duties delegated to or vested in the body." (Emphasis added.) Here, Holmes argues the law

enforcement interviews incorporated into her complaint show the members discussed government business regarding "the effectiveness, possible and actual censure and/or written reprimand, and consideration of potential future further action against ... Kirby," which amounted to a walking quorum sufficient to require notice of a public meeting. The Council had the authority to remove or suspend Kirby as president under WIS. STAT. § 17.12(1)(a) and (d). It also had authority under the City of Rhinelander Code to take one of two disciplinary actions against Kirby as Council president—that is, to fine him or to expel him for neglect of duty. *Compare* RHINELANDER, WIS., CODE § 2.02.01(1)(d), *with* § 2.01.18(8)(b) and (9).

¶21 Certainly, the Council removing, suspending, fining, expelling, censuring or reprimanding Kirby would involve governmental business. But, the question is whether Holmes' complaint alleges that the members convened a meeting for any of those purposes. Holmes contends that the members' actions culminated in a plan to reach an explicit agreement to prepare and sign a document calling Kirby's actions as a Council member into question, which, Holmes submits, effectively constituted a private reprimand.

¶22 We disagree. Holmes' allegation about the members reaching an explicit agreement is merely her own characterization of the members' discussions, and that characterization conflicts with the documents attached to her complaint. Again, if the facts alleged in the complaint conflict with those contained in the attached documents, the contents of the attachments prevail over the complaint's averments. ***Peterson***, 281 Wis. 2d 39, ¶15.

¶23 The attachments to the complaint do not indicate that any of the members discussed censuring or reprimanding Kirby. Rather, the investigative

documents reveal the members met to discuss what happened at the prior Council meeting and questioned why Kirby acted in the manner he did. The documents further indicate that the members agreed to send an individually signed letter questioning Kirby's actions at the prior Council meeting and asking Kirby for his input on how to resolve their questions and concerns about his actions. The documents do not indicate that the members arrived at any agreement about what to do in response to Kirby's actions other than to ask what happened and why. The fact that the members read and signed a pre-meeting resolution or document does not constitute gathering for a business purpose under the open meetings law, if the document did not discuss policy matters pending before the body and expressly commit the signatories to vote in a particular way.

¶24 Holmes refers to the members discussing Kirby's "effectiveness." These discussions do not violate the open meetings law unless the members agreed on a uniform course of government action to take in response to their effectiveness discussions. *See* ***Zecchino***, 380 Wis. 2d 453, ¶10. Here, the documents attached to Holmes' complaint show that the members identified the purposes of their questions to Kirby as trying to understand what motivated his actions at the meeting, to remind him of their agreement to work together, and to "stir conversation" in order for Kirby to think about his actions. The plain purpose of the letter was not to censure or reprimand Kirby or to "kick out Kirby," as the complaint claims.

¶25 Our supreme court has held that "[w]hen the members of a governmental body gather ... and then intentionally expose themselves to the decision-making process on business of their parent body—by the receipt of evidence, advisory testimony, and the views of each other—an evasion of the [open meetings] law is evidenced." ***Lynch***, 71 Wis. 2d at 685-86. While Holmes'

complaint may be construed as alleging that the members met and received "the views of each other," it cannot be construed as alleging that the members received "evidence" or "advisory testimony" against Kirby. The use of the conjunctive "and" means that the supreme court in ***Lynch*** intended that there be more than just the receipt of "the views of each other" to constitute the conduct of governmental business under the open meetings law. Rather, ***Lynch*** clearly envisions a deliberative process much as would occur at a properly noticed meeting, including meeting for a proper governmental purpose.

¶26 The ***Lynch*** court further explained:

> To impose open session requirements on all government business discussion between at least two members of the same body, merely on the basis that such discussion somewhat enhances the possibility that mutual interests will be furthered and possibly carried out in the form of some future official action, would virtually impede much of the preliminary labor involved in any government action and thus be incompatible with the necessary "conduct of governmental affairs and the transaction of governmental business."

Id. at 689. Here, the complaint's allegations demonstrate that the discussions between the members fall squarely within this articulation of the scope of the open meetings law.

¶27 This court's decision in ***Zecchino*** is also instructive. There, Zecchino's business, Adams Outdoor Advertising, leased three billboards near the Dane County Regional Airport. ***Zecchino***, 380 Wis. 2d 453, ¶2. Prior to the lease's expiration on December 31, 2015, the Dane County airport commission, the public works committee, and the personnel and finance committee all voted in support of renewing Adams' billboard lease. ***Id.*** On April 7, 2016, however, the county board rejected the lease in an eighteen to sixteen vote. ***Id.***

¶28 Adams then brought an action alleging a violation of the open meetings law through an illegal walking quorum and relief seeking a declaration that the board's April 7, 2016 decision was unlawful. ***Id.***, ¶3. Adams' complaint alleged that prior to the April 7 vote, a number of board members engaged in closed discussions with the purpose of negatively affecting the vote on the lease. ***Id.*** Specifically, the complaint alleged that board supervisor Paul Rusk emailed multiple other board supervisors prior to the vote and that he tried to call another supervisor to discuss her vote. ***Id.***

¶29 After setting forth the details of Rusk's emails, this court observed that the entire factual basis for Adams' complaint was the series of emails sent by Rusk either to other board supervisors or to constituents. ***Id.***, ¶12. Adams' argument relied primarily on Rusk's emails indicating that he was trying to "keep[] track" of the votes and emails to other supervisors in which Rusk expressed discontent with the billboards. ***Id.*** Most of Rusk's emails were one-way messages, garnering few, if any, responses from other supervisors. ***Id.*** None of the emails reflected a "tacit agreement" between the defendants to vote against the lease. ***Id.*** The emails all either dealt with scheduling matters, were communications with constituents, asked other supervisors for their opinions, or expressed Rusk's personal position. ***Id.***

¶30 In affirming the circuit court's dismissal of Zecchino's complaint for failure to state a claim upon which relief could be granted, this court held:

> The essential feature of a "walking quorum" is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no [] express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law. The signing, by members of a body, of a document asking that a subject be placed on the agenda of an upcoming meeting thus does not constitute a "walking

> quorum" where the signers have not engaged in substantive discussion or agreed on a uniform course of action regarding the proposed subject.

Id., ¶10.

¶31 As in ***Zecchino***, Holmes' complaint does not allege any express or tacit agreement among the members to take any action against Kirby other than to deliver a letter to him expressing their frustration with his refusal to participate in the Council meeting. Holmes' complaint clearly fails to allege that the members engaged in substantive discussion or agreed on a uniform course of action regarding removing, suspending, fining, expelling, censuring or reprimanding Kirby, or any other governmental business for that matter. Rather, in the words of the ***Lynch*** court, the members' discussion may have "somewhat enhance[d] the possibility that mutual interests [would] be furthered and possibly carried out in the form of some future official action." *See* ***Lynch***, 71 Wis. 2d at 689. That, however, does not constitute a meeting at which governmental business was conducted under the open meetings law.

¶32 Instead, the members agreed to individually sign and deliver to Kirby a letter relating to his recent actions as Council president at an attempted Council meeting. Without more, it cannot be said that the members agreed on a "uniform course of action" on behalf of the Council. *See* ***Zecchino***, 380 Wis. 2d 453, ¶10. The letter merely asked Kirby what was going on and if he would provide input on how to resolve the issue. The open meetings law does not apply to mere "discussions or brainstorming of a tentative nature preliminary to focusing on a specific outcome." *See* 68 Wis. Op. Att'y Gen. 171, 175 (1979), https://www.doj.state.wi.us/sites/default/files/dls/ompr/19860428-clifford.pdf.

This is precisely what occurred here. Therefore, the allegations in Holmes' complaint fail the first prong of the ***Showers*** test.

¶33 For the foregoing reasons, we conclude Holmes' complaint failed to allege sufficient facts that, if true, would demonstrate a violation of the open meetings law. We therefore affirm the circuit court's judgment dismissing Holmes' complaint.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

FILED
01-29-2020
ONEIDA COUNTY
CLERK OF CIRCUIT
COURT
2019CV000172

BY THE COURT:

DATE SIGNED: January 29, 2020

Electronically signed by Michael H. Bloom
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT ONEIDA COUNTY

STATE OF WISCONSIN
ex rel. HEATHER HOLMES
c/o THE LAKELAND TIMES,

Plaintiff,

Case No. 19 CV 172

v.

CITY OF RHINELANDER CITY COUNCIL,
ANDREW LARSON,
DAVID HOLT,
STEVE SAUER,
RYAN ROSSING,
CHRIS FREDERICKSON,

Defendants.

DECISION ON DEFENDANTS' MOTION TO DISMISS

The plaintiff, State of Wisconsin ex rel. Heather Holmes, filed the above-captioned action against the defendants City of Rhinelander City Council (denominated herein as the "Common Council"), Andrew Larson, David Holt, Steve Sauer, Ryan Rossing, and Chris Frederickson. Defendants Larson, Holt, Sauer, and Rossing are members of the Common Council. Defendant Frederickson is the Mayor of the City of Rhinelander. The Mayor is a member of the Common Council for purposes of breaking tied votes.

In her Complaint, the plaintiff alleges that the defendants knowingly violated the Wisconsin Open Meetings Law and sec. 19.83(1), Stats., by improperly conducting public business through means other than a public meeting and in a manner inconsistent with the requirements of Wisconsin's Open Meetings Law. The defendants have filed a Motion to Dismiss under sec. 802.06(2), Stats., requesting that the court dismiss the above-captioned action in its entirety on the grounds that the plaintiff has failed to state a claim upon which relief may be granted.

FACTS

All facts alleged in the plaintiff's Complaint, and reasonable inferences drawn therefrom, are accepted as true for purposes of this motion. Scott v. Savers Prop. & Cas. Ins. Co., 2003 WI 60, ¶ 5. The court finds that all of the facts set forth below are alleged in the plaintiff's Complaint.

The allegations in the plaintiff's Complaint flow from a January 28, 2019, meeting of the Common Council, at which Common Council President George Kirby refused to participate, temporarily depriving the Common Council of a quorum. Apparently, Kirby was upset that the Common Council had not put an item he requested on the agenda regarding large furniture expenditures by City Administrator Daniel Guild.

Several members of the Common Council were upset with Kirby's actions. Over the next several days, the defendants met with each other in a series of sub-quorum-sized groups and had multiple conversations regarding Kirby's actions, which ultimately culminated in a letter being signed by the five defendants and delivered to Kirby.

Following the January 28 meeting, Frederickson and Holt discussed Kirby's actions. On January 28 or 29, Sauer, Rossing, and Guild met to discuss "how to address Kirby." They talked about what they wanted Kirby to know and think about. Either Guild or Rossing wrote down

thoughts at that meeting. The plaintiff's Complaint alleges no affirmative facts relative to the contents of any such writing.

On some day between January 28 and January 30, Holt had a conversation with Sauer about Kirby. Holt said he vented his frustrations about Kirby, asking why he behaved like that and stating that the council president should support the council better and that Kirby's behavior was embarrassing and hypocritical. At some point, Holt asked Guild to put a discussion of the president's position on the council agenda, as Holt wanted to have a discussion about the position, not specifically Kirby. Holt indicated that he wanted to be able to speak in public to explain his feelings. However, after thinking about it more, he decided to retract this request.

On January 30, Sauer came to Frederickson's house for what initially started as a social gathering but turned into a discussion about Kirby. While there, Sauer received an e-mail on his phone from Guild with a draft of a letter to Kirby. Sauer and Frederickson discussed the letter, and contacted Rossing to invite him over to discuss the letter. All three discussed the letter. Sauer went home and printed a copy of the letter, and returned. Rossing, Sauer, and Frederickson signed the letter that night. According to Fredrickson, Rossing and Sauer had initially asked Frederickson that an item be added to the council agenda relative to removal of Kirby as council president, but both withdrew the request after providing Kirby the letter. Sauer told Rossing and Frederickson that he would show the letter to Larson and Holt to get their signatures.

On January 31, Holt met with Sauer to sign the letter. On the same day, Guild sent an email to Holt, Rossing, Sauer, Frederickson, and Larson with an attached article from the League of Wisconsin Municipalities regarding how to remove a council president. Around the same date, Rossing called Larson and told Larson he was drafting a letter asking about Kirby's actions. Rossing said the letter was written by Rossing and Sauer, and that they had showed it to Guild for

Guild's input. At some point after that, Larson went to Sauer's house, read the letter, and signed it. Holt then delivered the letter to Kirby.

The body of the letter reads, in its entirety, as follows:

Dear George,

We are writing to address the incident which occurred this past Monday night at the Common Council meeting. We are struggling to understand your conduct when it appears to us there were so many preferable alternatives.

From your public comments, we are aware of a disagreement between you and Administrator Daniel Guild. Our questions include wanting to know why did you not reach out to the Mayor, and/or your fellow Council members about your concerns prior to the meeting? Why did you choose not to seat yourself with us, allowing the official meeting to proceed, and then stating your concerns during public comment? Even after being compelled by the Council to take your seat and perform your duties, both on behalf of your constituents, and to us, your colleagues, you made a conscious decision not to be seated, knowing it could, potentially, affect our ability to convene and conduct the City's business.

Some of us are still unclear as to the reason behind your course of action. You started to make a public statement, which we know you were not able to finish, due to the fact we were not convened into an official meeting. Since then, many of us have not heard from you regarding these concerns, nor have we had any suggestion of your wanting to work with us to resolve them. We have been able to read some your comments to local news reporters. Why are you able to talk with reporters and not us, your fellow Council members, about your concerns?

It is our thought that the City of Rhinelander is bigger than any one City employee, or any one elected official. As a group, we have spoken about the expectations we have for each other as Council members. We have recently discussed the need for us to talk with each other, first, before we create unnecessary drama, which impacts the City's reputation and the community's perception of us as a governing body. Do you still agree with this principle? Should we not try to work together to solve problems and attend to the business of the City.

Regardless of your motivations and intentions, this incident does not reflect the level of leadership we are looking for from a seasoned, experienced elected official, such as yourself. As our Council President, we look to you for that leadership and setting a standard of behavior and conduct for the rest of the Council. Some of us would like to inquire further if you feel you have the composure necessary to continue to serve as Council President. Given recent events, perhaps it would be more comfortable for you to not continue in this capacity?

> This forthcoming conversation may be uncomfortable. It is not our intention for it to be so. As we have learned, as individuals, we cannot act on our own on behalf of the City. Rather it is the Common Council, as a group of elected officials, together, which has the authority to address problems.
>
> It is our hope you would be willing to meet with us. It is our desire to resolve any issues swiftly and then return our attentions to the business of the City and moving the community forward.

LEGAL STANDARD – MOTION TO DISMISS

A motion to dismiss under sec. 802.06(2)(a)6., Stats., for "failure to state a claim upon which relief can be granted" tests the legal sufficiency of the complaint. John Doe 67C v. Archdiocese of Milwaukee, 2005 WI 123, ¶19; Scott, 2003 WI 60, ¶5. Whether a complaint has properly pled a cause of action is a question of law, not of fact. Hermann v. Town of Delavan, 215 Wis. 2d 370, 378, 572 N.W.2d 855 (1998). All facts pled and all reasonable inferences from those facts are taken as admitted. Id. The complaint must be liberally construed in favor of stating a claim, and should be dismissed only if it is clear that there are no conditions under which the plaintiff could prevail. Id. "The court is not to be concerned with whether the plaintiff can actually prove the allegations . . . . The underlying facts alleged are taken as true, and only the legal premises derived therefrom are challenged." Keller v. Welles Dept. Store of Racine, 88 Wis. 2d 24, 29, 276 N.W.2d 319 (1979). However, the court "cannot add facts in the process of liberally construing the complaint" or draw unreasonable inferences from the pleadings in order to help the plaintiff plead a claim. John Doe 67C, 2005 WI 123 at ¶¶ 19-20.

LEGAL STANDARD – OPEN MEETINGS VIOLATION

There is no dispute that the Rhinelander Common Council is a "governmental body" under sec. 19.82(1), Stats., or that the defendants failed to provide public notice in advance of the alleged "meeting" or hold it in open session as required by sec. 19.83(1), Stats. The issue in this case is

whether the series of contacts among the defendants qualifies as a "meeting" under Wisconsin's Open Meetings Law.

A "meeting" for purposes of the Wisconsin Open Meetings Law is defined in sec. 19.82(2), Stats., as "the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." The Wisconsin Supreme Court has held that two elements are necessary to establish an open meetings law violation claim: (1) "there must be a purpose to engage in governmental business, be it discussion, decision or information gathering"; and (2) "the number of members present must be sufficient to determine the parent body's course of action ***regarding the proposal discussed***." State ex rel. Newspapers, Inc. v. Showers, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987)(emphasis supplied).

Regarding the first prong of the test, the Showers court explained that a governmental body acts with a purpose to engage in governmental business when it "intentionally exposes themselves to the decision-making process on business of their parent body—by the receipt of evidence, advisory testimony, and the views of each other..." Id. at 90. The law "cover[s] formal as well as informal action, i.e., discussion, decision, and information gathering..." Id. In this case the Common Council is the "parent body" at issue, so it is their own "decision-making process" that is implicated.

The second prong of the Showers test requires that the number of members present be sufficient to determine the governmental body's course of action on the business under consideration. The power to control a body's course of action can refer either to the affirmative power to pass a proposal or the negative power to defeat a proposal. Therefore, a gathering of one-half of the members of a body, or even fewer (if the body operates under a super majority

rule), may be sufficient to control a course of action if it is enough to block a proposal. This is characterized as a "negative quorum." See Id. at 91.

Relative to the second prong of the Showers test, Paragraph 4 in the plaintiff's complaint alleges as follows:

> On or about January 30, 2019, through a series of personal communications, e-mail messages, in-person meetings, and communications, Defendants Larson, Holt, Sauer, Rossing and Frederickson, in their capacities as members of the City Council, had discussions amounting to a walking quorum concerning governmental business without public notice, and specifically regarding the effectiveness, possible and actual censure and/or written reprimand, and consideration of potential future further action against a fellow City Council member, George Kirby.

The plaintiff's complaint does not allege that a sufficient number of members "convened" for a conventional "meeting" at the same time and place. Rather, the plaintiff's Complaint alleges that a series of contacts between sub-quorum-sized groups of the various defendants constituted a "walking quorum" in violation of Wisconsin's Open Meetings Law.

The existence of a "walking quorum," if established, constitutes a violation of Wisconsin's Open Meetings Law. State ex rel. Lynch v. Conta, 71 Wis. 2d 662, 687, 239 N.W.2d 313 (1976). In 2015, the Attorney General of the State of Wisconsin issued an open meetings law compliance guide (which was most recently updated in May 2019) in which the concept of a "walking quorum" is explained:

> A "walking quorum" is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum.
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> ...
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> The essential feature of a "walking quorum" is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law. The signing, by members of a body, of a document asking that a subject be placed on the agenda of an upcoming meeting thus does not constitute a "walking quorum" where the

> signers have not engaged in substantive discussion or agreed on a uniform course of action regarding the proposed subject.

This language was endorsed by the Wisconsin Court of Appeals in State ex rel. Zecchino v. Dane County, 2018 WI App 19, ¶ 10, 380 Wis. 2d 453, 909 N.W.2d 203. Pursuant thereto, in order to establish the existence of a "walking quorum," the plaintiff must show: (1) a series of gatherings among sub-quorum-sized groups of members for the purpose of addressing governmental business; and (2) an explicit or tacit agreement, among a sufficient number of members to control an action by the body, to act uniformly relative to such action.

Unlike a conventional "meeting," where mere ***discussion*** of "governmental business" by a sufficient number of members can constitute a violation of Wisconsin's Open Meetings Law, in order to establish the existence of a "walking quorum," proof that a sufficient number of members reached an explicit or tacit ***agreement*** to ***act uniformly*** relative to some form of "governmental business" is required. In other words, establishing the existence of a "walking quorum" carries an additional layer of proof beyond what is required relative to a conventional "meeting."

Section 19.82(2), Stats., provides that "[i]f one-half or more of the members of a body are present, the gathering is rebuttably presumed" to be a "meeting." The parties do not dispute that this rebuttable presumption does not apply in the context of a "walking quorum." The rebuttable presumption only applies when "one-half or more of the members of a governmental body are present." The plaintiff's Complaint does not allege that "one-half or more of the members" of the Common Council were ever contemporaneously convened or gathered together in violation of Wisconsin's Open Meetings Law. Rather, the plaintiff's Complaint alleges the existence of a "walking quorum." As such, no presumption applies in this case.

Where a person alleges that a gathering of less than one-half the members of a governmental body was held in violation of the open meetings law, that person has the burden of

proving that the gathering constituted a "meeting" subject to the law. Showers, 135 Wis. 2d at 102. Therefore, in addition to the added layer of proof that the plaintiff bears relative to establishing the existence of a "walking quorum," the plaintiff also bears the burden of alleging sufficient ***affirmative facts*** to establish the existence of a "walking quorum."

The court is not required to accept the plaintiff's allegation that the series of discussions and the letter itself constitutes an unlawful "walking quorum." Legal conclusions stated in a complaint need not be accepted as true and, in and of themselves, are insufficient to enable a complaint to withstand a motion to dismiss. Data Key Partners v. Permira Advisers LLC, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. As the court's analysis is limited to the ***affirmative facts*** alleged in the plaintiff's Complaint, and the reasonable inferences that may be drawn therefrom, the court must determine whether the affirmative facts alleged in the plaintiff's Complaint are legally sufficient to establish that the series of discussions leading up to the signing and distribution of the letter, and the signing and distribution of the letter itself, constitute a "walking quorum."

At first blush, discussing the fitness of the Common Council's sitting president, as well as discussing how to approach his recent behavior, would seem to qualify as Common Council "business." It is quite clear that the discussions in this case led to an agreement among the defendants to sign and distribute the subject letter to Kirby. However, did the discussions among the defendants that culminated in the agreement to sign and distribute the subject letter to Kirby, and their act of signing and distributing it to him, involve "governmental business" under the first prong of the Showers test? Furthermore, did agreeing to sign and distribute the subject letter to Kirby, and their act of signing and distributing it to him, manifest an agreement among the defendants to "take a uniform course of action" in their capacity as members of the Common

Council, so as to constitute a "walking quorum," thereby satisfying the second prong of the Showers test? In the court's judgment, these are the dispositive inquiries in this case.

The court must be mindful that sec. 19.81(4), Stats., provides that "[t]his subchapter shall be liberally construed to achieve the purposes set forth in this section...." However, a court may not use the legislative direction that the law "be liberally construed" to ignore statutory definitions or expand the law beyond what it says. See Bong v. Cerny, 158 Wis. 2d 474, 484-85, 463 N.W.2d 359, 363 (1990). "By liberal construction all that is meant is that the terms actually used by the legislature shall be given the fullest application within proper definitional guidelines that are consistent with the spirit of the legislation." American Motors Corp. v. DILHR, 101 Wis. 2d 337, 351, 305 N.W.2d 62, 68 (1981). "Liberal construction does not give a court the right to expand the terms of the legislation." Id. As such, the court's role in this case is not to determine whether Wisconsin's Open Meetings Law ***should***, as a matter of policy, apply to the scenario underlying this case. Rather, the court's role is to determine whether Wisconsin's Open Meetings Law, as it is, and consistent with its interpretation in decisions of the Wisconsin Supreme Court and Court of Appeals, ***does*** apply to the scenario underlying this case.

The Wisconsin Supreme Court has explained the policy justification underlying the open meetings law as follows:

> When the members of a governmental body gather in sufficient numbers to compose a quorum, and then intentionally expose themselves to the decision-making process on business of their parent body—by the receipt of evidence, advisory testimony, and the views of each other—an evasion of the law is evidenced. Some occurrence at the session may forge an open or silent agreement. When the whole competent body convenes, this persuasive matter may or may not be presented in its entirety to the public. Yet that persuasive occurrence may compel an automatic decision through the ***votes*** of the conference participants. The likelihood that the public and those members of the governmental body excluded from the private conference may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences

> as normally an evasion of the law. The possibility that a decision could be influenced dictates that compliance with the law be met.
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> Conta, 71 Wis. 2d at 685-86 (emphasis supplied).

Moreover, in Showers, the Wisconsin Supreme Court offered the following policy justification:

> When a group of governmental officials gather to engage in formal or informal government business and that group has the potential to determine the outcome of the proposal or proposals being discussed, the public, absent an exception found within the law has the right to know—fully—the deliberations of that group.
>
> Showers, 135 Wis. 2d at 103.

Implicit in this reasoning is that the discussions or activity at an alleged "meeting" or "series of gatherings"—a "walking quorum"—must involve some proposition that will ultimately ***require a formal vote of the governmental body in order to implement***. The sufficient numbers prong of the Showers test and the "walking quorum" test both require that the number of members present at the meeting or involved in the series of gatherings be sufficient to determine the governmental body's course of action on the subject proposition. How else can it be determined whether the number of members present is sufficient to determine the governmental body's course of action relative to the subject proposition other than by determining how many votes are necessary to either pass or defeat it? Indeed, the plaintiff, in her brief opposing the defendants' Motion to Dismiss, cites language from Conta (denominated in her cite as Lynch) stating that "[q]uorum gatherings should be presumed to be in violation of the law, due to a quorum's ability to thereafter call, compose and ***control by vote*** a formal meeting of a governmental body." Conta, 71 Wis. 2d at 685 (emphasis supplied). This necessarily requires that the subject of the alleged meeting or series of discussions involve some form of proposed action that would require a formal vote of the governmental body in order to implement.

In Conta, the discussion focused on an ***upcoming vote*** by the Wisconsin legislature's Joint Committee on Finance regarding Assembly Bill 222. In Showers, the discussion focused on an

upcoming vote by the Milwaukee Metropolitan Sewerage Commission regarding the method of funding to be used for the 1984 budget. In Zecchino, the discussion focused on an ***upcoming vote*** by the Dane County Board regarding the renewal of a billboard lease. In State ex rel. Badke v. Village of Greendale, 173 Wis. 2d 553, 494 N.W.2d 408 (1993), the discussion focused on a quorum of Greendale Village Board members' attendance at plan commission meetings that preceded an ***upcoming vote*** on the same matter addressed at the plan commission meetings that were attended by the board members. Id. at 561-63.

A determination of what constitutes "governmental business" for purposes of the first prong in the Showers test—that an alleged meeting be for the "purpose" of engaging in "governmental business"—must be made in light of sec. 19.82(2), Stats., which defines a "meeting" as "the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." On what basis can the Rhinelander Common Council exercise its "responsibilities, authority, power or duties" other than by some form of action based on a ***vote*** by the council members? In order to take binding action in its capacity as the Common Council, either a resolution or an ordinance must be adopted, or some other formal ***action*** by the Common Council must be taken, pursuant to a ***vote***. Nothing in the record in this case indicates anything to the contrary.

There are various decisions of the Wisconsin Supreme Court, including State v. Swanson, 92 Wis. 2d 310, 284 N.W.2d 655 (1979), State v. Beaver Dam Area Development Corporation, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295, and Krueger v. Appleton Area School District Board of Education, 2017 WI 70, 376 Wis. 2d 239, 898 N.W.2d 35, which address whether a certain committee or entity constitutes a "governmental body" for purposes of Wisconsin's Open Meetings Law. These cases, as best the court can tell, do not get at the issue of whether formal

action ***requiring a vote*** by the subject body need occur. Nevertheless, the factual scenarios underlying those cases are inapposite to those of the instant case. In this case, it is the "responsibilities, authority, power, or duties" of the ***Rhinelander Common Council*** that is at issue. There is nothing in the record in this case to support the proposition that the Common Council can exercise its "responsibilities, authority, power, or duties" by any form of action that does not require a formal vote by the Common Council.

Furthermore, application of the first prong in the Showers test must also be made in light of the ***second*** prong of the Showers test. The second prong of the Showers test requires that the number of members present at the meeting—or, in the case of a "walking quorum," the number of members involved in the series of gatherings or discussions—be sufficient to determine the governmental body's course of action on the subject proposition. Without a ***vote***, what formal "action" can a body such as the Common Council take? Again, how else can the number of members necessary to determine the governmental body's course of action be determined other than by determining the number of ***votes*** necessary to either pass or defeat the proposition at issue?

A majority of Common Council members cannot communicate informally and then just "decide" to take formal action as a governmental body. In order to take actual "action," the Common Council must posture a proposition and ***vote*** on it. The Wisconsin Supreme Court's above-cited discussion in Conta relative to the policy justification underlying Wisconsin's Open Meetings Law clearly indicates that the law is intended to prohibit a quorum of members privately orchestrating a predetermined outcome relative to a ***vote*** that will be taken at a subsequent public meeting, thereby concealing the actual controlling rationale of a government decision from the public and those members of the governmental body excluded from the private communications. Does the Wisconsin Supreme Court's language in Conta apply if a majority of Common Council

members informally "decide" to do something that does ***not*** require a formal vote in order to implement? The court believes, and finds herein, that it does not.

The court does not find that ***any*** and ***all*** violations of Wisconsin's Open Meetings Law ***must***, as a matter of law, involve some proposition requiring a vote by the governmental body at issue. However, in the specific context of this case, which alleges a "walking quorum" among members of the Rhinelander Common Council, in order to apply both prongs of the Showers test in harmony with each other, the court finds that to constitute "governmental business," the series of discussions between the defendants alleged in this case must involve or be directed towards some proposition that would require a formal vote by the Common Council in order to implement. The court finds that, otherwise, there would be no way to logically apply both the first and second prongs of the Showers test to the specific facts of this case.

The plaintiff argues that private discussions among sufficient members of a governmental body resulting in a decision ***not*** to pursue formal action constitutes "governmental business" under Wisconsin's Open Meetings Law. In other words, private discussions among council members to ***not*** pursue a particular course of action would ***prevent the issue from ever coming to a vote*** before the Common Council and would thereby conceal the actual controlling rationale of a government decision from the public and those members of the Common Council excluded from the private discussions. The court agrees, as far as it goes. However, in order for such discussions to constitute an open meetings violation, there must be actual and substantive discussion among a sufficient number of members that involves or is directed towards some proposition that would actually ***require*** a formal vote by the Common Council in order to implement and, in the context of a "walking quorum," an explicit or tacit agreement among the members ***not*** to take such action.

In any event, the plaintiff's argument in this regard does effectively illustrate that the underlying discussions themselves, separate from the signing and distribution of the letter itself, may constitute the basis for a violation of Wisconsin's Open Meetings Law. As such, the court shall address both the underlying discussions that led to the signing and distribution of the letter, and the signing and distribution of the letter itself, in its analysis of the plaintiff's claim in this case.

Based on all of the above, in order to apply the two prongs of the Showers test to the particular facts of this "walking quorum" case, the court must determine whether the plaintiff's Complaint alleges sufficient facts which, if true, would establish, relative to the discussions among the defendants culminating in the agreement to sign and distribute the letter to Kirby:

1) that the discussions were directed towards a proposition requiring a formal vote by the Common Council to implement;
2) that the discussions resulted in an agreement among the defendants to "take a uniform course of action," in their capacity as members of the Common Council, relative to some proposition requiring a formal vote by the Common Council to implement; and
3) that a sufficient number of the defendants to control formal Common Council action on such a proposition or propositions actually engaged in the discussions.

The court must further determine whether the plaintiff's Complaint alleges sufficient facts which, if true, would establish, relative to the defendants' act of signing and distributing the letter to Kirby:

1) that the contents of the letter address a proposition requiring a formal vote by the Common Council to implement; and

2) that the subject letter manifested an agreement among the defendants to "take a uniform course of action," in their capacity as members of the Common Council, relative to some proposition requiring a formal vote by the Common Council to implement.

(Relative to the defendants' act of signing and distributing the subject letter, it is not necessary to determine whether a "sufficient number" of the defendants signed the letter, as it is undisputed that all five defendants signed the letter and that four Common Council members, in concert with the Mayor, would be sufficient to control any agreed-upon action by the Common Council.)

If the court cannot make such findings, relative either to the discussions among the defendants culminating in the agreement to sign and distribute the letter to Kirby, or the defendants' act of signing and distributing the letter itself, then the defendant's Motion to Dismiss must be granted.

DISCUSSION

As an initial matter, intent to violate the open meetings law is irrelevant in determining whether the law has been violated. Paulton v. Volkmann, 141 Wis.2d 370, 378, 415 N.W.2d 528 (Ct. App. 1987). As such, the fact that the defendant's activity is alleged to have been undertaken with the intention of keeping it private does not tend to make it more probable that the alleged conduct was, as a matter of law, in violation of Wisconsin's Open Meetings Law.

The substance of the plaintiff's claim against the defendants is as follows: The plaintiff's Complaint alleges that the series of gatherings among the defendants were for the purpose of addressing "the effectiveness, possible and actual censure and/or written reprimand, and consideration of potential future further action against...Kirby." (plaintiff's Complaint, ¶ 4) The plaintiff's Complaint alleges that the series of gatherings among the defendants "culminated in the preparation and signature of a document that called Kirby's conduct as a council member into

question and that effectively constituted a private reprimand." (Id. at ¶ 5) The plaintiff's Complaint alleges that the defendants' subsequent comments to investigators demonstrate that the defendants had engaged in discussions and prepared the subject letter "specifically in order to keep Council business and the matter from the public and in order to avoid 'a spectacle.'" (Id. at ¶ 9) The plaintiff's Complaint alleges that the defendants told investigators that they did not believe that their conduct was subject to Wisconsin's Open Meetings Law. Finally, the plaintiff's Complaint alleges that this belief on the part of the defendants was erroneous. (Id. at ¶ 10)

I. Underlying Discussions

Relative to the series of discussions between the defendants that "culminated in the preparation and signature of" the subject letter, the plaintiff acknowledges that the court need not accept her allegation that what was discussed constitutes "governmental business," insofar as that constitutes a legal conclusion for the court to determine. However, relative to her allegation that the defendants discussed "the effectiveness, possible and actual censure and/or written reprimand, and consideration of potential future further action against...Kirby," the plaintiff asserts that the court "must accept the allegation that all of those things were, in fact, discussed." The court disagrees.

In order to satisfy sec. 802.02(1)(a), Stats., a complaint must plead ***facts***, which if true, would entitle the plaintiff to relief. Data Key Partners, 2014 WI 86, ¶ 21 (emphasis supplied). The plaintiff's Complaint incorporates law enforcement reports regarding an investigation conducted into this matter at the request of the Oneida County Sheriff's Department. These reports contain relatively detailed information about the events underlying this case and include the details of interviews conducted with each of the named defendants. While the plaintiff has chosen to ***characterize*** the contents of these reports as indicating that the defendants discussed "the

effectiveness, possible and actual censure and/or written reprimand, and consideration of potential future further action against...Kirby," the actual ***facts*** set forth in the law enforcement reports incorporated into the plaintiff's Complaint do not support such a characterization. Nowhere in the incorporated law enforcement reports or in the subject letter is it indicated that the defendants sought to "censure" or "reprimand" Kirby. No facts alleged in the plaintiff's Complaint indicate that the words "censure" or "reprimand" were ever used by any of the defendants. Both terms implicate a degree of formality that is simply not present here. The Common Council could certainly ***vote*** on a formal motion or other proposition to "censure" or "reprimand" Kirby, but there are no facts alleged in the plaintiff's Complaint to indicate that actually pursuing such action was ever discussed in this case. There are no affirmative ***facts*** alleged in the plaintiff's Complaint indicating that the defendants ever discussed "censuring" or "reprimanding" Kirby. The court need not accept the plaintiff's ***characterization*** of the actual facts alleged in her complaint.

The facts alleged in the plaintiff's Complaint clearly indicate that the defendants were upset by Kirby's behavior at the January 28 Common Council meeting, that they wanted such behavior to stop, and that they wanted to do something to make it stop. Be that as it may, the questions before the court are: 1) whether the discussions among the defendants in response to this state of affairs were directed towards a proposition requiring a formal vote by the Common Council to implement; 2) whether the discussions among the defendants resulted in an agreement among the defendants to "take a uniform course of action," in their capacity as members of the Common Council, relative to some proposition requiring a formal vote by the Common Council to implement; and 3) whether a sufficient number of the defendants to control formal Common Council action on such a proposition actually engaged in the discussions.

The plaintiff's Complaint alleges that the defendants discussed Kirby's "effectiveness." If the defendants merely shared thoughts with one another regarding Kirby's "effectiveness" or "ineffectiveness" as council president, and nothing more, there would be no basis to conclude that they were exercising the Common Council's "responsibilities, authority, power, or duties." If, on the other hand, a "walking quorum" of council members engaged in discussions regarding the Common Council taking specific formal action (i.e. action requiring a vote) relative to Kirby's "effectiveness" or "ineffectiveness" as council president and then ***agreed on a uniform course of action*** (i.e. action requiring a vote) relative to Kirby's "effectiveness" or "ineffectiveness" as council president, that would certainly be directed towards "governmental business" and would constitute a violation of Wisconsin's Open Meetings Law. But there are no affirmative ***facts*** alleged in the plaintiff's Complaint indicating that the defendants did so. Therefore, the court finds that the plaintiff's Complaint alleges insufficient affirmative facts to establish that any discussions among the defendants regarding Kirby's "effectiveness" were directed towards "governmental business."

The plaintiff's Complaint alleges that Rossing and Sauer initially asked Frederickson to add an item to the council agenda relative to potential removal of Kirby as council president, a request that was subsequently withdrawn. A request that a subject be placed on the agenda of an upcoming meeting does not constitute a "walking quorum" where the requesters have not engaged in substantive discussion or agreed on a uniform course of action regarding the proposed subject. See Zecchino, 2018 WI App 19, ¶ 10. There is no factual basis alleged anywhere in the plaintiff's Complaint that would support an inference that the defendants reached an ***agreement*** to put potential removal of President Kirby on the Common Council's agenda. Furthermore, there are no facts alleged in the plaintiff's Complaint indicating that Rossing, Sauer and/or Frederickson

engaged in any ***substantive discussion*** regarding a potential effort to actually remove Kirby as council president. There are no facts alleged in the plaintiff's Complaint indicating that Rossing, Sauer or Frederickson ever discussed an agenda item relative to potential removal of Kirby as council president with either Holt or Larson.

The most reasonable inference from the facts alleged in this case is that the defendants were seeking to ***avoid*** the public discussion that would necessarily accompany an agenda item relative to possible removal of Kirby as council president. Indeed, the plaintiff's Complaint explicitly alleges that the defendants sought to avoid the "spectacle" that would necessarily accompany any public airing of the issue. However, the plaintiff's Complaint does not allege any affirmative facts indicating that the proposed agenda item relative to possible removal of Kirby as council president was the subject of "substantive discussions." It is not reasonable to infer from the facts alleged that a "walking quorum" of the defendants engaged in a substantive discussion about doing what the defendants on the whole were clearly seeking to avoid. The court may not add facts to the plaintiff's Complaint—or disregard facts alleged therein—in drawing inferences in order to help the plaintiff plead a claim. There is no legal presumption that the defendants acted with the purpose to engage in "governmental business" in a "walking quorum" case. In absence thereof, and without any affirmative facts alleged in the plaintiff's Complaint indicating as much, the court finds that the allegations in the plaintiff's complaint are insufficient to establish that the defendants engaged in any substantive discussion about an agenda item relative to potential removal of Kirby as council president. There are certainly no facts alleged to indicate that the defendants agreed on a uniform course of action relative to potential removal of Kirby as council president.

The plaintiff's Complaint also alleges that defendant Holt asked City Administrator Guild to put discussion of the president's position on a council agenda, as Holt wanted to have a discussion about the president's position in general, not specifically about President Kirby. This allegation involves a request to have a public discussion about the position of council president in general and does not implicate the possibility of formal action involving President Kirby. There is nothing in the plaintiff's Complaint to indicate that Holt or Guild ever discussed this request with anyone else. There are no allegations in the plaintiff's Complaint indicating, or from which it could be reasonably inferred, that Holt had any substantive discussions with anyone else about it. One conversation between a single Common Council member and a non-member such as Guild would not be subject to Wisconsin's Open Meetings Law.

The allegation in the plaintiff's Complaint that the defendants engaged in "consideration of potential future further action against...Kirby" begs the question: ***What*** potential future further action? There is no applicable presumption in this "walking quorum" case to bolster the plaintiff's argument that defendants engaged in "consideration of potential future further action against Kirby." The plaintiff bears the burden of alleging sufficient facts to ***prove*** that the defendants did so. For the reasons set forth above, the court has already determined that the plaintiff's Complaint alleges no affirmative facts indicating that the defendants engaged in ***any*** discussion relative to potential "censure" or "reprimand" of Kirby. There are facts alleged relative to Rossing and Sauer requesting that potential removal of Kirby as council president be placed on the Common Council's agenda. However, a request by multiple members of a governmental body that a subject be placed on the agenda of an upcoming meeting does not constitute a "walking quorum" where the requesters have not engaged in ***substantive discussion*** or ***agreed on a uniform course of action*** regarding the proposed subject. Zecchino, 2018 WI App 19, ¶ 10. For the reasons set forth above,

the court has already determined that the affirmative facts alleged in the plaintiff's Complaint are insufficient to establish that the defendants engaged in any ***substantive discussion*** or ***agreed on a uniform course of action*** relative to potential removal of Kirby as council president. There are no facts alleged in the plaintiff's Complaint to indicate that any other form of "potential future further action against Kirby" was discussed. Therefore, the court finds that the plaintiff's Complaint alleges insufficient affirmative facts to establish that the defendants engaged in "consideration of potential future further action against Kirby."

On January 31, Guild sent an email to Holt, Rossing, Sauer, Frederickson, and Larson with an attached article from the League of Wisconsin Municipalities regarding how to remove a council president. This is a relatively striking fact that implies an actual intention to at least ***consider*** formal removal of Kirby as council president. However, there are no affirmative facts alleged in the plaintiff's Complaint indicating what, specifically, provoked Guild to send the email. There are no facts alleged indicating that Guild's email was preceded by any email or other communication from any of the defendants, nor that any of the defendants responded thereto. Holt did ask Guild to put discussion of the president's position on a council agenda, but no affirmative facts alleged in the plaintiff's Complaint indicate that that request involved ***removal*** of Kirby as president. The plaintiff's Complaint does allege that Rossing and Sauer asked ***Frederickson*** to add an item to the council agenda relative to potential removal of Kirby as council president. However, no affirmative facts alleged in the plaintiff's Complaint indicate that ***Guild*** was involved with or otherwise included in that discussion. It is certainly reasonable to infer from the facts alleged in the plaintiff's Complaint that ***someone*** informed Guild that the issue of possible removal Kirby as council president had been mentioned. However, in the court's judgment, inferring

anything substantial beyond that would enter the realm of conjecture and, therefore, not be "reasonable."

The underlying gist of the plaintiff's entire argument seems to be that, with all that was happening, ***something*** had to be going on in violation of Wisconsin's Open Meetings Law. In other words, "where there's smoke there's fire." On a visceral level, that argument has an inherent attractiveness that is compelling. A motion to dismiss should not be granted if reasonable inferences drawn from the alleged facts establish a plaintiff's claim. However, "[t]he court should not draw ***unreasonable*** inferences from the pleadings." John Doe 67C, 2005 WI 123 at ¶ 20 (emphasis supplied). The fact that ***reasonable*** inferences are permitted does not equate with a ***presumption*** that members of a governmental body convened for the purpose of engaging in "governmental business". The mere fact that some members of a governmental body ***raise*** a subject implicating "governmental business" does not reasonably imply that, therefore, they ***must*** have engaged in discussions or ***agreed on a uniform course of action*** relative to actual "governmental business."

> An elementary principle is that an inferred fact is a logical, factual conclusion drawn from basic facts or historical evidence. It is the probability that certain consequences can and do follow from basic events or conditions as dictated by logic and human experience. Building on this elementary principle is the principle that a reasonable inference is a conclusion arrived at by a process of reasoning. This conclusion must be a rational and logical deduction from facts admitted or established by the evidence when such facts are viewed in the light of common knowledge or common experience. See State ex rel. N.A.C. v. W.T.D., 144 Wis.2d 621, 636, 424 N.W.2d 707, 713 (1988). Further, an inference is not supposition or conjecture; it is a logical deduction from facts proven and guesswork cannot serve as a substitute. See Merco Distrib. Corp. v. Commercial Police Alarm Co., Inc., 84 Wis.2d 455, 460, 267 N.W.2d 652, 655 (1978).
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> Belich v. Szymaszek, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999).

The Court of Appeals has explicitly declared that a request by multiple members of a governmental body that a subject be placed on the agenda of an upcoming meeting does ***not***, in and of itself,

constitute a "walking quorum" where the requesters have not engaged in ***substantive discussion*** or ***agreed on a uniform course of action*** regarding the proposed subject. Zecchino, 2018 WI App 19, ¶ 10. Therefore, the court finds, as a matter of law, that the allegations in the plaintiff's Complaint that some of the defendants requested an agenda item relative to potential removal of Kirby as council president, without more, does not ***entitle*** the plaintiff to a reasonable inference that they engaged in ***substantive discussion*** or ***agreed on a uniform course of action*** regarding potential removal of Kirby as council president.

There is no legal presumption in this "walking quorum" case. The plaintiff bears the burden of alleging sufficient affirmative facts to establish her claim. The mere fact that something is ***within the realm of possibility***—or even that it is a rationally ***suspected***—does not, in the court's judgment, rise to the level of a ***reasonable inference***. Reasonable inferences flow from ***probability***. See Belich, 224 Wis. 2d at 425. Articulable facts justifying a "reasonable suspicion" do ***not*** rise to the level of proof necessary to constitute" probable" cause. See County of Jefferson v. Renz, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). The impression that something, from a particular perspective, "just looks bad" does not, in and of itself, establish the basis for a legal claim.

None of the affirmative facts alleged in the plaintiff's Complaint support a reasonable inference that the defendants engaged in ***substantial discussion*** relative to actual removal of Kirby from his position as council president. None of the affirmative facts alleged in the plaintiff's Complaint indicate an ***agreement*** among the defendants to place his potential removal on the agenda of an upcoming council meeting. None of the affirmative facts alleged in the plaintiff's Complaint indicate any ***agreement*** among the defendants to ***act uniformly*** in the event that removal of President Kirby was placed on the Common Council's agenda. The only ***agreement***

among the defendants established by the affirmative facts alleged in the plaintiff's Complaint is the defendants' agreement to sign and distribute the subject letter to Kirby. However, ***unless the actual contents of the letter itself address a proposition requiring a formal vote by the Common Council to implement***, the mere decision to sign and distribute the subject letter would not constitute "governmental business" for purposes of Wisconsin's Open Meetings Law.

In her argument relative to the present Motion to Dismiss, in response to the defendants' argument that there was "no agreement among the defendants to act in any sort of uniform manner" and not any "action even contemplated by the defendants," the plaintiff emphasizes that the defendants "all agreed to send the letter to Kirby." The lynchpin of the plaintiff's Complaint and her argument relative to the present Motion to Dismiss is the letter that the defendants signed and distributed to Kirby. The only reasonable inference from the facts alleged in the plaintiff's Complaint is that, whatever the intent underlying the series of discussions between the various defendants was, the subject letter was the manifestation of that intent. Indeed, the letter itself is the best evidence as to what the defendants actually discussed in the various contacts that culminated in the signing and distribution of the letter.

The plaintiff argues that the subject letter was "a uniform, collective action on a governmental topic by a majority of the [Common] Council." However, Wisconsin's Open Meetings Law does not address officials convening to discuss governmental "topics." Wisconsin's Open Meetings Law does not address officials convening to discuss matters that may be of "public and governmental interest." Wisconsin's Open Meetings Law addresses officials convening to discuss governmental ***business***, consistent with the definition of "meeting" set forth in sec. 19.82(2), Stats. As will be discussed more thoroughly in the next section of this decision, nothing in the subject letter indicates an intention on the part of the signatories to take any ***formal action***

(i.e. exercise the responsibilities, authority, power or duties delegated to or vested in the Common Council) against Kirby or otherwise. There is no need for the court to "interpret" or "construe" what the letter means. The letter is part of the record and speaks for itself. The letter itself simply does not refer to any potential formal action by the Common Council. The fact that the discussions among the defendants led to an agreement to sign and distribute the letter does not, ipso facto, convert those discussions into an act of "governmental business."

Regarding the "sufficient numbers" requirement, the court finds that, under the facts of this case, there is no distinction between an "affirmative" and "negative" quorum. Pursuant to sec. 17.12(1)(d), Stats., removing Kirby from the Common Council entirely would require a three-fourths vote of the council. However, there are no facts alleged in the plaintiff's Complaint from which it can be reasonably inferred that such action was ever contemplated by the defendants. The plaintiff's Complaint does allege that at least two of the defendants requested that an item be placed on the council agenda relative to potential removal of Kirby ***as council president***, but electing another council president in place of Kirby would require only a majority vote. See sec. 62.09(8)(e), Stats. Therefore, for purposes of this case, both an "affirmative" and a "negative" quorum would require the participation of a simple majority—four (4) members—of the Common Council.

Insofar as the Mayor is a member of the Common Council only for purposes of breaking tie votes, in determining whether a sufficient number of council members convened for a meeting, or engaged in a series of discussions, the court finds that Fredrickson's involvement is relevant only when four (4) Common Council members are involved. Rhinelander's Common Council is comprised of eight (8) alderpersons (See Rhinelander City Ordinance Section 2.01.02.). Three (3) members of the Common Council, even if supported by the Mayor, would be insufficient to control

the outcome of any formal action by the council as the remaining five (5) members could defeat it. Likewise, five (5) members of the Common Council would be sufficient to control the outcome of any formal action by the council without the need for the Mayor to break any tie. Therefore, Mayor Fredrickson's alleged involvement is relevant only if four (4) members of the Common Council were involved in the discussions that led to the signing and distribution of the subject letter to Kirby.

(If the Common Council temporarily comprised only seven (7) members, as was apparently the case on January 28, 2019, the Mayor's involvement would always be irrelevant to the determination, as the votes of three (3) council members would ***never*** be enough to control council action, and the votes of four (4) council members would ***always*** be enough to control council action.)

Regarding Common Council member Andrew Larson, the facts alleged in the plaintiff's Complaint indicate that Larson's involvement in this case was limited to: 1) being told about what happened at the January 28 meeting prior to his arrival; 2) being told that a letter to Kirby had been drafted; 3) being shown the letter itself; and 4) reading and then signing the letter. For purposes of the court's analysis, the court has separated the ***discussions leading up to*** the signing and distribution of the letter to Kirby from the ***act itself*** of signing and distributing the letter to Kirby. The court finds that, relative to the ***discussions leading up to*** the signing and distribution of the letter to Kirby, the plaintiff's Complaint does not allege any affirmative facts indicating that Larson was actually involved in the ***discussions leading up to*** the signing and distribution of the letter to Kirby. As there is no applicable presumption to the effect that he was, the plaintiff bears the burden of alleging sufficient affirmative facts to prove that he was. The plaintiff's Complaint does not meet this burden. The allegations in the plaintiff's Complaint indicate that only three (3)

members of the Common Council were involved in the ***discussions leading up to*** the signing and distribution of the letter to Kirby. Three (3) members of the Common Council, even if supported by the Mayor, are insufficient to control the outcome of any formal action by the council. As such, the affirmative facts alleged in the plaintiff's Complaint do not establish that a sufficient number of members of the Common Council actually engaged in the ***discussions leading up to*** the drafting, signing and distribution of the letter to Kirby to constitute a "walking quorum."

The court finds that the plaintiff's Complaint does not allege sufficient affirmative facts to establish that the discussions among the defendants which culminated in the agreement to sign and distribute the letter to Kirby were directed towards a proposition requiring a formal vote by the Common Council to implement and, therefore, did not constitute "governmental business." In making this finding, the court acknowledges that a complaint must be liberally construed in favor of stating a claim, and should be dismissed only if it is "quite clear" that there are no conditions under which the plaintiff could prevail. See Hermann, 215 Wis. 2d at 378, and John Doe 67C, 2005 WI 123 at ¶ 20. In light of the relatively amorphous quality of "reasonable inferences," it could be argued that the affirmative facts alleged in the plaintiff's Complaint, when "liberally construed," support a reasonable inference that the subject of the defendants' discussions was directed towards "governmental business," at least to the extent required to defeat a motion to dismiss. The court rejects that argument and, for the reasons set forth above, finds the plaintiff's Complaint deficient in regards to the first prong of the Showers test as it applies to the discussions among the defendants which culminated in the agreement to sign and distribute the letter to Kirby.

However, even if the court were to assume, *arguendo*, that the plaintiff's Complaint alleged sufficient facts from which it could be inferred that the discussions among the defendants which culminated in the agreement to sign and distribute the letter to Kirby were directed towards

"governmental business," thereby meeting the first prong of the Showers test, the plaintiff's Complaint nevertheless ***unequivocally*** fails to allege sufficient affirmative facts indicating that the discussions among the defendants which culminated in the signing and distribution of the letter to Kirby resulted in an agreement to "take a uniform course of action" relative to any matter constituting "governmental business." The court finds that it is ***quite clear*** that the plaintiff's Complaint alleges no affirmative facts establishing, or from which it could be reasonably inferred, that the discussions among the defendants which culminated in the signing and distribution of the letter to Kirby resulted in an ***agreement*** to "***take a uniform course of action***," in their capacity as members of the Common Council, relative to any proposition requiring a formal vote by the Common Council to implement. Therefore, a "walking quorum" has not been shown. As such, the allegations in the plaintiff's Complaint do not meet the second prong of the Showers test relative to the discussions among the defendants which culminated in the agreement to sign and distribute the letter to Kirby. As the plaintiff bears the burden of proving ***both*** prongs of the Showers test in order to establish a violation of Wisconsin's Open Meetings Law, even if the court were to find that the plaintiff's Complaint alleged sufficient facts from which it could be reasonably inferred that the discussions which preceded the defendants' signing and distribution of the letter to Kirby were directed towards "governmental business," thus meeting the first prong of the Showers test, the courts finding that the plaintiff's Complaint ***unequivocally*** fails to meet the second prong of the Showers test would still defeat the plaintiff's claim that the defendants violated Wisconsin's Open Meetings Law.

Finally, the court finds that the plaintiff's Complaint does not allege sufficient affirmative facts to establish that the number of defendants that actually engaged in the discussions which

culminated in the agreement to sign and distribute the letter to Kirby was sufficient to control formal Common Council action relative to same.

II. The Subject Letter Itself

Again, the facts alleged in the plaintiff's Complaint clearly indicate that the defendants were upset by Kirby's behavior at the January 28 Common Council meeting, that they wanted such behavior to stop, and that they wanted to do something to make it stop. The specific questions before the court, however, for purposes of this component of the court's analysis, are: 1) whether the contents of the letter to Kirby about this state of affairs addresses any proposition requiring a formal vote by the Common Council to implement; and 2) whether the contents of the letter manifested an agreement among the defendants to "take a uniform course of action," in their capacity as members of the Common Council, relative to some proposition requiring a formal vote by the Common Council to implement.

The letter indicates that the defendants did not understand Kirby's conduct at the January 28 meeting. The letter describes his conduct and asks why he behaved as such. The letter asks why he did not approach the situation differently, such as by reaching out to the Mayor or his fellow council members. The letter refers to Kirby's comments to "local newspapers" and asks why Kirby felt he could talk to reporters about such matters but not to them (the defendants).

The letter refers to the larger purpose underlying the Common Council's work and the need to "work together to solve problems and attend to the business of the City." The letter refers to the larger purpose underlying the council president's position and posits the question: "Given recent events, perhaps it would be more comfortable for you to not continue in this capacity?"

The letter refers to a "forthcoming conversation" and expresses the defendants' intention that it not be "uncomfortable." The letter concludes by stating: "It is our hope you would be

willing to meet with us. It is our desire to resolve any issues swiftly and then return our attentions to the business of the City and moving the community forward."

The letter makes no reference whatsoever to potential "censure" or "reprimand" of Kirby, nor does it allude to any other potential disciplinary action against Kirby by the defendants—formal or informal—in connection with his conduct at the January 28 meeting. The letter refers generally to the events of January 28 and ponders how the situation could have been better handled. The letter alludes to the general purposes underlying the Common Council's work and the role of the council president therein. The letter invites a "forthcoming conversation," that need not be "uncomfortable," and seeks to resolve any problems "swiftly" so that all concerned can "return [their] attentions to the business of the City and moving the community forward." None of these things implicate "governmental business" or an agreement among the defendants to take some uniform course of action against Kirby requiring a formal vote by the Common Council to implement.

The letter does make the provocative suggestion that "perhaps it would be more comfortable for [Kirby] to not continue" as council president. The question, however, is not whether the letter makes "provocative" suggestions. The questions are: 1) whether the suggestion implicates "governmental business" (i.e. some proposition requiring a formal vote by the Common Council to implement); and 2) whether the suggestion manifests an agreement among the defendants to take some uniform course of action relative to such business.

The letter does not specifically request or demand that Kirby do anything. The letter does not threaten Kirby. The letter does not indicate that, unless Kirby does some act desired by the defendants, the defendants will take some stated course of action against Kirby. The letter merely asks Kirby to ponder his role as council president in light of the events at the January 28, meeting.

In the court's judgment, provocative though it may be, the suggestion in the letter that Kirby ponder "not continuing" as council president does not implicate "governmental business" insofar as it does not get at any proposition that would require a formal vote by the Common Council to implement. It certainly does not manifest an agreement among the defendants to take some uniform course of action against Kirby requiring a formal vote by the Common Council to implement.

In the instant case, it is the plaintiff's burden to prove that the contents of the letter refers to "governmental business" and manifests an agreement among the defendants to take some uniform course of action relative to some proposition that would require a formal vote by the Common Council in order to implement. In the court's judgment, the facts alleged in the plaintiff's Complaint do not prove as much.

The subject letter does not discuss or allude to any potential action that would require the vote of the Common Council to implement. As such, the drafting, signing and distribution of letter, in and of itself, did not constitute a privately-conducted persuasive occurrence compelling a predetermined decision through the ***votes*** of the defendants whereby, at the time of subsequent public action, the public and those members of the governmental body excluded therefrom would never be exposed to the actual controlling rationale of a government decision. See Conta, 71 Wis. 2d at 685-86.

The court finds that the letter itself did not manifest an agreement among the defendants to "take a uniform course of action," in their capacity as members of the Common Council, relative to any proposition requiring a formal vote by the Common Council to implement. "Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law." Zecchino, 2018 WI App at ¶ 10.

CONCLUSION

No facts alleged in the plaintiff's Complaint indicate that the defendants "intentionally expose[d] themselves to the decision-making process...by the receipt of evidence, advisory testimony, and the views of each other" because no facts alleged in the plaintiff's Complaint indicate that the defendants heard or discussed information directed towards any proposition requiring a formal vote by the Common Council to implement. No facts alleged in the plaintiff's Complaint indicate that the defendants engaged in the decision-making process relative to anything that would have been the subject of any future vote by the Common Council. Informal action, such as discussion, decision, and information gathering, can constitute governmental business ***if it influences a decision about a matter over which the Common Council had decision-making authority***. However, no facts alleged in the plaintiff's Complaint indicate that the discussions among the defendants were directed towards any proposition that would require the Common Council to exercise its decision-making authority by way of a vote. No facts alleged in the plaintiff's Complaint indicate that the defendants forged an agreement that would control the outcome of any formal action that would be taken at a subsequent meeting of the Rhinelander Common Council.

Therefore,

THE COURT HEREBY FINDS that the facts alleged in the plaintiff's Complaint, and the reasonable inferences that can be drawn therefrom, do not establish that the discussions among the defendants which culminated in their agreement to draft, sign and distribute the subject letter to Kirby were directed towards any proposition requiring a formal vote by the Common Council to implement.

THE COURT FURTHER FINDS that the facts alleged in the plaintiff's Complaint, and the reasonable inferences that can be drawn therefrom, do not establish that the discussions among the defendants which culminated in their agreement to draft, sign and distribute the subject letter to Kirby resulted in any agreement among the defendants to "take a uniform course of action," in their capacity as members of the Common Council, relative to any proposition requiring a formal vote by the Common Council to implement.

THE COURT FURTHER FINDS that the facts alleged in the plaintiff's Complaint, and the reasonable inferences that can be drawn therefrom, do not establish that the number of defendants that actually engaged in the discussions that culminated in the agreement to sign and distribute the letter to Kirby was sufficient to control formal Common Council action relative to same.

THE COURT FURTHER FINDS that the facts alleged in the plaintiff's Complaint, and the reasonable inferences that can be drawn therefrom, do not establish that the contents of the subject letter to Kirby addressed any proposition requiring a formal vote by the Common Council to implement.

THE COURT FURTHER FINDS that the facts alleged in the plaintiff's Complaint, and the reasonable inferences that can be drawn therefrom, do not establish that the contents of the subject letter to Kirby manifested an agreement among the defendants to "take a uniform course of action," in their capacity as members of the Common Council, relative to any proposition requiring a formal vote by the Common Council to implement.

Therefore,

THE COURT HEREBY FINDS that the facts alleged in the plaintiff's Complaint, and the reasonable inferences that can be drawn therefrom, do not establish that the defendants acted with the purpose to engage in "governmental business" under the first prong of the Showers test.

THE COURT FURTHER FINDS that the facts alleged in the plaintiff's Complaint, and the reasonable inferences that can be drawn therefrom, do not establish the existence of a "walking quorum" and, as such, the second prong of the Showers test has not been met.

Therefore, the plaintiff's Complaint fails to state a claim upon which relief may be granted.

IT IS HEREBY ORDERED AND JUDGMENT IS HEREBY ENTERED to the effect that the defendants' Motion to Dismiss is GRANTED, that this action is DISMISSED in its entirety, and that any costs provided for by law are awarded to the defendants.

THIS IS A FINAL JUDGMENT FOR PURPOSES OF APPEAL.