

STATE OF WISCONSIN,)

Plaintiff,)

v.)

ABBOTT LABORATORIES, *et. al.*,)

Defendants.)

Case No.: 04 CV 1709

DEFENDANTS' MOTION TO COMPEL PRODUCTION OF EMAIL

[REDACTED VERSION]

Defendants move under Wis. Stat. § 804.12(1)(a) for an order compelling the State to produce electronic mail messages ("email") responsive to Defendants' second set of document requests ("Second Requests"). The State has repeatedly refused to make a comprehensive document production on the ground that locating email is too burdensome a task for the State to undertake.¹ This objection is unfounded.

In today's world, discovery of email is critical, often unearthing valuable information and concessions. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Defendants should not be denied access to such a fruitful source of admissions and other relevant discovery merely because the State finds it too

¹ See, e.g., E-mail from Frank D. Remington to Jennifer A. Walker and Steven F. Barley at 2, ¶3 (March 16, 2007 11:06 AM), attached as Exhibit 1; see also Letter from Frank Remington to Steven F. Barley (April 4, 2007), attached as Exhibit 2.

[REDACTED]

burdensome to do what is standard practice for litigants in all but the smallest of cases, and is absolutely required of it in a case of this size, temporal scope and complexity.

BACKGROUND

Defendants served their Second Requests on the State some 18 months ago, on February 20, 2006.³ The State's first production of documents responsive to these requests in November of that year was deficient in several respects, including the fact that the production contained relatively few emails.⁴

Over the next several months, the parties engaged in a series of meet-and-confers to discuss, among other things, issues surrounding the State's production of email. Throughout the course of these discussions, the defendants learned the State had undertaken no comprehensive effort to locate and retrieve email, and that the State maintained that searching for email responsive to Defendants' Second Requests was too burdensome a task for the State to undertake.⁵

In an effort to help focus the State's search, Defendants provided the State in January 2007 with a list of suggested search terms for searching email, Word, and Excel files.⁶ Defendants believed that email searches were then being conducted using the suggested search terms. However, over the next several months, and a full year after Defendants' Second Requests were first served, it became clear for the first time that the State's electronic searching capabilities were insufficient for locating responsive email

³ See Defendants' Second Requests attached as Exhibit 4.

⁴ See Letter from Steven F. Barley to Frank Remington at 2 (Nov. 28, 2006), attached as Exhibit 5 (“[T]here was an overall paucity of correspondence (email or otherwise) – strongly suggesting that no meaningful effort was made to solicit, review or produce individual staff members’ hard-copy and electronic files.”)

⁵ See, e.g., March 16, 2007 Remington E-mail at 2, ¶3, Ex. 1; see also April 4, 2007 Remington letter, Ex. 2.

⁶ See E-mail from Jennifer A. Walker to Frank Remington (Jan. 8, 2007 6:56 PM), attached as Exhibit 6.

using Boolean⁷ and relational⁸ searches.⁹ Defendants therefore revised their suggested terms to permit non-Boolean searching, and prioritized them to assist the State in its search.¹⁰ Notwithstanding these accommodations, the State continued to allege that searching for responsive email would be too difficult a task for the State to perform.¹¹

Defendants then suggested that the State acquire commercially available software capable of conducting searches for electronic documents. Electronic search software, such as ISYS System Software, has been used successfully by other states involved in so-called “AWP litigation” which have claimed difficulty in conducting electronic searches.¹² Defendants even offered to share half the approximately \$699 license cost to procure the software.¹³ The State responded that Defendants’ suggested software would be “tricky” to implement with Novell GroupWise, the State’s email server. The State also demurred by explaining that installation of software would be time consuming and that, frankly, any search for responsive email would require “time and staff that is not available.”¹⁴

In late April 2007, still hoping to receive responsive email, Defendants suggested that, at least initially, they would be willing to narrow the State’s search to the hard drives

⁷ A “Boolean search” is a keyword search that uses Boolean operators (i.e. “and,” “or,” “not” and “near”). In a Boolean search, use of these operators can narrow and refine the scope of a search.

⁸ A “relational search” allows for searching for items greater than, less than, between, like (and a variety of other parameters) in relation to the searched value. This type of comparison searching is most effective for searching numeric, date and text fields.

⁹ See E-mail from Jennifer A. Walker to Frank D. Remington at ¶3 (March 20, 2007 5:26 PM), attached as Exhibit 7; see also E-mail chain between Jennifer A. Walker and Frank D. Remington at 2 (Feb. 21, 2007 8:09 AM), attached as Exhibit 8 (requesting information regarding the State’s electronic searching capabilities).

¹⁰ See Letter from Steven F. Barley to Frank Remington at 1, ¶1 (Feb. 28, 2007), attached as Exhibit 9.

¹¹ See, e.g., March 16, 2007 Remington E-mail, Ex. 1 at 2, ¶3.

¹² See March 20, 2007 Walker E-mail, Ex. 7 at ¶3.

¹³ *Id.*

¹⁴ See April 4, 2007 Remington letter, Ex. 2 at 1 (“Although the ISYS software can be reformatted to work with GroupWise, the fellow I spoke with characterized it as time consuming and in his words: “tricky”).

of key individuals identified by Defendants, an idea to which the State initially seemed amenable.¹⁵ Indeed, Defendants were under the impression that such hard drive and email searches were ongoing until June 19, 2007, when Defendants received a set of electronic documents from the State, which, though including some electronic documents from four state employees, contained no email whatsoever. When Defendants inquired as to the lack of email in the June 19th production, the State admitted it had not searched for email, and once again claimed that searching its email system or the email of individual custodians would be unduly burdensome.¹⁶

In yet another attempt to facilitate the State's search and production of emails, Defendants researched and quickly uncovered yet another software package, "Gwava-Reveal," which would allow for searches of GroupWise email on an individual custodian basis.¹⁷ The licensing fee involved for "Gwava-Reveal" software is a mere \$20-25 per machine.¹⁸ Defendants also offered to arrange a telephone call between Defendants' IT experts and the State's internal IT staff to determine whether performing email searches might truly be unduly burdensome for the State, and to discover how Defendants might best assist the State in lessening any purported burden.¹⁹

¹⁵ See E-mail from Jennifer A. Walker to Frank D. Remington at ¶2 (April 24, 2007 12:11 PM), attached as Exhibit 10 (summarizing an April 19 meet-and-confer between Defendants and the State); see also Letter from Jennifer A. Walker to Frank Remington (June 25, 2007) (containing an updated list of key individuals), attached as Exhibit 11.

¹⁶ See E-mail from Jennifer A. Walker to Frank D. Remington (June 28, 2007 11:55 AM), attached as Exhibit 12.

¹⁷ *Id.*; see also E-mail from Steven F. Barley to Frank D. Remington (June 28, 2007 1:10 PM), attached as Exhibit 13; see also Affidavit of Matthew Ray, dated September __, 2007 (hereinafter referred to as "Ray Aff. at ¶ __"), attached as Exhibit A (explaining that searching the State's email system would be quite feasible using "Gwava-Reveal" software).

¹⁸ See June 28, 2007 Walker E-mail, Ex. 12. Defendants further agreed to limit for the time being the State's search to the list of individual custodians named by Defendants in prior correspondence. *Id.*; see also June 25, 2007 Walker letter, Ex. 11.

¹⁹ See E-mail from Jennifer A. Walker to Frank D. Remington (July 16, 2007 12:52 PM), attached as Exhibit 14.

The State rejected both offers. In fact, after initially indicating that it believed a call with Defendants' IT experts was a good idea, the State now refuses to participate in such a call. The State also refuses to consider the Gwava-Reveal software or any other commercial software designed to facilitate electronic email searches in GroupWise.²⁰ Instead, the State claims that it has "already gathered responsive documents in the old fashioned way by asking individuals to provide relevant and responsive records" and disagrees with Defendants to the extent Defendants believe "that using the computer to do the work formerly done by humans may result in a more reliable final product."²¹

Now, nearly 18 months after Defendants' Second Requests were served, Defendants request that this Court order the State to search for and produce relevant email responsive to those requests.

LEGAL STANDARD

Wisconsin law provides that a party is entitled to obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . ." ²² Wisconsin discovery law further reflects "a principle of liberal and open pretrial discovery."²³ The provisions governing the scope of discovery are to be liberally construed consistent with the objectives of discovery, which

²⁰ See Letter Frank D. Remington to Jennifer A. Walker at 3 (June 20, 2007), attached as Exhibit 15. Note that this letter is misdated June 20, 2007. The letter was actually sent via email on July 20, 2007.

²¹ *Id.* at 2.

²² Wis. Stat. § 804.01(2)(a).

²³ *Ambrose v. General Cas. Co. of Wisconsin*, 156 Wis.2d 306, 314-315 (Ct. App., 1990) (citing *State ex rel. Dudek v. Circuit Court*, 34 Wis.2d 559, 585-86 (1967) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947))).

include narrowing the issues to be tried, increasing the chances for settlement and fully informing the parties before trial.²⁴

If the opposing party fails to comply with a discovery request for production of relevant documents pursuant to Wis. Stat. § 804.09(1), a party may move to compel such production.²⁵ Trial courts have discretion in deciding whether to grant a motion to compel,²⁶ and should so grant where the information sought “could possibly contain information helpful” to petitioners and “would be reasonably likely to lead to the discovery of [relevant] evidence.”²⁷

ARGUMENT

A. THE STATE HAS AN OBLIGATION TO SEARCH FOR RELEVANT AND RESPONSIVE EMAIL IN GOOD FAITH.

Defendants are entitled to discover non-privileged matter relevant to the subject matter of the State’s complaint.²⁸ Electronic documents, including email, undoubtedly fall within the scope of discoverable matters.²⁹ Wisconsin courts have recognized that in today’s

²⁴ See *Albert v. Waelti*, 133 Wis.2d 142, 147-48 (Ct. App. 1986).

²⁵ Wis. Stat. § 804.12(1)(a); see also Wis. Stat. § 804.09(2) (“The party submitting the request may move for an order under § 804.12(1) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.”)

²⁶ *Franzen v. Children's Hosp. of Wis.*, 169 Wis.2d 366, 376 (Ct. App. 1992).

²⁷ *Banovez v. Wal-Mart Associates, Inc.*, 243 Wis.2d 115, at *4, ¶ 17 (Ct. App. 2001) (reversing and remanding to trial court with instruction to properly address petitioner’s motion to compel production of documents).

²⁸ See Wis. Stat. § 804.01(2)(a).

²⁹ Courts have made it clear that electronic documents, including email, are discoverable. See, e.g., *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 572 (N.D. Ill. 2004) (“Computer files, including email, are discoverable.”); see also *Custodian of Records v. Wisconsin (In re John Doe Proceeding)*, 680 N.W.2d 792, 809 (Wis. 2004) (Abrahamson, C.J., concurring) (assuming the discoverability of electronic documents); see also *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120, 1995 WL 649934, at *2 (S.D.N.Y. Nov. 3, 1995) (writing that it is “black letter law that computerized data is discoverable if relevant”); see also *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 463-64 (D. Utah 1985) (“information stored in computers should be as freely discoverable as information not stored in computers”); *Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000) (“[C]omputer records, including records that have been “deleted,” are documents discoverable under Fed. R. Civ. P. 34.”). Indeed, in April 2006, the Supreme Court approved, without comment or dissent, the entire package of Proposed Amendments to the

world, “most information is kept in digital form, and discovery, preservation and production of electronic information is one of the leading legal issues facing not only corporate America but also government. Reform in discovery, including electronic discovery, is a priority in several jurisdictions.”³⁰ Indeed, the State’s own “Statewide Enterprise E-Mail Policy & Guidance” manual acknowledges that email may be subject to discovery proceedings in legal actions,³¹ and thus, requires agencies to “develop policies and procedures to ensure consistent and reliable management of e-mail.”³² As such, the State clearly has an obligation to search for relevant and responsive emails.³³

The State apparently does not deny that relevant email are properly discoverable.³⁴ Rather, it denies that it has any obligation to do anything more than ask likely custodians to self-select whatever email they can find on their own. The State insists that its – as it terms it – “old-fashioned” method of searching email is sufficient to meet its obligation under the Wisconsin Rules of Civil Procedure.³⁵

Federal Rules of Civil Procedure which explicitly approves the discovery of “electronically stored information.” The Amendments took effect on December 1, 2006. *See, e.g.* Fed. R. Civ. P. 26.

³⁰ *In re John Doe Proceeding*, 680 N.W.2d at 809 (Abrahamson, C.J., concurring).

³¹ *See* Wisconsin Department of Administration, Division of Technology Management, “Statewide Enterprise E-Mail Policy & Guidance,” at 15, attached as Exhibit 16 (“Some courts have set legal precedents for using e-mail communications as evidence...All e-mail messages...may be subject to discovery proceedings in legal actions.”).

³² *Id.*

³³ *See, e.g. Wells v. Xpedx*, No. 8:05-CV-2193-T-EAJ, 2007 WL 1200955, *1 (M.D. Fla. April 23 2007) (“The producing party has the obligation to search available electronic systems for deleted emails and files.”) (citing *Peskoff v. Faber*, No. 04-526(HHK/JMF), 2007 U.S. Dist. LEXIS 11623, at * 13 (D.D.C. Feb. 21, 2007)); *see also McPeck v. Ashcroft*, 202 F.R.D. 31, 31, 34 (D.D.C. 2001) (declaring that, “[d]uring discovery, the producing party has an obligation to search available electronic systems for information demanded,” and ordering a limited back-up restoration of e-mails).

³⁴ *See, e.g.* June 20, 2007 Remington Letter, Ex. 15 at 2.

³⁵ *Id.*

This is incorrect and defies standard civil discovery practices, particularly in large and complex cases such as this one. Given the sheer number of email that are sent daily,³⁶ and the ease with which they are saved and relocated across multiple hard drives and email servers, the State's suggestion that its "old fashioned way" of locating electronic documents could result in the production of all, or even many, of the responsive email sent to or from the State over a period of fifteen years, is, quite simply, absurd.³⁷ Indeed, seven years ago it was recognized that:

The digital age changes everything. In the old days, the responsive documents were, mostly, physical pieces of paper, kept in a finite number of locations. In those good old days, you would go to a few key employees and say, "Here are the document requests. Search your files and give me anything responsive." That won't do today. You can't limit the search to a few, because in the digital age, information is shared by the many.³⁸

Moreover, individuals are rarely aware of all the responsive email they themselves have sent or received over extended periods of time, nor do they have the technical tools or acuity necessary to properly search and collect their own email.³⁹

The State's method, moreover, does not even attempt to address the issue of *former* State employees' emails, who likely possessed responsive emails and are not in a position to

³⁶ See, e.g. Wisconsin Bar Association, "Electronic Evidence: Issues," at 3 (Nov. 16-17, 2006), available at <http://www.wisbar.org>, attached as Exhibit 17 ("It is estimated that over 93% of recorded information is created electronically, and 70% of all corporate information exists ONLY in digital form. Over 30% of all corporate communications never appear in hard copy format. In 2003, it is estimated that there were 105 million e-mail users in the United States, who sent over 1.5 billion e-mail messages a day (approximately 547.5 billion e-mail messages per year)—nearly as many messages in a day as the U.S. Postal Service handles in a year.").

³⁷ *Id.*; see also Wisconsin E-mail Policy and Guidance, Ex. 16 at 8 (acknowledging that "[e]-mail technology has both increased business communication and created a message management problem, while providing few solutions for the user."); see also "Electronic Evidence: Issues," Ex. 17.

³⁸ Byman, Robert L. and Solovy, Jerold S., "Digital Discovery," *The National Law Journal*, Vol. 22, 12/27/99 NLJ at A16 (Dec. 27, 1999).

³⁹ See *id.* ("[M]ere business executives cannot be asked to search their computer files because they likely do not know how to. The documents reside in nooks and crannies of their computers and in network archives. In order to legitimately comply with most modern discovery requests, it is necessary to involve a management information systems (MIS) manager, so that you have an understanding of how data are kept, maintained, archived and retrieved.")

search their own emails, even the “old-fashioned” way. For example, James Vavra, Bureau Director of the Bureau of Fee for Service Healthcare Benefits in Wisconsin’s Division of Healthcare Financing (“DHCF”), testified as the State’s Wis. Stat. § 804.05(2)(e) designee that several former employees likely possessed responsive documents, including Mr. Ted Collins (former pharmacy consultant for Department of Health & Family Services)⁴⁰ and Mr. Mark Moody (former administrator for DHCF),⁴¹ to name but two. Ironically, the State has been willing to search and produce responsive *electronic* documents from these and other former employees, but it is unwilling to undertake the task of searching these individuals’ emails. If these individuals have responsive Word, Excel, and/or PDF documents, then they presumably also have responsive emails.

The State has further suggested that Defendants do not really need email evidence, especially to the extent relevant to “government knowledge” of Defendants’ pricing practices.⁴² The issue of government knowledge is certainly relevant to these proceedings and email are particularly useful for discovering the state of a party’s knowledge, but importantly, Defendants seek more than merely “government knowledge” documents. Email reflect who sent what information to whom, which individuals received what information, and who attended what meetings. In short, emails are important not just for their content, but for identifying relevant players, which is particularly needed at this stage of discovery to allow Defendants to discern, for example, whom to depose.

Moreover, some discovery can only be had through email. For example, as the State’s Wis. Stat. § 804.05(2)(e) designee, Mr. Vavra, testified, emails serve as one of the primary modes of correspondence between the State and the State’s fiscal agent for its

⁴⁰ Deposition Transcript of James Vavra (dated Jan. 24, 2007) (“Vavra Tr.”) at 72, 96-99.

⁴¹ Vavra Tr. at 131-132.

⁴² See, e.g., June 20, 2007 Remington Letter, Ex. 15 at 1.

Medicaid program, EDS,⁴³ between the State and the governor's office when discussing Medicaid reimbursement,⁴⁴ for receiving policy issue reports relating to Medicaid pharmaceutical reimbursement from State retained pharmacy consultants,⁴⁵ and between the State and other state governments concerning methods of determining EAC and pharmacy reimbursement generally.⁴⁶ Further, the ease and relative informality of corresponding by email lends itself to the memorialization of thoughts and opinions that might have otherwise gone unwritten.⁴⁷ Email can therefore be the sole source of exculpatory statements, declarations or party admissions.⁴⁸ It is clear, then, that email represent a potentially very important source of discovery in this case.

Defendants also seek email for purposes beyond what the State has implied, including, for example, for purposes of: establishing notice for a potential statute of limitations defense; discovering the State's reasons for continuing to reimburse based on AWP; identifying which individuals Defendants ought to depose or call as a witness; ascertaining what representations were made, and to whom; and calculating alleged damages. Ironically, the State has itself requested email correspondence from Defendants in response to the State's Requests for Production of Documents, and thus seems to fully appreciate the import of email evidence.

⁴³ See Vavra Tr. at 58:6-12.

⁴⁴ *Id.* at p. 90:10-22.

⁴⁵ *Id.* at p. 99:7-13.

⁴⁶ *Id.* at p. 100:7-11, *see also* Deposition Transcript of James Vavra (dated Aug. 16, 2007) at 28-30.

⁴⁷ See "Electronic Evidence: Issues," Ex. 16 at 4 ("Individuals' ability to rapidly fire off e-mails to fellow employees or other individuals lends itself to the memorialization of raw thoughts and feelings that would have been otherwise left unwritten had the author's only option been to put the words on paper. The informal tone people take in their email makes email a potential gold mine of information otherwise unobtainable.")

B. READILY AVAILABLE, INEXPENSIVE TECHNOLOGIES EXIST TO OVERCOME THE STATE'S CLAIMED DIFFICULTIES IN SEARCHING EMAIL.

The State has raised a number of technical issues relating to the State's GroupWise email software that the State alleges make searching for responsive email unduly burdensome.⁴⁹ The technical issues raised by the State, however, have reasonably efficient and cost-effective technical solutions.

For example, software known as Gwava Reveal is an inexpensive and user-friendly tool used to identify and collect GroupWise e-mails. Gwava Reveal requires a licensing fee of only \$20-25 per custodian.⁵⁰ Gwava Reveal also is easy to use. The State's IT personnel could quickly learn how to use the software to identify and collect e-mails responsive to the issues in this case.⁵¹ Should the State require assistance, Defendants' IT consultant can guide the State's IT personnel through the use of Gwava-Reveal.⁵² The State could also use Gwava Reveal to create a tape containing responsive emails and provide the tape to Defendants' IT consultant for further searching and review.⁵³ If the State lacks the resources and expertise to use Gwava Reveal, Defendants' IT consultant could visit the various offices where computers are located and collect relevant emails.⁵⁴ Other states involved in "AWP litigation," such as the State of Nevada and the State of Montana, have relied upon their outside counsel to search for and produce relevant email responsive to document requests. This may be yet another option for the State to consider. At bottom, there is existing, inexpensive technology that will resolve the State's concerns over the burden of email searching. Unfortunately, the State has refused to take advantage of it.

⁴⁹ See, e.g. June 20, 2007 Remington Letter, Ex. 15 at 2-3.

⁵⁰ See Ray Aff. at ¶ 11.

⁵¹ Ray Aff. at ¶ 7.

⁵² *Id.*

⁵³ See Ray Aff. at ¶ 8.

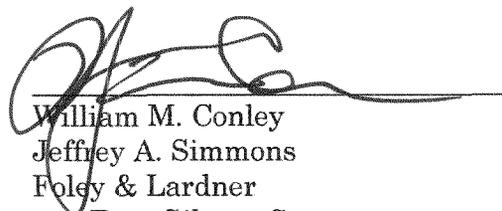
⁵⁴ Ray Aff. at ¶ 9.

Accordingly, the purported technical and human resource problems the State has asserted regarding the collection of relevant emails are without merit and should be rejected.⁵⁵

CONCLUSION

Because Plaintiff's objections to producing emails responsive to Defendants' Second Requests are meritless, Defendants move for an order compelling Plaintiff to respond fully to Defendants' Second Requests by searching email of individuals identified by Defendants, and those already identified by Plaintiff as having responsive documents, using the search terms provided to the State by the Defendants. Defendants further request that the Court award Defendants reasonable expenses incurred in obtaining this order, including attorneys fees, as provided for in Wis. Stat. § 804.12(1)(c).

Respectfully submitted,



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⁵⁵ See also *Williams v. Taser Intern., Inc.*, No. 1:06-CV-0051-RWS, 2007 WL 1630875, *7 (N.D. Ga., June 4, 2007) (“[Defendant] Taser implies that because it has elected to hire and train only a single technology employee, and because it has chosen to retain only a handful of attorneys to conduct document review, it is somehow relieved from its obligations to timely respond to Plaintiffs’ discovery requests. That is not the case. Rather, the Court expects that Taser will make all reasonable efforts to comply with its discovery Orders including, if necessary, retaining additional IT professionals to search electronic databases and adding additional attorneys to perform document review.”)

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