



whom the defendants now seek to depose. The state seeks to block those depositions from taking place.

There is, however, no support in either the statutes or in the case law to preclude the defendants from taking the depositions of the noticed analysts. Under Section 804.05 of the Wisconsin Statutes, the defendants have the right to issue civil process to compel “any person” to be deposed in this litigation. Plaintiff has plainly failed to establish that the evidence sought by the depositions is irrelevant (or that it would be inadmissible). Nor has plaintiff demonstrated, as it now claims, that the LFB analysts are exempted from civil process by “legislative privilege” under Article IV, Section 16 of the Wisconsin Constitution. Finally, even if plaintiff could establish that the testimony of the three LFB analysts falls within the legislative privilege, the Court should find that the privilege has been waived because the State and the LFB turned over pertinent LFB documents authored by the deponents without asserting the privilege and because no legislator objected to the depositions upon the analysts’ receipt of the deposition notices. State v. Beno, 116 Wis.2d 122, 146 (1984). The Court should deny plaintiff’s motion to quash the Notice of Depositions and the defendants should be allowed to proceed with the depositions of the three LFB analysts.

## **I. BACKGROUND**

### **A. Procedural History**

On May 18, 2006, the LFB supplied Wisconsin Deputy Attorney General Frank Remington with documents responsive to the defendants’ discovery requests. See Letter from Bob Lang, Dir., Legis. Fiscal Bureau, to Frank Remington, Assistant Attorney General, Wis.

Dept. of Justice (May 18, 2006), Exhibit A.<sup>1</sup> The State did not assert any privilege over those documents, but produced them to defendants as part of formal party discovery in this case. Included in the produced documents were memos and other “documents that relate to prescription drugs provided under the state’s medical assistance program” written by LFB staff “between January 1, 1992 and May 1, 2006.” Id.

The defendants also requested additional documents from the LFB under subchapter II of Wisconsin Statute, Chapter 19 on September 29, 2006. See Letter from William Conley to Bob Lang, Dir., Legis. Fiscal Bureau (Oct. 11, 2006), Exhibit B. On October 18, 2006, Bob Lang, director of the LFB, formally responded to defendants’ request. See Letter from Bob Lang, Dir., Legis. Fiscal Bureau, to William Conley (Oct. 18, 2006), Exhibit C. Mr. Lang informed defendants’ counsel that the materials would be available at the offices of the LFB, and they were produced. No privilege was asserted over the produced documents. Id.

B. The LFB Documents Produced

Included within the produced LFB documents were LFB memos that demonstrate that employees in several departments of the State of Wisconsin have known for years that AWP was not a close approximation of the price pharmacies paid to wholesalers, on average, to acquire prescription drugs. For example, in an LFB memorandum written in 1999 by noticed deponent Amie Goldman, Goldman stated that “[t]he AWP is the manufacturer’s suggested wholesale price of a drug and is analogous to the ‘sticker price’ of a car. It does not reflect the actual cost of acquiring the drug.” Paper #479 from the Legis. Fiscal Bureau on Drug Reimbursement

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<sup>1</sup> Documents referred to as Exhibits A-F, refer to the exhibits attached to the Affidavit of Mindy Rowland Buenger, filed herewith.

(DHFS – Medical Assistance) to the Joint Comm. on Finance (June 1, 1999), Exhibit D. In a 2001 memorandum written by noticed deponent Rachel Carabell, she wrote that two studies showed that “pharmacies’ average acquisition cost for most brand name drugs is approximately AWP-18%” -- not AWP. Paper #474 from the Legis. Fiscal Bureau on Reimbursement Rates for Prescription Drugs (DHFS – Medical Assistance) to the Joint Comm. on Finance (June 4, 2001), Exhibit E. Also, in a 2005 LFB memorandum written by noticed deponent Marlia Moore, Moore acknowledged that AWP is analogous to a car’s “sticker price” in that “very few purchasers actually pay that price,” and that, “[s]imilar to purchasing a car, it is very difficult to assess true costs in relation to list price.” Paper #371 from the Legis. Fiscal Bureau on Prescription Drugs Reimbursement Rates (DHFS – Medical Assistance, BadgerCare, and SeniorCare – Payments, Services, and Eligibility) to the Joint Comm. on Finance (May 26, 2005), Exhibit F.

**II. TESTIMONY SOUGHT FROM THE LEGISLATIVE FISCAL BUREAU ANALYSTS IS RELEVANT AND ADMISSIBLE, AND PLAINTIFF’S ADMISSIBILITY CHALLENGES SHOULD BE RAISED AT TRIAL AND NOT DURING PRETRIAL DISCOVERY.**

Plaintiff seeks to prevent the noticed depositions by arguing that the LFB analysts’ testimony is inadmissible and irrelevant. In support of this argument, plaintiff cites Moorman Mfg. Co. v. Industrial Comm., 241 Wis. 200 (1942). However, plaintiff’s argument is wrong and reliance on Moorman is misplaced.

A. The Evidence Sought is Relevant

The evidence that plaintiff is seeking to block -- testimony about the understanding of state analysts concerning AWP’s and pharmacy acquisition costs -- is clearly relevant.<sup>2</sup>

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<sup>2</sup> For a more detailed discussion of the relevance of this evidence, please see “Defendant’s Opposition to Plaintiff’s Motion For Protective Order Barring Defendants From

Section 904.01 of Wisconsin Statutes defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Moreover, Section 804.01(2)(a) of the Wisconsin Statutes provides, in part, that discovery is appropriate “if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

Plaintiff bases its Complaint on the premise that the State of Wisconsin thought that published AWP's were actual average prices paid by providers to wholesalers for drugs.<sup>3</sup> Similarly, plaintiff also alleges that it understood the published AWP's for drugs to reflect the actual average prices that providers paid to wholesalers.<sup>4</sup> These assertions are directly contradicted by a plethora of documents received from the State of Wisconsin -- including the LFB documents described above (and attached hereto) that were written by the noticed LFB analysts. See Exhibits D-F. Depositions of the authors of such obviously relevant documents -- in order to determine, among other things, the factual basis for their analysis and conclusions, who else in the State government and Medicaid program they spoke to concerning their analysis and conclusions, and what those other persons said about AWP's, provider acquisition costs, reimbursement issues and related topics -- would just as obviously elicit relevant testimony.

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Requiring Wisconsin To Search Its Electronic Files For What Defendants Call Government Knowledge Documents,” filed November 5, 2007.

<sup>3</sup> Complaint ¶ 36.

<sup>4</sup> Complaint ¶¶ 36, 59.

B. Plaintiff Has Not Shown that the Evidence Sought Is Inadmissible

Plaintiff relies on Moorman to argue that there is “no evidentiary purpose” to the LFB analysts’ testimony, thereby rendering it inadmissible and irrelevant.<sup>5</sup> (Plaintiff’s Mtn. at 4.) However, Moorman involved a completely different issue than the issue here, and is therefore inapplicable. In Moorman, the Wisconsin Supreme Court addressed an issue of statutory interpretation -- what evidence of legislative intent can be used to assist in statutory interpretation. In that context, the court held that “[w]hat the framer of an act meant by the language used cannot be shown by testimony.” Moorman, 241 Wis. at 208; see also Cartwright v. Sharpe, 40 Wis. 2d 494, 508-09 (1968) (holding it harmless error for member of legislature to testify as to the intention of the legislature when a statute is plain and unambiguous interpretation is unnecessary). Here, however, the defendants are not seeking to depose the LFB analysts to assist in the interpretation of a statute. Their depositions are sought to develop evidence that contradicts the State’s assertion concerning State officials’ understanding of the pharmaceutical pricing term “AWP.” Neither Moorman nor its progeny addressed an issue that has anything to do with these depositions.<sup>6</sup>

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<sup>5</sup> Section 904.02 of the Wisconsin Statutes provides that the Court must first ask whether evidence is relevant when determining if it is admissible. Plaintiff improperly seeks to reverse the analysis by arguing that the evidence is irrelevant because it is inadmissible. (Plaintiff’s Mtn. at 3) (“Testimony from persons involved in legislative process are inadmissible and therefore irrelevant.”)

<sup>6</sup> Plaintiff also relies on State v. Consolidated Freightways Corp., 72 Wis. 2d 727, 738 (1976) for the proposition that “no person can testify as to what the intent of the legislature was in the passage of a particular statute.” Plaintiff’s Mtn. at 5. However, as is the situation in Moorman, Consolidated has nothing to do with the issue here – namely, the State’s understanding of a published pricing term – as opposed to what the legislature intended when passing a statute. Consolidated, like Moorman, involved issues of

C. Inadmissibility Is an Issue for Trial, Not a Basis to Preclude Discovery

Moreover, even if the LFB analysts' testimony could somehow ultimately be deemed inadmissible, that would not be a reason to preclude a pretrial deposition of the analysts. Section 804.01(2)(a) of Wisconsin Statutes provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

See also Fed. R. Civ. P. 26(b)(1) ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.")

Wisconsin courts apply this rule liberally. See State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis. 2d 559, 576 (1967) ("Pretrial discovery is designed to formulate, define and narrow the issues to be tried, increase the chances for settlement, and give each party opportunity to fully inform himself of the facts of the case and the evidence which may come out at trial. Thus the function of pretrial discovery is to aid, not hinder, the proper working of the adversary system."). This broad standard is "essential because the purpose of discovery is identical to the purpose of our trial system -- the ascertainment of truth." Crawford, 243 Wis. 2d at 126-27.

Thus, even if the Court might ultimately find that the LFB analysts' testimony is inadmissible, the depositions still should be allowed because they concern relevant issues and are "reasonably calculated" to lead to the discovery of admissible evidence.

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statutory interpretation and simply held that no person may testify about legislative intent. 72 Wis. 2d at 738.

### III. ARTICLE IV, SECTION 16 OF THE WISCONSIN CONSTITUTION DOES *NOT* PROHIBIT THE DEFENDANTS FROM DEPOSING ANALYSTS FROM THE LEGISLATIVE FISCAL BUREAU

Contrary to plaintiff's arguments, employees of the LFB are subject to civil process and may be deposed. They are not exempt from discovery due to the legislative privilege under Article IV, Section 16 of the Wisconsin Constitution and, even if their testimony could somehow be deemed covered by the privilege, that privilege may only be invoked by a member of the legislature. Beno, 116 Wis. 2d at 146. No legislator has asserted such a claim of privilege here.

#### A. The Analysts' Testimony Is Not Privileged

Statutory and constitutional privileges are to be strictly and narrowly construed. See Steinberg v. Jensen, 194 Wis. 2d 439, 464 (1995) (citing Franzen v. Children's Hospital, 169 Wis. 2d 366, 386 (1992)). Article IV, Section 16 of the Wisconsin Constitution provides that "[n]o member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate." Plaintiff argues that the testimony sought from the LFB analysts is covered by this privilege and cites Beno as support for that proposition. (Plaintiff's Mtn. at 3.) However, Beno not only fails to support plaintiff's claim, but the holding actually contradicts plaintiff's argument that the privilege should preclude the analysts' depositions.

In Beno, the Wisconsin Supreme Court addressed, in part, the issue of whether the legislative privilege covered not only legislators but also personal aides to the legislators. The court noted that the "the framers' objectives in granting the legislator the privilege of not being compelled to testify *may* be implicated when the legislator's personal aide is subpoenaed to testify." Beno 116 Wis. 2d at 145-46 (emphasis added). Although the court in Beno held that

the privilege covered the personal aide in question, it strictly limited the privilege extension only to those aides who work so closely with the legislator as to become that legislator's "alter ego."

It is an aide's *relationship with a particular member* of the legislature, not the mere fact of employment, that makes it a realistic possibility that questioning of the aide in a judicial forum might have an inhibiting effect upon the member's performance and might infringe upon the member's legislative independence.

*When the aide is acting as the member's alter ego* in carrying out an activity which falls within the scope of section 16, the purposes of section 16 will be served if the aide and the member are treated as one under section 16 and the member is allowed to assert his or her privilege to prohibit the questioning of an aide.

Id. at 146 (emphasis added). Unlike the noticed deponents in Beno, the LFB analysts, whose depositions have been noticed here, are *not* personal aides to any "particular members," nor can they be considered the "alter ego" of any legislators.

In fact, it would be improper for an LFB analyst to act as a legislator's personal aide or "alter ego." The LFB's governing document, the State of Wisconsin "Blue Book," (which plaintiff cites in its motion), provides that the LFB "develops fiscal information for the legislature, and its services must be *impartial and nonpartisan*. One of the bureau's principal duties is to staff the Joint Committee on Finance and assist its members." (Plaintiff's Mtn. at 1-2)(quoting State of Wisconsin Blue Book 2005-2006, 298)(emphasis added). Unlike a personal aide, the LFB's analysts provide information to the legislators but do *not* assist any legislator with his or her own partisan agenda as a personal aide would. Indeed, working as a partisan personal aide would be contrary to the nonpartisan and impartial mandate of the LFB. Thus, the holding in Beno that applied the legislative privilege of Article IV, Section 16 to personal aides acting as their legislator's "alter ego" clearly does not apply to LFB analysts. This would be an unwarranted extension of a narrowly tailored exception to the broad rule that all people are

subject to civil process. See Crawford v. Care Concepts, 243 Wis. 2d 119, 127 (2001)

(“Exceptions to the demand for every man's [and woman’s] evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”).

B. Only A Legislator May Assert The Privilege

Even if this Court were to find that the legislative privilege in Article IV, Section 16 could apply to the LFB analysts here, the privilege would still be inapplicable in this case because it is held by individual legislators and only a legislator can assert the privilege. Beno, 116 Wis. 2d at 146. As the Wisconsin Supreme Court wrote in Beno:

The privilege of not being compelled to testify is the legislator’s, not the aide’s, and *only the legislator may invoke the privilege*. If an aide is subpoenaed to testify, the aide has no privilege under section 16 not to testify unless the member of the legislature approves the aide’s assertion of the privilege. . . . The member must thus formally and publicly take personal responsibility for the aide's activity.

Id. (emphasis added). It is undisputed that no legislator has invoked the privilege in this case to block the testimony of the LFB analysts. The State may not invoke the privilege on the analysts’ behalf, nor may the analysts assert the privilege themselves. Here, because no legislator has asserted the privilege, the LFB analysts are subject to being deposed and this Court should deny plaintiff’s motion to quash Defendants’ Notice of Deposition.

C. Plaintiff Has Waived Any Possible Legislative Privilege

Even if the Court found that the legislative privilege could theoretically exempt the LFB analysts from civil process despite the inapplicability of the privilege for the reasons set forth above, the Court should deny plaintiff’s motion because plaintiff has waived any such privilege here.

1. Waiver By Failure Of A Legislator To Object

Because no legislator has asserted the privilege or objected either to (a) the disclosure of the attached substantive documents authored by the LFB analysts or (b) the notice of depositions, any such privilege has been waived. Beno, 116 Wis. 2d at 147. In Beno, the Wisconsin Supreme Court noted two factors in its decision that the privilege had not been waived in that case. First, the legislator for whom the aid worked had immediately asserted the legislative privilege; and, second, the legislator thereafter continually asserted the privilege. Id. Here, no legislator has asserted the privilege at all, let alone immediately and continuously.

2. Waiver By Disclosure

Even if the Court were to find, despite Beno, that the privilege applies and can be asserted by someone other than an individual legislator, the privilege has still been waived here because plaintiff and an LFB official affirmatively disclosed to the defendants pertinent LFB documents without asserting the privilege. See, e.g., Wis. Stat. § 905.11; Johnson v. Rogers Memorial Hospital, 283 Wis. 2d 384, 403 (2005); see also United States v. Nobles, 422 U.S. 225, 239 (1975); United States v. Mezzanato, 513 U.S. 196, 201 (1995) (citing Shutte v. Thompson, 82 U.S. 151 (1873) (“A party may waive any provision either of a contract or a statute, intended for his benefit”); Weinstein’s Federal Evidence § 511.04[1] (2006). Indeed, plaintiff admits in its motion that it “has given the Defendants all of the relevant documents possessed by the Legislature’s Fiscal Bureau . . . [and after a second request under the Public Records law,] the Bureau provided Defendants with documents relevant to their request.” (Plaintiff’s Mtn. at 4.) Having disclosed these documents without asserting the privilege, plaintiff has waived the privilege and cannot now assert it to block depositions by the authors of those documents.

#### IV. CONCLUSION

The defendants seek to depose State employees to testify about their knowledge regarding facts integral to this litigation. Depositions of this nature are a normal part of civil litigation.<sup>7</sup> By seeking to expand a narrow exception to the general right of civil process and the duty to testify, and by trying to stretch the doctrine of legislative privilege way beyond its well-established boundaries, plaintiff is simply seeking to prevent discovery that it knows from produced documents will support one of defendants' core defenses. This Court should deny plaintiff's motion to quash the notice of deposition of Rachel Carabel, Marlia Moore and Amie Goldman and allow the depositions to go forward promptly.

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Respectfully submitted,

By:



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<sup>7</sup> Merely because the plaintiff hyperbolically deems this notice of depositions a "momentous" precedent does not make it so. (Plaintiff's Mtn. at 4.)