



evidence. Equally important, plaintiff has exclusive and sole possession of its email system. Thus, defendants cannot obtain discovery of plaintiff's email system from any other source and the preclusion of such discovery will prejudice defendants' ability to prepare their defense.

Although plaintiff asserts the discovery defendants seek - of how and where plaintiff's GroupWise email system stores emails - will impermissibly invade the attorney work product doctrine and thus prejudice it, plaintiff offers this Court no sworn statement from its technical consultant, or anyone else for that matter, to contradict the sworn affidavit of defendants' technical consultant, Matthew Ray, who has opined that he can economically and expeditiously collect email from plaintiff's email system. Instead, plaintiff moves to strike Mr. Ray's affidavit on the grounds that his opinions lack adequate foundation. That contention is nonsense. Mr. Ray has worked with GroupWise email software systems like that used by plaintiff for fifteen years and his opinions regarding the collection of emails stored in such software not only stand un rebutted, but are amply supported by his long years of personal experience.

For these reasons, and as set forth in more detail below, the Court should deny Plaintiff's Motions to Quash and Strike.

### PROCEDURAL HISTORY

On September 21, 2007, defendants noticed a section 804.05(2)(E) deposition seeking the testimony of "one or more officers, officials, employees, or other representatives" to testify regarding plaintiff's email system (the "Email System Deposition").<sup>1</sup> On October 5, 2007, plaintiff moved to quash

---

<sup>1</sup> The complete procedural history to date regarding the production of emails from plaintiff's email system is set forth more fully in the defendants' Motion to Compel the Production of Email (the "Email Motion"). Briefly, the history of the motions practice is as follows. On September 14, 2007, defendants served on plaintiff Defendants' Motion To Compel Production of Email. On September 21, 2007, defendants served plaintiff with a Notice of Section 804.05(2)(e) Deposition to State of Wisconsin Concerning Electronic Mail Messages. On October 5, 2007, plaintiff served the State of Wisconsin's Brief in Response to Defendants' Motion to Compel Production of Email. On that same date, plaintiff also served its Notice of Motion and Motion to Quash Defendants' Notice of Section 804.05(2)(e) Deposition to State of Wisconsin Concerning Electronic Mail Messages and Notice of Motion and Motion to Strike the Affidavit of Mathew Ray. On October 9, 2007, plaintiff filed Plaintiff's Motion for Protective Order Barring Defendants from Requiring Wisconsin to Search its Electronic Files for What Defendants Call Government Knowledge Documents. On October 12, 2007, defendants served Defendants' Reply Memorandum of Law In Support Of The Motion To Compel Production of Emails, together with the Affidavit of James S. Zucker in Further Support of Defendants' Motion to Compel The Production of Emails.

the Email System Deposition subpoena, arguing that if defendants' Motion to Compel Production of Email is denied, there is no need for a section 804.05(2)(e) deposition regarding its email system. (Plaintiff's Motions to Quash and Strike at 2, ¶ 2.) Plaintiff next asked that if the Court does not quash the Email System Deposition, the Court prohibit defendants from inquiring on five of the six areas of inquiry there identified.<sup>2</sup> (*Id.*)

**I. DEFENDANTS SEEK FACTUAL TESTIMONY REGARDING PLAINTIFF'S EMAIL SYSTEM**

**A. Defendants Seek Factual Testimony Regarding How and Where Plaintiff's Email System Stores Emails**

Because defendants' technical expert's un rebutted statement establishes that a search of plaintiff's emails system would be neither expensive nor impractical, defendants noticed the Email System Deposition to obtain factual testimony to better understand exactly what technical issues plaintiff claims preclude an organized and thorough search of its email system. For the Court's convenience, we briefly summarize below the Email System Deposition notice's areas of inquiry:

<u>AREA OF INQUIRY</u>	<u>SUMMARY</u>	<u>PLAINTIFF'S POSITION</u>
1.	Technical issues making the search, collection and production of emails from plaintiff's email system unduly burdensome.	Quash
2.	Efforts the State has undertaken to ascertain the burden/cost of overcoming technical issues that make it unduly burdensome to search its email system for responsive emails.	Quash
3.	Difficulties involved with acquiring and installing commercial software, including "ISYS" or "Gwava-Reveal" to search its email system for responsive emails.	Quash

<sup>2</sup> Plaintiff would preclude examination on subject areas 1-4 and 6.

<u>AREA OF INQUIRY</u>	<u>SUMMARY</u>	<u>PLAINTIFF'S POSITION</u>
4.	Efforts State has undertaken to determine the burden, cost or difficulties of acquiring, installing and running commercial software to search its email system for responsive emails.	Quash
5.	The State's I.T. staff's expertise and knowledge of its email system, the staff's size, workload capacity and past experience handling litigation and/or FOIA discovery requests.	Allow
6.	Plaintiff's knowledge of the cost to add I.T. staff to search its email system for responsive emails.	Quash

Plaintiff attempts to improperly exploit the attorney work-product doctrine to prevent discovery of its email system by claiming that testimony regarding subject areas 1-4 and 6 would impermissibly invade attorney work product developed by an unidentified information technology consultant. (Plaintiff's Motions to Quash and Strike at 2, ¶ 2.) Thus, plaintiff withholds from defendants and this Court any sworn statement of fact setting forth the technical problems that render unduly burdensome an organized and thorough search of its email system, while at the same time, maintaining that no state employee or contractor possesses knowledge sufficient to testify regarding its email system. Nor does plaintiff agree to educate a witness regarding how its email system operates. Plaintiff thus attempts to have its cake and eat it too, claiming on the one hand that the email system cannot be searched (which is completely at odds with the only sworn testimony before the Court) while on the other hand seeking to entirely obstruct defendants' efforts to obtain discovery which might well refute that claim. This, of course, leaves the plaintiff in the position of attempting to block any searching of its emails without offering a shred of admissible support for the prospect that doing so is impractical, while simultaneously attempting to block any effort by the defendants to ascertain the basis for this unsupported proposition. If indeed its email systems truly are not searchable, then plaintiff ought to put forward a witness to explain to the defendants and the Court why that is the case, and allow the defendants to examine the witness, instead of attempting to block all efforts to ascertain whether in fact what plaintiff says is true.

Defendants find it difficult to understand that the Information Technology Department of the State of Wisconsin does not employ a single individual or contractor who is knowledgeable about how its email system works and that the only person with such knowledge is plaintiff's consultant. Certainly, competent information technology professionals are necessary to install, maintain and enhance complex software systems such as plaintiff's GroupWise email system. (Supplemental Affidavit of Matthew Ray at ¶ 3.)<sup>3</sup> Similarly, information technology professionals are necessary to fix problems that crop up from time to time in even the best software systems. (Ray Suppl. Aff. at ¶ 4.) On occasion, email systems may stop working altogether, commonly referred to as the system "crashing" or "freezing". (*Id.*) There too, knowledgeable information technology technicians must intervene to fix the problem and restore the system to working order. (*Id.*) In fact, it is reasonable to suppose that the State of Wisconsin periodically receives FOIA and litigation discovery requests that require it to search for and produce documents responsive to such requests.<sup>4</sup>

Nonetheless, defendants' deposition notice does not seek, as plaintiff seems to assume, the deposition of its consultant or even the person most knowledgeable about or conversant with these issues, but rather seeks a designee of the plaintiff to testify about them. Even if plaintiff is correct that only an outside consultant possesses the information necessary to respond, that does not mean that plaintiff should not educate one of its employees regarding its email system to testify regarding the subject matter of the Email System Deposition notice.

**B. Technical Information Regarding The Operation of Plaintiff's Email System Is Not Work Product**

---

<sup>3</sup> All subsequent references herein to the Supplemental Affidavit of Matthew Ray shall be denominated as "Ray Suppl. Aff. at ¶ \_\_\_").

<sup>4</sup> The State's records management policy recognizes that "[e]-mail messages that are public records are subject to the open records law and need to be filed and stored in such a way that they can be located, accessed, and provided to requesters for inspection and/or copying, as specified in the law." *See* Statewide Enterprise E-Mail Policy & Guidance Updated Draft at page 3 (denominated as page 1 in document), dated October 19, 1999. A true and correct copy of the aforementioned document is attached as Exhibit A to the Affidavit of James S. Zucker in Support of Defendants' Opposition to Plaintiff's Motions to Quash Defendants' Email System Deposition notice and Strike the Affidavit of Matthew Ray.

The work product doctrine does not shield from discovery through a deposition factual information regarding how the GroupWise email system operates. “[T]he work product privilege does not protect facts ... [and] the party seeking those facts may obtain them through means ... such as [depositions and interrogatories.” *Weiss v. National Westminster Bank, PLC*, 242 F.R.D. 33, 61 (E.D.N.Y. 2007). Moreover, “[w]ork product protection typically applies only to “documents and tangible things,” and not to facts within the documents.” *In re Savitt*, 176 F.R.D. 44, 47-48 (N.D.N.Y. 1997); *ECDC Envtl., L.C. v. New York Marine and Gen. Ins. Co.*, No. 96 CIV. 6033, 1998 WL 614478, at \*16 (S.D.N.Y. June 4, 1998). The Email System Deposition notice seeks purely factual information regarding how plaintiff’s GroupWise email system operates to make discovery of its contents unduly burdensome. Further, defendants do not seek “tangible” documents. Pertinently, the factual information defendants seek does not seek to invade the province of strategy or tactics, and therefore will not reveal plaintiff’s attorneys’ thought process. Accordingly, the Court should deny plaintiff’s motion to quash the Email System Deposition notice because factual information regarding how plaintiff’s GroupWise email system operates does not come within the attorney work product protection.

**C. Wisconsin Law Permits Discovery of Plaintiff’s Information Technology Consultant**

Wisconsin law allows discovery of work product prepared by litigation consultants “upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means”.<sup>5</sup> Section 804.01(2)(c)1.

---

<sup>5</sup> See Wis. Stat. 804.01(2)(C): “Trial preparation: materials. 1. Subject to par. (d) a party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

Wisconsin law addresses the requirements of section 804.01(2)(c)1 under *Dudek* and its progeny.<sup>6</sup> Under *Dudek*, defendants must satisfy a three-part analysis to obtain discovery from plaintiff's consultant. The three-part analysis requires the party seeking discovery of a consultant to show (1) the discovery sought falls within the scope of section 804.01(2)(a); (2) the party opposing discovery must demonstrate that the "items" sought were prepared in anticipation of litigation or for trial; and (3) the party seeking discovery of "tangible" items must demonstrate "substantial need" and that it cannot obtain the "substantial equivalent of the materials by other means" without undue hardship.

The third requirement "is less stringent" where, as here, "only information is requested". *Ranft*, 163 Wis.2d at 298, 471 N.W.2d at 260 (Ct. App. 1991) citing *Meunier v. Ogurek*, 140 Wis.2d 782, 789-90, 412 N.W.2d 155, 158 (Ct. App. 1987). Thus, the Court's application of the third prong of the *Dudek-Ranft* analysis should be "less stringent" because defendants' Email System Deposition notice seeks "only information" regarding how plaintiff's email system operates to make a reasonably thorough search for emails unduly burdensome.<sup>7</sup>

Defendants satisfy step one of the *Dudek-Ranft* analysis because the subject matter of the deposition concerns matters that fall squarely within section 804.01(2)(a). That rule permits discovery of facts relating to the "existence, description, nature, custody, condition and location of ... documents [and] tangible things", here, how and where emails are stored in plaintiff's email system, that are "reasonably calculated to lead to the discovery of admissible evidence."

---

<sup>6</sup> *State ex rel. Dudek v. Circuit Court*, 34 Wis.2d 559, 150 N.W.2d 387 (1967). The three-step analysis is set forth in *Ranft v. Lyons*, 163 Wis. 2d 282, 298, 471 N.W.2d 254, 260 (Ct. App. 1991). There the Court of Appeals stated: "application of the doctrine insofar as it relates to the pretrial discovery of tangible items requires a three-step analysis. First, a party seeking discovery must show that the items are within the scope of section 804.01(2)(a), Stats. Second, if that showing is successful, the party opposing discovery of the items must demonstrate that they were "prepared in anticipation of litigation or for trial." If so, the items are protected by the work-product doctrine. Third, if tangible items are work-product, the party seeking discovery must demonstrate a "substantial need of the materials in the preparation of the case" and that it "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Although the first two steps also apply when discovery of other-than-tangible items is sought as well, *the third-step showing is less stringent when only information is requested.*" (emphasis added).

<sup>7</sup> Defendants' Email Deposition Notice seeks "only information" regarding, for example, how plaintiff's email system works and what technical impediments foreclose a thorough and organized search of that system; what investigation plaintiff made to locate and test software capable of conducting a thorough and organized search of its email system; and the steps plaintiff took to solve the technical problems impeding such a search.

Plaintiff has completely failed to carry its burden under the second prong of the *Dudek* analysis by not providing the Court with any sworn factual basis from which the Court can evaluate whether its consultant's knowledge of how plaintiff's email system operates was prepared in anticipation of litigation or for trial.<sup>8</sup>

The third prong is easily satisfied here. Plaintiff is the sole custodian of its email system. Defendants simply cannot obtain information regarding the technical obstacles plaintiff claims render discovery of its email system unduly burdensome from any other source. Defendants – and this Court – have a “substantial need” for this information so that they can objectively evaluate whether collecting emails from plaintiff's email system is, as plaintiff claims, unduly burdensome.

Thus defendants satisfy all three prongs of the *Dudek* analysis and respectfully submit that the Court should deny Plaintiff's Motion to Quash the Email System Deposition notice.

## **II. MR. RAY'S AFFIDAVIT IS BASED ON EXTENSIVE KNOWLEDGE AND EXPERIENCE WITH THE EMAIL SYSTEM USED BY PLAINTIFF KNOWN AS GROUPWISE AND SHOULD NOT BE STRICKEN**

Employing the old adage that “the best defense is a good offense,” Plaintiff asks this Court to strike the Affidavit of Matthew Ray (the “Ray Affidavit”) because it purportedly does not establish Mr. Ray's personal knowledge or otherwise lay an adequate foundation to support his statements regarding the Novell email system known as GroupWise. (Plaintiff's Motions To Quash and Strike at 2, ¶ 1.) “[O]pinion testimony by an expert witness is admissible ... as long as the expert is qualified and has adequate foundation for the opinion.” *Mettler v. Nellis*, 2005 Wi. App. 73, 280 Wis.2d 753, 695 N.W. 861. A brief review of Mr. Ray's affidavit demonstrates that it satisfies the requirements of Wisconsin law. There Mr. Ray informs the Court that he was “employed for thirteen years by Novell and, during that time, most of my duties concerned Novell's GroupWise e-mail software.” (Ray Aff. ¶ 1.) Mr. Ray averred that he holds a “Master CNE Novell in Messaging.” (*Id.*) In addition, Mr. Ray stated that for the last three years, he and his company have specialized in collecting GroupWise e-mails. (*Id.*) Thus,

---

<sup>8</sup> “The statement of a lawyer in a memorandum ... that it would be unduly burdensome to comply with the request is not evidence.” *Auto Club Family Ins. Co. v. Ahner*, CV No. 05-5723, 2007 WL 2480322, \*3 (E.D.La. Aug. 29, 2007).

contrary to plaintiff's contention, Mr. Ray undoubtedly has extensive personal and professional experience and knowledge of the Novell GroupWise email system used by plaintiff and therefore possesses the professional expertise necessary to offer his opinion regarding the collection of emails he has specialized in for at least three years. It is notable that plaintiff has neither sought to depose Mr. Ray to challenge his opinions nor offered a countervailing affidavit. Even if valid, plaintiff's complaints go not to whether Mr. Ray's affidavit should be considered by the Court, but to the weight it should be accorded.

Plaintiff also complains that Mr. Ray "has neither personal knowledge nor an adequate foundation in this field regarding the State of Wisconsin computer system." (Plaintiff's Motions to Quash and Strike at 3, ¶ 2.) This assertion is both circular and ironic: the lack of personal knowledge of the State's email systems stems solely from plaintiff's refusal to provide someone for an informal discussion with Mr. Ray or, failing that, for a deposition. In any event, the contention is wholly without merit. Mr. Ray has expressly opined that in his professional experience, GroupWise's internal software architecture – how GroupWise works – does not significantly vary from customer to customer. (Ray Suppl. Aff. at ¶ 5.) Thus, GroupWise software works in basically the same way on every computer system on which it is installed. (Ray Suppl. Aff. at ¶ 6.) Consequently, Mr. Ray informs the Court --although he does not need information regarding how plaintiff has installed the GroupWise email software to collect its GroupWise emails -- such information would make his job easier, faster and more economical. (*Id.*) Plaintiff's counsel's self-serving statements regarding technical matters are not evidence and should not be given any weight.

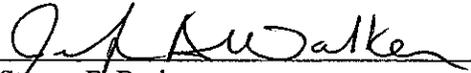
## CONCLUSION

As set forth in defendants' Motion to Compel the Production of Email and in our Reply papers to plaintiff's opposition thereto, plaintiff refuses to do precisely the same discovery work numerous defendants have already performed at plaintiff's insistence: a thorough search of email systems to locate and produce emails that are likely to contain information that is reasonably calculated to lead to the

discovery of admissible evidence. Plaintiff should be held to the same standard it demands from its adversaries.

October 25, 2007

Respectfully submitted,



Steven F. Barley  
Joseph H. Young  
Jennifer A. Walker  
Hogan & Hartson LLP  
111 S. Calvert St., Suite 1600  
Baltimore, MD 21202  
410-659-2700 (phone)  
410-539-6981 (fax)

William M. Conley  
Matthew D. Lee  
Foley & Lardner  
150 East Gilman Street  
Verex Plaza  
Madison, WI 53703  
608-257-5035 (phone)  
608-258-4258 (fax)

*Attorneys for Amgen Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 25, 2007, a true and correct copy of the foregoing was served upon all counsel of record via electronic service pursuant to Case Management Order No. 1 by causing a copy to be sent to LexisNexis File & Serve for posting and notification.

/s/ James S. Zucker  
James S. Zucker