
STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CV-1709

AMGEN INC., et. al.,

Defendants.

PLAINTIFF'S BRIEF
IN OPPOSITION TO DEFENDANTS'
MOTION TO COMPEL SUPPLEMENTAL INTERROGATORY RESPONSES AND
VERIFICATION OF OTHER RESPONSES

In their brief, the Defendants raise two issues. The first is whether the Plaintiff is legally obligated to produce “supplemental interrogatory responses” in response to “Defendants’ Second Set of Interrogatories.” (Defendants’ brief at p. 2).¹ The second issue is whether the Plaintiff should be ordered to verify its answer to Defendants’ “Fourth Set of Interrogatories.” (Defendants’ brief at p. 5). Plaintiff respectfully requests that this Court deny Defendants’ motion.

Preliminarily, the Plaintiff submits the Defendants have mischaracterized the legal standard and they predicate their motion on the wrong statute. For purposes of this motion, Defendants have not claimed that Plaintiff has failed or refused to respond to their

¹ Defendants’ brief states that it seeks a “formal” supplemental response to their Second Set of Interrogatories. However, their argument and more importantly, their exhibits related to not only the second set, but the third, and fourth sets as well.

interrogatories. Instead, Defendants complain that they are not satisfied with the manner in which Plaintiff responded.

Defendants cite Wis. Stat. § 804.12(1)(a), (Defendants' brief at p. 1). But that section does not really apply to these facts. Section 804.12(1)(a) applies to parties who either fail to answer an interrogatory or to parties who answer, but are evasive. *See* Wis. Stat. § 804.12(1)(b). Defendants' request is only to compel the Plaintiff to "formally memorialize supplemental interrogatory responses [that Plaintiff] served on all Defendants." (Defendants' brief at p. 1)

Plaintiff submits that the standard to be applied to the question now before this Special Discovery Master was previously stated on at least two prior occasions. The analysis should be guided by the following principles:

In my decision on a companion motion in this case, bearing today's date, I discussed the benefits to all concerned of cooperation in the discovery states of complex litigation.

In litigation of this magnitude, the interests of the parties, the public, and the judicial system itself, are better served by compromise (and a little give-and-take), than by nose-to-nose advocacy at the discovery state of the proceedings. The spirit of Wisconsin's discovery statutes is to facilitate the fullest possible exchange of information between the parties – in the belief that the ends of justice are best met when, at the time of trial, both sides are fully informed on all matters at issue. And to the extent that less advocacy at the discovery state of the proceedings facilitates the information exchange, it can only enhance the value (and the benefits) of advocacy at trial.

(Decision & Report of Discovery Master, dated January 31, 2006). The facts will clearly establish that Plaintiff has dutifully attempted to fulfill the spirit, if not the letter, of Wisconsin's discovery statutes by giving the Defendants all the information they demanded.

I. PLAINTIFF SHOULD NOT AT THIS TIME BE ORDERED TO “FORMALLY SUPPLEMENT” THEIR PREVIOUS RESPONSES.

The following facts are not reasonably disputed. On February 20, 2006, the Defendants served their joint “Second Set of Interrogatories” on the Plaintiff. (Plaintiff’s Exhibit A). On June 19, 2006, the Plaintiff filed its response to Defendants’ discovery. (Exhibit B). In its response, the Plaintiff answered and interposed objections. (*Id.*). Although it does not appear from their brief that Defendants are complaining about any other discovery request, the same statements can be made with respect to these other responses as well. In short, Defendants submitted interrogatories and the Plaintiff tendered its reply.

In the ensuing months, the parties engaged in a series of discussions on a wide range of topics, some of which related to Defendants’ Second Set of Interrogatories and Plaintiff’s response. The important point is that during these discussions:

- A. the parties discussed Plaintiff’s legal objections;
- B. the parties discussed the interrogatories which had been tendered and already answered; and
- C. the Defendants asked entirely new questions unrelated to what had been asked in the previous interrogatories and the Plaintiff provided responsive information.

During this year and one-half period, the Plaintiff endeavored to answer most every question or request made of it regardless of whether that question related to an interrogatory previously served upon it or even whether the question itself was objectionable. If a request was made that went beyond the scope of the Defendants’ Second, (or Third, Fourth, or Fifth), Set of Interrogatories, Plaintiff did not demand that a new or amended set of interrogatories be drafted. From Plaintiff’s perspective, when Defendants eventually asked for a formal supplement, enough information had been sent over this period of time that it was, frankly, a near impossible task, simply from a practical

point of view, to match what had been subsequently sent to one or more questions that had been previously asked.

A. PLAINTIFF'S RESPONSES TO DEFENDANTS' INTERROGATORIES WERE COMPLETE WHEN MADE.

The Plaintiff does not concede that its first response was inadequate. From the Plaintiff's perspective, it engaged in more than a little give-and-take during this process. Parenthetically, Plaintiff levels no criticism at the Defendants either and it is not unreasonable to characterize both parties' actions as being consistent with the spirit of Wisconsin's discovery statutes by facilitating the fullest possible exchange of information between the parties.² In order to grant Defendants' present motion, Defendants must establish: (1) that its interrogatory was clear; (2) that Plaintiff's answer was evasive or that Plaintiff's objection was without merit; and (3) that the information eventually given to the Defendants should have been provided at the time of the original response. Plaintiff submits Defendants have satisfied no such burden.

A party is under no obligation to supplement a previous answer to an earlier interrogatory if the answer was complete when it was made. Wis. Stat. § 804.01(5). Thus, it follows, a party who later provides additional information is not necessarily obligated to "formally memorialize" this new information in the form provided under Wis. Stat. § 804.08(1)(b). The Defendants have not met their burden of establishing each of the elements necessary to prevail on their motion to compel.

² This is not to say that the flow of information has been reciprocal. In fact, some Defendants have yet to answer a single interrogatory or produce a single witness for deposition. But that is not relevant to the issue of whether the Plaintiff has acted in accordance with the law.

B. PLAINTIFF ANSWERED DEFENDANTS' SUBSEQUENT QUESTIONS WITHOUT REGARD TO WHETHER THE QUESTION WAS A FOLLOW-UP TO A PREVIOUS INTERROGATORY.

Even though a party is under no obligation to supplement a previous answer to an earlier interrogatory if the response was complete when made, a party is obligated to act in a good faith during subsequent discovery negotiations. The Plaintiff engaged in a sincere, collegial, and cooperative exchange of information. As for the Defendants, as long as their questions were being answered, they kept asking more questions.

Defendants' own Exhibit 7 illustrates this last point. Although the Plaintiff had already provided documents from which the Defendants could derive an answer to most, if not all of their questions, (*See* Wis. Stat. § 804.08(3)), the Defendants asked the Plaintiff to succinctly state the reimbursement formula and its respective period of application. The question was reasonable and the Plaintiff could provide an answer with relative ease, notwithstanding its election of its rights under Wis. Stat. § 804.08(3). The information was given by the Plaintiff to the Defendants with an introduction that the purpose of the message was to "supplement" Plaintiff's earlier response.

However, some questions were clearly drafted in response to the information Plaintiff already provided to the Defendants as part of their discovery request. Defendants submit their Exhibit 9 in an effort to demonstrate what the Plaintiff should now "formally supplement." But the Defendants did not include the documents which were attached to that message. (*See* Plaintiff's Exhibit C). Plaintiff's Exhibit C are two documents prepared by counsel in response to Defendants' request. In bold are the questions posed by Defendants' counsel. The answers that follow were prepared by Plaintiff's counsel. These documents establish that during the period of time the parties were engaging in this informal discovery, the Defendants asked follow-up questions which had arisen after

Defendants' receipt and review of Plaintiff's response to Defendants' Second Request for Production of Documents. Instead of engaging in "nose-to-nose advocacy," Plaintiff unilaterally exchanged information rather than demand a new separate set of interrogatories be drafted and served upon the Plaintiff.

C. PLAINTIFF ANSWERED DEFENDANTS' QUESTION EVEN THOUGH IT HAD TIMELY INTERPOSED VALID OBJECTIONS TO DEFENDANTS' INTERROGATORIES.

It is worth mentioning, but not dwelling on, that Plaintiff interposed valid legal objections to much of Defendants' discovery. But during these "meet-and-confers" Plaintiff focused on compromise. (*See* Defendants Exhibit 15, p. 5). During the same time, for some Defendants these courtesies were not reciprocal. (*See infra*. f.n. 2). In large part, the Defendants' Second Set of Interrogatories was objectionable because the scope of the request was so broad as to make the entire request over burdensome. (*See generally* "decision and order" of Judge Niess "denying Defendants' motion to require plaintiff to preserve potentially responsive documents" dated 8/15/2007, Plaintiff's Exhibit D).

D. THE INFORMATION WAS EXCHANGED IN SUCH A FASHION THAT DID NOT LEND ITSELF TO BEING EASILY CONVERTED INTO A FORMAL INTERROGATORY RESPONSE.

After this collaborative process had gone on for some time, well over a year, the Defendants approached the Plaintiff with the request that it memorialize everything that had been communicated to the Defendants in what Defendants called a "formal supplemental response." At first, the request did not seem unreasonable. (*See*

Defendants' Exhibit 1). But soon three problems arose. Notwithstanding the legal defenses discussed above, simply from a practical point of view, Plaintiff could not reasonably do what the Defendants were now asking.

First, there had been so many communications in so many forms that the Plaintiff did not have a definitive record of what questions had been asked and answered to enable Plaintiff to confidently memorialize a year's worth of discussions. In fairness, as stated in the affidavit of Jennifer Walker around September 2007, Defendants agreed to forward back to Plaintiff what communications they wanted memorialized in a formal supplemental response. But Defendants' concession did not resolve these other problems.

Second, it was around this same time that the Defendants began insisting that the Plaintiff have someone sign its responses to interrogatories under oath as required in the statutes. This issue is discussed in greater detail later in this brief. These two issues intersected, nonetheless, at this point in time because many of the answers that the Defendants wanted "formalized" appear to be statements made by counsel. (See for example, Plaintiff's Exhibit E summary of 1/10/2007 meet-and-confer item 11). As further discussed below, the Plaintiff asked the Defendants to enter into a stipulation regarding signing of the interrogatory responses as part of this "formal supplementation," but got no response.

Third, because Plaintiff had not required that subsequent questions relate back explicitly to previous numerated interrogatories, it was not readily apparent how Plaintiff could "supplement" a previous response with an answer to a subsequent question if the two were not related. *See generally* Wis. Stat. § 804.08(1)(a).

In light of these concerns, the Plaintiff informed the Defendants that it could and should rely on the veracity of all the information and answers given to Defendants regardless of the form in which these answers had been provided. The Plaintiff asked the Defendants to take the information previously given to them and propose those portions deemed relevant back to the Plaintiff in the form of a “Set of Admissions.”

From the Plaintiff’s perspective this alternative solved all of the problems identified above and it preserved Plaintiff’s promise that the Defendants could rely on the truthfulness of all the information already informally provided to them. First, using admissions gave the Defendants the discretion to determine what was relevant among all the information that had been previously exchanged over the last year and one-half. Second, admissions eliminated the need for there to be a “supplement” to a previous answer as to information that was responsive only to a subsequent “informal” question. And lastly, because answers to admissions could be signed by an attorney, this discovery route at least for now avoided the simmering issue of who should sign the responses, including those responses relating to legal conclusions. *See Wis. Stat. § 804.11(1)(a).*

On November 19, 2007, the Defendants seemingly agreed to this compromise. (*See Defendants’ Exhibit 11*). But the Defendants added a new twist and insisted that Plaintiff agree in advance to admit the truthfulness of these yet unseen admissions within “one week” after receipt. (*Id.*). On November 21, 2007, the Plaintiff responded:

... On the admissions, I really can’t promise to sign them within seven days after receipt. I try never to make a promise unless I am sure I can keep it. I know you’ll do your best to faithfully duplicate what I have said back at us in the form of an admission, but there is always the possibility that a turn of a phrase or a word inserted or missing might change things. Additionally, because of the profound impact of an admission, I can’t imagine that I would forego running the answers by knowledgeable people at DHFS. I know that you have been patient and trying to get something

out of me for some time. But frankly, I view the issue as really one of form, rather than substance. As you know, I tried to be very timely in giving you all the substantive answers as soon as I had them and never thought of taking thirty days or more to answer. All I can promise is to do my best, (which some might reasonably argue is not much at all).

On December 4, 2007, unwilling to compromise and allow Plaintiff more than seven days to respond to the admissions, the Defendants stated “we have no choice but to raise this issue before Judge Eich for resolution.” The next day, Plaintiff again attempted to revisit the issue and wrote back to the Defendants:

Memorializing the State’s Supplemental Interrogatory Responses:

I am sorry that you take the position that you do on this issue. In particular, I am perplexed by what appears the Defendants’ willingness to adopt the solution I proposed some time ago but make it contingent on a response date reduced from thirty days to five. Had Defendants acceded to this proposal and submitted the admissions when first discussed you would have responses by now.

Please be aware that I do not consider all of the questions that were asked of me and that I answered to be part of or even related to the second set of interrogatories. When asked a question, I provided an answer without regard to whether it related to a prior interrogatory. Therefore, in the abstract, I consider it an open question as to whether the Plaintiff must supplement its earlier response at all.

But, be that as it may, I reiterate Plaintiff’s offer to memorialize the answers I have already given in the form of a single set of admissions.

(Defendants’ Exhibit 13, p. 2). Had Defendants submitted the admissions when first proposed by the Plaintiff, the Defendants would have had their “evidence” long before these communications in December, 2007. Had the Defendants submitted the admissions when they finally agreed to the compromise, they would have had their answers in less than thirty days, or about two months ago. Under both scenarios, the issues now presented to this Special Discovery Master would never have been raised.

This last observation leads to the inescapable conclusion that the issue before this Special Discovery Master is all about form over substance, principle or practicality and generally the notion that some believe it is better to litigate rather than compromise. At every turn, the Plaintiff has assured the Defendants that all the answers it has given, without regard to form, are reliable and that Plaintiff waived and waives any objection based on form if and when Defendants used the information as evidence in a motion or at trial as allowed under Wis. Stat. § 804.08(2).

Based on the forgoing, Plaintiff respectfully requests that this Special Discovery Master deny Defendants' Motion to Compel which they filed under Wis. Stat. § 804.12(1)(a). Defendants have not met their burden under this statute. More importantly, given the availability of an efficient compromise, it can hardly be said that the Defendants have satisfied the spirit of Local Rule 319. Defendants' motion can only be justified assuming they have concerns about admissibility of the information later in these proceedings under Wis. Stat. § 804.08(2). *See generally* Wis. Stats. §§ 908.01(4)(b) and 910.07. Thus, giving them the benefit of the doubt, the relief they now seek has already been offered by the Plaintiff. There is also some question as to whether the relief Defendants now request is even necessary. Plaintiff respectfully requests this Special Discovery Master deny Defendants' Motion to Compel.

II. THE PLAINTIFF HAS REASONABLY COMPLIED WITH WIS. STAT. § 804.08(1)(b).

The issue of who should sign the interrogatories has been a subject of much discussion between the parties. The Defendants' selective recitation of the facts taking the Plaintiff's response to Defendants' Fourth Set of Interrogatories out of context creates the

wrong impression about the Plaintiff's position on this issue. The following facts are generally not in dispute and are important to a complete understanding of the issue Defendants now raise.

A. DEFENDANTS CRAFTED THEIR SECOND REQUESTS SO BROADLY SO AS TO REQUIRE AN INNUMERABLE NUMBER OF SIGNATORIES.

Up until October 12, 2007, the Plaintiff served its response to all of Defendants' interrogatories under signature of counsel. The reason for this practice, notwithstanding Wis. Stat. § 804.08(1)(b), was that many of the interrogatories submitted to the "State of Wisconsin" by the Defendants, asked questions the answers to which required information that no one person had sufficient personal knowledge of so as to enable him or her to swear to the truthfulness of the response.

Defendants' instructions in their discovery request demanded that every question be answered by all of "Wisconsin's executive, administrative, and legislative offices and agencies." (*See* Defendants' Second Set of Interrogatories, General Instruction "A", Plaintiff's Exhibit A). Even more complicating was the fact that Defendants' question directed at the "plaintiff" demanded an answer on behalf of not only "the State of Wisconsin," but on behalf of all the "citizens" of the State as well.³ (*See* Defendants' Second Set of Interrogatories, "definitions" incorporating by reference their definitions contained in the accompanying request for production of documents. Plaintiff's Exhibit

³ Judge Niess already ruled that "any order drafted in accordance with Defendants' requests would be virtually meaningless, and would eventually yield endless ancillary motion practice and other litigation mischief, none of which would advance this case one iota." (Decision denying Defendants' motion to preserve potentially responsive documents dated 8/15/2007, Plaintiff's Exhibit D). Although the issue before this Special Discovery Master was not before the circuit court, its words are ominously prescient.

F). Although it was possible to answer the interrogatories in the abstract, it was apparent that the questions could not be answered under oath in accordance to the instructions dictated by the Defendants as they had defined the terms in their request.

B. BOTH PARTIES HAVE ENGAGED IN THE SAME PRACTICE.

The Defendants engaged in exactly the same practice. Thirteen Defendants have answered each of Plaintiff's interrogatories but have yet to provide a single verification whatsoever. These thirteen Defendants have never provided any discovery response to the Plaintiff with any document signed under oath or otherwise verified by anyone:

1. Ben Venue Laboratories
2. Boehringer Ingelheim Roxanne
3. Immunex
4. Ivax
5. Pfizer
6. Pharmacia
7. Roxanne
8. Schering-Plough Corporation
9. Sicor
10. SmithKline Beecham Corporation d/b/a GlaxoSmithKline
11. TAP
12. Teva
13. Warrick

At a minimum, it is ironic that these Defendants now come before this Special Discovery Master to criticize the Plaintiff for doing on one of its response what they have done on every one of their responses. At most, engaging in the same act combined with a refusal to negotiate a mutually acceptable resolution should be grounds alone to deny their Motion to Compel.

Whereas these thirteen Defendants have made no attempt to address the issue, at least the Plaintiff, on October 12, 2007, drafted a "verification" that attempted to satisfy both the Defendants' liaison counsel and Wis. Stat. § 804.08(1)(b). (*See Defendants'*

Exhibit 16). The form for this “verification” was lifted from documents drafted, used and submitted by one of the other Defendants.

Defendants’ response to the Plaintiff was swift. Defendants’ liaison counsel wrote Plaintiff’s counsel with the intended or unintended purpose of creating a conflict of interest under SCR 20:3.7.

Frank – I was surprised that when we finally received the State’s Interrogatory Answers, they were verified by you. Verifying the responses would make you a witness subject to discovery of the basis for knowledge contained in those responses. I assume that was not your intent, but perhaps it was. I wanted to see if that was the case before proceeding further.

Steve:

(Plaintiff’s Exhibit G). For obvious reasons, Plaintiff would be severely prejudiced if its counsel became a witness and was required to sit for an adverse examination. Redoubling its attempt to broker a compromise, Plaintiff wrote back:

Steve:

First, you and Jennifer have been persistent in demanding that the Plaintiff conform its answers to the interrogatories by having someone swear to them. I have had more than one discussions with you about the fact that because of the nature of the questions asked by the defendants that there was no person to sign the Plaintiff’s answers based on personal knowledge. Thus, as you know, the Plaintiff only previously tendered these answers under my signature as counsel.

In the last two weeks, I have received a telephone call from Jeremy Cole who reiterated for his client what I believed was defendants’ continued request that someone “verify” the Plaintiff’s answers. Again I told Jeremy that I did not have a personal knowledge to do this and that I did not know anyone who did.

Then I received the “verification” from Aventis’ lawyer.

In my subsequent discussions with Jeremy we talked about the fact that although the Aventis “verification” really did not say much as it merely states that the answers were made based on what other people said, it

would accomplish for what I understood was his client's goal of making the Plaintiff's answers admissible later on in these proceedings. I understood that the defendants were merely looking for something which they felt was necessary to make the Plaintiff's answers admissible. When asked to do what Aventis' lawyer had already done, and after reading what it was that this lawyer was actually swearing to, I could think of no reason to persist in my denial. So I agreed.

Obviously, I am sure you do not truly believe that I intended to submit myself to cross examination. This "verification" says all the defendants need to know. I put together the answers after talking to many people, (i.e. questions pertaining to the MA program), after consulting with members of our litigation team, (i.e. questions about the Plaintiff's damages), and after reviewing documents and records that were also produced. What I did to prepare these answers should be of no surprise because I remember at least three conversation with Jennifer about this very question. My notes of one conversation with Jennifer on this topic are lengthy.

Now if you think that defendants have the right to seize upon this compromise that I reached with Mr. Cole, there is little I can do or say at this point. I am not sure what you need to know "before proceeding further". If it is only to learn whether I intended to become a witness, the answer is "no".

It seems to me that you have two options. You can either conclude that this "verification" serves only the limited purpose of making the answers admissible, and let it go and move on. Or you can pursue the matter further. I guess in that event I would be forced to attempt to withdraw my "verification" admitting that I had no personal knowledge to make a verification to the underlying answers to defendants' interrogatories. Furthermore, because there is no one else to make such verification, I believe my only option then would be to withdraw, or attempt to withdraw, substantial portions of plaintiff's previous answers, (made as accurately, completely and honestly as could be under the circumstances), and argue that the questions are so broad, vague and ambiguous that there is no person or persons currently in employment that can answer them completely. I assume that was not what you intended by sending me this email message this morning.

Please let me know whether it was or if you have any additional questions or would like any other act taken in this regard.

(*Id.*). The Defendants rebuffed Plaintiff's offer to compromise, refused to discuss a mutually beneficial stipulation and more importantly, were unyielding in their threat to depose Plaintiff's legal counsel. Defendants' only response was:

Frank

I am not much interested in playing this game, Frank. I will get back to you with our position.

(Id.). Defendants' response is their motion now before this Special Discovery Master.

But again, as noted above, some Defendants themselves have never done anything to verify their answers. Others have verified some, but not all, of their responses. The Defendant Amgen, the principle author of the motion now before this Special Discovery Master made factual assertions in responding to Plaintiff's interrogatory no. 6 and 7 but provided no accompanying verification. (Plaintiff's Exhibit H). Amgen similarly disregarded what it calls "this straightforward procedural task," (Defendants' brief at p. 1), in making factual statements in response to Plaintiff's First Set of Interrogatories no. 5. (Plaintiff's Exhibit I).

Abbott provided no verification when it answered Plaintiff's Third Set of Interrogatories. (Plaintiff's Exhibit J). Smithkline Beecham provided no verification when it answered Plaintiff's Third Set of Interrogatories. (Plaintiff's Exhibit K). Ivax provided no verification when it answered Plaintiff's Third Set of Interrogatories. (Plaintiff's Exhibit L). Pfizer and Pharmacia provided no verification when it answered Plaintiff's Third Set of Interrogatories. (Plaintiff's Exhibit M and N). Sicor and Teva provided no verification when it answered Plaintiff's Third Set of Interrogatories. (Plaintiff's Exhibit O and P).

C. DEFENDANTS COMMONLY “VERIFY” THEIR ANSWERS BY HAVING AN ATTORNEY INTONE BOILERPLATE LANGUAGE.

The last word from Defendants’ liaison counsel was that anyone who “verified” answers to interrogatories subjected him or herself to a deposition. It is not clear whether the issue before this Special Discovery Master only concerns Plaintiff’s response to Defendants’ Fourth Set or whether Defendants’ complaint extends to all of Plaintiff’s responses⁴. Clearly, Defendants are not satisfied with what the Plaintiff has done in this case.

But the Defendants’ criticism of Plaintiff’s actions is disingenuous. To the extent the Defendants “verified” any of their answers, the predominant format was for a lawyer to say that he or she talked to some unnamed group of people, looked at some documents, maybe consulted with other counsel, and that even though he or she admits that he or she has no personal knowledge of what has been said, he or she then proceeds to aver “upon information and belief” that the foregoing response are true and correct to the best of his or her knowledge. (See Plaintiff’s Exhibit Q). Plaintiff’s Exhibit K contains documents submitted by some Defendants, (as opposed to other Defendants who submitted nothing), that are no different than what Plaintiff submitted in an attempt to placate the Defendants, (See Defendants’ Exhibit 16). But Plaintiff’s give and take prompted the ire of

⁴ Defendants’ headnote and the relief demanded refer to “responses” in the plural certainly implying criticism with all that Plaintiff has done. But in the first paragraph, Defendants mention only Plaintiff’s response to the Defendants’ Fourth Set of Interrogatories. However, Defendants argument on pp. 6 and 7 of their brief, and in particular, footnote 19, relate facts predating the submission of Defendants’ Fourth Set of Interrogatories and Plaintiff’s statements made with respect to its response to interrogatories predating the fourth set.

Defendants' lead counsel and raised the prospect of a conflict of interest. Plaintiff asked for a discussion and a resolution of this yet unresolved issue. (See Plaintiff's Exhibit G).

D. PLAINTIFF'S PROPOSED STIPULATION PROVIDES THE BEST SOLUTION AND ADDRESSES THE CLAIMED DEFICIENCIES IN PLAINTIFF'S AND THE DEFENDANTS' RESPONSES.

The only stated reason Defendants claim for filing this motion is their claim that without a proper verification they cannot reasonably and meaningfully rely on the statements made by opposing parties.⁵ This is simply untrue. The parties can enter into a stipulation to address the issue of admissibility. The Plaintiff offered to enter into a stipulation between the parties that essentially provided that any parties' unsworn answer to interrogatories would be admissible or otherwise construed to have been submitted as sworn under oath as required by Wis. Stat. § 804.08(1)(b). Defendants have not accepted this compromise.

III. CONCLUSION

The rules of civil procedure should be construed to conform the purpose for which they were promulgated. As the State Supreme Court observed over forty years ago:

⁵ Once again, Defendants inject irony in their legal argument. Plaintiff previously observed that the Defendants were condemning the Plaintiff for doing what they themselves had done. Here, on page 6 of their brief Defendants inappropriately cite to an unpublished opinion of the Wisconsin Court of Appeals in direct violation of Wis. Stat. § 809.23(3). In 1989, the penalty in one appellate case for this transgression was \$100.00. *Hagen v. Gulrud*, 151 Wis. 2d 1, 442 N.W.2d 570 (Wis. App., 1989). Although there has been some who advocate amendment, the Wisconsin Supreme Court has been clear. See generally *Matter of Amendment of Section (Rule) 809.23(3), Stats.*, 155 Wis.2d 832, 456 N.W.2d 783 (Wis., 1990). In criticizing the Plaintiff for allegedly violating one statute Defendants appear amenable to picking and choosing what other state statutes they adhere to.

Let our first observation be that the ultimate objective of the adversary trial system and of pretrial discovery is identical. The ends of justice and civil peace are best served when our trial procedure results in an informed resolution of controversy. The basic objective of our trial system, then, is the ascertainment of the truth, whether by court or jury, on the basis of those factors legal and factual, best calculated to effect a decision which comports with reality. The thought, of course, is that justice can more likely be done if there is a preliminary determination of the truth of facts.

A second observation is that our liberal rules of pretrial discovery (and the attorney-client privilege for that matter) are meant to facilitate the job of the adversary system in accomplishing its objective. 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.

State ex rel. Dudek v. Circuit Court, 34 Wis.2d 559, 576, 150 N.W.2d 387 (Wis., 1967).

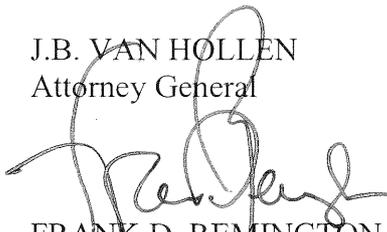
Formality without purpose does no service to the “ends of justice and civil peace.”

Plaintiff has given Defendants the information they asked for, but without a caption and absent a verification by a person to their liking.

The Plaintiff respectfully requests that this Special Discovery Master deny Defendants’ motion. Unable to secure a reasonable resolution to what appears to be a problem for both Plaintiff and most Defendants, Defendants turn to the Court for an order. Much like the Supreme Court, this Special Discovery Master has observed that “in litigation of this magnitude, the interests of the parties, the public, and the judicial system itself, are better served by compromise (and a little give-and-take), than by nose-to-nose advocacy at the discovery state of the proceedings.” The interest of all involved can be well served by means other than the order now demanded by the Defendants.

Dated this 3rd day of March, 2008.

J.B. VAN HOLLEN
Attorney General

A handwritten signature in black ink, appearing to read "Frank D. Remington", written over the printed name below.

FRANK D. REMINGTON
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