
STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CV-1709

AMGEN INC., et. al.,

Defendants.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS
"MOTION TO QUASH DEFENDANTS'
NOTICE OF SECTION 804.05(2)(E) DEPOSITION TO STATE OF WISCONSIN
CONCERNING ELECTRONIC MAIL MESSAGES"

The Plaintiff respectfully submits that based on the arguments below and on the grounds stated in the Plaintiff's motion, this Special Master should grant the Plaintiff's motion to quash Defendants' "Notice of Section 804.05(2)(e) Deposition To State Of Wisconsin Concerning Electronic Messages."

The Plaintiff believes that the Defendants have mischaracterized both the issue and the facts raised in the Plaintiff's motion.¹ Plaintiff's motion raises only two issues

¹ In their brief the Defendants accuse the Plaintiff of attempting to "blockade discovery," "obstruct discovery," "shirk its obligation," and characterize (presumably the motion) as a "transparent attempt to thwart important discovery." This vitriol is all contained in the first three sentences of their brief! This incivility and these patent mischaracterizations serve no purpose and do nothing to focus this Court on the issues or the valid legal arguments in support of the parties' position. *See generally* SCR 62.

and the questions are succinctly framed below. The answer to both questions, Plaintiff submits, is “no.”

I. SHOULD THE DEFENDANTS BE ALLOWED TO TAKE A DEPOSITION, THE PURPOSE OF WHICH IS TO INVESTIGATE WHY THE PLAINTIFF WILL NOT ELECTRONICALLY SEARCH ITS COMPUTERS FOR EMAIL MESSAGES, IN ADVANCE OF A DECISION ON DEFENDANTS’ OWN MOTION TO COMPEL THEIR PRODUCTION?

Plaintiff filed its motion to quash the notice of deposition, in large part because the underlying issue of whether the Plaintiff must electronically search for email messages was already pending before this Special Master. This underlying issue was raised by the Defendants in their “Motion To Compel Production Of Email.” From the Plaintiff’s perspective, given the pendency of Defendants’ Motion to Compel and in light of the fact that the Defendants themselves filed the motion to quash, the deposition of the Plaintiff’s consultant could and should wait until the underlying issues were resolved. Unable to secure an adjournment, Plaintiff filed their Motion to Quash the Notice.

Obviously, as stated in response to “Defendants’ Motion to Compel the Production of Email,” the Plaintiff believes it has already done all that is required of it under the law and the matter should, for now, be put to rest. More importantly, Plaintiff argued that it should not be ordered to electronically search its computer system for email messages using Defendants’ “search terms.” As support for that position, the Plaintiff has argued that because the Circuit Court has invalidated the Defendants’ original request for production of documents, no outstanding request to produce is currently pending. Therefore, Plaintiff argued that this Special Master should not order any action in accordance with or pursuant to an invalid discovery request. The Plaintiff also argued that the Defendants have no authority to control the manner in which the Plaintiff

discharges its obligation to produce relevant email messages. In short, the Plaintiff believes that if this Special Master denies the Defendants' "Motion To Compel The Production Of Email," then there is no reason to conduct a discovery deposition, the sole purpose of which is to probe the State for reasons why it will not or cannot electronically search its computer system for email.

The Defendants' brief does not directly address the relationship between the two motions or the Plaintiff's request, stated in the alternative in the motion, to adjourn the deposition pending a decision on the underlying issues. A decision on the underlying motion will at most obviate the need for this deposition, or at a minimum, may provide guidance on the proper scope of inquiry by stating the respective obligations of the parties in searching for relevant documents, regardless of whether they are in electronic format or not. In the interest of judicial economy and in accordance with the arguments more particularly stated in Plaintiff's Brief Opposing Defendants' "Motion To Compel The Production Of Email," the Plaintiff requests that this Special Master grant this motion to quash.

II. SHOULD THE DEFENDANTS BE ALLOWED TO DEPOSE THE PLAINTIFF'S CONSULTANT?

Regardless of the resolution of the underlying discovery issue and the resulting issue above, the Plaintiff's motion raises at least one independent defense. Plaintiff's motion to quash seeks protection from a discovery request that the Plaintiff believes is intended solely to exploit the relationship between the Office of the Attorney General and

the person with whom it consulted on a specific issue raised by the Defendants in this litigation.²

This motion comes on before the court because the Defendants articulated six defined areas of inquiry demanding that the Plaintiff produce a person or persons for deposition on each and every topic listed. Every topic, other than number five, related specifically to searching the State's computer system using Defendants' search terms, the discussions between counsel and the eventual impasse on the pending discovery dispute.

The historical facts and procedural history behind the parties' disagreement on the email question are thoroughly discussed in the briefs the parties filed pertaining to Defendants' Motion to Compel. For purposes here, the salient facts are as follows:

1. The Defendants demanded Plaintiff produce documents
2. The Plaintiff produced all relevant documents it could find, including copies of electronic documents and email messages. One thousand four hundred and thirty-two (1,432) pages of emails were produced on top of one thousand three hundred and twelve (1,312) pages of written correspondence.
3. The Defendants suggested that the Plaintiff could find more documents if the Plaintiff would use a computer program to search the State's computer system.
4. The Plaintiff agreed to undertake an electronic search of documents other than email messages, based on negotiations satisfactory to both parties. However, the Plaintiff objected to electronically searching for email messages claiming, among other things,

² The Defendants claim on page 5 of their brief that "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

that it was over burdensome, and not likely to lead to the discovery of relevant and admissible evidence.

5. The Defendants' counsel suggested to Plaintiff's counsel that this burden could be lessened if the State bought and loaded commercially available software such as ISYS and Gwava-Reveal. The State did not own nor currently use this software. Both programs became relevant only because they were suggested by the Defendants' counsel in this litigation as a means of compromise over the parties' discovery dispute.

6. Plaintiff's counsel consulted with Department staff on whether the burden of searching for emails could be lessened by doing what Defendants' counsel suggested. More than one meeting was held and specific instructions were given to those in attendance by legal counsel. These consultants responded to Plaintiff's counsel by stating that despite their efforts to lessen the burden of doing what Defendants demanded, none of the Defendants' counsels' suggestions seemed to satisfactorily work. Plaintiff's counsel fully communicated this information back to Defendants' counsel as part of ongoing discovery negotiation. Contrary to what is alleged in their brief, Plaintiff never said that it was not possible to electronically search its email system, but that it would be extremely time consuming and extraordinarily burdensome. (Again, for a more detailed recitation of these full, frank, and complete recitations, please consult Plaintiff's Brief in Opposition to Defendants' Motion to Compel the Production of Email messages.)

7. Apparently dissatisfied with the Plaintiff's position on electronically searching for emails, as expressed through legal counsel, the Defendants filed a motion with this

the plaintiff to testify about them." This statement is at odds with both the language of the notice and Wis. Stat. § 804.05(2)(e).

Special Master seeking an order compelling the Plaintiff to electronically search for emails using Defendants' search terms.

8. Simultaneously, Defendants served upon the Plaintiff a "Notice of Deposition" that essentially demanded the Plaintiff produce for deposition the person upon whom the Plaintiff's counsel relied in making its initial objection and the person who provided information to Plaintiff's counsel during the parties attempt to negotiate a resolution to the underlying issue.

A. Topics One Through Four and Topic Six Relate Explicitly To Issues Raised By The Defendants In This Litigation

The Defendants argue that even if these deponents are the Plaintiff's "consultants," then the Plaintiff has not shown that their knowledge was "prepared in anticipation of litigation or for trial." (Defendants' brief at p. 8). The Defendants' own articulation of the "Area of Inquiry" effectively rebut this assertion³. The Defendants' Notice asks the Plaintiff to name a person or persons who can testify as to the following:

1. Plaintiff's knowledge regarding the technical issues the State alleges make the State's search, collection, retrieval and/or extraction of email that are responsive to Defendants' discovery request unduly burdensome, including the search, collection, retrieval and/or extraction of email sent to or from former State employees.

2. Plaintiff's knowledge regarding what efforts the State has undertaken to ascertain the actual burden, cost and/or difficulties of searching email because of the technical issues referenced above in area of inquiry #1.

3. Plaintiff's knowledge regarding the alleged difficulties involved with acquiring, installing and/or running commercially available

³ In their brief, the Defendants only provided a "brief summary" of the topics demanded in their notice. These summaries appear to sanitize the original request and are, therefore, somewhat misleading. Reprinted above in full, the language used by the Defendants clearly expose their intent and the scope of these proposed depositions.

software designed to search for email – including software such as “ISYS System Software,” or “Gwava-Reveal” software – on Plaintiff’s computer systems, networks, or databases.

4. Plaintiff’s knowledge regarding what efforts the State has undertaken to ascertain the actual burden, cost and/or difficulties of acquiring, installing, and/or running commercially available email search software as referenced above in area of inquiry #3.

5. Plaintiff’s knowledge regarding the costs to the State of adding the additional IT staff and/or capacity that may be required for the State to search its computer systems, networks, or databases for relevant and responsive email.

The language in these five topics is clear and direct. The areas of inquiry specifically reference:

1) Plaintiff’s objection as contained in its response to Defendants’ discovery request that what is demanded is unduly burdensome because of technical issues, (areas number 1 and 2);

2) The position articulated by Plaintiff’s counsel in discovery negotiations that purchasing and installing commercially available software was not acceptable to the Plaintiff, (areas number 3 and 4 and 6).

The suggestion in Defendants’ brief that these topics do not relate explicitly to matters raised during and as a result of this litigation is specious. Who would know anything about computer software that the State does not own, has never used, but the persons who Plaintiff’s counsel relied upon in a good faith attempt to resolve ongoing discovery disputes as demanded by Defendants’ counsel. More importantly, the language in areas one, two and six specifically reference Defendants’ discovery request. Clearly all of these areas of inquiry relate to this litigation and counsel’s investigation of a possible resolution to an ongoing discovery dispute.

What is even more apparent by the language of these five topics is Defendants' apparent disdain for Plaintiff counsel's explanation of its good faith attempt to resolve the discovery dispute and the efforts, as described by counsel, that the State of Wisconsin undertook to avoid, albeit unsuccessfully, the motion to compel. In short, Defendants seek nothing more than direct access to the Plaintiff's consultant and its client and their effort should be denied.

The holding in *Halldin v. Peterson*, 39 Wis.2d 668, 674, 159 N.W.2d 738 (1968) is directly on point. In *Halldin* the court was asked to decide whether the circuit court acted properly by ordering both parties to name every doctor and x-ray technician who examined the pertinent x-rays. Here, in this case, under the guise of Wis. Stat. § 804.05(2)(e), the Defendants effectively accomplish the same thing by demanding the Plaintiff produce the person most knowledgeable about the topic described.

In reversing the order of the circuit court, the Supreme Court in *Halldin* cited *State ex rel Dudek v. Circuit Court*, 34 Wis.2d 559, 150 N.W.2d 387 (1967) and ruled that “[r]equiring discovery of the names of doctors and X-ray technicians who have examined the X rays at the request of the Plaintiff’s counsel would be a substantial obstacle to the proper and necessary trial preparation.” *Halldin* at 674. There, as here, “[t]he only purpose to be served by requiring the exchange of names of consultants would be to let a party learn how diligent his opponent has been. This information is obviously not relevant to the controversy.” *Id.* at 675.

It makes no difference here that the Defendants did not name “the consultant” in their notice of deposition. Although the Defendants used the process set forth in Wis. Stat. § 804.05(2)(e), they effectively described the topic with such particularity as to

make clear their intent, to cross-examine the person or persons Plaintiff's counsel relied on in defending the State in the pending and ongoing discovery dispute. Plaintiff respectfully requests this Special Master deny them this unwarranted and inappropriate effort to foray into the protected province of the attorney work product privilege and the protected relationship between the lawyer and their consultant.

B. Claiming That The Deposition Only Seeks "Factual" Testimony Is A Red Herring

The Defendants advance a number of other arguments in support of their position. One of those arguments is that because Defendants' only desire "factual" information, it does not make a difference that the deponent is the State's consultant. This Special Master should reject this artificial distinction. It has no support in the law as applied to these facts.

The Defendants' "areas of inquiry" one through four and number six are topics that only persons involved in the prosecution of the Defendants' fraudulent conduct would know about. Because of this fact, and this fact alone, it is not possible to distinguish between what information the state employee generally knows about the email system from issues that arose from this litigation. The only exception to this is area of inquiry number five. It may be that Defendants can conduct a deposition about the State's email system without intruding on Plaintiff's work product. (i.e. See Topic Five) But, it appears Defendants are unwilling to this limitation.

The Defendants accuse Plaintiff's counsel of attempting to "improperly exploit the attorney work product doctrine to prevent discovery ...".⁴ Either the information is "work product" or it is not. If it is in fact the product of an attorney's work, then the law is clear that, except for very limited exceptions, opposing counsel does not have access to it, and for good and laudable reason. There is nothing either improper nor exploitive about Plaintiff's invocation of its right to protect its attorney's work product as codified in Wis. Stat. § 804.01(2)(d)2. Indeed, our entire civil jurisprudence depends upon it. Defendants' castigation of Plaintiff's motives aside, this Special Master should grant the motion to quash

III. CONCLUSION

In footnote seven of their brief Defendants admit that they desire to cross-examine the Plaintiff's consultant on "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."

In *Dudek* this court concluded that a lawyer's work product:

"... consists of the information he has assembled and the mental impressions, the legal theories and strategies that he has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, mental impressions, personal beliefs, and other tangible or intangible means.

"This broad definition of lawyer's work product requires that most materials, information, mental impressions and strategies collected and adopted by a lawyer after retainer in preparation of litigation and relevant to the possible issues be initially classified as work product of the lawyer

⁴ The Defendants again resort to hyperbole which should be ignored. But Defendants also accuse the Plaintiff of "withholding" sworn statements to support its position. These are strong words and they are wholly inappropriate given the complete absence of any underlying factual support.

and not subject to inspection or discovery unless good cause for discovery is shown.”

Hallidin v. Peterson, 39 Wis.2d 668, 673-74, 159 N.W.2d 738 (1968). The Defendants ask to be allowed to inquire into the legal and factual research conducted by Plaintiff’s counsel regarding Defendants’ demand that Plaintiff search its email system. They ask to discover the Plaintiff’s work product.

“Wisconsin case law holds that an expert’s pretrial examinations are part of an attorney’s work product and thus protected from discovery.” *State v. Rachel*, 224 Wis.2d 571, 575, 591 N.W.2d 920 (1999). This is because “as a matter of public policy, prematurely compelling any expert ... to submit to a deposition would deter thorough defense investigation.” *Id.* at 576. Allowing this deposition would “inhibit candid communication between [the expert and] counsel.” *Id.* This last point was presaged by the court in *Blakely v. Waukesha Foundry Co.*, 65 Wis.2d 468, 481, 222 N.W.2d 920 (1974) wherein the court stated:

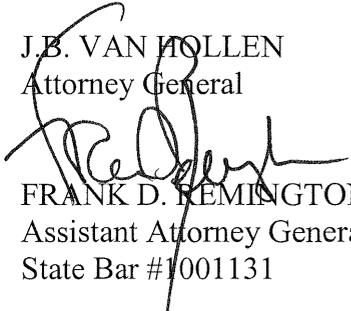
Unless there has been a waiver of the work product privilege, as there was here, we deem it of the utmost importance that under our adversary system counsel be encouraged to do a thorough job of investigation, including consulting experts, without having the results of such investigation used against their client, when such expert is not actually to be used as a witness in the trial, subject to the exceptions, where good cause is shown, set forth in *Dudek and Crull v. Preferred Risk Mut. Ins. Co.* (1967), 36 Wis.2d 464, 153 N. W. 2d 591.

This Special Master need only read the areas of inquiry numbers one through four and number six and the admissions of the Defendants in their brief to conclude that Defendants’ real aim is to discover the “results of [the Plaintiff’s] investigation” regarding the feasibility of electronically searching its email system. If allowed, this deposition will prospectively inhibit future candid

communications between counsel and people knowledgeable on the subject or subjects at hand for fear of allowing uncontrolled disclosure unrestricted and retaliatory pretrial discovery. But there are more serious consequences. If allowed, this deposition will uncover Plaintiff's factual and legal investigation for the purpose of using that investigation against the State of Wisconsin in this litigation. The Plaintiff respectfully suggests that it is of "the utmost importance" that this Special Master protect and preserve the confidence between Plaintiff and its consultant and grant this motion to quash. The facts justify it; the case law demands it.

Dated this 12th day of November, 2007.

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