
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 STRIKE THE AFFIDAVIT OF MATTHEW RAY
DATED SEPTEMBER 14, 2007

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 strike the affidavit of Matthew Ray dated September 14, 2007.

The Plaintiff originally filed one motion seeking to quash the Defendants' notice of deposition of Plaintiff's consultants and to strike the September 14, 2007, affidavit of Matthew Ray. Although both motions were joined in one document the legal issues are distinct and separate. Plaintiff therefore submits this brief in support of this motion to address the admissibility of Mr. Ray's affidavit.

The Defendants submitted the September 14, 2007, Ray affidavit in support of their motion to compel the production of email. One of the issues relating to the Defendants' motion to compel the production of email was whether searching for email messages was over burdensome. The gravamen of Mr. Ray's September 14, 2007,

affidavit was his opinion that there were “reasonably efficient and cost-effective technical solutions” to address what he understood were Plaintiff’s concerns.

The problem with the September 14, 2007, affidavit, from the Plaintiff’s perspective, was that the affidavit really did nothing more than give an unsupported and generalized opinion to contradict the Plaintiff’s objection tendered in discovery that searching for emails was over burdensome. From plaintiff’s perspective, the September 14, 2007, affidavit did not meaningfully assist the court by Mr. Ray suggesting that the best solution to the problem just happened to be a product he was licensed to sell. (See Ray September 14, 2007, affidavit at f.n. 3). Additionally, from Plaintiff’s perspective, the opinion in the September 14, 2007, affidavit was inadmissible because they were not supported by a clear statement of the expert’s foundation.

In response to the motion to strike, the Defendants supplemented the September 14, 2007, affidavit with another affidavit dated October 22, 2007¹. This curative measure seems to acknowledge the deficiency with the September 14, 2007, version. Attempting to address the deficiency, Mr. Ray now states in his October 22, 2007, affidavit that he does not need to know anything specific about “how the State has configured its GroupWise email system to provide the Court with an estimate the time or cost of an email collection... .” (October 22, 2007, affidavit of Ray at ¶7). Having said that he does not need to know how the State has configured its system to provide the court with an estimate of time or cost to do the work, Mr. Ray then contradicts himself by admitting

¹ The Defendants observe that possibly the Plaintiff has been guided by the old adage that the best defense is a good offense. Actually, that observation might not be all that inaccurate. But in response, perhaps the defendants are guilty of employing the other old

that if he knew how the State had configured its system it “would make it easier and more economical for [him] to collect GroupWise email.” Id. This statement shows two things. First, Mr. Ray does not know how the State has configured its system, and second, his so-called estimate of time and cost given in his first affidavit is inaccurate by design because of the lack of this critical supporting knowledge.

In the end, now that a second affidavit has been filed perhaps the Defendants’ only agreeable observation is that the 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.” (brief at p. 9). Plaintiff concedes that given the new affidavit there may be merit to that contention.

I. THE AFFIDAVIT OF RAY HAS LITTLE RELEVANCE AND SHOULD BE GIVEN LITTLE WEIGHT

Given the concession made in paragraph seven of his second affidavit, even if these affidavits are admissible, they should be given little or no weight. In other words, the Defendants have submitted no cogent evidence to contradict the Plaintiff’s complaint that the burden of buying, installing, configuring, and running commercially available software onto the State’s computers to search for some message between one or two state employees that contain one or more of Defendants’ words is over burdensome. There are two reasons to support the statement above. First, as discussed above, Mr. Ray presents only conclusory and self-serving statements in his affidavit. Second, and more important, Mr. Ray makes no mention of, nor considers in his estimate, and appears to be ignorant

adage, “when the law is against you argue the facts, and when the facts are against you argue the law.”

of, the fact that the Defendants have demanded Plaintiff search email messages that are not available on line, but are stored on magnetic tape.

The Plaintiff submits the affidavit of Thomas Haukohl for the purpose of describing the DHFS GroupWise Mail system including a description of what is available on-line and what are stored on backup tapes. Mr. Haukohl has the knowledge, training and expertise to support his conclusions. There appears no person better informed about the DHFS email system.

Mr. Haukohl believes that at a minimum, to search the active on-line accounts it would take over one hour per person.² (Affidavit of Haukohl at ¶6). But this estimate does not include the time expended by others and the disruption to the system. The net effective “cost” of what Defendants’ demand is much higher. Depending on the number of on-line accounts to be searched, (assuming every account was in fact on line), in the best case scenario, doing what Defendants demand would take the better part of a full week.

However, not every account is available on line. Therefore, to search the backup tapes, Mr. Haukohl estimates it would take approximately eight hours per backup tape for only restoration to the on-line system, (Affidavit of Haukohl at ¶10), plus an additional hour to search each restored account. (Affidavit of Haukohl at ¶11). But because each backup tape only captures those messages on the system at that “point in time,” the

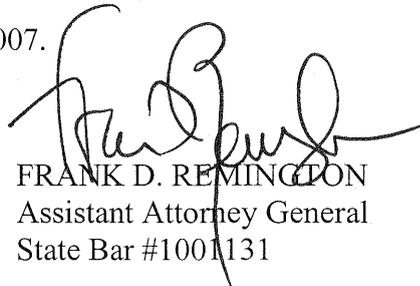
² Mr. Ray states he believes the defendants only want 25 to 30 accounts searched. The defendants have made no such concession to the Plaintiff. However, even if this were true, it would take approximately the time opined by Mr. Ray to accomplish the job.

possibility exists due to individual employee behavior, email messages that appear on one backup tape will not appear on others. It is a theoretical possibility, although admittedly unlikely, that if every backup tape had to be restored and searched, it would take nine hours multiplied times twenty-four tapes or 216 hours, (five and one half weeks) of work to search for one employee.

In the end, this would be a major disruption to the Department of Health and Family Services and would impose costs and incur time that simply do not exist. (Affidavit of Haukohl at ¶12). Completing the circle back to the arguments made elsewhere, the burden imposed is made more unacceptable by virtue of the fact that these email messages have no probative value on the relevant issues raised by this law enforcement action.

For the reasons stated in the Plaintiff's motion and in this brief, the Plaintiff respectfully requests that this court strike the affidavit of Mathew Ray on the ground that his failure to recognize the existence and complication of emails on backup tape exposes the lack of foundation necessary to support his opinion. In the alternative, the Plaintiff respectfully requests that this Special Master give Mr. Ray's two affidavits little or no probative weight.

Dated this 12th day of November 2007.



FRANK D. REMINGTON
Assistant Attorney General
State Bar #1001131

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3542