



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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October 5, 2007

The Honorable William Eich  
840 Farwell Drive  
Madison, Wisconsin 53704

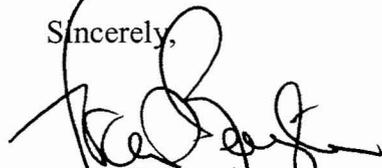
Re: State of Wisconsin v. Abbott Labs, et al.  
Case No. 04-CV-1709

Dear Judge Eich:

Enclosed you will find Plaintiff's brief in opposition to Defendants' Motion to Compel.

Also enclosed is a Notice of Motion and Motion for Protective Order and a Motion to Strike the Affidavit of Matthew Ray. The grounds supporting the motions for protective order and to strike are set forth in the motions themselves. No separate brief is filed at this time. Additional grounds supporting these motions are set forth in the Plaintiff's brief opposing Defendants' Motion to Compel. These motions are filed at this time to be consistent with the arguments set forth by the State as to why this Special Master should not order the Plaintiff State of Wisconsin to search its computer system using Defendants' proposed search terms.

Sincerely,



Frank D. Remington  
Assistant Attorney General

FDR:gdt

Enclosures

c: All Counsel of Record by LexisNexis File & Serve (w/enclosures)  
Ann Ford, Chambers of the Honorable Richard Niess (w/enclosures)

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 9

DANE COUNTY

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STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CV-1709

AMGEN INC., et. al.,

Defendants.

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STATE OF WISCONSIN'S BRIEF IN RESPONSE TO  
"DEFENDANTS' MOTION TO COMPEL PRODUCTION OF EMAIL"

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Presently before this Special Master is Defendants' request for "an order compelling the State to produce electronic mail messages ... responsive to Defendants' second set of document requests." For the reasons more particularly stated below, the Plaintiff respectfully requests this motion be denied.

First, the facts show the Plaintiff has already reasonably complied with Defendants' request. Second, notwithstanding Plaintiff's demonstrated compliance with Defendants' request, the Circuit Court has already ruled that Defendants' document request is overbroad, which is reason alone to deny this motion. Third, even if not barred as a matter of law from relitigating the validity of Defendant's discovery request, this Special Master should independently conclude that Defendants' request is overbroad. Finally, on top of all else, any effort expended to further produce emails is unduly burdensome because personal messages from or to individual state employees are

irrelevant in a lawsuit seeking to enforce state law as against the unlawful and fraudulent acts of the Defendants and are not admissible for any purpose. Plaintiff respectfully request the Special Master deny Defendants' motion to compel.

#### STATEMENT OF FACTS

The Defendants' factual recitation is incomplete. The salient facts pertaining to the Defendants' second document request and the Plaintiff's response are as follows:

1. On February 20, 2006, the Defendants served their "second document request" (hereafter "document request") directed to the Plaintiff. (Defendants' Exhibit 4).
2. After receiving extensions of time to respond, the Plaintiff served its production of documents responsive to the Defendants' document request on August 21, 2006. (Plaintiff's Exhibit 1).
3. In that response, the Plaintiff interposed various legal objections. Objection number 7 dealt with the issue of producing correspondence. Plaintiff informed the Defendants that because they had requested documents by only describing the topic or general subject, and because correspondence was not organized in this fashion, searching for correspondence would be overly burdensome. Notwithstanding this objection, the Plaintiff indicated it would nonetheless search for and produce responsive correspondence. (Plaintiff's Exhibit 1, pp 4-5).
4. In August 2006, and over the course of the intervening months, the Plaintiff produced to the Defendants 189,539 pages of documents in

response to Defendants' document request. The Plaintiff also produced its Medicaid Claims Data, data the Plaintiff acquired from pharmaceutical wholesale companies, and documents the Plaintiff acquired from third parties.<sup>1</sup>

5. During this time, the parties also met and discussed various issues. These discussions were collegial. Both parties compromised when necessary and a good many issues were resolved. The Plaintiff undertook additional work and made supplemental productions of documents on a rolling basis in part arising from these negotiations. Moreover, the Plaintiff endeavored to answer most of Defendants' questions that they asked as Defendants reviewed the documents already produced, engaging in a more collaborative basis of "informal" discovery.
6. The Plaintiff eventually produced all of the written correspondence currently possessed by the Department of Health and Family Services relating to the State's Medicaid Program maintained by that department's Bureau of Health Care Financing. Thirty-three boxes of written correspondence were produced from which Defendants marked 1,312 pages to be copied, electronically scanned and produced.
7. Additionally, the Plaintiff produced government records it located that were relevant to Defendants' document request without regard to whether

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<sup>1</sup> The Plaintiff believes that this fact as well as the facts stated below will not be genuinely disputed by the Defendants. In the interest of economy, the Plaintiff has not appended all the email to and from counsel on discovery issues. There are, literally,

the document was in “hard copy” or in “electronic form.” Almost without exception, all documents produced were electronically scanned and produced to the Defendants at the State’s expense in “electronic form” in a searchable format.

8. The Plaintiff produced to the Defendants 1,432 pages of electronic messages, (“emails”), in response to Defendants’ document request.
9. The parties engaged in a series of discussions about emails. The Plaintiff informed the Defendants that it had relied on individual employees to look for and produce hard and electronic documents and any relevant email messages to respond to Defendants’ document request<sup>2</sup>.
10. In the course of these continued discussions, the Plaintiff complained that Defendants’ document request was redundant, cumbersome, and overbroad.
11. In January 2007, the Defendants suggested a new approach by providing Plaintiff with “search terms”.
12. The Plaintiff agreed to investigate at how to implement this new approach.
13. Eventually, the parties agreed to a process to search for electronic documents. As for electronic documents (not including emails), the Plaintiff agreed to download to a compact disk all the electronic files of

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hundreds of them. The Plaintiff requests the leave to file these supporting documents if necessary or requested by this Special Master.

<sup>2</sup> It is hard to know how to respond to Defendants’ castigation of the Plaintiff for describing its actions as “old fashioned” hard work. Indeed, the Defendants boldly assert that it was “absurd” to ask competent and conscientious staff to produce responsive

persons named by the Defendants. Plaintiff hired outside staff to then search these disks using all of the terms given to the Plaintiff by the Defendants. To date the Plaintiff has searched the electronic files for twenty employees eventually producing to the Defendants 56,907 pages of electronic documents. This process is ongoing as the Defendants have added new names to the list of persons Defendants want searched. (*See* letter dated June 25, 2007, Defendants' Exhibit 11)

14. As to email messages, however, the parties were not able to agree on a process to search the State's computers generally or the computers of these selected state employees. The Plaintiff explained the disparity of moving forward only on electronic documents was caused by the nature in which emails were stored on the State of Wisconsin DHFS computer servers.

15. In a letter dated June 20, 2007 the Plaintiff provided a detailed explanation of its position on the email issue at that time:

The defendants would have the plaintiff buy commercial software to enable the State's computer system to search the servers that store electronic messages by looking for selected search terms. The plaintiff already gathered responsive documents in the old fashioned way by asking individuals to provide relevant and responsive records, documents that were assembled and were already produced. I understand that the defendants may believe that using the computer to do the work formerly done by humans may result in a more reliable final product. But with due respect, the plaintiff rejects the defendants' demand that they dictate the means by which the

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records regardless of their format, hard copy or electronic, even though this effort led to the production of 1,432 pages of electronic messages. (Brief at p. 8).

plaintiff discharges its obligation under the discovery statutes.

This is not to say that plaintiff was unwilling to compromise. As you know, the plaintiff looked into the question by considering various options including the first software suggested by the plaintiff that was incompatible with Groupwise. Our IT staff also looked at your second suggestion, "Guava Reveal." The problems are significant and the burden to do what defendants demand is still overwhelming. Although I am far from knowledgeable in these matters, I will try to explain.

As we discussed, the DHFS use GroupWise e-mail, not Microsoft Exchange which you and your consultants may be more familiar with. Using the less common GroupWise system means that the e-mail servers are not part of the SAN environment. In effect, search tools that can be used to search for documents that are stored in the SAN cannot "see" the e-mail servers and therefore cannot be used to search e-mails. Thus, the simplest solution is not available in this environment.

I am also told that another difference is that while documents can be stored locally, GroupWise e-mails are only stored in the e-mail server environment, which is controlled by the GroupWise server software. The client software does not store any e-mail on the local PC. Under this system even draft e-mails are stored on the e-mail server. The GroupWise client search tool offers only the individual user the means to search through the current contents of the e-mail space assigned to him or her.

Additionally, I am told that GroupWise has technical limitations that prevent it from being effectively used as a means to store a large volume of historical e-mail on-line. While e-mails are backed up in their server environment, the backup methodology is fundamentally different than the methodology applied to document storage. Document files are individually backed up. GroupWise e-mails are backed up only by the post office.

You should also be aware that the GroupWise client software has the capability to archive e-mail, but staff is under no obligation to use this capability at the time e-mail messages are created or stored. This has always been the

case. If a person individually decides to use the archiving capability, the archive files are stored either on the local drive or on the Home drive. But GroupWise e-mail archives are encrypted using an internal algorithm that provides unique security for each GroupWise user. They are viewable only from the original GroupWise account client installation that created the archive, thus, further complicating matters.

I was still in the process of digesting this information and looking for other options when I received your message demanding a final answer no later than today. I believe that your question is: whether the plaintiff will purchase, load, and configure the commercial software marketed by "Guava Reveal" to search the DHFS e-mail servers using all the search terms suggested by the defendants. The answer to this question is "no." This answer should not be construed to mean that we are unwilling to consider other options that may result in less burden in order to satisfy what may be defendants' revised discovery demands. The installation of commercial software on the DFHS computers does not significantly diminish the burden on the State to the point that it can or will agree to produce individual electronic messages of state employees. The individual electronic messages of state employees are irrelevant and not likely to lead to the discovery of relevant and admissible evidence.

(Defendants' Exhibit 15).

16. Since June 2007, the parties have unsuccessfully attempted to negotiate a compromise. Although originally Defendants placed no limit on emails that they claim should be produced, Defendants have offered "at least initially" (Defendants' brief at p. 3) to narrow their focus to a subset of individuals including approximately 32 current and former state employees plus any other state employee who contributed one or more documents to Plaintiff's response to the Defendants' document request.
17. Defendants have already used copies of emails produced by the Plaintiff in the depositions of state witnesses, marking them as exhibits. (*See*

Plaintiff's Exhibit 2 containing exhibits marked by Defendants' counsel on September 27, 2007 and used during the deposition of DHFS employee Carrie Gray)

## ARGUMENT

The present motion is brought by the Defendants, pursuant to Sec. 804.12 Stats., alleging that the Plaintiff has not complied with its obligations set forth in sec. 804.09 in responding to Defendants' earlier document request. "The question of whether the burden and expense of producing information in a particular case is excessive in light of the information's value is a question of law which [the court] determine[s] independently. *Earl v. Gulf & Western Mfg. Co.*, 123 Wis. 2d 200, 206-207, 366 N.W.2d 160 (Wis.App., 1985), (citation omitted).

### I. THE PLAINTIFF HAS ALREADY REASONABLY COMPLIED WITH DEFENDANTS' DOCUMENT REQUEST.

Based on a cursory review of Defendants' brief, one might believe that the Plaintiff has refused to produce relevant and responsive electronic messages in response to Defendants' document request. In their brief, the Defendants accuse the Plaintiff of having "repeatedly refused to make a comprehensive document production ... ." (Brief at p. 1). But the facts establish otherwise. The Plaintiff has discharged its obligations under the law in at least two respects. First, the Plaintiff diligently searched its files and

produced all the discovered relevant and responsive documents<sup>3</sup>. Second, the Plaintiff has undertaken a search of documents stored electronically and from these electronic files the Plaintiff has produced almost fifty seven thousand pages.

The Plaintiff believes that it has already produced all documents relevant to the Defendants' document request. The Defendants have submitted no evidence to support their accusation that Plaintiff has been either evasive or incomplete. Instead, Defendants' only complaint is that the Plaintiff refuses to search its computer system for emails using commercial software to generate a list of electronic documents that contain one or more of Defendants' "search terms." What the Defendants really mean to say to this Special Master is that they do not like the process the Plaintiff used to produce documents in response to their document request and that maybe there are emails to or from some state employee containing one or more words on Defendants' list. Defendants are on a classic fishing expedition.<sup>4</sup>

Section 804.09 Wis. Stats. does not require nor does it give Defendants the right to demand that Plaintiff not rely on State record custodians to produce responsive documents. Section 804.09 Wis. Stats. does not require, nor does it give Defendants the right to demand, the Plaintiff buy, load, reconfigure and run some kind of commercially available computer software to search for terms that the Defendants believe might lead to the discovery of interesting emails. The Defendants cannot dictate the process by which

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<sup>3</sup> On January 24, 2007 the defendants also took the deposition of DHFS employee Mr. Eli Soto for the purpose of investigating the manner in which the Plaintiff undertook the process of producing responsive documents.

<sup>4</sup> Black's Law Dictionary defines a "fishing trip or expedition" as "[u]sing the courts to find out information beyond the fair scope of the lawsuit. The loose, vague, unfocused questioning of a witness or the overly broad use of the discovery process. ..."

the Plaintiff assumes and discharges its discovery obligation because they think beyond the fourteen hundred pages of emails they have already received, there may be other emails they would like to see. Plaintiff respectfully requests that the Defendants' motion be denied.

The Defendants condemn the Plaintiff for responding to their request for documents by asking State record custodians to produce documents responsive and relevant to the Defendants' document request regardless of the form they are in (both hard copy and electronic). (Brief at p. 7). Instead, Defendants assert that the "standard civil discovery practice" is to employ some computer program that makes the human contribution obsolete. The Wisconsin Department of Justice is heretofore unaware of this "standard practice."

The Plaintiff respectfully suggests that it is Defendants who have been flawed and neglectful in their actions. Based on their suggestion that using a computer is "standard discovery practice," it is reasonable therefore to assume this is the method used by the Defendants in responding to Plaintiff's document requests. The Defendants have dumped more than fourteen million (14,000,000) pages of documents upon the Plaintiff. By comparison, using conscientious and competent record custodians and by employing old fashioned human hard work the Plaintiff produced approximately 190,000 relevant succinct and responsive government documents and records. If this so called "standard discovery practice" produces fourteen million pages in response to Plaintiff's targeted requests, Plaintiff respectfully suggests change may be in order.

The Defendants offer no law or citation of authority to support their claim that Wis. Stat. § 804.09 requires the Plaintiff to purchase computer software and use

Defendants' terms to search the State of Wisconsin computer email system and dump millions of pages upon the opposing party. No motion to compel can be sustained under sec. 804.12 Wis. Stats. predicated on the claim that the opposing party did not perform the search for the documents requested in the manner most desired by the opposing party. More importantly, the facts show Plaintiff has reasonably complied with Defendants' request. Plaintiff respectfully requests this Special Master deny Defendants' motion to compel.

**II. DEFENDANTS' MOTION IS BASED ON A DISCOVERY REQUEST ALREADY ADJUDGED BY THE CIRCUIT COURT AS "OVERBROAD" AND "IMPRECISE"**

To the extent that there is any disagreement between the parties, it was over whether Defendants' document request is overbroad, ambiguous and genuinely not conducive to a methodical discovery process. The Plaintiff argues above that it has faithfully discharged its statutory obligation to search for relevant records as demanded in the Defendants' document request. The Defendants obviously disagree as evidenced by their motion to compel.

The answer as to who is correct on this disagreement has already been answered. On August 15, 2007, the Circuit Court ruled that Defendants' document requests was overbroad in both Defendants' definition of "the Plaintiff" and Defendants' definition of "document." (Plaintiff's Exhibit 3). This Special Master should not be put in the position by the Defendants to contradict the law of this case and the decision and order of the Circuit Court. The Circuit Court has already ruled concerning the over-breadth of the Defendants' documents request and having lost on its motion, the Defendants cannot and

should not be allowed to forum shop and seek enforcement of the same document request now in the context of this motion to compel.

A. THE CIRCUIT COURT RULED THAT DEFENDANTS FAILED TO DRAFT CLEAR AND CONCISE REQUESTS

The Circuit Court held that the Defendants' second request for production of documents was overbroad. (Plaintiff's Exhibit 3). That decision is dispositive of the issue now presented to this Special Master. "[A] decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation." *State v. Brady*, 130 Wis. 2d 443, 447, 388 N.W.2d 151, 153 (Wis.,

1986) (quoted source omitted). There is "the old maxim that one should not be twice vexed for one and the same cause." *Kiel v. Scott & Williams, Inc.*, 186 Wis. 415, 420, 202 N.W. 672, 674 (Wis. 1925). "[P]arties should not have to litigate issues which they have already litigated." *Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464, 469 (C. A. 3 1951). The principle "rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (U.S. 1948). The Defendants, having tested their document request in Circuit Court, and having lost, cannot resurrect the document as a basis for the instant motion to compel.

The Defendants would have this Special Master "order the State to search for and produce relevant email responsive to [Defendants' second request for production of documents.]" (Brief at p. 5). The Defendants earlier would have the Circuit Court order the Plaintiff to preserve documents potentially relevant to Defendants' second request for production of documents. The Circuit Court denied Defendants' motion and held that the

Defendants' second request for production of documents was defective. (Plaintiff's Exhibit 3). This Special Master should similarly deny Defendants' motion. A document so condemned by the Circuit Court should not now be the basis for this motion to compel.

The Plaintiff opposed Defendants' motion that they filed in Circuit Court and that brief is attached as an exhibit here. (Plaintiff's Exhibit 4). Without overstating the point, the Circuit Court adopted the legal reasoning set forth in the State's brief and the Circuit Court held that the Defendants' document request was overbroad. (Plaintiff's Exhibit 3, p. 1). The Circuit Court refused to order the Plaintiff to preserve documents not yet produced because "any order drafted in accordance with Defendants' request would be virtually meaningless, and would inevitably yield endless ancillary motion practice and other litigation mischief, none of which would advance this case one iota." (Id.).

Defendants' document request was written in such a way, from Plaintiff's perspective, as to make it impossible to satisfy.<sup>5</sup> In other words, the Circuit Court accepted the Plaintiff's argument that it was not possible to define a specific and discernible category of documents "relevant" to the request, either then, for preservation or as now, for production. Similarly, if what the Plaintiff has already done is not enough, then the fault lies in the underlying document, not in the actions of the Plaintiff.

The Dane County Circuit Court suggested to the Defendants that they submit to the Plaintiff a "precise" document request. The Defendants actions speak louder than their words. Refusing to recognize the failure contained within the language of their own

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<sup>5</sup> This characterization is supported by the fact that over fourteen hundred pages of emails were produced to the apparent dissatisfaction of defendants' counsel

document request, the Defendants ostensibly refuse to rephrase their document request. Instead, Defendants filed this motion based on their defective document request without mentioning the earlier Circuit Court proceeding. At a minimum, this “end run” around the Circuit Court should be viewed by this Special Master with suspicion; at most, the motion should be rejected outright as the kind of “litigation mischief” predicted by the Circuit Court but now presented outside its watchful eye.

**B. DEFENDANTS’ DOCUMENT REQUEST IS IN FACT OVERBROAD**

The Defendants’ document request was a clear attempt to draft a demand with such sweeping breadth and unyielding magnitude so as to give them cause for the rest of the litigation justification to say that on February 20, 2006 they asked for “everything.” The problem with this kind of document request is that its broad and sweeping generality does not translate well into easy or effective implementation. If this Special Master is inclined to duplicate the work of the Circuit Court, the Plaintiff is confident that this Special Master will reach the same conclusion as did the Circuit Court. The same defects recognized by the Circuit Court are unaddressed and still exist and are ultimately reasons again for denying Defendants’ redundant motion.

All of the discovery disputes, the Defendants’ motion in the Circuit Court, and now this motion to compel can be traced back to the defective over-breadth of the Defendants’ document request. If the Plaintiff has been unable to produce all the documents that Defendants think relevant, it is because the original request is, as noted by the Circuit Court, anything but “precise.”

Depending upon how it is counted, Defendants demanded documents relating to approximately 93 separate subjects, inclusive of enumerated subparts. Notably, none of

the enumerated requests specifically or explicitly asked for a particular electronic message. Rather, the Defendants defined the term “document” to include emails and left to the specific request a demand for all “documents” relating to what was therein described.

The Plaintiff interposed various objections to the Defendants’ document request. (Plaintiff’s Exhibit 1, pp 2-5). One objection concerned the overbreadth of the request as it related to whom it was directed. (*See* Defendants’ document request at Defendants’ Exhibit 4, definition 39). Although the parties attempted to compromise on the scope and breadth of Defendants’ document request, no final resolution was produced. As stated in their brief to this Special Master, the Defendants would have this Special Master order the Plaintiff to search for relevant emails sent by all of the governmental entities, and employees within, as described in Defendants’ request for production of documents at p. 7 in definition 39<sup>6</sup>.

The Plaintiff reiterates its argument as set forth in its earlier brief filed with the Circuit Court at pp 2-4 and 6-7. The Plaintiff argued in that brief that Defendants’ document request was overbroad and by its application to the State’s legislative branch, the document request was also constitutionally defective.

C. DEFENDANTS DEMAND A REMEDY UNAVAILABLE TO THEM

On page one of their brief, the Defendants ask this Special Master for an order compelling the State to produce email responsive to their request. (Brief at p. 1). The

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<sup>6</sup> The plaintiff notwithstanding acknowledges the position advanced by the defendants in negotiation and reflected in the statement of facts above. This particular statement is based only on what is demanded in the defendants’ motion and brief filed with this Special Master.

Plaintiff argued above that it has already produced email responsive to Defendants' request. (see *infra*). If Plaintiff had refused to produce responsive email messages, this Special Master could decide whether that outright refusal was meritorious. There was, however, no such refusal.

Plaintiff submits that Defendants do not acknowledge the fact that the Plaintiff has produced almost fourteen hundred pages of emails because that concession would undermine the strength of their argument. But perhaps anticipating Plaintiff's response, on the very last page of their brief, the Defendants frame the real issue and admit what they really want from this Special Master. On this last page, Defendants do not ask this Special Master to order the Plaintiff to produce relevant emails, instead they request an "order compelling Plaintiff to respond fully to Defendants' Second Requests [sic] by searching email of individuals identified by Defendants, and those already identified by Plaintiff as having responsive documents, using the search terms provided to the State by the Defendants." (Brief at p. 12). This request really is an entirely different issue than the one articulated on page one of Defendants' brief. Plaintiff respectfully suggests that these are neither the facts nor the law to support their request.

There are two reasons to decline Plaintiff's invitation to order the Plaintiff to use Defendants' search terms. First, as argued above, no such equitable remedy is provided under sec. 804.12(1). Section 804.12(1) states that a "discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request." Nowhere in the statutes or in Wisconsin's case law is there support for the proposition that a party has the right to demand the opposing party

electronically search all of its electronic records using words dreamed up by the requesting party.

Second, from a practical point of view Defendants' search terms are not part of their request and on their face extend beyond what was originally requested to clearly irrelevant items, things or documents. (see Defendants' exhibit 6). This Special Master should not issue the order Defendants' demanded on the last page of their brief at least in part based on this Special Master's review of these terms. Many of these terms are words irrelevant to this enforcement action. Some of the terms are so broad as to invite the production of documents of a magnitude beyond experience. In short, the Plaintiff respectfully requests that this Special Master deny Defendants' motion, and reject their request to force the Plaintiff to search its electronic files using its so called "search terms."

### III. ANY ADDITIONAL DEMAND FOR EMAIL RECORDS IS OVER BURDENSOME AND NOT LIKELY TO LEAD TO THE DISCOVERY OF RELEVANT EVIDENCE

Notwithstanding the irrelevance of Defendants' request for emails, the Plaintiff undertook a massive, and still ongoing, undertaking to produce all documents relating to everything demanded of it in this discovery request. Section 804.01(2)(a) Wis. Stats. states that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending [litigation]." Email messages are not relevant to the issues in this case.

#### A. DEFENDANTS' DEMAND FOR ADDITIONAL EMAILS IS OVER-BURDENSOME

The Plaintiff has neither the software nor the manpower to do what is asked of it. Notwithstanding Defendants dismissive description of the Plaintiffs' efforts, all

suggestions offered by the Defendants were received, welcomed, analyzed and ultimately declined.<sup>7</sup>

The Defendants assert that “the State refuses to consider the Gwava-Reveal software or any other commercial software designed to facilitate electronic email searches ... .” Brief at p. 5). Again, the accusation is disingenuous as the record clearly demonstrates otherwise. (See Defendants’ Exhibit 2 relating to the ISYS suggestion). What was said in the June 20th letter is still relevant. More importantly, what was said then remains factually unchallenged by the Defendants.

The Defendants’ expert, Mathew Ray, does not have an adequate foundation to support the assertions made in his affidavit. [See Plaintiff’s motion to strike the affidavit of Matthew Ray.] Mr. Ray clearly believes that all the emails are available online. What he does not know, or chooses to ignore, is that deleted emails and email accounts of former employees are stored on magnetic tape and not available by either method of “access” described in paragraph 13 of his affidavit. More importantly, recently DHFS staff spent over ten hours trying to get Guava-Reveal to work but despite consulting with that company were unsuccessful. Plaintiff objects to Mr. Ray’s conclusory and self serving affidavit. Searching for emails is not as simple as Mr. Ray suggests.

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<sup>7</sup> Defendants’ brief contains a couple of false statements that should not be left uncorrected. The Defendants attribute to the Plaintiff the conclusion that the ISYS software was “tricky.” In fact the document cited as support establishes that ISYS admitted that its own product was not designed to be applied to the system in use at the DHFS and to reformat the program, according to ISYS staff, would be “time consuming and ‘tricky.’” The Defendants also accuse the Plaintiff of rejecting Defendants’ offer to coordinate a meeting between Defendants’ IT expert and the State’s internal IT staff. In fact, the Plaintiff accepted that offer, but retreated only after Defendants’ group counsel refused to allow such discussions to be undertaken outside the presence of legal counsel

B. EMAIL MESSAGES FROM OR TO SOME STATE EMPLOYEE ARE NOT RELEVANT FOR ANY PURPOSE

The proverbial “elephant in the room” is that email messages to or from one State employee or between two employees are simply not relevant. “The right to discovery only extends to material relevant to the subject matter involved in the pending actions. Sec. 804.01(2)(a), Stats. The trial court would exceed its authority if it were to order the production of documents relevant to a claim upon which it could grant no relief” *State ex rel. Rilla v. Dodge County Cir. Ct.*, 76 Wis.2d 429, 435, 251 N.W.2d 476 (Wis. 1977).

By the time this Special Master reads this brief, the Plaintiff will have filed a “Notice of Motion and Motion for Protective Order Pertaining to Electronic Communications” and an accompanying brief. That motion and those arguments are relevant here. If emails are not relevant, then Defendants’ motion to compel should be denied.

IV. DEFENDANTS’ REQUEST FOR COSTS AND FEES MUST BE DENIED

In their final paragraph the Defendants ask for costs and fees pursuant to sec. 804.12(1)(c). (Defendants’ brief at p. 12). While the Plaintiff does not believe the Defendants are entitled to prevail on their motion, they are clearly not entitled to fees and costs. It is the long standing law of Wisconsin that costs, including attorneys fees, may not be taxed against the State without express statutory authority. *Dept. of Transp. v. Wis. Personnel Comm.*, 176 Wis. 2d 731, 736, 500 N.W.2d 664 (Wis. 1993), citing

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but demanded a context, from Plaintiffs perspective, more like an informal deposition by legal counsel.

*Martineau v. State Conservation Comm.*, 54 Wis. 2d 76, 79, 194 N.W.2d 664 (Wis. 1972) and *Noyes v. The State*, 46 Wis. 250, 251-52, 1 N.W. 1 (Wis. 1879).

Almost 100 years ago the Wisconsin Supreme Court explained the basis for this rule as follows:

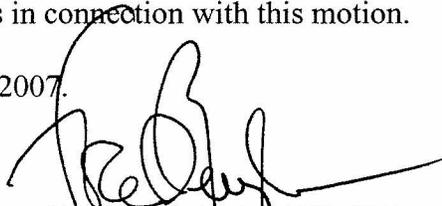
The judgment for recovery of costs against the state is erroneous. No court is authorized to render judgment for costs against the sovereign state, in absence of statute giving express authority. (citations omitted)

. . . We find no statute giving such authority. The doubt expressed by Ryan, C.J., in *Noyes v. State*, 46 Wis. 250, 252, whether general costs statutes might apply against the state in civil actions is readily resolved by reference to the rule that general statutes are not be construed to include, to its hurt, the sovereign. (citations omitted)

*Sandberg v. State*, 113 Wis. 578, 589, 89 N.W. 504 (Wis. 1902).

Section 804.12(1)(c) does not provide express authority to award costs against the state. *Dept. of Transp.*, 176 Wis. 2d at 737, *see also, State v. Beloit Concrete Stone Co.*, 103 Wis. 2d 506, 513-14, 309 N.W.2d 28 (Wis.App., 1981). Thus, there is no authority for awarding the Defendants fees or costs in connection with this motion.

Dated this 5th day of September, 2007.



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