

STATE OF WISCONSIN,

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Plaintiff,

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Case No.: 04 CV 1709

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v.

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ABBOTT LABORATORIES, *et. al.*,

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Defendants.

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**DEFENDANTS' REPLY IN SUPPORT OF A MOTION TO COMPEL THE  
PRODUCTION OF EMAILS**

Plaintiff's opposition concedes the central point of Defendants' motion – the State has failed to conduct a reasonably thorough search of its email system for emails and documents responsive to Defendants' discovery requests. Plaintiff stonewalls Defendants' request despite, or perhaps because, even the small number of emails it has produced to date reveal Plaintiff's knowledge of pharmaceutical pricing in general and of average wholesale price in particular. Plaintiff understandably expends great efforts to avoid producing emails that completely undermine its claims. Defendants, however, will be greatly prejudiced if Plaintiff succeeds in excluding such important documents from discovery.

In an effort to resolve this discovery dispute without involving the Court, Defendants agreed to narrow the scope of the email system search to 20-25 people and also suggested that Plaintiff further reduce the number of emails it must review for responsiveness and privilege by using a set of keyword search terms. Yet Plaintiff remains adamant that it will not search its email system. Plaintiff attempts to excuse this glaring deficiency by pointing to other documents it has produced. None of these documents,

however, are the result of an organized, systematic search of Plaintiff's email system. Moreover, documents culled from other locations on Plaintiff's computer network are no replacement for responsive documents that are stored within Plaintiff's email system. Plaintiff excuses its failure to search its email system by making the incredible assertion – before it conducts any search at all – that each and every email in its system is not reasonably calculated to lead to the discovery of admissible evidence. Obviously, no one, not this Court, Plaintiff or Defendants, can possibly know whether Plaintiff's email system contains emails and documents that are responsive to the issues of this case until after Plaintiff has conducted a reasonably thorough search of its email system.

Plaintiff also claims that the unique characteristics of its email system prevent it from conducting an organized search and collection of email and, further, that it lacks the resources necessary to conduct such a search. In his sworn affidavit, Defendants' Information Technology consultant Matthew Ray belies Plaintiff's claims, informing the Court that a technician with the requisite knowledge and expertise can successfully search Plaintiff's email system at a reasonable cost. Plaintiff offers only its counsel's self-serving assertions regarding technical issues to controvert Mr. Ray's affidavit. Such statements regarding technical matters and burden are insufficient as a matter of law to rebut Mr. Ray's affidavit.

**I. THE COURT SHOULD GRANT DEFENDANTS' MOTION BECAUSE PLAINTIFF ADMITS IT HAS NOT SEARCHED ITS EMAIL SYSTEM FOR RESPONSIVE EMAILS AND DOCUMENTS**

Incredibly, Plaintiff admits it has not conducted an organized search of its email system for emails containing information that is reasonably calculated to lead to the discovery of admissible evidence. Despite this, Plaintiff informs the Court of its purportedly unassailable conclusion that its email system does not contain such emails.

Even the small number of emails produced thus far demonstrate that Plaintiff is mistaken. Moreover, recent case law regarding the discovery of email requires Plaintiff to search its available electronic systems for emails and documents that contain information that is reasonably calculated to lead to the discovery of admissible evidence. For these reasons, the Court should grant Defendants' motion.

**A. Plaintiff's Emails Contain Information That Is Reasonably Calculated To Lead To The Discovery of Admissible Evidence**

In a remarkable blanket assertion, Plaintiff reveals its desperation to avoid discovery of its email system by advancing the fiction that its system does not contain even a single email authored or received by any of the targeted state employees that is reasonably calculated to lead to the discovery of admissible evidence in this case.<sup>1</sup> (State of Wisconsin's Brief In Response To "Defendants' Motion To Compel Production of Email" at pages 1-2, 17, 19.)<sup>2</sup> In fact, emails included in the small production Plaintiff has made flatly contradict the representations of its counsel. Below are brief quotes from just a few of Plaintiff's emails revealing its knowledge of pharmaceutical pricing and average wholesale price:

<u>FROM</u>	<u>TO</u>	<u>DATE</u>	<u>LANGUAGE</u>
<u>Ted@chsra.wisc.edu</u> (Ted Collins)	<u>Whiteas@dhfs.state.wi.us</u> (Carrie Gray)	2/24/98	However, since AWP (i.e. ain't what's paid) prices rarely reflect the market, we should continue to have a MAC price.

<sup>1</sup> Plaintiff's desperation is further demonstrated by the Motion for a Protective Order Barring Defendants from Requiring Wisconsin to Search Its Electronic Files For What Defendants Call Government Knowledge Documents, served on Defendants via LexisNexis File and Serve on October 9, 2007. Defendants will respond to Plaintiff's latest filing under separate cover and there argue in greater detail why discovery of these emails is appropriate.

<sup>2</sup> Hereinafter, all references to the State of Wisconsin's Brief In Response To "Defendants' Motion To Compel Production of Email" shall be denominated as "Plaintiff's Opp. at \_\_\_").

<u>FROM</u>	<u>TO</u>	<u>DATE</u>	<u>LANGUAGE</u>
Kimberly Smithers	Carrie Gray	8/20/01	We take \$.50 from every prescription, regardless of dispensing fee, where the "allowed" amount is greater than \$1.00. This arrangement was agreed upon by the industry in order to "save" the reimbursement rate of AWP-10%.
Theodore Collins	Carrie Gray	2/26/03	The prices currently range from \$.37 to \$.49. So we let them make a few bucks and we still save over \$2 per tab.

The emails quoted above are but a few examples that reveal Plaintiff's knowledge of actual drug prices and average wholesale price.<sup>3</sup>

In addition, other states' productions have revealed communications with Wisconsin that relate directly to the issues involved in this case. For example, the state of Montana produced a March 1998 email from an Arkansas Medicaid employee to various Medicaid personnel of other states including Peggy Bartels of Wisconsin Medicaid, that stated

"[o]ur research suggests AWP is increasing (*sic*) a bogus mark, the Wholesaler Acquisition Cost (WAC) that we have access to is often half or less of the AWP. When we pay off AWP we pay the single independent retailer the same as the chain who gets huge discounts for volume purchase ---we get none of the benefit of these discounts and an often huge markup is allowed to chain retailers. Is

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<sup>3</sup> True and correct copies of emails containing information reasonably calculated to lead to the discovery of admissible evidence already produced to Defendants are attached as Exhibits A - G to the Affidavit of James S. Zucker in Further Support of Defendants' Motion to Compel the Production of Emails (hereinafter, the "Zucker Aff.").

anybody looking at innovative ways to move away from AWP toward something that makes more sense?"<sup>4</sup>

Even the shortest survey of recent case law reveals case after case in which courts found emails contained relevant information. *See e.g., Wachtel v. Guardian Life Ins. Co.*, 239 F.R.D. 376 (D.N.J.,2006) (relevant documents included emails). In response, Plaintiff “merely makes a blanket assertion that ... emails [are] not [ ] relevant. Such a panoptic plea is unpersuasive and unavailing.” *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, No. 1:05-cv-657, 2007 WL 2687670 at \*8 (N.D.N.Y. Sep. 7, 2007). The contents of Plaintiff’s email system cannot possibly be rationally assessed until after Plaintiff has collected and reviewed emails from its email system. *See e.g. Peskoff v. Faber*, No. 04-526, 2007 WL 2416119, at \*6 (D.D.C. Aug. 27, 2007) (hereinafter “*Peskoff II*”) (“the results of the forensic examination to be had can only be accurately assessed after it is done.”).<sup>5</sup>

**B. The State Concedes It Has Not Searched Its Email System For Responsive Emails and Documents**

Plaintiff argues that it has complied with Defendants’ discovery requests, but undermines this argument by admitting that it has not conducted a reasonably thorough, electronic search of its email system for emails and documents containing information that is reasonably calculated to lead to the discovery of admissible evidence in this matter. (Plaintiff’s Opp. at 4, ¶13.) Rather than accept a discovery burden Defendants have met, Plaintiff refers throughout its paper to other documents it has produced to excuse its failure

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<sup>4</sup> *See* email produced by the State of Montana bearing the bates numbers MT016339-MT016340, attached to the Zucker Aff. as Exhibit G.

<sup>5</sup> *See, e.g. Peskoff II*, 2007 WL 2416119 at \*6 (“Nonetheless, it can be said that the [email] that has been produced thus far in this case permits the court to infer the possible existence of additional similar [email] that warrants further judicial action.”); *see also Ameriwood Indus. Inc.*, 2006 WL 3825291 at \*3 (“In light of the Samsung email, the Court finds that other deleted or active versions of email may yet exist on defendants’ computers.”); *Zubulake*, 217 F.R.D. at 317 (stating that the production of responsive emails to date suggested the existence of other responsive emails).

to conduct a reasonably thorough search of its email system.<sup>6</sup> This sleight of hand cannot mask Plaintiff's failure to comply with its discovery obligations.

Neither should the Court accept Plaintiff's view that it suffices to ask "individual employee[s to] look for and produce hard and electronic documents and any relevant email messages". (Plaintiff's Opp. at 4, ¶ 9.) Many courts have found such self-help approaches to electronic document collection to be insufficient for a variety of reasons.<sup>7</sup>

The State's admitted failure to search its email system, together with its consequent reliance on the self-selection of responsive emails by individual employees, is deficient as a matter of law.<sup>8</sup> As one Court noted, "[d]uring discovery, the producing party has an obligation to search available electronic systems for the information demanded." *Peskoff I*,

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<sup>6</sup> Plaintiff's opposition references at various times Plaintiff's production of non-email documents including: Medicaid claims data, data the Plaintiff acquired from pharmaceutical wholesale companies, documents the Plaintiff acquired from third parties, written correspondence possessed by DHFS, government records, and electronically stored documents. (Plaintiff's Opp. at pp. 2, 3, and 9). Lost in Plaintiff's various recitations is the simple fact that of a total of 189,549 pages of documents it has produced, only 1,432 pages, or approximately 0.0076%, constitute email. (Plaintiff's Opp. at 4).

<sup>7</sup> See, e.g. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317 (S.D.N.Y.) (describing the difficulties of searching through large volumes of electronically stored documents); *Ameriwood Industries, Inc. v. Liberman*, Civ. No. 06-524, 2006 WL 3825291 at \*3 (E.D.Mo. Dec. 27, 2006) ("[A]s recognized in the advisory committee's note to Fed.R.Civ.P. 26(f), some [electronically stored information (ESI)] might not be obtained during a typical search."); *Peskoff v. Faber*, No. 04-526, 2006 WL 1933483 at \*5 (D.D.C., July 11, 2006) (noting that the help of a computer forensic technologist may be required to retrieve e-mails from so-called "slack space," or "the unused space at the logical end of an active file's data and the physical end of the cluster or clusters that are assigned to an active file. Deleted data, or remnants of deleted data can be found in the slack space....") (citing *United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 46 n. 7 (D.Conn.2002)) (hereinafter "*Peskoff I*").

<sup>8</sup> Of crucial importance here, Plaintiffs relied on employees to search for relevant email. Those employees may not have had access to emails stored on other areas of the computer system to which Wisconsin's employees are not granted access by Plaintiff's I.T. policies. Thus Plaintiff's self-help collection methodology by its design may necessarily have failed to collect all emails stored in system storage areas that state employees are not permitted to access. Further, if Plaintiff's email system does not allow state employees to store emails online for more than a limited period of time, for example, for more than three months, Plaintiff has necessarily excluded from discovery any and all emails sent and received by the State's employees during the period of time preceding this lawsuit.

2006 WL 1933483 at \* 4 (citing *McPeck v. Ashcroft*, 202 F.R.D. 31, 32 (D.D.C.2001) (citing to Fed.R.Civ.P. 34(a))). The adequacy of a search is measured by a standard of reasonableness and depends on the individual circumstances of each case. *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C.Cir.1990). The question is not whether other responsive documents may exist, but whether the search itself was adequate. *Steinberg v. United States Dep't of Justice*, 23 F.3d 548, 551 (D.C.Cir.1994). Here, Plaintiff's failure to search its email system is unreasonable because it is "an available electronic system" that Plaintiff's employees used during the period of time relevant to this case to conduct business on behalf of the State.<sup>9</sup> Under these circumstances, relying on a handful of employees to self-select what in their subjective view constitute "responsive" emails is plainly not "adequate".<sup>10</sup>

Neither does Plaintiff's claim pass muster that it has met its discovery obligations concerning "electronic documents", by "diligently search[ing] its files" and "undertak[ing] a search of documents stored electronically" – while intentionally excluding its email system from those searches. (Plaintiff's Opp. at 8-9.) Here, Plaintiff conflates its production of electronic documents culled from other locations on its computer network with its obligation to search and collect emails from its email system containing information that is reasonably calculated to lead to the discovery of admissible evidence. By electronic documents, the

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<sup>9</sup> See *Peskoff II*, No. 04-526, 2007 WL 2416119, at \*4 (D.D.C. Aug. 27, 2007) (“[O]f the five possible locations where the Court explained electronic documents may exist, Defendant’s search only involved two, each of which I found was questionable in its scope.”)

<sup>10</sup> Government agencies must respond to FOIA requests by conducting a search for documents that is “reasonably calculated to uncover all relevant documents.” *Kean v. National Aeronautics and Space Admin.*, 480 F.Supp.2d 150, 156 (D.D.C.,2007). Although the instant motion is not a FOIA request, the State should be held to at least the same standard.

State could be referring to a variety of documents stored in different formats.<sup>11</sup> But Plaintiff's use of the term "electronic documents" plainly does not include emails located by a reasonably thorough search of its email system. Thus Plaintiff carefully skirts the central issue of this motion – that it has not conducted an organized and comprehensive search of its email system for email responsive to the issues of this case.

Instead, Plaintiff attempts to obfuscate the issues by claiming that Defendants would impose on it "the process" by which the State will search its email system. (Plaintiff's Opp. at 9, 15-17). Defendants have not imposed any "process" on Plaintiff. As set forth in Defendants' opening brief, for more than 18 months, Defendants engaged in a protracted dialogue with Plaintiff to identify a practical way for the State to search for and produce responsive emails from its email system. As part of that process, Defendants suggested the State consider using a list of search terms, referred to as keywords, because keyword searching to identify responsive documents has become a common-sense approach to solve discovery disputes in the digital age.<sup>12</sup>

Ignoring this now well-established law, Plaintiff denigrates Defendants' request for an order compelling the State to conduct an organized, reasonably thorough search and production of emails from its email system as a "fishing expedition". (Plaintiff's Opp. at 9.)

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<sup>11</sup> For example, electronic documents include documents created by word processing software such as Microsoft Word, Microsoft Excel and documents saved as ".pdf files" by the widely used Adobe Acrobat software.

<sup>12</sup> See *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*, No. CV 05-1516-RSWL, 2007 WL 2758571 at \*14 (C.D.Cal., Sep. 18, 2007) (suggesting the use of keyword searching); *Alexander v. FBI*, 194 F.R.D. 316, 323 (D.D.C. 2000) (parties agreed to search of email for 40 individuals, utilizing 36 search terms); *Proctor & Gamble Co. v. Haugen*, 179 F.R.D. 622, 632 (D.Utah 1998) (sustaining, in part, magistrate's order authorizing keyword searches of 25 terms in electronic databases); see also Bennett, Steven C., *E-Discovery by Keyword Search*, ALI Practical Litigator, 15 No. 3 Prac. Litigator 7, at \*16 (May 2004) ("[T]here can be little question that keyword searching as an e-discovery technique is here to stay....[R]apidly developing technology has brought us to the cusp of an age in which keyword search technology moves from rare, expensive and diverse to near-universal, cheap and standardized.")

Belying Plaintiff's mischaracterization, Defendants have sought to narrow the scope of email discovery by targeting 20-25 current and former state employees whose email is potentially responsive to Defendants' discovery requests by providing Plaintiff with a list of search terms to cull potentially relevant from irrelevant email.<sup>13</sup> Other courts have recognized that similarly targeted approaches to discovery of emails are not fishing expeditions. *See Reino de Espana v. American Bureau of Shipping*, No. 03 Civ. 3573, 2006 WL 3208579, at \*1 (S.D.N.Y., Nov. 03, 2006) (rejecting party's characterization as "fishing expedition" the targeted search of 98 people and 15 email addresses).

Defendants seek an order compelling the focused search for a targeted set of email responsive to the issues of this case – just as the individual Defendant companies produced to the State. Defendant Bristol-Myers Squibb, for example, collected and produced hundreds of thousands of pages of emails. Defendant Novartis Pharmaceuticals Corporation produced 182,780 pages of emails (without even considering the page count of documents attached to the emails). Plaintiff must be required to comply with the very same obligations it has demanded of defendants.

### **C. Proven Software Solutions Are Available to Search The State's Email System**

The State argues that the unique architecture of its email system, known as "GroupWise", makes it impossible to search for its emails in an organized and systematic manner. (Plaintiff's Opp. at 5-7). Defendants have submitted the sworn Affidavit of Matthew Ray ("Ray Aff.") who avers that he is an expert in GroupWise email systems, he has solved the problems that arise in collecting GroupWise emails and that he has done so many times. The State largely ignores Mr. Ray's affidavit and has failed to produce a single

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<sup>13</sup> Defendants suggested search terms that are central to the case, including, for example, "AWP" and "average wholesale price". Such an approach will almost certainly eliminate from Plaintiff's document production those emails that are of a purely personal nature. (See Plaintiff's Opp. at 1.)

expert witness, sworn affidavit or other evidence to rebut Mr. Ray's opinion, relying instead on only the self-serving assertions of its counsel. However, "[t]he statement of a lawyer in a memorandum ... that it would be unduly burdensome to comply with the request is not evidence." *Auto Club Family Ins. Co. v. Ahner*, CV No. 05-5723, 2007 WL 2480322, \*3 (E.D.La. Aug. 29, 2007). Thus Plaintiff's excuses that technical difficulties somehow excuse it from its discovery obligations ring hollow and are deficient as a matter of law.<sup>14</sup>

#### **D. A Purported Lack of Resources Does Not Excuse The State From Its Discovery Obligations**

The State complains that it "has neither the software nor the manpower to do what is asked of it." (Plaintiff's Opp. at 17). As Defendants established in our opening brief, a purported lack of resources does not excuse a party from its discovery obligations. (Defendants' Opening Brief at 12, 12 fn. 55).<sup>15</sup> Plaintiff brought this suit, imposed similar discovery obligations on Defendants and now must meet the same obligations.

## **II. THE CIRCUIT COURT'S DECISION IN NO WAY PRECLUDES AN ORDER COMPELLING PLAINTIFF TO SEARCH ITS EMAIL SYSTEM**

While difficult to follow, Plaintiff also appears to contend, quite erroneously, that the Circuit Court's August 15, 2007 Decision and Order Denying Defendants' Motion to Require Plaintiff To Preserve Potentially Relevant Documents (the "Order Denying Motion to

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<sup>14</sup> In fact, in *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*, 242 F.R.D. 139 (D.D.C. 2007), the Court compelled a governmental entity to produce emails created under a GroupWise email system like that used by Plaintiff. Moreover, the Court ordered the producing party to produce emails in a document format accessible to the party receiving the production.

<sup>15</sup> See also *Peskoff v. Faber*, 240 F.R.D. 26, 31 (D.D.C., 2007) ("[I]t cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary.") (citing *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 283-84 (S.D.N.Y. 2003) and *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, (1978) (presumption is that responding party must bear the expense of complying with discovery requests)).

Preserve Documents”) constitutes law of the case and precludes an order compelling the State to search its email system for responsive emails. (Plaintiff’s Opp at 11-14). The Circuit Court’s decision with respect to the motion seeking the preservation of documents is wholly inapplicable as against a motion seeking to compel the State to search its email system. The two motions concern different subject matter, and seek entirely different relief.<sup>16</sup>

Fundamentally, the instant motion seeks an order compelling Plaintiff to *search* its email system for emails and documents as they currently exist and thus has nothing to do with an earlier decision by the Court declining to order Plaintiff to take affirmative steps to preserve documents requested because (1) defendants’ original requests were very broad and (2) the Plaintiff was obligated to preserve relevant documents generally anyway. Even if law of the case did somehow apply here (and it does not), Wisconsin has long applied a flexible approach to the doctrine and it would be manifestly unjust to preclude discovery of Plaintiff’s email system based only on dicta in the Circuit Court’s decision and order.

Moreover, the Plaintiff would improperly apply the law of the case doctrine to dicta in the Circuit Court’s decision regarding Defendants’ Second Set of Document Requests. There, the Circuit Court noted that certain of the terms used in Defendants’ Second Set of Document Requests were overbroad. The terms with which the Circuit Court found issue, however, are wholly inapplicable to the motion at hand.<sup>17</sup>

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<sup>16</sup> See *State v. Pfaff*, 2004 WI App 31 (refusing to apply the law of the case doctrine because the prior decision concerned a different issue).

<sup>17</sup> Indeed, to the extent that the Court’s Order Denying Motion to Preserve Documents found the terms “Plaintiff” and “document” as defined in Defendants’ Second Requests to be overbroad, those definitions are not pertinent to the motion at hand. The Court took issue with Defendants’ definition of “Plaintiff” to the extent such definition purported to include “all citizens of Wisconsin.” See Order Denying Motion to Preserve Documents, Plaintiff’s Exhibit 3, at 1, fn 1. Here, however, Defendants are not seeking to compel the production of email sent to or from “Plaintiff” or even “all citizens of Wisconsin.” Rather, Defendants are

Finally, Defendants' opening brief informed the Court that through the meet and confer process, the parties targeted Defendants' requests to 20-25 current and former employees and framed keyword search terms to winnow responsive from nonresponsive emails. Thus, the meet and confer process has resulted in exactly what the State says is necessary here – a “precise” document request. (Plaintiff's Opp. at 13.)<sup>18</sup>

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seeking to compel the production of email sent to and from individuals designated by name on a short list of current and former State employees. Similarly, the Circuit Court's comment regarding the over-breadth of Defendants' definition of “document” is wholly beside the point, as Defendants are here seeking to compel the production of only one specific category of “document,” namely, email, together with attachments thereto.

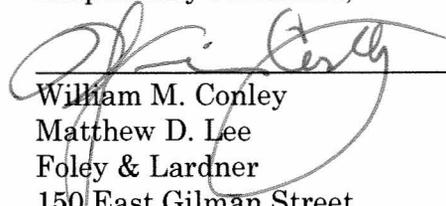
<sup>18</sup> Even if the Circuit Court's August 15 decision were somehow applicable to the instant motion, the *Brady* case cited by Plaintiff makes clear that in 1929, Wisconsin's Supreme Court “departed from [its] tradition of rigid adherence to the law of the case doctrine” and held that it is “within the power of the courts to disregard the rule of ‘law of the case’ in the interests of justice”. *Brady*, 388 N.W.2d at 153 (citing *McGovern v. Eckhart*, 227 N.W. 300 (Wis.,1929)). See also, *State v. Moeck*, 2005 WI 57, ¶25, 280 Wis.2d 277, 695 N.W.2d 783 (Wis.,2005) (“[T]he law of the case doctrine is not an absolute rule that must be inexorably followed in every case. Courts have the power “to disregard the rule of ‘law of the case’ in the interests of justice” and to reconsider prior rulings in a case. We have recognized that “cogent, substantial, and proper reasons exist” under which a court may disregard the doctrine and reconsider prior rulings in a case.”). Here, it would be manifestly unjust to allow Plaintiff to exclude the contents of its email system from the discovery process.

CONCLUSION

Contrary to the State's suggestion, the "litigation mischief" here would arise from allowing the State to circumvent its discovery obligations by allowing it to remove its email system from the discovery process. (Plaintiff's. Opp. at 14.) Accordingly, Defendants respectfully request that the Court order Plaintiff to conduct an organized and reasonably thorough search of its email system and to produce to Defendants emails containing information responsive to Defendants' discovery requests.

October 12, 2007

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2007, a true and correct copy of the foregoing was served upon all counsel of record via electronic service pursuant to Case Management Order No. 1 by causing a copy to be sent to LexisNexis File & Serve for posting and notification.

/s/ James S. Zucker

James S. Zucker