

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

CASE TYPE: Employment

Clifford L. Whitaker and
Michael V. Mucci,
on behalf of themselves
and all others similarly situated,

Court File No. C4-04-12239

Plaintiffs,

**MEMORANDUM IN OPPOSITION TO
MOTION TO COMPEL AND MODIFY
PHASE ONE SCHEDULING ORDER**

vs.

3M Company,

Defendant.

INTRODUCTION

Plaintiffs never proposed to 3M what appears to be their core request to the Court, namely that the remaining pre-class certification deadlines be adjusted by a handful of months. Factual mischaracterizations aside, this is the most disappointing aspect of Plaintiffs' Motion to Compel. Had Plaintiffs proposed an extension, it is likely that the parties could have offered a joint proposal and avoided this Motion. Plaintiffs, however, prefer to disparage 3M's substantial efforts to satisfy their mammoth and burdensome discovery requests to gain a tactical advantage and to disguise their own inactivity over the last several months. Plaintiffs cannot, in all fairness, ask for what ultimately amounts to hundreds of thousands (if not more) of pages of documents and data and then complain about the time it takes to collect, review, and produce that material. Other than a reasonable extension to the schedule, Plaintiffs' Motion should be denied.

FACTUAL BACKGROUND

Clearly, 3M and Plaintiffs have markedly different views of the facts and circumstances preceding this Motion. 3M will not waste the Court's time setting out all these differences.

Some basic facts, however, must be settled to equip the Court to decide the issues before it.

I. PLAINTIFFS SERVED OVER-BROAD DISCOVERY AND MOVED TO ADD NAMED PLAINTIFFS ON THE LAST POSSIBLE DAY.

The parties agree that a reasonable amendment to the schedule is in order. They disagree on the reason for the amendment. The record, however, makes plain that Plaintiffs' own actions in this case underlie the needed extension.

First, Plaintiffs served monstrously overbroad discovery and accompanied it with overbroad instructions and definitions. Plaintiffs demanded, for example, that 3M locate, compile, and preserve "each and all" documents and data concerning every personnel decision made since 2001, with continuing demands for supplemental production, in five broad categories (performance appraisal, training, promotion, compensation, and termination). *See generally*, e.g., Plaintiffs' Second Set of Document Production Requests (attached as Ex. A to accompanying Affidavit of Michael Iwan Regarding Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion to Compel and Modify Phase One Scheduling Order in Support of Motion to Compel and Modify Phase One Schedule ("Iwan Aff.")). Plaintiffs' demands encompass decisions affecting tens of thousands of employees and required 3M to scour through millions of pages of material gathered from throughout the company. At the same time, Plaintiffs requested that they not be inundated with marginally relevant material, a request which 3M endeavored to honor, since 3M indisputably has the right to safeguard its privileges and to prevent discovery from turning into an unwarranted fishing expedition. 3M therefore developed a comprehensive process to identify the relevant documents, conduct a privilege review, and prepare privilege logs.

Second, by waiting until the very last day to add additional Named Plaintiffs, Plaintiffs injected the equivalent of four, single-plaintiff cases into an already compressed discovery period.¹ Plaintiffs, however, fail even to acknowledge this new development as a factor affecting discovery and warranting a need for additional time. They prefer instead to style their request as attributable to 3M alone and even suggest a punitive element to their proposed relief. Such relief is not justified and not helpful to preparing this case for a timely hearing on class certification.

It is defendants' burden in these kinds of cases to endure taxing document discovery. Plaintiffs will never face reciprocal demands, but complain about the pace, volume, format, and order of materials produced and proffer indignation when such materials, organized and maintained to further the running of a business, do not happen to coincide neatly with their discovery requests. 3M trusts the Court will reject Plaintiffs' effort, in this case, to blame 3M for the natural consequences of Plaintiffs' unrestrained discovery requests, unrealistic production demands, delayed addition of new parties and more recent focus on other matters. This matter can be resolved with a sensibly revised calendar, but should not penalize 3M for its diligent efforts to respond to discovery.

II. 3M PROMPTLY PROVIDED VOLUMES OF WORKFORCE DATA IN RESPONSE TO PLAINTIFFS' FIRST SET OF DISCOVERY.

Plaintiffs' Memorandum picks up the story in the middle of discovery and thus omits mention of the fact that 3M has spent, to date, thousands of hours separately compiling and

¹ Plaintiffs stated as early as May 2005 their intent to add as a plaintiff a salaried non-exempt employee, but failed to do so until the last minute. *See* Memorandum of Law in Support of Plaintiffs' Motion to Compel at 18 (May 23, 2005). Curiously, this newly named plaintiff, Ms. Sterrett, was never identified on Plaintiffs' voluminous lists of those persons they claim are clients or in possession of relevant information. This clearly casts doubt on the veracity and reliability of Plaintiffs' own disclosures, which clearly are short of complete. Moreover, Plaintiffs' introduction of a salaried non-exempt employee as a Named Plaintiff brings to the fore a multitude of previously hypothetical questions regarding whether a class properly defined under Minn. R. Civ. P. 23 can include members with divergent, if not antagonistic, interests, such as non-exempt and exempt employees and supervisors and those supervised by them.

producing 1.31 GB of employee data from its human resources information system databases in response to Plaintiffs' First Set of Interrogatories and Document Production Requests, and that 3M has agreed to update this data as more becomes available. *See* Iwan Aff. ¶ 2; Affidavit of Kathie L. Karls ¶¶ 3, 8-12 (attached as Ex. B to Iwan Aff.). Plaintiffs have raised no complaints about the volume, pace, format, or order of 3M's production of data in response to these requests. Thus, Plaintiffs' suggestion that 3M is intentionally delaying its production of other documents and information in order to prejudice Plaintiffs is plainly inconsistent with the vast amounts of data already compiled and produced, at great effort and expense to 3M.

III. 3M HAS SHOWN SIMILAR DILIGENCE RESPONDING TO PLAINTIFFS' ADDITIONAL DEMANDS FOR UNENDING DOCUMENT DISCOVERY.

A. Plaintiffs' 94 Additional Document Requests Implicate The Records Of Virtually Every Employment Decision Made With Respect To Minnesota-Based, Salaried Employees Over The Last Five Years.

Plaintiffs' Motion involves Plaintiffs' Second Set of Document Production Requests, which includes 94 (not including subparts) wide-ranging requests on topics including "Organizational Documents," "Black Belt and Master Black Belt Training," "ALDP Training," "Age Discrimination in General," "Performance Appraisal Process," "Compensation," "Advancement," "Job Elimination Program," "Qualifications of Employees," "Named Plaintiff Documents," and "Other." *See generally* Plaintiffs' Second Set of Document Production Requests (attached as Ex. A to Iwan Aff.). These requests are preceded by a lengthy set of "Instructions and Definitions," which confirm that Plaintiffs seek virtually every document regarding any employment decision made about Minnesota-based, salaried employees at 3M over not less than five years.²

² At least 80 (of 94) document requests bear the designation "(MN Sal.)," which purportedly requires the production of "all documents concerning salaried employees both in and outside Minnesota or both salaried and hourly Minnesota employees"). *See* Plaintiffs' Second Set of Document Production Requests at 2-6 (attached as Ex. A to Iwan Aff.). "Document" itself is

With some glimmer of recognition of the enormity of the tasks posed, Plaintiffs at least conceded that, “[i]f all of the requested documents cannot be produced within 30 days after service of these requests, produce those documents gathered when due and produce other documents as collected, and as soon as possible after the date of this request.” *See id.* at 6. And upon that task, 3M promptly embarked.

B. 3M’s Process Balances Plaintiffs’ Need For Information With 3M’s Right To Withhold Privileged And Non-Responsive Material.

In March 2005, 3M began an interviewing and document collection process designed to obtain all the potentially relevant paper and electronic documents from the approximately 250 managers and human resources personnel at 3M most likely to possess the most relevant material. 3M has described this process in prior submissions to the Court, *see generally, e.g.,* Affidavit of Barbara D. Valitchka in Opposition to Plaintiffs’ Motion to Compel Production of 3M’s Document Destruction and Retention Policies and for a Document Preservation Order (attached as Ex. C to Iwan Aff.), and will only here note that, given the vastness of Plaintiffs’ discovery requests and in the interest of completeness, 3M chose to err, if at all, on the side of over-inclusiveness in its document collection efforts. This process has resulted in the collection of well over 2 million pages (or the equivalent thereof) of material. *See* Iwan Aff. ¶ 3. Between

defined by Plaintiffs “in its broadest possible sense, including but not limited to any original, reproduction or copy, and non-identical copy (i.e., copy with marginal notes, deletions, etc.) of any kind of written or documentary material, or drafts thereof, including but not limited to, computer-readable data” *See id.* at 2. Further, “[w]hen appropriate, the terms ‘all’ and ‘each’ shall be construed as ‘all and each.’” *See id.* at 3. Ninety-one of Plaintiffs’ 94 document requests begin with the word “all” or “each” and, therefore, seek all and each documents “concerning” one or more topics, where “concerning” means “relating to, referring to, discussing, mentioning, responding to, identifying, containing, alluding to, commenting upon, disclosing, explaining, analyzing, comprising, describing, supporting, evidencing, contradicting, or constituting.” *See id.* at 2-3. Finally, almost all of the document requests are compound, but, as the Instructions and Definitions explain, “each and every part must be answered with the same force and effect as if such part were the subject of and were asked by a separate discovery request.” *See id.* at 4.

inside and outside personnel, 3M has had an average of 10 to 12 people working full-time, every business day, since approximately April 2005 on the collection, review, logging, and production efforts, with as many as 40 different people involved over the entire process. *See id.* ¶ 4.

Plaintiffs have received these details via submissions to the Court, in separate correspondence and meet and confer communications, and even through what amounted to an informal 30.02(f) telephone deposition of one of 3M's IT professionals. *See id.* ¶ 5. Plaintiffs, however, prefer to disregard the amount of material and number of people involved in 3M's efforts, because the figures reveal that 3M has not shirked the heavy burdens pressed uniquely upon it in this case. Contrary to Plaintiffs' representations, 3M has gone to great lengths to satisfy Plaintiffs' extreme discovery demands. Contrary to Plaintiffs' representations, these demands have placed great strains on 3M's internal systems. And, contrary to Plaintiffs' statement that "substantial and complex litigation *of this type* is a routine fact of business for a corporation of 3M's size," *see* Pls.' Mem. at 3 (emphasis added), until this case, 3M, tellingly, has faced very little employment litigation and certainly nothing approaching a 7,000 person putative class action assailing virtually every personnel decision-making system utilized over five years. 3M is navigating discovery in many of these areas for the first time, and had hoped that its substantial good faith efforts would be at least recognized, if not fully appreciated.

ARGUMENT

Plaintiffs' Motion contains four distinct demands: (1) a request to modify the "Phase One" discovery schedule; (2) a demand that 3M produce all hard-copy (*i.e.*, paper original) documents by March 31, 2006; (3) a demand that 3M update its privilege logs to become current with all document productions; and (4) a demand that 3M produce all electronic documents by February 28, 2006, upon conditions dictated by Plaintiffs. On the first three, there is little disagreement between the parties, making it clear that these issues could have been resolved.

There are fundamental factual, legal, and logistical problems, however, with Plaintiffs' proposal for immediate production of all electronic documents. Most problematic is the suggestion that 3M be compelled to produce these documents without the benefit of an effective privilege review. Such a suggestion is without basis in fact or law. Indeed, Plaintiffs cite not a single case in support of their position. 3M consistently and unequivocally has rejected this idea every time Plaintiffs have suggested it. Ironically, this was one of the few matters raised with any specificity by Plaintiffs in the parties' meet and confer on January 20, 2006, and 3M again rejected it there. Lest there be any doubt, however, 3M will again state that it opposes any effort to limit its right to review its documents for privilege or to force it to waive this right. It asks the Court to reaffirm its legal rights in this regard, and deny Plaintiffs' Motion to Compel.

I. 3M DOES NOT OBJECT TO A MODIFICATION OF THE REMAINING DEADLINES IN THE PHASE ONE SCHEDULING ORDER, GIVEN THE DISCOVERY DEMANDS IN THIS CASE.

The Court ultimately controls the scheduling of matters before it, even if the parties might otherwise desire and agree upon a modification. In the present case, numerous factors, in addition to the parties' general agreement, support a modification of the Phase One schedule.

3M does not object to a reasonable and balanced modification of the remaining scheduling deadlines, although Plaintiffs' proposed dates present some internal inconsistencies and unwarranted punitive elements that must be addressed. Simply put, the same extensions should apply to all deadlines. As proposed, Plaintiffs' expert reports are due before the close of discovery and Plaintiffs would shorten, as a penalty, 3M's time to prepare its expert reports. These untenable changes should not be adopted, but otherwise a reasonable extension is in order.

The Court has classified this case as "complex" and thus not subject to the standard case management timelines. *See* Phase One Scheduling Order ¶ 2 (June 14, 2005). Two to three years of discovery between filing a putative class action complaint and the class certification

hearing is common. Several other matters recently handled by Plaintiffs' counsel, Sprenger & Lang, for example, fell within just those time ranges. For example, in *Cargill v. Arnold*, filed in the District of Minnesota, the court scheduled almost exactly three years between filing the complaint, in November 2001, and a class certification hearing, in October 2004.³ Notably, the putative class in that race discrimination case was estimated to be around 1,500 people, not the 7,000 now estimated by Plaintiffs here. Similarly, just over two years elapsed between the filing of the complaint, in October 2002, and the class certification hearing, in October 2004, in *Carlson v. C.H. Robinson Worldwide, Inc.*, another Sprenger & Lang case in the District of Minnesota, before Judge Ericksen.⁴

The diverse and individualized criteria that factor into every employment decision render discovery in a putative employment discrimination class action inherently more complicated than in other class actions. The modified scheduled 3M proposes falls well within the range of time from complaint to class certification hearing in other such matters and is a reasonable schedule for a matter requiring discovery down into the details of individualized personnel decision-making at "a corporation of 3M's size." *See* Pls.' Mem. at 3.

Finally, it should not be forgotten, that, just within the last few weeks, Plaintiffs proposed the addition of four new Named Plaintiffs. *See* Plaintiffs' Notice of Motion and Motion to Join Four Additional Plaintiffs and Amend Complaint (Jan. 3, 2006). Plaintiffs' decision to wait until

³ *See* Docket Excerpt from *Arnold v. Cargill Incorporated*, Civil No. 01-2086 (DWF/AJB) (attached as Ex. D to Iwan Aff.). Ultimately, the class hearing was continued to January 19, 2006, following disqualification of Sprenger & Lang as plaintiffs' counsel due to the Judge Frank's finding that one or more attorneys at Sprenger & Lang had engaged in improper communications with a former human resources executive at Cargill. *See Arnold v. Cargill, Incorporated*, 2004 WL 2203410 at *10 (D. Minn. Sept. 24, 2005) (unreported, copy attached as Ex. E to Iwan Aff.).

⁴ *See* Docket Excerpt from *Carlson v. C.H. Robinson Worldwide, Inc.*, Civil No. 02-3780 (JNE/JJG) (attached as Ex. E to Iwan Aff.); *see also* Docket Excerpt from *Young v. Potomac Elec. Power Co.*, Civil No. 87-1177 (RCL) (reporting, in a case in which Sprenger & Lang appeared as counsel, filing of the complaint in 1987 and class certification hearing in 1992) (attached as Ex. F to Iwan Aff.).

the last possible day to seek to add these new Named Plaintiffs places additional burdens on 3M to investigate their employment histories and to supplement its discovery responses as to these new parties. These new Named Plaintiffs are not only putative class representatives, but are also individual claimants, subjecting their particular employment circumstances to scrutiny. After more than a year of litigation, Plaintiffs have added the equivalent of four, single-plaintiff discrimination cases into the discovery and scheduling mix.⁵ In light of this new development, it is odd that Plaintiffs insist that any extension of discovery, expert, or class certification deadlines the Court may authorize must come only “at the expense of 3M.” *See* Pls.’ Mem. at 14.

In addition to advancing a needlessly penal view of discovery, Plaintiffs’ Motion also seems influenced by their insistence that they cannot commence depositions until they have received every last responsive datum from the over 2 million pages of hard copy and electronic documents 3M has collected and is reviewing on their behalf. If logical sequencing of discovery is critical, it is ironic that Plaintiffs’ modified schedule appears to both truncate important time periods leading up to the class certification hearing and to place certain important deadlines in conflict, most notably those involving the timing of expert reports and depositions.

Pursuant to the Court’s authority under Minn. R. Civ. P. 16.03(f), 3M respectfully proposes the following extension of the remaining Phase One scheduling deadlines, which is designed to afford *both* parties equally fair and sufficient time to develop and present their class certification arguments to the Court. *See Baskerville v. Baskerville*, 75 N.W.2d 762, 769 (Minn. 1956) (recognizing the now long-established proposition that the “tenor of the [discovery] rules is to permit a wide discovery and investigation of the facts . . . but not to permit such discovery

⁵ It is also revealing that, after more than a year of publicity, investigation, and other efforts by Sprenger & Lang to augment the Named Plaintiff ranks, that Sprenger & Lang could find only four putative class members (out of an alleged pool of 7,000) who apparently felt disadvantaged enough by the thousands upon thousands of individual employment decisions made by 3M to assert their own claims.

and investigation to be used in bad faith or in such a manner as unreasonably to annoy, embarrass, oppress, or injure the parties”).

Proposed Revised Schedule

| | |
|-------------------|--|
| July 24, 2006 | Plaintiffs identify experts and provide a brief description of topics anticipated area of testimony |
| August 28, 2006 | Defendants identify experts and provide a brief description of topics of anticipated area of testimony |
| October 16, 2006 | Close of discovery; Plaintiffs’ expert reports due; non-dispositive motion filing deadline |
| December 18, 2006 | Defendant’s expert reports due |
| January 2, 2007 | Plaintiffs’ expert rebuttal reports due |
| February 26, 2007 | Deadline to complete expert depositions |
| March 5, 2007 | Plaintiffs’ opening class certification brief due |
| April 2, 2007 | Defendant’s class certification response brief due |
| April 16, 2007 | Plaintiffs’ class certification reply brief due; deadline for filing dispositive motions (although dispositive motions may be filed at any earlier time) |
| May 14, 2007 | Class certification hearing, as permitted by Court’s schedule |

II. INTERIM DEADLINES SHOULD REFLECT THE PARTIES’ EFFORTS TO DATE AND THE WORK REMAINING.

A. 3M Will Produce Its Remaining Non-Privileged Hard Copy Documents by March 31, 2006.

Plaintiffs’ demand for 3M’s remaining hard-copy documents is all but resolved now. As Plaintiffs acknowledge, on January 20, 2006, 3M proposed a date for the production of hard copy documents earlier than that Plaintiffs now seek. 3M therefore does not object to a March 31, 2006, deadline as part of an overall modification of the Phase One Scheduling Order. Such a deadline, however, will be extremely difficult to manage if an even earlier deadline for completing the review and production of a greater volume of electronic documents is interposed.

B. 3M Will Timely Update Privilege Logs within 30 Days after Productions.

As of January 30, 2006, 3M has provided updated privilege logs covering its first eight document production installments. 3M agrees that the timely production of privilege logs

facilitates the progression of this case and, for that reason, does not oppose an instruction from the Court that privilege logs be produced within a specified period of time following the underlying document production. In light of the substantial production efforts that 3M elsewhere has agreed to undertake, however, 3M respectfully submits that 30 days following a document production is an equally reasonable, and not unduly burdensome, alternative to the two weeks Plaintiffs propose. 3M requests and looks forward to receiving privilege logs from Plaintiffs (including, but not limited to, their discovery responses with respect to the four, new Named Plaintiffs) within a similar timeframe.

III. 3M WILL CONTINUE ITS REASONABLE EFFORTS TO PRODUCE ELECTRONIC DOCUMENTS.

At the center of Plaintiffs' demand for compelled, immediate production of electronic documents lies an extraordinary request that the Court, in effect, order 3M to waive its right to conduct a meaningful review for relevance and privilege. There are two areas to be addressed, e-mail and all other electronically stored information. To understand how Plaintiffs would have arrived at such an unprecedented and remarkable position, it is necessary to understand more fully the history of the parties' interactions on the general topic of electronic document discovery and production to date and clear up several misrepresentations in Plaintiffs' Memorandum.

A. Plaintiffs Have Ignored 3M's Repeated Requests For An Alternative Method Of Searching E-Mail That Would Reasonably Balance The Burden On 3M And The Relevance Of The Materials Sought.

The parties have always treated e-mail as a separate and distinct category of electronic documents. Starting with 3M's initial responses and objections to Plaintiffs' second set of discovery, 3M consistently has advised Plaintiffs that due to their voluminous and unwieldy nature, 3M could not, without undue burden, scour the e-mail accounts of hundreds, if not thousands, of individuals in response to Plaintiffs' 90-plus discovery requests for "each and all documents concerning" multiple subject matters. *See, e.g.,* Defendant's Responses to Plaintiffs'

Second Set of Document Production Requests, Doc. Prod. Req. No. 9 (Apr. 1, 2005) (attached as Ex. G to Iwan Aff.). 3M also explained that 3M's Lotus Notes e-mail system poses particular technical challenges to any type of automated, keyword searching, which the parties recognized from the outset would be the only feasible way of reducing the number of e-mails on an initial basis, to permit the possibility of subsequent review and/or production.⁶ As the record shows, Plaintiffs' claim that they only recently understood 3M's position on e-mail is therefore disingenuous, to say the least.

On May 23, 2005, 3M reiterated that the e-mail searching protocol proposed by Plaintiffs was simply unworkable as applied against the hundreds, or even thousands, of e-mail accounts in which Plaintiffs were interested. *See* Letter from H. Eng to S. Coler at 5 (May 23, 2005) (attached as Ex. H to Iwan Aff.). Consistent with this concern, in a submission to the Court and Plaintiffs on June 3, 2005, 3M explained the steps taken to preserve e-mail for the potentially relevant employee population, but specifically noted that its collection efforts thus far were limited to "efforts to obtain relevant hard copy and electronic documents that are maintained outside of 3M's e-mail system." *See* Valitchka Aff. ¶ 11 (attached as Ex. C to Iwan Aff.).

Plaintiffs' proposed search terms included 35 words or phrases, plus all their derivations and combinations, some of them as common as "old, new, fast, slow, and years." *See*

⁶ 3M, has no idea what possible basis Plaintiffs have for claiming that during the meet and confer process "3M revealed that it had identified and extracted certain electronic documents for it [sic] own purposes, including e-mails of specified employees." The record to which Plaintiffs refer is actually a letter prepared by their own counsel that says nothing of the kind. *See* Pls.' Mem. at 10 & Ex. 11 to Coler Aff. Other than the single test to verify the unduly burdensome and overly broad nature of Plaintiffs' proposed e-mail search protocol, 3M has not undertaken computerized searches of employee e-mail files. If the 250 individuals from whom 3M has collected documents either printed or saved a particular e-mail outside of e-mail files for their own business purposes, such printed or saved e-mails possibly would have been gathered along with other hard copy and electronic documents. As Plaintiffs know, 3M scans and loads such material into a computer program that allows document reviewers to view document images on a computer screen and then manually enter a code indicating whether the documents they are reviewing are responsive and/or privileged. If this is not the process Plaintiffs have in mind, however, then they are simply wrong to suggest that "e-mails of specified employees" have been "identified and extracted."

Defendant's Responses to Plaintiffs' Second Set of Document Production Requests, Doc. Prod. Req. No. 9 (attached as Ex. G to Iwan Aff.). A single test run, in fact, by 3M against just one account using these search terms required approximately four hours of run time and netted more than 5,000 e-mails from a single e-mail account, a number only slightly less than half the original number of e-mails in the account. *See* Letter from H. Eng to S. Coler at 5 (May 23, 2005) (attached as Ex. H to Iwan Aff.). As indicated by the test case run by 3M using Plaintiffs' search protocol, Plaintiffs' expectations for e-mail discovery would require thousands of hours of IT staff and computer run time to generate the retrieval of hundreds of thousands of e-mails, most of which undeniably will prove not to be relevant to the issues in this case.

On September 9, 2005, 3M again informed Plaintiffs that "for technical reasons mentioned earlier, multiple term key word searching of Lotus Notes [e-mail] accounts is extremely time consuming, and, consistent with the proposed Federal Rules of Civil Procedure on electronic discovery and the majority of court decisions considering the cost of company-wide e-mail reviews, *3M will not agree to conduct such a review without an appropriate cost-sharing agreement or order in place.*" *See* Letter from M. Iwan to S. Coler at 8 (Sept. 9, 2005) (suggesting further, given the allegations of company-wide patterns of discrimination, that e-mail issues could be addressed within a smaller, but still representative and statistically significant, sample of the employee population) (emphasis added) (attached as Ex. I to Iwan Aff.). Plaintiffs were not receptive to sharing costs, but offered no alternatives. *See* Letter from M. Iwan to T. Henderson at 7 (Dec. 2, 2005) (noting that "Plaintiffs' Doc. Req. No. 9, purporting to require 3M to run a search of its entire e-mail system based on an over-inclusive list of search terms, many of which are so common as to assure the identification of mostly irrelevant material . . . is a matter requiring further discussion by the parties, including most certainly the issue of shared expense") (attached as Ex. J to Iwan Aff.).

Given the documented communications between the parties and substantially similar meet and confer discussions, how can Plaintiffs claim not to have understood e-mail to be a separate and still outstanding discovery matter? 3M is not suggesting that e-mails are not potentially relevant to the issues in the case or that Plaintiffs somehow have forgone the right to receive a reasonable compilation of responsive e-mails. 3M is suggesting, however, as many courts have recognized, that, due to its very proliferation, e-mail discovery on anything approaching the scale Plaintiffs have demanded in this case should be pursued on a narrowly tailored and equitable basis, with oversight by the court, as necessary.⁷ Any order on e-mail should reflect a realistic protocol that balances the parties' respective interests and imposes equitable cost sharing so as not to burden one party at the expense of the other.

B. Plaintiffs' Criticisms Of 3M's Handling Of Other Electronic Document Discovery Are Likewise Unfounded.

Without evidence to support their charge, Plaintiffs insinuate that 3M is staging its production of electronic documents for tactical advantage. Simply put, Plaintiffs' imagined descriptions of 3M's actions and positions with respect to electronic document discovery are inaccurate. Plaintiffs repeatedly accuse 3M of withholding electronic documents from production, although they have been repeatedly advised that:

3M is not "withholding the production of electronic documents" as

⁷ See, e.g., *Byers v. Illinois State Police*, 2002 WL 1264004 at *10 (N.D. Ill. June 3, 2002) ("[T]he Court is not persuaded by the plaintiffs' attempt to equate traditional paper-based discovery with the discovery of e-mail files. Several commentators have noted important differences between the two. Chief among these differences is the sheer volume of electronic communication [C]omputers have the ability to capture several copies (or drafts) of the same e-mail, thus multiplying the volume of documents. All of these e-mails must be scanned for both relevance and privilege. Also, unlike most paper-based discovery, archived e-mails lack a coherent filing system.") (attached as Ex. K to Iwan Aff.). Plaintiffs mention software that they claim "converts Lotus Notes e-mail into text files easily subject to automated searches." See Pls.' Mem. at 13 n.3. Such a suggestion would have been more timely several months ago, when first 3M invited Plaintiffs' input, but in any event is directly at odds with Plaintiffs' insistence elsewhere that 3M produce all electronic documents in native format. See, e.g., Letter from T. Henderson to M. Iwan at 1 (Jan. 9, 2006) (attached as Ex. L to Iwan Aff.); Letter from S. Coler to H. Eng at 2 (Aug. 17, 2005) (attached as Ex. M to Iwan Aff.).

you have suggested. Rather, it was simply the case that, in the course of the document collection process, hard copy documents were more readily available and thus more quickly gathered. Once gathered the materials undergo review by counsel for responsiveness, privilege, and potential redaction before production [D]ocuments that are gathered first generally get reviewed and, to the extent responsive, produced first. There has been no decision made to “withhold the production of electronic documents,” except to the extent that, once a significant volume of hard copy documents had been gathered and a process established for reviewing and producing them, it made sense to complete that process in its entirety before embarking upon a related, but nonetheless different, process for reviewing and producing electronic documents.

See Letter from M. Iwan to T. Henderson at 5 (Jan. 3, 2006) (attached as Ex. Q to Iwan Aff.).

Moreover, 3M has provided Plaintiffs’ counsel with “information regarding the remaining paper document production to enable [Plaintiffs] to request that specified sources receive priority attention in our review and production process. We certainly extend that same offer to you with respect to electronic documents.” *See* Letter from M. Iwan to T. Henderson at 4 (Jan. 19, 2006) (attached as Ex. N to Iwan Aff.).

Likewise without apparent basis, Plaintiffs claim that they only recently “have learned that defendant intended to produce very large electronic documents in hard copy rather than electronic form” *See* Pls.’ Mem. at 2. In fact, 3M has confirmed its intent to do exactly the opposite in communications with Plaintiffs. As recently as January 19, 2006, 3M reminded Plaintiffs in writing of an earlier discussion in which:

As we discussed, 3M’s established (and thus tested and verified) process for producing electronic documents broken out into three, linked components: (1) a document image file in .tif format; (2) a searchable document text file in .txt format; and (3) an extracted metadata file in .mdb (or if you prefer in .xls) format offers you the ability to view and search all aspects of the document you identified. It also delivers this content in a static, easily handled, easily loaded, and easily processed form, as compared to the variety of native formats you mentioned. Further, we have offered to make a reasonable number of files available to you in native format, upon request, if you deem it necessary for your review.

