

Schenkenberg Aff. Exhibit 0

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

| | | |
|------------------------------|---|---------------------------|
| IOWA NETWORK SERVICES, INC., |) | |
| |) | NO. 4:10-cv-00102-JEG-RAW |
| Plaintiff, |) | |
| |) | |
| vs. |) | RULING ON PLAINTIFF'S |
| |) | THIRD MOTION TO COMPEL |
| SPRINT COMMUNICATIONS |) | |
| COMPANY, L.P., SPRINT NEXTEL |) | |
| CORPORATION, SPRINT UNITED |) | |
| MANAGEMENT COMPANY, and |) | |
| SPRINT CORPORATION, |) | |
| |) | |
| Defendants. |) | |

The above resisted motion [126] is before the Court. It concerns redactions from e-mails and spreadsheets produced to INS by Sprint. INS contends the e-mails contain improper redactions on the basis of attorney-client privilege or work product protection and that the spreadsheets are so heavily redacted that it cannot for lack of context determine the meaning of the few unredacted lines pertaining to INS. Besides, says INS, it is entitled to the unredacted spreadsheets in an effort to determine if Sprint had a financial motive for withholding payment to INS.

The motion papers leave the Court at sea with respect to the privilege/work product issue. Sprint evidently has produced an updated privilege log which is not, however, in the motion papers. The references in the motion papers hint that the privilege log may be quite lengthy. Nor has the Court been provided with an explanatory affidavit of counsel. See *Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559, 565 (8th Cir. 1997); *St. Paul*

Reins. Co. Ltd. v. Commercial Financial Corp., 197 F.R.D. 620, 640 (N.D. Iowa 2000). As a result the Court is left without any basis to assess Sprint's claims of attorney-client privilege and work product protection. See Fed. R. Civ. P. 26(b)(5)(A). As the proponent, Sprint of course has the burden to establish the applicability of the privileges it puts forward. The Court, however, is reluctant to find waiver on this record.

INS asks the Court to review unredacted copies of the e-mails *in camera* but the Court is concerned about the practicability of this if there is a large volume of documents. In its motion INS does refer to several documents as examples of its suspicion that Sprint has redacted e-mails solely on the basis an attorney was copied on the e-mail or where the content concerns only ordinary business activity.

As the Court understands it, at the time the motion was filed the parties had been in discussion about some of the issues presented. Indeed, Sprint claimed the motion was premature. Perhaps in the interim the parties have reached a resolution. But if not and if INS wants to pursue the issue, the Court will make a limited *in camera* review as follows. INS shall within fourteen (14) days identify to Sprint no more than twenty (20) documents with respect to which it has questions concerning the propriety of attorney-client/work product redactions. Sprint shall, within fourteen (14) days thereafter, provide the unredacted documents to the Court for

review *in camera* accompanied by the portions of the privilege log which pertain to the documents. Unless counsel believes protected status is evident from content and the identities and status of the authors and recipients (which should be part of the privilege log), counsel should file an affidavit or declaration setting out the asserted factual basis for the privilege/work product claims put forward for the documents. *Rabushka*, 122 F.3d at 565. The affidavit may be filed under seal, but not *ex parte*. If it appears Sprint has been overbroad in its redactions, the Court may consider further *in camera* review. If the redactions appear appropriate it is unlikely the Court will undertake further consideration of the matter.

In considering the issue concerning spreadsheets, the Court has been treated to a singularly unrewarding review of hundreds of completely redacted, blank spreadsheet pages (merely a sample the Court is told), all of which are dutifully marked "Confidential." (See INS Motion Ex. C). The Court finds it difficult to believe that INS really wants to review tens of thousands of pages of volume and billing information concerning third-party carriers without any relationship to Iowa or INS for the purpose of attempting to demonstrate that Sprint was motivated to withhold payments to INS by broader financial difficulties. The Court agrees with Sprint that the discovery relevancy of the spreadsheets for this purpose is most attenuated. According to Sprint it has told INS it would unredact information on the

spreadsheets pertaining to other carriers in Iowa and presumably this process has been completed.

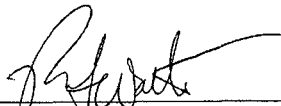
INS has a point when it says it needs more context in order to understand the few unredacted snippets of information on the spreadsheets which relate to INS. Devoid of headings or other information the Court can understand it is very difficult for INS to determine what its entries on the spreadsheets mean. The motion is granted to the extent that where a spreadsheet page contains information about INS, the entire page with no redactions except for the identifying information of third-party carriers shall be produced subject to the protective order in place. In addition, if it has not already done so, Sprint shall make the promised "unredactions" with respect to spreadsheet information pertaining to other carriers in Iowa. There is one caveat to this. The Court has made this part of the ruling without a clear idea of the number of pages and effort involved in providing additional information to address INS's legitimate concerns about context. The Court would be open to any suggestions by Sprint about less burdensome means to produce additional data from the spreadsheets to INS which would add context to help INS understand the data disclosed pertaining to INS.

Motion [126] **granted in part and denied in part** as above. With respect to the attorney-client privilege/work product issue, the parties shall proceed as directed above. Additional spreadsheet

information required as a result of this order shall be produced by Sprint within thirty (30) days.

IT IS SO ORDERED.

Dated this 8th day of December, 2010.



ROSS A. WALTERS
UNITED STATES MAGISTRATE JUDGE