BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT OF SOUTH DAKOTA NETWORK, LLC, AGAINST SPRINT COMMUNICATIONS COMPANY LP IN THE MATTER OF THE THIRD PARTY COMPLAINT OF SPRINT COMMUNICATIONS COMPANY L.P. AGAINST SPLITROCK PROPERTIES, INC., NORTHERN VALLEY COMMUNICATIONS, INC., SANCOM, INC., AND CAPITAL TELEPHONE COMPANY	))))))))))	DOCKET NUMBER TC 09-098

AFFIDAVIT OF PHILIP R. SCHENKENBERG IN SUPPORT OF SPRINT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER REGARDING NORTHERN VALLEY'S CORPORATE DEPOSITION NOTICE

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

Philip R. Schenkenberg, being first duly sworn, states as follows:

1. I make this Affidavit in support of Sprint's Reply Memorandum in Support of its Motion for Protective Order Regarding Northern Valley's Corporate Deposition Notice.

2. **Exhibit A** hereto is a true and correct copy of Sprint's Third Amended Notice of Taking Deposition of Northern Valley Communications, LLC 30(b)(6) Representative, which was served on Northern Valley on August 11, 2011.

3. Sprint deposed James Groft and Tanya Berndt, both individually and as corporate representatives, on September 26 and September 27, 2011. Those are the only two Northern Valley depositions Sprint conducted.

4. **Exhibit B** hereto is a true and correct copy of *Connect Insured Tel., Inc. v. Qwest Long Distance, Inc.*, No. 3-10-CV-1987-D, 2011 WL 4736292 (N.D. Tex. Oct. 6, 2011).

5. **Exhibit C** hereto is a true and correct copy of *Northern Valley Commc'ns, L.L.C. v. Qwest Commc'ns Corp.*, No. 09-1004-CBK, 2010 WL 3672233 (D.S.D. Sept. 10, 2010).

AFFIANT SAYS NOTHING FURTHER.

s/Philip R. Schenkenberg
Philip R. Schenkenberg

Subscribed and sworn before me
this 11th day of May, 2012.

s/Sheryl M. O'Neill
Notary Public

EXHIBIT A

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT OF SOUTH DAKOTA NETWORK, LLC, AGAINST SPRINT COMMUNICATIONS COMPANY LP)	DOCKET NUMBER TC 09-098
IN THE MATTER OF THE THIRD PARTY COMPLAINT OF SPRINT COMMUNICATIONS COMPANY L.P. AGAINST NORTHERN VALLEY PROPERTIES, INC., NORTHERN VALLEY COMMUNICATIONS, INC., SANCOM, INC., AND CAPITAL TELEPHONE COMPANY)	**THIRD AMENDED NOTICE OF TAKING DEPOSITION OF NORTHERN VALLEY COMMUNICATIONS, LLC 30(b)(6) REPRESENTATIVE**

TO: Northern Valley Communications, LLC and its lawyers David Carter, ARENT FOX LLP, 1050 Connecticut Ave, NW, Washington, DC 20036 and James M. Cremer, BANTZ, GOSCH & CREMER, L.L.C., 305 Sixth Ave, SE, Aberdeen, SD 57402-0970:

PLEASE TAKE NOTICE that, pursuant to SDCL § 15-6-30(b)(6), Sprint Communications Company L.P. ("Sprint") will take the oral deposition of Northern Valley Communications, LLC's 30(b)(6) Representative on the 27th day of September, 2011, commencing at 8:30 a.m. at the offices of Bantz, Gosch & Cremer LLC, P O Box 970, Aberdeen, SD 57402-0970.

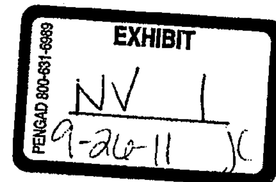
The topics of this deposition will be:

1. Northern Valley's line counts, and how Northern Valley's relationships with Call Connection Companies ("CCCs") are reflected in line counts.

2. Northern Valley's Accounting treatment of dollars received from IXCs for calls to CCCs.

3. Northern Valley's Accounting treatment of the "line charges payable to Telco" by CCCs, the base marketing fees, and per-minute marketing fees described in its agreements with CCCs.

4. Payments to CCCs (via netting or otherwise) and accounting treatment of any such payments, including how such amounts were reflected on the books of Northern Valley and/or its parent company.



5. Payment of taxes and assessments on amounts related to provision of service to CCCs, and remittance of universal service contributions collected for such service.

6. Application of Northern Valley's access tariffs to Sprint.

7. Services provided to CCCs and the application of Northern Valley's intrastate and interstate access tariffs to CCCs.

8. CCCs' payment (or non payment) of end user common line charges and universal service assessments.

9. Amounts Northern Valley claims it has charged CCCs, or that CCCs have owed it for services over time, including information responsive to Sprint's now-withdrawn Interrogatories 18, 33, 34, 50, 63, 88, 100, and 112.

10. Meaning of information on bills for services provided to or obtained from CCCs.

11. The network path taken by calls from Sprint to CCCs, including the function and ownership of equipment and facilities utilized, and whether any calls terminated outside of Northern Valley's service area.

12. The capacity of TDM and SIP bridges, including the number of concurrent calls that can be delivered to such bridges.

13. How numbers were/are assigned to CCCs and others.

14. The business relationships between CCCs and Northern Valley's affiliates, and the way in which CCCs use or have used the network facilities of any Northern Valley affiliate.

15. Northern Valley's relationship with CCCs, including but not limited to: the genesis of Northern Valley's decision to enter contracts with CCCs, the information collected by Northern Valley in connection with initiation of service (including information in application or customer intake forms), the meaning of each contract with CCCs, the basis of the decisions to change contracts with CCCs over time, negotiation of such changes, and the extent to which CCCs and Northern Valley have shared the costs of delivering traffic to CCCs and the revenues generated by that traffic.

16. The process by which CCCs' equipment was placed in Northern Valley's central offices or other locations, including but not limited to any interstate access tariff provisions or intrastate access tariff provisions under which such placement occurred, control and ownership of the space in which such equipment was placed, who had access to the space, and whether non-CCC customers can locate equipment at Northern Valley central offices and under what conditions.

17. Northern Valley's provision of service to non-CCC customers including its provision of voice ports.

18. The retail services provided by CCCs.

19. The decision on where to locate CCCs' equipment and the decision, if applicable, to change the location for that equipment.

20. The extent to which CCCs were capable of dialing out from conference bridges, and if so, the extent to which outbound dialing occurred.

21. Calls sent by CCCs from bridges to the Internet, including calls referred to in NVC 00046110.

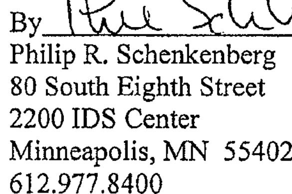
22. The switching services provided by Northern Valley to National Communications Group, and the calls discussed and represented on NVC 00045680-81 and NVC 00045443.

23. Northern Valley's document preservation policies, electronic systems on which documents reside, the process of preserving and producing documents for this litigation, whether there were documents related to the subject of this docket that no longer exist and reasons they no longer exist, and any effort to destroy documents related to traffic to CCCs or any anticipated subjects of this litigation (before or after litigation commenced).

The deposition will be taken before a certified court reporter and will be recorded stenographically and/or by audio or audio-visual means.

Dated: August 11, 2011

BRIGGS AND MORGAN, P.A.



By____________________

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Attorneys for Sprint Communications Company L.P.

CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of August, 2011, copies of:

- Sprint Communications Company L.P.'s Amended Second Set of Interrogatories to Northern Valley Communications, L.L.C.;
- Sprint Communications Company L.P.'s Amended Third Set of Interrogatories to Northern Valley Communications, L.L.C.;
- Sprint Communications Company L.P.'s Second Amended Fourth Set of Interrogatories to Northern Valley Communications, L.L.C.;
- Sprint Communications Company L.P.'s Amended Fifth Set of Interrogatories to Northern Valley Communications, L.L.C.;
- Sprint Communications Company L.P.'s Second Amended Sixth Set of Interrogatories to Northern Valley Communications, L.L.C.;
- Sprint Communications Company L.P.'s Amended Seventh Set of Interrogatories to Northern Valley Communications, L.L.C.;
- Sprint Communications Company L.P.'s Amended Eighth Set of Interrogatories to Northern Valley Communications, L.L.C.;
- Sprint Communications Company L.P.'s Amended Ninth Set of Interrogatories to Northern Valley Communications, L.L.C.;
- Sprint Communications Company L.P.'s First Set of Requests for Admissions to Northern Valley Communications, L.L.C.; and
- Third Amended Notice of Taking Deposition of Northern Valley Communications, LLC 30(b)(6) Representative.

were served via email to:

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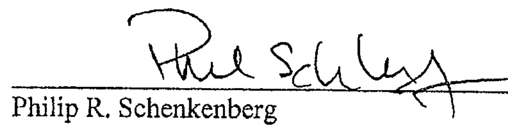

Philip R. Schenkenberg

3484591v29

EXHIBIT B

2011 WL 4736292
Only the Westlaw citation is currently available.
United States District Court,
N.D. Texas,
Dallas Division.

CONNECT INSURED TELEPHONE, INC.,
Plaintiff,
v.
QWEST LONG DISTANCE, INC., et al.,
Defendants.

No. 3–10–CV–1897–D. | Oct. 6, 2011.

Attorneys and Law Firms

Eric D. Fein, Vickie S. Brandt, Eric D. Fein & Associates, Dallas, TX, for Plaintiff.

Julie E. Heath, Farrow-Gillespie & Heath LLP, Dallas, TX, Charles Walter Steese, Sandra L. Potter, Steese Evans & Frankel PC, Denver, CO, for Defendants.

Opinion

MEMORANDUM OPINION AND ORDER

JEFF KAPLAN, United States Magistrate Judge.

***1** Plaintiff Connect Insured Telephone, Inc. ("CIT") has filed a motion to compel discovery from Defendants Qwest Long Distance, Inc. and Qwest Communications Company, LLC ("Qwest") in this civil action removed from state court to federal court on the basis of diversity of citizenship. For the reasons stated herein, the motion is denied.

I.

A brief overview of the facts of the case and the claims of the parties is necessary to the disposition of the pending motion. CIT is a competitive local exchange carrier that provides local telephone service to customers in Texas. (*See* Def. Ans, to Plf. Am. Compl. at 17, ¶ 6). Qwest is a nationwide telecommunications company that provides domestic long distance telephone service to customers throughout the country, (*Id.* at 17, ¶ 5). When Qwest carries long distance calls to customers within CIT's local calling area, it must use CIT's network facilities to connect the calls. (*See* Plf. Am. Compl. at 2, ¶ 6). Use of CIT's facilities in this way is referred to as "switched access" services, and obligates Qwest to pay "access charges" to CIT. (*See id,;* Def. Ans. to Plf. Am. Compl. at 19–20, ¶¶ 15–16. Such "access charges" are regulated by tariffs on file with the Federal Communications Commission ("FCC") and the Texas Public Utilities Commission ("PUC"). (*See* Def. Ans. to Plf. Am. Compl. at 19–20, ¶ 16).

At issue in this lawsuit are toll-free long distance calls, or calls to 1–8xx numbers, for which the originating customers do not pay any fees. (*See* Plf. Am. Compl. at 2, ¶¶ 6–7; Def. Ans. to Plf. Am. Compl. at 19, ¶ 15). When a customer places a 1–8xx call, the local exchange carrier performs a "database dip," which queries a 1–8xx database to identify the long distance carrier responsible for carrying the call to that number. (*See* Def. Ans. to Plf. Am. Compl. at 20, ¶ 17). The local exchange carrier then routes the 1–8xx call to the appropriate long distance carrier, who pays the originating local exchange carrier a "switched access" charge that includes a charge for the "database dip." (*Id.* at 20, ¶¶ 18–19). If the call is answered, the owner of the 1–8xx number reimburses the long distance carrier for these charges. (*Id.*). If the call is not answered, the owner of the number is not billed by the long distance carrier. (*Id.*). In this lawsuit, CIT alleges that Qwest owes approximately $250,000 for database queries for 1–8xx numbers dating back to December 2008. (*See* Plf. Am. Compl. at 2–4, ¶¶ 6, 8, 11, 14, 26). Qwest counters that the charges are not legitimate because CIT engaged in an unlawful "traffic pumping" scheme, whereby autodialers place millions of 1–8xx calls to random numbers, but disconnect the calls before they are answered. (*See* Def. Ans. to Plf. Am. Compl. at 20, ¶ 20). According to Qwest, "switched access" charges apply only to calls originating from an "end-user" at a "premises" unique to the user. (*See id.* at 21–23, ¶¶ 27, 29, 35, 38–39). Because the autodialers are not "end-users" and are located on CIT's premises, Qwest maintains that it is not required to pay "switched access" charges for autodialed calls. (*Id.* at 24–25, ¶¶ 43–45).

***2** The instant discovery dispute involves two interrogatories and 12 document requests served on Qwest.1 The two interrogatories seek:

- the amount of charges Qwest billed for CIT customers each month for the period beginning June 1, 2007 to December 31, 2009, and the amount of revenue Qwest received from CIT customers during

those months (Interrog.# 10); and

- information regarding all "Call Centers" owned and/or operated by Qwest from January 1, 2006 to the present, including the name and address of each Call Center and contact information for the manager of the Call Center (Interrog.# 17).

The document requests seek:

- documents that show, list, or account for calls made from telephone numbers assigned to CIT for the period beginning June 1, 2008 to the present (RFP # 8);

- documents and electronic data that show, list, or account for financial or payment data for calls made from telephone numbers assigned to CIT for the period beginning June 1, 2008 to the present, including long distance charges, payments, refunds, credits, late payments, and disputed payments (RFP # 11, 12, 13, 14, 15 & 16);

- documents and electronic data that show, list, or account for payments to Qwest affiliates for l–8xx calls that originated from call centers for the period beginning June 1, 2008 to the present (RFP # 17);

- internal audits and related documentation performed by Qwest regarding 1–8xx call traffic with CIT for the period beginning June 1, 2007 to the present (RFP # 42);

- documents and electronic data that relate to, summarize, or reflect ledgers, statements, and accounts for l–8xx calls with CIT for the period beginning June 1, 2007 to the present (RFP # 43);

- documents that relate to the volume of traffic for 1–8xx calls6 originating with CIT and terminating with Qwest subscribers, including all call detail records, CABS billing records, logfiles, call collection information, and call detail information (RFP # 52); and

- documents about any Qwest call center or outbound calling product, including enhanced call routing, predictive dialing services, and other services sold to call centers (RFP # 59).

Qwest objects to these discoveiy requests as irrelevant, overly broad, and unduly burdensome. In addition, Qwest contends that some 300 documents withheld from production are privileged or otherwise exempt from discovery. The parties have briefed their respective positions a Joint Status

Report filed on August 31, 2011, and the motion is ripe for determination.

II.

Rule 26(b) allows a party to obtain discoveiy "regarding any nonprivileged matter that is relevant to any party's claim or defense[.]" FED. R. CIV. P. 26(b)(1). The information and materials sought need not be admissible at trial "if the discoveiy appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Relevant information includes "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Merrill v. Waffle House, Inc.,* 227 F.R.D. 467, 470 (N.D.Tex.2005), *quoting Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978). In the discovery context, "[r]elevancy is broadly construed, and a request for discoveiy should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party." *Id., quoting Sheldon v. Vermonty,* 204 F.R.D. 679, 689 (D.Kan.2001). Once the moving party establishes that the information and materials sought are within the scope of permissible discovery, the burden shifts to the nonmovant to show why the discovery is irrelevant, overly broad, unduly burdensome, or should not be permitted. *See SSL Set-vices, LLC v. Citrix Systems, Inc.,* No. 2–08–CV–158–TJW, 2010 WL 547478 at *2 (E.D.Tex. Feb. 10, 2010), *citing Spiegelberg Mfg., Inc. v. Hancock,* No. 3–07–CV–1314–G, 2007 WL 4258246 at *1 (N.D.Tex. Dec.3, 2007).

A.

***3** The documents responsive to RFP Nos. 8, 11, 12, 13, 14, 15, 16, 17, 43 and 52 consist of call detail records, or "CDRs." (*See* Jt. Stat. Rep. at 16–18, 21, 33–44). A CDR is a computer-generated record that is created when a long distance call is made. The CDR contains certain information regarding the call, including the originating telephone number, the number dialed, and the length of the call. (*See* Jt. Stat. Rep.App. at 325, ¶ 6 & *id.* at 78, ¶ 8). In most cases, special equipment and software are required to analyze a CDR. (*See id.* at 325, ¶ 7 & *id.* at

78–79, ¶ 8). Because there are millions of disputed calls at issue in this case, there are millions of CDRs responsive to CIT's document requests. (*See id.* at 325, ¶ 8). Among other things, Qwest contends that it would be unduly burdensome and oppressive to gather and analyze the CDRs.

Rule 26(b) (2)(C) requires a court to limit otherwise permissible discovery if:

> (i) the discoveiy sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discoveiy in the action; or
>
> (iii) the burden or expense of the proposed discoveiy outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(C). *See also Crosby v. Lousiana Health Service and Indemnity Co.,* 647 F.3d 258, 264 (5th Cir.2011) (district court must limit proposed discovery if it determines that the burden or expense of the discovery outweighs its likely benefit). In a sworn declaration, Christopher Inman, Director of Finance for Qwest, explains that CDRs are archived on magnetic tapes housed off site. (*See* Jt. Stat. Rep.App. at 326, ¶ 9). The CDRs for the calls at issue are interspersed on tapes with CDRs for billions of other calls that Qwest carries each year. (*Id.* at 326, ¶¶ 10, 11). According to Inman, it would take "hundreds if not thousands of hours" and "tens of thousands of dollars" to gather the CDRs and have TEOCO, a third-party vendor, use specialized tools to parse the responsive CDRs from the billions of other CDRs archived in its warehouse. (*Id.* at 325–26, ¶¶ 7–8, 11). Inman states that every telephone company that bills switched access, including CIT, "must have access to a company that generates and maintains CDRs on their behalf." (*Id.* at 326, ¶ 13). Indeed, it appears that CIT previously provided Qwest with CDRs for at least some of the disputed calls at issue in this lawsuit. (*See id.* at 206–07, 350). Inman suggests that it would be "substantially easier and more cost effective" for CIT to gather the same CDRs from its own billing agent because CIT handles a significantly lower volume of calls than Qwest. (*See id.* at 326, ¶ 13).

***4** CIT does not deny any of these facts. Nor does it offer any evidence to controvert Inman's sworn testimony that it would take "hundreds if not thousands of hours" and "tens of thousands of dollars" to obtain the relevant CDRs. Instead, CIT merely asserts that "[t]he alleged burdensome nature of the request is overblown and exaggerated" because Qwest is a multi-billion dollar company, the amount in controversy is at least $264,398, and the CDRs are "key" to its claims for unjust enrichment, money had and received, conversion, and exemplary damages. (*See* Jt. Stat. Rep. at 20–21). Notably, CIT fails to explain why it cannot obtain the CDRs from a more convenient, less burdensome source-namely, its own billing agent. The only evidence before the court on this issue comes from Inman, who states that it would be "substantially easier and more cost effective" for CIT to gather the CDRs from that other source. The court therefore sustains Qwest's objection to RFP Nos. 8, 11, 12, 13, 14, 15, 16, 17, 43, and 52.2

With respect to Interrogatory No. 10, Inman explains that Qwest does not maintain records of the amount of charges billed to or the revenues received from CIT customers. (*See* Jt. Stat. Rep.App. at 327, ¶ 20). The analysis required to determine those charges would involve the review of millions of CDRs on an individual basis. (*Id.* at 327–28, ¶¶ 20–21; *see also* Jt. Stat. Rep. at 2). Additionally, Qwest would need to analyze the calling plan for every individual customer who received one of the 1–8xx calls at issue to determine whether the charges for those calls were disputed and written off. (*See* Jt. Stat. Rep.App. at 327–28, ¶ 21). Inman conservatively estimates that such an analysis would take more than 50,000 hours to perform. (*Id.* at 328, ¶ 24). CIT does not dispute this estimate. Nor does CIT argue that the information requested in Interrogatory No, 10 is relevant to any of its claims other than unjust enrichment, money had and received, conversion, and exemplary damages. (*See* Jt. Stat. Rep. at 4). Even if the requested information is relevant to CIT's equitable claims, *but see Northern Valley Communications, LLC v. Qwest Communications Corp.,* No. 09–1004–CBK, 2010 WL 3672233 at *5 (D.S.D. Sept.10, 2010) (questioning relevance of long distance carrier's revenues to local carrier's claim for unjust enrichment), the marginal benefit of such discovery does not justify the expenditure of tens of thousands of dollars by Qwest to obtain the information, particularly in a lawsuit where the principal allegations involve breach of contract and the amount in controversy is less than $265,000. That Qwest is a multi-billion dollar company does not, in itself, make the discovery any less burdensome. Qwest's objection to Interrogatory No. 10 is sustained.

The court also sustains Qwest's objection to Interrogatory No. 17 and RFP Nos. 17 and 59, which seek information and documents regarding Qwest call centers and

outbound calling products. CIT has defined the term "call center" to mean "any business ... that engages in receiving or transmitting large volumes of requests by way of using telephone lines and/or telephone equipment [.]" (*See* Jt. Stat. Rep.App. at 136). Qwest objects that these discovery requests are irrelevant, vague, ambiguous, and overly broad. (*See* Jt. Stat. Rep. at 12–13, 37–38). In particular, Qwest contends that the term "call center," as defined by CIT, encompasses virtually every Qwest office building and every Qwest business customer because they all receive or send large volumes of requests by way of using telephone lines or telephone equipment, (*See* Jt. Stat. Rep.App. at 330, ¶ 4). With respect to outbound calling products, Qwest maintains that virtually eveiy telecommunications product it sells has the ability to make outbound calls. (*Id.* at 332, ¶ 14). CIT does not deny the breadth of its discovery requests, but refuses to limit the definition of "call centers" to include only "call centers whose primary function is outbound calling."[3] (Jt. Stat. Rep. at 11–12, 36), Instead, CIT argues that the information sought is relevant to its "discriminatory cause of action" under the Texas Public Utility Regulatory Act, Tex. Util.Code Ann. § 55.001, *et seq.* (*See* Jt. Stat. Rep. at 12, 36). Regardless of the relevance of this information, the term "call centers," as defined in the discovery requests, is overly broad.

B.

***5** Finally, the parties dispute whether some 300 documents listed on Qwest's privilege log, which include "internal audits" responsive to RFP No. 42 and some documents responsive to RFP No. 43, constitute work product.[4]

The federal work product doctrine, as codified in FED. R. CIV. P. 26(b)(3), provides for the qualified protection of documents and tangible things prepared by or for a party or that party's representative "in anticipation of litigation or for trial." FED. R. CIV. P. 26(b)(3).[5] Determining whether a document is prepared in anticipation of litigation is a "slippery task." *Minis v. Dallas County,* 230 F.R.D. 479, 483 (N.D.Tex.2005), *citing United States v. El Paso Co.,* 682 F.2d 530, 542 (5th Cir.1982), *cert. denied,* 466 U.S. 944, 104 S.Ct. 1927, 80 L.Ed.2d 473 (1984). A document need not be generated in the course of an ongoing lawsuit in order to qualify for work product protection. *Id.* However, "the primary motivating purpose" behind the creation of the document must be to aid in possible future litigation. *In re Kaiser Aluminum & Chemical Co.,* 214 F.3d 586, 593 (5th Cir.2000), *cert. denied,* 532 U.S. 919, 121 S.Ct. 1354, 149 L.Ed.2d 285 (2001); *United States v. Davis,* 636 F.2d 1028, 1039 (5th Cir.), *cert. denied,* 454 U.S. 862, 102 S.Ct. 320, 70 L.Ed.2d 162 (1981). As the advisory committee notes to Rule 26(b)(3) make clear, "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." FED. R. CIV. P. 26, adv. comm. notes; *see also El Paso Co.,* 682 F.2d at 542. Among the factors relevant to determining the primary motivation for creating a document are "the retention of counsel and his involvement in the generation of the document and whether it was a routine practice to prepare that type of document or whether the document was instead prepared in response to a particular circumstance." *Navigant Consulting, Inc. v. Wilkinson,* 220 F.R.D. 467, 477 (N.D.Tex.2004), *quoting Electronic Data Systems Corp. v. Steingraber,* No. 4–02–CV–225, 2003 WL 21653414 at *5 (E.D.Tex. Jul.9, 2003). If the document would have been created without regard to whether litigation was expected to ensue, it was made in the ordinary course of business and not in anticipation of litigation. *Id.*

Like all privileges, the work product doctrine must be strictly construed. *Minis,* 230 F.R.D. at 484; *see also McCook Metals LLC. v. Alcoa, Inc.,* 192 F.R.D. 242, 260 (N.D.Ill.2000) (work product doctrine "significantly restricts the scope of discoveiy and must be narrowly construed in order to aid in the search for the truth"); *Republican Party of North Carolina v. Martin,* 136 F.R.D. 421, 429 (E.D.N.C.1991) (same). The burden is on the party who seeks work product protection to show that the materials at issue were prepared by its representative in anticipation of litigation or for trial. *See Minis,* 230 F.R.D. at 484. A general allegation of work product is insufficient to meet this burden. *See Nagivant Consulting,* 220 F.R.D. at 473, *citing Hodges, Grant & Kaufmann v. United States,* 768 F.2d 719, 721 (5th Cir.1985). Instead, "a clear showing must be made which sets forth the items or categories objected to and the reason for that objection." *Id., quoting Caruso v. Coleman Co.,* No. 93–CV–6733, 1995 WL 384602 at *1 (E.D.Pa. Jun.22, 1995). The proponent must provide sufficient facts by way of detailed affidavits or other evidence to enable the court to determine whether the documents constitute work product, *Id.* Although a privilege log and an *in camera* review of documents may assist the court in conducting its analysis, a party asserting the work product exemption still must provide "a detailed description of the materials in dispute and state specific and precise reasons for their claim of protection from disclosure." *Id.* at 473–74, *quoting Pippenger v. Gruppe,* 883 F.Supp. 1201, 1212 (S.D.Ind.1994). In fact, "resort to *in camera* review is appropriate only *after* the burdened party has submitted detailed affidavits and other evidence to the extent

possible." *Id.* at 474, *quoting Caruso,* 1995 WL 384602 at *1 (emphasis in original).

***6** Judged against this standard, Qwest has met its burden of proving that the documents at issue are entitled to work product protection. In addition to a detailed privilege log identifying each document withheld from production and the reasons therefor, Qwest provides the sworn declaration of its Associate General Cousnel, Thomas M. Dethlefs, who explains:

> Qwest began analyzing evidence concerning Connect IT in late 2008. Initially, the Facilities Cost organization found Connect IT's calling patterns aberational. Shortly thereafter, they came to the Qwest Law Department seeking counsel about how to address the situation. I was the person within the Qwest Law Department that the matter was assigned to for investigation. I began to work with Chris Inman and Doug Hyatt of Qwest Facilities Cost Organization and John Cunningham of Network Security. I asked them to gather material for me because the case appeared to have many aspects similar to those Qwest was confronting in existing litigation pending in Iowa and South Dakota; what is known as "traffic pumping" litigation. Thus, in late 2008, Qwest and I specifically believed that litigation with Connect IT was probable, and began to prepare for that eventuality. At the time, Qwest did not have all of the facts necessary to initiate litigation, but began to conduct itself in anticipation of potential litigation by asking me to investigate and analyze the charges of potential illegality.

(*See* Jt. Stat. Rep.App. at 335–36, ¶ 5). CIT does not dispute any of these facts. Without evidence to suggest otherwise, the court determines that all the documents identified in the privilege log were prepared by or for Qwest "in anticipation of litigation," and thus are protected from disclosure by the work product doctrine, Contrary to CIT's suggestion, a document need not be generated in the course of an ongoing lawsuit in order to qualify for work product protection. *See Mims,* 230 F.R.D. at 483. Nor is there any requirement, at least in the Fifth Circuit, that an attorney add "creative or analytic input" to a document for it to qualify as work product. *See Navigant Consulting,* 220 F.R.D. at 477 (document is entitled to work product protection if the "primary motivating purpose" behind the creation of the document was to aid in possible future litigation). Accordingly, CIT is not entitled to any of these documents.[6]

CONCLUSION

Plaintiff's motion to compel discovery [Doc. # 93] is denied in its entirety.

SO ORDERED.

Footnotes

1 One of the defendants, Qwest Long Distance, Inc. ("QLD"), has not operated as an interexchange carrier or competitive local exchange carrier in Texas since 2003, and has no information or documents responsive to any of the discovery requests. (*See* Jt. Stat. Rep. at 5). As a result, Qwest has answered the requests as if they were directed to the otlier defendant, Qwest Communications Company, LLC ("QCC"), which is the certificated long distance carrier in Texas. (*Id.*).

2 In the Joint Status Report, CIT expresses "doubts" as to whether certain Financial information and payment data would be found in CDRs. (*See* Jt. Stat. Rep. at 15), To the extent CIT seeks an order requiring the production of documents other than CDRs, the existence and responsiveness of such other documents has not been adequately briefed by the parties.

3 CIT refuses to narrow the definition of this term because it allegedly has learned through "independent research" that Qwest call centers make outbound calls, (*See* Jt. Stat. Rep. at 12). However, CIT does not elaborate on the details of its "independent research" or explain how this information justifies the broad definition of "call centers." To the extent Interrogatory No. 17 and RFP Nos. 17 and 59 seek information about call centers whose primary function is outbound calling, Qwest states that it does not operate any such call centers, (*See* Jt. Stat. Rep.App. at 63).

4 Qwest also contends that many of these documents are privileged attorney-client communications. In view of the determination that ail the withheld documents constitute work product, the court need not consider whether the attorney-client privilege applies.

5 Work product is not a substantive privilege within the meaning of FED. R. CIV. P. 501. *See Interphase Corp. v. Rockwell International Corp.,* No. 3–96–CV–0290–L, 1998 WL 664969 at *4 (N.D.Tex. Sept.22, 1998). Therefore, the resolution of this

issue is governed by federal law.

6 CIT briefly mentions that the "substantial need exception" to the work product doctrine may allow for discovery of the documents withheld by Qwest. (*See* Jt. Stat. Rep. at 47). Other than this off-hand comment in the Joint Status Report, CIT makes no attempt to satisfy the requirements of FED. R. CIV. P. 26(b)(3)—that is, to establish a "substantial need of the materials in the preparation of [its] case and that [it] is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *See Mints,* 230 F.R.D., at 484, *quoting* FED. R. CIV. P. 26(b)(3).

End of Document

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EXHIBIT C

2010 WL 3672233
Only the Westlaw citation is currently available.
United States District Court,
D. South Dakota,
Northern Division.

NORTHERN VALLEY COMMUNICATIONS, L.L.C., Plaintiff, Counterclaim Defendant
v.
QWEST COMMUNICATIONS CORPORATION, Defendant, Counterclaimant
v.
Global Conference Partners, Counterclaim Defendant.

Civ. No. 09-1004-CBK. | Sept. 10, 2010.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

JOHN E. SIMKO, United States Magistrate Judge.

***1** Pending are:

1. Qwest Communications Corporation's ("Qwest") motion to compel.1
2. Northern Valley Communications, L.L.C.'s ("Northern") motion to compel.2
3. Qwest's motion to amend or correct declaration.3
4. Northern's motion to seal.4
5. Qwest's motion to seal.5
6. Qwest's motion to seal.6
7. Northern's motion to seal.7

Central to Northern's motion to compel is its claim that Qwest has been unjustly enriched at Northern's expense.8 Northern asserts it originated and terminated long distance calls for Qwest customers but did not receive payment from Qwest. Northern claims this was inequitable because Qwest collected money for these calls.

Central to Qwest's motion to compel is its claim that it is a victim of Northern's traffic pumping scheme, i.e. Qwest did not choose Northern's services to complete conference calls for Qwest's customers.9 Instead Northern paid conference calling companies10 to attract Qwest customers to use a telephone number belonging to Northern, which in turn triggered a fee for Qwest to use Northern's origination and termination services.

Qwest's Motion to Compel.11

Qwest's motion asserts:

- Northern refuses to identify all of the Free Calling Service Companies ("FCSCs") who have contacted, interacted or contracted with Northern. Northern refuses to identify the FCSCs other than those which actually used Northern telephone numbers. The request's full scope is relevant and necessary to several of Qwest's claims, particularly to the question of whether Northern's FCSC arrangements were "end user" customer relationships subscribing to services under its tariffs.

- Northern identifies contractual amendments with its FCSC partners on its privilege log and re fuses to produce them. Northern claims they are "settlement agreements" and withholds them as well as documents related to them (i.e., drafts and correspondence). These agreements define the prospective (and potentially historic) relationships between Northern and its FCSCs, which is at the very heart of this lawsuit. This material goes to several claims. The requested documents are relevant and necessary to all of Qwest's claims.

- Northern refuses to produce several non-privileged, public documents because their lawyers provided advice about these public materials. While the advice itself is privileged and protected, the underlying public documents are not. Qwest seeks production of the non-privileged documents, which cannot be

shielded from discovery simply by attaching them to privileged emails.

Northern's Motion To Compel.[12]

Northern's motion asserts:

> Specifically, Northern seeks documents and interrogatory responses relating to its alternative theory of recovery for unjust enrichment, including discovery regarding Qwest's revenues derived from its customers for calls destined to Northern's network. Northern seeks documents regarding Qwest's own practices with regard to issues in this litigation, including revenue sharing practices and concerning the payment and collection of access charges associated with calls directed to Qwest's affiliated conference call provider, Genesys. Northern also seeks documents that Qwest has shared with its potential purchaser, CenturyLink, including statements regarding its analysis of the instant litigation. Finally, Qwest has erroneously claimed that several documents are protected from disclosure as a result of the attorney work product or attorney-client privilege. Northern requests that those documents be produced or reviewed by the Court *in camera* to evaluate Qwest's claims of privilege.

DECISION

*2 Neither Qwest nor Northern identified the disputed discovery requests by number in their respective motions to compel. Both parties submitted hundreds of pages of briefs, exhibits, and sworn declarations. The specific references to specific disputed discovery requests are identified within these documents. Because the motions to compel categorize the disputed subjects rather than identify each particular disputed discovery request by number, the rulings are likewise by category rather than by number.

A. QWEST'S MOTION TO COMPEL.

1. Qwest's motion to compel Northern to identify all Free Calling Service Companies with whom Northern has communicated, interacted or contracted.[13]

Qwest argues the identity of companies with whom Northern *did not do business* is helpful to prove the free calling service companies with whom Northern *does do business* are not end users. Qwest asserts:

> First, if Northern Valley declined any inquiries from FCSCs (either as brokers for other FCSCs or directly for themselves), this is directly relevant to whether the FCSCs were end users subscribing to Northern Valley's tariffs, or instead were doing business with Northern Valley outside of its tariffs. Only common carrier services can be tariffed, and holding oneself out to provide services indifferently to all potential users is a hallmark of tariffed services.[14]

There are many reasons why people and companies choose to do business with each other. One of the reasons could be the one articulated by Qwest, i.e. that Northern *declined* to do business. But, one can imagine many other reasons which would not tend to prove or disprove the free calling service customer with whom Northern does business is an end user. This discovery request is too broad and only minimally likely to produce relevant or admissible information. When compared to the work Northern would have to accomplish to uncover the identity and contact information for every free calling service company with whom Northern has communicated, interacted or contracted directly or indirectly, the burden is too great and the benefit too little. On the other hand, if there are so few free calling service companies that it would not be burdensome for Northern to identify those with whom it *did not do business* despite having communicated, interacted or contracted directly or indirectly, then the burden is not too great for Qwest to conduct its own investigation about those free calling service companies to discover facts tending to prove Northern's current free calling service customers or partners are not end users. Qwest's motion to compel Northern to identify all of the free calling service companies with whom Northern has communicated, interacted or contracted is DENIED.

2. Qwest's Motion To Compel Northern To Produce Contract Amendments With Free Calling Service Companies, Including Drafts And Communications Relating To Them.[15]

Qwest argues these amendments are

> *3 substantive evidence about whether the FCSCs are end users, and whether

> Northern Valley is, or is not, delivering calls pursuant to the terms of its switched access tariff. Under the official notes to Rule 408, Qwest is not seeking these documents for a use prohibited by Rule 408(a), and therefore, Rule 408(b) expressly authorizes use of these documents at trial.16

These amendments are the result of confidential litigation settlement agreements to which Northern is a party. The pertinent cases have been considered.17 Qwest has satisfied both the ordinary Rule 26(b)(1) standard18 and the heightened standard giving deference to Federal Rule of Evidence 408.19 Northern has not claimed privilege as a protection from discovery. Northern argues:

> In order to effectuate the terms of those settlement agreements and operate on a forward looking basis, Northern Valley has been obliged to amend the terms of its agreements with the affected conference-calling providers (the "Amendments") to reflect the financial arrangement reached with the IXCs (i.e., to set a new rate at which the conference-calling providers will be compensated for the traffic delivered by the settling carriers). This new rate is the sole content of the Amendments to the conference-calling providers' contracts that Northern Valley has not produced to Qwest, and constitutes confidential information pursuant to the terms of the settlement agreements reached with the relevant IXC.20

But Qwest claims that if Northern is either charging different rates to different free calling service companies or off tariff rates21 then the different rates or off tariff rates tend to prove whether the FCSCs are end users, and whether Northern is, or is not, delivering calls pursuant to the terms of its switched access tariff. That claim is central to Qwest's theories in this litigation. Qwest's motion to compel Northern to produce contract amendments with free calling service companies, including drafts and communications relating to them is GRANTED. Northern may redact from the drafts and communications matters which are protected by the attorney/client privilege. The materials produced must be protected by the Protective Order which is on file and must be "for attorneys' eyes only" unless otherwise ordered by the court.

3. Qwest's Motion To Compel Production Of Public Documents Attached To Privileged E-Mail.22

Qwest argues that attaching non-privileged documents to privileged communications does not make the public documents privileged. Otherwise, Qwest argues, fully discoverable material could be shielded from discovery through the simple expedient of conveying copies to his attorney.23 Northern asserts "all of the disputed e-mails and attachments were selected and forwarded by either Northern Valley or its counsel for the specific purpose of obtaining legal advice or dispensing it."24 The disputed documents are not in the record. Northern has asserted an attorney/client privilege for all of the disputed documents and a work product privilege for two of them. Qwest identified the attachments it is seeking in its brief by beginning Bates number and description:25

***4** The controlling principles were identified in *Barton:*26

> Federal Rule of Civil Procedure 26(b)(1) permits discovery into any nonprivileged matter that is relevant to any party's claim or defense.... Relevant information need not be admissible at trial so long as the discovery appears reasonably calculated to lead to the discovery of admissible evidence.... There are two well-known exceptions to the liberal discovery rules that are relevant to this discovery dispute: the attorney-client privilege and the work-product doctrine.... The party seeking to invoke the attorney-client privilege bears the burden of establishing all of the privilege's essential elements.... Nevertheless, simply including an attorney in a communication will not render an otherwise discoverable document protected by the privilege. The courts will not permit the corporation to merely funnel papers through the attorney in order to assert the privilege.... E-mails, with sometimes different and multiple recipients and authors, add complexity to the analysis of the attorney-client privilege Email strands can span over several days, and they may have many different recipients and authors. Moreover, some e-mails in which counsel are involved may contain factual information, which is not protected by the privilege, while others within the same strand may contain exclusively legal advice....("It is beyond question that the attorney-client privilege does not preclude the discovery of factual information. Only the communications and advice given are privileged; the underlying facts communicated are discoverable if they are otherwise the proper subject of discovery.").... The work-product doctrine is a qualified privilege and is "distinct from and broader than the attorney-client privilege.... Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative....

But an important competing principle was described in *Hilton-Rorar:*27

Although the assistance of others is often indispensable to the attorney's work, the attorney-client privilege only exists and extends to communications to an attorney's representative if the communication was made (1) in confidence and (2) for the purpose of obtaining legal advice.28

...

> To the extent these e-mails contain attachments or other e-mail communications that are not otherwise independently privileged, the attorney-client privilege nevertheless applies because to order the disclosure of those e-mails would necessarily reveal the substance of a confidential client communication made seeking legal advice. Thus, compelling disclosure would undercut a bedrock principle underlying the attorney-client privilege that is the privilege encourages clients to make full disclosure to their lawyers.[29]

Northern is the party seeking to invoke the attorney-client privilege. Northern bears the burden to establish all of the privilege's essential elements. Northern has represented that these documents "directly reflect the legal issues important to counsel and client."[30] Understanding that a claim of privilege cannot be a blanket claim and, instead, must be made and sustained on a document-by-document basis, the *Hilton-Rorar* Court conducted an *in camera* review of the all of the e-mails listed on Plaintiffs' privilege log.[31] Northern must produce these documents for *in camera* inspection before a ruling can be made. The ruling on this part of Qwest's motion to compel is DEFERRED.

B. NORTHERN'S MOTION TO COMPEL.

1. Discovery regarding Qwest's revenues derived from its customers for calls destined to Northern's network.

***5** Northern contends that Qwest's revenues are relevant to Northern's unjust enrichment claim.[32] Northern also contends the information it seeks from Qwest *may* be important to evaluate "the parties' damages."[33] Northern has not cited a case in which this sought after information has been allowed.

Qwest contends its revenues are not relevant and cites rulings disallowing production of revenues.[34] Despite Qwest's assertions that "every known motion to compel the same information" and that "the IUB case involved virtually identical claims and issues," there is a significant difference between Northern's motion and the other motions in which the long distance carriers' revenues were either not relevant or only marginally relevant. Here Northern has a claim for unjust enrichment. The unjust enrichment theory was not addressed in the cases cited by Qwest. Northern's unjust enrichment claim has survived Qwest's motion to dismiss.[35] "When a claim of unjust enrichment is established, the law implies a contract obligating the beneficiary to compensate the benefactor for the value of the benefit conferred."[36] Qwest has represented it does not record the information Northern seeks and that it would take thousands of hours to reconstruct the information. Other fact finders in other cases have determined the effort to produce like information would be burdensome. There are circular arguments in this case about the effect of tariff rates as a complete defense and as a measure of damages. Judge Kornmann said:

> There may be serious doubts as to whether Northern Valley could ever prove the element of inequity. However, to survive dismissal, Northern Valley must allege only enough facts to state a claim to relief that is plausible on its face. A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely .[37]

Northern's motion to compel production of Qwest's revenues derived from its customers for calls destined to Northern's network is DENIED without prejudice because at this stage the relevance of Qwest's revenues is questionable, probably marginal at best, and the effort to produce the information sought by Northern would be burdensome. Qwest has also asserted the cost to produce the information would be burdensome. Cost shifting may be a consideration if Northern perceives a need to pursue production of Qwest's revenues in the future.

2. Documents regarding Qwest's own practices with regard to issues in this litigation, including revenue sharing practices and concerning the payment and collection of access charges associated with calls directed to Qwest's affiliated conference call provider, Genesys.

Northern argues Qwest should produce its own revenue sharing agreements because Qwest does the same thing it complains about Northern doing. Northern contends that constitutes a statement against Qwest's interest and thus is relevant and discoverable.[38] No cases are cited to support the argument.

***6** Qwest argues it has already produced the same materials for South Dakota in another case and has authorized the use of those documents in this case.[39] Qwest also argues the information is not relevant, that it would be unduly burdensome to produce the information, and that the request for production is too broad.[40] Qwest refers to the *Tekstar* case in Minnesota[41].

This case is about the money Northern claims from Qwest. This case is about the legitimacy of Northern's conduct. If Northern's conduct is not legitimate, that Qwest is conducting business the same way does not

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make Northern's conduct legitimate. The motion is directed to evidence which is not relevant. The request is too broad, i.e. it is directed to Qwest's business relationships which are different from and broader than Northern's relationships with its free calling service companies. Northern's request also is too broad in that it addresses nationwide relationships when only South Dakota business relationships are at issue. The burden and cost to produce the information is too much compared to the benefit to be derived, if any. Qwest has already provided the same information in another case in South Dakota in which the issues are substantially identical and in which the same lawyers for Northern are also involved. Northern's motion regarding Qwest's own practices about revenue sharing, payment and collection of access charges associated with calls directed to Qwest's affiliated conference call provider(s) is DENIED.

3. Documents that Qwest has shared with its potential purchaser, CenturyLink, including statements regarding its analysis of the instant litigation.

Northern seeks production of "relevant materials" that Qwest or its affiliates have exchanged with CenturyLink, a company with which Qwest intends to merge. But Northern has not explained why Qwest's expected merger with another company has any relevance to the issues is this lawsuit.

Qwest cites case law about the common interest privilege.[42] Qwest responded to the disputed discovery request

> .... Qwest's attorney-client privilege and/or work product protection continue to apply to privileged information shared with CenturyLink subject to a confidentiality agreement in merger negotiations and post-merger agreement, based on Qwest and CenturyLink's common legal interest....[43]

Qwest asserts the disputed documents were disclosed to CenturyLink "to consider various risks and anticipated that after a potential merger, the combined company would handle the pending litigation. The disclosure was therefore necessary for formulating common legal strategy...."[44] Qwest's refusal is based upon attorney/client privilege and the work product doctrine, from which springs the common interest privilege.

Northern's motion to compel production of documents that Qwest has shared with its potential purchaser, CenturyLink, including statements regarding its analysis of the instant litigation is DENIED. Northern has not demonstrated relevance. Beyond relevance, the documents are protected by the attorney/client privilege and work product doctrine. This issue is different from the earlier ruling about public documents attached to privileged e-mails. Northern has not argued there are non-privileged documents among the privileged communications. Northern has argued that *none* of the communications are privileged and protected from discovery.

4. Documents[45] that Qwest claims are protected from disclosure as a result of the attorney work product or attorney-client privilege. Northern requests that those documents be produced or reviewed by the Court *in camera* to evaluate Qwest's claims of privilege.

*7 This part of Northern's motion to compel is the reverse side of the coin from Qwest's motion to compel disclosure of public documents attached to privileged e-mails. Northern argues:

> Qwest has either failed to establish that a communication is privileged or has waived that privilege through its broad distribution of information that may have previously been privileged. Accordingly, Northern Valley requests that the Court either compel the production of the documents identified below or examine those documents in camera to establish whether they are privileged.[46]

But this side of the coin is different. Qwest has supplied enough specific facts to satisfy its burden to establish the privilege which protects the respective document from discovery.[47] It has gone beyond reliance upon a blanket assertion of the attorney/client privilege or the work product doctrine. Based on the supplied facts a decision can be made about each disputed document without an *in camera* review. The rulings follow:

• **Document 950.**

This is a spreadsheet summary analyzing traffic of various Local Exchange Carriers ("LECs"). It was prepared at the request of Qwest's legal department. It was prepared by a person who is not a lawyer. His title is Lead Network Planning Engineer. The spreadsheet was attached to an e-mail to the Manager Network Planning. Northern contends the spreadsheet was created for ordinary business purposes and might contain facts subject to discovery.[48] Northern contends it has a substantial need for these facts because it has no other way of knowing what facts Qwest evaluated when it made the decision to withhold payment from Northern.[49] Qwest represents the

spreadsheet was prepared in anticipation of litigation.50 Qwest also represents the spreadsheet contains nothing about Northern.51 The motion to compel production of document 950 is DENIED.

• Document 1278.

This is an e-mail "reflecting conversation between Qwest Legal Department and client regarding request to restrict termination from certain carriers."52 A Staff Engineer drafted the e-mail which was sent to the Network Routing Team.53 Northern asserts the e-mail is not protected by the attorney/client privilege because the privilege extends only to communications that were made to secure legal advice.54 Additionally, a corporation waives the privilege if a privileged communication is shared with persons who do not have a corporate responsibility regarding the subject matter of the communication.55 Qwest represents the e-mail included only persons who were communicating in anticipation of litigation to identify questions to ask legal counsel and that each person who received or sent the e-mail possessed a pertinent job responsibility .56

> [T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.57

***8** The work product doctrine applies to mental impressions of lawyers and non-lawyers alike.58 Document 1278 is protected by the work product doctrine. Northern's motion to compel production of document 1278 is DENIED.

• Documents 1942 & 1944.

These are e-mails "reflecting communication between Qwest Legal Department and client regarding request to modify terms with wholesale carriers."59 Document 1942 was authored by the Manager Network Ops, and document 1944 was authored by a Staff Engineer.60 Northern argues the e-mails are not protected by the attorney/client privilege, but does not address the work product doctrine. Qwest has lumped its discussion about these two e-mails together with its discussion about documents 1278, 2034, and 2035. Qwest represents documents 1942 and 1944 included only persons who were communicating in anticipation of litigation to identify questions to ask legal counsel and that each person who received or sent the e-mails possessed a pertinent job responsibility.61 Documents 1942 and 1944 are protected by the work product doctrine. Northern's motion to compel production of documents 1942 and 1944 is DENIED.

• Document 1945.

This is an e-mail between two non-attorneys "reflecting communication between Qwest Legal Department and client regarding investigation of independent company access arbitrage."62 Counsel for Qwest represents the e-mail was prepared jointly by him and in-house legal counsel describing the results of their investigation into traffic pumping.63 The document was prepared for the specific purpose of recommending commencement of litigation.64 Document 1945 is protected from discovery by both the attorney/client privilege and the work product doctrine. Northern's motion to compel production of document 1945 is DENIED.

• Document 1975.

This is an e-mail "reflecting conversation between attorney Tana Simard-Pacheco and client regarding withholding payment of certain termination charges."65 Qwest represents the e-mail contains legal advice from in-house lawyers, relates to an Iowa local exchange company (not Northern), and was prepared "because of the prospect of litigation."66 Northern's motion to compel production of document 1975 is DENIED. It is protected from discovery by both the attorney/client privilege and the work product doctrine.

• Document 2011.

This is an e-mail between two non-attorneys "reflecting communication between Qwest Legal Department and client regarding team to address access arbitrage."67 Northern asserts the e-mail pre-dates the commencement of litigation by such a long time that the e-mail could not have been produced in anticipation of litigation, so it must have been produced in the ordinary course of business.68 Qwest lumps together documents 2011, 2147, and 2293 for discussion. Qwest represents:

> Each of these Qwest internal emails arose from an email of Ms. Hensley Eckert in mid-November, 2006, which initiated Qwest's first large-team investigation for providing information to in-house counsel so they could give legal advice to Qwest because of the prospect of litigation against traffic pumpers. These emails all ensure the legal advice was reaching the

> appropriate individuals within Qwest. These emails thus are both attorney-client privileged and contain attorney work product protected material (in-house counsel's legal advice in anticipation of litigation against traffic pumpers).69

***9** Document 2011 is protected from discovery by both the attorney/client privilege and the work product doctrine. Northern's motion to compel production of document 2011 is DENIED.

• Documents 2034 & 2035.

These are e-mails "reflecting communication between Qwest Legal Department and client regarding request to exercise rights with BellSouth, Broadwing, Level 3 and Global Crossing numbers" and "summary regarding request to exercise rights with BellSouth, Broadwing, Level 3 and Global Crossing prepared at attorney request.70 Northern refers to its arguments about documents 1942 and 1944 to support its motion to compel. Northern's motion to compel production of documents 2034 and 2035 is DENIED for the same reasons as production of documents 1942 and 1944 were denied.

• Documents 2135, 2136, 2147.

These are e-mails "reflecting conversation between attorney Robert McKenna and client regarding South Dakota Intermediate Tandem ."71 Northern asserts the e-mail pre-dates the commencement of litigation by such a long time that the e-mail could not have been produced in anticipation of litigation, so it must have been produced in the ordinary course of business. Northern also asserts the facts contained within the e-mails should be produced even if the e-mails themselves are privileged.72 Qwest represents:

> These are Qwest internal emails sent to Qwest's in-house counsel, with questions regarding the legal ownership of Splitrock, one of the traffic pumping carriers. These emails follow earlier emails between senior managers (not challenged) and specifically discuss the legal advice from Mr. McKenna. These documents were prepared at the direction of and in communication with counsel for the specific purpose of initiating litigation against Splitrock.73

Documents 2135 and 2136 are protected from discovery by both the attorney/client privilege and the work product doctrine. Northern's motion to produce documents 2135 and 2136 is DENIED.

• Document 2293.

This is an e-mail "reflecting conversation between attorney Robert McKenna and client regarding access arbitrage."74 Northern offers the same reasons as were offered to support production of documents 2135, 2136, and 2147.75 For the reasons represented by Qwest which are quoted above in connection with the ruling on document 2011, Northern's motion to compel production of document 2293 is DENIED.

• Documents Q050191-Q050196.

These are "minutes of Qwest Board of Directors Meeting."76 Given Qwest's description on the privilege log, Northern is unsure why the minutes qualify for attorney/client or work product protection.77 Qwest represents:

> The custodians identified for each of these documents are in-house counsel at Qwest. In each document, lawyers provide significant legal advice, which the Board implements. Every aspect of these documents that concern traffic pumping are both privileged legal advice and contain the mental impressions of the respective lawyers. Thus, each of these documents is on the privilege log because it contains the legal advice given to respectively the audit commit tee of the board of directors and the board of directors, regarding Qwest's ongoing traffic pumping cases, and is protected by the attorney work product doctrine.78

***10** Documents Q050191-Q050196 are protected from discovery by both the attorney/client privilege and the work product doctrine. Northern's motion to compel production of documents Q050191-Q050196 is DENIED.

ORDER

It is ORDERED:

1. Qwest's motion to compel (Doc. 123) is GRANTED in part, DENIED in part, and DEFERRED in part as follows:

> (a). Qwest's motion to compel Northern to identify all of the free calling service companies with whom Northern has communicated, interacted or contracted is DENIED.

> (b). Qwest's motion to compel Northern to produce contract amendments with free calling service companies, including drafts and communications

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relating to them is GRANTED. Northern may redact from the drafts and communications matters which are protected by the attorney/client privilege. The materials produced must be protected by the Protective Order which is on file and must be "for attorneys' eyes only" unless otherwise ordered by the court.

(c). Qwest's Motion To Compel Production Of Public Documents Attached To Privileged E-Mail is DEFERRED. Northern must produce these documents for *in camera* inspection before a ruling can be made.

2. Northern's motion to compel (Doc. 126) is DENIED and DENIED WITHOUT PREJUDICE as follows:

(a). Northern's motion to compel production of Qwest's revenues derived from its customers for calls destined to Northern's network is DENIED without prejudice.

(b). Northern's motion to compel regarding Qwest's own practices about revenue sharing, payment and collection of access charges associated with calls directed to Qwest's affiliated conference call provider(s) is DENIED.

(c). Northern's motion to compel production of documents that Qwest has shared with its potential purchaser, CenturyLink, including statements regarding its analysis of the instant litigation is DENIED.

(d). Northern' motion to produce the each of the disputed documents from Qwest's privilege log is DENIED.

3. Both Qwest's (Doc. 123) and Northern's (Doc. 126) motions for fees and expenses as sanctions against the other are DENIED. There existed sufficient legitimate justification about the disputes for each party to take the positions taken by each party.

4. Qwest's motion to amend or correct declaration (Doc. 128) is GRANTED.

5. Northern's motion to seal (Doc. 130) is GRANTED.

6. Qwest's motion to seal (Doc. 138) is GRANTED.

7. Qwest's motion to seal (Doc. 141) is GRANTED.

8. Northern's motion to seal (Doc. 147) is GRANTED.

Footnotes

1 Doc. 123.

2 Doc. 126.

3 Doc. 128.

4 Doc. 130.

5 Doc. 138.

6 Doc. 141.

7 Doc. 147.

8 Doc. 1, Count VI.

9 Doc. 73, p. 12.

10 Characterized by Qwest as a traffic pumping scheme in which a conference calling company offers free calls, generally long distance, to Qwest's customers on numbers assigned by Northern. The calls originate or terminate on Northern's system so Northern charges Qwest for accessing Northern's origination and termination services. Northern and the conference calling company share the access fees paid by Qwest to Northern.

11 Doc. 123.

12 Doc. 126.

13 Doc. 124, p. 5, Interrogatory 1.

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14 Doc. 124, p. 15.

15 Doc. 124, p. 6, requests for production 2, 3, 18, 33, and 38.

16 Doc. 124, p. 24.

17 *Evansville Greenway and Remediation Trust v. Southern Indiana Gas,* 2010 WL 1737875 (S.D.Ind.); *Evansville Greenway and Remediation Trust v. Southern Indiana Gas,* 2010 WL 779494 (S.D.Ind .); *Southern Shrimp Alliance v. Louisiana Shrimp Ass'n,* 2009 WL 3447259 (E.D.La.); *Southern Shrimp Alliance v. Louisiana Shrimp Ass'n,* 2009 WL 3447259 (E.D.La.); *Auto-Owners Ins. Co. v. Mid-America Piping, Inc.,* 2008 WL 2570820, (E.D.Mo.); *Multi-Tech Systems, Inc. v. Dialpad.com, Inc.,* 2002 WL 2714 (D.Minn); *Young v. State Farm Mut. Auto. Ins. Co.,* 169 F.R.D. 72 (S.D.W.Va.1996); *Fidelity Federal Sav. and Loan Ass'n v. Felicetti,* 148 F.R.D. 532 (E.D.Pa.1993).

18 Showing relevance or likely to lead to admissible evidence.

19 Switching the burden to Qwest rather than holding Northern to the burden of showing an exception from discovery.

20 Doc. 131, p. 12 (internal citation to record omitted).

21 Rates lower than the tariff schedule.

22 Doc. 124, pp. 11-12.

23 *Renner v. Chase Manhattan Bank,* 2001 WL 1356192, *5 (S.D.N . Y.).

24 Doc. 131, p. 20.

25 Doc. 124, pp. 11-12.

36336	Ex parte meeting notice
36339	FCC decision
36356	Ex parte filing
36362	AT & T ex parte
36370	AT & T ex parte
36376	Complaint from related litigation
36408	AT & T dispute letter
36410	AT & T dispute letter
36412	R. Buntrock Audit response letter
36416	R. Buntrock Audit response letter
36475	Sprint dispute report
36479	Sprint dispute report
36488	Recent FCC decision
36504	Recent FCC NPRM

26 *Barton v. Zimmer, Inc.,* 2008 WL 80647, 3 (N.D.Ind.). Internal citations and quotation marks omitted except for one to show that the quotation within the parentheses is from a case cited by the author of the *Barton* opinion.

27 *Hilton-Rorar v. State & Fed. Commc'ns Inc.,* 2010 WL 1486916, (N.D.Ohio).

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28 *Id.* at *4.

29 *Id.* at *8.

30 Doc. 131, p. 20.

31 *Hilton-Rorar* at *7.

32 Attachment to Doc. 130, p. 8.

33 *Id.*

34 Doc. 134, p. 6. (*Order of IUB,* 2008 WL 5235712 ("Data Request Nos. 44-46 ask QCC to identify the amounts QCC received from each of its long distance customers to carry calls to the Reasnor exchange. QCC states that it does not maintain this information in a format that makes it readily available to Reasnor. QCC has asserted that it would require thousands of hours to provide complete responses to these data requests and the Board finds that this expenditure of effort on QCC's part would be unduly burdensome for the collection of information for a marginally relevant issue. Therefore, the Board will deny Reasnor's motion to compel regarding Data Request Nos. 44-46").

Tekstar Commc'ns Inc. v. Sprint Commc'ns Co. LP, Civ. No. 08-1130-MJD-SRN, June 18, 2009 (D.Minn). Opinion attached to Doc. 138 as Ex. 14 and to Doc. 140 as Ex. 23. Without questioning Qwest's reason for citing this case, nothing can be found in it which addresses disclosing revenues received by the long distance carrier. The opinion addressed production of settlement agreements, privileged documents, and taking more than ten depositions. There is discussion of similar, if not the same, revenue sharing or fee arrangements in the *Tekstar* briefs, e.g. Doc. 138, Ex. 14, Plaintiff's Memorandum, p. 13. But, there is enough information in the hundreds of pages in the multiple briefs, declarations, and exhibits in this case alone without trying to sort through briefs from other cases.

Aventure Commc'ns Tech., L.L.C. v. MCI Commc'ns Serv., Inc., 2008 WL 4280371, *2 (N.D.Iowa). ("Finally, Aventure seeks information about the revenue Verizon has received from traffic terminated to Aventure's network. At issue are Interrogatory Nos. 5 and 7 and Request for Production No. 6. Aventure suspects the revenue information will show that Verizon still makes a lot of money even after the terminating access charges are considered. (Aventure Brief at 10). The Court can perceive no obvious relevance of Verizon's revenue receipts to the defense of the traffic pumping, tariff validity, and Switched Access Services allegations in the counterclaim. The motion to compel is denied with respect to Interrogatory Nos. 5 and & and Request for Production No. 6.")

35 Doc. 73. Judge Kornmann distinguished other cases in this District in which Judges Schreier and Piersol have dismissed an unjust enrichment claim. *Id.* p. 9.

36 Doc. 73, p. 11, the quotation in this opinion is taken from quoted material in Judge Kornmann's opinion, case citation omitted.

37 Doc. 73, p. 12. Internal quotation marks and citation omitted.

38 Attachment to Doc. 130, p. 13.

39 Doc. 134, p. 13.

40 Doc. 134, pp. 14-15.

41 *Tekstar Commc'ns Inc. v. Sprint Commc'ns Co. LP,* Civ. No. 08-1130-MJD-SRN (D.Minn.)

42 *Rayman v. American Charter Fed. Sav. & Loan Assoc.,* 148 F.R.D. 647, 654-55 (D.Neb.1993); *Hewlett-Packard Co. v. Bausch and Lomb Inc.,* 115 F.R.D. 308, 310 (N.D.Cal.1987); *In re: Regents of University of California,* 101 F.3d 1386, 1390 (Fed.Cir.1996); and *Cargill, Inc. v. LGX, LLC,* 2007 WL 2142355, *2-3 (E.D.Pa.).

43 Doc. 134, p. 21.

44 Doc. 134, p. 23.

45 Although identified as "documents," this is a different category of documents from those kept in the Clerk of Courts office which are also referred to as "Doc-."

46 Attachment to Doc. 130. p. 17.

47 See the discussion above under in Section A.3. under the heading "Qwest's Motion To Compel Production Of Public Documents Attached To Privileged E-Mail.

48 *Lindley v. Life Investors Insurance Co. of America,* 2010 WL 1741407 (N.D.Okla).

49 Attachment to Doc. 130, p. 19.

50 Doc. 134, p. 31.

51 Doc. 134, p. 31.

52 Attachment to Doc. 130, p. 19.

53 Attachment to Doc. 130, p. 19.

54 *Ellenbergv. Tuffy's Div. of Starkist Foods, Inc.,* 1985 WL 1559, at *5 (D.Minn).

55 *Id.*

56 Doc. 134, p. 32.

57 *Simon v. G.D. Searle & Co.,* 816 F.2d 397, 401 (8th Cir.1987).

58 *Id.* at 407.

59 Attachment to Doc. 130, p. 21.

60 Attachment to Doc. 130, p. 21.

61 Doc. 134, p. 32.

62 Attachment to Doc. 130, p. 21.

63 Doc. 134, p. 32.

64 Doc. 134, p. 32.

65 Attachment to Doc. 130, p. 22.

66 Doc. 134, p. 33.

67 Attachment to Doc. 130, p. 22.

68 Attachment to Doc. 130, p. 22-23.

69 Doc. 134, p. 33.

70 Attachment to Doc. 130, p. 23.

71 Attachment to Doc. 130, p. 23.

72 Attachment to Doc. 130, p. 24.

73 Doc. 134, p. 33-34.

74 Attachment to Doc. 130, p. 24.

75 Attachment to Doc. 130, p. 24.

76 Attachment to Doc. 130, 24.

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77 Attachment to Doc. 130, p. 24.

78 Doc. 134, p. 34.

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