Schenkenberg Aff.
Exhibit J

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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Tekstar Communications, Inc.

Plaintiff,

vs. ORDER

Sprint Communications Company L.P.,

Defendant. Civ. No. 08-1130 (JNE/RLE)

* * * * * * * * * * * * * * * * * * * *

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. §636(b)(1)(A), upon the Motion of the Plaintiff to Compel Answers to Interrogatories, and to Produce Documents, and the Motion of the Defendant for Leave to Take More Than Ten Depositions. See, Docket Nos. 58 and 65. A Hearing on the Motions was conducted on May 14, 2009, at which time, the Plaintiff Tekstar Communications, Inc., appeared by James N. Moskowitz, Esq.; and the Defendant Sprint Communications Company, L.P., appeared by Kevin M. Decker, Esq. For

reasons expressed during the course of the Hearing, and briefly reiterated below, the Plaintiff's Motion is granted in part, and the Defendant's Motion is granted.

In addition, the Defendant had previously filed its own Motion to Compel, see, Docket No. 35, but we had deferred our ruling on whether the documents, which the parties had identified as Category Three documents, were protected by the attorney-client privilege or a settlement communications privilege. See, Plaintiff's Memorandum in Opposition -- Defendant's Motion to Compel, Docket No. 41, at 14; Docket No. 95, at 26-27. Our ruling was delayed because the Plaintiff had failed to clearly identify where Category Three Document Nos. 1, 4, 8, and 11, were located in the documents submitted to us, which effectively stymied our in camera review for privileged status. See, Docket No. 95, at 26-27. By Order dated May 14, 2009, we directed the Plaintiff to submit, and to clearly identify, Document Nos. 1, 4, 8, and 11. Id. The Plaintiff has now complied with that directive and, on the basis of our in camera review, we have determined that Documents Nos. 1, 4, 8, and 11, are entitled to protection under the attorney client privilege, and that the remainder of the Category Three documents should be produced.

II. Factual and Procedural Background[1]

The Plaintiff seeks to Compel the Defendant to answer numerous Interrogatories, and Document Requests, to which, it contends, the Defendant has failed to properly respond.[2] See, Plaintiff's Memorandum in Support -- Motion to Compel, Docket No. 60, at 1. The Defendant responds that it has answered the Plaintiff's discovery requests, and that the Plaintiff's additional discovery requests are overbroad and irrelevant. See, Defendant's Memorandum in Opposition -- Motion to Compel, Docket No. 78, at 1-2.

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[1]The general, factual background to this action is detailed in our Order of May 14, 2009, see, Docket No. 95, at pp. 2-6, and will not be repeated here.

[2]Several of the issues before us may be resolved summarily. First, the Plaintiff contended that certain of its discovery requests required a response in order to allow the Plaintiff to challenge the Defendant's negligent misrepresentation claim, as contained in the Defendant's Counterclaim. See, Answer and Counterclaim, supra at pp. 13-14. However, on May 8, 2009, the parties filed a joint stipulation to dismiss the Defendant's negligent misrepresentation Counterclaim, see, Docket No. 91, rendering discovery as to that claim moot.

In addition, the Plaintiff had requested that the Defendant be directed to perform a search of the computer of Randy Farrar, who is a non-lawyer employee of the Defendant, in order to produce non-privileged responsive documents, and to prepare a privilege log for any documents which were not produced on privilege grounds. See, Plaintiff's Memorandum in Support -- Motion to Compel;, supra at 22-23. The Defendant advises, however, that it has complied with the Plaintiff's request, see, Defendant's Memorandum in Opposition, supra at 22-23, we do not further address that aspect of the Plaintiff's Motion.

As noted, the Defendant has filed its own Motion, in which it seeks leave to take more than the ten (10) depositions which were authorized by our Pretrial Order. See, Defendant's Memorandum in Support -- Additional Depositions, Docket No. 67, at 1. The Defendant argues that it requires nine (9) additional depositions in order to adequately prosecute, and defend, its claims and defenses. Id. The Plaintiff contends that the Defendant is not entitled to any additional depositions since it has failed to demonstrate that the additional depositions are necessary. See, Plaintiff's Memorandum in Opposition -- Additional Depositions, Docket No. 74, at 1.

Lastly, we have conducted an in camera review of the Category Three documents, and we address the Plaintiff's contention, that those documents are privileged, and therefore, insulated from production. See, Docket No. 35.

III. Discussion

A. The Parties' Motions to Compel.

1. Standard of Review. Under Rule 26(b)(1), Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things * * *." So long as relevant, parties may obtain discovery by several methods,

including: "depositions upon oral examination or written questions; written interrogatories; production of documents * * * and requests for admission." Rule 26(a)(5), Federal Rules of Civil Procedure. "The overriding purpose of the federal discovery rules is to promote full disclosure of all facts to aid in the fair, prompt and inexpensive disposition of lawsuits." Woldum v. Roverud Const., Inc., 43 F.R.D. 420, 420 (N.D. Iowa 1968). "While the standard of relevance in the context of discovery is broader than in the context of admissibility * * *, this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery." Hofer v. Mack Trucks, Inc., 981 F.2d 377, 380 (8th Cir. 1992). Instead, "[s]ome threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case." Id.; see also, Wacker v. Gehl Co., 157 F.R.D. 58, 58 (W.D. Mo. 1994)

If the party from whom discovery is sought fails to comply with discovery requests, the requesting party may file a Motion to Compel. See, Rule 37, Federal Rules of Civil Procedure. A Trial Court generally has considerable discretion in granting or denying discovery requests, and it is no abuse of discretion to deny a discovery request that is untimely. See, Robinson v. Potter, 453 F.3d 990, 995 (8th

Cir. 2006), citing Firefighters' Inst. for Racial Equal. v. City of St. Louis, 220 F.3d 898, 903 (8th Cir. 2000).

2. Legal Analysis.

a. The Plaintiff's Motion to Compel. The Plaintiff argues that the Defendant has failed to answer numerous Interrogatories, and Document Requests, which, it argues, are essential to the Plaintiff's claims and defenses. See, Plaintiff's Memorandum in Support -- Motion to Compel, supra at 1. In response, the Defendant has raised numerous objections to the Plaintiff's discovery, including that the requests are overbroad or irrelevant. See, Defendant's Memorandum in Opposition -- Motion to Compel, supra at 1-2.

Given the Record presented, we agree with the Defendant. We find that almost all of the Plaintiff's discovery encompasses a wade swath of information which the Plaintiff has failed to demonstrate has relevance to any claim or defense. Nor has the Plaintiff demonstrated that the minimally relevant discovery, which may have some relevance, outweighs the Defendant's demonstrated burden in responding to those requests. Indeed, the Defendant advises that to answer the Plaintiff's discovery would require it to locate numerous documents, that are scattered throughout its numerous offices, to parse its records, to create information that it does not maintain in the

regular course of its business, and to copy and submit thousands of pages of documents to the Plaintiff with no correlating relevance to the issues in this case. See, Defendant's Memorandum in Opposition -- Motion to Compel, supra at 12, 17, 19-20, and 22; Affidavit of Bill Davison ("Davison Aff."), Docket No. 80, at ¶3; Affidavit of Karine M. Hellwig ("Hellwig Aff."), Docket No. 81, at ¶¶2-5; Affidavit of Mary A. Hull ("Hull Aff."), Docket No. 82, at ¶3; Affidavit of Ralph R. Smith ("Smith Aff."), Docket No. 83, at ¶2.

Notably, the Defendant has agreed to answer the Plaintiff's Interrogatory No. 8, and Document Request No. 3, by producing its settlement agreements with other Local Exchange Carriers ("LECs") concerning services provided to Call Connection Companies ("CCCs"), as long as the settlement agreements are subject to the same protections from further disclosure that attach to the Plaintiff's settlement agreements. See, Defendant's Memorandum in Opposition -- Motion to Compel, supra at 8-9; Affidavit of James Moskowitz ("Moskowitz Aff."), Docket No. 63, Exhibit A at pp. 9, 12. The Defendant contends that those settlement agreements would answer many of the Plaintiff's discovery requests. Id. at 8-9.

Notwithstanding the Plaintiff's arguments to the contrary, we find that the Defendant's settlement agreements are likely to provide the information that is being

properly requested by the Plaintiff. The Defendant's settlement agreements with other LECs are likely to reveal the Defendant's attitude toward, treatment of, as well as the prices paid for similar services to, other LECs, which the Plaintiff's maintains is necessary for its for unclean hands, and quantum meruit claims. In addition, we find that the Defendant's settlement agreements are a more efficient, and inexpensive method of discovery, which will inure to the benefit of both parties. Lastly, even if the Plaintiff is unable to find all the information it seeks, the information, which is provided by the Defendant's settlement agreements, will enable the Plaintiff to tailor any further discovery requests.

If, however, after it reviews the Defendant's settlement agreements, the Plaintiff believes that further discovery is required, the parties are directed to engage in a responsible "meet and confer" so as to resolve any future discovery disputes. Should a dispute remain, after a diligent meet and confer, then they should contact this Court to resolve any disagreements which remain.

Accordingly, we direct the Defendant to produce its settlement agreements with other LECs concerning services provided to CCCs, but subject to the following limitations: 1) that only the Plaintiff's retained counsel may see the LEC settlement agreements (i.e., the LEC settlement agreements should be for the eyes of the

Plaintiff's external counsel), and the Plaintiff's retained attorneys are prohibited from sharing the contents of the LEC settlement agreements, either directly or indirectly, with any the Plaintiff's business personnel, inclusive of the Plaintiff's in-house counsel; and 2) that the Plaintiff's attorneys may not share, or disclose, the contents of the LEC settlement agreements, or use the LEC settlement agreements for any purpose outside of this litigation.

b. Defendant's Motion to Compel -- Category Three Documents. As we have noted, the Plaintiff has complied with the directive set forth in our Order of May 14, 2009, as to the Category Three Documents Nos.1, 4, 8, and 11. See, Docket No. 95, at 26-27. Accordingly, we turn to consider whether Documents Nos. 1, 4, 8, and 11, are entitled to the attorney-client privilege, and whether any of the Category Three documents are protected by a settlement communications privilege.

1. Standard of Review. "The party asserting attorney-client privilege or the work product doctrine bears the burden to provide a factual basis for its assertions." Triple Five of Minnesota, Inc. v. Simon, 212 F.R.D. 523, 527 (D. Minn. 2002), citing Hollins v. Powell, 773 F.2d 191, 196 (8th Cir. 1985). "Questions of privilege are to be determined by federal common law in federal question cases."

Reed v. Baxter, 134 F.3d 351, 355 (6th Cir. 1998); see also, Hollins v. Powell, supra at 196, citing Rule 501, Federal Rules of Evidence.

The attorney-client privilege provides absolute protection from the disclosure of confidential communications between an attorney and his or her client. See, Triple Five of Minnesota, Inc. v. Simon, supra at 527. "The elements of the attorney-client privilege are as follows: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived." Reed v. Baxter, supra at 355-56; see also, Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 601-02 (8th Cir. 1977). The purpose of the attorney-client privilege is "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

In turn, the work product doctrine is codified in Rule 26(b)(3), Federal Rules of Civil Procedure, which provides, in pertinent part, that "[o]rdinarily, 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 (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." "In order to protect work product, the party seeking protection must show the materials were prepared in anticipation of litigation, i.e., because of the prospect of litigation." PepsiCo, Inc. v. Baird, Kurtz, & Dobson LLP, 305 F.3d 813, 817 (8th Cir. 2002), citing Binks Mfg. Co. v. Nat'l Presto Industries, Inc., 709 F.2d 1109, 1118-19 (7th Cir. 1983).

Two different kinds of work product are encompassed in the language of the rule -- namely, ordinary work product, which includes "raw factual information," and opinion work product, which includes an attorney's "mental impressions, conclusions, opinions or legal theories." Baker v. General Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000). As the language of the Rule, and of the relevant case law makes clear, the privilege which attaches to ordinary work product may be defeated by an appropriate showing that "the party seeking discovery has a substantial need for the materials and the party cannot obtain the substantial equivalent of the materials by other means." Id.; see also, Marvin Lumber v. PPG Indus., Inc., 168 F.R.D. 641, 644 (D. Minn. 1996), citing Petersen v. Douglas County Bank & Trust Co., 967 F.2d 1186, 1189 (8th Cir. 1992).

Thus, "while Rule 26(b)(3) affords protection for documents and tangible things, the underlying facts are not protected by the work-product doctrine." Onwuka v. Federal Express Corp., 178 F.R.D. 508, 512-13 (D. Minn. 1997), and cases cited therein. As we explained, in Onwuka:

> Only when the party seeking discovery attempts to ascertain "historical" facts, which inherently reveal the attorney's mental impressions, does the ordinary work-product privilege extend to protect the intangible interests. See, Shelton v. American Motors Corp., 805 F.2d 1323, 1326 (8th Cir. 1986). While the distinction is a fine one, it represents a tenable footing between "unwarranted inquiries into the files and the mental impressions of an attorney," Hickman v. Taylor, [329 U.S. 495], 510 [(1947)] * * * and the intolerable prospect that the work-product protections will be employed to shroud otherwise discoverable corporate affairs in a veil of secrecy.

Id. at 513.

Unlike ordinary work product, "opinion work product enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances." Baker v. General Motors Corp., supra at 1054; see also, In re Chrysler Motors Corp. Overnight Evaluation, 860 F.2d 844, 846 (8th Cir. 1988), quoting In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977).

2. Legal Analysis. As noted, in response to the Defendant's Motion to Compel, see, Docket No. 35, the Plaintiff argues that the Category Three

documents, identified as Document Nos.1, 4, 8, and 11, are protected by the attorney-client privilege.[3] See, Plaintiff's Memorandum in Opposition -- Defendant's Motion to Compel, Docket No. 41, at 14. In addition, the Plaintiff contends that all of the documents in Category Three are protected by the settlement communications doctrine. See e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 983 (6th Cir. 2003)(determining that "any communications made in furtherance of settlement are privileged."). First we consider the Plaintiff's attorney-client privilege claim.

After our in camera review of Document Nos. 1, 4, 8, and 11, we conclude that the documents are protected by the attorney-client privilege, as they appear to involve edits, by an attorney for the Plaintiff, of settlement agreements reached with one or more other companies. While some of the documents appear to be transmittals of the attorney's edits, we consider them to be privileged, as well, as relating to the opinions

[3]In its Memorandum, the Plaintiff claimed that all of the remaining Category Three documents are protected by the attorney-client privilege, however, it only identified, and provided for our in camera review, Document Nos. 1, 4, 8, and 11. See, Plaintiff's Memorandum in Opposition -- Defendant's Motion to Compel, supra at 14. Accordingly, we have only analyzed those specific documents in determining whether they are entitled to protection by the attorney-client privilege. Absent some showing to the contrary, and none has been made, we presume that the remaining Category Three documents are not subject to any privilege, and therefore, that they should be produced.

of the Plaintiff's attorney. Notably, the subject documents do not appear to disclose facts that would be otherwise discoverable. Therefore, these specific documents need not be produced on attorney-client privilege grounds.

However, the Defendant argues that, even if the attorney-client privilege is applicable, the Plaintiff waived that privilege when it forwarded the documents to the Plaintiff's own employees. Generally, the "[v]oluntary disclosure of the confidential communication to either an opposing or third party expressly waives the privilege." Pucket v. Hot Springs School Dist. No. 23-2, supra at 580, citing United States v. Workman, 138 F.3d 1261, 1263 (8th Cir. 1998); see also, S&S Forage & Equipment Co., Inc. v. Up North Plastics, Inc., 1999 WL 34967061 at *4 (D. Minn., October 25, 1999)("The attorney-client privilege is generally waived by the disclosure of confidential communications to any third parties, except in limited waiver situations[.]").

Nonetheless, "[a] corporation does not waive its privilege when non-lawyer employees send or receive communications because corporate communications which are shared with those having a need to know of the communications are confidential for purposes of the attorney-client privilege." Deel v. Bank of America, N.A., 227 F.R.D. 456, 460 (W.D. Va. 2005), citing Santrade, Ltd. v. General Elec. Co., 150

F.R.D. 539, 545 (E.D. N.C. 1993); see also, Roth v. Aon Corp., 254 F.R.D. 538, 542 (N.D. Ill. 2009)(determining that a corporation did not waive the attorney-client privilege when it disseminated privileged e-mails to corporate employees); cf., Southeastern Pennsylvania Transp. Authority v. Caremarkpcs Health, L.P., 254 F.R.D. 253, 258 (E.D. Pa. 2008)(noting that communications retain their privileged status if they are distributed to employees who need to have access to such communications); Smithkline Beecham Corp. v. Apotex Corp., 194 F.R.D. 624, 626 n. 1 (N.D. Ill. 2000)("Where the client is a corporation, the privilege is waived if the communications are disclosed to employees who did not need access to the communication.")[citation omitted].

Here, based on the Record presented, we conclude that the employees, who received the privileged communications or documents, were involved in facilitating settlement agreements, or in pursuing the current action. See, Roth v. Aon Corp., supra at 542 (documents protected by attorney-client privilege where employees were involved in drafting and editing of disclosure form to the Securities Exchange Commission); Wrench LLC v. Taco Bell Corp., 212 F.R.D. 514, 517-18 (W.D. Mich. 2002)(attorney-client privilege not waived where employee's department implicated in the legal dispute). As a consequence, we conclude that the Plaintiff did not waive

the attorney-client privilege when it shared privileged communications with its own employees.

With respect to the Plaintiff's claim that the remaining Category Three documents are protected by the settlement communications privilege, we note that our Circuit has yet to recognize the existence of any such broadly encompassing privilege. In addition, cases within this District reveal a lack of support for a settlement communications privilege. See, Homax Corp. v. Wagner Spray Tech Corp., 1988 WL 1091942 at *1 (D. Minn., September 16, 1988)(concluding that "settlement negotiations should not be totally immune from discovery."); United States v. Reserve Min. Co., 412 F. Supp. 705, 712 (D. Minn. 1976)(finding that the privilege protecting offers of compromise is not "designed to shield otherwise discoverable documents, merely because these documents represent factual matters that might be or are incorporated in a settlement proposal.").

Indeed, only the Sixth Circuit has recognized the existence of such a privilege. See, Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., supra at 983; cf. JZ Buckingham Investments LLC v. United States, 78 Fed. Cl. 15, 22-24 (Fed. Cl. 2007)(finding no basis for a new settlement privilege); Heartland Surgical Speciality Hosp., LLC v. Midwest Div., Inc., 2007 WL 1246216 at *4 (D. Kan., April 27,

2007)(no settlement privilege); Matsushita Electric Industrial Co., Ltd. v. Mediatek, Inc., 2007 WL 963975 at *3-6 (N.D. Cal. March 30, 2007)(same); In re Subpoena Issued to Commodity Futures Trading Com'n, 370 F.Supp.2d 201, 207-213 (D. D.C. 2005)(same). As a result, we find no basis to preclude the discovery of the remaining Category Three documents based upon a purported settlement communications privilege.

As a result, the Defendant's Motion to Compel is denied with respect to the communications in Document Nos. 1, 4, 8, and 11, but is granted with respect to the other non-privileged Category Three documents.

C. The Defendant's Motion for Leave to Take More than Ten Depositions.

Our Pretrial Order of August 1, 2008, provides that "no more than **10** depositions (excluding expert depositions) shall be taken by any party without prior Order of the Court." See, Docket No. 17, at p. 2 [emphasis in original].[4] The Defendant now seeks leave to take more than the prescribed ten (10) depositions.

1. Standard of Review. Rule 30(a)(2), Federal Rules of Civil Procedure, presumptively limits the number of depositions, that a party may take

[4]The parties have stipulated to a number of extensions of our Pretrial Order deadlines but the ten (10) deposition limit remained unaffected. See, Docket Nos. 19-21.

without leave of the Court, to ten (10). Moreover, leave to notice additional depositions is governed by Rule 26(b)(2), Federal Rules of Civil Procedure, which requires the Court to limit discovery if:

> (I) the discovery sought is unreasonable cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the part seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery 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.

"In practical terms, a party seeking leave to take more depositions, or to serve more Interrogatories, than are contemplated by the Federal Rules or by the Court's Scheduling Order, must make a particularized showing of why the discovery is necessary." Archer Daniels Midland Co. v. Aon Risk Services, Inc. of Minnesota, 187 F.R.D. 578, 586 (D. Minn. 1999), citing, in part, Bell v. Fowler, 99 F.3d 262, 271 (8th Cir. 1996)([W]here plaintiff "presented no good reason why additional depositions

were necessary *** [t]he district court committed no abuse of discretion in denying the plaintiff's request).

2. Legal Analysis. The Defendant requests that it be allowed to take up to nineteen (19) depositions. See, Defendant's Memorandum in Support -- Additional Depositions, supra, at 1. Specifically, it seeks to depose "up to 8 [of Plaintiff's] employees or agents, the 1 expert identified by [the Plaintiff], and up to 10 CCC representatives." Id. The Defendant argues that the additional depositions, and especially those of the CCCs, are necessary to defend against the Plaintiff's claims, and to authenticate the documents that were received from the CCCs. Id. Further, the Defendant maintains that the additional depositions are necessary in order to preserve the CCCs' testimony, since almost all of the CCCs are outside of this District. Id. at 5; see also, Rules 32(a)(4)(B) and 45(3)(A)(ii), Federal Rules of Civil Procedure.

In response, the Plaintiff contends that there is no need for the extra depositions, because the Plaintiff, and over twenty-two (22) CCCs have provided thousands of pages of documents which illustrate the Plaintiff's business relationships with various CCCs. See, Plaintiff's Memorandum in Opposition, Docket No. 74, at 2. The Plaintiff also maintains that the Defendant has failed to make a particularized showing of a need for the additional depositions. Id. at 6. Given the circumstances of this case,

we find that the Defendant has adequately shown that the additional depositions are required.

As a threshold matter, we note that the Plaintiff has relied upon our decision in Archer Daniels Midland Co. v. Aon Risk Services, Inc. of Minnesota, supra, in opposing the Defendant's Motion. However, that decision is inapposite to the present circumstances. In Archer Daniels Midland Co., the defendant requested that our Pretrial Order be amended to allow the taking of up to seventy-five (75) depositions. Id. at 581. We denied the defendant's Motion, to take depositions beyond its then current limit of (20) depositions, since the defendant had yet to exhaust its current quota of depositions and, as a result, it had not yet demonstrated a particularized need for the additional depositions. Id. at 587.

Here, however, we find that the circumstances differ. As we noted at the Hearing, unlike the defendant in Archer Daniels Midland, the Defendant, here, has limited its request to only nine (9) additional depositions, and not the seventy-five (75) requested there. See, Archer Daniels Midland Co. v. Aon Risk Services, Inc. of Minnesota, supra at 581. Although a party must normally exhaust its current quota of depositions before seeking leave to take more, id., the Defendant has made an sufficient showing that the additional depositions are necessary.

We are mindful of the Plaintiff's argument, that the additional depositions are not necessary, and will only result in duplicative discovery, since the Plaintiff, and twenty-two (22) CCCs, have produced voluminous records which explain their business relationships. See, Plaintiff's Memorandum in Opposition -- Additional Depositions, supra at 2-5. However, the paper discovery already produced graphically demonstrates the need for the additional depositions. While the extent of the documents, that have been produced to the Defendant, will provide some reflection of the business relationships that the Plaintiff has maintained with a variety of CCCs, and while additional discovery may result in some duplicative effort, we are persuaded that an opportunity to have the CCCs, and employees of the Plaintiff, explain the documents already produced, should not be foreclosed. Such discovery is essential to any determination as to whether the Defendant was improperly charged for access services, as the Defendant claims. Since the discovery will potentially illuminate the substantive content of the CCCs' documents, the nature of the services that the CCCs were providing to the Plaintiff, the CCCs' billing practices, as well as other relevant information concerning the CCC's business relationships with the Plaintiff, we find good cause to allow a modestly greater number of depositions.

We also reject the Plaintiff's argument, that the additional depositions will place undue costs on the Plaintiff, and on those CCCs whose representatives will be deposed. See, Plaintiff's Memorandum in Opposition -- Additional Depositions, supra at 3-9. Although we accept that the Plaintiff, and the pertinent CCCs may face some additional costs, those would not appear to be large and, in any event, the resultant costs plainly do not outweigh the relevance of the information to be discovered. Simply put, without the additional, requested depositions, the Defendant would be at a disadvantage in challenging the Plaintiff's characterization of its business relationships with the CCCs, and may allow the Defendant to preserve testimony for presentation at Trial, in lieu of an appearance of a witness outside of the jurisdictional scope of this Court's subpoena power. See, Rule 45(3)(A)(ii), Federal Rules of Civil Procedure (permitting a party file a motion to quash a subpoena that "requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed or regularly transacts business in person[.]"); Rule 32(a)(4)(B), Federal Rules of Civil Procedure, ("A party may use for any purpose the deposition of a witness whether or not a party, if the court finds: * * * that the witness is more than 100 miles from the place of the hearing[.]"); Moskowitz Aff., supra, Exhibit E.

Lastly, we add this caveat, as we did at the Hearing, if the Defendant's depositions raise legitimate concerns over the propriety of any specific deposition, the Plaintiff is at liberty to raise those concerns to our attention, at which time, we will have an informed basis, and not simply the Plaintiff's surmise, as to the propriety of those depositions that have been taken to date, and scheduled in the future. Therefore, the Defendant's Motion to amend our Pretrial Order to take a total of nineteen (19) depositions is granted.

NOW, THEREFORE, It is --

ORDERED:

1. That the Plaintiff's Motion to Compel [Docket No. 58] is GRANTED in part, as more fully detailed in the text of this Order.

2. That the Defendant's Motion to Compel [Docket No. 35] is GRANTED in part, as more fully detailed in the text of this Order.

3. That the Defendant's Motion for Leave to Take More Than Ten Depositions [Docket No. 65] is GRANTED.

BY THE COURT:

Dated: June 18, 2009

s/Raymond L. Erickson

Raymond L. Erickson
CHIEF U.S. MAGISTRATE JUDGE