UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY L.P., Plaintiff, vs. NATIVE AMERICAN TELECOM, LLC; B.J. JONES, in his official capacity as Special Judge of Tribal Court; and CROW CREEK SIOUX TRIBAL COURT, Defendants.	Case No. 10-4110-KES

NATIVE AMERICAN TELECOM, LLC'S OPPOSITION TO SPRINT COMMUNICATIONS L.P.'S MOTION TO DISMISS

Defendant Native American Telecom, LLC ("NAT") opposes Sprint Communications Company, L.P.'s ("Sprint") Motion To Dismiss Counts One (breach of contract), Two (breach of implied contract), Five (declaratory judgment re collateral estoppel) and Six (abuse of process) of NAT's Amended Counterclaim and Jury Demand ("Motion").

Sprint's Motion should be denied because NAT's Amended Counterclaim properly alleges each cause of action, easily satisfying the notice pleading standards of Fed. R. Civ. P. 8(a). Moreover, Sprint's attacks on NAT's claims are based on unsupported factual contentions far outside the scope of proper review under Rule 12(b)(6).

At a minimum, NAT should be given leave to amend. Although NAT has complied with its obligation under the rules to give notice to Sprint of the nature of its claims, NAT can, if the Court finds necessary, provide extensive additional support for its claims, especially the claims that are the subject of Sprint's Motion.

I. INTRODUCTION.

Sprint's Motion does not identify a single legal deficiency in NAT's Amended Counterclaim and should be denied for the following reasons:

First, Sprint contends that Counts One and Two (breach of contract) should be dismissed to the extent they seek payments due after August-2011 on the ground that such recovery is barred by a two-year statute of limitations. However, Counts One and Two were not when originally filed in 2010, and are not now, based on breaches of specific tariffs or limited to specific periods of time. When originally filed, the claims sought to recover from Sprint for terminating access for all calls from March 2010 forward, when Sprint first articulated baseless grounds for its refusal to pay. Sprint's own 2010 Complaint seeks relief into the future, and NAT's original Counterclaim seeks relief for damages "accruing daily as Sprint continues to withhold amounts due." Docket 1, Complaint, ¶¶ 44, 45; Docket 99, Counterclaim, ¶ 30.

Second, even if NAT's contract claims had been limited to specific tariffs, NAT's claims concerning Sprint's post-August 2011 conduct relates back to NAT's original counterclaim. Since 2010, both parties have made express claims about Sprint's refusal to pay charges to NAT for all future calls. Moreover, Sprint's post-August 2011 conduct is identical to conduct before NAT filed a new tariff, and thus to the extent the Amended Counterclaim is deemed to amend the original contract claims, the amended claims arise out of the same transactions and occurrences as the original claims in any event. They thus relate back under Rule 15(c).

Third, NAT's claim for a declaration concerning collateral estoppel is properly pled, and there is no basis to dismiss it under Rule 12(b)(6). NAT has sufficiently alleged the elements of claim preclusion, and the Order of the South Dakota Public Utilities Commission ("PUC"), attached as an exhibit to the Amended Counterclaim, supports NAT's request for declaratory

judgment in Count Five. On a Rule 12(b) motion, without access to the record before either the PUC or the District Court in the *Central Telephone* case available, this Court had no basis to make any final determination of NAT's request for declaratory relief. Yet, Sprint argues that there is *no possibility* that *any issue* in the prior proceedings was sufficiently adjudicated for the doctrine of collateral estoppel to apply here. There is simply no basis for the Court to reach such a conclusion in the context of a Rule 12 motion.

Fourth, NAT properly pled a claim for abuse of process. The Amended Counterclaim details at length that Sprint's conduct toward NAT are part of its corporate cost-cutting plan to delay and avoid its lawful obligations to pay for terminating access. *See* Amended Counterclaim ("AC"), ¶¶ 30-36. Similar to its attacks on Count Five, Sprint's arguments are based on unsupported factual contentions outside the four corners of the pleading. The actual Amended Counterclaim, especially taking all of the allegations as true and making all reasonable inferences in favor of NAT, as the Rules require, states a claim of abuse of process.

II. FACTUAL AND PROCEDURAL BACKGROUND.

This is an action arising from Sprint's unlawful refusal to pay NAT for completing and terminating Sprint's long distance traffic. The following facts are alleged in the Amended Counterclaim and must be accepted as true in the context of Sprint's Motion.

NAT seeks to enforce its well-established legal rights to collect compensation for terminating Sprint's telecommunications calls. Amended Counterclaim ("AC") ¶ 1. The charges for the work provided by NAT are known as "access charges." *Id*. NAT is entitled to charge Sprint for these "access charges" for allowing Sprint to utilize NAT's local network services to complete long distance calls. *Id*. Sprint has ignored its legal obligations to compensate NAT for completing calls for Sprint and its customers. *Id*. NAT also asserts claims for a declaratory

judgment that Sprint is estopped from relitigating certain issues that it previously litigated and lost in earlier proceedings. AC ¶¶ 82-85. Finally, NAT has asserted an abuse of process claim against Sprint because its complaint against NAT was filed primarily to put NAT out of business, as part of its multifaceted cost-cutting plan, and to delay its payment obligations without any good faith basis to believe there is any continued validity to its justification for its refusal to pay NAT as articulated in its Complaint. *See* AC ¶¶ 2-3, 30-36. This is especially so given that the only claims Sprint is now pursuing have been rejected by the South Dakota PUC or superseded by orders of the FCC and a federal judge in Virginia found, after a verdict Sprint unsuccessfully appealed to the Supreme Court, that Sprint engaged in a scheme to avoid paying intercarrier compensation because of a corporate cost-cutting plan.

A. NAT and Sprint's Business Relationship.

Since 2009, NAT has had interstate tariffs duly filed with the FCC. AC ¶ 15. NAT provides interstate exchange access under its federal tariffs. These tariffs are validly filed and consistent with Section 203 of the Federal Communications Act ("Act"), 47 U.S.C. § 203. AC ¶ 20. NAT's tariffs have been in full force and effect during the time that it has been providing access services to Sprint. *Id*., ¶ 21. Pursuant to its tariffs, NAT has submitted invoices to Sprint for access charges associated with the access services provided to Sprint. *Id*., ¶ 22. Sprint continues to take access services from NAT, while withholding payment for the services NAT provides. *Id*., ¶ 23. NAT has provided exchange access and other services to Sprint under lawful federal tariffs. *Id*., ¶ 24. NAT's tariffed access rates are fully compliant with the FCC's regulations governing CLEC access charges. *Id*.

Beginning in March 2010, Sprint ceased paying for the access services it took from NAT. *Id*., ¶ 27. On March 22, 2010, Sprint provided the following notice regarding its refusal to pay NAT's invoices:

> Sprint objects to the nature of certain traffic for which Cabs Agents/Native American Telecom is billing access charges and Sprint disputes the terminating charges in full. It is Sprint's position that traffic volumes associated with, but not limited to; artificially stimulated usage, chat lines, free conferencing, and revenue sharing are not subject to access charges. If you have any questions please call Julie Walker at 913-762-6442 or email at julie.a.walker@sprint.com.

Id., ¶ 34. Sprint followed up the dispute notice with a lawsuit in which it identified that same purported dispute regarding NAT's bills.

B. Sprint's Complaint.

In August 2010, Sprint initiated this action. *Id*., ¶ 35. As stated in its Complaint, Sprint commenced this action "to bring to an end NAT's efforts to establish traffic pumping operations on the Crow Creek Sioux Reservation in South Dakota in violation of federal and state law." Docket 1, Complaint, ¶ 1. Sprint also alleged that "NAT purports to operate local exchange carrier operation on the Reservation but in reality exists only to engage in traffic pumping." *Id*., ¶ 2. Further, Sprint alleged that NAT's "claim that it provides competitive local exchange services to the Reservation is a sham" and that "Sprint refuses to acknowledge the PUC's jurisdiction over NAT," *Id.*, ¶¶ *10*, 11. Finally, Sprint's Complaint alleged that "the FCC has found such traffic-pumping scheme to be likely unlawful and is still exploring ways to prohibit them going forward." *Id*., ¶ 29.

Sprint's 2010 Complaint references NAT's two tariffs filed in September 2009, one with the FCC and one with the Crow Creek Utility Commission (the "2009 Tariffs"). Sprint's Complaint does not, however, only concern the 2009 Tariffs. First, Sprint also seeks permanent injunctive relief enjoining "NAT from assessing charges on Sprint pursuant to ***their unlawful***

scheme." *Id*., ¶ 45 (emphasis added). In addition, Sprint's 2010 Complaint also seeks a declaratory judgment establishing that NAT has no right to charge or collect access charges based on routing long distance calls from Sprint to entities that provide conference calls or other entities that Sprint considers to qualify as "access stimulators." *Id*., ¶ 45. Its Complaint thus asserts claims as to charges from NAT even through today.

On July 23, 2014, the Court gave the parties leave to amend their pleadings, which gave Sprint an opportunity to assert additional grounds for its failures to pay NAT and to delete grounds that had be superseded by events since 2010. Docket, 168. Sprint chose not to amend and thus has made a considered decision to assert, for the entire period at issue (2010-the present) only two basic grounds for non-payment: (1) that NAT is engaged in a "unlawful scheme of "traffic pumping" and "access stimulation;" and (2) that NAT is a "sham."

C. NAT's Original Counterclaim.

On March 8, 2011, NAT filed its original Counterclaim in this action ("Original Counterclaim"). Docket 99. The Original Counterclaim alleges facts identical to those in the Amended Counterclaim − Sprint's refusal to pay access charges it owes, plus late fees, as provided in NAT's tariffs. The Original Counterclaim alleges the damages suffered by NAT to date and states that its damages are ongoing. Paragraph 30 of the Original Counterclaim states the following:

> Because of Sprint's refusal to pay its bills, NAT has thus far been damaged in the amount of approximately $600,000, including interstate and intrastate charges. **Additional damages are accruing daily as Sprint continues to withhold amounts due for interstate and intrastate access services rendered by NAT**.

Docket 99, Original Counterclaim, ¶ 30 (emphasis added).

The Original Counterclaim also sought declaratory relief in light of Sprint's continued wrongful conduct. *See id*., Count Four. Count Four alleged, "[A]bsent a declaratory judgment,

Sprint will continue its wrongful practices of refusing to pay interstate and intrastate access charges and late fees for these services from which Sprint benefits." *Id*., ¶ 49 (emphasis added). NAT alleged that declaratory relief is appropriate because "it would be unduly burdensome and inefficient for NAT to bring new actions for damages each time Sprint wrongfully refuses to pay an invoice." *Id*., ¶51. Thus, the language of the Original Counterclaim expressly made reference to the future harm Sprint will cause and sought relief going forward, both monetary "*damages that are accruing daily*…" and declaratory relief as to Sprint's obligations to pay future fees.

Moreover, as Sprint has decided not to amend its Complaint and add new grounds for not paying, even the grounds stated by NAT in its Original Counterclaim fully address Sprint's disputes as of today.[1]

D. The PUC Proceeding.

In 2010, NAT filed an application for a certificate to obtain, to the extent necessary, authority to provide intrastate interexchange access services that originate or terminate on the Crow Creek Sioux Reservation ("PUC Proceeding"). AC, ¶ 39. In October 2011, Sprint intervened in the PUC Proceeding for the purpose of contesting NAT's application. *Id*., ¶ 40. Sprint advanced the same arguments in the PUC Proceeding as it does here to avoid paying NAT for terminating access, including that NAT was engaged in a "traffic pumping scheme," is a "sham," and was engaged in artificial mileage inflation. *Id*., ¶ 83.

In February 2014, the PUC conducted a contested evidentiary hearing on NAT's application for a certificate of authority. *Id*., ¶ 51. At the hearing, a long-term Sprint employee testifying as Sprint's representative and expert stated unequivocally that NAT was complying

[1] Sprint has filed a motion for summary judgment that asserts a claim – not asserted in its pleadings – that it does not have to pay NAT because NAT is a "VoIP" provider. That position is not supported by the record, is disputed, and is not supported by the law. Further, Sprint waived this new claim when it decided not to amend its complaint. Also, none of Sprint's dispute notices, that are a prerequisite to disputing charges under tariffs, identify the reason advanced in Sprint's summary judgment motion as a ground for disputing NAT's bills.

with all applicable laws and regulations. *Id*. On May 13, 2014, after approximately four years of scrutiny by the South Dakota PUC, AT&T, CenturyLink, and Sprint, the PUC voted to approve NAT's application and subsequently issued a certificate of authority to NAT. *Id*., ¶ 54. In its subsequent order dated June 12, 2014 ("PUC Order"), the PUC made formal Findings of Fact and Conclusions of Law rejecting the reasons Sprint advanced for denying NAT's application. *Id*. In particular, the PUC found that NAT was not a "sham" and that the FCC has already held that revenue sharing or so-called "traffic pumping" is legal. A copy of the PUC Order is attached as "Exhibit A" to the Amended Counterclaim. *Id*. The PUC Order is final and binding on Sprint, Sprint did not appeal the Order, and the time for appealing the PUC Order has expired. *Id*.

E. Central Telephone.

In March 2011, the same year Sprint intervened in the PUC proceeding, the United States District Court for the Eastern District of Virginia issued an opinion after a bench trial in the case *Central Telephone Co. of Virginia v. Sprint Communications of Virginia*, 759 F. Supp. 2d 789 (2011) ("*Central Telephone*"). *Id*., ¶ 30. In *Central Telephone*, the Court found that in the summer of 2009, Sprint embarked on company-wide cost cutting efforts. *Id*. As part of those efforts, Sprint launched a coordinated effort to contest access charges on Voice over IP-originated ("VoIP") traffic with other carriers across the telecommunications industry. *Id*. It also found that Sprint invented pretexts for breaching contracts with 19 carriers even though the carriers had formerly been Sprint affiliates. *Id*. The Court also found that, for the first time in its history, Sprint started disputing access charges due to AT&T, Verizon, Qwest and other carriers. *Id*.

Sprint's cost cutting plan eventually led Sprint to proffer false testimony at trial – even by its own in-house counsel. *Id*. Among other things, the Court wrote, "Simply put, on the record as

a whole, [in-house counsel's] testimony is not credible….. Sadly, the testimony of other Sprint witnesses is no more trustworthy." *Central Telephone*, 759 F. Supp. 2d 807. *Id*.

Central Telephone is not an isolated case. In 2013, CenturyLink made similar allegations against Sprint in an adversary proceeding brought before the Missouri Public Service Commission. AC, ¶ 32. In the present case, Sprint is also refusing to pay NAT as part of its cost cutting efforts and, as with the 19 Central Telephone plaintiffs, CenturyLink, AT&T, Verizon, Qwest and other carriers, the only grounds it cites to justify its conduct are pretext. *Id*., ¶ 33.

F. The CAF Order and NAT's 2011 Tariff.

Around the time Sprint intervened in the PUC Proceeding and the *Central Telephone* case was decided, the FCC was accepting comments on a variety of telecommunications issues in a process that became known as the "Connect America Fund" proceeding. *Id*., ¶ 41. Among those issues was concern expressed by some about high switched access rates that were applicable to higher volume traffic like conferencing traffic that was being directed to rural LECs like NAT. *Id*.

On November 18, 2011, the FCC issued an order in connection with the Connect America Fund proceeding (the "CAF Order"). *Id*., ¶ 50. Among other things, the CAF Order rejected the basic premise of Sprint's 2010 Complaint. In the CAF Order, the FCC found that "access stimulation" – Sprint uses the term "traffic pumping" – is not unlawful and rejected the request of various carriers, including Sprint, who had "urged us to declare revenue sharing to be a violation" of the Communication Act. *Id*.

Aware of the concern about high switched access rates, even before the FCC issued the CAF Order, in August 2011, NAT filed an amended tariff voluntarily reducing its rates so they became equivalent to the price cap LEC with the lowest interstate switched access rates in South

Dakota, that tariff is Tariff No. 3.[2] With that change, NAT's interstate rate for terminating calls was competitive with rates across the United States, including rates in urban areas.[3] Even after NAT filed its amended tariff in August 2011, Sprint continued to terminate calls at NAT without paying for the service that NAT was providing to Sprint and its customers.

G. NAT's Amended Counterclaim.

On September 10, 2014, pursuant to the Court's scheduling order, NAT filed its Amended Counterclaim. The Amended Counterclaim added two new causes of action: declaratory judgment concerning collateral estoppel (Count Five) and abuse of process (Count Six), as well as extensive allegations supporting these claims. Counts One through Four remain essentially identical to those in the Original Complaint, although the facts were supplemented with the major developments that occurred in 2011-2014, as recited above, and the amount of accrued fees was brought current. *See* AC, ¶ 29.

Count Five was added to prevent Sprint from re-litigating issues that it had litigated and lost in the PUC Proceeding and *Central Telephone.* Given Sprint's decision not to amend its original Complaint, Sprint continues to advance only the same two justifications for not paying NAT that it advanced in its 2010 Complaint: that NAT was engaged in an "unlawful traffic pumping" scheme and that NAT was a "sham." Sprint litigated those two issues before the PUC for *four years,* and it lost. The FCC also rejected in the CAF Order the notice that "access stimulation" was unlawful.

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[2] NAT's rate is actually lower than that of the lowest price capped carrier in the state. NAT also lowered its intrastate rate, which has always been the same as its interstate rate, at the same time .NAT did this approximately 22 months prior to its obligation to do so in compliance with the CAF Order.

[3] Prior to NAT adjusting its rates, NAT's rates were at or below the NECA rate, which is presumed to be a reasonable rate. NAT never took advantage of the higher rural exemption rate that it technically could have used, but instead chose to comply with the spirit of the regulatory rules, and used tariff rates that were at or below the lower NECA rates.

Count Six was added to address what has now become clear: Sprint has not been using the PUC Proceeding or this action for the purpose for which they were intended. Instead, Sprint has, as the District Court found in *Central Telephone,* adopted a plan to avoid switched access fees, and it is carrying out that plan even if it involved lying in federal court, inventing pretext to justify non-payment, advancing arguments that no longer have even a pretense of validity, and inventing new pretenses when old ones are rejected by the FCC and the PUC. NAT, a tribally-owned entity established to provide services to an impoverished group that the large carriers like Sprint have essentially abandoned, simply had enough.

ARGUMENT.

I. STANDARD OF REVIEW.

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint so as to eliminate those actions "which are fatally flawed in their legal premises and designed to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity." *Young v. City of St. Charles,* 244 F.3d 623, 627 (8th Cir.2001) (*quoting Neitzke v. Williams,* 490 U.S. 319, 326–27 (1989). Because the pleading rules require only "notice" pleading, rather than detailed fact pleading, a court must construe a plaintiff's allegations liberally. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). At the motion to dismiss stage, a judge assumes "that all the allegations in the complaint are true (even if doubtful in fact). *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 589 (2007). The complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible. *See Vila v. Inter–Am. Inv. Corp.,* 570 F.3d 274, 285 (D.C.Cir.2009) (factual allegations should be "viewed in their totality").

The Eighth Circuit Court of Appeals has explained that on a motion to dismiss courts should consider only the materials that are necessarily embraced by the pleadings and exhibits attached to the complaint. *See Mattes v. ABC Plastics, Inc.,* 323 F.3d 695, 697 n.4 (8th Cir.2003) ("in considering a motion to dismiss, the district court may sometimes consider materials outside the pleadings, such as materials that are necessarily embraced by the pleadings and exhibits attached to the complaint.")

Counts One, Two, Five and Six of NAT's Amended Counterclaim more than satisfy the requirements of notice pleading. Sprint's attacks on NAT's Amended Counterclaim are based on unsupported contentions outside the scope of the Amended Counterclaim, rather than on any legal deficiencies. The Motion should thus be denied.

II. NAT'S BREACH OF CONTRACT CLAIMS FOR SPRINT'S POST-AUGUST 2011 CONDUCT RELATES BACK TO THE ORIGINAL COUNTERCLAIM.

Sprint claims that a portion of NAT's breach of contract claims (Counts One and Two) are time barred. This argument fails for two reasons. First, NAT's contract claims, and Sprint's reasons for withholding payment, are not specifically tied to the tariffs filed at the time Sprint refused to pay. The claims allege that NAT provided interstate switched access to Sprint for which Sprint is required to pay under all of NAT's tariffs. AC, ¶¶ 62-68. Sprint refused to pay for *any* services NAT provided to Sprint, beginning in March 2010 and continuing to today. *Id*., ¶ 58. Counts One and Two do not plead breaches of specific tariff provisions and thus are not time barred on their face. *See* AC, pp. 17-18.

Any argument to the contrary is fact specific and cannot be supported without a factual record that has not been presented by Sprint at this point in the litigation; nor is it appropriate for evaluation in the context of a motion to dismiss. A defense based on a statute of limitations that requires a factual inquiry is not amenable to resolution on a motion to dismiss. *See Blankenship*

v. Chamberlain, 695 F.Supp.2d 966, 971 (E.D.Mo. 2010). Even if there was some merit to Sprint's argument, it is not an appropriate subject for a Rule 12 motion.

Second, even if NAT's contract claims were related to specific tariffs, claims concerning terminating access service billed under the 2011 tariff relate back to the filing of the original Counterclaim and are thus not time barred in any event. Under Fed. R. Civ. P. 15(c), "an amendment to a pleading relates back to the date of the original pleading when…the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out-or attempted to be set out-in the original pleading." The relation back rule is remedial and should be liberally construed and applied. *See Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F. 2d 1286, 1300 (5th Cir. 1971); 6A Charles Alan Wright et al., *Federal Practice and Procedure §1497* (3d ed. 2013).

A party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide. *Maegdlin v. Int'l Ass'n of Machinists & Aerospace Workers,* 309 F.3d 1051, 1052 (8th Cir. 2002) (citations omitted). Thus, when the opposing party, standing in the place of a reasonably prudent person, should have been able to anticipate or should have expected the original claim to be altered or expected that aspects of the occurrence set forth in the original pleading would be called into question, that party should not have the protection of the statute of limitations. *Senger v. Soo Line R.R. Co.,* 493 C. Supp. 143, 145 (D. Minn. 1980). Only when the amendment "significantly alters the nature of the proceeding so that it cannot be said the defendant was given adequate notice will the amendment be time barred." *Oro v. Hull & Assocs.,* 217 F.R.D. 401 (N.D. Ohio 2003).

Here, Sprint has not availed itself of the leave given to the parties by the Court to amend their claims. Sprint is thus asserting today the same claims and contentions regarding its

obligations to pay NAT as it raised in 2010 with its original Complaint. That original Complaint asserts claims for injunctive and declaratory relief that are prospective and seek relief beyond the original, 2009 tariffs. Sprint has thus acknowledged that the grounds for not paying today are the same grounds it asserted for not paying in 2010.

Sprint nevertheless claims, without any legal support, that because NAT filed a new tariff in August 2011 (Tariff No. 3), its refusals to pay after that time do not relate back to NAT's Original Counterclaim. Sprint does not address that, despite the leave granted by the Court, its reasons for not paying have not changed even in its own pleading – despite the CAF Order, the PUC findings, or any other events since 2010.

Specifically, Sprint, in its Complaint, put in issue all future access charges by claiming that "after Sprint determined that NAT was engaging in a traffic pumping [scheme]," Sprint began disputing NAT's access bills. Complaint, ¶ 30. Sprint currently continues to seek an order enjoining NAT ***from assessing any charges on Sprint***. *See* Complaint, ¶ 44. These claims are not related to specific tariffs but instead are an attack on NAT's entire business. [4]

Similarly, NAT's original Counterclaim expressly alleged that NAT's harm was ongoing.

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[4] In its original Complaint, Sprint also alleged, "[T]he FCC has found such traffic-pumping schemes to be likely unlawful and is still exploring ways to prohibit them going forward." Complaint, ¶ 29. Since then, however, the FCC in the CAF Order rejected attempts by Sprint and other long distance carriers to make revenue sharing and "access stimulation" unlawful. The PUC expressly rejected Sprint's position on the very issue, writing in the PUC Findings:

> The Commission finds that it is in the public interest to grant NAT a certificate of authority. The Commission finds that, under the specific facts of this case, NAT's involvement in access stimulation does not warrant denial of its application for a certificate of authority. The Commission notes that the FCC declined to ban revenue-sharing arrangements and promulgated rules to limit adverse effects of access stimulation through its mandated reductions in access rates charged by those companies engaged in access stimulation and mandated reductions in access rates through the FCC's intercarrier compensation reform. As required by the FCC's Transformation Order, NAT's access rates have been reduced. The Commission has found that NAT is not a sham entity. The Commission further notes that NAT has plans for further expansion of telecommunications services that do not include access stimulation.

PUC Order, ¶ 53. Still, Sprint elected not to amend its Complaint and continues to pursue its original claim that "traffic pumping" is a valid reason for it not to pay NAT's bills.

Docket 99, Counterclaim, ¶ 30. NAT alleged that declaratory relief was appropriate because "it would be unduly burdensome and inefficient for NAT to bring new actions for damages each time Sprint wrongfully refuses to pay an invoice." *Id*., ¶ 51.

Thus, the express language of the pleadings evidence that Sprint was fully aware that all future access charges would be included in NAT's damages. Sprint even affirmatively requested relief concerning the future access charges for which NAT was continuing to invoice it for the service it provides Sprint, even today. Thus, Sprint's contention that there is no relation back is not supported by the applicable legal principals or its own pleadings.

Moreover, there can be no dispute that the both the original contract claims and the claims with their minor change in the Amended Counterclaim, which simply identify the revised liability that has accrued, arise out of the same transactions and occurrences. The language of Counts One and Two in the original and Amended Counterclaims are essentially identical. Sprint refused to pay for services NAT provided in September 2011 for the same reasons it refused in September 2010. The only differences in NAT's counterclaims are in the supplemental facts added concerning the events that occurred between the filing of the original Counterclaim and the amendment. This type of amendment undoubtedly relates back. "[A]mendments to complaints that build on previously alleged facts will relate back to the original complaint." *Young Women's Christian Ass'n of National Capital Area, Inc. v. Allstate Ins. Co. of Canada*, 214 F.R.D. 1 (D.D. 2003)). Therefore, Sprint's Motion to dismiss Counts one and two should be denied.

III. SPRINT'S MOTION RELATED TO NAT'S COLLATERAL ESTOPPEL CLAIM MUST BE DENIED BECAUSE IT IS BASED ON "FACTS" OUTSIDE THE AMENDED COUNTERCLAIM AND HAS NO LEGAL MERIT.

In Count Five of the Amended Counterclaim, NAT seeks the declaratory relief that Sprint is barred from re-litigating issues that it contested and lost in earlier proceedings. Sprint now

contends that the Court should exercise its discretion to dismiss NAT's claim even though the Court has no factual record on which it might exercise its discretion. Sprint also contends that NAT fails to state a claim for collateral estoppel, again without any factual record as to the nature of the underlying proceedings and the issues that were litigated in them. The Amended Counterclaim provides proper notice as to the nature of the claim and adequately states a claim that there are issues in dispute for which the Court should declare the rights of the parties. That is all that is required of a pleading.

A. The Court Should Permit NAT To Proceed On Its Claim.

The Declaratory Judgment Act authorizes federal courts to issue declaratory judgments to "declare the rights and other legal relations of any interested party seeking such declaration," except "with respect to Federal taxes." 28 U.S.C. § 2201(a). A declaratory judgment is appropriate "when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and ... when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Centennial Life Ins. Co. v. Poston,* 88 F.3d 255, 256 (4th Cir.1996) (*quoting Aetna Cas. & Sur. Co. v. Quarles,* 92 F.2d 321, 325 (4th Cir.1937)). A court's authority to grant a declaratory judgment is discretionary. *Wilton v. Seven Falls Co.,* 515 U.S. 277, 282, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995). "District courts 'have great latitude in determining whether to assert jurisdiction over declaratory judgment actions', but should refuse to entertain a declaratory judgment ***only for good cause***." *First Nationwide Mortgage Corp. v. FISI Madison, LLC,* 219 F.Supp.2d 669, 672 (D.Md.2002) (*citing Aetna Casualty & Surety Co. v. Quarles,* 92 F.2d 321, 324 (4th Cir.1937)) (emphasis added).

There may be a time when the Court will exercise its discretion as to whether to declare it appropriate for Sprint to keep litigating issues that it has litigated before and lost. Currently, there is no record before the Court to decide that issue now. The Court does not have the record

of the other proceedings to consider, does not know what specifically Sprint argued, what evidence it presented, and any of the specifics about the underlying proceedings that would be necessary to determine whether collateral estopped should be applied.

Based on the Amended Counterclaim, when reviewed in the context of the rules governing a motion under Rule 12(b)(6), there is no question that Count Five states a claim for relief. The Amended Counterclaim takes note of the fact that Sprint itself alleges only two purported justifications for Sprint's refusal to pay NAT: NAT is "sham" entity and NAT is engaged in an "unlawful traffic pumping" scheme. As alleged in the Amended Counterclaim, Sprint already litigated and lost on the identical issues in the PUC Proceeding. Even if Sprint denies the truth of NAT's allegations, they and all reasonable inferences from them are deemed to be true for the purpose of Sprint's Motion.

B. The Amended Counterclaim States A Claim For Collateral Estoppel.

Sprint also claims that NAT's Amended Counterclaim does not state a claim for collateral estoppel because (1) the claims in the PUC Proceeding, Central Telephone and this case are not identical; and (2) the claims adjudicated in the PUC Proceeding were not essential to its holding. Sprint's argument misstates the claim and the law. NAT does not claim that the "claims" were identical, just that certain issues in dispute were identical and were fully litigated in the prior proceedings.

The Eighth Circuit has identified five elements necessary to establish a successful claim for issue preclusion or collateral estoppel. They are: (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought

to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment. *Anderson v. Genuine Parts Co., Inc.,* 128 F.3d 1267, 1273 (8th Cir.1997).

NAT's Amended Counterclaim alleges all five of the required elements for collateral estoppel:

- Sprint, the same party with the same counsel of record in the instant case, was a party in the PUC Proceeding and the *Central Telephone* case. AC, ¶¶ 31, 40.
- Sprint advanced arguments and took positions on *issues* in the PUC Proceeding "that are identical to those that Sprint advances in this action as ground to avoid paying NAT for terminating access, including that NAT was engaged in a 'traffic pumping scheme,' is a 'sham,' and was 'engaged in artificial mileage inflation.'" *Id*., ¶ 83.
- "Sprint had a full and fair opportunity [to litigate] those issues in the PUC Proceeding" and the PUC "rejected Sprint's objection to NAT's application." *Id.*

These allegations alone satisfy the pleading requirements of collateral estoppel.

Still, Sprint contends that NAT's Count Five is subject to dismissal because the *claims* adjudicated in the PUC Proceeding and *Central Telephone* are not actually identical to the issues in this case. However, the Amended Counterclaim includes detailed factual allegations in support of its collateral estoppel cause of action defeating this argument:

- Paragraphs 35 and 38 of the Amended Counterclaim list the identical issues raised by Sprint in the PUC Proceeding and in the current case;
- Paragraphs 45-47 detail the discovery conducted by Sprint in the PUC Proceeding;
- Paragraphs 51-53 recite the issues raised by Sprint in the PUC Proceeding, including a lengthy citation from the testimony of Sprint's expert;

- Exhibit A to the Amended Counterclaim is the PUC Order identifying then rejecting Sprint's arguments as to the very same issues raised in this case, i.e. that NAT is a "sham entity" (¶ 43) and is engaged in unlawful "traffic pumping" activities (¶¶ 45-53); and
- Paragraphs 30-34 outline the issues in the *Central Telephone* case and compare them to identical issues in the case at bar, namely that Sprint is refusing to pay terminating access charges because of corporate cost cutting policies, not for bona fide legal reasons.

The allegations in the Amended Counterclaim, which the Court must accept as true in considering a Rule 12(b)(6) motion, establish with great detail that Sprint has made and lost arguments on issues pertinent to claims in this case before. Sprint's Motion does not identify any failures to state a claim for collateral estoppel. It just disagrees with NAT's position. Contests about the facts do not support motions under Rule 12(b)(6), and Sprint's motion must thus be denied.

In addition to claiming that the issues in the earlier proceedings are not identical to those in dispute here, Sprint contends that the issues adjudicated in the PUC Proceeding were not essential to its determination, and thus, the collateral estoppel claim fails. Sprint Brief, p. 13. Sprint provides no support for this contention. In fact, the PUC Order analyzes Sprint's contentions that NAT is a "sham" and its business model as "traffic pumpers" is unlawful and then expressly rejects Sprint's arguments. Again, any further evaluation of the issues adjudicated in the PUC Proceeding requires a review of the factual record in that proceeding. There is no such record here and such an evaluation is not proper in the context of a Rule 12 motion.

IV. NAT Has Properly Pled A Cause Of Action For Abuse Of Process.

Abuse of process consists of the misuse or misapplication of the legal process. *Layton v. Chase,* 82 S.D. 270, 274 (1966). In *Miessner v. All Dakota Ins. Associates, Inc*., 515 N.W.2d 198 (1994), the Supreme Court of South Dakota adopted Section 682 and Comments a and b of the Restatement (Second) of Torts defining abuse of process. The Restatements defines abuse of process as "one who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed." Restat. 2d Torts, § 682. Comment a explains that the gravamen of the claim is that the process is for "any purpose ***other than that which it was designed to accomplish.***" Restat. 2d Torts, § 682, cmt. a.

Sprint's entire argument on NAT's abuse of process claim is that Sprint's use of process is not "primarily" for an improper purpose. This argument, on its face, is one that is properly a question of fact for a jury, or at least an issue for summary judgment, not an issue subject to determination on a motion to dismiss. In support of its argument, Sprint makes arguments about its "intentions" and "beliefs." *See* Sprint Brief, p. 18. Sprint makes these arguments without any real factual support in the Amended Counterclaim, which is the only record at issue in a motion under Rule 12(b)(6).

Sprint points to the Court's denial of NAT's motion for a preliminary injunction in 2011 as proof that NAT cannot properly state a claim for abuse of process. However, the Court's decision on that issue is precisely the point of Count Six. Besides not being part of the record, that decision was before the CAF Order, before the PUC's decision, and before the conduct of Sprint described in *Central Telephone* became the subject of an adverse verdict of a United States District Court. With the issuance of the CAF Order and after four years of Sprint's delays at the PUC, NAT expected that Sprint would begin meeting its obligations to pay terminating access fees. However, Sprint has continued looking for pretenses to avoid meeting its

obligations. (Sprint's summary judgment motion based on yet another new Sprint invention, that NAT is a "VoIP" carrier like Skype after never having disputed a bill on that basis is another example of this Sprint's abuse of process.)

The Amended Counterclaim alleges that Sprint's complaint is an abuse of process because, as the District Court found in *Central Telephone*, Sprint is refusing to pay terminating access fees as part of a cost cutting scheme, as well as inventing pretext and telling lies to advance that scheme. *See* AC, ¶ 33. It also alleges that Sprint is using the legal process to put NAT out business and delay paying NAT the millions it legally owes in light of the following: the FCC's ruling in the CAF Order declaring that revenue sharing is lawful; the PUC's findings that NAT is not a sham and not engaged in unlawful activity; and Sprint's admissions in the PUC Proceeding that NAT is not acting in violation of any laws. *See id*., ¶¶ 58-60. Moreover, Sprint's refusal to amend or withdraw the obsolete allegations that are in direct contradiction to the legal and factual developments since the filing of its Complaint evidence that this case is intended to advance Sprint's cost-cutting plan and to delay or avoid its lawful obligations to pay for terminating access service. *See* AC, ¶ 36.

Whether or not Sprint disputes NAT's allegations, the allegations in the Amended Counterclaim must be accepted as true for the purpose of this Motion – and in fact they are true, too. The 10 pages of allegations contained in the Amended Counterclaim properly state a claim for an abuse of process. Sprint can identify no defects in NAT's pleading and it cannot, at this juncture, request a dismissal based on its supposed "intentions" or "beliefs" in filing the instant action.[5] NAT makes substantial allegations concerning Sprint's abuse of process over the past four years to put NAT out of business. Sprint claims that it had good intentions and beliefs. It

[5] It is telling that although Sprint has moved for summary judgment on an isolated technical issue concerning NAT's Tariff No. 3 as it relates to the breach of contract claim, Sprint has not moved for summary judgment on NAT's abuse of process claim or its request for a declaratory judgment on collateral estoppel.

will have a chance to make that case to a jury when its time comes. For now, Sprint's motion to dismiss count six under Rule 12(b)(6) has to be denied.

CONCLUSION.

For the foregoing reasons, Sprint's motion to dismiss should be denied.

October 31, 2014

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on October 31, 2014.

/s/ Scott R. Swier

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