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

SPRINT COMMUNICATIONS COMPANY, L.P., Plaintiff, vs. NATIVE AMERICAN TELECOM, LLC; et al., Defendants.	Case No. 10-4110-KES

NATIVE AMERICAN TELECOM'S PARTIAL OPPOSITION TO SPRINT'S MOTION TO DETERMINE REASONABLE ATTORNEYS' FEES

I. INTRODUCTION.

Native American Telecom LLC ("NAT") hereby opposes in part Sprint Communications Company L.P.'s ("Sprint") Motion to Determine Reasonable Attorneys' Fees (ECF 327) ("Motion"). NAT does not dispute that Sprint is entitled to its "reasonable" fee in connection with successfully pursuing its claim for $29,170.27 in damages for violation of the Federal Communications Act (the "Act"). Most of the fees Sprint seeks now, however, are not reasonable fees for pursuing its affirmative damage claim under the Act but instead arise from defending NAT's claims against Sprint. Fees incurred in *defending* claims are not recoverable under any statue that applies to this action.

In its Motion, Sprint seeks fees of $690,617.25, even though its only claim for "damages" under §§ 206 or 207 of the Act is for $29,170.27. As discussed below, throughout the litigation Sprint has made clear that its claims cover the period only through the filing of its original complaint on August 16, 2010, and, in fact, Sprint had stopped paying NAT before it filed its complaint. ECF 1, ¶ 30. Thus, all attorneys' fees incurred by Sprint on bills after August 2010

were in relation to Sprint's effort to defend NAT's affirmative claims—and not in connection with seeking damages under the Act. Those fees thus are not recoverable.

NAT also notes that Sprint's sole damage claim in this action is for the recovery of amounts that had been billed and paid at the time Sprint filed its complaint, and thus its damages were fully liquidated at the time it filed this action. Should this Court make an award of attorneys' fees to Sprint for prevailing on its claim for $29,170.27, any fee award should be proportional to the damages incurred on Count I of its original Complaint, or one-third of its recovery ($10,000).

II. BACKGROUND.

Sprint initiated the instant suit against NAT on August 16, 2010. ECF 1. In its original Complaint, Sprint alleged that NAT violated the Act by billing Sprint for terminating access charges for which it was not entitled. ECF 1, Count I. The Complaint made clear that, as of the date of its filing, Sprint had already stopped paying NAT. *Id.*, ¶ 30. Thus Sprint's affirmative damage claim was limited in time to the date of Sprint's last payment to NAT, which was sometime before the action was commenced. Sprint sought "reasonable damages in the amount of the unauthorized access charges paid to NAT under NAT's federal tariff [$29,170.27], plus reasonable costs and attorneys' fees, pursuant to 47 U.S.C. §§ 206, 207." *Id.* Count I is the only claim for damages for violation of the Act asserted by any party in this action.

Sprint also asserted a state-law claim, alleging that NAT was unjustly enriched by the terminating access charges paid through the date of the Complaint.[1] *Id.*, Count II. Sprint also asserted a claim against the Crow Creek Tribal Court, asking the Court to enjoin it from exercising jurisdiction over it. *Id.* Count III.

[1] In Count I, Sprint also requested injunctive relief under the Act.

After filing its Complaint, Sprint moved for a preliminary injunction on September 28, 2010 to enjoin the Crow Creek Sioux Tribal Court from taking any action on the issues disputed between Sprint and NAT. ECF 20. Sprint also sought to enjoin NAT from pursuing a claim against Sprint (to collect terminating access charges) in Tribal Court. *Id.* On January 12, 2011, NAT filed its own motion for a preliminary injunction seeking to enjoin Sprint from withholding or otherwise retaining switched access charges billed to Sprint through March 1, 2010 and beyond that date into the future. ECF 67. The Court denied NAT's preliminary injunction motion. ECF 118.

On March 8, 2011, NAT filed a First Amended Answer and Counterclaim. ECF 99. In its counterclaim, NAT asserted state law claims to collect money from Sprint: breach of contract (tariffs), breach of implied contract (resulting from violation of federal tariffs), and quantum meruit/unjust enrichment. *Id.*, Counts I – III. None of those state-law claims entitled NAT to collect attorneys' fees if NAT prevailed in prosecuting them, or if Sprint prevailed in defending them. NAT also sought a declaratory judgment that it lawfully charged Sprint and that Sprint is contractually obligated to make past and future payments to NAT. *Id.*, Counts IV.

On June 13, 2011, NAT sought a stay of proceedings and referral to the FCC of the issues addressed in the case *Qwest Communications Co. v. Northern Valley Communications, LLC*, FC-11-87. ECF 121. On July 5, 2011, Sprint also moved to stay and refer certain issues to the FCC. ECF 124. In February 2012, the Court granted a stay in the instant action and referred three issues to the FCC for resolution:

> 1) Whether NAT is entitled to collect interstate switched access charges it has billed to Sprint using VoIP technology pursuant to NAT's interstate access [T]ariff [No. 1], interstate access [T]ariff [No. 2], or revised interstate [T]ariff [No. 2] for calls to numbers assigned to free calling providers;

2) If the services provided by NAT do not qualify as switched access services to Free Conferencing Corporation or other free calling providers, determination of how the traffic should be classified, whether that traffic can be tariffed and whether NAT is entitled to any compensation for the services NAT provided, and if so, what a reasonable rate would be for NAT's services; and

3) In the event that the services provided by NAT to Sprint do not qualify as switched access services under NAT's applicable interstate access tariff, but NAT is otherwise entitled to compensation for these services, determination of a reasonable rate for these services.

ECF 141.

After the Court issued the stay and referred the above-listed issues to the FCC, NAT, out of an abundance of caution, sought competitive local exchange carrier ("CLEC") authority from the South Dakota Public Utilities Commission (the "SDPUC"). Sprint actively objected to NAT's sought-after certification. The focus then became NAT's fight with Sprint at the SDPUC. After a number of years, in July 2014, the SDPUC proceeding was resolved in NAT's favor.

On July 23, 2014, the Court held a status conference with the parties to reset the schedule of the case. ECF 167. During the status conference, Sprint's counsel stated that Sprint's claims were limited to claims about NAT's FCC tariffs that became effective in 2009 and 2010 ("Tariff No. 1" and "Tariff No. 2," respectively), and *only as to Sprint's invoices billed through the date of Sprint's Complaint*. Sprint's counsel stated:

> [T]here isn't a claim pending in this case or any time period under that new contract ["Tariff No. 3"] that was filed with the FCC in the summer of '11. Our position back in the fall of '12, when we talked to the FCC and when we circulated that stipulation, initially was exactly that. This case was about Tariffs 1 and 2, nothing else.

ECF 169, lines 18-24. After the status conference, the Court lifted the stay, withdrew the FCC referral, and issued new case deadlines. ECF 168.

On September 10, 2014, NAT filed an Amended Counterclaim against Sprint. ECF 172. Notably, Sprint did not amend its original Complaint and thus the operative complaint remained

Sprint's original Complaint, which asserted a single count under the Act for the $29,170.27 Sprint had paid to NAT prior to the filing of the Complaint. ECF 1, Count I. NAT's Amended Counterclaim asserted claims for breach of contract, breach of implied contract, unjust enrichment, and abuse of process. ECF 172. NAT also sought declaratory relief as to Sprint's payment obligations and to collaterally estop Sprint from asserting defenses against NAT already made and lost at the SDPUC. *Id.*

On October 1, 2014, Sprint moved to dismiss NAT's amended breach of contract claims to the extent they sought the recovery of terminating access service fess billed to Sprint after August 11, 2012. ECF 181. Sprint claimed that these damages were barred by the statute of limitations. ECF 182. Sprint argued that this suit only involved claims under NAT's Tariffs Nos. 1 and 2, which were separate transactions, duties and obligations than those under NAT's Tariff No. 3. ECF 182, at 6-7. Thus, according to Sprint, NAT's claims for payment under Tariff No. 3 could not relate back to the original counterclaim. Sprint also sought to dismiss NAT's request for a collateral estoppel ruling and its claim for abuse of process. *Id.*

On that same day, Sprint filed a Motion for Partial Summary Judgment on NAT's claims for breach of contract and breach of implied contract. ECF 176. In its Motion, Sprint argued that NAT was not entitled to payment under its FCC Tariff No. 3 as to calls delivered on or after December 29, 2011 because of an issue concerning the delivery of VoIP-PSTN traffic (the "Sprint VoIP MSJ"). ECF 178. The Court granted Sprint leave to take additional discovery on this issue. ECF 199.

On February 26, 2015, while the Sprint VoIP MSJ was pending, NAT filed a Motion for Partial Summary Judgment (the "NAT MSJ"). ECF 211. NAT sought summary judgment in favor of NAT dismissing all of Sprint's claims against NAT, and awarding NAT judgment on its

breach of contract claim and a declaration that Sprint was obligated to pay NAT terminating access charges going forward. ECF 213.

On March 19, 2015, Sprint filed another Motion for Summary Judgment. ECF 223. This time Sprint sought a judgment dismissing NAT's breach of contract and declaratory action counts (the "Sprint MSJ on NAT's Claims"). *Id.*

On April 1, 2015, the Court denied Sprint's Motion to Dismiss NAT's counterclaim, but held that collateral estoppel is properly asserted as a defense, not an affirmative claim. ECF 234. All other claims under NAT's amended counterclaim went forward. On April 27, 2015, the Court denied Sprint's VoIP MSJ. ECF 243.

On August 7, 2015, the Court issued an order on the NAT MSJ and the Sprint MSJ on NAT's Claims (not on Sprint's Act claim). ECF 250. The Court found:

- Sprint is entitled to summary judgment regarding counts I [breach of contract] and IV [declaratory judgment] of NAT's amended counterclaim as they pertain to NAT's original and revised interstate [T]ariff [No.] 1 and original and revised [T]ariff [No.] 2;
- Counts I and IV of NAT's amended counterclaim as they pertain to NAT's [T]ariff [N]o. 3 should proceed to trial; and
- NAT's MSJ should be denied except that the Court issued an order that Sprint was precluded from making certain arguments that were adjudicated before the SDPUC.

Id.

On September 17, 2015, the Court held a status conference where it identified with agreement by the parties that Sprint's only remaining affirmative claim was the amount it alleges it wrongfully paid to NAT during the first two months of billing by NAT. ECF 252. Sprint recognized that by the time the case went to trial, Sprint likely would not be a plaintiff on any of the remaining claims left to be tried. ECF 254. Sprint's counsel stated that Sprint did not intend to be a Plaintiff on a declaratory ruling. ECF 254, lines 3-15.

On October 9, 2015, Sprint filed a motion for Summary Judgment on Count I of its Complaint (the "Sprint Count I MSJ"). ECF 258. In the Sprint Count I MSJ, Sprint sought to recover the money it paid to NAT through the date of the Complaint ($29,170.27), plus attorneys' fees under the Act. ECF 259. NAT did not substantively oppose the motion. ECF 263. The Court granted Sprint's Motion on February 26, 2016. ECF 281. Additionally, the Court ordered that Sprint was entitled to recover a limited amount of attorneys' fees; with regard to this award, the Court stated as follows on this issue:

> Sprint also seeks an award of attorneys' fees. Section 206 of the [Act] provides that
>
> > In case any common carrier shall do . . . any act, matter, or thing in this chapter prohibited or declared to be unlawful, . . . such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. 47 U.S.C. § 206.
>
> This statute provides for the award of reasonable attorneys' fees to the injured party in cases where the court has determined that the injured party is entitled to recover damages. *Am. Tel. & Tel. Co. v. United Artists Payphone Corp.*, 852 F. Supp. 221, 225 (S.D.N.Y. 1994) ("Thus, the Court concludes that under 47 U.S.C. § 206, attorney's fees may only be awarded to a party that has recovered damages."), *aff'd* 39 F.3d 411 (2d Cir. 1994) [hereinafter, "*AT&T*"]. Because the court has concluded that Sprint is entitled to recover damages on Count 1 of its complaint, Sprint is also entitled to an award of its reasonable attorneys' fees. The amount of reasonable attorneys' fees will be determined after trial.

Id.

The parties went to trial on NAT's state-law claim for breach of contract related to the charges billed by NAT under FCC Tariff No. 3 from August 2011 forward. The Court found that NAT was not entitled to collect those charges. ECF 325.

On August 29, 2016, Sprint filed a motion and related materials seeking an award of $690,617.25 in attorneys' fees. ECF 326. That motion seeks an award of 100% of all fees incurred by Sprint in this action. None of the materials filed by Sprint separately account for or even identify the difference between fees incurred by Sprint for pursuing its $29,170.27 in damages under § 206 of the Act and the hundreds of thousands of dollars spent defending the state-law claims asserted by NAT against Sprint. For some of the most significant examples, Sprint's application includes amounts billed for defending the following aspects of NAT's state-law contract claim:

- The Sprint VoIP MSJ, where Sprint moved for summary judgment on NAT's state-law claims, arguing that NAT could not bill for "VoIP" traffic on the grounds that the CAF Order, which became effective in 2012, required the filing of a new tariff, s*ee* ECF 176;
- Sprint's discovery motion and related discovery on the "VoIP" issue, *see* ECF 199;
- Sprint's motion to dismiss NAT's state-law counterclaims, *see* ECF 181;
- The Sprint MSJ on NAT's Claims, s*ee* ECF 223;
- The 2016 trial that only concerned NAT's bills for the period from 2012 forward, and thus had nothing to do with Sprint's claim for damages (which factually ended before the action was commenced in August 2010).

III. Argument

Sprint recovered damages in the amount of $29,170.27. ECF 281. Along with these damages, the Court awarded "reasonable attorneys' fees" to be determined at a later time, pursuant to § 206 of the Act. ECF 281 at 10. Sprint now seeks a determination of its "reasonable attorneys' fees," and claims it is entitled $690,617.25. ECF 327. However, an award of close to $700,000 is grossly excessive in light of the controlling statutory authorization for attorneys' fees and Sprint's limited recovery of damages. This Court must deny Sprint's motion for $690,617.25 because Sprint (1) fails to consider the language of the Act's attorneys' fees provision and the case law interpreting said provision, namely the requirement that Sprint is

only entitled to attorneys' fees for its claim for damages under the Act; (2) has arrived at a attorneys' fees figure bloated with fees for work that is not attributable to the claim (and recovery) for which it is entitled an award of fees under § 206 of the Act; and (3) incorrectly applies standards grounded in the Civil Rights Act, as opposed to the Act or statutes similar to the Act. Awarding Sprint $690,617.25 would amount to a windfall for Sprint at the expense of NAT, rather than a reimbursement or recovery of attorneys' fees for Sprint's Act claim.

A. The Statutory Directives of the Act and the Case Law Interpreting the Act Permit Sprint To Recover Its Fees For Its Count I Only.

Sprint only is entitled to an award of attorneys' fees under section 206 of the Act, entitled "Carrier's liability for damages", which states the following:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier **shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee**, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 206 (emphasis added).

The express language of section 206, as well as the case law interpreting and applying this section, permits an award of attorneys' fees only to a party that prevails on an affirmative claim for damages against a common carrier. Here, NAT has not even brought affirmative claims against Sprint under the Act, and thus, the only claim that Sprint could obtain its fees in litigating is its claim for damages under Count I. Sprint's Motion wholly ignores the express language of the statute and the law interpreting this status widely accepted in federal courts across the country, including this very Court.

By neglecting to address any federal case law specific to the Act (or statutes with similar purposes and attorneys' fees provisions as the Act's), Sprint omits from its analysis the

fundamental requirements an "injured party" must meet in order to obtain attorneys' fees under § 206.

First, the injured party must plead a violation of the Act. In *Central Telephone Company of Virginia v. Sprint Communications Company of Virginia*, the district court for the Eastern District of Virginia held that an award of attorneys' fees was not appropriate where the "[plaintiff] did not plead a violation of the [Act] and the Court did not find a violation of the [Act]," even though the court found defendant in breach of federally-recognized contracts. No. 3:09CV720, 2011 WL 1226001, at *5 (E.D. Va. Mar. 30, 2011), *aff'd sub nom. Cent. Tel. Co. of Virginia v. Sprint Commc'ns Co. of Virginia*, 715 F.3d 501 (4th Cir. 2013). Thus, where a party merely asserts a breach of contract or equitable claim, not a specific violation of the Act, an award of attorneys' fees is not appropriate, regardless of the success on that state-law claim. *Id.*

Second, the "injured party" must recover damages on its claim under the Act in order to be entitled to an award of attorneys' fees. *AT&T*, 852 F. Supp. at 225. Even where a plaintiff is clearly the "prevailing party" in an action under the Act, it cannot recover attorneys' fees if it has not "recovered" anything. *Id.* If there is no recovery of monetary damages, the Court will not award attorneys' fees. *Id.* On at least two occasions, this Court (Schreier, J.) specifically, has relied on *AT&T* for the proposition that attorneys' fees are only recoverable under § 206 on claims for damages. *See Sancom, Inc. v. Sprint Commc'ns Co. P'ship*, No. CIV. 07-4107-KES, 2012 WL 2449934, at *1 (D.S.D. June 27, 2012). In *Sancom*, this Court indicated that other courts, not just the *AT&T* court, have so "similarly held":

> There is no right to attorney's fees under § 206 if there has "been no independent recovery of damages." *Swain* [*v. AT&T Corp.*, No. CIVA3:94-CV-1088-D, 1997 WL 573464, at *1 (N.D. Tex. Sept. 9, 1997)] (reasoning that "[s]everal courts have held that the plain language of § 206 . . . precludes an award of attorney's fees where there has been no independent recovery of damages." (citations omitted)). The Second Circuit has noted that the FCA "does not permit the

> recovery of presumed damages." *Conboy* [*v. AT & T Corp.*, 241 F.3d 242, 250, 2001 WL 178498 (2d Cir. 2001)] (citing *In re Commcn's Satellite Corp.*, 97 F.C.C. 2d 82, 90 (1984)).

Id. at *2. Further, in awarding damages to Sprint on its Count I *in this case*, this Court relied upon *AT&T* to find that Sprint was entitled to attorneys' fees. *Sprint Commc'ns Co. L.P. v. Crow Creek Sioux Tribal Court*, No. 4:10-CV-04110-KES, 2016 WL 782247, at *4 (D.S.D. Feb. 26, 2016).

Third, and related to the second element above, after recovering damages on its Act claim, the injured plaintiff is ***only*** entitled to attorneys' fees on that "case of recovery." 47 U.S.C. § 206; *see AT&T*, 852 F. Supp. at 225 (emphasis added) ("The requirement that a party have been awarded damages is also suggested both by the title of § 206 ('Carriers' liability for damages') and by its language, which provides for 'damages . . . together with a reasonable counsel or attorney's fee.' *This language links the recovery of attorney's fees to the recovery of damages*."). As such, "[t]he [fee] applicant should exercise 'billing judgment' with respect to hours worked and should maintain billing time records in a manner that ***will enable a reviewing court to identify distinct claims.***" *Centurytel of Chatham, LLC v. Sprint Commc'ns Co. LP*, No. CV 09-1951, 2016 WL 4005965, at *7 (W.D. La. July 25, 2016) (internal citations omitted) (emphasis added).

Finally, hours spent on related administrative proceedings are not to be included in the ultimate award of attorneys' fees under § 206. *See AT&T*, 852 F. Supp. at 224 ("[Section] 206 [of the Act] provides that an attorney's fee 'shall be taxed and collected as part of the costs in the case.' This language suggests that the services in question must have been incident to court proceedings rather than to FCC proceedings, as the Supreme Court concluded in *Meeker* [*v. Lehigh Valley R.R. Co.*, 236 U.S. 412 (1915)]. *See also Parker v. Califano*, 561 F.2d 320, 326

(D.C.Cir.1977) (finding attorney's fees incident to administrative proceedings may be awarded under Title VII [of the Civil Rights Act] because, unlike the term "suit" in Section 8 of the Interstate Commerce Act [and the term "case" in the Act], the term "proceedings" [in Title VII] includes administrative proceedings).").[2]

An application of these fundamental considerations to the facts in this case demonstrates that Sprint's request for $700,000 is overreaching. Under the mandate of the express language of the Act, and the finding of the *AT&T* widely accepted by this Court and others across the country, a party prevailing under an Act claim is not enough- that prevailing party must recover damages and attorneys' fees are only awarded on the case that recovered those damages.

B. Sprint's Attorneys' Fees are Not Properly Apportioned to the One Claim for Which it Recovered Damages Under § 206 of the Act

Sprint alleged *only one* violation of the Act, and that allegation is located in Count I of its original Complaint. The damages Sprint sought in connection with Count I were narrow—Sprint only sought recovery for the amount Sprint paid NAT under Tariff No. 1, up through the filing date of the original Complaint (August 16, 2010). These damages amounted to $29,170.27. Sprint was granted summary judgment on its Count I nearly six months ago, in February 2016. For that single "case of recovery" (of $29,170.27), as the injured party, Sprint is entitled to attorneys' fees. 47 U.S.C. § 206. However, Sprint fails to present any evidence of the fees incurred in its "case of recovery." Rather than apportion its attorneys' fees to its *single* recovery of damages on its *single* Act claim, Sprint seeks to recover fees for time spent on *all* claims

[2] *AT&T* does identify one case—*ITT World Commc'ns, Inc. v. W. Union Tel. Co.*, 598 F. Supp. 1439, 1441–42 (S.D.N.Y. 1984)—in which a court has awarded attorneys' fees for prior related actions before the FCC; however the *AT&T* court distinguishes the holding in *ITT World* on the grounds that the attorneys' fees awarded in *ITT World* were included in the "full amount of damages," separate and apart from the attorneys' fees that are "taxed and collected as part of the costs in the case." *AT&T*, 852 F. Supp. at 224. Further, AT&T notes that the court in *ITT World* "stated that its award of attorney's fees was premised on the 'peculiar facts of th[e] case,' including the fact that the defendant's actions had been 'in blatant violation to the extant law.'" *Id.* (citing *ITT World*, 598 F. Supp. at 1441).

involved in the litigation, including NAT's state-law claims.[3] As a result, the requested fees—nearing $700,000—are exorbitant.

Sprint makes a point of elaborating on its great success over the course of the litigation spanning multiple years and involving many complex matters. However, much of the litigation did not involve Count I of Sprint's original Complaint, or the specific issues underlying that claim. Rather, much of the litigation—including the preliminary injunction motions, motions to dismiss, motions for summary judgment (*i.e.*, the Sprint VOIP MSJ, the NAT MSJ, the Sprint MSJ on NAT's Claims), and the trial—derived from non-Act claims brought by NAT, such as NAT's breach of contract, breach of implied contract, and unjust enrichment/quantum meruit claims. These state-law claims did not involve NAT's violation of the Act, and moreover, did not concern NAT as a carrier's "liability for damages," as expressly stated in the title of section 206 providing the right to attorneys' fees. Sprint also neglects to acknowledge that much of the litigation involved non-statutory claims brought *by NAT*, not Sprint. Sprint cannot recover attorneys' fees for defending against NAT's claims. The plain language of the Act simply does not allow for such a recovery.

Requiring that NAT pay nearly $700,000 in attorneys' fees—an amount twenty-three times as large as the judgment Sprint sought and ultimately recovered—is more punitive than Congress could have intended when it scripted the Act's attorneys' fees provision. Although Sprint tries to persuade the Court that the "amount in dispute" in this case is over $3 million dollars, that figure is actually what NAT sought to recover from Sprint on non-Act claims. Such a statement is not appropriate where, such as here, the determination of fees must be tailored to

[3] Sprint is not requesting attorneys' fees for work performed in the SDPUC matters and the FCC referral. ECF 327. Sprint asserts it has exercised "billing judgment" by excluding the legal fees incurred during those administrative proceedings. However this exclusion cannot be misconstrued as "billing judgment" when the Act and applicable case law do not allow for inclusion of such fees in the first place.

the violation plead by the prevailing party and the damages recovered. The fees Sprint requests are completely out of proportion to its damages, and should not be awarded.[4]

As Sprint has failed to provide the Court with any evidence of its fees incurred in its case to recover the award $29,170.27 under the Act, Sprint's Motion should be denied. A more reasonable figure—one which factors in the limitations on recovery of attorneys' fees inherent in § 206 of the Act—is one-third of the damages Sprint recovered on Count I of its original Complaint, or $10,000. Such an "across-the-board cut" is appropriate here, where the time records are voluminous and complex, and where plaintiff has failed to apportion the attorneys' fees incurred on its only claim for damages under the Act. *Centurytel of Chatham, LLC v. Sprint Commc'ns Co. LP*, No. CV 09-1951, 2016 WL 4005965, at *7 (W.D. La. July 25, 2016) (citing *Maxwell v. Angel-Etts of California, Inc.*, 53 Fed.Appx. 561, 568 (Fed. Cir. 2002), *opinion amended on reh'g* (Jan. 2, 2003) (citing *Gates v. Deukmejian*, 987 F.2d 1392, 1399-1400 (9th Cir. 1992)).

C. Sprint's Reliance on Case Law Unrelated to the Act is Unfounded and Improper.

In its Motion to Determine Reasonable Attorneys' Fees, Sprint creates the illusion that the Act's attorneys' fees provision is broad in scope. To do so, Sprint has cherry-picked case law that analyzes statutes with purposely-broad attorneys' fees provisions. If the Court accepts Sprint's analysis, it would be ignoring its own decisions on the subject and would be making a sweeping adoption of a line of cases that do not involve telecommunications law, no less the Act

[4] While there is a body of case law rejecting the notion that attorneys' fees must be proportional to the recovery, those cases, again, are typically in the context of Civil Rights Act litigation in which a unique policy goal is at play to encourage attorneys to litigate important public policy issues and to reimburse individual plaintiffs' for the amount expended on said litigation. *See, e.g. Simpson v. Merchants & Planters Bank*, 441 F.3d 572, 581 (8th Cir. 2006) (affirming that the Eighth Circuit "[has], indeed, explicitly rejected a 'rule of proportionality' in civil rights cases because tying the attorney's fees to the amount awarded would discourage litigants with small amounts of damages from pursuing a civil rights claim in court"). Said policy goals are not at play here, where two telecommunication companies sought to determine their rights under certain contracts.

or statutes with similar attorneys' fees provisions. These latter-referenced cases, instead, involve civil rights litigation where the relevant statutory attorneys' fees provisions are found in the Civil Rights Act. *See, e.g. Hensley v. Eckerhart*, 461 U.S. 424 (1983) (authority to award attorneys' fees and expenses derived from 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988); *Wal-Mart Stores, Inc. v. Barton*, 223 F.3d 770 (8th Cir. 2000) (same authority); *Jenkins by Jenkins v. State of Mo.*, 127 F.3d 709, 714 (8th Cir. 1997) (same authority); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974) (same authority); *Mock v. S. Dakota Bd. of Regents*, 296 F. Supp. 2d 1061 (D.S.D. 2003) (same authority).

Sprint's sole reliance on civil rights cases is improper where the relevant authority for attorneys' fees is the Act. For one, the Act's attorneys' fees provision has elements markedly different from those in the Civil Rights Act attorneys' fees provisions. *See Parker v. Califano*, 561 F.2d 320, 327 n. 17 (D.C. Cir. 1977) (noting that the language of Civil Rights Act attorneys' fees provisions is "wholly distinguishable" and "significantly different" from that used in the attorneys' fees provisions of the Interstate Commerce Act[5]). Furthermore, a strict application of law interpreting the Civil Rights Act—which concerns issues of great public interest—is inappropriate in private Act matters. *See Wal-Mart Stores, Inc. v. Barton*, 223 F.3d 770, 773 (8th Cir 2000) (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986)) (highlighting that "'[b]ecause damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief'"); *Aaacon Auto Transp., Inc. v. Medlin*, 575

[5] NAT's reliance on cases interpreting the Interstate Commerce Act is appropriate. In *AT&T v. United Artists Payphone Corp.*, which this Court relied on in its Memorandum and Opinion Order to award attorneys' fees to Sprint, the court held that "decisions construing the [Interstate Commerce Act] are persuasive in establishing the meaning of the [Federal Communications Act]." *AT&T*, 852 F. Supp. at 222. To support its holding, the court noted that (1) "the Communications Act was modelled on the Interstate Commerce Act," and (2) the section of the Federal Communications Act authorizing the award of damages and attorneys' fees (47 U.S.C. § 206 (1988)) "[was] taken practically verbatim from the provision[] of the Interstate Commerce Act then in force [(49 U.S.C.A. § 8 (1951) (repealed 1978))]." *Id.* at 222–23.

F.2d 1102, 1106 (5th Cir. 1978) (observing that "Congress did not wish to provide the same encouragement for private claimants under the Interstate Commerce Act as it has for Title VII [of the Civil Rights Act] litigants").

Lastly, it is unacceptable for Sprint to rely solely upon civil rights cases and *ignore* the case law specifically interpreting the Act when Sprint itself has relied upon cases such as *AT&T* in opposing requests for attorneys' fees under the Act. In the *Sancom* litigation before this very Court, Sprint opposed the third-party defendants' request for attorneys' fees on the ground that "section 206 [of the Act] permits an award of attorneys' fees only to a party that prevails on *an affirmative claim for damages against a common carrier*." Brief for the Defendant and Third-Party Plaintiff at 6, *Sancom, Inc. v. Sprint Commc'ns Co. P'ship*, No. CIV. 07-4107-KES, 2012 WL 2449934 (D.S.D. June 27, 2012), ECF 134 (emphasis in the original). Sprint continued:

> [S]ection 206 does not provide for attorney's fees unless a common carrier has been found liable for damages. Section 206 states that a common carrier shall be liable for damages for violating the Act "together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery. . . ." 47 U.S.C. 206. Thus, attorneys' fees are to be fixed only in a "case of recovery." Moreover, where there is no award of damages, there is nothing for an attorneys' fee award to be "together with." Defendants acknowledge that the very case they cite denied an award of attorneys' fees because there had been no award of damages. Mem. at 10 (citing *AT&T v. United Artists Payphone Corp.*, 852 F. Supp. 221 (S.D.N.Y. 1994)). That case pointed both to the statutory language and to the history of section 206. There are no cases of which Sprint is aware that have reached a contrary result. Third Party Defendants have not obtained (or even sought) a damages award here.

Id. at 8-9.

Moreover, in its *Sancom* submission, Sprint acknowledged that a party who alleges violation of a tariff for nonpayment is not entitled to fees upon prevailing on "collection actions" because they are not claims under the Act. *Id*.

As mentioned above in Section A, this Court, adopting the *AT&T* rationale, ultimately determined that third-party defendants were not entitled to an award of attorneys' fees because it would not independently recover damages under the Act. *Sancom*, 2012 WL 2449934, at *2.

The Court should not give weight to arguments supported by irrelevant case law. Instead, this Court must consider the language of the Act itself and the body of case law interpreting the Act's attorneys' fees provision—law which this Court has indeed relied upon when faced with determining attorneys' fees under the Act.

IV. Conclusion

For the foregoing reasons, NAT respectfully requests that the Court deny Sprint's Motion to Determine Reasonable Attorneys' Fees. Should the Court award Sprint its fees, it should only grant a more reasonable and proportional award of attorneys' fees in the amount of $10,000 to Sprint.

September 19, 2016

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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 September 19, 2016.

/s/ Scott R. Swier