UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY L.P.,

Plaintiff,

v.

NATIVE AMERICAN TELECOM, LLC; B.J. JONES in his official capacity as Special Judge of Tribal Court; and CROW CREEK SIOUX TRIBAL COURT,

Defendants.

Civil No. 10-4110-KES

SPRINT'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO DETERMINE REASONABLE ATTORNEYS' FEES

Sprint Communications Company L.P. ("Sprint") submits this Reply Memorandum in further support of its Motion to Determine Reasonable Attorneys' Fees (Docket 326) to be awarded to Sprint.

I. SPRINT IS ENTITLED TO FEES

In its Partial Opposition to Sprint's Motion ("Partial Opposition," Docket 337), Defendant Native American Telecom, LLC ("NAT") concedes that Sprint is entitled to an award of fees. NAT does not dispute that the Court previously determined that NAT violated the Communications Act, and that Sprint was entitled to damages associated with that violation. Partial Opposition, Docket 337 at 7; Docket 281 at 10. Instead, NAT

admits that Sprint is entitled to reasonable fees, but argues those fees should be $10,000. Partial Opposition, Docket 337 at 1.

As such, the sole issue for the Court is the amount of reasonable fees to be awarded.

II. IF *HENSLEY* AND *ALBERS* APPLY, THE LODESTAR AMOUNT REPRESENTS THE REASONABLE FEES INCURRED "ON THE LITIGATION"

It is both striking and telling that, in its Partial Opposition, NAT fails to cite the governing standard for determining a reasonable attorneys' fee. As Sprint explained in its Memorandum, the analysis was detailed in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Albers v. Tri-State Implement, Inc.*, No. CR. 06–4242–KES, 2010 WL 960010, at *22 (D.S.D. Mar. 12, 2010). Docket 327 at 3-4. Under the established standard, the Court must multiply the number of hours reasonably expended "on the litigation" by a reasonable hourly rate, subject to modification by the *Johnson* factors. *Albers*, No. CR. 06–4242–KES, 2010 WL 960010, at *22.

NAT has conceded the facts that Sprint's lawyers reasonably spent 2,056.85 hours "on the litigation," and billed reasonable rates.[1] Moreover, NAT does not ask the Court to apply the *Johnson* factors to

[1] On page 11-12 of the Partial Opposition, NAT argues that time spent on related administration proceedings should not be part of the award. But on page 13, n.3, NAT admits that Sprint excluded such hours from its request.

reduce the lodestar. As such, if *Hensley* and *Albers* apply, Sprint's motion should be granted in full.

III. NAT'S REQUEST TO "APPORTION" FEES IS CONTRARY TO *HENSLEY*

NAT argues that the Court must "apportion" the total hours spent on a claim-by-claim basis. Partial Opposition, Docket 337 at 12. This is not the law under *Hensley*. As this Court recognized in *Albers*, hours should be calculated on claim-by-claim basis only where sets of claims are "distinctly different" and "based on different facts and legal theories." *Albers*, 2010 WL 960010, at *25 (quoting *Hensley*, 461 U.S. at 434-35). The Court followed the Supreme Court's guidance that, when counsel's time is devoted to litigation as a whole, the lawsuit cannot be viewed as a series of discrete claims. *Id.* Accordingly, instead of apportioning work by claim, the focus should be on the "overall relief obtained." *Id.*

In *Albers*, this Court held that several claims arose from a common core of facts, and, thus, rejected a request to apportion the work spent. 2010 WL 960010, at *25. Instead, any reduction must result from "partial or limited success" in the case as a whole. *Id.* at *24. This Court quoted with approval the Supreme Court's directive that:

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation .... In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every

> contention raised in the lawsuit.... If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, non-frivolous, and raised in good faith.

Id. at *25 (quoting *Hensley*, 461 U.S. at 435-36) (emphasis added).

The same result is warranted here. All of the work done by Sprint's attorneys in this case resulted from NAT's unlawful billing of access charges that, among other things, were not due under the FCC's 2009 *Farmers* decision. And the Court's decision to allow NAT's claims under Tariffs No. 2 and 3 to "relate back" was predicated on its finding that all claims arose out of the same common core of facts. Docket 234 at 9-12. By focusing on the fact that there were separate claims, and ignoring whether those claims arose out of a common core of facts, NAT seeks to sidestep *Hensley* and *Albers*. NAT's argument should be rejected.

IV. THERE IS NO AUTHORITY THAT WOULD ALLOW THE COURT TO DISREGARD *HENSLEY* IN A CASE UNDER 47 U.S.C. § 206

In essence, NAT argues for a new "apportionment" standard to supersede *Hensley* in fee petitions arising under Section 206. NAT's argument is unsupported; to accept it, the Court would have to create a new standard.

Nothing in the text of 47 U.S.C. § 206 justifies disregarding *Albers* and *Hensley* when awarding fees. To the contrary, Section 206 contains

fee shifting language indistinguishable from 29 U.S.C. § 216(b) (the fee shifting statute in *Albers*) and 42 U.S.C. § 1988 (the fee shifting statute in *Hensley*). All three statutory provisions allow a prevailing party to obtain fees incurred in the case. While policy considerations may impact application of the *Johnson* factors, neither party argues that the *Johnson* factors justify a deviation from the lodestar.

NAT cites no caselaw to support its proposition that *Hensley* is inapplicable to a fee award under Section 206. Instead, its Communications Act cases cited are off point:

- NAT cites to *Central Telephone Company of Virginia v. Sprint Communications Company of Virginia*, No. 3:09CV720, 2011 WL 1226001 (E.D. Va. Mar. 30, 2011), *aff'd*, 715 F.3d 501 (4th Cir. 2013), for the proposition that a party must plead and prove a violation of the Communications Act to obtain a fee award. Partial Opposition, Docket 337 at 10. Here, Sprint meets this requirement, as the Court held in Docket 251.

- NAT cites to *Sancom, Inc. v. Sprint Communications Company Limited Partnership*, No. CIV. 07-4107-KES, 2012 WL 2449934 (D.S.D. June 27, 2012) for the proposition that fees are recoverable only when a party provides damages. Here, Sprint has incurred damages, as the Court held in Docket 251.

- NAT cites to *CenturyTel of Chatham, LLC v. Sprint Communications Company LP*, No. CV 09-1951, 2016 WL 4005965 (W.D. La. July 25, 2016) for the proposition that it may be necessary for a reviewing court to identify "distinct claims." But in that case, the court awarded recovery for 100% of the attorney hours requested, despite the fact that the Communications Act claim was a tertiary claim that did not support recovery of damages independent of those awarded under the tariff enforcement claims. *See CenturyTel of Chatham, LLC v. Sprint Commc'ns Co. LP*, -- F.3d --, 2016 WL 2347926, at

> *12 (W.D. La. May 4, 2016) (CenturyLink may not recover independent damages on its Communications Act claim, but may obtain an award of fees).

In short, NAT cites to no case decided under the Communications Act that supports a conclusion that *Hensley* is to be disregarded in cases involving 47 U.S.C. § 206.[2]

V. CONCLUSION

NAT continues its pattern of ignoring the law. It also misstates the facts claiming, for example, that "all attorneys' fees incurred by Sprint on bills after August 2010 were in relation to Sprint's effort to defend NAT's affirmative claims." Partial Opposition, Docket 337 at 1-2. To the contrary, Sprint had to file a lawsuit and litigate for over 5 years to obtain an order for refund. Similarly, NAT would have the Court believe that being partially compensated for the time spent fighting NAT's unlawful practices is a "windfall," *i.e.*, a "gift." Sprint never should have

[2] NAT reaches even farther by quoting *Aaacon Auto Transport, Inc. v. Medlin*, 575 F.2d 1102 (5th Cir.1978) for the proposition that Congress did not provide the same encouragement for a fee award under the Interstate Commerce Act (and by extension the Communications Act) as it did under Civil Rights statutes. Partial Opposition, Docket 337 at 15-16. In that case, the court applied a *discretionary* fee-shifting provision, not the *mandatory* fee-shifting provision found in Section 206 (or *Hensley or Albers*). *Id.* at 1106 (fee-shifting provision provided that prevailing party "may, in the discretion of the court, recover reasonable attorney's fees to be fixed by the court"). That case has no application here.

had to file this case because NAT never should have improperly billed Sprint access charges for calls delivered to Free Conferencing.

Sprint pled and proved that NAT violated the Communications Act, causing it damages. By the end of the case, the Court had properly decided that NAT acted in violation of the Communications Act every month between December 2009 and December 2015. The fees Sprint requests were reasonably incurred on the litigation, and are properly charged to NAT under precedent of this Court and the Supreme Court. Sprint's motion should be granted in full.

Dated: September 22, 2016

By *s/Tom D. Tobin*
Tom D. Tobin
P.O. Box 730
422 Main Street
Winner, SD 57580
Telephone: (605) 842-2500

Philip R. Schenkenberg
Scott G. Knudson
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
Telephone: (612) 977-8400

Attorneys for Sprint Communications Company L.P.

7870812v3