Sprint's Exhibit 133

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

NORTHERN VALLEY COMMUNICATIONS, LLC, Plaintiff, vs. SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, Defendant and Third-Party Plaintiff, vs. GLOBAL CONFERENCE PARTNERS, LLC, Third-Party Defendant.	)	CIV. 08-1003-KES ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS AND DENYING THIRD-PARTY DEFENDANT'S MOTION TO DISMISS THIRD-PARTY COMPLAINT

Plaintiff, Northern Valley Communications, LLC, moves to dismiss the counterclaims asserted by defendant, Sprint Communications Company Limited Partnership. Third-party defendant, Global Conference Partners, moves to dismiss Sprint's third-party complaint.

FACTUAL BACKGROUND

Viewed in the light most favorable to the nonmoving party, Sprint, and as alleged in the counterclaim and the third-party complaint, the facts are as follows: There are two types of telephone calls: local calls and long distance calls. Local calls originate and terminate within one designated local calling

area and local exchange carriers (LECs) usually serve customers within a local calling area. There are incumbent LECs, which are traditional providers of local exchange services in an area and competitive LECs, which are new entrants whose purpose is to offer local services in competition with the incumbent LECs. In contrast, long distance calls are carried by a long distance carrier, known as an interexchange carrier (IXC), from one local calling area to another local calling area. When a customer makes a long distance telephone call, the call is originated on wires and facilities owned by the LEC serving the end-user customer making the call and the call is terminated over wires and facilities owned by the LEC serving the end-user customer receiving the call. Long distance companies pay "originating" access charges to the LECs that serve customers who initiate long distance calls within their local calling area and pay "terminating" access charges to the LECs that serve customers who receive long distance calls within their local calling area. Local telephone companies obtain access charges from the IXCs to assist with the cost of the local plant used in the origination and termination of interstate calls. Such access charges "are determined by tariffs which carriers file either with the Federal Communications Commission (FCC) (when the charges pertain to purely interstate communications) or the applicable state utility commissions (when the charges pertain to intrastate communications)." Rural Iowa

Independent Telephone Ass'n v. Iowa Utilities Board, 476 F.3d 572, 574 (8th Cir. 2007).

Turning to the specifics of this case, Northern Valley is a South Dakota rural competitive LEC that provides telecommunication services to its customers and originating and terminating access services to long distance companies. Being an IXC that provides long distance services, Sprint utilizes the originating and terminating services provided by Northern Valley. Because Northern Valley's access charges pertain to interstate and intrastate communications, Northern Valley filed tariffs with both the FCC and the South Dakota Public Utilities Commission (SDPUC), pursuant to federal and state regulations.

Sprint began purchasing tariffed access services from Northern Valley in September of 2001. Northern Valley argues that Sprint unilaterally stopped paying for access services on May 1, 2007. As a result, Northern Valley filed suit against Sprint, seeking to collect charges it alleges are due under the applicable tariffs. In its answer to Northern Valley's complaint, Sprint asserts ten counterclaims based upon both federal and state law. Sprint alleges that Northern Valley, together with the Call Connection companies (CC companies), including the third-party defendant, Global Conference Partners, LLC, participated in a "traffic pumping scheme," resulting in an increase in access charges billed to Sprint.

More specifically, Sprint alleges that Northern Valley has entered into business relationships with the CC companies to increase the long distance traffic delivered through Northern Valley's switches, which forces Sprint to pay high terminating access charges. The CC companies provide individuals with free or nearly free access to chat rooms and conference calling. The CC companies offer these services to the public for free or nearly free and encourage their customers to make long distance calls to a number assigned to Northern Valley in South Dakota. Sprint alleges that the CC companies purposefully partnered with Northern Valley because it is a competitive LEC and, therefore, is eligible to file a higher tariff rate. The higher revenue gained by Northern Valley as a result of the increased long distance calling was partly "kicked back" to the CC companies.

Sprint alleges that because Northern Valley is not connecting calls to "end users," Northern Valley is collecting terminating access revenue in violation of the law and its own tariffs. Furthermore, Sprint alleges that the CC companies are not customers of Northern Valley and therefore, Northern Valley's tariffs do not apply. Finally, Sprint argues that Northern Valley is not providing a "switched access" service or "terminating access" service under Northern Valley's tariff. For all these reasons, Sprint contends that Northern Valley's access charges are not authorized under the tariff.

Sprint also filed a third-party complaint against Global Conference Partners, which seeks damages for claims of unjust enrichment and civil conspiracy. Global Conference denies liability.

MOTION TO DISMISS STANDARD

In considering a motion to dismiss a counterclaim or third-party complaint, the court assumes all facts alleged in said pleadings are true, construes the pleadings liberally in the light most favorable to the claimant, and should dismiss only if "it appears beyond a doubt that the [claimant] can prove no set of facts which would entitle the [claimant] to relief." Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994). "The issue is not whether a claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183, 191, 104 S. Ct. 3012, 3017, 82 L. Ed. 2d 139 (1984).

DISCUSSION

I. Counterclaim

Sprint responded to the complaint of Northern Valley with a set of counterclaims. In its motion to dismiss Sprint's counterclaims, Northern Valley argues that Sprint's claims are barred by the filed rate doctrine.

Northern Valley further argues that dismissal of the counterclaims is appropriate in light of the recently issued decision of the FCC in Qwest Communications Corp. v. Farmers & Merchants Mutual Telephone Company, Mem. Op. & Order, File No. EB-07-MD-001, FCC 07-175 (Oct. 2, 2007). Northern Valley also argues that Sprint failed to state a claim with respect to each individual counterclaim.

A. Filed Tariff Doctrine

Section 203(a) of the Communications Act requires telecommunications carriers to file a tariff with the FCC "showing all charges" and "showing the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). Telecommunications carriers cannot "charge, demand, collect, or receive a greater or less or different compensation" for services subject to tariffs. 47 U.S.C. § 203(c). These provisions are modeled after provisions contained in the Interstate Commerce Act, and therefore, courts have found that the filed rate doctrine applies to telecommunications carriers. American Tel. & Tel. Co. v. Central Office Telephone, Inc., 524 U.S. 214, 221-22, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998).

" 'Under [the filed rate] doctrine, once a carrier's tariff is approved by the FCC, the terms of the federal tariff are considered to be 'the law' and to therefore 'conclusively and exclusively enumerate the rights and liabilities' as between the carrier and the customer.' " Iowa Network Servs., Inc. v. Qwest

Corp., 466 F.3d 1091, 1097 (8th Cir. 2006) (quoting Evanns v. AT & T Corp., 229 F.3d 837, 840 (9th Cir. 2000)) (alteration in original). The filed rate doctrine prohibits courts from granting relief that would have the effect of changing the rate charged for services rendered pursuant to a valid tariff. The filed rate doctrine is equally applicable to tariffs set by state regulatory agencies. See Teleconnect Co. v. US West Commc'ns, Inc., 508 N.W.2d 644, 647-48 (Iowa 1993).

1. Standing

Northern Valley argues that Sprint lacks Article III standing to assert its counterclaims because the filed rate doctrine prevents the court from altering the access charges that Sprint is required to pay for services. Northern Valley also argues that under the filed rate doctrine, Sprint has suffered no cognizable injury because it has a duty to pay the rates set forth in Northern Valley's filed tariffs. But, as explained below, Sprint is not challenging the reasonableness of the rates charged by Northern Valley. Instead, Sprint is asserting that Northern Valley is billing it for services not set forth in the tariff. Because Sprint does more than simply allege the tariffs are unreasonable, it has asserted a cognizable injury by virtue of being charged for services not provided for in the tariff.

2. Counterclaims

Northern Valley argues that Sprint's objective is to continue to obtain tariffed services from Northern Valley at rates different from the tariffed prices. Thus, Northern Valley argues that the filed tariff doctrine acts to bar Sprint's counterclaims in this case. In response, Sprint argues that the filed rate doctrine is not applicable, in part, because it alleges that Northern Valley did not provide the services contemplated by the tariff. Sprint alleges that the services that it received and were billed for did not qualify as the services set forth in the tariffs and, therefore, Northern Valley is attempting to charge the filed tariff rates for services that are not set forth in the tariffs.

"[T]he purpose of the filed rate doctrine is to: (1) preserve the regulating agency's authority to determine the reasonableness of the rates; and (2) insure that regulated entities charge only those rates that the agency has approved or been made aware of as the law may require." Qwest Corp. v. Scott, 380 F.3d 367, 375 (8th Cir. 2004) (quoting H.J. Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 488 (8th Cir. 1992)). In other words, there are two principles underlying the filed rate doctrine: (1) nonjusticiability ("preserving the exclusive role of federal agencies in approving rates for telecommunications services that are 'reasonable' by keeping courts out of the rate-making process [which is] a function that the federal regulatory agencies are more competent to perform") and (2) nondiscrimination ("preventing carriers from engaging in price

discrimination as between ratepayers.") Marcus v. AT & T Corp., 138 F.3d 46, 58 (2d Cir. 1998).

The nonjusticiability principle acts to preserve the FCC's primary jurisdiction over determinations regarding the reasonableness of rates charged by regulated carriers. Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577-78, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981). This principle "prevents more than judicial rate-setting; it precludes any judicial action which undermines agency rate-making authority." Marcus, 138 F.3d at 61. With respect to Sprint's contention that Northern Valley attempted to charge the filed tariff rates for a service that is not set forth in the tariffs, the court does not find that this type of claim is barred by the filed rate doctrine. In making this allegation, Sprint is not asking the court to modify the rates filed by Northern Valley with the FCC. In the context of a motion to dismiss, the court must assume all facts alleged in Sprint's counterclaims are true, namely that Northern Valley charged Sprint the filed tariff rates for a service that is not set forth in the tariffs. Because the action does not challenge the legality of the rate approved by the FCC, judicial relief in this case would not disturb the FCC's determination in relation to the reasonableness of the rates. Accordingly, the court finds that these allegations and the claims related to these allegations do not violate the nonjusticiability principle under the filed rate doctrine.

The nondiscrimination principle ensures that all telecommunications customers are charged the same rate for their service—the rate filed with and approved by the FCC. The filed rate doctrine prevents carriers from negotiating a lower rate with some customers and then charging a rate other than the rate filed with the FCC. Central Office Telephone Inc., 524 U.S. at 223. This explains why courts have no power to adjudicate claims that would "invalidate, alter, or add to the terms of the filed tariff." Davel Commc'ns, Inc. v. Qwest Corp., 460 F.3d 1075, 1084 (9th Cir. 2006). With respect to Sprint's contention that Northern Valley did not provide the services set forth in the tariff, the court does not find that this type of claim is barred by the filed rate doctrine. Sprint is not challenging the validity of the rate, but rather it argues that the arrangement between Northern Valley and the CC companies results in the provision of services not covered by the tariff. In the context of a motion to dismiss, the court must assume the allegations of Sprint to be true, that it was billed for tariffed services that it did not receive. A ruling in Sprint's favor would not result in Sprint paying rates different from other entities who obtained services properly categorized under the tariff from Northern Valley. The court therefore finds that these allegations and claims related to these allegations are not barred by the nondiscrimination principle pursuant to the filed rate doctrine.

Further, Northern Valley filed suit seeking to recover fees it alleges are owed under the tariff. To recover for amounts charged pursuant to a tariff, Northern Valley "must demonstrate (1) that they operated under a federally filed tariff and (2) that they provided services to the customer pursuant to that tariff." Advamtel LLC v. AT & T Corp., 118 F. Supp. 2d 680, 683 (E.D. Va. 2000). Under this second element, Northern Valley must show it provided services pursuant to the tariff, which is the converse of what Sprint alleges in its counterclaims. The court finds that because this determination is appropriately made by the fact-finder with respect to Northern Valley's claims, that further supports the court's finding that the allegations contained within the counterclaims, as discussed above, are not barred by the filed rate doctrine.

Although the filed rate doctrine does not bar Sprint's claims that Northern Valley charged it the filed tariff rates for a service that is not set forth in the tariffs and that Northern Valley billed it for tariffed services that it did not receive, the court does find that the filed rate doctrine bars Sprint's assertions that the tariffs are "void ab initio" because Northern Valley is not a rural competitive LEC. Northern Valley has filed tariffs as a rural competitive LEC and Sprint's allegations are effectively a direct challenge to the validity of that rate. Further, there is no indication that Northern Valley's status has ever been questioned by the FCC. If the court were to invalidate the tariffs with

respect to the services provided to Sprint and subsequently apply a different tariff rate to those services, the result of that determination would be that the court would be setting the rate and other long distance carriers would pay a different rate than Sprint. This is exactly what the nonjusticiability and discriminatory principles under the filed rate doctrine are intended to prevent. See, e.g., H.J. Inc., 954 F.2d at 489-92. Accordingly, to the extent that Sprint alleges that Northern Valley's tariffs are void because Northern Valley is not a "rural competitive LEC," that argument is dismissed by the court.

B. Farmers

Northern Valley also argues that Sprint's counterclaims are precluded by the FCC's recent decision in Farmers. The FCC's ruling in Farmers should be given deference by this court pursuant to Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).[1] In Farmers, the FCC faced a factual situation similar to the one present in this case. In that case, Qwest alleged that Farmers, a local exchange carrier similar to Northern Valley, violated the Communications Act. Farmers, ¶ 1. Qwest alleged that Farmers intended to participate in a scheme,

[1] The court notes that the FCC granted an order for reconsideration of the Farmer decision in January of 2008 to allow further development of the factual record. See Qwest Communications Corp. v. Farmers & Merchants Mutual Telephone Co., Order on Reconsideration, File No. EB-07-MD-001, FCC 08-29 (Jan. 29, 2008).

which would increase traffic to its network through agreements with conference calling companies. Id.

A significant difference between Farmers and Northern Valley in this case is that Farmers was an incumbent local exchange carrier rather than a competitive local exchange carrier. As an incumbent LEC, the tariff rate for Farmers was determined by the rate of return it achieved in previous time periods. The essence of Qwest's complaint was that after establishing the tariff rate during a period of low traffic, Farmers dramatically increased traffic through agreements with the conference calling companies, thus earning an unreasonably high rate of return.

The FCC determined that during the period in question, Farmers had vastly exceeded its prescribed rate of return. Id. at ¶ 25. Despite this finding, the FCC found that Farmers, although it "manipulated the Commission's rules to achieve a result unintended by the rules," did not act in an unlawful manner. Id. The FCC found that the conference calling companies were appropriately identified by Farmers as end users under the relevant tariff. Id. at ¶ 35. The FCC further found that Farmers' payment of "marketing fees" to the conference calling companies did not affect the status of those companies as customers of Farmers. Id. at ¶ 38.

Although the issues that confronted the FCC in Farmers are similar to those at issue in this case, the court does not find that the FCC's findings are

dispositive at this stage of the litigation. In Farmers, both parties had the opportunity to conduct discovery, and the FCC relied on the developed record in determining that Farmers had acted lawfully under the tariff. See id., ¶¶ 30-39.

Further, the claims made by Sprint in this case differ in some ways from the claims made by Qwest in Farmers. Sprint alleges that most, if not all, of the services being provided to the CC companies do not terminate in the local exchange area in which Northern Valley collects access charges. Sprint alleges that the CC companies provide a service that does not terminate a call at their equipment but simply facilitates communication between multiple parties, almost none of whom reside in Northern Valley's local service area. The court acknowledges that a similar argument was made before the FCC in Farmers and rejected. But here, Sprint further alleges that Northern Valley is essentially delivering traffic to the CC companies and is not receiving terminating access charges for such services. Sprint also alleges that the CC companies' equipment is actually located outside of Northern Valley's service territory. Finally, Sprint asserts that the FCC has specifically given long distance carriers, like Sprint, the ability to refuse to deliver long distance calls that are delivered to the CC companies. At this stage of the litigation, without a developed record regarding the relationship between the CC companies and Northern Valley, the court must accept Sprint's allegations as true and

therefore the situation faced by the FCC in Farmers is distinguishable. For these reasons, the court finds that the FCC's ruling in Farmers does not mandate dismissal of Sprint's counterclaims.

C. Individual Counterclaims

1. Violation of Federal and State Tariffs

Counterclaims 1 and 2 allege that Northern Valley acted in violation of federal law, namely 47 U.S.C. § 203, as well as state law, by billing Sprint for services that it did not provide. Northern Valley argues that these claims are barred by the filed rate doctrine, because Sprint is asking the court to void Northern Valley's tariffs and apply a different rate. Viewing the counterclaims in the light most favorable to Sprint, the court finds that Sprint has successfully alleged that Northern Valley billed Sprint for tariffed services that were never provided and therefore has made allegations sufficient to state a claim for a violation of 47 U.S.C. § 203 and South Dakota Law. Accordingly, Northern Valley's motion to dismiss is denied.

2. Unjust Enrichment

Counterclaim 3 alleges a claim for unjust enrichment against Northern Valley. "Unjust enrichment occurs 'when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying.' " Hofeldt v. Mehling, 658 N.W.2d 783, 788 (S.D. 2003) (quoting Parker v. Western Dakota Insurors, Inc., 605 N.W.2d 181, 187 (S.D.

2000)). Sprint alleges that Northern Valley has received substantial profits from Sprint under Northern Valley's tariffs and that it would be unjust for Northern Valley to enrich itself at the expense of Sprint.

Northern Valley argues that because an express contract exists between the parties, the equitable remedy of unjust enrichment cannot be relied upon by Sprint. In support of this argument, plaintiffs cite Thurston v. Cedric Sanders Co., 125 N.W.2d 496, 498 (S.D. 1963), which held "where there is a valid express contract existing between parties in relation to a transaction fully fixing the rights of each, there is no room for an implied promise, or a suit on *quantum meruit*." In this case, however, Sprint has alleged that the contract does not cover the services provided by Northern Valley. Assuming the facts alleged by Sprint to be true, Sprint has successfully alleged that it is entitled to recover damages under a theory of unjust enrichment. Accordingly, Northern Valley's motion to dismiss is denied.

3. Negligent Misrepresentation

Counterclaim 4 alleges that plaintiffs are liable for negligent misrepresentation. Sprint alleges that Northern Valley billed it for services Northern Valley did not provide and at unlawful tariff rates. In Northern Valley's motion to dismiss, it asserts that this claim is barred by the filed rate doctrine.

To state a claim for negligent misrepresentation, Sprint must allege that "in the course of business or any other transaction in which an individual has a pecuniary interest, he or she supplies false information for the guidance of others in their business transaction, without exercising reasonable care in obtaining or communicating the information." Bayer v. PAL Newcomb Partners, 643 N.W.2d 409, 412 (S.D. 2002).

As discussed above, the court finds that the filed rate doctrine does not bar Sprint's allegation that it did not receive services under the tariff. This is a different situation from that faced by the court in Central Office Telephone, where there was no dispute over whether the tariffed service was actually provided, but rather over the terms of the agreement to provide the services. Central Office Telephone, 524 U.S. at 224-25. Assuming all allegations contained in the counterclaim are true, the court finds that Sprint has sufficiently alleged a claim of negligent misrepresentation. Northern Valley's motion to dismiss that claim is therefore denied.

4. Civil Conspiracy

Counterclaim 5 alleges that Northern Valley conspired with the CC companies to artificially increase the volume of long distance traffic that was routed to Northern Valley's networks in order to allow Northern Valley to charge an unlawful rate for services it did not perform. Under South Dakota law, to prove a prima facie case of civil conspiracy, the plaintiff must prove the

following five elements: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action to be taken; (4) the commission of one or more unlawful overt acts; and (5) damages as the proximate result of the conspiracy." Setliff, 616 N.W.2d at 889.

Northern Valley argues that Sprint has not properly alleged a claim for civil conspiracy because it has not alleged any unlawful acts. In its counterclaim, however, Sprint alleges that Northern Valley was involved in an illegal scheme that resulted in charging Sprint for services not provided for in the applicable tariffs. As discussed in more detail above with respect to the Farmers decision, Northern Valley's argument that the scheme was lawful based upon the FCC ruling is not dispositive at this stage of the litigation. Assuming all facts alleged in the counterclaim to be true, and construing the counterclaim liberally in the light most favorable to Sprint, the court finds Sprint has alleged sufficient facts to state a claim under the fifth counterclaim. Thus, Northern Valley's motion to dismiss is denied.

5. Violation of 47 U.S.C. § 201(b)

Counterclaim 6 alleges that Northern Valley acted in violation of federal law, namely 47 U.S.C. § 201(b), by billing and collecting terminating access charges pursuant to a federal tariff imposing unlawfully high access charges, and based on an unreasonable practice of kickbacks. Sprint contends that the high tariffs are unlawful because Northern Valley does not qualify as a rural

CLEC. Northern Valley argues that this claim is prohibited by the filed rate doctrine because Sprint seeks a determination of the reasonableness of Northern Valley's tariffs, which are filed with the FCC. As discussed above, Sprint's claim that Northern Valley's tariff rates are "void ab initio" is barred by the filed rate doctrine. A ruling in Sprint's favor on counterclaim 6 would result in this court setting the tariff rate and other long distance carriers paying a different rate than Sprint. This is exactly what the nonjusticiability and discriminatory principles under the filed rate doctrine are intended to prevent. See, e.g., H.J. Inc., 954 F.2d at 489-92.

Sprint's allegations that the unlawfully high access charges are "based on an unreasonable practice of kickbacks" does not affect the applicability of the filed tariff doctrine. In determining whether the filed rate doctrine applies, the court is guided not by "the underlying conduct," but the "impact the court's decision will have on agency procedures and rate determinations." H.J. Inc., 954 F.2d at 489. Therefore, even assuming that the payment of funds to the CC companies by Northern Valley is "unreasonable," the filed rate doctrine bars this court from adjudicating the validity of a tariff filed with the FCC. Accordingly, Sprint's motion to dismiss the sixth counterclaim is granted.

II. Third-Party Complaint

A. Filed Rate Doctrine

Global Conference contends that Sprint's third-party complaint must be dismissed under the filed rate doctrine. For the reasons set forth previously in Section I.A., supra, the court finds that the filed rate doctrine does not bar Sprint's complaint. It does, however, preclude Sprint from contending that Northern Valley's tariffs are void because Northern Valley is not a "rural competitive LEC," and that argument is dismissed by the court.

B. Farmers

Global Conference also contends that Sprint's third-party complaint must be dismissed based on the FCC precedent set forth in Farmers. For the reasons set forth previously in Section I.B., supra, however, the court finds that the Farmers decision does not mandate dismissal of Sprint's complaint.

C. Individual Claims

1. Unjust Enrichment

Count 1 alleges a claim for unjust enrichment against Global Conference. "Unjust enrichment occurs 'when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying.' " Hofeldt v. Mehling, 658 N.W.2d 783, 788 (S.D. 2003) (quoting Parker v. Western Dakota Insurors, Inc., 605 N.W.2d 181, 187 (S.D. 2000)). Sprint alleges that Global Conferencing received substantial profits

from Sprint in the form of kickbacks obtained from Northern Valley's alleged illegal billings to Sprint for access charges and that it would be unjust for Global Conferencing to enrich itself at the expense of Sprint.

Global Conferencing argues that because an express contract exists between the parties, the equitable remedy of unjust enrichment cannot be relied upon by Sprint. In support of this argument, Global Conferencing cites Burch v. Bricker, 724 N.W.2d 604, 609 (S.D. 2006), which held "where there is a valid express contract existing between parties in relation to a transaction fully fixing the rights of each, there is no room for an implied promise, or (claim) on *quantum meruit*." In this case, however, Sprint has alleged that the contract does not cover the services provided by Northern Valley. Assuming the facts alleged by Sprint to be true, Sprint has successfully alleged that it is entitled to recover damages under a theory of unjust enrichment.

Global Conferencing next argues that Sprint did not allege and is unable to show that it made any payments directly to Global Conferencing. Global Conferencing contends that Parker requires a plaintiff to prove that the plaintiff, individually, conferred a benefit on the defendant. Sprint argues that because it alleges that Northern Valley and Global Conferencing were acting together in a joint venture, with the purpose of extracting unlawful access charges from Sprint, it is irrelevant which of the parties actually received payments from Sprint.

Under South Dakota law, "the association of two or more persons to carry on as co-owners a business for profit forms a partnership." SDCL 48-7A-202(a); see also Fin-Ag, Inc. v. Cimpl's Inc., ___ N.W.2d ___, 2008 WL 2469183 (S.D. 2008). The definition of "person" includes both individuals and corporations. SDCL 48-7A-101. Further, "[p]roperty acquired by a partnership is property of the partnership and not of the partners individually." SDCL 48-7A-203. Construed liberally, Sprint's third-party claims allege that Northern Valley and Global Conferencing were acting in a joint venture to unlawfully bill Sprint. Because Northern Valley and Global Conferencing are alleged to be partners in the venture, Global Conferencing is also considered to be the legal recipient of the payments from Sprint under South Dakota law. Accordingly, Sprint has successfully alleged a claim for unjust enrichment against Global Conferencing.

Finally, Global Conferencing contends that Sprint cannot establish the third element, which is proof of unfairness in retaining the money without payment. If the contract does not cover the services provided by Northern Valley as Sprint alleges, however, then Sprint would be able to prove this element. Accordingly, Global Conferencing's motion to dismiss is denied.

2. Civil Conspiracy

Count 2 alleges that Global Conference conspired with Northern Valley to artificially increase the volume of long distance traffic that was routed to

Northern Valley's networks in order to allow Northern Valley to charge an unlawful rate for services in violation of Northern Valley's federal and state access tariffs in exchange for Northern Valley paying Global Conference a kickback. Under South Dakota law, to prove a prima facie case of civil conspiracy, the plaintiff must prove the following five elements: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action to be taken; (4) the commission of one or more unlawful overt acts; and (5) damages as the proximate result of the conspiracy." Setliff, 616 N.W.2d at 889.

Global Conference argues that Sprint has not properly alleged a claim for civil conspiracy because it has not alleged any unlawful acts. In its third-party complaint, however, Sprint alleges that Northern Valley was involved in an unlawful scheme that resulted in charging Sprint for services not provided for in the applicable tariffs. As discussed in more detail above with respect to the Farmers decision, Global Conference's argument that the scheme was lawful based upon the FCC ruling is not dispositive at this stage of the litigation. Assuming all facts alleged in the counterclaim to be true, and construing the counterclaim liberally in the light most favorable to Sprint, the court finds Sprint has alleged sufficient facts to state a claim under the second claim Thus, Global Conference's motion to dismiss is denied.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion to dismiss (Docket 16) is granted in part and denied in part.

IT IS FURTHER ORDERED that Third-Party Defendant Global Conference Partners' motion to dismiss (Docket 14) is denied.

Dated July 30, 2008.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
CHIEF JUDGE