ATTACHMENT G

STATE OF SOUTH DAKOTA	)	CIRCUIT COURT
	) SS	
COUNTY OF BROWN	)	FIFTH JUDICIAL CIRCUIT

JAMES VALLEY COOPERATIVE TELEPHONE COMPANY, a South Dakota cooperative; JAMES VALLEY COMMUNICATIONS, INC., a South Dakota corporation; and NORTHERN VALLEY COMMUNICATIONS, LLC, a South Dakota limited liability company, Plaintiffs, v. SOUTH DAKOTA NETWORK, LLC, a South Dakota limited liability company, Defendant.	Case No.: 06CIV15-000134 **DEFENDANT'S REPLY TO PLAINTIFFS' SUR-REPLY IN SUPPORT OF ALL DEFENDANTS' MOTION TO DISMISS AND ALTERNATIVE MOTION TO STAY PROCEEDINGS AND REFER ISSUES TO THE FEDERAL COMMUNICATIONS COMMISSION** **[FILED UNDER SEAL]**

COMES NOW Defendant South Dakota Network, LLC ("SDN"), by and through its respective counsel of record, and hereby respectfully submits the following Reply to Plaintiffs' Sur-Reply in Support of All Defendants' Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission.

I. INTRODUCTION

On March 9, 2017, this Court issued a Memorandum Decision, which, among other rulings, granted summary judgment in favor of the individual Defendant Managers on all of the claims asserted by Plaintiffs. As a result of the recent Memorandum Decision, the sole remaining defendant in this litigation is SDN and, therefore, the prior arguments advanced in this Motion relating to the improper claims against the individual Managers are now moot. This Brief will address only the remaining improper claims against SDN.

This case is squarely within the artful-pleading doctrine. Plaintiffs acknowledged during this litigation that they intentionally chose not to pursue the alleged violations of the Federal Communications Act ("FCA") so as not to damage SDN in the long-run.[1] Brief in Support of Motion, Ex. A (Letter from Plaintiffs' Counsel to Defendants dated August 3, 2015). Therefore, Plaintiffs are undeserving of any benefit of the doubt that they were somehow ignorant of the appropriate avenue of relief under the FCA. Rather, Plaintiffs intentionally chose to pursue their sham State law claims while simultaneously arguing the alleged violations of the FCA and raising and implicating numerous complex issues of federal law. Plaintiffs have attempted to persuade the Court that the numerous and repeated protestations about the alleged violations of federal law, which included retaining two expert witnesses solely to discuss certain technical issues of federal law, somehow *only* related to the two claims against the Managers and the claim against SDN for dissolution as discussed in prior pleadings in this Motion. Dissolution was not even pleaded in this action until SDN pleaded for expulsion. That argument, which is so completely inconsistent with Plaintiffs' own actions and statements in this case, is unworthy of credibility. Instead, Plaintiffs' assertions that the significant and interwoven issues of federal law are not even relevant to their state law claims should be recognized for what the arguments actually are in reality: transparent attempts to avoid preemption or referral to the Federal Communications Commission ("FCC") at all costs, even if it means haphazardly and prejudicially leading the Court to act outside its jurisdiction.

1. Again, like their responses to this Motion, Plaintiffs' words do not match their actions. Plaintiffs assured SDN that they "intentionally" did not pursue the alleged violations of the FCA because that would damage SDN in the long-run, but yet Plaintiffs nevertheless requested leave to conduct punitive damage discovery and even pleaded for dissolution of SDN.

At minimum, Plaintiffs' claims contain embedded issues of federal law that are actually disputed, which the federal forum can entertain without disturbing any balance between federal and state judicial responsibilities. Even after this Motion was filed, and Plaintiffs attempted to retroactively change their prior arguments, Plaintiffs still were unable to keep their story straight. Plaintiffs stated that the "true dispute" in this case is whether SDN can treat its long-distance tandem switching as an unregulated service. *See* Ex. A. (Dep. of Mr. Gillan at 70:4-9). In addition to that issue, which Plaintiffs characterize as the true dispute of this litigation, are other substantial federal questions such as whether the AT&T/SDN 2014 Service Agreement is unlawful because it violates certain provisions of the FCA, whether Northern Valley Communications ("NVC") has an underlying right to the traffic between Sioux Falls and Groton, whether a private Operating Agreement can even limit the movement of a point of interconnection ("POI") for a third-party IXC, whether the service that SDN is providing is a dominant or non-dominant service, whether a CEA can provide access service pursuant to a private contract, and the interpretation of multiple federal orders. These are all issues that are implicated by this litigation and must be resolved, and in many instances Plaintiffs have essentially raised and *asked* to be resolved. The Court need only review the transcript of the depositions of Expert Witnesses Mr. Gillan and Mr. Starkey to understand the complex and highly-technical embedded issues of federal law that Plaintiffs have put at issue in this case.[2]

2. And indeed, critical to Plaintiffs' case is an alleged confirmation by FCC staff of Plaintiffs' interpretation of federal regulations barring SDN from providing transport services by contract in lieu of tariffed rates. *See* SRB at 22. That allegation forms the basis for several conclusory statements by Plaintiffs by which they seek to have this Court assuaged that it will not have to decide federal law issues. Not so; the FCC has not determined the issues and is the proper agency to address these matters in the first instance as more fully explained herein.

While SDN can only speculate as to why Plaintiffs chose to plead their case in state court rather than under the FCA, the claims against SDN must be dismissed before this case advances any further than the case already has. As cited in prior pleadings in this Motion, state courts have routinely dismissed artfully-pleaded federal claims, including, for example, claims for breach of contract, unjust enrichment, violation of state statutes, and tortious interference. In the alternative, and at minimum, the highly-technical federal issues underlying the claims against SDN must be referred to the FCC, which has the appropriate experience and expertise to resolve the issues under the doctrine of primary jurisdiction.

II. ANALYSIS

A. PLAINTIFFS' CLAIMS ARE PREEMPTED BY FEDERAL LAW.

Each of Plaintiffs' claims is preempted by federal law. Plaintiffs' claims are preempted either under the doctrine of artful pleading—which Plaintiffs scarcely even acknowledge in their combined 76-pages of responsive briefing[3]—or are preempted under the alternative and independent substantial federal question doctrine. In fact, Plaintiffs failed to even address, much less mention, many of the cases cited in earlier pleadings supporting the conclusion that Plaintiffs' claims are preempted. *See, e.g., Boomer v. AT&T Corp.*, 309 F.3d 404, 423 (7th Cir. 2002); *Dreamscape Design, Inc. v. Affinity Network, Inc.*, 414 F.3d 665, 669 (7th Cir. 2005). Despite Plaintiffs' clever and extensive efforts in completely recasting the numerous arguments they already made in this litigation in a brazen attempt to survive dismissal or referral, there is simply no escaping the looming federal issues in this case, which have firmly latched on to each

3. Despite a second bite out of the apple with their Sur-Reply, Plaintiffs continue to fail to address the relationship between the artful-pleading doctrine and the embedded-question doctrine, which are independent and separate doctrines. Both doctrines support the conclusion that Plaintiffs' claims are preempted.

and every single issue pending before the Court. There is no delicate severance of the federal issues from this case without uprooting the entire tree.

1. Federal Court Action.

Before engaging in an analysis of the numerous federal issues and the improper individual claims, it is first necessary to address the misrepresentations Plaintiffs made in the opening paragraphs of their Sur-Reply. Plaintiffs cite to a recent Opinion and Order from the United States District Court for the District of South Dakota (the "Federal Court") to apparently support their argument that this Court has jurisdiction and that the Court should "bring this case to trial expeditiously[.]" Plaintiffs' Sur-Reply in Opposition to Motion at 3 ("SRB"). First, it must be emphasized that the Federal Court made no findings or conclusions regarding this Court's jurisdiction, or lack thereof, over the claims and issues pending before this Court.[4] Instead, the Federal Court appeared to merely acknowledge the existence of the claims pending before this Court, and did not undertake its own analysis of the proper jurisdiction of those claims. The Federal Court's Opinion and Order have no bearing over the question of whether *this* Court has jurisdiction to hear Plaintiffs' claims.

Second, Plaintiffs are plainly incorrect insofar as they represent to this Court that the District Court concluded that the "existence of the SDN-AT&T contract *interferes* with Northern

4. The pleadings in the District Court action are sealed and, as a result, SDN and this Court are unable to determine what information and facts the District Court even considered, including whether it was even aware of the individual claims at issue and the numerous federal issues that are implicated. Given that the Federal Court devoted less than one page of its 40-page Order and Opinion to addressing this lawsuit, it is reasonable to assume that issue was not extensively briefed. Again, Plaintiffs are leveraging the Federal Court action while simultaneously selectively disclosing only certain information to this Court.

Valley's ability to obtain summary judgment[.]"[5] SRB at 2 (emphasis added). The District Court did not reach any such conclusion. Instead, the District Court made no inquiry into whether the AT&T/SDN 2014 Service Agreement (the "Agreement") was a "valid agreement" as that was not a question that had been presented to the District Court for its determination. *See* Affidavit of Cremer dated March 29, 2017 ("Aff. of Cremer"), Exhibit 1 ("Ex. __") at 38. Again, the appropriate forum to resolve whether the Agreement is a "valid agreement" is through the FCC under the express provisions of the FCA. The tenuous relationship between the FCC, the Federal Court, and this Court could have been easily avoided altogether had Plaintiffs simply filed a complaint with the FCC at the outset. Rather than properly planting both feet at the doorstep of the FCC, Plaintiffs have one foot in state court and the other foot in federal court. Curiously, the FCC—which has the jurisdiction, expertise, and experience to resolve the complex issues in this case—has been shut out of the process completely.

Third, Plaintiffs further misrepresent that "SDN's decision to enter into the SDN-AT&T Agreement now is the *undisputed cause* for NVC not receiving summary judgment against AT&T[.]" SRB at 2 (emphasis added). However, it would appear from the Opinion and Order that there is still a factual question, which would provide an independent basis to deny summary judgment in Federal Court, regarding whether "NVC spurned an unconditional offer from AT&T for AT&T to install a direct link at AT&T's cost[.]" Aff. of Cremer, Ex. 1 at 39 (citing *In re Access Charge Reform*, 23 FCC Rcd. 2556 (2008)). The Federal Court concluded that NVC "may be required to *accept* a direct trunk connect, contingent on AT&T designing, installing, and implementing it at AT&T's cost without conditions." *Id.* at 21 (emphasis in original). In

5. Nowhere in the District Court's 40-page Opinion and Order did the Court conclude that the Agreement *interfered* with NVC's ability to obtain summary judgment. *See generally* Aff. of Cremer, Ex. 1.

other words, the Opinion and Order does not appear to be a large victory for NVC because AT&T ultimately has the legal ability to compel NVC to accept a direct connect. However, "[t]he record [was] unclear whether AT&T offered to install a direct trunk at its own expense at NVC, or instead negotiated for or demanded that NVC do so or pay for any costs of doing so." *Id.* at 20. Thus, irrespective of whether the Agreement is valid or not, a factual question remains and NVC can still be denied summary judgment on a separate and independent basis. To now argue that the Agreement *interferes* with and is the *undisputed reason* that NVC did not obtain a summary judgment is incorrect.

Fourth, the Opinion and Order is not even a final decision. Moreover, AT&T may elect to appeal the Opinion and Order to the Eighth Circuit Court of Appeals and challenge the conclusions and orders rendered by the District Court. For Plaintiffs to use the non-binding and non-final Opinion and Order as a sword in this case, including encouraging this Court to *expedite* its consideration of this Motion, is improper and prejudicial. Again, Plaintiffs made the decision to litigate their claims in state court rather than properly attempt to seek relief through the FCC. SDN should not continue to bear the burden of Plaintiffs' short-sighted decision.

In all, Plaintiffs embellish the non-final conclusions reached in the Opinion and Order and cite the same as apparent evidence that this Court somehow has jurisdiction over the not-so-artful claims at issue herein, despite the fact that the District Court did not consider whether this Court has jurisdiction. In fact, Plaintiffs appear to even encourage the Court to now "expeditiously" resolve this Motion in light of the non-binding and non-final Opinion and Order. Yet, at the same time, SDN and the Court are left in the dark about what arguments and information the District Court heard and considered in reaching its conclusions and the extent to which it was even aware of the claims and issues in this case. *See* Aff. of Cremer, Ex. 1 ("This

dispute regarding the NVC-SDN lease and the AT&T-SDN Agreement is currently the subject of a separate lawsuit in the Fifth Judicial Circuit in Brown County, South Dakota."). Nevertheless, as stated above, the Opinion and Order should not bear on the independent legal question of whether this Court has jurisdiction, and Plaintiffs hurried attempts to conflate the two should be rejected.

2. Plaintiffs' Own Prior Statements Undermine and Contradict Their Arguments in this Motion.

Plaintiffs' prior statements and arguments do all of the necessary talking in this Motion. *See* Brief in Support of Motion, Ex. A. At all times, except for this Motion, this litigation has *always* been about the alleged unlawfulness of the Agreement. *See id.* To be sure, Plaintiffs retained an expert witness—Mr. Starkey—to conclude (1) REDACTEDREDACTED REDACTEDREDACTEDREDACTEDREDACTEDREDACTED REDACTEDREDACTEDREDACTEDREDACTEDREDACTEDREDACTED REDACTEDREDACTEDREDACTEDREDACTEDREDACTEDREDACTED REDACTEDREDACTEDREDACTEDREDACTEDREDACTEDREDACTED REDACTEDREDACTEDREDACTEDREDACTEDREDACTEDREDACTED REDACTEDREDACTEDREDACTEDREDACTEDREDACTEDREDACTED *See* Brief in Support of Motion, Ex. I, at 6, 38.

In fact, this Court need only examine Plaintiffs' Second Amended Complaint, which specifically seeks declaratory relief because "SDN will continue its wrongful practices of providing secret, off-tariff services to AT&T" and because "SDN has no authority to provide AT&T or any other long-distance carrier transport services from Sioux Falls to NVC's switch in Groton, South Dakota[.]" *See* Second Am. Complaint at ¶¶ 131, 133(d).

Revealing the true nature of the claims against Defendants, Plaintiffs legal counsel sent a letter to counsel for Defendants on August 3, 2015—near the commencement of this litigation—addressing the alleged unlawfulness of the Agreement based upon the premise that the Agreement violated certain provisions of the FCA:

> "[I]t is time for SDN to make a simple choice: will it continue to operate in defiance of law and to the detriment of one of its members, despite the significant consequences that come with doing so, **or will it do the right thing by terminating its unlawful agreement with AT&T**?"

Id. (Letter from Plaintiffs' Counsel to Defendants dated August 3, 2015) (emphasis added).

In that same August 3, 2015 letter, Plaintiffs further acknowledged that they *intentionally* chose not to bring claims against SDN for violations of the FCA because they allegedly did not want to "weaken [SDN] in the long-term[.]" *Id.*

> JVC and NVC have, as we have repeatedly stated to you, made decisions that were intended to insulate SDN from events that might weaken it in the long-term (e.g., by intentionally choosing not to bring claims for violation of federal telecommunications law against SDN that might squarely put at issue the monopoly that SDN tries to maintain with regard to its members' access traffic).

Id. Putting aside the inherent inconsistency of Plaintiffs' representation that they did not want to harm SDN in the long-term despite their subsequent decisions to seek punitive damages and the dissolution of SDN, the important point of emphasis is that Plaintiffs acknowledged that they intentionally decided not to pursue alleged claims for violation of the FCA. Instead, Plaintiffs brought sham state law claims, which presuppose that SDN violated the FCA without actually proving those claims much less raising them in the proper forum. Perhaps Plaintiffs believed they could simply obtain an expedited settlement and termination of the Agreement, and the improper federal claims would never be litigated or even reach the stage of a jurisdictional analysis.

To make matters worse, even after this Motion was filed and Plaintiffs assured SDN and the Court that the issues of federal law are not *relevant* to their claims for damages against SDN, Plaintiffs still have trouble keeping their story straight. On March 9, 2017, Plaintiffs' legal counsel asked SDN's expert witness, Mr. Gillan, whether he understood that the "true dispute" in this litigation is whether SDN can provide non-regulated tandem switching to AT&T for the exchange of long-distance traffic:

> **Q**: Okay. And you understand that the true dispute in this litigation is whether or not, with regard to regulated or non-regulated, is whether or not SDN can provide tandem switching to AT&T and treat it as a non-regulated service with regard to centralized equal access for the exchange of long-distance traffic.

See Ex. A. (Dep. of Mr. Gillan at 70:4-9). These are Plaintiffs' own words. According to Plaintiffs, the "true dispute" is not, *inter alia*, whether NVC and SDN agreed to move the POI, whether SDN breached certain circuit lease contracts, or whether SDN converted Plaintiffs' property; instead, the "true dispute" involves a complex and perhaps novel federal question, which relies on multiple federal regulations under the FCA and has required each party to retain an expert in the field of FCC regulations to solely address the issue—i.e., Mr. Gillan and Mr. Starkey.

Plaintiffs cannot erase from the record the numerous instances in which they have argued that the unlawfulness of the Agreement is at the heart of this litigation. There is no reason to believe that anything will change after this Motion is heard and argued. The true federal nature of the claims against SDN will undoubtedly continue to show its face throughout the rest of the litigation and during trial. The appropriate course of action is to dismiss the causes of action now before further irreparable harm is done, i.e., wasted time, effort, and resources expended in litigating this dispute in an improper forum.

3. Plaintiffs' Individual Claims.

Each of Plaintiffs' claims for damages is preempted by federal law either under the doctrine of artful pleading or separate and independent substantial federal question doctrine. *See* Defendants' Reply Brief in Support of Motion at 3-6; *see also, e.g., Connolly v. Union Pacific R. Co.*, 453 F. Supp. 2d 1104, 1109 (E.D. Mo. 2006) (quoting *M. Nahas & Co., Inc. v. First Nat'l Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir. 1991)); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005).

As the court in *Mellman v. Sprint Communications Company* acknowledged, an examination of Plaintiffs' "state law claims reveals that those claims are either preempted by the FCA, or necessarily implicate the FCA[.]" 975 F. Supp. 1458, 1461 (N.D. Fla. 1996).

a. Breach of Operating Agreement.

Plaintiffs now argue that their claim for breach "is rooted in the provision in Article 15 [of the Operating Agreement] that requires points of interconnection to be established by agreement." SRB at 5. However, this is not a dispute about an ordinary contract provision. Rather, it is a dispute about a POI and such disputes are not resolved in state court. These disputes are resolved by regulatory agencies. Expert Witness Mr. Gillan opined as follows:

> **Q**: Is it your – is it nevertheless your opinion that SDN – that the operating agreement and the commitment in the operating agreement to establish points of interconnection for member and affiliate traffic is somehow governed by federal law as compared to State of South Dakota contract law? Are you rendering an opinion on that?
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> **Ms. Moore**: Objection; form. Foundation. The document speaks for itself. Legal conclusion.
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> **A**: And having heard all that, let me say you have a POI dispute. A big part of the dispute really involves AT&T's POI which in effect has been moved. I'm not a lawyer, but I don't understand at all an argument that any operating agreement between – that doesn't include AT&T could have changed AT&T's rights to request service at a POI.

> I keep looking at this and keep coming to the conclusion that this is a POI dispute, period. Next step. Where do you go to resolved POI disputes? You take them to regulatory agencies because they're highly technical in nature, and regulatory agencies have the charge to resolve these disputes looking at the broader consequences on networks, consumers, you know, efficiencies, social justice, universal service, everything – everything in the world.
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> And I don't see any – I don't know what – I'm not rendering a legal opinion about your operating agreement, but I'm just pointing out AT&T is not a party to that, so I don't see how you can answer a question involving AT&T's POI by looking inside an agreement that doesn't involve them.

Ex. A (Dep of Gillan at 142:8-143:13). There is no dispute here for this Court to resolve. This claim implicates more than simply whether NVC *consented* to the movement of the POI. It necessarily involves a broader predicate question relating to whether an operating agreement can limit the right of an IXC that is not a party to the operating agreement to request a different POI with a CLEC.[6] This is an issue that is actually disputed—as evidenced by the competing expert reports of Mr. Gillan and Mr. Starkey—and involves a substantial federal question that is necessary for the FCC to resolve and one that must be resolved prior to the question of whether NVC consented to the movement of the POI. Indeed, the FCC's pervasive regulation of interstate communications includes a policy of transport competition. Plaintiffs' lawsuit based upon the operating agreement is merely a lever to defeat competition in the transport market. It appears that CLECs, like NVC, possess the smallest bundle of rights – based upon market abuses – and lack the right to even determine how traffic is routed in the first instance. *In Re: Access*

6. And, SDN must point out, the entire discussion about movement of the POI and revenue sharing with NVC by SDN arose from the context of the obligations to AT&T under the requirements of the FCA, specifically the Connect America Fund Order. *In the Matter of Connect America Fund*, 26 FCC Rcd. 17663 (2011). This is clearly a federal law issue, as raised by Plaintiffs in their correspondence and claims before and throughout this litigation.

Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, 16 FCC Rcd. 9923 (FCC 2001) at ¶ 92.

ii. Breach of Contracts.

Plaintiffs' Sur-Reply denies that its breach of contract claim is based upon federal law; instead, it contends that SDN's provision of transport capacity is "private carriage" governed by South Dakota state law. SRB at 7-8. Plaintiffs' claim that this count is unrelated to federal law should first be measured against the claim itself. The initial paragraph in this count repeats and realleges the background paragraphs in the complaint – and of course this breach count relies upon many of the legal conclusions and federal regulations therein. One such incorporated legal allegation is that NVC has a "right to charge AT&T the access charges associated with carrying the long-distance calls of AT&T's customers from Sioux Falls to Brown County." Second Am. Complaint at ¶ 6. Indeed, in the language of the cause of action itself, Plaintiffs allege that an "implied term" of a transport agreement "was that SDN would not interfere with NVC's ability to collect tariffed transport charges for long-distance carriers for transporting special access traffic from Sioux Falls to Brown County." *Id.* at ¶ 86.

The FCC rules and competition policy clearly intersect with NVC's breach claim here. As an initial matter, Plaintiffs acknowledge in their claim for conversion that whether a service is provided on a common carrier or private carriage basis requires certain interpretations of federal law. In addition, the FCC's rules are invoked in Plaintiffs' claim to 'entitlement' to bill for transport, and an entitlement as an "implied term" to protect it from competition. Aside from the public policy implications arising from Plaintiffs' implied non-compete claim, it is clear that a ruling finding such an entitlement expectation or monopoly right would run headlong into the FCC's policies. Because this claim necessarily implicates substantial issues of federal law that

are actually disputed in this litigation, and because the balance of federal and state judiciary responsibilities weigh in favor of federal jurisdiction when the FCA has an articulated avenue for relief, this claim is undoubtedly preempted under both the artful pleading doctrine and the substantial federal question doctrine.

iv. Intentional Interference with Business Relationship.

This fourth cause of action for intentional interference with a business relationship is also preempted. Courts have routinely found that such claims are preempted by the FCA. *See Zimmer Radio of Mid-Missouri, Inc. v. Lake Broadcasting, Inc.*, 937 S.W.2d 402, 407 (E.D. Mo. 1997) ("Zimmer's common law action for tortious interference with business expectancies was preempted by federal law."); *Harbor Broadcasting, Inc. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560, 567 (Minn. Ct. App. 2001) ("[T]he FCA and appellants' state-law claim for tortious interference with business expectancy are in irreconcilable conflict, and we affirm the district court's dismissal."); *Fetterman v. Green*, 689 A.2d 289, 294 (Penn. Super. 1997) (affirming dismissal of claim for tortious interference with existing and prospective contractual relations); *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1011 (9th Cir. 2010) (affirming dismissal of claim for intentional interference with prospective economic advantage because it was preempted by the FCA).

There is little question that this claim implicates the alleged unlawfulness of the Agreement, whether NVC has the underlying right to the transport between Sioux Falls and Groton, and whether SDN has the authority to enter into a private, off-tariff contract with AT&T, which it does. *See generally* Ex. A (Dep. of Gillan). Because there is a specific avenue to pursue these issues under the FCA, the savings clause does not preserve this claim in state court. "[T]he savings clause preserves only those causes of action that are based upon breaches of

duties distinct from, and not created or contemplated by, the FCA." *Zimmer*, 937 S.W.2d at 406. "[T]he act cannot be held to destroy itself." *Telesaurus*, 623 F.3d at 1011. Because allowing this cause of action to proceed would render the FCA meaningless, this cause of action is preempted.

Moreover, the embedded issues of federal law satisfy all four elements of the *Grable* test. *Grable*, 545 U.S. 308, 312, 125 S. Ct. 2363. The issue is necessarily raised because this claim makes the assumption that the Agreement is unlawful and that NVC has the underlying right to the transport between Sioux Falls and Groton. These issues are not only "actually disputed" between the parties, but the parties have offered competing expert reports. As has been repeatedly expressed in the prior pleadings in this Motion, these are substantial federal issues that must be weighed by a federal court or, more appropriately, the FCC. Simply put, this sham claim should not and cannot be salvaged by the savings clause of the FCA.

v. Violation of South Dakota Trade Regulation SDCL § 37-1-4.

Once again, Plaintiffs attempt to leverage a state claim from SDN's interstate operations. Plaintiffs contend that there is "no conflict" between SDCL § 37-1-4 and the FCA. SRB at 14-15. But, the opposite is true as evidenced by the actual language supporting this cause of action in the Second Amended Complaint: "SDN has engaged in unfair discrimination *by attempting to displace NVC as the regular established dealer of transport services from Sioux Falls to Groton* by offering AT&T – and only AT&T – a lower rate for transporting calls to part of the state served by NVC, as compared to any other parts of the state." Second Am. Complaint at ¶ 102 (emphasis added).

To the extent that this law is intended to apply to interstate traffic, which it is not, it is certainly preempted. The term "regular established dealer" has no application, nor any

definition, in the pervasively regulated field of interstate telecommunications. Plaintiffs claim SDCL § 37-1-4 prohibits "geographic discrimination" within the state. *See* SRB at 14. But, discrimination is already regulated by Section 202(a) of the FCA, which prohibits "unreasonable" discrimination, *not* "geographic" discrimination as does the state statute. *Kellerman v. MCI Telecoms. Corp.*, which is relied upon by Plaintiffs, indicates that state law remedies are preserved where they "do not interfere with the federal government's authority over interstate telephone charges or service" or do not otherwise conflict with the FCA. *See* SRB at 14.

Plaintiffs' application of SDCL § 37-1-4, which in any event is completely misplaced, undoubtedly interferes with the federal regulatory scheme. For instance, the charges are for *interstate* service where South Dakota is only one end-point of the call. The State of South Dakota would therefore be unlawfully regulating interstate traffic. Moreover, protecting NVC as the "regular established dealer" would flatly contradict the FCC's transport competition policy. Regardless, Plaintiffs' application of this state statute is misguided insofar as the regulation of telecommunications services are expressly preempted from this trade regulation, which the South Dakota Legislature almost certainly recognized and intended when it enacted this chapter. *See* SDCL § 37-1-3.5 ("The provision of . . . noncompetitive and emerging competitive telecommunications services by public utilities pursuant to tariffs or scheduled approved by the South Dakota Public Utilities Commission, or pursuant to any other federal or state regulatory authority, do not constitute a violation of this chapter.").

This claim is plainly preempted and should be dismissed.

vi. Unjust Enrichment.

Plaintiffs' unjust enrichment count is predicated upon the premise that SDN "is not lawfully permitted" to provide the transport service to AT&T. Instead, Plaintiffs claim that NVC is "the entity that actually provides the transport services." *See* Second Am. Complaint at ¶¶ 106-110.

SDN earlier demonstrated that this claim is in reality an artfully pleaded federal claim sounding in Section 202 and is, therefore, preempted by the FCA. Interestingly, Plaintiffs challenge whether this cause of action even implicates the Agreement, and concludes that the unjust enrichment claim does not conflict with FCC regulations. SRB at 15-17 ("Nor does [SDN's Reply Brief] explain why 'this claim necessarily implicates and relates to the AT&T/SDN Agreement,' or why, even if it did, the claim is preempted."). But, the actual language in Plaintiffs' Complaint belies their argument. *See* Second Am. Complaint at ¶¶ 106-109. Specifically, Plaintiffs claim that "SDN is not lawfully permitted to provide" the transport service at issue, and further mentions the "AT&T/SDN Service Agreement" four times in four paragraphs. *Id.* ¶¶ 106-109. The FCA and authority granted to SDN under Section 214 thereof determines which interstate services SDN may lawfully provide. These rights cannot be cabined by state common law without an invasion of the FCC's jurisdiction over interstate traffic and facilities.

Not only is this an artfully-pleaded federal law claim, but it also necessarily raises a substantial issue of federal law under *Grable*, which is certainly actually disputed in light of the contested record, and raises an important federal issue specifically governed by the FCA. *See Telesaurus*, 623 F.3d 998 (affirming dismissal of state-law claim for unjust enrichment because

it was preempted by the FCA). The unjust enrichment claim is preempted and should be dismissed.

vii. Conversion.

Plaintiffs claim that SDN wrongfully used facilities and equipment leased to NVC in providing transport of terminating telephone calls from Sioux Falls to Groton, SD. The claim of conversion in South Dakota applies to *unwarranted* exercise of control or dominion over personal property, where the plaintiff has a greater right to the property than defendant, and where the defendant's conduct deprived plaintiff of his interest in the property. The South Dakota Supreme Court stated in *W. Consolidated Co-op v. Pew* as follows:

> "Conversion is the unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or in a manner inconsistent with such right." *First Am. Bank & Trust, N.A. v. Farmers State Bank of Canton,* 2008 S.D. 83, ¶ 38, 756 N.W.2d 19, 31 (quoting *Chem–Age Indus., Inc. v. Glover,* 2002 S.D. 122, ¶ 20, 652 N.W.2d 756, 766). In *Rensch v. Riddle's Diamonds of Rapid City, Inc.,* 393 N.W.2d 269, 271 (S.D.1986), we quoted *Poggi v. Scott,* 167 Cal. 372, 375, 139 P. 815, 816 (1914), for the following proposition:
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> > The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the *unwarranted* interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action.
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> (Emphasis added.) Furthermore, in order to prove conversion, the plaintiff must show
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> > (1) [plaintiff] owned or had a possessory interest in the property; (2) [plaintiff's] interest in the property was greater than the [defendant's]; (3) [defendant] exercised dominion or control over or seriously interfered with [plaintiff's] interest in the property; and (4) such conduct deprived [plaintiff] of its interest in the property.
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> *First Am. Bank & Trust, N.A.,* 2008 S.D. 83, ¶ 38, 756 N.W.2d at 31.

2011 S.D. 9, ¶ 22, 795 N.W.2d 390, 396–97. The initial element of this tort to be addressed is whether SDN's action was unauthorized. That undertaking requires review of the circuit capacity lease at issue. NVC has at most a lease of SDN equipment capacity "at will" under no written lease agreement for any specific term. The "lease" between SDN and NVC consists of a few emails from 2007 with spreadsheets setting forth rates. *See* Exhibit B. Nothing in this or any agreement creates any exclusive right to transport of access traffic or a specific duration for any use of the circuit capacity.

In short, the exclusivity which would support any conversion claim can only arise from rights of NVC under the FCA. NVC must have rights that limit the ability of SDN to offer transport services (that is, a monopoly over transport services under the FCA) in order to establish dominion and control over this property as to the AT&T access traffic.[7] The only way for NVC to establish a superior possessory right to support a conversion claim, NVC *must* rely on federal law monopoly or a prohibition on SDN providing transport services. The federal regulatory scheme at issue must be examined to see if such a claim is supportable, and if so, whether it preempts the state law claim or would require the FCC to make a determination of the rights of the parties in the first instance.

Here AT&T was seeking a direct connection or its functional equivalent to transport access stimulation traffic (nearly all of which was interstate traffic) to NVC. The entirety of the negotiations and eventual agreement between AT&T and SDN address that issue and the federal regulatory framework. NVC cannot establish or control the right to transport traffic through a state law claim that interferes or is in conflict with the FCA. To allow a conversion claim would

7. NVC cannot bootstrap a breach of contract claim into a conversion claim, and therefore reliance on the SDN Operating Agreement will not establish a state law claim of conversion. That contract claim is addresses above, and is preempted.

"trump" the arrangement between AT&T and SDN providing the service while sharing revenues with NVC, and thereby would materially interfere with the provision of interstate telecommunications services. That claim is preempted.

Likewise, the issue of capacity and use of the leased facilities to provide the transport service, goes directly to the issue of whether NVC has a monopoly and can dictate how transport services are provided to AT&T. Its lease rights must be superior to those rights of SDN in order to establish two elements of conversion: NVC's interests were greater than SDN's interests, and that SDN deprived NVC of its superior interests in the personal property. *W. Consol. Co-op.*, 2011 S.D. 9, ¶ 22, 795 N.W.2d at 396–97. The central question of whether AT&T requested and was denied a direct connection, and the obligations that flow from that issue, are matters that will determine whether NVC had exclusive rights to transport of the traffic and how the parties (and AT&T) were obligated to interact under federal regulatory requirements. Whether the interference was unwarranted will be determined within the context of the federal regulatory scheme – the biggest part of which is the dispute over the movement of the POI. *See* Ex. A (Dep of Gillan at 142:8-143:13), set forth supra, at 10 ("Where do you go to resolve POI disputes? You take them to regulatory agencies because they're highly technical in nature, and regulatory agencies have the charge to resolve these disputes . . . .").

Conversion elements are thus determined by the embedded federal law issue of the right to transport the AT&T traffic , i.e., whether SDN was authorized – or even obligated – to provide a functional equivalent to a direct connection in this situation, and whether SDN could provide an off-tariff transport service. Both questions are determined by federal law under regulations that occupy the field of transporting interstate traffic. A state law conversion claim that gives NVC control over the transport would conflict with the FCA and is preempted.

Finally, other federal issues related to the interpretation of the FCA will dictate whether SDN was authorized or obligated to provide the transport services at issue. Even Plaintiffs acknowledge that this claim requires certain interpretations of federal law regarding whether the lease transmission capacity is provided on a common-carrier basis or private carriage basis. Determining the use of telecommunications facilities and whether such use is inconsistent with the rights of the parties squarely places this claim within the four corners of the FCA. It simply cannot be determined without making decisions wholly within the jurisdiction of the FCC. This is the exact kind of fact pattern that the doctrine of artful pleading was designed to resolve. *See Connolly*, 453 F. Supp. 2d at 1109.

viii. Dissolution.

The claim for dissolution will be addressed in more detail below in Section D, which discusses Plaintiffs' invitation to the Court to bifurcate this claim from the other remaining claims against SDN.

B. IN THE ALTERNATIVE, PREDICATE FEDERAL ISSUES SHOULD BE REFERRED TO THE FCC UNDER THE DOCTRINE OF PRIMARY JURISDICTION.

SDN has demonstrated in its prior pleadings that the four-factor test outlined in *Advamtel, LLC v. Sprint Communications Co.* is satisfied. 105 F. Supp. 2d 476, 480 (E.D. Va. 2000). The question at issue involves technical and policy considerations within the FCC's particular field of expertise, the questions at issue are within the particularity within the FCC's discretion, there exists a substantial danger of inconsistent rulings if this Court decides those issues, and no prior application has been made to the FCC. *See id.*

In their Sur-Reply, Plaintiffs claim that "Referral Remains Unnecessary" because there is no danger of inconsistent rulings between this Court and FCC policy if no referral were to be

made by this Court. *See* SRB at 20. The reality is that, at bottom, Plaintiffs' lawsuit requests that this Court declare unlawful a contract that relates to interstate traffic traversing AT&T's facilities and transport facilities entirely within the state of South Dakota. Plaintiffs' request not only hinges upon the interpretation of FCC rules and precedent, but further asks this Court to ignore the FCC's jurisdiction over interstate traffic, as well as the facilities used to carry it.[8] This is true even if those facilities are solely located within the state of South Dakota.[9] Accordingly, the FCC's policies relating to a CLEC's exclusive right to carry such traffic are necessarily invoked, and are impacted by any decision made by this Court. Indeed, each one of Plaintiffs' claims and the FCC's pro-competitive policies are inextricably intertwined, and nothing in Plaintiffs' Sur-Reply changes this fact. These points are discussed below.

1. The Danger of Inconsistent Rulings is Clear.

There are two key FCC access policies implicated by the SDN/NVC dispute. The first is the FCC's long-standing goal to promote competition for interstate transport services; the second is the FCC's recognition that there are certain market failures in the terminating access market that require regulatory correction. This dispute involves both because Plaintiffs, through their attacks on the Agreement, are effectively attempting to eliminate SDN's ability to contract with an IXC and, in doing so, surreptitiously extend its terminating monopoly. For instance, the

8. The dividing line between the regulatory jurisdictions of the FCC and states depends on "the nature of the communications which pass through the facilities [and not on] the physical location of the lines." *National Ass'n of Regulatory Util. Com'rs v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984) *quoting California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978).

9. Indeed, the FCC's jurisdiction has been upheld over physically intrastate terminal equipment even against evidence that "[a]pproximately 97% of telephone calls" were intrastate. *See North Carolina Utilities Commission, et al. v. FCC*, 552 F.2d 1036, 1044 n. 7 (4th Cir. 1977).

Second Amended Complaint asserts that Plaintiffs refused to relinquish NVC's "right" to transport AT&T's traffic, *see* Second Am. Complaint at ¶ 6, and that SDN interfered with NVC's "expectancy of future business with AT&T pursuant to NVC's tariffs," *id.* at ¶ 95. NVC's rationale for its protected status in the interstate transport market is thin (as one would expect). NVC has argued variously that its "right" to transport arises because its tariff was "deemed lawful," that SDN promised to accord NVC "the same terms and conditions" which apply to NVC's ILEC owner and SDN's other owners, *see* Second Am. Complaint at ¶¶ 85, (and thus implicitly agreed that NVC has an exclusive transport arrangement), and that the FCC's *Connect America Fund Order* cemented, in an unspecified way, NVC's exclusive transport rights.

As early as 1991, the FCC began to restructure its Part 69 Rules governing access in order "to promote competition for interstate switched transport." *See In Re: Transport Rate Structure and Pricing*, 7 FCC Rcd. 7006 at ¶¶ 1-6 (FCC 1992). That order adopted an interim rate structure and interim pricing rules in order to accomplish that result. *Id.* In a companion proceeding, the FCC took a series of steps to increase competition in the long-distance access market through expanding interconnection including for switched access transport, particularly given the emergence of the competitive access provider ("CAP") industry, and tandem switching. *See In Re: Expanded Interconnection with Local Telephone Company Facilities, Transport Phase I,* 8 FCC Rcd. 7374 (FCC 1993) at ¶¶ 1-4 ("Transport Phase I"); *In Re: Expanded Interconnection with Local Telephone Company Facilities, Transport Phase II*, 9 FCC Rcd. 2718 (FCC 1994) at ¶¶ 2-4 ("Transport Phase II"). Though access competition did develop as intended by its decisions and the Telecommunications Act of 1996, it also emerged that LECs retained market power over terminating traffic that required FCC intervention in order to discipline anticompetitive CLEC behavior. Specifically, in imposing access charge benchmarks

upon the CLEC industry, the FCC noted the market power enjoyed by CLECs over their end users:

> [T]here is ample evidence that the combination of the market's failure to constrain CLEC access rates, our geographic rate averaging rules for IXCs, the absence of effective limits on CLEC rates and the tariff system create an arbitrage opportunity for CLECs to charge unreasonable access rates. Thus, we conclude that some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services.

In Re: Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, 16 FCC Rcd. 9923 (FCC 2001) at ¶¶ 34 ("Seventh R&O"). The *Seventh R&O* went on to find that "IXCs are subject to the monopoly power that CLECs wield over access to their end users," and established benchmark pricing rules, described as a "restriction on the CLEC's exercise of their monopoly power . . . ." *Id.* at ¶¶ 38-40; *see also*, *In Re: ACS Anchorage, Inc.*, 22 FCC Rcd. 16304 (FCC 2007) at ¶ 59 (stating that "interexchange carriers are subject to the monopoly power that all competitive LECs wield over access to their end users, and that carriers' carrier charges cannot be fully deregulated." (footnote omitted)).

After plugging that hole in the regulatory paradigm, principally caused by the CLEC manipulation of internet service provider ("ISP") bound traffic, the FCC was shortly faced with new access stimulation schemes like that of NVC. Once again, the FCC stepped in with new benchmarking rules, finding that CLECs were at least partially insulated from the effects of competition in the case of terminating access. *See In Re: Connect America Fund*, 26 FCC Rcd. 17663, at ¶¶ 656-701 ("Connect America Fund Order"). The FCC recognized that terminating switched access presents evidence of market power. *Id.* at ¶ 674. Accordingly, the FCC took steps to prevent CLECs from charging "unjust and unreasonable" interstate switched access rates. *Id.* at ¶ 661.

Plaintiffs undercut their own argument when they state that there is "virtually zero chance of an inconsistent ruling because of the limited number of CEA providers." SRB at 20. On the contrary, this misapprehension of Mr. Gillan's statement highlights the subtle and complex nature of the issues at hand and in actuality *supports* referral of the matter to the FCC. As Mr. Gillan continued in his report, "In contrast to the *three* operating CEA providers that I am aware of, the FCC reports that there are 754 ILECs and 969 CLECs in the nation." *See* Affidavit of Counsel dated March 7, 2017 in Support of Reply Brief, Ex. C at 2-3 (Gillan Expert Report) (emphasis in original). Any ruling by this Court will necessarily impact the FCC's policy not only with regard to the CEA providers, but to potentially hundreds of CLECs, like NVC.

Finally, it should be noted that access stimulation is often based in rural areas and those are the only areas where CEAs exist because of their nature. This reinforces the need for the FCC to rule on these issues rather than to have piecemeal and potentially contradictory rulings in state and federals courts. Although perhaps limited in number, the sheer economics of access stimulation by rural LECs – both as to call volume and the amount of money involved – give rise to an increased likelihood of litigation. The courts would be well-served to have the agency make a determination on the issues in this case. A state court ruling which authorizes a CLEC to impose an exclusive right to transport interstate traffic, let alone access stimulation traffic, will have significant interstate consequences which are likely to be challenged elsewhere.

In light of the FCC's policies, which are aimed directly at increasing competition in the access market and curbing CLEC monopoly power, an assertion like NVC's claiming a monopoly on interstate transport is contradictory. As such, the danger of inconsistent rulings is immense and the Court should refer the matter to the FCC under primary jurisdiction.

2. Effects of the Federal Court Order.

The District Court's Order also shows that there is a danger of inconsistent rulings. In the Order and Opinion, the District Court makes clear that NVC has no right to require AT&T to use its tariffed access transport service and that AT&T can establish a direct connection to NVC's end office and thereby avoid NVC's access transport service and charges. The District Court also makes clear that NVC can only charge AT&T for the services provided by NVC. However, Plaintiffs' claims for breach of contract, intentional interference with business relationship, violation of South Dakota trade regulation and unjust enrichment are based, at least in part, on Plaintiffs' insistence that NVC is entitled to bill AT&T for transport services via its federal access charge tariff. A ruling by the Court in favor of Plaintiffs on this point would immediately establish an inconsistent ruling with a federal court.

In its Order and Opinion, the District Court also states that the resolution of how much AT&T owes NVC "appears to depend on the outcome of an ongoing lawsuit between NVC and SDN," and that NVC cannot collect its tariffed transport charges between Sioux Falls and Groton from AT&T after September 2014 "if AT&T and SDN have a valid agreement under which SDN is providing to AT&T the transport services between Groton and Sioux Falls." Aff. of Cremer, Ex. 1 at 38. Specifically, the District Court states that "it is a material issue whether SDN had the ability to enter into an agreement with AT&T or had a binding agreement with NVC such that it could not."

As shown herein, however, the services at issue are entirely interstate and any determination as to the manner in which SDN provides interstate services is entirely within the jurisdiction of the FCC. Accordingly, notwithstanding the District Court language, this issue should be referred to the FCC.

Finally, Plaintiffs—even after the District Court decision was issued—have continued to rely upon their interpretation of communications with FCC staff as dispositive as to lawfulness of SDN's provisions of services to AT&T under an agreement outside SDN's tariff. *See* SRB at 21-24; Aff. of Cremer, Ex. 4. The March 10, 2015 email relied upon by Plaintiffs, between counsel for them and FCC staff, plainly sets forth a conclusion that is based on "Tandem switched transport services provided by ILECs[.]" Aff. of Cremer, Ex. 4. Of course, neither SDN nor NVC are ILECs – SDN is a CEA and NVC is a CLEC. Outside the acronyms, there is a real dispute over this issue because both Plaintiffs' counsel and expert claim to have discussed the same issues with FCC staff that SDN and its expert (Mr. Gillan) discussed with the FCC staff, with allegedly different determinations. *Compare* SRB at 22-23 *with* Ex. A (Dep. of Mr. Gillan at 94:15-97:10). Instead of deciding which of the parties before it has the proper interpretation from the FCC, the agency itself must be given the opportunity for a complete and full hearing and decision. This issue fairly begs for resolution by the FCC under the provisions of a complete presentation of the facts and arguments in a contested proceeding. That is also one reason why an amicus brief is insufficient as more fully explained below.

C. AN AMICUS BRIEF IS INSUFFICIENT TO SATISFY PRIMARY JURISDICTION CONCERNS.

While courts have found agency amicus briefs to be useful in dealing with questions that could potentially be referred on primary jurisdiction, it is usually where such questions are narrow or minor. The federal policy questions involved in this case, elucidated above, are not narrow in any sense of the word. If Plaintiffs are primarily concerned with saving time, then the Court can request that the FCC, upon primary jurisdiction referral, act on the matter within a certain time frame. This would avoid unnecessary delay in the proceeding while ensuring that inconsistent rulings do not occur.

Indeed, in each of the cases cited by Plaintiffs in support of its argument that an amicus brief would be a suitable substitution for primary jurisdiction referral, the specific issues being considered for referral were comparatively narrow. *Distrigas of Massachusetts Corp. v. Boston Gas Company* is particularly instructive in this regard, as the court only held that amicus participation was sufficient because the question for the agency to consider was narrow:

> Parties are **ordinarily** required to enter into full-blown administrative proceedings because only then can the agency adequately resolve the complex issues of fact and policy that underlie the usual primary jurisdiction case. In this case, however, the agency's task is only secondarily to make traditional factual findings and policy judgments; the primary question before it is simply what it meant to do when it approved the Long Term Program in December 1978.

693 F.2d 1113, 1119 (1st Cir. 1982) (emphasis added). The First Circuit Court of Appeals recognized that the ordinary course of proceeding in situations such as this would be to refer the case on primary jurisdiction. It was only because a narrow issue—the agency's intention behind a single action—was all that needed resolution. Similarly, in *TGC New York, Inc. v. City of White Plains*, in deciding that an amicus brief was appropriate rather than referral, the court noted that it was significant that the parties in that case had stipulated to the facts. 305 F.3d 67, 74 (2nd Cir. 2002). Likewise, in *Austin Lakes Joint Venture v. Avon Utilities, Inc.*, the court's reference to the usefulness of an amicus brief in lieu of primary jurisdiction referral was mere dicta – the court actually declined to invoke primary jurisdiction because it was "unable to find any issue presented that is within the jurisdiction of the administrative or regulatory agencies." 648 N.E.2d 641, 648-649 (Ind. 1995).

As demonstrated above, the federal policy issues involved in the instant case are in no way narrow or minor. On the contrary, NVC's claims are steeped in federal law and any of the relief requested by NVC would, if granted, run headlong into decades of pro-competitive federal policy and result in inconsistent rulings—the very situation primary jurisdiction referral is meant

to avoid. In light of the deep-seeded federal policies underpinning the parties' dispute, and the fact that the ordinary course of addressing such situations is to refer the issue on primary jurisdiction, it is highly unlikely that the inclusion in the record of an amicus brief by the FCC would be sufficient. If NVC is concerned with undue delay, the Court may allow termination or modification of the stay based upon undue delay by the FCC. *See, e.g., Demmick v. Cellco Partnership*, 2011 WL 1253733 (D.N.J. March 29, 2011); Ex. C (Order in *Demmick v. Cellco*).

D. THE CLAIM FOR DISSOLUTION NEED NOT BE BIFURCATED.

Plaintiffs invite the Court to bifurcate the dissolution claim from the remaining claims. This invitation is convenient to Plaintiffs for several reasons. First, Plaintiffs already testified that this claim was pleaded in retaliation for SDN's expulsion claim. Plaintiffs' directors each testified about not wanting SDN to be dissolved and admitted not even planning for such an occurrence. Second, as a result, Plaintiffs have now seized the opportunity to recast all of their numerous federal claims and arguments onto their undesired claim for dissolution. In this respect and according to Plaintiffs' misguided arguments, the Court could then refer the federal issues to the FCC without impacting their remaining claims. However, as already demonstrated, their remaining state law claims are artfully-pleaded federal claims. At minimum, each of the causes of action contains substantial embedded questions of federal law that must be resolved. Bifurcation will not solve the remaining federal issues contained in the other causes of actions.

Rather, all bifurcation would serve to accomplish is allowing Plaintiffs to remove an undesired claim from the rest of the litigation and further complicating this procedural labyrinth. Part of the reason this litigation, including this specific Motion, is so overly complicated is because Plaintiffs have chosen such an unusual and unprecedented avenue for alleged relief. In many respects, this case is a novel case because litigants, especially those intimately involved in

the industry of telecommunications, would raise their concerns and issues with the forum that is designed to address those concerns and issues—the FCC. *See* 47 U.S.C. §§ 206-208. To that end, there is not much case law to draw from with a comparable set of facts because, presumably one would expect, most cases are commenced in the appropriate forum. The few cases that are improperly commenced in state court are often dismissed. *See* Brief in Support of Motion at 14-16; *see also* Reply Brief in Support of Motion at 6, 9-11. Despite acknowledging an alleged basis for bringing claims under the FCA, *see* Brief in Support of Motion, Ex. E, Plaintiffs intentionally chose to bring their claims in an improper forum while still attempting to litigate the federal issues.

In all, the claim for dissolution should be either preempted or the underlying predicate issues should be referred to the FCC.[10] As noted, SDN is a "heavily regulated corporation." It is licensed to provide interstate CEA service pursuant to Section 214 of the FCA. Importantly, carriers subject to Section 214 are required to seek prior FCC approval for any discontinuance, reduction, or impairment of service. *See* 47 U.S.C. § 214(a).

Given SDN's federal mandate to provide interstate service, and Section 214's requirements on discontinuance, a strong case can be made that NVC's dissolution claim is in

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10. SDN's Reply Brief demonstrates that the dissolution count should be referred to the FCC, to the extent not subject to federal preemption. *See* Reply Brief in Support of Motion at 25. In support, SDN noted the heavy FCC regulation to which it is subject, and how FCC expertise is first necessary to resolve this claim. NVC now suggests that SDN has waived the preemption argument, *see* SRB at 4, and that the Court can proceed with a jury trial with the dissolution, *id.*at 27-28. But, this argument is wrong. SDN's Reply Brief reads in pertinent part:

> *To the extent* the Court concludes that this cause of action is not preempted because it seeks equitable relief and not monetary damages, the appropriate remedy is to refer the predicate issues of the violations of the FCA to the FCC[.]"

Reply Brief in Support of Motion at 25 (emphasis added).

fact preempted. At minimum, as SDN argues, the substantial federal issues underlying the claim for dissolution should be referred to the FCC under the doctrine of primary jurisdiction.

III. CONCLUSION

SDN respectfully requests that Plaintiffs' claims be dismissed under the doctrine of preemption. At minimum, Plaintiffs request that specific implicated federal issues be referred to the FCC for its consideration because the FCC has primary jurisdiction over the highly-technical predicate issues in this case.

Dated this 7th day of April, 2017.

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CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that on this 7th day of April, 2017, I have electronically filed the foregoing using the Odyssey File & Serve system which will effectuate service upon the following:

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ATTACHMENT H

version of events in which they claim that the plaintiffs had given them the right to take over transport capacity for the AT&T traffic while ignoring all of the things that plaintiffs discussed would be a necessary condition or prerequisite if SDN was going to take over that transport capacity.

And so this case has proceeded along with SDN asserting time and time again that there was an agreement by the parties reached in the Groton meeting that permitted SDN to begin providing transport capacity. Only during depositions did we finally have testimony from again SDN's CEO and the two managers who participated in the Groton meeting that acknowledged the fact that there was, indeed, conditions and that those conditions included protection for Northern Valley against AT&T's wholesale traffic manipulation in the included protections in which AT&T would have to pay both a piece for the outstanding balance as well as a commitment to paying owing/going rate elements.

And so it was only when we were conducting these depositions that we appreciated that, indeed, if SDN's view of the facts is correct, then their conduct amounts to an interference with the settlement agreement that they testified we should have received if they were going to begin to take over of the transport capacity.

And so we believe that, contrary to SDN's assertions, this path for the same claim, it's still the same claim, it's still

tariffs. NVC and AT&T, however, did not have a healthy, robust business relationship. Moreover, neither JVCTC or JVC had any contract or business relationship with AT&T with which SDN could have interfered." Very similar to the arguments they presented here today.

Ironically, defendants really present the best argument against that theory of the case just a few sentences later in the brief where they say, "This was not the first time AT&T had withheld payment from NVC because of access stimulation. Less than a year before the commencement of the March 2013 dispute, NVC and AT&T entered into a settlement agreement."

To me, that's the perfect example of the fact that a business entity or business entities can have serious disputes and continue in their business relationships or reengage in their business relationships. That's the nature of big businesses is people keep going on even when they have disputes. And sometimes, despite their disputes, they come back later and reengage in their relationships.

There is a material issue of fact about whether a valid business relationship or expectancy existed. There is a material issue of fact about whether SDN engaged in an intentional or unjustified act of interference. A finder of fact could conclude that the evidence establishes damages caused by SDN. And for those reasons, the Court is going to deny the motion for summary judgment on the intentional

interference with business relationship claim.

Next I'll talk about the motion for summary judgment on the claim of conversion. A recurring theme in each of the motions for summary judgment is the argument that the plaintiffs should not be allowed to pursue alternative theories related to the same conduct. Under South Dakota law they clearly can; however, they cannot recover duplicative damages. And I'm hoping to talk about that briefly after we get all done because that's going to be one of the really tough parts of this case as we go forward.

The conversion claim is a good example. A depiction of this is contained in SDN's brief in support of the motion for summary judgment on conversion. Here is how they describe the circumstances. "At no time did SDN interfere with the NVC use of the circuit capacity. It merely agreed with AT&T on transport charges and services which NVC claims the right to control. Thus, there is no serious interference with the right of NVC to control the chattel because the calls continue to be transported, and NVC never had such control as to be able to exclude SDN from using its own property or the other network elements through FRPPA (sic) or to dictate to AT&T that access traffic would be transported to Groton. The SDN/AT&T agreement to transport access traffic to NVC from Sioux Falls to Groton was done with the intention of splitting revenues with NVC to resolve nonpayment of transport charges

by AT&T to the benefit of both SDN and NVC; and, therefore, it was not a use that interfered with any alleged possessory right by NVC."

Here is my translation. When I read it, here is what I read. NVC was using the circuits that it leased from FRPPA (sic) to transport the calls for AT&T and other carriers. NVC was charging AT&T X amount for those services. AT&T wanted to pay less. SDN agreed to transport the same calls over the same circuits for less than X amount. This was okay, according to SDN, because SDN was simply helping to resolve the dispute between AT&T and NVC by removing NVC from the equation. In return, SDN intended to share some portion of that "amount less than X" with NVC.

Any member of SDN would rightfully be alarmed at SDN's claim in that paragraph. If that very scenario were believed by a finder of fact and found to have occurred, it could possibly be the basis for a finding of breach of contract. It could also be the basis for a finding of a conversion claim.

Essentially, SDN's theory is that there is no limitation on how it may use the FRPPA (sic) circuits even though it has leased certain capacity to a specific member with specific purposes in mind. Inherent in that claim and the paragraph quoted above is the theory that SDN is authorized to use those circuits in a manner that is contrary to the rights of the member entities that have leased back the same use of that

circuitry contributed to FRPPA (sic). SDN's theory is that as long as they left NVC with the ability or the possibility of carrying the same traffic, as a matter of law they could not have interfered in the manner that would constitute conversion.

This is based on an incorrectly narrow view of the idea of conversion. Instead, as described in the restatement, "One who is authorized to make a particular use of a chattel and uses it in a manner exceeding the authorization is subject to liability for conversion to another whose right to control the use of the chattel is seriously violated." A finder of fact could find and conclude that SDN utilized the circuits in a manner that exceeded their authorization and, as a result, violated the plaintiffs' right to utilize their circuits in that manner. That's my conclusion that there are material issues of fact in dispute and that that motion for summary judgment is denied.

Lastly, the motion for summary judgment on plaintiffs' claim for punitive damages. It's my determination that plaintiffs have a viable claim for the intentional interference with a business relationship. My review of the evidence still shows that there is sufficient evidence to justify submitting the issue of punitive damages to the jury. A finder of fact could certainly conclude that SDN's conduct when entering into a contract with AT&T in which SDN replaced