McDaniel et al v. QWest Communications Corporation et al Doc. 342 Att. 1

# EXHIBIT A

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## FIBER-OPTIC-CABLE FEE ALLOCATION ARBITRATION AWARD

## BASIS FOR DECISION

**March 6, 2012**

This Arbitration is being conducted pursuant to that certain "Agreement to Negotiate, Mediate and, if Necessary, Arbitrate Division of Attorney-Fee and Costs Award," executed at various times in 2006 and 2007 by the various plaintiffs' counsel in what is generally known as the "fiber-optic-cable right-of-way litigation" ("the Med-Arb Agreement"). The undersigned James D. Wilson and Eric D. Green ("the Arbitrators") were named as Mediators (Para. 2 of the Agreement) and, if mediation failed, as Arbitrators (Para. 3 of the Agreement) to resolve "the equitable division of the Gross Fees" awarded in the fiber-optic-cable litigation.

The parties to the mediation portion of the process included all plaintiffs counsel claiming a share of the Gross Fees. For purposes of this process, plaintiffs counsel are denominated as "the 45-firm group" (four sub-groups of 45 firms led by Ackerson Kauffman Fex, P.C.; Cohen & Malad, LLP; Hare; Solberg, Stewart, Miller & Tjon, Ltd.; and Hare, Wynn, Newell & Newton), "the Susman/Gotfryd group" (Susman, Heffner & Hurst, LLP; William T. Gotfryd, Esq.; Murray, Tillotson, Nelson & Wiley; Donaldson & Guin; Ludens Potter Melton & Calvo), "the Litman group" (Seth A. Litman, Esq.; Alembik, Fine & Callner), "Sullivan" (John C. Sullivan, Jr., Esq.), and "Smith" (on behalf of the estate of Hugh V. Smith, Jr., Esq. (deceased) . The parties to the arbitration portion of this process include all plaintiffs counsel claiming a share of the Gross Fees <u>except for</u> the Susman/Gotfryd group (sometimes referred to herein as "non-arbitrating counsel").

For purposes of this process, total Gross Fees constitute $41.5m, which is the amount that all plaintiffs' counsel, on behalf of the various putative settlement classes, and defense counsel, have agreed is available to compensate all plaintiffs' counsel for all fees and costs on a national basis as part of their national settlement of the fiber-optic-cable litigation, albeit implemented on a 46 state-by-state basis. More than twice the $41.5m in available Gross Fees has been claimed by all plaintiffs' counsel in their mediation and arbitration submissions. Further, $5,411,669 has been claimed as expenses to be paid out of the total Gross Fees, as follows:

| | |
|---|---|
| 45-firm group | $4,913,207[1] |
| Susman/Gotfryd non-arbitrating group | $ 422,477 |
| Litman group | $ 60,970 |
| Smith | $ 0 |
| Sullivan | $ 15,015 |

As part of the process under the Med/Arb Agreement, a mediation was conducted among all plaintiffs' counsel claiming a share of the Gross Fees in the fiber-optic-cable litigation. After two sessions, it became clear to the Mediators that the parties would be unable to agree on a fee and cost allocation. Accordingly, the mediation was declared at an impasse and, at the request of plaintiffs' counsel participating in the arbitration phase of the process, this arbitration was commenced.

Although the mediation phase of this process attempted to resolve the allocation of Gross Fees on a national basis, the issue in this Arbitration concerns only the allocation of fees and costs in the settlement of the Illinois case, *McDaniel v. Sprint*. Pursuant to plaintiffs' counsel's agreement, $3,453,000 of the $41.5m in Gross Fees is available to be allocated among counsel

[1] We are informed and understand that $426,000 has already been distributed to the 45-firm group out of the Idaho fee award and further that the 45-firm group, apparently for internal accounting purposes amongst the 45 firm group, has treated the entire Idaho award as expenses/costs. For the purposes of the Illinois Award, we consider the 45-firm's internal allocation treatment as irrelevant.

for fees and costs in this case. Accordingly, the percentage of Gross Fees allocable to Illinois for fees and expenses is 8.32% of the national total ($3,453,000/41,500,000 = 8.32%).

Jurisdiction having been properly conferred over the arbitrating parties, the Arbitrators having been properly designated, and the agreed-upon process for the submission of proof and argument having been followed, this memorandum sets forth the basis of the Arbitrators' decision on the allocation of the Illinois fees and costs.

The legal standard applied by the Arbitrators in this process is to allocate the award of fees and costs attributable to this matter based on the relative contributions of the attorneys to the creation of the settlement fund from which these fees and costs are awarded.

The Arbitrators' decision applying this legal standard is based on the extensive and comprehensive submissions provided by all counsel (including the non-arbitrating counsel) during the mediation process, the supplemental arbitration submissions provided by the arbitrating counsel, and the Arbitrators' considerable direct observations over approximately nine and a half years of this litigation during which the Arbitrators served as mediators and Special Master. Counsels' mediation and arbitration submissions detailed the hours and expenses incurred by each firm during the entire decade-long course of this litigation, broken down into various time-frames and phases and by time-keeper. The mediation and arbitration submissions reviewed by the Arbitrators forcefully and in great detail described each counsel's claimed contributions to the national and state-by-state litigation and settlement efforts and commented on the claimed contributions of other counsel. The detailed reports of hours billed, rates charged, work performed, and expenses incurred provided comprehensive back-up for the various claims to relative shares of the allocable Gross Fees. All of this data has been carefully reviewed and considered by the Arbitrators. In addition, at the mediation, each of the competing

counsel groups had a full opportunity to explain and present their claims to the Arbitrators for their proposed allocation of the Gross Fees and to comment on the claims of competing counsel. As agreed by the mediating and arbitrating counsel, in reaching their decision, the Arbitrators have considered all of this information as well as their personal observations during most of the litigation and settlement negotiations.

The Arbitrators' personal observations of the relative contributions of counsel are unusually extensive and comprehensive in this case. Arbitrator James Wilson was appointed a Special Master to attempt to mediate the disputes between the plaintiffs and defendants in 2002. In addition to mediating numerous disputes between the parties to the *Smith v. Sprint* case, he provided a report and recommendation to the court in which he found, based upon his review of the privileged communications of the plaintiffs' counsel, there was no evidence of a reverse auction having taken place. *Id.* As part of the negotiating process he spent numerous hours with each of the defendants' counsel, as well as plaintiffs' counsel, attended the depositions of a number of both lay witnesses and experts, and actively participated in negotiating the settlement which was preliminarily approved by Judge Andersen. He attended and attempted to mediate the fee division issues between the parties to the Med/Arb Agreement and non-arbitrating counsel on a number of occasions going as far back as 2003. He was familiarized with the history of the cases prior to his appointment as Special Master and reviewed the daily time records of plaintiffs' counsel in 2003, as part of his assignment as Special Master, and again as part of this Med/Arb process.

Eric Green began his mediation efforts on behalf of the putative class represented by all plaintiffs counsel and defendants in April 2006, after the rejection of the *Smith* settlement by the Court of Appeals. Professor Green met with plaintiffs counsel and defendants dozens of times

over the course of the next four years to mediate a revised settlement of the fiber-optic-cable cases. These mediation efforts required a close analysis of the prior and on-going litigation efforts and contributions by all plaintiffs counsel in every state. They provided Professor Green with a rare bird's-eye view of each counsel's relative contribution to the litigation and settlement efforts that have resulted in this national, state-by-state settlement out of which the Gross Fees are to be allocated. During this four-year mediation effort, Professor Green worked and spoke with counsel on a daily, weekly, or monthly basis as the litigation and settlement effort ebbed and flowed in the *Smith, Kingsborough, McDaniel* and other cases. Professor Green's efforts included discussions with defense counsel, which provided an opportunity for Professor Green to observe and understand which efforts by plaintiffs' counsel contributed to defendants' willingness to settle on a national basis with Gross Fees to be allocated of $41.5m, and to observe which plaintiffs counsel carried the laboring oar and contributed actual value to litigating, negotiating, mediating, settling and documenting this settlement. It was precisely because of the Arbitrators' exceptional familiarity with all the details of this litigation and settlement that counsel designated Messrs. Wilson and Green as the mediators and arbitrators under the Med/Arb Agreement to allocate the Gross Fees.

Based upon the submissions, presentations by counsel, and the personal observations and experience of the Arbitrators in these matters, the Arbitrators find that the negotiation of a national framework for settlement in the 46 states was the primary procuring cause or significant precondition to the creation of the *McDaniel* Illinois settlement. This conclusion is borne out by the fact that railroad system involved, as well as the fiber-optic network that followed, is an integrated system that has little to do with state boundaries. Again and again, throughout the many years and phases of settlement negotiations, defendants took the position that they required

a global framework for settlement to create the maximum settlement value for the cable companies and to put behind them once and for all on a global basis the issues of fiber optic trespass on railroad rights of way. Thus, the Arbitrators conclude that it is appropriate to allow counsel who prosecuted matters outside of Illinois and who do not represent Illinois clients to participate to some extent in the distribution from the settlement fund created by the Illinois settlement. However, the efforts of counsel who had Illinois clients and who prosecuted and settled the Illinois settlement must be also recognized and given additional weight in allocating the Illinois portion of the Gross Fees. Understandably, each counsel claiming a share of these fees attributes greater value to his or her own efforts than to those of other claiming counsel. Sometimes, unfortunately, counsel unfairly and without basis, denigrate and criticize the good faith efforts and contributions of their colleagues. Such is human nature. The Arbitrators have considered and weighed each of these claims and criticisms carefully. The Arbitrators have waded through each counsel's mediation and arbitration submissions detailing their specific efforts with each and every case in each and every state they were involved and how critical these efforts were in producing the national settlement of which the Illinois settlement before us is a piece. There is some truth in each of these submissions, and a great deal of advocacy. Specifically, the Arbitrators have carefully reviewed and considered the vigorous arguments of non-arbitrating counsel set forth in their 38-page mediation statement (plus the many exhibits and tables they provided) claiming that the 45-firm group's time and efforts were unreasonable and were not the substantial and procuring cause of the national or Illinois settlements, but rather that the non-arbitrating counsels' time and efforts were reasonable and the substantial cause of procuring these settlements. Based on our review of these arguments and the data and our

personal observations of the actual events that led to these settlements, we reject non-arbitrating counsel's arguments as mostly inaccurate, invalid, and self-serving.

Understanding that there is no scientific or mathematical method of precisely calculating the relative efforts and successes of counsel in a sprawling litigation such as this that has played itself out over more than a decade in multiple jurisdictions, it is the Arbitrators' judgment that a fair and reasonable allocation of the Illinois Gross Fees should be calculated based on giving seventy (70%) percent of the weight and credit to the national efforts, which we believe became the procuring cause of the Illinois settlement, and thirty (30%) percent of the weight and credit to the purely local efforts. Thus, we allocate the fee portion of the Illinois Gross Fees based on 70% to those lawyers who participated in creating the national framework that allowed this fund to be created, and 30% to only those lawyers who also actively participated in the prosecution and settlement of the Illinois case.

In allocating between the competing claiming counsel, after reviewing the time-entries provided by counsel, the Arbitrators have concluded that attempting a day-by-day, hour-by-hour analysis of each fee entry over an almost 15 year period would be prohibitively difficult, expensive, inconclusive, unfair, and counterproductive to allocating the Illinois Gross Fees based on relative contributions to creating the settlement fund. Having spent dozens of hours reviewing the submitted time records, the Arbitrators do not believe that a re-review of the 1995-2003 daily time and hour-by-hour review of the records since will assist the Arbitrators in determining exactly which hours were most productive or which hours should be discounted or which hourly rates should be adjusted up or down. Thus, we have attempted to consider all the hours on an equal basis, initially without discounts for efficiency, production, or rates, but ultimately with our collective experience of nine and one-half years of working with these legal

teams. All of these factors inform our allocation of the fees and expenses, which is set forth below in a mathematical precision that belies the inherently subjective nature of the exercise.

In order to determine the amount of fees to be divided, the Arbitrators first looked at expenses. Overall, and given the time over which these expenses were incurred, the Arbitrators have determined that the most equitable approach is to first compensate counsel off the top out of the Illinois share of the national Gross Fees amount for a proportionate share of their reasonable expenses. Accordingly, having determined that the expense requests are reasonable and entitled to reimbursement, the Arbitrators award 8.32% (see above: 8.32% is the Illinois proportion of the total national Gross Fees) of the total expenses incurred and claimed, as follows:

| | |
|---|---|
| $408,779.00 | to the 45-firm group |
| 5,073.00 | to the Litman group |
| 1,249.00 | to Sullivan |
| 35,150.00 | to non-arbitrating counsel |
| $450,251.00 | TOTAL EXPENSES AWARDED |

This leaves a balance of $3,002,749 to be awarded as fees out of the total of $3,453,000 allocable Illinois Gross Fees.

For the reasons set forth above, the Arbitrators have determined that 70% of the Illinois fee allocation should be attributed to the national settlement efforts. Seventy (70%) percent of $3,002,749 is $2,101,924.30. The Arbitrators have determined based on their review of the time records, submissions of counsel, and, most importantly, their observations over almost a decade working with counsel and defendants and the courts involved in the various settlement efforts, that this portion of the allocable fees should initially be divided as follows:

| | | | |
|---|---|---|---|
| 90.3321% | or | $1,898,712.78 | to the 45-firm group |
| 1.4895% | or | $31,308.85 | to the Litman group |

| | | | |
|---|---|---|---|
| 0.6483% | or | $13,626.36 | to Sullivan and Smith[2] |
| 7.6946% | or | $158,276.31 | to non-arbitrating counsel |
| | | $2,101,924.30 | SUB TOTAL |

For the reasons set forth above, the Arbitrators have determined that 30% of the Illinois fee allocation should be attributed to the local Illinois efforts. Thirty (30%) percent of $3,002,749 is $900,824.70. The Arbitrators have determined based on their review of the time records, submissions of counsel, and, most importantly, their observations over almost a decade working with counsel and defendants and the courts involved in the various settlement efforts, that this portion of the allocable fees should initially be divided as follows:

| | | | |
|---|---|---|---|
| 92.3054% | or | $831,510.18 | to the 45-firm group |
| 7.6946% | or | 69,314.52 | to non-arbitrating counsel |
| | | $900,824.70 | SUB TOTAL |

Adding up the amounts allocated to expenses and fees based on the 70/30 attribution of fees to the national/state efforts results in an initial rounded award as follows:

| | Expenses | Fees | Total |
|---|---|---|---|
| 45-firm group | $408,779 | $2,730,222.96 | **$3,139,001.96** |
| Litman group | 5,073 | 31,308.85 | **36,381.85** |
| Sullivan (and Smith) | 1,249 | 13,626.36 | **14,875.36** |
| Non-arbitrating counsel | 35,150 | 227,590.83 | **262,740.83** |
| TOTALS | $450,251 | $ 3,002,749.00 | **$3,453,000.00** |

In rendering our final award, the Arbitrators have determined that one final adjustment to these figures is justified by the record and necessary to a fair allocation of the Illinois Gross Fees. For a variety of reasons (all of which go to the relative contributions to the creation of the Illinois

[2] Fees claimed on behalf of Attorney Hugh V. Smith, Jr. are aggregated with those of John C. Sullivan, Jr. because Mr. Sullivan kindly and generously advanced and advocated the claim on behalf of his friend, Mr. Smith. However, the basis of a claim for Mr. Smith is unclear, perhaps due to his untimely death in 2004, and the lack of records. Mr. Smith may well be due a fee allocation for his contribution to the national effort but it is impossible for the Arbitrators to quantify it separately on its own. The Arbitrators have taken into account in the award of fees that Messrs. Sullivan and Smith constitute a de facto group of two, akin to the other counsel groups.

settlement fund), including but not limited to the relative efficiencies in the submitted time records of the various counsel groups, the relative amount of paralegal or junior attorney time, as opposed to senior lawyer time, in the time records, and the particular facts and circumstances of the Illinois litigation, the Arbitrators have determined that the final award to the 45-firm group should be decreased by 5%, or $156,950.09, and that the final award allocated to non-arbitrating counsel should be increased by this amount.

Accordingly, the Arbitrators' Final Award is as follows:

| 45-firm group | $2,982,052 |
|---|---:|
| Litman group | 36,382 |
| Sullivan (and Smith) | 14,875 |
| Non-arbitrating counsel | 419,691 |
| TOTAL | $3,453,000 |

This Award is final and binding on the arbitrating parties and is enforceable in any court of competent jurisdiction pursuant to the Med/Arb Agreement.

SO ORDERED.

Date: March 6, 2012

James D. Wilson

Eric D. Green