

1 BRAMSON, PLUTZIK, MAHLER & BIRKHAUSER, LLP

2 Alan R. Plutzik (State Bar No. 077785)

3 Jennifer S. Rosenberg (State Bar No. 121023)

4 2125 Oak Grove Road, Suite 120

5 Walnut Creek, CA 94598

6 Telephone: (925) 945-0200

7 Facsimile: (925) 945-8792

8 Liaison Counsel and Executive Committee Member

9 BURSOR & FISHER, P.A.

10 Scott A. Bursor (State Bar No. 270006)

11 888 Seventh Avenue

12 New York, NY 10019

13 Telephone: (212) 989-9113

14 Facsimile: (212) 989-9163

15 FRANKLIN & FRANKLIN

16 J. David Franklin (State Bar No. 41659)

17 550 West C Street, Suite 950

18 San Diego, CA 92101-8569

19 Telephone: (619) 239-6300

20 Facsimile: (619) 239-6369

21 Executive Committee Members

22 SUPERIOR COURT OF THE STATE OF CALIFORNIA

23 COUNTY OF ALAMEDA

24 RAMZY AYYAD *et al.*, Individually and On
25 Behalf of the Sprint Payer Class,

26 Plaintiffs and Cross-Defendants,

27 vs.

28 SPRINT SPECTRUM, L.P. *et al.*,

Defendants and Cross-Complainants.

Case No. RG03-121510

Assigned to: Hon. Winifred Y. Smith

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' PETITION TO CONFIRM
ARBITRATION AWARD**

Date: December 9, 2016

Time: 10:00 a.m.

Dept.: 21

Reservation No.: R-1799018

TABLE OF CONTENTS

PAGE(S)

I. INTRODUCTION 1

 A. The Settlement Agreement 1

 B. The Arbitration 2

 C. The Arbitration Award 3

 D. Plaintiffs’ Motion To Correct Computational Errors 5

II. STANDARD OF REVIEW 6

III. ARGUMENT 7

IV. CONCLUSION 7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

PAGE(S)

CASES

Cable Connection, Inc. v. Directv, Inc.
(2008) 44 Cal.4th 1334..... 7

In re Cellphone Termination Fee Cases
(2009) 180 Cal.App.4th 1110..... 1

Ketchum v. Moses
(2001) 24 Cal.4th 1122..... 4

Moncharsh v. Heily & Blase
(1992) 3 Cal.4th 1..... 7

Oaktree Capital Management, L.P. v. Bernard
(2010) 182 Cal.App.4th 60..... 6, 7

Swissmex-Rapid S.A. de C.V. v. SP Systems, LLC
(2012) 212 Cal. App.4th 539..... 1, 2, 3

STATUTES

9 U.S.C. § 9 1, 7

9 U.S.C. § 10 7

Code of Civil Procedure § 1285 1, 6

Code of Civil Procedure § 1286.2 6, 7

Code of Civil Procedure § 1287.4 7

1 I. INTRODUCTION

2 Plaintiffs respectfully petition this Court to confirm the August 9, 2016 Arbitrator’s Award
3 Of Attorneys’ Fees And Costs In Class Action Settlement (“Arbitrator’s Award”) and to enter
4 judgment on it pursuant to CCP §§ 1285 *et seq.* and 9 U.S.C. § 9. A copy of the Arbitrator’s
5 Award is submitted herewith as Bursor Decl. Ex. 1.

6 A. The Settlement Agreement

7 The Amended Stipulation of Settlement executed May 10, 2016 (the “Settlement
8 Agreement”) states that Sprint has agreed to pay plaintiffs’ reasonable attorney’s fees, costs and
9 expenses, but the parties were unable to agree on the amount that would constitute reasonable
10 attorney’s fees, costs and expenses. Settlement Agreement Art. IV, § 4. So the parties agreed to
11 submit the fee dispute to arbitration, as described in *In re Cellphone Termination Fee Cases* (2009)
12 180 Cal.App.4th 1110, 1125. The Amended Stipulation of Settlement, Article III(4), at p. 11,
13 provides: “Pursuant to § 9 of the Federal Arbitration Act, 9 U.S.C. § 9, this Court shall have
14 exclusive jurisdiction to enter judgment on the award to be entered by the Arbitrator in the Fee and
15 Expense Arbitration”

16 On May 3, 2016, this Court made a preliminary finding that fees within the range agreed to
17 by the parties would be reasonable. 5/3/16 Tentative Ruling at 3:25-4:2 (“The court makes a
18 preliminary finding that any award of attorneys’ fees in the \$17-\$20 million range agreed to by the
19 parties would be reasonable.”). The Court preliminarily approved the Settlement Agreement on
20 May 17, 2016, which authorized the parties to go forward with the arbitration. *See* 5/17/06 Order
21 at ¶ 3(c) (stating the Court would determine, at the Final Approval Hearing, “whether the Court
22 should enter judgment on the award to be entered by the Arbitrator in the Fee and Expense
23 Arbitration, pursuant to § 9 of the Federal Arbitration Act, 9 U.S.C. § 9”).¹

24 _____
25 ¹ The parties’ agreement specifies application of the Federal Arbitration Act (FAA), but because
26 there is some uncertainty as to whether the FAA or the California Arbitration Act (CAA) should be
27 applied in state court, Plaintiffs have brought this motion pursuant to both statutes. *See, e.g.,*
28 *Swissmex-Rapid S.A. de C.V. v. SP Systems, LLC* (2012) 212 Cal. App.4th 539, 541-43 (concluding
that 9 U.S.C. § 9 does not apply in state court because it is “procedural, not substantive,” and
because “the FAA does not preempt California law unless there is a conflict and no such conflict
exist[s] here”). Insofar as this motion is concerned, there is no conflict between the CAA and
FAA.

1 additional exhibits, including additional billing records, on behalf of the 10 law firms representing
2 the plaintiffs and the class. Bursor Decl. ¶ 7. An eleventh law firm, Robbins Geller Rudman &
3 Dowd LLP, the successor to a law firm that had previously represented the plaintiffs, but had
4 withdrawn from the case in 2009, made a separate application supported by a brief and a
5 declaration of counsel submitting billing records and other materials. *Id.* ¶ 7. Sprint submitted a
6 26-page opposition brief and a declaration of counsel, together with more than 1,000 pages of
7 exhibits, mostly comprising a detailed critique of the billing records that had been submitted by the
8 plaintiffs' counsel. *Id.* ¶ 7.

9 On July 14, 2016, an arbitration hearing was held before Judge Infante. *Id.* ¶ 8. Scott A.
10 Bursor, Alan R. Plutzik, Marc G. Reich, and Anthony Ferrigno appeared for the plaintiffs. *Id.*
11 Aelish Baig appeared on behalf of Robbins Geller. *Id.* Joseph Boyle and Arsen Kourinian
12 appeared on behalf of Sprint. *Id.*

13 **C. The Arbitration Award**

14 On August 9, 2016, Judge Infante issued a 26-page Arbitrator's Award Of Attorneys' Fees
15 And Costs In Class Action Settlement. Bursor Decl. Ex. 1 (the "Arbitrator's Award"). Judge
16 Infante determined that the fee should be calculated by reference to the lodestar method.
17 Arbitrator's Award at 7 ("The Arbitrator will rely upon the lodestar method to determine the
18 amount of reasonable fees"). Judge Infante then conducted a detailed review of the billing
19 records, and imposed a number of cuts to reduce the claimed hours. *See id.* at 10 ("Sprint's request
20 to deduct time spent working to defeat the FCC petition is granted; 1603.18 [hours] shall be
21 deducted from the lodestar."); *id.* at 13 ("Ninety-seven point two (97.2) hours will be deducted
22 from the lodestar due to Class Counsel's clerical error."); *id.* at 14-15 ("Sprint's objection to Mr.
23 David Franklin's submission of time entries of 134.75 hours for the 'review and dictation of time
24 records' is well taken Class Counsel's lodestar will be reduced by 134.75 hours.").

25 Judge Infante also scrutinized the hourly rates claimed by plaintiffs' counsel and cut them
26 substantially by imposing a \$650 per hour blended rate. *Id.* at 15-18 ("Given the current labor
27 market in the San Francisco Bay Area, a firm-wide billing rate of \$650 per hour is reasonable.").

Judge Infante then analyzed the factors enumerated in *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132, and determined that a multiplier of 1.4 was appropriate. See Arbitration Award at 20 (“Class Counsel’s risks and accomplishments would warrant a multiplier in the range of 1.5 - 1.75. A downward adjustment is warranted, however, for Class Counsel’s strategic decision to forgo expert designation in 2008 [sic] and for inefficiencies due to conflicts within the Executive Committee. A modest deduction to a 1.4 multiplier is appropriate.”).

Judge Infante then analyzed the expenses submitted by each of the ten firms and imposed a number of cuts on those as well. Arbitrator’s Award at 20-25. The expenses sought by and awarded to each firm are summarized in the table below:

<u>Summary Of Expenses Sought, Disallowed & Awarded</u>			
Firm	Expenses Sought	Expenses Disallowed	Expenses Awarded
Bramson, Plutzik Mahler & Birkhaeuser, LLP	\$717,391.41	\$168,816.41	\$548,575.00
Bursor & Fisher, P.A.	\$678,442.23	\$8,392.29	\$670,049.94
Franklin & Franklin APC	\$166,887.82	\$152,369.04	\$14,518.78
Law Offices Of Anthony A. Ferrigno	\$19,918.30	\$12,118.30	\$7,800.00
Faruqi & Faruqi LLP	\$40,492.06	\$30,637.71	\$9,854.35
Pastor Law Office, LLP	\$3,649.05	\$3,649.05	\$0.00
James Abernethy	\$7,844.42	\$2,330.38	\$5,514.04
Reich Radcliffe LLP	\$12,569.42	\$22.90	\$12,546.52
Carl Hilliard	\$1,268.73	\$1,268.73	\$0.00
Cuneo, Gilbert & LaDuca	\$0.00	\$0.00	\$0.00
Total	\$1,648,463.44	\$379,604.81	\$1,268,858.63

The Arbitrator’s Award concludes:

“Class Counsel’s total allowable hours worked on the case is 18,528.57. Based on an hourly rate of \$650, Class Counsel is entitled to a lodestar of \$12,043,570.50. Class Counsel is also entitled to a 1.4 multiplier, which results in attorneys’ fees in the amount of \$16,860,998.70. Class Counsel is entitled to reimbursement of costs amounting to \$1,268,858.63. The total award of attorneys’ fees and costs is \$18,129,857.33.”

1 Arbitrator's Award at 25-26.

2 **D. Plaintiffs' Motion To Correct Computational Errors**

3 On August 12, 2016, Plaintiffs moved to correct computational errors in the Arbitrator's
4 Award pursuant to AAA Commercial Rule R-50, which states:

5 Within 20 calendar days after the transmittal of an award, any party, upon
6 notice to the other parties, may request the arbitrator, through the AAA, to
7 correct any clerical, typographical, or computational errors in the award. The
8 arbitrator is not empowered to redetermine the merits of any claim already
9 decided. The other parties shall be given 10 calendar days to respond to the
10 request. The arbitrator shall dispose of the request within 20 calendar days
11 after transmittal by the AAA to the arbitrator of the request and any response
12 thereto.²

13 Bursor Decl. Ex. 2 (Class Counsel's Motion To Correct Computational Errors).

14 Class Counsel argued that Judge Infante had miscalculated the amount of compensable
15 litigation expenses because he had misunderstood the accounting of the litigation fund, which
16 caused miscalculations in the expenses awarded to the Bramson Plutzik firm, the Franklin firm, and
17 the Law Offices of Anthony A. Ferrigno. *Id.* at 2-8. Class Counsel also argued that the Arbitrator
18 had double-counted the 134.75 hours recorded by Franklin & Franklin for "dictating time records,"
19 because Class Counsel had already excluded those hours from the fee application, over Mr.
20 Franklin's objection. *Id.* at 8-9. Class Counsel asserted that these two computational errors denied
21 plaintiffs' counsel \$336,333.95 in expenses, and \$122,622.50 in fees, that should have been
22 awarded. *Id.* at 9.

23 On August 22, 2016, Judge Infante denied the motion. Bursor Decl. Ex. 3 (Order Re
24 Motion To Correct Computational Errors In Arbitrator's Award). Judge Infante ruled that the
25 denial of \$336,333.95 in expenses was attributable to the applicants' failure to properly document
26 the time and expenses in their initial submissions to the arbitrator. *Id.* at 3 (stating the expenses
27 were denied because they were "inadequately documented"). Judge Infante similarly found that

28 ² Though Judge Infante is affiliated with JAMS, the parties' agreement provides that the arbitration
would be governed by the rules of the American Arbitration Association ("AAA"). Settlement
Agreement, Addendum D ("The Fee And Expense Arbitration shall be conducted in accordance
with the American Arbitration Association's Commercial Arbitration Rules ...").

1 the double-counting of Mr. Franklin’s time for “dictating time records” was due to a lack of clarity
2 in the papers submitted. *Id.* at 5 (“Class Counsel’s general statement that ‘some’ of the ‘time
3 recorded’ for ‘the preparation of time records’ was deducted from Class Counsel’s lodestar is
4 insufficient ... to rebut Sprint’s specific objection to 134.75 hours in Mr. Franklin’s submission.”).

5 **II. STANDARD OF REVIEW**

6 The California Arbitration Act, CCP §§ 1285, *et seq.*, narrowly circumscribes judicial
7 review of an arbitration award. *Oaktree Capital Management, L.P. v. Bernard* (2010) 182
8 Cal.App.4th 60, 69. “[A]n award reached by an arbitrator pursuant to a contractual agreement to
9 arbitrate is not subject to judicial review except on the grounds set forth in Code of Civil Procedure
10 sections 1286.2 (to vacate)” *Oaktree Capital Management*, 182 Cal.App.4th at 69. Section
11 1286.2 provides that an arbitration award can be vacated only if the court determines:

- 12 (1) The award was procured by corruption, fraud or other undue
13 means.
- 14 (2) There was corruption in any of the arbitrators.
- 15 (3) The rights of the party were substantially prejudiced by
16 misconduct of a neutral arbitrator.
- 17 (4) The arbitrators exceeded their powers and the award cannot
18 be corrected without affecting the merits of the decision upon
the controversy submitted.
- 19 (5) The rights of the party were substantially prejudiced by the
20 refusal of the arbitrators to postpone the hearing upon
21 sufficient cause being shown therefor or by the refusal of the
22 arbitrators to hear evidence material to the controversy or by
other conduct of the arbitrators contrary to the provisions of
this title.
- 23 (6) An arbitrator making the award either: (A) failed to disclose
24 within the time required for disclosure a ground for
25 disqualification of which the arbitrator was then aware; or (B)
26 was subject to disqualification upon grounds specified in
Section 1281.91 but failed upon receipt of timely demand to
disqualify himself or herself as required by that provision.

27 Aside from those set forth in CCP § 1286.2, there are no other grounds for vacating an
28 arbitration award. The Federal Arbitration Act uses nearly verbatim the same language as CCP

1 § 1286.2 to describe the limited circumstances in which an arbitration award can be vacated –
2 corruption, fraud, misconduct or acts in excess of the arbitrator’s jurisdiction. 9 U.S.C. § 10.³

3 “As a consequence, arbitration awards are generally immune from judicial review.”

4 *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11, 10 Cal.Rptr.2d 183, 832 P.2d 899; *see also*
5 *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1342, 82 Cal.Rptr.3d 229, 190
6 P.3d 586.) “[A]n arbitrator’s decision is not generally reviewable for errors of fact or law, even if
7 the error appears on the face of the award and causes substantial injustice.” *Oaktree Capital*
8 *Management*, 182 Cal.App.4th at 69.

9
10 **III. ARGUMENT**

11 Class Counsel vigorously disagree with many aspects of the arbitrator’s rulings, which
12 unfairly cut billable time, hourly rates, and reimbursable expenses, resulting in significant under-
13 compensation for the work done and the result achieved in this case. But given the very limited
14 standard of review, there are no grounds for challenging the arbitrator’s rulings in this Court. Class
15 Counsel believe that Judge Infante made several errors. But he did not commit any form of
16 misconduct described in CCP § 1286.2. Thus there are no grounds for vacating the award, and it
17 should be confirmed pursuant to CCP § 1287.4 and 9 U.S.C. § 9.

18 **IV. CONCLUSION**

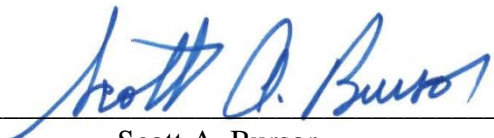
19 For the foregoing reasons, the Court should confirm the August 9, 2016 arbitration award
20 and enter judgment in conformity therewith pursuant to CCP § 1287.4 and 9 U.S.C. § 9.

21
22
23
24
25
26
27
28

³ See *supra* footnote 1.

1 DATED: November 8, 2016

BURSOR & FISHER, P.A.

2
3 By: 
4 Scott A. Bursor

5 Scott A. Bursor (State Bar No. 276006)
6 888 Seventh Avenue
7 New York, NY 10019
8 Telephone: (212) 989-9113

9 Plaintiffs' Lead Trial Counsel and Executive
10 Committee Member

11 BRAMSON, PLUTZIK, MAHLER &
12 BIRKHAUSER, LLP
13 Alan R. Plutzik (State Bar No. 077785)
14 Jennifer S. Rosenberg (State Bar No. 121023)
15 2125 Oak Grove Road, Suite 120
16 Walnut Creek, CA 94598
17 Telephone: (925) 945-0200

18 Liaison Counsel and Executive Committee Member

19 FRANKLIN & FRANKLIN
20 J. David Franklin (State Bar No. 41659)
21 550 W "C" St #950
22 San Diego, CA 92101-8569
23 Telephone: (619) 239-6300

24 Executive Committee Member

25 BURSOR & FISHER, P.A.
26 L. Timothy Fisher (State Bar No. 191626)
27 1990 North California Blvd., Suite 940
28 Walnut Creek, CA 94596
Telephone: 925-300-4455

PASTOR LAW OFFICE
David Pastor (*pro hac vice*)
63 Atlantic Avenue, Third Floor
Boston, MA 02110
Telephone: (617) 742-9700

LAW OFFICES OF ANTHONY A. FERRIGNO
Anthony A. Ferrigno (State Bar No. 61104)
1116 Ingleside Avenue

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Athens, TN 37303
Telephone: (423) 744-4041

REICH RADCLIFFE LLP
Marc G. Reich (State Bar No. 159936)
4675 MacArthur Court, Suite 550
Newport Beach, CA 92660
Telephone: (949) 975-0512

LAW OFFICES OF JAMES MICHAEL
ABERNETHY, PLLC
3838 N Central Ave Ste 1750
Phoenix, AZ 85012
Telephone: 602-234-3753

FARUQI & FARUQI, LLP
Nadeem Faruqi
685 Third Avenue, 26th Floor
New York, NY 10017
Telephone: (212) 983-9330

CARL HILLIARD
1246 Stratford Court
Del Mar, CA 92014
Telephone: (858) 509-2938

Attorneys for Plaintiffs