

1 Sanford Jay Rosen – 62566  
Holly M. Baldwin – 191317  
2 Kenneth M. Walczak – 247389  
3 ROSEN, BIEN & GALVAN, LLP  
315 Montgomery Street, 10th Floor  
4 San Francisco, California 94104  
5 Telephone: (415) 433-6830  
6 Facsimile: (415) 433-7104  
7 srosen@rbg-law.com  
hbaldwin@rbg-law.com  
8 kwalczak@rbg-law.com

9 Attorneys for Kay McKenzie Parker

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13  
14 EDWARD ALVARADO, et al.,

15 Plaintiffs,

16 v.

17 FEDEX CORPORATION, a Delaware  
18 corporation, dba FEDEX EXPRESS,

19 Defendant.

Case No. C 04-0098 SI

Case No. C 04-0099 SI (*White v. FedEx*)

20 EDWARD ALVARADO, CHARLOTTE  
21 BOSWELL,

22 Plaintiffs,

23 v.

24 WAUKEEN McCOY, KAY M. PARKER,  
25 MICHAEL DAVIS,

26 Defendants.

Case No. C 09-0485 SI

**KAY MCKENZIE PARKER’S REPLY IN  
SUPPORT OF MOTION FOR  
DECLARATORY RELIEF**

Hearing Date: July 31, 2009

Time: 9:00 a.m.

Courtroom: 10, 19th Floor

Judge: Hon. Susan Illston

TABLE OF CONTENTS

Page

1

2

3 INTRODUCTION..... 1

4 ARGUMENT ..... 3

5 I. THE COURT HAS THE POWER TO ISSUE THE REQUESTED

6 DECLARATION OR OTHER APPROPRIATE ORDER..... 3

7 A. Ms. Parker Has Satisfied the Requirements for Entry of an Order that

8 Her Statutory Fees for Work on Behalf of Alvarado and Boswell

9 Cannot Be Settled Without Her Consent. .... 3

10 B. The Issues Raised in Ms. Parker’s Motion Are Ripe..... 5

11 C. The Court Should Not Defer Issuing the Order that Ms. Parker Seeks. .... 7

12 D. The Court Need Not Parse the Contract Language Cited in the

13 Complaint..... 9

14 II. THE STATUTORY FEES BELONG TO MS. PARKER UNLESS, DUE TO

15 THE APPEALS OF THE ALVARADO AND BOSWELL JUDGMENTS, A

16 FINAL ORDER IS ENTERED THAT FEDEX HAS NO LIABILITY TO

17 ALVARADO AND BOSWELL ON THEIR CLAIMS. .... 10

18 III. THERE IS NO RISK THAT MS. PARKER WILL RECEIVE DOUBLE

19 RECOVERY OR AN UNCONSCIONABLE FEE. .... 11

20 A. If She Is Appropriately Compensated by Her Statutory Attorney’s

21 Fees, Ms. Parker Will Waive Any Share of Plaintiffs’ Damages or Will

22 Reimburse Any Plaintiff Who Prevailed on His or Her Claims Against

23 FedEx. .... 11

24 B. This Court Already Has Made it Clear that It Will Not Allow Improper

25 Double Recovery or an Unconscionable Fee..... 13

26 CONCLUSION ..... 15

27

28

## TABLE OF AUTHORITIES

**Cases****Page**

1		
2	<b><u>Cases</u></b>	<b><u>Page</u></b>
3	<i>Bankes v. Lucas,</i>	
4	9 Cal. App. 4th 365 (1992) .....	13
5	<i>Blanchard v. Bergeron,</i>	
6	489 U.S. 87 (1989).....	12
7	<i>Budinich v. Becton Dickinson &amp; Co.,</i>	
8	486 U.S. 196 (1988).....	13
9	<i>Cazares v. Saenz,</i>	
10	208 Cal.App.3d 279 (1989) .....	10
11	<i>Celotex Corp. v. Catrett,</i>	
12	477 U.S. 317 (1986).....	5
13	<i>Cooper v. Singer,</i>	
14	719 F.2d 1496 (10th Cir. 1983) .....	14
15	<i>Crowley Maritime Corp. v. Boston Old Colony Ins. Co.,</i>	
16	158 Cal.App.4th 1061 (2008).....	8
17	<i>Davis v. Yageo Corp.,</i>	
18	481 F.3d 661 (9th Cir. 2007) .....	7
19	<i>Dunn v. H.K. Porter Co.,</i>	
20	602 F.2d 1105 (3rd Cir. 1979).....	14
21	<i>EEOC v. Waffle House, Inc.,</i>	
22	534 U.S. 279 (2002).....	8
23	<i>Flannery v. Prentice,</i>	
24	26 Cal.4th 572 (2001) .....	passim
25	<i>Folsom v. Butte County Assn. of Governments,</i>	
26	32 Cal.3d 668 (1982) .....	11
27	<i>Horsford v. Bd. of Trustees of Cal. State Univ.,</i>	
28	132 Cal.App.4th 359 (2005) .....	12, 13
	<i>International Bhd. of Teamsters v. Eastern Conference of Teamsters,</i>	
	160 F.R.D. 452 (S.D.N.Y. 1995) .....	4, 5
	<i>Jackson v. United States,</i>	
	881 F.2d 707 (9th Cir. 1989) .....	14

1 *Jenkins v. Whittaker Corp.*,  
 2 785 F.2d 720 (9th Cir. 1986) ..... 7

3 *Kam-Ko Bio-Pharm Trading Co. Ltd-Australasia v. Mayne Pharma (USA)*  
 4 *Inc.*,  
 560 F.3d 935 (9th Cir. 2009) ..... 4, 5

5 *Ketchum v. Moses*,  
 6 24 Cal.4th 1122 (2001) ..... 13

7 *Lyons v. Chinese Hospital Ass’n*,  
 8 136 Cal.App.4th 1331 (2006) ..... 11

9 *Maryland Casualty Co. v. Pacific Coal & Oil Co.*,  
 312 U.S. 270 (1941)..... 2

10 *MedImmune, Inc. v. Genentech, Inc.*,  
 11 549 U.S. 118 (2007)..... 2

12 *Phillips v. State Farm Mut. Auto. Ins. Co.*,  
 13 437 F.2d 365 (5th Cir. 1971) ..... 13

14 *Schlesinger v. Teitelbaum*,  
 15 475 F.2d 137 (3rd Cir. 1973) ..... 14

16 *Venegas v. Mitchell*,  
 17 495 U.S. 82 (1990)..... 12

18 *Venegas v. Skaggs*,  
 867 F.2d 527 (9th Cir. 1989) ..... 14

19 *Weeks v. Baker & McKenzie, et al.*,  
 20 63 Cal. App. 4th 1128 (1998) ..... 13

21 **Rules**

22 California Rules of Professional Conduct, Rule 2-107 (1975) ..... 14

23 Fed. R. Civ. P. 56 ..... 5

24 Model Code of Professional Responsibility, Canon 13 (1980)..... 14

25 **Other Authorities**

26 *Schwarzer et al.*,  
 27 California Practice Guide, Civil Proc. Before Trial, §§ 14:208, 14:225 ..... 4

28

**INTRODUCTION**

Ms. Parker's property right to her statutory fees vested when the Court entered the judgments in favor of plaintiffs Alvarado and Boswell. The amount of her fees is the only remaining issue. As a party-intervenor in the underlying action, her rights to that property are fully protected unless a court of competent jurisdiction (either the Ninth Circuit, or this Court pursuant to reversal and remand by the Ninth Circuit) enters a final order of no liability on the Alvarado and Boswell claims.

Contrary to the oppositions to Ms. Parker's Motion for Declaratory Relief, this Court is fully empowered to order that her statutory attorney's fees under California's FEHA cannot be settled out from under her without her consent. By deciding her motion the Court would clarify for all parties how they can proceed with any post-judgment settlement. Delaying resolution of her motion, as the opposing parties propose, *see* FedEx Opp. at 3:15-4:2 (delay until exhaustion of all possible appeals); McCoy Opp. at 2:1-6 (advocating "some sort of dispute resolution" following settlement); Alvarado/Boswell Opp. at 6:26-7:4 (advocating full resolution of declaratory relief action first), likely would impede early settlement and cause expenditure of needless judicial resources.

The order requested is necessary and appropriate given the unusual posture of the cases before this Court and the Ninth Circuit. There is no risk that, by providing the relief requested, Ms. Parker will receive an unconscionable or duplicative fee through a statutory fee award and a share of the plaintiffs' damages. As she has made clear throughout these proceedings, Ms. Parker seeks no such result and views her *quantum meruit* claims as a failsafe protection of her right to compensation for her work, given the extraordinary nature of the fees proceedings. Moreover, the Court has demonstrated in the underlying actions and the related *Satchell* action that it will not permit any such result.

Whether characterized as declaratory relief or judgment, summary or partial summary judgment, or summary adjudication of an important legal issue, the Court should issue an order reaffirming Ms. Parker's vested property right to statutory attorney's fees. Such an order would resolve the issues raised in the Alvarado/Boswell declaratory relief action with respect to Ms. Parker and would guide FedEx, Alvarado, and Boswell as to any settlement pending the appeals from the

1 Alvarado and Boswell judgments.<sup>1</sup> The purpose of declaratory relief is to determine rights *before* there  
 2 is an actual injury. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) (case-or-controversy  
 3 requirement in declaratory relief actions is “whether the facts alleged, under all the circumstances,  
 4 show that there is a substantial controversy, between parties having adverse legal interests, of sufficient  
 5 immediacy and reality to warrant relief”), *quoting Maryland Casualty Co. v. Pacific Coal & Oil Co.*,  
 6 312 U.S. 270, 273 (1941).

7 All the oppositions misconstrue the purpose of Ms. Parker’s motion, the theory behind it, and  
 8 the law supporting her position. A syllogism may facilitate the process at this point.

- 9 • **Premise:** Alvarado and Boswell prevailed after separate jury trials, and the Court  
 10 entered judgments in their favor.
- 11 • **Premise:** On the basis of those judgments, FedEx must pay attorney’s fees under the  
 12 FEHA, unless this Court or an appellate court enters a final order that FedEx is not  
 13 liable to Alvarado and Boswell on their claims.
- 14 • **Premise:** Under California law, FedEx owes the statutory fees, absent an “enforceable  
 15 agreement to the contrary,” to the attorney who “labored to earn them.” *Flannery v.*  
 16 *Prentice*, 26 Cal.4th 572, 590 (2001).
- 17 • **Premise:** Ms. Parker represented Alvarado and Boswell and performed work as their  
 18 attorney to advance their claims against FedEx. She is the attorney who “labored to  
 19 earn” the fees, and as the Court determined, there is no “agreement to the contrary”  
 20 altering Ms. Parker’s right to statutory attorney’s fees for her work.
- 21 • **Conclusion 1:** It follows that the statutory attorney’s fees are Ms. Parker’s property.
- 22 • **Premise:** Under California and federal law, upon entry of a judgment the property right  
 23 to statutory fees vests in the holder even though the amount is yet to be determined.
- 24 • **Premise:** The Court correctly held that Ms. Parker had standing to pursue and protect  
 25

26 <sup>1</sup> Ms. Parker filed her motion in both the declaratory relief action, No. 09-0485 SI (*Alvarado v. McCoy*), and the  
 27 underlying action, No. 04-0098 SI (*Alvarado v. FedEx*)/04-0099 SI (*White v. FedEx*). This Reply responds to  
 28 Oppositions filed in both cases. All Docket Numbers refer to Case No. 04-0098 SI, except where otherwise  
 indicated.

1 her rights to statutory attorney's fees.

- 2 • **Conclusion 2:** Therefore, Ms. Parker's right to statutory attorney's fees is vested.
- 3 • **Premise:** Plaintiffs (or their attorneys) in FEHA cases prevail by settlement for
- 4 purposes of entitlement to statutory attorney's fees.
- 5 • **Premise:** The Court correctly granted Ms. Parker leave to intervene as a full party, to
- 6 protect her vested right to statutory attorney's fees.
- 7 • **Premise:** An intervenor has the same rights as all other parties to an action.
- 8 • **Premise:** Parties to an action are not bound by settlements absent their consent.
- 9 • **Conclusion 3:** No settlement can extinguish Ms. Parker's vested right to statutory attorney's
- 10 fees unless she consents to it.

## 11 ARGUMENT

### 12 I. THE COURT HAS THE POWER TO ISSUE THE REQUESTED DECLARATION OR

### 13 OTHER APPROPRIATE ORDER.

#### 14 A. Ms. Parker Has Satisfied the Requirements for Entry of an Order that Her

#### 15 Statutory Fees for Work on Behalf of Alvarado and Boswell Cannot Be Settled

#### Without Her Consent.

16 The Court has the power to issue the order Ms. Parker seeks. *See, e.g.*, Order Adopting Special

17 Master's April 7, 2008 Order Regarding Parker's Standing, filed 6/5/08 (Docket No. 1145) ("Order

18 Adopting SM Order") (Court's decision on standing, establishing Ms. Parker's entitlement to statutory

19 attorney's fees); Order Granting [*inter alia*] Defendant [FedEx]'s Motion for Declaratory Relief, filed

20 1/27/09 (Docket No. 1279) (granting declaratory relief as to seven settling plaintiffs). *See also*

21 Parker's Post-Hearing Brief, filed 5/1/09 (Docket No. 1407), at 12:17-13:15 (equity and judicial

22 economy weigh in favor of exercise of ancillary jurisdiction to resolve fees issues).

23 Like FedEx's earlier-filed motion for declaratory relief, Ms. Parker's motion seeks declaratory

24 or summary relief as to her entitlement to statutory fees in the event of a post-judgment settlement of

25 the Alvarado and Boswell claims. FedEx's motion involved the issue of entitlement after pre-

26 judgment settlements; Ms. Parker seeks a declaration on her rights in the event of a post-judgment

27 settlement to which she does not consent.

28

1 Alvarado and Boswell argue that this motion is properly a motion for summary judgment in  
2 Ms. Parker's favor. Alvarado/Boswell Opp. at 3:8-26. They also incorrectly contend that "the issues  
3 raised by Ms. Parker's motion are not appropriate for summary judgment[.]" Alvarado/Boswell Opp.  
4 at 3:24-25. But there are no genuine issues of material fact, and an appropriate order would resolve  
5 the claims against her in the Alvarado/Boswell declaratory relief action, Case No. 09-0485. Such an  
6 order also would assist all parties, by guiding any post-judgment settlement negotiations.

7 The three Oppositions reveal no genuine issues of material fact.

- 8 • The language of the contracts retaining Ms. Parker is undisputed.
- 9 • That the Court has ordered that Ms. Parker owns the statutory attorney's fees from  
10 FedEx for her work representing Alvarado and Boswell is undisputed.
- 11 • That Ms. Parker has a vested property interest in statutory fees, unless a court orders  
12 FedEx free of liability on the Alvarado and Boswell claims, is undisputed (despite  
13 FedEx's arguments that the fees have yet to be quantified).
- 14 • Ms. Parker's status as a full party-intervenor is undisputed.
- 15 • The possibility that Alvarado and Boswell may try to settle their claims with FedEx  
16 during the pending appeals is conceded.

17 The Oppositions dispute only Ms. Parker's application of the law to these undisputed facts,  
18 making this matter ripe for summary disposition. *See Schwarzer et al.*, CALIFORNIA PRACTICE GUIDE:  
19 CIVIL PROC. BEFORE TRIAL, §§ 14:208, 14:225 (summary judgment proper where dispute is of a type  
20 normally decided by the court and not a jury, such as a dispute over a "purely legal issue.") And as  
21 discussed below, the Oppositions do not dispute most of Ms. Parker's legal analysis.

22 The cases cited by Alvarado and Boswell do not establish that the order Ms. Parker seeks is  
23 improper. *See* Alvarado/Boswell Opp. at 3:10-4:12. Unlike the movant in *Kam-Ko Bio-Pharm*  
24 *Trading Co. Ltd-Australasia v. Mayne Pharma (USA) Inc.*, 560 F.3d 935 (9th Cir. 2009), Ms. Parker is  
25 not seeking an evidentiary hearing to establish her claims. Ms. Parker agrees that her entitlement to  
26 statutory fees in the event of a settlement may be resolved "without a trial, let alone an evidentiary  
27 hearing[.]" *Id.* at 943. Unlike the movant for declaratory judgment in *International Bhd. of Teamsters*  
28 *v. Eastern Conference of Teamsters*, 160 F.R.D. 452 (S.D.N.Y. 1995), Ms. Parker has complied with



1 the requirements of Fed. R. Civ. P. 56. She has “inform[ed] the district court of the basis for [her]  
2 motion [*see, e.g.*, Docket No. 1449, at 1:1-20], and identif[ied] those portions of the [the record], if  
3 any, which [she] believes demonstrate the absence of a genuine issue of material fact [*see* Docket No.  
4 1449, at 1:21-24].” *International Bhd. of Teamsters*, 160 F.R.D. at 456, *quoting Celotex Corp. v.*  
5 *Catrett*, 477 U.S. 317, 323 (1986); Fed. R. Civ. P. 56(c).

6 The *Teamsters* case actually validates Ms. Parker’s approach. As Alvarado and Boswell  
7 concede, Alvarado/Boswell Opp. at 3:23-24, in essence Ms. Parker has moved “for summary judgment  
8 on an action for declaratory judgment.” Indeed she has always described her declaratory relief motion  
9 as dispositive of the issues in the declaratory relief action. *See* Joint Case Management Statement,  
10 filed 5/15/09 (Case No. 09-0485, Docket No. 30) (“CMC Statement”) ¶ 4; Parker’s Answer to  
11 Amended Complaint (Case No. 09-0485, Docket No. 32), ¶ 13.

12 Ms. Parker need not satisfy the requirements of filing a separate action and identifying a basis  
13 for jurisdiction, as Alvarado and Boswell have already done so, by filing their declaratory relief action.  
14 *See Kam-Ko*, 560 F.3d at 943 (district court properly construed motion for declaratory judgment as a  
15 motion for summary judgment on previously-filed action for declaratory judgment). *And cf.* McCoy  
16 Opp. at 1, n.1 (Declaratory Judgment Act requires “independent jurisdictional basis” for declaratory  
17 relief) *with* Amended Complaint, Case No. 09-0485, ¶ 1 (asserting supplemental jurisdiction); CMC  
18 Statement, ¶ 1 (same).

19 **B. The Issues Raised in Ms. Parker’s Motion Are Ripe.**

20 Ms. Parker does not seek an “advisory opinion” on an “unripe” matter. *Cf.* McCoy Opp. at  
21 1:12-2:6. She seeks a declaration or an order that FedEx and Alvarado and Boswell cannot now  
22 extinguish her vested property interest to the statutory attorney’s fees to which she is entitled unless  
23 she consents by participating in a settlement, or unless as a result of the pending appeals this Court or  
24 an appellate court enters an enforceable final order that FedEx is not liable to Alvarado and Boswell on  
25 their claims.

26 Alvarado and Boswell agree that the issue of the parties’ entitlement in the event of a post-  
27 judgment settlement is ripe, and that a declaration should issue in order to allow settlement  
28 negotiations to proceed. *See* Amended Complaint, Case No. 09-0485, ¶¶ 13-14 (declaration necessary

1 to resolve potential “interpretations” of legal services agreements). The alternative is that there will be  
2 lengthy contested proceedings down the line like those that followed FedEx’s (thus-far successful)  
3 efforts to “freeze out” Ms. Parker from settlement negotiations and her statutory fees for work on  
4 behalf of seven settling plaintiffs. *See* Baldwin Decl. ISO Opp. to Renewed Motion for Decl. Relief,  
5 filed 6/24/08 (Docket No. 1168), and Exhibits (detailing concerted effort to exclude Ms. Parker from  
6 settlement negotiations). *See also* Order Re: April 23, 2009 Hearing, filed 4/17/09 (Docket No. 1383),  
7 at 1:25-2:1 (“these matters have been pending for a long time,” *i.e.*, since at least December 13, 2007,  
8 when FedEx filed settlement agreements under seal); Minute Order, filed 7/16/07 (Docket No. 897)  
9 (“The parties shall prepare a plan to resolve Ms. Parker’s fees issues prior to proceeding[.]”)

10 McCoy’s argument that Ms. Parker may not “seek reconsideration ... in this Court” of the order  
11 denying her standing to seek statutory fees for her work on behalf of the seven settling plaintiffs is both  
12 misplaced and ironic. McCoy Opp. at 3:8. It is misplaced because reconsideration of that order is not  
13 necessary for the Court to declare Ms. Parker’s rights that flow from the separate order that she owns  
14 the statutory fees for her work on behalf of Alvarado and Boswell. It is ironic because it was McCoy  
15 who first raised the issue of the enforceability of Ms. Parker’s retainer agreements, by arguing that Ms.  
16 Parker’s contracts with the settling plaintiffs were voidable or void *ab initio*. *Cf.* Transcript of 2/5/09  
17 CMC at 21:14-17 (“MR. MCCOY: ... First of all, it’s not conceded by the clients that Kay McKenzie  
18 Parker has a contract with the clients. She does not have a contract with the clients.”); Transcript of  
19 4/23/09 Hearing (filed as Docket No. 1442) at 66:15-68:6; Parker’s Post-Hearing Brief, filed 5/1/09  
20 (Docket No. 1407), at 3:1-5:24; McCoy Memo in Response, filed 5/15/09 (Docket No. 1421), at 2:16-  
21 3:8 & 6:19 *with* McCoy Opp. at 3:3-5 (the Court should not “revisit a ruling it made after affording the  
22 parties a full opportunity to present their positions”).

23 In any event, Ms. Parker had valid contracts with Alvarado and Boswell. *See* Parker’s Post-  
24 Hearing Brief, filed 5/1/09 (Docket No. 1407), at 2:1-6:25 (summarizing evidence that all contracts  
25 were valid and enforceable). And Alvarado and Boswell expressly admitted that they had fee  
26 agreements with Ms. Parker. *See* Amended Complaint, filed 2/20/09 (Case No. 09-0485 SI, Docket  
27 No. 5), ¶¶ 4-5. Again, this does not present a genuine issue of material fact.

1           Nonetheless, if the Court now were to reach a contrary decision (*e.g.*, that Ms. Parker’s  
2 agreements with Alvarado and Boswell were void *ab initio*), it would not constitute “reconsideration”  
3 of anything. The Court has not yet expressly reached the issue in any order. *See* Parker’s Motion for  
4 Declaratory Relief, filed 6/26/09 (Docket No. 1449), at 14:23-16:14.

5           Under such circumstances, a party to the appeal in the Ninth Circuit from the Court’s Order  
6 concerning the seven settling plaintiffs, *see* Ninth Circuit Case Nos. 09-15415 and 09-15417, could ask  
7 the Ninth Circuit to remand for the Court to reconsider its earlier Order related to the settling plaintiffs  
8 in the underlying action. *See Jenkins v. Whittaker Corp.*, 785 F.2d 720, 722, n.2 (9th Cir. 1986)  
9 (granting motion for limited remand after district court indicated willingness to consider and  
10 inclination to grant postjudgment motion for reconsideration). *See also Davis v. Yageo Corp.*, 481  
11 F.3d 661, 685 (9th Cir. 2007) (describing process for seeking limited remand).

12           **C.     The Court Should Not Defer Issuing the Order that Ms. Parker Seeks.**

13           Delaying resolution of Ms. Parker’s motion, as the opposing parties propose, *see* FedEx Opp. at  
14 3:15-4:2; McCoy Opp. at 2:1-6; Alvarado/Boswell Opp. at 6:26-7:4, likely would cause expenditure of  
15 needless judicial resources hereafter. Deciding Ms. Parker’s motion would clarify for all parties how  
16 they can proceed with any post-judgment settlement.

17           The questions posed by Alvarado and Boswell do not impede the immediate resolution of Ms.  
18 Parker’s motion. *See* Alvarado/Boswell Opp. at 7:12-21. In fact, there are simple and straightforward  
19 answers to these questions, none of which raise a genuine issue of material fact.

20           **Q:** How are plaintiffs and FedEx supposed to know whether a settlement might “diminish or  
21 otherwise affect” Parker’s right to statutory fees?

22           **A:** “*Diminish*” can be eliminated from the Order; “*Affect*” in this context means “*adversely*  
23 *affect.*” *See* Conclusion, *infra*, at 15.

24           **Q:** Are plaintiffs and FedEx required to have Parker “fully participate,” pursuant to a Court  
25 order that grants her de facto veto power, in any and all settlement negotiations?

26           **A:** *FedEx, Alvarado, and Boswell may settle any claim except Ms. Parker’s statutory attorney’s*  
27 *fees claim. To settle her statutory fees claim, they need to negotiate with her and have her*  
28 *sign on to any settlement provisions disposing of her fees claim.*

1           **Q:** If not, what are the consequences if plaintiffs and FedEx enter into a settlement that is  
2           subsequently determined to “affect” Parker’s statutory fees?

3           **A:** *Any settlement entered without Ms. Parker’s consent would not affect her statutory fees*  
4           *claim. If otherwise proper, the settlement would be fully enforceable between the plaintiffs*  
5           *and FedEx. “[A] contract cannot bind a nonparty.”* Crowley Maritime Corp. v. Boston  
6           Old Colony Ins. Co., 158 Cal.App.4th 1061, 1069 (2008), citing EEOC v. Waffle House,  
7           Inc., 534 U.S. 279, 294 (2002).

8           Similarly, the Court should disregard Alvarado and Boswell’s empty threat to relitigate prior  
9           proceedings. *See* Alvarado/Boswell Opp. at 5:18-22 (contending that plaintiffs “reserve the right to  
10          challenge [the Special Master’s findings] on the grounds that they were denied due process”).  
11          Plaintiffs have no such right; they cannot challenge the result of multiple proceedings in which they  
12          fully participated through their counsel of record.

13          McCoy’s proposal that the Court delay decision until the Ninth Circuit rules on the pending  
14          Alvarado and Boswell appeals follows a familiar pattern: whenever a party files a motion, McCoy  
15          suggests that the Court defer to actual or potential litigation in another forum. The California courts  
16          twice have rejected Mr. McCoy’s efforts, and deferred to this Court. *See, e.g.* Parker Decl. filed  
17          1/13/09 (Docket No. 1269), Exhs. C and D (two state court orders deferring to this Court, despite Mr.  
18          McCoy’s efforts to the contrary); 2/25/09 Order at 6:24-7:1 (“[A]rbitration of this one issue, isolated  
19          from the balance of this complex web of competing claims to the interpled funds, would be  
20          extraordinarily difficult. It would also risk further delay[.]”); Order [Denying Plaintiffs’ Motion to  
21          Extinguish Liens], filed 5/20/08 (Docket No. 1135).

22          FedEx complains that the issues presented by Ms. Parker’s motion arose because the Court  
23          erroneously “grant[ed] Parker (as a fired attorney) independent ‘standing’ to seek fees[.]” FedEx Opp.  
24          at 3:3-5. FedEx surely cannot now seek reconsideration of that Order. Moreover, *Flannery* does not  
25          require that the attorney who labored to earn the fees must try the case. *See* SM Order, at 15:2-16:16  
26          (rejecting McCoy and FedEx position that only attorneys of record at trial are “prevailing parties”).

27          FedEx’s attempt to re-characterize the Court’s order granting Ms. Parker standing, by calling it  
28          non-“collateral” is yet another invitation to delay. FedEx Opp. at 2, n.2. The finality of this Court’s

1 orders does not depend on FedEx's alleged "rights to challenge [the] Order" in any forum in  
2 perpetuity. Similarly, FedEx's argument that the Court should stay its hand pending the outcome of  
3 the Ninth Circuit appeals from any order this Court will make hereafter concerning the amount of Ms.  
4 Parker's statutory fees evokes the Yiddish word *chutzpah*. FedEx has successfully delayed Ms.  
5 Parker's statutory fees proceedings in this court (we suggest) beyond all reason, in an effort to push its  
6 financial advantage over Ms. Parker and avoid *ad infinitum* payment of the statutory fees to which she  
7 is entitled. *See* Chronology, attached hereto as Appendix A. *See also* 12/14/07 Tr. at 24:17-18 ("THE  
8 COURT: I will tell you, I haven't seen a case like this very often.").

9 FedEx also misrepresents that an issue is pending regarding Ms. Parker's "fee splitting  
10 agreements with Boswell and Alvarado." FedEx Opp. at 2:20-21. Such an agreement likely would be  
11 illegal. *See Flannery*, 26 Cal.4th at 587. Ms. Parker has no agreement to split attorney's fees with  
12 any plaintiff.

13 Finally, Ms. Parker's ownership of the statutory fees claim no more "negatively affect[s] the  
14 parties' ability to settle their disputes on appeal," FedEx Opp. at 3:8-9, than would be the case of  
15 settlement of any multiparty case that is pending on appeal. In such cases, parties can reach  
16 settlements that bind only some of the parties; or they can settle with all parties who have interests in  
17 the claims. Surely FedEx is capable of choosing which avenue to pursue, evaluating and factoring in  
18 Ms. Parker's statutory fees if it chooses a separate settlement with Alvarado and/or Boswell. Likewise,  
19 Alvarado and Boswell, represented by competent counsel, can evaluate their potential exposure to Ms.  
20 Parker's *quantum meruit* claim, given her comprehensive briefing on the subject, her consistent  
21 commitment not to take double recovery (*see* Section III-A, *infra*, at 11-13), and the Court's  
22 jurisdiction and power to ensure that Ms. Parker does not receive an unconscionable fee (*see* Section  
23 III-B, *infra*, at 13-15).

24 **D. The Court Need Not Parse the Contract Language Cited in the Complaint.**

25 Alvarado and Boswell focus unduly on the specific language of the contracts retaining Ms.  
26 Parker, to express their fears about unconscionable or double recovery of both a contingent fee and a  
27 statutory fee. *See* Alvarado/Boswell Opp. at 6:4-20. These are red herrings. As a discharged attorney,  
28 Ms. Parker does not claim contingent fees out of the damages under the contracts that Alvarado and

1 Boswell renounced. She claims fees out of damages awards only in *quantum meruit*. The language of  
 2 the contracts does not control such an award, except by limiting the total fees to be taken from  
 3 damages. *See, e.g., Cazares v. Saenz*, 208 Cal.App.3d 279, 289 (1989) (*quantum meruit* award may be  
 4 unconscionable if it exceeds contingency). Ms. Parker seeks no double or unconscionable recovery of  
 5 fees, which are wholly within the court's control. *See* Section III, *infra*, at 11-15.

6 **II. THE STATUTORY FEES BELONG TO MS. PARKER UNLESS, DUE TO THE**  
 7 **APPEALS OF THE ALVARADO AND BOSWELL JUDGMENTS, A FINAL ORDER**  
 8 **IS ENTERED THAT FEDEX HAS NO LIABILITY TO ALVARADO AND BOSWELL**  
 9 **ON THEIR CLAIMS.**

10 The essence of Ms. Parker's Declaratory Relief motion is encapsulated in the syllogism, *supra*,  
 at 2-3, and as annotated below:

- 11 • The entry of the Alvarado and Boswell final judgments established a right to statutory  
 12 attorney's fees under the FEHA. *See* Motion for Declaratory Relief, filed 6/26/09  
 13 (Docket No. 1449) ("Decl. Relief Mot."), at 7:19-8:16.
- 14 • As the Court decided under the contracts between Ms. Parker and the two judgment  
 15 plaintiffs, Ms. Parker owns that right. *Id.* at 10:18-14:2.
- 16 • As the Court determined, the contracts retaining Ms. Parker were silent on the subject of  
 17 statutory fees. *Id.* at 14:2-14:22.
- 18 • If those contracts are unenforceable for any reason, Ms. Parker still owns those statutory  
 19 attorney's fees. *Id.* at 14:23-16:5.
- 20 • Under California property law, Ms. Parker's entitlement to statutory fees became a  
 21 choate, or vested, property right when the judgments were entered and/or when the  
 22 Court ordered her intervention. *Id.* at 7:26-8:16.
- 23 • Federal interest-running and bankruptcy law recognize that Ms. Parker's property right  
 24 is choate or vested. *Id.* at 9:3-20.
- 25 • Ms. Parker's vested rights to statutory attorney's fees may not be extinguished, except  
 26 by a final order that FedEx is liable to no one as to Alvarado and Boswell's claims, *see*,  
 27 *e.g., FedEx Opp.* at 1:23-24 ("As plaintiff Evans is no longer a 'prevailing party' under  
 28 California Government Code section 12965, the special master denies Parker's fee

petition in *Evans.*”), quoting SM Order, Docket No. 1062, at 3:6-11.

- The Court’s Order that Ms. Parker may intervene under Fed.R.Civ.P. 24 gives Ms. Parker all of the rights enjoyed by any party to protect her property that is at stake in the litigation. Decl. Relief Mot. at 8:17-9:2.
- Because Ms. Parker has such rights, no other party may compromise or extinguish her choate and vested rights to statutory attorney’s fees without her consent. *Id.* at 10:6-17; *Phillips v. State Farm Mut. Auto. Ins. Co.*, 437 F.2d 365, 369 (5th Cir. 1971) (“A collusive judgment is open to attack whenever and wherever it may come in conflict with the rights or the interest of third persons. Fraud is not a thing that can stand, even when robed in judgment.”).
- Any settlement nevertheless would render Ms. Parker a prevailing party entitled to statutory fees under California and federal law. Decl. Relief Mot. at 15:20-22, citing *Lyons v. Chinese Hospital Ass’n*, 136 Cal.App.4th 1331, 1345 (2006) (“It is undisputed that relief obtained through a settlement may qualify a plaintiff as the prevailing party[.]”); *Folsom v. Butte County Assn. of Governments*, 32 Cal.3d 668, 685 (1982) (statutory fees properly awarded unless expressly or by necessary implication excluded by a stipulating party).

### III. THERE IS NO RISK THAT MS. PARKER WILL RECEIVE DOUBLE RECOVERY OR AN UNCONSCIONABLE FEE.

#### A. If She Is Appropriately Compensated by Her Statutory Attorney’s Fees, Ms. Parker Will Waive Any Share of Plaintiffs’ Damages or Will Reimburse Any Plaintiff Who Prevailed on His or Her Claims Against FedEx.

Alvarado and Boswell say they are concerned that Ms. Parker not receive double recovery by way of statutory fees and a share of their damages. They place emphasis on the parenthetical in the *Flannery* holding that “attorney fees awarded pursuant to section 12965 (**exceeding fees already paid**) belong, absent an enforceable agreement to the contrary, to the attorneys who labored to earn them.” Alvarado/Boswell Opp. at 5:2-4 (emphasis in Opposition brief).

First, Alvarado and Boswell admit they do not know if the *Flannery* parenthetical phrase “(exceeding fees already paid)” includes contingent fees from damages awards. *See id.* at 5:4-6. They

1 suggest that the *Flannery* court might have intended the past tense “already paid” to include the future  
2 tense, and that any potential contingent fee award to Ms. Parker would reduce her entitlement to  
3 statutory fees. Alvarado/Boswell Opp. at 5:11-13 (suggesting addition to the *Flannery* parenthetical of  
4 the following language: “or will be pursuant to a fee agreement, contingent or otherwise”).

5 Nothing in the case law suggests such a bizarre interpretation or result. It has been made  
6 abundantly clear, for example, that a civil rights defendant cannot rely on a plaintiff’s percentage-of-  
7 recovery contingent fee agreement to limit the statutory fee to the amount of the contingent fee, or  
8 even by reference to it. *See Venegas v. Mitchell*, 495 U.S. 82, 90 (1990) (federal law permits  
9 percentage contingent fee contracts with civil rights plaintiffs, even though fee under the contract  
10 exceeds statutory fee award); *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) (attorney’s contingency  
11 fee agreement does not influence the amount of fees the court may award).

12 All the California Supreme Court did in *Flannery* was to clarify that the client might retain a  
13 right to reimbursement out of the statutory fee, for services for which the client already paid, by fee-  
14 for-service or contingent fee payment. *See Horsford v. Bd. of Trustees of Cal. State Univ.*, 132  
15 Cal.App.4th 359, 401 (2005) (“If the contingency fee is *larger* than the statutory fee award, counsel is  
16 permitted to accept that fee, with a setoff for statutory fees received. If the contingency fee is smaller  
17 than the statutory fee, counsel must reimburse the plaintiff from the statutory award for any amounts  
18 already paid by the client pursuant to the contingency contract.”) (emphasis in original).

19 Second, neither Alvarado nor Boswell has paid any fees to Ms. Parker. Declaration of Kay  
20 McKenzie Parker, filed herewith (“Parker Reply Decl.”), ¶ 2. Ms. Parker’s fee in the *Satchell* case  
21 involved no payment on account of these cases. *See Parker Decl. ISO Amended and Supp. Fee*  
22 *Petition*, filed 9/19/08 (Docket No, 1218), ¶ 4. Thus, awarding her “100% of any statutory fee award  
23 [for her work],” Alvarado/Boswell Opp. at 6:22, will not trigger any of the unconscionable result  
24 imagined by Alvarado and Boswell. *Id.* at 6:2-3. Given this Court’s vigilance (and Ms. Parker’s  
25 representations), Ms. Parker will not be getting double or unconscionable recovery.

26 And Ms. Parker has made it clear throughout these proceedings that she seeks an appropriate  
27 fully compensatory statutory attorney’s fee, in keeping with the purposes of the California FEHA.  
28 “Fee awards should be fully compensatory. ... Absent circumstances rendering the award unjust, an



1 attorney fee award should ordinarily include compensation for all the hours reasonably spent in  
2 litigating the action to a successful conclusion.” *Horsford*, 132 Cal.App.4th at 394, quoting *Ketchum*  
3 *v. Moses*, 24 Cal.4th 1122, 1133 (2001). “[T]he attorney who takes [a FEHA] case can anticipate  
4 receiving full compensation for every hour spent litigating a claim against even the most polemical  
5 opponent.” *Weeks v. Baker & McKenzie, et al.*, 63 Cal. App. 4th 1128, 1175-76 (1998).

6 The issue before the Special Master is the amount of Ms. Parker’s statutory fees. If Ms. Parker  
7 receives full compensation, she has no intention to seek or to retain any portion of plaintiffs’ damages.  
8 See Parker Reply Decl., ¶¶ 3-6. See also Brief ISO Parker’s *Quantum Meruit* Claim, filed 3/13/09  
9 (Docket No. 1346) at 13, n.4; Parker Decl. ISO *Quantum Meruit* Claim, filed 3/13/09 (Docket No.  
10 1347), ¶ 11; Parker’s Brief Re: April 23, 2009 Hearing, filed 5/1/09 (Docket No. 1407), at 18:16-21;  
11 Decl. Relief Motion at 16:11-14.

12 **B. This Court Already Has Made it Clear that It Will Not Allow Improper Double**  
13 **Recovery or an Unconscionable Fee.**

14 This Court has continuing jurisdiction over fees issues in the underlying action. See *Budinich*  
15 *v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) (court retains jurisdiction to resolve fees issues after  
16 judgment on the merits); *Bankes v. Lucas*, 9 Cal. App. 4th 365, 368 (1992) (filing of a notice of appeal  
17 from final judgment on the merits does not affect trial court’s ancillary jurisdiction over a later-filed  
18 fee application).

19 In the *Satchell* action, this Court already has made it clear that it will vigilantly guard against  
20 any unconscionable recovery of any attorneys. See, e.g., Order Granting Motion for Plaintiffs’  
21 Counsel’s Reasonable Attorneys’ Fees Regarding Motion for Declaratory Relief, filed 12/29/08  
22 (*Satchell v. FedEx*, Case No. 03-2659, Docket No. 890) (awarding fees for preparation of declaratory  
23 relief motion occasioned by McCoy’s efforts to seek money from class settlement, in excess of  
24 statutory fee he already received); Ninth Circuit Case No. 08-15904 (McCoy’s appeal of same). It also  
25 has demonstrated its intention that fees not be collected by any attorney if extraordinary circumstances  
26 are proven. See Order Adopting and Modifying Special Master’s Recommendation and Order on  
27 Defendant’s and Plaintiff’s Motion for Sanctions, filed 3/19/09 (Docket No. 1353), at 23:3-4 (striking  
28 Mr. McCoy’s fee petitions with prejudice, because “the Court cannot rely with any confidence on Mr.

1 McCoy's papers, declarations or arguments in support of his fee petitions.”).

2       The Court has inherent authority to ensure that attorney's fees are properly awarded and to  
3 prevent unconscionable results. “All courts possess an inherent power to prevent unprofessional  
4 conduct by those attorneys who are practicing before them. This authority extends to *any*  
5 unprofessional conduct, including conduct that involves the exaction of illegal fees.” *Jackson v.*  
6 *United States*, 881 F.2d 707, 710 (9th Cir. 1989) (emphasis in original), *citing Venegas v. Skaggs*, 867  
7 F.2d 527, 532 n. 6 (9th Cir. 1989) (rejecting argument that the district court was without authority to  
8 review the reasonableness of a contingent fee agreement that provided compensation exceeding § 1988  
9 statutory award); *Cooper v. Singer*, 719 F.2d 1496, 1505 (10th Cir. 1983) (*en banc*) (“[f]ees are central  
10 to [the attorney-client] relationship,” over which courts retain supervisory power, “and contingent fee  
11 arrangements are therefore subject to the court's supervision”); *Dunn v. H.K. Porter Co.*, 602 F.2d  
12 1105, 1108 (3rd Cir. 1979) (“courts have power to monitor [contingency fee agreements] either  
13 through rule-making or on an *ad hoc* basis”); *Schlesinger v. Teitelbaum*, 475 F.2d 137, 141 (3rd Cir.  
14 1973) (“[i]n its supervisory power over the members of its bar, a court has jurisdiction of certain  
15 activities of such members, including the charges of contingent fees”), *cert. denied*, 414 U.S. 1111, 94  
16 S.Ct. 840 (1973); Cal. Rules of Prof. Conduct, Rule 2-107 (1975) (forbidding attorneys from entering  
17 “into an agreement for, charge or collect an illegal or unconscionable fee”); Model Code of Prof.  
18 Responsibility, Canon 13 (1980) (“A contract for a contingent fee ... should always be subject to the  
19 supervision of a court, as to its reasonableness.”).

20       Unlike McCoy, Ms. Parker will abide by the Court's future orders, and not try to recover an  
21 unconscionable fee. *See* Parker Reply Decl., ¶¶ 6-7; Parker Decl. ISO *Quantum Meruit* Claim  
22 (*Alvarado v. FedEx* Docket 1347, filed 3/13/09), ¶ 11. By contrast, *see* 12/14/07 Tr. at 22:13-23:6  
23 (McCoy assurances that he will not seek “a penny” from settlement funds, pursuant to his waiver of  
24 costs from plaintiffs); Plaintiffs' Exh. A, filed 4/23/09 (Docket No. 1401), at 16-17 (letters from  
25 McCoy evincing contrary intent to “request to the Court ... that the Court would relieve me of my  
26 waiver” of fees and costs); 4/23/09 Tr. at 8:4-10:16, 13:22-17:9, 17:13-19:12 (testimony that McCoy  
27 received cash payments from individual clients). If Ms. Parker were to receive and collect a *quantum*  
28 *meruit* fee award before she received and collected a statutory fee award, she fully expects that the

1 Court would enter an appropriate order, with which she would comply, allocating an appropriate  
2 portion of the statutory fee award for direct payment to the appropriate plaintiff or plaintiffs.

3 **CONCLUSION**

4 There are no issues of material fact to resolve. The purely legal issues presented by Ms. Parker  
5 are ripe for summary disposition. The Court should enter an Order that:

6 “Ms. Parker has a vested property right to statutory attorney’s fees and costs from FedEx  
7 Corporation under the FEHA, California Gov’t. Code sec. 12965(b), for and/or related to her work on  
8 behalf of plaintiffs Alvarado and Boswell, unless (due to the pending appeals for the Alvarado and  
9 Boswell judgments) an appellate court or this Court enters a final and non-appealable order that FedEx  
10 is liable to no one for the claims of Alvarado and Boswell in these cases. No party may extinguish or  
11 compromise Ms. Parker’s vested right to statutory attorney’s fees, by settlement, unless Ms. Parker  
12 fully participates in negotiations pertaining to her statutory attorney’s fees, and consents to any  
13 settlement.”

14 Dated: July 17, 2009

Respectfully submitted,

ROSEN, BIEN & GALVAN, LLP

17 By: s/ Sanford Jay Rosen  
Sanford Jay Rosen  
Attorneys for Kay McKenzie Parker