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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 EDWARD ALVARADO, et al.,
17 Plaintiffs,
18 v.
19 FEDEX CORPORATION, a Delaware
20 corporation, dba FEDEX EXPRESS,
21 Defendant.

22 Case No. C 04-0098 SI
23 Case No. C 04-0099 SI (White v. FedEx)

24 **KAY MCKENZIE PARKER'S**
25 **OPPOSITION TO DEFENDANT'S**
26 **MOTION FOR DECLARATORY**
27 **RELIEF**

28 Date: February 1, 2008
Time: 9:00 a.m.
Courtroom: 10, 19th Floor
Judge: Hon. Susan Illston

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INTRODUCTION

1
2 Kay McKenzie Parker, former co-counsel for Plaintiffs and a current and potential
3 movant for attorney's fees in this action, hereby opposes the Motion for Declaratory Relief
4 filed by Federal Express Corporation ("FedEx" or "Defendant") on December 12, 2007
5 (Docket No. 976) ("Def's Mot."), and requests declaratory relief in her favor. FedEx's motion
6 involves its request to interplead a bond to satisfy settlements between it and plaintiffs Tanda
7 Brown, Kevin Neely, Bertha Duenas, Dyronn Theodore, Janice Lewis, Lasonia Walker, and
8 Alex Rivera (collectively, "Settlement Plaintiffs"). In seeking declaratory relief, FedEx asks
9 the Court to endorse its flawed reading of both contract and attorney's fees law, under which it
10 contends that Ms. Parker may be bound (and her right to recovery limited) by agreements to
11 which she was not a party or in privity, and of which she had no knowledge prior to their filing
12 in this Court.

13 FedEx's positions are unsupported by law, public policy, or the record of this case. The
14 Court should therefore hold that Ms. Parker is not bound by the agreements between FedEx
15 and the Settlement Plaintiffs and their trial counsel, Waukeen McCoy. The Court also should
16 hold that Ms. Parker has standing to seek the attorney's fees and costs she labored to earn on
17 behalf of the Settlement Plaintiffs directly from FedEx under the FEHA, or it should refer the
18 issue to the Special Master for resolution in the first instance in conjunction with his pending
19 rulings.

20 Because Ms. Parker's right to seek attorney's fees and costs from FedEx does not
21 implicate the *res* proffered in interpleader, the Court can permit the interpleader action sought
22 by FedEx to proceed, without impeding Ms. Parker's ability to proceed with her independent
23 claims for attorney's fees that would be filed after the entry of judgment. Public policy does
24 not support hindering Ms. Parker's legitimate claims under the guise of expediting distribution
25 to the Settlement Plaintiffs, or extinguishing her claims under Agreements to which she was
26 not a party.

27 All the issues raised by FedEx, except for the issues concerning the impact of the
28 settlement agreements, are presently before the Special Master, in proceedings concerning Ms.

1 Parker's fee applications for work done for judgment plaintiffs Alvarado, Evans, and Boswell.
2 These issues include Ms. Parker's standing to seek statutory attorney's fees and costs directly
3 from FedEx under the FEHA. Moreover, this Court's Order of December 19, 2007 directs that
4 discovery be taken concerning certain facts pertaining to that issue. *See* Order Denying
5 Plaintiffs' Motion for Disqualification; Granting Defendant's Motion for Discovery, filed
6 12/19/07 (Docket No. 988), at 5:10-6:10. Ms. Parker therefore submits that the Court should
7 refer the same issues as they pertain to the Settlement Plaintiffs to the Special Master. If not,
8 the Court should hold that Ms. Parker has standing.

9 PROCEDURAL BACKGROUND

10 Ms. Parker has repeatedly documented the facts regarding her work as counsel for both
11 the settling and judgment plaintiffs, before they were severed from the related *Satchell* class
12 action as well as in this action, and briefed her entitlement to recover reasonable attorney's fees
13 and costs for her work in prosecuting the plaintiffs' individual claims. *See, e.g.*, Motion to
14 Intervene to Resolve Attorney's Fees and Expenses, filed 10/10/06 (Docket No. 572), at 1:16 -
15 4:10; Reply In Support Of Motion to Set Aside Special Master's Ruling Denying Parker's
16 Motions for Attorney's Fees as to Plaintiffs Edward Alvarado and Pernell Evans, filed 9/4/07
17 (Docket No. 924), at 1:2-18; Letter Brief In Support of Ms. Parker's Standing to Seek
18 Attorney's Fees, filed 8/15/07 (Docket No. 914) ("Letter Brief"); Letter Brief Reply ISO Ms.
19 Parker's Standing to Seek Fees, filed 8/27/07 (Docket No. 921) ("Letter Brief Reply").

20 The Court appointed Edward Swanson as a Special Master "to supervise and preside
21 over all remaining discovery in this case." Order of 10/13/05 (Docket No. 292), at 3:19-20.
22 The Special Master also presides over all issues "related to the attorneys' fees matter ... in the
23 first instance." Order Referring Attorneys' Fees Motions to Special Master, filed 5/1/07
24 (Docket No. 811), at 1:14-15. *See also* Order Re: Referral of Attorneys' Fees Motions and All
25 Related Matters to Special Master, filed 6/7/07 (Docket No. 849).

26 The parties are currently awaiting a ruling from the Special Master on the issue of Ms.
27 Parker's standing to seek attorney's fees and costs for the work she performed on behalf of
28 judgment plaintiffs Alvarado, Evans, and Boswell. *See* Special Master's Order Regarding

1 Briefing Schedule, filed 9/13/07 (Docket No. 928), at 2:4-6 (Special Master “will issue a single
2 order that will address ... [Parker’s] standing to seek fees in *Alvarado, Evans, and Boswell*”).
3 This ruling presumably will follow the discovery the Court has permitted into certain facts.
4 *See* Order, Docket No. 988, *supra*.

5 FedEx has apparently reached settlements with the seven Settlement Plaintiffs for a total
6 (gross, pre-tax) amount of \$1,499,000. *See* Motion for Counterclaim and Interpleader Relief,
7 filed November 15, 2007 (Docket No. 955) (“Interpleader Motion”) at 1:23-24. No entry of
8 judgment has yet issued concerning these plaintiffs’ cases. Ms. Parker has filed no fees
9 applications under FEHA pertaining to those cases. She intends to file such applications at the
10 appropriate time hereafter.

11 In its Interpleader Motion, FedEx requests that the Court accept its bond in the amount
12 of \$1,499,000; “determin[e] ... to whom the funds belong; [r]estrain[] [Ms. Parker] from
13 instituting any action against FedEx for the recovery of said interplead funds; [and] dismiss[]
14 all claims of Settlement Plaintiffs against FedEx with prejudice and with each party bearing its
15 own costs, including attorney’s fees.” *Id.* at 10:3-10. On November 26, 2007, Ms. Parker filed
16 her Conditional Agreement to the Interpleader Motion, in which she stated:

17 Ms. Parker does not oppose interpleader of the \$1,499,000 settlement amount,
18 provided that (1) there must be full disclosure of all agreements between FedEx,
19 the Settlement Plaintiffs and counsel, including formal discovery if necessary, in
20 order for the Court to determine the entitlement of the claimants including Ms.
Parker; and (2) the dismissal of Settlement Plaintiffs’ claims against FedEx will
not extinguish Ms. Parker’s right to seek the fees to which she is entitled.

21 Docket No. 958, at 6:3-8.

22 FedEx responded on November 29, 2007 by filing (without leave of Court) a document
23 styled “Objections” to Ms. Parker’s Conditional Agreement (Docket No. 964). FedEx
24 “objected” on the grounds that, as discharged counsel for the Settlement Plaintiffs, Ms. Parker
25 both lacks standing to pursue her statutory fee claims and is bound by the agreements signed
26 by said Plaintiffs. On November 30, 2007, Ms. Parker requested leave to file and proffered a
27 response to these “Objections” (Docket No. 965).

1 Although the Court has not yet ruled on any of these issues, FedEx submitted the instant
2 Motion for Declaratory Relief on December 12, 2007 (Docket No. 976). FedEx's
3 Memorandum of Points and Authorities in support of said motion restates the bulk of FedEx's
4 earlier, erroneous arguments.

5 ARGUMENT

6 I. MS. PARKER IS NOT BOUND BY SETTLEMENT AGREEMENTS TO 7 WHICH SHE WAS NOT A PARTY OR PRIVY.

8 As in its "Objections" to Ms. Parker's Conditional Agreement to Interpleader Relief,
9 FedEx cannot decide how to characterize Ms. Parker in its Motion for Declaratory Relief. In
10 several instances, FedEx argues that, as discharged counsel, Ms. Parker must sue her former
11 clients directly in order to receive any compensation for services performed. Def's Mot. at
12 9:5-10, 10:13-12:12. This characterization of Ms. Parker as an attorney discharged by, and
13 even adverse to, the Settlement Plaintiffs does not prevent FedEx from simultaneously arguing
14 that Ms. Parker's rights are limited by the settlement agreements these same individuals
15 signed.

16 FedEx is wrong as a matter of basic contract and agency law. "It goes without saying
17 that a contract cannot bind a nonparty." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294
18 (2002) (government agency not required to relinquish statutory authority on basis of arbitration
19 agreement it did not sign). *See also Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103 (2nd Cir.
20 1985) (contract cannot bind a person not party to it); 13 Williston on Contracts, § 37:1 (4th
21 ed.).

22 Strangers to a contract may acquire some rights pursuant to that contract if they are
23 intended and immediate third-party beneficiaries under its terms. *See Polo Ralph Lauren, L.P.*
24 *v. Tropical Shipping & Const. Co., Ltd.*, 215 F.3d 1217, 1222 (11th Cir. 2000) ("Contracts
25 bind only named parties unless both parties to the contract clearly express an intent to benefit a
26 third party."); 13 Williston on Contracts, § 37:1, *supra*. A third party's rights to enforce a
27 contract are predicated on the contracting parties' intent to benefit it. 13 Williston on
28 Contracts, § 37:1, *supra*; Cal. Civ. Code § 1559 (contract made expressly for benefit of third

1 person may be enforced by him); *Hess v. Ford Motor Co.*, 27 Cal.4th 516, 524 (2002); *Souza*
2 *v. Westlands Water Dist.*, 135 Cal.App.4th 879, 891-894 (2006).

3 But the makers of a contract cannot use their contract to impose their will on unaware
4 third parties. *Abraham Zion Corp.*, 761 F.2d at 103 (third-party beneficiary argument not
5 available where “question is not [third party]’s right to enforce the agreement but rather the
6 right of the plaintiffs to enforce the agreement (as they construe it) *against* [him]”) (emphasis
7 in original).

8 FedEx and the Settlement Plaintiffs have sought to impose no “benefit” on Ms. Parker.
9 To the contrary, FedEx seeks to impose an obligation – *i.e.*, to extinguish her ability to recover
10 fees and costs from FedEx. And far from intending that Ms. Parker’s fees be paid by the
11 interpleaded funds, both Plaintiffs and FedEx have contested Ms. Parker’s standing to recover
12 fees at all. *See, e.g.*, Docket Nos. 734, 864, 875, 907, 917 (FedEx’s oppositions) and Docket
13 Nos. 580, 771, 780, 918, 931 (Plaintiffs’ oppositions). Ms. Parker has received no benefit as a
14 result of the Settlement Agreements, and has never expressed her assent to them. She is
15 therefore free to reject any associated burden. Restatement (Second) of Contracts, § 306 (one
16 who “has not previously assented” to a promise “may in a reasonable time after learning of its
17 existence and terms render any duty to himself inoperative from the beginning by disclaimer”).

18 The plain language of the Settlement Agreements filed under seal by FedEx establishes
19 that they were not intended to limit Ms. Parker’s claims. In them, the signing parties directly
20 acknowledge the existence of Ms. Parker’s claim to attorney’s fees and costs. This language
21 recognizes what contract law requires: that following her dismissal as counsel of record, Ms.
22 Parker was not in privity with the Settlement Plaintiffs, and both they and FedEx lack the
23 ability to negotiate away her right to seek reasonable compensation.

24 Because the Settlement Agreements cannot bind Ms. Parker, the Court should hold that
25 the Settlement Agreements do not affect Ms. Parker’s right to present a claim for the attorney’s
26 fees and costs she incurred in representing the Settlement Plaintiffs.

1 **II. INTERPLEADER DOES NOT REQUIRE MS. PARKER TO**
2 **RELINQUISH HER RIGHT TO STATUTORY OR QUANTUM MERUIT**
3 **FEE RECOVERY.**

4 FedEx is correct that interpleader may be appropriate in order to “resolve in one
5 proceeding all claims to a *res*.” *In Re Republic of Philippines*, 309 F.3d 1143, 1153 (9th Cir.
6 2002). The *res* in question here is the sum of \$1,499,000 allegedly payable by FedEx to the
7 Settlement Plaintiffs. FedEx may have carried its burden to establish that entitlement to this
8 *res* is contested between plaintiffs, their counsel, and lienholders including Ms. Parker. FedEx
9 has not established that Ms. Parker’s claims against FedEx are limited by law to her share of
10 this \$1,499,000 fund.

11 Such a finding is neither necessary nor warranted. As Ms. Parker previously noted:
12 “Interpleader being a remedy solely for the protection of the stakeholder, it may not be used by
13 the stakeholder as a weapon to defeat recovery from funds other than the one before the court.”
14 *American Ins. Co. v. Bank of Bellevue*, 366 F.2d 289, 294 (8th Cir. 1966). *See also*
15 Conditional Agreement, at 5:20-6:1. On a showing that interpleader is appropriate, the Court
16 can adjudicate the proper allocation of the *res* proffered by FedEx. Such an adjudication
17 would not, by definition, affect claims such as Ms. Parker’s to monies not included in the
18 \$1,499,000 amount.

19 FedEx’s repeated references to “multiple liability” are thus wrong. “[I]nterpleader is
20 designed to protect the stakeholder from such liability only when [the liability is] based upon
21 the particular fund proffered by the interpleader plaintiff ... or, put another way, [w]hen only a
22 single obligation is owing.” *Libby, McNeill, and Libby v. City Nat. Bank*, 592 F.2d 504, 509
23 (9th Cir. 1978), *citing Provident Mut. Life Ins. Co. v. Ehrlich*, 374 F.Supp. 1134, 1138 (E.D.
24 Pa. 1973); *Trowbridge v. Prudential Ins. Co. of America*, 322 F.Supp. 190, 192 (S.D.N.Y.
25 1971). Under the system established by Federal Rule of Civil Procedure 22, interpleader is
26 permissible when “more than a single obligation is owed, and the possibility of a double
27 recovery justified by law is very real.” *Libby, McNeill, and Libby*, 592 F.2d at 509, *quoting*
28 *Trowbridge*, 322 F.Supp. at 193.

1 Since Ms. Parker filed her Conditional Agreement, FedEx has filed two sets of
 2 “Objections” and this Motion, in an effort to give the impression of an urgent need to protect
 3 its interests. No such urgency exists. Ms. Parker does not oppose the use of the interpleader
 4 mechanism to facilitate the allocation of the \$1,499,000 in settlement funds between plaintiffs,
 5 their counsel, and the lienholders (including herself). She does oppose FedEx’s unwarranted
 6 effort to use the mechanism to eliminate her legitimate and independent claim for attorney’s
 7 fees and costs.

8 **III. MS. PARKER HAS STANDING TO SEEK AN AWARD OF**
 9 **ATTORNEY’S FEES FOR WORK PERFORMED ON BEHALF OF THE**
 10 **SETTLEMENT PLAINTIFFS.**

11 The issues concerning Ms. Parker’s standing to seek attorney’s fees and costs directly
 12 from FedEx are presently before the Special Master in connection with the judgment plaintiffs.
 13 Hence Ms. Parker restates and incorporates in full her argument that, as a motion “related to
 14 the attorneys’ fees matter ... in the first instance,” this motion can be referred for resolution to
 15 Special Master Swanson.¹ See Order of 5/1/07, *supra*, at 1:14-15; Formal Request for Referral
 16 to Special Master, filed 12/19/07 (Docket No. 986). FedEx has repeatedly opposed referral of
 17 this motion, despite the fact that the arguments it raises in support of declaratory relief are
 18 functionally identical to those it has levied against Ms. Parker’s claims for attorney’s fees and
 19 costs for her representation of plaintiffs Alvarado, Evans, and Boswell. (The sole new
 20 argument advanced by FedEx is the contention that plaintiffs who prevail by means of
 21 settlement are somehow distinguishable from those who obtain a judgment after trial. As
 22 shown below, this proposition is manifestly false.)

23 FedEx once again relies incorrectly on federal fees law, and on an overly restricted
 24 reading of *Flannery v. Prentice*, 26 Cal.4th 572, 590 (2001). The parties have been down this
 25

26 ¹ As the contract issues raised by FedEx are both clear and amenable to quick resolution – see Section
 27 I, *supra* – Ms. Parker requests that, before referral, the Court enter an order declaring that the
 28 Settlement Agreements do not preclude Ms. Parker from presenting her claims for attorney’s fees and
 costs for her representation of the Settlement Plaintiffs.

1 road before, in the Alvarado/Evans/Boswell context. *See, e.g.*, Letter Brief, at 3:13-27;
 2 Transcript of August 9, 2007 Hearing at 26:6-21; Letter Brief Reply, at 1:6-2:2.

3 In whichever forum the parties raise this issue, Ms. Parker's position is the same. In
 4 brief:

- 5 • Because FedEx and the Settlement Plaintiffs litigated FEHA claims (*See* Amended
 6 Complaint, filed 1/9/04 (Docket No. 1), at ¶¶ 306-319), Ms. Parker is entitled to present
 7 to this Court her statutory and *quantum meruit* claims for attorney's fees under
 8 California law. *Crommie v. PUC*, 840 F. Supp. 719, 721 (N.D. Cal. 1994), *aff'd sub*
 9 *nom Mangold v. PUC*, 67 F.3d 1470 (9th Cir. 1995), *citing United States Mine Workers*
 10 *v. Gibbs*, 383 U.S. 715, 726 (1966); Letter Brief, at 2:1-3:9.
- 11 • Ms. Parker's standing to seek recovery of the fees and expenses she labored to earn is
 12 the same with regard to all her former clients, whether they eventually prevail via
 13 settlement, or by jury verdict. *See Folsom v. Butte County Ass'n of Governments*, 32
 14 Cal.3d 668, 685 (1982); *Lyons v. Chinese Hospital Ass'n*, 136 Cal.App.4th 1331, 1345
 15 (2006) ("It is undisputed that relief obtained through a settlement may qualify a plaintiff
 16 as the prevailing party, even in the presence of a stipulation disclaiming liability on the
 17 merits."), *citing Santisas v. Goodin*, 17 Cal.4th 599, 621-622 (1998); *Planned*
 18 *Parenthood v. Aakhus*, 14 Cal.App.4th 162, 174 (1993); Richard M. Pearl, *California*
 19 *Attorney Fee Awards*, § 2.23 at p. 58 (2d ed., 2005); Conditional Agreement at 5:6-19.
- 20 • Because the work Ms. Parker performed included litigation of the FEHA claims
 21 advanced by Settlement Plaintiffs, she is entitled to benefit from California fee-shifting
 22 provisions regardless of the basis for said Plaintiffs' recovery. *See Flannery*, 26 Cal.4th
 23 572 (2001); *Lindelli v. Town of San Anselmo*, 139 Cal.App.4th 1499 (2006); *Filipino*
 24 *Accountants' Ass'n v. State Bd. of Accountancy*, 155 Cal. App. 3d 1023 (1984); Letter
 25 Brief at 2:27-3:27; Letter Brief Reply, at 1:10-2:2.
- 26 • Ms. Parker's fees should be awarded by this Court directly against defendant FedEx,
 27 thereby advancing the public policy behind FEHA and avoiding unjust enrichment. *See*
 28 *Flannery v. Prentice*, 26 Cal.4th 572, 582-86 (2001) (FEHA public policy and unjust

1 enrichment, *i.e.*, windfalls); *Lindelli v. Town of San Anselmo*, 139 Cal.App. 4th 1499,
2 1513 (attorney intervention avoids windfalls to defendants and wasteful collateral
3 actions).

- 4 • As *Lindelli* demonstrates, *Flannery* should not be read to hold that an attorney
5 performing work in the absence of a contract is somehow better situated than one
6 seeking intervention to enforce her rights under a valid, written agreement. *See* Letter
7 Brief at 3:13-27.

8 The Court should either refer these same issues concerning standing as to the Settlement
9 Plaintiffs to the Special Master, or it should review the relevant arguments and hold that Ms.
10 Parker has standing under the *Flannery* and *Lindelli* line of cases.

11 **IV. PUBLIC POLICY DOES NOT SUPPORT FEDEX'S ATTEMPT TO**
12 **IMPEDE MS. PARKER'S LEGITIMATE CLAIM FOR ATTORNEY'S**
FEES AND COSTS.

13 In its "Objections" to Ms. Parker's Conditional Agreement, FedEx suggests that
14 "Parker's position undermines public policy that encourages litigants to voluntarily reach
15 settlement." Docket No. 964, at 6:16-17. FedEx does not provide any support for this
16 proposition, and does not repeat it in its Motion for Declaratory Relief. As Ms. Parker has
17 argued before the Special Master, public policy is best served by full and proper compensation
18 of the attorneys who labor on behalf of FEHA plaintiffs.

19 It need hardly be reiterated that the policy that promotes the right to seek and
20 hold employment free of prejudice is fundamental. Job discrimination foments
21 domestic strife and unrest, deprives the state of the fullest utilization of its
22 capacities for development and advance, and substantially and adversely affects
23 the interest of employees, employers, and the public in general. As California
24 courts long have recognized, [statutory] fees are intended to provide fair
25 compensation to the attorneys involved in the litigation at hand and encourage
26 litigation of claims that in the public interest merit litigation.

24 *Flannery*, 26 Cal.4th at 584, *citing Commodore Home Systems, Inc. v. Superior Court*, 32
25 Cal.3d 211, 220 (1982); *Weeks v. Baker & McKenzie* 63 Cal.App.4th 1128, 1172 (1998). *See*
26 *also* Letter Brief Reply, at 2:3-14 (domestic relations cases cited by FedEx inapplicable, per
27 *Lindelli*).

1 California law also recognizes the public policy in favor of preserving Ms. Parker's
2 right to seek fees against interference by the settling parties. *See Epstein v. Abrams*, 57
3 Cal.App.4th 1159, 1169-1170 (1997) (courts should not approve settlements entered into as
4 attempts to defeat existing attorney's liens); *Pangborn Plumbing Corp. v. Carruthers &*
5 *Skiffington*, 97 Cal.App.4th 1039, 1049 n.4 (2002) (clients not allowed to appropriate benefits
6 of judgment while refusing to pay attorney through whose efforts judgment was obtained),
7 *citing id.*

8 **CONCLUSION**

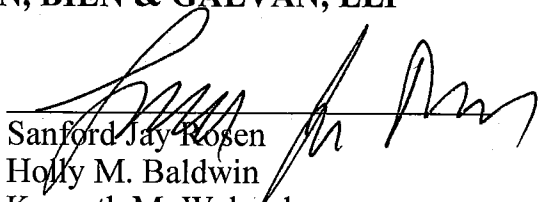
9 The issue of Ms. Parker's standing to seek the attorney's fees and costs she labored to
10 earn on behalf of judgment plaintiffs Alvarado, Evans, and Boswell is presently and properly
11 before the Special Master. The Court should either refer the duplicative arguments concerning
12 standing to the Special Master, or hold that Ms. Parker has standing.

13 There is no basis in law or public policy for granting the declaratory relief sought by
14 FedEx. Because the Settlement Agreements cannot preclude Ms. Parker from submitting her
15 claims seeking recovery directly from FedEx, the Court should instead hold that Ms. Parker
16 may seek her fees and costs related to representation of the Settlement Plaintiffs. The Court
17 can grant FedEx's Interpleader Motion without prejudicing Ms. Parker's independent right to
18 recovery.

19
20 Dated: January 11, 2008

ROSEN, BIEN & GALVAN, LLP

21
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27
28