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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,  
MICHAEL DAVIS,

25 Defendants.

Case No. C 09-0485 SI

**KAY MCKENZIE PARKER’S NOTICE  
OF MOTION AND MOTION FOR  
DECLARATORY RELIEF;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Hearing Date: July 31, 3009

Time: 9:00 a.m.

Courtroom: 10, 19th Floor

Judge: Hon. Susan Illston

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1 **NOTICE OF MOTION**

2 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on July 31, 2009, at 9:00 a.m., or as soon thereafter as  
4 the matter may be heard, in the Courtroom of the Hon. Susan Illston, located at Courtroom 10,  
5 19th Floor, 450 Golden Gate Avenue, San Francisco, Kay McKenzie Parker, former counsel  
6 for Plaintiffs and a prevailing party-intervenor in the underlying actions (Nos. C 04-0098 SI  
7 and C 04-0099 SI) and a defendant in the declaratory relief action (No. C 09-0485 SI), will and  
8 hereby does move the Court for a declaration to be entered in all three actions concerning her  
9 vested or choate property right to reasonable statutory attorney's fees and unreimbursed costs  
10 from Federal Express Corporation ("FedEx") for the work she performed to benefit Edward  
11 Alvarado and Charlotte Boswell, who are plaintiffs and have secured judgments in those  
12 actions.

13 These plaintiffs' claims in Case Nos. 04-0098/04-0099 have been merged into  
14 judgments against FedEx, that are now on appeal. The Court correctly ordered that Ms. Parker  
15 is a full prevailing party-intervenor in Case Nos. 04-0098/04-0099, for the purpose of  
16 recovering her statutory attorney's fees and costs from FedEx. The Court should declare that  
17 any future settlement of the judgments may not dispose of Ms. Parker's vested and choate  
18 property interest in statutory attorney's fees and costs without her participation and agreement.  
19 Such a declaration will provide clarity to all parties regarding their rights, and resolve the sole  
20 legal issue posed by plaintiffs' complaint for declaratory relief relative to Ms. Parker.

21 This motion is based on this Notice of Motion, the Memorandum of Points and  
22 Authorities, the Declaration of Sanford Jay Rosen and the [Proposed] Order filed herewith, the  
23 Court records and files in these three actions (not limited to those referenced herein), and such  
24 other materials and argument as may be presented before or at the hearing.

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **INTRODUCTION**

27 After separate jury trials resulting in verdicts for plaintiffs, and new trial and related  
28 motions, the Court issued amended judgments in favor of plaintiffs Alvarado and Boswell in

1 *Alvarado v. FedEx*, No. C 04-0098 SI (collectively with its related case, *White v. FedEx*, No. C  
2 04-0099 SI, referred to as the “underlying actions”). Appeals of the judgments are pending in  
3 the Ninth Circuit. *See* Ninth Cir. Nos. 08-15940, 08-15935, and 08-16088.

4 Plaintiffs’ declaratory relief action (Case No. 09-0485) is based entirely on materials in  
5 the record developed in the underlying actions. They seek a declaration essentially to resolve a  
6 single legal issue: Can any post-judgment settlement between plaintiffs and FedEx alter Ms.  
7 Parker’s right to recover statutory attorney’s fees and unreimbursed costs? The answer is “no,”  
8 unless she participates and agrees to settlement of her vested statutory fees and costs.

9 Due to the Court’s entry of the Alvarado and Boswell judgments, Ms. Parker’s right to  
10 recover statutory attorney’s fees and costs from FedEx for her work on behalf of plaintiffs is  
11 vested, and pursuant to the Court’s subsequent Order she is a full party-intervenor in the  
12 underlying cases pursuant to Federal Rule of Civil Procedure 24, for purposes of pursuing her  
13 attorney’s fees and costs from FedEx. Her interest in attorney’s fees and costs now is a vested  
14 or choate property right that is fully protected by California contract and property law, the  
15 United States and California Constitutions, and by federal law governing the rights of  
16 intervening parties. Her property rights are rooted in the relevant contracts and documents  
17 executed by the plaintiffs pertaining to attorney’s fees, the controlling California appellate  
18 decisions concerning attorney’s fee-shifting law, the policies underlying both the California  
19 FEHA and pertinent federal law, and federal intervention law.

20 Declaratory relief should now be granted to provide clarity to all parties with respect to  
21 any potential post-judgment settlement.

## 22 PROCEDURAL BACKGROUND

### 23 A. Proceedings Leading to the Entry of Judgments in Favor of Plaintiffs 24 Alvarado and Boswell and the Appeals in the Underlying Actions

25 Ms. Parker’s retention as counsel for plaintiffs Alvarado and Boswell, her work on their  
26 behalf, and her termination on the eve of trial have all been analyzed and proven in the  
27 underlying actions. *See, e.g.* Amended and Supp. Fee Petition, and Supporting Declarations,  
28 filed 9/19/08 (Docket Nos. 1217-1222); Opening Brief ISO Parker’s *Quantum Meruit* Claim,



1 Supporting Declaration, and Incorporated Documents, filed 3/13/09 (Docket Nos. 1346-1348);  
2 Parker's Post-Hearing Brief Re: *Quantum Meruit* Entitlement, filed 5/1/09 (Docket No. 1407);  
3 Reply ISO Post-Hearing Brief, and Supporting Declaration, filed 6/11/09 (Docket Nos. 1440-  
4 1441) (Except where otherwise indicated, all Docket Numbers refer to the underlying *Alvarado*  
5 *v. FedEx* action, No. C 04-0098 SI.)

6 Shortly before the trials of Alvarado and Boswell's cases, they and the other individual  
7 plaintiffs discharged Ms. Parker, and the Court subsequently relieved her from the case. *See*  
8 Docket Nos. 449-457 & 462. Plaintiff Alvarado prevailed at trial in September 2006. *See* Jury  
9 Verdict, filed 9/5/06 (Docket No. 521); Special Verdict re: punitive damages, filed 9/7/06  
10 (Docket Nos. 526-527). Plaintiff Boswell prevailed at trial in April 2007. *See* Special Verdict,  
11 filed 4/11/07 (Docket No. 762).

12 Separate judgments for Alvarado and Boswell were entered in February 2007 and May  
13 2007, respectively. *See* Separate Judgment Re: Edward Alvarado, filed 2/28/07 (Docket No.  
14 694) (awarding \$500,000 for retaliation); Judgment Re: Charlotte Boswell, filed 5/21/07  
15 (Docket No. 823) (awarding \$550,000 in compensatory damages for sexual harassment,  
16 retaliation, and constructive discharge, and punitive damages of \$2,450,000).

17 Later the Court conditionally ordered a new trial of Alvarado's case, unless he accepted  
18 *remittitur*. *See* Order Granting Def's Mot. for New Trial Unless Plaintiff Alvarado Accepts  
19 Remittitur, filed 3/18/08 (Docket No. 1035). Plaintiff Alvarado accepted *remittitur*. *See*  
20 Alvarado Decl. Regarding Remittitur, filed 3/31/08 (Docket No. 1054); Amended Judgment  
21 Re: Edward Alvarado, filed 4/1/08 (Docket No. 1057) (awarding reduced sum of \$300,000 for  
22 retaliation).

23 The Court also reduced as a matter of law the punitive damages component of  
24 Boswell's award to \$300,000. *See* Order Resolving Def.'s Motions, filed 3/18/08 (Docket No.  
25 1037); Amended Judgment Re: Charlotte Boswell, filed 3/18/08 (Docket No. 1039) (awarding  
26 reduced sum of \$550,000 in compensatory damages, plus \$300,000 in punitive damages).

27 FedEx appealed both amended judgments. *See* Ninth Cir. Nos. 08-15940 (Alvarado)  
28 and 08-15935 (Boswell). Boswell cross-appealed the Court's reduction of her punitive

1 damages. *See* Ninth Cir. No. 08-16088.

2 Following FedEx's notices of appeal, Alvarado and Boswell discharged Waukeen  
3 McCoy as their counsel and retained Stephen Murphy and Gerald Clausen. *See* Notices of  
4 Substitution of Counsel, Docket Nos. 1234-1235. Subsequently the Court struck Mr.  
5 McCoy's statutory fee applications and barred him from any claim for statutory attorney's fees  
6 for his work representing Alvarado and Boswell. *See* Order [striking fee petitions], filed  
7 3/19/09 (Docket No. 1353). Mr. McCoy appealed that Order. *See* Ninth Cir. No. 09-15575.

8 **B. Proceedings Leading to Ms. Parker's Rule 24 Intervention in the Underlying**  
9 **Actions to Pursue her Statutory Attorney's Fees and Costs From FedEx**

10 Following her termination by the plaintiffs, Ms. Parker timely asserted her right to  
11 recover reasonable attorney's fees for the work she performed on their behalf, and to recoup  
12 the costs she advanced. *See* Motion to Intervene for Attorney's Fees and Expenses, and  
13 Affidavit in Support, filed 10/10/06 (Docket nos. 572-573). For nearly two years, she litigated  
14 the issue of her right to intervene in the underlying actions to pursue her claim for attorney's  
15 fees under the FEHA.

16 On April 7, 2008, the Court's Special Master determined that Ms. Parker owns the  
17 FEHA claim for statutory attorney's fees and costs from FedEx for her work on behalf of  
18 Alvarado and Boswell, and that she is a proper full party-intervenor in the underlying actions  
19 under Fed. R. Civ. P. 24, for purposes of securing her attorney's fees and costs. *See* Special  
20 Master's Order Regarding Kay Parker's Fee Petitions, filed 4/7/08 (Docket No. 1062) ("SM  
21 Order"). The Special Master determined that her interests were controlled by *Flannery v.*  
22 *Prentice*, 26 Cal.4th 572 (2001), in which the California Supreme Court held that "attorney  
23 fees awarded pursuant to [FEHA] (excluding fees already paid) belong, absent an enforceable  
24 agreement to the contrary, to the attorneys who labored to earn them," *id.* at 590, and by  
25 *Lindelli v. Town of San Anselmo*, 139 Cal.App.4th 1499 (2006), in which the California Court  
26 of Appeal "extend[ed] the reasoning of *Flannery* to a logical conclusion" and held that  
27 discharged counsel have standing to intervene in underlying actions and to pursue their claims  
28 for statutory attorney's fees. SM Order at 8:3-15. "Thus, the special master finds that, under

1 the applicable law, attorneys are ‘prevailing parties’ with standing to seek [FEHA] fees,  
2 provided no enforceable contract states otherwise.” *Id.* at 9:25-27.

3 On June 5, 2008, the Court adopted the Special Master’s Order, thereby recognizing that  
4 Ms. Parker owns those statutory fee claims and is a Rule 24 prevailing party-intervenor in the  
5 underlying actions, fully empowered to pursue her statutory attorney’s fees directly from  
6 FedEx. *See* Order Adopting Special Master’s April 7, 2008 Order Regarding Parker’s  
7 Standing and Timeliness of Fee Petitions; Setting Schedule for Resolution of Pending Matters,  
8 filed 6/5/08 (Docket No. 1145) (“Order Adopting SM Order”). No party appealed this Order,  
9 which is final and binding on the parties.

### 10 C. Proceedings Since Ms. Parker Intervened in the Underlying Actions

11 On January 27, 2009, the Court revisited the issue of Ms. Parker’s entitlement to  
12 statutory fees, when it decided FedEx’s Motion for Declaratory Relief in connection with  
13 FedEx’s pre-trial settlements with seven other plaintiffs. *See* Order Granting [*inter alia*]  
14 Defendant’s Motion for Declaratory Relief, filed 1/27/09 (Docket No. 1279) (“1/27/09 FedEx  
15 Decl. Relief Order”).

16 The Court decided that the settling plaintiffs’ situation materially differed from that of  
17 plaintiffs Alvarado and Boswell, whose claims were merged into judgments following jury  
18 verdicts. Comparing the documentation between the seven settling plaintiffs and the lawyers  
19 and the documents signed by Alvarado and Boswell, the Court noted an important difference:  
20 “[while] the judgment plaintiffs [Alvarado and Boswell] signed a separate addendum explicitly  
21 waiving their right to statutory fees; here there is no indication that the settlement plaintiffs  
22 signed any such addendum[.]” *Id.* at 6, n.5. Also, no judgments had been entered in the seven  
23 settling plaintiffs’ cases, so fees entitlement was not fixed. *Cf.* SM Order at 10:3-13:1  
24 (analyzing contract language providing for contingent award to attorneys of “40% of any  
25 amounts received or recovered by way of settlement after arbitration, mediation, or trial;”  
26 concluding original agreement is “silent on the question of statutory fee awards and does not  
27 assign all or part of them to the clients.”). Consequently, the Court decided that the  
28 “contingency fee upon settlement” clauses contained in the settling plaintiffs’ retainer

1 agreements constitute “agreements to the contrary” under *Flannery*, thereby negating Ms.  
2 Parker’s right to pursue statutory attorney’s fees from FedEx for her work on behalf of the  
3 seven plaintiffs who settled pre-trial. *See* 1/27/09 FedEx Decl. Relief Order, at 6:3-6.

4 Ms. Parker appealed the Court’s Order denying her statutory fees for her work on behalf  
5 of the seven settling plaintiffs. *See* Ninth Cir. No. 09-15415.

6 Since the Court’s January 27, 2009 Order, the Court has received more complete  
7 evidence concerning the formation of the retainer agreements and the course of Ms. Parker’s  
8 representation of the individual plaintiffs. *See* Parker Decl. Re: Client Contracts, filed 4/22/09  
9 (Docket No. 1400); Parker’s Post-Hearing Brief, filed 5/1/09 (Docket No. 1407); McCoy  
10 Declaration In Opp. to Parker’s Post-Hearing Brief, filed 5/15/09 (Docket No. 1422); Parker’s  
11 Reply and Supporting Declaration, filed 6/11/09 (Docket Nos. 1440-1441) (refuting false and  
12 misleading claims in McCoy Declaration). The Court has taken *sub judice* all competing  
13 claims to the remainder of the *res* interpleaded by FedEx to fund its settlements with the seven  
14 plaintiffs, including Ms. Parker’s *quantum meruit* fees and costs claims.

15 In the *quantum meruit* proceedings, Mr. McCoy argued, contrary to the Court’s January  
16 27, 2009 Order, that Ms. Parker never had a valid fee agreement with any of the plaintiffs, or  
17 that any agreements she had are void *ab initio* or voidable.

## 18 ARGUMENT

### 19 I. THE COURT SHOULD GRANT MS. PARKER’S MOTION FOR 20 DECLARATORY RELIEF.

21 “In a case of actual controversy within its jurisdiction, except with respect to Federal  
22 taxes, ... any court of the United States, upon the filing of an appropriate pleading, may  
23 declare the rights and other legal relations of any interested party seeking such declaration,  
24 whether or not further relief is or could be sought. Any such declaration shall have the force  
25 and effect of a final judgment or decree and shall be reviewable as such.” Federal Declaratory  
26 Judgment Act, 28 U.S.C. § 2201. “Under the Declaratory Judgment Act, a federal court may  
27 declare the rights and other legal relations of parties to a case of actual controversy ... The  
28 purpose of the Declaratory Judgment Act is to relieve potential defendants from the

1 Damoclean threat of impending litigation which a harassing adversary might brandish, while  
 2 initiating suit at his leisure – or never.” *Spokane Indian Tribe v. United States*, 972 F.2d 1090,  
 3 1091-92 (9th Cir. 1992), *citing Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d  
 4 1542, 1555 (9th Cir. 1990); *Société de Conditionnement v. Hunter Engineering Co.*, 655 F.2d  
 5 938, 943 (9th Cir. 1981).

6 Ms. Parker’s ownership of the statutory fees for her work on behalf of Alvarado and  
 7 Boswell is fixed. She is the only person who can pursue or settle those fees, under *Flannery*,  
 8 *Lindelli*, and federal party intervention law. In the instant action, Alvarado and Boswell have  
 9 expressly admitted that they had fee agreements with Ms. Parker. *See* Amended Complaint,  
 10 filed 2/20/09 (Case No. 09-0485 SI, Docket No. 5), ¶¶ 4-5. Interpreting those contracts, the  
 11 Court correctly determined that as to Alvarado and Boswell, there is no enforceable agreement  
 12 to the contrary that would negate Ms. Parker’s right to statutory fees. Moreover, if *arguendo*  
 13 Mr. McCoy is correct that the contracts never existed or were void *ab initio*, then there never  
 14 was an “enforceable” contract that conveyed Ms. Parker’s interest in the statutory fees from  
 15 her to anyone else.

16 There are no additional facts to find here or material factual disputes. The Court should  
 17 issue a declaration that Ms. Parker’s right to recover statutory attorney’s fees is her vested and  
 18 choate property right, thereby guiding all parties in any post-judgment settlement.

19 **II. ONCE JUDGMENTS WERE ENTERED, MS. PARKER’S RIGHT TO**  
 20 **RECOVER STATUTORY ATTORNEY’S FEES FROM FEDEX BECAME A**  
 21 **VESTED PROPERTY RIGHT FULLY PROTECTED BY CALIFORNIA LAW.**

22 Under California fees law, Ms. Parker is the sole owner of statutory attorney’s fees and  
 23 costs for her work on behalf of Alvarado and Boswell and the only person who can pursue that  
 24 property right in the absence of an enforceable contract to the contrary. *See Flannery*, 26 Cal.  
 25 4th at 590; *Lindelli*, 139 Cal.App.4th at 1513-1514. (*See* Discussion in Part III-B, *infra* at 14-  
 26 16, as to the absence of any such contract.)

27 Under California property law, “A judgment is a vested property right ... [and] [t]he  
 28 remedy by which a judgment may be enforced is itself a vested property right.” *In Re*  
*Marriage of Comer*, 14 Cal.4th 504, 541-542 (1996) (Mosk, J., concurring), *citing Pacific Gas*

1 & Elec. Co. v. Nakano, 12 Cal.2d 711, 712-713 (1939) (tort claim merged in final judgment is  
2 a debt); Jones v. Union Oil Co., 218 Cal. 775, 778 (1933) (remedy is part of obligation of  
3 contract and subject to constitutional protection against impairment) (other citations omitted).  
4 See also County of San Bernardino v. Ranger Ins. Co., 34 Cal.App.4th 1140, 1149 (1995)  
5 (vesting of entitlement occurs on vesting of claims, and is not disturbed by passage of contrary  
6 statute during pendency of appeal). It follows that Ms. Parker's property right in her statutory  
7 fees is a property right that vested with the entry of the initial judgments in favor of Alvarado  
8 and Boswell, and certainly when the Court entered amended judgments. See Estate of Hilton,  
9 44 Cal.App.4th 890 (1996) (enactment of new statutory fee rates did not operate retroactively  
10 to decrease entitlement vested by interim fee award); see also Britz, Inc. v. Alfa-Laval Food &  
11 Dairy Co., 34 Cal.App.4th 1085, 1107 (1995) (interest accrued as of date arbitration award  
12 fixed entitlement); City of Oakland v. Oakland Raiders, 203 Cal.App.3d 78, 85 (1988) (interest  
13 began accruing on date of judgment).

14 Ms. Parker's property right in her reasonable statutory attorney's fees and unreimbursed  
15 costs from FedEx was confirmed on June 5, 2008, when the Court held that she is entitled to  
16 intervene in the Alvarado and Boswell cases under Federal Rule of Civil Procedure 24.

17 Under federal law, Ms. Parker's intervention to recover her statutory attorney's fees  
18 from FedEx makes her a full party in the underlying action. See SM Order at 17-18-20; Order  
19 Adopting SM Order at 1:25-27 ("[T] the Court finds that the Special Master correctly applied  
20 the relevant and controlling legal authority to determine that Ms. Parker's fee petitions are  
21 timely, and that Ms. Parker has standing to seek statutory fees pursuant to FEHA.")

22 She now possesses all rights held by the original parties. "[A]s a general rule,  
23 intervenors are permitted to litigate fully once admitted to a suit." League of United Latin  
24 American Citizens v. Wilson, 131 F.3d 1297, 1304 (9th Cir. 1997), citing Wright, Miller, &  
25 Kane, 7C Federal Practice & Procedure: Civil 2d, § 1920, at 488-491. Cf. City of Santa  
26 Monica v. Stewart, 126 Cal.App.4th 43, 87 (2005) (under California law, "when a party  
27 qualifies and enters an action as an intervenor, it is vested with all of the same procedural  
28 rights and remedies of the original parties") (citations omitted). Ms. Parker's rights as a full

1 party-intervenor include the right to protect her vested interest in statutory attorney's fees from  
2 interference by the original parties.

3 Under federal law an intervening attorney's property right to fees becomes vested or  
4 choate when the basis for entitlement is first established. *See Feiler v. United States*, 62 F.3d  
5 315, 317 (9th Cir. 1995) (claim for attorney's fees became choate as of date of order awarding  
6 specific performance). An order of entitlement to attorney's fees, like this Court's decision that  
7 Ms. Parker has standing to pursue the fees claim and to intervene in the underlying cases to do  
8 so, is like a judgment for these purposes. *See, e.g., Friend v. Kolodziejczak*, 72 F.3d 1386,  
9 1391-92 (9th Cir. 1995), *cert. denied*, 516 U.S. 1146 (1996) (interest on fee award accrues as  
10 of date entitlement is fixed); *Spain v. Mountanos*, 690 F.2d 742, 747-48 (9th Cir. 1982) (same);  
11 *see also Exxon Valdez v. Exxon Mobil Corp.*, 2009 WL 1652256, \*2 (9th Cir. Jun. 15, 2009)  
12 ("When the legal and evidentiary basis of an award is thus preserved, post-judgment interest is  
13 ordinarily computed from the date of [the judgment's] initial entry"), *citing Planned*  
14 *Parenthood of Columbia/Willamette Inc. v. Am. Coal. of Life*, 518 F.3d 1013 (9th Cir. 2008).

15 In bankruptcy law, too, a statutory fees-shifting property interest is a claim, just like any  
16 other vested property interest, that can be asserted and discharged, usually as a general  
17 unsecured creditor's claim, even if the amount was not set prior to a defendant's bankruptcy  
18 filing. *See, e.g., In Re SNTL Corp.*, \_\_\_ F.3d \_\_\_, 2009 WL 1758759 (9th Cir. Jun. 23, 2009)  
19 (unsecured creditor can seek allowance of statutory attorney's fees arising out of a prepetition  
20 claim); Rosen Decl. ISO Parker Decl. Relief Motion, filed herewith, at ¶¶ 3-6.

21 Under California law, Ms. Parker holds the same position as an attorney who perfects a  
22 charging lien for her services. California law strongly disfavors any effort to interfere with an  
23 attorney's fixed entitlement to recover fees. *See Epstein v. Abrams*, 57 Cal.App.4th 1159,  
24 1169-1170 (1997) (perfected lien "entitl[es] the attorney to any available equitable remedy  
25 necessary to effect payment of his fee for services rendered in connection with his client's  
26 claim out of any recovery upon that claim"; denying court approval of settlement reached in  
27 order to defeat attorney's valid fees claim); *Fletcher v. Davis*, 33 Cal.4th 61, 68-69 (2004)  
28 (charging lien entitles attorney to prevent judgment debtor or settling party from remitting

1 recovery to the client until fees dispute is resolved, grants attorney the right to have the court  
 2 interfere to prevent payment by judgment debtor to creditor in fraud of the attorney's right to  
 3 it) (citations omitted). *See also* Order Denying Plaintiffs' Motion to Extinguish Liens, filed  
 4 5/20/08 (Docket No. 1135); Order Denying Motion to Dissolve Interpleader and Immediately  
 5 Release Settlement Funds, filed 2/25/09 (Docket No. 1314).

6 It follows that the other parties to the underlying actions cannot dispose of Ms. Parker's  
 7 statutory fees unless she participates in settlement negotiations, and approves of any agreement  
 8 reached. *See Continental Casualty Co. v. Fibreboard Corp.*, 4 F.3d 777, 780 (9th Cir. 1993)  
 9 (refusing to vacate underlying judgment where parties did not agree, because "[t]his case does  
 10 not involve a bilateral agreement intended to moot an appeal, followed by a joint motion for  
 11 *vacatur*. It involves mootness brought about by unilateral action, and a motion by one party  
 12 strongly opposed by the other."); *Independent Union of Flight Attendants v. Pan American*  
 13 *World Airways, Inc.*, 966 F.2d 457, 460 (9th Cir. 1992) (unilateral request for *vacatur* after  
 14 settlement requires remand to district court for determination of "the consequences and  
 15 attendant hardships of dismissal or refusal to dismiss"; balancing of "the competing values of  
 16 finality of judgment and right to relitigation of unreviewed disputes"), *citing Ringsby Truck*  
 17 *Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 721-22 (9th Cir. 1982).

18 **III. MS. PARKER OWNS THE CLAIM FOR STATUTORY ATTORNEY'S FEES**  
 19 **FOR HER WORK ON BEHALF OF ALVARADO AND BOSWELL.**

20 **A. The Court Correctly Decided that Ms. Parker's Contracts and**  
 21 **Documentation with Alvarado and Boswell Did Not Convey Entitlement to**  
 22 **the Statutory Fees.**

23 Through the prism of the *Flannery* and *Lindelli* decisions, the Special Master analyzed  
 24 the Alvarado and Boswell retainer agreements with Mr. McCoy, and the two Addenda by  
 25 which they acknowledged Ms. Parker as their co-equal attorney.

26 In July 2002, each plaintiff executed an "Engagement for Legal  
 27 Services" with the Law Offices of Waukeen McCoy and attorney  
 28 Michael Davis. *See Parker Decl.* (Docket 932), Exhibit A. This  
 document states the following with regards to attorneys' fees:

We have agreed to the following attorney fee



1 arrangement: (a) 33 1/3% of any amounts received or  
 2 recovered by way of settlement prior to mediation  
 3 and/or arbitration; (b) 40% of any amounts received  
 4 or recovered by way of settlement after arbitration,  
 5 mediation, or trial.

6 *Id.* Subsequently, in or around January 2004, each plaintiff  
 7 executed “Addendum No. 1 to Attorney Representation  
 8 Agreement,” which substitutes Parker as “co-counsel no. 1” in  
 9 place of Davis. *See* Parker Decl. (Docket 587), Exhibit E.  
 10 Addendum No. 1 provides that “CLIENT understands and agrees  
 11 that ATTORNEY and CO-COUNSEL NO. 1 will share attorneys’  
 12 fees described in the Agreement.” *Id.* In or around August 2004,  
 13 each plaintiff executed “Addendum No. 2 to Attorney  
 14 Representation Agreement” adding John Burris as co-counsel. *See*  
 15 Parker Decl. (Docket No. 932), Exhibit B. Addendum No. 2 states  
 16 that “CLIENT understands and agrees that ATTORNEY, CO-  
 17 COUNSEL NO. 1 and CO-COUNSEL NO. 2 will share  
 18 proportionately the contingency attorneys’ fees described in the  
 19 Agreement.” *Id.*

20 SM Order at 10:3-17 (footnote omitted).

21 The Special Master found that none of the documents described in the above passage  
 22 constitutes an “agreement to the contrary” that would bar Ms. Parker’s personal ownership of  
 23 the statutory attorney’s fees following judgment in favor of the plaintiffs under *Flannery*. *See*  
 24 SM Order at 12:25-13:1 (“based on a plain reading of the contracts, the absence of any explicit  
 25 waiver or assignment of attorneys’ fees, the interpretation of the contracts by plaintiffs  
 26 themselves, and the public policy concerns raised by FedEx’s proffered interpretation, the  
 27 special master concludes that the ‘Engagement for Legal Services’ is silent on the question of  
 28 statutory fee awards and does not assign all or part of them to the clients”); *id.* at 13:2-6  
 (“neither Addendum No. 1 nor Addendum No. 2 speaks to statutory fees”).

Thus the Special Master essentially posed three questions: (1) did Ms. Parker have any  
 contract with plaintiffs Alvarado and Boswell? (2) Was any such contract enforceable?; and  
 (3) Was any such contract “to the contrary,” *i.e.*, did it operate as a waiver of Ms. Parker’s  
 right to recover statutory fees? *See* SM Order at 11:4-15:1.

1 He answered these questions as follows: while [1] Ms. Parker appeared to perform legal  
2 services pursuant to a valid contract, SM Order at 10:3-11:3, it is [2] not at all clear that the  
3 agreement is enforceable in this context (to the contrary, assigning 60 percent of statutory fees  
4 to the clients, as urged by FedEx, “may violate public policy,” *id.* at 12:14-24); and [3]  
5 moreover, “there is no evidence that the parties to the agreement intended it to relate to [post-  
6 judgment] statutory fees” claims. *Id.* at 12:9-10. In other words, Question (3) was dispositive.  
7 In particular, the Special Master did not determine whether contracts were enforceable,  
8 because he found that the agreements among Ms. Parker, Mr. McCoy, and the individual  
9 plaintiffs are silent on the issue of attorney’s fees.

10 The post-judgment conduct of Alvarado, Boswell, and McCoy demonstrates that the  
11 retainer agreements did not deal with statutory fees. *See* Cal. Code Civ. Proc. § 1856(c)  
12 (where the terms of a contract are silent about an issue, they may “be explained or  
13 supplemented by course of dealing or usage of trade or by course of performance”). “The  
14 conduct of the parties may be, in effect, a *practical construction* thereof, for they are probably  
15 least likely to be mistaken as to the intent.” *Cedars-Sinai Medical Center v. Shewry*, 137  
16 Cal.App.4th 964, 983 (2006), *quoting* 1 Witkin, Summary of Cal. Law (10th ed. 2005)  
17 Contracts, § 749, p. 838 (emphasis in original).

18 As the Special Master found: “there is no evidence that the parties to the agreement  
19 intended it to relate to statutory fees. Plaintiffs have not argued that the contract be interpreted  
20 in this manner. Indeed, they apparently entered into separate agreements with Mr. McCoy to  
21 address how statutory fees would be allocated, indicating the issue of statutory fees was not  
22 explicitly covered by the initial agreement.” SM Order at 12:9-13. *See also* Tr. of 1/4/08  
23 Telephone Hearing (Docket 1022, Exh. A) at 23:17-24:2 (McCoy stating that his prejudgment  
24 contracts do not deal with entitlement to statutory fees).

25 The Court adopted the Special Master’s Order in full on June 5, 2008. Later, in its  
26 Order granting FedEx declaratory relief in connection with the fees issues concerning Ms.  
27 Parker’s work on behalf of the seven settlement plaintiffs, the Court noted the significance of  
28 the post-judgment documents signed by Alvarado and Boswell. “[T]he judgment plaintiffs

1 signed a separate addendum explicitly waiving their right to statutory fees; [whereas] there is  
 2 no indication that the settlement plaintiffs signed any such addendum[.]” 1/27/09 FedEx Decl.  
 3 Relief Order at 6, n.5.

4 Adopting the Special Master’s April 7, 2008 Order, the Court also correctly decided  
 5 that, if the parties to the relevant agreements had intended for them to cover statutory fees, the  
 6 language they used did not convey that intent. Nowhere do the documents hiring Ms. Parker  
 7 speak of fees awarded or recovered after judgment, the moment at which statutory fees are  
 8 fixed. *See* Section II, *supra* at 7-10. Nor do the contracts ever refer to statutory fees  
 9 themselves.

10 First, on their face, the contracts appear to address only what the  
 11 attorneys will receive “by way of settlement.” The contract  
 12 provides for 33 1/3 percent of amounts recovered by settlement  
 13 prior to mediation or arbitration, and 40 percent of amounts  
 14 recovered by settlement after mediation, arbitration or trial. The  
 15 contracts do not contemplate what would happen if there was no  
 16 settlement and the matter was resolved solely by trial. While the  
 17 intent of the contracts presumably was to allocate to the attorney 40  
 18 percent of any amount recovered by way of settlement after  
 19 arbitration or mediation or recovered by way of trial, that is not  
 how they were written. Moreover, even if they had been written to  
 provide the attorneys with 40 percent of “amounts received or  
 recovered by way of . . . trial,” there is nothing indicating that  
 would include not just the jury award but any subsequently  
 awarded statutory fees.

20 SM Order at 11:15-12:2.

21 And the Court correctly determined that the language used in the contracts is  
 22 insufficient as a matter of law to convey her right to statutory attorney’s fees.

23 Courts generally require that any waiver of the right to statutory  
 24 fees be explicit. *See, e.g., Zambrano v. Oakland Unified School*  
 25 *Dist.*, 229 Cal.App.3d 802, 805 (1991) (“California courts have  
 26 generally been hesitant to find implied waivers of [statutory]  
 27 attorney fees.”); *Wakefield v. Mathews*, 852 F.2d 482, 484 (9th Cir.  
 1988) (“Waiver of [statutory] attorneys’ fees should not be  
 28 presumed from a silent record.”). The special master finds no  
 explicit waiver of fees in the “Engagement for Legal Services.”

1 *Id.* at 12:2-12:10. *See also Muckleshoot Tribe v. Puget Sound Power & Light*, 875 F.2d 695,  
2 698 (9th Cir.1989) (similar requirement of explicit waiver in federal courts).

3 In its order denying Ms. Parker standing to obtain statutory attorney's fees for her work  
4 on behalf of the seven settling plaintiffs, the Court again began its analysis with question (3)  
5 above. It does not appear to have determined whether the contracts were enforceable. The  
6 Court first quoted *Flannery's* observation that "absent an **enforceable** agreement to the  
7 contrary," FEHA attorney's fees belong to the attorneys who labored to earn them, 1/27/09  
8 FedEx Decl. Relief Order at 5:25-28, *quoting* 26 Cal.4th at 590 (emphasis added), then held  
9 "that these agreements constitute an 'agreement to the contrary' under *Flannery*, and thus Ms.  
10 Parker does not have standing to seek fees under FEHA directly from FedEx." 1/27/09 FedEx  
11 Decl. Relief Order at 6:3-4.

12 The bottom line is that due to the post-judgment addenda signed by Alvarado and  
13 Boswell, purporting to grant all statutory fees to Mr. McCoy, their documentation negates any  
14 argument that these plaintiffs expected to have an interest in any statutory fee award. As noted  
15 by the Special Master: "Therefore, based on a plain reading of the contracts, the absence of any  
16 explicit waiver or assignment of attorneys' fees, the interpretation of the contracts by plaintiffs  
17 themselves, and the public policy concerns raised by FedEx's proffered interpretation ... the  
18 'Engagement for Legal Services' is silent on the question of statutory fee awards and does not  
19 assign all or part of them to the clients." SM Order at 12:25-13:1; *see also id.* at 13:2-12 (Ms.  
20 Parker's standing is also not affected by Addendum No. 1 to the contract, Addendum No. 2 to  
21 the contract, or the post-judgment contracts assigning statutory fees to McCoy). *Accord*,  
22 1/27/09 FedEx Decl. Relief Order at 6, n. 5.

23 **B. If *Arguendo* Mr. McCoy Is Correct, and Ms. Parker Did Not Have an**  
24 **Enforceable Contract, Under *Flannery* And *Lindelli* She Owns the Statutory**  
**Fees Claims for Her Work on Behalf of All Prevailing Plaintiffs.**

25 In the *quantum meruit* proceedings, Mr. McCoy recently argued that, contrary to the  
26 Court's January 27, 2009 Order, Ms. Parker never had a valid fee agreement with any  
27 individual plaintiff, or that any agreements she had are void *ab initio*. *See* Transcript of  
28 4/23/09 Hearing (filed as Docket No. 1442) at 66:15-68:6; Parker's Post-Hearing Brief, filed

1 5/1/09 (Docket No. 1407), at 3:1-5:24; McCoy Memorandum in Response, filed 5/15/09  
2 (Docket No. 1421), at 2:16-3:8 & 6:19.

3 Mr. McCoy contends that Addenda 1 and 2 to the initial retainer agreement are not  
4 contracts at all, but merely agreements to divide an attorney's fee, which are void or voidable  
5 for failure to comply with California Rule of Professional Conduct 2-200. McCoy  
6 Memorandum at 6:19-7:10. Mr. McCoy contends, *inter alia*, that the documents lack  
7 necessary signatures in violation of Rule 2-200. *Id. See also* 4/23/09 Tr. at 63:13-20 ("MR.  
8 BASS: ... "There was no written agreement when [Ms. Parker] came into the case as to a  
9 division of fee. No client signed a consent to any particular fee sharing. ... [O]n the facts, there  
10 was no agreement; no client signed a document consenting to any disclosed terms of any fee-  
11 sharing agreement.") Notably, Mr. McCoy's post-hearing brief in the *quantum meruit*  
12 proceedings says nothing about the post-judgment, statutory fee agreements signed by  
13 plaintiffs Alvarado and Boswell. *See* Docket No. 1421. The Court has yet to pass on Mr.  
14 McCoy's contentions in the *quantum meruit* proceedings.

15 Under *Flannery* and *Lindelli*, if Ms. Parker's agreements were void *ab initio* (or  
16 possibly even if just voidable) it would be as though there were no contract at all between the  
17 clients and Ms. Parker, and the Court's decision that Ms. Parker had contracted away her  
18 property right to statutory fees against FedEx for her work on behalf of the seven settling  
19 plaintiffs was wrong. *See Flannery*, 26 Cal.4th at 590 (2001); *Lindelli*, 139 Cal.App.4th at  
20 1513-1514 (2006); *Lyons v. Chinese Hospital Ass'n*, 136 Cal.App.4th 1331, 1345 (2006) ("It is  
21 undisputed that relief obtained through a settlement may qualify a plaintiff as the prevailing  
22 party, even in the presence of a stipulation disclaiming liability on the merits."). *See also* SM  
23 Order at 13:27-14:6 (summarizing FedEx's argument that *Flannery* only applies in the absence  
24 of a contract).

25 As discussed in Section III-A, *supra* at 10-14, the Court does not appear to have decided  
26 whether the contracts are enforceable. *See also* SM Order at 13:27-14:18 (refuting FedEx  
27 argument that *Flannery* only applies in the absence of a contract). If the Court now were to  
28 find that Ms. Parker has no valid contract with any plaintiffs or that those contracts were void,

1 under *Flannery* and *Lindelli* the contracts would not be “enforceable agreements to the  
2 contrary” negating her right to statutory fees. Thus, Ms. Parker would own the statutory fees  
3 for her work on behalf both of the judgment plaintiffs and the seven settlement plaintiffs, and  
4 she would be entitled to pursue her statutory fees claims and claims for unreimbursed costs for  
5 her work on behalf of all these plaintiffs directly against FedEx.

6 So far as the ongoing *quantum meruit* proceedings are concerned, regardless of whether  
7 the agreements are enforceable, Ms. Parker has made the requisite showing that the settling  
8 clients knew she was working on their behalf and expected payment. *See* Reply ISO Parker’s  
9 Post-Hearing Brief, filed 6/11/09 (Docket No. 1440), at 3:8-4:22. Thus she is fully entitled to  
10 pursue her *quantum meruit* and costs claims, which are now *sub judice* with the Court. *See id.*  
11 And Ms. Parker repeats her assurance that she views her *quantum meruit* claims as failsafe  
12 protection of her interests, in the event that she is awarded no statutory fees, or the statutory  
13 fees are insufficient to compensate her for her work. *See* Opening Brief Re: *Quantum Meruit*  
14 at 13, n.4.

15 **IV. PUBLIC POLICY REQUIRES CONTINUED ACKNOWLEDGMENT AND**  
16 **PROTECTION OF MS. PARKER’S VESTED INTEREST IN HER**  
**STATUTORY ATTORNEY’S FEES.**

17 As the Special Master observed, it is essential that courts protect the rights of attorneys  
18 discharged before trial. “Rendering attorneys discharged prior to trial ineligible for statutory  
19 fee awards would discourage counsel from taking civil rights claims, would benefit  
20 wrongdoing defendants by not requiring them to pay costs of pre-trial preparation, and would  
21 encourage subsequent collateral lawsuits between discharged counsel and former clients.” SM  
22 Order at 16:5-8. *See also id.* at 15:8-16:3 (summarizing “a number of public policies served by  
23 vesting ownership of statutory fee awards in attorneys,” as recognized by *Flannery* and  
24 *Lindelli*, including reducing the likelihood of windfalls to both defendants and plaintiffs,  
25 reducing likelihood of subsequent litigation between discharged counsel and former clients).

26 Awarding a fully compensatory fee to Ms. Parker, an attorney who labored for years to  
27 win these meritorious FEHA cases, promotes the fundamental public policy behind FEHA  
28 itself. “[V]est[ing] ownership of [FEHA] fees ... in counsel, when, for whatever reason, no

1 contract exists disposing of them, thus diminishing the risk of noncompensation or  
2 undercompensation, will enhance the likelihood that attorneys who undertake FEHA cases will  
3 be fully compensated, and to that extent will enhance the fee provision's effectiveness in  
4 encouraging counsel to undertake FEHA litigation." *Flannery*, 26 Cal.4th at 584-585  
5 (citations and footnote omitted); *Weeks v. Baker & McKenzie*, 63 Cal.App.4th 1128, 1172  
6 (1998). *See also Lindelli*, 139 Cal.App.4th 1499 (successful intervention and fee claim under  
7 private attorney general statute, CCP § 1021.5, for completion of legal services); *Ketchum v.*  
8 *Moses*, 24 Cal.4th 1122, 1133-1134 (2001) (public policy requires compensation for all hours  
9 reasonably spent, to encourage attorneys to undertake such cases).

10 Declaratory relief also furthers the principle that "mootness by reason of settlement does  
11 not justify *vacatur* of a judgment under review." *U.S. Bancorp Mortg. Co. v. Bonner Mall*  
12 *Partnership*, 513 U.S. 18, 29 (1994). *Cf. Arizonans for Official English v. Arizona*, 520 U.S.  
13 43, 71-75 (1997) (*vacatur* appropriate under "exceptional circumstances" not present here,  
14 including unilateral action by prevailing party to moot underlying judgment).

15 These principles are at large now in California law as well. The California legislature  
16 has enacted a statutory presumption against vacating public judgments by means of private  
17 settlement for many of the same reasons, finding that "stipulated reversal undermines judicial  
18 efficiency by encouraging parties to try cases rather than settle them, and erodes public  
19 confidence in the judiciary by fostering the perception that litigants having sufficient wealth  
20 may buy their way out of the ordinary collateral consequences of public adjudications."  
21 *Hardisty v. Hinton & Alfert*, 124 Cal.App.4th 999, 1006 (2004) (Kaye, P.J.) (discussing  
22 enactment of Cal. Code Civ. Pro. § 128(a)(8) to reverse majority opinion in *Neary v. Regents*  
23 *of the University of California*, 3 Cal.4th 273 (1992)), *citing Neary*, 3 Cal.4th at 294-295  
24 (Kennard, J., dissenting).

25 Since the passage of Section 128(a)(8), California courts "deny requests for stipulated  
26 reversal if there is a reasonable possibility that the interests of nonparties or the public could be  
27 adversely affected by reversal. If there is no reasonable possibility of adverse impact on third  
28 parties or the public, then the court should weigh the parties' reasons for requesting stipulated

1 reversal against the other institutional concerns, [namely] the erosion of public trust likely to  
2 result from an appearance that the nullification of a judgment can be purchased, and the risk  
3 that the availability of stipulated reversal will reduce the incentive for pretrial settlements.”  
4 *Hardisty*, 124 Cal.App.4th at 1006 (citations omitted). Settlement to defeat Ms. Parker’s fixed  
5 and choate property rights risks just that: an “adverse impact on third parties.” Declaratory  
6 relief is appropriate to make it clear to all parties that this will not happen.

7 **CONCLUSION**

8 For the foregoing reasons, the Court should enter a declaration concerning the  
9 respective rights of the parties to this action and the underlying actions. The Court should state  
10 Ms. Parker’s continuing right to recover statutory attorney’s fees and unreimbursed costs for  
11 her work representing plaintiffs Alvarado and Boswell, and that no post-judgment settlement  
12 may be made that purports to resolve her fees claims unless she participates and agrees to such  
13 settlement.

14 Dated: June 26, 2009

Respectfully submitted,

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