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11 FEDERAL EXPRESS CORPORATION,
dba FEDEX EXPRESS (erroneously sued herein as
12 FedEx Corporation, dba FedEx Express)

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16 EDWARD ALVARADO, JOHN AZZAM,)
17 CHARLOTTE BOSWELL, TANDA BROWN,)
BERTHA DUENAS, PERNELL EVANS,)
18 CHARLES GIBBS, JANICE LEWIS, MARIA)
MUNOZ, KEVIN NEELY, LORE PAOGOFIE,)
19 DYRONN THEODORE, LASONIA WALKER)
and CHRISTOPHER WILKERSON,)

20 Plaintiffs,

21 v.

22 FEDEX CORPORATION, a Delaware
23 corporation, dba FEDEX EXPRESS,

24 Defendant.
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Case No. C 04-0098 SI
Case No. C 04-0099 SI (White v. FedEx)

**DEFENDANT'S MEMORANDUM OF
LAW IN OPPOSITION TO KAY
MCKENZIE PARKER'S MOTION FOR
DECLARATORY RELIEF**

Hearing Date: July 31, 2009
Time: 9:00 a.m.
Courtroom: 10, 19th Floor
Judge: Hon. Susan Illston

1 Defendant Federal Express Corporation (“FedEx”) files this Memorandum of Law in
2 opposition to Kay McKenzie Parker’s Motion for Declaratory Relief (Docket No. 1449)
3 (“Motion”). Parker’s premature Motion must be denied until the appeals of the underlying
4 judgments Parker is relying upon to support her “standing” are completed. While Parker’s
5 “standing” may have been ruled upon by the Court, Parker’s actual “entitlement” to fees has not
6 been adjudicated. Essentially, Parker is attempting to turn this Court’s previous Order (Docket
7 No. 1145) granting her “standing” to seek statutory fees from FedEx into a premature advisory
8 opinion that she is entitled to such fees. Indeed, any such “entitlement” and the amount of fees
9 Parker may recover has been previously referred by this Court to Special Master Swanson for
10 initial determination. *See* Docket Nos. 849 and 1145 at 2:2-4.

12 Parker bases her Motion on the judgments the Court entered in *Alvarado* and *Boswell*.
13 She, however, acknowledges that these judgments, which provide her “standing” to seek fees,
14 are on appeal to the Ninth Circuit. *See* Motion at 3:27-28.¹ While Parker takes an extraordinary
15 amount of pages to articulate to the Court what its Order means, the Court’s Order was straight-
16 forward, clear, and concise. The Court determined that “Ms. Parker has standing to seek
17 statutory fees pursuant to FEHA.” (Docket No. 1145 at 1:27.) (emphasis added.) The Special
18 Master, in turn, determined that under California law, Parker has standing as a “prevailing party”
19 to seek fees. The Special Master also determined that without a judgment, a party is not a
20 “prevailing party” and, thus, is not entitled to fees. *See* Special Master’s Order (Docket No.
21 1062 at 3:6-11 (“As plaintiff Evans is no longer a “prevailing party” under California
22 Government Code section 12965, the special master denies Parker’s fee petition in *Evans*.”)).

26 ¹ Parker is only partially correct in her statement that the judgments are on appeal. She
27 does not acknowledge that Ms. Boswell has also appealed the Court’s judgment, which is the
28 linchpin to Parker’s right of “standing.” *See* Docket No. 1095.

1 Unlike the issue of Parker's "standing" to seek fees in *Alvarado* and *Boswell*, which is not an
2 immediately appealable order, since Parker did not even appeal the Special Master's Order
3 regarding her lack of standing to seek fees in a case where there is no judgment, that portion of
4 the Court's Order is final and binding on the parties.² Moreover, based upon the Court's
5 rationale for granting Parker standing, if one or both of these judgments are vacated on appeal,
6 Parker would no longer have standing to seek statutory fees from FedEx.
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8 Finally, the Court has not yet had the opportunity to adjudicate Parker's "entitlement" to
9 attorneys' fees and what that entitlement means. For example, currently pending before this
10 Court is the judgment plaintiffs' declaratory relief action. *See Alvarado et al. v. McCoy et al.*
11 case no. cv 09-0485-SI. Among other things, the settlement plaintiffs have asserted the
12 following:

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14 Finally, the order [Special Master's order (Docket No. 1062), which was
15 adopted by the Court (Docket No. 1145)] appears to have implicitly
16 concluded that any statutory fees awarded in the underlying action belong
17 solely to the attorneys and not to the plaintiffs. . . For a number of reasons,
18 plaintiffs Boswell and Alvarado do not concede that these conclusions are
19 valid or binding as to them.

20 Amended Complaint For Declaratory Relief, case no. cv-09-0485-SI (Docket No. 5) ("Amended
21 Complaint") ¶ 11, attached for the Court's easy reference as Exhibit A.

22 Further, and as another example, the Court has not had the opportunity to rule whether
23 Parker's "fee splitting agreements" with Boswell and Alvarado conform to the strict legal

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25 ² In passing, Parker asserts that the Court's order on Parker's standing (Docket No. 1145)
26 is "final and binding on the parties." (Motion at 5:9.) Tellingly, in her Motion, Parker has not
27 (because she cannot) assert that FedEx has waived its rights to challenge this Order or that this
28 order somehow satisfies the "collateral order doctrine." *See Swint v. Chambers County Comm'n*,
514 U.S. 35, 42, 115 S. Ct. 1203 (1995) (holding that for an interlocutory order to be appealable
as a "collateral order," it must satisfy three requirements: (1) it must be conclusive; (2) resolve
an important question separate from the merits, and (3) be effectively unreviewable on appeal
from a final judgment.).

1 requirements under California law and, if these “agreements” do not conform to California law,
2 how that affects Parker’s “standing” to seek fees.

3 The public policy concerns FedEx originally raised if the Court granted Parker (as a fired
4 attorney) independent “standing” to seek fees (*see e.g.*, Docket Nos. 917, 1026) have now come
5 to fruition. First, the Court’s ruling has caused the judgment plaintiffs to expend substantial time
6 and money to institute a separate legal action against Parker. *See Alvarado et al. v. McCoy et al.*,
7 case no. 09-0485 SI. Second, the Court’s order has negatively affected the parties’ ability to
8 settle their disputes on appeal. *See Amended Complaint*, ¶ 14. Indeed, it is clear from the relief
9 requested by Parker -- “No party may diminish or otherwise affect Ms. Parker’s vested rights, by
10 settlement or other means, unless Ms. Parker fully participates in negotiations, and consents to
11 any settlement or other action,” (Docket No. 14449-1) -- that Parker’s real goal is to obtain veto
12 authority over any settlement attempted by the parties.

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15 Parker has, by filing this declaratory judgment action, attempted to do an end run around
16 the Court of Appeals by having this Court make a ruling that is completely dependent upon a
17 favorable ruling by the Ninth Circuit. The cases cited by Parker (Motion, pp. 7-8) do not stand
18 for the proposition for which she has cited them. None of them deal with a situation such as this
19 in which an attorney claims immediate entitlement to statutory attorneys’ fees during the
20 pendency of an appeal. In fact, Parker’s argument completely ignores the effect of the parties’
21 appeal of the *Boswell* judgment and FedEx’s appeal of the *Alvarado* judgment. Judgments do
22 not become fully enforceable until the appeals have been exhausted. Both the *Alvarado* and
23 *Boswell* judgments may be reversed by the Ninth Circuit. Alternatively, the judgments may be
24 vacated and a new trial may be ordered. Either way, under the interpretation by the Special
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1 Master (adopted by the Court and not timely challenged by Parker), Parker would no longer be a
2 prevailing party with “standing” to seek statutory fees against FedEx.

3 In short, Parker’s motion is completely improper at this time and seeks relief that this
4 Court cannot grant. Until the Ninth Circuit rules on the pending appeals of the *Alvarado* and
5 *Boswell* judgments, Parker is not entitled to any statutory attorneys’ fees. Furthermore, until the
6 Court adjudicates all of the other potential issues underlying Parker’s “entitlement” to fees, this
7 motion is improper.
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9 Based on the foregoing, Parker’s Motion must be denied.

10 DATED: July 10, 2009.

FEDERAL EXPRESS CORPORATION

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12 By: /s/ Barak J. Babcock
13 Barak J. Babcock
14 Attorney for Defendant
Federal Express Corporation

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