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16 UNITED STATES DISTRICT COURT
17
18 NORTHERN DISTRICT OF CALIFORNIA

19 DERRICK SATCHELL, KALINI
BOYKIN, VALERIE BROWN, RICK
20 GONZALES, CYNTHIA GUERRERO,
RACHEL HUTCHINS, TYRONE
21 MERRITT, KELVIN SMITH, SR., and
KEN STEVENSON, on behalf of
22 themselves and all others similarly situated,

23 Plaintiffs,

24 v.

25 FEDEX EXPRESS, a Delaware
corporation,

26 Defendant.
27
28

Case No. C 03-2659 SI; C 03-2878 SI

CLASS ACTION

**APPLICATION OF PLAINTIFFS FOR
ATTORNEYS' FEES AND FOR
REIMBURSEMENT OF COSTS AND
EXPENSES**

Date: August 9, 2007
Time: 3:30 p.m.
Place: Courtroom 10, 19th Floor
Judge: Hon. Susan Illston

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1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE that on August 9, 2007, at 3:30 p.m., or as soon thereafter as
4 the matter may be heard, in Courtroom 10 of the United States District Court of the Northern
5 District of California, located at 450 Golden Gate Avenue, 19th Floor, San Francisco, California,
6 Plaintiffs Derrick Satchell, Kalini Boykin, Valerie Brown, Rick Gonzales, Cynthia Guerrero,
7 Rachel Hutchins, Tyrone Merritt, Kelvin Smith, Sr., and Ken Stevenson, on behalf of themselves
8 and all others similarly situated, will apply, and hereby do apply, to this Court for an order
9 awarding to Class Counsel, on behalf of Plaintiffs and the Class, reasonable attorneys' fees of
10 \$12,425,000, and reimbursement of litigation costs and expenses of \$2,575,000.

11 The Application is based on this Notice; the Memorandum of Points and Authorities; the
12 Order (1) Conditionally Certifying Settlement Classes; (2) Granting Preliminary Approval to
13 Proposed Class Action Settlement, Consent Decree, and Plan of Allocation; (3) Directing
14 Dissemination of Notice And Claim Form to the Class; and (4) Setting Date for Fairness Hearing
15 and Related Events, dated April 13, 2007 (Doc. No. 729) ("Preliminary Approval Order"); the
16 [Proposed] Consent Decree (Doc. No. 729, Exhibit 1) preliminarily approved by the Court;
17 Stipulation and [Proposed] Order Re Interpretation of Section XXII.A.1 of the Consent Decree,
18 June 13, 2007 (Doc. No. 737); the Declaration of James M. Finberg In Support of Motion for
19 Preliminary Approval (Doc. No. 722); the declarations of Eve H. Cervantez, James M. Finberg,
20 Guy B. Wallace, John Burris, Kelly M. Dermody, Kay McKenzie Parker, Barry Goldstein, and
21 Michael S. Davis, submitted herewith; the pleadings and papers filed in this case; and any oral
22 argument this Court permits.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. INTRODUCTION**

25 Plaintiffs Derrick Satchell, Kalini Boykin, Valerie Brown, Rick Gonzales, Cynthia
26 Guerrero, Rachel Hutchins, Tyrone Merritt, Kelvin Smith, Sr., and Ken Stevenson, on behalf of
27 themselves and all others similarly situated ("Plaintiffs"), have reached a settlement with
28 Defendant Federal Express Corporation, dba FedEx Express ("FedEx"). In that settlement,

1 FedEx agreed to pay to Class Counsel, on behalf of Plaintiffs, attorneys' fees and costs and
2 expenses in a total amount of \$15,000,000 for work performed through final approval.
3 [Proposed] Consent Decree (Doc. No. 729, Exhibit 1) ("Consent Decree"), ¶ XXIII.B.2.
4 Although Plaintiffs' attorneys' fees and litigation costs and expenses to date far exceed that
5 amount, *see* Declaration of Eve H. Cervantez in Support of Application for Award of Attorneys'
6 Fees and Reimbursement of Costs and Expenses ("Cervantez Decl.") ¶ 2, Class Counsel's request
7 is limited to the amount specified in the Consent Decree and the Notice sent to the Class. Class
8 Counsel are applying for \$12,425,000 in fees and \$2,575,000 as reimbursement for costs and
9 expenses reasonably incurred in connection with the prosecution of this action.

10 Attorneys' fee and cost amounts negotiated at arms length should be approved if the
11 negotiated amounts are fair and reasonable. Here, the negotiated amounts requested by Class
12 Counsel are fair and reasonable, whether assessed under the percentage of a common fund
13 approach or the lodestar approach. Viewed under the lodestar method, Class Counsel's detailed
14 time records support an award well in excess of the amount requested. Altogether, the lodestar of
15 seven of the eight Class Counsel firms is \$13,166,739.25, yet Class Counsel seek to recover only
16 \$12,425,000 in fees. As a percentage, the fees requested are only approximately 22.6% of the
17 almost \$55 million fund created for the benefit of the class – less than the Ninth Circuit
18 benchmark of 25%. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002); *In re*
19 *Washington Pub. Power*, 19 F.3d 1291 (9th Cir. 1994); *Six Mexican Workers v. Arizona Citrus*
20 *Growers*, 904 F.2d 1301 (9th Cir. 1990); *Paul, Johnson, Alston & Hunt v. Graelty*, 886 F.2d 268
21 (9th Cir. 1989). Moreover, the \$2,655,208.78 in costs represents costs actually advanced. These
22 costs were necessary and appropriate, and typical of litigation of this type and size.

23 Pursuant to this Court's Preliminary Approval Order, the Court-Approved Notice of
24 Settlement was mailed to approximately 23,000 Class Members on May 23, 2007. The Notice
25 stated the amount requested in attorneys' fees and costs, and the procedure for objecting to these
26 amounts. To date, no Class Member has objected to the requested fees and costs. Cervantez
27 Decl. ¶ 15.¹

28 ¹ The deadline for objections is July 7, 2007. If objections to counsel's fees and costs are

1 **II. STATEMENT OF FACTS**

2 **A. The Litigation**

3 On September 25, 2003, the Court issued an order relating the *Caldwell* and *Satchell*
4 cases, and, on November 13, 2003, the cases were consolidated for all purposes pursuant to
5 stipulation.

6 Plaintiffs filed a First Consolidated Amended Complaint on November 12, 2003. The
7 Consolidated Complaint, filed by nine class representatives, asserted claims on behalf of two
8 classes, a class of hourly employees and a class of salaried low-level managerial employees. The
9 Consolidated Complaint asserted claims for race and national origin discrimination on behalf of
10 African Americans and Latinos under 42 U.S.C. §1981, Title VII, and, with respect to California
11 class members, FEHA. The Consolidated Complaint limited its claims and the scope of the
12 putative class to FedEx's Western Region.

13 On October 12, 2005, plaintiffs filed a Second Consolidated Amended Complaint, adding
14 Tyrone Merritt, who had a claim regarding FedEx's Basic Skills Test ("BST"), as a class
15 representative.

16 On November 14, 2006, the Court granted plaintiffs' motion for leave to file a Third
17 Amended Complaint. The Third Complaint eliminated the class FEHA claim and broke the Title
18 VII cause of action into separate claims for disparate impact and disparate treatment.

19 Class Counsel have actively prosecuted this case. They conducted extensive discovery
20 and participated in hard-fought motion practice on a variety of procedural, discovery, merits, and
21 evidentiary issues. By the time the Consent Decree was finally negotiated, all fact discovery had
22 concluded, almost all expert discovery had concluded, and the Court had ruled on numerous
23 issues, including several motions *in limine* about trial evidence. In short, Class Counsel were
24 fully prepared to try the case, and had expended considerable effort to reach that point.

25 Plaintiffs conducted an extensive pre-filing investigation. Declaration of Michael S.
26 Davis in Support of Application of Plaintiffs for Attorneys' Fees and for Reimbursement of Costs

27
28 submitted after this Application is filed, Plaintiffs will file a reply brief on or before August 2,
2007.

1 and Expenses (“Davis Decl.”), ¶¶ 21-25 (attached as Exhibit C to the Cervantez Decl.). Once the
2 Consolidated Amended Complaint was filed, the parties conducted discovery related to class
3 certification throughout the first half of 2004. *See* Declaration of James M. Finberg In Support of
4 Motion for Preliminary Approval (Doc. No. 722) (“Finberg Preliminary Approval Decl.”), ¶17.
5 On September 11, 2004, plaintiffs moved for class certification. FedEx separately sought
6 summary judgment as to six of the named plaintiffs. These motions were litigated during the fall
7 of 2004 and winter of 2005. Plaintiffs opposed summary judgment, moved to compel additional
8 discovery, and sought relief from FedEx’s summary judgment motions pursuant to FRCP 56(f).

9 On March 21, 2005, the Court granted plaintiffs’ motion to compel discovery and Rule
10 56(f) motion. On September 28, 2005, the Court granted class certification and denied FedEx’s
11 summary judgment motions pending further discovery. In its class certification order, the Court
12 certified two classes nearly identical to the classes now proposed as part of the parties’ settlement:

13 1. A “Minority Employee Class” consisting of all African-
14 American and Latino Handlers, Freight Handlers, Material
15 Handlers, Checker-Sorters, Customer Service Agents, Couriers,
16 Swing Drivers, Ramp Transport Drivers, Ramp Area Drivers,
17 Shuttle Drivers, Dangerous Goods Agents, Information Agents,
18 Operations Agents, Ramp Agents, Service Assurance Agents,
19 Truck Control Agents, Trace Representatives, Input Auditors, Team
20 Leaders, and Dispatchers, working in defendant’s Western Region,
who are or were employed during the class period, who allege
claims of employment discrimination in violation of Title VII of the
Civil Rights Act of 1964 (both disparate impact and disparate
treatment), 42 U.S.C. §1981, and for those class members working,
or who worked, in California, the California Fair Employment and
Housing Act; and

21 2. An “African-American Lower-Level Manager Class” consisting
22 of all African-American Operations Managers working in
23 defendant’s Western Region during the class period who allege
24 claims of employment discrimination in violation of Title VII of the
Civil Rights Act of 1964 (both disparate impact and disparate
treatment), 42 U.S.C. §1981, and for those class members working,
or who worked, in California, the California Fair Employment and
Housing Act.

25 *See* Order re: Plaintiffs’ Mot. for Class Certification, Sept. 28, 2005 (Doc. No. 353). The Court
26 certified plaintiffs’ Title VII, §1981, and FEHA claims for Rule 23(b)(2) class treatment during
27 the first phase of the case, which was limited to liability and equitable relief. The Court also set
28 forth several different liability periods depending on plaintiffs’ claims. The longest class period –

1 for plaintiffs' §1981 claims regarding compensation and certain promotions – began on October
2 17, 1999.

3 FedEx sought to appeal the Court's class certification order to the Ninth Circuit Court of
4 Appeals pursuant to FRCP 23(f), and, on October 14, 2005, sought a stay of the district court
5 proceedings pending the outcome of that appeal. This Court denied FedEx's motion for a stay,
6 and the Ninth Circuit denied FedEx's Rule 23(f) petition on December 12, 2005.

7 The parties conducted broad, extensive and thorough discovery on the merits of the action
8 through the end of 2005 and all of 2006. Altogether, the written fact discovery conducted in this
9 case included 29 sets of document requests, nine sets of interrogatories, and requests for
10 admission propounded by plaintiffs, and multiple sets of document requests, interrogatories, and
11 requests for admission propounded by FedEx. *See* Finberg Preliminary Approval Decl. ¶22.
12 Class Counsel reviewed several hundreds of thousands of pages of documents that were produced
13 in discovery. Class Counsel reviewed, and, with expert assistance, analyzed computerized
14 personnel and payroll data from 1997 through October 2006. *See id.* ¶23.

15 Deposition discovery was also extensive. Plaintiffs deposed approximately 122
16 individuals, including approximately 42 corporate designees who testified on a variety of topics,
17 including FedEx's personnel policies, evaluations, training, computerized records, retention of
18 documents, the BST, and the reasons for employment actions against specific class members. *See*
19 *id.* ¶24. Plaintiffs also defended approximately 71 depositions, including plaintiffs, class
20 members, and experts. *See id.*

21 In June, September, and December 2006, the parties served and filed expert reports,
22 rebuttal expert reports, and surrebuttal expert reports, including reports prepared by statisticians,
23 industrial organizational psychologists, labor economists, a sociologist, a social psychologist, and
24 a management practices specialist. Plaintiffs and FedEx each took depositions over several days
25 of approximately five experts each. *Id.* ¶25.

26 In the winter of 2006, the parties exchanged lists of trial exhibits. The parties also
27 prepared jury verdict forms and questionnaires. In December 2006 and January 2007, the parties
28 filed and briefed many motions *in limine*. *Id.* ¶26.

1 **B. The Settlement**

2 At the instruction of the Court, the parties participated in negotiations with the assistance
3 of an experienced mediator, Hunter Hughes of Atlanta, Georgia. The parties had face-to-face
4 negotiating sessions in April 2006, December 2006, February 2007, and March 2007. *Id.* ¶27.
5 Under the supervision of the mediator, the parties' negotiations were conducted at arms' length.
6 *Id.* ¶28. As a result of these negotiations, Plaintiffs and FedEx achieved a settlement of this case
7 that included extensive programmatic relief and approximately \$55 million in monetary relief,
8 which included \$15 million designated to pay attorneys' fees, costs, and expenses. *See* Consent
9 Decree ¶ XXII.A.1; *see also* Stipulation and [Proposed] Order Re Interpretation of Section
10 XXII.A.1 of the Consent Decree, June 13, 2007 (Doc No. 737). The terms of the parties'
11 agreement following negotiations are contained in the Consent Decree, preliminarily approved by
12 this Court on April 13, 2007. Preliminary Approval Order, April 13, 2007 (Doc. No. 729).

13 The provision in the Consent Decree that FedEx will pay \$15 million in attorneys' fees
14 and costs for work performed by Class Counsel through the final approval hearing was negotiated
15 at arms length with the assistance of mediator Hunter Hughes. Declaration of James M. Finberg
16 in Support of Application of Plaintiffs for Attorneys' Fees and for Reimbursement of Costs and
17 Expenses ("Finberg Decl."), ¶ 28 (attached as Exhibit A to the Cervantez Decl.). There was no
18 trade-off of injunctive relief for attorneys' fees. *Id.* Nor was there a trade-off of monetary relief
19 for attorneys' fees. *Id.* Rather, in February 2007, after the negotiations over injunctive relief and
20 monetary relief had made substantial progress, mediator Hughes asked Class Counsel to provide
21 him with their day by day detailed lodestar and an itemization of their costs and expenses. *Id.*
22 Mediator Hughes received that information from almost all of the firms serving as Class Counsel.
23 *Id.* After receiving that information, and discussing the reasonableness of Class Counsel's
24 lodestar with Counsel for FedEx, and after taking into account the need for some additional work
25 (but not as much work as was ultimately needed), mediator Hughes made a "mediator's proposal"
26 of \$15 million in attorneys' fees and costs for work performed through final approval. Both sides
27 agreed to the mediator's proposal. *Id.*

28 Class Counsel's extraordinary efforts over many years on behalf of a class of over 20,000

1 current and former African-American and Latino employees of FedEx in several different salaried
2 and hourly job classifications have resulted in comprehensive programmatic relief, including
3 making changes in FedEx's selection practices (including the elimination of the Basic Skills Test
4 and manager approval of promotion applications), performance evaluations, and disciplinary
5 policies; requiring new diversity training, record-keeping, and data collection; and calling for on-
6 going monitoring by representatives of Class Counsel and a Special Master, plus monetary relief
7 of approximately \$55 million.

8 Together, the Law Offices of Michael S. Davis, Kay McKenzie Parker, and John Burris;
9 the law firms of Altshuler Berzon LLP, Schneider & Wallace, Lieff, Cabraser, Heimann &
10 Bernstein, LLP; and Barry Goldstein, of counsel to Goldstein, Demchack, Baller, Borgen &
11 Dardarian have performed approximately 33,173.55 hours of work, having a lodestar value of
12 \$13,166,739.25, on behalf of the Plaintiff Classes, as summarized in the declarations submitted
13 by each firm or attorney. *See* Cervantez Decl. ¶ 4; Finberg Decl. ¶ 24; Declaration of Kelly M.
14 Dermody in Support of Application of Plaintiffs for Attorneys' Fees and for Reimbursement of
15 Costs and Expenses ("Dermody Decl."), ¶ 35 (attached as Exhibit B to the Cervantez Decl.);
16 Davis Decl. ¶ 18; Declaration of Kay McKenzie Parker in Support of Application of Plaintiffs for
17 Attorneys' Fees and for Reimbursement of Costs and Expenses ("Parker Decl."), ¶ 10 (attached
18 as Exhibit D to the Cervantez Decl.); Declaration of John Burris in Support of Application of
19 Plaintiffs for Attorneys' Fees and for Reimbursement of Costs and Expenses ("Burris Decl."), ¶
20 18 (attached as Exhibit E to the Cervantez Decl.); Declaration of Guy B. Wallace in Support of
21 Application of Plaintiffs for Attorneys' Fees and for Reimbursement of Costs and Expenses
22 ("Wallace Decl."), ¶ 12 (attached as Exhibit F to the Cervantez Decl.); Declaration of Barry
23 Goldstein in Support of Application of Plaintiffs for Attorneys' Fees and for Reimbursement of
24 Costs and Expenses ("Goldstein Decl."), ¶ 21 (attached as Exhibit G to the Cervantez Decl.).² As
25 set forth in the attached declarations, in reaching this figure, each of these attorneys and law firms
26 has exercised billing judgment, reducing the lodestar submitted to exclude redundancies,

27
28 ² The Law Office of Waukeen McCoy was also appointed Class Counsel, but has not provided
other Class Counsel with time-records or a declaration stating the total amount of work
performed. *See* Cervantez Decl. ¶ 13.

1 inefficiencies, or other time not appropriately charged to a paying client. Finberg Decl., ¶ 26;
2 Dermody Decl., ¶¶ 28, 32; Davis Decl., ¶ 20; Parker Decl., ¶ 10; Burris Decl., ¶ 16; Wallace
3 Decl., ¶ 46; Goldstein Decl., ¶¶ 16-17. As further set forth in the Class Counsel’s declarations,
4 Class Counsel have also eliminated all time spend preparing this fee petition even though they are
5 entitled to “fees on fees.” Cervantez Decl., ¶ 14; Dermody Decl., ¶ 32; Davis Decl., ¶ 20; Burris
6 Decl., ¶ 16. Moreover, the attached declarations report time only through May 31, 2007, and thus
7 do not include many hours of additional time that Class Counsel has spent and will continue to
8 spend counseling class members about the settlement and moving for Final Approval of the
9 settlement. Cervantez Decl. ¶ 4; Finberg Decl. ¶ 24; Dermody Decl. ¶ 35; Davis Decl. ¶ 18;
10 Parker Decl. ¶ 10 Burris Decl. ¶ 18; Wallace Decl. ¶ 12; Goldstein Decl. ¶ 21. Thus, the value of
11 the actual time spent on the case far exceeds the \$13,166,739.25 gross lodestar amount.

12 **III. THE REQUESTED FEES AND COSTS ARE REASONABLE AND**
13 **APPROPRIATE.**

14 **A. The Requested Attorneys’ Fees are Reasonable.**

15 “Attorneys’ fees provisions included in proposed class action settlement agreements are,
16 like every other aspect of such agreements, subject to the determination whether the settlement is
17 “fundamentally fair, adequate, and reasonable.” *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir.
18 2003) (quoting Fed. R. Civ. Proc. 23(e)). Where attorneys’ fees are negotiated separately from
19 the class relief, and are separately provided for in the Consent Decree, the appropriate method for
20 determining the reasonableness of the fees is the lodestar method, applicable to fee recoveries
21 under fee-shifting statutes, with the percentage of recovery method used as a cross-check on
22 reasonableness. *Staton*, 327 F.3d at 972; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th
23 Cir. 1998).

24 Here, Plaintiffs’ entitlement to attorneys’ fees derives from two fee shifting statutes.³ The

25 ³ Title VII provides for “a reasonable attorney’s fee” to a “prevailing party.” 42 U.S.C. § 2000e-
26 5(k). Likewise, 42 U.S.C. § 1988 grants courts in cases brought under, inter alia, 42 U.S.C. §
27 1981 the discretion to “allow the prevailing party ... a reasonable attorney’s fee.” It is
28 uncontested that the Plaintiffs are a “prevailing party” for purposes of attorneys’ fees. In *Texas*
State Teachers Ass’n v. Garland School District, 489 U.S. 782 (1989), the Supreme Court ruled
that a party is a “prevailing party” if it succeeds on a significant issue and receives some of the
relief sought in the lawsuit. See also *Buckhannon Board and Care Home, Inc. v. West Virginia*
Department of Health & Human Resources, 532 U.S. 598, 604 (2001) (“[C]ourt-ordered consent

1 fees and costs were separately negotiated at arms length with the assistance of mediator Hunter
2 Hughes, and are expressly provided for in the Consent Decree independently of the class
3 monetary relief. Thus, the requested fees and costs are on top of the settlement amount secured
4 for the benefit of the Class and do not in any way diminish the Class's recovery. Consequently,
5 under *Staton*, the lodestar is the appropriate measure of the reasonableness of the fees.

6 **1. Plaintiffs' Lodestar is Reasonable.**

7 The starting point for computing the lodestar amount is to multiply the number of hours
8 the prevailing party reasonably expended on the litigation by a reasonable hourly rate. *See*
9 *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1028 (9th Cir. 2000); *see also Hensley v.*
10 *Eckerhart*, 461 U.S. 424 (1983). The court may reduce the hours claimed where the time was not
11 reasonably expended, but must provide an explanation for the reduction. *Sorenson v. Mink*, 239
12 F.3d 1140, 1146 (9th Cir. 2001). The hourly rates used must be "in line with those prevailing in
13 the community for services by lawyers of reasonably comparable skill, experience and
14 reputation." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). In addition, courts typically apply each
15 attorney's current rates for all hours of work regardless of when performed "as a means of
16 compensating for the delay in payment." *In re Washington Public Power Supply System Sec.*
17 *Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994). Once this "raw" lodestar figure has been determined,
18 the court "may, if circumstances warrant, adjust the lodestar to account for other factors which are
19 not subsumed within it." *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n. 4 (9th Cir.
20 2001).

21 Here, the amount of attorneys' fees agreed to by the parties in the Consent Decree is
22 substantially less than the reasonable lodestar amount even after exercising billing judgment, as
23 evidenced by each firm's supporting declarations. *See Cervatnez Decl.*, Exhibits A-G. Class
24 Counsel thus is not seeking its full lodestar, but only the amounts agreed to under the terms of the
25 Consent Decree.

26 The tasks performed by Class Counsel for the benefit of the Class in this case over a five-

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decrees create the 'material alteration of the legal relationship of the parties' necessary to permit
an award of attorney's fees.").

1 year period have included interviewing several hundred class members; drafting complaints;
2 researching a host of legal issues; reviewing and analyzing hundreds of thousands of pages of
3 documents; propounding written discovery; responding to document requests and interrogatories;
4 taking and defending almost 200 depositions; analyzing computer data regarding liability and
5 damages issues; retaining and working with experts regarding labor markets, statistics, cognitive
6 bias, and test validation; moving for class certification; opposing motions for summary judgment;
7 drafting and opposing motions *in limine*; preparing pretrial materials, such as exhibit and witness
8 lists and jury instructions; preparing for and participating in numerous mediation sessions;
9 drafting and negotiating the settlement agreement and plan of allocation; preparing the motions
10 for preliminary and final approval; and drafting and sending the notice of settlement and claim
11 forms. Class Counsel have performed this work entirely on a contingent basis and have not been
12 compensated for their time. *See* Cervantez Decl., Exhibit A, ¶ 24 (Finberg) ; Cervantez Decl.,
13 Exhibit B, ¶ 27 (Dermody); Cervantez Decl., Exhibit C, ¶ 18 (Davis); Cervantez Decl., Exhibit E,
14 ¶ 19 (Burriss); Cervantez Decl., Exhibit G, ¶ 18 (Goldstein).

15 The rates used in calculating the lodestar are likewise reasonable. Class counsel's
16 experience, reputation, and ability justify the rates charged. Class Counsel have extensive
17 experience litigating complex employment discrimination class actions, and other class actions
18 and civil rights cases. *See* Cervantez Decl., Exhibit A, ¶¶ 6-18; Cervantez Decl., Exhibit B, ¶¶ 5-
19 26; Cervantez Decl., Exhibit C, ¶¶ 5-12; Cervantez Decl., Exhibit D, ¶¶ 3-6; Cervantez Decl.,
20 Exhibit E, ¶¶ 3-13; Cervantez Decl., Exhibit F, ¶¶ 2-10; Cervantez Decl., Exhibit G, ¶¶ 7-12.

21 Based on these hours and rates, Plaintiffs' raw lodestar is \$13,166,739.25.⁴ Under the
22 terms of the Consent Decree, however, Plaintiffs seek only \$12,425,000, significantly less than
23 the presumptively reasonable lodestar amount. Accordingly, the requested fees are reasonable
24 under the lodestar method.⁵

25
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27 ⁴ Again, this excludes any work performed by the Law Office of Waukeen McCoy.

28 ⁵ Thus, although a number of the factors laid out in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), might support an enhanced award beyond the raw lodestar here, it is unnecessary for the court to address them.

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2. The Attorneys' Fees Sought are Also Reasonable Under the Percentage Method.

A percentage-based cross-check provides a means of confirming the reasonableness of the fee. *Hanlon*, 150 F.3d at 1029 (approving of the district court's apparent review of the negotiated fees under a lodestar methodology, then conducting a brief percentage review as a cross-check). In the Ninth Circuit, the benchmark for reasonableness under the percentage-of-the-recovery method is 25%. *Id.*; *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990); *Paul, Johnson, Alston & Hunt v. Graully*, 886 F.2d at 272; *see also Vizcaino v. Microsoft*, 290 F.3d at 1050 n.4 (finding that "a bare majority" of recent awards in "mega fund" cases are "clustered in the 20-30% range"). Here, considering only the monetary relief, and making no attempt to place a value on the extensive programmatic and injunctive relief secured for the Class, the amount payable by FedEx for the Class's benefit is approximately \$55 million.⁶ Accordingly, the requested attorneys' fees of \$12,425,000 represent 22.6% of this amount, less than the Ninth Circuit benchmark.

Thus, the percentage-of-the-recovery cross-check confirms that the lodestar amount sought by Plaintiffs is reasonable.

B. The Costs for Which Class Counsel Seek Reimbursement Are Reasonable

In the course of this litigation, Class Counsel have had to incur substantial costs, including retainer fees paid to five experts for their extensive analysis of FedEx's policies and employee data as well as for the time spent preparing for and having their depositions taken; costs associated with almost 200 depositions, including court reporter costs, transcript costs, and travel expenses associated with depositions taken outside the Bay Area; expenses associated with the preparation, research, and filing of the many pleadings filed and responded to in this matter; costs associated with copying, uploading, and analyzing hundreds of thousands of pages of documents; and costs associated with retaining a mediator for and traveling to mediations around the country. Dermody Decl., ¶ 36a-g; Wallace Decl. ¶¶ 18, 23. All of these costs and expenses were advanced

⁶ See Consent Decree ¶ XXII.A.1 (describing amount of monetary relief and calculation of interest).

1 by Class Counsel with no guarantee they would ultimately be recovered, and most were “hard”
2 costs paid out of pocket to third party vendors, court reporters, and experts. *Id.* These costs were
3 necessary in connection with the presentation of this litigation for the benefit of the plaintiff class.
4 Accordingly, these costs are reimbursable. *See In re UEC Corp. Sec. Litig.*, Fed. Sec. L. Rep. P
5 94,376, 1989 WL 73211 *6; *In re GNC Shareholder Litigation*, 668 F. Supp. 450, 452 (W.D. Pa.
6 1987); Conte, *Attorneys’ Fee Awards*, § 2.08 at 50-51 (2d ed. 1977). The total costs and expenses
7 incurred by seven of the eight Class Counsel in this litigation is \$2,655,208.78, Cervantez Decl. ¶
8 5, and pursuant to the Consent Decree, Plaintiffs seek reimbursement for these costs in the
9 amount of \$2,575,000.

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1 **IV. CONCLUSION**

2 For the forgoing reasons, Plaintiffs respectfully request this Court to approve their
3 application for attorneys' fees in the amount of \$12,425,000 and reimbursement of costs and
4 expenses in the amount of \$12,575,000.

5 Dated: June 22, 2007

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