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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DERRICK SATCHELL, *et al.*, Plaintiffs, v. FEDEX EXPRESS, a Delaware Corporation, Defendant. ______________________ PATRICIA CALDWELL, *et al.*, v. FEDEX EXPRESS, a Delaware Corporation, Defendant.	Case No.: C03-2659 SI; C 03-2878 SI CLASS ACTION **NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR FINAL CERTIFICATION OF SETTLEMENT CLASSES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: August 9, 2007 Time: 3:30 p.m. Place: Courtroom 10, 19th Floor Judge: Hon. Susan Illston

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 9, 2007, at 3:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 10 of the United States District Court, Northern District of California, located at 450 Golden Gate Avenue, 19th Floor, San Francisco, California, the plaintiff classes will, and hereby do, move for orders granting final approval to the parties' class action settlement, finally certifying the proposed settlement classes, and approving and entering the proposed Consent Decree (attached to the Court's April 13, 2007 preliminary approval order, Doc. 729).

Plaintiffs' Motion is based on this Notice, the accompanying Memorandum of Points and Authorities, the declarations of James M. Finberg, Mark Patton, and Barry Goldstein, the proposed Consent Decree, all other pleadings and papers on file in this action, and any oral argument the Court permits.

Defendant FedEx Express does not oppose this Motion.

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INTRODUCTION

The parties have agreed to a settlement that provides comprehensive injunctive relief and monetary relief totaling approximately $55,000,000. The parties' settlement, embodied in the Consent Decree, easily satisfies the "fair, reasonable, and adequate" standard for final approval. *See* Federal Rule of Civil Procedure 23(e).[1]

The Decree provides exceptional relief to African-American and Latino FedEx Express ("FedEx") employees. The Decree's extensive injunctive relief provisions address class members' promotion, compensation, and discipline claims, and will materially advance the goal of equal employment opportunity for African-American and Latino employees at FedEx. The monetary relief provided to class members is also substantial and fairly allocated. Taken together, the injunctive and monetary provisions of the Decree will provide class members with prompt, certain, and exceptional relief – in contrast to the complexity, delay, expense, and risk of continuing litigation.

Class members have responded favorably to the settlement. Class notice was mailed to 23,790 class members on May 23, 2007. As of July 2, 2007, the claims administrator had already received 8,426 claims, even though the deadline for submitting claim forms is not until August 1, 2007. Only 10 class members had opted out, and only one class member had submitted an objection.[2] Class counsel, who are experienced in litigating employment discrimination and class action cases, firmly believe that this proposed settlement is in the best interest of the class.

SUMMARY OF SETTLEMENT TERMS

The proposed Consent Decree provides comprehensive injunctive relief and substantial monetary relief.

I. INJUNCTIVE RELIEF

During the four-year period of the Decree, FedEx has agreed to implement comprehensive

[1] The proposed Consent Decree is attached to the Court's preliminary approval order. *See* Doc. 729.

[2] The deadline for postmarking objections and opt outs is July 7, 2007. Plaintiffs will address any objections received after July 2 in a reply brief.

affirmative relief addressing the promotion, compensation, and discipline claims in this action, including the following:

A. Selection Practices

1. FedEx will discontinue use of the Basic Skills Test ("BST") as a requirement for awarding Courier, Ramp Transport Driver, and Customer Service Agent positions, without requiring passage of an alternative cognitive-ability test as a condition precedent to being offered one of those positions during the period of the Decree. *See* Consent Decree Section XI.A.1.

2. If FedEx chooses to implement a new selection device or test for those positions, it will monitor whether such selection device or test has an adverse impact with respect to African-Americans or Latinos, and it will report the results of its adverse impact analyses to a Special Master, *see id.* Section XVIII, and to a subset of class counsel designated as "Monitoring Counsel," *see id.* Section IV.W. If there is adverse impact, FedEx will, after consultation with the Special Master and Monitoring Counsel, take appropriate steps, in accordance with the Uniform Guidelines on Employee Selection Procedures. *Id.* Section XI.A.2.

3. As part of the parties' settlement, FedEx has eliminated the "casual" category of employees. By the approval date, FedEx will offer existing casual employees upgrades to permanent status based on location availability and most recent hire date. Casual employees who are not upgraded will be advised of the opportunity to apply for available permanent positions. *Id.* Section XI.B.

4. Subject to very limited authorized exceptions enumerated in the Consent Decree, hourly positions will be filled only through the Job Change Application Tracking System ("JCATS"). A "Monitoring Panel" described in Section XVII of the Decree will develop and review reports to help ensure that this occurs, and monitoring reports will be provided to Monitoring Counsel and the Special Master. *Id.* Section XI.C.6.[3]

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[3] The Monitoring Panel will be established within two weeks of final approval and will be charged with using its best efforts to ensure FedEx's implementation of and compliance with the Consent Decree. The Panel will include an attorney from FedEx's Labor and Employment Group, an attorney from the FedEx Litigation Group, and a Managing Director from FedEx Human Resources. The Panel will report directly to the Chief Diversity Officer and the Legal Department Vice President member of

(continued . . .)

5. FedEx will make a computer or terminal reasonably available for employees to review posted Career Opportunities. *Id.* Section XI.C.1.

6. For JCATS positions, the manager will not approve, but only "verify," whether an employee has met the minimum objective requirements. FedEx will replace references to manager "recommendation" with references to manager "verification" in its Career Opportunities policy to reflect more accurately the role of managers in the internal application process. *Id.* Sections XI.C.4, XI.E.1.

7. FedEx will reprogram JCATS so that if a manger fails to take the action required to verify timely that an employee meets the minimum objective requirements, the employee's name will be included on the list of eligible applicants for consideration by the hiring manager. The hiring manager will verify the employee's eligibility before the employee may be offered the position. *Id.* Section XI.E.2.

8. FedEx will revise its Candidate Selection and Internal Applicant Processing policies to subject mangers to discipline up to and including termination for failing to fill positions according to company policy, including selection policies relating to priority groups and CEV scores. *Id.* Section XI.F.

9. The FedEx intranet will contain information about the Assessment of Skills, Performance and Interests Requirement for Entry into Management ("ASPIRE") process for each division. *Id.* Section XI.D.1.

10. FedEx will develop and distribute offline materials that outline the ASPIRE process for each division. *Id.* Section XI.D.2.

11. FedEx will allow enrollment in the available ASPIRE to Management classes

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(continued ...)
the FedEx Officer Diversity Council. FedEx will provide the Panel with all resources reasonably necessary to carry out its duties. *See* Consent Decree Section XVII.

In selecting members of the Monitoring Panel, FedEx will use its best efforts to appoint individuals who will be effective in carrying out the Panel's duties and responsibilities. Monitoring Counsel will be provided with a resume and qualifications for each person FedEx intends to appoint. Monitoring Counsel may interview candidates and provide their views about the candidates' qualifications and suitability. *See id.*

upon verification by an employee's manager that the employee meets the objective eligibility requirements, *i.e.*, the employee has no active warning letter, has a satisfactory rating in all performance review categories, has a satisfactory overall performance review score, has two years of college credit or equivalent work experience, and has four years of work experience in addition to the experience, if any, used for college credit equivalent. *Id.* Section XI.D.3.

B. Performance Evaluations

1. FedEx will modify its online performance review categories to include additional anchor statements, descriptions, and guidelines to assist managers in evaluating employee performance, particularly with respect to subjective categories. *Id.* Section XII.1.

2. FedEx will develop and communicate to managers clear guidelines setting forth when an exception to the rating scale may be given. Exception scores will be appropriate for: (a) active warning or reminder letters; (b) compliance with FMLA, military leave laws, state workers' compensation laws, or other federal, state or local law; (c) adding bonus points for perfect attendance and/or perfect punctuality; (d) consideration of documented events such as severe weather conditions or traffic situations that impacted a significant number of employees on the same date in the same location; (e) consideration of documented staffing shortages that impacted categories such as quality or efficiency; (f) consideration of other documented circumstances that justify exceptions in compliance with policy and after consultation with Human Resources and the location Senior Manager. *Id.* Section XII.3.

3. FedEx will enforce its written requirements that all exception scores must be approved by the location Senior Manager and that the reason for all exception scores must be documented in the comments section of performance reviews. *Id.* Section XII.4.

4. FedEx will add a performance review item to its location audit process to audit a sample of performance reviews for hourly employees to ensure that the guidelines and rating scales for the objective scores are followed and that any exception ratings are fully documented and approved as required by policy. *Id.* Section XII.5.

5. FedEx will develop an interactive mandatory training module to assist managers in conducting performance reviews in an accurate and consistent manner. The training module will

include a focus on the items set forth in the performance evaluation section of the Consent Decree. *Id.* Section XII.6.

6. FedEx will establish a procedure by which it will monitor whether the subjective components of its performance evaluations for Handlers and Couriers produce more than two negative standard deviations of disparity between African-American or Latino employees and white employees in the same job code, organization code, COMAT, time-in-position, and length of FedEx Express service.[4] FedEx will conduct regression analyses for Handlers and Couriers in the Western Region of the Air, Ground and Freight Services ("AGFS") and Domestic Ground Operations ("DGO") Divisions, aggregating data by (1) Handlers in AGFS, (2) Couriers in AGFS, (3) Handlers in DGO, and (4) Couriers in DGO. *Id.* Section XII.7.

7. FedEx will establish a procedure by which it will monitor whether the subjective components of its performance evaluations for Operations Managers produce more than two negative standard deviations of disparity between African-American and white employees in the same job code, organization code, COMAT, time-in-position, time-in-management, and length of FedEx service. FedEx will conduct a regression analysis, aggregating all data from (1) the Western Region of the AGFS division, and (2) the Western Region of the DGO Division. *Id.*

8. FedEx will report the results of its impact analyses to Monitoring Counsel and the Special Master. If, for any year during the term of the Decree, there is adverse impact as to either African Americans or Latinos, FedEx will validate in accordance with the Uniform Guidelines the subjective portions of the performance evaluation and associated processes for which a statistically significant disparity was found. *Id.*

C. Discipline and Complaints

1. FedEx will revise its Acceptable Conduct and Performance Improvement policies to provide for greater consistency in the use of disciplinary tools such as warning letters and

[4] COMATS are the AGFS and DGO locations that comprise the Western Region for purposes of the Decree. A list of Western Region COMATS is attached to the Decree as Appendix A. Those in Arizona, Colorado, Idaho, Montana, New Mexico, Texas, Utah, and Wyoming became part of the Western Region on or about October 12, 2003. *See* Consent Decree Section IV.K.

performance reminders, including by adding language that clarifies that an On Line Compliment/Counseling ("OLCC") is not considered discipline but may be considered when determining whether discipline is required and when identifying patterns of conduct or performance issues that may warrant discipline. FedEx will also merge the separate categories of "documented verbal counselings" and "documented written counselings" into the single category of "documented counselings," and will require that all counselings be "documented" as OLCCs regardless of whether a separate memo or written synopsis of the counseling is given to the employee. *Id.* Section XIV.A.1.

2. FedEx will develop an interactive mandatory training module to assist managers with understanding and applying the Acceptable Conduct and Performance Improvement policies for greater consistency and neutrality. *Id.* Section XIV.A.4.

3. FedEx will enforce its policy that a written record must be made of the basis for all discipline. *Id.* Section XIV.A.2.

4. FedEx will prepare a complaint tracking spreadsheet that will record pertinent information regarding complaints in the Western Region of alleged discrimination on the basis of race (African American) or national origin (Latino) or retaliation against class members. *Id.* Section XV.2. Pertinent information shall include a designation identifying the complaint as one of race or national origin discrimination, or both; the name, job classification, and work location of the complainant(s); and the results of the investigation undertaken in response to the complaint, including the corrective action taken, if any, and the name of the manager(s) or other employee(s) disciplined. *Id.*

5. FedEx will provide its complaint tracking spreadsheets on a regular basis to the Monitoring Panel, *see id.* Section VII, and to Monitoring Counsel. *Id.* Section XV.3.

6. FedEx will, on a regular basis, provide the Monitoring Panel and Monitoring Counsel with a sample of employee complaints (as selected by the Monitoring Panel from the complaint tracking spreadsheet), along with all related non-privileged investigative files, and non-privileged written reports summarizing the investigation and remedial actions taken or proposed by FedEx relative to each selected complaint, for the purpose of review of the propriety and justness of the resolution of such complaints. The Monitoring Panel will review FedEx's investigation of each complaint and may, where appropriate, make recommendations regarding the investigation and

resolution of complaints. The Monitoring Panel may recommend that FedEx take additional investigative steps including, without limitation, re-interviewing the complaining party and other persons of interest. The Monitoring Panel may also take any other investigative actions the panel deems appropriate. In carrying out its monitoring duties, the Monitoring Panel may seek non-privileged backup or further documents or information regarding any complaint identified on the tracking spreadsheet. *Id.* Sections XV.4-XV.6.

7. FedEx will modify the steps for initiating a Guaranteed Fair Treatment ("GFT") process to encourage, rather than require, employees to engage in an open and frank discussion with the decision-maker before the GFT. *Id.* Section XVI.1.

8. FedEx will allow employees initiating a GFT process a reasonable amount of time prior to the GFT hearing to review and respond to the rationale submitted in support of FedEx's decision. *Id.* Section XVI.2.

D. General Equitable Provisions

1. FedEx will not knowingly maintain or enact any policy or practice that has the purpose or effect of unlawfully discriminating against any hourly class members on the basis of race or national origin, or the effect of unlawfully discriminating against any salaried, managerial class members on the basis of race. *Id.* Section X.1.b.

2. FedEx shall make available to African-American and Latino employees and African-American Operations Managers the same opportunities and terms and conditions of employment that FedEx affords to similarly situated white employees and white Operations Managers. *Id.* Section X.1.d.

E. Communication of Decree Terms

Within 30 days of settlement approval, and at least once during each year of the Decree, FedEx will provide to each of its Western Region officers, managers, and employees a written communication that reflects the company's commitment to diversity, equal employment opportunity, and implementation of the non-monetary aspects of the Consent Decree. *Id.* Section XX.[5]

[5] FedEx sent this written communication for this year shortly before the hearing on preliminary

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F. Diversity Training

FedEx will develop an interactive, mandatory diversity training module to help managers (1) identify barriers that inhibit valuing race and ethnic diversity, (2) understand why race and ethnic diversity awareness and acceptance is important to FedEx's growth and future, (3) learn how racial and ethnic stereotypes hinder effective communication and workplace interactions, and (4) learn how to recognize differences and how those differences can enhance the workgroup. *Id.* Section XXI.

G. Reporting, Recordkeeping, Monitoring, and Dispute Resolution

1. Section XVIII.A of the Consent Decree lists a series of records that FedEx must retain for the duration of the Decree (or as required by law, whichever period is longer). On reasonable notice, Monitoring Counsel will be entitled to review all non-attorney/client privileged or work-product protected documents required to be maintained or created under the Decree. If any dispute arises as to whether the production of certain documents is unreasonable, the Special Master will resolve the dispute. *Id.* Section XVIII.B.1.

2. FedEx will provide regularly scheduled and detailed progress reports on its compliance with the Decree to Monitoring Counsel and the Special Master. *Id.* Sections XVIII.C, XVIII.D.

H. Dispute Resolution

1. The parties agree to the appointment of Hunter Hughes as Special Master. *Id.* Section XVIII.1.

2. The Consent Decree establishes a comprehensive dispute resolution procedure, with disputes generally to be resolved by the Special Master. The Decree provides that decisions made by the Special Master may be appealed to Court. *See id.* Section XIX.

II. MONETARY RELIEF

In addition to the comprehensive injunctive relief described above, FedEx will establish a Settlement Fund of approximately $55 million and will also pay one half of the employer's share of payroll taxes deducted from class member awards. *See id.* Sections XXII.A.1, XXII.A.2.d, XXII.M.[6]

(continued …)
approval, after circulating a copy of the communication to class counsel.

[6] The precise amount to be paid by FedEx to the Settlement Fund will be determined as follows: (1)
(continued . . .)

This Fund will compensate class members who do not opt out and who submit timely claims, will provide small service payments to class representatives and 18 declarants for services provided on behalf of the class, and will pay attorneys' fees, notice costs, and administrative expenses.

Nearly $38.5 million of the Settlement Fund is allocated for payments directly to class members, reduced only by service payments not to exceed $360,000 total (or less than 1% of the Settlement Fund), by the actual cost of providing notice, and by any opt-out credits. *See id.* Section XXII.B.2.[7] Each class member who does not opt out of the settlement will receive a proportionate share of the net Settlement Fund (*i.e.*, $38.5 million less notice costs, service payments, and opt-out credits). Each class member's share will be determined using a point system, with a certain number of points allocated based upon specific factors related to the different claims at issue in the case. For African-American and Latino hourly claimants, the specific factors considered will be: (1) length of service during the class period; (2) status as part-time or full-time employee; and (3) BST failure. For African-American managerial claimants, the specific factor considered will be length of service as an Operations Manager during the class period. *See id.* Section XXII.L.

Class members who do not opt out must submit a claim form by August 1, 2007 in order to receive a monetary award. *See id.* Section XXII.F; *see also* Order Approving Revised Notice and Claim Form (Doc. 734), Ex. A (final version of claim form mailed to class members). Once all claim forms are submitted, the Claims Administrator – Settlement Services, Inc. – will allocate points, determine each class member's award, and distribute the settlement proceeds as soon as practicable.

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$53,500,000.00, plus (2) 4.924% per annum multiplied by the amounts the Court awards as service payments, attorneys' fees, and costs, calculated for the period from the 10th business day after preliminary approval to date of payment, plus (3) 5% per annum multiplied by the balance of $53,300,000.00 (less any opt-out credits or incremental payments), calculated for the period from the 10th business day after preliminary approval to the date of payment. *See* Consent Decree Section XXII.A.1; *see also* Order re: Interpretation of Section XXII.A.1 of the Consent Decree (Doc. 743).

[7] FedEx is entitled to a credit for each class member who submits a timely and complete opt-out request and who does not rescind that opt out as provided in Section XXII.D.3. The credit amount will be the average settlement award for class members eligible to participate in the monetary Settlement Fund as determined by the Allocation Plan in Section XXII.L. The total of all opt-out credits to which FedEx is entitled will be deducted from the final payment to be made into the Settlement Fund. *See* Consent Decree Section XXII.D.4.

See Consent Decree Section XXII.M.

III. RELEASE OF CLAIMS

If the Court grants final approval to the parties' settlement and the proposed Consent Decree, "all Settlement Class Members who do not timely opt out will release all race and national origin discrimination claims against FedEx Express under federal and state laws that were certified by the Court on September 27, 2005, for the liability period of October 17, 1999 through the Preliminary Approval Date [April 13, 2007]." *Id.* Section VIII.A.[8]

The specific release provision for hourly Settlement Class Members states:

> The Court certified on September 27, 2005, claims of the Minority Employee Settlement Class concerning race or national origin discrimination in promotions, compensation, and discipline. The Minority Employee Settlement Class will release claims, arising during the Class Period, under any federal or state legal theory, for race and national origin discrimination in compensation, promotions identified in plaintiffs' statement regarding promotion claims filed on November 30, 2006, *i.e.*, (1) promotions in the Western Region of the AGFS and DGO Divisions from any casual Class Member Hourly Position to any permanent hourly position, (2) promotions from any permanent Class Member Hourly Position to any other permanent hourly position, (3) promotions of Latinos from a Class Member Hourly Position to operations manager positions, (4) promotion from Class Member Hourly Positions to customer representative positions from the beginning of the class period until June 1, 2006, and in the allegedly discriminatory issuance of performance reminders or warning letters, to the extent that the issuance of such discipline had an impact on an active employee's compensation or ability to promote.

Id.

The specific release provision for operations manger Settlement Class Members states:

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[8] The "Settlement Class" is the Rule 23(b)(3) class – including a "Minority Employee Settlement Class" and an "African-American Operations Manager Settlement Class" – that the Court granted conditional certification to in its April 13, 2007 preliminary approval order. *See* Doc. 729 at 3-5.

> The Court certified on September 27, 2005, claims of the African-American Operations Manager Settlement Class of race and national origin discrimination . . . concerning compensation and discipline. The African-American Operations Manager Settlement Class will release claims, arising during the Class Period, under any federal or state legal theory, for race and national origin discrimination in compensation and the allegedly discriminatory issuance of performance reminders or warning letters to the extent that the issuance of such discipline had an impact on any active employee's compensation or ability to promote.

Id.

The Decree does not release the non-class claims asserted by the class representatives individually, as set for in plaintiffs' Third Amended Complaint, paragraphs 77-81, 88-90, 98-100, 109-111, 117-119, 130-134, 141-143, 154-162, 181-185, 203-218, 226-253, 254-257. *Id.* Section VIII.B.

LEGAL STANDARD

The Ninth Circuit has recognized a strong policy favoring voluntary settlement of complex class actions. "[V]oluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). This is "especially true in complex class action" cases, *id.*, which lend themselves to compromise because of the difficulties of proof, uncertainty of outcome, and length and complexity of litigation. *See also Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) ("strong judicial policy . . . favors settlements, particularly where complex class action litigation is concerned").

Public policy also favors the settlement of Title VII cases. In *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), the Supreme Court explained that "[i]n enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims." *Id.* at 88 n.14; *see also Officers for Justice*, 688 F.2d at 625. This Court has reached the same conclusion. *See Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) ("settlement is favored in resolving Title VII litigation").

Federal Rule of Civil Procedure 23(e) requires that a class action settlement be "fair, adequate and reasonable" in order to merit approval. The Ninth Circuit has identified a non-exhaustive list of factors to guide the final approval inquiry, including (1) the amount offered in settlement, (2) the reaction of the class to the proposed settlement, (3) the strength of the plaintiffs' case balanced against the "risk, expense, complexity, and likely duration of further litigation" and the "risk of maintaining class action status throughout the trial," (4) the "extent of discovery completed" and the "stage of the proceedings," and (5) the informed views of experienced counsel. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). With respect to the last factor, the "recommendations of plaintiffs' counsel should be given a presumption of reasonableness," particularly when counsel has significant experience litigating similar cases. *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979); *Ellis*, 87 F.R.D. at 18 ("the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight").

When determining whether to grant final approval, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625; *see also Hanlon*, 150 F.3d at 1026 ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.").

ARGUMENT

I. THE COURT SHOULD GRANT FINAL APPROVAL TO THE SETTLEMENT AND CONSENT DECREE.

A. The Consent Decree Provides Exceptional Injunctive and Monetary Relief to the Class.

1. The Consent Decree Provides Exceptional Injunctive Relief.

The proposed Consent Decree provides exceptional injunctive relief that will materially advance the goal of equal employment opportunity for African-American and Latino employees at FedEx.

With respect to plaintiffs' promotions claims, the Consent Decree requires FedEx to discontinue use of the allegedly biased BST for Courier, Ramp Transport Driver, and Customer Service Agent positions, and it prevents FedEx from requiring passage of any alternative cognitive ability test during the period of the Decree. *See* Consent Decree Section XI.A. The Decree also includes requirements that any new selection device for the positions listed above be monitored for adverse impact (with reports to Monitoring Counsel); that hourly positions be filled through the JCATS system, with very limited authorized exceptions; that mangers only be permitted to "verify" – not approve – employees' satisfaction of minimum objective requirements for JCATS positions; and that FedEx provide information about the ASPIRE program on the company intranet and through offline materials, and permit enrollment in ASPIRE whenever an employee meets specified eligibility requirements. *Id.*

The Consent Decree addresses plaintiffs' compensation claims by providing extensive injunctive relief with respect to the allegedly discriminatory performance evaluation process, which affects employee pay. FedEx must monitor whether the subjective components of its performance evaluations for Handlers, Couriers, and Operations Managers have a statistically significant adverse impact (*i.e.*, result in two negative standard deviations of disparity), must report the results of its monitoring to Monitoring Counsel, and must validate under the Uniform Guidelines on Employee Selection Procedures, 41 CFR §§60-3.1 *et seq.*, any subjective portions of the performance evaluation or associated processes for which a statistically significant disparity is found. *See* Consent Decree Section XII.7. FedEx must also develop a mandatory training module to train managers regarding accurate and consistent performance reviews (with a focus on the items addressed in the Decree); develop and communicate clear guidelines setting forth specific circumstances for which an exception to the ordinary rating scale may be given; enforce the requirement that all exception scores be approved by the location Senior Manager and be documented by written reasons; and add a performance review item to its location audit process to audit a sample of performance reviews to ensure that the guidelines and rating scales for objective scores are followed and that any exception ratings are fully documented and approved as required. *Id.*

With respect to plaintiffs' discipline claims, the Consent Decree requires FedEx to review its Acceptable Conduct and Performance Improvement policies to provide for greater consistency in the use of disciplinary tools such as warning letters and performance reminders. *Id.* Section XIV.A.1. FedEx must develop a mandatory training module to train managers in proper, consistent, and neutral application of the Acceptable Conduct and Performance Improvement policies, *id.* Section XIV.A.4, and FedEx must enforce its policy requiring a written record for all discipline. *Id.* Section XIV.A.2.

The Consent Decree also provides relief with respect to the complaint processes employees may use to challenge discriminatory treatment. FedEx must track complaints of discrimination, create a Monitoring Panel to regularly review a sample of complaints and make any appropriate recommendations regarding their investigation and resolution, and provide its complaint tracking spreadsheets to both the Monitoring Panel and Monitoring Counsel. *Id.* Section XV. FedEx must revise the Guaranteed Fair Treatment Process so that employees are only encouraged, not required, to discuss their GFT complaint with the decision-maker, and to provide employees a reasonable time before a GFT hearing to respond to the company's decision. *Id.* Section XVI.

2. The Monetary Relief Provided by the Decree Is Substantial and Fairly Allocated.

The Consent Decree provides substantial monetary relief. The total fund created by the Decree will be approximately $55 million, with nearly $38.5 million allocated for payments directly to the class. *Id.* Section XXII. In order to claim monetary benefits, class members need only complete and then affirm the accuracy of a one-page information sheet, which asks for contact information, racial or ethnic background, positions and dates worked for FedEx (with information from FedEx's records already filled in, so that claimants need only review for accuracy), and information regarding whether the claimant has taken, passed, or failed the BST (again with information from FedEx's records already filled in). *See* May 14, 2007 Order Approving Revised Notice and Claim Form, Ex. A (Doc. 734).[9]

Each class member's monetary recovery will be determined according to an objective points

[9] The claim form submitted with plaintiffs' motion for preliminary approval also asked claimants to state whether they believed they had been discriminated against. Plaintiffs (in consultation with FedEx) later revised the claim form to eliminate that question, and the Court approved the revised claim form. The revision takes account of the fact that class members may not know whether they have been discriminated against, particularly in this case involving disparate impact claims.

system. *See* Consent Decree Section XXII.L. No class member will be required to prove that he or she suffered any specific amount of damage, or to attempt to estimate monetary damage suffered. *See id.*; May 14 Order, Ex. A.

For hourly employees, points will be awarded based on three factors: (1) length of service for FedEx during the class period; (2) status as a full-time or part-time employee; and (3) whether the class member failed the BST. *See* Consent Decree Section XXII.L. The length of service factor recognizes that longer term employees are more likely to have suffered discrimination; that their damages (as a percentage of pay that they would have earned but for discrimination) are likely to be higher because they worked a longer time during the class period; and that their damages may have been compounded over time (*i.e.*, if a poor performance review affected compensation for many subsequent years). The full-time versus part-time factor takes account of the fact that employees on the job for more time are more likely to have suffered discrimination, and that part-time employees earn less, which inevitably means that any reduction in pay as a result of discrimination would have been less as an absolute amount. Finally, the BST factor reflects that plaintiffs alleged a disparate impact claim based primarily on the BST, and that this claim was one of the strongest in the case.

For Operations Manager claimants, the relevant factor considered in awarding points will be length of service. This consideration is relevant for the reasons given above. Because Operations Managers do not work part-time and do not have promotions claims, the part-time versus full-time and BST factors are not relevant for operations manger class members.

B. The Reaction of the Class Supports Approval of the Settlement.

Class notice and claim forms were sent to 23,790 class members and potential class members on May 23, 2007. *See* Decl. of Mark Patton ¶2. The list of notice recipients was determined using data provided by FedEx and data gathered by class counsel during the course of litigation. Information about the settlement was provided at two web sites – www.FedExExpressClaims.com and www.racecaseagainstfedex.com. The settlement also generated substantial news coverage.

Objections and opt-outs are due July 7, 2007 and class member claims must be postmarked by August 1, 2007. See *id.* ¶¶ 5, 8-9. As of July 2, 2007, the claims administrator had already received approximately 8,426 claims. *Id.* ¶5. Only 12 class members have submitted opt-out requests, and two of those 12 have already rescinded their opt outs. *Id.* ¶8. Only one class member has submitted an objection. *Id.* ¶9. This overwhelming class member support for the settlement strongly favors final approval.

The single objection submitted to date was filed by Brett Hoiland, one of the 18 declarants for whom plaintiffs seek $5,000 service awards in a separate motion filed today. *See* Decl. of James M. Finberg Ex. A. Mr. Hoiland's objection is without merit. First, Mr. Hoiland objects that other class members may recover under the settlement even though they "never came forward with their individual claims." This is essentially an objection to the class action process itself, which is expressly permitted by Federal Rule of Civil Procedure 23 and which was already approved with respect to this case by the Court when it granted class certification. Rule 23 recognizes – as Mr. Hoiland does himself, elsewhere in his letter – that many individuals may be harmed in the same or similar ways by a common unlawful practice and that it would be administratively inefficient and often prohibitively expensive to require each individual who had been similarly harmed to litigate his or her claim separately. There are also many reasons why a class member in this case might not have come forward with an individual claim, including fear of possible retaliation or because the individual did not know that he or she had been discriminated against (*e.g.*, if the individual failed the BST but did not know that the BST had an adverse impact or did not know that he or she was compensated less than a similarly situated white.

Second, Mr. Hoiland appears to object on the basis that he believes his claim is stronger than others' and that his precise amount of damage should be calculated separately. As explained above, the parties have agreed on a point system to determine individual payments that takes account of several factors that serve as a proxy for the strength of individual damage claims. This procedure strikes an appropriate balance between taking fair account of the differing strengths of individual claims and permitting class members to claim without imposing onerous burdens of proof on each individual claimant. Mr. Hoiland's suggested alternative, which would require separate damages hearings for each individual class member, would be very expensive, exceedingly administratively complex, and would likely delay recovery for years.

Finally, Mr. Hoiland states that if he could, he would opt out of the class, but he believes his claims are time-barred. If Mr. Hoiland's claims are in fact time-barred, then he cannot possibly be receiving less through this class action than he would through a separate suit. And if Mr. Hoiland's claims are not time-barred (*i.e.*, if the filing of this case tolled the statute of limitations as to his claims) then Mr. Hoiland is free to opt out and to pursue his claims separately.

C. The Litigation Involved Substantial Potential Risks.

The "risk, expense, complexity, and likely duration of further litigation" are factors to be considered in assessing a proposed settlement. *Hanlon*, 150 F.3d at 1026.

The factual and legal issues in this case are complex, as demonstrated by the parties' years of hard-fought litigation and the terms of the Consent Decree itself. Any liability phase trial of plaintiffs' claims – which involve thousands of class members employed throughout FedEx's Western Region – would also be complex and would require substantial additional preparation and many fact and expert witnesses. Remedial phrase proceedings would add to this complexity.

All of these complex proceedings would be expensive and would result in significant delay before any potential recovery. FedEx has also already sought an appeal to the Ninth Circuit, and additional appeals would likely follow any trial on the merits. Appeals would, at a minimum, cause additional delay.

Litigating the case to trial also presents substantial risks. Although plaintiffs and class counsel believe class members' claims are strong, it is clear that FedEx would put on a vigorous defense, and it would ultimately be up to the fact-finder to determine, for example, whether FedEx acted with a prohibited discriminatory intent or whether the BST has had a prohibited discriminatory impact that cannot be defended on job relatedness or business necessity grounds.

In contrast to the complexity, delay, risk and expense of continuing litigation, the proposed settlement will yield a prompt, certain, and substantial recovery for class members.

D. The Parties Conducted Extensive Investigation and Analysis and the Settlement Was Reached through Arms' Length Negotiations.

The parties engaged in extensive fact-gathering, motion practice, and informal and formal discovery before agreeing to the terms of the proposed Consent Decree. By the time the Decree was finally negotiated, all fact discovery had concluded, almost all expert discovery had concluded, and the Court had ruled on numerous issues, including several motions *in limine* about trial evidence.

The Court issued an order relating the *Caldwell* and *Satchell* cases on September 25, 2003, and the cases were consolidated for all purposes on November 13, 2003. The parties then conducted extensive discovery related to class certification throughout the first half of 2004. *See* Finberg Decl. ¶18. On September 11, 2004, plaintiffs moved for class certification. *Id.* FedEx separately sought summary judgment as to six of the named plaintiffs. *Id.* ¶19. These motions were litigated during the fall of 2004 and winter of 2005. *Id.* ¶20. Plaintiffs opposed summary judgment, moved to compel additional discovery, and sought relief from FedEx's summary judgment motions pursuant to Federal Rule of Civil Procedure 56(f). *Id.* On March 21, 2005, the Court granted plaintiffs' motion to compel and Rule 56(f) motion. *Id.* ¶21. On September 28, 2005 the Court granted class certification and denied FedEx's summary judgment motions pending further discovery. *Id.*[10]

The parties conducted broad, extensive and thorough merits discovery through the end of 2005 and throughout 2006. Altogether, class counsel conducted approximately 122 depositions, including five expert depositions and approximately 42 depositions of subject matter experts designated pursuant to Rule 30(b)(6). *Id.* ¶25. Class counsel also defended approximately 71 depositions, including 9 named plaintiff depositions and approximately 47 depositions of additional class members and FedEx employees. *Id.* In addition, Class counsel spoke with approximately 1,000 class members, thoroughly interviewed many hundreds, and analyzed the information from those interviews. *Id.* ¶23.

Written fact discovery included 29 sets of document requests, nine sets of interrogatories, and requests for admission propounded by plaintiffs, and multiple sets of document requests, interrogatories, and requests for admission propounded by FedEx. *Id.* Class counsel reviewed many tens of thousands of pages of documents produced in discovery. *Id.* ¶24. Class counsel also received and analyzed, with expert assistance, computerized personnel and payroll data for the period from 1997 through October 2006. *Id.*

[10] FedEx sought to appeal the Court's class certification order to the Ninth Circuit Court of Appeals and sought a stay of the district court proceedings pending that appeal. This Court denied FedEx's motion for a stay, and the Ninth Circuit denied FedEx's petition for an appeal.

In June, September, and December 2006, the parties served and filed expert reports, rebuttal expert reports, and surrebuttal expert reports, including reports prepared by statisticians, industrial organizational psychologists, labor economists, a sociologist, a social psychologist, and a management practices specialist. *Id.* ¶26.

Litigation also continued in the form of motion practice and trial preparation. The parties litigated numerous discovery disputes, exchanged exhibit lists, prepared jury verdict forms, and filed and briefed many motions *in limine*. *Id.* ¶27.

At the instruction of the Court, the parties participated in negotiations with the assistance of an experienced mediator, Hunter Hughes. The parties' negotiations were protracted and required multiple lengthy sessions, including face-to-face meetings in April 2006, December 2006, February 2007, early March 2007, and late March 2007. *Id.* ¶28. Under the supervision of the mediator, all negotiations were conducted at arms' length and in good faith. *Id.* ¶29.

The extensive discovery, fact-gathering and motion practice allowed class counsel – who are experienced employment discrimination attorneys – to assess the strengths and weaknesses of the claims against FedEx and the benefits of the proposed settlement under the circumstances of this case. *Id.* ¶30. As a result of discovery exchanges and communications with class members, class counsel were well informed regarding FedEx's policies and practices and relied on that information in negotiating the injunctive relief terms of the Consent Decree. *Id.* ¶31.

Class counsel were also well informed regarding the potential for monetary recovery. Plaintiffs' statistical experts performed promotions and compensation analyses, and then a damages analysis, using the computerized personnel and payroll data provided by FedEx. *Id.* ¶32. FedEx's experts did the same. *Id.* The parties' expert calculations formed the basis for negotiations regarding the monetary terms of the settlement. *Id.*

In sum, the proposed Consent Decree is the non-collusive result of extensive factual and legal analysis and protracted arms' length negotiations between experienced and well-informed counsel under the supervision of an experienced mediator.

E. The Recommendations of Experienced Counsel Favor Approval of the Settlement.

The judgment of experienced counsel regarding the settlement is entitled to significant weight, *see, e.g.*, *Hanlon*, 150 F.3d at 1026, and the recommendation of experienced class counsel should be given a presumption of reasonableness. *See Boyd*, 485 F.Supp. at 622.

Class counsel have extensive experience prosecuting and litigating employment discrimination cases and complex class actions. *See* Finberg Decl. ¶¶4-12; Decl. of Barry Goldstein ¶¶4-12; *see also* Dermody Decl. ¶¶3-26 (attached as Ex. B to the June 22, 2007 Declaration of Eve H. Cervantez ISO Application of Plaintiffs for Attorneys' Fees and for Reimbursement of Costs and Expenses (Doc. 746)); Decl. of Michael S. Davis ¶¶4-12 (attached as Ex. C to June 22, 2007 Cervantez Decl.); Decl. of Kay McKenzie Parker ¶¶3-6 (attached as Ex. D. to June 22, 2007 Cervantez Decl.); Decl. of John L. Burris ¶¶2-13 (attached as Ex. E to June 22, 2007 Cervantez Decl.); Decl. of Guy B. Wallace ¶¶2-10 (attached as Ex. F to June 22, 2007 Cervantez Decl.); Decl. of Bary Goldstein ¶¶5-12 (attached as Ex. G. to June 22, 2007 Cervantez Decl.). Class counsel conducted a comprehensive legal and factual investigation into the claims in this case, *see* discussion *supra*, and class counsel firmly believe that the proposed Consent Decree easily satisfies Rule 23(e)'s requirements and is in the best interest of all class members. Finberg Decl. ¶33; Goldstein Decl. ¶13. This considered view of experienced counsel weighs heavily in favor of final approval.

II. THE COURT SHOULD GRANT FINAL CLASS CERTIFICATION.

The Court's April 13, 2007 preliminary approval order conditionally certified two injunctive relief classes under Rule 23(b)(2) and a monetary relief Settlement Class under Rule 23(b)(3). *See* 4/13/07 Order at 3-5 (Doc. 729). The Court ruled that the injunctive-relief classes satisfied all of the requirements of Rule 23(a) and 23(b)(2) and that the Settlement Class satisfies all of the requirements of Rule 23(a) and Rule 23(b)(3). *Id.* The Court also appointed the named plaintiffs as class representatives and plaintiffs' counsel as class counsel. *Id.* at 5-6. No member of the class has objected to class certification or the appointment of the class representatives or class counsel.

For this reason, in addition to the reasons stated in plaintiffs' motion for preliminary approval and in the Court's April 13, 2007 order, the Court should grant final certification to the injunctive-relief and monetary-relief class and should confirm the appointment of class representatives and class counsel.

CONCLUSION

For the foregoing reasons, the Court should grant final approval to the parties' settlement, grant final certification to the proposed classes, and enter the proposed Consent Decree.

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