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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

FEDEX EXPRESS, a Delaware corporation,

Defendant.

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

CLASS ACTION

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Date: January 14, 2005
Time: 9:00 a.m.
Courtroom of the Honorable Susan Illston

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INTRODUCTION

FedEx opposes Plaintiffs' Motion for Class Certification by brandishing its paper promises. But as FedEx's own expert concedes: "[A]ctions, particularly those of company leaders, speak louder than words." (Declaration of D. Jan Duffy ("Duffy Decl.") ¶ 14.) No paper promises can bury the reality of statistical proof: in evaluating, disciplining, compensating, and promoting employees, FedEx treats Minorities worse than white employees.

FedEx has a centralized, hierarchical structure and uniform policies governing promotion, compensation, evaluation, and discipline. The statistical evidence establishes that these policies have an adverse impact across the DGO and AGFS divisions, raising a host of common questions. The proposed class representatives are members of the proposed classes and suffered the same harm as that suffered by other class members. Accordingly, t he two proposed classes meet the requirements of Rule 23(a) and Rule 23(b)(2).

Rule 23(a)(1). Numerosity: FedEx does not dispute that joinder of all members of the proposed classes is impracticable.

Rule 23(a)(2). Commonality: In the Ninth Circuit, commonality is satisfied where there are shared legal issues and divergent factual predicates, or where there is a "common core of salient facts" coupled with disparate legal remedies. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). FedEx disputes commonality, but ignores this permissive standard. The record before the Court establishes numerous common questions that satisfy that standard, including the following: (a) Whether FedEx's companywide performance evaluation system, which FedEx concedes has discretionary components as to all jobs, has adverse impact on Minority Employees and African American Lower -Level Managers; (b) Whether FedEx's performance evaluation system has been validated for any jobs in accordance with the Uniform Guidelines on Employee Selection Procedures; (c) Whether FedEx's companywide requirement of passage of the Basic Skills Test ("BST") for promotions to Courier, Ramp Transport Driver, and Customer Service Agent is justified in view of its conceded adverse impact; (d) Whether FedEx's companywide discipline system has adverse impact on Minority Employees and African American Lower-Level Managers; (e) Whether FedEx's uniform compensation system, which

uniformly incorporates biased performance and discipline scores, has adverse impact on Minority Employees and African American Lower-Level Managers; (f) Whether FedEx's uniform promotion system, which uniformly incorporates biased performance and discipline scores, has adverse impact on Minority Employees; (g) Whether FedEx engages in a pattern and practice of disparate treatment adverse to Minority Employees and African American Lower-Level Managers; (h) Whether FedEx's policies and practices violate Title VII of the 1964 Civil Rights Act; 42 U.S.C. § 1981; and the California Fair Employment and Housing Act, as to class members who have been employed or reside in California; (i) When the applicable statutes of limitation began running with respect to class members' claims; and (j) Whether injunctive relief and other equitable remedies (including back pay and front pay) are warranted for class members.

Rule 23(a)(3). Typicality: The requirement of typicality is satisfied when the claims of class representatives are "reasonably co-extensive" with those of absent class members. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). FedEx disputes typicality, but again ignores this permissive standard. The proposed class representatives' claims cover the range of common questions regarding FedEx's promotion, evaluation, compensation, and discipline systems. They are "reasonably co-extensive" with the claims of other class members. FedEx attempts to create standing requirements that are not supported by Ninth Circuit law.

Rule 23(a)(4). Adequacy: FedEx appears to concede adequacy in its Proposed Order. FedEx's contention that managers and hourly employees have a potential conflict is already accounted for by the two separate classes proposed.[1]

Rule 23(b)(2). Injunctive Relief: The proposed classes meet the standard for certification under Rule 23(b)(2) because plaintiffs seek meaningful injunctive relief. *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003).

FedEx attempts to distract the Court's attention by focusing on the lack of

[1] FedEx's memorandum in Opposition ("Opp.") attacks Class Counsel as inadequate for relying on certain deposition testimony evidencing a discriminatory culture at FedEx in the face of an order from the Court, then under reconsideration, denying a motion to compel (Opp. at 14), but does not explain how Class Counsel, given their collective resources and experience in the field of civil rights litigation, would be unable adequately to represent the interests of the Classes.

statistically significant adverse impact for claims that Plaintiffs do not seek to certify.[2] Far from seeking to certify an "across-the-board, wall-to-wall discrimination action," as FedEx suggests (Opp. at 1), Plaintiffs responsibly seek to certify only those class claims for which they have established a sound evidentiary basis for asserting class claims at this time.[3]

As to the claims for which certification is sought, FedEx's statistical expert concedes that (1) there is a statistically significant shortfall in the promotion of Latinos from Casual Handler jobs to Courier jobs (Report of Mary Dunn Baker, Ph.D. ("Baker Rpt.") at 9-10 & Tbl. 4) and (2) Latino Couriers were paid less than their white counterparts by a statistically significant amount (Baker Rpt. at 29). FedEx's expert is only able to eliminate statistical significance in other analyses by improperly including tainted variables such as performance evaluation score, BST score, and manager approval—all of which FedEx concedes have adverse

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[2] On page 10 of its Opposition, FedEx lists 11 preliminary findings that it asserts Dr. Drogin chose not to report because they were not statistically significant. Of those, the second and third findings relate to issues that are not the subject of Plaintiffs' class certification motion: promotions to senior manager, and the pay of Latino managers. Findings four through eleven relate to analyses of job changes involving a relatively small number of promotions that are, for the most part, subsumed by Dr. Drogin's overall promotions analysis, using JCATS data, set forth in paragraphs 44-48 of his Statistical Analysis of Race and Ethnic Patterns in Federal Express Workforce ("Drogin Rpt."), where he did find and report statistically significant under-promotion of African Americans and Latinos. Neither Dr. Baker (Baker Rpt. at 7) nor FedEx (Opp. at 10) bothered to mention that Dr. Drogin also did not report over 40 other preliminary studies he conducted, and produced to FedEx, where he did find statistical significance. (Dr. Richard Drogin Reply Declaration to Declaration of Dr. Mary Baker ("Drogin Reply") ¶¶ 3f, 24.) Contrary to what FedEx asserts, the standard Dr. Drogin used for whether to report a finding was not whether the result was favorable to Plaintiffs, but whether the study was reliable, probative, and informative regarding a policy or practice that is the subject of Plaintiffs' motion.

The first finding listed on page 10 relates to a study whose results are likely skewed by a tainted pool. As Dr. Drogin reports, African Americans are not promoted to the Courier position in the numbers one would expect. (Drogin Rpt. ¶¶ 25-27.) Had they been, the percentage of African Americans in the pool of Couriers would be larger and the results of an analysis of promotions from Courier to Operations Manager might well yield a statistically significant shortfall, as it does for Latinos (Drogin Rpt. ¶ 32). *See Stender v. Lucky Stores*, 803 F. Supp. 259, 333 (N.D. Cal. 1992) (lack of statistically significant disparities in promotion to certain positions caused by women being "blocked from upper management positions at the lower rungs of the promotional ladder").

[3] There is no motion before the Court with respect to potential class claims not included in Plaintiffs' Motion for Class Certification. The Court does not need to address those claims at this time. FedEx's request that such claims be dismissed without prejudice (which can perhaps be characterized as a cross-motion to strike), is premature since, for example, whether there is a meritorious claim for promotions from Operations Manager to Senior Manager is dependent on whether the pool of Operations Managers contains an under-representation of Minorities due to discrimination. *See Stender v. Lucky Stores*, 803 F. Supp. 259, 333 (N.D. Cal. 1992).

impact—or by improperly grouping casual employees in a pool with external hires, when they have different characteristics from external hires.[4] In any event, whether Plaintiffs' statistical model or FedEx's statistical model is more appropriate is a common issue and should be resolved on the merits. *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999). The differing opinions of the parties' experts on the merits present classic common questions that militate in support of class certification.

ARGUMENT

I. RULE 23(a)(2)'s COMMONALITY REQUIREMENT IS SATISFIED.

A. "Pure Subjectivity" Is Not Required for Class Certification.

FedEx asks this Court to deny class certification because its personnel policies contain some objective components. (Opp. at 12-13.) This is not the correct legal standard. The Supreme Court affirmed that subjective decisionmaking can be a basis for a disparate impact claim in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988). In that case, the Court held explicitly that a system that is a mix of subjective and objective components is subject to attack on an adverse impact theory. *Id.* at 989-90 (giving example of selection system requiring high school diploma and passage of general aptitude test, plus a brief interview); *see Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (holding that disparate impact analysis "may be applied to challenge both objective and subjective employment practices or criteria"). Here, FedEx's criteria for promotions, evaluations, compensation, and discipline are commonly tainted by discretionary components that produce discriminatory results.[5]

[4] *See* Drogin Reply ¶ 4; The Expected Representation of Race/Ethnic Minorities When Selected Vacancies Are Filled at FedEx Express, by Marc Bendick, Jr., Ph.D. ("Bendick Rpt.") ¶¶ 9-14.

[5] FedEx draws its erroneous notion of an "entirely subjective decisionmaking process" from a footnote in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982). The Court in that case found that an employee could not maintain a class action because he had not identified any questions of law or fact common to the proposed "across-the-board" class. *Id.* at 158-59. The Court opined in *dicta* that such an "across-the-board" class action *would* have been maintainable had "the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.* at 159 n.15. This statement—articulating an exception to the general rule that "across-the-board" class actions will not be certified—is not applicable here, where Plaintiffs are not alleging across-the-board discrimination, but have instead identified specific discriminatory policies and practices. Moreover, the Court made this statement by way of example only ("such as"), and also indicated that commonality and typicality would "clearly" be satisfied had the employer used a biased testing procedure. *Id.* The common questions in this case are consistent

Consistent with *Watson*, courts in this district have certified classes based on a subjective decisionmaking theory where the practices at issue were not "entirely subjective." *See, e.g.*, *Dukes v. Wal-Mart*, 222 F.R.D. 137, 149 (N.D. Cal. 2004) (describing Wal-Mart's compensation and promotion policies as involving both objective and subjective elements); *Butler v. Home Depot*, 1997 WL 605754 (N.D. Cal. Aug. 29, 1997) (Home Depot selection decisions involved both objective [*e.g.*, age] and subjective elements).

Plaintiffs here have identified discretionary components of FedEx's personnel policies and practices that have an adverse impact on class members. The presence of certain objective components does not immunize FedEx from liability for discrimination, and it does not preclude class treatment of Plaintiffs' disparate impact and disparate treatment claims:

1) First, FedEx's argument that promotions are based on "objective" criteria ignores the adverse impact of these criteria and FedEx's failure to validate them (including BST scores), as well as managers' unmonitored discretion to approve or not approve employee applications. FedEx also ignores the regular occurrence of CEV and job ranking group "pass-overs" in favor of non-class member candidates.

2) Second, FedEx's argument that performance evaluations have certain objective components ignores the declarations from Dr. Bielby and from operations managers including Kalini Boykin and Derrick Satchell regarding the discretionary elements of performance reviews, and the lack of guidance on how to apply the rating scale. [6]

3) Third, FedEx's argument that discipline is based on objective criteria ignores FedEx's failure to discipline non-class members for the same infractions. When, whether, and how to apply the disciplinary criteria remains discretionary and unmonitored. [7]

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with the examples given in t his footnote: a biased testing procedure (the BST), and largely subjective decisionmaking processes.

[6] *See* Expert Report of William T. Bielby, Ph.D. ("Bielby Rpt.") ¶¶ 26 -29; Decl. of K. Boykin ¶¶ 2-16; D. Satchell ¶¶ 4-11; J. Haynes ¶¶ 23 -36; I. James ¶¶ 18-30.

[7] *See* Bielby Rpt. ¶¶ 30, 32; Declarations of K. Boykin ¶¶ 17 -20; D. Satchell ¶¶15 -17; J. Haynes ¶¶ 38-40; I. James ¶¶ 32-34; Aroz Dep. at 141:6-144:22, Keitner Reply Decl., Ex. 1; Miller Dep. at 145:4-155:16 (no training on how to issue discipline; minorities disciplined more frequently than non-minorities for the same conduct; minority operations manager directed by senior manager to discipline minority employees in workgroup), Keitner Reply Decl., Ex. 17.

B. FedEx's Promotion System Has Adverse Impact and Raises Common Questions.

1. The Relevant Liability Period Is At Least October 17, 1999 to the Present.

FedEx argues that all promotions claims that arose prior to June 12, 2002 are time-barred and that, therefore, statistically significant disparities in earlier years are not relevant. This argument fails: 1) the liability period for Plaintiffs' promotions claims dates back to at least October 17, 1999 under 28 U.S.C. § 1658 and the continuing violations theory applicable to pattern-or-practice claims;[8] and 2) even if the liability period starts later, evidence from before the start of the liability period is relevant to proving timely claims.

The Supreme Court recently held in *Jones v. R.R. Donnelley*, __ U.S.__, 124 S.Ct. 1836 (2004), that claims brought under 42 U.S.C. § 1981 that were not actionable prior to 1990 are governed by the four-year, catch-all federal statute of limitations enacted in § 1658. Section 1658, rather than the applicable state statute of limitations, applies "if the plaintiff's claim against the defendant was made possible by a post-1990 enactment." *Id.* at 1845. The salient question, then, is whether Plaintiffs' promotions claims were actionable prior to 1990, or were only made possible by the amendments to Title VII enacted in the Civil Rights Act of 1991 (78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*).

The Ninth Circuit held in *Sitgraves v. Allied Signal, Inc.*, 953 F.2d 570 (9th Cir. 1992), a case involving race discrimination in promotion decided under pre-1991 law, that claims of denial of promotion to more skilled hourly positions with higher pay were not actionable under § 1981. The court found that where such a move did not entail the addition of supervisory duties, it did not "involve a meaningful, qualitative change in the contractual relationship," and therefore could not give rise to a § 1981 claim. *Id.* at 573-74 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)). Under *Sitgraves*, Plaintiffs' claims of denial of promotions from one hourly position to another, such as from Handler to Courier, were made possible only by the Civil Rights Act of 1991. They are therefore governed by the four-year statute of § 1658.

Plaintiffs' promotions claims dating back to 1999 are also timely because they

[8] FedEx concedes that the four-year statute applies to Plaintiffs' § 1981 compensation claims.

arise from a classwide pattern-or-practice of widespread, systematic discrimination at FedEx and are therefore part of a continuing violation. The Supreme Court and the Ninth Circuit have left open the applicability of the continuing violations theory to such claims. *See AMTRAK v. Morgan*, 536 U.S. 101, 115 n.9 (2002); *Lyons v. England*, 307 F.3d 1092, 1107 n.8 (9th Cir. 2002). Plaintiffs' pattern-or-practice claims are supported by evidence of FedEx's system of arbitrary and subjective decisionmaking in promotions, and by common statistical evidence demonstrating disparities in promotions and other selection procedures, such as the BST and performance reviews.[9] In this context, the liability period is not limited to the charge-filing period corresponding to any single act that forms part of the pattern-or-practice. Instead, the employer's liability may extend back to cover the entire period during which the pattern of discriminatory conduct prevailed, reasonably bounded by equitable defenses such as laches and by the two-year limitation on recovering back pay.[10] *See Morgan*, 536 U.S. at 119, 121-22.

In addition, both the Supreme Court and the Ninth Circuit have clearly held that time-barred discriminatory acts may serve as relevant background evidence for timely discrimination claims. *Morgan*, 536 U.S. at 113; *Lyons*, 307 F.3d at 1108-11. Such evidence is also relevant to proving that an employer acted with discriminatory intent during the liability period, even if the prior acts were taken against a different victim. *Lyons*, 307 F. 3d at 1111, n.12. In *Lyons*, the Ninth Circuit further clarified that the applicable standard for the admission of such time-barred evidence is the definition of relevance set forth in Rule 401 of the Federal Rules of Evidence, rather than the Circuit's pre-*Morgan*, more stringent "reasonable-relation" test.[11] *Id.*

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[9] *See Cherosky v. Henderson*, 330 F.3d 1243, 1247 (9th Cir. 2003) (noting in reference to the timely filing question that pattern-or-practice claims are distinct from discrete acts because they are "based on discriminatory conduct that is widespread throughout a company or that is a routine and regular part of the workplace," and that such claims "typically use statistical evidence to demonstrate the employer's [ ] treatment of the protected group").

[10] It is not necessary for this Court to further delineate the liability period at this stage, since FedEx has not yet produced complete data from before 1999 nor alleged any basis for laches.

[11] Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable," Fed. R. Evid. 301, whereas the Ninth Circuit's previous "reasonable relation" test required that the discriminatory prior acts be part of a continuing violation extending into the liability period. The Ninth Circuit noted in *Lyons* that under the reasonable relation test, a single derogatory racial remark from before the liability period would not be admissible, but that such a remark would be admissible under the Rule 401 standard applicable post-*Morgan*. *Id.*

at 1110-11. For these reasons, FedEx's argument that only statistics from 2002 and 2003 are relevant is unavailing, and Plaintiffs' inclusion of earlier years in their statistical analysis demonstrating common and statistically significant disparities is warranted.

Finally, all of these questions are common questions of law for the classes that support class treatment, regardless of their ultimate outcome.

2. Dr. Drogin Found Overall Adverse Impact in Promotions.

Contrary to FedEx's assertions (Opp. at 20), Dr. Drogin did perform an overall promotions analysis, using FedEx's Job Change Application Tracking System ("JCATS") database, of promotions among permanent hourly positions and from permanent hourly positions into operations manager positions. He found that African American applicants we re approved by their managers less often tha n white applicants (Z-value of -27.79) and selected less often tha n white applicants (Z-value of -7.19). (Drogin Rpt. ¶¶ 44-46.) He also found that Latino applicants (defined as such in FedEx's EEO data[12]) were approved less often tha n white applicants (Z-value of -13.24) and were selected less often tha n white applicants (Z-value of -4.74). (*Id.* ¶¶ 47-48.)

Because "Courier jobs represent the bulk of the highest-paying hourly jobs at FedEx, and are the stepping stone to the entry level management job of Oper ations Manager" (*id.* ¶ 21), Dr. Drogin also specifically analyzed promotions into the Courier position. (*Id.* ¶¶ 22-27, 30-31.) He found statistical significance with respect to both African Americans and Lat inos. (*Id.*)[13]

The overall disparities in promotions of class members, as well as the disparities in certain illustrative job moves, support an inference of class-wide discrimination in promotions. *See, e.g.*, *Stender v. Lucky Stores*, 803 F. Supp. 259, 333 (N.D. Cal. 1992) (finding statistical

[12] Plaintiffs use the term "Latino" rather than "Hispanic" because they understand that this is the term more commonly used on the West Coast.

[13] FedEx accuses Dr. Drogin of failing to report results that were not statistically significant on that basis. *See* Opp. at 10; *supra* note 2. In truth, FedEx, which was given all of Dr. Drogin's backup data, should be aware that Dr. Drogin did not report many statistical runs on relatively small samples, including many runs that showed statistical significance. D rogin Reply ¶ 24 n. 30 (36 unreported JCATS analyses with significant adverse impact; 8 unreported discipline or BST analyses with significant adverse impact; at least 9 unreported promotion analyses showing statistically significant adverse impact; at leas t 2 performance rating analyses showing statistically significant adverse impact).

evidence sufficient to prove disparate treatment in defendant's "promotion practices a s a whole" where the statistical evidence was significant for some positions and not for others).

The question at this stage is simply whether Dr. Drogin's approach is a reasonable method of conducting a statistical analysis. *Dukes v. Wal-Mart*, 222 F.R.D. 137, 158-59 (N.D. Cal. 2004); *see Barefield v. Chevron U.S.A.*, 44 F.E.P. 1885, 1987 U.S. Dist. LEXIS 15125 at *12 (N.D. Cal. Sept. 9, 1987). Dr. Drogin's methodology easily satisfies this requirement.

3. Dr. Baker's Analyses Are Flawed and Do Not Undercut Dr. Drogin's Analyses.

a. Dr. Baker Concedes Statistically Significant Disparities.

FedEx's expert, Dr. Baker, reported statistically significant disparities that support Plaintiffs' allegations of discrimination in (1) the under-promotion of casual Latino employees to Courier jobs (Baker Rpt. at 10, 18 & Tbl. 4; Z-value of -8.22); (2) hourly pay rates for Latino Couriers in 1999, with nearly ¾ of Latinos in DGO working in the Courier position (*id.* at 29); (3) pay rates for African-Americans for Customer Service Agent in 1 999 and Handlers in 2003 (*id.* at 27), and for Latino Ramp Agents in 2000 and 2001 (*id.* at 28) and Latino Material Handlers in 1999 (*id.* at 29); and (4) discipline of African-American employees by Caucasian managers in AGFS and DGO (*id.* at Tbl. 6.1; Z-values of 3.33 and 5.24).[14]

b. Dr. Baker Improperly Includes Tainted Variables in Her Models.

Dr. Baker opines that promotions analyses should take into account BST scores,[15] performance review scores, discipline records, and manager approval, and that compensation analyses should take into account performance reviews, and time in permanent positions. As Dr. Drogin's report demonstrates, however, and as Dr. Baker does not contest, all of those variables have statistically significant adverse impact.[16] They are all tainted variable s. Tainted

[14] Dr. Baker concedes that "when the outcome is adverse to the protected group and the number of standard deviations is two . . . or more . . . the data provide statistical s upport for a claim of discrimination. . . . " Baker Rpt. at 5.

[15] FedEx offers no evidence or expert testimony in defense of its BST. Dr. Nita French concluded in her Report on the Basic Skills Tests and Their Use by Federal Express that the BST is not properly required by FedEx for the three class member jobs for which it is used. The BST presents a classic common question and area for injunctive relief.

[16] Drogin Rpt. 50-52 (BST), 34-35 (performance), 53-55 (discipline), 39-47 (approval); Baker Rpt. at 20 & Tbl. 6.1 (conceding significant disparities in discipline); Baker Dep. at 31:19-32:3

variables should not be used in a proper model because they mask the discrimination being studied. A proper model analyzes expected outcomes in race-neutral processes and compares them to actual outcomes.[17]

Similarly, an employee's ability to embark on the ASPIRE process depends largely on manager invitation and requires manager approval. (Brooks Dep. at 33:7-34:10, Keitner Decl., Ex. 2 & Keitner Reply Decl, Ex. 4; Aroz Dep. at 42:20-47:19.) Whether a candidate has taken the PET is a grossly under-inclusive measure of interest because, before taking the PET, candidates must (1) have no active warning letters and have a current "above-satisfactory" performance review rating; (2) receive manager approval to take a series of pre-requisite classes; (3) receive manager confirmation of successful completion of the classes; and (4) receive manager assessment of "eCompetencies." (Brooks Dep. at 21:21-26:22, 32:23-38:16; Aroz Dep. at 47:20-51:21.) FedEx does not know whether this discretionary pre-approval process has adverse impact. (Brooks Dep. at 23:25-24:11, 25:19-26:5, 40:3-13.) Restricting an analysis of promotions to operations manager to candidates who have completed the PET, as Dr. Baker does (Baker Rpt. at 11 & Tbl. 5), unjustifiably restricts the relevant availability pool in a manner that masks statistical evidence of discrimination.

c. Dr. Baker's Selective Use of JCATS Data is Internally Inconsistent and Relies on Tainted Variables.

Dr. Baker offers no justification for her selective use of JCATS data to provide "actual" candidate pool data. Baker Rpt. at 10; *see* Drogin Reply ¶¶ 6(a)-(b), 7-9. As Dr. Drogin explained in his original report, only a small percentage of class member promotions appear in JCATS. Drogin Rpt. ¶¶ 23-24. Dr. Baker concedes that the JCATS data are incomplete. (Baker Rpt. at 15.) Dr. Baker does not adequately explain why she is willing to use incomplete data to

(BST), 32:4-33:21 (performance), 44:22-47:14, 50:16-51:9 (discipline), 71:22-74:21 (approval), Keitner Reply Decl., Ex. 2. Dr. Baker relied on variables such as BST and performance reviews without determining whether or not they were valid. *See* Baker Dep. at 17:1-25:17 (discussing tainted variables), 40:8-42:22, 43:1-5.

[17] Courts have rejected reliance on tainted variables in statistical analyses. *See, e.g.*, *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 332 (5th Cir. 1977) (rejecting pay rate regression analysis that incorporated race-biased differences in job classification and in subjective performance evaluations); *see also Butler v. Home Depot*, 1997 Dist. LEXIS 16296 at *37 (N.D. Cal. Aug. 29, 1997) ("A 'tainted variable' is one whose value is affected by discrimination and has the effect of concealing disparities due to discrimination.").

determine comparative interest, but not to do a promotions analysis. (Baker Dep. at 124:21-137:5.) Having used JCATS for the sole purpose of providing incomplete applicant pool data, Dr. Baker then inexplicably failed to analyze JCATS comparative approval and selection rates. Dr. Drogin analyzed comparative approval rates and selection rate s using JCATS data, and found strong statistical significance adverse to Minorities. Drogin Rpt. ¶¶ 44-48.

Although Dr. Baker concedes that a disproportionately fewer number of Minorities receives manager approval (Baker Dep. at 71:22-74:21), she uses the percentage of Minority "approved applicants" instead of the percentage of Minority applicants as her measure of interest. (Baker Rpt. Tbl. 2.1, 2.2, 3.1, 3.2; Baker Dep. at 77:18-79:12.) Had she simply used the percentage of Minority applicants, without including the tainted variable "approved," she would have found a much higher percentage of interested Minorities. (Baker Dep. at 80:17-84:11.)

d. Dr. Baker's Analysis of Promotions of Casual Employees Improperly Groups Casual Employees With External Hires.

Dr. Baker also errs in analyzing the move from casual to permanent status as if casual employees were external applicants. (Baker Rpt. at 9.) Dr. Marc Bendick, an expert labor economist, has found that this approach is unwarranted because FedEx treats c asual employees as employees. (Bendick Rpt. ¶ 14(a)-(b).) Casual employees at FedEx are properly treated as internal candidates and, as expected of internal candidates, have a much greater probability of being selected to fill job vacancies than external candidates. (*Id.* ¶¶ 9-13.) Dr. Bendick finds that Dr. Drogin's approach of treating casuals in a separate pool is supported by the evidence. (*Id.* ¶ 14(c)-(d).)[18]

e. "Statistical Duelling" Presents Common Questions.

Whether Plaintiffs' statistical model or FedEx's statistical model is more appropriate is a common issue and should be resolved on the merits. *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999) (noting irrelevance of "statistical duelling" at class certification stage of proceedings); *see also Bouman v. Block*, 940 F.2d 1211, 1225 (9th Cir.

[18] Even if it were appropriate to consider an external availability percentage, Dr. Baker did not use the appropriate Census category, since the category she selected does not even include the population being studied. (Bendick Rpt. ¶¶ 15-16; *see also* Drogin Reply ¶ 4(b); Baker Dep. at 115:11-123:3.)

1991) (whether statistics are rebutted is a question for the trier of fact). The statistical and expert testimony in this case will present common questions for the trier of fact. *Dukes v. Wal-Mart*, 222 F.R.D. 137, 155 (N.D. Cal. 2004); *Butler v. Home Depot*, *Butler v. Home Depot*, 1996 WL 421436 at *3 (N.D. Cal. Jan. 25, 1996).

C. FedEx's Performance Evaluation System Has Adverse Impact and Raises Common Questions.

1. FedEx Uses Centralized and Uniform Evaluations.

FedEx argues that, because there are several different performance review forms, there can be no class claim relating to the adverse impact of these reviews. No case law supports this stringent requirement. To the contrary, the Ninth Circuit has supported grouping much more diverse requirements together for the purpose of evaluating disparate impact. *See Paige v. State of California*, 291 F.3d 1141 (9th Cir. 2002) (grouping together written and oral exams with different questions and covering different topics for each peace officer rank).

FedEx uses a single evaluation form for Operations Managers, satisfying even FedEx's proposed requirement for commonality. For Hourly Employees, the 12 forms identified by FedEx use the same rating scale and have overlapping categories. They are centrally designed and disseminated (on paper or, more recently, on-line), and a single FedEx employee, Dr. Jerilyn Hayward, is responsible for all of them. [19]

2. FedEx's Evaluations Are Discretionary.

Managers at FedEx have virtually unfettered discretion and minimal guidance in scoring employees on the subjective components of performance evaluation forms. *See supra* note 6. Hourly employees are scored on a scale of 1 to 7 for each performance category, and managers are scored on a scale of 1 to 4 for each performance category. These scales have remained the same throughout the class period, although the reviews have been modified and

[19] FedEx cites two cases in support of its argument: *Grosz v. Boeing*, 2003 U.S. Dist. LEXIS 25341 (C.D. Cal. 2003), a case involving a proposed class of hundreds of job categories with no centralized performance evaluation policies or practices among the different business units, and *Barefield v. Chevron*, 44 FEP Cases (BNA) 1885 (N.D. Cal. 1987), where one evaluation was used for all class members. FedEx's high degree of centralization and uniformity of reviews is far from the situation in *Grosz*, where certification was denied, and much closer to that in *Barefield*, where certification was granted. *Cf. Barefield*, *supra*, at *11.

moved on-line. The computerization of the reviews has not improved them; to the contrary, the guidelines that appeared on the paper review forms have been truncated, causing Dr. Jerilyn Hayward to express concern about the resulting lack of guidance for managers.[20]

FedEx presents no evidence to support its claim that performance reviews and other employment policies are "driven" by objective factors. (Opp. at 12; Prop. Ord. at 3.) What matters is which aspects of its practices drive the observed adverse impact. FedEx has not even examined the adverse impact of its performance reviews, let alone whether the objective or the subjective components account for the adverse impact and thus "drive" differences in scores.[21]

3. FedEx Has Not Validated Its Evaluations.

FedEx's failure to validate its performance reviews represents a central common question affecting both the Minority Employee Class and the African American Lower-Level Manager Class. FedEx's performance evaluations of hourly employees and operations managers form the basis for employment decisions including eligibility for promotions, obtaining promotions, and pay rate increases. The evaluations fall squarely within the scope of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 *et seq.* They also fall squarely within the scope of the named plaintiffs' EEOC charges relating to the discriminatory outcomes of FedEx's performance evaluation system.[22] Because FedEx's performance evaluations have adverse impact on African-Americans and Latinos, FedEx is legally required to document their validity. FedEx has disregarded this obligation.

[20] Hayward Dep. at 195:10-196:21, Keitner Reply Decl., Ex. 14; E-mail from Jerilyn LeDuc (Hayward) to Wanda Lanier dated July 13, 2000, Keitner Reply Decl., Ex. 26 [Dep. Ex. 98].

[21] *See* Response to Declarations of Dr. Jerilyn Hayward and Ms. Jan Duffy by Nita R. French, Ph.D. ("French Reply") at 15-16. Whether the subjective components of the evaluations account for a disproportionate amount of the variation among scores is a common question for the classes.

[22] *See* EEOC charges of named plaintiffs, attached to Plaintiffs' Consolidated Amended Complaint: Gonzales (alleging discrimination in terms and conditions of employment and retaliation in the form of lower performance evaluation scores); Brown (alleging discrimination in compensation, promotions, and terms and conditions of employment); Satchell (same); Boykin (same); Guerrero (same; also alleging policies and practices with disparate impact); Hutchins (same); Smith (same); Stevenson (discrimination in terms and conditions of employment).

Contrary to FedEx's suggestion (Prop. Ord. at 6), Plaintiffs have exhausted their administrative remedies with respect to their performance evaluation claims. *See EEOC v. Farmer Bros.*, 31 F.3d 891, 899 (9th Cir. 1994) (affirming that district court has jurisdiction over scope of the EEOC charge and the scope of the actual EEOC investigation or an EEOC investigation which "*can reasonably be expected* to grow out of the charge of discrimination") (emphasis in original, quoting *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990)).

In response to the declarations submitted by Dr. Jerilyn Hayward and by Ms. Jan Duffy in support of FedEx's Opposition to class certification, Dr. Nita French concludes that FedEx's performance reviews "have not been shown to be valid, do not comply with the Uniform Guidelines on Employee Selection Procedures (UGESP, 1978), and do not meet other important criteria for good practice."[23] FedEx's own industrial psychologists have repeatedly highlighted problems with the reliability and consistency of performance reviews as they are used at FedEx. [24] FedEx's outside expert Jan Duffy did not inquire into whether FedEx complies with its obligation to validate selection procedures including performance reviews. Duffy Dep. at 83:5-25, Keitner Reply Decl., Ex. 9. She testified in deposition that FedEx's failure to comply with federal law requiring validation would not affect her opinion that FedEx represents the "Gold Standard" in personnel management. *Id.* at 137:5-138:3.

FedEx has produced no documentation indicating that FedEx's reviews are valid (*see* French Reply at 3-5, 7-8, 11-12), even though federal law requires employers to maintain such documentation. 29 C.F.R. § 1607.15. FedEx has disregarded its obligation to inquire into the adverse impact of performance evaluations and their effect on other employment decisions such as promotion and compensation. (French Reply at 15-16.) FedEx has produced no evidence that it has ever at tempted to identify alternative selection procedures with less adverse impact, despite its legal obligation to do so. 29 C.F.R. § 1607.3(B).

Ms. Duffy, who has no formal training in industrial organizational psychology or management (Duffy Dep. at 13:3-11, 18:8-19:25) and only extremely limited experience in employment discrimination class actions (*id.* at 7:17-8:4), offers no substantive opinions against class certification. She simply restates her previous public comments about FedEx's policies

[23] French Reply at 2; *see also id.* at 3-16 (cataloguing deficiencies, including: inadequate design (3-5); failure to ascertain whether or not reviews are interpreted and used consistently (5); lack of validation of both objective and subjective components (5-6); lack of evidence that category weights are appropriate (6); no validation of changes to reviews (6); insufficient evidence of job - relatedness (7-8); inappropriate use of traits rather than behavior as basis for evaluation (9); lack of definition of rating scale points (9-10); lack of evidence regarding properties such as rater reliability and ability accurately to distinguish different levels of performance across ratees and categories (11-13); lack of adequate rater skills training (13 -14); lack of monitoring and enforcement of policy (14-15); lack of monitoring of adverse impact (15 -16)).

[24] *See* Plaintiffs' MPA in Support of Plaintiffs' Motion for Class Cert. at 16 -17 (citing critical comments by FedEx I/O psychologists Joel Vaslow and David Brooks); French Reply at 12.

(Duffy Decl. ¶ 11) and studiously avoids examining FedEx's actual practices,[25] even though she concedes that "it is not reasonable management practice to engage in policies and procedures and practices or the implementation of those that result in legally declared discrimination" (Duffy Dep. at 53:13-17), and that mere "capability" to avoid discrimination is not enough. *Id.* at 92:19-93:5. Dr. French concludes that "numerous facts about FedEx practices are inconsistent with Ms. Duffy's conclusions." French Reply at 17; *see id.* at 17-19 (listing examples).

The written policies lauded by Ms. Duffy provide cold comfort where, as here, an employer takes no systematic steps to monitor whether the policies are followed, and where the policies themselves invite the influence of racial stereotypes.[26]

D. FedEx's Compensation System Has Adverse Impact and Raises Common Questions.

FedEx's compensation system is discriminatory, in large part, because performance evaluations with adverse impact are factored directly into permanent employees' compensation levels.[27] Dr. Baker's statistical comparison model, which uses the tainted variable of performance review (and only counts seniority in permanent positions even though Minorities spend disproportionate time in casual positions), ignores the causes of the discrimination. As discussed above, such a model is improper. *See supra* at 9-10; *James v. Stockham Valves &*

[25] Duffy Dep. at 29:10-20, 94:13-18; *see* French Reply at 16-17 (detailing flaws in Ms. Duffy's approach). Ms. Duffy failed to review or even to request materials including expert and deposition testimony (Duffy Dep. at 26:24-28:9), EEO-1 reports (*id.* at 82:10-21), or affirmative action program data (*id.* at 114:24-115:9). She did not interview any non-management employees. *Id.* at 105:2-12. Her "30 hours" of interviews consisted of two group meetings, and discussions with counsel for FedEx. *Id.* at 25:20-26:3. She wrote a report devoid of references to the record and based largely on "memory" because she is a "terrible note taker." *Id.* at 101:20-24. But her "memory" fails her on critical issues. For example, Ms. Duffy does not recall whether 90% of employees' grievances are rejected or upheld in the first stage of the GFT process. *Id.* at 102:7-103:15; *see also id.* at 111:12-25 (not aware of how often appeals board decides in favor of employee). Remarkably, she maintains that, either way, the GFT process is exemplary. *Id.* at 104:12-21. In addition, Ms. Duffy insists that the results of statistical analyses are not relevant to her inquiry. *Id.* at 32:1-14, 71:16-72:1, 86:1-17; 87:22-88:7, 137:5-13. In so doing, she ignores a basic method recognized by courts, scholars, and governmental agencies for examining whether employment practices are causing or preventing discrimination.

[26] *See* Bielby Rpt. ¶ 23 ("Formal written policies alone … are not sufficient to minimize bias. … The most effective approaches rely on proactive policies and practices, including recurring and mandatory training of managers and supervisors, and systematic and consistent monitoring of outcomes of personnel decisions.").

[27] The "Step Progression" pay administration system referred to by Dr. Baker does not apply to class member jobs. Baker Rpt. at 24; *see* Drogin Reply ¶ 15.

Fittings Co., 559 F.2d 310, 332 (5th Cir. 1977); Drogin Reply ¶¶ 19-21.

Dr. Baker's compensation model is also at odds with Ninth Circuit law disfavoring unnecessary stratification in statistical analyses. The Ninth Circuit has affirmed the "generally accepted principle" that using aggregated statistical data is generally more probative than using subdivided data, unless "the employer can demonstrate that 'the stratification is appropriate, and that the stratifying variable is business justified.'" *Paige v. State of California*, 291 F.3d 1141, 1148 (9th Cir. 2002); *see also Dukes v. Wal-Mart*, 222 F.R.D. 137, 158 (N.D. Cal. 2004). Subdivided data is often unhelpful because small sample size may distort the statistical analysis. *Paige*, 291 F.3d at 1148; *Stout v. Potter*, 276 F.3d 1118, 1123 (9th Cir. 2002).

Aggregation is appropriate where the groups in question "may be presumed to have been similarly situated and affected by common policies." *Paige*, 291 F.3d at 1148-49, *quoting Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprent. & Training Comm.*, 833 F.2d 1334, 1339 n.7 (9th Cir. 1987). FedEx is highly centralized and uniform and applies the same promotion, compensation, performance evaluation, and discipline policies to hourly employees and lower-level managers in both of the divisions at issue here, A GFS and DGO. Managers and employees move freely and frequently among FedEx locations, and between the two divisions. Local and regional managers do not have authority to deviate from company policy.

E. FedEx's Discipline System Has Adverse Impact and Raises Common Questions.

A disparate impact claim focuses on the results of an employer's policies and practices, regardless of the employer's intent. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). The race, gender, or other characteristics of each individual FedEx supervisor charged with issuing discipline are irrelevant to determining whether FedEx's discipline system has a disparate impact on class members. Dr. Drogin has shown that such disparate impact exists. (Drogin Rpt. ¶¶ 53-55.) Dr. Baker's analyses confirm Dr. Drogin's conclusion that African Americans are disciplined more than Whites by a statistically significant amount in both the AGFS and DGO divisions.[28]

[28] Baker Rpt. Tbl. 6.1; Baker Dep. at 44:22-47:14, 50:16-51:9. Dr. Baker believes that this disparity results from Minorities committing more infractions (Baker Dep. at 51:10 -53:17), even

FedEx's discipline system suffers from the same defects of manager discretion, lack of systematic monitoring, and adverse impact that characterize its promotion, evaluation, and compensation systems.[29] FedEx argues that discipline claims, by their very nature, are "ill-suited for class treatment." (Prop. Ord. at 8.) This blanket statement ignores the cases in which discipline claims have been certified. *See, e.g.*, *Chisholm v. USPS*, 665 F.2d 482, 492 (4th Cir. 1981) (certifying class claim for discriminatory discipline); *Battle v. White Cap, Inc.*, 1999 U.S. Dist. LEXIS 4658 at *10, *13-14 (N.D. Ill., March 30, 1999) (certifying claim for discriminatory application of a centralized discipline policy for tardiness and attendance); *Binion v. Metropolitan Pier and Exposition Auth.*, 163 F.R.D. 517, 521-24 (N.D. Ill. 1995) (certifying class claim for discriminatory discipline under centralized policy for tardiness, unexcused absence, and other infractions). It also disregards the reasons why certification was denied in the cases cited by FedEx.[30] The statistical and anecdotal evidence on the record here supports a class claim for disparate treatment and disparate impact in discipline for both the Minority Employee Class and the African American Lower-Level Manager Class.[31]

The race of the disciplining manager is not an appropriate variable to consider. In individual discrimination cases, courts have found that a supervisor may be liable for discriminating against an employee who belongs to the same protected group. *See, e.g.*, *United States v. Crosby*, 59 F.3d 1133, 1135, n.4 (11th Cir. 1995) (noting that a Title VII violation may occur even when supervisor or decision-maker is same race as alleged victim); *Motley v. Tractor*

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though it would also be consistent with Plaintiffs' allegations that Minority employees are disciplined more frequently than non-minorities for the same infractions. (*Id.* at 59:15-63:10.)

[29] *See supra* note 7.

[30] *See Pendleton v. Rumsfeld*, 628 F.2d 102, 105 (D.C. Cir. 1980) (position of representatives "markedly different" from that of other proposed class members; no statistical evidence presented); *Alexander v. Gino's, Inc.*, 621 F.2d 71, 74 (3d Cir. 1970) (insufficient facts in the record to show common issues of law or fact; no statistics presented); *Carson v. Giant Food, Inc.*, 187 F. Supp. 2d 462, 470 (D. Md. 2002) (no allegation of disparate impact); *Lang v. Kansas City Power & Light Co.*, 199 F.R.D. 640, 657 (W.D. Mo. 2001) (insufficient showing of commonality; statistical report not considered by court because of failure to disclose expert).

[31] *See, e.g.*, Hutchins Dep. at 203:20-204:25, Keitner Reply Decl., Ex. 16; Satchell Dep. at 103:1-16, 124:12-24, Keitner Reply Decl., Ex. 21; Smith Dep. at 138:18-140:19, Keitner Reply Decl., Ex. 22; Stevenson Dep. at 172:13-173:9, 197:12-198:24, Keitner Reply Decl., Ex. 24; Guerrero Dep. at 151:3-152:12, 154:14-156:14, Keitner Reply Decl., Ex. 13; Gonzales Dep. at 116:10-118:1, Keitner Reply Decl., Ex. 12; *see also* Declarations of D. Satchell ¶¶ 2, 15-17; S. Akins ¶ 12; Y. Canela ¶ 8; M. Griffin ¶ 12; E. Hill ¶ 6; I. James ¶ 15; Z. Latin ¶ 16; M. McCoy ¶¶ 10-12; V. McCray, Sr., ¶ 14; R. Moncrief ¶¶ 6-8; A. Norris ¶ 12.

Supply Co., 32 F. Supp. 2d 1026, 1055-56 (S.D. Ind. 1998); *Hansborough v. City of Elkhart Parks & Rec. Dept.*, 802 F. Supp. 199, 201-06 (N.D. Ind. 1992). The same rationale applies with even greater force in the class action context, in which courts rely on statistics as evidence that racial discrimination is the employer's "standard operating procedure." *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-8 (1977); *see International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive … can in some situations be inferred from the mere fact of differences in treatment.") FedEx cites no case law supporting its contention that the race of the disciplining manager is dispositive.

II. RULE 23(a)(3)'s TYPICALITY REQUIREMENT IS SATISFIED.

FedEx argues that there is "no class representative" for many of the class claims. (Opp. at 31; Prop. Ord. at 6.) This misconstrues the permissive standing and typicality requirements for class actions. The proposed class representatives satisfy the applicable standard.

Rule 23(a) is satisfied when the class representative is a member of the class and is subject to the discriminatory employment practices alleged on behalf of the class. There is no requirement of identity; indeed, such a requirement would defeat the very purpose of the class action procedure. The Ninth Circuit has held that "[u]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *see also Staton v. Boeing*, 327 F.3d 938, 957 (9th Cir. 2003) (rejecting defendant's argument that each job category should have a class representative for each type of discrimination claim alleged); *Paige v. State of California*, 291 F.3d 1141 (9th Cir. 2002) (single class representative in class action challenging multiple examinations for multiple job moves); *Barefield v. Chevron U.S.A.*, 44 F.E.P. 1885, 1987 U.S. Dist. LEXIS 15125 at *14 (N.D. Cal. Sept. 9, 1987) ("Typicality does not require that the representatives' claims be identical to those of the other class members.").[32]

[32] That FedEx found some class members willing to sign declarations indicating their satisfaction with the company does not warrant denying class certification. *See Shores v. Publix Super Markets*, 1996 WL 407850 at *3 (M.D. Fla. March 12, 1996) (that "potential class members are satisfied with the status quo … cannot defeat class certification."). At least 15 of FedEx's employee declarants are not even class members, because they are not African American or

As this Court has previously stated, "[c]ourts have routinely found that allegations that an employer operated under a general policy of discrimination can justify a class comprised of a diverse set of individuals."[33] As this Court held in *Home Depot*, "any potential problems inherent in the fact that the proposed class in the present case is comprised of a diverse group of plaintiffs can be remedied by bifurcation of the case into a liability phase (addressing issues

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Latino. These declarations are suspect because they are all from current employees and because the evidence establishes that FedEx's method of gathering declarations was coercive. FedEx declarant Mike Aroz, an operations manager, testified that he was instructed during the work day by his senior manager, Eva Brown, that he was "scheduled to do a declaration," and that he had no idea what the declaration was about until he was called into her office to sign it. Aroz Dep. at 60:1-62:23. He does not recall making any edits or changes to the draft declaration that was provided to him, and he estimates that he reviewed the declaration for about ten minutes. *Id.* at 70:1-25; *see also* Diaz Dep. at 39:2-4 (declaration signed during work hours), 10:23-14:9 (FedEx did not inform him that he is a member of the proposed class or that Plaintiffs are challenging FedEx practices), Keitner Reply Decl., Ex. 8; Barrett Dep. at 58:22-23 (declaration signed during work hours), 57:15-23 (simply presented with declaration to sign with no prior explanation), Keitner Reply Decl., Ex. 3. The declarations should be discounted accordingly. *See Shores v. Publix Super Markets*, 1996 WL 859985 at *4 (M.D. Fla. Nov. 25, 1996) (court was "highly suspicious" of class member declarations taken by employer via *ex parte* communication that occurred in workplace); *see also Siddiqui v. Regents of the Univ. of Cal.*, 2000 WL 33190435 at *8 (N.D. Cal. Sept. 6, 2000) (citing *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1202-03) (11th Cir. 1985)).

All of the employee declarations submitted by FedEx are of the cookie-cutter variety, containing virtually identical language. *See generally Planned Parenthood v. Doyle*, 162 F.3d 463, 468 (7th Cir. 1998) (discrediting identical affidavits). This Court has viewed such declarations with skepticism in the past. *Siddiqui v. Regents of the Univ. of Cal.*, 2000 WL 33190435 at *8 (N.D. Cal. Sept. 6, 2000). Declarations like FedEx's should not be given weight because only FedEx has had an opportunity to discuss the litigation with the declarants, giving declarants a one-sided view of the case. *Siddiqui v. Regents of the Univ. of Cal.*, 2000 WL 33190435 at *8 (N.D. Cal. Sept. 6, 2000). Moreover, multiple declarants assert facts that are consistent with Plaintiffs' class claims. *See*, *e.g.*, Declarations of F. Diaz ¶ 6 (failed BST); S. Jackson ¶ 30 (has heard that there is favoritism); H. Johnson ¶¶ 23, 27 (believes that white employees are compensated more than minorities and that he has been disciplined for petty matters); A. De Pacheco ¶ 7 (failed BST when first taken); B. Reyes ¶ 19 (aware of favoritism for white employee); K. Stevenson-Joyce ¶ 14, 18 (knows of minorities who unsuccessfully applied for position changes and knows of white employee who was selected for special assignments); F. Leos ¶ 5 (did not pass BST); L. Barrett ¶ 4 (failed BST). For example, in deposition, FedEx declarant Feliz Diaz testified that he took the BST twice in the hopes of securing a promotion to Courier, and that failing the BST prevented him from obtaining that job. Diaz Dep. at 23:12-18, 27:6-17; *see also* Barrett Dep. at 34:11-15, 37:4-10 (prevented from applying for Courier position because failed BST).

[33] *Butler v. Home Depot*, 1996 WL 421436 at *4 (N.D. Cal. Jan. 25, 1996) (certifying class), *citing Richardson v. Byrd*, 709 F.2d 1016, 1020 (5th Cir. 1983) (rejecting defendant's argument that an employee could not represent an applicant class); *see also Hartman v. Duffey*, 19 F.3d 1459, 1472 (D.D.C. 1994) (holding that a job-by-job requirement for typicality "would permit an employer to defeat the broad enforcement of Title VII simply by administering different objective tests as part of the application process for each job"); *Dukes v. Wal-Mart*, 222 F.R.D. 137, 167 (N.D. Cal. 2004) (holding that "there is no requirement that plaintiffs have a class representative for each management category that they seek to represent").

common to the class such as injunctive relief) and a remedial phase (addressing the individual compensatory damage claims)." *Butler v. Home Depot*, 1996 WL 421436 at *4 (N.D. Cal. Jan. 25, 1996). That is what Plaintiffs propose here.

The Rule 23(a) typicality requirements are met here with respect to the Minority Hourly Employee Class, comprised of African American and Latino casual and permanent employees who are all subject to the same discriminatory promotion, evaluation, compensation, and discipline policies and practices that Valerie Brown, Rick Gonzales, Cynthia Guerrero, Rachel Hutchins, Kelvin Smith, and Ken Stevenson complain of and seek to change. They are also met with respect to the African American Lower-Level Manager Class, comprised of African American operations managers who are all subject to the same discriminatory evaluation, compensation, and discipline policies and practices that Kalini Boykin and Derrick Satchell complain of and seek to change.[34]

The requirement that applicants for Courier, Ramp Transport Driver, and Customer Service Agent positions pass the BST forms part of the same pattern and practice of discrimination that has adversely affected Valerie Brown, Rick Gonzales, Cynthia Guerrero, Rachel Hutchins, Kelvin Smith, and Ken Stevenson. These class representatives can challenge the BST as part and parcel of FedEx's disregard for the adverse impact of its selection procedures, its failure to validate those procedures, and its failure to search for alternatives with less adverse impact as required by law.[35]

[34] FedEx asserts that some of the named plaintiffs' claims of discriminatory discipline make them inadequate as class representatives. (Opp. at 34.) However, as FedEx acknowledges, these claims are typical of the class members' disciplines claims. FedEx cites no authority prohibiting class members who have been disciplined from representing a class in an employment discrimination case, especially where there are allegations of unfair discipline.

[35] Moreover, Plaintiffs have filed a charge with the EEOC on behalf of Tyrone Merritt, a FedEx employee who failed the BST and was prevented from applying for Courier positions on that basis. (EEOC charge, Keitner Reply Decl., Ex. 25.) Mr. Merritt is willing to serve as a class representative if necessary. In addition, if the Court determines that class members who have failed the BST would best be represented by someone who has also failed the BST, the Court can issue a notice informing class members that the BST has adverse impact and inviting them to come forward. Because Plaintiffs do not have class member names and addresses, and because class members are not aware that the BST has adverse impact, this may be the best method to locate additional class representatives if the Court deems this necessary. The Eleventh Circuit has explicitly held that, when a court is presented with a motion for class certification, the court must first determine whether the case is appropriate for certification, and then "go on to decide whether any of the named plaintiffs are qualified to serve as class representative and, *if not qualified,*

III. RULE 23(a)(4)'s ADEQUACY REQUIREMENT IS SATISFIED.

FedEx argues that class certification is inappropriate because minority managers evaluate and discipline members of the Minority Employee class (Prop. Ord. at 7)—an argument rejected by the Ninth Circuit in *Staton v. Boeing*, 327 F.3d 938, 958-59 (9th Cir. 2003) (rejecting adequacy challenge to class comprised of both nonsupervisory and supervisory employees). Managers are not part of the Minority Employee class proposed here. Plaintiffs seek to certify a separate Lower-Level Manager class comprised of African American Lower-Level managers.

There is also no basis for denying certification based on the purely speculative notion that injunctive relief designed to promote fairness in t he application of FedEx's personnel policies will disadvantage those class members who have high performance review scores or have not been disciplined.[36]

IV. THE CLASSES MEET THE REQUIREMENTS OF RULE 23(b)(2).

FedEx attempts to avoid certification of a 23(b)(2) class by arguing, contradictorily, that (1) monetary relief "necessarily" predominates over the "impossible to quantify" injunctive relief requested, and that (2) the Court cannot determine whether monetary relief predominates over injunctive relief "bec ause consideration of the former claims is deferred." (Opp. at 37.) The law does not require a quantitative comparison. The class representatives seek to end FedEx's pattern and practice of discriminating against them and similarly situated employees. That is what Rule 23(b)(2) requires.

FedEx ignores the applicable standard in the Ninth Circuit, which has explicitly refused to follow the Fifth Circuit case law cited by FedEx in its brief. *See* Opp. at 37, citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).[37] The Ninth Circuit has warned

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whether a member of the class is willing and qualified to serve as class representative." *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1216 (11th Cir. 2003) (emphasis added).

[36] *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2002) (Ninth Circuit "does not favor denial of class certification on the basis of speculative conflicts"); *Social Services Union, Local 535 v. County of Santa Clara*, 609 F.2d 944, 948 (9th Cir. 1979) ("Mere speculation as to conflicts that may develop at the remedy stage is insufficient to support denial of class certification."), *citing Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975) (same).

[37] FedEx attempts to dismiss *all* injunctive relief as "precatory" based on the Ninth Circuit's statement in *Staton v. Boeing* that "much" of the injunctive relief under the rejected consent decree in that case "appears to be largely precatory in nature." *Staton v. Boeing*, 327 F.3d 938,

that FedEx's proposed approach, which this Circuit has rejected, "holds troubling implications for the viability of future civil rights actions." *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003). Instead, this Circuit recognizes the discretion vested in the district courts to evaluate the intent of the plaintiffs in bringing a particular suit. *Id.*

Here, as in *Molksi*, injunctive relief is the primary form of relief sought by the class representatives. FedEx has acted in a manner generally applicable to the classes by using selection procedures with adverse impact that have not been validated such as the BST and excessively discretionary performance reviews; by implementing a discipline system with adverse impact and no systematic monitoring of outcomes; by building these discretionary results into a compensation system based on biased performance reviews that has significant adverse impact; by discriminating in promotions, both because of the built-in biases of the BST, performance review, and discipline components, and because of a lack of monitoring of "pass-overs" where managers disregard policy; and by maintaining a tap-on-the shoulder system of promotion from casual to permanent jobs. Plaintiffs seek to change all of these aspects of FedEx's behavior to secure the equal treatment they have been denied.

CONCLUSION

Because the requirements of Rule 23(a) and 23(h)(2) are satisfied, this Court should certify a Minority Employee Class and an African American Lower-Level Manager Class so that class members can collectively seek redress for FedEx's common, discriminatory treatment of them.

Dated: December 16, 2004

LIEFF CABRASER HEIMANN & BERNSTEIN LLP

By: _____
James M. Finberg

944 (9th Cir. 2003); Opp. at 37. The class representatives here, unlike the proponents of the rejected Boeing settlement, seek legally enforceable relief. FedEx's citation to an unpublished decision about the certification of a punitive damages claim is similarly irrelevant to the question of the class representatives' intent here. Opp. at 37, citing *Beck v. Boeing*, 2003 U.S. App. LEXIS 3619 (9th Cir. 2003).

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