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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

20 FAITH D. MARTIN, et al,

21 Plaintiff,

22 v.

24 FEDEX GROUND PACKAGE SYSTEM INC.,
25 et al,

26 Defendants.

**PLAINTIFFS' MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT AND POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Date: May 21, 2009
Time: 2:30 p.m.
Courtroom 6

Honorable Vaughn R. Walker

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**PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT AND POINTS AND AUTHORITIES IN SUPPORT THEREOF**

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1 **I. Factual and Procedural Background**

2 This action involves claims that Defendant FEDEX GROUND PACKAGE SYSTEM
3 INC. ("FEDEX" or Defendant herein) failed to provide meal and rest periods to its hourly
4 employees. Plaintiff FAITH MARTIN filed this action on behalf of "all hourly employees"
5 against Defendant FEDEX on September 20, 2006 in San Francisco Superior Court (the
6 MARTIN action") -- and that action was removed to federal court. At the time of filing, and
7 unknown to Plaintiff MARTIN, another action had been pending for several years in Orange
8 County Superior Court entitled OLGUIN, et al. v. FEDEX GROUND PACKAGE SYSTEM
9 INC. The "OLGUIN" action had substantially the same allegations and was filed on behalf of all
10 "Package Handlers."
11

12 Plaintiffs in the pending OLGUIN and MARTIN actions worked with the Defendants to
13 resolve both cases collectively. The parties engaged in mediation on July 20, 2007 with the
14 Hon. Justice Richard C. Neal (ret) and after extensive and time consuming settlement
15 negotiations reached a settlement subject to court approval. The parties believe the settlement is
16 fair and provides an equitable method to distribute the settlement proceeds.
17

18 On December 31, 2008, the Court granted preliminary approval of the settlement,
19 conditional certification of the *class* for settlement purposes, approval of the proposed form of notice and
20 approval of the proposed opt-out, objection and claim procedure. Docket No. 72.

21 Having met the requirements for the granting of preliminary approval and having
22 complied with the Court's order regarding notice to the class and other related claims procedures,
23 as set forth in the Court's preliminary approval order, the parties are now before the Court
24 seeking final approval of the class action settlement.
25

26 ///

1 **II. Discussion**

2 A. LEGAL STANDARD

3
4 The Ninth Circuit has declared that a strong judicial policy favors settlement of class actions.
5 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). "There is an overriding
6 public interest in settling and quieting litigation" that is "particularly true in class action
7 suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). Nevertheless, where
8 "parties reach a settlement agreement prior to class certification, courts must peruse the proposed
9 compromise to ratify both the propriety of the certification and the fairness of the settlement."
10 *Staten v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). Having conducted the first inquiry
11 regarding the propriety of certification, the "court must carefully consider "whether a
12 proposed settlement is fundamentally fair, adequate, and reasonable," recognizing that "[i]t is
13 the settlement taken as a whole, rather than the individual component parts, that must be
14 examined for overall fairness" *Id.* at 952 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
15 1026 (9th Cir. 1998)); *see also* Fed. R. Civ. P. 23(e).

16
17
18 At the fairness hearing, the court should entertain any objections by putative class
19 members to: (1) the treatment of this litigation as a class action and/or (2) the terms of the
20 settlement. *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989) (holding
21 that prior to approving the dismissal or compromise of claims containing class allegations, district
22 courts must, pursuant to Rule 23(e), hold a hearing to "inquire into the terms and circumstances of
23 any dismissal or compromise to ensure that it is not collusive or prejudicial"). Following the fairness
24 hearing, the court will make a final determination as to whether the parties should be allowed
25 to settle the class action pursuant to the terms agreed upon. *Nat'l Rural Telecomms. Coop. v.*

1 *DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004).

2 In determining whether the terms of the parties' settlement are fair, adequate, and
3 reasonable, the court must balance several factors, including:

4 the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of
5 further litigation; the risk of maintaining class action status throughout the trial; the
6 amount offered in settlement; the extent of discovery completed and the stage of the
7 proceedings; the experience and views of counsel; the presence of a governmental
participant; and the reaction of the class members to the proposed settlement.

8 *Hanlon*, 150 F.3d at 1026. But see *Molski v. Gleich*, 31B F.3d 937, 953-54 (9th Cir. 2003) (noting
9 that a district court need only consider some of these factors -- namely those designed to protect
10 absentees).

11
12 B. TERMS OF THE SETTLEMENT AGREEMENT

13 The key terms of the stipulation and settlement are as follows:

14 1. Class Definitions:

15 Class No. 1: All FedEx Ground Package System, Inc. package handlers who held their
16 positions at FedEx Ground anytime between October 1, 2000 and the date
17 preliminary approval of this settlement is granted and
18

19 Class No. 2: All FedEx Ground Package System, Inc., non-package handler non-
20 exempt employees who held their positions at FedEx Ground anytime between
21 September 20, 2002 and the date preliminary approval of this settlement is granted.
22

23 2. Settlement Amount: Defendant agrees to a make available to settle the claims in this
24 case the sum of eight million one hundred twenty-five thousand dollars (\$8,125,000.00)

25 3. Deductions: Attorneys' fees of up to \$2,681,250.00 (33%), plaintiffs' costs of up to
26

1 class members. The parties consulted and retained experts (in the areas of subject matter, surveys
2 and statistics) to review the evidence and legal issues with an eye toward determining if there
3 existed appropriate scientifically approved methods for studying the class claims (such as surveys
4 and statistical sampling) in order to develop an appropriate class wide trial methodology that met
5 due process standards. The parties served and answered approximately 10 sets of interrogatories,
6 12 sets of document requests, and 9 sets of requests for admission (with hundreds of queries). The
7 parties took approximately 46 depositions, including the Plaintiffs' depositions, declarant
8 depositions, expert depositions, and depositions of other witnesses and affiants. There were
9 extensive law and motion briefings both on merits issues and discovery issues – along with all
10 expert retention/disclosure/discovery and class certification briefing. There were approximately
11 three on-site facilities inspections. Counsel for the parties have further invested extensive time
12 investigating the applicable and quickly evolving law as applied to the facts discovered regarding
13 the alleged claims of Plaintiffs and potential defenses thereto, and the damages claimed by
14 Plaintiffs. Plaintiffs' Counsel is aware of the defenses and legal positions of FedEx Ground and,
15 while Plaintiffs believed they would ultimately succeed in the Actions, there were considerable
16 risks as discussed in the preliminary approval motion and supporting declarations. FedEx Ground,
17 of course, believed it would ultimately succeed in the Actions either at certification and/or on the
18 merits. (Declaration of Michael L. Carver, ¶7; Declaration of Matthew Righetti, ¶10; Declaration
19 of Geoffrey F. Gega, ¶s 12 and 13; Docket Nos. 48, 49 and 56, respectively).

22
23 a. Plaintiffs' Investigation.

24 During the discovery process, Plaintiffs' counsel were given access to FedEx Ground's
25 time records and other documents pertaining to hours worked by the class. Since the records
26 produced by FedEx Ground were so voluminous (hundreds of thousands of documents), for
27

1 purposes of certification on the issue of missed meal and rest breaks Plaintiffs conducted a
2 sampling in support of motion for class certification. For purposes of settlement Plaintiffs'
3 counsel conducted a further and more detailed evaluation of the time records. This evaluation
4 was provided to the court in two separate filings, November 8, 2008 and December 22, 2008.
5 Following, the November 8, 2008 submission, the parties appeared before the court to discuss
6 their evaluation of the claims at issue. The Court requested further briefing and Plaintiffs filed
7 their additional submission on December 22, 2009. The Court, having reviewed the submissions
8 -- and after several hearings with counsel for both sides -- determined that the settlement was
9 fair and reasonable and the product of arms-length negotiations. See, Order, Docket 72, p. 9.
10

11
12 2. Risk, Expense, Complexity, and Likely Duration of Further Litigation

13 Despite having significantly developed the facts in the case, both sides faced significant
14 uncertainty because the claims (in particular the meal period class claim) encompass unsettled legal
15 issues. Class counsel faced a risk of non-recovery at the outset of the litigation, as class certification is
16 sometimes difficult to obtain in wage and hour cases. See *White v Starbucks Corp*, 497 F.Supp 2d 1080,
17 1081 (ND Cal, 2007)(Walker, J). Further, whether any meal/rest case could be certified based on the
18 legal standards set down by *Brinker v. Superior Court*, California Court of Appeal Case No.
19 D049331 (4th App.Dist, 2008) created further obstacles. However, the pendency of *Brinker* and
20 interpretations of the law by federal district courts created uncertainty over how California
21 courts would interpret the meal/rest statutes, which was a significant factor in evaluating the
22 litigation risk in this case. The California Supreme Court has granted review of the *Brinker*
23 decision (See California Supreme Court October 22, 2008 Order, Case No. S166350 granting
24 petition for review). If the *Brinker* decision is overturned, then Plaintiff expects the decision will
25 further strength Plaintiffs' position in this case; however, Defendant felt strongly that a decision
26
27

1 to uphold *Brinker* would strengthen its case. Further, Plaintiffs allege that a scheme was in place
2 whereby Defendants prevented employees from taking meal and rest breaks. Thus, the facts of
3 this case are most similar to the California Court Of Appeal decision in *Cicairos v. Summit*
4 *Logistics, Inc.* 133 Cal.App.4th 949 (2005). As such, Plaintiffs believe the facts presented by this
5 case fit precisely the situation carved out by the *Brinker* court as actionable. In brief, Plaintiffs
6 submit that the predominant factual situation presented here, wherein the class was allegedly
7 denied the opportunity to take meal periods and/or rest breaks due to Defendant's practice of
8 continually running the conveyor belts, removes it from the principle issues before the
9 California Supreme Court in *Brinker*. The Court expressly concurred with this reasoning in its
10 preliminary approval order. Order, Docket 72, p. 21.

11
12 These circumstances were explained at length in declarations of counsel, discussed at
13 length with the Court during the preliminary approval motion process and determined in the
14 Court's preliminary approval order.
15

16 3. Reaction of the Class Members to the Proposed Settlement

17 At preliminary approval, the Court found that the proposed notice sent to class members
18 is the best practicable under the circumstances. FRCP23(c)(2)(B). The Court further found that
19 the revised notice adequately appraises class members of their rights under the settlement.
20 Following preliminary approval, Defendant provided the claims administrator, Gilardi and Co.,
21 with the names and last known contact information and SSNs for the class members.
22 Accordingly, Gilardi and Co. mailed out the notice pursuant to the procedure outlined for the
23 court and which the court deemed acceptable. See, Declaration of Bernie Lenhart.
24

25 Specifically, on February 9, 2009, Gilardi sent notice to 51,974 individuals (Lenhart
26 Decl.). Following the mailing of the notice, Gilardi received 85 notice packets deemed
27

1 undeliverable but with a forwarding address. Gilardi re-mailed these packets. In addition,
2 Gilardi received 9,390 Notice packets as undeliverable where no new address was provided.
3 Gilardi performed skip tracing on these 9,390 individuals using SSNs and found additional
4 addresses for 7,820. Notice packets were re-mailed to these 7,820 addresses. For the those
5 individuals who were re-mailed Notice packets, the deadline to file a claim or a request for
6 exclusion was extended 30 days from the original deadline of March 26, 2009. Thus, these
7 individuals were given until April 25, 2009 to file claims or request exclusion (Lenhart Decl.).
8

9 As of April 27, 2009, there are 11,064 class members who have filed valid timely claims.
10 The settlement amount claimed by the class members who have made timely and valid claims
11 represents 36% of the Net Settlement Amount (\$1,860,700.00). The 11,064 claims represent
12 approximately 21% of the class (Lenhart Decl.). The maximum pay-out for any class member is
13 \$2,202; the average pay-out for class members is approximately \$218.
14

15 a. Not A Single Objection Filed And Only 48 Opt Outs.
16

17 The Court engaged in a detailed and thorough analysis at preliminary approval. Following
18 the Court's preliminary approval what remained to be seen was the response from the class
19 members as to the fairness and reasonableness of the settlement. The deadline for objecting to
20 the settlement has passed and not a single class member filed an objection to the terms of the
21 settlement, the amount of fees and costs sought, or the service payments to the named plaintiffs.
22 And, a mere 48 timely opt outs were received. (Lenhart Decl.).
23

24 The fact that there has not been a single objection and only a scant 48 opt outs from a
25 class size of 51,974 confirms the Court's extensive findings on preliminary approval as to the
26 fairness and reasonableness of the settlement.
27

1 16:10. The requested fee award is immanently fair, as the Court determined at preliminary
2 approval. No class member has objected to the requested fee and the fee request should be
3 approved.

4 Moreover, inasmuch as the Court performed the lodestar check at the preliminary
5 approval stage, its determination does not take into account the additional hours of work
6 undertaken by Class Counsel for the period subsequent to June 2, 2008. Class counsel submit
7 in the accompanying declarations their statement of these additional hours for purposes of an
8 updated lodestar check (although we do not believe that is necessary since the Court has
9 already found requested fees to be reasonable and we are not seeking any extra compensation
10 for these additional hours worked). These additional hours will reduce the lodestar multiplier
11 below the 1.48 factor which the Court earlier found to be very reasonable. Order, Docket 72, p.
12 16. Also see, Declarations of Geoffrey Gega, Michael Carver in Support of Final Approval.

13
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15 F. NAMED CLASS REPRESENTATIVES ARE ENTITLED TO INCENTIVE
16 AWARDS FOR THEIR SERVICES TO THE CLASS

17 Representative Plaintiffs are entitled to receive appropriate reimbursement for their
18 efforts. (*Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995). The
19 payments to the Class Representatives are intended to recognize the critical role they played in
20 this case and the substantial time, effort, and risks undertaken by each representative in helping
21 to secure the exceptional result obtained on behalf of the Class. "Courts routinely approve
22 incentive awards to compensate named plaintiffs for the services they provide and the risks they
23 incurred during the course of the class action litigation." (*Ingram v. The Coca-Cola Co.*, 200
24 F.R.D. 685, 694 (N.D. Ga. 2001) (quoting *In Re S. Ohio Correctional Facility*, 175 F.R.D. 270,
25 272 (S.D. Ohio 1997) (approving \$303,000 payment to each class representative plaintiff in
26
27

1 employment case settling before class certification); *Martens v. Smith Barney*, 1998 WL
2 1661385 *4 (S.D.N.Y. July 1998) and 181 F.R.D. 243, 262 (S.D.N.Y. 1998) (approving
3 payments of up to \$150,000 for named plaintiffs, for a total of \$1.9 million in incentive
4 payments for employment case settling prior to class certification); *Roberts v. Texaco*, 979
5 F.Supp. 185 (S.D.N.Y. 1997) (approving incentive payments up to \$85,000 for named plaintiffs
6 in employment case settling prior to class certification); see also *Bell v. Farmers Ins. Exch.*, 115
7 Cal.App.4th 715, 726 (2004) (upholding “service payments” to Named Plaintiffs for their efforts
8 in bringing class case); *Manual for Complex Litigation, Fourth* ’21.62n. 973 (2004) (noting that
9 service awards are warranted).

11 The factors courts use in determining the amount of incentive payments include 1) the
12 time and effort put into the litigation; 2) whether the litigation will further the public policy
13 underlying the statutory scheme; and 3) the risks of retaliation. (See *Van Vranken, supra*, 901
14 F.Supp. at 299; *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th cir. 1998); and *Roberts, supra*, 979
15 F.Supp. at 202.)

17 In this case, the settlement agreement provides that Plaintiffs may request incentive
18 awards for the Named Plaintiffs. Paragraph IX, section 6, states that:

19 Class Counsel will request that the Court approve incentive awards in any amount not to
20 exceed Ten Thousand Dollars (\$10,000) to each of the four Named Plaintiffs (Javier Olguin,
21 Miguel Vargas, Kelley Freeman, and Faith Martin). Class Counsel may request additional
22 amounts for incentive awards, not to exceed an additional total of \$10,000, provide the request
23 for attorneys’ fees will be reduced by any amounts requested for incentive awards in excess of
24 \$40,000. Defendant will not oppose such requests. Any Incentive Awards shall be paid to Class
25 Counsel within twenty-five (25) days of the Effective Date from the Settlement Fund. The
26 Named Plaintiffs’ Incentive Awards will not be taxed as wages. The Named Plaintiffs will
27 receive 1099 forms relating to the Incentive Awards.

1 The factors discussed above for incentive awards supports Plaintiffs' request for the
2 incentive awards sought here. The Class Representatives spent a lot of time, and provided
3 invaluable assistance to Class Counsel and the Class, in this case. (Gega Decl.) The assistance
4 the Class Representatives provided Class Counsel included, but is not limited to, reviewing, for
5 factual accuracy, all major pleadings filed with the Courts; providing the factual background for
6 the Class Complaint; reviewing many documents provided by Defendant and confirming the
7 accuracy of those documents; traveling to FedEx terminals throughout the State of California and
8 confirming the various violations alleged against Defendant prior to the filing of the Complaint;
9 enlisting the support of Class member's participation in the case including declarations;
10 analyzing and providing rebuttal to Defendant's factual assertions made in discovery responses;
11 and participating in meetings to discuss the factual allegations, and trial and settlement strategy.
12 (See Declarations of Javier Olguin, Kelley Freeman, and Miguel Vargas.) The Class
13 Representatives were also dedicated to providing responses to Defendant's numerous sets of
14 discovery requests. (*Ibid.*) Similarly, the Class Representatives spent significant time preparing
15 for their individual depositions, and attending their respective depositions. (*Ibid.*) The Class
16 Representatives also provided critical assistance in serving as liaisons between Class Counsel
17 and Class Members. (*Ibid.*) Plaintiffs would not have been able to secure the participation of
18 Class Members without the assistance of the Class Representatives. (Gega Decl.)

19
20
21 While Plaintiffs did not keep timesheets reflecting how many hours were actually spent
22 on the class action by each Named Plaintiff, all of the named Plaintiffs spent significant time
23 participating in this case as indicated by all of the activities listed above. (See Olguin, Freeman,
24 and Vargas Decls.) In fact, named Plaintiffs Vargas and Freeman spent at least 1-2 weeks
25 traveling to FedEx Ground terminal locations in Southern California looking for potential
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1 witnesses and declarants who would participate in this case together with other fact-finding
2 investigation. (Freeman and Vargas Decls.) Plaintiffs' counsel seeks an incentive award of
3 \$10,000 for these two Plaintiffs.

4 Plaintiffs' counsel are further requesting an incentive award in the amount of \$20,000 for
5 Javier Olguin. Plaintiffs' counsel requests that Plaintiff Olguin receive a higher incentive award
6 than the other Representative Plaintiffs for numerous reasons: 1) Plaintiff Olguin was the
7 Plaintiff who initiated this entire action against Defendant; 2) Plaintiff Olguin took the most risks
8 in pursuing this action as he was the sole employee who complained to Defendant about its
9 unlawful practices, and was subsequently terminated by Defendant as a result; 3) Plaintiff
10 Olguin took the lead in this case over the other Representative Plaintiffs and has been involved in
11 all aspects of the litigation including the final settlement agreement that was reached; 4) Plaintiff
12 Olguin spent more hours in this action than the other Plaintiffs in that he spent considerable time
13 traveling to Defendant's terminal offices and canvassing/investigating looking for class member
14 participants and potential witnesses. (Olguin Decl.) Plaintiff Olguin spent nearly one month
15 traveling to most of FedEx Ground terminal locations in Northern, Central and Southern
16 California looking for potential witnesses and declarants and engaging in other fact-finding.
17
18
19 (*Ibid.*)

20
21 By bringing this action, all of the Class Representatives also furthered the twin public
22 policy goals of employment class actions, as recognized by the California Supreme Court in *Sav-*
23 *On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 340 (2004) (recognizing remedial nature
24 of overtime laws and public policy encouraging use of the class action device). Additionally, the
25 Class Representatives took on significant risks of retaliation. FedEx Ground is a well-known
26 company, and each Class Representative has put themselves at risk of employers who would
27

1 choose not to employ someone who has sued an employer. (*See* Olguin, Freeman, and Vargas
2 Decls.) The requested incentive payments are therefore fully deserved and justified.

3 Finally, the Class Notice sent to all class members disclosed the incentive awards. No
4 Class Members objected to any of these proposed awards. (Lenhart Decl.) Accordingly, the
5 requested incentive awards are appropriate and justified as part of the overall Settlement, and
6 should be awarded by the Court.
7

8 G. ADMINISTRATIVE EXPENSES ARE REASONABLE

9 The Settlement Agreement provides that Fed Ex would pay up to \$250,000 in
10 administrative expenses for a third-party claims administrator. (Doc #50, Exhibit A at 12:8-
11 14.) At the June 19, 2008 hearing on the proposed settlement, the parties informed the Court
12 that Gilardi & Company ("Gilardi") had been selected as the claims administrator and that the
13 administrative costs estimate was reduced to \$180,000. (Doc #61 at 13:19-14:5.) As part of
14 its preliminary approval order, the Court approved those estimated expenses.
15

16 Gilardi now submits that its total costs will be reduced even further to approximately
17 \$138,000. The estimate is within the parameters earlier approved by this Court and well below
18 the original estimate of the parties and what was set aside in the settlement agreement. It is
19 also below the amount set forth in the notice to the class. Class Counsel therefore requests
20 that the Court approve Gilardi's expenses for payment by Fed Ex. (*See* Declaration of Bernie
21 Lenhart.)
22

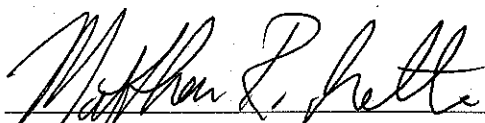
23 **III. CONCLUSION.**

24 The Settlement Agreement provides substantial benefits to the Class Members that are
25 fair, reasonable, and adequate. The final approval meets the standards required for the Court to
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1 grant final approval. Accordingly, Class Counsel respectfully request that the Court grant final
2 approval of the Settlement and enter judgment accordingly.

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4 Dated: April 30, 2009

RIGHETTI LAW FIRM, P.C.

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6 By: 
7 **MATTHEW RIGHETTI**
8 Attorneys for Plaintiffs
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