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SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

CALIFORNIA DENTAL ASSOCIATION, a California Corporation

Plaintiffs

vs.

DELTA DENTAL OF CALIFORNIA, a California Corporation,

Defendant.

No.: CGC-14-538849

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CERTIFICATION OF SETTLEMENT CLASS; PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT; APPROVAL OF CLASS NOTICE AND CLASS NOTICE PLAN; APPROVAL OF CLASS REPRESENTATIVES; APPOINTMENT OF CLASS COUNSEL

Date: April 21, 2017
Time: 9:00 a.m.
Judge: Hon. Mary E. Wiss
Dept.: 305

TABLE OF CONTENTS

Page

I. INTRODUCTION. 1

II. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND PROVIDES LONG TERM BENEFITS AND SUBSTANTIAL MONETARY RECOVERY FOR THE CLASS THAT COULD NOT HAVE BEEN ACHIEVED BY CONTINUED LITIGATION. 2

A. The *Kullar* Analysis For Final Approval Of A Class Settlement Calls For The Court To Review The Claims And Evidence To Determine If The Settlement Is "In The Ballpark." 2

B. An Objective Analysis Of The Strengths And Weakness Of The Claims Asserted In This Case Demonstrate That The Proposed Settlement Is Well Within The Range Of A Fair And Reasonable Settlement. 4

1. The Nature Of The Claims Asserted In The Amended Complaint And The Second Amended Complaint 4

2. The Strengths And Weaknesses Of The Non-Monetary Claims. 5

3. The Limitations Of Federal And State Antitrust Laws On The Non-Monetary Settlement Terms. 10

4. The Benefits Achieved By The Non-Monetary Settlement Terms. 13

5. The Strengths And Weaknesses Of The Monetary Claims Arising From Delta Dental's Application Of The INAP. 14

III. THE PROPOSED CLASS IS APPROPRIATE AND SHOULD BE CERTIFIED AND THE CLASS REPRESENTATIVES AND CLASS COUNSEL ARE WELL QUALIFIED AND SHOULD BE APPROVED. 18

A. The Individual Class Representatives Are All Suitable And Well Qualified. 18

B. CDA Is Well Qualified To Serve As An Additional Class Representative. 18

C. The Student Loan Repayment Grant Is Equally Available To All Recent Graduates Of Dental Schools Who Agree To Serve An Underserved Community. . 19

IV. THE LONG FORM AND SHORT FORM NOTICES HAVE BEEN REVISED TO ADDRESS EACH OF THE ISSUES RAISED BY THE COURT AND IS FAIR, REASONABLE AND ADEQUATE. 20

V. CONCLUSION. 22

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. Maricopa County Medical Society,
457 U.S. 332 (1982) 10, 11

Cal. Dental Ass'n, v. F.T.C.,
128 F. 3d 720 (9th Cir. 1997) 12

Cal. Dental Ass'n v. F.T.C.,
224 F.3d 942 (9th Cir. 2000) 12

F.T.C. v. Superior Court Trial Lawyers Ass'n.,
493 U.S. 411 (1990) 12

Kullar v. Foot Locker Retail, Inc.,
168 Cal. App. 4th 116 (2008) 1, 2, 3, 5, 17

STATUTES, RULES AND REGULATIONS

Code Civ. Proc. § 877.6 3

I.R.C. § 501(c)(3) 19

I. INTRODUCTION.

This Supplemental Brief, the revised Settlement Agreement,[1] revised long form Notice and revised short form Notice, together with the additional declarations presented for the Court's consideration address the issues raised by the Court at the initial hearing on this Motion held on March 21, 2017. The evidence and briefing now before the Court demonstrate:

First, the Proposed Settlement meets the standards for preliminary approval and also final approval under the analysis called for by *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116 (2008). It achieves important and lasting non-monetary recovery and significant monetary recovery on behalf of those injured by the alleged contractual breaches. This reflects an excellent result for the class, one well within the bounds of a fair and reasonable settlement. The Proposed Settlement therefore merits the Court's preliminary approval.

Second, the proposed class is appropriate and the class representatives, including CDA, are well-qualified and have demonstrated that, if appointed by the Court, they will continue to represent the class well. The individual class representatives appropriately mirror the class. Each has provided a declaration establishing that they are appropriate class representatives. CDA, which represents at least two-thirds of the proposed Class, has played and will continue to play an important role in arriving at and implementing the Proposed Settlement. The proposed class and class representatives should be approved for settlement purposes. No issue as to the appropriateness of class counsel has been raised, and the Court should appoint Paul Alexander and Emily Wood and the firm of Arnold & Porter Kaye Scholer LLP as class counsel.

Third, the Settlement Agreement and both the long form and short form Notices have been revised in response to the Court's observations. They are filed (both in redline format and without redlining) with the Court along with this Supplemental Memorandum. The changes are reflected in the redlining. The more significant of the changes are also discussed in this Supplemental

[1] The revised Settlement Agreement is set forth as Exhibit A to the Declaration of Paul Alexander filed herewith. It contains the revised long form Notice and short form Notice. For the convenience of the Court, a redlined version showing the changes to each document is contained in Exhibit B to the Alexander Declaration.

Memorandum. The parties believe that these modifications address each of the issues raised by the Court. The revised Settlement Agreement has been shared in draft form with the parties and has now been forwarded to them for signature. The parties anticipate that the revised Settlement Agreement will have been executed by all parties before the April 21, 2017 hearing and that they will be able to confirm this for the Court at the hearing.[2] As modified, the revised Settlement Agreement merits the Court's preliminary approval. Additionally, both the long form and short form Notices have been revised and also merit the Court's approval.

The Proposed Settlement now before the Court provides a fair and reasonable settlement of the pending litigation and does so in a manner that serves both the immediate and the long term interests of the Class.[3] The process adopted by the Court, which has involved a detailed review of the Settlement Agreement itself, the two Notices, and the evidence presented by the parties, has been thorough and complete. It has resulted in improvements that further confirm both the fairness of the Settlement Agreement and the adequacy of the two Notices. The revised Settlement Agreement should be preliminarily approved and both the long and short form Notices should be approved and the plan for providing notice to the proposed Class ordered to begin.

II. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND PROVIDES LONG TERM BENEFITS AND SUBSTANTIAL MONETARY RECOVERY FOR THE CLASS THAT COULD NOT HAVE BEEN ACHIEVED BY CONTINUED LITIGATION.

A. The *Kullar* Analysis For Final Approval Of A Class Settlement Calls For The Court To Review The Claims And Evidence To Determine If The Settlement Is "In The Ballpark."

In *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116 (2008), the court addressed the analysis and evidence required for determining whether a proposed class action settlement should

[2] Additionally, it is contemplated that a declaration from each of the individual proposed class representatives will be filed with the Court before the April 21, 2017 hearing.

[3] The Proposed Class consists of "All California dentists who are or were signatories to, or are or were parties to or subject to, a Participating Dentist Agreement with Delta Dental of California for participation in the Delta Dental Premier network at any time from January 1, 2011 to the date of the Preliminary Approval Order in this case." The "PDA's" themselves do not refer to the dentists as "Premier Dentists." However, Delta Dental generally refers to dentists who are compensated based on the Contracted Fee as defined in the PDA as "Premier Dentists," and that term is adopted in this Supplemental Memorandum for that reason.

be granted final approval as a fair and reasonable settlement on behalf of the class. While the motion currently before the Court seeks preliminary approval, plaintiffs agree that it is appropriate to address the ultimate standard for final approval now. In *Kullar*, the court stated:

> The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

Id. at 128. The court then pointed to four factors that generate an initial presumption that the class settlement is fair and reasonable:

> Relying on an earlier edition of *Newberg on Class Actions*, the court in *Dunk* asserted that "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

Id. As the court in *Kullar* went on to explain, however, in making its final decision on the fairness and reasonableness of a class settlement, the court does not rely upon the presumption alone. The court should go further to "... independently satisf[y] itself that the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." *Id.* at 129. The court then concluded:

> We do not suggest that the court should attempt to decide the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys. However, as the court does when it approves a settlement as in good faith under Code of Civil Procedure section 877.6, the court must at least satisfy itself that the class settlement is within the "ballpark" of reasonableness.

Id. at 133. Using the analysis and criteria set forth by the court in *Kullar*, the evidence before the Court shows that the Proposed Settlement is a very good one for the class. The Proposed Settlement is not just "within the ballpark", it is squarely in the infield, and the right call is to grant preliminary approval.

B. An Objective Analysis Of The Strengths And Weakness Of The Claims Asserted In This Case Demonstrate That The Proposed Settlement Is Well Within The Range Of A Fair And Reasonable Settlement.

1. The Nature Of The Claims Asserted In The Amended Complaint And The Second Amended Complaint.

In both the original Amended Complaint and the current proposed Second Amended Complaint, plaintiffs have asserted three basic claims: (1) that the amendments to the Participating Dentist Agreement ("PDA") proposed by Delta Dental in August, 2013 were invalid because they breached the terms of the PDA and because they violated Delta Dental's contractual duty of good faith and fair dealing by unlawfully attempting to reduce the "maximum amounts allowed" for "Contracted Fees" under the PDA[4]; (2) that these same amendments to the PDA were invalid because Delta Dental had given false and misleading notice of the nature and purpose of the amendments; and (3) that Delta Dental had breached the PDA by continuing to impose the "INAP" even though the contractual authority to do so had been removed from the PDA by the amendment the was implemented effective January 1, 2011.

In the Amended Complaint, CDA brought these claims under the doctrine of associational standing. In January, 2016, the Court issued its Proposed Statement of Decision Re California Dental Association's Associational Standing, subsequently amended, which found that CDA "has associational standing to bring the claims associated in this litigation." *See* Amended Proposed Statement of Decision re California Dental Association's Associational Standing filed March 22, 2016 ("Proposed Statement of Decision") at 1-2. While this allowed CDA to assert these claims on behalf of all of its members, CDA could not seek or recover monetary damages for anyone. It could seek only declaratory and injunctive relief on a prospective basis. *Id.* at 12. This meant, by way of

[4] Paragraph 2 of the PDA provides that participating dentists will accept his or her "Contracted Fees" for dental services provided to eligible patients under a Delta Dental plan. "Contracted Fees" are those fees that the dentist submits to Delta Dental. The "Contracted Fees," however, are "subject to a maximum amount allowed as determined by Delta dental for the network, specialty and location in which the dentist participates. "The fee reductions at issue in this litigation are actually reductions in the "maximum amount allowed" calculated by Delta Dental for "Contracted Fees" for dentist who are parties to the PDA. These reductions have not been implemented as a result of this litigation. In this Supplemental Memorandum, these fee reductions are generally referred to either as "maximum fee reductions" or simply reductions in "maximum fees," for the sake of convenience and consistency.

example, that CDA could not recover damages on behalf of anyone for the alleged improper maximum fee reductions caused by Delta Dental's continued application of the INAP. Nor could CDA seek to represent at all those dentists who were not CDA members. Recovery of damages for the conduct could come, if at all, only years from now and only through either multiple individual actions or a class action. Both of these alternatives would require new litigation, which would bring further uncertainties, risks, costs and delay. The Proposed Settlement now before the Court seeks to resolve now both the non-monetary and monetary claims for the benefit of the all California Premier dentists affected by the alleged misconduct.

For the sake of clarity, this Supplemental Memorandum addresses the *Kullar* analysis of the non-monetary and monetary claims separately.

2. The Strengths And Weaknesses Of The Non-Monetary Claims.

In its contract and breach of covenant claims addressed to Delta Dental's August, 2013 amendment of the PDA, CDA challenged Delta Dental's right to amend the PDA, primarily the amendment that sought to remove the language "The maximum amount will not be reduced unless participating dentists' filed or submitted fees decrease to such an extent that Delta Dental is warranted in reducing the maximum amount allowed."[5] Am. Compl., ¶¶7-9, 24-37; Second Am. Compl., ¶¶13-15, 42-54, Alexander Decl., Exhibit G. CDA alleged that the August, 2013 amendment seeking to remove this language violated the covenant of good faith and fair dealing because it was intended to "avoid or eliminate a central and fundamental promise contained in the 2011 PDA and to allow it to implement significant reductions in fee reimbursements for every dental procedure throughout California." Second Am. Compl., ¶ 22.

CDA also asserted that Delta Dental had not performed the required "actuarial calculation" in determining the reduced maximum amounts for Contracted Fees that Delta Dental sought to impose by the August, 2013 amendment. *Id.* ¶19. The PDA required these "actuarial calculations"

[5] Plaintiffs also challenged Delta Dental's 2013 amendment that purported to limit the types of claims that were subject to binding arbitration. That challenge was related to the primary claim asserting the amendments and efforts by Delta Dental to reduce maximum allowable amounts for Contracted Fees breached the PDA.

even after the challenged August, 2013 amendments. Second Am. Compl ¶19 & Ex. A. Since these had not been performed, plaintiffs alleged, Delta Dental could not put the reduced maximum fees into place without breaching the PDA. *Id.*

CDA and the individual plaintiffs strongly believe in the merits of their claims. In assessing whether to enter into a settlement, however, it was necessary to consider the litigation risk that resulted from evidence that might lead the trier of fact to decide in favor of Delta Dental. Delta Dental is well-represented and has argued that it has done nothing wrong and has no liability. As with most cases, there was no certainty of any particular outcome. In short, there was litigation risk for both sides. The categories of this litigation risk, and why it supports the conclusion that the Proposed Settlement is fair and reasonable, are summarized below.

The risk that the Court would find that Delta Dental had the right to amend the PDA as it sought to do. Plaintiffs asserted a claim for breach of contract and breach of the covenant of good faith and fair dealing, arguing that Delta Dental sought by its August, 2013 amendment to change a "fundamental promise" that violated the "reasonable expectations" of the Premier dentists. Second Am. Compl. ¶¶22-23. This claim, in particular, was aimed at the portion of Delta Dental's amendment that sought to remove the language prohibiting reductions in maximum allowable fee limits unless "...filed or submitted fees decrease to such an extent that Delta Dental is warranted in reducing the maximum amount allowed." *Id.* ¶21. The evidence indicated, however, that this language had existed in the PDA only since January, 2011. Moreover, this language was itself the product of an amendment to the PDA, effective January 1, 2011. *Id.* ¶¶11-13. This created a risk that the Court might ultimately decide that a subsequent amendment to this same language less than three years later was lawful and not a breach of either the PDA itself or the covenant of good faith and fair dealing inherent in the PDA.

Prior to January, 2011, the PDA had provided that the Contracted Fees for Premier network dentists were determined by a process using the fees of network dentists filed with Delta Dental, which were used to determine a "usual, customary and reasonable" fee for each region. *Id.* ¶¶11-12. The "Contracted Fee" was generally the "usual, customary and reasonable" fee less a percentage, which had grown to 20%. In 2011, Delta Dental moved away from this "usual, customary and

reasonable" structure for fee determination to an entirely different method, which entitled Delta Dental to determine unilaterally the maximum fee using a calculation that it described as an "actuarial calculation." *Id.* ¶13. Alexander Decl., Exhibits F, G. The departure from the "usual, customary and reasonable" methodology was arguably a much more significant change in the basic promises made in the PDA than the amendment challenged in the current litigation. However, discovery produced no evidence that any dentist had objected to this amendment, either at the time or any subsequent time up prior to the commencement of this litigation. This created a further risk that the Court would decide against CDA's breach of contract and breach of covenant claims, since it arguably indicated that in the normal course of business, dentists voiced no objection to PDA amendments that were at least as significant as the one challenged in the litigation.

In addition, discovery produced evidence that a substantial number of the "Premier-only" dentists who had PDA's with Delta Dental had, by the time of the challenged amendments, already agreed to provide the same dental services for other insurers at significantly lower fees by joining the "PPO networks" of competing insurers. For example, Delta Dental presented evidence that this factor had created a significant competitive problem. Thomas Leibowitz, Delta Dental's Chief Actuary, testified:

> We are in a partnership with the dentists, and we need them in order to have the breadth of the network that we have today and in order to compete in this market. That being said, the level of compensation that we are providing to the highest paid of Premier providers is completely unsustainable, and it becomes especially unsustainable in an environment where the same Premier providers are willing to take PPO-level payments from other carriers.

Deposition of Thomas Leibowitz ("Leibowitz Dep.") at 224:20-225:4. *See also* Alexander Decl., Exhibit G at Deltacourt 00031. Put differently, there was some evidence that indicated that half of the dentists on whose behalf CDA claimed that the fee reduction that Delta sought to impose would create serious and irreparable damage to their practices had in fact already agreed with other insurers to charge fees that appeared to be lower than their "Contracted Fees" under their PDA's with Delta Dental.

This evidence provided support for Delta Dental's argument that the reason behind its proposed reductions to the maximum fees was the fact that its competitiveness had been reduced in

part by the fact that many dentists who were parties to the PDA had agreed with other insurers who competed with Delta Dental to join their PPO plans and thus to provide the same services at lower fees. This evidence of a competitive need to reduce maximum fees and the reason for that need could also persuade the Court that the amendment to the PDA that Delta Dental sought should be allowed.

The risks and costs of continued litigation. Plaintiffs' challenges to the 2013 amendment and its attempt to impose reduced maximum fee limits were also based on the evidence that Delta Dental had not performed an "actuarial calculation" in order to develop the reduced maximum fee levels that it sought to impose in 2013. The PDA, even after the proposed amendment in 2013, required an "actuarial calculation" in order to implement any change in the maximum fees. (PDA, Definition of Contracted Fee, at 7). There was substantial evidence that Delta Dental had not performed the "actuarial calculation" required to make any change in the "Contracted Fee." *See* Alexander Decl., Exhibit C. Delta Dental, on the other hand, claimed that it had done an equivalent analysis and that the reductions that it had determined arose from "market pricing by competitors" and "acceptability by customers," which the PDA explicitly allowed. This was a significant claim that plaintiffs believe was likely a major reason why Delta Dental did not implement the reductions to maximum fees that it had calculated while the litigation was pending.

Delta Dental had calculated the total financial impact of the maximum fee reductions on Premier dentists as many millions of dollars per year. It could be argued, therefore, that the better course would be to continue with the litigation regardless of the result, since as long as Delta Dental was tied up in litigation, it likely would not reduce the maximum fees. Another year of litigation, even if the result were a loss, would therefore produce significant economic benefit for members of Delta Dental's network whose practices were substantially impacted by the maximum fee reductions.

There were, however, significant risks, as well as costs, that came with such continued litigation. Delta Dental's economic expert witness, Dr. Monica Noether, identified the concern that existed even if plaintiffs prevailed in the underlying litigation:

> Delta is concerned about its ability to be competitive in the marketplace, views its competitors as getting stronger, and believes

> that it needs to implement one strategy or another that is designed to reduce or limit the increase in rates that it pays its dentists. As a result, if it doesn't -- if its unable to implement an MPA reduction, the based on the economic environment in which it operates and what I've learned from reviewing Delta documents and speaking with members of Delta, and my general knowledge of competition among dental -- or health insurance plans, is that Delta would, in fact, need to find another cost reduction strategy."

Deposition of Monica Noether ("Noether Dep.") at 142:2-15.

There was corroborating evidence. Delta Dental's Chief Actuary testified about the reasons that Delta Dental was seeking the fee reductions:

> The company's reason for making those changes were because ultimately we need to run a viable business, and in order to run a viable business, we have to have competitive costs. We do not have, as a general rule, as -- we do not have costs that are sufficiently competitive for us to maintain and grow our business in the state of California. So we, as an organization, are in position where we need to and continue to need to make changes to provider compensation.

Leibowitz Dep. at 78:25-79:9.

There were several alternatives that Delta Dental might implement if the outcome of the litigation prevented it from reducing the maximum fees under the PDA. One alternative identified by Dr. Noether was the reduction of fees for "specialists" who served in Delta Dental's PPO plan. There was evidence, therefore, that even if CDA won an injunction against the reduction of maximum fees under the PDA, Delta Dental would "need to make changes to provider compensation" in order to remain competitive. *Id.* One alternative might be to reduce fees for dentists in the Delta network of dentists such as specialists.

There were other potential actions Delta Dental might take if litigation continued for a long period and if plaintiffs succeeded in forever blocking a reduction in the maximum fees under the PDA. One concern centered on what is known as the "Premier" or "Premier only" plan offered by Delta Dental. The advantage of the "Premier" plan to all dentists in the Delta Dental network was that all dentists, including those who had agreed to provide dental service at the generally lower PPO rates, were entitled to charge the generally higher "Contracted Fees" for services provided to patients whose employers had purchased the Premier plan. Competition had substantially reduced the number of the higher-priced Premier plans in the marketplace, but a number still remained.

Plaintiff's counsel heard concern from a number of dentists during the period leading up to the mediation that causing Delta Dental to move further away from the remaining pure Premier plans would be a very negative result. Yet, if the litigation continued and Delta responded in this way, there was nothing that could be done in the litigation to prevent it.

Similarly, as a part of its ongoing marketplace competition, Delta Dental had developed dental plans generally referred to as "PPO Plus Premier" plans. Under this plan, Premier-only dentists are paid the generally higher Contracted Fees under the PDA, while dentists who had agreed to serve the Delta Dental PPO plan were limited to the generally lower PPO fee schedule. In order to lower its overall fees and enhance its competitiveness to its customers, Delta Dental could sell fewer of the PPO Plus Premier plans and more of the pure PPO plans, which were generally lower cost because dentists who agreed to serve the PPO network were compensated based on the lower PPO fee schedule. *See* Alexander Decl., Ex. I. his, too, would have an adverse financial effect on the Premier-only dentists who had PDA's with Delta Dental, because more patients would be shifted to the lower cost PPO plan. Were this to happen, the result might well be a greater loss of income to dentists than the reduction that would come from a reduction in the maximum allowable amounts for Contracted Fees that Delta Dental contemplated in 2013.

In other words, a significant potential existed that a "victory" that prevented Delta Dental from reducing maximum fees under the PDA could well turn out to be Pyrrhic. It could result in a decision by Delta Dental to adopt alternative competitive strategies that would have had a more negative financial effect on dentists than the action that the litigation challenged. The exact value of a "win," therefore, was far from clear. The potential to end up with a result that created financial harm was an important consideration in balancing the value of a settlement against the result that might be achieved from continued litigation.

3. The Limitations Of Federal And State Antitrust Laws On The Non-Monetary Settlement Terms.

Any attempt to arrive at a settlement that included provisions that restricted, directly or indirectly, the prices that Delta Dental determined it would pay to individual dentists for dental services would run directly into the teeth of *Arizona v. Maricopa County Medical Society*, 457 U.S.

332 (1982). In *Maricopa County*, two non-profit Arizona corporate foundations, composed essentially of doctors, established maximum fee schedules for medical services provided by the doctors to insurance plans. Insurers (or self-insured employers) agreed to pay the doctors' fees up to the maximum amounts on the schedules established by the foundation. Doctors were free to charge less to insured patients and also free to charge less or more to uninsured patients. The maximum fee schedules applied only to medical services provided by the insurance plans. Insured patients benefitted from this overall scheme in that the doctors who were foundation members agreed to accept the scheduled payments as full payment for their medical services.

The Supreme Court held that agreements involving the doctors, the non-profit foundations, and the insurers violated Section 1 of the Sherman Act. More, the Court held these agreements to be *per se* violation of the Sherman Act. The Court acknowledged that "[t]he fee schedules limit the amount that member doctors may recover for services performed for patients insured under the plans approved by the foundations." *Maricopa County*, 457 U.S. at 341. The foundations argued that these agreements served as cost-containment measures. They argued further that agreements benefitted patients by creating efficiencies for the insurers that ultimately reduced costs to consumers. The Court flatly rejected all of these arguments as justifications for the maximum fee limitation agreements. The Court also rejected the argument that because physicians and the delivery of medical services were involved, the *per se* rule condemning price fixing agreements as unlawful should not apply. Likewise, the Court rejected the argument that the agreed upon fee schedules should be viewed as procompetitive because they made it possible to provide essential medical services to a broader range of people, and provided them with a broader choice of doctors and, ultimately, lower insurance premiums.

The Court held that because the foundations were essentially composed of a variety of medical professional services in competition with one another, the agreements to maximum fee schedules were, just as similar agreements in other areas of commerce, "categorically forbidden by the Sherman Act." *Id.* at 356. The rule of *per se* illegality applies and makes irrelevant any argument that the underlying agreements have a positive purpose and ultimately benefit consumers. The Court held: "The agreement under attack is an agreement among hundreds of competing

doctors concerning the price at which each will offer his own services to a substantial number of consumers." *Id.* at 357. As a result, "[t]hey fit squarely into the horizontal price-fixing mold." *Id.*

The Supreme Court engaged in very much the same analysis eight years later in *F.T.C. v. Superior Court Trial Lawyers Ass'n.*, 493 U.S. 411 (1990). In that case, an association of trial lawyers, many of whose members provided legal representation to defendants in criminal case, formed a "strike committee" to deal with a governmental Committee on Judicial Administration in the District of Columbia, which had set legal fees at $30 per hour for court time and $20 per hour for non-court time for indigent criminal defendants. Despite multiple arguments that the behavior was not only reasonable, but necessary in order to meet the constitutional mandate of fair and adequate legal representation of those charged with crimes, the Court found that attempts by an association to negotiate an agreement on fees on behalf of its members was a plain violation of Section 5 of the Federal Trade Commission Act.

The parties, therefore, concluded that they could not attempt to negotiate a settlement that determined either the fees themselves or the formula by which fees for the PDA were determined for the many thousands of dentists in Delta Dental's network. To do so would expose them to the risk that a claim would be made that the fees determined by an agreed upon methodology were *per se* violations of § 1 of the Sherman Act and or violations § 5 of the Federal Trade Commission Act. The proposition of creating a potential legal problem down the road as part of a current settlement was highly undesirable. Indeed, the costs of a subsequent legal action under the antitrust laws, standing alone, were potentially so large that a settlement that attempted to control how Delta Dental determined fees for dentists was not regarded as an acceptable risk.[6]

[6] CDA was well aware of the extraordinary cost and impact of such litigation. In the 1990's, the Federal Trade Commission brought an action against CDA challenging a rule that attempted to limit advertising by dentists. This rule had far less impact on fees than an agreement with Delta Dental that would affect how it determined fees to dentists, yet the FTC concluded it was unlawful under the antitrust laws. While the courts ultimately decided the matter in favor of CDA, the litigation took years and required an enormous expenditure of legal fees and executive resources. *See Cal. Dental Ass'n, v. F.T.C.*, 128 F. 3d 720 (9th Cir. 1997); *Cal. Dental Ass'n v. F.T.C.*, 224 F.3d 942 (9th Cir. 2000).

4. The Benefits Achieved By The Non-Monetary Settlement Terms.

A primary approach to settlement, therefore, became to focus on provisions in the PDA that would benefit all Premier dentists by requiring Delta Dental to provide more meaningful accurate notice of future material changes in the PDA and to provide that notice a more significant time ahead of the effective date of any future change. This was the genesis for the 120 calendar days' notification period that the Proposed Settlement requires. It was also the genesis for the provisions in the Proposed Settlement that require a detailed and individualized financial analysis of any future change that might reduce Contracted Fees.

An individualized financial analysis would allow a dentist to make a meaningful decision on whether his or her best interests would be served by continuing with a Delta Dental PDA or going "out of network," which would allow the dentist to charge fees of their choosing. An "out of network" dentist could charge his or her normal fee (or any fee negotiated with the patient). Delta Dental would still be responsible to the patient to reimburse a significant portion of that fee. Depending upon the circumstances of his or her practice, going "out of network" could be advantageous for a significant number of Premier dentists. Indeed, counsel had become increasingly aware of Premier dentists who had successfully made this change.

Thus, the significance of knowing with reasonable certainty the actual likely financial effect of a future fee adjustment by Delta Dental took on added significance. For its part, Delta Dental has a natural desire to retain as many of the current "Premier-only" dentists in its network in order to be able to continue to point to the fact that it has the largest network of dentists of any dental insurer as an advantage to potential customers. If Delta Dental attempted to impose a change whose financial impact on Premier dentists -- as made clear by the individualized financial analysis required -- was too severe, this could well convince a significant number of those dentists to leave the Delta Dental network. This would reduce the size of Delta Dental's overall network, one of its key competitive advantages. This, in turn, would create competitive pressure on Delta Dental to refrain from further decreases in maximum fees, and ultimately to increase them. To the extent this took place, it would result from marketplace conditions and competition rather than a potentially unlawful agreement.

Put differently, the goal of the settlement of the non-monetary claims focused on creating

the conditions that allowed Premier dentists to know and understand any future material change by Delta Dental so that they could react to it in the best way possible for their practice. This enhanced the forces of market competition. It also responded directly to one of the significant concerns that CDA and counsel heard throughout the litigation process: that Delta Dental's fee decisions and changes were a "black box" that no one understood. Creating an economic climate in which the consequences of fee changes were made clear to all those affected would enable Premier dentists to react to the change in ways that served their own best interests -- including leaving the Delta Dental network. Since Delta Dental needed to retain its substantial network of dentists in order to remain competitive, the forces of competition would, over time, restrain Delta Dental from significant decreases in maximum fees.

In the long run, informed competition and a more level playing field will benefit all concerned more than continued litigation. Analyzing all the strengths, weaknesses, potential advantages and risks of continued litigation for all class members led to this conclusion. It is the right decision. It is a further reason why the Proposed Settlement should be preliminarily approved by the Court as fair and reasonable.

5. The Strengths And Weaknesses Of The Monetary Claims Arising From Delta Dental's Application Of The INAP.

In reviewing the documents produced by Delta Dental, CDA discovered that there was an arguable contractual basis for imposing the INAP in the PDA that existed prior to 2011. However, when it made the amendments to the PDA that it put into effect in January, 2011, Delta Dental deleted the language in the PDA that authorized Delta Dental to apply the INAP. Yet Delta Dental continued to impose the INAP, even though the contractual basis for doing so had been deleted. This formed the primary basis for the INAP claim.

In the litigation that existed at the time mediation began, however, CDA could recover none of the fees that it argued were improperly limited by the INAP because individual damages are not recoverable in an action brought under the doctrine of associational standing. Proposed Statement of Decision at 12. Notwithstanding this, CDA argued that the INAP issue was part of the litigation and needed to be resolved, and that in order to do so, Delta Dental would need to find a way to

compensate dentists whose actual fee payments had been reduced by application of the INAP.

Though plaintiffs' claims based on Delta Dental's continued imposition of the INAP were strong, Delta Dental was not without defenses. Delta Dental provided evidence that the INAP had been applied uniformly for many years prior to January, 2011 as a means of ensuring that that fee increases did not become so dramatic at a single time that it would cause employers to cease doing business with Delta Dental (and thus, potentially, with the plaintiff Premier dentist). It argued that the change in the language in the 2011 PDA was not intended to eliminate the ability to use the INAP, that other amendments to the PDA allowed its continued application, and that application of the INAP had become an accepted "course of dealing" between Delta Dental and the dentists in its network.

Delta Dental also argued that it did not profit directly from application of the INAP because most of its import on terms of reduced fees was passed on to customers. Since the substantial majority of Delta Dental's policies were self-funded by employers, the benefit of the lower rates resulting from the INAP were actually enjoyed by the employers and employees who purchased Delta Dental insurance plans. The evidence tended to support this and thus had to be considered in arriving at a settlement.

Delta Dental also pointed to evidence that many Premier dentists had been advised of the INAP's effect on fees and had not previously complained about it. For example, in 2011, after Delta Dental set the INAP at zero, CDA published an article in CDA's *update* news magazine entitled "Delta Dental explains freeze of Premier provider fees." (Alexander Decl., Exhibit E). This article discussed the Delta Dental's decision to "hold the Premier schedule static for six months" in order to prevent the gap between Premier fees and PPO fees from widening. *Id.* Delta Dental could accomplish this "freeze" by setting the INAP at zero. This, Delta Dental argued, indicated that the ability to freeze rates with no increase for a period was publicly discussed by CDA itself. While the term "INAP" was not used, the practical application of INAP to "freeze" rates was publicly reported on.

Delta Dental produced evidence that the total financial loss associated with application of the INAP for the period 2012 through 2015 was $63,707,817. *See* Alexander Decl., Exhibit H.

Although the data for 2011 was no longer readily available, it was possible to use existing data to estimate the total financial loss for the period from 2011 through 2015 at $69,507,817. *Id.* It was necessary to estimate INAP related losses for 2016, since that year was still ongoing. Using available data, plaintiffs estimated the total INAP related losses for the entire period from 2011 through 2016 at between $85,000,000 and $95,000,000. This estimate turned out to be reasonably accurate, as the actual total INAP financial impact was ultimately calculated at approximately $96,000,000. *See* Alexander Decl., Exhibit. H.

As set forth in the initial Memorandum in support of Preliminary Approval, the ultimate settlement amount of $34,750,000 came about as a result of the mediator's proposal, made after he had heard and considered the arguments of both sides -- including the evidence summarized above. This amounts to slightly more than 36% of the total financial losses associated with INAP. All of the evidence and arguments on the INAP issue were presented to the mediator. Having heard it, he arrived at a "mediator's proposal" in the amount of $34,750,000 as a fair and reasonable settlement. Ultimately, both sides accepted this proposal.

Further, the settlement has been separately considered by all seven individual plaintiffs, each of whom has a different practice in different areas of the state. Because the revised Settlement Agreement could not be sent to them until very recently, their declarations concerning that agreement cannot be included with the filing of this Supplemental Memorandum. Plaintiffs anticipate, however, that they will present Declarations from Dr. Barnes, Dr. Reed, Dr. Middleton, Dr. Lau, Dr. Johnson, Dr. Schweitzer and Dr. Hawthorne, indicating their view that the settlement that has been reached is fair and reasonable and that, in the view of some, the monetary recovery exceeded their expectations, since originally the action sought no monetary compensation. These declarations will be presented to the Court prior to (or possibly at) the April 21, 2017 hearing.

This Settlement Amount of $34,750,000 is a fair and reasonable settlement of the INAP claims on behalf of the class because:

1. No monetary recovery could be achieved in the current litigation, since the associational standing basis for standing precluded individual damage recovery;

2. For any amount to be recovered, it would require a new action to be filed and be

certified as a class action, which would entail substantial litigation costs and commit the parties to years of additional litigation;

3. Even if a class action were filed at some time in the future and a class certified, the result of that litigation could not be predicted with certainty. While the contract claims were good ones, no claim is without risk and Delta Dental's arguments and evidence could have produced a defense judgment. It was likely that a class action would be settled at some point on terms not that different from those agreed to now and possibly on worse terms for the class. Moreover, even if a future class action produced financial recovery at some future time, it would be reduced by attorneys' fees, expert fees, and other costs. A future recovery might well produce less in the way of financial benefits to the class.

4. An experienced mediator, having heard the arguments and evidence from both sides, determined this amount to be a fair and reasonable recovery for the monetary claims:

5. Each of the individual class representatives, after considering the Proposed Settlement and the alternatives, individually found the Proposed Settlement, including the monetary terms, to be fair and reasonable.

There is thus substantial and persuasive evidence before the Court establishing that the Proposed Settlement is fair and reasonable under the standards articulated in *Kullar*. It achieves substantially longer and greater notice of any future material change to the PDA than the law requires or that could have been achieved by pursuing this litigation. The individualized financial calculations required in connection with future changes affecting Contracted Fees provides dentists with clear and understandable information that they can use in deciding how to structure their practice going forward and even whether it makes economic sense to remain in the Delta Dental network of dentists. The Proposed Settlement also achieves a major financial recovery for class members who have been injured by Delta Dental's application of the INAP. And it achieves that financial recovery immediately, rather than after years of litigation and substantially greater attorney's fees years from now. The recovery produced by the Proposed Settlement arises from an action in which damages could not have been recovered at all. This is an excellent result for class members. It is well "within the ballpark" of a fair and reasonable settlement.

III. THE PROPOSED CLASS IS APPROPRIATE AND SHOULD BE CERTIFIED AND THE CLASS REPRESENTATIVES AND CLASS COUNSEL ARE WELL QUALIFIED AND SHOULD BE APPROVED.

A. The Individual Class Representatives Are All Suitable And Well Qualified.

Plaintiffs have presented declarations from four of the seven class representatives setting forth his or her qualifications and commitment to serve as a class representative as well as his or her approval of the Settlement Agreement. [7] These declarations establish that each of the proposed class representatives has claims that are typical of class members generally. The declarations also establish that these individuals have already been involved in reviewing the settlement documents, discussing those with counsel, participating in conference calls to discuss the status of the litigation and decisions to be made. Their declarations also establish that they have a reasonable understanding of the issues presented in this litigation as well as the resolution of those issues contained in the Proposed Settlement. The evidence before the Court thus establishes that each of the proposed individual class representatives readily meets the standards for serving as a class representative in this case.

B. CDA Is Well Qualified To Serve As An Additional Class Representative.

In addition to the declarations of the individual class representatives, CDA has presented the declaration of its Executive Director, Peter DuBois. Mr. DuBois confirms that CDA understands that its role as a class representative will be to treat all class members equally. Declaration of Peter DuBois ("DuBois Decl."), ¶ 6.

More specifically, Mr. DuBois addresses the "12 day advance notice" provision in paragraph III.C of the Settlement Agreement. He confirms that "The purpose of this provision is simply to allow CDA a brief period of time before future announcements in order to analyze the proposed amendment and be in a position to communicate accurately about the proposed amendment to all dentists who may be affected by it." *Id.* ¶ 7. Mr. DuBois also states that: "As a practical matter, CDA is uniquely situated to serve the role of analyzing a future change on behalf

[7] Because the final documents were not available until Monday, not all of putative class representatives have been able to review the and completed their declarations. Counsel anticipates that the remaining declarations will be filed before the hearing on April 21, 2017.

of California dentists, communicating the results of that analysis, and responding to questions that dentists may have about it." *Id.* Mr. DuBois goes on to explain that: "CDA regularly communicates with dentists broadly throughout California, including both members of CDA and non-members. Certain CDA publications, including the monthly newspaper, *CDA Update*, and the peer-reviewed scientific Journal, are made available to the dental community generally, including non-CDA members. In addition, information about this lawsuit and the tentative settlement that has been reached is made available to the public on CDA's website, and is available to anyone." *Id.* ¶8. He goes on to make clear that CDA will not limit publication or dissemination of information about any future changes to the PDA exclusively to CDA members but will communicate that information broadly. Indeed, Mr. Dubois specifically confirms that: "Neither the purpose nor the effect of the provision in paragraph III.C of the proposed settlement agreement for 12 calendar days for CDA to study and analyze future amendments or changes that Delta Dental may make in the PDA is to provide a benefit to CDA or CDA members that is not shared broadly with the dental profession in California." *Id.* ¶10.

Thus, the evidence before the Court shows that the provisions of paragraph III.C are intended to provide communication about future changes to the PDA to all affected dentists and to be in position to respond to any questions they may have, regardless of whether they are CDA members are not. The provisions of Paragraph III.C thus provide a benefit to all class members generally and do not create preferential treatment for CDA members.

C. The Student Loan Repayment Grant Is Equally Available To All Recent Graduates Of Dental Schools Who Agree To Serve An Underserved Community.

Plaintiffs have presented the Court with the Declaration of Debi Irwin ("Irwin Decl."), who is currently the Interim Executive Director of CDA Foundation. Ms. Irwin confirms that: "CDA Foundation is a separate California corporation established in 1998 as a public benefit corporation under California law. It qualifies for tax exempt status under I.R.C. § 501(c)(3) and a tax exempt organization under California. While it is related to the California Dental Association (CDA), it is a separately managed corporate entity and operates in the public interest, not for the interest of CDA." Irwin Decl., ¶2. More specifically, with respect to the Student Loan Repayment Grant, which is the

subject of the potential *cy pres* distribution, Ms. Irwin describes this Grant and its purpose -- in order to facilitate the career choice of serving an underserved community and to offset the burden of the high cost of dental education, the Student Loan Repayment Grant is made to "facilitate career choices by repaying their educational loan up to $35,000 per year for a maximum of $105,000 over three years in exchange for a commitment by the recipient to care for the underserved." *Id.* ¶3. Ms. Irwin further states that: "Membership in CDA is not considered in deciding who should receive these grants each year." The information requested of an applicant does not include whether or not the applicant is a member of CDA." *Id.* Further, Ms. Irwin states that: "The availability of the Student Loan Repayment Grant is widely published and circulated publically including not only on the CDA Foundation website but also at dental schools throughout California. In my experience, the availability of this grant to students who have significant dental school debt and a desire to serve underserved communities is broadly known." Irwin Decl., ¶5.

Ms. Irwin also provides other details about the Student Loan Repayment Grant. Her declaration confirms that this Grant is available to any recent graduate of a dental student who agrees to serve an underserved community for a period of time, regardless of whether he or she joins CDA or not. Indeed, she confirms that CDA membership is not considered in deciding who should receive the Grant. Thus the evidence demonstrates that the Student Loan Repayment Grant is a proper use of *cy pres* funds should they become available.

IV. THE LONG FORM AND SHORT FORM NOTICES HAVE BEEN REVISED TO ADDRESS EACH OF THE ISSUES RAISED BY THE COURT AND IS FAIR, REASONABLE AND ADEQUATE.

At the March 21, 2017 hearing, the Court pointed to certain aspects of the long form and short form notices that it thought could be improved or made more clear. Additional detail has been added to several provisions of the long form and short form notice, and both notices have been made consistent. *See generally* Alexander Decl., Exhibit B at Appxs. 4, 5. In particular, the revised notices make plain that the calculation of the allocations contemplated by the Proposed Settlement have been reviewed by Class Counsel and by their retained expert to ensure that they follow a proper methodology and that the allocations made are reasonably based on the data maintained in the normal course of business for dentists who are members of Delta Dental's network. *Id.* Ex. B at

Appx. 4 at 2, 12; *id.* Ex. B at Appx. 5 at 2. The use of this data allows for settlement distributions to be made without the need for claim forms and without the need for each dentist to attempt to re-produce his or her records of fee submissions going back many years (which for many dentists would not be possible). Given the nature of the settlement, the desire for reasonably prompt payment of the Settlement Amount, the absence of any need for a claim form, and the significant work done to ensure that a reasonable and accurate calculation is done consistently for the entire class, the revised Notices make clear that these calculations will be regarded as final for purposes of administering the settlement. *Id.* Ex. B at Appx. 4 at 2, 12.

The Notices have also been further revised to provide information regarding the number of Class Members who will be allocated some portion of the Settlement Amount, as well as the range of those allocations. *Id.* Ex. B at Appx. 4 at 12; *id.* Ex. B at Appx. 5 at 2. The notices also make clear that although the Settlement Amount will be allocated to individual Class Members, if the Class Member practiced as part of a dental group practice and Premier fee reimbursements for procedures the Class Member performed were made to that group practice in the ordinary course of business, then the distribution from the Settlement Amount will be made to that group practice rather than directly to that Class Member. *Id.* Ex. B at Appx. 4 at 3, 12; *id.* Ex. B at Appx. 5 at 2.

The Notices have been further revised to make clear that all administrative costs in implementing the settlements terms, including the payment of the monetary portions of the settlement, will be borne by Delta Dental, unless it becomes necessary for a Qualified Settlement Fund to be created. *Id.* Ex. B at Appx. 4 at 14; *id.* Ex. B at Appx. 5 at 2. In that event, all of the funds will be deposited into a Qualified Settlement Fund, which will bear interest for the benefit of the class, and the administrative costs of distributing the proceeds will be borne by the Qualified Settlement Fund. *Id.* The estimated amount of the administrative costs for the Qualified Settlement Fund are also set forth in the Notices. *Id.*

Additionally the notices have been revised to make clear that any member of the class has the right to appear and address the Court at the Final Approval Hearing. *Id.* Ex. B at Appx. 4 at 18; *id.* Ex. B at Appx. 5 at 3. For an objection to the settlement to be considered, however, an objecting class member must give written notice of the objection to the parties. *Id.*

Other revisions have been made as well, in response to the Court's questions and observations. These are reflected in the redlined versions of both the long form and short form notices filed along with this Supplemental Memorandum. *See generally* Alexander Decl., Exhibit B at Appxs. 4, 5. Plaintiffs believe that the currently proposed long form and short form notices respond to each of issues raised by the Court.

V. CONCLUSION.

For all the foregoing reasons, Plaintiffs urge the Court to issue an Order Certifying the Proposed Class, Appointing the Class Representatives and Class Counsel, Preliminarily Approving the Proposed Settlement, and Ordering the Notice to be provided in accordance with the Proposed Notice Plan.

Dated: April 17, 2017

ARNOLD & PORTER KAYE SCHOLER LLP

By: */s/ Paul Alexander*
PAUL ALEXANDER

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