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ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
12/14/2017
Clerk of the Court
BY:RONNIE OTERO
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

CALIFORNIA DENTAL ASSOCIATION, a
California Corporation, RICHARD W.
BARNES, D.D.S.; ROBERT E. REED,
D.D.S.; DEAN SCHWEITZER, D.D.S.;
GERALD MIDDLETON, D.D.S.; WHITNEY
JOHNSON, D.D.S.; TERRENCE Y. LAU,
D.D.S.; and BARBARA M. HAWTHONE,
D.D.S., individually and on behalf of all others
similarly situated

Plaintiffs,

v.

DELTA DENTAL OF CALIFORNIA, a
California Corporation,

Defendant.

Case No.: CGC-14-538849

**DECLARATION OF ERIC D. GREEN IN
SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF
AMENDED CLASS ACTION
SETTLEMENT AGREEMENT**

Date: December 27, 2017
Time: 10:30 a.m.
Judge: Hon. Mary E. Wiss
Dept.: 305

1 I, Eric D. Green, declare as follows:

2 1. I am co-founder and a principal of Resolutions, LLC, and, since March, 2016, have
3 served as mediator in this case. My professional background and experience as a mediator are set
4 forth in my prior declaration in this case dated February 24, 2017. I submit this declaration in
5 support of the amended settlement agreement reached between Delta Dental of California (“Delta
6 Dental”), the California Dental Association (“CDA”) and the class of California dentists as defined
7 in the Second Amended Class Action Complaint in this case (the “Class”), which I understand will
8 be presented to the Court for preliminary and ultimately final approval (the “Amended Settlement
9 Agreement”). I am personally familiar with the facts and legal issues presented by this case and
10 with the process and the negotiations that ultimately led to the Amended Settlement Agreement
11 reached by the parties. The facts set forth in this declaration are based upon my personal
12 knowledge arising from my participation as the mediator in this case and any opinions expressed
13 herein are based upon my knowledge of the facts and expertise as a mediator of legal disputes. If
14 called as a witness, I could and would testify to the matters set forth below in this declaration.

15 2. In early June, 2017, I participated in a telephone conference with Bob Rosenfeld of
16 Orrick, Herrington & Sutcliffe, LLP, representing Delta Dental, and Paul Alexander of Arnold &
17 Porter Kaye Scholer, LLP (APKS), representing the plaintiff Class and class representatives. In that
18 telephone conference, I learned that there had been an error in the calculation of the financial impact
19 of the INAP¹ that had been used as the basis for the prior settlement negotiations, and that both
20 parties regarded that error as material. I learned that the Court had been advised of this error and
21 that the Court had suspended the class notice process, and directed the parties to investigate the
22 facts pertaining to the financial impact of the INAP and to determine whether any amendment was
23 required to the initial settlement agreement in this case. I understood that the parties intended to
24 retain experts and begin that investigation immediately, and that it would likely take 60 – 90 days to
25

26 ¹ As used in this declaration, the “INAP” refers to the Inflation Adjustment Percentage that Delta
27 Dental applied to requests for fee increases submitted by Premier dentists, which in some situations
28 limited the amount of the fee increase that would become the “Contracted Fee” under the Delta
Dental Participating Dentist Agreement. Plaintiffs challenged Delta Dental’s right to apply the
INAP after January 1, 2011.

1 complete. Mr. Rosenfeld and Mr. Alexander requested that I be available to mediate the issue of
2 the financial impact of the INAP and to assist the parties in achieving an amended settlement
3 agreement. I agreed to continue my service as a mediator in this case for that purpose. After initial
4 telephone conversations, the parties agreed to a schedule that ultimately called for the submission of
5 supplemental mediation statements and related materials on September 27, 2017, and reply
6 mediation statements and materials on October 2, 2017. The parties presented lengthy supplemental
7 mediation statements and a significant amount of evidence in support of their respective positions.
8 In addition, both parties had retained sophisticated experts to review and analyze the data and to
9 provide their views on what the evidence showed, and their respective presentations drew upon
10 these expert opinions. The submitted materials were comprehensive, thorough, and very
11 informative.

12 3. Thereafter, the parties participated in a formal mediation session with me on October
13 4, 2017, at the offices of APKS in New York. For the plaintiff Class, the mediation was attended by
14 Alison Sandman, Chief Legal Officer of CDA, Carrie Gordon, Chief Strategy Officer of CDA, and
15 Paul Alexander, outside counsel for CDA, and for Delta Dental the participants were Michael
16 Castro, Delta Dental's Executive Vice President and Chief Financial Officer, Michael Hankinson,
17 Delta Dental's Executive Vice President and Chief Legal Officer, and David Goldstein and Howard
18 Ullman, outside counsel for Delta Dental. In addition, Bob Rosenfeld, outside counsel for Delta
19 Dental, participated by telephone. The mediation was intense and lasted throughout the day and
20 into the evening before agreement could be reached.

21 4. In their written submissions and in the in-person presentations, the parties provided
22 both the evidence and their respective arguments and views on the actual financial impact of the
23 INAP on the Class. The presentations and negotiations focused on several key issues, including
24 what the experts on each side indicated was the INAP impact on various Premier dentists, the time
25 period that should be used in determining the INAP impact, the impact on certain dentists with
26 specialties whose fees and claims may differ from general dentists, and the correct approach for
27 making the determination of the INAP impact in calendar year 2011, for which detailed data was
28 less available due to a change in record keeping software at Delta Dental. The parties engaged in

1 vigorous argument on each of these and other issues. As the mediator directly responsible for
2 moving these negotiations forward and for facilitating the exchanges of views and positions
3 between the parties, I can attest to the fact that the negotiations that led to the settlement agreement
4 between the parties were in fact arms-length, hard-fought, vigorous and conducted in good faith.

5 **THE PROPOSED AMENDED SETTLEMENT AGREEMENT**

6 5. Throughout the day, I worked with both parties to hear their views on the evidence,
7 the appropriate calculations and components of those calculations, and other related issues. The
8 presentations were increasingly detailed and specific as the day progressed, and we were able to
9 narrow differences toward the end of the day. However, after a full day of vigorous mediation, the
10 parties had not come to an agreement. I told them that before the mediation ended without success,
11 I would be willing to make a double-blind mediator's proposal, based on my evaluation of the
12 evidence, data and arguments, which each side would be free to accept or reject. If both sides
13 accepted the amount I proposed, the case would be settled. Both sides said they would like to
14 receive my proposal. I then proposed to the parties a settlement figure of \$65,029,299 for a full and
15 complete settlement of all claims asserted by the plaintiff Class. After deliberation, both parties
16 accepted this figure as a fair and reasonable settlement. As this figure suggests, my proposal did not
17 arise from a superficial or general approach to the evidence and the issues determining INAP
18 impact, but from a specific review of each of the components of each party's assessment of the
19 INAP impact as well as the facts and circumstances relating to the initial settlement agreement and
20 the Court's approval of that agreement. I view \$65,029,299 as a fair and reasonable figure in light
21 of the exposure created by the issue and the risks of litigation on both sides, as explained by the
22 parties.

23 6. This amended settlement amount will provide for significantly greater
24 compensation to the plaintiff Class than the \$34,750,000 previously agreed to and preliminarily
25 approved by the Court. As reflected in substantial detail in my February 24, 2017 declaration, the
26 parties' agreement to the initial settlement amount of \$34,750,000 occurred after substantial debate
27 and mediation and ultimately resulted from a Mediator's Proposal that I made in July, 2016. At that
28 time, based on the evidence available, the parties estimated that the total INAP impact was between

1 \$85,000,000 and \$95,000,000. I learned that by April, 2017, Delta Dental's claims data indicated
2 that the total INAP impact was approximately \$96,000,000 for the period January 1, 2011 through
3 December 31, 2016. This initial settlement amount was thus in a range between 36% and 40% of
4 the estimated total INAP impact on the Class at that time. I regarded this as a reasonable settlement
5 at the time and I am aware that in April, 2017, the Court granted preliminary approval to the initial
6 Settlement Agreement which included the Settlement Amount of \$34,750,000, which was arrived at
7 when the parties understood that the maximum amount of INAP impact on the Class was in the
8 range of \$85,000,000 to \$95,000,000 and which Delta Dental confirmed was approximately
9 \$96,000,000 in March, 2017.

10 7. During the mediation that led to the parties' agreement to the new settlement amount
11 of \$65,029,299, the parties presented both evidence and opinions of experts regarding the proper
12 calculation of the financial impact of the INAP. Delta Dental maintained that the total INAP
13 financial impact was approximately \$149.5 million for the period from January 1, 2011 through
14 December 31, 2016, which Delta Dental maintained was the appropriate time period to be
15 considered because it was the same time period previously used by the parties in their negotiations.
16 Plaintiffs, on the other hand, argued that the total financial impact of the INAP was approximately
17 \$183 million for the period January 1, 2011 through September 14, 2017. I learned that Delta
18 Dental amended the PDA effective September 15, 2017 to add language expressly authorizing it to
19 apply the INAP. Plaintiffs contended that the appropriate period to measure the financial impact of
20 the INAP for settlement purposes was January 1, 2011 through September 14, 2017. The parties
21 presented extensive argument and evidence regarding their respective views of an appropriate
22 settlement amount. As reflected above, the figure of \$65,029,299 arose from a proposal that I
23 formulated after considering the evidence and arguments presented by both parties. In reaching this
24 figure, I also considered the Settlement Amount approved by the Court as within the range of a
25 reasonable settlement, which was 36.2% of the \$96,000,000 total INAP impact that the parties
26 thought was accurate at the time the initial Motion for Preliminary Approval was submitted to the
27 Court. This settlement amount is in a range between 35.5% of plaintiffs' estimate of total INAP
28 impact for the period of January 1, 2011 through September 14, 2017 and 43% of defendant's

1 estimate of total INAP impact for the period January 1, 2011 through December 31, 2016. The
2 settlement amount of \$65,029,299 is thus in very much the same range of recovery, based on the
3 estimates of total INAP impact, as the initial settlement agreement. In my opinion, the amended
4 settlement amount of \$65,029,299 is an excellent recovery for the Class and reflects an amount that
5 is justified by risks of litigation, the likelihood of success on the merits, the cost of further litigation,
6 and the current status of the litigation. It is in the same range of recovery when measured against
7 the evidence and estimates of the total financial impact of the INAP on the Class as the initial
8 settlement agreement. And, significantly, it provides for significantly greater monetary
9 compensation to Class Members.

10 8. Following agreement on the amended settlement amount, the parties turned to the
11 issue of whether the amount of class counsel's attorneys' fees (including expert fees) to be awarded
12 subject to Court approval should be increased in light of the additional costs and expenses incurred
13 by plaintiffs in addressing the need for an amended settlement agreement. After discussion of the
14 legal work already done and expert fees already incurred, and the remaining fees and expenses that
15 would be required to finalize an amended settlement agreement, obtain preliminary and final
16 approval, and implement the settlement agreement, the parties agreed that it was appropriate to
17 increase the legal fees, including experts' fees and other costs, by \$850,000. Thus, the parties
18 agreed to amend the provision for attorneys' fees in the initial settlement agreement from
19 \$1,500,000 to \$2,350,000, subject to Court approval. None of this payment reduces the amount to
20 be paid to Class Members in the Amended Settlement Agreement. The negotiation and agreement
21 on this payment of attorney's fees took place after the agreement for the payment of the
22 \$65,029,299 as the amended settlement amount to be paid to the plaintiff Class. It was arrived at by
23 arms-length and vigorous negotiation in which both parties were represented by knowledgeable and
24 sophisticated counsel.

25 9. The description provided above, coupled with the description contained in my
26 previous declaration in this case dated February 24, 2017, illustrates the significant issues addressed
27 during both the initial and recently completed mediation sessions. As I stated in my previous
28 declaration, the settlement in this case achieves several benefits that could not have been achieved

1 by litigation. It also resolves hotly disputed damage claims for application of the INAP that would
2 have required substantial further litigation. The case presented significant risks for both parties. It
3 would have required several more years of difficult and expensive litigation in order to resolve these
4 issues, and there was no certainty of a result favorable to either side. The settlement achieves
5 important benefits for the Class that could not have been achieved even if they had they prevailed in
6 the action. The amended settlement amount of \$65,029,299 provides for significant payments to
7 dentists who had INAP impact, significantly more than the initial Settlement Agreement. As with
8 the initial settlement agreement, this substantial monetary recovery could not have been achieved in
9 an action based on associational standing. In my opinion, this Amended Settlement Agreement is
10 an excellent settlement and one with which I continue to be proud to be associated with as a
11 mediator.

12 I declare under penalty of perjury under the laws of the State of California that the foregoing
13 is true and correct to the best of my knowledge, information and belief and correctly sets forth my
14 opinion as the mediator in this case.

15 Executed this 12th day of December, 2017 at Boston, Massachusetts.

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ERIC D. GREEN