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7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 CITY AND COUNTY OF SAN FRANCISCO  
10

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

17 Plaintiffs,

18 v.

19 DELTA DENTAL OF CALIFORNIA, a  
California Corporation,

20 Defendant.  
21

No.: CGC-14-538849

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR FINAL APPROVAL OF  
AMENDED SETTLEMENT;  
CERTIFICATION OF SETTLEMENT  
CLASS; APPROVAL OF CLASS NOTICE;  
AND APPROVAL OF PLAN OF  
ALLOCATION AND DISTRIBUTION.**

Hearing Date: April 25, 2018  
Time: 1:30 p.m.  
Judge: Hon. Mary E. Wiss  
Dept.: 305

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1 **I. INTRODUCTION**

2 Pursuant to California Code of Civil Procedure Section 382 and California Rule of Court  
3 3.769, Plaintiffs move for (1) final approval of the proposed Amended Settlement Agreement; (2)  
4 final certification for settlement of a class of “all California dentists who are or were signatories to,  
5 or are or were parties to or subject to, a Participating Dentist Agreement with Delta Dental of  
6 California for participation in its Premier network at any time from January 1, 2011 through  
7 December 27, 2017” (the “Class”); (3) a finding that the Class has been provided adequate notice of  
8 the Amended Settlement Agreement; (4) final approval of the Plan of Allocation and Distribution  
9 and related relief.

10 On December 27, 2017, the Court conditionally certified the Class for settlement purposes  
11 and granted preliminary approval of the Amended Settlement Agreement. *See* Dec. 27, 2017 Order  
12 Granting Plaintiffs’ Motion for Preliminary Approval of Amended Class Action Settlement (the  
13 “12-27-2017 Preliminary Approval Order”). In its 12-27-2017 Preliminary Approval Order, the  
14 Court also approved proposed manner of Class notice, appointed Rust Consulting, Inc. as the Class  
15 Notice Administrator, and ordered that the Long Form Amended Notice be mailed to the Class by  
16 first class mail and that the Short Form Amended Notice be posted on the settlement website. *Id* at  
17 ¶¶ 8 -10. This notice has now been provided. *See* 4-4-2018 Declaration of Kim Schmidt, Senior  
18 Vice President of Rust Consulting, Inc. Administrator, ¶¶ 3-8, (the “4-4-2018 Kim Schmidt Decl.”),  
19 the Class Notice. The time period for class members to respond or object has now passed. *Id.* No  
20 member of the Class has objected to the proposed Amended Settlement. (See 3-20-2018 Notice of  
21 Settlement Class Opt Outs and Objections Provided Pursuant to December 27, 2017 Order). Only  
22 seven out of 28,754 Class members have opted out. *Id.*

23 The Amended Settlement Agreement provides what is by any measure substantial monetary  
24 recovery for the Class – payment by Delta Dental of up to \$65,029,299 to Class members whose fee  
25 payments for services rendered from January 1, 2011 through September 14, 2017 were limited by  
26 Delta Dental’s application of a limitation on fee increases that Delta Dental called the Inflation  
27  
28

1 Adjustment Percentage (the “INAP”).<sup>1</sup> See Amended Settlement Agreement, Exh. A to Declaration  
2 of Paul Alexander ISO Motion for Preliminary Approval of Amended Class Settlement, filed  
3 December 13, 2017 (hereinafter “Amended Settlement Agreement”). The Amended Settlement  
4 Agreement also provides substantial non-monetary relief in the form an amendment to the  
5 Participating Dentist Agreement (“PDA”) that requires Delta Dental to give 120 calendar days’  
6 notice of any future material amendment to the PDA. (Amended Settlement Agreement, ¶ III.1.b).  
7 More, if Delta Dental seeks to lower the “maximum amount allowed” under the PDA for dental fees  
8 in the future, it must provide each affected dentist with an individualized illustration of the  
9 financial impact of the reductions on the dentist’s practice based upon his or her claims submitted  
10 during a recent 12 month period. (Amended Settlement Agreement, ¶ III.1.a). This recovery,  
11 considered in light of the factual and legal issues and the history of this litigation, provides strong  
12 evidence that the Amended Settlement Agreement is fair, adequate and reasonable for the Class.

13 The Amended Settlement Agreement is the product of hard-fought adversarial negotiations,  
14 undertaken by experienced counsel. (See 2-24-2017 Declaration of Eric D. Green in Support of  
15 Motion for Preliminary Approval of Class Action, ¶¶ 9 -13; 12-12-2017 Declaration of Eric D.  
16 Green in Support of Motion for Preliminary Approval of Amended Class Action Settlement, ¶¶ 3 –  
17 7). It was reached after significant discovery, extensive data analysis by experts, and the assistance  
18 of an experienced mediator over the course of two separate mediations. *Id.* The history of the  
19 litigation and the settlement negotiations provides further confirmation that the Amended  
20 Settlement Agreement is fair, adequate and reasonable for the Class.

21 The reasonableness of the Amended Settlement Agreement is further confirmed by the fact  
22 that *there have been no objections to the Amended Settlement Agreement* filed by any of the 28,754  
23 Class members. (See 3-20-2018 Notice of Settlement Class Opt Outs and Objections Provided  
24 Pursuant to December 27, 2017 Order). Just as significant, only seven (7) dentists have opted out of

25 \_\_\_\_\_  
26 <sup>1</sup> As set forth in the declaration of Plaintiffs’ expert, Colin Loveness, the monetary amount allocated  
27 to the seven opt outs is \$8,675. Pursuant to paragraph III.D.1.a. of the Amended Settlement  
28 Agreement, these allocations will not be paid but rather retained by Delta Dental. Therefore, the  
final calculation of the amount Delta Dental is required to pay by the Amended Settlement  
Agreement is \$65,020,624 (hereinafter the “Final Settlement Amount”). See 4-4-2018 Declaration  
of Colin Loveness, ¶¶ 19-20.

1 the Amended Settlement Agreement.<sup>2</sup> *Id.* These facts are indicative of near universal approval by  
2 the Class of the Amended Settlement Agreement. This is further strong evidence that the Amended  
3 Settlement Agreement is fair, adequate and reasonable to the Class.

4 The Amended Plan of Allocation and Distribution, which is contained in Appendix 3 of the  
5 Amended Settlement Agreement, sets forth the manner in which the Amended Settlement Amount  
6 will be allocated among Class members. The agreed upon allocation methodology is based on the  
7 relative impact of the INAP on each class member as determined using the Delta Dental claim  
8 records. The calculations that produce the allocation of the Final Settlement Amount to Class  
9 members have been prepared by an expert, Colin Loveness, retained by Class Counsel. 4-4-2018  
10 Loveness Decl., ¶¶ 2-16. Mr. Loveness, who also performed calculations underlying Plaintiffs'  
11 damage calculations presented at the mediation, used the same Delta Dental claims databases that  
12 were used to develop the damage calculations. *Id.* ¶ 12. Mr. Loveness used these Delta Dental  
13 claim records to determine as accurately as possible, the actual impact of the INAP on each Class  
14 member. *Id.* In some instances, such as calendar year 2011, some individual claims records were  
15 not available and therefore a reasonable basis had to be developed to estimate the INAP impact on  
16 individual dentists for that period. *Id.* ¶¶ 8-9. The data, methods and cross-checking involved in  
17 this determination are described more completely in the 4-4-2018 Loveness Decl. filed with this  
18 Motion.

19 On numerous occasions during this process, the methodology, allocations and results of the  
20 calculations were shared Class Counsel, who reviewed the calculations and how they implemented  
21 the requirements of the Amended Settlement Agreement with Mr. Loveness. (4-4-2018 Alexander  
22 Decl., ¶¶ 9-12. Further, on numerous occasions, Mr. Loveness and Mr. Alexander shared the  
23 calculations with Delta Dental's counsel, actuaries and employees. Mr. Loveness was able to  
24 discuss the use of the data and the nature of the calculations being performed with Delta Dental,  
25 actuaries and executives to make certain he was interpreting and using the claims data appropriate.

26 \_\_\_\_\_  
27 <sup>2</sup> Four class members opted out of the original settlement agreement. Class counsel contacted each  
28 of them to discuss whether they wished to continue or rescind their opt out. One dentist, Dr. Gloria  
Ratui, elected to rescind her opt out and remain a part of the Class. *See* 4-4-2018 Declaration of  
Paul Alexander, ¶12. (the "4-4-2018 Alexander Dec.").



1 4-4-2018 Loveness Decl., ¶ 21 Based on this extensive process and vetting, Class counsel  
2 concluded that the allocation determinations prepared by Mr. Loveness made appropriate use of the  
3 Delta Dental claims data and were reasonable, accurate and reliable. 4-4-2018 Alexander Decl.  
4 ¶11.

5           Additionally, as required by the Amended Plan of Allocation and Distribution, Plaintiffs'  
6 experts, using the same Delta Dental claims records, determined the portions of any allocation of  
7 the Amended Settlement Amount that arose when a dentist worked for a group practice. In the  
8 normal course of business, these payments would be made to the group practices that normally  
9 submits claims and receives payments. The amounts received by the dentists would then be  
10 determined by the dentist's contract with the group practice. Under the Amended Plan of  
11 Allocation and Distribution, each Class member affected (as well as each group practice) may  
12 object to the distribution of the allocation to the group practice within 30 days of written notice.  
13 See Appendix 3 to Amended Settlement Agreement, ¶¶ 8 a. – c). If an objection is filed, the  
14 affected Class member(s) and group practice (s) have a sixty day window to resolve the objection.  
15 *Id.* If the objection cannot be resolved within the sixty days, the contested amounts will be placed  
16 in a separate account that is part of the Qualified Settlement Fund to be administered by the Class  
17 Notice Administrator, who will pay the disputed amounts in accordance with an agreed upon  
18 instruction or final, non-appealable court order resolving how payment should be made. *Id.* This  
19 protects the interests of both the Class members and the group practices (many of which are owned  
20 by Class members).

21           The notice requirements of this aspect of the Amended Plan of Allocation and Distribution  
22 will be implemented by written notices sent by first class mail by the Class Administrator, copies of  
23 which are contained in Exhibits 1-4 of the 4-4-2018 Alexander Decl. These letters set forth the  
24 essential information, including the calculations themselves and the procedure for objecting to  
25 payment of these amounts to the group practice, all as provided for in the Amended Plan of  
26 Allocation and Distribution. See 4-4-2018 Alexander Decl. ¶¶ 1-4 and Exh.1-4 thereto. This  
27 process, including the actual sending of checks to Class members, the sending of the Letters  
28 described in this paragraph, and the administration of the Qualified Settlement Fund that will

1 contain the Final Settlement Amount, will be supervised and implemented by Rust Consulting, Inc.  
2 pursuant to this Court's Order. (See 12-27-2017 Preliminary Approval Order, ¶ 8; 4-4-2018  
3 Alexander Decl., ¶ 13

4 Accordingly, based on the evidence and briefing before it, Plaintiffs urge the Court to issue  
5 the following Orders:<sup>3</sup>

6 (1). that the Class be finally certified as a proper settlement class;

7 (2). That the Class has received fair and adequate notice of the Amended Settlement  
8 Agreement and that the procedure for providing that notice employed the best practical procedures  
9 in light of the nature of the Class and this case and that, following this notice, no Class member has  
10 objected to the Amended Settlement Agreement;

11 (3) That the Amended Settlement Agreement is fair, reasonable and adequate to the Class  
12 and provides meaningful and adequate relief to the Class;

13 (4) That the Amended Plan of Allocation and Distribution, Appendix 3 to the Amended  
14 Settlement Agreement, is fair, reasonable and adequate to the Class and that Plaintiffs have  
15 determined the allocations and provided for distribution of those allocations in a reasonably  
16 accurate manner that appropriate implements the Amended Plan of Allocation and Distribution;  
17 and

18 (5) That Delta Dental be ordered to pay into the qualified settlement fund created by the  
19 Amended Settlement Agreement the sum of \$65,020,624 and that the Class Notice Administrator  
20 be ordered to distribute these funds to the Class in accordance with the allocation and distribution  
21 determinations made by Plaintiffs' expert and approved by Class counsel and to mail letters to Class  
22 members regarding these allocations in substantially the form set forth in Alexander Decl. Exhibits  
23 1 – 4.

24  
25  
26  
27 <sup>3</sup> In order to expedite payments to the Class members, the parties proposed a minor modification to  
28 the procedures relating to his Qualified Settlement Fund. These are described in Exhibit 5 ¶13 of  
the 4-4-2018 Alexander Decl.

1 **II. BACKGROUND**

2 **A. History of the Litigation.**

3 *The Arbitration Proceedings.* This litigation began in August, 2013, with a claim brought  
4 by the California Dental Association (“CDA”) and, ultimately, six individual dentists before a three-  
5 member panel of the American Arbitration Association.<sup>4</sup> In the arbitration, Delta Dental moved to  
6 exclude CDA from participating in the arbitration and, thereafter, for summary disposition of the  
7 claims asserted against it. The arbitration panel granted Delta Dental’s motion to exclude CDA on  
8 the basis that it was not a party to the PDA (which contained the arbitration clause), and granted for  
9 summary disposition as to the claims for breach of contract and violation of Business & Professions  
10 Code section 17200, but denied the motion as to the claim for breach of the covenant of good faith  
11 and fair dealing. This history that led to this litigation and references to the significant documents  
12 that gave rise to it are set forth in more detail in the 3/7/2017 Motion for Preliminary Approval  
13 previously filed in this action, pages 18 – 20.

14 *The Superior Court Action.* In June, 2014, concerned that the arbitration might be limited to  
15 the claims of only six dentists, CDA filed an amended complaint in Superior Court on behalf of its  
16 members, based on the doctrine of associational standing. See 6-20-2014 Amended Complaint for  
17 Declaratory and Injunctive Relief. On August 29, 2014, Delta Dental filed a demurrer to CDA’s  
18 Amended Complaint, asserting that CDA has failed to allege sufficient facts to state a cause of  
19 action. See 8-29-2014 Delta Dental Demurrer to Plaintiff California Dental Association’s Amended  
20 Complaint. Additionally, on November 19, 2014, Delta Dental filed a motion to dismiss CDA’s  
21 Amended Complaint, arguing that CDA lacked associational standing to bring the action. See  
22 November 19, 2014 Delta Dental Motion to Dismiss for Lack of Standing. The parties exchanged  
23 briefs on both the demurrer and the motion to dismiss, and the Court held a hearing on both March  
24 18, 2015. See 3-27-2015 Order: (1) Denying Delta’s Motion to Dismiss for Lack of Standing; (2)  
25 Overruling Delta’s Demurrer to the Amended Complaint; (3) Granting Motions to Seal.

26  
27 \_\_\_\_\_  
28 <sup>4</sup> The history of this litigation is set out in more detail in the 3/7/2017 Motion for Preliminary  
Approval, at 18-20.

1 On March 27, 2015, the Court overruled Delta Dental’s demurrer and denied its motion to  
2 dismiss, holding that CDA had adequately alleged facts to support its claims and its right to bring  
3 those claims under the doctrine of associational standing. *Id.* The Court ruled, however, that an  
4 evidentiary hearing was required on Delta Dental’s arguments that the doctrine of associational  
5 standing should not apply in this case. *Id.*

6 The Court set a trial date of November 16, 2015 for an evidentiary trial on the issue of  
7 associational standing. *See* 10-21-2015 Minutes of Case Management Conference). The parties  
8 then engaged in substantial discovery, including the exchange of expert reports and expert  
9 depositions in preparation for this trial. The Court held the trial on November 16, 2015. *Id.*

10 On January 26, 2016, the Court issued its Proposed Statement of Decision Re California  
11 Dental Association’s Associational Standing. In its Proposed Decision, the Court stated that “CDA  
12 has met proving it has standing to bring the claims asserted in the litigation on behalf of its  
13 members who are CDA dentist”. *See* 1-26-2016 Proposed Statement of Decision re California  
14 Dental Associations’ Associational Standing, ¶ IV. The Court also urged the parties to consider  
15 mediation. Shortly thereafter, the parties agreed to stay the litigation and proceed with mediation.

16 ***The First Mediation.*** The parties agreed to mediate before Professor Eric Green of  
17 Resolutions, LLC. *See* 3-7-2017 Declaration of Eric Green ¶ 3. On March 30, 2016, after the  
18 parties had provided Professor Green with documents and mediation statements, and participated in  
19 a pre-hearing conference, the mediation began with a full-day session in Boston, Massachusetts.  
20 Green Decl. ¶¶ 9 – 12. High ranking executives and counsel for both parties participated in this  
21 first mediation. *Id.* Six months of extensive negotiations followed, during which the parties  
22 debated every issue and made proposals and counterproposals. *Id.* ¶¶ 11, 13.

23 During the mediation process, the parties realized that the only procedural vehicle to ensure  
24 the uniform treatment of all Class members (including dentists who were and were not members of  
25 CDA) was a class action brought on behalf of all California Premier Dentists who had signed a  
26 PDA with Delta Dental at any time since January 1, 2011. *Id.* ¶ 15. From Delta Dental’s  
27 perspective, a class action was the only procedural means available to ensure that all of the claims  
28 against it could be fully addressed and finally resolved. *Id.*

1           ***The Initial Proposed Settlement Agreement.*** After months of negotiation, on March 7, 2017  
2 the entered into a proposed settlement agreement. *See* 3-13-2017 Declaration of Paul Alexander, ¶ 2  
3 and Exh. A. (the “Initial Proposed Settlement”). On March 7, 2017, Plaintiffs filed a Motion for  
4 Preliminary Approval of the Initial Proposed Settlement. 3-7-2017 Motion and Memorandum of  
5 Points and Authorities In Support of Motion for Certification of Settlement Class; Preliminary  
6 Approval of Proposed Class Action Settlement, Approval of Class Notice Plan, Approval. On April  
7 17, 2017, Plaintiffs filed a 4-17-2017 Supplemental Memorandum in Support of Preliminary  
8 Approval addressing issues that the Court raised at an initial hearing on the Motion for Preliminary  
9 Approval. After a hearing on April 21, 2017, the Court issued the 4-21-2017 Preliminary Approval  
10 Order provisionally certifying the Class, and ordering that notice be provided to the class via first  
11 class mail and publication. The Court also gave leave for Plaintiffs to file the Second Amended  
12 Complaint and on the same day, Plaintiffs filed the Second Amended Complaint (the “4-21-2017  
13 Second Amended Complaint”). Shortly thereafter, pursuant to the 4/21/2017 Preliminary Approval  
14 Order, the Class Notice Administrator mailed the long-form Class Notice to the members of the  
15 Class on May 11, 2017, published the short-form Class Notice in the California edition of *USA*  
16 *Today*, and established a settlement website, ([www.DeltaDentalofCaliforniaSettlement.com](http://www.DeltaDentalofCaliforniaSettlement.com)), a toll-  
17 free number for Class members to reach the class notice administrator, and a P.O. Box for the  
18 receipt of opt-outs and objections. *See* 12-17-2017 Declaration of Kim Schmidt In Support of  
19 Motion For Preliminary Approval, ¶¶ 5-6.

20           ***The Amended Proposed Settlement Agreement.*** In the process of validating the accuracy  
21 of the calculations for the allocation of the Settlement Amount in the Initial Proposed Settlement,  
22 the parties discovered that there had been a material miscalculation of the financial effect of Delta  
23 Dental’s application of the INAP to limit fees that had been the primary basis for the parties’  
24 agreement on the Settlement Amount in the Initial Proposed Settlement. *See* 6-8-2017 Order  
25 Vacating Dates and Deadlines Contained in Preliminary Approval Order and Setting Case  
26 Management Conference. The parties promptly informed the Court of this discovery. *Id.* The  
27 Court then vacated the deadlines in the 4-21-2017 Preliminary Approval Order and directed the  
28 parties to notify the Class that these dates had been vacated and to “use their best efforts to

1 determine the correct amount of the financial impact of the INAP and to determine whether any  
2 revision to the Settlement Agreement may be necessary and appropriate as a result of this  
3 determination.” *Id.*, ¶¶ 1 - 3. The parties notified the Class by means of a notice approved by the  
4 Court in an Order of June 20, 2017, and thereafter retained independent experts to determine the  
5 correct amount of the financial impact of Delta Dental’s application of the INAP. *See* 12-13-2017  
6 Alexander Decl. ¶ 4.

7           Following this, the parties engaged in additional discovery, pursuant to which Delta  
8 Dental provided Class Counsel and the expert retained by Class Counsel with access to Delta  
9 Dental database records created and maintained in the normal course of business for the period  
10 beginning January 1, 2011 through mid-2017. *Id.* ¶ 5. The parties’ independent experts each used  
11 this data to reach independent determinations of the financial impact on the Class of Delta  
12 Dental’s application of the INAP. *Id.* The parties and their counsel and experts then held a series  
13 of meetings to discuss their analyses of the data and their conclusions regarding the INAP  
14 impact. *Id.* In August, 2017, each party deposed the other party’s expert on this issue. *Id.*

15           ***The Second Mediation.*** The parties then had informal settlement discussions that led to a  
16 second formal mediation with Professor Green. *Id.*; *see also* 12-12-2017 Declaration of Eric  
17 Green In Support Of Motion for Preliminary Approval of Amended Class Action Settlement  
18 Agreement (“12/12/2017 Green Decl.”) ¶ 2. On October 4, 2017, high ranking executives and  
19 counsel for each party attended a full day in-person mediation session in New York. At the  
20 conclusion of this mediation, the parties reached agreement on the Amended Settlement Amount to  
21 be paid by Delta Dental, and thereafter on an amended amount to be paid for attorney’s fees and  
22 costs. 12/12/2017 Green Decl. ¶¶ 3-5.

23           On December 14, 2017, Plaintiffs moved for Preliminary Approval of the Amended  
24 Settlement Agreement. The Court heard the Motion on December 27, 2017, following which the  
25 Court issued the 12-27-2017 Preliminary Approval Order, which, among other things, preliminarily  
26 approved the Amended Settlement Agreement, ordered appropriate Notice to be given to the Class,  
27 and set April 25, 2018 as the date for a hearing on the Motion for Final Approval of the Amended  
28 Class Settlement.

1           **B.       The Terms of the Amended Settlement Agreement.**

2           The Amended Settlement Agreement contains essentially the same non-monetary terms that  
3 the Court preliminarily approved in the Initial Settlement Agreement. The monetary payment  
4 required by the Amended Settlement Agreement, however, increased substantially. Under the  
5 Amended Settlement Agreement, Delta Dental is required to pay up to \$65,029,299 to Class  
6 members whose fee payments for services rendered from January 1, 2011 through September 14,  
7 2017 were limited by Delta Dental’s application of the INAP. (Amended Settlement Agreement,  
8 ¶ III.D. 1). This is, by any measure, a substantial recovery for the Class. The minimum allocation to  
9 Class members adversely affected by the INAP is \$500. (Appendix 3 to Amended Settlement  
10 Agreement, ¶ 4. The average allocation is over \$4,480 for Class members who were adversely  
11 impacted by the INAP. Loveness Decl., ¶ 15.

12           The non-monetary benefits from the Amended Settlement Agreement – which benefit all  
13 Class members whether they were injured by the INAP or not – are also substantial. Under the  
14 Amended Settlement Agreement, the PDA will be amended to require Delta Dental to give 120  
15 calendar days’ notice of any future material amendment to the PDA, significantly longer than the  
16 minimum 45 business days that California law requires and that the current PDA provides. See  
17 Amended Settlement Agreement § III.B.1.a.<sup>5</sup> This notice will give Class members a meaningful  
18 time period to consider and understand any future material amendment and to decide whether to  
19 continue their relationship with Delta Dental.

20           More, the Amended Settlement Agreement requires that Delta Dental provide an individualized  
21 analysis of the financial impact of any future reduction in the “maximum amount allowed” for any  
22 Contracted Fee for each and every Premier dentist who may be affected by it. *Id.* Under this provision,  
23 Delta Dental must prepare and provide to each Premier dentist affected by any such reduction an  
24 individualized analysis of the potential financial impact on the Premier dentist’s practice based upon a  
25 recent twelve month period of that Class member’s claims with Delta Dental. *Id.* This analysis must  
26 include not only the total potential financial impact based on historical data, but also the dentist’s new

27 \_\_\_\_\_  
28 <sup>5</sup> The Amended Settlement Agreement is Exhibit A to the 12/13/2017 Alexander Declaration in Support of the Motion For Preliminary Approval of the Amended Settlement.

1 “contracted fees” that would result from the reduction. This is an unprecedented disclosure that Class  
2 Counsel believes no other dental plan provides. 4-7-2018 Alexander Decl. ¶10. It will provide each  
3 affected dentist with heretofore unavailable information about exactly how much the reductions could  
4 affect his/her practice based on historical data of the procedures the dentist performed. The availability  
5 of this detailed information 120 days before any reduction can take effect will provide an even more  
6 detailed picture of how these changes could affect a Class member’s economic future with Delta  
7 Dental and what might be done about it. Indeed, a primary complaint that is often heard from Premier  
8 dentists is the unknown nature of Delta Dental’s fee mechanisms. *Id.*

9 In exchange for this non-monetary and monetary relief, the members of the Class release all  
10 claims that are “based on, arise from or relate directly to Delta Dental’s conduct, acts or omissions  
11 alleged in the Second Amended Complaint including without limitation the determination or application  
12 of Premier Fee Reimbursement Limits and/or Contracted Fees for Premier Dentists prior to the Effective  
13 Date of the Amended PDA, Delta Dental’s determination or application of INAP, Delta Dental’s  
14 amendments to the PDA announced on November 17, 2010, Delta Dental’s amendments to the PDA  
15 announced on August 1, 2013, and/or Delta Dental’s notice to dentists of those amendments, and/or the  
16 claim that the terms of the current or any prior version of the PDA, the covenant of good faith and fair  
17 dealing implied in the current or any prior version of the PDA, or any other law applicable to the current  
18 or prior versions of the PDA preclude the amendments proposed by Delta Dental to the PDA, regardless  
19 of when such claims accrue or accrued, for the period through the Effective Date of the Amended  
20 PDA.” Amended Settlement Agreement ¶ VI.1. The release includes claims known and unknown  
21 arising from the conduct alleged in the Second Amended Complaint, but it does not apply to other  
22 conduct that is not “based on, “aris[ing] from or relat[ing] directly to the conduct alleged in the Second  
23 Amended Complaint. *Id.* Further, It does not, however, release any claim for future conduct by Delta  
24 Dental. *Id.*

25 **III. FINAL CERTIFICATION OF THE CLASS FOR SETTLEMENT PURPOSES IS**  
26 **APPROPRIATE.**



1 Plaintiffs respectfully request that this action be certified as a class action for settlement  
2 purposes pursuant to California Code Civil Procedure Section 382 and California Rule of Court  
3 3.769.

4 Class certification is appropriate when: (1) the class is ascertainable; and (2) there is a “well-  
5 defined community of interest in the questions of law and fact involved affecting the parties to be  
6 represented.” *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 704 (1967). Any doubts as to the propriety  
7 of class certification are to be resolved in favor of certification. *Richmond v. Dart Indus., Inc.*,  
8 29 Cal. 3d 462, 473-75 (1981). Certification of a proposed class for settlement purposes is thus  
9 proper under California law. *See Hernandez v. Vitamin Shoppe Indus., Inc.*, 174 Cal. App. 4th  
10 1441, 1456 (2009). The court reviews the proposed settlement class under the law applicable to  
11 certification of a class generally. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 237-  
12 38 (2001).

13 **A. The Class Is Ascertainable And So Numerous That Joinder Is Impracticable.**

14 Class members are “ascertainable” when they can be “readily identified without  
15 unreasonable expense of time by reference to official records.” *Rose v. City of Hayward*, 126  
16 Cal. App. 3d 926, 932 (1981); *see also Wilner v. Sunset Life Ins. Co.*, 78 Cal. App. 4th 952, 960  
17 (2000) (holding that a class is ascertainable when it is precise, objective, and can be determined  
18 from defendants’ public, or other existing records).

19 The Preliminary Approval Order provisionally certifies the following class for settlement  
20 purpose: “All California dentists who are or were signatories to, or are or were parties to or subject  
21 to, a Participating Dentist Agreement with Delta Dental of California for participation in its Premier  
22 network at any time from January 1, 2011 through December 27, 2017.” 12-27-2017 Preliminary  
23 Approval Order ¶ 3.

24 By definition, then, each Class member has entered into a PDA with Delta Dental. Delta  
25 Dental maintains computerized records of these agreements, and thus it is able to identify the  
26 Class members using its own records. The members of the proposed Class are therefore readily  
27 ascertainable.

1 Further, Delta Dental's records show that there are 28,754 members of the proposed Class.  
2 Individual joinder of all of these members would plainly be impracticable. The size of the proposed  
3 Class far exceeds the threshold for class certification. *See Anesthesia Care Assocs. Med. Grp., Inc.*  
4 *v. Blue Cross of Cal.*, No. 986677, 2002 WL 484662, at \*4 (Cal, Super. Ct. Feb. 25, 2002)  
5 (“Numerosity . . . is easily satisfied here. The number of class members is estimated to exceed  
6 13,000.”)

7 **B. A Well-Defined Community of Interest Exists.**

8 A well-defined community of interest is established where (1) there are predominant  
9 common questions of law or fact, (2) the representative plaintiffs have “claims or defenses typical  
10 of the class,” and (3) the representative plaintiffs are able to adequately represent the class. *See*  
11 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1806 (1996); *see also Sav-on Drug Stores, Inc. v.*  
12 *Superior Court*, 34 Cal. 4th 319, 326-37 (2004).

13 *1. Common Questions Of Law And Fact Predominate.*

14 Plaintiffs need not show that all issues in the litigation are identical for each class member;  
15 common legal or factual questions must only predominate. *See Sav-on Drug Stores*, 34 Cal. 4th at  
16 328, 332-33. In this case, that standard is easily met, because there are numerous common  
17 questions of law and fact predominate over any individualized questions. These include, without  
18 limitation:

19 i. In 2013, Did Delta Dental determine the reductions in the “maximum amount  
20 allowed” for Contracted Fees under the PDA that it was planning to implement in the manner  
21 contractually required by the PDA?

22 ii. Did Delta Dental provide adequate notice to Class members of the nature, purpose  
23 and effect of the amendment of the PDA that it announced, and did the notice it gave omit  
24 material facts necessary to provide fair and adequate written notice of the amendment as required  
25 by the PDA?

26 iii. Did Delta Dental impose the INAP after January 1, 2011, and did the application of  
27 the INAP to limit the "Contracted Fees" of Class members result in losses in the form of lower fees  
28 paid to Class members beginning January 1, 2011?

1           iv.     Was Delta Dental’s application of the INAP from January 1, 2011 through  
2     September 14, 2017 a breach of the PDA and/or the covenant of good faith and fair dealing under  
3     the PDA?

4           v.     Was Delta Dental’s announced amendment to the PDA changing and eliminating  
5     language in the PDA in order to facilitate a reduction in “maximum amount allowed” for  
6     Contracted Fees under the PDA a breach of the PDA or of the covenant of good faith and fair  
7     dealing under the PDA?

8           These questions, as well as others that are also relevant to the outcome of this case,<sup>6</sup> are  
9     common ones that arise from common facts. In particular, they arise from PDA Rules that are  
10    uniformly applicable as between Delta Dental and the members of the Class. They predominate  
11    over any individual issue, such as the amount of INAP impact that might have been incurred by any  
12    individual class member. Indeed, the Amended Plan of Allocation and Distribution (Appendix 3 to  
13    the Amended Settlement Agreement) shows that it is possible to calculate the INAP impact for each  
14    Class member, and allocate to each a proportional amount of the Amended Settlement Amount,  
15    using Delta Dental’s claim records. Common questions of law and fact thus predominate over any  
16    individualized issues.

17                               2. *The Representative Plaintiffs Have Claims Or Defenses Typical Of The*  
18                                *Class.*

19           A representative plaintiff’s claim is typical if it arises from the same event, practice, or  
20    course of conduct that gives rise to the claims of other class members, and if his or her claims are  
21    based on the same legal theory. *Classen v. Weller*, 145 Cal. App. 3d 27, 46 (Cal. Ct. App. 1983);  
22    *Anesthesia Care Assocs. Med. Grp., Inc.*, 2002 WL 484662, at \*5. In a contract-based dispute, a  
23    class representative’s claims are “generally held to be typical of the class members’ claims where all  
24    arise out of the same general contract.” W. Rubenstein, 1 *Newberg on Class Actions* § 3:37 (5th ed.  
25    2017).

26  
27  
28           <sup>6</sup> Additional common questions of law and fact are set forth in Plaintiff’s initial motion for final approval. See 3/7/2017 Memo In Support of Preliminary Approval, at 9.

1 The claims of the individual class representatives are typical of the claims of the proposed  
2 Class. They arise from the same Rules, the same practices, the same INAP and other conduct that  
3 gives rise to the claims of all Class members. The proposed individual class representatives received  
4 the same notice from Delta Dental regarding its proposed amendments to the PDA that forms a  
5 basis for certain claims made by all Class members. The individual class representatives sustained  
6 the same basic type of injury and damage as that sustained by all members of the proposed Class.  
7 The claims of the individual proposed class representatives are thus representative of, and co-  
8 extensive with, the claims of the Class.

9 Further, as set forth in greater detail in the Motion for Attorneys' Fees and Incentives  
10 Awards, each individual Plaintiff assisted in the litigation by, among other things, reviewing  
11 documents, working with counsel, reviewing pleadings, providing declarations and discussing  
12 facts, discussing the claims, discussing the potential settlement. See Motion for Attorneys' Fee  
13 And Incentive Awards, at 17-18. *See also* Declarations of Whitney Johnson, Barbara M.  
14 Hawthorne, Gerald Middleton, Dean Schweitzer, Richard W. Barnes, Robert E. Reed, and Terrence  
15 Y. Lau in Support of Motion For Attorneys' Fees And Incentive Awards filed on 4-18-2017.<sup>7</sup>

16 CDA is equally an appropriate representative of the proposed Class. As the Court  
17 preliminarily determined in its 1-26-2017 Proposed Statement of Decision, CDA would be an  
18 appropriate plaintiff to bring an associational standing action on behalf of its members. See 1-26-  
19 2016 Proposed Statement of Decision re California Dental Associations' Associational Standing,  
20 For the same reasons, CDA is an appropriate class representative. Furthermore, CDA has in large  
21 measure been the driving force behind this litigation. CDA conducted the factual investigation that  
22 led to this action, retained counsel, and initiated this litigation on behalf of its members. CDA's  
23 Chief Legal Officer and executives have spent substantial time and effort to prosecute this action.  
24 *See* 3/7/2017 Declaration of Paul Alexander In Support of Motion For Preliminary Approval  
25 ("3/7/2017 Alexander Decl.") ¶ 3 and 4-4-2018 Alexander Decl. ¶ 8. CDA's Chief Legal Officer

26 \_\_\_\_\_  
27 <sup>7</sup> On February 16, 2018, Class counsel timely filed the Motion for Attorneys Fees Incentive Awards  
28 to Class Representatives. No opposition or objections to this Motion has been received. For the  
reasons stated in that Motion, Plaintiffs request the Court to issue an Order approving the requested  
attorneys fees and incentive awards.

1 and executives have spent many hours reviewing documents, working with counsel, making  
2 themselves available for depositions, preparing declarations and participating extensively in the  
3 negotiations that led to the Amended Settlement Agreement. *Id.* CDA is thus a highly qualified  
4 and appropriate class representative.

5 *3. The Representative Plaintiffs Are Able To Adequately Represent The Class.*

6 There are no conflicts amongst Class members that would preclude class certification here.  
7 All Class Members will benefit equally from the non-monetary relief contained in the Proposed  
8 Amended Settlement, by receiving more notice of material changes to the PDA, more notice of  
9 fee reductions, and individualized analyses of the potential financial impact of any future fee  
10 reductions. Furthermore, each Class member who sustained a financial loss as a result of Delta  
11 Dental's application of the INAP is treated fairly under the Allocation and Distribution Plan  
12 (Appendix 3 to the Amended Settlement Agreement), as discussed below.

13 Previously in this litigation, Delta Dental had argued that conflicts would arise between  
14 Class members because some Class members would benefit from reductions in maximum allowable  
15 fees due to an increase in volume of dental procedures performed, as Delta Dental sold more dental  
16 plans. This concern no longer pertains, however, because (in large part due to the antitrust laws),  
17 the Proposed Amended Settlement does not attempt to dictate to Delta Dental whether or not it  
18 can reduce the "maximum amount allowed" for "Contracted Fees." It only affects the notice and  
19 information Delta Dental must provide before doing so. Accordingly, all Class members are  
20 similarly situated vis-à-vis the relief afforded by the Proposed Amended Settlement, and there  
21 are no conflicts that would preclude certification.

22 **C. A Class Action Is A Superior Method Of Resolving This Dispute.**

23 A further inquiry in deciding the propriety of class certification is whether a class action is  
24 superior to other available methods of resolving the dispute between the parties. *Reyes v. San Diego*  
25 *Cty. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987).

26 In this case, individual joinder is plainly not practical. Moreover, during the Parties' first  
27 mediation, the Parties realized that a representative action by CDA was also deficient because  
28 although it would aggregate a large number of similar claims, it would not address the claims of the

1 large number of dentists who are not members of CDA. Correspondingly, a representative action  
2 brought by CDA would not permit Delta Dental to resolve all of the claims against it in one  
3 proceeding. 2/24/2017 Green Declaration ¶ 15. A class action on behalf of all Premier dentists is  
4 thus superior to the other alternatives for resolving this matter.

5 **IV. THE BEST PRACTICABLE NOTICE HAS BEEN PROVIDED.**

6 In the 12-17-2017 Preliminary Approval Order, the Court approved the form and content of  
7 the Long Form Amended Notice and the Short Form Amended Notice, substantially in the form of  
8 Exhibits A and B to the Amended Settlement Agreement. See 12-17-2017 Preliminary Approval  
9 Order ¶ 9. The Court further found these Notices, as well as the overall plan for providing them to  
10 the Settlement Class, to be “the best notice practicable under the circumstances” and found them to  
11 constitute “valid, due, and sufficient notice to the Settlement Class of the pendency of the action,  
12 the preliminary certification of the Settlement Class, the terms of the Amended Settlement, the  
13 procedures for objecting to the Amended settlement, and the time and place of the Final Approval  
14 Hearing.” *Id.* The Court further held that the proposed manner of notice “satisfies the requirements  
15 of due process and complies with applicable law, including California Code of Civil Procedure  
16 section 382 and California Rules of Court rule 3.769.” *Id.*

17 **A. The Court-Approved Notice Plan Has Been Successfully Implemented.**

18 Pursuant to the Preliminary Approval Order, on January 17, 2018, the Class Notice  
19 Administrator mailed the Long Form Amended Notice to the Class via first class mail. See  
20 Declaration of Kim Schmidt In Support of Motion For Final Approval Of The Amended Settlement  
21 (“Schmidt Decl.”) ¶ 5. In order to maximize the likelihood of each Class Member receiving the  
22 Notice, a Long Form Amended Notice was mailed to each address on file for each Class member,  
23 from a list compiled from the records of both Delta Dental and CDA. *Id.* ¶ 4. In total, 42,607 Long  
24 Form Amended Class Notices were mailed. *Id.* ¶ 5. In addition, the Long Form Amended Class  
25 Notice and the Short Form Amended Class Notice were posted on the settlement website on January  
26 18, 2018). *Id.* ¶ 5. Thus class members have received the written Notice multiple times because  
27 they practice at multiple locations.

1 The Preliminary Approval Order also directs that, “[i]f a Long Form Amended Notice sent  
2 to a Class Member is returned as undeliverable, the Class Notice Administrator shall promptly take  
3 additional and reasonable steps to determine whether a valid current address for such Class Member  
4 exists and complete any mailing to that address by first class mail no later than thirty (30) days after  
5 the initial mailing.” Preliminary Approval Order ¶ 10b. After the first mailing, the Class Notice  
6 Administrator accordingly undertook the steps required by the 12-27-2017 Preliminary Approval  
7 Notice to re-mail notices that were returned as undeliverable. 4-4-2018 Schmidt Decl.

8 ¶ 8. Pursuant to this process, the Class Notice Administrator mailed additional Notices to 193  
9 updated addresses on February 16, 2018. *Id.* ¶ 8¶

10 During the process of compiling the data for the plan of allocation, Class Counsel and their  
11 expert were able to match a number of additional claims that had impacted by the INAP with  
12 individual Class members. Once these claims could be attributed to Class members, Class Counsel,  
13 the Class Notice Administrator, and counsel for Delta Dental cross-checked the mailing records to  
14 confirm whether these Class members had been mailed the Long Form Amended Notice. This  
15 process revealed the possibility that 72 of these Class members had not been mailed the Long Form  
16 Amended Notice. The next day, February 14, 2018, the Class Notice Administrator mailed by  
17 overnight delivery 117 Long-Form Amended Notices to addresses for these Class members 4-4-  
18 2018 Schmidt Decl. ¶ 7. Eleven additional Long-Form Amended Notices were also sent via priority  
19 mail to those address that were P.O. Boxes. *Id.* ¶ \_.

20 Pursuant the Preliminary Approval Order, the Class Notice Administrator has also  
21 continuously maintained the settlement website, [www.DeltaDentalofCaliforniaSettlement.com](http://www.DeltaDentalofCaliforniaSettlement.com), a toll-  
22 free number for Class members to reach the class notice administrator, and a P.O. Box for the  
23 receipt of opt-outs and objections. *Id.* ¶ \_. As of April 4, 2018, there have been 12,415 visits to the  
24 website. 4-4-2018 Schmidt Decl. ¶ 5. In addition to this, 344 calls have been made to the Class  
25 Notice Administrator at the toll-free number provided in the Class notices. 4-4-2018 Schmidt Decl.  
26 ¶ 6All of this evidence supports the conclusion that notice of both the Initial Settlement Agreement  
27 and the Amended Settlement Agreement has been effective.

1 All of the available evidence, therefore, supports the conclusion that the Court-approved  
2 class notice plan has been implemented that this implementation has been extremely successful in  
3 providing notice of the Amended Settlement Agreement to the class.

4 **B. The Adequacy Notice is Further Confirmed by the Extensive Notice of Initial**  
5 **Settlement Agreement.**

6 That adequate notice has been provided by the Class Notice Administrator's execution of the  
7 Court-approved notice plan is further supported by the fact that the Class has previously received  
8 notice of a prior iteration of the Settlement. In particular, as described above, as directed by the  
9 Court's Order preliminarily approving the Initial Settlement Agreement, the Class Notice  
10 Administrator mailed the initial long form notice to the class members on May 12, 2017, and  
11 published the short-form Notice of that settlement in the California Edition of *USA Today*. Rust  
12 also established a settlement website, a toll-free number for Class members to reach the class notice  
13 administrator, and a P.O. Box for the receipt of opt-outs and objections. Although the monetary  
14 relief increased by approximately 100% in the Amended Settlement Agreement versus the prior  
15 one, the non-monetary relief remained the same. Effectively, then, adequate notice has been  
16 provided to Class members twice in this case, which makes the low number of opt outs and lack of  
17 objections even more compelling evidence that the Class approves of the Amended Settlement  
18 Agreement.

19 **C. There Have Been No Objections to the Amended Settlement Agreement And**  
20 **Only Seven Class Members Have Opted Out.**

21 No Class members have objected to the settlement. Only seven (7) Class members have  
22 opted out of the Amended Settlement Agreement. 4-4-2018 Schmidt Decl. ¶¶ 11-12. This is  
23 approximately.0003 percent of the total Class. None of these seven opt outs contains any  
24 substantive basis or reason for the opt out. The complete absence of objection to the Amended  
25 Settlement Agreement provides strong evidence of the reasonableness of that agreement. The  
26 extremely low opt out rate further confirms that the Amended Settlement Agreement is regarded by  
27 the Class as fair and reasonable.

28 **V. THE AMENDED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE.**



1           The Amended Settlement Agreement is fair, reasonable and adequate, and thus warrants  
2 final approval. First, the Court may presume that it is fair under California law. Second, even  
3 absent the presumption, the Amended Settlement Agreement warrants approval under the factors set  
4 for in *Kullar v. Foot Locker Retail, Inc.* 168 Cal. App. 4th 116 (2008).

5           **A. California Law Affords The Settlement A Presumption Of Fairness.**

6           California law favors settlement, particularly in class actions and other complex cases where  
7 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.  
8 *See 7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000).  
9 Further, under California law, a settlement is presumed to be fair if “(1) the settlement is reached  
10 through arm’s length bargaining; (2) investigation and discovery are sufficient to allow counsel and  
11 the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage  
12 of objectors is small.” *Dunk v. Ford Motor Co.* 48 Cal. App. 4th 1794, 1802 (1996).

13           These criteria are met here. As described in more detail below, the Amended Settlement  
14 Agreement was reached substantial after discovery, extensive expert analysis of data, and extensive  
15 adversarial negotiations conducted under the oversight of an experienced mediator. *See infra; see also*  
16 12/12/2017 Green Decl. ¶¶ 3-4. The discovery and expert analysis included Delta Dental’s claim  
17 records showing the actual impact of the INAP. This allowed counsel for both sides to negotiate the  
18 Amended Settlement Agreement with both a thorough awareness of the strengths and weaknesses of the  
19 case, and an accurate understanding of the total financial exposure. *See* 12/13/2017 Alexander Decl. ¶  
20 5. Both Plaintiffs’ counsel and Delta Dental’s counsel are experienced litigators with extensive  
21 experience in class action and complex commercial litigation. *See* 2/16/2018 Motion for Attorneys’  
22 Fees And Incentive Awards, at 5-6. And, as stated above no Class members has objected to the  
23 Amended Settlement Agreement. Schmidt Decl. ¶ 12. Accordingly, a strong presumption arises that  
24 the Amended Settlement Agreement is fair and reasonable. *Dunk*, 48 Cal. App. At 1802.

25           **B. The Amended Settlement Agreement Is Fair And Reasonable.**

26           In *Kullar v. Foot Locker*, the court identified the following “well recognized factors” that  
27 should be considered in evaluating the reasonableness of a class settlement: “the strength of  
28 plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of

1 maintaining class action status through trial, the amount offered in settlement, the extent of  
2 discovery completed and stage of the proceedings, the experience and views of counsel, the  
3 presence of a governmental participant, and the reaction of the class members to the proposed  
4 settlement.” *Id.* 168 Cal. App. 4th at 128. Consideration of these factors allows the court to  
5 “independently and objectively analyze the evidence and circumstances before it in order to  
6 determine whether the settlement is in the best interests of those whose claims will be  
7 extinguished.” *Id.* at 130. The court added that the list is “not exhaustive and should be tailored to  
8 each case.”<sup>8</sup> *Id.* at 128. The most important factor is “the strength of the case for plaintiffs on the  
9 merits, balanced against the amount offered in settlement.” *Id.* at 130. In this case, an objective  
10 analysis of all the factors, including the strength and weakness of Plaintiffs’ claims, confirms that  
11 the Amended Settlement Agreement is fair, adequate and reasonable for the Class.

12 *1. The Amended Settlement Agreement Appropriately Weighs the Strengths and*  
13 *Weaknesses of Plaintiffs’ Claims*

14 In the Second Amended Complaint, Plaintiffs allege that Delta Dental breached the PDA  
15 and the covenant of good faith and fair dealing in 2013 when it amended the PDA Rules to delete  
16 the sentence in the definition of Contracted Fee that provided that in determining the “maximum  
17 amount allowed” for the “Contracted Fee” under the PDA, “[t]he maximum amount will not be  
18 reduced unless participating dentists’ filed or submitted fees decrease to such an extent that Delta  
19 Dental is warranted in reducing the maximum amount allowed.” SAC ¶¶ 13-14, 17. Plaintiffs  
20 further allege that Delta Dental issued a false and misleading notice to Class members that failed to  
21 disclose the true purpose of the 2013 amendments and made false and misleading statements to the  
22 California Department of Managed Health Care (“DMHC”) in its filings to secure approval of the  
23 2013 amendments. *Id.* ¶¶ 17-20.

24 In addition, Plaintiffs allege that Delta Dental had determined to implement a new and lower  
25 “maximum amount allowed” for every dental procedure and for every region in California without  
26

27 <sup>8</sup> In the Motion for Preliminary Approval of the Amended Settlement, Plaintiffs provided a detailed  
28 analysis of the Amended Settlement under the *Kullar* factors. That analysis remains accurate, and is  
summarized here for the Court’s convenience.

1 performing the “actuarial calculation” that the PDA required. Second Amended Complaint ¶ 24.  
2 Plaintiffs also allege that for many years, Delta Dental did not determine “maximum amounts  
3 allowed” in accordance with the PDA. *Id.* ¶ 25.

4 Plaintiffs allege that Delta Dental’s application of the INAP since January 2011 to limit  
5 Class members’ fee reimbursements was not authorized by the PDA in light of amendments to the  
6 PDA effective January 2011. Second Amended Complaint ¶¶ 12-15, 17, 25. Plaintiffs claim that  
7 amendments implemented by Delta Dental effective on January 1, 2011 eliminated any right to  
8 impose the INAP limitation and that, as amended, the PDA effective January 1, 2011 affirmatively  
9 precludes implementation of the INAP. *Id.*

10 Finally, Plaintiffs allege that Delta Dental breached the PDA and the covenant of good faith  
11 and fair dealing by revising the dispute resolution provision to limit the circumstances in which  
12 arbitration is available. Second Amended Complaint ¶ 21. Plaintiffs claim that the above conduct  
13 constitutes breach of contract, breach of the implied covenant of good faith and fair dealing, and  
14 violations of California Business and Professions Code § 17200 (West), *et seq.* (the Unfair  
15 Competition law or the “UCL”). Plaintiffs seek damages, declaratory relief and injunctive relief.  
16 SAC ¶¶ 55-62.

17 Plaintiffs presented significant evidence in support of their claims. Indeed, otherwise there  
18 would be no settlement. Delta Dental, however, also presented evidence in support of its defenses.  
19 As a threshold matter, Delta Dental pointed to language in § 1375.7 of California’s Knox Keene Act  
20 that authorizes a dental plan provider like Delta Dental to make material changes to its contracts,  
21 including the fees it pays to dentists. Delta Dental presented evidence that it had followed the  
22 procedures set for in § 1357 and that the California Department of Managed Health Care, after  
23 reviewing Delta Dental’s submissions, decided to allow the amendment to proceed. This  
24 administrative “approval,” Delta Dental maintained, precluded a challenge to the amendment in  
25 Superior Court.

26 With respect to the claim that Delta had not performed the “actuarial calculation” required  
27 by the PDA, Delta presented evidence that it performed an equivalent analysis and that the  
28 reductions that it determined to make were necessitated by “market pricing by competitors” and

1 “acceptability by customers,” which the PDA has explicitly allowed since January 1, 2011. *See*  
2 4/17/2017 Supplemental Memo, at 8. Furthermore, discovery produced evidence that a substantial  
3 number of the “Premier-only” dentists who had PDA’s with Delta Dental had, by the time of the  
4 challenged amendments, already agreed to provide the same dental services for other insurers at  
5 significantly lower fees by joining the “PPO networks” of competing insurers. *Id.* This meant that  
6 there was some evidence indicating that many of the dentists on whose behalf Plaintiffs claimed that  
7 the fee reduction that Delta sought to impose would create serious and irreparable damage to their  
8 practices had in fact already agreed with other insurers to charge fees that appeared to be lower than  
9 their “Contracted Fees” under their PDA’s with Delta Dental. *Id.*

10 With respect to the imposition of the INAP, Delta Dental pointed to evidence that the INAP had  
11 been applied uniformly for many years prior to January, 2011; that the change in the language in the  
12 2011 PDA was not intended to eliminate Delta Dental’s ability to use the INAP; that other amendments  
13 to the PDA allowed its continued application; that application of the INAP had become an accepted  
14 “course of dealing” between Delta Dental and the dentists in its network; that Delta Dental did not  
15 profit directly from application of the INAP because most of its lower costs as a result of reduced fees  
16 were passed on to customers; and, that many Premier dentists had been advised of the INAP’s effect on  
17 fees and had not previously complained about it. *Id.* Further, Delta Dental’s amendment to the PDA  
18 effective September 15, 2017 arguably ended ongoing damages for application of the INAP.

19 12/13/2017 Alexander Decl. ¶ 6. Delta Dental also asserts that any limits on fee increases were a  
20 response to competitive and market conditions that ultimately had the effect of increasing the number  
21 of patients who are covered by a Delta Dental plan, which in turn benefitted Premier Dentists by  
22 bringing more patients to them. *See* 3/7/2017 Motion For Preliminary Approval, at 6.

23 Both the parties and the mediator weighed all of this evidence in reaching the Amended  
24 Settlement Agreement. Plaintiffs urge that the Court’s consideration of this same evidence will confirm  
25 that the Amended Settlement Agreement presents a compromise that is well within the range of  
26 reasonable settlements.  
27  
28



1 arguments for higher damages, but also discounted certain defense arguments that would have limited  
2 total damages to an amount well below \$65,029,299.

3 The Amended Settlement Amount thus reflects a well-informed blend that considers the  
4 strength of the assertions made by each party on the merits of the case and the amount of recoverable  
5 damages. Mathematically, the Amended Settlement Amount is approximately 1.9 times the initial  
6 settlement amount. The considerations on the merits that confirm this to be a fair and reasonable  
7 settlement include:

- 8 • While Plaintiff's claims were strong, Delta Dental did have significant defenses,  
9 including the fact that the INAP had been implemented for many years prior to January  
10 1, 2011;
- 11 • Delta Dental had significant evidence that its contract revisions effective 2011 were not  
12 intended to eliminate implementation of the INAP;
- 13 • The evidence tended to indicate that dentists had accepted implementation of the INAP  
14 for many years since January 1, 2011, though this evidence was tempered by the fact that  
15 few dentist understood the operation of the INAP and many viewed Delta Dental's fee  
16 determinations as coming from a "black box;"
- 17 • Monetary damages could not be recovered in the action based on associational standing.  
A new action would have been required, which would have required years to prosecute,  
with no certainty as to its outcome on the merits;
- Even assuming a new action were commenced and a class certified, any recovery in such  
an action would have been offset by attorneys' fees incurred in that action, which would  
have been substantial.

18 The Amended Settlement Amount of \$65,029,299 thus represents a substantial percentage of total  
19 recovery possible – very much in line with the 36.2% of total recovery considered and preliminarily  
20 approved by the Court in connection with the Initial Settlement and by some estimates larger than that.  
21 As the evidence demonstrates, it was reached as a result of an intense and adversarial mediation process  
22 overseen by a well-qualified mediator. It represents an excellent result for the Class. Based on the  
23 record before the Court, it is plainly a fair, adequate and reasonable settlement.

24 *3. The Risk, Expense, Complexity and Likely Duration of Further Litigation*  
25 *Further Confirm the Reasonableness of the Amended Settlement Agreement.*

26 As described above, continuing with the litigation would have meant incurring substantial risks  
27 that Delta Dental might defeat certain of Plaintiffs' claims, or that it might even prevail entirely at trial.  
28 Furthermore, continued litigation would assuredly have caused Plaintiffs to incur additional legal fees

1 and expenses. As set forth in Plaintiff's Motion for Attorneys' Fees, litigating the case to this point has  
2 already caused Plaintiffs to incur legal fees and costs in excess of \$3.7 million. Litigating through class  
3 certification, summary judgment and trial would require expenditure of a comparable amount again,  
4 without certainly that any of it could be recovered. By contrast, the Amended Settlement provides that  
5 Delta Dental will pay attorneys' of up to \$2,350,000 *over and above* the Amended Settlement  
6 Amount, subject to Court approval.

7 An additional risk associated with continuing the litigation was that if Plaintiffs were to prevail,  
8 the response from Delta Dental could have ultimately been more harmful to the Class than the practices  
9 challenged in this litigation. For example, Delta Dental's economic expert witness, Dr. Monica  
10 Noether, testified that even if Plaintiffs prevailed in the underlying litigation, Delta Dental would "need  
11 to find another cost reduction strategy." *See* Supplemental Memo, at 8-9 (quoting Noether Depo. Tr. at  
12 142:2-15). Delta's chief actuary also testified that the reason for the changes was to "run a viable  
13 business" and that "we, as an organization, are in position where we need to and continue to need to  
14 make changes to provider compensation." *Id.* at 9 (quoting Leibowitz Dep. at 78:25-79:9). The evidence  
15 also showed various alternatives Delta could pursue in this regard, such as reducing fees for  
16 "specialists," moving away from offering "Premier" or "Premier only" plans that entitled dentists to  
17 charge the generally higher "Contracted Fees," and replacing "PPO Plus Premier" plans with pure PPO  
18 plans, which are generally lower cost to Delta Dental because dentists who agree to serve the PPO  
19 network are compensated based on the lower PPO fee schedule. *See id.* at 9-10.

20 In other words, a significant potential existed that a "victory" that prevented Delta Dental  
21 from reducing maximum fees under the PDA would prove to be Pyrrhic in that it would compel  
22 Delta Dental to adopt alternative competitive strategies that would have had a more negative  
23 financial effect on dentists than the action that the litigation challenged. The potential that prevailing  
24 in the litigation could in this way ultimately harm to the Class was an important consideration in  
25 balancing the value of a settlement against the result that might or might not be achieved from  
26 continued litigation.







1 not to be involved in the class action process at all rather than from a specific view on the merits of  
2 the settlement. Indeed, one opt out from the Initial Settlement Agreement rescinded her opt out and  
3 elected to remain a member of the Class under the Amended Settlement Agreement. (*See*  
4 Alexander Decl. ¶ 13.) In short, the Amended Settlement Agreement has received broad  
5 acceptance by the Class, with no substantive objection expressed and only a minimal number of opt  
6 outs. Accordingly, this factors weighs heavily in support of the Court granting final approval of the  
7 Amended Settlement Agreement.

8 Each of the *Kullar* factors thus weighs in favor of granting final approval to the Amended  
9 Settlement Agreement. The “independent and objective” analysis of the evidence and  
10 circumstances in this case called for by *Kullar* leads to the conclusion that the Amended Settlement  
11 is fair, reasonable and adequate, and thus warrants final approval. *Kullar*, 168 Cal. App. 4th at 130.

12 **VI. THE AMENDED PLAN OF ALLOCATION AND DISTRIBUTION IS FAIR,**  
13 **ADEQUATE AND REASONABLE TO THE CLASS.**

14 The Amended Plan of Allocation and Distribution of the Amended Settlement Amount is set  
15 forth in Appendix 3 to the Amended Settlement Agreement. The basic principle underlying the  
16 Amended Plan of Allocation is that the amount allocated to each Class member will be a share of  
17 the Amended Settlement Amount that is proportionate to that Class Member’s share of the total  
18 INAP impact on the Class. The Amended Plan of Allocation also provides that the minimum  
19 allocation to a Class member impacted by application of the INAP is \$500. (Cite).

20 **A. Plaintiffs’ Expert and Counsel Have Determined the Allocation of the Amended**  
21 **Settlement Amount in the Manner Required by the Amended Plan of Allocation**  
22 **and Distribution.**

23 The allocation of the Amended Settlement Amount to individual Class members has been  
24 determined by the method set forth in the Amended Plan of Allocation and Distribution approved by the  
25 Court. (Appendix 3 to the Amended Settlement Agreement). In determining the allocations,  
26 Plaintiffs’ expert, Colin Loveness, used the best available actual Delta Dental claims data (i.e. the  
27 actual fee submissions, claims for payment and payments made in response to the each claim) to  
28 calculate the INAP impact for each Class member for the period January 1, 2011 through September 14,

1 2017. To provide as much up to date accuracy as possible, these calculations were made on the best  
2 available claims data for this period which were processed by Delta Dental through December 31, 2017.

3 Using the same data, Mr. Loveness calculated each Class member's pro rata share of the  
4 total INAP injury. *See* Loveness Decl., ¶¶ 2 – 16. Class members whose pro rata share of the total  
5 INAP injury produced an allocation greater than zero but not greater than \$500 were each allocated  
6 the minimum allocation of \$500. *Id.* Once these allocations were made, Mr. Loveness determined  
7 the allocations of the remaining Amended Settlement Amount to all remaining Class members who  
8 were injured by the INAP during the January 1, 2011 through September 14, 2017 period. *Id.* This  
9 implemented the Plan of Allocation, ¶ 5.

10 As stated, the actual allocation determinations were based on the best available claims data  
11 provided by Delta Dental. There were a limited number of situations in which data limitations  
12 required reasonable estimates of the allocation to be made. The data for calendar year 2011  
13 illustrates this. Due to a change in data management systems, the individualized claims records for  
14 each class member were not available for that year. Class Counsel's expert developed an  
15 alternative approach for determining as accurately as possible the INAP impact sustained by Class  
16 members for that year based on the Delta Dental claims data that was available. This and other  
17 details of the allocation are set forth in considerable detail in the Declaration of Colin Loveness  
18 filed with this Motion. *See* Loveness Decl. ¶¶ 4 – 9.

19 As Mr. Loveness developed the allocation calculations, meetings were held with Class  
20 Counsel and with counsel, actuaries and employees of Delta Dental. Loveness Decl. ¶ 21 The  
21 purpose of these meetings was to vet the allocation calculations as they were developed with  
22 appropriate representatives of Delta Dental. In situations where Mr. Loveness had questions about  
23 the nature of the Delta Dental records or how they should be interpreted, Delta Dental provided the  
24 appropriate information and explanations. *Id.* This continual vetting process provided additional  
25 assurance that the allocation methodology developed by Mr. Loveness was reasonable and accurate.  
26 *Id.* In addition, Mr. Loveness caused his methodology and calculations to be subjected to a peer  
27 review process at his firm, for still further assurance that it produces reasonable and accurate  
28 allocations.

1 Based on this extensive process, Class Counsel has concluded that the allocation  
2 methodology that has been developed and implemented by Mr. Loveness is fair, reasonable and  
3 adequate and accurately allocates the Amended Settlement Amount to Class members. 4-14-2018  
4 Alexander Decl., ¶ 11. While not every Class member suffered financial impact from the INAP,  
5 slightly more than half of the Class did suffered impact and each of them be allocated funds from  
6 the Amended Settlement Amount. Based upon the most current calculations using this  
7 methodology, 14,518 Class members will receive a monetary allocation from the Amended  
8 Settlement Amount. Of these, 6,503 will be allocated the minimum allocation of \$500. Further,  
9 8,013 Class members will be allocated larger amounts, many of which are substantially larger.<sup>9</sup>  
10 Loveness Decl. ¶ 15. The average allocation Class member is \$4,480. *Id.* These are significant  
11 monetary recoveries in virtually any class action and any substantial recoveries in this one.

12 **B. Plaintiffs Have Determined a Distribution Methodology That Will Distribute**  
13 **the Amended Settlement Amount in a Fair, Reasonable and Accurate Manner.**

14 The Amended Plan of Allocation and Distribution also provides the procedure for  
15 distributing the allocation amounts to Class members. The actual distribution of the funds is  
16 scheduled to be completed within the time period set forth in Section II.D.3.c of the Amended  
17 Settlement Agreement.

18 First, in accordance with the Amended Settlement Agreement, the allocations to those  
19 dentists who have elected to opt out must be deducted from the Amended Settlement Amount of  
20 \$65,029,299. As set forth above, only seven Class members elected to opt out. The allocations to  
21 these class members determined in the manner described above totals \$8,675. Loveness Decl. ¶ 19.  
22 As a result, the amount to be distributed to the Class amounts to \$65,020,624 (the “Final Settlement  
23 Amount”). Loveness Decl., ¶ 20. Shortly before the actual distribution of the Final Settlement  
24 Amount begins, Delta Dental will deposit this sum into an account to be administered by the Class  
25 Notice Administrator. *Id.* The Class Notice Administrator will then be responsible for sending

26 \_\_\_\_\_  
27 <sup>9</sup> Many Class members have indicated that they regard the amount of their allocation to be  
28 confidential and do not wish it to be disclosed publicly. Class Counsel will be prepared to share  
more specific allocation information with the Court at the hearing should that be regarded as  
necessary.

1 communications to Class members who have an allocation and for making the required payments to  
2 Class members. *Id.*

3 The distribution of the allocations of the Final Settlement Amount to Class members whose  
4 INAP impact occurred while they were working in their own practice rather than in a group practice  
5 is simple and straightforward. In these situations, each Class member will be sent a check in the  
6 amount of his or her allocation. *See* 4-4-2018 Alexander Decl., Ex. 1.

7 As recognized in the Amended Settlement Agreement, the situation in which a Class  
8 member's allocation arose when he or she was working as part of a practice group is more complex.  
9 Amended Settlement Agreement, Appendix 3. In these situations, claims for payment are generally  
10 made by the group practice and payments are received by the group practice. Distribution of the  
11 payments then occurs in accordance with the agreement between the group practice and the  
12 individual dentist who is a member of that group practice. The Amended Settlement Agreement  
13 recognizes this phenomenon by requiring that both the individual dentist and the group practice be  
14 notified of the allocation in issue and afforded an opportunity to object to distribution of these funds  
15 to the group practice. *Id.*

16 In order to implement these provisions of the Amended Settlement Agreement and  
17 Amended Plan of Allocation and Distribution, Mr. Loveness – again using the same best available  
18 actual claims data, determined for each Class member who worked in a practice group the portion  
19 of his or her allocation that arose while working with that practice group. Loveness Decl. ¶ 18. If  
20 the Class member worked for multiple practice groups during the relevant time period, the same  
21 data was used to determine the portion of the allocation attributable to his or her work with each  
22 group practice. *Id.* As with the other calculations done to implement the Amended Settlement  
23 Agreement, the methodology and calculations were vetted with Delta Dental counsel, actuaries and  
24 executives at numerous times along the way. This extensive process had allowed Class counsel to  
25 conclude that this aspect of the distribution methodology has also been determined in a reasonable  
26 and accurate manner. 4-4-2018 Alexander Decl. ¶ 11

27 As reflected above, Class counsel, working with Delta Dental Counsel, developed a series of  
28 letters to be sent by the Class Notice Administrator in order to make the actual distributions. *See* 4-

1 14-2018 Alexander Decl., Exhibits 1 - 4. A brief description of these letters should be helpful to  
2 the Court.

3 *Letters To Class Members Who Incurred INAP Impact As Solo Practitioners:* The first letter  
4 will be sent to sole proprietors, meaning Class members who incurred INAP impact in their  
5 personal capacity, or as part of a group of which they were the sole members, or for whom 100% of  
6 their INAP impact was incurred in performing procedures either in their personal capacity or for a  
7 group in which they are the only member. The letter simply states the amount of the allocation and  
8 the address to which the check will sent. *See Declaration of Paul Alexander In Support of Motion*  
9 *for Final Approval, Ex. 1.*

10 *Letters to Class Members Who Incurred INAP Impact At Groups:* The second letter will be  
11 sent to providers who incurred impact at one or more group practices at which they were not the  
12 only provider. These are scenarios in which the notice procedure above is activated, and therefore  
13 these letters apprise the providers of their total allocation, and of the portion of the allocation that  
14 will be distributed to them individually, and the portion that will be held for sixty days pending  
15 instructions from the provider and the group. *Id.*, Ex. 2 - 3.

16 *Letters To Group Practices:* The third letter will sent to group practices, using the addresses  
17 on file for such practices in Delta Dental's records. These letters will state the INAP allocation that  
18 will be distributed to the group practice, and list the dentists whose claims resulted in the INAP  
19 impact, and the percentage of the total allocation that is attributable to each dentist. *Id.*, Ex. 4.

## 20 **VII. CONCLUSION**

21 For the foregoing reasons, Plaintiffs request the Court to issue an Order and a Final  
22 Judgment as follows:

- 23 (1). The Class is finally certified as a proper settlement class;
- 24 (2). The Class has received fair and adequate notice of the Amended Settlement Agreement  
25 and that the procedure for providing that notice employed the best practical procedures in light of  
26 the nature of the Class and this case and that, following this notice, no Class member has objected  
27 to the Amended Settlement Agreement and only seven (7) Class members have opted out;
- 28 (3) The Amended Settlement Agreement is fair, reasonable and adequate for the Class;

1 (4) The Amended Plan of Allocation and Distribution, Appendix 3 to the Amended  
2 Settlement Agreement, is fair, reasonable and adequate to the Class and Plaintiffs have determined  
3 the allocations and provided for distribution of those allocations in a reasonable and accurate  
4 manner that appropriately implements the Amended Plan of Allocation and Distribution;

5 (5) The Class Notice Administrator is ordered to send letters to Class members receiving an  
6 allocation of the Final Settlement Amount in substantially the form contained in Exhibits \_\_\_-\_\_\_ of  
7 the Alexander Declaration and to follow the procedures set forth in the Amended Settlement  
8 Agreement with respect to any responses to those letters.

9 (5) Delta Dental is ordered to pay into the qualified settlement fund created by the Amended  
10 Settlement Agreement the sum of \$65,020,624 and that the Class Notice Administrator is ordered to  
11 distribute these funds to the Class in accordance with the allocation and distribution determinations.  
12 All costs of distributing these allocations to Class members shall be paid by Delta Dental except for  
13 the costs associated with distributing allocations as to which an objection is timely received and  
14 remains unresolved within 60 days, which shall be borne by the funds retained in the qualified  
15 settlement fund that remain subject to these unresolved objections until the objections are resolved  
16 and payment of those funds is made.

17 Plaintiffs further request that Final Judgment be issued consistent with the Order set forth  
18 above.

19  
20 Dated: April 4, 2018

ARNOLD & PORTER KAYE SCHOLER  
LLP

21  
22  
23 By:           /s/ Paul Alexander            
Paul Alexander

24 Attorneys for Plaintiffs and the Class  
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26  
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