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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,

vs.

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 CLASS  
ACTION SETTLEMENT**

Date: March 21, 2017

Time: 10:00 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 specialize in mediating and  
3 arbitrating complex and legally intensive and, at times, high profile cases. My background and  
4 experience as a mediator and arbitrator of complex legal cases is described more fully in paragraphs  
5 4 - 7 below and in my curriculum vitae, which is attached as Exhibit A. I submit this declaration in  
6 support of the settlement between Delta Dental of California (“Delta Dental”), the California Dental  
7 Association (“CDA”) and the class of California dentists as defined in the Amended Class Action  
8 Complaint in this case (the “Settlement Class”), which I understand will be presented to the Court  
9 for preliminary and ultimately final approval (the “Proposed Settlement”).

10 2. In February, 2016, the parties in this case engaged me to serve as an impartial mediator  
11 and to facilitate settlement negotiations. I have personally served as the mediator in this case since  
12 that time. In that capacity, I held numerous discussions with the parties and their counsel directed  
13 at reaching a settlement in this case. These discussions began with a lengthy in-person mediation  
14 session held on March 31, 2016 in Boston, Massachusetts and continued with many telephone  
15 conference calls and discussions, at times with counsel and at times with counsel and principals. I  
16 am personally familiar with the facts and legal issues presented by this case and with the process  
17 and the negotiations that ultimately led to the settlement reached by the parties. The facts set forth  
18 in this declaration are based upon my personal knowledge arising from my participation as the  
19 mediator in this case and any opinions expressed herein are based upon my knowledge of the facts  
20 and expertise as a mediator of legal disputes. If called as a witness, I could and would testify to the  
21 matters set forth below in this declaration.

22 3. As set forth with more particularity below, the negotiations that led to the settlement  
23 agreement in this case were adversarial and arms-length negotiations between informed and capable  
24 parties and counsel. The parties and their respective counsel participated diligently and in good  
25 faith in these negotiations. These negotiations lasted over six months and involved multiple  
26 exchanges of positions by both sides. The case presented complex legal and factual issues and  
27 there was no certainty as to how the issues in the case might ultimately have been decided had the  
28 case proceeded to trial. Based upon my knowledge of the case and my background and expertise as

1 a mediator, it is my opinion that the settlement ultimately reached by the parties will afford  
2 meaningful relief and value to the Settlement Class and is appropriate in light of the risks of  
3 litigation and a realistic appraisal of what could be achieved in the litigation. In several respects,  
4 including the monetary recovery, the relief afforded to the Settlement Class by the settlement could  
5 not have been achieved even had CDA prevailed in the case as it was framed at the time of the  
6 mediation.

#### 7 MY BACKGROUND AS A MEDIATOR

8 4. I am a full time professional mediator with Resolutions, LLC, an ADR firm located in  
9 Boston, Massachusetts. Before retiring in 2008, I was a professor at the Boston University School  
10 of Law for thirty years, where I taught negotiation, mediation, complex ADR processes, resolution  
11 of mass torts, constitutional law and evidence. I currently teach Evidence at Harvard Law School.  
12 I am a co-founder and principal of Resolutions, LLC and previously co-founded EnDispute, which  
13 merged with JAMS. I aided in establishing the Center for Public Resources (“CPR”) (now the  
14 Institute of Conflict Prevention and Resolution), have served on many of CPR’s panels and  
15 committees, and have spoken at numerous CPR conferences and programs on mediation and ADR.  
16 I co-authored with Professors Frank Sander and Stephen Goldberg the first edition of *Dispute*  
17 *Resolution*, the first legal textbook on ADR, and have written numerous books and articles on  
18 dispute resolution and evidence. I maintain an active ADR/mediation practice for complex, legally-  
19 intensive disputes.

20 5. My mediation experience includes the successful resolutions of many high stakes cases,  
21 including the *United States v. Microsoft* antitrust case; various MasterCard/Visa merchants’ class  
22 action antitrust cases; portions of the Enron Securities class action cases; Monsanto PCB cases in  
23 Alabama; the childhood and adult cancer cases in Toms River, New Jersey; and numerous large  
24 construction cases, including disputes arising out of the design and construction of major league  
25 baseball and football stadiums. In my practice, I have resolved insurance coverage, intellectual  
26 property, international disputes, ERISA cases, and class action consumer cases. I have mediated  
27 numerous complex, multi-party class action cases involving horizontal and vertical price-fixing  
28 claims, mergers and acquisitions, contract disputes, patent disputes, securities fraud, shareholder

1 derivative claims, accounting problems, mass torts, employment and consumer claims. My  
2 experience also includes mediations of a substantial number of cases arising out of the 2007-2008  
3 financial crisis, including class actions involving mortgage-based securities, CDO's, auction-rate  
4 securities, private equity, and various types of financial fraud. I have served as court-appointed  
5 Special Master, Futures Representative, Mediator, and Guardian Ad Litem in class or mass claimant  
6 matters in the Northern District of Ohio, Southern District of New York, District of Massachusetts  
7 and Eastern District of Texas. I currently serve as the Monitor of three large RMBS settlements  
8 between the U.S. Department of Justice and various states on the one hand and, respectively, Bank  
9 of America, Morgan Stanley, and Goldman Sachs, on the other hand.

10 6. I am a 1968 Honors graduate of Brown University and graduated in 1972 from Harvard  
11 Law School, *magna cum laude*, where I was Executive Editor of the Harvard Law Review. I am a  
12 member of the bars of the states of California (inactive) and Massachusetts, the United States  
13 District Courts for the Northern and Central Districts of California and the District of  
14 Massachusetts, several Courts of Appeal, and the Supreme Court of the United States. Prior to  
15 teaching at Boston University School of Law, I clerked for the Hon. Benjamin Kaplan, Supreme  
16 Court of Massachusetts, and then was an associate and partner at Munger Tolles & Olson in Los  
17 Angeles.

18 7. In 2001, I was awarded a Lifetime Achievement Award from the American College of  
19 Civil Trial Mediators. In 2011, I received the James F. Henry Award for outstanding contributions  
20 to the field of ADR from The International Institute for Conflict Prevention & Resolution. That  
21 same year, I was voted Boston's Lawyer of the Year for Alternative Dispute Resolution in light of  
22 my "particularly high level of peer recognition."

23  
24 **THE NEGOTIATIONS THAT LED TO THE PROPOSED SETTLEMENT**

25 8. After being contacted by counsel for CDA and for Delta Dental in February, 2016, I  
26 agreed to serve as a mediator in this case. At the time, I learned from counsel for the parties that  
27 they had engaged in extensive litigation in this case, including depositions, expert reports and  
28 discovery, substantive motions, court appearances and exchanges of pertinent documents. I

1 understood that the Court had urged the parties to consider mediation of their dispute and that, after  
2 consultation with their respective clients, counsel for the parties agreed to engage in mediation to  
3 determine whether the case could be resolved through mediation rather than further litigation. I  
4 also understood counsel for the parties mutually agreed that I was a suitable mediator for this case.  
5 With this basic understanding, I agreed to serve as a mediator in this case.

6 9. Pursuant to my instructions and the agreement of counsel for both parties, on March 18,  
7 2016, the parties submitted separate mediation statements that set forth the merits of the case as  
8 perceived by the parties, including the nature of the claims and defenses, the relevant facts and  
9 applicable law, the relative strengths and weaknesses of both the plaintiffs' and defendant's case,  
10 and the parties' estimates of likely relief, including the potential for and issues pertaining to  
11 monetary relief. The parties also submitted the basic pleadings in the case, relevant documents  
12 and excerpts of relevant testimony. I found these presentations to be very informative and  
13 complete. Following this, on March 23, 2016, I held a pre-mediation conference call with counsel  
14 for the parties to ensure that the initial mediation session would be meaningful and productive and  
15 that counsel for both sides understood my expectations for that initial mediation session.

16 10. On March 30, 2016, I presided over a full day mediation session in Boston,  
17 Massachusetts. Paul Alexander and Erica Connolly of Arnold & Porter LLP appeared on behalf of  
18 CDA. In addition, CDA participated in the mediation session through its Executive Director, Peter  
19 DuBois, CDA's Chief Strategy Officer, Carrie Gordon, and CDA's Chief Legal Officer, Alison  
20 Sandman. Robert Rosenfeld and Howard Ullman of Orrick, Herrington & Sutcliffe LLP appeared  
21 on behalf of Delta Dental. In addition, Anthony S. Barth, President and Chief Executive Officer of  
22 Delta Dental, Michael Castro, Delta Dental's Executive Vice President and Chief Financial Officer,  
23 and Michael Hankinson, Delta Dental's Executive Vice President and Chief Legal Counsel,  
24 attended this initial mediation session. During this initial mediation session, I heard from both  
25 counsel and principals concerning their respective views of the issues and the merits of the  
26 litigation.

27 11. At this initial meeting, the parties also stated their respective positions on a potential  
28 resolution, which differed significantly. For the next six months, I acted as a mediator in facilitating

1 continuing discussions and negotiations between the parties. The parties negotiated in an arms-  
2 length and extremely vigorous manner on each of the issues. Each side expressed and demonstrated  
3 a willingness to continue to litigate rather than accept a settlement that was not in its best interests.  
4 During the mediation and subsequent negotiations, the parties exchanged numerous offers and  
5 counter-offers, often after extensive discussions with their clients and the mediator.

6 12. The March 30<sup>th</sup> mediation session and the subsequent negotiations in this case were  
7 conducted on both sides by highly experienced and capable counsel who were fully prepared and  
8 demonstrated an excellent understanding of the strengths and weaknesses of their claims and  
9 defenses. The quality of the advocacy on both sides was extremely high. While counsel were  
10 professional and cooperative, they zealously advanced their respective arguments in the best  
11 interests of their clients. Moreover, based on the mediation discussions and the ongoing  
12 negotiations in which I was involved, I believe that each side was able to assess in detail the  
13 strengths and risks association with continued litigation of their dispute.

14 13. The mediation process continued actively throughout the next six months in an ongoing  
15 effort to find a basis for mutual agreement on the terms of a settlement. The parties continued to  
16 press their positions on each issue, which differed significantly. The negotiations that took place  
17 during the following six months were daunting and vigorous throughout. Compromise occurred  
18 slowly over these months through repeated mediation sessions held by telephone conference call.  
19 As these negotiations continued, counsel for the parties often asked for my help to resolve particular  
20 issues on which they had reached an impasse. As the mediator directly responsible for moving  
21 these negotiations forward and for facilitating the exchanges of views and positions between the  
22 parties, I can attest to the fact that the negotiations that led to the settlement agreement between the  
23 parties were in fact arms-length, hard-fought, vigorous and conducted in good faith.

## THE PROPOSED SETTLEMENT

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14. An initial consideration raised by counsel for the parties pertained to the limitations on the negotiations imposed by federal and state antitrust laws as well as the California regulatory regime reflected principally in the Knox-Keene Health Care Act and its regulations. In general, counsel for both parties had concluded that any agreement on fee levels or the mechanisms for determining fee levels had a potential to raise issues under applicable federal and state antitrust laws. Counsel for both sides concluded that they should avoid an agreement that might create further legal issues and expense for their respective clients. Accordingly, counsel for both sides concluded, and I concurred, that the determination of actual fee or reimbursement levels and the mechanism for determining those levels was not an appropriate subject for negotiation and agreement but rather were matters that Delta Dental must determine unilaterally. The settlement agreement ultimately agreed to by the parties reflects this understanding and this principle.

15. Another threshold issue for the negotiations was the need for a complete resolution that would apply to all Premier Dentists who had been a party to a Participating Dentist Agreement (“PDA”) with Delta Dental at any time since January 1, 2011. CDA’s members appeared to constitute the majority but not all of these Premier Dentists. As explained by counsel, significant number of Premier Dentists affected by the conduct at issue in the case were and are not CDA members. In order to effect a complete resolution of the litigation that would bind both Delta Dental and Premier Dentists, the parties agreed that it was necessary to find a procedural vehicle that would make the settlement available to all pertinent Premier Dentists, regardless of whether or not they were CDA members. Counsel concluded that the only appropriate procedural vehicle to accomplish this end was a class action. After further negotiation, CDA agreed to file an amended complaint in the case on a class action basis, with the class to include all Premier Dentists since January 1, 2011. In my opinion, this amended class action complaint was necessary and appropriate in order to make the settlement available on an equal basis to all Premier Dentists.

16. One important issue in the mediation was how much notice Delta Dental would be required to provide to Premier Dentists of any material amendment to the Delta Dental PDA, including any amendment that would allow or create reductions in maximum amounts allowed for

1 Contracted Fees under the PDA. My understanding is that California's Knox-Keene Act provides  
2 that 45 business days' notice must to given to Premier Dentists of any material change to a provider  
3 contract such as the PDA. CDA's position was that, for significant changes such as changes to  
4 maximum allowable fees, 45 business days' notice was not sufficient and that the type of notice that  
5 Delta Dental had given in the past was not sufficiently informative. Delta Dental pointed out that  
6 the 45 business day period was legislatively determined and uniformly applicable to all dental plans.  
7 During the next several months, the parties presented their respective views and arguments on this  
8 issue and I pressed each party on its position. Ultimately, the parties agreed upon a notice period of  
9 120 calendar days, which is contained in the Settlement Agreement. This is significantly longer  
10 than the law requires.

11 17. Another significant issue during the mediation was the content of the notice that Delta  
12 Dental would give of any future reduction in maximum amounts allowed for the Contracted Fees  
13 agreed to by Premier Dentists. CDA urged that Premier Dentists need a clear statement of which  
14 fee levels were being changed and the impact of any change on the practice of each Premier Dentist  
15 and that in order to be meaningful, this financial calculation should be provided on an  
16 individualized basis for each Premier Dentist affected by the change. Delta Dental pointed out that  
17 California law does not require such an individualized calculation to be provided and that  
18 significant cost would be incurred in order to perform and provide these calculations. After  
19 significant negotiation, Delta Dental agreed to provide each Premier Dentist with 120 calendar  
20 days' notice of a reduction in Contracted Fee maximum amounts allowed along with, for each  
21 affected Premier Dentist, the potential financial impact of the reduction based upon the Premier  
22 Dentist's submissions for procedures to Delta Dental over the twelve (12) month period ending on  
23 the most recent complete calendar quarter preceding the notice on the assumption that the dentist  
24 will perform the same set of procedures during the twelve (12) months following the reduction(s)  
25 (and subject to other limitations noted in the Settlement Agreement). My understanding is that this,  
26 too, is not required by the Knox-Keene Act and is of substantial benefit to Premier Dentists.

27 18. A further issue that required substantial negotiation and on which there was major  
28 disagreement was Delta Dental's application of the so-called Inflation Adjustment Percentage (or



1 INAP) during the period starting January 1, 2011. CDA contended that Delta Dental amended the  
2 PDA effective January 1, 2011 and that this amendment made continued application of the INAP  
3 impermissible under the PDA. Delta argued equally vigorously that the INAP was permissible  
4 under the PDA as revised effective January 1, 2011, had been continually applied in the same  
5 manner virtually since the inception of the PDA, and had been publicly disclosed and was well  
6 known by Premier Dentists. CDA sought a monetary recovery based on its theory of the INAP.  
7 Delta Dental pointed out that CDA did not assert damage claims in the litigation and could not seek  
8 to recover damages in the action under the doctrine of associational standing.

9 19. The parties were unable to come to an agreement to settle the INAP issue at this stage of  
10 the mediation. After considering the arguments, briefs, and documentation submitted by both  
11 parties, I presented a Mediator's Proposal, which each side considered separately and ultimately  
12 accepted. The agreed-upon figure of \$34,750,000 to be paid by Delta Dental in order to resolve this  
13 issue arose from my Mediator's Proposal. I view this as a fair and reasonable figure in light of the  
14 exposure created by the issue and the risks of litigation on both sides, as presented in the parties'  
15 submissions.

16 20. The parties also agreed, subject to Court approval, to an additional payment by Delta  
17 Dental of \$1,500,000 in legal fees to the firm of Arnold & Porter, now Arnold & Porter Kaye  
18 Scholer, which represents a part of the legal fees paid by CDA to that firm in prosecuting this  
19 action. This, too, was a compromise. I understand it represents approximately 50% of the total fees  
20 incurred by CDA in maintaining and resolving this action. None of this payment reduces the  
21 amount to be paid to Premier Dentists in the Settlement Fund. The negotiation and agreement on  
22 this payment of attorney's fees took place after the agreement for the payment of the \$34,750,000  
23 into the Settlement Fund as described above and did not reduce the payment into that fund in any  
24 respect.

25 21. I have provided the foregoing description in order to illustrate several of the significant  
26 issues addressed during the mediation, the positions of the parties, and how they were resolved  
27 during the mediation. This description also illustrates the complexities involved in the case and  
28 how they were addressed during the mediation. The settlement achieves several benefits that could

1 not have been achieved by litigation. It also resolves hotly disputed damage claims for application  
2 of the INAP that would have required substantial further litigation. The case presented significant  
3 risks for both parties. It would have required several more years of difficult and expensive litigation  
4 in order to resolve these issues, and there was no certainty of a result favorable to either side. The  
5 settlement achieves important benefits for the Settlement Class that could not have been achieved  
6 even had CDA prevailed in the action. The settlement provides for up to \$34,750,000 in payments  
7 to Premier Dentists which could not have been recovered in the action based on associational  
8 standing. The payment of these funds to Premier Dentists will not require the filing of a proof of  
9 claim, because the parties will use the actual claims data in the possession of Delta Dental to  
10 determine the eligibility for and amount of payments from this fund. This enhances the likelihood  
11 that all Premier Dentists whose fees were limited by application of the INAP after January 1, 2011  
12 will in fact receive a payment from the Settlement Amount. In sum, this is a very good settlement  
13 with which I am proud to be associated as the Mediator.

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

17 Executed this 24 day of February, 2017 at Boston, Massachusetts.

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ERIC D. GREEN