Paul Alexander (C.S.B. #49997)
Paul.alexander@apks.com
Emily Wood (C.S.B. #260382)
Emily.wood@apks.com
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center, 10th Fl.
San Francisco, CA 94111-4024
Telephone: (415) 471-3122
Facsimile: (415) 471-3400

Attorneys for Plaintiffs

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., BARBARA M. HAWTHORNE, D.D.S., individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

DELTA DENTAL OF CALIFORNIA, a California Corporation,

Defendant.

No.: CGC-14-538849

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SEAL SUPPLEMENTAL AGREEMENT REGARDING OPT-OUT THRESHOLDS

Hearing Date: March 21, 2017
Time: 10:00 a.m.
Judge: Hon. Mary E. Wiss
Dept.: 305

I. INTRODUCTION

As the Court is aware, the parties to this action have entered into a proposed settlement reflected in a written proposed Settlement Agreement, which is currently before the Court. (Exhibit A to the Declaration of Paul Alexander dated March 7, 2017). Paragraph II.E.6 of the Settlement Agreement provides Delta Dental with an option to terminate the agreement if the level of putative class members who choose to opt out of the Settlement Agreement is too great. This provision is included in the publicly filed proposed Settlement Agreement.

The specific thresholds that give rise to Delta Dental's right to terminate are contained in a separate Supplemental Agreement Between Class Representatives and Delta Dental Regarding Opt-Out Thresholds ("Supplemental Agreement").[1] That Supplemental Agreement is the subject of this Motion to Seal. While essentially everything else concerning the proposed Settlement Agreement is now and will remain open and public, this limited information should be held confidential because, as many courts have recognized, this type of information can be and often is used by those seeking to gain private advantage in class action settlements to take actions that are not in the interests of the class as a whole. Numerous California cases as well as cases from other jurisdictions have held that in the context of a class action, this specific information on opt out thresholds is properly the subject of an order sealing it as confidential. For the same reasons as these courts have found confidentiality of such information should be observed, Plaintiffs, joined by Defendant, hereby respectfully request an order from the Court sealing the Supplemental Agreement pursuant to California Rules of Court, Rule 2.550.

II. LEGAL STANDARD

Rule 2.550 of the California Rules of Court provides that a court may order a record sealed only if:

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest.

Cal. R. Ct. 2.550. "A party seeking to seal documents . . . must come forward with a specific enumeration of the facts sought to be withheld and specific reasons for withholding them." *H.B. Fuller Co. v. Doe*, 151 Cal. App. 4th 879, 894 (2007).

[1] The Supplemental Agreement is attached as Exhibit A to the Declaration of Emily Wood in Support of Plaintiffs' Motion to Seal ("Wood Decl."), filed herewith.

III. ARGUMENT

All of the criteria for sealing are met in this case. Confidential treatment is sought only for the Supplemental Agreement, which is one small portion of the overall Settlement Agreement. The Supplemental Agreement contains the specific thresholds that trigger Delta Dental's right to terminate the Settlement Agreement. These provisions do not affect the benefits that will be provided to class members if the settlement is finally approved, nor do they bear on the reasonableness, fairness, or adequacy of the Proposed Settlement. There are ample protections in place to ensure that the thresholds must in fact be met before any right to terminate can be exercised. Therefore, the specific thresholds in the Supplemental Agreement have no bearing on any class member's decision to object to or to opt out of the settlement.

The parties have a legitimate interest in maintaining the confidentiality of the Supplemental Agreement, an interest which many courts have recognized. Courts consider "ensuring the fair administration of justice" to be an "overriding interest" that can justify a sealing order. *McNair v. Nat'l Collegiate Athletic Ass'n*, 234 Cal. App. 4th 25, 33 (2015) (citing *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1222 n.46 (1999)). Here, revealing the provisions of the Supplemental Agreement may interfere with the fairness of the settlement process by encouraging professional objectors to thwart the settlement, with no benefit to class members. Courts throughout the country have recognized the problem of professional objectors seeking to interfere with the settlement of a class action for their own private gain. *See, e.g., Dennis v. Kellogg Co.*, 2013 WL 6055326, at *4 & n.2 (S.D. Cal. Nov. 14, 2013) ("[A] cottage industry has developed of professional objectors, where again the emphasis or at least the primary motivation is attorneys' fees.") (citing cases) [2]; *In re Hydroxycut Mktg. & Sales Practices Litig.*, 2013 WL 5275618, at *5 & n.3 (S.D. Cal. Sept. 17, 2013) (noting that "abuse of the objection process is not uncommon"); *cf. Credit/Debit Card Tying Cases*, J.C.C.P. No. 4335, at 10-13 (Cal. Super. Ct. Jun. 3, 2015) (rejecting objector's fee request of over $8 million, nearly 90% of class counsel's fee award, because objector

[2] In the class action context, California courts may look to federal authority. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 n.7 (1996).

"did not provide a benefit to the class") (Wood Decl., Ex. B). Courts have also condemned opt-out campaigns in which objectors sought to opt out large numbers of class members to scuttle a settlement. *See, e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998) (allowing counsel or putative class plaintiff to "attempt[] to effect a group-wide exclusion . . . would infringe on the due process rights of individual class members).

Recognizing this interest in the fair administration of class action settlements, and the threat posed by professional objectors, many California courts have authorized the sealing of opt-out thresholds. *See, e.g.*, *In re John Muir Uninsured Healthcare Cases*, J.C.C.P. No. 4494 (Cal. Super. Ct. May 30, 2008) (sealing provision regarding rescission of settlement agreement) (Wood Decl., Ex. C); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 948 (9th Cir. 2015) (withholding exact opt-out percentage does not render settlement "unfair"); *Thomas v. Magnachip Semiconductor Corp.*, 2016 WL 3879193, at *7 (N.D. Cal. July 18, 2016) ("There are compelling reasons to keep this information [re opt-out thresholds] confidential, in order to prevent third parties from utilizing it for the improper purpose of obstructing the settlement and obtaining higher payouts."); *Friedman v. Guthy-Renker, LLC*, 2016 WL 5402170, at *2-3 (C.D. Cal. Sept. 26, 2016) (sealing opt-out thresholds because the "potential for abuse" by professional objectors "outweighs the interest in public access to this information"). Courts in other jurisdictions have done so as well, noting that the opt-out threshold is "typically not disclosed and is kept confidential to encourage settlement and discourage third parties from soliciting class members to opt out." *In re HealthSouth Corp. Securities Litig.*, 334 Fed. Appx. 248, 250 n.4 (11th Cir. 2009). *See also In re Deepwater Horizon*, No. 13-30095 (5th Cir. Oct. 16, 2013) (denying motion to unseal opt-out thresholds, following briefing) (Wood Decl., Ex. D); *In re Red Hat, Inc. Securities Litig.*, 2010 WL 2710517, at *5-6 (E.D.N.C. June 11, 2010) (finding good cause to file supplemental agreement containing opt-out thresholds under seal to avoid "provid[ing] a roadmap to dissatisfied claimants to derail the settlement"); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 253 (D. Del. 2002), *aff'd*, 391 F.3d 516 (3d Cir. 2004) (threshold is "irrelevant to [class] members' opt-out decision."); *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314, at *18 (D.N.J. Sept. 13, 2005) (opt-out information properly sealed "in the interest of consummating the settlement" when it had no

legitimate bearing on a class member's decision to opt-out of the settlement, [or] object"). Confidential treatment of this information is also endorsed in the Manual for Complex Litigation and similar authorities. *See, e.g.*, Manual for Complex Litig., Fourth, § 21.631 ("Opt-out agreements, in which a defendant conditions its agreement on a limit on the number or value of opt outs, may warrant confidential treatment. Knowledge of the specific number of opt outs that will vitiate a settlement might encourage third parties to solicit class members to opt out. A common practice is to receive information about such agreements *in camera*."); Newberg on Class Actions (5th ed.) § 13:6 (noting that settlement agreements will sometimes "not specify, or disclose, the precise level that triggers the defendant's withdrawal right" in order to "dissuade attorneys . . . from attempting to organize an opt-out campaign").

As the cases cited above recognize, the courts also have a legitimate interest in the confidentiality of specific opt out thresholds. California public policy generally encourages settlements and, as has been true in this very case, courts often encourage the parties to settle complex cases such as this one. Disclosure of the specific opt out thresholds runs counter to this legitimate interest and serves only to encourage those who would seek to manipulate the settlement process for their own private gain. The interest in the confidentiality of the Supplemental Agreement therefore outweighs the far more limited public interest in its disclosure.

Further, no benefit to the Class members supports disclosure of the information. The Settlement Agreement, along with the Notice, contains all of the information that is pertinent to class members' decision to participate in, opt out of, or object to the Proposed Settlement. The Settlement Agreement also informs the Class members of the existence of the opt-out threshold. However, the precise numerical value of the opt-out threshold has no impact whatsoever on the substantive terms of the Proposed Settlement, and class members' knowledge of the numerical value of the threshold will not further inform their decision of whether to participate. Rather, as discussed above, disclosure of the opt-out threshold would run the risk of allowing manipulation and solicitation of opt-outs by third parties seeking leverage to negotiate special treatment, an outcome that is undesirable to all parties. Finally, the requested redaction of the information is

narrowly tailored—covering only the specific opt-out thresholds—and there are no less restrictive means to achieve this interest.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion to file the Supplemental Agreement under seal.

Dated: March 7, 2017

ARNOLD & PORTER KAYE SCHOLER LLP

By: */s/ Emily H. Wood*
Emily H. Wood

Attorneys for Plaintiffs