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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

DECLARATION OF EMILY WOOD IN SUPPORT OF MOTION TO SEAL SUPPLEMENTAL AGREEMENT REGARDING OPT-OUT THRESHOLDS

EXHIBIT A FILED UNDER SEAL

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

I, EMILY WOOD, declare as follows:

1. I am an attorney at law duly admitted to practice in the State of California and before this Court. I am an associate at Arnold & Porter Kaye Scholer LLP, counsel of record for Plaintiffs California Dental Association ("CDA"), 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. Hawthorne, D.D.S. (collectively, "Class Representatives") and proposed class counsel for the Class in this matter. The matters set forth herein are known to me personally and based upon my personal participation in the proceedings in this case. I could and would testify competently thereto if called as a witness.

2. On March 7, 2017, Class Representatives submitted to the Court a proposed settlement for its consideration in conjunction with their Motion for Certification of Settlement Class; Preliminary Approval of Proposed Class Action Settlement; Approval of Class Notice; Approval of Class Representatives; Appointment of Class Counsel ("Proposed Settlement"). *See* Declaration of Paul Alexander in Support of Motion for Preliminary Approval ("Alexander Decl."), Ex. A (Settlement Agreement).

3. The Proposed Settlement includes a provision permitting Defendant Delta Dental of California ("Delta Dental") to terminate the Settlement Agreement under certain circumstances relating to the level of class members who may choose to opt out of the Settlement Agreement. This provision is Section II.E.6 of the Settlement Agreement.

4. The Settlement Agreement specifies that Delta Dental's option to terminate the Settlement Agreement is based on the thresholds set forth in the Supplemental Agreement Between Class Representatives and Delta Dental Regarding Opt-Out Thresholds ("Supplemental Agreement"). *Id.*; *see also* Settlement Agreement I.39 (definition of "Supplemental Agreement"). A true and correct executed copy of the Supplemental Agreement is attached hereto as Exhibit A.

5. Class Representatives and Delta Dental have concluded that the terms of the Supplemental Agreement are appropriately confidential and subject to an Order of the Court sealing that document under California law because making that document public would create a risk of abuse or manipulation by third parties, including professional objectors, to the detriment of the

Class. The provisions of the Supplemental Agreement 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.

6. Attached hereto as Exhibit B is a true and correct copy of the trial court's June 3, 2015 order denying objector's application for attorneys' fees issued in *Credit/Debit Card Tying Cases*, J.C.C.P. 4335 (Cal. Super. Ct.).

7. Attached hereto as Exhibit C is a true and correct copy of the trial court's May 30, 2008 order sealing rescission of settlement agreement provision issued in *In re John Muir Uninsured Healthcare Cases*, J.C.C.P. 4494 (Cal. Super. Ct.).

8. Attached hereto as Exhibit D is a true and correct copy of the Fifth Circuit's October 16, 2013 order denying motion to unseal opt-out thresholds issued in *In re Deepwater Horizon – Appeals of the Economic and Property Damage Class Action Settlement*, Case 13-30095 (5th Cir.).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge, information, and believe.

Executed this 7th day of March, 2017, at San Francisco, California

/s/ Emily H. Wood
EMILY H. WOOD

EXHIBIT A

Filed Under Seal

EXHIBIT B

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FILED
Superior Court of California
County of San Francisco

JUN - 3 2015

CLERK OF THE COURT
BY: ________
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 305

COORDINATION PROCEEDING SPECIAL TITLE [RULE 1550(b)]

CREDIT/DEBIT CARD TYING CASES

This Document Relates to:

All Actions and *Attridge v. Visa U.S.A., Inc., et al.,* CGC-04-436920

J.C.C.P. No.: 4335

ORDER DENYING OBJECTOR ATTRIDGE'S APPLICATION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARD

I. Introduction

On April 11, 2013, this Court granted final approval to the parties' class settlement, awarded class counsel more than $9 million in attorneys' fees, and entered judgment in the above-captioned coordinated proceeding (the "JCCP"). Class member James Attridge objected to final approval of the settlement, and appealed that judgment, on the ground that, among other things, the settlement failed to adequately compensate a subset of class members for claims advanced by Attridge in his separately filed class action (*Attridge v. Visa U.S.A, Inc.*, San Francisco Super. Ct. No. CGC-04-436920) (hereafter, "*Attridge*"). The Court of Appeal affirmed the judgment and the Supreme Court denied Mr. Attridge's petition for review. The remittitur issued on February 28, 2015.

Based on the assertion that he and his counsel provided a benefit to the class in this coordinated proceeding, on March 30, Mr. Attridge filed an application for an order awarding (a) his counsel, Lingel H. Winters, more than $8 million in attorney's fees; (b) $10,388 to Mr. Winters for litigation costs; and (c) a $1,000 "service award" to Mr. Attridge ("Fee Application"). Mr. Attridge and his counsel submit that their efforts in *Attridge* contributed to the value of the settlement in the JCCP because the *Attridge* claims were distinct from, and had value independent from, the claims brought in the JCCP.

The Court heard argument on the Fee Application on May 18, 2015. Being fully advised in the matter, and good cause appearing, the Court denies the application for two independently sufficient reasons. First, the Fee Application is untimely. Second, Mr. Attridge and his counsel did not substantially benefit the class in this coordinated proceeding.

II. Background

A. The JCCP

The history of these coordinated cases began on January 26, 2000 – more than fifteen years ago – with the filing of *Johns v. Visa* in this Court (Case No. CGC-00-309461). Over the next four years, twelve similar cases were filed in San Francisco, Los Angeles, and

Contra Costa County Superior Courts.[1] In February 2004, a group of those thirteen cases were coordinated in this JCCP and assigned to Judge Richard A. Kramer of this Court. The Consolidated Complaint in this proceeding advanced causes of action for violations of the Cartwright Act (Bus. & Prof. Code § 16720 *et seq.*) and the Unfair Competition Act (Bus. & Prof. Code § 17200 *et seq.*) (the "UCL"). On October 6, 2004, Judge Kramer sustained defendants' demurrers in part, dismissing the Cartwright Act claims and leaving only the UCL claims for which the only remedies are restitution and injunctive relief.

B. Attridge

Two months after Judge Kramer dismissed the Cartwright Act claims in the JCCP, and nearly four years after the filing of *Johns*, on December 8, 2004, Mr. Attridge, arriving on the scene for the first time, filed his putative class action (*Attridge*) in this Court. Mr. Attridge's initial complaint was a near identical imitation of the Consolidated Complaint filed in the JCCP. Despite Judge Kramer's earlier ruling dismissing the Cartwright Act claims in the JCCP, Mr. Attridge's complaint repeated those deficient causes of action.

Mr. Attridge's First Amended Complaint was substantially similar to his initial complaint, and on April 29, 2004, he filed a Second Amended Complaint.[2] In it, for the first time, he modified his class definition to include those who maintained "revolving balances" on their Visa or MasterCard accounts – a theory distinct from that in this JCCP.

On June 6, 2005, defendants applied for complex designation in *Attridge* so that it could be handled by Judge Kramer together with this JCCP. However, Attridge filed a

[1] Those cases are: (1) *Johns v. Visa*, S.F. No. CGC-00-309461 (filed 1/26/00); (2) *Wallgreen v. Visa*, L.A. No. BC-300482 (filed 8/12/03); (3) *Lossada v. Visa,* L.A. No. BC-303893 (filed 10/9/03); (4) *Leonard & Siu v. Visa,* S.F. No. CGC-03-425942 (filed 10/30/03); (5) *DeFrantz v. Visa*, S.F. No. CGC-03-426156 (filed 11/6/03); (6) *Miller v. Visa*, S.F. No. CGC-03-426159 (filed 11/6/03); (7) *Mkano v. Visa*, L.A. No. BC-306743 (filed 11/25/03); (8) *Kalu v. Visa*, Contra Costa No. C-03-02950 (filed 11/25/03); (9) *Johns v. Visa*, ("*Johns II*"), S.F. No. CGC-04-428206 (filed 1/23/04); (10) *Ahmadi v. Visa*, S.F. County No. CGC-04-430074 (filed 4/1/04); (11) *Brock v. Visa*, S.F. No. CGC-04-428026 (filed 1/15/04); *Rosenthal v. Visa*, S.F. No. CGC-04-432277 (filed 6/16/04); (12) *Chiurazzi v. Visa*, S.F. No. CGC-04-433357 (filed 7/28/04).

[2] Mr. Attridge titled this his "Amended First Amended Complaint."

peremptory challenge of Judge Kramer. *Attridge* was then singly assigned to Judge Peter J. Busch for all purposes.

Judge Busch sustained demurrers to Attridge's Second Amended Complaint on November 2, 2005. On December 2, 2005, Mr. Attridge filed the still-operative Third Amended Complaint, again pleading a violation of the Cartwright Act. Defendants demurred again. On May 23, 2006, Judge Busch sustained the demurrer with respect to Mr. Attridge's Cartwright Act claims. Defendants then answered the remainder of the Third Amended Complaint.

On February 14, 2008, defendants jointly moved for single assignment to this Department—i.e., before Judge John E. Munter— and that motion was denied on April 8.

On November 7, 2008, defendants moved for summary judgment (or adjudication in the alternative) on Mr. Attridge's remaining UCL claims. *Attridge* was re-assigned to Judge Katherine Feinstein on January 5, 2009. On July 1, 2009, Judge Feinstein denied the motion for summary judgment and continued the motion for summary adjudication to allow plaintiff to conduct more discovery, despite the fact that counsel for Mr. Attridge had "failed to submit the required declaration in compliance with [the Code of Civil Procedure]." (July 1, 2009 Order Denying Motion for Summary Judgment, *Attridge*, No. 436920, at p. 10:11-13.) Despite the fact that *Attridge* had been pending for more than four-and-a-half years, Judge Feinstein wrote that "[P]laintiff [has] obtained little discovery from Defendants in this case. He obtained answers to only one set of interrogatories and [has] only deposed" defendants' designated 'person most knowledgeable.' (*Id.* at 10:14-15.)

Meanwhile, the JCCP was proceeding, and by late 2008 the parties reached a settlement in principle. On September 17, 2009, counsel for defendants advised Judge Feinstein of the settlement in the JCCP. The parties stipulated to stay of *Attridge* on December 4, 2009, which stay remained in effect until April 11, 2015.

C. The First JCCP Settlement

The parties' First Settlement Agreement ("FSA") in the JCCP called for defendant

Visa to pay $25 million and MasterCard $6 million in to a common fund. After deduction of attorneys' fees and administrative costs, the balance of the common fund was to be paid to *cy pres* recipients. Paragraph 8(b) of the FSA stated as follows:

> Class Counsel shall make payments in amounts approved by the Court upon application, but not to exceed a total of $9,300,000.00 . . . for any and all plaintiffs' attorneys fees, litigation costs, and other expenses incurred in connection with prosecuting, handling, and settling the Action. . . . However, in the event that *Attridge* . . . is fully and finally dismissed because of the release in paragraph 14 below, and counsel for plaintiff in [the] *Attridge* [case] makes any application for attorneys' fees, litigation costs, or other expense in this Action, such an application will not be considered one that contributes to the $9,300,000.00 cap provided in this paragraph, and [the *cy pres* award] shall be reduced to cover the payment of any sums that the Court awards to counsel for plaintiff in the *Attridge* case.

Thus, any attorneys' fees awarded to counsel in *Attridge* would reduce the *cy pres* award provided by the FSA.

Judge Kramer granted preliminary approval of the FSA on January 5, 2010. The preliminary approval order set a Final Approval Hearing for August 6, 2010, and set a due date for any fee application of July 30. (*See* January 5, 2010 Order Preliminary Approving Settlement, *JCCP*, No. 4335, at ¶¶19, 20.)

Class Counsel filed their motion for final approval and application for attorneys' fees on July 30, 2010. Although Mr. Attridge moved to intervene in the JCCP and filed objections to the settlement and a notice of intent to appear at the final approval hearing, he did not file a fee application.

At the August 6 final approval hearing, Judge Kramer heard extensive argument from several objectors, including Mr. Winters on behalf of Mr. Attridge. Mr. Attridge objected on the grounds that the settlement would release the claims in *Attridge*. Mr. Winters argued: "In other words, if our cases were released, we walk away with nothing unless we are compensated for fees. The Settlement Agreement, which is incorporated in the Court's preliminary order, specifically acknowledges that opportunity." (Corbitt Decl., Ex. 6 (8/6/10 Hr'g Tr. at 5-6).) The Court's response to Mr. Winters was that he had not filed any fee

application. (*Id.* at 5.) After hearing argument, in open court, Judge Kramer granted final approval of the First Settlement Agreement and awarded Class Counsel attorneys' fees of $9.3 million.[3] The Court also denied Mr. Attridge's motion to intervene.

Four days *after* final approval had been granted, Mr. Winters filed an application for attorney's fees in this JCCP on August 10, 2010. Defendants opposed the application on August 17, and Mr. Winters withdrew his application the following day, August 18. For reasons that are still not entirely clear to this Court, the day after that, Mr. Winters moved *ex parte* for an order allowing removal of his filed application for attorney's fees from the Court's files. The *ex parte* application was denied by written order dated August 23, 2010, and Mr. Winters' first application remains in the record.

Mr. Winters' first (and withdrawn) application for attorney's fees is notable for several reasons. First, it was untimely, having been submitted *after* the date it was due per Judge Kramer's preliminary approval order, *after* the hearing on final approval and Class Counsel's fee application, and *after* the settlement was finally approved and attorneys' fees awarded to Class Counsel. Second, in the application, Mr. Winters claimed that he had expended 4,155 hours at $850 per hour,[4] and that co-counsel, Girardi & Keese, had spent an additional 3,000 hours at an average of $497 per hour, for a grand total lodestar of $5,021,750 for 7,155 hours of work.[5] (8/10/10 Fee App. at p. 13.) Third, the fee application sought "costs" of $650,000.00.

Mr. Attridge appealed Judge Kramer's judgment in the JCCP. The Court of Appeal reversed the judgment on the ground that that the FSA effectively released the claims in

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[3] Written orders granting final approval and awarding attorneys' fees to class counsel were filed on August 23, 2010, and judgment was entered on August 24.

[4] On the next page of his application, however, Mr. Winters went on to explain why a rate of $690 per hour (not the $850 requested) would be justified and adequate for his services. This discrepancy was not acknowledged or explained.

[5] The Court notes that 7,155 hours equates to about 179 weeks of work at 40 hours per week, or about 3½ years of non-stop full time employment for one attorney. The Court further notes that Mr. Attridge is no longer seeking any fees for work performed by Girardi and Keese – without explanation.

Attridge, and that the trial court had abused its discretion in evaluating the reasonableness of the FSA *without adequately considering* whether it provided sufficient compensation for the release of the *Attridge* claims. (Slip Op. A129672.) The remittitur issued on March 14, 2012.

A week before the remittitur, Mr. Attridge again filed a peremptory challenge of Judge Kramer—this time in the JCCP. Judge Kramer denied the challenge and Mr. Attridge sought writ relief rom this ruling. The Court of Appeal issued an alternative writ (A135111), and on June 11, 2012, the JCCP was singly assigned to Judge Munter in this Department 305.

D. The Revised Settlement Agreement

Following remand, the parties modified the FSA slightly, entering into a Revised Settlement Agreement ("RSA"). The RSA did *not* provide for any compensation for the class greater than the First Settlement did—*i.e.*, the class was to receive a common fund in the amount of $31 million—though it did make clear that the claims in *Attridge* were being released. Paragraph 8(b) regarding attorneys' fees, quoted above, remained substantially the same.

The parties moved for preliminary approval of the RSA. Mr. Attridge opposed the motion, asserting that class counsel had disabling conflicts and that the named plaintiffs were inadequate class representatives. Counsel for Mr. Attridge also recited settlement discussions with defendant Visa's counsel, though he did not contend that his efforts contributed to the common fund.

Judge Munter issued an order granting preliminary approval of the RSA on November 10, 2012 which set a final approval hearing for April 2, 2013 and stated that "[a]ll motions and papers filed in support of final approval of the Revised Settlement Agreement shall be filed no later than three weeks prior to the Final Approval Hearing [March 12, 2013]." Nov. 10, 2012 Order Granting Preliminary Approval, *JCCP*, No. 4335, at ¶ 24.)

Class counsel timely renewed their application for attorneys' fees and filed a final approval motion. Mr. Attridge opposed the motion for final approval of the RSA,

contending, among other things, that: (a) class counsel has a conflict because they have represented banks before; (b) plaintiffs' expert has a conflict; (c) the RSA is insufficiently different from the original settlement; (d) class counsel and the named plaintiffs were inadequate to represent the class; (e) the settlement was collusive; and (f) the Court should certify a separately represented *Attridge* subclass. None of his arguments concerned fees.

Although Mr. Attridge's counsel now claims that his efforts enhanced the $31 million common fund, at the time of final approval, once again, he did not file an application for attorneys' fees, nor did he object to class counsels' fee request. At no time before (or during) the final approval hearing did he advise Judge Munter, class counsel, or defense counsel that he intended to file a fee application, nor did he request leave to file it at a later date.

After carefully considering all of the materials in support of, and in opposition to, final approval, including Mr. Attridge's, on April 11, 2013, Judge Munter issued detailed written findings of facts, orders granting final approval and awarding class counsel their attorneys' fees, and a judgment. Mr. Attridge appealed on June 10, 2013, again arguing that the value of the claims advanced in *Attridge* had not been sufficiently considered by the Court when approving the RSA.

The Court of Appeal affirmed Judge Munter's findings, rulings, and orders. ("As we have set forth earlier in this opinion, the record makes clear that before approving the Revised Settlement, the trial court carefully considered Attridge's arguments about the value of the Attridge claims, and ultimately rejected them.") (Slip Op., A138984, p. 23.) Rehearing was denied, as was review by the California Supreme Court. A remittitur issued on February 28, 2015, at which time judgment in this JCCP became final.

E. The Instant Fee Application

On March 30, 2015, Mr. Attridge filed the instant application for attorneys' fees, costs, and a service award. Mr. Attridge's counsel seeks fees as high as $8,114,712 when including his requested multiplier of up to 2.0 – mostly for his work in the *Attridge* action, not this JCCP. Class counsel in these coordinated cases were awarded a combined

$9,019,972 based upon 11,001.7 attorney hours at an average of $601.42 per hour, with a multiplier of 1.4 in consideration of "the novelty, complexity, and difficulty of the issues in the case; the extent to which the nature of the litigation has precluded other employment by counsel; the result achieved; the contingent nature of the fee award and incentive for counsel to risk pursing the litigation on a contingent basis; and the time value of money with regard to the delay in receipt of fees." (April 11, 2013 Fee Order at 2.) Counsel for Mr. Attridge, an unsuccessful objector, now seeks a fee award fully ninety percent as large as class counsel's[6] at an hourly rate 141 percent larger than class counsel's average rate ($850 versus $601.42 per hour).

III. Discussion

A. Mr. Attridge's Fee Application Is Untimely

As noted above, the deadline for filing any applications for attorney's fees was March 12, 2013. On that date, class counsel filed their application. Counsel for Mr. Attridge did not file any fee application until now—two years after judgment was entered (for the second time) and more than five years after the first motion for preliminary approval in this coordinated proceeding. In addition to missing court-ordered deadlines, the instant Fee Application, filed March 30, 2015, is untimely for two additional reasons.[7]

[6] If awarded his full fee and the requested maximum multiplier of 2.0, Mr. Attridge's requested fee would be $8,144,712 – almost exactly ninety percent of class counsel's fee award of $9,010,972.

[7] It is common for objectors to submit fee applications at the same time as class counsel, *i.e.* before the final approval hearing. "After notice to the class, the court provides objection opportunities to class members before ruling on [the] reasonableness" of an attorneys' fee request and "the common fund rules . . . require a very objective analysis of the cash available to the class to support the common fund approach to attorneys fees." Cohelan on California Class Actions § 10:7 (2014-15 ed.). *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI, 2013 WL 1365900, at *14-15 (N.D. Cal. Apr. 3, 2003) (in which Mr. Winters was among plaintiffs' counsel) (discussing the applications of "[t]hree attorneys representing separate objectors or groups of objectors [who sought] awards of attorneys' fees for their contributions to improvement of the Settlements" prior to the approval of the settlements).

First, when Judge Munter adjudged the RSA "fair, adequate and reasonable" as a whole, that determination was based upon the evidence before him, and a record void of any fee request by Mr. Winters. Put differently, when the Court granted final approval of the RSA, and evaluated its fairness, Mr. Winters' fee request, which (per the terms of the RSA) would diminish the *cy pres* award, was not before the Court. In effect, the instant fee application is an untimely motion for reconsideration of the final approval order and judgment. In order for this Court to grant Mr. Attridge's untimely fee application, the Court would have to claw back funds already awarded for the benefit of the class in a judgment that was affirmed by the Court of Appeal in all respects and is now final. The only way for the Court to do that would be to start from scratch and determine whether the settlement as a whole, including any award of fees to Mr. Winters, is fair, adequate, and reasonable. That, at this late date, the Court cannot do.

Second, because Mr. Attridge did not file a fee application before either the first or second final approval hearing, the class was not given notice of his intent to seek fees or their amount, nor given any opportunity to object to them. Concerning Mr. Attridge's instant fee application, the class has still been provided with no notice that Mr. Attridge is seeking fees, which, if awarded, would come from the common fund and reduce the *cy pres* award which is intended to benefit the class. The balance of the settlement to be distributed is approximately $22 million. Counsel for Attridge seeks $8 million— more than 35%—of that common fund as the RSA provides that *if* counsel for Attridge is awarded fees, it would come from the common fund and not from the $9.3 million already awarded to class counsel. Mr. Attridge cites no authority for the proposition that attorneys' fees may be awarded from the class's common fund without notice to, and an opportunity to be heard by, the class members, years after judgment. Having twice forfeited the opportunity to apply for attorneys' fees before final approval and judgment, [8] Mr. Attridge cannot do so now to the detriment of the class and without notice.[9]

[8] Mr. Attridge argued at the hearing on this Application that if he had accepted the benefits of the settlement by seeking fees before appealing the judgment, then he would have

B. Attridge and His Counsel Did Not Substantially Benefit the Class

Mr. Attridge and his counsel seek fees under the common fund doctrine. Even if this Court were to find that Mr. Attridge's Fee Application was timely, which it does not, the Court denies the Application on the separate and independent ground that Mr. Attridge and his counsel failed to demonstrate that their efforts substantially benefited the class in this JCCP.

To be entitled to fees under the common fund doctrine, an objector such as Mr. Attridge must show that he "substantially enhanced the benefits to the class under the settlement." As stated by the Ninth Circuit:

> The equitable common fund/common benefit doctrine authorizes attorney fees only when the litigants preserve or create a common fund for the benefit of others as well as themselves. In the absence of a showing that objectors substantially enhanced the benefits to the class under the settlement, as a matter of law they were not entitled to fees, and the district court did not abuse its discretion.

Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1051-52 (9th Cir. 2002) (quotations and citations omitted); *see also Class Plaintiffs v. Jaffe & Schlesinger, P.A.* (9th Cir. 1994) 19 F.3d 1306, 1308 (9th Cir. 1994) ("an award of attorneys' fees from a common fund depends on whether the attorneys specific services benefited the fund—whether they tended to create, increase, protect or preserve the fund") (quotations and citations omitted).

Mr. Attridge has not made and cannot make this showing. Despite Mr. Attridge's objections and his appeal, which required the parties to revise the FSA and enter into the RSA—his objections and appeal *did not* increase the dollar amount of the settlement nor the

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waived his right to appeal. However, because the settlement funds remain in trust (pursuant to the RSA) until the time for all appeals (including a petition for a writ of certiorari to the United States Supreme Court), Mr. Attridge could not have accepted the benefits of the settlement until after his appeal.

[9] At oral argument, Mr. Attridge relied upon *Citizens Against Rent Control v. City of Berkeley*, 181 Cal.App.3d 213 (1986) for the proposition that an attorneys' fee application can be considered for the first time following remittitur. That case is inapposite. *Citizens* was not a class action, and there, the court addressed timing of fee applications made pursuant to Code of Civil Procedure section 1021.5, a section with no application here.

1 amount going to benefit the class via *cy pres*. The only "benefit" Mr. Attridge provided to
2 the class was the addition of language in the RSA's release which specifically stated that the
3 claims in *Attridge* were being released.

4 Mr. Attridge's argument before Judge Munter on final approval, and before the Court
5 of Appeal, was that the claims advanced in *Attridge* were separate and distinct from those in
6 the JCCP and had value independent of the JCCP claims, and that the RSA failed to
7 adequately compensate the *Attridge* putative class. However, Judge Munter found, and the
8 Court of Appeal affirmed the finding, that it would be very difficult to obtain class
9 certification or establish liability and therefore that the settlement value of the claims in
10 *Attridge* was essentially zero. *See* April 11, 2013 Findings of Fact, JCCP No. 4335, ¶¶ 35-
11 50.

12 As the Court of Appeal observed, Judge Munter "carefully considered Attridge's
13 arguments about the value of the Attridge claims, and ultimately rejected them," and his
14 findings on the issue "are supported by substantial evidence." (10/30/14 Slip Op., A138984
15 at p. 23.)

16 Mr. Winters has not persuaded this Court that his efforts "substantially enhanced" the
17 benefits to the class under the settlement because none of the work performed in *Attridge*
18 benefitted the JCCP class in any way.

19 At argument and in his papers, Mr. Winters advanced several arguments in support of
20 his fee application. The Court rejects each of those arguments and will address each
21 *seriatim*.

22 First, he argues that "[t]he [RSA] authorizes an award of attorneys' fees for *Attridge*
23 Counsel in the actions." (Attridge's Opening Mem. at 5.) Not so. Paragraph 8(b) of the
24 RSA states that *if* counsel for Mr. Attridge makes a fee application, any award would not be
25 considered part of the $9.3 million designated for class counsel. That language contemplates
26 that *Attridge* counsel may apply to the Court for fees. It does not "authorize" an award of
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attorneys' fees. And, as noted above, the class had no notice of such an application prior to either of the final approval hearings.

Second, Mr. Attridge's counsel states that "*Attridge* counsel's services contributed to the increase in the amount of the common settlement fund from $16 million to $31 million." (Attridge's Opening Mem. at 6.) Counsel for the defendants and the class dispute that Mr. Winters played any role in securing the $31 million settlement and the record does not support Mr. Attridge's assertions. Although Mr. Winters was invited to participate in settlement negotiations in the JCCP, he refused to do so. When the RSA was presented to the Court for approval by Judge Munter, the $31 million settlement had not changed from the FSA.

Third, the Fee Application claims that Mr. Attridge was responsible for renegotiation of the "Tool Kit" provisions in the FSA. Thus, he submits that:

> [I]n response to objections of *Attridge* counsel to the "Tool Kit," in the initial settlement agreement proposed in *Credit/Debit* the trial Court, on August 6, 2010, expressed reservations regarding the "Tool Kit," a consumer information booklet to be prepared by Visa and MasterCard as proposal by the parties, and suggested that the parties and *Attridge* counsel reconsider the recipient of the "Tool Kit" funds. As a result the "Tool Kit" was stricken as a *cy pres* recipient and does not appear in the RSA.

(Attridge's Opening Mem. at 6.) However, at the August 6, 2010 final approval hearing, Mr. Winters did not object to the "Tool Kit" provisions—Joseph M. Alioto, counsel for objector Melvin Salveson, did. The transcript for the August 6, 2010 final approval hearing reflects that Judge Kramer was not satisfied with the "Tool Kit" benefit. (Corbitt Decl., Ex. 6 (Aug. 6, 2010 Hr'g Tr.) It was Judge Kramer who suggested to the parties that the "Tool Kit" be revisited and he invited "just trial counsel" to discuss an alternative proposal at a break in the hearing. (*Id.* at pp. 64-65.) Following the break, class counsel and counsel for defendants announced that they had reached an agreement to modify the "Tool Kit" provisions. Thus, Mr. Attridge's claim to have been the genesis of the renegotiation of the "Tool Kit" provisions is not supported by the record.

Fourth, Mr. Attridge contends that *Attridge* was significant in that Visa designated *Attridge* as one of its top-four "Covered Litigations" in its SEC filings, for which Visa had set aside a combined $6.4 billion. (Attridge's Opening Mem. at 8:4.) This argument was raised before, considered by, and rejected by, Judge Munter.

And finally, Mr. Attridge maintains that *Attridge* has significant value because it was predicated on the judgment in a prior case prosecuted by the United States Department of Justice. (Attridge's Opening Mem. at 9.) All of this litigation, including *Attridge* and the JCCP, followed on the heels of, and was duplicative of, the DOJ's antitrust litigation against Visa and MasterCard. Judge Munter's findings made clear the specific risks and weaknesses of the claims in *Attridge* as well as the doubtfulness of ever achieving class certification. The Court of Appeal's affirmance of those findings was made with full knowledge of the DOJ's prosecution of the defendants in the JCCP and *Attridge*.

To the extent Mr. Attridge would be entitled to any fee award in this JCCP, it would be in his role as an objector to and appellant of the settlement, and it would be in recognition of a "substantial benefit" he provided the class by increasing the amount of the common fund. Here, most of the fees he is seeking are for work he did in his separate *Attridge* case (preparing his various complaints, defending demurrers, a MSJ/MSA, and discovery fights) – not for work done objecting in *this* case. And, in both cases, he was not successful. The *only* change to the settlement in the JCCP that can be definitively attributed to Mr. Attridge is that because of his first appeal, the claims of the purported class members he represented in his *Attridge* case were *expressly released* in the RSA. (He does not seek fees from the second appeal.) In other words, the only thing Mr. Winters achieved was to preclude his own purported clients from ever receiving anything from the litigation he filed. This is not a valid reason to award him fees and costs from the JCCP class.

C. Mr. Attridge is Not Entitled to a Service Award

Mr. Attridge is not entitled to a service or incentive award for the reasons set forth above, namely that he did not provide a benefit to the class in this JCCP and his request

1 comes far too late.

2 **D. Conclusion**

3 For the foregoing reasons, Objector Attridge's Application for Attorneys' Fees,

4 Costs, and Service Award is denied in its entirety.

5 IT IS SO ORDERED.

6 Dated: June 3, 2015

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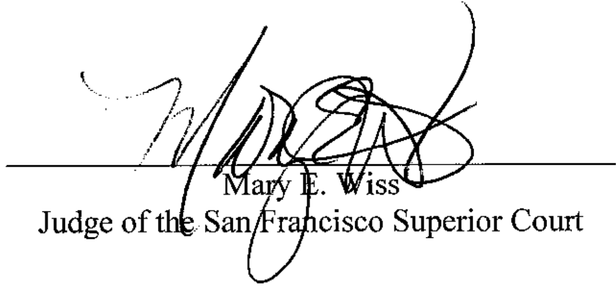

8 Mary E. Wiss

9 Judge of the San Francisco Superior Court

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Superior Court of California
County of San Francisco

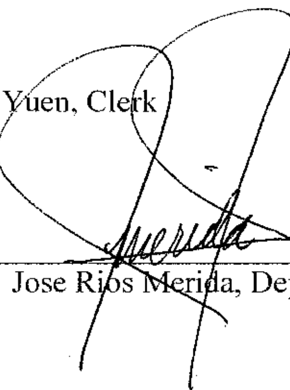
COORDINATION PROCEEDINGS SPECIAL TITLE **CREDIT/DEBIT CARD TYING CASES**	Case Number: CJC-03-004335 **CERTIFICATE OF ELECTRONIC SERVICE** (CCP 1010.6(6) & CRC 2.260(g))

I, Jose Rios Merida, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On June 3, 2015, I electronically served the ORDER DENYING OBJECTOR ATTRIDGE'S APPLICATION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARD via File&ServeXpress® on the recipients designated on the Transaction Receipt located on the File&ServeXpress® website.

Dated: June 3, 2015

T. Michael Yuen, Clerk



By: ______________________
Jose Rios Merida, Deputy Clerk

EXHIBIT C

ELECTRONICALLY
FILED
05-30-08
K. TORRE, CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA - MARTINEZ
BY: S. KRICKEN, DEPUTY CLERK

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Attorneys for Plaintiff and Cross-Complainants and the Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

Coordinated Proceeding Special Title (Rule 3.550(b)) IN RE JOHN MUIR UNINSURED HEALTHCARE CASES	J.C.C.P. No. 4494 (Unlimited Civil Case) **[PROPOSED] ORDER GRANTING COMPLAINANTS' UNOPPOSED MOTION TO FILE UNDER SEAL DERMODY DECLARATION CONTAINING RESCISSION OF SETTLEMENT AGREEMENT PROVISION** Judge: Hon. David B. Flinn Trial Date: None Set

I. INTRODUCTION

Complainants filed an unopposed motion for an order to file under seal the the Declaration of Kelly M. Dermody Containing Rescission of Settlement Agreement Provision, containing the Rescission of Settlement Agreement provision, pursuant to California Rules of Court, Rule 2.550 *et seq.*

The Court, having considered the motion and being fully advised in the matter, finds as

follows:

FINDINGS

This Court finds there exists an overriding interest supporting sealing of the unredacted Rescission of Settlement Agreement provision. This provision of the Settlement Agreement contains the percentage of Class members who must opt out or exclude themselves in order for John Muir to have the ability to terminate the Agreement. This number does not affect the Settlement benefits that are to be provided if finality is reached here, and it has no bearing on the reasonableness, fairness or adequacy of the Settlement. The interest in maintaining the confidentiality of this number outweighs the public interest in its disclosure. The requested redaction of the information is narrowly tailored, and there are no less restrictive means to achieve the interest identified.

ORDER

THIS COURT HEREBY ORDERS Complainants' Unopposed Motion to Seal the Dermody Declaration Containing Rescission of Settlement Agreement Provision is GRANTED.

IT IS FURTHER ORDERED that any documents lodged with the Court for purposes of this motion, and/or filed Conditionally Under Seal, be sealed for the duration of this lawsuit.

IT IS SO ORDERED.

May 13, 2008

Digitally signed by David Flinn
DN: cn=David Flinn, c=US, o=Superior Court, ou=Dept. 6, email=dflin@contracosta.courts.ca.gov
Reason: I am approving this document
Location: Martinez, CA
Date: 2008.05.13 15:36:23 -07'00'

Hon. David B. Flinn
JUDGE OF THE SUPERIOR COURT

EXHIBIT D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 13-30095

IN RE: DEEPWATER HORIZON - APPEALS OF THE ECONOMIC AND PROPERTY DAMAGE CLASS ACTION SETTLEMENT

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

O R D E R :

IT IS ORDERED that the motion of the BCA Appellants to unseal the settlement agreement opt-out threshold number is denied.

/s/ Lyle W. Cayce
LYLE W. CAYCE
CLERK OF COURT

ENTERED AT THE DIRECTION OF THE COURT

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

October 16, 2013

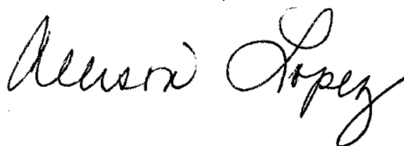
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No.13-30095 In Re: Deepwater Horizon
USDC No.2:10-MD-2179
USDC No.2:10-CV-7777
USDC No.2:12-CV-970
USDC No.2:10-CV-2771
USDC No.2:12-CV-2953
USDC No.2:12-CV-964

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By:_______________________
Allison G. Lopez, Deputy Clerk
504-310-7702

Mr. N. Albert Bacharach Jr.
Mr. Robert C. Mike Brock
Mr. George Howard Brown
Ms. Elizabeth Joan Cabraser
Mr. Jeffrey Bossert Clark Sr.
Mr. Brent Wayne Coon
Mr. Timothy A. Duffy
Mr. Miguel Angel Estrada
Mr. Theodore Harold Frank
Mr. Soren E. Gisleson
Mr. Richard Cartier Godfrey
Mr. Kevin Walter Grillo
Mr. Don Keller Haycraft
Mr. Stephen Jay Herman
Mr. Thomas George Hungar
Mr. Samuel Issacharoff
Mr. James Andrew Langan
Mr. Scott Payne Martin
Mr. Steven Andrew Myers
Mr. Theodore B. Olson
Mr. Joseph Darrell Palmer
Mr. John Jacob Pentz III
Mr. James Parkerson Roy
Mr. Stuart Cooper Yoes