

1 ARNOLD & PORTER KAYE SCHOLER LLP
2 PAUL ALEXANDER (SBN 49997)
3 Paul.Alexander@arnoldporter.com
4 GEORGE LANGENDORF (SBN 255563)
5 George.Langendorf@arnoldporter.com
6 Three Embarcadero Center, 10th Floor
7 San Francisco, CA 94111
8 Telephone: 415.471.3122
9 Facsimile: 415.471.3400

10 Attorneys for Individual Plaintiffs and the Class

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 CITY AND COUNTY OF SAN FRANCISCO
14 COMPLEX LITIGATION

15 CALIFORNIA DENTAL ASSOCIATION, a
16 California Corporation, RICHARD W.
17 BARNES, D.D.S.; ROBERT E. REED, D.D.S.;
18 DEAN SCHWEITZER, D.D.S.; GERALD
19 MIDDLETON, D.D.S.; WHITNEY
20 JOHNSON, D.D.S.; TERRENCE Y. LAU,
21 D.D.S.; and BARBARA M. HAWTHORNE,
22 D.D.S., individually and on behalf of all others
23 similarly situated,

24 Plaintiffs,

25 vs.

26 DELTA DENTAL OF CALIFORNIA, a
27 California Corporation,

28 Defendant.

Case No. CGC-14-538849

**STATUS CONFERENCE STATEMENT
AND COMPLIANCE REPORT
SUBMITTED BY CLASS COUNSEL**

Date: November 16, 2018
Time: 11:30 a.m.
Dep't: 305
Judge: Honorable Mary E. Wiss

1 In compliance with this Court’s Corrected Order Granting Plaintiffs’ Motion for Final
2 Approval of Proposed Amended Class Action Settlement dated May 2, 2018 (“Final Approval
3 Order”), Class Counsel hereby submit this Status Conference Statement and Compliance Report
4 regarding the status of the distribution of the Amended Settlement Amount (“Settlement Fund”)
5 as set forth in the Amended Settlement Agreement (“Settlement Agreement”).

6
7 **I. Introduction and Summary.**

8 As of the date of this Status Conference Statement and Report, Class Counsel, working
9 with Rust Consulting and the expert for the Class, has supervised the mailing of 12,302 settlement
10 checks for a total \$62,822,829 out of the total \$65,020,624 Settlement Fund. \$2,197,795
11 remains to be distributed, resulting primarily from objections that have not been resolved and
12 other issues, such as how to deal with distributions of allocations made to class members who
13 have passed away while the action was pending.

14 The expert for the Class, working with Class Counsel, developed the allocation
15 calculation for these distributions that followed this Court’s Final Approval Order and the
16 Settlement Agreement, specifically including Appendices 3 and 4 thereof. Thereafter, beginning
17 on July 18, 2018, Rust Consulting began mailing written notices of these allocations to the
18 individual Class members who were eligible for a distribution from the Settlement Fund and to
19 the involved group practices. Distribution of settlement checks followed in three separate
20 tranches to date, the first on September 20, 2018, the second on October 12, 2018, and the third
21 on November 8, 2018.

22 During this period, an extraordinary amount of time and expert expense has been required
23 of Class Counsel to assist Class members in responding to the written notices, resolving
24 objections to, e.g., sending a settlement allocation to a group practice rather than an individual
25 dentist, understanding the basis for their allocations, and obtaining other related information
26 requested. This is set forth in more detail in the Request for a Supplemental Fee Award that Class
27 counsel has filed in this case.¹ In responding to these requests, Class Counsel and their expert

28 ¹ This Motion and all moving papers have been posted to the Class Website in a prominent position on the landing page.

1 retrieved the detailed fee and claims history of the Class member underlying the allocation and
2 reviewed it in sum and substance with him or her. In some situations, Class Counsel was able to
3 point to issues or deficiencies in the way the Class member has been filing his or her fees or
4 claims for reimbursement that will enable them to improve the financial health of their practice.
5 In most every instance, the Class member has ultimately understood and accepted the basis for an
6 amount of his or her allocation. In many instances, Class members have expressed their
7 appreciation for the response and work of Class counsel in responding to their requests.

8 Certain issues remain, such as following up on uncashed settlement checks, deciding on
9 the correct distribution of settlement allocations that had been made to of those Class members
10 who have passed away, and the like. These are detailed in the final section of this Status
11 Conference Statement and Report. Class Counsel will address these and be prepared to respond
12 to any questions the Court may have at the hearing.

13 **II. The Settlement Fund Has Been Deposited into Escrow, the Allocation of Individual
14 and Group Practice Settlement Amounts Have Been Determined, and Written
15 Notices of Those Allocations Have Been Mailed to Class Members and Group
16 Practices.**

16 **A. The Escrow Agreement and Deposit of the Settlement Fund.**

17 Class Counsel and Delta Dental Counsel negotiated and entered into a written Escrow
18 Agreement with Rust Consulting as of July 16, 2018. The Escrow Agreement provides that Rust
19 will take responsibility for distributing the Settlement Fund but will do so in accordance with
20 instructions from counsel. Rust also set up appropriate facilities, including a toll-free telephone
21 number, to respond to questions and inquiries from Class members. However, when those
22 questions and inquiries required explanation of the settlement allocation or other more complex
23 issues, Rust forwarded the inquiry or question to Class counsel for response.

24 In accordance with the terms of that agreement, on or about August 3, 2018, Delta Dental
25 deposited the sum of \$65,020,624 with Rust Consulting which deposited those funds into the
26 Huntington National Bank located in Columbus, Ohio. Rust chose the Huntington National
27 Bank because it has an ongoing relationship with that bank in dealing with class action payments
28 and Rust confirmed that the bank meets the requirements set forth in the Escrow Agreement.

1 Rust prudently deposited this sum into an interest bearing account. As of the date of this Status
2 Conference Statement, the amount of interest earned on the Settlement Fund is almost \$200,000
3 and will exceed \$200,000 by November 16, 2018, the date of the Status Conference.

4
5 **B. The Preparation and Notices Prior to the Distribution of Allocations from the
6 Settlement Fund.**

7 Before any of the settlements checks could be prepared or mailed, the allocations of the
8 Settlement Fund had to be determined and Class members and their group practices notified of
9 these allocations. Class Counsel worked with their retained expert, Mr. Colin Loveness, to
10 develop the necessary calculations. These calculations were done for all Class members in the
11 manner described in Appendices 3 and 4 of the Settlement Agreement. The allocation algorithm
12 determined each individual Class members entitlement to the Settlement Fund based upon the
13 relationship between the financial harm sustained as a result of Delta Dental's application of the
14 "INAP" to his or her fees and claims for reimbursement and the total financial harm sustained by
15 all Class members. Where the financial harm existed but was below a threshold that created an
16 entitlement to at least \$500, the \$500 minimum was applied. The resulting settlement allocations
17 -- and the entire methodology -- were tested and retested multiple times to ensure that the results
18 were accurate and reliable. Though counsel for Delta Dental did not develop these algorithms
19 and take no responsibility for them, Class Counsel provided copies of the allocation figures as
20 they were developed. Delta Dental counsel reviewed these and asked logical questions about
21 them, which was helpful. Their good faith participation in this process is acknowledged and
22 appreciated.

23 Once this work was completed, written notices of the allocations were mailed to Class
24 members and, where applicable, group practices. This process began on July 18, 2018. In the
25 relatively few cases in which these written notices were returned as undeliverable, Rust and Class
26 counsel engaged in significant follow-up to identify a valid address for the Class member and
27 group practice. Rust and Class Counsel have received hundreds of inquiries, objections and
28 requests for information or other action in response to this mailing, a substantial portion of which

1 is described in more detail in the application of Class Counsel for a supplemental fee award. That
2 supplemental fee award, if granted, would be paid from (and limited to) interest earned on the
3 Settlement Fund.

4 **III. The Settlement Distributions Made to Date Pursuant to the Court's Final Approval**
5 **Order and the Number and Value of Uncashed Settlement Checks.**

6 **A. The Mailing of Settlement Checks.**

7 As of the date of this Status Conference Statement, settlement checks have been made to
8 Class members and/or their group practices on three separate dates², one on September 20, 2018,
9 one on October 12, 2018 and one on November 8, 2018. Settlement distributions primarily to
10 individual practice Class members presented the simplest issue (since no group practices were
11 involved and no objections were received), and for that reason, they were mailed first. Following
12 that, a second mailing of checks was made to Class members and group practices for whom either
13 no objection was received (and no issue raised about the correctness of the allocation and
14 recipient) and those for whom, even though an objection or related issue had been raised, it had
15 been resolved to the satisfaction of all concerned. A third mailing of settlement checks occurred
16 on November 8, 2018 to Class members and/or group practices for whom a supplemental mailing
17 was required (because the original mailing was returned as undeliverable and an updated address
18 was located), those whose objections or issues had been resolved by this time and to certain
19 others. In the case of any Class member or group practice for whom it was necessary to re-mail a
20 notice, 30 days from the date of new mailing was provided for the Class member and/or group
21 practice to respond.

22 **B. The Number and Value of Settlement Checks Mailed and Those That Are**
23 **Currently Uncashed.**

24 In compliance with paragraph 11 of the Court's Final Approval Order, set forth below is a
25 summary of the distributions of the Settlement Fund made to date, including the number and
26 value of checks that have been sent and the number and value of checks that remain uncashed as
27 of the date of this Status Conference Statement.³ This information is set forth separately for each

28 ² Settlement checks in excess of \$100,000 were sent via Federal Express with a signature required. All of these checks have been received and cashed.

³ Dollar figures are rounded to the nearest whole dollar.

1 of the three mailings of checks and a total is provided at the end.

2 ***Settlement Checks Sent on September 20, 2018:***

3 Number of Checks Sent: 8,801

4 Total Value of Settlement Checks Sent: \$41,699,522

5 Number of Checks Remaining Uncashed: 910

6 Value of Checks Remaining Uncashed: \$2,871,487

7 ***Settlement Checks Sent on October 12, 2018:***

8 Number of Checks Sent: 3,071

9 Total Value of Settlement Checks Sent: \$19,056,823

10 Number of Checks Remaining Uncashed: 823

11 Value of Checks Remaining Uncashed: \$3,847,158

12 ***Settlement Checks Sent on November 8, 2018:***

13 Number of Checks Sent: 430

14 Total Value of Settlement Checks Sent: \$2,066,484

15 Number of Checks Remaining Uncashed: 430

16 Value of Checks Remaining Uncashed: \$2,066,484

17 ***Total Number and Value of Settlement Checks Sent to Date:***

18 Number of Checks Sent: 12,302

19 Total Value of Settlement Checks Sent: \$62,822,829

20 Number of Checks Remaining Uncashed: 2,163 (including the 430 checks mailed
21 on November 8, 2018). If the checks mailed on November 8, 2018 are excluded, the total number
22 of uncashed checks is 1,733.

23 Value of Checks Remaining Uncashed: \$8,785,129 (including the \$2,066,484 in
24 checks mailed on November 8, 2018). If the November 8, 2018 checks are not included, the total
25 value of uncashed checks is \$6,718,645.

26 As set forth above, as of the date of this Status Conference, settlement checks have been
27 sent to Class members and/or their group practice in the total amount of \$62,822,829. This
28

1 amounts to more than 96% of the total Settlement Amount of \$65,020,624. \$2,197,795 remains
2 to be distributed for the reasons set forth in the following section of this Statement.

3
4 **IV. The Distribution Issues that Remain.**

5 **A. Class members or group practices whose objections have not been resolved.**

6 As provided in the Settlement Agreement, individual Class members who had been part of
7 a group practice had the right to object to payment of the settlement allocation to the group
8 practice rather than to them. A significant number of Class members have made these objections.
9 While a substantial portion of these have been resolved, a number remain. In some situations, the
10 group practices are large and in these situations, multiple objections are resolved in an extended
11 negotiation. Others must be done on an individual basis. At present, none of the objections has
12 reached a stage in which it appears that an extended period will be needed in order to allow the
13 parties to resolve the objection.

14 **B. Class members who have passed away during the pendency of the litigation.**

15 Based on current calculations, Class Counsel believes that 31 dentists have passed away
16 during the pendency of this litigation, representing approximately \$47,500 in total distributions.
17 In some of these, an estate exists and Class Counsel intends to direct the distribution to the estate,
18 as requested by the administrator of the estate. In other situations, Class Counsel has not been
19 able to determine whether any formal probate or estate exists. In several situations, a surviving
20 spouse has simply requested that the settlement check be made payable to them. Subject to this
21 Court's approval, Class Counsel suggests that where a surviving spouse represents that he or she
22 is the sole heir, the settlement payment be made to that surviving spouse. Likewise, and subject
23 to the Court's approval, Class Counsel suggests that allocations of \$500 amounts be distributed to
24 surviving spouses (rather than incurring the substantial expense necessary to locate potential
25 additional heirs who might be entitled to a *de minimus* amount. Where allocations amount to
26 \$1,000 or more, an effort can be made to ensure that all potential heirs agree on the mode of
27 distribution.
28

1 **C. Class members for whom no valid address can be found.**

2 At present, Rust Consulting has advised Class Counsel that there are 90 Class members
3 for whom Rust Consulting has been unable to locate a valid mailing address, despite numerous
4 efforts to locate them. There are multiple reasons for this. One situation that Class Counsel has
5 encountered is the situation in which a dentist retires, sells his or her practice, and moves away.
6 After a year or two, the individuals who purchased or took over the practice, lose touch with the
7 retired dentist, and no readily available record discloses his or her address. Rust Consulting and
8 Class Counsel are making continued efforts to locate these individuals. Indeed, one such dentist -
9 - whose settlement allocation exceeds \$15,000 -- was located as this Status Conference Statement
10 was being finalized. These efforts will continue, with priority given to the larger allocations, over
11 the next 30 days to locate these individuals and provide a further report to the Court on this issue.

12 **D. Follow-up on uncashed checks or checks returned as undeliverable.**

13 The number and amount of uncashed checks is an issue of concern. The early follow-up
14 on this issue to date has focused on the large checks that were sent via Federal Express, and those
15 issues have been resolved. For the 8,801 checks sent on September 20, 2018, 910 checks remain
16 uncashed for a total of \$2,871,487 -- roughly 6.8% of the total value of the checks sent. Once all
17 of the settlement checks have been mailed, Rust Consulting will attempt to locate Class members
18 with uncashed checks either by telephone or email (or both). Inevitably, a small amount of
19 checks will go uncashed, though Class Counsel and Rust Consulting will work to make certain
20 that this is as low as reasonably possible. Class Counsel suggests a further report to the Court
21 near the end of January to apprise the Court on this issue and to suggest alternatives, including
22 potential invocation of the *cy pres* provisions of the Settlement Agreement.

23 Respectfully submitted:

24
25 Dated: November 9, 2018

ARNOLD & PORTER KAYE SCHOLER LLP

26 By: /s/ Paul Alexander
27 Paul Alexander

28 Attorneys for Plaintiffs