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

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

25 Plaintiffs,

26 v.

27 DELTA DENTAL OF CALIFORNIA, a
28 California Corporation,

Defendant.

No.: CGC-14-538849

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR APPROVAL OF
ATTORNEYS' FEES AND INCENTIVE
AWARDS TO CLASS
REPRESENTATIVES**

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

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1 **I. INTRODUCTION**

2 The Proposed Amended Settlement now before the Court is the result of lengthy, hard-
3 fought litigation that began in August, 2013. As the record in this case affirms, Delta Dental of
4 California (“Delta Dental”) strongly defended the case throughout, filing multiple motions to
5 dismiss based on different theories. *See* Declaration of Paul Alexander (“Alexander Decl.”) ¶ 4.
6 Plaintiffs successfully defeated these motions, which required significant discovery, substantial
7 briefing and hearings, and a mini-trial on the merits of Delta Dental’s standing defense. *Id.* ¶¶ 3-6.
8 The parties also engaged in two intensive and adversarial mediations, the second of which required
9 additional discovery and further mediation briefing. *Id.* ¶ 7.

10 Ultimately, Delta Dental agreed to an Amended Settlement Agreement that conferred
11 substantial benefit to the Class, including \$65,029,299 in cash payments to Class members and
12 significant improvements to the basic contract between Delta Dental and the Class members.¹

13 As an additional part of the Amended Settlement Agreement, Delta Dental agreed to pay up
14 to \$2,350,000 in attorneys’ fees, subject to the approval of the Court. *See* Amended Settlement
15 Agreement § III.D.1.² Delta Dental also agreed to pay \$3,500 in incentive awards to each of the
16 individual Class Representatives for their role in the litigation, again subject to the approval of the
17 Court. *Id.* § III.D.1.b. This portion of the Amended Settlement Agreement was negotiated only
18 after agreement had been reached on the substantive terms of the Amended Settlement Agreement,
19 including the Settlement Amount of \$65,029,299.³ The Court is therefore authorized to award fees
20 in this amount under California Code of Civil Procedure Sections 1033.5(a)(10)(A), and 1021. The
21 Court is also authorized to award the agreed upon service awards under California law, as discussed
22 in more detail below.

23 The requested attorneys’ fees of \$2,350,000 are substantiated, reasonable, and well below
24

25 ¹ The benefits conferred by the Amended Settlement Agreement are described in detail in Plaintiffs’
26 12/14/2017 Motion For Preliminary Approval Of Amended Class Settlement, at 16-18.

27 ² The Amended Settlement Agreement is Appendix A to Declaration of Paul Alexander In Support
28 Of Plaintiffs’ 12/14/2017 Motion for Preliminary Approval of the Amended Class Settlement.

³ *See* Declaration of Eric Green In Support Of Plaintiffs’ 12/14/2017 Motion for Preliminary
Approval of the Amended Class Settlement (“Green Decl.”) ¶ 9.

1 what would be suggested by either of the accepted methods for evaluating a request for attorneys’
2 fees in a California class action: the lodestar/multiplier approach and the common fund or
3 percentage-of-recovery approach. Class Counsel’s actual hours, fees and expenses — the
4 “lodestar” under California law — amount to 6,843.45 hours, which equates to \$3,860,064.67. The
5 request for Court approval of \$2,350,000 in fees and expenses amounts to approximately 62% of the
6 lodestar amount. Under the percentage-of-recovery approach, the requested fees of \$2,350,000 are
7 only approximately 3.6% of the monetary component of the Amended Settlement alone, whereas
8 fees of 25% or even higher are often approved under this method. Further, the requested fees do not
9 reduce the cash amount available to the Class.

10 This case presented novel and difficult legal issues. The legal work necessary to achieve the
11 Proposed Amended Settlement was difficult and time-consuming. Alexander Decl. ¶¶ 3-6. The
12 litigation involved an extensive factual investigation, ongoing legal research, extensive motions
13 practice, party and expert discovery, a bench trial, and two mediations. *Id.* The amount of fees
14 sought by Class Counsel is reasonable and will not reduce the total benefit provided to the Class by
15 the Amended Settlement. Class Counsel therefore respectfully requests that the Court approve the
16 agreed-upon award of \$2,350,000 in attorneys’ fees and expenses.

17 The incentive fee awards of \$3,500 for each of the Class Representatives is likewise
18 reasonable. Six of the seven Class Representatives stepped forward at the outset of this litigation,
19 devoting their time and risking their reputations to ensure that this action could be maintained. The
20 seventh, Dr. Hawthorne, joined in late 2016 to ensure that the interests of class members who were
21 not CDA members were properly represented. Collectively, the Class Representatives have spent
22 considerable time and effort in assisting counsel, reviewing and commenting on settlement
23 documentation, and providing commentary and guidance during settlement negotiations. Each of
24 the Class Representatives has exactly the interest of any other Class member. Each has been
25 provisionally approved by the Court as an appropriate Class Representative. The incentive awards
26 of \$3,500 to each Class Representative, which Delta Dental has agreed to pay, are fully justified
27 under California law, and Plaintiffs respectfully request that these awards be approved.

1 **II. THE ATTORNEYS' FEES REQUESTED ARE SUBSTANTIATED, FAIR AND**
2 **REASONABLE.**

3 The award of attorneys' fees requested in this case is justified, first, because Delta Dental
4 has contractually agreed to pay it. Amended Settlement Agreement § VI. As the record before the
5 Court establishes, after the parties had agreed to all of the essential provisions of the Amended
6 Settlement Agreement, the parties further negotiated the issue of attorneys' fees. Green Decl. ¶ 9.
7 Those negotiations resulted in a written agreement by Delta Dental to pay both the attorneys' fees
8 and the service awards requested in this case, provided the Court approved those fees as fair and
9 reasonable. The amount of fees requested are fair and reasonable, as the evidence presented with
10 this Motion demonstrates. Indeed, given the novelty and complexity of the issues presented by this
11 case, and the substantial amount of legal work required, there is no reasonable doubt that the
12 requested fees are fair and reasonable. No part of these fees reduces the recovery to the Class. The
13 Court should therefore approve the payment of \$2,350,000 in attorneys' fees that Delta Dental has
14 agreed to pay.

15 **A. Plaintiffs' Counsel Reasonably Expended Over 6,800 Hours Prosecuting This**
16 **Case, Incurring Fees Valued At \$3.8 Million.**

17 In prosecuting this case, Class Counsel and employees of Arnold & Porter have worked over
18 6,800 hours over the past 4.5 years – work valued at approximately \$3.8 million. The hours and
19 average hourly rates for these legal services are set forth below:

20

Name	Position	Average Hourly Rate	Hours	Total
Paul Alexander	Sr. Counsel	\$814.39	2,394.60	\$1,950,137.83
Emily Wood	Associate	\$586.76	1,210.25	\$710,125.85
George Langendorf	Associate	\$618.45	261.00	\$161,416.02
Erica Connolly	Associate	\$440.26	344.60	\$151,713.60
Eric Trostad	Legal Assistant	\$307.67	1,678.30	\$516,362.68
Jerome Ferrer	Legal Assistant	\$309	119.50	\$36,928.54
Litinomics	Economic Expert Witness	\$372.23	476.6	\$177,407.00
Resolutions, LLC	Mediator	—	—	\$19,545.78

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1	Milliman, Inc.	Actuarial Expert	\$332.67	175.5	\$58,382.50
2	Consulting Partners ⁴	Partner	\$816	43.0	\$35,088.44
3	Support Personnel ⁵	Various	\$306.61	140.1	\$42,956.43
4	Total			6,843.45	\$3,860,064.67

5
6 Declaration of George Langendorf (“Langendorf Decl.”) ¶ 5.⁶

7 **1. The Hourly Rates For Class Counsel Are Reasonable.**

8 Reasonable hourly rates are determined by the prevailing market rates in the relevant
9 community — *i.e.*, the rates a lawyer of comparable skill, experience and reputation could
10 command in that community. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001); *PLCM Grp., Inc.*
11 *v. Drexler*, 22 Cal. 4th 1084, 1095 (2000) (“The reasonable hourly rate is that prevailing in the
12 community for similar work.”); *see also Blum v. Stenson*, 465 U.S. 886, 895 (1984) (“[R]easonable
13 fees’ . . . are to be calculated according to the prevailing market rates in the relevant
14 community . . .”).

15 The hourly rates sought for the matter averaged approximately \$814 for Paul Alexander, a
16 Senior Counsel (and former partner), \$440 to \$618 for associates, and \$308 for legal assistants.⁷

17
18 ⁴ In addition to the listed individuals, Class Counsel conferred with other firm partners on issues
requiring specific expertise, such as antitrust concerns. Langendorf Decl. ¶ 6.

19 ⁵ In addition to Eric Trostad and Jerome Ferrer, Class Counsel relied on staff attorneys, paralegals,
20 and library staff to assist with discovery, research, filings, and other tasks. *Id.* ¶ 7.

21 ⁶ Class Counsel has not submitted time records in support of this motion. This is consistent with
22 California law, which permits attorney time expended and billing rates to be established by
23 declaration for purposes of fee awards. *See, e.g., Lunada Biomedical v. Nunez*, 230 Cal. App. 4th
24 459, 487-88 (2014) (time records not required; counsel’s declaration sufficient); *City of Colton v.*
25 *Singletary*, 206 Cal. App. 4th 751, 784-85 (2012) (same); *Syers Props. III v. Rankin*, 226 Cal. App.
26 4th 691, 698 (2014) (same); *In re Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495,
27 512 (2009) (same); *Chavez v. Netflix, Inc.*, 162 Cal App. 4th 43, 64 (2008) (same). In light of the
nature of this fee request, which amounts to only 62% of fees actually billed, the fact that counsel’s
fees were reviewed monthly for reasonableness by CDA’s Chief Legal Officer, and the fact that the
agreement concerning fee payment arose from an adversarial mediation process supervised by an
experienced mediator, presentation of the actual billing records is unnecessary. Doing so at this
stage would require expenditure of additional time and effort to redact matter that may be the
subject of attorney-client privilege. Nonetheless, should the Court determine that a need arises for
actual billing records, those records exist and can be provided. *Id.* ¶ 9.

28 ⁷ The chart depicts the average rates for the timekeepers, which reflects the fact that rates changed
at different time periods during the more than four years of this litigation. *Id.* ¶ 3.

1 Langendorf Decl. ¶ 5. All of these rates are consistent with, if not slightly below, the average rates
2 for partners, associates and legal assistants at comparable firms in the Bay Area.

3 Courts frequently look to hourly rate determinations in other matters to assess the
4 reasonableness of rates. *See United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407
5 (9th Cir. 1990) (“rate determinations in other cases, particularly those setting a rate for the
6 plaintiffs’ attorney, are satisfactory evidence of the prevailing market rate”). Courts in the San
7 Francisco area have often approved hourly rates that are even higher than those requested in this
8 case. For example, Judge Orrick of the Northern District of California recently approved fees of
9 Arnold & Porter attorneys at higher rates. *See Wynn v. Chanos*, No. 14-cv-04329 WHO, 2015 WL
10 3832561, at *2 (N.D. Cal. June 19, 2015) (approving associate hourly rates of \$570 to \$710, and
11 partner hourly rates of \$1,035 to \$1,085). Judge Orrick’s holding was in line with other courts’
12 recent determinations regarding the prevailing market rates in the Bay Area. *See, e.g., Banas v.*
13 *Volcano Corp.*, 47 F. Supp. 3d 957, 965–66 (N.D. Cal. 2014) (finding that rates up to \$1,095 per
14 hour were within the prevailing market rates in the Northern District of California); *Logtale, Ltd. v.*
15 *IKOR, Inc.*, No. 11-cv-05452-EDL, 2016 WL 7743405, at *1-2 (N.D. Cal. Oct. 14, 2016) (Valeo
16 database provided the following range of 2016 rates for the Bay Area: Associates—\$600 to \$770;
17 Partners—\$760 to \$1,300; court subsequently approved associate and partner rates within those
18 ranges).

19 The majority of attorney hours devoted to this case were worked by Paul Alexander, who
20 served as lead counsel throughout the entire litigation. The rates for Mr. Alexander’s services are
21 reasonable for an attorney with his expertise and experience. Mr. Alexander has been a member of
22 the California Bar since 1972, and has continuously practiced in the Bay Area since that time.
23 Alexander Decl. ¶ 2. Prior to joining Arnold & Porter, Mr. Alexander was a partner at Heller,
24 Ehrman, White & McAuliffe. *Id.* Mr. Alexander has extensive experience litigating complex
25 commercial matters, including contract and related claims of the type at issue in this case. He also
26 has substantial experience litigating class action lawsuits both in state court and federal court,
27 involving both California and federal law. *Id.* Further, Mr. Alexander brought to the case
28 significant expertise in cases involving the conduct of insurance companies. He has served as lead

1 counsel representing major insurance companies doing business in California in both state court
2 actions regarding its business as an insurer and in regulatory actions before the California
3 Department of Insurance and the California courts. *Id.* Mr. Alexander is an experienced trial
4 attorney and a member of the American College of Trial Lawyers. *Id.* He has been recognized as a
5 Northern California Super Lawyer many times since 2005, as well as a “Best Lawyer” for Insurance
6 Law (2010-2017), Bet-the-Company Litigation (2010-2017), Commercial Litigation (2009-2017)
7 and “San Jose Lawyer of the Year” for Insurance Law (2017).

8 The rates for Emily Wood, the lead associate on this case until her departure from Arnold &
9 Porter in 2017, averaged \$587 per hour. The rates for George Langendorf, who took over for Ms.
10 Wood, averaged \$617 per hour. These rates are within, or slightly lower than, the ranges approved
11 by other courts and the rates identified in the Valeo database,⁸ and supported based on their
12 respective experience. Ms. Wood has been a member of the California bar for more than eight
13 years, and practiced with Arnold & Porter from 2011 to 2017. At the time she provided the services
14 for which compensation is sought in this motion, she had extensive experience handling complex
15 commercial litigations, including contract litigation such as that involved in this case. She also had
16 significant experience handling class actions in both state and federal court. *Id.* ¶ 7.

17 Near the end of the litigation, Ms. Wood left Arnold & Porter to pursue a career as an
18 attorney for the California Court of Appeal, where she serves today. *Id.* That is an unavoidable
19 consequence of a lengthy litigation such as this. In order to ensure continuity and to fill her role,
20 lead counsel asked Arnold & Porter associate George Langendorf to step into the litigation and to
21 serve the role previously served by Ms. Wood. The learning and transition time associated with
22 these events was not billed and is not a part of this fee request. *Id.* ¶ 8. Mr. Langendorf is equally
23 well qualified to serve the role that Ms. Wood had played. Mr. Langendorf has been a member of

24 _____
25 ⁸ Although to the best of plaintiff counsels’ knowledge, this Court has not opined on the Valeo
26 database, the Northern District of California has uniformly found the Valeo database relevant when
27 assessing the reasonableness of rates. *See, e.g., Banas v. Volcano Corp.*, 47 F. Supp. 3d 957, 965
28 (N.D. Cal. 2014) (finding rates set forth in Valeo database to be relevant); *Ferriss v. All. Publ’g,
Inc.*, No. 15-cv-05675-EMC, 2016 WL 7116110, at *14 (N.D. Cal. Dec. 6, 2016) (“[The Northern
District of California] has already found that the rates set forth in Valeo database are relevant.”);
Logtale, Ltd. v. IKOR, Inc., No. 11-cv-05452-EDL, 2016 WL 7743405, at *2 (N.D. Cal. Oct. 14,
2016) (relying on rates contained in the Valeo database for reasonableness).

1 the California bar for more than ten years, and also has extensive experience in commercial
2 litigation and class actions. *Id.*

3 Finally, the rates for the two legal assistants, Eric Trostad and Jerome Ferrer, averaged
4 approximately \$308. These rates are also supported as reasonable by the Valeo database which, as
5 discussed above, courts have cited with approval. This database shows that the average paralegal
6 rate in the San Francisco market for 2015 was \$339. *See Wynn v. Chanos*, No. 14-cv-04329 (N.D.
7 Cal.), Dkt. No. 66-2. Both Mr. Trostad's and Mr. Ferrer's average rates were below this.

8 Eric Trostad served as the lead paralegal on the case, taking primary responsibility for
9 administrative and related tasks that the litigation required. Mr. Trostad was exceptionally well
10 qualified for this role. He has served as senior paralegal in the representation of dozens of
11 companies in multiple cases, including complex commercial cases and class actions. He has served
12 as the managing paralegal for three nationwide consumer class actions. He, along with Mr.
13 Alexander, was also a member of a legal team that received the State Bar of California 2007
14 President's Pro Bono Service award, and another that received the State Bar of California Law Firm
15 Team award 2015. *Id.* ¶ 9.

16 At times when the demands of the case required it, Mr. Trostad was assisted by senior
17 paralegal Jerome Ferrer. Mr. Ferrer is a graduate of U.C. Berkeley and has been a legal assistant
18 since 1989. He has served as lead legal assistant in over 20 complex litigations and has providing
19 support on over 150 matters from 2011 to the present. *Id.* ¶ 9. His background and qualifications
20 are similar to those of Mr. Trostad.

21 There is thus substantial evidence that the rates charged for the services rendered by Class
22 Counsel were fair, reasonable, and directly in line with the relevant market for those services.

23 **2. The Total Number of Hours Worked Is Also Reasonable.**

24 Reasonable hours include time that is "reasonably expended on the litigation." *Hensley v.*
25 *Eckerhart*, 461 U.S. 424, 433 (1983); *Webb v. Bd. of Educ.*, 471 U.S. 234 (1985). This includes
26 time spent on ancillary proceedings closely related to the litigation. 2 Richard M. Pearl, *California*
27 *Attorney Fee Awards* § 9.13 (2016) (citing *Children's Hosp. & Med. Ctr. v. Bonta*, 97 Cal. App. 4th
28 740, 778 (2002)).

1 Class Counsel has represented the plaintiffs in this case from the outset of the litigation. The
2 number of hours spent by Class Counsel is unquestionably reasonable, particularly for a case such
3 as this one that presented difficult and novel legal issues. As reflected in the Alexander
4 Declaration, the hours spent were necessary to prosecute the case successfully on behalf of the
5 plaintiffs and to meet the numerous legal challenges presented by skilled and aggressive adversary
6 counsel. Alexander Decl. ¶¶ 3-6.

7 The prominent role that Mr. Alexander played was necessary and appropriate to the needs of
8 this case. Significant portions of the work involved developing legal theories, responding to
9 aggressive litigations tactics taken by Delta Dental, taking crucial depositions, arguing motions to
10 dismiss, acting as lead counsel in the mini-trial that addressed Delta Dental's motion challenging
11 CDA's standing to bring this action, and presenting plaintiffs' positions at two extensive
12 mediations. Associates supported Mr. Alexander appropriately and well in supervising discovery,
13 including document discovery and interrogatory responses, and in preparation of initial drafts of
14 briefs, as well as other tasks. However, given the unique nature of the legal issues presented in this
15 case, and the need for consistency throughout the litigation, the significant nature of Mr.
16 Alexander's role was necessary and appropriate. *Id.* ¶ 3.

17 Another factor necessitated this role: the vigorous and sophisticated defense presented on
18 behalf of the Defendant. For virtually the entire litigation, Delta Dental was represented by three
19 highly experienced lawyers, Mr. Rosenfeld and Mr. Goldstein, both partners, and Mr. Ullman, who
20 is Of Counsel with the firm of Orrick, Herrington & Sutcliffe, LLP, in addition to associates,
21 paralegals and support personnel. *Id.* At depositions and court hearings, it was common for Delta
22 Dental to be represented by all three of these senior lawyers. The presence of one senior counsel to
23 represent the Plaintiffs throughout this case was therefore entirely reasonable and appropriate.

24 The reasonableness of the hours expended is further confirmed by considering the nature of
25 the legal tasks required by this case. Those tasks can be broken down as follows:

26 ***Investigation and Fact Discovery.*** Class Counsel engaged in written discovery, document
27 production, and depositions in prosecuting this case. These were essential to establishing the
28 factual merit of the case and to the successful result achieved. For example, one result of these

1 discovery efforts was the discovery and confirmation of Delta Dental’s application of the INAP,
2 which formed the basis of the monetary component of the Proposed Amended Settlement.
3 Alexander Decl. ¶¶ 4-5.

4 ***Expert Discovery.*** The parties were required to retain and work with experts originally in
5 connection with Delta Dental’s motion to dismiss the arbitration. Class Counsel then retained
6 another expert in connection with Delta Dental’s challenge to CDA’s associational standing. In
7 connection with that discovery, the parties prepared expert reports and took multiple rounds of
8 expert depositions, which culminated in identifying key pieces of expert testimony for presentation
9 at the bench trial on associational standing. Both parties also retained economic experts in
10 connection with the recalculation of the INAP impact, and Class Counsel have worked extensively
11 with and relied upon their expert in forming the plan of allocation and distribution. *Id.* ¶ 6.

12 ***Motion Practice.*** Delta Dental attacked the pleadings in this matter multiple times,
13 requiring Class Counsel to devote extensive resources to defend the claims. Class Counsel’s efforts
14 included legal and factual research and drafting, editing, communicating with plaintiffs, and
15 determining sound strategies for advancing and pursuing the claims on behalf of the plaintiffs and,
16 eventually, the Class. *Id.* ¶¶ 4-5.

17 ***Settlement Negotiations.*** Class Counsel also devoted a considerable amount of time and
18 energy in connection with the adversarial mediations that ultimately brought about the settlement of
19 this litigation. The first mediation session took place on March 30, 2016. Prior to the mediation,
20 the parties provided the mediator with extensive documents and mediation statements.
21 Unfortunately, the full-day session ended without resolution. The parties continued to work with
22 the mediator for numerous months, during which numerous proposals and counter-proposals were
23 made. Finally, the parties agreed on broad terms for a settlement. It then took the parties until
24 March, 2017, to reach agreement on all associated terms and issues. Thereafter, as described above,
25 the Parties recalculated the amount of INAP impact, a process that involved generating expert
26 reports, deposing one another’s experts, and ultimately another full-day mediation that finally led to
27 the Proposed Amended Settlement. *Id.* ¶ 7.

1 Based on the length of this litigation (well over four years), the substantial activity required,
2 including discovery, extensive motion practice, a bench trial, and two adversarial but ultimately
3 successful mediations, the number of hours sought in connection with the fee request is reasonable.

4 **B. The Court Should Approve The Agreed-Upon Legal Fees Of \$2,350,000.**

5 California courts generally award attorneys' fees pursuant to the agreement of the parties
6 involved. California Code of Civil Procedure Section 1021 provides that "[e]xcept as attorneys'
7 fees are specifically provided for by statute, the measure and mode of compensation of attorneys
8 and counsels at law is *left to the agreement*, express or implied, of the parties." Code Civ. Proc
9 § 1021 (emphasis added). California courts traditionally defer to fee agreements between parties if
10 the agreement is otherwise valid. *Cazares v. Saenz*, 208 Cal. App. 3d 279, 287 (1989).
11 Additionally, the U.S. Supreme Court has opined: "A request for attorneys' fees should not result in
12 a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley v.*
13 *Eckerhart*, 461 U.S. at 437.

14 In this case, there is a further substantial reason why the agreed upon fee amount of
15 \$2,350,000 should be approved: the parties separately negotiated the fee amount to ensure that the
16 recovery by the Class was preserved, not diminished, by the payment of attorneys' fees. Green
17 Decl. ¶ 9. Had the parties not addressed this issue explicitly, plaintiffs' counsel could, and
18 necessarily would, have sought an award of attorneys' fees under California Code of Civil
19 Procedure 1021.5, or the common fund doctrine, using either the lodestar or percentage-of-recovery
20 method to establish reasonableness of the requested fees. As set forth below, there is every reason
21 to believe that the attorneys' fees award under either approach would be higher than \$2,350,000.
22 Indeed, under the lodestar approach, even at a small multiplier of 1.5, a request for attorneys' fees
23 exceeding \$5.6 million would have been justified. Further, if sought under the common fund
24 doctrine, any such fee award would necessarily have been paid out of the total class monetary
25 recovery. Had that been done, the total amount paid to the class would have been significantly
26 reduced.

27 Instead, the parties chose a different course – one significantly more advantageous to the
28 Class. Delta Dental specifically agreed "not to oppose and to pay an award of attorneys' fees an

1 award of Attorneys' Fees and Expenses up to two million three hundred and fifty thousand dollars
2 (\$2,350,000), separate and apart from delta Dental's payment of the Amended Settlement Amount."
3 Amended Settlement Agreement § VI.1. In other words, Delta Dental entered into a written
4 agreement to pay \$2,350,000 in attorneys' fees and costs over and above its agreed upon payment
5 of the \$65,029,299 Amended Settlement Amount, provided only that the Court approve the
6 payment. In so doing, the parties structured the payment of attorneys' fees in a way that protects
7 the interests of the Class and enhances the total monetary recovery of the Class. In the declarations
8 filed with this motion, Plaintiffs' counsel has established that fees of significantly more than the
9 \$2,350,000 were actually and reasonably incurred. The current request for approval of the
10 \$2,350,000 agreed-upon fee payment is significantly lower than the lodestar amount of \$3,860,064.
11 Moreover, it constitutes an amount equal to roughly 3.6% of the agreed upon monetary recovery.
12 The agreed-upon fee award of \$2,350,000 should therefore be approved by the Court.

13
14 **C. The Request for Fees and Costs Is Plainly Justified Under the Lodestar
Approach To Determining Appropriate Fees for Class Counsel.**

15 Although the agreed upon attorneys' fees are demonstrably reasonable and in the best
16 interests of the Class, the fact that that the fee request is fair and reasonable is further confirmed by
17 viewing the request under the traditional methods for considering attorneys' fees in a class action.
18 In California, the prevailing method for measuring the reasonableness of a fee request in a class
19 action is the "lodestar" method. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131-32 (2001). This
20 approach entails calculating the time spent and the reasonable hourly compensation of the attorneys
21 and paralegals who worked on the matter, and then applying a "multiplier" based on various factors
22 such as risk, quality and result. *Id.* at 1132-33. Applying the lodestar method here further confirms
23 the reasonableness of the requested fees.

24 As set forth above, total fees and expenses through February 1, 2018 amounted to
25 \$3,860,064.67. The current fee request seeks approximately 62% of that amount. This discount
26 was negotiated as part of the Proposed Amended Settlement, with the intention of avoiding any
27 potential disputes over the reasonableness of Class Counsel's rates or the hours spent, and
28 maximizing the recovery for the Class. As set forth above, both the hourly rates and the number of

1 hours spent on this matter were reasonable and would likely support a fee award of the entire
2 amount, and possibly even a multiplier thereof.⁹

3 Despite the fact that a multiplier under the “lodestar” approach is well warranted by the
4 work performed and results achieved in this case, no multiplier is sought. Instead, the attorneys’
5 fees sought by this motion amount to only 62% of the lodestar. This is consistent with the
6 agreement that the parties reached at the conclusion of the negotiations that led to the Amended
7 Settlement Agreement. It is also consistent with the efforts of both CDA as class representative to
8 support this action on behalf of Class members and to do everything possible to preserve the
9 monetary recovery for the benefit of Class members.

10 Courts often approve significant multipliers in litigation such as this. This case presented
11 novel legal issues. From the outset, there was substantial risk as to the outcome of the case. The
12 defendants presented an aggressive defense which necessary required time consuming and intense
13 legal work by Class counsel. Alexander Decl. ¶¶ 3-6. In cases of this sort, multipliers of two or
14 more are often approved. *See, e.g., Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255
15 (2001) (multipliers can range from two to four or even higher); *State v. Meyer*, 174 Cal. App. 3d
16 1061, 1073 (1985) (“[f]ederal cases disclose the use of multipliers of from one to five times the
17 hourly rate.”); *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 24-25, 52 (2000) (trial
18 court’s refusal to enhance the lodestar as part of a fee award was an abuse of discretion, and opining
19 that a multiplier in excess of 3 was reasonable).

20 Thus, when measured by the lodestar method for evaluating the reasonableness of a request
21 for attorneys’ fees in a class action, the \$2,350,000 request is plainly reasonable. If anything, it is
22 low. Plaintiffs therefore respectfully request that the Court approve the request.

23
24
25 ⁹ In addition, throughout the litigation, Class Counsel benefitted from the legal work done by Ms.
26 Sandman, Chief Legal Officer of CDA. Ms. Sandman attended depositions and court hearings. She
27 reviewed and commented on legal briefs. She discussed and participated in major strategy
28 decisions. And she played a major role in the mediations that led to the settlement. Sandman Decl.
¶¶ 2-7. The Class has benefitted significantly from the role she played. Yet no compensation is
requested for Ms. Sandman’s time. *Id.* ¶ 7. This fact further supports the reasonableness of the
request for attorneys’ fees in this case.

1
2 **D. The Requested Fee Award Is Also Reasonable Under the Percentage-of-
Recovery Approach to the Determination of Class Action Legal Fees.**

3 The fee award sought by this motion is equally reasonable under the percentage-of-recovery
4 approach to determining class action legal fees. The Amended Settlement Agreement
5 unquestionably achieved an excellent result for the class, which includes \$65,029,299 in monetary
6 recovery as well as significant non-monetary relief. The current \$2,350,000 fee request amounts to
7 only 3.6% of the \$65,029,299 in direct, monetary recovery that Class Counsel obtained for Class
8 members. This percentage is well below those that are commonly approved in common fund
9 settlements. What is more, in this case the requested legal fees will be paid *in addition* to the
10 \$65,029,299. Considered from any perspective, this is a superior result at an extraordinarily low
11 cost, which will be borne primarily by the Defendant, not the Class.

12 In applying the percentage-of-recovery method, courts consider factors including the results
13 achieved; the risks of litigation; the skill required and the quality of work; and awards made in other
14 similar cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002). In this case,
15 these factors strongly support the reasonableness of the requested fee.

16 **1. Class Counsel Achieved An Excellent Result For The Class.**

17 The Proposed Amended Settlement provides significant monetary and non-monetary
18 benefits to Class members. As detailed more fully in the Motion for Preliminary Approval of the
19 Proposed Amended Settlement, Class Members were frequently frustrated with the “black box”
20 from which their fees were determined. *See* Mot. for Prelim. Approval of Amended Settlement, at
21 18. The Proposed Amended Settlement addresses this by requiring Delta Dental to provide 120
22 days advance notice and individualized financial information regarding the impact of any future fee
23 changes, which will allow dentists to make intelligent and informed decisions regarding how to best
24 manage their practices. *Id.* at 16-17. In addition, the monetary component of the Proposed
25 Amended Settlement is designed to compensate Class Members whose fees were improperly set at a
26 lower rate during the period from January 1, 2011 through September 15, 2017, because of Delta
27 Dental’s application of the INAP. This monetary component of the settlement was originally
28 \$34,750,000, but during the performance of Class Counsel’s due diligence to determine the

1 reasonableness of the allocations of this amount, a significant error was discovered in the
2 methodology employed by Delta Dental to arrive at the estimate of the total monetary impact of the
3 INAP. Alexander Decl. ¶ 5. Delta Dental recognized this problem and, to its credit, agreed to
4 renegotiate the cash settlement amount after additional discovery was completed. *Id.* The fact
5 remains, however, that had Class Counsel not engaged in vigorous due diligence in this case, this
6 error would likely have gone undiscovered. *Id.* Class Counsel discovered the evidence regarding
7 Delta Dental’s application of the INAP that led to Delta Dental’s agreement to pay substantial cash
8 settlement and then, even after an initial agreement on the amount of the payment , exercised the
9 due diligence that resulted in an increase of the cash component of the settlement from \$34,750,000
10 to \$65,029,299. *Id.*

11 Furthermore, because the parties are able to use Delta Dental’s business records to identify
12 which Class Members were impacted by the application of the INAP during the relevant period, and
13 the amount of that impact, Class Members will not be required to submit claims forms or otherwise
14 take any affirmative steps to receive compensation. Rather, all Class members who do not opt out
15 will automatically receive payments proportional to the amount that they were harmed by the INAP,
16 according to Delta Dental’s records.¹⁰ As a result, the parties anticipate that almost all of the
17 settlement fund will be distributed to the Class.

18 Given both the quantity and quality of the relief afforded the Class, this “most critical
19 factor” in approving the percentage award strongly favors the requested fee. *Hensley v. Eckerhart*,
20 461 U.S. at 436 (the “most critical factor is the degree of success obtained”).

21 **2. The Settlement Was Achieved Despite Substantial Risks.**

22 The recovery and relief obtained by Class Counsel is more noteworthy given the risks that
23 were present from the outset of the case. First, Class Counsel had to defend against numerous
24 efforts by Delta Dental to dismiss the matter at the pleading stage, both initially in an arbitration,
25 and then again in the lawsuit. Alexander Decl. ¶¶ 3-6. Then, Class Counsel was required to engage
26 in both party and expert discovery, and to participate in a bench trial on the issue of associational

27 _____
28 ¹⁰ Class members who would receive less than \$500 will be allocated the minimum payment of
\$500, an approach adopted to prevent paying out *de minimis* recoveries.

1 standing and to obtain a proposed decision in plaintiffs’ favor, before Delta Dental was open to
2 mediating the dispute. *Id.* From there, it took multiple sessions with a highly experienced mediator
3 and numerous months of expert work and negotiations before the Proposed Amended Settlement
4 was finally reached. *Id.*

5 Throughout this process, Class Counsel was faced with considerable risks. For example, in
6 connection with non-monetary claims, the evidence showed that the language in dispute—which
7 Class Counsel asserted prevented Delta Dental from making certain revisions to the PDA—had only
8 existed in the PDA since January, 2011, and that this language was itself the product of an
9 amendment to the PDA, effective January 1, 2011. SAC ¶¶11-13. This created a risk that the Court
10 might decide that a subsequent amendment to this same language less than three years later was
11 lawful and not a breach of either the PDA itself or the covenant of good faith and fair dealing
12 inherent in the PDA. In addition, discovery produced evidence that a substantial number of the
13 “Premier-only” dentists who had PDA’s with Delta Dental had, by the time of the challenged
14 amendments, already agreed to provide the same dental services for other insurers at significantly
15 lower fees by joining the “PPO networks” of competing insurers. *See* 12/14/2017 Mot. for Prelim.
16 Approval of Amended Settlement, at 14.

17 With respect to the monetary claims, the original lawsuit, brought by CDA on behalf of its
18 members, was premised on associational standing, meaning that the relief available was only
19 injunctive and declaratory in nature. By converting the case to a class action, Class Counsel was
20 able to seek and negotiate for a substantial amount of monetary relief for the Class.

21 Class Counsel was able to overcome these risks and others, as outlined in the Motion for
22 Preliminary Approval of the Amended Settlement, to achieve an excellent result on behalf of the
23 Class. As a result, this factor strongly supports the reasonableness of the requested fee.

24 **3. The Issues Were Complex And The Legal Work of High Caliber.**

25 As described above, the case presented numerous challenging legal issues, such as the
26 question of associational standing and numerous issues of contract interpretation. In navigating
27 these challenges, Class Counsel consistently prepared thoughtful and thorough work on behalf of
28 Plaintiffs and the Class. The briefing and argument in this matter, the favorable terms of the

1 Proposed Amended Settlement, and the result obtained from the bench trial on associational
2 standing is evidence of this. The settlement negotiations in this matter were likewise difficult, and
3 Class Counsel negotiated a favorable settlement against a difficult and determined adversary, again
4 as evidenced by the Proposed Amended Settlement.

5 In evaluating Class Counsel’s work, it is also proper to consider the quality of opposing
6 counsel and the resources they applied to this case. *See Barbosa v. Cargill Meat Sols. Corp.*, 297
7 F.R.D. 431, 449 (E.D. Cal. 2013) (“The quality of opposing counsel is important in evaluating the
8 quality of Class Counsel’s work.”); *Wing v. Asarco Inc.*, 114 F.3d 986, 988–89 (9th Cir. 1997)
9 (approving a 2.0 fee multiplier and noting “the quality of the [defendant’s] opposition”). In this
10 case, Defense counsel included three partners and an associate from the prominent defense firm
11 Orrick, Herrington & Sutcliffe, LLP, who zealously litigated the claims and defenses and would
12 have continued to do so absent their resolution. The fact that Class Counsel reached the Proposed
13 Amended Settlement in the face of such high-quality opposing counsel means that this factor, too,
14 strongly supports the requested fee.

15 **4. The Fee Request Is Below The Benchmark Set By Other Cases.**

16 The percentage of the recovery requested by Class Counsel here — approximately 3.6% —
17 is far lower than the percentage usually granted in common fund cases, which routinely falls
18 between 25% and 30% of the recovery. *See, e.g., Chavez v. Netflix*, 162 Cal. App. 4th 43, 66 n.11
19 (2008) (approving fee award amounting to 27.9% of the benefits to the class); *In re Consumer*
20 *Privacy Cases*, 175 Cal. App. 4th 545, 557 n.13 (2009) (endorsing 25% benchmark for fee awards);
21 *Lealao*, 82 Cal. App. 4th at 24 n.1 (citing cases showing that a 25% benchmark award should be
22 provided in common fund cases).

23 Here, such a percentage would have justified a fee request in the range of \$15,000,000 to
24 \$20,000,000. The requested fee of \$2,350,000 is lower than this by an order of magnitude, and was
25 negotiated with a view to obtaining agreement to the Proposed Amended Settlement and ensuring
26 that it maximized recovery for the Class members. Further, as noted above, any fees, expenses and
27 incentive awards awarded by the Court will be paid by Delta Dental on top of the amount recovered
28 for the Class. This factor thus also clearly supports the reasonableness of the fee request.

1
2 **III. THE REQUESTED INCENTIVE AWARDS TO THE SEVEN CLASS REPRESENTATIVES ARE FAIR AND REASONABLE.**

3 California law supports service awards in order to provide reasonable incentives for class
4 representatives to serve this function and to compensate them for the time and risks they incur. *See*
5 *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 806 (2009) (approving the rationale
6 behind awarding participation payments); *see also Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th
7 715, 726 (2004) (affirming an order for “service payments” to the five named plaintiffs for their
8 efforts litigating the case); *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th 1380, 1395
9 (2010) (awarding \$10,000 each to two named plaintiffs); *Van Vranken v. Atl. Richfield Co.*, 901 F.
10 Supp. 294, 299-300 (N.D. Cal. 1995) (awarding \$50,000 to the named plaintiff).

11 Courts routinely approve incentive awards in amounts significantly greater than the awards
12 requested in this case. *See, e.g., Clark*, 175 Cal. App. 4th at 806 (approving the rationale behind
13 awarding participation payments); *Bell*, 115 Cal. App. 4th at 726 (affirming an order for “service
14 payments” to the five named plaintiffs for their efforts litigating the case). These awards recognize
15 that class representatives perform a public service through their willingness to step forward and
16 represent the Class. Approval of these awards is warranted as a matter of public policy and
17 appropriate under applicable precedents. *See, e.g., In re Cellphone Fee*, 186 Cal. App. 4th at 1395
18 (awarding \$10,000 each to two named plaintiffs); *Van Vranken*, 901 F. Supp. at 299-300 (awarding
19 \$50,000 to the named plaintiff).

20 Courts consider the following relevant factors when assessing the appropriateness of an
21 incentive payment: “1) the risk to the class representative in commencing suit, both financial and
22 otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the
23 amount of time and effort spent by the class representative; 4) the duration of the litigation, and; 5)
24 the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.”
25 *In re Cellphone Fee*, 186 Cal. App. 4th at 1394-95 (quoting *Van Vraken*, 901 F. Supp. at 299).

26 Here, these factors support an incentive payment to the individual Class Representatives.
27 First, the individual Class Representatives undertook significant risks a result of bringing this case.
28 The individual Class Representatives did not know how Delta would react to the lawsuit.

1 Individual Plaintiffs put their contracts with Delta—as well as the income they earn as a Premier
2 Dentist—at risk. Second, the individual Class Representatives have spent significant time and
3 effort reviewing documents, working with counsel, reviewing pleadings, providing declarations and
4 discussing facts, discussing the claims, discussing the potential settlement, and the like. They have
5 also actively reviewed the documentation regarding a potential settlement. Many have raised
6 questions and all have participated in a timely and helpful manner indicating they are active and
7 suitable class representatives. Third, resolution of this matter has not been quickly achieved;
8 rather, the individual Class Representatives (apart from Dr. Hawthorne, whose participation was
9 crucial to ensuring representation of non-CDA members) have been involved in this matter since
10 mid-2013.¹¹

11 Further, while the amount that Class members will receive varies substantially, the average
12 allocation is currently estimated to be approximately \$4,500. The proposed \$3,500 incentive
13 payment to the individual Class Representatives is appropriate in light of this average, and is
14 miniscule compared to this settlement fund of \$65,029,299. *See Munoz v. BCI Coca-Cola Bottling*
15 *Co.*, 186 Cal. App. 4th 399, 412 (2010) (holding that one indicator courts use to assess the
16 reasonableness of the participation payment amount is the payment amount relative to what the
17 other Class members will receive). Class members will also receive significant non-monetary
18 benefits, including 120-day notice of contract changes and an individualized financial analysis from
19 Delta Dental regarding the financial impact of any future fee change.

20 **IV. CONCLUSION**

21 For the foregoing reasons, Plaintiffs request that the Court grant Class Counsel’s request for
22 an award of attorneys’ fees and expenses in the amount of \$2,350,000, and grant the individual
23 Class Representatives’ requests for incentive awards in the amount of \$3,500 each.

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27 ¹¹ *See* Declarations of Whitney Johnson, Barbara M. Hawthorne, Gerald Middleton, Dean
28 Schweitzer, Richard W. Barnes, Robert E. Reed, and Terrence Y. Lau In Support of Motion For
Attorneys’ Fees And Incentive Awards.

1 Dated: February 16, 2018
2

ARNOLD & PORTER KAYE SCHOLER
LLP

3 By: /s/ Paul Alexander
4 Paul Alexander

5 Attorneys for Plaintiffs and the Class
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