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7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 CITY AND COUNTY OF SAN FRANCISCO

10 CALIFORNIA DENTAL ASSOCIATION, a
California Corporation;
11 RICHARD W. BARNES, D.D.S.;
ROBERT E. REED, D.D.S.;
12 DEAN SCHWEITZER, D.D.S.;
GERALD MIDDLETON, D.D.S.;
13 WHITNEY JOHNSON, D.D.S.;
TERRENCE Y. LAU, D.D.S.,
14 BARBARA M. HAWTHORNE, D.D.S.,
individually and on behalf of all others
15 similarly situated,

16 Plaintiffs,

17 vs.

18 DELTA DENTAL OF CALIFORNIA, a
California Corporation,

19 Defendant.
20

No.: CGC-14-538849

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SUPPLEMENTAL
ATTORNEYS' FEES**

Hearing Date: November 16, 2018
Time: 11:30 a.m.
Judge: Hon. Mary E. Wiss
Dept.: 305

1 **I. INTRODUCTION**

2 By this Motion, Class Counsel seeks a supplemental award of attorneys' fees incurred in the
3 unanticipated and substantial additional legal work required to administer the payment of the
4 Amended Settlement Amount ("Settlement Fund") in this case and to respond to and resolve the
5 many hundreds of questions, inquiries and requests from members of the Class concerning their
6 allocations of the Settlement Fund. The source of the payment for this supplemental award sought
7 is the interest earned on the Settlement Fund since it was deposited by Delta Dental. The amount of
8 the award sought is \$200,000 which is less than the amount of interest earned on deposit of the
9 Settlement Fund in the escrow account, currently estimated to be no less than \$247,000 as of the
10 date of the hearing on this Motion. The award sought is *less* than the actual attorneys' fees
11 expended in doing this work on behalf of the Class.¹ None of this fee will reduce recovery to the
12 Class. As set forth below, this award is well justified by the extraordinary extra effort of Class
13 counsel in administering hits complex settlement allocation.

14 At the time the Amended Settlement Agreement was negotiated and signed, the parties
15 initially contemplated that Delta Dental would take on the task of allocating the Settlement Fund.
16 Near the end of the process, however, it was agreed that Delta Dental would pay the entire
17 Settlement Fund into the escrow account and leave the allocation and administration of the
18 Settlement Fund to the Class Notice Administrator and Class Counsel. Appendix 4 of the Amended
19 Settlement Agreement provides that any interest earned by the escrow account may be distributed
20 by this Court's Order. It also states that expenses and costs incurred in connection with
21 administration and operation of the Settlement Fund, including "expenses of attorneys," shall be
22 paid from the Settlement Fund, which includes, by reference, the interest earned on the Settlement
23 Fund after it was placed in escrow.

24 Now, in light of the substantial and unanticipated nature of the additional legal cost incurred
25 by Class Counsel in finalizing the allocation and in addressing an enormous volume of questions
26

27 ¹ This amount, and this request, specifically excludes any interest earned on amounts that are held
28 because the allocation is disputed by Class members and/or their group practices, consistent with
paragraph 9 of Appendix 3 to the Amended Settlement Agreement.

1 from Class members during the very period this interest arose, it is both fair and proper that a
2 substantial part of this interest be directed to paying at least a portion of the unusual legal costs
3 required to allocate and payout this Settlement Fund. These fees all directly benefit the Class,
4 because the fees have been incurred in doing the additional and unanticipated legal work required to
5 develop and implement the complex allocation and to respond to the huge volume of questions and
6 inquiries from Class members. This work was done as efficiently as possible, with routine
7 questions answered by the Class Notice Administrator, Rust Consulting. But Class Counsel have
8 been called upon to respond to many hundreds of inquiries, questions and issues raised by Class
9 members, the nature of which made it essential that these issues be addressed by Class Counsel.

10 In a typical class action, substantially all of the attorney and expert work is done during the
11 merits stage of the case. Generally, the payout of the settlement is primarily an administrative task
12 that can be accomplished by the class administrator. That turned out not to be true in this case. The
13 fees previously requested and awarded by the Court were, as the Court noted in its Order, were both
14 reasonable and actually *less* than the actual fees incurred in the case. Equally important, those fees
15 contained nothing to address any additional work that turned out to be necessary to administer the
16 Settlement Fund and, in particular, respond to the large volume of Class member objections,
17 questions and inquires. The Motion for Attorneys' Fees filed by Plaintiffs and granted by the Court
18 sought compensation only for fees incurred during the litigation and settlement-negotiation phases
19 of the case, and did not seek compensation for additional time necessary to administer the
20 Settlement Fund.

21 Determination of the allocations themselves turned out to be complex because Class
22 members often had complex work histories. They worked individually at times, for a group practice
23 at times, and for different group practices at different times. One Class member, for example,
24 worked for 33 different group practices during his career, making it necessary to determine how
25 much of his settlement allocation arose during the period he worked for each separate group. Many
26 class members worked for multiple group practices, even though not as many as 33. This meant
27 that, in order to effectuate the terms of the Amended Settlement Agreement and the Amended Plan
28 of Allocation, it was necessary to determine not only the total the allocation for each Class member

1 but also the amount of that allocation that arose during the time he or she worked for each different
2 group practice. This process had to be completed for each class member, many of whom had
3 worked for several group practices during the class period. As it turned out, this required complex
4 programming that had to be tested and checked multiple times to ensure that it was accurate. This
5 process proved to be significantly more complex and time-consuming than was originally
6 anticipated.

7 Moreover, the task of responding to Class members who had questions or explanations
8 concerning their allocations has required an extraordinary amount of unanticipated time and
9 expense. Class members have responded to their allocation notices in large numbers via email,
10 phone and by letter. A significant number of these responses took the form of formal objections to
11 the allocations. One group practice, for example, submitted 476 objections on behalf of the 476
12 dentists who had worked for that group practice during the class period. This required Class
13 Counsel and the expert retained to perform the allocation to go back to the database for each of
14 these 476 dentists and respond with the underlying data for each. This was done and all of this
15 group practice's 476 objections have been resolved, but the process was difficult and time
16 consuming and necessarily required the expenditure of considerable attorney and expert time.

17 Class counsel also received over a hundred other separate inquiries from individual class
18 members about a wide range of issues, such as the amount of the allocation, the basis for it, the size
19 of one Class member's allocation relative to another Class member's allocation, or the lack of an
20 allocation. Some of these inquiries raised special situations, such as where a Class member
21 receiving an allocation is deceased, or retired, or has sold his or her practice to another dentists. In
22 these cases, Class members required extra assistance in determining who would receive the
23 settlement allocation under the current allocation model, and in understanding their rights, if they
24 wished to object. For each inquiry, the underlying claims of the Class member had to be reviewed
25 and analyzed and then explained to the Class member. The conversations with the Class members
26 themselves were often lengthy, and in some cases multiple calls or emails were required.

27 At the same time that this work was being performed, interest began accruing on the
28 Settlement Amount, which Delta Dental had deposited into the Qualified Settlement Fund on or

1 about August 3, 2018. By the date of the hearing on this Motion (November 16), the amount of
2 interest that will have accrued is estimated to be \$247,432.98.² The existence of this interest was
3 unexpected, in part for the same reason that Class counsel did not anticipate incurring such
4 substantial additional fees: the Parties did not foresee the extent of the time and effort that would be
5 required to allocate the Settlement Amount and respond to Class member objection and inquiries, or
6 the corresponding delay is distributing the entirety of the Amount. This is evident from the fact that
7 there is no provision in the Amended Settlement Agreement providing for whether the QSF should
8 even be in an interest-bearing account, much less dictating what should be done with the interest
9 (with the exception of Appendix 4, which does not mandate any specific use of the interest, but
10 supports the attorneys' fees award requested by this Motion). Further, there is no practical way to
11 allocate the interest amongst the Class, because the time, effort and cost associated with doing so
12 would be swamp the small additional payments that class members would receive.

13 Accordingly, by this motion, Plaintiffs' request that a portion of the interest on the
14 Settlement Fund be used to compensate Class Counsel for attorneys' fees incurred in allocating the
15 Settlement Amount amongst the class, and responding to Class member objections and inquiries.
16 This is an equitable result, because it compensates Class Counsel for work necessarily done at the
17 request of and on behalf of Class members. It does not reduce the recovery of any Class member.
18 The requested is a reasonable and limited one, and supported by the same analysis underlying the
19 Court's Order approving attorneys' fees for the legal work previously done on behalf of the Class.

20 **II. BACKGROUND**

21 The Amended Settlement Agreement provided that Delta Dental would not contest an
22 application for attorneys' fees by Class Counsel for an amount of up to \$2,350,000, and would pay
23 this amount, if awarded by the Court, over and above the Amended Settlement Amount. *See*
24 Amended Settlement Agreement § VI. On February 16, 2018, Class Counsel filed its Motion for

25 _____
26 ² *See* Langendorf Declaration, ¶ 2. The interest is continuing to accrue but in smaller amounts,
27 since checks for approximately \$60,000,000 of the Settlement Fund have now been mailed out.
28 Plaintiffs and Class Counsel are not requesting the full amount of the Interest be paid as attorneys'
fees at this time, but may approach the Court for additional payments from the interest, depending
on the work that is required to resolve the outstanding issues associated with the allocation and
distribution of the Settlement Fund, such those presented by Class members that are deceased.

1 Attorneys' Fees and Incentive Awards, requesting that the Court award \$2,350,000 in attorneys'
2 fees. On April 30, 2018, the Court entered an Order granting Class Counsel's fee request.
3 4/30/2018 Order Granting Plaintiffs' Motion For Approval Of Attorneys' Fees ("Attorneys' Fees
4 Order"). In the Attorneys' Fees Order, the Court found under the common fund method, Plaintiffs'
5 attorneys' fees were "approximately 3.6% of the monetary component of the Amended Settlement,"
6 an amount it described as "well below the percentage of fees typically awarded in class actions."
7 *Id.* ¶ 1. The Court further found that Class Counsel's lodestar was \$3,604,729.39, more than a
8 million dollars higher than the requested fee award. It also noted that that under the Settlement
9 Agreement, the attorneys' fees "did not come from the settlement fund, but will be paid by
10 defendant in addition to the Amended Settlement Amount, and therefore will not reduce recovery of
11 the class." *Id.*

12 In its Final Approval Order, the Court stated that "[t]he Class Notice Administrator will
13 cause the above sum to be deposited in *either an interest-bearing or a non-interest bearing account*
14 at a national bank, as approved by Class Counsel and counsel for Delta Dental." *See* 5/2/2018
15 Corrected Order Granting Plaintiffs' Motion For Final Approval Order ¶ 9 (emphasis added). It
16 then ordered, in summary terms, that "[a]fter Class Counsel determines each Settlement Class
17 member's allocation from the Settlement Amount, the Class Notice Administrator will issue checks
18 from the QSF to Settlement Class members and/or dental group practices in accordance with the
19 same terms described in the Amended Plan of Allocation and Distribution." *Id.* Nothing in the
20 Court's Order contains specific direction for how the payment of interest on the Amended
21 Settlement Amount would be paid, since at the time it was not known whether there would be any
22 such interest.

23 The Amended Settlement Agreement briefly addresses the issue in Appendix 4, and does so
24 in a manner that is fully consistent with the fee award requested in this motion. *See* Appendix 4 ¶¶
25 5-6 (providing that any interest on the Settlement Fund is in the legal custody of the Court and shall
26 remain there pending distribution per the Plan of Allocation, or further Order of the Court); ¶ 11
27 (stating that "all of the following shall be paid out of the Settlement Fund: . . . expenses and costs
28 incurred in connection with the administration, operation and implementation of the Settlement

1 Fund . . . including, without limitation . . . **expenses of attorneys** or accountants . . .”) (emphasis
2 added). Thus, the award sought by this Motion is consistent with the terms of the Amended
3 Settlement Agreement.

4 **III. ADMINISTERING THE SETTLEMENT FUND AND ADDRESSING CLASS**
5 **MEMBER QUESTIONS, INQUIRIES AND OBJECTIONS HAS REQUIRED**
6 **SUBSTANTIAL ATTORNEY AND EXPERT TIME, FAR BEYOND ANYTHING**
7 **THAT WAS PREVIOUSLY ANTICIPATED.**

8 **A. Determining The Allocation For Each Class Member and Group Practice**
9 **Proved To Be Far More Complex Than Anticipated.**

10 After the Final Approval Order, Class Counsel directed its expert, Litinomics, to generate
11 the allocation model that would provide the information necessary to provide Class members with
12 the notices of their allocations required in terms of Appendix 3 to the Settlement Agreement.

13 As Class Counsel and the expert developed the allocation method in detail, the level of
14 complexity it entailed began to emerge. For example, while some Class members worked
15 essentially as solo practitioners, many others worked for multiple different group practices during
16 the relevant period. Further, there were many group practices that had been staffed by multiple
17 different providers over time. As a result of this, Class Counsel determined that the allocation
18 amounts for class members had to be broken down further, in order to identify the percentage of the
19 allocation attributable to services performed at each of a number of different groups. And,
20 correspondingly, allocations to group practices also had to be broken down, in order to identify
21 what amount of the total allocation was attributable to work done by what Class member. This
22 effort was further complicated by the fact that many Class members incurred INAP impact both
23 individually, *i.e.*, for services performed at their own group practices, and while working for one or
24 more group practices. The Plan of Allocation provides that, for these Class members, the portion of
25 their allocation arising from service performed for their own practice group would be sent to them,
26 while the portion arising from services performed for other practice would be sent to those practices
27 (absent objection), and so these had to be separately identified, and notice provided of them.

28 The creation and validation of a model that would accurately accomplish the required
allocation required extensive work from Class Counsel and Plaintiffs’ expert. Ultimately, it proved
necessary to determine INAP impact on a claim-by-claim basis using the records in the Delta Dental

1 database for each Class member, in order to trace each individual claim submitted by each provider
2 that was limited by the INAP, and to thereby determine which portions of allocations of individual
3 Class members should be sent to them, and which would be attributed to groups. This ensured that
4 INAP impact was appropriately allocated for both individual Class members and the practice
5 groups, but was done at substantial cost. During the month of June alone, for example, Litinomics
6 spent 68.3 hours, predominantly on the allocation model, which cost \$24,588.00 (after the
7 negotiation by Class Counsel of a \$9,000 discount). This was on top of 39.7 hours spent in May,
8 which cost an additional \$14,292.00. Langendorf Decl. ¶¶ 4,5.

9 **B. Responding to Class Member Objections, Questions and Inquiries About the**
10 **Allocations Has Required Extensive Amounts of Time and Effort From Class**
11 **Counsel and the Expert.**

12 Based on the work described above, over 15,000 allocation notice letters were mailed to
13 Class members and group practices via first class mail beginning on July 16, 2018. Although this
14 was the result of substantial expert and attorney work, it was only the beginning of the effort that
15 would be required. Shortly after the notices were mailed, Class Counsel began to receive a large
16 number of objections, questions and inquiries from Class members. Many of these were beyond the
17 ability of the Class Notice Administrator to address, and thus were forwarded to Class Counsel.
18 This process -- which is still not completed -- has required a substantial amount of attorney and
19 expert time and cost, which could not have been anticipated earlier.

20 **Objections:** A number of these responses took the form of objections to the allocation and
21 proposed distribution of the Settlement Funds in the manner indicated by the allocation letter. For
22 example, one large group practice submitted a voluminous set of objections on behalf of 476 class
23 members who had worked for its group practice during the class period. This necessarily required
24 Class Counsel, and the expert, to review the claims data for all 476 of these class members and to
25 set forth the specifics of the allocation for each of them. This task was complicated by the fact that
26 many of these dentists had worked for this group practice for only a part of the class period, and from
27 other group practices during other parts of the class period. The exchanges of data and negotiations
28 concerning each of these 476 dentists lasted for over three weeks and involved several exchanges of
data. Ultimately, it was determined that the allocations provided were correctly stated and each of

1 the objections was resolved. But this process necessarily required a large number of attorney hours
2 and a substantial amount of additional expert time as well. *See* Declaration of Paul Alexander
3 (“Alexander Decl.”) ¶ 6.

4 This is far from the only situation involving substantial complexity that has required the
5 attention of counsel. One notable example -- which is still in the process of being resolved -- is the
6 situation presented by a dentist with a specialty practice who works for different dental group
7 practices throughout southern California on different days of the month. The total allocation for
8 this dentist was quite substantial. During the period in which it arose, however, this Class member
9 had worked at 33 different practice groups, each of which was involved to a greater or lesser degree
10 in the total allocation. The Class member objected to his settlement allocation being paid to any of
11 these group practices and has demanded that it all be paid to him. This necessitated notice to each
12 of the 33 group practices involved and will require that the objections be resolved with each of these
13 group practices. This process, which has already proven extremely time consuming, is still
14 ongoing. Alexander Decl. ¶ 7.

15 These are illustrative of the complexity of the task and the reason why attorneys’ fees and
16 expert fees beyond anything that could have been anticipated before have been -- and continue to be
17 -- incurred. At this point, there are more than 50 additional individual objections that have been
18 submitted, each of which has already required the expenditure of significant attorney and expert
19 time well beyond what could have been anticipated before. Langendorf Decl. ¶ 6. In another case,
20 a claims administrator submitted individual objections on behalf of each of 25 dentists and group
21 practices for whom she processes claims. Class counsel anticipates these objections will be
22 withdrawn, but again, has had to respond to them on a provider-by-provider basis, a process that has
23 taken substantial time already. Alexander Decl. ¶ 7.

24 For each objection it receives, Class Counsel is required to notify the objector and the group
25 practice of the objection, so that they might resolve it and jointly issue instructions for distributing
26 the funds in dispute, pursuant to the process set forth in Appendix 3 to the Amended Settlement
27 Agreement. Class counsel has responded individually to over forty such objections to date, in
28 addition to the large objections described above. Langendorf Decl. ¶ 6. Responding to objections is

1 required under the Amended Settlement Agreement, and is important for providing the parties
2 involved an opportunity to resolve the dispute. Responding and addressing these objections has
3 necessarily required the involvement of Class Counsel and, where necessary, the expert, to provide
4 the parties with accurate allocation data, an understanding of the allocation process and, where
5 possible, to facilitate an amicable resolution of the objection.

6 **Questions and Inquiries About Allocations Amounts:** In addition to objections, Class
7 Counsel has fielded and responded to approximately 115 inquiries from Class members regarding
8 the settlement allocation and distribution process. Langendorf Decl. ¶ 6. Some of these Class
9 members want to know why their allocation was not higher; others want to understand the
10 allocation methodology; still others want to know why their allocation is different from an
11 allocation of another Class member they know. *Id.* Class Counsel was also contacted by many
12 Class members who received no allocation, and who understandably wanted to understand what that
13 was the case. *Id.*

14 Responding to these questions requires Class counsel to review the data underlying the
15 allocation. There are several reasons why one Class member may have had fees limited by the
16 INAP, whereas another did not. A Class member may not have been impacted by the INAP, for
17 example, if his or her fees were already at the maximum allowable amount, or if his or her fees are
18 paid pursuant to a PPO schedule, or if he or she did not seek to increase her fees during the relevant
19 time period, or for any number of other reasons. The only way to know, and therefore the only way
20 to respond to any given Class member in a meaningful way, is to review the records associated with
21 the claims submitted by that Class member. This data is stored on Delta Dental servers, and so even
22 accessing it is time-consuming and unwieldy because the data cannot be copied into notes to be
23 used in responding to Class members.

24 To respond adequately to a given Class member, therefore, can easily take several hours.
25 Most Class members have, at most, a high-level understanding of the operation of the INAP or the
26 fact that it was the basis for the monetary component of the Amended Settlement Agreement. It has
27 generally been necessary to explain all of this in responding to Class member emails. Given that
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1 Class Counsel received and responded to over a hundred such inquiries, it is reasonable that they
2 have expended hundreds of hours on the allocation process.

3 In the month of August, for example, Mr. Langendorf expended 88.2 hours, virtually all of
4 which was spent responding to inquiries from providers regarding allocation letters. The time
5 records indicate that Mr. Langendorf expended 3 to 4 hours per day in reviewing inquiries
6 submitted by Class members, researching the basis for the allocations, and then contacting these
7 Class members and explaining the allocation methodology to them. Langendorf Decl. ¶¶ 4, 5. This
8 translated to an expenditure of \$61,916.40 for that month alone. This work continued steadily
9 through the month of September, with Mr. Langendorf expending 74.7 hours, totaling \$52,439.40,
10 again almost exclusively spent responding to Class members questions regarding the Settlement
11 allocation. *Id.*

12 **Specials Situations: Practice Group Sales, Retired Class Members, Deceased Class**
13 **Members.** The process of responding to Class member inquiries also revealed myriad individual
14 situations that impact the allocation and distribution process, and that themselves require additional
15 time and effort by Class Counsel. For example, a significant number of class members receiving
16 allocations are deceased. Class counsel has thus received inquiries from surviving spouses or other
17 providers who took over practice of the deceased provider, with questions regarding who should
18 receive the settlement allocation. In other situations, a Class member receiving an allocation has
19 retired or sold his or her practice, and either the Class member or the new owner believes that he or
20 she is entitled to the allocation. (This can depend on whether the accounts receivable were included
21 in the sale, for example.) In these situations, it is incumbent on Class Counsel to ensure that all
22 parties have received notice, that they understand to whom the funds will be sent absent any
23 objection, and that they have an opportunity to submit and formal objection, should they wish to do
24 so. This is necessary but a time-consuming process. Alexander Decl. ¶ 9; Langendorf Decl. ¶ 9.

25 Broadly speaking, the allocation process has been a success. The allocation model has
26 proven to be correct, and has withstood many inquiries and challenges. The vast majority of Class
27 members have accepted the explanations provided and have ultimately agreed with, or at least
28 accepted, their allocation. Hundreds of objections have been resolved, resulting in the distribution

1 of the bulk of the Settlement Fund to the Class, as will be reflected in the Status Report that will be
2 submitted to the Court in advance of the November 16, 2018, status hearing. All of this came at
3 considerable cost, however, as described above and that should be recognized with a supplemental
4 fee award. Alexander Decl. ¶ 9; Langendorf Decl. ¶ 8.

5 **IV. THE ATTORNEYS' FEES REQUESTED ARE REASONABLE AND APPROPRIATE**
6 **UNDER THE PERCENTAGE-OF-COMMON FUND APPROACH OR THE**
7 **LODESTAR APPROACH, AND AWARDING THE REQUESTED FEES IS FAIR**
8 **AND APPROPRIATE.**

9 In the 4/30/2018 Order Granting Plaintiffs' Motion For Approval of Attorneys' Fees And
10 Incentive Awards, the Court applied the common fund approach and concluded that the requested
11 attorneys' fees of \$2,350,000 amounted to "approximately 3.6% of the monetary component of the
12 Amended Settlement," which was "well below the percentage of fees typically awarded in class
13 actions." 4/30/2019 Attorneys' Fees Order ¶ 1. Although it was not required to do so, the Court
14 also cross-checked the award against Class Counsel's lodestar, and concluded that "Class Counsel
15 has spent at least 6,191.35 hours litigating the class claims, which results in a lodestar of
16 \$3,604,729.39." The Court found that this amount was "justified given the contingent nature of the
17 litigation, the quality of the representation, the benefits obtained for the class, the risk of
18 nonpayment, the extent of the litigation to date, and the results achieved." *Id.* The Court also took
19 note of the fact that there was no objection to the fee request, and that the fees did not come from
20 the settlement fund, and approved the amount of \$2,350,000 in attorneys' fees, which was only
21 approximately 65% of the approved lodestar. *Id.*

22 If the Court awards the additional attorneys' fees requested by this Motion, the exact same
23 analysis will still pertain. For example, the additional award will only change the percentage of the
24 award from approximately 3.6% of the monetary recovery, to approximately 3.9% of the monetary
25 recovery, a figure that remains well below the benchmark fees typically awarded in class actions.
26 *See, e.g., Chavez v. Netflix*, 162 Cal. App. 4th 43, 66, n.11 (2008) (approving fee award amounting
27 to 27.9% of the benefits to the class); *In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556,
28 n.13 (endorsing 25% benchmark for fee awards); 4/30/2019 Attorneys' Fees Order ¶ 1.

1 Similarly, a lodestar cross-check will confirm that awarding the additional attorneys' fees
2 sought by this Motion are reasonable, because Class Counsel has expended significantly more time
3 and effort than sought by this Motion. Indeed, the value of the total time expended during the
4 allocation stage by Mr. Langendorf, Mr. Alexander, and Litinomics is \$332,419.88, as reflected in
5 the following chart:

Hours Spent And Expenses Incurred May 1, 2018 to October 19, 2018			
Name	Position	Hours	Total
Paul Alexander	Senior Counsel	135.5	\$124,792.28
George Langendorf	Associate	232.0	\$156,975.6
Litinomics	Expert	165.7	\$50,652
TOTAL			\$332,419.88

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10 In comparison, the total interest that is estimated to have accrued on the Settlement Fund as
11 of the date of the hearing on this Motion, and that is the subject of this fee request, is more than
12 \$247,432.98. Langendorf Decl. ¶ 2. Of this amount, Plaintiffs' are requesting \$200,000 at this
13 time, which means that if the Court grants this Motion, it will still be approving compensation for
14 only approximately 60% of the amount expended by Class Counsel and Plaintiffs' expert in
15 implementing and managing the allocation process and responding to Class member issues. The
16 hourly rates are reasonable, as they are the same as those reflected in the initial attorneys' fees
17 Motion, and the number of hours is also reasonable, having been necessitated by the above-
18 referenced unexpected and formidable challenges associated with the allocation process, and the
19 number and nature of objections and inquiries received regarding the allocation. The low amount of
20 the initial award also supports the reasonableness of the additional fee award requested here. The
21 initial fee application did not contemplate that there would be extensive attorney or expert work
22 involved in the allocation of the Settlement Amount.

23 Awarding the interest on the Settlement Fund to Class Counsel also makes practical sense,
24 because all of the work begin done by Class Counsel directly benefits the Class. It is comprised of
25 responses to the questions, inquiries and objections submitted by the Class. It is work that is being
26 undertaken in service of allocating the Settlement Fund accurately amongst them, proportionally to
27 the amount that each Class member was impacted by Delta Dental's application of the INAP during
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1 the relevant period. It is therefore fully appropriate usage for interest accrued while the allocation
2 of the Settlement Fund was being done by Class Counsel.

3 It is all the more appropriate because the work necessary to allocate the Settlement is still
4 not done. Special situations such as where a Class member is deceased require additional work,
5 such as identifying whether there is a surviving spouse or estate that can speak for the Class
6 member with respect to the allocation. Class member inquiries are still coming in.

7 Awarding attorneys' fees from the interest on the Settlement Fund is also inconsistent with
8 the Settlement Agreement and the Court's prior Orders. The question of whether the Settlement
9 Fund would accrue interest at all, much less how that interest would be dealt with, had not been
10 considered by the Parties at the time of Final Approval. *See* Final Approval Order ¶ 9 (“[t]he Class
11 Notice Administrator will cause the above sum to be deposited in *either an interest-bearing or a*
12 *non-interest bearing account* at a national bank, as approved by Class Counsel and counsel for
13 Delta Dental.”) (emphasis added). In the only place where the Amended Settlement Agreement
14 addresses the question of interest, it does so in a manner that is fully consistent with this Motion,
15 because it states that the interest shall be distributed only pursuant to the Plan of Allocation or Court
16 Order, and that the cost of “administration, operation and implementation of the Settlement Fund
17 . . . including without limitation . . . attorneys’ fees” shall be paid out of the Settlement Fund. *See*
18 Amended Settlement Agreement, Appendix 4, ¶¶ 5-6, 11.

19 Finally, it remains the case that awarded the requested attorneys' fees out of the interest on
20 the Settlement Fund will not lessen the recovery to the Class. The recovery to the Class is
21 specifically set forth in the Amended Settlement Agreement and that does not change. Further,
22 there is no practicable way that this interest could be distributed amongst the thousands of class
23 members, even if that was called for. The cost of attempting to send the extremely small amounts
24 to individual Class members would likely exceed the amount to be distributed.

25 Thus, the facts and circumstances before the Court establish that it is both equitable and
26 practical that the Settlement Fund interest be used to pay attorneys' fees that were necessarily
27 expended for the benefit of the Class, though previously unanticipated. Plaintiffs therefore
28 respectfully request that the Court order that \$200,000.00 – which is only a portion of the amount of

1 interest earned on the Settlement Fund, currently \$247,432.98 – be awarded as attorneys’ fees and
2 costs, and that the Class Notice Administrator be authorized to pay this amount from the interest
3 accrued by the Settlement Fund.

4 **V. CONCLUSION**

5 For the foregoing reasons, Plaintiffs respectfully request that the Court grant Class
6 Counsel’s request for an award of additional attorneys’ fees in the amount of \$200,000.00 and that
7 the Class Notice Administrator be directed to pay this amount provided it does not exceed the
8 amount of interest actually earned on the Settlement Fund as of the date of payment.

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10 Dated: October 24, 2018

ARNOLD & PORTER KAYE SCHOLER LLP

11 By: /s/ Paul Alexander
12 Paul Alexander

13 Attorneys for Plaintiffs and the Class
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