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Superior Court of California
County of San Francisco

MAY 01 2024

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

CALIFORNIA DENTAL ASSOCIATION, a
California Corporation; SPENCER ANDERSON,
D.D.S.; SHADIE AZAR, D.M.D.; STEVE
CHEN, D.D.S.; RAY KLEIN, D.D.S.; TOM
MASSARAT, D.D.S., M.S.; MEREDITH
NEWMAN, D.M.D.; and GARRETT
RUSSIKOFF, D.M.D.,

Plaintiffs,

v.

DELTA DENTAL OF CALIFORNIA, a
California Corporation; LYNN L. FRANZOI;
ROY A. GONELLA; GLENN F. BERGERT;
STEVEN F. MCCANN; HEIDI YODOWITZ;
TERRY A. O'TOOLE; ANDREW J. REID; IAN
R. LAW; JAY C. LAMB, D.M.D.; MICHAEL J.
CASTRO; ALICIA F. WEBER; SARAH M.
CHAVARRIA; and DOES 1 through 20,
inclusive,

Defendants.

Case No. CGC-22-603753

ORDER ON (1) DELTA DENTAL OF
CALIFORNIA'S DEMURRER TO
PLAINTIFFS' SECOND AMENDED
COMPLAINT; AND (2) INDIVIDUAL
DEFENDANTS' DEMURRER TO
PLAINTIFFS' SECOND AMENDED
COMPLAINT

Delta Dental of California's Demurrer to Plaintiffs' Second Amended Complaint and Individual Defendants' Demurrer to Plaintiffs' Second Amended Complaint came on for hearing on April 10, 2024. Having considered the pleadings and papers on file in the action, and the arguments of counsel presented at the hearing, the demurrers are hereby sustained without leave to amend.

BACKGROUND

On April 20, 2023, Plaintiffs California Dental Association (“CDA”), Spencer Anderson, D.D.S., Shadie Azar, D.M.D., Steve Chen, D.D.S., Ray Klein, D.D.S., Tom Massarat, D.D.S., M.S., Meredith Newman, D.M.D., and Garrett Russikoff, D.M.D. (collectively, “Plaintiffs”) filed the First Amended Complaint (“FAC”) against Defendants Delta Dental of California (“DDC” or “Delta Dental”), Lynn L. Franzoi, Roy A. Gonella, Glen F. Bergert, Steven F. McCann, Heidi Yodowitz, Terry A. O’Toole, Andrew J. Reid, Ian R. Law, Jay C. Lamb, D.M.D., Michael J. Castro, Alicia F. Weber, and Sarah M. Chavarria (collectively, “Defendants”). Plaintiffs alleged seven causes of action: (1) Breach of Fiduciary Duty; (2) Breach of Duty of Care; (3) Breach of Duty of Loyalty; (4) Breach of the Implied Covenant of Good Faith and Fair Dealing; (5) Breach of Contract; (6) Violation of Business and Professions Code § 17200 *et seq.*; and (7) Declaratory Relief. (FAC ¶¶ 78-113.) On October 12, 2023, the Court sustained in part and overruled in part Defendants’ demurrers to the FAC. In particular, the Court sustained DDC’s demurrer without leave to amend as to the first, fifth, and sixth causes of action and overruled the demurrer on the remaining grounds. (Oct. 12, 2023 Order, 29 ¶¶ 1-2, 5-7, 9.) The Court sustained Individual Defendants’ demurrer without leave to amend as to the sixth cause of action, sustained with leave to amend as to the second and third causes of action, and overruled the demurrer on the remaining grounds. (*Id.* ¶¶ 1, 3-4, 7-8.)¹

On November 13, 2023, Plaintiffs filed a Second Amended Complaint (“SAC”). Plaintiffs seek to state four causes of action: (1) Breach of Duty of Care against the Individual Defendants; (2) Breach of Duty of Loyalty against the Individual Defendants; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing against DDC; and (4) Declaratory Relief. (SAC ¶¶ 88-106.) Plaintiffs allege as follows.

CDA is a “membership-based organization comprised of more than 27,000 California dentists and dental students” making it “the largest state dental association in the country.” (*Id.* ¶ 10.) Plaintiffs Anderson, Massarat, and Newman are members of DDC and parties to a Participating Provider Agreement (“PPA”) with DDC as Premier Specialty Dentists.² (*Id.* ¶¶ 13-15.) Plaintiff Chen is a member

¹ “Individual Defendants” are Defendants Franzoi, Gonella, Bergert, McCann, Yodowitz, O’Toole, Reid, Law, Lamb, Castro, Weber, and Chavarria.

² “Premier Specialty Dentists” are California-based specialists such as periodontists, endodontists, and oral surgeons who are parties or otherwise subject to a PPA with DDC for participation in DDC’s Premier

1 of DDC and party to a PPA with DDC as a Premier General Dentist.³ (*Id.* ¶ 16.) Plaintiffs Klein, Azar,
2 and Russikoff are members of DDC and parties to a PPA with DDC as PPO Dentists.⁴ (*Id.* ¶¶ 17-19.)

3 DDC is a non-profit, tax-exempt corporation that “is the largest provider of dental benefit plans in
4 California.” (*Id.* ¶ 20; see *id.* ¶¶ 38, 44, 47.) Defendants Franzoi, Gonella, Bergert, McCann, Yodowitz,
5 O’Toole, Reid, Law, and Lamb are members of DDC’s Board of Directors (“Board”). (*Id.* ¶¶ 21-29.)
6 Defendants Castro, Weber, and Chavarria are the CEO, Executive Vice President and CFO, and President
7 of DDC, respectively. (*Id.* ¶¶ 30-32.) DDC “has two classes of members: Dentist Members and
8 Corporate Members.” (*Id.* ¶ 39.) “Dentist Members have no vote over the actions of Delta Dental or the
9 composition of the Board.” (*Id.*) “Under Delta Dental’s Bylaws, at least sixty percent of its Corporate
10 Members (and thus its Board) are required to be members who (a) are not dentists, (b) are not the spouse
11 of a dentist, and (c) have no significant interest in any entity that provides dental services. Only twenty-
12 five percent of Delta Dental’s Corporate Members are required to be practicing dentists licensed in
13 California.” (*Id.*) The Board delegates its authority on reimbursement fees to the “Dentist Compensation
14 Committee.” (*Id.* ¶ 41.) However, “Dentist Members, including those who are also Corporate Members
15 (and thus members of the Board),” cannot serve on the Dentist Compensation Committee. (*Id.*)

16 “Plaintiffs challenge as unlawful and invalid the actions of Defendants in approving and
17 implementing amendments, effective as of January 1, 2023 (‘2023 Amendments’), to the [PPA] that
18 [DDC] imposes on its Dentist Members.” (*Id.* ¶ 1.) “The 2023 Amendments change the entire structure
19 by which the fees of many Dentist Members are determined, including by eliminating the ability of
20 certain Dentist Members to submit their own fee schedules accounting for their costs. The 2023
21 Amendments also substantially reduce the reimbursement fees paid to Dentist Members, in some cases by
22 up to 40%, thereby threatening the ability of many Dentist Members to continue to provide services to
23 Delta Dental patients.” (*Id.* ¶ 4.)

24 “Defendants’ actions in adopting and implementing the 2023 Amendments violated Defendants’

25
26 Network. (SAC ¶ 13 fn. 1.) “‘Premier’ providers, [] generally [have] better reimbursement fees than PPO
dentists.” (*Id.* ¶ 72 fn. 13.)

27 ³ A “Premier General Dentist” is a California-based general dentist, who is a party or otherwise subject to
a PPA with DDC for participation in DDC’s Premier Network. (*Id.* ¶ 16 fn. 2.)

28 ⁴ “PPO Dentists” are California-based specialty and general dentists who are parties to or otherwise
subject to a PPA with DDC for participation in DDC’s PPO Network. (*Id.* ¶ 17 fn. 3.)

1 fiduciary duties and other obligations to Dentist Members.” (*Id.* ¶ 5; see *id.* ¶¶ 6, 9, 60-61, 63, 87, 90,
2 96.) In particular, “[t]he Compensation Committee charged with considering and approving the 2023
3 Amendments received no materials or analysis in advance of the meeting at which the amendments were
4 addressed and approved.” (*Id.* ¶ 5; see also *id.* ¶ 61.a; see, e.g., *id.* ¶ 66 [“failed to conduct a reasonable
5 investigation into whether there was a legitimate need or justification for the 2023 Amendments.”], ¶ 68
6 [“did not undertake any assessment or analysis regarding the necessary amount of net assets Delta Dental
7 must maintain to conduct operations and mitigate risk.”].) Additionally, “the Compensation Committee
8 had no advisers, consultants, or other independent information presented to them regarding the impact of
9 the 2023 Amendments on Dentist Members and their patients [or] . . . on any issues at all, before or
10 during the meeting during which the 2023 Amendments were approved.” (*Id.* ¶ 5; see also *id.* ¶¶ 61.b-c, ¶
11 65 [“did not conduct or cause to be conducted *any* organized outreach to Dentist Members to obtain
12 information or get their perspective on the potential impact of the 2023 Amendments on their practices
13 and patients – even though none of the Compensation Committee members were Dentist Members.”
14 (emphasis in original)].) Furthermore, “Compensation Committee members at the August 10 Meeting
15 were told that the timeline for approval was short; to proceed with management’s desired effective date of
16 January 1, 2023, notice would need to be provided to CDA no later than August 20, 2022 – a mere ten
17 days after the meeting – and providers were required to be notified no later than September 1, 2022. Yet
18 there was no business urgency.” (*Id.* ¶ 61.d.) Indeed, the Compensation Committee voted “unanimously
19 to pass the 2023 Amendments in full, without a single adjustment or revision.” (*Id.* ¶ 62.)

20 “[T]he 2023 Amendments reduced reimbursement fees paid to Dentist Members” despite
21 exponentially increasing costs for labor and materials. (*Id.* ¶ 71.) “For Premier Specialty Dentists, the
22 2023 Amendments substantially reduce fees across the board – in some instances by up to 40% - while for
23 Premier General Dentists, the 2023 Amendments decrease reimbursement fees for more frequently billed
24 services while increasing (often modestly) fees for less common services, such as those generally referred
25 out to specialty dentists.” (*Id.* ¶ 72.) Additionally, the 2023 Amendments “modify the entire fee
26 determination process for Premier Dentists . . . Now, rather than file their own schedules, Premier
27 Dentists are bound by Delta Dental’s standard schedules.” (*Id.*) Furthermore, the 2023 Amendments
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1 “result in reduced reimbursement fees for many PPO Dentists. That is because the 2023 Amendments
2 increased the fees associated with certain procedures by only a negligible amount, while materially
3 decreasing fees associated with other procedures.” (*Id.* ¶ 73.)

4 Although Dentist Members received notice of the 2023 Amendments, “many of the notices
5 received by Dentist Members misrepresented the nature of the fee changes, as did the notice to the CDA.”
6 (*Id.* ¶ 74.) “Between the time Dentist Members were notified of the 2023 Amendments by mail in
7 September 2022, and the time they became effective on January 1, 2023, Plaintiffs (including the CDA),
8 as well as other Dentist Members, repeatedly reached out to Delta Dental to discuss the purported
9 rationale behind the 2023 Amendments and to determine whether any changes or accommodations could
10 be made.” (*Id.* ¶ 75; see also *id.* ¶ 76.) However, “[t]hese inquiries and pleas fell on deaf ears” and DDC
11 “refused to provide any meaningful answers.” (*Id.* ¶ 75.) “Nor would Delta Dental disclose the data,
12 information, or analyses purportedly relied upon in evaluating the 2023 Amendments and their impact on
13 the Dentist Members.” (*Id.*) Instead, DDC “informed Dentist Members that their only options were to
14 accept the 2023 Amendments or ‘get out’ of [DDC’s] network.” (*Id.*; see *id.* ¶ 76.)

15 The 2023 Amendments have “caused and will continue to cause these Dentist Members
16 substantial harm. For certain Dentist Members, the continued viability of their practices will be
17 threatened. For others, in order to mitigate the impact of the significant fee decreases, they will need to
18 change the way they conduct their practices in ways that compromise their ability to provide high quality
19 services, including by reducing the comprehensiveness of services provided, increasing their workload in
20 a manner that causes increased wait times, adjusting staff or office space, and/or leaving the Delta Dental
21 network entirely.” (*Id.* ¶ 7; see also, e.g., *id.* ¶ 48 [“Delta Dental strongly discourages its patients from
22 using dentists outside the Delta Dental network by providing less favorable coverage for out-of-network
23 services and by urging patients covered by Delta Dental plans not to use out-of-network dentists.”], ¶ 49
24 [“through the PPAs, Delta Dental prohibits its Dentist Members from charging patients covered by Delta
25 Dental plans anything above the now-reduced reimbursement fee amounts set forth in the applicable Delta
26 Dental fee schedule -- even if the patient wants the service in question and even if the patient is willing to
27 pay the dentist directly for amounts above Delta Dental’s maximum reimbursement fee.”].) Patients will
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1 also be affected by the 2023 Amendments “through reduced choice of services and providers, increased
2 wait times due to increased patient loads for in-network providers, delays in scheduling appointments due
3 to fewer in-network providers, increased costs due to fewer in-network providers, compromised quality of
4 experience, and . . . disruption of long-standing, trusted dentist-patient relationships.” (*Id.* ¶ 8.)

5 “While Delta Dental’s policies and practices have made it very difficult for Dentist Members and
6 other dental providers to continue providing quality oral health care services over the years, Delta Dental
7 remains among the most profitable providers of dental benefit plans in California and has been steadily
8 increasing its profits and market dominance.” (*Id.* ¶ 50.) “A meaningful portion” of DDC’s revenue is
9 paid to its “directors and officers, including the Individual Defendants,” which “exceeds that which is
10 appropriate for officers of a non-profit organization.” (*Id.* ¶¶ 51-52.) DDC’s “Bylaws expressly prohibit
11 directors from receiving any salary for their service as a Board member . . . Yet the Individual Defendants
12 who are directors of Delta Dental have provided themselves with substantial compensation that goes
13 beyond the permitted reimbursements and clearly constitutes a salary.” (*Id.* ¶ 54; see *id.* ¶ 85.) “Because
14 Dentist Members have limited rights under Delta Dental’s Bylaws, they have no meaningful say regarding
15 the compensation of Delta Dental’s officers or directors. Nor is there any meaningful external oversight
16 of these decisions.” (*Id.* ¶ 56.) “The Individual Defendants consciously disregarded their duties to
17 Dentist Members and clearly relevant information, instead acting in their own self-interest by rubber-
18 stamping contract changes desired by management that protected their own financial interest while
19 harming the Dentist Members.” (*Id.* ¶ 57; see also *id.* ¶¶ 59, 70, 94.)

20 Furthermore, “the Individual Defendants have approved and Delta Dental has enacted certain
21 policies and programs intended to accord preferential treatment to some Dentist Members above others.”
22 (*Id.* ¶ 78.) In particular, DDC

23 has entered into an arrangement with Smile Generation, a network of dentists operating
24 throughout California, by which dentists affiliated with Smile Generation receive preferential
25 treatment over other PPO Dentists and Premier Dentists. Under this agreement, patients covered
26 by [DDC] plans receive more favorable coverage if they visit dentists affiliated with Smile
27 Generation than a non-Smile Generation PPO or Premier Dentist. Thus, through this differential
28 treatment, which [DDC] has not disclosed to the Dentist Members, . . . Defendants are driving []
patients towards Smile Generation dentists over other Dentist Members to whom Defendants owe
fiduciary duties and/or other obligations.

1 (*Id.*) In addition, DDC “is discriminating against Premier Dentists by reducing benefits for patients
2 covered by [DDC] plans who chose to receive services from a Premier Dentist.” (*Id.* ¶ 79.) Moreover,
3 DDC recently enacted a “Loyalty Program” where “Premier Specialty Dentists and Premier General
4 Dentists who (as of May 15, 2022) only accepted [DDC] plans – i.e., they were not ‘in network’ with any
5 [non-DDC] plans – were permitted to continue with higher fees and avoid being subject to the fee
6 decrease[] imposed by the 2023 Amendments.” (*Id.* ¶ 80.)

7 Plaintiffs seek “an injunction preventing Delta Dental from enforcing the 2023 Amendments”; a
8 declaration “determining that the conduct of the Individual Defendants in enacting and enforcing the 2023
9 Amendments violates the duties of loyalty and due care owed by the Individual Defendants to Delta
10 Dental’s Premier Specialty Dentists, Premier General Dentists, and PPO Dentists”; a declaration
11 determining that the 2023 Amendments constitute a violation of the covenant of good faith and fair
12 dealing under the PPA; and unspecified damages sustained by the Individual Defendants. (*Id.* at 39-40.)

13 DDC now demurs to the SAC on the ground that Plaintiffs fail to state a cause of action. (DDC
14 Demurrer, 2-3.) The Individual Defendants join in DDC’s Demurrer. (Defs. Demurrer, 2-3.)⁵ The
15 Individual Defendants also demur to the SAC on the same ground. (Defs. Demurrer, 2-5.) DDC joins in
16 the Individual Defendants’ Demurrer. (DDC Demurrer, 2-3.) Plaintiffs oppose the demurrers.

17 LEGAL STANDARD

18 A demurrer lies where “the pleading does not state facts sufficient to constitute a cause of action.”
19 (Code Civ. Proc. § 430.10(e).) A demurrer admits “all material facts properly pleaded, but not
20 contentions, deductions, or conclusions of fact or law.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)
21 The complaint is given a reasonable interpretation, reading it as a whole and its parts in their context.
22 (*Id.*) The Court accepts as true, and liberally construes, all properly pleaded allegations of material fact,
23 as well as those facts which may be implied or reasonably inferred from those allegations; its sole
24 consideration is whether the plaintiff’s complaint is sufficient to state a cause of action under any legal
25 theory. (*O’Grady v. Merchant Exchange Prods., Inc.* (2019) 41 Cal.App.5th 771, 776-777.)

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28 ⁵ Citations to “Defs. Demurrer,” “Defs. Opening Brief,” and “Defs. Reply” refer to Individual Defendants’ pleadings.

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The Court declines Plaintiffs' request to take judicial notice of the legislative history of the 2002 bill by which Health and Safety Code section 1375.7 was originally enacted. Where, as here, the statutory language is unambiguous, its plain meaning controls and there is no need to resort to legislative history. (E.g., *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 83; *Kuntz v. Kaiser Foundation Hospital* (2021) 62 Cal.App.5th 1135, 1146.)

- 8 -

California Dental Association, et al. v. Delta Dental of California, et al. CGC-22-603753
Order on Defendants' Demurrers to Plaintiffs' Second Amended Complaint

1 **DISCUSSION**

2 Defendants' demurrers raise two principal issues: (1) whether Plaintiffs have stated a cause of
3 action for breach of fiduciary duty against Individual Defendants (i.e., members of DDC's Board of
4 Directors) in connection with their adoption of the 2023 Amendments; and (2) whether Plaintiffs have
5 stated a cause of action for breach of the implied covenant of good faith and fair dealing against DDC
6 itself for adopting those Amendments. The Court answers each question in the negative.

7 **I. Individual Defendants Do Not Owe Members A Fiduciary Duty In Connection With Setting**
8 **Fees And Reimbursement Rates.**

9 To plead a cause of action for breach of fiduciary duty, the plaintiff must allege the existence of a
10 fiduciary relationship, breach of fiduciary duty, and damages. (*Coley v. Eskaton* (2020) 51 Cal.App.5th
11 943, 958; see also *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) Here, Plaintiffs'
12 claims for breach of the duty of care and breach of the duty of loyalty are both premised on the common
13 allegation that Individual Defendants (DDC directors) owed Dentist Members a fiduciary duty in
14 connection with the 2023 Amendments to the PPAs, which altered the fee structure and reimbursement
15 rates under those agreements. Those claims fail at the threshold because Individual Defendants do not
16 owe Dentist Members a fiduciary duty in connection with adopting amendments to the PPAs affecting
17 fees or reimbursement rates.

18 A fiduciary relationship is:

19 any relation existing between parties to a transaction wherein one of the parties is in duty bound to
20 act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises
21 where a confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can
take no advantage from his acts relating to the interest of the other party without the latter's
knowledge of consent.

22 (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1338, quoting *Herbert v. Lankershim* (1937) 9
23 Cal.2d 409, 483 (cleaned up).) Before charging a person "with a fiduciary obligation, he must either
24 knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship
25 which imposes that undertaking as a matter of law." (*Cleveland*, 209 Cal.App.4th at 1338, quoting *City of*
26 *Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 386.) "Traditional examples of
27 fiduciary relationships in the commercial context include trustee/beneficiary, directors and majority
28 shareholders of a corporation, business partners, joint adventurers, and agent/principal." (*Wolf v. Superior*

1 Court (2003) 107 Cal.App.4th 25, 30.) In an appropriate case, a court may determine as a matter of law
2 on the pleadings that no fiduciary duty exists. (See, e.g., *Berg & Berg Enterprises, LLC v. Boyle* (2009)
3 178 Cal.App.4th 1020, 1037-1044 [affirming judgment of dismissal following order sustaining demurrers
4 without leave to amend where plaintiff failed to plead a cognizable claim for breach of fiduciary duty
5 against individual directors].) This is such a case.

6 Plaintiffs allege:

7 By reason of their positions as officers and/or directors of the Company, each of the Individual
8 Defendants owed and owe the Dentist Members, including the Individual Plaintiffs, fiduciary
9 obligations of trust, loyalty, good faith, and due care, and were and are required to perform their
10 duties in good faith, in a manner consistent with and in furtherance of the stated mission of the
non-profit, tax-exempt organization, and with such care, including reasonable inquiry, as an
ordinarily prudent fiduciary in a like position would use under similar circumstances.

11 (SAC ¶ 81; see also *id.* ¶¶ 1, 5, 83.) Plaintiffs incorporate similar allegations into their causes of action
12 for breach of the duty of care and breach of the duty of loyalty, each of which is premised on Individual
13 Defendants' alleged breach of their fiduciary duty to Dentist Members. (*Id.* ¶¶ 89, 93.)

14 Plaintiffs assert that DDC's "directors have a statutorily mandated fiduciary duty to DDC's
15 members—including Plaintiffs" under Corporations Code section 7231. (Opposition, 6, 15; see *id.* at 16.)
16 Individual Defendants disagree, asserting that "dentists have a dual relationship with DDC—they are non-
17 profit members, and they can render services as independent contractors with PPAs," however, "the
18 SAC's challenge regarding the PPAs has nothing to do with dentist's [sic] capacity as members of the
19 DDC, precluding any claim for breach of fiduciary duty." (Defs. Opening Brief, 7; see *id.* at 1, 8 ["none
20 of the SAC's allegations has anything to do with the enumerated rights that Plaintiffs have as DDC
21 members, and instead relate to Plaintiffs' challenge to the reimbursement rates as independent contractors
22 under the PPAs."]; Defs. Reply, 1.) Individual Defendants have the better argument.

23 Nonprofit mutual benefit corporations, such as DDC,⁶ are a specific type of nonprofit corporation
24 governed by Corporations Code section § 7231 *et seq.* The plain language of the Corporations Code
25 supports Individual Defendants' contention that they do not owe a fiduciary duty to members of DDC.⁷

26 ⁶ See SAC ¶ 20 [alleging that DDC is a California nonprofit mutual benefit tax-exempt corporation and a
27 501(c)(4) social welfare organization]; 6/12/23 RFJN Ex. D [Articles of Incorporation, Delta Dental of
California].)

28 ⁷ Under Corporations Code section 7231, as the Court has previously concluded, no fiduciary duty is
imposed on DDC itself with respect to its members. (Corp. Code § 7231(a); see, e.g., *Oakland Raiders v.*

1 The general standard of care that applies to directors of for-profit corporations subject to the
2 General Corporations Law requires that they perform their duties “in good faith, in a manner such director
3 believes to be in the best interests of the corporation *and its shareholders.*” (Corp. Code § 309(a)
4 (emphasis added); see *id.* § 2700(a) [same language for directors of social purpose corporations].) This
5 language codifies the fiduciary duty directors are recognized to owe to the corporation and its
6 shareholders, which derived from the common law. (*Berg & Berg Enterprises, LLC*, 178 Cal.App.4th at
7 1037; *Lehman v. Superior Court* (2006) 145 Cal.App.4th 109, 120-121.) In contrast, Section 7231,
8 subdivision (a) provides that a director of a nonprofit mutual benefit corporation “shall perform the duties
9 of a director . . . in good faith, in a manner such director believes to be *in the best interests of the*
10 *corporation* and with such care, including reasonable inquiry, as an ordinarily prudent person in a like
11 position would use under similar circumstances.” (§ 7231(a) (emphasis added).) The same language,
12 which eliminates the reference in section 309 to shareholders, is echoed in the general standard of conduct
13 applicable to directors of nonprofit public benefit corporations (§ 5231), nonprofit religious corporations
14 (§ 9241), and for-profit benefit corporations (§ 14620(a)), among others. Thus, the plain language of
15 these provisions makes clear that directors of such corporations, in contrast to directors of for-profit
16 corporations organized under the General Corporations Law, owe a fiduciary duty only to the corporation,
17 not to its shareholders or members.

18 The difference in statutory language between the standard of care for directors of for-profit
19 corporations and those of nonprofit and similar corporations is not inadvertent. Rather, as one treatise
20 explains in discussing benefit corporations, in framing directors’ duties in terms of the “best interests of
21 the corporation” language, the Legislature deliberately deviated from the principle of “shareholder
22 primacy.” (California Practice Guide: Corporations (The Rutter Group 2023) ¶ 9:552 [discussing Corp.
23 Code § 14620(a)].) While DDC is a nonprofit mutual benefit corporation, and as such is subject to a
24 different statutory scheme,⁸ the use of identical statutory language supports the conclusion that the

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26 *National Football League* (2005) 131 Cal.App.4th 621, 635, 638 [finding no fiduciary relationship existed
27 as a matter of law when the plaintiff member, the Raiders, claimed “the *organization* (the NFL), not its
majority members (or purported ‘majority shareholders’)” owed the plaintiff fiduciary duties]; Oct. 12,
2023 Order, 13-17.)

28 ⁸ Corp. Code §§ 14600-14631 “shall be applicable to all benefit corporations.” (Corp. Code § 14600(a).)
“Benefit corporation” is defined as a corporation organized under the General Corporation Law that has

1 Legislature's omission from section 7231 of any requirement that the director of such a corporation act in
2 the best interests of its members was a deliberate one. A nonprofit mutual benefit corporation may be
3 formed for any lawful purpose "not contemplating the distribution of gains, profits, or dividends to
4 members except upon dissolution." (3 Ballantine and Sterling, California Corporation Laws § 404.01[d].)
5 Indeed, DDC's own bylaws specifically provide that DDC "shall conduct its affairs and business without
6 pecuniary gain or other profit to its members and without distribution of any gain or dividends to its
7 members." (RFJN filed June 12, 2023 Ex. D (Bylaws of Delta Delta of California) Art. I § 2.) Thus,
8 directors of a mutual benefit corporation, like directors of other types of nonprofit corporations,
9 necessarily are expected to act with the corporation's broader purpose and objectives in mind, rather than
10 placing the financial interests of members over and above all other considerations. (Compare *Oakland*
11 *Raiders*, 131 Cal.App.4th at 631 ["A fiduciary must give priority to the best interest of the beneficiary."
12 (cleaned up).] Thus, the Court concludes that directors of such corporations do not owe a fiduciary duty
13 to members because they are expected to act in the best interests of the corporation and to prioritize those
14 interests over the narrow interests of any group, including members.

15 Plaintiffs rely on a single case which concluded that "directors of a nonprofit mutual benefit
16 corporation . . . are fiduciaries who must act for the benefit of the corporation and its members." (*Coley*,
17 51 Cal.App.5th at 958.) However, as Individual Defendants correctly point out, all parties in *Coley*
18 "accept[ed]" that the directors owed a fiduciary duty to plaintiff and other homeowners. (51 Cal.App.5th
19 at 958.) The language in the opinion to that effect therefore is dicta. (See *Kim*, 9 Cal.5th at 85 fn. 4
20 [cases are not authority for propositions that are not considered].) Even more significant, *Coley* involved
21 a homeowners' association.⁹ Courts have recognized that homeowners' associations owe a fiduciary duty

22
23 elected to become subject to this part. (*Id.* § 14601(a).) These provisions do not apply to DDC, which
24 was organized under the Nonprofit Corporation Law. (See *id.* § 5059 ["nonprofit mutual benefit
25 corporation" or "mutual benefit corporation" means a corporation which is organized under Part 3
26 (commencing with Section 7110), or subject to Part 3 under the provisions of subdivision (a) of Section
27 5003]; see also *id.* § 10820(b) [a nonprofit health care service plan may be formed under or subject to Part
28 2 (commencing with Section 5110) or Part 3 (commencing with Section 7110) of this division].)

⁹ In *Coley*, a homeowner brought an action against the homeowners' association, two directors on the
HOA's board, and the directors' employers, alleging that the directors ran the association for the benefit
of the defendants rather than the association and its members. The trial court found the directors breached
their fiduciary duty to the homeowners' association and its members in several respects, and the Court of
Appeal affirmed in substantial part, agreeing with plaintiff that the trial court should have found the two
directors personally liable for their actions.

1 to their members in recognition of their “quasi-governmental” nature:

2 Upon analysis of the association’s functions, one clearly sees the association as a quasi-
3 government entity paralleling in almost every case the powers, duties, and responsibilities of a
4 municipal government. As a ‘mini-government,’ the association provides to its members, in
5 almost every case, utility services, road maintenance, street and common area lighting, and refuse
6 removal. In many cases, it also provides security services and various forms of communication
7 within the community. There is, moreover, a clear analogy to the municipal police and public
8 safety functions. All of these functions are financed through assessments or taxes levied upon the
9 members of the community, with powers vested in the board of directors . . . clearly analogous to
10 the governing body of a municipality.

11 (*Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 651 (cleaned up); see also *Chantiles v.*
12 *Lake Forest II Master Homeowners Association* (1995) 37 Cal.App.4th 914, 922 [“For many
13 Californians, the homeowners association functions as a second municipal government, regulating many
14 aspects of their daily lives.”].) Further, membership in such associations usually is mandatory, and the
15 powers of such associations over owners is extensive. (*Id.*) No such considerations are present here:
16 membership in DDC is voluntary, and DDC lacks comparable quasi-governmental powers over its
17 members. (See *Oakland Raiders*, 131 Cal.App.4th at 636 [“In contrast [to *Cohen*], the NFL neither
18 performs ‘public-service functions,’ nor acts in a manner similar to homeowners’ associations.
19 Furthermore, homeowners’ associations are organized to regulate and govern various aspects of unit
20 owners’ day-to-day occupancy and maintenance of their homes; the NFL is organized for a far different
21 purpose.”].) The Court is unaware of any case (and the parties have cited none) in which a court found
22 that the directors of any nonprofit mutual benefit corporation other than a homeowners’ association owed
23 a fiduciary duty to the corporation’s members.

24 But even if Individual Defendants could be deemed to owe a fiduciary duty to Dentist Members
25 under some circumstances, that would not support Plaintiffs’ position here. A party may owe a fiduciary
26 duty in one capacity but not in another. In *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d
27 490, for example, the plaintiff brought an action against a homeowner’s association and members of the
28 association’s board of directors for injuries the plaintiff “sustained when she was attacked in her
condominium unit.” (*Id.* at 495.) The plaintiff sought to state a cause of action for breach of fiduciary
duty, alleging that the CC & Rs and bylaws gave rise to a fiduciary duty. (*Id.* at 513.) The court noted

1 that the plaintiff “had a dual relationship with defendants”: a fiduciary relationship requiring “directors to
2 exercise due care and undivided loyalty for the interests of the corporation,” and “a common law
3 relationship, similar to that of landlord and tenant, that requires the landlord to exercise reasonable care in
4 protecting tenants from criminal activity.” (*Id.*) The court held the plaintiff could not state a cause of
5 action for breach of fiduciary duty “because plaintiff alleged that the Association, as a landlord, breached
6 its duty to her as a tenant rather than as a shareholder. Indeed, the defendants fulfilled their duty to
7 plaintiff *as a shareholder* by strictly enforcing the provision in the CC & Rs that prohibited alteration of
8 the common areas except with the prior written consent of the board.” (*Id.* at 514.)¹⁰

9 So, too, here. Plaintiffs’ claims relate to reimbursement rates available to them under their
10 contracts (the PPAs) with DDC for the provision of dental services, not to their rights as members, such
11 as membership or voting rights. (See also *Oakland Raiders*, 131 Cal.App.4th at 637 [“The Raiders does
12 not contend that the NFL owes it fiduciary duties because it administers the Raiders’ pension plan
13 retirement funds.”].) “In general, employment-type relationships are not fiduciary relationships.”
14 (*O’Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 811 [holding that although
15 hospital may have fiduciary duty to the hospital’s shareholders and/or the public, it does not owe a
16 fiduciary duty to physicians or other medical staff members].)¹¹

17 Further, critically, recognition of a fiduciary duty would be inconsistent with the parties’
18 contractual relationship. “Many of the cases rejecting breach of fiduciary claims have been based (at least
19 in part) upon the principle . . . that a mere contract . . . does not constitute a trust or create a fiduciary
20 relationship. As a general rule, courts finding no fiduciary duty have done so where other legal
21 relationships clearly existed between the parties which covered the transaction in suit and which were
22 inconsistent with the existence of a fiduciary duty.” (*Oakland Raiders*, 131 Cal.App.4th at 634 (cleaned
23

24 ¹⁰ Plaintiffs contend that because dentists must become DDC members in order to contract with it, their
25 status as DDC members is “inextricably intertwined” with their contractual relationship with DDC.
(Opposition, 15.) That fails to distinguish *Frances T.*, where the plaintiff could not have been a member
26 of the condominium owners association without also being a tenant in the condominium development.

27 ¹¹ Individual Defendants asserted at the hearing that dentists have “no other rights” as members of DDC
28 than the privilege of entering into contracts with DDC. Not so. DDC’s Bylaws govern, among other
things, dentists’ applications for membership, revocation of membership, resignation, voting rights,
termination of membership, probation, rules for conduct, and membership meetings. (6/12/23 RFJN Ex.
E (Bylaws of Delta Dental of California) Art. II, secs. 2, 4-6, Arts. III, IV.)

up.) That is the case here, where Dentist Members entered into PDAs with DDC that squarely address the contested reimbursement rates. The PDAs expressly recite dentists' understanding that they will be bound by any amendment to those Agreements, the Bylaws, and the Participating Dentist Rules (PDRs), and to any policies or procedures referred to in the Bylaws or PDRs. (RFJN filed June 12, 2023, Ex. A to Ex. A, Participating Dentist Agreement and Confidential Fee Filing Form, 3.) The appended PDRs, in turn, required a participating dentist to accept his or her "Contracted Fees" with DDC as "full payment for services provided to any eligible patients." (*Id.* at 4.) The PDRs similarly defined "Contracted Fee" as "the fee for each Single Procedure that a participating dentist has contractually agreed with Delta Dental to accept as payment in full for accepting Enrollees." (*Id.* at 7.) Significantly, the PDRs in effect before the 2023 Amendments conferred essentially unlimited authority on DDC to set and adjust those fees:

The "Contracted Fee" will be subject to a maximum amount allowed as determined by Delta Dental for the network, specialty and location in which the dentist participates. The maximum amount is based on an actuarial calculation, and taking into account filed fees, general inflation rates, health care inflation rates, market pricing by competitors, and acceptability by customers. The maximum amount will not be reduced unless participating dentists' filed or submitted fees decrease to such an extent that Delta Dental is warranted in reducing the maximum amount allowed.

(*Id.*) Thus, DDC's agreements with participating dentists conferred broad authority on it to set binding fees, taking into account a wide range of factors, and left it entirely to DDC to determine whether and when any reduction in fees was "warranted." Recognizing a fiduciary duty on the part of DDC directors in connection with setting such fees would be irreconcilable with the express terms of DDC's contracts with participating dentists. (See *Waverly Productions, Inc. v. RKO General, Inc.* (1963) 217 Cal.App.2d 721, 731-732 [no basis for finding fiduciary duty where "[t]he contract is an elaborate one which undertakes to define the respective rights and duties of the parties."]; see also, e.g., *Wolf*, 107 Cal.App.4th at 30-31 ["the contractual right to contingent compensation in the control of another has never, by itself, been sufficient to create a fiduciary relationship where one would not otherwise exist."].)

Similarly, the provisions of the PDAs, which designate dentist members as independent contractors,¹² provide no indication that DDC entered into them with the view of acting primarily for the

¹² See RFJN filed June 12, 2023 Ex. D, Articles of Incorporation, Art. 2(b) ["The specific and primary purpose for which this corporation is formed is to provide dental benefit coverage through contracts with independent professional service providers."].

benefit of Dentist Members, rather than for the parties' mutual benefit. Where, as here, the parties are in a contractual relationship, a court must look to the terms of the contract to determine whether the party sought to be charged with a fiduciary relationship undertook an obligation "to act on behalf of and for the benefit of another." (*City of Hope National Medical Center*, 43 Cal.4th at 343, quoting *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 221.) Where, as here, the "contractual provisions indicate that the parties' common goal was to achieve a mutually beneficial arrangement," and nothing in the contract indicates that one party was to subordinate its interests to those of the other, there is no basis for finding a fiduciary duty. (*Id.* at 342-343 [holding that no fiduciary relationship arose from biotechnology company's contract with medical research center, since contractual provisions did not indicate that company undertook fiduciary obligation to act on behalf of and for benefit of research center where, among other things, contract provided that center was to be an independent contractor]; see also, e.g., *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC* (N.D. Cal. 2007) 634 F.Supp.2d 1009, 1021 [granting motion to dismiss counter-claim for breach of fiduciary duty where no facts were pled that demonstrated counter-defendant agreed in the alleged contract at issue to undertake a fiduciary relationship and give priority to plaintiff's interests].) To the contrary, as discussed below, it is undisputed that DDC was authorized by statute and by the prior settlement agreement to change the material terms of the PPAs, provided that it gives dentist members notice and an opportunity to terminate their contracts. Such terms are irreconcilable with Plaintiffs' claim that DDC's individual directors owed them a fiduciary duty in connection with making amendments to the PPAs or setting the reimbursement rates under those contracts.¹³

Accordingly, the Court sustains the Individual Defendants' demurrer to the first and second cause of action of the Second Amended Complaint.

¹³ Individual Defendants assert Plaintiffs do not allege any breach by Defendants Franzoi, Law, Lamb, Castro, Weber, and Chavarria, therefore, Plaintiffs cannot state a claim against those Defendants. (Defs. Opening Brief, 4, 9-10; see, e.g., Defs. Reply, 1 ["Only six of the Individual Defendants sat on the Dentist Compensation Committee [] that made the decision to authorize the 2023 Amendments at issue in this case."], 2.) The SAC and Plaintiffs' opposition brief are silent as to any alleged breach by these Defendants. (See, e.g., Defs. Reply, 2-3 ["Plaintiffs, who have made no argument in response, have effectively conceded this point."].) Accordingly, Individual Defendants' demurrer is sustained without leave to amend as to Defendants Franzoi, Law, Lamb, Castro, Weber, and Chavarria on this alternate ground.

1 **II. The Court Need Not Reach The Application Of The Business Judgment Rule.**

2 The parties dispute whether, even if the Individual Defendants owed Dentist Members a fiduciary
3 duty, the business judgment rule would protect their actions in adopting the 2023 Amendments. “The
4 existence of a fiduciary relationship between the board and the participants in an enterprise has never
5 precluded application of the [business judgment] rule. For example, the courts have applied the business
6 judgment rule to limited partnerships, although general partners are held to be agents and fiduciaries of
7 the limited partners. Similarly, the directors and controlling shareholders of for-profit corporations and
8 the directors of nonprofit corporations and mutual insurance companies are deemed to be agents and
9 fiduciaries of the shareholders and members, yet their management decisions are shielded by the business
10 judgment rule.” (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 712 (cleaned up).)

11 Individual Defendants contend Plaintiffs’ allegations are insufficient to overcome the business
12 judgment rule. (Defs. Opening Brief, 1-2, 10, 15-20; Defs. Reply, 1-2, 6, 8-12.) Plaintiffs disagree and
13 assert that the business judgment rule does not shield the Individual Defendants’ alleged conduct because
14 they did not conduct an adequate investigation and acted with a conflict of interest. Opposition, 7-8; see
15 also *id.* at 17-23.) Because the Court concludes as a matter of law that the Individual Defendants did not
16 owe Plaintiffs or other Dentist Members a fiduciary duty, it need not reach this issue.

17 **III. Plaintiffs Do Not Allege Sufficient Facts To State A Cause Of Action For Breach Of The**
18 **Implied Covenant Of Good Faith And Fair Dealing Against DDC.**

19 DDC argues that the implied covenant of good faith and fair dealing “cannot trump DDC’s
20 express right under both the applicable statutory scheme and its contract with dentists to set provider
21 reimbursement rates as it sees fit.” (DDC Opening Brief, 8; see also *id.* at 9 [“The contractual right to set
22 fees cannot give rise to a covenant claim for adjusting fees, regardless of whether the adjustment is
23 alleged to be ‘arbitrary’ or done with improper motive.”]; DDC Reply, 3.) The Court agrees in substantial
24 part.

25 “The covenant of good faith and fair dealing, implied by law in every contract, exists merely to
26 prevent one contracting party from unfairly frustrating the other party’s right to receive the *benefits of the*
27 *agreement actually made*. A claim for breach of the implied covenant of good faith and fair dealing
28 requires the existence of a contract, whether express or implied. Further, it is well established that an

1 implied covenant of good faith and fair dealing cannot contradict the express terms of a contract.”
2 (*Alameda Health System v. Alameda County Employees’ Retirement Association* (2024) 100 Cal.App.5th
3 1159, 319 Cal.Rptr.3d 710, 737-738 (cleaned up); see *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th
4 317, 349-350.) “The covenant of good faith finds particular application in situations where one party is
5 invested with a discretionary power affecting the rights of another. Such power must be exercised in good
6 faith.” (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342,
7 372.) However, “if the express purpose of the contract is to grant unfettered discretion, and the contract is
8 otherwise supported by adequate consideration, then the conduct is, by definition, within the reasonable
9 expectation of the parties and can never violate an implied covenant of good faith and fair dealing.” (*Wolf*
10 *v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1121 (cleaned up).)

11 **A. The Health Care Providers’ Bill of Rights Does Not Limit DDC’s Discretion To Set**
12 **Fees.**

13 DDC asserts that under its governing statutory scheme, it “has the right to set its dentist fees as it
14 sees fit.” (DDC Opening Brief, 7; DDC Reply, 1-3.) The Court concludes, and the parties agree, that the
15 statutory scheme expressly contemplates that DDC has the right to set and amend fees, and places no
16 limitations on DDC’s discretion to do so.

17 “Health care service plans are governed by the Knox-Keene Health Care Service Plan Act of 1975
18 . . . a comprehensive system of licensing and regulation . . . within the jurisdiction of the Department of
19 Managed Health Care.” (*Centinela Freeman Emergency Medical Associates v. Health Net of California,*
20 *Inc.* (2016) 1 Cal.5th 994, 1004-1005 (cleaned up).)

21 The intent and purpose of the Legislature in enacting the Knox-Keene Act was to promote the
22 delivery and the quality of health and medical care for the people of the State of California who
23 enroll in, or subscribe for the services rendered by, a health care service plan or specialized health
24 care service plan. The Legislature sought to accomplish this purpose by, among other things, (1)
25 transferring the financial risk of health care from patients to providers in order to help ensure the
26 best possible health care for the public at the lowest possible cost, (2) imposing proper regulatory
27 procedures in order to ensure the financial stability of the system, and (3) establishing a system
28 that ensures health care service plan subscribers and enrollees receive available and accessible
health and medical services rendered in a manner providing continuity of care.
(*Id.* at 1005, quoting Health & Saf. Code § 1342 (cleaned up).)

The Health Care Providers’ Bill of Rights, part of the Knox-Keene Act, provides that:

1 If a contract between a provider and a plan provides benefits to enrollees or subscribers through a
2 preferred provider arrangement, the contract may contain provisions permitting a material change
3 to the contract by the plan if the plan provides . . . notice to the provider of the change and the
4 provider has the right to terminate the contract prior to the implementation of the change.

5 (Health & Saf. Code § 1375.7(b)(1)(B).) Similarly, subdivision (c) of the same provision, which was
6 enacted in 2012 at the behest of the CDA,¹⁴ provides:

7 With respect to a health care services plan contract covering dental services or a specialized health
8 care service plan contract covering dental services . . . If a material change is made to the health
9 care service plan's rules, guidelines, policies, or procedures concerning dental provider contracting
10 or coverage of or payment for dental services, the plan shall provide . . . written notice to the
11 dentists contracting with the health care service plan to provide services under the plan's
12 individual or group plan contracts.

13 (*Id.* § 1375.7(c)(1).) A "material change" is defined as "a change to the system by which the plan
14 adjudicates and pays claims for treatment that would reasonably be expected to cause delays or
15 disruptions in processing claims or making eligibility determinations, or a change to the general coverage
16 or general policies of the plan that affect rates and fees paid to providers." (*Id.* § 1375.7(c)(2).)

17 The Court's analysis necessarily starts with the plain language of the statute. (*See Huff v.*
18 *Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 754 ["When we interpret a statute our
19 primary task is to ascertain the Legislature's intent and effectuate the purpose of the law. We look first to
20 the words of the statute itself as the most direct indicator of what the Legislature intended."].) The plain
21 language of the Health Care Providers' Bill of Rights sets forth the procedural requirements for material
22 changes to health care service plan contracts, including changes to coverage that affect rates and fees paid
23 to providers. Namely, with respect to dental services, it mandates procedures for providing notice to
24 participants regarding material changes to a "health care service plan's rules, guidelines, policies, or
25 procedures covering dental provider contracting or coverage of or payment for dental services," including
26 the fees and rates paid to providers. (Health & Saf. Code § 1375.7(c)(1).)

27 Thus, the statutory scheme expressly contemplates that dental care service plans such as DDC
28

14 The legislative history of the bill, AB 2252, Stats. 2012, c. 447, reflects that it was "sponsored by the
[CDA] to strengthen the partnership that already exists between providers and plans by ensuring that
adequate notification of significant changes in plan policies are communicated in a transparent and timely
manner." (E.g., Assembly Floor Analysis, Concurrence in Sen. Amendments, AB 2252 (Aug. 24, 2012);
Sen. Rules Comm., Office of Sen. Floor Analyses (Aug. 8, 2012).) Nothing in the legislative history of
the bill reflects any intention on the part of DMHC to regulate reimbursement rates or to restrict health
service plans' discretion to set such rates.

1 have the right to make such material changes to their contracts with dental providers, including changes to
2 coverage and payment for dental services, provided that they give dentists adequate written notice of such
3 changes and an opportunity for the provider to terminate the contract prior to the implementation of such
4 changes.¹⁵ Section 1375.7(g) expressly states that nothing in the Health Care Providers' Bill of Rights
5 "shall be construed or applied as setting the rate of payment to be included in contracts between plans and
6 health care providers." (*Id.* § 1375.7(g).) Health and Safety Code section 1375.7(g) expressly
7 contemplates that health care service plans may set and change their rates, and places no restriction on
8 their ability to do so other than the requirements of written notice. As DDC correctly observes, it "has the
9 right under the statutory scheme applicable to it to make material changes to its contracts, including
10 changes to the general coverage or general policies of the plan that affect rates and fees paid to
11 providers." (DDC Reply, 1.)

12 **B. Plaintiffs' Implied Covenant of Good Faith and Fair Dealing Claim Contradicts the**
13 **Express Terms of the 2018 Settlement Agreement And The Parties' Contract.**

14 DDC contends that "following the 2018 Settlement, the contract at issue—the dentists' PPA—was
15 amended to remove any contractual limitation on DDC's ability to set fees." (DDC Opening Brief, 7; see
16 DDC Reply, 1 ["DDC also has the express contractual right to set fees."], 2 [same].) Plaintiffs expressly
17 concede "there's no question the contract does give Delta [Dental] the discretion to change rates and to
18 make amendments" (R.T. (Apr. 10, 2024) 8:13-15; see also *id.* 10:9-11, 15:7-9), but contends that they
19 have nonetheless adequately pled a breach of the implied covenant. The Court disagrees.

20 Plaintiffs allege that "Dentist Members entered into written contracts, referred to herein as the
21 PPA, with Delta Dental to become participating dentists in Delta Dental's Premier or PPO network."
22 (SAC ¶ 99.) Plaintiffs allege "the PPAs (including the provisions at issue in this action) between each
23 Dentist Member and Delta Dental are essentially identical, and each expressly incorporate the 'Delta
24 Dental Bylaws,' Delta Dental's 'Participating Dentist Rules,' and 'Delta Dental's Dentist Handbook.'" (*Id.* ¶ 43.) Plaintiffs allege the PPA includes "an implied covenant of good faith and fair dealing under
25

26
27 ¹⁵ DDC's rules permit member dentists to submit provider disputes regarding fees to an internal resolution
28 mechanism and to binding arbitration. (RFJN filed June 12, 2023, Ex. A to Ex. A, Participating Dentist
Rules § 12; see also *Delta Dental Plan of California v. Banasky* (1994) 27 Cal.App.4th 1598, 1605-1608
[right to judicial review of DDC's internal determination of usual, customary and reasonable fees].)

1 California and any other applicable law.” (*Id.*) Plaintiffs allege that DDC “also agreed to the terms of the
2 Settlement Agreement, which prohibits Delta Dental from violating statutory or common law – including
3 the implied covenant of good faith and fair dealing – when setting reimbursement fees.” (*Id.*) Plaintiffs
4 allege DDC’s “enactment of the 2023 Amendments . . . constitutes a violation of the implied covenant of
5 good faith and fair dealing” because, “[u]pon information and belief, Delta Dental enacted the 2023
6 Amendments based on false pretenses and faulty assessments, and in the absence of valid data or
7 information that would justify the imposed modifications.” (*Id.* ¶ 102.)

8 The “2018 Settlement” refers to the Court-approved settlement in *California Dental Association v.*
9 *Delta Dental of California, et al.*, San Francisco Superior Court, Case No. 14-538849. (See RFJN filed
10 June 12, 2023 Ex. B.) The 2018 Settlement resolved class claims arising out of DDC’s 2013 amendments
11 to the PDA (the “2013 Amendments”), which the plaintiffs in that action (including the CDA) challenged
12 on the grounds, among others, that the 2013 Amendments were not permitted by the PDA or California
13 law; that the methods DDC used to determine Maximum Amounts Allowed and to determine Premier
14 Contracted Fees violated the PDA; and that DDC’s conduct constituted a breach of contract, a breach of
15 the covenant of good faith and fair dealing, and a violation of the UCL. (*Id.* Ex. B, Ex. A (Amended
16 Settlement Agreement and Release), 2-3.)

17 Part of the consideration for the 2018 Settlement was that DDC would make two amendments to
18 the PDA. (*Id.* § III.B.1.) The first of those amendments was an amended definition of “Contracted Fee”
19 in the PDR that generally required DDC to provide participating dentists with 120 calendar days’ notice
20 of a decrease in Premier Contracted Fee maximum amounts allowed or amounts of fee reimbursement
21 generally applicable to Premier dentists. (*Id.* at Ex. B, Ex. A § III.B.1.a.)¹⁶ The second was to amend
22 Section 13 of the PDR regarding notice and the effect of material amendments. (*Id.* at Ex. B, Ex. A §
23 III.B.1.b; see, e.g., *id.* at Ex. B, Ex. A, Appx. 5 (Redline of Participating Dentist Rules) § 13.) However,
24 the 2018 Settlement expressly provides,

25
26 ¹⁶ The 120-day advance notice requirement exceeds the 45 and 90 business days’ notice requirements in
27 the Health Care Providers’ Bill of Rights. (See Health & Saf. Code § 1375.7(b)(1)(A)-(C).) Further, it
28 requires DDC to provide notice to dentists not only of any decrease in contracted fees, but also of “the
potential financial impact of the reduction(s) on his/her Contracted Fee reimbursements from Delta Dental
based upon the Premier dentist’s submissions for procedures to Delta Dental over” the preceding 12-
month period. (RFJN filed June 12, 2023 Ex. B, Ex. C, A-6.)

Other than [those two] amendments . . . *Delta Dental has the right to determine unilaterally the provisions of the PDA (including the Rules), including without limitation any provisions relating to fee reimbursement; levels or amounts of fee reimbursement; methods, procedures or formulas for determining fee reimbursement, dispute resolution, and Delta Dental's right to amend the PDA (including the Rules), provided that nothing contained herein shall be construed to constitute an agreement that Delta Dental may violate any statutory or common law right by future conduct.*

(*Id.* at Ex. B, Ex. A § III.B.2 (emphasis added).) Significantly, the 2018 Settlement removed a provision from the PDA that had previously specified that the maximum amount determined by DDC for Contracted Fees would take into account a number of specified factors, including “filed fees, general inflation rates, health care inflation rates, market pricing by competitors, and acceptability by customers.” (*Id.* at Ex. B, Ex. A, Appx. 5, 5.) Instead, the 2018 Settlement states that in determining the maximum amounts, DDC “may”—but is not required to—“take into account, among other things, market and competitive conditions.” (*Id.*)

Thus, pursuant to the express language of the 2018 settlement agreement and the parties’ agreements, DDC has unfettered discretion to set its rates, provided that it gives adequate notice. Imposing a covenant of good faith and fair dealing would impermissibly contradict the express terms of the settlement agreement. (See *Wolf*, 162 Cal.App.4th at 1120 [“the implied covenant will only be recognized to further the contract’s purpose; it will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself.”].) Should “the dentist decline[] to be bound by the amendment(s), the dentist shall so advise Delta Dental and terminate his/her participating dentist agreement.” (RFJN filed June 12, 2023 Ex. B, Ex. A, Appx. 5 § 13; see, e.g., SAC ¶ 43 [PPAs are drafted and imposed on a “take it or leave it” basis], ¶¶ 75-76.)¹⁷

Plaintiffs, relying upon the last clause of the provision quoted above, argue that “‘nothing contained’ in the [settlement agreement], settlement agreement’s appendices, including the 2018 PPA amendments, can be construed to allow DDC to violate the common law.” (Opposition, 13; see also *id.* at 14; SAC ¶ 86.) However, Plaintiffs’ argument that the general proviso in the settlement agreement

¹⁷ Plaintiffs assert that the Court’s conclusion that DDC has unfettered discretion to change fees and reimbursement rates is inconsistent with its prior ruling on Defendants’ demurrer to the First Amended Complaint. Not so. To the contrary, the Court expressly recognized that “the PPA Agreements and the Health & Safety Code expressly contemplate that DDC may change its reimbursement rates from time to time, without placing any limitations on its discretion to do so.” (Oct. 12, 2023 Order, 23 fn. 14.) However, because DDC rested its argument on another ground, it did not reach that issue. (*Id.*)

1 regarding “the common law” refers to the implied covenant is fatally circular, since the covenant is
2 implied by law into every contract. Further, it would render meaningless the specific provisions of the
3 agreement expressly permitting DDC to unilaterally determine the terms of the provider contracts and to
4 amend those agreements. Further, Plaintiffs’ reading of the implied covenant of good faith and fair
5 dealing as limiting DDC’s express contractual right to unilaterally determine the provisions of the PDA
6 and to amend the PDA would *contradict* the express terms of the settlement agreement. (See, e.g., *Prager*
7 *University v. Google LLC* (2022) 85 Cal.App.5th 1022, 1039 [rejecting claim that implied covenant
8 prevented defendants from restricting access to and third party advertising on plaintiff’s YouTube videos
9 where “the contracts give defendants unfettered and unilateral discretion to remove, restrict, demonetize,
10 or de-emphasize content as they see fit” and the plaintiff’s claim sought to impose a duty, “to make
11 publishing decisions in a manner [the plaintiff] alleges good faith requires,” which “would be at odds with
12 the” contract]; *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 217 [trial court’s
13 conclusion that \$3 bank fee for returned checks violated the implied covenant was error “in light of the
14 rule that an implied contractual term . . . should not be read to vary an express term”].)

15 In addition to these provisions of the 2018 settlement agreement, DDC points to a variety of other
16 terms in the parties’ contracts (which incorporate the PDRs) that, in its view, reinforce the conclusion that
17 the parties’ agreement gives DDC the unfettered right to set fees. (Reply, 6.) The Court agrees. Thus,
18 the PDRs made it clear that the Contracted Fee “is subject to and cannot exceed a maximum amount
19 allowed *as determined by Delta Dental* for the Enrollee’s Plan, as well as the network, specialty and
20 location in which the dentist participates” (RFJN filed 6/12/23, Ex. C, App’x A (California Provider
21 Documents: California Participating Dentist Rules), A-5 (emphasis added)); it provided that a
22 participating dentist “*will accept* the lesser or his/her Contracted Fees with Delta, or the fee submitted . . .
23 as full payment for services provided to any Enrollee” (*id.* at A-1 ¶ 2 (emphasis added)); and, critically, it
24 provided that in the event of certain decreases in Premier Contracted Fee maximum amounts allowed or
25 levels or amounts of fee reimbursement generally applicable to Premier dentists, DDC would provide
26 enhanced and extended notice to dentists and “*may, at its option*, send a notice of decreases in Contracted
27 Fee maximum amounts allowed at the same time that it provides a notice” of amendments to the PDRs or
28

1 any other rules, policies, or procedures. (*Id.* at A-6 (emphasis added).) None of these provisions places
2 any constraint or limit on DDC's ability to set fees, other than the advance notice requirement set forth in
3 the 2018 settlement agreement.

4 Plaintiffs misplace their reliance upon cases that, they contend, stand for the proposition that one
5 party's discretion to set prices or fees under a contract may be constrained by the implied covenant.
6 (Opposition, 11.) None of those authorities, however, supports that proposition in the context of an
7 "evergreen" contract—that is, a contract that continues year-to-year but gives one party discretion to
8 adjust the prices from time to time, subject to the other party's right to notice and to terminate the
9 contract—akin to the PPAs. Plaintiffs point to one case involving such a contract, *Richards v. Direct*
10 *Energy Services, LLC* (2d Cir. 2019) 915 F.3d 88, but it supports Defendants' position, not Plaintiffs'.
11 There, plaintiff consumer entered into a contract with defendant electricity supplier, which provided that,
12 for the first twelve months, defendant would guarantee him a fixed electricity rate that was ten percent
13 below the state-approved rate, but thereafter, if he did not leave the contract, would begin charging
14 plaintiff a new variable rate that would be set on a month to month basis at defendant's "discretion" and
15 would be "based upon business and market conditions." The court, applying Connecticut law, held that
16 the defendant did not breach the implied covenant because, among other things, the contract gave the
17 defendant discretion to set a variable rate "based upon business and market conditions," there was no
18 language in the contract suggesting that the variable rate had to bear a direct relationship to the supplier's
19 procurement costs, the fact that the rate was lower than the standard service rates set by the pertinent state
20 regulatory authority did not mean that the supplier abused its discretion, and even if the supplier offered
21 low "teaser rates" to lure new customers, the consumer received exactly what he bargained for. (*Id.* at 97-
22 100.) As the *Richards* court observed, "There can be no breach of the implied promise or covenant of
23 good faith and fair dealing where the contract expressly permits the actions being challenged, and the
24 defendant acts in accordance with the express terms of the contract." (*Id.* at 99, quoting 23 Williston on
25 Contracts § 634:22 (4th ed. 2018).) Significantly, the contractual language in *Richards* (supplier may set
26 variable rate "based upon business and market conditions") is closely similar to that involved here (in
27 determining maximum amounts, DDC may take into account "market and competitive conditions").
28

1 *Richards* thus is irreconcilable with Plaintiffs' argument that the implied covenant can be used as a basis
2 for setting (or limiting) prices or rates under a contract containing similar discretionary language.

3 Even more broadly, those cases stand for the principle that "courts are not at liberty to impose a
4 covenant directly at odds with a contract's express grant of discretionary power except in those relatively
5 rare instances when reading the provision literally would, contrary to the parties' clear intention, result in
6 an unenforceable, illusory agreement." (*Third Story Music, Inc. v. Waits* (1996) 41 Cal.App.4th 798,
7 808.) Plaintiffs make no such contention here. Nor could they, since both the statutory scheme and the
8 settlement agreement give them a right to reasonable notice of any change in reimbursement rates and an
9 opportunity to terminate their agreements with DDC if they are not satisfied with the new rates.

10 Finally, as DDC points out, Plaintiffs' position that DDC's ability to adjust fees and rates from
11 time to time is somehow constrained by the implied covenant would be unworkable, for at least two
12 reasons. First, "it contains no limiting principle; even a very small absolute or percentage decrease in fees
13 would support a lawsuit and a thorough review by the courts, subjecting plans to seriatim if not endless
14 litigations." (Reply, 1.)¹⁸ Moreover, nothing in the case authority relating to the implied covenant
15 supplies any standard by which a trier of fact could determine whether a given change in fees would be
16 reasonable or unreasonable, nor do Plaintiffs propose one.¹⁹

17 Second, "courts are ill-situated to judge the 'reasonableness' of prices or function as price
18 regulators." (*Id.*; see, e.g., *California Grocers Assn.*, 22 Cal.App.4th at 218 ["This case implicates a
19 question of economic policy—whether service fees charged by banks are too high and should be
20 regulated. It is primarily a legislative and not a judicial function to determine economic policy." (cleaned
21 up)]; see also *Willard v. AT&T Communications of California, Inc.* (2012) 204 Cal.App.4th 53, 59 ["it is
22 primarily a legislative and not a judicial function to determine the best economic policy" (cleaned up)].)

23
24 ¹⁸ Further, different categories of providers, such as DDC's Premier Specialty Dentists, Premier General
25 Dentists, and PPO Dentists, would likely be affected in different ways by adjustments to reimbursement
26 rates, giving any adversely affected provider an incentive to sue even if the overall effect of the changes
27 would benefit providers as a whole.

28 ¹⁹ The only California case Plaintiffs cite in which the implied covenant was invoked as the basis for
setting a price term is readily distinguishable on precisely this ground. (See, e.g., *Cal. Lettuce Growers v.*
Union Sugar Co. (1955) 45 Cal.2d 474, 483-484 [in action for value of beets delivered to defendant sugar
company by plaintiff grower, price formula was sufficiently certain in light of industry practice, parties'
prior course of dealing and provision calling for verification of average net selling price by independent
accounting firm].)

1 Plaintiffs have no convincing response to either objection. As Defendants aptly observe, Plaintiffs'
2 claims inappropriately invite this Court to become "the dental industry's price regulator in California."
3 (DDC Opening Brief, 1; Defs. Opening Brief, 1.)

4 Accordingly, DDC's demurrer to the third cause of action is sustained.²⁰

5 **IV. Plaintiffs' Declaratory Relief Claim Must Be Dismissed.**

6 As the Court sustains Defendants' demurrers to the first through third causes of action, Plaintiffs'
7 fourth cause of action must be dismissed as it is derivative of the underlying causes of action. (See SAC
8 ¶¶ 105-106.)

9 **V. The Demurrers Are Sustained Without Leave To Amend.**

10 In ruling on a demurrer, a court should grant leave to amend only if there is a reasonable
11 possibility the plaintiff could cure the defect with an amendment. The burden of proving such reasonable
12 possibility is squarely on the plaintiff. (*Blank*, 39 Cal.3d at 318.) Although Plaintiffs sought leave to
13 amend, they did not specify any amendment that could overcome the foregoing defects. Rather, they
14 sought leave to plead additional facts and to take "limited" discovery into the process by which the
15 Dentist Compensation Committee adopted the 2023 Amendments. Plaintiffs cannot meet their burden to
16 show grounds for amendment merely by seeking further discovery; moreover, their proposal would only
17 address the application of the business judgment rule, which the Court need not reach in order to decide
18 the demurrers.²¹ Accordingly, the demurrers are sustained without leave to amend.

23
24 ²⁰ As the Court sustains DDC's demurrer on this ground, it need not reach the other arguments DDC
raised on demurrer. (See DDC Opening Brief, 10-14.)

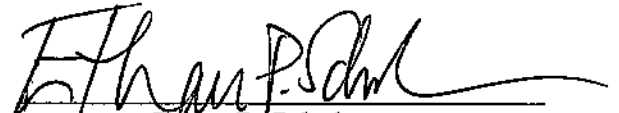
25 ²¹ Plaintiffs also represented at the hearing that the proviso language in the 2018 Amendments discussed
26 above was specifically negotiated, but did not make any offer of proof as to what the parties mutually
intended that language to mean, much less that it would be reasonably susceptible to such meaning or that
27 it could overcome the grant of discretion to DDC to set Maximum Allowable Rates based on, "among
other things, market and competitive conditions." (See *Hewlett-Packard Co. v. Oracle Corp.* (2021) 65
28 Cal.App.5th 506, 537-538 [courts generally ascertain the parties' mutual intent based solely on the
agreement's plain language, and may not consider extrinsic evidence to give an instrument a meaning to
which it is not reasonably susceptible].)

1 CONCLUSION

2 For the foregoing reasons, Delta Dental of California's Demurrer to Plaintiffs' Second Amended
3 Complaint and Individual Defendants' Demurrer to Plaintiffs' Second Amended Complaint are sustained
4 without leave to amend. Defendants shall submit a proposed judgment.

5
6 IT IS SO ORDERED.

7 Dated: May 2, 2024

8 
9 Ethan P. Schulman
10 Judge of the Superior Court
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CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

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

On May 1, 2024, I electronically served ORDER ON (1) DELTA DENTAL OF CALIFORNIA'S DEMURRER TO PLAINTIFFS' SECOND AMENDED COMPLAINT; AND (2) INDIVIDUAL DEFENDANTS' DEMURRER TO PLAINTIFFS' SECOND AMENDED COMPLAINT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: May 1, 2024

Brandon E. Riley, Court Executive Officer

By: _____

Sean Kane, Deputy Clerk