

No. A170821

IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION ONE

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CALIFORNIA DENTAL ASSOCIATION ET AL.,

*Appellants,*

v.

DELTA DENTAL OF CALIFORNIA ET AL.,

*Respondents.*

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Appeal from San Francisco Superior Court,  
Case No. CGC-22-603753  
Hon. Ethan Schulman

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**APPELLANTS' OPENING BRIEF**

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## I. INTRODUCTION

Effective January 1, 2023, appellee Delta Dental of California (Delta Dental) unilaterally imposed amendments to its agreements with its Dentist Members (the 2023 Amendments), which changed the way in which the reimbursement fees of those members are determined. The 2023 Amendments substantially reduced those fees and imposed a structure that fundamentally deprives the Dentist Members of the benefit of their bargain. In doing so, Delta Dental violated the covenant of good faith and fair dealing that is implied in every contract. And the Individual Defendants—Delta Dental directors—breached their duty of care to Delta Dental’s Dentist Members by rubber-stamping the 2023 Amendments without even considering the damage caused to the Dentist Members, to whom the Individual Defendants owe fiduciary duties.

Accordingly, this lawsuit was brought by Dentist Members of Delta Dental (the Individual Plaintiffs) and by the California Dental Association (CDA), a nonprofit association of dentists, of which the Individual Plaintiffs are also members. Plaintiffs (collectively CDA) properly alleged claims for breach of the implied covenant of good faith and fair dealing, breach of the duty of care, and declaratory relief.

The trial court, however, sustained defendants’ demurrers without leave to amend. The trial court found that Delta Dental is not bound by the implied covenant of good faith and fair dealing because, in the trial court’s

view, the contracts at issue give Delta Dental “unfettered discretion.” But that is not what the contracts say. And the complaint, the allegations of which must be accepted as true at this stage, says the opposite. In fact, Delta Dental agreed to a contractual provision that constrains its discretion and ensures that the covenant of good faith and fair dealing applies. The trial court read that crucial provision out of the agreement, and instead read “unfettered discretion” into it, which was error.

The trial court also held that Delta Dental’s Board of Directors does not owe fiduciary duties to Delta Dental’s members. But “the directors of a nonprofit mutual benefit corporation, like [Delta Dental] here, are fiduciaries who must act for the benefit of the corporation *and its members.*” (*Coley v. Eskaton* (2020) 51 Cal.App.5th 943, 958 (*Coley*), italics added.) That rule is particularly apropos here. The Dentist Members are Delta Dental’s core constituency and the source of its success. Indeed, Delta Dental itself has stated that the members of its Board of Directors are fiduciaries of Delta Dental’s stakeholders, which includes the Dentist Members. (AA347 ¶ 83.)

In addition, the trial court sustained the demurrer with regard to CDA’s claim for declaratory relief. But CDA is entitled to declaratory relief that the implied covenant of good faith and fair dealing and the Individual Defendants’ fiduciary duties preclude Delta Dental from enforcing the 2023 Amendments.



Finally, the trial court denied leave to amend. But CDA showed that it can allege additional facts to overcome what the trial court perceived as defects in the complaint. The trial court abused its discretion in denying leave to amend.

The trial court erred. This Court should reverse.

## **II. STATEMENT OF THE CASE**

### **A. Parties**

#### **1. Delta Dental and the Individual Defendants**

Delta Dental is a California nonprofit mutual benefit corporation and a 501(c)(4) social welfare organization. (AA322–323 ¶ 20.) It is the largest provider of dental benefit plans in California and dominates the market for dental benefit plans provided to individuals, companies, and state and federal government agencies in California. (*Ibid.*) Delta Dental’s “specific and primary purpose” is to “provide dental benefit coverage through contracts with independent professional service providers.” (*Ibid.*) That is also the purpose that provides the basis for Delta Dental’s tax-exempt status, since it is a mechanism by which private dental service can be made broadly available to the public. (See AA327, AA344 ¶¶ 38, 77.)

The contracts through which Delta Dental is to provide dental benefit coverage are called Participating Provider Agreements (PPAs), formerly referred to as Participating Dentist Agreements (PDAs). The ability to enter into a PPA with Delta Dental is a “privilege of

membership.” (*Ibid.*) Indeed, it is the primary privilege of being a Dentist Member of Delta Dental, and one must be a Dentist Member to enter into a PPA. (AA329 ¶ 42.) The primary benefit of Dentist Members’ bargain in entering into a PPA is to receive adequate fees. (See AA319, AA348 ¶¶ 6, 86.) Delta Dental and its Board of Directors must exercise good faith and due care when setting fees. (See *ibid.*; AA349 ¶ 89.)

By failing to exercise good faith and due care, and failing to even consider the interests of the Dentist Members, leading to fees that are significantly below an adequate level, Delta Dental not only deprives Dentist Members of the benefit of their bargain, it also harms patients and violates its own corporate purpose and the justification for its tax-exempt status. (See AA327, AA344 ¶¶ 38, 77.) Without adequate fees, Dentist Members are forced to reduce services or leave the Delta Dental network altogether, eliminating rather than providing dental benefit coverage to patients through the PPAs—the exact opposite of Delta Dental’s purpose as a tax-exempt corporation. (See *ibid.*)

The Individual Defendants are members of Delta Dental’s Board of Directors and of its “Dentist Compensation Committee,” or “Compensation Committee,” to which the Board delegated its authority regarding dentist reimbursement fees. (AA323–324, AA328–329 ¶¶ 22–27, 41.)<sup>1</sup>

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<sup>1</sup> The “Individual Defendants,” as used herein, are Roy A. Gonella (member of the Board and Chair of the Compensation Committee); Glen F.

## 2. CDA and the Individual Plaintiffs

CDA is a non-profit organization that has worked since 1870 to serve California's community of dentists. (AA320 ¶ 10.) It is the largest state dental association in the country, with approximately 27,000 dentist and dental-student members. (*Ibid.*) The Individual Plaintiffs are members of CDA and of Delta Dental, with the exception of Dr. Shadie Azar, a former Dentist Member who was forced to leave the Delta Dental network due to the substantial reduction in reimbursement fees. (AA322 ¶ 19.)<sup>2</sup>

### B. The Settlement Agreement imposes duties of good faith, fair dealing, and due care on Delta Dental.

In 2013, Delta Dental sought to impose fee reductions that were contrary to agreements in place at the time. (AA330 ¶ 46.) Litigation ensued, followed by settlement. (*Ibid.*) As part of the heavily-negotiated Settlement Agreement, Dentist Members succeeded in imposing an

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Bergert (member of the Board and of the Compensation Committee); Stephen F. McCann (member of the Board and of the Compensation Committee); Heidi Yodowitz (Chair of the Board and ex-officio member of the Compensation Committee); Terry A. O'Toole (member of the Board and of the Compensation Committee); and Andrew J. Reid (member of the Board and of the Compensation Committee). (AA323–326 ¶¶ 21–32.) The operative complaint also names Lynn L. Franzoi, Ian R. Law, Jay C. Lamb, Michael J. Castro, Alicia F. Weber, and Sarah M. Chavarria, but the trial court dismissed them from the case and CDA does not appeal that ruling.

<sup>2</sup> The Individual Plaintiffs are Meredith Newman, D.M.D.; Tom Massarat, D.D.S.; Spencer Anderson,, D.D.S.; Steve Chen, D.D.S.; Ray Klein, D.D.S.; Garrett Russikoff, D.M.D.; and Shadie Azar, D.M.D. (AA321–322 ¶¶ 13–19.)

important limitation on Delta Dental’s ability to set fees: Delta Dental was required to comply with statutory and common law, including fiduciary duties and the implied duty of good faith and fair dealing. (*Ibid.*)

The Settlement Agreement was intended to and did restrict Delta Dental’s discretion, imposing accountability for decisions regarding reimbursement fees. (AA330 ¶ 46.) Under the Settlement Agreement, Delta Dental’s obligation to comply with statutory and common law carried forward to all future conduct, including the setting of fees. (*Ibid.*) Accordingly, while Delta Dental may have retained a level of discretion, that discretion was expressly limited, giving Dentist Members crucial protection with respect to fee changes going forward. (*Ibid.*)

Specifically, the Settlement Agreement provides that “Delta Dental has the right to determine unilaterally the provisions of the PDA [now PPA],” *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.”* (AA180, italics added.) The specific intent of the italicized proviso was to make clear that, going forward, Delta Dental would continue to have the duty of good faith and fair dealing and could not write it out of existence unilaterally. (AA330, AA348 ¶¶ 46, 86.)

**C. Defendants breached their duties of good faith, fair dealing, and due care in adopting the 2023 Amendments.**

Effective January 1, 2023, Delta Dental adopted the 2023

Amendments. Those amendments change the entire structure by which the fees of many Dentist Members are determined, including by eliminating the ability of certain Dentist Members to submit their own fee schedules accounting for their costs. (AA317 ¶ 4.) The 2023 Amendments also substantially reduce the reimbursement fees paid to Dentist Members, in some cases by up to 40%, thereby threatening the ability of many Dentist Members to continue to provide services to Delta Dental patients. (*Ibid.*) Some Dentist Members have been forced to leave the Delta Dental network entirely. (See AA322 ¶ 19.) The practices of other Dentist Members continue to be threatened, as their reimbursement fees are reduced while their costs continue to increase. (See AA319, AA330 ¶¶ 7, 47.) This contravenes Delta Dental’s corporate purpose and the basis for its tax-exempt status. Instead of “provid[ing] dental benefit coverage through contracts with independent professional service providers” (AA322–323 ¶ 20), Delta Dental has *reduced* dental benefit coverage by making it untenable for Dentist Members to continue to provide dental services. (See AA344 ¶ 77.)

Delta Dental enacted the 2023 Amendments without any legitimate business need and without any regard to how they would impact Dentist Members or their patients. (AA317 ¶ 4.) Delta Dental and the Individual Defendants focused, instead, on Delta Dental’s already-dominant market position and profits, and on providing excessive compensation for its

directors and officers, all at the expense of maintaining and expanding the availability and quality of oral healthcare services in California. (AA329–330 ¶ 45; see also AA323–326, AA331–336 ¶¶ 21–33, 50–59.)

Furthermore, all of this was done without due care for the interests of Delta Dental’s Dentist Members. On August 10, 2022, Delta Dental’s Compensation Committee met for the first and only time—with no materials or preparation in advance—to consider the 2023 Amendments. (See AA336–339 ¶¶ 60–63.) Although the changes made by the 2023 Amendments were monumental and the issues implicated complex, the changes were considered and approved at a single 75-minute Zoom meeting. (AA336–339 ¶ 61.) Delta Dental’s general practice was to provide appropriate materials to the Board ahead of meetings, recognizing that this is what due care requires. In this case, however, Delta Dental provided nothing in advance of the meeting, leaving the directors entirely dependent on the limited and selective information presented orally by management during the brief Zoom meeting. (AA337 ¶ 61(a).) This prevented Compensation Committee members from preparing for the meeting in advance, as any reasonably prudent director would. (*Ibid.*)

The brief and superficial overview the Compensation Committee received from a Delta Dental executive failed to address a host of significant issues that were highly pertinent to the decision of whether to approve the amendments, including:

- whether the amendments were necessary given Delta Dental’s market dominance and substantial net assets and the already low fees that had been in place without significant increase for roughly ten years;
- the methodology used to determine the proposed changes to Dentist Members’ fees and whether it included any consideration of the needs and interests of Dentist Members;
- the impact on Dentist Members’ ability to provide oral healthcare services especially in the face of rising costs and long-stagnant fees, including whether the changes made it economically infeasible for dentists to continue providing certain procedures;
- the impact on patient experience and provider relationships;
- the impact on Dentist Members generally, including whether the amendments are fair and reasonable; and
- whether the amendments served Delta Dental’s corporate purpose of making dental service from private dentists more available to the public or whether instead they were inimical to that purpose.

(See AA337–338 ¶ 61(b).)

Moreover, this superficial overview was provided by an executive

who focused on areas such as sales, product strategy, and business development. (*Ibid.*) He thus lacked competency and reliability on critical issues such as the needs of dental providers and the impact of fee reductions on patient services, which in any event were not meaningfully addressed. (See *ibid.*)

Because none of the Compensation Committee members were dentists, they lacked the knowledge necessary to adequately evaluate the 2023 Amendments and their impact on Dentist Members and their practices and patients. (AA338 ¶ 61(c).) Yet the Compensation Committee sought no independent analysis of the proposed amendments or their likely impact. Indeed, no independent experts or consultants presented at or attended the meeting and no expert materials, studies, or analyses were distributed to Committee members at or in advance of the meeting. (*Ibid.*) Given that the primary purpose of the 2023 Amendments was to reduce the reimbursement fees paid to Dentist Members, and given the complexity of assessing the impacts of these reductions on dental providers, any reasonably prudent director would have insisted on a thorough expert analysis in evaluating the impacts associated with such a major shift. (*Ibid.*) In particular, the Compensation Committee should have employed and considered the advice and analysis of independent experts qualified to address the impact of the various fee modifications on dental providers' practices and their ability to serve patients within the Delta Dental network. (*Ibid.*) The Compensation



Committee failed to do so. (*Ibid.*)

Compensation Committee members at the August 10, 2022 meeting were told that the timeline for approval was short, and that to proceed with management's desired effective date of January 1, 2023, notice would need to be provided to CDA no later than August 20, 2022, and to providers no later than September 1, 2022. (AA338–339 ¶ 61(d).) Yet there was no actual business urgency for the 2023 Amendments to be approved. (*Ibid.*) The fees in place at the time had been in effect for many years, during which Delta Dental had successfully grown in size and market dominance. (See AA330 ¶ 47.) During this time, the costs that individual Dentist Members incurred in providing dental services had gone up substantially, making the potential impact of a fee reduction even more significant. (See *ibid.*) There was every reason for careful consideration and no reason for the immediate action that management sought. (AA338–339 ¶ 61(d).)

Given the complexity, scope, and likely impact of the 2023 Amendments, a reasonably prudent director would have insisted upon much more than a mere 75-minute Zoom meeting with no materials distributed in advance and no experts in attendance. (AA338–339 ¶ 61(d).) More time and information were required to adequately evaluate the proposed changes, including the opportunity to closely review relevant materials and to consider the impact of the proposed amendments on Dentist Members and their ability to continue to serve Delta Dental's corporate purpose of

making dental service available to members of the public. (See *ibid.*)

In short, despite representing a massive sea change in the relationship between Dentist Members and Delta Dental, the 2023 Amendments were presented as a *fait accompli*. (AA339 ¶ 62.) The Compensation Committee was simply asked to rubber-stamp the changes. (*Ibid.*) And that is precisely what they did, voting unanimously to pass the 2023 Amendments in full, without a single adjustment or revision. (*Ibid.*)

Defendants failed to conduct a reasonable inquiry into fundamental issues that Defendants knew or should have known were highly material to the decision of whether to enact the 2023 Amendments. (*Ibid.*) The entire purpose of the 2023 Amendments was to substantially reduce the reimbursement fees paid to Dentist Members or otherwise modify their arrangements with Delta Dental. (*Ibid.*) Yet Defendants failed to investigate the impact these changes would have on Dentist Members and their ability to serve patients. (*Ibid.*) This failure constitutes a significant dereliction of duty. (*Ibid.*)

At a minimum, any reasonably prudent director would have investigated and considered:

- the frequency of billed procedures for which fee reductions were being imposed, which determines the overall impact of the proposed fee changes on Dentist Members;
- the costs of performing procedures, which determines

whether and to what extent Dentist Members will be able to sustain their practices and provide dental services despite the fee reductions;

- the costs of running a dental practice, including obtaining the necessary labor and materials during a time when those costs have significantly increased;
- the training necessary for complex procedures, which increases the investment required for dental providers to provide these needed services to patients;
- the impact of COVID, which significantly reduced the number of patient visits in the years leading up to the 2023 Amendments, causing many (if not most) dental practices to suffer economically; and
- the impact of decreasing Dentist Members' reimbursement fees on the ability of Dentist Members to continue to provide dental services to California residents, including whether some Dentist Members would be forced to reduce their practice, cease providing certain services for which the fees had been cut, or exit the Delta Dental network entirely.

(See AA339–340 ¶ 64.)

Furthermore, the Individual Defendants did not conduct any outreach to Dentist Members in order to assess the impact of the 2023

Amendments. (AA340 ¶ 65.) Defendants' failure to investigate these issues was grossly negligent and violated their duty to act in good faith and with such care as an ordinarily prudent director in a like position would use under similar circumstances. (*Ibid.*)

In addition to ignoring the impact of their decisions on a key constituency, Defendants failed to conduct a reasonable investigation into whether there was a legitimate need or justification for the 2023 Amendments. (AA340 ¶ 66.) At the time the 2023 Amendments were considered and approved, Delta Dental dominated the market and had experienced significant growth in both net worth and market share. (AA340 ¶ 67.) It had developed substantial capital and reserves, far greater than required and for which it had demonstrated no purpose or plan. (*Ibid.*) Indeed, in 2021, the last full year before the 2023 Amendments were considered, Delta Dental had \$2.8 billion in total revenue and \$3.1 billion in total assets. (*Ibid.*) In 2022, when Defendants enacted the 2023 Amendments but before they went into effect, Delta Dental continued to maintain total assets of more than \$3 billion and net assets of over \$2 billion—3,000% more than the amount required by the California Department of Managed Healthcare (DMHC). (*Ibid.*) Thus, Delta Dental was operating very successfully under the existing fee structure. (See *ibid.*)

Defendants failed to take any of this into account in evaluating the 2023 Amendments. (AA340–341 ¶ 68.) They did not undertake any

assessment or analysis regarding the necessary amount of net assets that Delta Dental should maintain to conduct operations and mitigate risk. (*Ibid.*) They did not discuss a plan for Delta Dental's rapidly accumulating assets or how they intended to reconcile the increasing cash holdings with Delta Dental's status as a nonprofit. (*Ibid.*) Nor did they consider the fact that, as a tax-exempt organization, Delta Dental pays virtually no taxes, which gives it a significant competitive advantage over most other companies offering dental benefit plans in California. (*Ibid.*) In fact, Defendants failed to conduct any reasonable inquiry into whether there was a legitimate and justifiable need for the 2023 Amendments and whether they were consistent with Delta Dental's tax exempt status. (*Ibid.*) Defendants' failure to consider these fundamental issues was an abuse of discretion and a dereliction of duty. (*Ibid.*)

If Delta Dental and the Individual Defendants had conducted a good-faith inquiry into these issues, as they were required to do, they would not have adopted the 2023 Amendments, which lack any legitimate justification, punitively impact Dentist Members, harm their ability to provide dental service to patients, and deprive them of the benefit of their bargain under the PPA. (AA319 ¶ 6.) Any reasonable, good-faith inquiry would have revealed that reducing the reimbursement fees paid to Dentist Members was not only unnecessary to maintain Delta Dental's competitive position, profitability, and success, but in fact inconsistent with its

corporate purpose. (See AA341 ¶ 69.)

The 2023 Amendments impose unreasonably low reimbursement fees that significantly penalize Dentist Members and meaningfully hinder their ability to provide services to patients with a Delta Dental plan. (AA341–342 ¶ 70.) Given Delta Dental’s secure financial position—evidenced by, among other things, its dominant market position and billions of dollars in excess assets—no reasonable, independent fiduciary would approve amendments that significantly harm Dentist Members and their patients. (*Ibid.*) Yet that is precisely what Defendants did, rubber-stamping amendments that are unjust and unreasonable towards the very Dentist Members to whom they owe fiduciary duties and the duty of good faith and fair dealing. (*Ibid.*)

**D. The 2023 Amendments significantly harm Dentist Members.**

The 2023 Amendments caused, and continue to cause, widespread harm to Dentist Members. (AA319, AA342 ¶¶ 7, 71.) For some members, the continued viability of their practices is threatened. (AA319 ¶ 7.) Others have had to change the way they conduct their practices in ways that compromise their ability to provide high quality services. (*Ibid.*) For some, this has meant decreasing the number of dental services they can provide or even contracting the size of their practice. (*Ibid.*) Others have been forced to reduce staff and thus increase patient waiting times and decrease the number of patients who can be served. (*Ibid.*) Some have already been

forced to exit the Delta Dental network entirely to their detriment given Delta Dental's market dominance. (*Ibid.*) As just one example, Dr. Azar could no longer operate within the Delta Dental network given the substantial reduction in reimbursement fees and was thus forced to leave the network to the substantial detriment of his practice. (AA322 ¶ 19.)

At the time of the 2023 Amendments, Dentist Members had not received a significant fee increase in over a decade, but the 2023 Amendments made the situation far worse, reducing many Dentist Members' fees by up to 40%. (AA342 ¶ 72.) The 2023 Amendments also modify the entire fee determination process for many Dentist Members, to their significant detriment. (*Ibid.*) Before the 2023 Amendments, many Dentist Members filed their own fee schedules with Delta Dental and were permitted to file annually to seek a modest increase in their fees. (*Ibid.*) Now, rather than file their own schedules, those Dentist Members are bound by Delta Dental's standard schedules. (*Ibid.*)

In some instances, the reduction in reimbursement fees associated with a particular procedure is so drastic that Dentist Members have no choice but to cease providing the service—even when it is specifically requested by a patient, and even if the patient is willing to pay out of pocket for amounts above Delta Dental's approved reimbursement fees but cannot do so due to Delta Dental's punitive prohibition on such payments. (*Ibid.*)

All of this contravenes Delta Dental's overriding corporate purpose

of “provid[ing] dental benefit coverage through contracts with independent professional service providers.” (AA327 ¶ 38.) Indeed, the 2023 Amendments reduce rather than enhance dental coverage to the public through contracts between Delta Dental and its Dentist Members—the exact opposite of Delta Dental’s stated mission and justification for its tax-exempt status. (AA344 ¶ 77.) Meanwhile, Delta Dental’s own profits, net assets, and market dominance continue to increase, as does the Individual Defendants’ compensation, all at the expense of the Dentist Members and the patients they serve. (*Ibid.*)

#### **E. Procedural History**

CDA filed its initial complaint in this action on December 30, 2022. (AA009.) CDA filed a First Amended Complaint on April 20, 2023. (AA039.) Delta Dental and the Individual Defendants demurred, and the trial court sustained the demurrers in part and overruled them in part. (AA283–313.) Notably, the court overruled Delta Dental’s demurrer to CDA’s cause of action for violation of the implied covenant of good faith and fair dealing, holding that the “2018 settlement did not give [Delta Dental] unfettered discretion to set reimbursement rates potentially in violation of statutory or common law.” (AA306:10–12.) The trial court also stated that “directors of a nonprofit mutual benefit corporation . . . are fiduciaries who must act for the benefit of the corporation and its members.” (AA298:24–26, quoting *Coley, supra*, 51 Cal.App.5th at p.



958.)

CDA filed its Second Amended Complaint on November 13, 2023, alleging causes of action for (1) breach of the duty of care; (2) breach of the duty of loyalty; (3) breach of the implied covenant of good faith and fair dealing; and (4) declaratory relief. (AA314–360.) Delta Dental and the Individual Defendants again demurred and the trial court sustained the demurrers with prejudice. (AA746–774.) Contrary to its earlier ruling, the trial court this time held that Delta Dental *does* have “unfettered discretion” in setting reimbursement fees. (AA768:11–20.) The trial court also held that members of Delta Dental’s Board do not owe fiduciary duties to Dentist Members, reversing its prior reliance on *Coley*. (AA755–762.)

The trial court entered its judgment of dismissal on May 7, 2024. (AA775–779.) Notice of entry of judgment followed on May 8, 2024. (AA780–788.) The notice of appeal was timely filed on June 26, 2024. (AA789–793.)

### III. STATEMENT OF APPEALABILITY

The judgment of dismissal is appealable. (See Code Civ. Proc., § 904.1, subd. (a)(1); *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699.)

### IV. ARGUMENT

In its “review of a dismissal entered after the sustaining of a demurrer without leave to amend,” this Court “accept[s] as true the plaintiff’s well-pleaded allegations and reasonable inferences therefrom,

and” determines “de novo whether those facts state a viable cause of action.” (*Galeotti v. International Union of Operating Engineers Local No. 3* (2020) 48 Cal.App.5th 850, 856.) “If, as here, the trial court sustained the demurrer without leave to amend,” this Court decides “if there is a reasonable possibility that amendment could cure the defect.” (*Amy’s Kitchen, Inc. v. Fireman’s Fund Ins. Co.* (2022) 83 Cal.App.5th 1062, 1067.) “Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment.” (*Skov v. U.S. Bank National Assn.* (2012) 207 Cal.App.4th 690, 695 (*Skov*), citation omitted.)

Here, the Court should reverse because CDA’s allegations and reasonable inferences from those allegations state causes of action for breach of the implied covenant of good faith and fair dealing, breach of the duty of due care, and declaratory relief. And even if the Court does not reverse on those grounds, it should reverse the denial of leave to amend.

**A. The trial court erred in sustaining the demurrer to the claim for breach of the implied covenant of good faith and fair dealing.**

In California, every contract “contains an implied covenant of good faith and fair dealing that ‘neither party will do anything which will injure the right of the other to receive the benefits of the agreement.’” (*Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1306, quoting *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23

Cal.4th 390, 400.) “The implied covenant ‘finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith.’” (*Ibid.*, quoting *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372 (*Carma*); accord, e.g., *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 363 (*Locke*)). “The essence of the good faith covenant is objectively reasonable conduct.” (*Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 141 (*Lazar*)). For example, failure to set prices “in good faith at a reasonable level” is a breach of the implied covenant. (*Ibid.*)

Whether the defendant has deprived the plaintiff of the benefit of his or her bargain, and the interpretation of ambiguous contract terms, are questions for the trier of fact. For example, in *Moore v. Wells Fargo Bank, N.A.* (2019) 39 Cal.App.5th 280, 300, the Court of Appeal reversed the trial court’s nonsuit on an implied-covenant claim “because it was based entirely on the trial court’s interpretation of the contract documents. In essence, the trial court concluded [the plaintiff] could not imply a covenant into the contract documents precluded by the express terms, as interpreted by the trial court.” But the cause of action “can be resolved only after a trier of fact resolves the contract interpretation issue.” (*Ibid.*) The *trier of fact* must then determine whether the defendant deprived the plaintiff of the benefit of its bargain. (*Ibid.*)

For a court to take judicial notice of the meaning of a document submitted by a demurring party based on the document alone, without allowing the parties an opportunity to present extrinsic evidence of the meaning of the document, would be improper. A court ruling on a demurrer therefore cannot take judicial notice of the proper interpretation of a document submitted in support of the demurrer. In short, a court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show.

*(Fremont Indemnity Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 114–115 (Fremont), citations omitted.)*

Here, CDA alleged all the elements of its cause of action for breach of the implied covenant of good faith and fair dealing. Yet the trial court failed to accept as true the facts alleged in CDA’s complaint in finding that there was no implied covenant of good faith and fair dealing. Worse, it substituted its own factual assumptions and contract interpretations for the allegations in the complaint. The trial court erred.

**1. CDA alleged all of the elements of its claim for breach of the implied covenant of good faith and fair dealing.**

CDA alleged all of the elements of its cause of action for breach of the implied covenant of good faith and fair dealing. (See CACI No. 325 [elements of cause of action for breach of the implied covenant].)

*First*, the Dentist Members and Delta Dental are parties to the PPA. (AA352 ¶ 99.) Delta Dental also agreed to the terms of the Settlement Agreement, which prohibits Delta Dental from violating statutory or

common law—including the implied covenant of good faith and fair dealing. (*Ibid.*) The Settlement Agreement remains valid and binding upon Delta Dental in addition to the PPA, and cannot be negotiated away through unilateral amendments to the PPA. (*Ibid.*)

*Second*, the Dentist Members who are CDA members, including the Individual Plaintiffs, performed all or substantially all of the actions that the PPA and the Settlement Agreement required of them. (AA352 ¶ 100.)

*Third*, all conditions required for Delta Dental’s performance of the PPA and Settlement Agreement have either occurred or been excused. (AA352 ¶ 101.)

*Fourth*, Delta Dental deprived the Dentist Members of the benefit of their bargain. In particular, Delta Dental deprived the Dentist Members of the benefit of their bargain by enacting the 2023 Amendments, which completely change the method for determining fees for many Dentist Members and impose unreasonably low reimbursement fees that significantly penalize Dentist Members and hinder their ability to provide services to patients pursuant to the PPA. (AA341–342, AA352 ¶¶ 70, 102.) Failure to set fees “in good faith at a reasonable level” is a breach of the implied covenant of good faith and fair dealing. (*Lazar, supra*, 143 Cal.App.3d at p. 141.)

*Fifth*, Delta Dental did not act fairly and in good faith. On the contrary, Delta Dental rubber-stamped the 2023 Amendments based on a

deficient process and woefully inadequate information. (AA336–342, AA352 ¶¶ 60–70, 102.) As outlined above, the Delta Dental Compensation Committee received no materials prior to the meeting at which they approved the 2023 Amendments, even though the normal practice was to receive and review materials in advance. (AA336–337 ¶ 61(a).) Committee members failed to consider numerous issues crucial to a good-faith decision whether to adopt the 2023 Amendments, including whether fee reductions were necessary given Delta Dental’s massive reserves and increasing market dominance; the methodology used to determine the proposed fee reductions; the impact on members’ ability to provide dental services; the impact on dentist-patient relationships; and whether the amendments are fair and reasonable. (AA337–38 ¶ 61(b).) The Committee members were not dentists, and thus lacked the knowledge necessary to adequately consider the 2023 Amendments and their impact on Dentist Members, yet Delta Dental did not provide them with that information, from experts or otherwise. (AA338 ¶ 61(c).) Despite the lack of business urgency, the Individual Defendants adopted the 2023 Amendments in a 75-minute Zoom meeting with no expert analysis or materials. In sum, the 2023 amendments were a *fait accompli*. (AA339 ¶ 62.)

*Sixth*, Delta Dental’s conduct has harmed and continues to harm the Dentist Members who are CDA members, including the Individual Plaintiffs, who have suffered economic damage in the form of reduced fee

reimbursements and damage to their practices. (AA319, AA321–322, AA342–343, AA352–353 ¶¶ 7, 13–19, 71–73, 103.) Individual Plaintiffs Newman, Massarat, Anderson, Chen, Klein, and Russikoff are all Dentist Members on whom Delta Dental imposed revised fee schedules that will yield net reductions in reimbursement fees. (AA321–322 ¶¶ 13–18.) And many Dentist Members have been forced to exit the Delta Dental network entirely, as Dr. Azar’s experience illustrates. (See AA319, AA322 ¶¶ 7, 19.) Furthermore, many Dentist Members have had their fees reduced by up to 40%. (AA342 ¶ 72.) And the 2023 Amendments eliminate many Dentist Members’ ability to file their own fee schedules to seek even minor increases in their fees, to those Dentist Members’ detriment. (*Ibid.*)

Thus, CDA adequately alleged the elements of its claim for breach of the implied covenant of good faith and fair dealing.

**2. The trial court erred in holding that Delta Dental had “unfettered” discretion.**

As stated above, it is well established that “[w]here a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing.” (*Locke, supra*, 57 Cal.App.4th at p. 363, quoting *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 923.) Indeed, the covenant of good faith and fair dealing “finds *particular* application in situations where one party is invested with a discretionary power affecting the rights

of another.” (*Id.* at p. 365, quoting *Carma, supra*, 2 Cal.4th at p. 372, italics added.) Here, Delta Dental did not exercise its discretion in good faith and in accordance with fair dealing. Instead, it deprived Dentist Members of the benefit of their bargain, as CDA amply alleged.

Instead of accepting CDA’s allegations as true and drawing reasonable inferences in CDA’s favor—as required on demurrer—the trial court erroneously accepted *Delta Dental’s* allegation that “following the 2018 Settlement, the contract at issue—the dentists’ PPA—was amended to remove any contractual limitation on [Delta Dental’s] ability to set fees.” (AA766:13–15.) That contradicts CDA’s allegation—which must be accepted as true on demurrer—that the Settlement Agreement imposes “an important limitation on Delta Dental’s ability to set fees: Delta Dental was obligated to comply with statutory and common law, including fiduciary duties and the implied duty of good faith and fair dealing.” (AA330 ¶ 46.) The “Settlement Agreement was intended to and did restrict Delta Dental’s discretion and impose accountability for decisions regarding reimbursement rates.” (*Ibid.*) That “carried forward to all future conduct including (among other things) the setting of fees. Accordingly, while Delta Dental may have been accorded discretion, that discretion was expressly limited, affording Dentist Members crucial protection with respect to fee changes going forward.” (*Ibid.*) These are well-pleaded and highly plausible allegations. The trial court was not free to disregard them on demurrer. (See, e.g.,



*Fremont, supra*, 148 Cal.App.4th at pp. 114–115.)

Nevertheless, the trial court held that the Settlement Agreement and the PPA give Delta Dental “unfettered discretion” to set its fees.

(AA768:11–13.) But neither agreement gives Delta Dental “unfettered discretion.” Those words do not appear in the agreements. On the contrary, as set forth above, Delta Dental’s discretion was expressly limited by the Settlement Agreement and is governed by the duty of good faith and fair dealing. (AA330, AA348 ¶¶ 46, 86.)

In purported support of its erroneous conclusion that Delta Dental has “unfettered discretion,” the trial court quoted the Settlement Agreement’s statement that “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 . . . .” (AA768, quoting AA180, italics omitted.) But that same sentence continues on to provide 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.*” (*Ibid.*, italics added.) As CDA alleged, the purpose and intent of that heavily-negotiated provision was to make clear that, going forward, Delta Dental would continue to have the duty of good faith and fair dealing and could not write it out of existence. (AA348 ¶ 86.) Indeed, the whole point

of that explicit provision of the Settlement Agreement was to make certain that, going forward, Delta Dental’s conduct was limited by the covenant of good faith and fair dealing as well as the fiduciary duties applicable to its Board. (See *ibid.*; AA330 ¶ 46.) Yet the trial court read that express provision *out* of the contract and a nonexistent “unfettered discretion” provision *into* it. This was error.

The trial court stated that the “argument that the general proviso in the settlement agreement regarding ‘the common law’ refers to the implied covenant of good faith and fair dealing is fatally circular, since the covenant is implied by law into every contract.” (AA768–769.) But the point of the proviso is that Delta Dental’s right to determine the provisions of the PDA “unilaterally” is cabined by, among other duties, the duty of good faith and fair dealing. (See AA330, AA348 ¶¶ 46, 86.) There is nothing circular about that. Nor does it “render meaningless the specific provisions of the agreement expressly permitting [Delta Dental] to unilaterally determine the terms of the provider contracts and to amend those agreements,” or “*contradict* the express terms of the settlement agreement.” (AA769.) “Unilaterally” means that Delta Dental is not required to negotiate amendments with CDA. It does *not* mean—as the trial court erroneously held—that Delta Dental has no duty of good faith and fair dealing. Delta Dental does have that duty. (See AA330, AA348 ¶¶ 46, 86; *Locke, supra*, 57 Cal.App.4th at p. 367.)

As in *Moore, supra*, 39 Cal.App.5th at page 300, the trial court’s ruling “was based entirely on the trial court’s interpretation of the contract documents. In essence, the trial court concluded [CDA] could not imply a covenant into the contract documents precluded by the express terms, as interpreted by the trial court.” The trial court’s interpretation was wrong. But in any event, the cause of action “can be resolved only after a trier of fact resolves the contract interpretation issue.” (*Ibid.*) At this stage, because the Settlement Agreement is “reasonably susceptible” to CDA’s interpretation, that interpretation must be accepted as correct. (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 229; see also *Fremont, supra*, 148 Cal.App.4th at pp. 114–115.) Thus, the trial court erred in sustaining the demurrer.

The trial court also cited other provisions of the parties’ contracts and stated that none of them “places any constraint or limit on [Delta Dental’s] ability to set fees, other than the advance notice requirement set forth in the 2018 settlement agreement.” (AA769–770.) But the absence of *express* contractual constraints or limits does not negate the *implied* covenant of good faith and fair dealing. A contract does not confer unfettered discretion simply because it does not expressly state the constraints of the implied covenant of good faith and fair dealing. (See, e.g., *Locke, supra*, 57 Cal.App.4th at p. 367.) On the contrary, the covenant of good faith and fair dealing implied in every contract is *particularly*

*applicable* when one party has discretion. (*Id.* at p. 365.) Although the implied covenant cannot *contradict* express contractual provisions, there is no such contradiction here: neither the Settlement Agreement nor the PPA states that Delta Dental has “unfettered discretion.” On the contrary, the Settlement Agreement expressly limits Delta Dental’s discretion, reflecting the parties’ intention that the duty of good faith and fair dealing applies and cannot be read out of the contract as the trial court did here. (See AA330, AA348 ¶¶ 46, 86.)

The trial court also opined that the implied covenant does not apply to “evergreen” contracts that continue year-to-year but give one party “discretion to adjust the prices from time to time, subject to the other party’s right to notice and to terminate the contract.” (AA770.) As purported support for that proposition, the trial court cited only *Richards v. Direct Energy Services, LLC* (2d Cir. 2019) 915 F.3d 88, a federal case that did not discuss or apply California law. In any case, the Second Circuit in *Richards* did not hold that the implied covenant does not apply to “evergreen” contracts. On the contrary, the court held that, “[t]o be sure, even though the Evergreen clause gave [the defendant] discretion in setting the variable rate, [the defendant] was obliged to ‘exercise that discretion in good faith.’” (*Id.* at p. 99, quoting 23 Williston on Contracts § 63:22 (4th ed. 2018).) Moreover, the *Richards* court applied Connecticut law, which—unlike California law—imposes a “high bar” on implied-covenant claims,

which are limited to “a narrow range of cases.” (*Id.* at p. 97, citation omitted.) *Richards* was also decided on summary judgment, not on a motion to dismiss. The *Richards* court simply found that the plaintiff failed to carry his summary-judgment burden to show breach of the implied covenant under Connecticut law. (See *id.* at pp. 97–100.) *Richards* is inapposite and provides no support for the trial court’s decision. There is nothing in California law to support an argument that the implied covenant does not apply to evergreen contracts. On the contrary, the nature and purpose of the implied covenant indicate that it should apply with particular force to such contracts, given their lasting impact on the parties.

Finally, the trial court held that enforcing the duty of good faith and fair dealing would be “unworkable” because there is no standard for determining whether a given change in fees is reasonable and courts are ill-situated to judge the reasonableness of fees. (AA771.) But “[t]he essence of the good faith covenant is objectively reasonable conduct,” and the failure to set prices “in good faith at a reasonable level” is a breach of the implied covenant. (*Lazar, supra*, 143 Cal.App.3d at p. 141.) Whether Delta Dental’s conduct was reasonable is for the trier of fact to decide. (See *Moore, supra*, 39 Cal.App.5th at p. 300.) CDA has not sought to have the trial court determine what is or is not a “reasonable” fee but rather whether the adoption of 2023 Amendments met the standard for reasonable and good faith action and whether the Board acted with due care in adopting

those amendments.

Thus, the trial court erred in sustaining the demurrer to CDA’s implied-covenant claim. This Court should reverse.<sup>3</sup>

**B. The trial court erred in sustaining the demurrer to the claim for breach of the duty of care.**

The elements of the cause of action for breach of the duty of care are (1) the existence of the duty; (2) breach of the duty; and (3) damages. (See, e.g., *Coley, supra*, 51 Cal.App.5th at p. 958 [elements of cause of action for breach of fiduciary duty are “existence of a fiduciary relationship, breach of fiduciary duty, and damages”].) CDA alleged these elements. (See AA348–350 ¶¶ 88–91.)

**1. CDA alleged that the Individual Defendants owe the Dentist Members the duty of care.**

“[T]he directors of a nonprofit mutual benefit corporation, like [Delta Dental] here, are fiduciaries who must act for the benefit of the corporation and its members.” (*Coley, supra*, 51 Cal.App.5th at p. 958; see

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<sup>3</sup> The trial court also held that the Health Care Providers’ Bill of Rights, part of the Knox-Keene Health Care Service Plan Act of 1975, “places no limitations on [Delta Dental’s] discretion” to set and amend fees. (AA764.) But that is beside the point. CDA does not rely on the Health Care Providers’ Bill of Rights, but rather on the implied covenant of good faith and fair dealing. There is nothing in the Knox-Keene Act—which was enacted to protect health care providers from the practices of insurers such as Delta Dental—to indicate any legislative intent to abrogate the covenant of good faith and fair dealing that is implied in every contract. The Health Care Providers’ Bill of Rights is irrelevant. Indeed, both the trial court and Delta Dental’s counsel acknowledged as much at oral argument. (See RT 341:25–345:6.)

AA322–323 ¶ 20 [Delta Dental is a nonprofit mutual benefit corporation].) The Individual Defendants are directors of Delta Dental. (AA323–326 ¶¶ 21–32.) Thus, they owe fiduciary duties to the Dentist Members, including the duty of care. (AA349 ¶ 89.)

Delta Dental itself has acknowledged that its directors owe fiduciary duties to Dentist Members. (AA347 ¶ 83.) For example, in a December 19, 2017 Press Release, Delta Dental stated “[a]s fiduciaries, the directors . . . represent the collective interests of the company’s stakeholders.” (*Ibid.*) This includes the Dentist Members. (*Ibid.*) Indeed, the Dentist Members are the engine that drives Delta Dental, enabling it to build the largest provider network in California and secure the market dominance it enjoys today. (AA329 ¶ 44.) Much like shareholders’ investments in a for-profit organization, the investments Dentist Members make in the Delta Dental network are the *sine qua non* of its success. (See *ibid.*)

The trial court, however, held that the Individual Defendants do not owe fiduciary duties to the Dentist Members. (See AA755–762.) The court distinguished between Corporations Code section 309, subdivision (a), and section 7231, subdivision (a). (A757.) The former is the general corporations statute, which addresses directors’ duties to the corporation and its shareholders. (Corp. Code, § 309, subd. (a).) The latter is the statute that applies to nonprofit mutual benefit corporations, which only mentions directors’ duties to the corporation. (*Id.*, § 7231, subd. (a).) But there is no

indication that the Legislature intended to abrogate directors' duties to the corporation's members. The omission of "shareholders" simply reflects the fact that nonprofit mutual benefit corporations do not have shareholders. And "members" are not specified because nonprofit mutual benefit corporations need not have members. (See *id.*, § 7310.) But where, as here, a nonprofit mutual benefit corporation *does* have members, the directors owe the members fiduciary duties. (See *Coley, supra*, 51 Cal.App.5th at p. 958.)

The trial court acknowledged the principle in *Coley* that directors of nonprofit mutual benefit organizations owe fiduciary duties to the corporation and its members, but characterized it as dicta. (AA758.) It was, however, a well-considered statement of the Court of Appeal, which the court asserted repeatedly. (See *Coley, supra*, 51 Cal.App.5th at p. 958.)

The trial court also attempted to distinguish *Coley* on the grounds that it involved a homeowner's association. (AA758–759.) But the statute at issue—Corporations Code section 7231—does not make such a distinction. The same statutory language applied in *Coley* as here. (See *Coley, supra*, 51 Cal.App.5th at p. 953.) Thus, here, as in *Coley*, "the directors of a nonprofit mutual benefit corporation . . . are fiduciaries who must act for the benefit of the corporation and its members." (*Id.* at p. 958.)

The trial court opined that the Individual Dentists' claims do not relate to their "rights as members" but rather to their rights under the PPA.



(AA760.) But the right to have Delta Dental’s directors conduct a sufficient investigation prior to making decisions that harm its members is a right of membership, not merely a right arising out of the PPA. The ability to enter into a PPA with Delta Dental is a “privilege of membership.” (AA322–323 ¶ 20.) The right to due care in Delta Dental’s amendments to the PPA is likewise a right of membership.

The trial court relied on *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490 (*Frances T.*), but *Frances T.* supports the conclusion that directors of nonprofit mutual benefit corporations owe fiduciary duties to their members, as the court recognized in *Coley*, citing *Francis T.* (See *Coley, supra*, 51 Cal.App.5th at p. 958.) In *Frances T.*, the plaintiff was a condominium owner and member of a homeowner’s association who suffered rape and robbery in her condominium unit. She sued the homeowner’s association for breach of fiduciary duty, among other claims, for failure to maintain adequate lighting. The California Supreme Court agreed that the directors of the homeowner’s association owed the plaintiff a fiduciary duty as a member of the association, but held that her physical and personal injuries did not arise from the association’s breach of that fiduciary duty but from the breach of the duty it owed her as a landlord. (*Frances T., supra*, 42 Cal.3d at pp. 513–514.)

Here, CDA alleges financial injury directly arising from the breach of the Individual Defendants’ duty to conduct a reasonable investigation of

the 2023 Amendments. (AA349–350 ¶¶ 90–91.) That duty arises from the relationship between the parties as directors and members of Delta Dental. *Frances T.* is pertinent here only in that it confirms that the Individual Defendants owe fiduciary duties to the Dentist Members. (See *Frances T.*, *supra*, 42 Cal.3d at p. 513; *Coley*, *supra*, 51 Cal.App.5th at p. 958.)

The trial court also held that the parties’ contractual relationship is inconsistent with the recognition of a fiduciary duty. (AA760–762.) The cases on which the trial court relied, however, were based on the principle that “a mere contract” does not “create a fiduciary relationship.” (*Id.*, quoting *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 634.) CDA does not argue that the PPA created a fiduciary relationship “by itself . . . where one would otherwise not exist.” (*Id.*, quoting *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 30–31.) Rather, the Individual Defendants’ fiduciary duties exist because they are directors of the corporation of which the Individual Plaintiffs are members. (See *Coley*, *supra*, 51 Cal.App.5th at p. 958.)

If the trial court’s order is allowed to stand, directors of nonprofit corporations will be able to evade their fiduciary duties to the corporations’ members. That result is contrary to the law and to basic fairness. It gives Delta Dental’s Dentist Members, who are the source of its success, significantly less protection than shareholders of a for profit corporation, who generally have far less stake in and are less dependent upon those

corporations. The trial court got it backwards. The directors of a nonprofit corporation should not be allowed to escape their fiduciary duties to their core constituency.

Thus, CDA adequately alleged that the Individual Defendants owe the Dentist Members the duty of care.

**2. CDA alleged that the Individual Defendants breached the duty of care and are not shielded by the business judgment rule.**

CDA more than adequately alleged that the Individual Defendants breached the duty of care. Those allegations are also more than sufficient to show that the business judgment rule does not shield the Individual Defendants' violations.<sup>4</sup> "The business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest." (*Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 430.) For example, directors "did not reach an informed business judgment" where they approved a merger "upon two hours' consideration, . . . without the exigency of a crisis or emergency," and without sufficient information. (*Smith v. Van Gorkom* (Del. 1985) 488

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<sup>4</sup> The trial court did not reach the issue of the business judgment rule and denied Defendants' request for judicial notice of materials purportedly relating to the rule. (See AA754, AA763.) This Court should "decline [any] invitation to dispose of the case on issues not considered by the trial court, such as the business judgment rule." (*Busse v. United PanAm Financial Corp.* (2014) 222 Cal.App.4th 1028, 1051.)

A.2d 858, 874 (*Smith*), overruled on other grounds in *Gantler v. Stephens* (Del. 2009) 965 A.2d 695, 713, fn. 54.)<sup>5</sup>

Here, CDA amply alleged facts showing that reasonable inquiry was called for and would have resulted in the discovery of facts material to the decision to adopt the 2023 Amendments, yet the Individual Defendants conducted no such inquiry. (AA336–342 ¶¶ 60–70.) The Individual Defendants failed to investigate crucial factors, including rising costs for dentists. (AA317–318, AA336–340 ¶¶ 5, 61–64.) They also failed even to consider the crucial issue of whether these major changes would make dental service from private dentists more or less available to California residents. If the Individual Defendants had conducted a reasonable investigation, they would have learned that, while reimbursements to Dentist Members have remained stagnant for over a decade, the costs of procedures, staffing, and materials for dentists have increased substantially. (*Ibid.*) As a result, the dramatic fee reductions that Delta Dental unilaterally imposed in its 2023 Amendments jeopardize the practices of private practice dentists and make dental services from this important resource less available to California residents, whose choice of and access to oral

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<sup>5</sup> California courts commonly “rely on corporate law developed in the state of Delaware given that it is identical to California corporate law for all practical purposes.” (*Oakland Raiders v. National Football League* (2001) 93 Cal.App.4th 572, 586, fn. 5.)

healthcare is diminished, directly contrary to Delta Dental's mandated corporate purpose. (AA317–318, AA319, AA327, AA339–340, AA341–343 ¶¶ 5, 8, 38, 64, 70–73.)

Likewise, the Individual Defendants made no inquiry into whether there was an actual financial need for these major changes, much less on the rushed basis that Delta Dental's management sought. Any review of the facts would have revealed that Delta Dental's market power and assets have only increased, obviating any need for the reimbursement fee reductions and rendering them counterproductive. (AA340–341 ¶¶ 67–68.) The Individual Dentists failed to investigate why dentists' reimbursements were being reduced when costs for dentists had increased and Delta Dental's competitive and financial position had only gotten stronger. (AA336–342 ¶¶ 61–70.)

The Individual Defendants did not receive or review any materials in advance of the meeting at which they approved the 2023 Amendments. This is remarkable because these 2023 Amendments imposed major changes in the entire fee-setting structure of Delta Dental as well as major reductions in fees for large numbers of Delta Dental Dentist Members. Receiving materials in advance of deliberations, thereby allowing time for a thorough review of changes, was a regular practice of the Delta Dental Board. Indeed, it is a normal practice of any reasonably prudent board called upon to make important decisions. Yet in this instance, the

Individual Defendants reviewed nothing in advance of voting on this major decision. (AA337 ¶ 61(a).) Instead, they received a superficial overview from a Delta Dental executive at the brief Zoom meeting, which failed to address key issues that a reasonably prudent director would have considered, including the need for the fee reductions, their effect on Delta Dental’s members in light of rising costs, and the impact on patients. (AA337–338 ¶ 61(b).)

The Individual Defendants lacked the knowledge necessary to adequately evaluate the 2023 Amendments, yet they received no advice from independent experts prior to or at the meeting. (AA338 ¶ 61(c).) Compensation Committee members were told that the timeline for approval was short; hence they decided on the momentous 2023 Amendments in a 75-minute Zoom call with no advance materials, no expert analysis, and no adequate basis for making their decision. (AA338–339 ¶ 61(d).) But there was no business exigency requiring action on a short time frame. (*Ibid.*) The contractual and fee setting provisions as well as the fees themselves had been in place for years. And, in those same years, Delta Dental had profited substantially and grown in both net worth and market presence. (AA330 ¶ 47.) Delta Dental’s management pushed these amendments through without any meaningful reflection or question from the Board. (See AA339 ¶ 62.)

In sum, the 2023 Amendments were adopted on less than “two

hours' consideration," without adequate materials, and "without the exigency of a crisis or emergency" (*Smith, supra*, 488 A.2d at p. 874), at a meeting that "had an aura of inevitability which was clearly at variance with the requirement that the board members be adequately informed and act after sufficient deliberation." (*EAC Ind., Inc. v. Frantz Mfg. Co.* (Del. Ch., June 28, 1985) 1985 WL 3200 at \*8.) Indeed, the meeting at which the 2023 Amendments were adopted was "mere window dressing" (*ibid.*) for a "*fait accompli*." (AA339 ¶ 62.)

Thus, the business judgment rule does not apply and CDA has more than adequately alleged the element of breach of the duty of care.

### **3. CDA alleged damages.**

As already discussed, the Dentist Members suffered damages as a result of the 2023 Amendments, which were adopted in violation of the Individual Defendants' duty of care. (AA349–350 ¶ 91; see also §§ II.D, IV.A.1, *supra*.) The decrease in reimbursement fees caused the Dentist Members substantial harm. (AA319, AA342–343 ¶¶ 7, 71–73.) Indeed, their practices are threatened, with some members—such as Dr. Azar—being forced to leave the Delta Dental network entirely, to their detriment given Delta Dental's market dominance. (AA319, AA322 ¶¶ 7, 19.)

Thus, CDA adequately alleged the elements of its cause of action for breach of the duty of care. The trial court erred in sustaining the Individual Defendants' demurrer. This Court should reverse.

**C. The trial court erred in sustaining the demurrer to the cause of action for declaratory relief.**

CDA also seeks declaratory relief that the implied covenant of good faith and fair dealing and the Individual Defendants' fiduciary duties preclude Delta Dental from enforcing the 2023 Amendments. (AA353 ¶¶ 104–106.) The trial court sustained the demurrer to this cause of action because it had sustained the demurrers to the other causes of action. Because CDA stated valid claims for breach of the implied covenant of good faith and fair dealing and breach of the duty of care, it likewise stated a valid claim for declaratory relief. This Court, therefore, should reverse the judgment of dismissal as to this claim, as well.

**D. The trial court abused its discretion in denying leave to amend.**

It is an abuse of discretion to sustain a demurrer without leave to amend “if there is any reasonable possibility that the defect can be cured by amendment.” (*Skov, supra*, 207 Cal.App.4th at p. 695, citation omitted.) Here, there is more than a reasonable possibility that the purported defect in CDA's allegations can be cured by amendment. The trial court, therefore, abused its discretion in denying leave to amend.

As discussed above, the trial court held that Delta Dental has “unfettered discretion” to set fees because, under the Settlement Agreement, it has the right to set fee reimbursement “unilaterally.” (AA768.) But that same sentence provides 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.” (*Ibid.*) The trial court interpreted that proviso as *not* referring to the duty of good faith and fair dealing. (AA768–769.) But it is *at least* a reasonable interpretation of the proviso that it *does* refer to the duty of good faith and fair dealing.

At the hearing on the demurrers, counsel for CDA explained that CDA could allege additional facts supporting its reasonable interpretation that the preservation of common law rights included the right to good faith and fair dealing. (See RT 373:17–375:19, 378:2-15.) Those include the fact that CDA drafted the proviso with the express intent of preserving the duty of good faith and fair dealing and disclosed that intent to Delta Dental during lengthy negotiations. (See *ibid.*; AA330, AA348 ¶¶ 46, 86) “If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.” (Civ. Code, § 1649.)

CDA should have been allowed to amend to plead additional facts regarding the negotiation of the proviso; the parties’ mutual intent underlying the proviso; and CDA’s intent as disclosed to Delta Dental. These factual allegations, combined with those already in the Second Amended Complaint, preclude demurrer. (See, e.g., *Moore, supra*, 39 Cal.App.5th at p. 300 [the claim for breach of the implied covenant of good faith and fair dealing “can be resolved only after a trier of fact resolves the

contract interpretation issue”].)

**V. CONCLUSION**

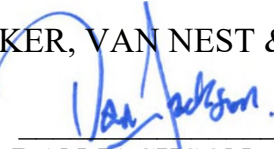
For all of the reasons above, the Court should reverse the judgment of dismissal and remand this case for further proceedings.

Respectfully submitted,

Dated: October 28, 2024

KEKER, VAN NEST & PETERS LLP

By: \_\_\_\_\_



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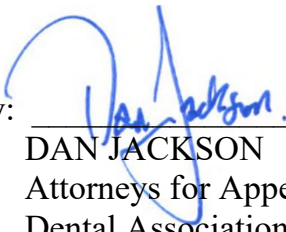
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**CERTIFICATE OF WORD COUNT**  
**PURSUANT TO CALIFORNIA RULES OF COURT**

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the attached brief/petition is proportionately spaced, has a typeface of 13 points and contains 10,251 words (as counted by the computer program used to prepare this brief).

Keker, Van Nest & Peters LLP

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## CERTIFICATE OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Kecker, Van Nest & Peters LLP, 633 Battery Street, San Francisco, CA 94111-1809.

On October 28, 2024, I served the following:

### APPELLANTS' OPENING BRIEF

- by TRUEFILING ELECTRONIC SERVICE: I electronically served the foregoing via the Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) on the designated recipients on the attached service list.

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- by regular **UNITED STATES MAIL** by placing Copy in a sealed envelope addressed as shown below. I am readily familiar with the practice of Keeker, Van Nest & Peters LLP for collection and processing of correspondence for mailing. According to that practice, items are deposited with the United States Postal Service at San Francisco, California on that same day with postage thereon fully prepaid. I am aware that, on motion of the party served, service is presumed invalid if the postal cancellation date or the postage meter date is more than one day after the date of deposit for mailing stated in this affidavit.

Hon. Ethan P. Schulman  
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Executed on October 28, 2024, at San Francisco, California. I

declare under penalty of perjury under the laws of the State of California that the above is true and correct.

  
Sandy Giminez

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