

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

KOLETA ANDERSON, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

BURGER KING CORPORATION,

Defendant.

Civil Action No. 17-CV-01204-TDC

EXECUTION VERSION

CLASS ACTION SETTLEMENT AGREEMENT

Representative Plaintiff Koleta “Koko” Anderson (“Plaintiff”), on behalf of herself and all Class Members (defined below), and defendant Burger King Corporation (“BKC,” and, with Plaintiff, the “Parties”), hereby enter into this Class Action Settlement Agreement (“Settlement Agreement”), subject to the approval of the Court, pursuant to Rule 23 of the Federal Rules of Civil Procedure.

I. DEFINITIONS

1.1. Action: *Koleta “Koko” Anderson v. Burger King Corporation*, Case No. 1:17-cv-01204, an action pending in the United States District Court for the District of Maryland.

1.2. Class: All persons in the United States who, during the Class Period (defined below), purchased two or more CROISSAN’WICH® (hereafter “Croissan’wich”) breakfast sandwiches from a BKC restaurant, redeemed a buy-one-get-one-free (“BOGO”) coupon in connection with the purchase, yet paid more than the amount that restaurant was charging at the time for the higher-priced Croissan’wich the person ordered.

1.3. Class Counsel: The law firms of Robbins Geller Rudman & Dowd LLP (Stuart A. Davidson, Christopher C. Gold, and Roxana Pierce), and Silverman Thompson Slutkin & White LLC (Steven D. Silverman and William N. Sinclair).

1.4. Class Member: A person who falls within the definition of the Class set forth in subsection 1.2 herein.

1.5. Class Period: The period from October 1, 2015 and May 19, 2017.

1.6. Complaint: The class action complaint filed against BKC in the Action by Plaintiff on May 2, 2017.

1.7. Court: The U.S. District Court for the District of Maryland.

1.8. Defendant: Burger King Corporation (“BKC”) and its related parties, including its parent company, subsidiaries, affiliates, franchisees and all of their respective officers and employees.

1.9. Defense Counsel: The law firm of Kelley Drye & Warren LLP (Jeffrey Jacobson, Lauri Mazzuchetti, Joseph Wilson and Mindy Pava).

1.10. Effective Date of Settlement: The date on which the Order of the Court granting final approval of the Settlement of the Action becomes final and no longer subject to further appeal or review, whether by exhaustion of any possible appeal, writ of certiorari, lapse of time or otherwise.

1.11. Fee and Expense Application: An application by Class Counsel to the Court for an award of Class Counsel’s attorneys’ fees and expenses incurred in connection with the Action, as well as any interest thereon, and a service award to Plaintiff Koleta Anderson.

1.12. Fee and Expense Award: An order by the Court granting Class Counsel’s Fee and Expense Application in whole or in part.

1.13. Parties: The parties to the litigation, *i.e.*, the Plaintiff and Defendant.

1.14. Preliminary Approval: A Court order, providing for, among other things, preliminary approval of the Settlement.

1.15. Plaintiff: Koleta “Koko” Anderson.

1.16. Released Claims: Any and all claims, including Unknown Claims, arising from the Croissan’wich BOGO coupon during the Class Period and the acts, facts, or circumstances that were or could have been alleged by Plaintiff in the Action; except that Released Claims do not include any claims for damages, restitution, or compensation of any kind relating to the Croissan’wich BOGO coupon, unless a person seeks compensation pursuant to this Settlement,

in which case BKC may condition payment on provision of a damages release), or claims respecting enforcement of this Settlement Agreement.

1.17. Releasing Parties: The parties granting the release, including BKC.

1.18. Settlement: The terms of the settlement set forth in this Settlement Agreement.

1.19. Settling Parties: Plaintiff, Defendant, and all Class Members.

1.20. Unknown Claims: All Released Claims that any of the Parties or Class Members do not know or suspect to exist in his, her or its favor at the time of the release, which if known by him, her, or it, might have affected his, her or its decision not to object to this Settlement or release of the Released Parties, Plaintiff, Class Counsel, or Class Members. With respect to any and all Released Claims, the Parties stipulate and agree that upon the Effective Date the Parties shall, to the fullest extent permitted by law, fully, finally, and forever expressly waive and relinquish with respect to the Released Claims, any and all provisions, rights, and benefits of §1542 of the California Civil Code and any and all similar provisions, rights, and benefits conferred by any law of any state or territory of the United States or principle of common law that is similar, comparable, or equivalent to §1542 of the California Civil Code, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

1.21. The plural of any term defined herein includes the singular, and vice versa.

II. INTRODUCTION

A. Background of the Settlement

2.1 On May 2, 2017, Plaintiff filed the Complaint against BKC in the Action, alleging, among other things, that BKC violated the statutory and common law of the states of Maryland and Virginia, and of the District of Columbia, relating to a BOGO coupon promotion

for its Croissan'wich products; in particular, charging a higher price for two Croissan'wiches when a consumer redeems a BOGO coupon than had the consumer purchased a single Croissan'wich without a BOGO coupon. BKC was served with the Complaint on May 4, 2017;

2.2 Following receipt of notice of the Complaint, BKC quickly commenced an internal investigation regarding the allegations made by Plaintiff in the Action.

2.3 Pursuant to its investigation, BKC determined that Plaintiff's allegations were, in certain respects, correct, in that some consumers in multiple states who special-ordered two Croissan'wiches without egg, cheese, and/or a meat and used a BOGO coupon at certain Burger King® restaurant locations that used a particular electronic Point of Sale ("POS") system may have been inadvertently charged the full price for a single meat, egg, and cheese Croissan'wich, as opposed to the full price for a single Croissan'wich with only the ingredients the consumer ordered, with the price difference typically ranging from a few cents up to \$1.00.

2.4 BKC's investigation further concluded that, based upon a random sampling of receipts, fewer than 10% of all BOGO orders were for two modified Croissan'wiches and were conceivably impacted by the problem, with the remaining 90%+ of Croissan'wich purchasers who redeemed BOGO coupons unaffected by any problem;

2.5 Promptly following BKC's confirmation of certain allegations alleged by Plaintiff in the Action, BKC pushed out a software update to the POS system at issue and provided detailed instructions to Burger King® restaurants to follow a different procedure for honoring BOGO coupons for the Croissan'wich, pursuant to which cashiers are required to manually select the lower-priced of the two purchased Croissan'wich before pressing the appropriate coupon button on the register screen.

2.6 BKC believes that all franchisees using the only impacted POS performed the necessary update on or before May 19, 2017, and BKC does not believe that the problem has arisen at any restaurant since then.

B. Settlement Negotiations Between The Parties

2.7 Beginning on May 22, 2017, counsel for the Parties began good faith, arm's-length discussions regarding a possible resolution of the Action and, in particular, whether the case should be settled for injunctive relief under Rule 23(b)(2) in light of, among other things, the nature of the issue, BKC's prompt correction and its undertakings in this Settlement, the relatively small amount of damages per aggrieved consumer, and what BKC contends would be the difficulties inherent in satisfying the conditions for certification of a damages class in this case under Rule 23(b)(3).

2.8. During settlement negotiations between counsel for the Parties, counsel for Plaintiff requested and received from BKC's counsel a significant amount of information concerning, among other things, the investigation conducted by BKC with respect to the issue; data on the average number of BOGO Croissan'wich purchases per week in Maryland, Virginia, the District of Columbia, and nationwide; data on the total number of BOGO Croissan'wich purchases during the Class Period in Maryland, Virginia, the District of Columbia, and nationwide; whether any product other than the Croissan'wich was affected by the problem; and the ability (or lack thereof) of BKC to identify consumers who were affected by the problem;

2.9 In August 2017, the Parties reached an agreement in principle providing for the settlement of the Action between and among Plaintiff, on behalf of herself and the putative Class and BKC, on the terms and subject to the conditions set forth in this Settlement Agreement.

C. Defendant's Denial of Wrongdoing or Liability

2.10. The Parties recognize the tremendous time and expense that would be incurred by further litigation in this matter and the uncertainties inherent in any such litigation, and that their interests would be best served by a settlement of the litigation herein.

2.11. To avoid the costs, disruption and distraction of further litigation, and without admitting the validity of any allegations made in the Action, or any liability with respect thereto, BKC has concluded that it is desirable that the claims against it be settled and dismissed on the terms reflected in this Settlement Agreement.

. The Settlement is Fair, Adequate and Reasonable

2.12. BKC has consented to the conditional certification of a mandatory, non-opt-out class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure for settlement purposes only, as defined in paragraph 3.1 hereinafter.

2.13. BKC provided additional confirmatory discovery to Plaintiff's counsel after reaching agreement in principle on the terms of this Settlement Agreement. That confirmatory discovery included the production of further documentary evidence and the deposition of a responsible senior BKC official. Following this confirmatory discovery, Plaintiff and Plaintiff's counsel remain of the view that a settlement of the Action on the terms reflected in this Settlement Agreement is fair, reasonable, adequate, and in the best interests of Plaintiff and the Class.

NOW THEREFORE, in consideration of the promises and mutual covenants set forth herein, it is hereby STIPULATED AND AGREED, by and among the Parties to this Settlement Agreement, through their respective attorneys, subject to approval of the Court pursuant to Rule 23 of the Federal Rules of Civil Procedure and satisfaction of all the terms and conditions set

forth herein, that the Action and all Released Claims shall be compromised, settled, released, and dismissed with prejudice, upon and subject to the following terms.

III. RULE 23(B)(2) CLASS CERTIFICATION AND INJUNCTIVE RELIEF

3.1. The Parties consent to conditional certification of the Action as a mandatory, non-opt-out class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure for settlement purposes only that includes the Class defined as “all persons in the United States who, during the Class Period, purchased two or more Croissan’wich breakfast sandwiches from a BKC restaurant, redeemed a BOGO coupon in connection with the purchase, yet paid more than the amount that restaurant was charging at the time for the higher-priced Croissan’wich the person ordered.”

3.2. BKC has agreed to be bound by the following permanent injunction in the Court’s final judgment approving the Settlement in the Action: “BKC and its employees, with actual or constructive knowledge of the Court’s final judgment, shall be and hereby are permanently enjoined and restrained from operating a BKC-approved Point of Sale system that charges consumers more money for two Croissan’wiches when redeeming a BOGO Croissan’wich coupon than the higher-priced of the two Croissan’wiches had the consumer ordered that single Croissan’wich by itself.”

3.3. BKC represents that the problem with the POS system arose inadvertently; it had no notice of the problem prior to the filing and prosecution of the Action; and the filing of the Action therefore prompted BKC’s investigation and cessation of the conduct alleged in the Complaint.

3.4. The injunctive relief contemplated by this Settlement Agreement is for purposes of settlement only, and nothing in this Settlement Agreement shall constitute, in this or in any

other action or proceeding, an admission by BKC or a finding or evidence that BKC violated any statute, regulation, or principle of common law; that any claims that either were brought or could have been brought in the Litigation are appropriate for class treatment; or that any requirement for class certification is or could otherwise be satisfied. The fact that BKC entered into this Settlement Agreement shall not be offered, received, or construed as an admission, finding, or evidence, for any purpose, including the appropriateness of this injunctive relief, except for purposes of enforcing this Settlement Agreement.

IV. SETTLEMENT TERMS

4.1 For settlement purposes only, BKC consents to conditional certification of the Class specified above in Paragraph 3.1 as a mandatory, non-opt-out class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

4.2 On the Effective Date, each Releasing Party shall be deemed to have released and forever discharged BKC and its related parties, including its parent company, subsidiaries, affiliates, franchisees, and all officers and employees (collectively, the “Released Persons”) from any and all Released Claims, including Unknown Claims; *provided, however*, that the Released Claims shall not include any claims for damages, restitution, or compensation of any kind relating to the Croissan’wich BOGO coupon, or to enforce the terms of this Settlement Agreement (except that BKC may condition its provision of cash and gift cards, as provided for in Paragraph 4.8 below, on each requestor’s individual agreement to provide a full release).

4.3. On the Effective Date, the Released Persons shall be deemed to have released and forever discharged Plaintiff, Class Counsel, and members of the Class, from all claims arising out of the institution, prosecution, settlement or resolution of the Action. Plaintiff and Class Counsel, solely on their behalf, release Defendants and the Released Persons from all claims

arising out of their institution, prosecution, settlement or resolution of the Action. Plaintiff, solely on her own behalf, further releases BKC from all claims, including claims for damages, arising from any and all purchases she made from BKC (including purchases from any Burger King[®] restaurant) at any point in time prior to the execution of this Settlement Agreement. That release of damage claims applies only to Plaintiff, not to any other member of the Class.

4.4 BKC has denied, and continues to deny, that it has committed or has threatened to commit any violations of law to the Plaintiff, the Class, or anyone else, and believes that Plaintiff would not have been able to certify a class pursuant to Rule 23(b)(3).

4.5 Plaintiff believes that her claims have substantial merit and that she is agreeing to settle these claims only because BKC has ceased the allegedly wrongful conduct and has taken appropriate steps to ensure the issue will not arise in the future, and because the settlement will provide substantial relief to the Class.

4.6. While retaining their right to deny liability, BKC will agree that, based upon the publicly available information at the time, the Action filed was filed in good faith and with an adequate basis in fact, was not frivolous and is being settled voluntarily by BKC after consultation with competent legal counsel in an amount and in a fashion that reflects the merits of the claims. The Parties will further agree that throughout the course of the litigation, all Parties and their counsel complied with the provisions of Federal Rule of Civil Procedure 11.

4.7. BKC is entering into the Settlement solely because it will eliminate the uncertainty, distraction, burden and expense of further litigation.

4.8. Within five (5) business days of the Order granting preliminary approval of the Settlement (the "Preliminary Approval Order") (a proposed version of which is attached hereto as Exhibit A), BKC, either itself or by engaging a vendor, shall establish a toll-free hotline for

Class members to seek the following relief: (a) persons who provide one or more receipts demonstrating that, during the Class Period, they purchased two modified Croissan'wiches using a BOGO coupon and were charged the full price for a single unmodified Croissan'wich, which price was higher at that Burger King® restaurant than the price for a Croissan'wich modified per that customer's request, shall receive a cash payment of five dollars (\$5.00) for each such receipt or purchase; and (b) persons who, in lieu of a receipt, sign a statement attesting under penalty of perjury that they made such a purchase of two modified Croissan'wiches on a specified date from a specified restaurant, and were charged the full price for a single unmodified Croissan'wich, which price was higher at that Burger King® restaurant than the price for a Croissan'wich modified per that customer's request, shall receive a single two dollar (\$2.00) Burger King® gift card, irrespective of the total number of such purchases attested to have been made. All claims will be subject to verification, and BKC may condition payment of these amounts on the requesting class member's agreement, solely on his or her own behalf, to a release of damages claims that were or could have been pursued in the Action. Consumers shall have the opportunity to seek these payments for four (4) weeks after the program's announcement, and the cash or gift cards shall be distributed within 30 calendar days after the close of that period. BKC shall issue a press release announcing and providing details regarding this program, and the publication of that press release will commence the four-week claims period.

4.9. In the event the Settlement does not become final for any reason, BKC reserves the right to oppose certification of any class in future proceedings.

4.10. Because this Settlement does not include a release of damages claims, and because the Class herein will be certified only on a non-opt-out basis pursuant to Federal Rule of

Civil Procedure 23(b)(2), the Parties agree that, other than BKC's issuance of the press release specified above, no notice need issue or should issue to the Class pursuant to Federal Rules of Civil Procedure 23(c)(2)(A) or 23(e)(1). BKC's willingness to enter into this Settlement is predicated on the belief that it will not have to expend funds on notice to the Class and, for that reason, if the Court orders notice to the Class, notwithstanding the Parties' agreement that no notice is necessary, BKC reserves the right, in its sole discretion, to withdraw from this Settlement Agreement.

4.11. Subject to the Order of the Court, pending determination of whether the Settlement shall receive final Court approval, Plaintiff and all members of the Class, and any of them, are barred and enjoined from commencing, prosecuting, instigating, assisting or in any way participating in the commencement or prosecution of any action asserting any Released Claims, either directly, representatively, derivatively or in any other capacity, against any Released Person.

4.12. The Parties agree that all proceedings in this or any other Court or forum against BKC relating to claims or actions asserted in the Action shall be stayed, other than such proceedings as are necessary to effectuate the terms of this Court's approval of the Settlement. The Parties shall take such actions as are necessary to effectuate a stay of proceedings, and agree that, pending final Court approval of the Settlement, BKC shall not be required to answer the Complaint or any discovery requests, except as relating to confirmatory discovery as agreed to by the Parties. The Parties shall cooperate and use all reasonable efforts to seek and effectuate a stay of any proceedings not pending before this Court.

V. **PLAINTIFF'S COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND FOR A SERVICE AWARD FOR PLAINTIFF**

6.1. Plaintiff and Class Counsel intend to petition the Court for an award of attorneys' fees in the amount of \$185,000, and an award of expenses not to exceed \$10,000.

6.2. BKC agrees to pay a Fee and Expense Award to Robbins Geller Rudman & Dowd LLP within fifteen (15) business days after the date on which the Court enters the Judgment and order awarding such fees and expenses, notwithstanding the existence of any timely filed objections thereto, or potential for appeal therefrom, or collateral attack on the Settlement or any part thereof, subject to Plaintiff's counsel's several obligation to make appropriate refunds or repayments to BKC, plus interest earned thereon if, and when, as a result of any appeal and/or further proceedings on remand, or successful collateral attack, the Fee and Expense Award is lowered, or the Settlement is disapproved by a final order not subject to further review. Class Counsel agree to furnish BKC with an appropriate Form W-9 in advance of BKC paying the Fee and Expense Award. A copy of the proposed Final Judgment is attached hereto as Exhibit B.

6.3. Plaintiff has spent material amounts of time and effort participating and assisting Class Counsel in the Action, including, by way of example, providing documentation concerning her experiences at Burger King[®] restaurants and communicating on numerous occasions with Class Counsel regarding the Action. Accordingly, Plaintiff and Class Counsel intend to petition the Court for a service award for Plaintiff of no more than \$500.

6.4. BKC agrees to pay Plaintiff a service award of \$500, subject to Court approval. Within fifteen (15) business days after the Effective Date, BKC shall pay the service award to Plaintiff through Plaintiff's counsel. Plaintiff agrees to provide BKC with an appropriate Form W-9 in advance of BKC's making that payment.

VII. PRELIMINARY APPROVAL ORDER; FINAL FAIRNESS HEARING

7.1. Promptly after execution of this Settlement Agreement, Class Counsel will move the Court for entry of the Preliminary Approval Order, requesting, *inter alia*, preliminary approval of the Settlement and for a stay of all proceedings in the Action until the Court renders a final decision on approval of the Settlement.

7.2. Within 10 days after the Parties seek preliminary Court approval for this Settlement, BKC will direct notice of the proposed Settlement to the federal and state officials required to be notified by the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1715. The Parties will ask the Court to schedule a Fairness Hearing to determine whether or not the Settlement should receive final approval, with that hearing to occur no earlier than 90 days after BKC provides that CAFA notice. At an appropriate time prior to that Fairness Hearing, Class Counsel will move the Court for appropriate orders approving and effectuating the Settlement, including orders:

- (a) certifying the Class for settlement purposes pursuant to Rule 23(b)(2), and, fully and finally approving the Settlement contemplated by this Settlement Agreement and its terms as being fair, reasonable and adequate within the meaning of Rule 23 of the Federal Rules of Civil Procedure and directing its consummation pursuant to its terms and conditions;
- (b) directing that the Action be dismissed with prejudice;
- (c) discharging and releasing the Released Persons from all Released Claims;
- (d) permanently barring and enjoining the institution and prosecution, by Plaintiff and Class Members, of any other action against the Released Persons, in any court, asserting any Released Claims;
- (e) reserving continuing and exclusive jurisdiction over the Settlement, including all future proceedings concerning the consummation and enforcement of this Settlement Agreement;

(f) determining pursuant to Fed. R. Civ. P. 54(b) that there is no just reason for delay and directing entry of a final judgment as to BKC in the Action; and

(g) containing such other and further provisions consistent with the terms of this Settlement Agreement to which the parties expressly consent in writing.

7.3. The Parties will request that the Court set deadlines for objections to the Settlement, and for the parties' responses to any such objections, at appropriate intervals prior to the Fairness Hearing.

VIII. MISCELLANEOUS PROVISIONS

8.1. If, for any reason, the Settlement is not approved by the Court, is terminated, overturned, or materially modified on appeal or as a result of further proceedings on remand, or otherwise does not become effective, unless the Parties shall agree otherwise, the Parties shall revert to their litigation positions immediately prior to the execution of the Settlement Agreement, without waiver of any rights, claims or defenses.

8.2. If any action is filed in any court asserting claims that are related to the subject matter of the Action prior to final Court approval of the proposed Settlement, Plaintiff shall cooperate with BKC in obtaining the dismissal or withdrawal of such related litigation, including where appropriate joining in any motion to dismiss such litigation.

8.3. The Parties acknowledge and agree that this Settlement Agreement memorializes the entire agreement among the Parties, that they have not executed this Settlement Agreement in reliance on any promise, representation, inducement, covenant, or warranty except as expressly set forth herein, and that this Settlement Agreement supersedes all other prior statements or agreements, whether oral or written, to the extent any provision hereof is inconsistent with any such prior oral or written statements or agreements.

8.4. This Settlement Agreement may not be amended except by a writing executed by all Parties hereto or their respective successors-in-interest.

8.5. The Court will retain jurisdiction with respect to implementation and enforcement of the terms of this Settlement Agreement and over any disputes arising under this Settlement Agreement, and all Parties hereby submit to the jurisdiction of the Court for such purposes.

8.6. Each Party represents and warrants to all other Parties that such Party: (a) was represented by attorneys of the Party's choosing in connection with the execution of this Settlement Agreement; (b) has read and understood all aspects of this Settlement Agreement and all of its effects; and (c) has executed this Settlement Agreement as a voluntary act of the Party's own free will and without any threat, force, fraud, duress, or coercion of any kind.

8.7. If any provision of this Settlement Agreement is declared by the Court to be invalid, void, or unenforceable, the remaining provisions of this Settlement Agreement will continue in full force and effect, unless the provision declared to be invalid, void, or unenforceable is material, at which point the Parties shall attempt to renegotiate the Settlement Agreement or, if that proves unavailing, either Party can terminate the Settlement Agreement without prejudice to any Party.

8.8. This Settlement Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto. Without limiting the generality of the foregoing, each and every covenant and agreement herein by Plaintiff and Class Counsel shall be binding upon all Class Members.

8.9. This Settlement shall be governed by and construed in accordance with the laws of the State of Maryland, without regard to Maryland's principles governing choice of law. The Parties agree that any dispute arising out of or relating in any way to the Settlement shall not be

litigated or otherwise pursued in any forum or venue other than the Court, and the parties expressly waive any right to demand a jury trial as to any such dispute.

8.10. The provisions contained in this Settlement Agreement shall not be deemed a presumption, concession or admission by BKC of any fault, liability or wrongdoing as to any facts or claims that have been or might be alleged or asserted in the Action, or any other action or proceeding that has been, will be, or could be brought, and shall not be interpreted, construed, deemed, invoked, offered, or received in evidence or otherwise used by any person in the Action, or in any other action or proceeding, whether civil, criminal or administrative, for any purpose other than as provided expressly herein.

8.11. This Settlement Agreement will be construed as if the Parties jointly prepared it, and any uncertainty or ambiguity will not be interpreted against any one Party because of the manner in which this Settlement Agreement was drafted or prepared.

8.12. The headings used in this Settlement Agreement are for convenience only and will not be used to construe its provisions.

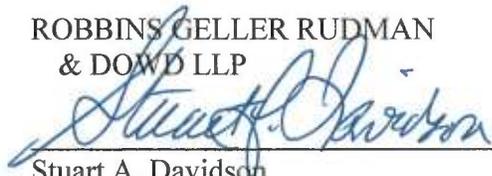
8.13. The Settlement may be executed in any number of counterparts and by each of the different Parties on several counterparts, each of which when so executed and delivered will be an original. The executed signature page(s) from each counterpart may be joined together and attached and will constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement effective as of the date set forth below.

Dated: October __, 2017

EXECUTION VERSION

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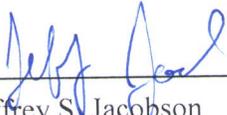
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