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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

In Re: Smashburger IP Holder LLC, et al.

ALL CASES

Lead Case No. 2:19-CV-00993-JAK-(JEMx)

STIPULATION OF CLASS ACTION SETTLEMENT

Judge: John A. Kronstadt

1 Subject to Court approval pursuant to Rule 23 of the Federal Rules of Civil
2 Procedure, Plaintiffs Andre Galvan, Lucinda Lopez, Thu Thuy Nguyen, Robert
3 Meyer, and Jamelia Harris (“Plaintiffs”), on behalf of themselves and each of the
4 Class Members, and Smashburger IP Holder LLC and Smashburger Franchising LLC
5 (“Defendants”) (collectively, the “Parties”), by and through their respective counsel,
6 authorized to settle this Action on their behalf, in consideration for and subject to the
7 promises, terms, and conditions contained in this Stipulation of Class Action
8 Settlement (“Agreement”), hereby stipulate and agree, as follows:

9 **I. RECITALS**

10 A. On February 8, 2019, Plaintiff Andre Galvan filed a proposed
11 nationwide (or, in the alternative, California) class action complaint against
12 Defendants in the United States District Court for the Central District of California,
13 Case No. 2:19-CV-00993-JAK-(JEMx).¹ On March 18, 2019, Mr. Galvan filed a first
14 amended class action complaint against Defendants.² The lawsuit alleged that
15 Defendants misrepresented the size of the hamburgers sold under the Smashburger
16 brand with any name that included the phrase “Triple Double,” including, but not
17 limited to hamburgers sold as the Triple Double, Bacon Triple Double, French Onion
18 Triple Double, and Pub Triple Double (collectively the “Subject Products”).

19 B. On March 11, 2019, Barbara Trevino filed a similar lawsuit against
20 Defendants in the United States District Court for the Central District of California,
21 Case No. 2:19-CV-02794. On May 16, 2019, the Court ordered Galvan’s lawsuit
22 consolidated with the Trevino lawsuit and appointed the law firm of Bursor & Fisher,
23 P.A. as interim lead class counsel.

24 C. On July 24, 2019, Plaintiffs Galvan, Lopez, Nguyen, Meyer, Trevino,
25 and Harris, filed a Consolidated Amended Class Action Complaint. On August 22,
26 _____

27 ¹ Jollibee Foods Corporation was also named as a defendant in the complaint.

28 ² The first amended complaint added Lucinda Lopez as a co-plaintiff and omitted Jollibee Foods Corporation as a defendant.

1 2019, Plaintiffs filed their Second Amended Consolidated Class Action Complaint,
2 which is the Operative Complaint.³ The Operative Complaint asserts claims for
3 violations of the California Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750,
4 *et seq.*) (“CLRA”), California’s Unfair Competition Law (Cal. Bus. & Prof. Code §§
5 17200, *et seq.*) (the “UCL”), California’s False Advertising Law (Cal. Bus. & Prof.
6 Code §§ 17500, *et seq.*) (the “FAL”), and violations of New York General Business
7 Law §§ 349 and 350 (collectively, “NYGBL”), as well as claims for Breach of
8 Express Warranty, Fraud, and Unjust Enrichment.

9 D. Before entering into this Agreement, the Parties, by and through their
10 respective counsel, conducted a thorough examination, investigation, and evaluation
11 of the relevant law, facts, and allegations to assess the merits of the claims and
12 potential claims to determine the strength of liability, potential remedies, and all
13 defenses thereto, including an extensive investigation into the facts and law relating
14 to (i) the development and formulation of the Subject Products; (ii) the marketing and
15 advertising of the Subject Products; (iii) sales, pricing, and financial data relating to
16 the Subject Products; and (iv) the sufficiency of the claims asserted and
17 appropriateness of class certification.

18 E. This Agreement was reached as a result of extensive arm’s-length
19 negotiations between the Parties and their counsel. Counsel have engaged in
20 extensive settlement discussions to determine if the Parties could reach a resolution
21 short of protracted litigation. This included two full days of mediation before Jill R.
22 Sperber, Esq. of Judicate West on February 6, 2020 and May 7, 2020, and several
23 months of follow-up settlement discussions with Ms. Sperber and amongst counsel
24 before a settlement in principle was reached.

25 F. Before and during these settlement negotiations, the Parties had an
26 arm’s-length exchange of sufficient information to permit Plaintiffs and their counsel
27

28 _____
³ Barbara Trevino dismissed her individual claims on November 26, 2019.

1 to evaluate the claims and potential defenses and to meaningfully conduct informed
2 settlement discussions. This included conducting extensive discovery where
3 Defendants provided and Plaintiffs reviewed over 14,500 documents. Plaintiffs also
4 reviewed numerous files from the trademark case filed against Smashburger, entitled
5 *In n Out Burgers v. Smashburger IP Holder LLC and Smashburger Franchising LLC*,
6 Case No. 8:17-cv-01474. Finally, Plaintiffs investigated the potential damages model
7 for the claims in this action and discussed the case with a potential damages expert.

8 G. Based upon their review, investigation, and evaluation of the facts and
9 law relating to the matters alleged in the pleadings, Plaintiffs, as settlement class
10 representatives, believe that the claims settled herein have merit. However, they and
11 their counsel recognize and acknowledge the expense and length of continued
12 proceedings necessary to prosecute the claims through trial, appeal, and ancillary
13 actions. Plaintiffs and their counsel have also taken into account the uncertain
14 outcome and risk of litigation, and the difficulties and delay inherent in such
15 litigation, and they believe that the settlement set forth in this Agreement confers
16 important benefits upon the Class Members (defined herein). Accordingly, based
17 upon their evaluation, after considering, among other things: (i) the benefits to the
18 Class Members under the terms of this Agreement; (ii) the risks, costs, and
19 uncertainty of protracted litigation, especially in complex actions such as this, as well
20 as the difficulties and delays inherent in such litigation; and (iii) the desirability of
21 consummating this Agreement promptly to provide effective relief to Class Members,
22 Plaintiffs and their counsel have determined that the settlement set forth in this
23 Agreement is in the best interests of the Class and, on behalf of Plaintiffs and the
24 Class, have agreed to settle the Action pursuant to the provisions of this Agreement.

25 H. Defendants denied and continue to deny all charges of wrongdoing or
26 liability against them arising out of any of the conduct, statements, acts or omissions
27 alleged, or that could have been alleged, in the Action. Defendants specifically deny
28 all allegations that their advertising and marketing of the Subject Products contained

1 any false or misleading statements. As a result, Defendants believe they cannot be
2 held liable for any of the alleged conduct, statements, acts, or omissions at issue in
3 the Action.

4 I. Defendants also denied and continue to deny, amongst other things,
5 allegations that Plaintiffs, the Class, or any member of the Class have suffered
6 damage or harm by reason of any alleged conduct, statement, act, or omission of
7 Defendants, or that Plaintiffs could establish damages or entitlement to injunctive
8 relief on a classwide basis. Defendants further have denied and continue to deny that
9 the Action meets the requisites for certification as a class action under federal,
10 California, or New York law, except for purposes of settlement, or that the evidence
11 is sufficient to support a finding of liability on an individual or classwide basis.
12 Nonetheless, Defendants have concluded that further defense of the Action would be
13 protracted and expensive, and that it is desirable that the Action be fully and finally
14 settled in the manner and upon the terms and conditions set forth in the Agreement.
15 Defendants also have taken into account the uncertainty and risks inherent in any
16 litigation. Defendants, therefore, have determined that it is desirable and beneficial to
17 them that the Action be settled in the manner and upon the terms and conditions set
18 forth in this Agreement.

19 J. This Agreement, and the proposed certification, for settlement purposes
20 only, of the Class, effectuates the resolution of disputed claims and is for settlement
21 purposes only.

22 NOW THEREFORE, it is hereby STIPULATED AND AGREED, by and
23 between the Parties that: (a) the Action and all Released Claims be fully and finally
24 compromised, settled, and released upon final settlement approval by the Court after
25 the hearings as provided for in this Agreement; and (b) upon such approval by the
26 Court, a Final Order and Final Judgment, substantially in the form attached hereto as
27 Exhibits A and B, respectively, be entered dismissing the Action with prejudice upon
28 the following terms and conditions:

1 **II. DEFINITIONS**

2 As used in this Agreement and the attached exhibits, the following terms have
3 the following meanings, unless this Agreement specifically provides otherwise.

4 Other capitalized terms used in this Agreement but not defined below shall have the
5 meaning ascribed to them in this Agreement and the exhibits attached hereto:

6 1. “Action” shall mean the proposed class action lawsuit entitled *In Re:*
7 *Smashburger IP Holder, LLC, et al*, Lead Case No. 2:19-CV-00993-JAK-(JEMx)
8 pending in the United States District Court for the Central District of California.

9 2. “Agreement” means this Stipulation of Settlement and its exhibits,
10 attached hereto and incorporated herein, including all subsequent amendments agreed
11 to in writing by the Parties and any exhibits to such amendments.

12 3. “Attorneys’ Fees and Expenses” means such funds as may be awarded
13 by the Court to Plaintiffs’ Counsel to compensate Plaintiffs’ Counsel for their fees
14 and expenses in connection with the Action and the Settlement, as described more
15 particularly in Section VI of this Agreement.

16 4. “Authorized Claimant” means a member of the Class who timely
17 submits a valid Claim Form in accordance with the terms of this Agreement.

18 5. “Claim Deadline” means the final time and date by which a valid Claim
19 Form must be postmarked or received by the Settlement Administrator for a Class
20 Member to be eligible for any of the settlement consideration contemplated in this
21 Agreement. The Claim Deadline shall be clearly set forth in the Court order granting
22 preliminary approval of the Settlement, the Long Form Notice and Summary Notice,
23 on the Settlement Website, and on the front page of the Claim Form.

24 6. “Claim Form” means the proof of claim and release form(s),
25 substantially in the form attached hereto as Exhibit C, the format of which may be
26 modified to meet the requirements of the Court and/or Settlement Administrator, to
27 be submitted by Class Members seeking to recover settlement consideration pursuant
28 to this Agreement.

1 7. “Class” means all persons in the United States and United States
2 Territories who purchased and/or consumed one or more of the Subject Products
3 during the Class Period. Specifically excluded from the Class are: (a) Defendants and
4 their employees, principals, officers, directors, agents, affiliated entities, legal
5 representatives, successors and assigns; (b) the judges to whom the Action has been
6 or is assigned and any members of their immediate families; (c) those who purchased
7 the Subject Products for the purpose of re-sale; and (d) all persons who have filed a
8 timely Request for Exclusion from the Class.

9 8. “Class Member(s)” means any member of the Class.

10 9. “Class Notice” means, collectively, the Long Form Notice and Summary
11 Notice provided to the Class as provided herein and directed by the Court, and the
12 Internet advertising to be facilitated by the Settlement Administrator.

13 10. “Class Period” means the period from July 1, 2017 up to and including
14 the May 31, 2019.

15 11. “Court” means the United States District Court for the Central District of
16 California and all judges assigned to the Action.

17 12. “Defense Counsel” means the law firm of Umberg Zipser LLP.

18 13. “Effective Date” means the first date after which all of the following
19 events and conditions have been met or have occurred:

- 20 (a) The Court has entered the Preliminary Approval Order;
- 21 (b) The Court has entered the Final Order and Final Judgment;
- 22 (c) Unless the Parties otherwise agree in writing to waive all or any
23 portions of the following provision, there has occurred: (i) in the event there is no
24 properly and timely filed objection to entry of the Final Order and Final Judgment,
25 the expiration (without the filing or noticing of an appeal) of the time to appeal from
26 the Final Order and Final Judgment; (ii) if the Final Order and Final Judgment is
27 appealed, the final dismissal of an appeal from the Final Order and Final Judgment or
28 the affirmance on appeal of the Final Order and Final Judgment in its entirety; (iii) if

1 a ruling or decision is entered by an appellate court affirming the Final Order and
2 Final Judgment, the time to petition for a writ of certiorari with respect to such ruling
3 or decision has expired; or (iv) if a petition for a writ of certiorari with respect to the
4 Final Order and Final Judgment is filed, the petition has been denied or dismissed or,
5 if granted, has resulted in affirmance of the Final Order and Final Judgment in
6 substantial form.

7 14. “Fairness Hearing” means the hearing that is to take place after the entry
8 of the Preliminary Approval Order and after the Notice Date for purposes of: (a)
9 determining the fairness, adequacy and reasonableness of the Agreement in
10 accordance with applicable jurisprudence; (b) if the Court so decides, entering the
11 Final Order and Final Judgment and dismissing the Action with prejudice; (c) ruling
12 upon an application by Class Counsel for Attorneys’ Fees and Expenses and
13 Plaintiffs’ incentive awards. The Parties shall request that the Court schedule the
14 Fairness Hearing for a date that is in compliance with the provisions of 28 U.S.C. §
15 1715(d).

16 15. “Final Order and Final Judgment” means the Court’s order and judgment
17 fully and finally approving the Settlement and dismissing the Action with prejudice,
18 substantially in the form attached hereto as Exhibits A and B.

19 16. “Long Form Notice” means the long form notice of settlement,
20 substantially in the form attached hereto as Exhibit E.

21 17. “Defendants” means Smashburger IP Holder LLC and Smashburger
22 Franchising LLC, and includes, without limitation all related entities, including but
23 not limited to parents, subsidiaries, agents, employees and assigns, predecessors,
24 successors and affiliates of Defendants and their related entities and owners.

25 18. “Net Cash Amount” means the value derived by subtracting the value of
26 Attorneys’ Fees and Expenses to be awarded to Plaintiffs’ Counsel, any incentive
27 awards to be awarded to Plaintiffs, and any Settlement Administration Expenses from
28 two million five hundred thousand dollars (\$2,500,000).

1 19. “Notice Date” means the first date upon which the Class Notice is
2 disseminated.

3 20. “Objection Deadline” means the date, to be set by the Court, by which
4 Class Members must file objections, if any, to the Agreement in accordance with
5 Section IX of this Agreement. The Parties shall request that the Court set an
6 Objection Deadline coinciding with the Opt-Out Date.

7 21. “Opt-Out Date” means the date, to be set by the Court, by which a
8 Request For Exclusion must be sent to Settlement Administrator for a Class Member
9 to be excluded from the Settlement Class. The Parties shall request that the Court set
10 an Opt-Out Date coinciding with the Objection Deadline.

11 22. “Parties” means Plaintiffs and Defendants, as each of those terms are
12 defined in this Agreement.

13 23. “Plaintiffs” means Andre Galvan, Lucinda Lopez, Thu Thuy Nguyen,
14 Robert Meyer, and Jamelia Harris.

15 24. “Plaintiffs’ Lead Counsel” and/or “Lead Counsel” means the law firm
16 Bursor & Fisher, P.A.

17 25. “Plaintiffs’ Counsel” and/or “Class Counsel” means the law firms
18 Bursor & Fisher, P.A., Ahdoot & Wolfson, PC and Reich Radcliffe & Hoover LLP.

19 26. “Preliminary Approval Order” means the order, substantially in the form
20 attached hereto as Exhibit D, conditionally certifying, for settlement purposes only,
21 the Class; appointing Plaintiffs’ Counsel as counsel for the Class; setting the date of
22 the Fairness Hearing; preliminarily approving this Agreement; approving the Class
23 Notice program and Claim Form; and setting dates for the Claim Deadline, Opt-Out
24 Date, Objection Deadline, and Notice Date.

25 27. (a) “Released Claims” means and includes any and all claims,
26 demands, rights, damages, obligations, suits, debts, liens, and causes of action under
27 common law or statutory law (federal, state, or local) of every nature and description
28 whatsoever, monetary, injunctive, or equitable, ascertained or unascertained,

1 suspected or unsuspected, existing or claimed to exist, including Unknown Claims as
2 of the Notice Date by Plaintiffs and all Class Members (and Plaintiffs' and Class
3 Members' respective heirs, guardians, executors, administrators, representatives,
4 agents, attorneys, partners, successors, predecessors-in-interest, and assigns) that:

5 (i) were asserted or that could have been reasonably asserted in the Action
6 against the Released Parties (as hereinafter defined), or any of them, and that
7 arise out of or are related in any way to any or all of the acts, omissions, facts,
8 matters, transactions, or occurrences that were or could have been directly or
9 indirectly alleged or referred to in the Action (including, but not limited to,
10 alleged violations of the CLRA, UCL, FAL, NYGBL or similar laws of any
11 state or United States territory, and alleged claims for injunctive relief, breach
12 of warranty, breach of the implied warranty of merchantability, negligent
13 misrepresentation, fraud, and unjust enrichment); or

14 (ii) were asserted or that could have been reasonably asserted by any Class
15 Member against the Released Parties (as hereinafter defined), or any of them,
16 and that arise out of or are related in any way to any or all of the acts,
17 omissions, facts, matters, transactions, or occurrences that were or could have
18 been directly or indirectly alleged or referred to, including all claims for
19 monetary, injunctive, or equitable relief that relate in any way to
20 communications, disclosures, representations, statements, claims,
21 nondisclosures and/or omissions, packaging, advertising, labeling, and/or
22 marketing of or concerning the Subject Products.

23 28. "Released Parties" shall be defined and construed broadly to effectuate a
24 complete and comprehensive release, and means Defendants and any entity that
25 made, manufactured, tested, inspected, audited, certified, purchased, distributed,
26 supplied, licensed, transported, donated, marketed, advertised, promoted, sold or
27 offered for sale any Subject Product, including all of their respective franchisees,
28 predecessors, successors, assigns, parents, subsidiaries, divisions, departments, and

1 affiliates, and any and all of their past, present and future officers, directors,
2 employees, shareholders, partners, principals, agents, servants, successors, attorneys,
3 insurers, representatives, licensees, licensors, customers, subrogees and assigns. It is
4 expressly understood that, to the extent a Released Party is not a Party to this
5 Agreement, all such Released Parties are intended third party beneficiaries of this
6 Agreement.

7 29. “Releasing Parties” means Plaintiffs and all Class Members, and any
8 person claiming by or through each Class Member, including but not limited to
9 spouses, children, wards, heirs, devisees, legatees, invitees, employees, associates,
10 co-owners, attorneys, agents, administrators, predecessors, successors, assignees,
11 representatives of any kind, shareholders, partners, directors, or affiliates.

12 30. “Request For Exclusion” means the written communication that must be
13 sent to the Settlement Administrator and postmarked on or before the Opt-Out Date
14 by a Class Member who wishes to be excluded from the Class.

15 31. “Settlement” means the settlement embodied in this Agreement,
16 including all attached exhibits (which are an integral part of this Agreement and are
17 incorporated in their entirety by reference).

18 32. “Settlement Administrator” means Heffler Claims Group.

19 33. “Settlement Administration Expenses” means the expenses incurred by
20 the Settlement Administrator assisting with the implementation of this Agreement,
21 which shall primarily result from administering the notice program and processing all
22 claims made by Class Members.

23 34. “Summary Notice” means the summary notice of the proposed
24 settlement, substantially in the form attached hereto as Exhibit F.

25 35. “Unknown Claims” means any and all Released Claims that a Class
26 Member, or anyone acting on behalf of or in the Class Member’s interest, does not
27 know or suspect to exist against any of the Released Parties relating to any Subject
28 Product, which, if known, might have affected his or her decision to enter into or to

1 be bound by the terms of this Agreement. The Plaintiffs and Class Members
2 acknowledge that they may hereafter discover facts in addition to or different from
3 those that they now know or believe to be true concerning the subject matter of this
4 Agreement, but nevertheless fully, finally, and forever settle and release any and all
5 Released Claims, monetary, injunctive, or equitable, known or unknown, suspected
6 or unsuspected, contingent or non-contingent, which now exist, may hereafter exist,
7 or heretofore have existed which arise from, or in any way relate to, the labeling,
8 packaging, sale, distribution, supply, marketing, testing, or advertising, regardless of
9 medium, of any Subject Product, without regard to subsequent discovery or existence
10 of such different or additional facts concerning each of the Released Parties.
11 Notwithstanding this paragraph or any other paragraph herein, this Agreement shall
12 not be deemed to release any individual, class, representative, group or collective
13 claim, liability, right, demand, suit, matter, obligation, damage, loss, action or cause
14 of action, of any kind or description that a Releasing Party has or may have for
15 personal injuries.

16 **III. SUBMISSION OF THE SETTLEMENT TO THE COURT FOR**
17 **REVIEW AND APPROVAL**

18 36. As soon as is practicable following the signing of this Agreement, Class
19 Counsel shall apply to the Court for entry of the Preliminary Approval Order
20 (substantially in the form attached as Exhibit D), for the purpose of, among other
21 things:

- 22 (a) Approving the Class Notice, including the Long Form Notice and
23 Summary Notice, substantially in the form set forth at Exhibits E and F;
24 (b) Finding that the requirements for preliminary certification of the
25 Class have been satisfied, appointing Plaintiffs as the representatives of the Class and
26 their counsel as Class Counsel, and preliminarily approving the Settlement as being
27 within the range of reasonableness such that the Class Notice should be provided
28

1 pursuant to this Agreement;

2 (c) Scheduling the Fairness Hearing on a date ordered by the Court,
3 provided in the Preliminary Approval Order, and in compliance with applicable law,
4 to determine whether the Settlement should be approved as fair, reasonable, and
5 adequate, and to determine whether a Final Order and Final Judgment should be
6 entered dismissing the Action with prejudice.

7 (d) Determining that the notice of the Settlement and of the Fairness
8 Hearing, as set forth in this Agreement, complies with all legal requirements,
9 including but not limited to the Due Process Clause of the United States Constitution;

10 (e) Preliminarily approving the form of the Final Order and Final
11 Judgment;

12 (f) Appointing Heffler Claims Group as the Settlement
13 Administrator;

14 (g) Directing that Class Notice shall be given to the Class as provided
15 in Section V of this Agreement.

16 (h) Providing that Class Members will have until the Claim Deadline
17 to submit Claim Forms;

18 (i) Providing that any objections by any Class Member to the
19 certification of the Class and the proposed Settlement contained in this Agreement,
20 and/or the entry of the Final Order and Final Judgment, shall be heard and any papers
21 submitted in support of said objections shall be considered by the Court at the
22 Fairness Hearing only if, on or before the Objection Deadline set by the Court, such
23 objector files with the Court a written objection and notice of the objector's intention
24 to appear, and otherwise complies with the requirements in Section IX of this
25 Agreement;

26 (j) Establishing dates by which the Parties shall file and serve all
27 papers in support of the application for final approval of the Settlement and/or in
28 response to any valid and timely objections;

1 (k) Providing that all Class Members will be bound by the Final
2 Order and Final Judgment dismissing the Action with prejudice unless such members
3 of the Class timely file valid written Requests for Exclusion in accordance with this
4 Agreement and the Class Notice;

5 (l) Providing that Class Members wishing to exclude themselves
6 from the Settlement will have until the Opt-Out Date to submit a valid written
7 Request for Exclusion to the Settlement Administrator, in accordance with the
8 procedures set forth in Section IX of this Agreement;

9 (m) Directing the Parties, pursuant to the terms and conditions of this
10 Agreement, to take all necessary and appropriate steps to establish the means
11 necessary to implement the Settlement;

12 (n) Pending the Fairness Hearing, vacating any litigation deadlines
13 and staying all proceedings in the Action, other than proceedings necessary to carry
14 out or enforce the terms and conditions of this Agreement and the Preliminary
15 Approval Order; and

16 (o) Pending the Fairness Hearing, enjoining Plaintiffs and Class
17 Members, or any of them, from commencing or prosecuting, either directly or
18 indirectly, any action in any forum (state or federal) asserting any Released Claims.

19 37. Following the entry of the Preliminary Approval Order, the Class Notice
20 shall be given and published in the manner directed and approved by the Court, as set
21 forth in fuller detail in Section V of this Agreement.

22 38. At the Fairness Hearing, the Parties shall seek to obtain from the Court a
23 Final Order and Final Judgment in the form substantially similar to Exhibits A and
24 Exhibit B, respectively. The Final Order and Final Judgment shall, among other
25 things:

26 (a) Find that the Court has personal jurisdiction over all Class
27 Members, the Court has subject matter jurisdiction over the claims asserted in the
28 Action, and that venue is proper;

1 (b) Finally approve the Agreement and the Settlement pursuant to
2 Rule 23 of the Federal Rules of Civil Procedure;

3 (c) Certify the Class for settlement purposes only;

4 (d) Find that the notice to the Class complied with all laws and
5 requirements, including, but not limited to, the Due Process Clause of the United
6 States Constitution;

7 (e) Incorporate and effectuate the release set forth in the Agreement
8 and make the release effective as of the date of the Final Order and Final Judgment;

9 (f) Authorize the Parties to implement the terms of the Settlement;

10 (g) Dismiss the Action with prejudice; and

11 (h) Notwithstanding the aforementioned dismissal with prejudice,
12 retain jurisdiction relating to the administration, consummation, enforcement, and
13 interpretation of the Agreement, the Final Order and Final Judgment, any final order
14 approving Attorneys' Fees and Expenses and incentive awards, and for any other
15 necessary purpose.

16 39. The Parties acknowledge that each intends to implement the terms of this
17 Agreement. The Parties shall, in good faith, cooperate and assist with and undertake
18 all reasonable actions and steps to accomplish all required events on the schedule set
19 by the Court, and shall use reasonable efforts to implement all terms and conditions
20 of this Agreement. In the event the Court does not preliminarily or finally approve
21 this Agreement, the Parties further agree to continue to cooperate in good faith in an
22 attempt to address any deficiencies raised by the Court in an expeditious manner.

23 **IV. THE SETTLEMENT CONSIDERATION**

24 The consideration for this Settlement will be distributed in the form of cash
25 payments and product vouchers as follows:

26 **A. Settlement Fund and Awards to Class Members**

27 40. Total Financial Commitment: Defendants' total financial commitment
28 under the Settlement shall be two million five hundred thousand dollars

1 (\$2,500,000.00) in cash (the “Cash Settlement Fund”) and 1.5 million vouchers with
2 a current value of between approximately \$2.00 and \$2.49 per voucher. The Cash
3 Settlement Fund shall be used for any Court ordered Attorneys’ Fees and Expenses,
4 Plaintiffs’ incentive awards, any and all Settlement Administration Expenses, and all
5 cash awards paid to Class Members. That is, under no circumstances will Defendants
6 be obligated to contribute more than \$2.5 million in cash. The Cash Settlement Fund
7 and the vouchers are non-reversionary.

8 41. Cash or Voucher Option: Class Members who (a) execute and submit a
9 valid Claim Form on or before the Claim Deadline; and (b) attest under the penalty of
10 perjury that they purchased or consumed one or more of the Subject Products during
11 the Class Period and comply with all other conditions and requirements specified
12 herein, may opt to receive either a cash award or a product voucher (but not both) as
13 follows:

14 (a) Cash Award Option: The relief to be provided to each Authorized
15 Claimant who (i) submits a valid Claim Form on or before the Claim Deadline
16 pursuant to the terms and conditions of this Agreement, and (ii) opts to receive a cash
17 award, which is a \$4.00 cash award for each Subject Product the Authorized
18 Claimant purchased or consumed during the Class Period, up to a maximum of five
19 (5) claims (or \$20.00 in cash) per household without proof of purchase.

20 (b) Product Voucher Option: The relief to be provided to each
21 Authorized Claimant who (i) submits a valid Claim Form on or before the Claim
22 Deadline pursuant to the terms and conditions of this Agreement, and (ii) opts to
23 receive a product voucher award in lieu of the cash award described in section (a)
24 above, is a product voucher. The product vouchers will be fully and freely
25 transferrable. The product vouchers will entitle the bearer of the voucher, upon the
26 purchase of a regularly-priced entrée at a company owned Smashburger-branded
27 restaurant, to either: a) upgrade a single beef hamburger to a double beef hamburger
28 for no additional cost; or b) get a small fountain drink for no additional cost.

1 Authorized Claimants may elect to receive up to 10 product vouchers. Currently, an
2 upgrade from a single beef hamburger to a double beef hamburger generally costs
3 approximately \$2.00, and a small fountain drink generally costs approximately \$2.49.
4 To the extent that all vouchers are not claimed, then a donation of the residual amount
5 of the vouchers will be made to a charitable organization as described below. The
6 vouchers shall, subject to reasonable measures to prevent fraud, duplicating or
7 counterfeiting of vouchers, be redeemable at any Smashburger-branded, company-
8 owned restaurant (but will not be redeemable at any franchisee-owned restaurant).

9 (c) Timing of Awards: Defendants shall pay the Settlement
10 Administrator the two million five hundred thousand dollars (\$2,500,000.00) cash
11 component of the settlement within 14 calendar days of the Court's issuance of the
12 Preliminary Approval Order. All Class Members who submit Claim Forms shall be
13 sent cash awards or product vouchers or, as applicable, a letter explaining the
14 rejection of their Claim Forms, within forty-five (45) calendar days of the Effective
15 Date (the "Award Issuance Date"). All cash awards to Class Members will be in the
16 form of checks, or, at the option of the Class Member, through electronic means such
17 as PayPal or Zelle, and such checks or payment will state that they must be redeemed
18 within 120 calendar days of the Award Issuance Date (the "Expiration Date") or they
19 will become void. Defendants shall provide the Settlement Administrator with all
20 product vouchers no later than fifteen (15) calendar days before the Award Issuance
21 Date. The product vouchers will expire no earlier than two years after the Award
22 Issuance Date.

23 42. Insufficient or Excess Funds: If the aggregate value of the cash rewards
24 claimed by Authorized Claimants pursuant to valid and timely Claim Forms exceeds
25 the Net Cash Amount, then the monetary value of the awards to be provided to each
26 Authorized Claimant shall be reduced on an equal pro rata basis, such that the
27 aggregate value of the awards does not exceed the Net Cash Amount. If the
28 aggregate value of the cash rewards claimed by Authorized Claimants pursuant to

1 valid and timely Claim Forms is less than the Net Cash Amount, then the monetary
2 value of the awards to be provided to each Authorized Claimant shall be increased on
3 an equal pro rata basis, such that the aggregate value of the awards equals the Net
4 Cash Amount. After the Award Issuance Date, the Settlement Administrator, in
5 consultation with the Parties as necessary, shall determine each Authorized
6 Claimant's pro rata share based upon each Authorized Claimant's Claim Form and
7 the aggregate value of the awards claimed by Authorized Claimants.

8 43. Insufficient or Excess Vouchers: If more than 1.5 million vouchers are
9 requested, then the number of vouchers per person will be reduced on an equal pro
10 rata basis and if more than 1.5 million people request vouchers, then the vouchers
11 will be distributed based on when they were requested. If fewer than 1.5 million
12 vouchers are requested, the remaining vouchers will be donated to the Boys and Girls
13 Club, or some other charitable organization chosen by the Defendants, subject to the
14 Court's approval.

15 **V. NOTICE TO THE CLASS**

16 44. The Parties shall jointly recommend and retain Heffler Claims Group as
17 the Settlement Administrator. Following the entry of the Preliminary Approval Order
18 and the Court's appointment of the proposed Settlement Administrator, the
19 Settlement Administrator shall disseminate the Class Notice as specified in the
20 Preliminary Approval Order and in this Section, to comply with all applicable laws
21 and requirements, including, but not limited to, the Due Process Clause of the United
22 States Constitution. The Settlement Administrator shall develop a notice and claims
23 administration program, subject to the approval of the Parties and the Court, designed
24 to achieve at least 80% reach under a budget not to exceed \$400,000. If the costs of
25 notice and claims administration exceeds this budget, the Settlement Administrator
26 will make a motion to the Court for payment of its additional fees and costs. Direct
27 notice will be provided to class members for whom Defendants have contact
28 information including its SmashClub Rewards customer loyalty program. All costs

1 of notice and administration will be paid from the Cash Settlement Fund. Defendants
2 will have the right to review, and reasonably approve, all notices and media plans.
3 Following the dissemination of the Class Notice, the Settlement Administrator shall
4 submit a declaration under the penalty of perjury attesting that the Class Notice has
5 achieved at least 80% reach.

6 45. The Long Form Notice: The Long Form Notice, which shall be made
7 available on the Settlement Website, to Class Members requesting a hard copy from
8 the Settlement Administrator, and to Class Members that Defendants can identify in
9 its records through reasonable effort, shall be in a form substantially similar to the
10 document attached to this Agreement as Exhibit E, and shall comport to the following
11 terms and requirements:

12 (a) General Terms: The Long Form Notice shall contain a plain and
13 concise description of the nature of the Action and the proposed Settlement, including
14 information on the definition of the Class, the identity of eligible Class Members,
15 how the proposed Settlement would provide relief to Class Members, what claims are
16 released under the proposed Settlement, and other relevant information.

17 (b) Opt-Out Rights: The Long Form Notice shall inform Class
18 Members that they have the right to opt out of the Settlement. The Long Form Notice
19 shall provide the deadlines and procedures for exercising this right.

20 (c) Objection to Settlement: The Long Form Notice shall inform
21 Class Members of their right to object to the proposed Settlement and appear at the
22 Fairness Hearing. The Class Notice shall provide the deadlines and procedures for
23 exercising these rights.

24 (d) Fees and Expenses: Class Counsel will be seeking Attorneys'
25 Fees and Expenses and Plaintiffs' incentive awards. Class Counsel will arrange for
26 the motion to be posted to the Settlement Website.

27 (e) Claim Form: The Long Form Notice and Settlement Website
28 shall include the Claim Form, which shall inform Class Members that they must fully

1 complete and timely return the Claim Form prior to the Claim Deadline to be eligible
2 to obtain relief pursuant to this Agreement.

3 46. Internet Advertising Program: No later than the Notice Date, the
4 Settlement Administrator shall cause notice of the settlement to be provided through
5 digital advertising, pursuant to the Settlement Administrator’s notice plan set forth in
6 the declaration of the Settlement Administrator to be filed in support of preliminary
7 approval of the Settlement.

8 47. Settlement Website: No later than the Notice Date, the Settlement
9 Administrator shall establish and caused to be published an Internet website (the
10 “Settlement Website”), www.burgersettlement.com (or something appropriately
11 similar if this domain is not available). All Internet advertising that is part of the
12 Class Notice program will direct Class Members to the Settlement Website. The
13 Settlement Website will allow Class Members to submit Claim Forms online and will
14 contain information relevant to Class Members, including but not limited to all
15 applicable deadlines, the Agreement, Class Notice, a downloadable Claim Form, all
16 papers filed by the Parties in support of this Agreement (including Plaintiffs’
17 anticipated motion for Attorneys’ Fees and Expenses), orders of the Court pertaining
18 to this Agreement, and contact information for reaching the Settlement Administrator
19 via a toll-free telephone number, e-mail and U.S. mail. The Parties shall use
20 reasonable efforts to agree on all information and documents to be posted on this
21 website and no information shall be posted or provided on the website without the
22 Parties’ express approval. The website may be rendered inactive one hundred fifty
23 (150) days after the Award Issuance Date. Settlement Administration Expenses
24 include the costs associated with maintenance of the Settlement Website.

25 48. Toll-Free Telephone Number: Prior to the dissemination of the Class
26 Notice, the Settlement Administrator shall establish a toll-free telephone number that
27 will provide Settlement-related information to Class Members, pursuant to the terms
28 and conditions of this Agreement. Settlement Administration Expenses include the

1 costs associated with maintenance of this toll-free telephone number. The Parties
2 shall also create a protocol for the Settlement Administrator to refer Class Member
3 inquiries to Class Counsel. The toll-free telephone number may be rendered inactive
4 one hundred fifty (150) calendar days after the Award Issuance Date.

5 49. Nothing contained herein shall limit Class Counsel's ability to
6 disseminate notice by publishing a link to the Settlement Website on their firm or
7 attorneys' websites, Facebook pages, or social media accounts, provided that any
8 such dissemination must comply with Paragraph 103 of this Agreement.

9 **VI. ATTORNEYS' FEES AND EXPENSES AND CLASS**
10 **REPRESENTATIVE INCENTIVE AWARD**

11 50. In recognition of the time and effort the representative Plaintiffs
12 expended in pursuing this action and in fulfilling their obligations and responsibilities
13 as class representatives, and of the benefits conferred on all Class Members by the
14 Settlement, Class Counsel may ask the Court for the payment of incentive awards to
15 the representative Plaintiffs. Defendants will not oppose and Plaintiffs and Class
16 Counsel will submit an application for an incentive award of five thousand dollars
17 (\$5,000.00) to each Plaintiff. Any court-ordered incentive award will be paid to
18 Plaintiffs from the Cash Settlement Fund no later than fifteen (15) calendar days after
19 the Effective Date.

20 51. Class Counsel will make an application to the Court for an award of
21 Attorneys' Fees and Expenses in the Action. Defendants will not have the right to
22 challenge Class Counsel's entitlement to Attorneys' Fees and Expenses. Defendants
23 will have the right to challenge the amount of Attorneys' Fees and Expenses
24 requested by Class Counsel. The Parties have no agreement between themselves as
25 to the amounts of Attorneys' Fees and Expenses that Class Counsel will request or
26 that Defendants will oppose. The Attorneys' Fees and Expenses ordered by the Court
27 shall represent Class Counsel's sole compensation under the Settlement and shall be
28 inclusive of all fees and costs of Class Counsel to be paid from the Cash Settlement

1 Fund. Plaintiffs and Class Counsel agree that Defendants shall not pay or be
2 obligated to pay Class Counsel in excess of any award of Attorneys' Fees and
3 Expenses ordered by the Court. And in no event shall Defendants be obligated to pay
4 Attorneys' Fees and Expenses (or any other payments) that would make Defendants'
5 total cash payment towards the Settlement an amount in excess of two million five
6 hundred thousand (\$2,500,000.00).

7 52. Any court-ordered Attorneys' Fees and Expenses shall be paid to Class
8 Counsel from the Class Settlement Fund no later than thirty (30) calendar days after
9 the Court's order awarding Attorneys' Fees and Expenses, provided that, pursuant to
10 the terms of the undertaking attached as Exhibit G to this Agreement, any such
11 Attorneys' Fees and Expenses will be repaid to Defendants by Class Counsel should
12 the Court's order awarding Attorneys' Fees and Expenses or Final Approval Order be
13 reversed on appeal and/or should the Settlement be terminated according to its terms.

14 53. Plaintiffs' Lead Counsel shall have the sole and absolute discretion to
15 allocate the Attorneys' Fees and Expenses amongst Plaintiffs' Counsel and any other
16 attorneys for Plaintiffs. Defendants shall have no liability or other responsibility for
17 allocation of any such Attorneys' Fees and Expenses awarded, and, in the event that
18 any dispute arises relating to the allocation of fees, Class Counsel agree to hold
19 Defendants harmless from, and indemnify Defendants with respect to, any and all
20 such liabilities, costs, and expenses, including attorneys' fees and dispute costs, of
21 such dispute.

22 **VII. RELEASES AND DISMISSAL OF ACTION**

23 54. Upon the Effective Date, the Releasing Parties shall be deemed to have,
24 and by operation of the Final Order and Final Judgment shall have, fully, finally and
25 forever released, relinquished, and discharged all Released Claims against the
26 Released Parties. In connection with the Released Claims, each Releasing Party shall
27 be deemed as of the Effective Date to have expressly, knowingly, and voluntarily
28 waived any and all provisions, rights, benefits conferred by Section 1542 of the

1 California Civil Code, and any statute, rule, and legal doctrine similar, comparable, or
2 equivalent to Section 1542, which provides as follows:

3 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE**
4 **CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO**
5 **EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE**
6 **RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE**
7 **MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE**
8 **DEBTOR OR RELEASED PARTY.**

9
10 In connection with such waiver and relinquishment, the Releasing Parties hereby
11 acknowledge that they are aware that they or their attorneys may hereafter discover
12 claims or facts in addition to or different from those that they now know or believe
13 exist with respect to Released Claims, but that it is their intention to hereby fully,
14 finally, and forever settle and release all of the Released Claims, whether known or
15 unknown, suspected or unsuspected, that they have against the Released Parties. In
16 furtherance of such intention, the release herein given by the Releasing Parties shall
17 be and remain in effect as a full and complete general release notwithstanding the
18 discovery or existence of any such additional different claims or facts. Each of the
19 Releasing Parties expressly acknowledges that he/she/it has been advised by
20 his/her/its attorney of the contents and effect of Section 1542, and with knowledge,
21 each of the Parties hereby expressly waives whatever benefits he/she/it may have had
22 pursuant to such section. Releasing Parties are not releasing any claims for personal
23 injuries. Plaintiffs acknowledge, and the Class Members shall be deemed by
24 operation of the Final Judgment to have acknowledged, that the foregoing waiver was
25 separately bargained for and a material element of the Settlement of which this
26 release is a part.

27 55. Upon the Effective Date, the Action shall be dismissed with prejudice.
28 Plaintiffs and Class Counsel shall have the responsibility for ensuring that the Action

1 is dismissed with prejudice in accordance with the terms of this Agreement.

2 56. The Court shall enter an order retaining jurisdiction over the Parties to
3 this Agreement with respect to the future performance of the terms of this Agreement.
4 In the event that any applications for relief are made, such applications shall be made
5 to the Court.

6 57. Upon the Effective Date: (a) the Agreement shall be the exclusive
7 remedy for any and all Released Claims of Plaintiffs and Class Members; and (b)
8 Plaintiffs and the Class Members stipulate to be and shall be permanently barred and
9 enjoined by Court order from initiating, asserting, or prosecuting against the Released
10 Parties in any federal or state court or tribunal any and all Released Claims.

11 **VIII. ADMINISTRATION OF THE SETTLEMENT**

12 58. The Parties shall, subject to Court approval, retain Heffler Claims Group
13 as the Settlement Administrator to help implement the terms of the Agreement.
14 Subject to the terms and conditions of this Agreement, all costs and fees associated
15 with the Settlement Administrator, including costs of providing Class Notice and
16 reviewing and processing claims shall be paid from the Cash Settlement Fund.

17 59. In fulfilling its responsibilities, the Settlement Administrator shall be
18 responsible for, without limitation: (a) consulting on and designing the notice to be
19 disseminated to Class Members; (b) dissemination of Class Notice; (c) responding to
20 requests from Class Counsel and/or Defense Counsel; and (d) otherwise assisting
21 with administration of the Settlement.

22 60. The Settlement Administrator also shall be responsible for, without
23 limitation, the dissemination of Class Notice and implementing the terms of the claim
24 process and related administrative activities that include communications with Class
25 Members concerning the Settlement, claim process, and their options thereunder. In
26 particular, the Settlement Administrator shall be responsible for: (a) printing, e-
27 mailing, mailing or otherwise arranging for the mailing of the Class Notice in
28 response to Class Members' requests; (b) making any mailings required under the

1 terms of this Agreement; (c) establishing the Settlement Website; (d) establishing a
2 toll-free voice line to which Class Members may refer for information about the
3 Action and the Settlement; (e) receiving and maintaining any Class Member
4 correspondence regarding requests for exclusion and objections to the Settlement; (f)
5 forwarding inquiries from Class Members to Class Counsel or their designee for a
6 response, if warranted; (g) establishing a post office box for the receipt of Claim
7 Forms, exclusion requests, and any correspondence; (h) reviewing Claim Forms
8 according to the review protocols agreed to by the Parties and standards set forth in
9 this Agreement; and (i) otherwise implementing and/or assisting with the claim
10 review process and payment of the claims.

11 61. The Settlement Administrator shall administer the Settlement in
12 accordance with the terms of this Agreement and, without limiting the foregoing,
13 shall: (a) treat any and all documents, communications and other information and
14 materials received in connection with the administration of the Settlement as
15 confidential and shall not disclose any or all such documents, communications or
16 other information to any person or entity except as provided for in this Agreement or
17 by court order; and (b) receive Requests for Exclusion and provide to Class Counsel
18 and Defense Counsel a copy thereof within three (3) business days of receipt. If the
19 Settlement Administrator receives any Requests for Exclusion after the deadline for
20 the submission of such forms and requests, the Settlement Administrator shall
21 promptly provide Class Counsel and Defense Counsel with copies thereof and receive
22 and maintain all correspondence from any Class Member regarding the Settlement.

23 62. The Claim Form will be available for downloading and may be
24 completed and submitted online at the Settlement Website, and, at Class Counsel's
25 option, the Claim Form will be available for downloading on Class Counsel's
26 websites. The Claim Form may also be requested by calling the toll-free number
27 provided by the Settlement Administrator or by writing to the Settlement
28 Administrator.

1 63. To be eligible for a cash award or product voucher, each Class Member
2 must submit or postmark a Claim Form, on or before the Claim Deadline, containing
3 his or her name, mailing address, and e-mail address, and an attestation, under
4 penalty of perjury, that the Class Member purchased or consumed one or more
5 Subject Products during the Class Period. The Claim Form will be deemed to have
6 been submitted when the Claim Form is posted, if received with a postmark, or
7 equivalent mark by a courier company indicated on the envelope or mailer and if
8 mailed with pre-paid postage and addressed in accordance with the instructions set
9 out in the Claim Form. In the case of online claims, the Claim Form shall be deemed
10 to have been submitted when it is fully uploaded to the Settlement Website.

11 64. Any Class Member who, in accordance with the terms and conditions of
12 this Agreement, neither seeks exclusion from the Class nor submits a valid and timely
13 Claim Form, will not be entitled to receive any relief pursuant to this Agreement, but
14 will be bound together with all Class Members by all of the terms of this Agreement,
15 including the terms of the Final Order and Final Judgment to be entered in the Action
16 and the releases provided for herein, and will be barred from bringing any action in
17 any forum (state or federal) against any of the Released Parties concerning the
18 Released Claims.

19 65. The Settlement Administrator shall use adequate and customary
20 procedures and standards to determine whether a Claim Form meets the requirements
21 set forth in this Agreement and to prevent the payment of fraudulent claims and/or
22 pay only valid and eligible claims. Each Claim Form shall be submitted to and
23 reviewed by the Settlement Administrator, who shall determine the extent, if any, to
24 which each claim shall be allowed. The Settlement Administrator shall use all
25 reasonable efforts and means to identify and reject duplicate and/or fraudulent claims,
26 including, without limitation, indexing all awards provided to Class Members.

27 66. Claim Forms that do not meet the terms and conditions of this
28 Agreement shall be promptly rejected by the Settlement Administrator. The

1 Settlement Administrator shall have forty-five (45) calendar days from the Effective
2 Date to exercise the right of rejection. The Settlement Administrator shall notify the
3 Class Member using the contact information provided in the Claim Form of the
4 rejection, including via electronic mail. Class Counsel and Defense Counsel shall be
5 provided with copies of all such notifications to Class Members. If any claimant
6 whose Claim Form has been rejected, in whole or in part, desires to contest such
7 rejection, the claimant must, within fifteen (15) business days from receipt of the
8 rejection, transmit to the Settlement Administrator by e-mail or U.S. mail a notice and
9 statement of reasons indicating the claimant's grounds for contesting the rejection,
10 along with any supporting documentation, and requesting further review by the
11 Settlement Administrator, in consultation with Class Counsel and Defense Counsel,
12 of the denial of the claim. If Class Counsel and Defense Counsel cannot agree on a
13 resolution of claimant's notice contesting the rejection, the disputed claim shall be
14 presented to the Court or a referee appointed by the Court for summary and non-
15 appealable resolution.

16 67. No person shall have any claim against Defendants, Defense Counsel,
17 Plaintiffs, Plaintiffs' Counsel, the Class, Class Counsel, and/or the Settlement
18 Administrator based on any eligibility determinations, distributions, or awards made
19 in accordance with this Agreement. This provision does not affect or limit in any
20 way the right of review by the Court or referee of any disputed Claim Forms as
21 provided in this Agreement.

22 68. Class Counsel and Defense Counsel shall have the right to inspect the
23 Claim Forms and supporting documentation received by the Settlement Administrator
24 at any time upon reasonable notice.

25 69. Not later than seven (7) calendar days before the date of the Fairness
26 Hearing, the Settlement Administrator shall file with the Court: (a) a list of those
27 persons who have opted out or excluded themselves from the Settlement; and (b) the
28 details regarding the number of valid Claim Forms received and processed by the

1 Settlement Administrator.

2 70. The Settlement Administrator may retain one or more persons to assist in
3 the completion of its responsibilities.

4 71. The Settlement Administrator shall distribute benefits to eligible Class
5 Members only after the Effective Date and pursuant to the deadlines set forth in
6 Section 41(c) of this Agreement.

7 72. If the Settlement is not approved or for any reason the Effective Date
8 does not occur, no payments or distributions of any kind shall be made pursuant to
9 this Agreement, except as otherwise provided herein and except for the costs and
10 expenses of the Settlement Administrator, for which Plaintiffs and/or Plaintiffs'
11 Counsel are not responsible.

12 73. In the event the Settlement Administrator fails to perform its duties,
13 and/or makes a material or fraudulent misrepresentation to, or conceals requested
14 material information from, Class Counsel, Defendants, and/or Defense Counsel, then
15 the party to whom the misrepresentation is made shall, in addition to any other
16 appropriate relief, have the right to demand that the Settlement Administrator
17 immediately be replaced. No party shall unreasonably withhold consent to remove
18 the Settlement Administrator. The Parties will attempt to resolve any disputes
19 regarding the retention or dismissal of the Settlement Administrator in good faith,
20 and, if they are unable to do so, will refer the matter to the Court for resolution.

21 74. The Settlement Administrator shall coordinate with the Parties to
22 provide notice as required by 28 U.S.C. § 1715, and the costs of such notice shall be
23 considered Settlement Administration Expenses.

24 75. Defendants and the Released Parties are not obligated to (and will not be
25 obligated to) compute, estimate, or pay any taxes on behalf of any Plaintiffs, any
26 Class Member, Plaintiffs' Counsel, Class Counsel, and/or the Settlement
27 Administrator.

1 **IX. OBJECTIONS AND REQUESTS FOR EXCLUSION**

2 76. Members of the Class who fail to file, no later than the Objection
3 Deadline, through the Court’s Case Management/Electronic Case Files (“CM/ECF”)
4 system or through any other method in which the Court will accept objections, if any,
5 and serve upon the Settlement Administrator, Class Counsel, and Defense Counsel,
6 written objections in the manner specified in this Agreement and the Class Notice
7 shall be deemed to have waived all objections and shall be foreclosed from making
8 any objection (whether by appeal or otherwise) to the Settlement.

9 77. Any Class Member who intends to object to the fairness, reasonableness,
10 and/or adequacy of the Settlement must, in addition to filing the written objection
11 with the Court through the Court’s CM/ECF system (or any other method in which
12 the Court will accept filings, if any) no later than the Objection Deadline, provide a
13 copy of the written objection by U.S. mail or e-mail to the Settlement Administrator
14 with a copy by U.S. Mail or e-mail to Class Counsel and Defense Counsel (at the
15 addresses set forth below) postmarked no later than the Objection Deadline. Class
16 Members who object must set forth in their written objection: (a) their full name; (b)
17 current address; (c) a written statement of their objection(s) and the reasons for each
18 objection; (d) a statement of whether they intend to appear at the Fairness Hearing
19 (with or without counsel); (e) their signature; (f) a statement, sworn to under penalty
20 of perjury, attesting to the fact that he or she purchased or consumed one or more of
21 the Subject Products during the Class Period; (g) details of the purchase of the
22 Subject Products, including the Subject Products purchased, and the date and location
23 of purchase; and (h) the case name and number of the Action. Objections must be
24 served on Class Counsel and Defense Counsel as follows:

25 *Upon Class Counsel at:*

26 L. Timothy Fisher
27 **BURSOR & FISHER P.A.**
28 1990 North California Blvd., Suite 940
 Walnut Creek, California 94596

1 ltfisher@bursor.com

2 *Upon Defense Counsel at:*

3
4 Dean J. Zipser
5 Mark A. Finkelstein
6 Adina W. Stowell
7 **UMBERG ZIPSER LLP**
8 1920 Main Street, Suite 750
9 Irvine, California 92614
dzipser@umbergzipser.com
mfinkelstein@umbergzipser.com
astowell@umbergzipser.com

10 78. The Parties shall request that the Court allow any interested party to file
11 a reply to any objection no later than seven (7) calendar days before the Fairness
12 Hearing, or as the Court may otherwise direct.

13 79. Members of the Class may also elect to opt out of the Settlement,
14 relinquishing their rights to benefits hereunder. Members of the Class who opt out of
15 the Settlement will not release their claims pursuant to this Agreement. Proposed
16 Class Members wishing to opt out of the Settlement must send to the Settlement
17 Administrator by U.S. Mail a Request for Exclusion postmarked no later than the
18 Opt-Out Date. The Request for Exclusion must be a personally signed letter from the
19 Class Member including (a) their full name; (b) current address; (c) a clear statement
20 communicating that they elect to be excluded from the Class, do not wish to be a
21 Class Member, and elect to be excluded from any judgment entered pursuant to the
22 Settlement; (d) their signature; and (e) the case name and case number of the Action.
23 Members of the Class who fail to submit a valid Request for Exclusion on or before
24 the Opt Out Date shall, in accordance with this Agreement, be bound by all terms of
25 this Agreement and the Final Order and Final Judgment, regardless of whether they
26 have requested exclusion from the Settlement.

27 80. Any member of the Class who submits a timely Request for Exclusion or
28 opt out may not file an objection to the Settlement and shall be deemed to have

1 waived any rights or benefits under this Agreement. So-called “mass” or “class” opt
2 outs shall not be allowed.

3 81. The Settlement Administrator shall promptly provide copies of all
4 Requests for Exclusion, objections, and/or related correspondence from Class
5 Members to Class Counsel and Defense Counsel. Not later than three (3) business
6 days after the deadline for submission of Requests for Exclusion, the Settlement
7 Administrator shall provide to Class Counsel and Defense Counsel a complete list of
8 Class Members requesting exclusion from the Settlement together with copies of the
9 Requests for Exclusion. Notwithstanding any other provision of this Agreement, if
10 more than five percent of the Class opt out of the Settlement, Defendants, in their sole
11 discretion, may rescind and revoke the entire Settlement and this Agreement, thereby
12 rendering the Settlement null and void in its entirety, by sending written notice that
13 Defendants revoke the settlement pursuant to this paragraph to Class Counsel within
14 twenty (20) business days following the date the Settlement Administrator informs
15 Defendants of the number of Class members who have requested to opt out of the
16 Settlement pursuant to the provisions set forth above. If Defendants rescind the
17 Settlement pursuant to this paragraph, they shall have no further obligations to pay
18 into the settlement and shall be paid back any money they have contributed to the
19 Class Settlement Fund. Defendants shall only be responsible for the fees and
20 expenses actually incurred by the Settlement Administrator, for which Plaintiffs and
21 their Counsel are not liable.

22 82. On the date set forth in the Preliminary Approval Order, a Fairness
23 Hearing shall be conducted to determine final approval of the Settlement. A Motion
24 in support of the Fairness Hearing shall be filed no later than fourteen (14) calendar
25 days after the deadline to object or opt out of the Settlement. Upon final approval of
26 the Settlement by the Court at or after the Fairness Hearing, the Parties shall present
27 the Final Order and Final Judgment, substantially in the form attached to this
28 Agreement as Exhibits A and B, and a final order approving Attorneys’ Fees and

1 Expenses and incentive award, to the Court for approval and entry. Class Members
2 who wish to be heard at the Fairness Hearing (whether individually or through
3 separate counsel) and are objecting to the Settlement shall comply with the provisions
4 of this Agreement. Class Members who wish to be heard at the Fairness Hearing
5 (whether individually or through separate counsel) and are not objecting to the
6 Settlement shall file a notice of appearance with the Court's CM/ECF system or
7 through any other method in which the Court will accept filings, if any, and serve
8 upon Class Counsel and Defense Counsel at the addresses indicated above at least
9 seven (7) calendar days before the Fairness Hearing.

10 **X. SCOPE AND EFFECT OF CONDITIONAL CERTIFICATION OF THE**
11 **CLASS SOLELY FOR PURPOSES OF SETTLEMENT**

12 83. For purposes of settlement only, the Parties agree to seek preliminary
13 certification, pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3), of a
14 damages and injunctive relief Class on a nationwide basis, including United States
15 territories. The Parties further agree that the Court should make preliminary findings
16 and enter the Preliminary Approval Order (substantially in the form attached at
17 Exhibit D) granting preliminary certification of the Class subject to final findings and
18 ratification in the Final Order and Final Judgment, and appointing Plaintiffs as the
19 representative of the Class and Class Counsel as counsel for the Class.

20 84. Defendants do not consent to certification of the Class for any purpose
21 other than to effectuate the Settlement of the Action or otherwise admit that the
22 litigation of any claims that have or could have been asserted in the Action on a
23 classwide basis is appropriate under applicable laws and standards. Defendants'
24 agreement to conditional certification does not constitute an admission of
25 wrongdoing, fault, liability, or damage of any kind to Plaintiffs or any of the putative
26 class members.

27 85. If this Agreement is terminated pursuant to its terms, disapproved by any
28 court (including any appellate court), and/or not consummated for any reason, or the

1 Effective Date for any reason does not occur, the order certifying the Class for
2 purposes of effectuating this Agreement, and all preliminary and/or final findings
3 regarding that class certification order, shall be automatically vacated upon notice of
4 the same to the Court, the Action shall proceed as though the Class had never been
5 certified pursuant to this Agreement and such findings had never been made, the
6 Action shall return to the procedural status quo in accordance with this paragraph,
7 and nothing in this Agreement or other papers or proceedings related to the
8 Settlement shall be used as evidence or argument by any Party concerning whether
9 the Action may properly be maintained as a class action, whether the purported class
10 is ascertainable, whether the case has any merit, or whether Class Counsel or the
11 Plaintiffs can adequately represent the Class Members under applicable law.

12 **XI. MODIFICATION OR TERMINATION OF THE SETTLEMENT**

13 86. If the preconditions necessary to trigger the Effective Date (as set forth
14 in this Agreement) are not met, this Agreement shall be cancelled and terminated
15 unless Defense Counsel and Class Counsel mutually agree in writing to proceed with
16 and effectuate this Agreement.

17 87. The terms and provisions of this Agreement may be amended, modified,
18 or expanded by written agreement of the Parties and approval of the Court; provided,
19 however that, after entry of the Final Order and Final Judgment, the Parties may by
20 written agreement effect such amendments, modifications, or expansions of this
21 Agreement and its implementing documents (including all exhibits hereto) without
22 further notice to the Class or approval by the Court if such changes are consistent
23 with the Court's Final Order and Final Judgment and do not materially alter, reduce
24 or limit the rights of Class Members under this Agreement.

25 88. Either Party may terminate this Agreement by providing written notice
26 to the other Party and the Court within twenty (20) days of the occurrence of the
27 following: (a) The preliminary or final approval of this Agreement is not obtained
28 without substantial modification, which modification the Parties did not agree to and

1 which modification the terminating Party deems in good faith to be material (*e.g.*,
2 because it significantly increases the costs of the settlement or deprives the
3 terminating party of an expressly stated benefit of the settlement); or (b) The Final
4 Order and Final Judgment is reversed, vacated, or modified in any material respect by
5 another court, except that it is expressly agreed by the Parties that any reduction of
6 the Court's award of Attorneys' Fees and Expenses shall not be grounds to terminate
7 this Agreement.

8 89. In the event that this Agreement is not approved by the Court or the
9 settlement set forth in this Agreement is terminated or fails to become effective in
10 accordance with its terms, the Parties shall be restored to their respective pre-
11 settlement positions in the Action, including with regard to any agreements
12 concerning tolling and similar agreements, and this entire Agreement shall be null
13 and void, shall have no further force and effect with respect to any Party in the
14 Action, and shall not be offered in evidence or used in any litigation for any purpose,
15 including the existence, certification, or maintenance of any purported class or
16 Defendants' liability with respect to the claims that are, were or could have been
17 asserted in the Action. In the event of such, this Agreement and all negotiations,
18 proceedings, documents prepared, and statements made in connection with it shall be
19 without prejudice to the Parties, shall not be admissible for any purpose whatsoever,
20 and shall not be deemed or construed to be an admission or confession by any Party
21 of any fact, matter, or proposition of law, and shall not be used in any manner for any
22 purpose, and all Parties to the Action shall stand in the same position as if this
23 Agreement had not been negotiated, made, or filed with the Court.

24 90. In the event of termination, the terminating Party shall cause the
25 Settlement Administrator to post information regarding the termination on the
26 Settlement Website.

27 **XII. SETTLEMENT NOT EVIDENCE AGAINST PARTIES**

28 91. The Parties expressly acknowledge and agree that this Agreement and its

1 exhibits, along with all related drafts, motions, pleadings, conversations, negotiations,
2 and correspondence, constitute an offer of compromise and a compromise within the
3 meaning of Federal Rule of Evidence 408 and any equivalent state law or rule. In no
4 event shall this Agreement, any of its provisions or any negotiations, statements or
5 court proceedings relating to its provisions in any way be construed as, offered as,
6 received as, used as, or deemed to be evidence of any kind in the Action, any other
7 action, or in any judicial, administrative, regulatory or other proceeding, except in a
8 proceeding to enforce this Agreement or the rights of the Parties or their counsel.

9 Without limiting the foregoing, neither this Agreement nor any related negotiations,
10 statements, or court proceedings shall be construed as, offered as, received as, used as
11 or deemed to be evidence or an admission or concession of any liability or
12 wrongdoing whatsoever on the part of any person or entity, including, but not limited
13 to, Defendants, the Released Parties, Plaintiffs, or the Class, or as a waiver by
14 Defendants, the Released Parties, Plaintiffs, or the Class of any applicable privileges,
15 claims or defenses.

16 92. The provisions contained in this Agreement are not and shall not be
17 deemed a presumption, concession, or admission by Defendants of any default,
18 liability or wrongdoing as to any facts or claims alleged or asserted in the Action, or
19 in any actions or proceedings, nor shall they be interpreted, construed, deemed,
20 invoked, offered, or received in evidence or otherwise used by any person in the
21 Action, or in any other action or proceeding, whether civil, criminal or administrative.
22 Defendants expressly deny the allegations in the Action. Defendants do not admit
23 that they or any of the Released Parties has engaged in any wrongful activity or that
24 any person has sustained any damage by reason of any of the facts complained of in
25 the Action. And Defendants do not consent to certification of the Class for any
26 purpose other than to effectuate the Settlement of the Action or otherwise admit that
27 the treatment of any claims that have been or could have been asserted in the Action
28 on a classwide basis is appropriate.

XIII. BEST EFFORTS

1
2 93. Class Counsel shall take all necessary actions to accomplish approval of
3 the Settlement, the Class Notice, and dismissal of the Action. The Parties (including
4 their counsel, successors, and assigns) agree to cooperate fully and in good faith with
5 one another and to use their best efforts to effectuate the Settlement, including
6 without limitation in seeking preliminary and final Court approval of the Agreement
7 and the Settlement embodied herein, carrying out the terms of this Agreement, and
8 promptly agreeing upon and executing all such other documentation as may be
9 reasonably required to obtain final approval by the Court of the Settlement. In the
10 event that the Court fails to approve the Settlement or fails to issue the Final Order
11 and Final Judgment, the Parties agree to use all reasonable efforts, consistent with
12 this Agreement and subject to Section XI, to cure any defect identified by the Court.

13 94. Each party will cooperate with the other party in connection with
14 effectuating the Settlement or the administration of claims thereunder. Any requests
15 for cooperation shall be narrowly tailored and reasonably necessary for the requesting
16 party to recommend the Settlement to the Court, and to carry out its terms.

XIV. MISCELLANEOUS PROVISIONS

17
18 95. The Parties agree that the recitals are contractual in nature and form a
19 material part of this Agreement.

20 96. This Agreement and its accompanying exhibits set forth the entire
21 understanding of the Parties. No change or termination of this Agreement shall be
22 effective unless in writing and signed by Plaintiffs' Counsel and Defense Counsel.
23 No extrinsic evidence or parol evidence shall be used to interpret this Agreement.

24 97. Any and all previous agreements and understandings between or among
25 the Parties regarding the subject matter of this Agreement, whether written or oral,
26 are superseded and hereby revoked by this Agreement. The Parties expressly agree
27 that the terms or conditions of this Agreement will control over any other written or
28 oral agreements.

1 98. All of the Parties warrant and represent that they are agreeing to the
2 terms of this Agreement based upon the legal advice of their respective attorneys, that
3 they have been afforded the opportunity to discuss the contents of this Agreement
4 with their attorneys and that the terms and conditions of this document are fully
5 understood and voluntarily accepted.

6 99. The waiver by any party of a breach of any term of this Agreement shall
7 not operate or be construed as a waiver of any subsequent breach by any party. The
8 failure of a party to insist upon strict adherence to any provision of the Agreement
9 shall not constitute a waiver or thereafter deprive such party of the right to insist upon
10 strict adherence.

11 100. The headings in this Agreement are inserted merely for the purpose of
12 convenience and shall not affect the meaning or interpretation of this document.

13 101. This Agreement may be executed by facsimile signature and in
14 counterparts, each of which shall be deemed an original and all of which, when taken
15 together, shall constitute one and the same instrument. The date of execution shall be
16 the latest date on which any party signs the Agreement.

17 102. This Agreement has been negotiated among and drafted by Class
18 Counsel and Defense Counsel. Plaintiffs, Plaintiffs' Counsel, Class Members, and
19 Defendants shall not be deemed to be the drafter of this Agreement or of any
20 particular provision, nor shall they argue that any particular provision should be
21 construed against its drafter or otherwise resort to the contra proferentem canon of
22 construction. Accordingly, this Agreement should not be construed in favor of or
23 against one party as to the drafter, and the Parties agree that the provisions of
24 California Civil Code § 1654 and common law principles of construing ambiguities
25 against the drafter shall have no application. All Parties agree that counsel for the
26 Parties drafted this Agreement during extensive arm's-length negotiations. No parol
27 or other evidence may be offered to explain, construe, contradict, or clarify its terms,
28 the intent of the Parties or their counsel, or the circumstances under which this

1 Agreement was made or executed.

2 103. Except in connection with any court filing or proceeding, or the
3 dissemination of notice to the Class or as otherwise provided in this Agreement,
4 Plaintiffs and Class Counsel will not issue any press releases regarding the Settlement
5 or the Action without prior approval of Defendants. Plaintiffs and Class Counsel
6 agree not to disparage Defendants, Defense Counsel, or the Settlement in the media,
7 through any public statements, or otherwise and agree to never publicly state that
8 Defendants have engaged in any wrongdoing in connection with the Subject
9 Products. Defendants agree not to disparage Plaintiffs, Class Counsel, or the
10 Settlement in the media, through any public statements, or otherwise.

11 104. Each individual Defendant represents and warrants that the individual(s)
12 executing this Agreement on behalf of that Defendant are authorized to enter into this
13 Agreement on behalf of that Defendant.

14 105. Any disagreement and/or action to enforce this Agreement shall be
15 commenced and maintained only in the Court in which this Action is pending.

16 106. Whenever this Agreement requires or contemplates that one of the
17 Parties shall or may give notice to the other to the addresses set forth above, such
18 notice shall be provided by e-mail and/or next-day (excluding Saturdays, Sundays
19 and Legal Holidays) express delivery service.

20 107. The Parties reserve the right, subject to the Court's approval, to agree to
21 any reasonable extensions of time that might be necessary to carry out any of the
22 provisions of this Agreement.

23 108. Plaintiffs expressly affirm that the allegations contained in the
24 complaints filed in the Action were made in good faith and have a basis in fact, but
25 consider it desirable for the Action to be settled and dismissed because of the
26 substantial benefits that the proposed Settlement will provide to Class Members.

27 109. In the event any one of the provisions contained in this Agreement shall
28 for any reason be held to be invalid, illegal, or unenforceable in any respect, such


1 invalidity, illegality, or unenforceability shall not affect other provisions if Defense
2 Counsel and Class Counsel, on behalf of the Parties, mutually elect to proceed as if
3 such invalid, illegal, or unenforceable provision had never been included in this
4 Agreement.

5
6 IN WITNESS WHEREOF, the Parties hereto, by and through their respective
7 attorneys, and intending to be legally bound hereby, have duly executed this
8 Agreement as of the date set forth below.

9
10 **AGREED AND ACCEPTED:**

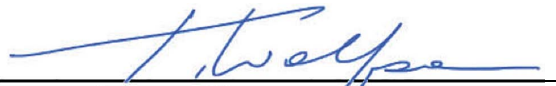
11
12 **PLAINTIFFS' COUNSEL**

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14 Dated: Feb 24, 2021, 2021


Timothy Fisher (Feb 24, 2021 12:16 PST)

15 By: L. Timothy Fisher
16 Bursor & Fisher P.A.
17 Lead Counsel for Plaintiffs and the Class

18 Dated: March 1, 2021



19 By: Tina Wolfson
20 Ahdoot & Wolfson, P.C.
21 Attorneys for Plaintiffs

22 Dated: Feb 24, 2021, 2021



Marc Reich (Feb 24, 2021 12:48 PST)

23 By: Marc Reich
24 Reich Radcliffe & Hoover LLP
25 Attorneys for Plaintiffs
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DEFENSE COUNSEL

Dated: 2/24, 2021



By: Dean J. Zipser
Umberg Zipser LLP
Attorneys for Defendants