

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the U.S. Small Business Administration (“SBA”) (collectively the “United States”), KServicing Wind Down Corp. and the bankruptcy estates of Kabbage, Inc. d/b/a KServicing (the “Wind Down Estates”) (through its Wind Down Officer Jeremiah Foster (the “Wind Down Officer”)), and David Berteletti (“Relator”) (hereinafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

A. The Paycheck Protection Program (“PPP”) was a federal program that provided emergency relief to small businesses affected by the COVID-19 pandemic. *See* 15 U.S.C. § 636(a)(36). The SBA administered the PPP and guarantees loans that were made according to PPP rules.

B. Prior to October 3, 2022, Kabbage, Inc. (“Kabbage”) was a Delaware corporation headquartered in Atlanta, Georgia. It both made loans as a direct PPP lender and served as a processing agent for third-party banks making PPP loans (collectively “Kabbage PPP loans”).

C. The PPP required a lender to certify, for each loan, that it had confirmed the loan calculation. After the lender processed and approved a borrower’s PPP loan application, but prior to the closing of the PPP loan, the PPP required a lender to submit SBA Form 2484, applying for a guarantee on the loan. SBA Form 2484 required a lender to certify that it had complied with paragraphs 3.b(i)-(iii) of 85 Fed. Reg. 20811, 20815, which provides that:

Each lender shall:

- i. Confirm receipt of borrower certifications contained in Paycheck Protection Program Application form issued by the Administration;
- ii. Confirm receipt of information demonstrating that a borrower had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020; [and]
- iii. Confirm the dollar amount of average monthly payroll costs for the preceding calendar year by reviewing the payroll documentation submitted with the borrower's application[.]

Id. at 20815. SBA Form 2484 required a further certification that “[t]he Lender has obtained and reviewed the required application (including documents demonstrating qualifying payroll amounts) of the Applicant and will retain copies of such documents in the Applicant’s loan file.”

D. The SBA paid PPP lenders a fee for processing each PPP loan and allowed agents to be paid by lenders out of the fees the lenders received from the SBA. The processing fee for both lenders and agents was a percentage of the amount of each PPP loan. *See* 85 Fed. Reg. 20811, 20816; 86 Fed. Reg. 3692.

E. On November 25, 2020, Relator filed a *qui tam* action in the United States District Court for the District of Massachusetts captioned *United States ex rel. David Berteletti v. Kabbage, Inc., et al.*, No. 1:20-cv-12114-GAO, pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the “Massachusetts Civil Action”). Relator alleged that Kabbage violated the False Claims Act, 31 U.S.C. § 3729, by knowingly inflating borrowers’ loans by including improper payroll costs in

originating and processing PPP loans. Relator alleges that Kabbage's conduct resulted in Kabbage issuing inflated PPP loans to businesses, thereby causing inflated claims for forgiveness or guarantee payment and inflated claims for processing fees to the SBA.

F. On or around January 12, 2021, Kabbage received a Civil Investigative Demand from the U.S. Attorney's Office for the District of Massachusetts, which indicated that the federal government was investigating whether Kabbage caused the submission of false claims to the SBA in connection with PPP loans.

G. On October 3, 2022, Kabbage filed for Chapter 11 bankruptcy in the Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), *In re Kabbage, Inc. d/b/a KServicing, Inc., et al.*, Case No. 22-10951 (CTG) (hereinafter "Bankruptcy Case").

H. On March 15, 2023, the Bankruptcy Court entered the confirmation order approving and confirming the Amended Joint Chapter 11 Plan of Liquidation (the "Plan") of Kabbage, Inc. (D/B/A KServicing) and Its Affiliated Debtors (collectively, the "Debtors"). The Plan became effective on June 20, 2023, at which time the Wind Down Officer began serving and administering the Wind Down Estates. Under the Plan, the Wind Down Officer has authority to compromise claims against the Wind Down Estates, subject to certain consent and consultation rights held by third parties.

I. On March 31, 2023, SBA filed proof of claim No. 245 (the "SBA Claim") asserting certain administrative claims as a claim in the amount of \$720,218,115.31, and secured to the extent of any setoff right, 11 U.S.C. §§ 506(a) & 553, in the Bankruptcy Case.

J. On April 3, 2023, the United States filed proof of claim No. 246 ("POC

No. 246”) as a claim in the amount of \$450,182,913, and secured to the extent of any setoff right, 11 U.S.C. §§ 506(a) & 553, in the Bankruptcy Case.

K. After the bankruptcy filing referenced in Paragraph G of the recitals above, the Wind Down Estates (through counsel and the Wind Down Officer) reviewed materials pertinent to the government’s investigation, and met with government representatives multiple times to discuss the government’s allegations.

L. The Wind Down Estates admit and acknowledge the following facts in subparagraphs (a) through (d):

- a. Contrary to PPP regulations, Kabbage included employee annual compensation over \$100,000 in calculating borrowers’ eligible loan amounts on some applications for PPP loans processed by Kabbage. This “\$100k Inflation” increased the loan amounts of, at a minimum, 1,900 loans, collectively, by at least one hundred million dollars. Between April 1, 2020 and May 31, 2021, Kabbage received excess processing fees as a result of the \$100k Inflation. As of August 11, 2022, SBA placed “Hold Codes” on forgiveness and guarantee purchase applications for certain Kabbage PPP loans potentially affected by \$100K Inflation; the “Hold Codes” triggered additional review within SBA in connection with any request for forgiveness or guarantee payments on those loans. Prior to August 11, 2022, on some loans, Kabbage (or the lender for whom Kabbage was servicing such Kabbage PPP loans) received from SBA excess forgiveness or guarantee purchase payments as a result of the \$100k Inflation.

- b. In processing PPP loan applications, on some loan applications, Kabbage requested and included data from borrowers' IRS Form 940 Box 4, which includes payments exempt from federal unemployment tax. Some of those amounts were not payroll costs eligible for inclusion in calculating loan amounts under PPP rules, or were duplicative of costs included by Kabbage as inputs from other tax documents, resulting in double counting of those amounts. This "Form 940 Inflation" improperly increased the loan amounts of, at minimum, more than 700 borrowers, collectively, by at least several millions of dollars. Between April 1, 2020 and May 31, 2021, on some loans, Kabbage received excess processing fees as a result of the Form 940 Inflation. As of August 11, 2022, SBA placed "Hold Codes" on forgiveness and guarantee purchase applications for Kabbage PPP loans potentially affected by Form 940 Inflation; the "Hold Codes" triggered additional review within SBA in connection with any request for forgiveness or guarantee payments on those loans. Prior to August 11, 2022, on some loans, Kabbage (or the lender for whom Kabbage was servicing such Kabbage PPP Loans) received from SBA excess forgiveness or guarantee purchase payments as a result of the Form 940 Inflation.
- c. In processing PPP loan applications, on some loans, Kabbage double counted employees' state and local tax ("SALT") withholdings in determining borrowers' average monthly payroll. This "SALT

Inflation” increased the loan amount of tens of thousands of borrowers, collectively, by at least one hundred million dollars. Between April 1, 2020 and August 31, 2020, Kabbage received excess processing fees as a result of the SALT Inflation.

- d. As of May 3, 2021, Kabbage voluntarily stopped issuing forgiveness decisions to SBA on all PPP loans affected by “SALT Inflation.” On October 22, 2021, the SBA and Kabbage entered into a settlement agreement concerning the SALT Inflation, pursuant to which Kabbage paid \$30 million to the SBA, including \$12,500,000 relating to loan excess attributable to the SALT Inflation for approximately 8,994 loans that had already been forgiven by the SBA at the time of the agreement (hereinafter, the “SBA SALT Settlement”). The SBA accepted Kabbage’s representations that Kabbage did not include eligible healthcare and retirement expenses in its calculations of borrowers’ loans, which offset the inflated SALT amounts for numerous loans. *See* SBA SALT Settlement, Recitals L & M. The SBA SALT Settlement did not release Kabbage for False Claims Act liability for past SALT inflation, and expressly reserved such claims, but did permit going-forward submission of Kabbage PPP loans potentially affected by SALT Inflation for forgiveness or guaranty purchase at the full loan amount. *Id.* ¶ 8.

Any claims that Kabbage submitted or caused to be submitted to the SBA related to the \$100K Inflation, Form 940 Inflation, and SALT Inflation, including with respect to any

claims arising from or related to processing fees, guarantee purchase payments, or forgiveness payments, which SBA paid, as set out in subparagraphs (a) through (d) of Paragraph L, are referred to below as the "Covered Conduct."

M. The United States contends that it has certain civil claims against Kabbage based on the Covered Conduct for submitting or causing the submission of false claims to the SBA.

N. Relator claims entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Agreement. Relator has agreed to waive any claim for reasonable expenses, attorneys' fees, and costs related to the Massachusetts Civil Action, as contemplated by 31 U.S.C. § 3730(d). Relator is not entitled under 31 U.S.C. § 3730(d) to a share of the proceeds of any recovery pursuant to the SBA Claim.

O. SBA and the Wind Down Estates have been and continue to be engaged in separate discussions regarding a potential settlement or compromise of their respective claims, rights, and defenses, including as to the SBA Claim but not as to the claims released in Paragraph 3 below. This Agreement is not intended to and does not resolve or impact any claims, rights, or defenses of the SBA or the Wind Down Estates against one another except as related to the claims released in Paragraph 3 below.

In consideration of the mutual promises and obligations of this Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. The Wind Down Estates agree that the United States has an Allowed General Unsecured Claim (as that term is defined in the Plan) that is not subject to subordination or reconsideration against Kabbage in the Bankruptcy Case for the

Covered Conduct in the amount of sixty-three million two hundred ninety-four thousand two hundred seventy dollars and forty-three cents (\$63,294,270.43) (the “Allowed Claim”). The Allowed Claim is exclusive of a credit to the Wind Down Estates of twelve million five hundred thousand dollars (\$12,500,000), which represents a payment by Kabbage, Inc. to the SBA in 2021 pursuant to the terms of the SBA SALT Settlement; this payment was in connection with loans with SALT Inflation that were forgiven by the SBA. The Allowed Claim includes twenty-five million three hundred ninety-seven thousand one hundred thirty-five dollars and twenty-one cents (\$25,397,135.21) in restitution. The Parties agree that the Allowed Claim shall be treated *pari passu* with all other allowed general unsecured claims against Kabbage under the Plan—except that the Parties agree that eight million five hundred eighty thousand four hundred eighty-three dollars and forty-four cents (\$8,580,483.44) (the “Supplemental Amount”) shall not be used to calculate the pro rata distribution paid to the United States until all other unsecured creditors’ allowed claims against Kabbage have been paid in full. The Parties further agree that once, and only if, all other allowed general unsecured claims against Kabbage have been paid in full, the United States shall receive payment on account of the Supplemental Amount as an allowed general unsecured claim against Kabbage, *pari passu* with Proof of Claim No. 247, also filed by the United States.

2. Upon the United States receiving payment of any portion of the Allowed Claim from the Wind Down Estates and as soon as feasible after receipt, the United States shall pay an 18.75% share of that portion of the Allowed Claim received by the United States to Relator by electronic funds transfer pursuant to 31 U.S.C. § 3730(d). In addition, as soon as feasible after the Effective Date of this Agreement, the United States

shall pay Relator two million three hundred forty-three thousand seven hundred fifty dollars (\$2,343,750.00), which consists of 18.75% of the SBA SALT Settlement attributable to the SALT Inflation that has been forgiven by the SBA and which is credited toward the Allowed Claim set forth above. The payments in this Paragraph shall be referred to as the "Relator's Share." Relator agrees that the United States shall not be obligated to pay Relator more than 18.75% of the total portion of the Allowed Claim that the United States receives from the Bankruptcy Case.

3. Subject to Paragraph 5 (concerning reserved claims), and upon the Effective Date of the Agreement, the United States releases the Wind Down Estates from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733, the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812, or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud; or under the setoff provisions of 11 U.S.C. § 553 with respect to the Allowed Claim. If any court or arbitrator finds that this Paragraph releases, hinders, or otherwise bars any claim pursued by the Wind Down Estates, including but not limited to claims brought pursuant to 11 U.S.C. § 544, this Paragraph shall be rescinded and void to the extent necessary to avoid any such foregoing effect. This Paragraph is likewise rescinded and void if the United States is compelled by court order to pay back to the Wind Down Estates, any other trustee appointed in the Bankruptcy Case, or any successor of the estate any portion of the Allowed Claim.

4. Subject to Paragraph 5 (concerning reserved claims), and upon the Effective Date of the Agreement, Relator, for himself and for his heirs, successors, attorneys, agents, and assigns, releases the Wind Down Estates, their predecessors, their

current and former corporate parents, divisions, subsidiaries, successors, and assigns from any civil monetary claim Relator has on behalf of the United States for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733.

5. Notwithstanding the releases in Paragraphs 3 or 4 of this Agreement, or any other term of this Agreement, the following claims and rights of the United States are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability;
- c. Any claim that the United States may have to avoid any transfer of property of the Debtors or any obligation incurred by the Debtors;
- d. Except as explicitly stated in this Agreement, any administrative liability or enforcement right, or any administrative remedy, including the suspension and debarment rights of any federal agency;
- e. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- f. Any liability based upon obligations created by this Agreement;
- g. Any liability of individuals; and
- h. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services.

6. Nothing in this Agreement affects, modifies, alters, impairs, or diminishes the exculpation provisions at Paragraph 10.7 of the Plan except as limited by Paragraph 32 of the order confirming the Plan.

7. Relator and his heirs, successors, attorneys, agents, and assigns shall not object to this Agreement and agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B). Upon the Effective Date of the Agreement, Relator and his/her heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States, its agencies, officers, agents, employees, and servants, from any claims arising from the filing of the Massachusetts Civil Action or under 31 U.S.C. § 3730, and from any claims to a share of the proceeds of this Agreement and/or the Massachusetts Civil Action.

8. Relator, for himself, and for his heirs, successors, attorneys, agents, and assigns, releases the Wind Down Estates, and their officers, agents, and employees, from any liability to Relator arising from the filing of the Massachusetts Civil Action, or under 31 U.S.C. § 3730(d) for expenses or attorneys' fees and costs.

9. Relator further agrees to cooperate truthfully with the Wind Down Estates' investigation into claims vested and retained by the Wind Down Estates under the Plan, whether or not such claims have been filed or otherwise initiated. Such cooperation includes, but is not limited to, producing relevant non-privileged documents, making himself reasonably available for interviews with counsel for the Wind Down Estates, and offering truthful testimony at both deposition and trial.

10. The Wind Down Estates fully and finally release the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorneys'

fees, costs, and expenses of every kind and however denominated) that Kabbage or the Wind Down Estates have asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Covered Conduct or the United States' investigation or prosecution thereof.

Notwithstanding the foregoing, this Agreement does not affect or limit the Wind Down Estates' claims, rights, or defenses with respect to the SBA except as related to the claims released in Paragraph 3. SBA and the Wind Down Estates have been and continue to be engaged in separate discussions regarding a potential settlement or compromise of any claims, rights, and defenses other than the claims released in Paragraph 3.

11. The Wind Down Estates fully and finally releases Relator from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that Kabbage or the Wind Down Estates has asserted, could have asserted, or may assert in the future against Relator, related to the Covered Conduct and Relator's investigation and prosecution thereof.

12. a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of Kabbage and the Wind Down Estates, and their present or former officers, directors, employees, shareholders, and agents in connection with:

- i. the matters covered by this Agreement;
- ii. the United States' audit(s) and civil investigation(s) of the matters covered by this Agreement;
- iii. Kabbage's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and

- civil investigation(s) in connection with the matters covered by this Agreement (including attorneys' fees);
- iv. the negotiation and performance of this Agreement;
 - v. the payment the Wind Down Estates makes to the United States pursuant to this Agreement and any payments that the Wind Down Estates may make to Relator, including costs and attorneys' fees,

are unallowable costs for government contracting purposes (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by the Wind Down Estates, and the Wind Down Estates shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Agreement, the Wind Down Estates shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by Kabbage or the Wind Down Estates or any of their subsidiaries or affiliates from the United States. The Wind Down Estates agree that the United States, at a minimum, shall be entitled to recoup from the Wind Down Estates any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine Kabbage's books and

records and to disagree with any calculations submitted by Kabbage or the Wind Down Estates or any of their subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by Kabbage or the Wind Down Estates, or the effect of any such Unallowable Costs on the amount of such payments.

13. The Wind Down Estates agree to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, the Wind Down Estates shall encourage, and agrees not to impair, the cooperation of their directors, officers, and employees, and shall use their best efforts to make available, and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. The Wind Down Estates further agree to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in their possession, custody, or control concerning any investigation of the Covered Conduct that they have undertaken, or that has been performed by another on their behalf.

14. The Wind Down Estates waive and shall not assert any defenses Kabbage or the Wind Down Estates may have had or may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

15. The Wind Down Estates agree that any amended bankruptcy plan, confirmation order, or any material agreement or other order of the Bankruptcy Court shall not in any manner, by their terms, contain any provisions that amend, modify, supplement, supersede or conflict with, any of the provisions of this Agreement in any manner that is materially adverse to, or materially prejudicial to the United States or the Relator, in each case, with respect to their rights under this Agreement. Any amended plan or confirmation order shall be in form and substance reasonably acceptable to the United States.

16. The United States may, in its sole discretion, declare that the occurrence of any of the following events is a default of the Wind Down Estates' obligations under this Agreement (each "an Event of Default"):

- a. the Bankruptcy Case is converted to a case under Chapter 7 of the Bankruptcy Code or dismissed;
- b. the Bankruptcy Court enters an order that amends, modifies, supplements, supersedes, or conflicts with, any of the provisions of this Agreement;
- c. the Bankruptcy Court or any other court of competent jurisdiction, issues any ruling, judgment or order enjoining the consummation of this Agreement or denying approval of this Agreement;
- d. the filing of a pleading by the Wind Down Estates seeking to withdraw, amend or modify the Plan, the Confirmation Order, or any motion to assume or approve this Agreement, which

withdrawal, amendment, modification or filing is not consistent with this Agreement in any material respect; or

- e. any court of competent jurisdiction enters a judgment or order declaring this Agreement to be unenforceable.

17. Upon the occurrence of an Event of Default the United States shall have the rights and protections contemplated in Paragraphs 13 through 15. An Event of Default may be waived by the written consent of the United States.

18. This Agreement is intended to be for the benefit of the Parties only.

19. Within a reasonable time after the Effective Date of this Agreement, the United States and Relator shall promptly sign and file in the Massachusetts Civil Action a Notice of Dismissal of the Massachusetts Civil Action pursuant to Rule 41(a)(1).

20. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

21. Each Party and signatory to this Agreement represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion.

22. This agreement is governed by the laws of the United States. The exclusive venue for any dispute relating to this Agreement is the United States District Court for the District of Massachusetts except to the extent that the Bankruptcy Court has exclusive statutory jurisdiction. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

23. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties. Forbearance by the United States from pursuing any remedy or relief available to it under this Agreement shall not constitute a waiver of rights under this Agreement. Nothing in this Agreement shall be construed as limiting the ability of the SBA to enter into a potential agreement with the Wind Down Estates, as contemplated in Paragraph O of the recitals herein.

24. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

25. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

26. This Agreement is binding on the Wind Down Estates' successors, transferees, heirs, and assigns.

27. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

28. All Parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

29. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

[SIGNATURE PAGES FOLLOW]


THE UNITED STATES OF AMERICA

DATED: 5/7/2024

BY: BRIAN LAMACCHIA Digitally signed by BRIAN LAMACCHIA
Date: 2024.05.07 14:55:32 -04'00'

BRIAN M. LaMACCHIA
DIANE SEOL
Assistant U.S. Attorneys
U.S. Attorney's Office for the
District of Massachusetts

DATED: 5/7/24

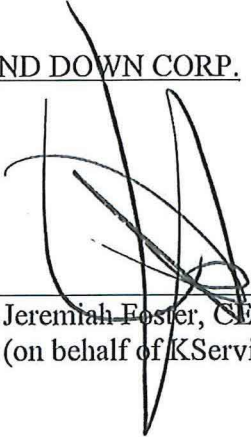
BY: 

SARAH E. LOUCKS
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

KSERVICING WIND DOWN CORP.

DATED: 5/7/2024

BY: _____


Jeremiah Foster, CEO
(on behalf of KServicing Wind Down Corp.)

DAVID BERTELETTI - RELATOR

DATED: 5/6/2024

BY: David Bertelitti
David Bertelitti
Relator

DATED: 5/6/24

BY: [Signature]
Michael Lester
Evan Hoffman
Counsel for Relator David Bertelitti