

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into by the Attorney General of the State of California (“Attorney General”), on behalf of the People of the State of California, the Regents of the University of California (“UC”), and VMware, Inc. (“VMware”). The persons and entities entering into this Agreement are at times referred to individually as a “party” and/or collectively as the “parties.”

WHEREAS, on or about October 21, 2011, Relator Dane Smith (“Relator”) filed a qui tam complaint (“Complaint”) under seal titled *State of California et al. ex rel. Smith v. VMware, Inc., et al.*, 34-2011-00112732, in the Superior Court of California, County of Sacramento (the “Action”), alleging claims under the California False Claims Act (“CFCA”);

WHEREAS, VMware is a Delaware corporation specializing in cloud infrastructure and digital workspace technology;

WHEREAS, Relator alleges that VMware violated its obligation under the federal General Services Administration (“GSA”) Multiple Award Schedule (“MAS”) Program to make current, accurate, and complete disclosures of its commercial pricing policies and practices. This violation allegedly caused the federal government to negotiate higher prices than it would have had it received accurate pricing disclosures;

WHEREAS, Relator alleges that California’s Department of General Services (“DGS”) directly incorporates the pricing structure set forth in the GSA pricelists, and wholly relies on the federal government’s pricing negotiations and commercial disclosure analyses;

WHEREAS, Relator alleges that VMware defrauded California and UC by causing them to rely on inflated GSA schedules based on inaccurate or incomplete commercial sales practices

disclosures; as a result, VMware allegedly willfully, knowingly, and/or intentionally caused California and UC to be overcharged for VMware products;

WHEREAS, the Attorney General, as head of the California Department of Justice, conducted an investigation pursuant to the powers conferred by Article 2 of Chapter 2 of Division 3 of Title 2 of the Government Code of California (Cal. Gov. Code § 11180 et seq.) into the allegations contained in the Relator's Complaint;

WHEREAS, the Attorney General believes that there is an evidentiary basis for potential legal claims against VMware as a result of the alleged pricing fraud scheme;

WHEREAS, VMware denies the allegations of the Complaint or that it has violated the CFCA or any California statute, law, rule, or regulation with respect to the allegations contained in the Complaint, and denies any wrongdoing whatsoever with respect to the allegations in the Complaint;

WHEREAS, the parties have reached a mutually satisfactory resolution of their respective claims;

WHEREAS, the Attorney General and Relator will agree in a separate document on the Qui Tam Plaintiff's share pursuant to California Government Code Section 12652(g)(2).

WHEREAS, the parties seek to avoid delay and the continued uncertainty and cost of litigation;

NOW THEREFORE, in consideration of the mutual promises, covenants, and obligations set forth in this Agreement, and for good and valuable consideration as stated herein, the parties agree as follows:

1. **Covered Conduct.** "Covered Conduct" as used herein is defined as VMware's causing California and UC to be overcharged for VMware products as a result of VMware's

failure to provide current, accurate, and complete commercial sales practices disclosures to the GSA for the period of January 1, 2004 through December 31, 2013.

2. **Payment.** As discussed herein, VMware's payment to the Attorney General and UC will be an exchange of value in full and final satisfaction of all claims alleged against VMware in the Complaint and/or with respect to the Covered Conduct (defined in Paragraph 1), and shall be full and adequate consideration for the Releases (defined in Paragraphs 4 and 5). Although the Attorney General does not represent the local governmental or political subdivision customers within the State of California, which according to the Sales Data were affected by the Covered Conduct ("Local Governmental Customers"), under the California False Claims Act (Cal. Gov. Code § 11180 et seq.), the parties agree to the settlement mechanism defined below with respect to these customers.

- a. **Payment to Attorney General.** VMware agrees to pay a total sum of \$4,000,000 ("Settlement Amount"), of which \$2,954,509 constitutes restitution, in settlement of all potential claims to be released under this Agreement by the Attorney General and UC, as well as the claims tentatively released by the Local Governmental Customers subject to the provisions of Paragraph 2(b). Payment shall be made by VMware to the Attorney General by electronic funds transfer within thirty (30) days of receiving written payment processing instructions from the State of California, Office of the Attorney General. The parties agree that the Attorney General shall be responsible for transferring the UC's pro rata share of the Settlement Amount to the UC.

b. Notice and Payment to Local Governmental Customers.

- i. Within 90 business days of the Effective Date, the Attorney General will provide each Local Governmental Customer with a copy of this Settlement Agreement, the Relator's Share Agreement, a check reflecting each respective Local Governmental Customer's pro rata share of the Settlement Amount, less the pro rata Relator's Share, and a letter or other notification that contains the following language in boldface text: ***“By accepting and depositing the enclosed check by [date], you are consenting to the provisions of the enclosed Settlement Agreement and Relator's Share Agreement. If you do not deposit the enclosed check by [date], you will forfeit your pro rata share of the settlement proceeds.”*** (“Notification”). Contemporaneous copies of the Notification will be provided to VMware.
- ii. Each Local Governmental Customer will have until 200 business days from the Effective Date to review the Notification, seek additional information, if needed, from the Attorney General, and decide whether to consent to the terms of the Settlement Agreement and the Relator's Share Agreement. A Local Governmental Customer's failure to deposit the check by 200 business days from the Effective Date will not result in any increase in the pro rata share to which any other Local Governmental Customer is entitled under the terms of this Agreement. Any amounts that a Local Governmental Customer

does not timely deposit under this paragraph shall be retained by California.

3. **Compromise of Disputed Claims.** The parties acknowledge and agree that this Agreement is not, and shall not in any way be construed as, a presumption, concession, or admission by any of the parties of any fault, liability, wrongdoing, damages, or any unlawful or wrongful conduct as to any facts or claims that have been or might have been alleged in the Action or any other actions or proceedings whatsoever. The parties acknowledge and agree that this Agreement is the compromise of strongly disputed claims and has been entered into to avoid the time, burden, expense, distraction, uncertainty, and inconvenience of litigation. The provisions of this Settlement Agreement shall not be invoked, offered, or received in evidence, or otherwise used by any person in any action or proceeding, whether civil, criminal, or administrative, except in connection with a proceeding to enforce the terms of this Agreement.

4. **Releases by the Attorney General and UC of VMware.**

- a. **Release.** Subject to the exceptions in Paragraph 4(c) (Claims Excluded from Release), and conditioned solely upon VMware's full payment of \$4,000,000 to the Office of the Attorney General, in accordance with written payment instructions from the Attorney General, to remediate harms to the State and UC, pursuant to California Government Code §§ 12650- 12656 and 12658, allegedly resulting from unlawful conduct of VMware, the Attorney General and UC fully and finally release VMware, as well as its current and former partners, subsidiaries, parent companies, joint ventures, predecessors, successors in interests, assigns, affiliates, and each of their respective officers, directors, representatives, owners, managers, shareholders, servants, and

current and former employees, agents, insurers and attorneys, each and every as to or in their individual and corporate capacities (together the “VMware Released Persons”) from any and all claims, demands, and/or causes of action, known or unknown, suspected or unsuspected, relating to, concerning, or arising from the Covered Conduct that the Attorney General and/or UC have against the VMware Released Persons, including but not limited to: California Government Code §§ 12650-12656, California Business and Professions Code § 17200, and all statutory and common law theories of negligence, payment by mistake, unjust enrichment, money had and received, breach of fiduciary duty, breach of contract, misrepresentation, deceit, fraud and aiding and abetting any of the foregoing. The Attorney General executes this release in his official capacity and releases only claims that the Attorney General has the authority to release for the Covered Conduct.

- b. **Waiver of California Civil Code § 1542.** The Attorney General and UC expressly waive and relinquish all rights and benefits afforded by Section 1542 of the California Civil Code, and do so understanding and acknowledging the significance and consequences of such specific waivers. Section 1542 of the California Civil Code states as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

- c. **Claims Excluded from Release.** The following claims are specifically reserved and not released by the Attorney General or UC in this Agreement:
 - (i) any liability based upon obligations created by this Agreement;
 - (ii) any liability of any person or entity other than the VMware Released Persons;
 - (iii) any liability to any other department or agency of the State of California, including but not limited to for the Covered Conduct; and
 - (iv) any liability to the State of California (or its departments or agencies) or to UC for any conduct other than the Covered Conduct.

5. **Release by VMware of Attorney General, UC, Local Governmental Customers, the State of California and Relator.** VMware fully and finally releases the Attorney General, UC, Local Governmental Customers, and the State of California, and each of their political subdivisions, departments, agencies, and all their directors, officers, employees, servants and agents and Relator and each of his heirs, personal representatives, successors, agents, and assigns, from any claims, including attorney's fees, costs, and expenses of every kind and however denominated, that VMware has asserted, could have asserted, or may assert in the future against them related to the Covered Conduct, to the extent released hereunder, and the investigation thereof.

6. **Release by Relator of VMware.**

- a. **Release.** Except as provided below, Relator, for himself and Relator's heirs, personal representatives, successors, agents, and assigns (each in their individual and corporate capacities) ("Relator Parties"), hereby covenants not to sue and releases VMware and the VMware Released Persons from any and all claims, rights, demands, and/or causes of action that: (i) have been asserted

in the Complaint/Action; or (ii) could have been asserted by Relator arising out of or related to the facts alleged in the Complaint/Action.

- b. **Waiver of California Civil Code § 1542.** Relator, for himself and Relator Parties, expressly waives and relinquishes all rights and benefits afforded by Section 1542 of the California Civil Code, and does so understanding and acknowledging the significance and consequences of such specific waivers. Section 1542 of the California Civil Code states as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

Notwithstanding the provisions of Section 1542, and for the purposes of implementing a full and complete release and discharge, Relator, for himself and the Relator Parties, acknowledges that this Agreement includes in its effect, without limitation, all claims covered by the releases in this Agreement which Relator or the Relator Parties do not know or suspect to exist at the time of execution hereof, and that this Agreement contemplates extinguishment of any and all such claims.

- c. **Claim Excluded From Release.** Expressly excluded from Relator's release is his claim for expenses, costs and attorney's fees recoverable pursuant to California Government Code Section 12652(g)(1)(C)(8).

7. **Dismissal of the Action.** The Attorney General and UC shall consent to dismissal with prejudice of the action upon the later of payment by VMware to the Attorney General (pursuant to Paragraph 2(a)) and resolution of any dispute regarding attorney's fees under California Government Code Section 12652(g)(1)(C)(8)).

8. **Effects of Agreement.** This Agreement is intended to be for the benefit of the parties only. This Agreement is not intended for use by any other third party in any other proceeding. Nothing contained herein shall be construed so as to create any other third-party rights or private rights of action or to deprive any person of any private right under the law.

9. **Understanding of Terms.** The terms of this Agreement were negotiated in good faith by the parties, and reflect a settlement that was reached voluntarily after full investigation, consultation with experienced legal counsel and arms-length negotiation.

10. **No Adjudication on the Merits.** This Agreement is made without any trial or adjudication or court finding on any issue of fact or law, and it is not a final order of any court or governmental authority.

11. **Authority.** Each signatory to this Agreement represents that he or she is fully authorized by the party he or she represents to enter into this Agreement to execute it on behalf of the party represented and to legally bind that party.

12. **Modification.** This Agreement may not be amended except by an instrument in writing signed on behalf of all the parties.

13. **Execution in Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original. Said counterparts shall constitute but one and the same document.

14. **Waiver.** No term or condition of this Agreement shall be deemed to have been waived, nor shall there be an estoppel against the enforcement of any provision of this

Agreement, except by written instrument signed by the party charged with the waiver or estoppel. No written waiver shall be deemed a continuing waiver unless specifically stated therein, and the written waiver of a term or condition as to a specific act or occurrence shall not operate as a waiver of any other term or condition or for any other or future act or occurrence.

15. **Interpretation.** This Agreement shall be deemed to have been drafted equally by the parties and any rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Agreement.

16. **Severability.** If any provision of this Agreement shall for any reason or to any extent be construed by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall remain in effect and be interpreted so as best reasonably to effect the parties' intent.

17. **Notices.** All notices, reports, requests, and other communications to any party pursuant to this Agreement shall be in writing and shall be directed as follows:

If to VMware, to:

Brooks Beard
Vice President and Deputy General Counsel
VMware, Inc.
3401 Hillview Avenue
Palo Alto, California 94304

If to the Attorney General, to:

Rick Acker
Supervising Deputy Attorney General
Department of Justice
Office of the Attorney General
State of California
455 Golden Gate Avenue, Suite 11000

San Francisco, CA 94102-7004

If to UC, to:

Rhonda Stewart Goldstein
Senior Counsel, Litigation
Office of the General Counsel
The Regents of the University of California
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200

If to Relator, Dane Smith, to:

Justin T. Berger, Esq.
Cotchett Pitre & McCarthy LLP
840 Malcolm Road, Suite 200
Burlingame, California 94010

19. **California Law.** This Agreement shall be governed by the laws of the State of California without regard to any conflict of laws principles.

20. **Enforcement and Jurisdiction.** In the event of any dispute arising from or relating to this Agreement, the parties and the Released Persons submit and consent to the exclusive jurisdiction of the Superior Court of California, County of San Francisco.

21. **Integration.** This Agreement constitutes the entire agreement between the parties, and supersedes any prior communication, understanding, or agreement, whether written or oral, concerning the subject matter of this Agreement.

22. **Non-Disqualification.** This Agreement is not intended to disqualify VMware from any business that it is otherwise qualified, licensed, or permitted to perform under the laws or regulations of California.

23. **Effective Date.** This Agreement shall become effective and binding upon execution by the parties hereto.

Dated: OCT. 21, 2020

VMware, Inc.

By: 
Brooks Beard

Dated: _____, 2020

PEOPLE OF THE STATE OF CALIFORNIA
by and through the Attorney General

By: 
Suneeta D. Fernandes
Deputy Attorney General

Dated: October 15, 2020

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: 
Rhonda Stewart Goldstein

Dated: October 15, 2020

DANE SMITH

By: 

Dated: Oct 21, 2020