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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 RICKY COCHRAN, ALAIN BERREBI, and
17 JARAMEY STOBBE, individually and on
behalf of all others similarly situated,

18 Plaintiffs,

19 v.

20 THE KROGER CO. and ACCELLION, INC.,

21 Defendants.
22
23
24
25

Case No. 5:21-cv-01887-EJD

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

DATE: September 16, 2021

TIME: 9:00 A.M.

JUDGE: Hon. Edward J. Davila

CTRM: 4, 5th Floor

[Declarations of Cameron Azari, Ben
Barnow, Robert Siciliano, and Tina Wolfson
filed concurrently herewith]

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 16, 2021, at 9:00 a.m., in Courtroom 4 of the United States District Court for the Northern District of California, Robert F. Peckham Federal Building & United States Courthouse, 280 South 1st Street, San Jose, 95113, the Honorable Edward J. Davila presiding, Plaintiffs Ricky Cochran, Alain Berrebi, and Jaramey Stobbe, will and hereby do move for an Order for Preliminary Approval of Class Action Settlement.

This motion is based upon this Notice of Motion and Motion, the supporting Memorandum set forth below, and the exhibits attached hereto, the pleadings and records on file in this Action, and other such matters and argument as the Court may consider at the hearing of this motion.

Respectfully submitted,

Dated: June 30, 2021

By: /s/ Tina Wolfson

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE ISSUES TO DECIDED

Whether the proposed Settlement warrants: (a) preliminary approval; (b) certification of a Settlement Class; (c) dissemination of Notice to the Settlement Class Members (“Class Members”) of the Settlement’s terms in the proposed method using the proposed forms; (d) appointment of Ahdoot & Wolfson, PC, and Barnow and Associates, P.C. as Class Counsel and of Plaintiffs Ricky Cochran, Alain Berrebi, and Jaramey Stobbe as Class Representatives; and (e) setting a Fairness Hearing for final approval of the Settlement and a hearing to consider any application for attorneys’ fees, Service Awards, and reimbursement of expenses.

II. INTRODUCTION

Plaintiffs Ricky Cochran, Alain Berrebi, and Jaramey Stobbe request that the Court preliminarily approve a nationwide class action settlement (“Settlement”) with Defendant, The Kroger Co. (“Kroger”), that would resolve all class claims against Kroger, only, on behalf of approximately 3.82 million Class Members relating to Accellion’s File Transfer Appliance (“FTA”) Data Breach (the “FTA Data Breach”).¹

The Settlement would establish a non-reversionary cash fund of \$5 million to pay for valid claims, notice and administration costs, and incentive awards to the named Plaintiffs and any attorneys’ fees and costs awarded by the Court. Claimants may elect to receive: (1) a cash payment, calculated in accordance with the terms of the Settlement Agreement (with double the amount to California residents because of the statutory claims available to them); (2) two years of Credit Monitoring and Insurance Services (“CMIS”); or (3) a payment for reimbursement of Documented Losses of up to \$5,000. The Settlement also provides for robust injunctive relief which includes, *inter alia*, confirming that Class Members’ sensitive personally identifiable information (“PII”) is secured; dark web monitoring for five years for fraudulent activity relating to Class Members’ PII; and various enhancements to Kroger’s third-party vendor risk management program and other data

¹ Unless otherwise noted, all capitalized terms not separately defined herein have the meaning ascribed to them in the Settlement Agreement filed concurrently herewith.

1 privacy enhancements.

2 The Settlement is the product of hard-fought, arms-length negotiations between experienced
3 counsel after necessary discovery. The Hon. Judge Jay C. Gandhi (Ret.) of JAMS mediated this
4 matter on May 13, 2021, and the parties spent numerous hours over the subsequent weeks
5 negotiating and finalizing the Settlement details.

6 The Settlement resolves claims against Kroger only and, if approved, would release claims
7 in: *Jones v. The Kroger Co.*, No. 1:21-cv-00146 (S.D. Ohio), *Govaert et al. v. The Kroger Co.*, No.
8 1:21-cv-00174 (S.D. Ohio), *Doty et al. v. The Kroger Co.*, No. 1:21-cv-00198 (S.D. Ohio), *Strohm*
9 *v. The Kroger Co.*, No. 1:21-cv-00226 (S.D. Ohio), *Abrams et al. v. The Kroger Co.*, No. 1:21-cv-
10 00240 (S.D. Ohio), *Buck v. The Kroger Co.*, 1:21-cv-00279 (S.D. Ohio), and *Baer v. The Kroger*
11 *Co.*, No. 1:21-cv-00323 (S.D. Ohio) (collectively, the “Ohio Actions”; *see, infra*, Sec. III.A.); and
12 *Martin v. Kroger Co.*, No. 1:21-cv-00717-JRS-DML (S.D. Ind.) (*pro se* plaintiff) (“*Martin*”).

13 The Settlement delivers tangible and immediate benefits to the Settlement Class that address
14 all the potential harms of the data breach suffered by Class Members without protracted class action
15 litigation including multiple parties and serious inherent risks. It delivers a fair, adequate, and
16 reasonable resolution for the Class and merits approval. Fed. R. Civ. P. 23(e)(2).

17 **III. BACKGROUND**

18 **A. The FTA Data Breach and Subsequent Litigation**

19 In late 2020 and early 2021, Accellion began disclosing to its clients that certain threat
20 actors had breached Accellion client data via vulnerabilities in Accellion’s File Transfer Appliance
21 (“FTA”) software. First Amended Complaint (“FAC”), ECF No. 27, ¶ 2. These threat actors were
22 then able to steal sensitive data from many Accellion clients, including corporations, law firms,
23 banks, universities, and other entities. *Id.* ¶ 31. On January 23, 2021, Accellion notified Kroger that
24 it was one such client impacted by the FTA Data Breach. *Id.* ¶ 42. As part of the FTA Data Breach,
25 hacker(s) accessed Kroger’s files containing Plaintiffs’ and Class Members’ PII. *Id.*

26 On February 19, 2021, Kroger publicly confirmed that the PII of certain Kroger pharmacy
27 customers and former and current employees was compromised in the Data Breach. *Id.* ¶ 5. The
28

1 affected PII included names, email addresses, dates of birth, home addresses, phone numbers, social
2 security numbers, salary information, health benefits information including prescription ID
3 numbers, and prescription information. *Id.* ¶ 1. As a result of the breach, unauthorized persons
4 accessed sensitive PII of approximately 3.82 million Kroger pharmacy customers and current and
5 former employees. Declaration of Tina Wolfson (“Wolfson Decl.”) ¶ 36.

6 On March 17, 2021, this action was filed on behalf of Plaintiffs Ricky Cochran and Alain
7 Berrebi, naming Accellion and Kroger as co-defendants. ECF No. 1. Plaintiffs filed the FAC on
8 June 25, 2021. ECF No. 27.² Each of the Plaintiffs received notification from Kroger indicating
9 that their PII was accessed during the FTA Data Breach. *Id.* ¶ 9.

10 Plaintiffs allege that, *inter alia*, Kroger and Accellion: (a) failed to implement and maintain
11 adequate data security practices to safeguard Plaintiffs’ and Class Members’ PII; (b) failed to
12 prevent the FTA Data Breach; (c) failed to detect security vulnerabilities leading to the FTA Data
13 Breach; and (d) failed to disclose that their data security practices were inadequate to safeguard
14 Class Members’ PII. ECF No. 27 ¶¶ 48, 54, 64-70, 113. With respect to Kroger, Plaintiffs alleged
15 that it had a duty to, and impliedly promised Plaintiffs and Class Members that it would, protect
16 their sensitive PII from unauthorized disclosure and handle this data securely, and that it failed to
17 do so by entrusting the PII to a third-party file transfer vendor whose products and services were
18 prone to security vulnerabilities that left Class Members’ PII exposed. *Id.* ¶¶ 54, 89.

19 Plaintiffs’ allegations include claims for negligence, breach of implied contract, violations
20 of the California Consumer Privacy Act (“CCPA”), and violations of the California Confidentiality
21 of Medical Information Act (“CMIA”). *Id.* ¶¶ 83-169. Plaintiffs seek certification of a nationwide
22 class. ¶ 75.

23 Kroger has steadfastly denied all such allegations and responded to Plaintiffs’ CCPA
24 demand letter that it had cured any violation of the statute, sent notice to all impacted individuals
25

26 _____
27 ² The FAC includes Plaintiff Jareme Stobbe, a plaintiff in the separately filed class action
28 in this Court against Accellion only, entitled *Stobbe v. Accellion, Inc.*, No. 5:21-cv-01353-EJD
(filed February 24, 2021) (“*Stobbe*”).

1 and offered two years of credit monitoring and ID theft insurance, reported the incident and work
2 closely with the FBI, recovered the impacted data and received evidence that any remaining copies
3 of the data were deleted, and confirmed that none of the impacted data was published or offered for
4 sale on the dark web. Wolfson Decl. ¶ 12. Kroger discontinued its use of Accellion and FTA,
5 reported the incident to law enforcement, and initiated its own investigation. *Id.* ¶ 29.

6 According to Kroger, Accellion never informed Kroger that the FTA product was insecure
7 or ill-suited for its purpose of providing securing file transfers, but, rather, represented that the
8 opposite is true. *Id.* ¶ 30. Prior to the disclosure of the FTA Data Breach, Kroger already had
9 purchased from Accellion its next generation file transfer product, known as Kiteworks, and was
10 on target to complete migration to this product, from the breached FTA product by March 2021. *Id.*
11 ¶ 31. Accellion supported the FTA product platform utilized by Kroger up to the announcement of
12 the FTA Data Breach. *Id.* ¶ 32. Accellion represented that the FTA product would remain licensed
13 and supported during the transition to Kiteworks. *Id.* ¶ 33.

14 Following announcement of the FTA Data Breach, Kroger worked with Accellion to
15 investigate. *Id.* ¶ 34. Separately, Accellion hired Mandiant, a U.S. based cyber security firm, to
16 conduct a forensic analysis, and later posted its report on the Accellion website.³ Kroger also
17 reported the incident to the FBI and activated Verizon's Incident Response support team to analyze
18 relevant information, review impacted data, and prepare notification to affected individuals. *Id.* ¶
19 35.

20 Approximately 3,825,200 Kroger employees and customers were impacted by the FTA Data
21 Breach. *Id.* ¶ 36. Of the total individuals impacted, approximately 2,458,800 were Kroger
22 employees; 1,324,600 were Kroger customers; and 23,800 were both employees and customers of
23 Kroger. In California approximately 150,000 individuals were impacted. *Id.*

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25
26
27 ³ ACCELLION, INC., FILE TRANSFER APPLIANCE (FTA) SECURITY ASSESSMENT, (2021),
28 [https://www.accellion.com/sites/default/files/trust-center/accellion-fta-attack-mandiant-report-
full.pdf](https://www.accellion.com/sites/default/files/trust-center/accellion-fta-attack-mandiant-report-full.pdf).

1 According to Kroger, it learned of the FTA Data Breach on January 23, 2021, and on
2 February 2, 2021, it received a ransom demand in exchange for a commitment not to disseminate
3 Kroger's data. *Id.* ¶ 37. Kroger informed the FBI and paid the ransom on February 18, 2021. *Id.*
4 The extortion entity returned the data the next day, along with a video purporting to show the
5 deletion of Kroger's files. *Id.* While nothing stops the extortion entity on renegeing on its
6 commitments, Kroger reports that it continually has monitored the dark web to make certain that
7 the data was not retained or disseminated. *Id.* ¶ 38. The Settlement ensures that this monitoring will
8 continue for five years. SA ¶ 70.e.

9 Following commencement of this action, Plaintiffs and Kroger began a dialogue about case
10 management issues and engaged in multiple meet-and-confer discussions. Wolfson Decl. ¶ 14;
11 Barnow Decl. ¶ 14. Plaintiffs' counsel already had been engaging in efforts to coordinate all of the
12 cases filed in this District relating to the FTA Data Breach, including drafting a stipulation to
13 consolidate all of those cases and set deadlines for submitting leadership applications. Wolfson
14 Decl. ¶ 14; Barnow Decl. ¶ 14. After this action was filed, Plaintiffs' counsel coordinated with
15 Kroger's counsel to facilitate Kroger's inclusion in the stipulation. Wolfson Decl. ¶ 14; Barnow
16 Decl. ¶ 14.

17 In view of the fact that many cases relating to the FTA Data Breach continued to be filed in
18 multiple courts, two weeks after this action was commenced, on March 31, 2021, attorneys from
19 Ahdoot & Wolfson, PC filed a motion for transfer and centralization pursuant to 28 U.S.C. § 1407
20 with the United States Judicial Panel on Multidistrict Litigation, seeking to transfer numerous FTA
21 Data Breach-related actions in four district courts to this Court for centralized proceedings. *In re*
22 *Accellion, Inc., Data Breach Litigation*, MDL No. 3002 (J.P.M.L. 2021), at ECF No. 1 ("JPML
23 Motion").

24 During the pendency of the JPML Motion, dialogue between counsel for Plaintiffs and
25 Kroger continued. Some of the plaintiffs' counsel in the Ohio Actions who also had cases against
26 Accellion pending before this Court did not join the consolidation stipulation. Wolfson Decl. ¶ 15;
27 Barnow Decl. ¶ 14. On April 9, 2021, Plaintiffs and Kroger submitted a stipulation in this action
28

1 extending Kroger's time to respond to the Complaint to the earlier of 45 days following a decision
2 on the JPML Motion, or 45 days after Kroger answers or otherwise responds to a complaint in any
3 of the other FTA Data Breach actions. ECF No. 14. On June 7, 2021, the Panel issued an order
4 denying transfer. MDL No. 3002, ECF No. 88.

5 As stated above, this Settlement would resolve all claims in the Ohio Actions and in *Martin*.
6 On April 20, 2021, the attorneys in the Ohio Actions filed a motion to consolidate six of those
7 matters. *Jones*, ECF No. 14. On June 3, 2021, the attorneys in the Ohio Actions filed a motion,
8 pursuant to Rule 23(g), seeking to appoint a 10-firm leadership structure. *Jones*, ECF No. 20-1.
9 One day after Kroger sought to stay or extend certain deadlines in the Ohio Actions on the grounds
10 that it had entered into this Settlement Agreement, among other reasons (*Jones*, ECF No. 21), the
11 Ohio District Court (i) granted the unopposed Motion to Consolidate, but (ii) ruled that Kroger's
12 "motion for extension of time to answer is DENIED as moot, given Plaintiff will be filing a
13 consolidated complaint. Plaintiffs' motion to appoint interim class counsel (Doc. [20]) and
14 Defendant's [Kroger] motion to stay (Doc. [21]) remain pending until briefing is concluded." *Jones*,
15 Text Order, June 22, 2021. The *pro se* plaintiff in *Martin*, as of the filing of this Motion, has filed
16 a number of amended complaints in response to the Court's *sua sponte* orders regarding defective
17 jurisdictional allegations. Wolfson Decl. ¶ 16.

18 **B. Mediation and Settlement Negotiations**

19 As a result of their continued meet-and-confer efforts, the Parties were able to reach an
20 agreement to participate in mediation to attempt to resolve this matter. Wolfson Decl. ¶ 17; Barnow
21 Decl. ¶ 17. The mediation took place on May 13, 2021 before the Hon. Judge Jay C. Gandhi (Ret.)
22 of JAMS. Wolfson Decl. ¶ 17; Barnow Decl. ¶ 17.

23 Prior to the mediation session, the Parties voluntarily exchanged information to prepare for
24 and facilitate a productive mediation session. Wolfson Decl. ¶ 18; Barnow Decl. ¶ 18. The Parties
25 communicated their respective positions on the litigation and the Parties' claims and defenses with
26 each other and the mediator. Wolfson Decl. ¶ 18; Barnow Decl. ¶ 18. Plaintiffs received and
27 analyzed data from Kroger relating to the impact of the FTA Data Breach on Kroger, including
28

1 specific information concerning the categories of individuals who received breach notification
2 letters from Kroger (e.g., customers, employees), the nature of the PII impacted, and the number of
3 Class Members impacted. Wolfson Decl. ¶ 18; Barnow Decl. ¶ 18.

4 On May 13, 2021 the Parties participated in a full-day mediation session with Judge Gandhi
5 by video conference. Wolfson Decl. ¶ 19; Barnow Decl. ¶ 19. With Judge Gandhi's guidance, the
6 Parties had a productive mediation session with both sides zealously represented by experienced
7 counsel. Late in the day, the Parties reached an agreement in principle to settle the litigation.
8 Wolfson Decl. ¶ 19; Barnow Decl. ¶ 19.

9 Following the mediation, the Parties continued to work together to finalize the Settlement's
10 terms. Wolfson Decl. ¶ 21; Barnow Decl. ¶ 21. During this time, the Parties exchanged numerous
11 drafts of the Settlement Agreement and its exhibits and negotiated numerous details to maximize
12 the benefits to the Class Members. Wolfson Decl. ¶ 21; Barnow Decl. ¶ 21.

13 Counsel solicited competing bids and negotiated with four separate third-party
14 administrators for settlement notice and administration. Wolfson Decl. ¶ 23; Barnow Decl. ¶ 22.
15 Counsel ultimately negotiated an agreement with Epiq Class Action and Mass Tort Solutions, LLC
16 ("Epiq"), which estimates that the total administration and notice charges in this matter will be
17 approximately \$740,948 to \$827,299. *Id.* This estimate is reasonable in the context of this proposed
18 Settlement, and includes all costs associated with providing direct notice, class member data
19 management, CAFA notification, telephone support, claims administration, creation and
20 management of the Settlement Website, disbursements and tax reporting, and includes postage
21 (which is estimated to be approximately \$320,000 to \$350,000). *Id.* Plaintiffs' counsel also solicited
22 competing bids from alternative providers of CMIS. Barnow Decl. ¶ 27. Ultimately, counsel
23 negotiated for Experian to provide the CMIS. *Id.* ¶ 27 (for details of the features of the CMIS).

24 During the Settlement negotiations process, the Parties deferred any discussion concerning
25 the maximum Service Awards to be sought by the proposed Class Representatives until after
26 reaching an agreement on all material terms of the Settlement. Wolfson Decl. ¶ 22; Barnow Decl.
27 ¶ 37. There has been no negotiation and no agreement as to the amount of attorneys' fees and
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1 expenses to be sought by proposed Class Counsel. *See, e.g.*, SA ¶ 99. Negotiations regarding the
2 Settlement have been conducted at arm's length, in good faith, free of any collusion, and under the
3 supervision of Judge Gandhi. Wolfson Decl. ¶ 42; Barnow Decl. ¶ 33.

4 After comprehensive negotiations and diligent efforts, Plaintiffs and Kroger finalized the
5 terms of the Settlement, and seek preliminary approval of the Settlement from the Court.

6 **IV. TERMS OF THE SETTLEMENT**

7 **A. The Class Definition**

8 The proposed Settlement Class is defined as follows:

9 [A]ll residents of the United States who were notified by The Kroger Co. that their
10 PII was compromised as a result of the FTA Data Breach. Excluded from the
11 Settlement Class are: (1) the Judges presiding over the Action, and members of
12 their families; (2) the Defendant Kroger, their subsidiaries, parent companies,
13 successors, predecessors, and any entity in which the Defendant Kroger or their
14 parents have a controlling interest and their current or former officers, directors,
15 and employees; (3) Persons who properly execute and submit a Request for
16 Exclusion prior to the expiration of the Opt-Out Period; and (4) the successors or
17 assigns of any such excluded Persons.

18 SA ¶ 44. The proposed Settlement Class is identical to the Nationwide Class defined in the FAC.
19 ECF No. 27 ¶ 75.

20 **B. The Release**

21 In exchange for the benefits provided under the Settlement Agreement, Class Members will
22 release any claims against Kroger related to or arising from any of the facts alleged in the FAC filed
23 in this litigation. SA ¶ 57. Class Members do not release any claims they may have against other
24 defendants related to the FTA Data Breach. The claims sought to be released by the Settlement are
25 coextensive with the claims in the FAC.

26 **C. The Settlement Benefits**

27 The Settlement provides for a \$5 million non-reversionary Settlement Fund (*id.* ¶ 60) that
28 will be used to provide Participating Class Members, at their choice, with one of the following
Settlement Benefits:

1 **1. Cash Fund Payments**

2 Participating Class Members may submit a claim to receive a cash Settlement Payment
3 (“Cash Fund Payment”). The amount of the Cash Fund Payment will be calculated in accordance
4 with the terms of the Settlement Agreement. *Id.* ¶ 71(b); *see also, infra*, Sec. V.D. In view of the
5 heightened protections afforded to California Class Members under the California statutory claims
6 asserted in this lawsuit (i.e., the CCPA, CMIA), California Class Members who submit valid claims
7 for Cash Fund Payments will receive Settlement Payments that are twice the amount of Settlement
8 Payments made to non-California Class Members. SA ¶ 76(b).

9 It is difficult to estimate the amount of the Cash Fund Payment as it will depend on a number
10 of factors. Assuming, however, that the claims rate here is 1% to 3% (Declaration of Cameron R.
11 Azari (Settlement Administrator) (“Azari Decl.”), ¶ 27; *see also, infra*, Sec. V.B.5, previous Data
12 Breach Settlement claims rate chart, Class Counsel estimate that California Claimants will receive
13 approximately \$182 at 1%, \$74 at 2%, and \$36 at 3%, and non-California Claimants will receive
14 approximately \$91 at 1%, \$37 at 2%, and \$18 at 3%. Wolfson Decl. ¶ 26.

15 **2. Credit Monitoring and Insurance Services**

16 Each Participating Settlement Class Member who submits a valid claim alternatively may
17 elect to receive CMIS. The CMIS protection plan will be provided by Experian and is referred to
18 as the “IdentityWorks Credit 3-Bureau Plan.” Barnow Decl. ¶ 27. If a Participating Settlement Class
19 Member chooses the CMIS as her respective Settlement Benefit and already maintains a
20 subscription for a similar product, they will have the option to postpone the commencement of the
21 CMIS by 12 months for no additional charge. SA ¶ 71.a.

22 The CMIS protection plan will include the following services: (i) up to \$1 million dollars
23 of identity theft insurance coverage; (ii) three-bureau credit monitoring providing notice of changes
24 to the participant’s credit profile; (iii) alerts for activity including new inquiries, new accounts
25 created, change of address requests, changes to public records, postings of potentially negative
26 information, and other leading indicators of identity theft; (iv) customer care and dedicated fraud
27 resolution agent; (v) comprehensive educational resources; and (vi) extended fraud resolution. *Id.*;

1 Barnow Decl. ¶ 27. The retail value of this CMIS is \$15 per month (a total \$360 for the entire two-
2 year term) for each subscriber. Declaration of Robert Siciliano (“Siciliano Decl.”) ¶¶ 7-8.

3 **3. Documented Loss Payment**

4 In the alternative to the CMIS or the Cash Fund Payment, Class Members may seek
5 reimbursement of up to \$5,000 of Documented Losses (“Document Loss Payment”). To receive a
6 Documented Loss Payment, a Settlement Class Member must submit a valid Claim Form with
7 attestation regarding the amount of the loss supported by reasonable documentary proof. SA ¶ 71.c.

8 **4. Prospective Relief and Changes in Business Practices** 9 **Attributable to the Settlement**

10 The Settlement also promises significant remedial measures that Kroger has agreed to
11 implement as a result of this litigation, all of which will benefit all Class Members, whether or not
12 they submit a claim. Kroger will confirm that it has fully ended its use of the Accellion FTA and
13 migrated to a new secure file transfer solution. SA ¶ 70. It will undertake measures to secure, or
14 securely destroy, the PII that was subject to and subsequently recovered in the FTA Data Breach,
15 and confirm that this has been completed. *Id.* Kroger also will:

16 “enhance its existing third-party vendor risk management program ... by taking at
17 least the following measures: (i) [c]onduct periodic reviews of all file transfer
18 programs or software currently being utilized for individual-to-individual transfers
19 by ... Kroger, including any third-party products, and evaluate whether any
20 software used for such purpose is known by Kroger to be outdated, unsupported, or
21 unsecure; (ii) [t]o the extent Kroger changes its third-party file transfer vendor in
22 the next five years, implement an RFP or bid solicitation program for third-party
23 file transfer vendors; (iii) [f]or a period of five (5) years following the date the Court
24 approves of the Settlement Agreement, continue to maintain positions within
25 Kroger that are specifically responsible for overseeing third-party data transfer
26 vendors and operations; and (iv) [c]ontinue to provide for the next five (5) years
27 annual security awareness training for Kroger employees involved with customer
28 and employee data sharing and data transfer activities, to cover industry best
practices for data security and privacy.”

25 *Id.* Finally, for five years after final approval of the Settlement, Kroger will continue to monitor the
26 dark web for indications of fraudulent activity with respect to data of Kroger customers and current
27 and former employees in connection with the FTA Data Breach. *Id.*

1 **5. The Settlement’s Value to Settlement Class Members**

2 The value of the Settlement is significant. The cash fund value of the Settlement is
3 \$5,000,000. This does not include the value of the Settlement’s prospective relief or the retail value
4 of the CMIS claimed by Participating Settlement Class Members.

5 **D. Plan of Distribution**

6 Subject to the Court’s approval, the Settlement Administrator (“Administrator”) will apply
7 the Net Settlement Fund to make all distributions necessary for an election of CMIS, Cash Fund
8 Payments, and Documented Losses. The Administrator will first apply the Net Settlements Fund to
9 pay for claimed CMIS and then to pay for any valid claims for Documented Loss. SA ¶ 76.a.

10 The amount of the Settlement Fund remaining after all payments for CMIS and Documents
11 Loss Payments are applied (the “Post DC Net Settlement Fund”), will be applied to pay valid claims
12 for Cash Fund Payments. *Id.* ¶ 76(a)-(b). The amount of each Cash Fund Payment shall be
13 calculated by dividing the Post DC Net Settlement Fund by double the number of valid claims
14 submitted by California residents added to the number of valid claims submitted by non-California
15 residents to determine a “Initial Cash Amount.” *Id.* The Cash Fund Payment amount to non-
16 California residents with Approved Claims will be equal to the Initial Cash Amount, and the Cash
17 Fund Payment to California residents with Approved Claims will equal twice the Initial Cash
18 Amount. *Id.*

19 Settlement Class Claimants will have the option to receive any Settlement Payment
20 available to them pursuant to the terms of the Settlement Agreement via digital PayPal, Venmo,
21 and or digital payment Card. *Id.* ¶ 72; Azari Decl. ¶ 23. In the event Class Members do not exercise
22 an electronic payment option, they will receive their Settlement Payment via a physical check,
23 which they will have 60 days following distribution to deposit or cash. SA ¶ 77. This plan is similar
24 to past distributions of settlements negotiated and recommended by proposed Class Counsel, and
25 approved by Courts. Wolfson Decl. ¶ 25; Barnow Decl. ¶ 31.

1 **E. Residual**

2 Importantly, the Settlement Fund is non-reversionary. To the extent any monies remain in
3 the Net Settlement Fund more than 150 days after the distribution of Settlement Payments, a
4 subsequent Settlement Payment will be evenly made to all Claimants with Approved Claims who
5 cashed or deposited the initial payment they received, assuming such payment is over \$3.00. SA ¶
6 78. In the event such a payment is less than \$3.00 for each Approved Claim for cash, then the
7 remaining funds will be used to extend the two-year term of the CMIS for as long as possible for
8 all Claimants who selected CMIS. *Id.* Any amount remaining thereafter will be paid to the proposed
9 Non-Profit Residual Recipient: Rose Foundation’s Consumer Privacy Rights Fund (“Rose
10 Foundation”), a 26 U.S.C. 501(c)(3) non-profit organization. *Id.* ¶¶ 25, 78. The Rose Foundation’s
11 efforts are directly related to the subject matter of this action. Wolfson Decl. ¶ 27. Proposed Class
12 Counsel have no relationship with the Rose Foundation. *Id.*; Barnow Decl. ¶ 26.

13 **F. Notice to Class**

14 Pursuant to Rule 23(e), the Administrator will provide Class Members with the Summary
15 Notice via email for any Class Member for whom an email address is available, and via U.S. mail
16 in post card form for all other Class Members for whom a physical mailing address is available. SA
17 ¶ 85; Azari Decl. ¶¶ 13-15. If an email notice is returned undeliverable, the Administrator shall
18 attempt two other email executions; if unsuccessful, the Administrator will send a post card
19 Summary Notice via U.S. mail to the extent a current mailing address is available. SA ¶ 85.c.; Azari
20 Decl. ¶¶ 14-15. For Summary Notices returned as undeliverable via U.S. mail, the Administrator
21 will re-mail the notice to any forwarding address identified on the return mail. SA ¶ 85.d.; Azari
22 Decl. ¶ 15.

23 For recipients of notice via email who have not submitted Claim Forms, the Administrator
24 will periodically transmit reminder emails of the opportunity to submit a Claim Form prior to the
25 Claims Deadline. SA ¶ 88; Azari Decl. ¶ 16.

26 The Administrator also will design and conduct an internet digital advertising publication
27 notice program, which will continue through the Claims Deadline. SA ¶ 86; Azari Decl. ¶¶ 17-18.

1 Furthermore, the Summary Notice will be posted on Kroger’s internal intranet called “The Feed,”
2 to which current Kroger associates have access and which they frequently view for company
3 updates and shift schedules. SA ¶ 86; Azari Decl. ¶ 18.

4 The Administrator also will create and maintain a Settlement Website that containing all
5 relevant information and documents regarding the Settlement (including the Long Form Notice, the
6 Claim Form, the Settlement Agreement, Preliminary Approval documents, and the operative
7 Complaint), through which Class Members can submit electronic Claims Forms and Requests for
8 Exclusion. SA ¶ 89; Azari Decl. ¶ 19. The Settlement Website will also contain a toll-free telephone
9 number and mailing address through which Class Members can contact the Administrator. SA ¶
10 89; Azari Decl. ¶ 20. The language of all Notice Forms (Summary Notice, Long Form Notice,
11 Claim Form, etc.) is easily understandable and takes into account the education level or language
12 needs of the proposed Class Members. Azari Decl. ¶¶ 21, 24-25.

13 **G. Proposed Class Representative Service Awards**

14 Since the litigation was commenced, Plaintiffs have been dedicated and active participants.
15 They investigated the matter prior to and after retaining counsel, participated in the plaintiff vetting
16 process implemented by their counsel, reviewed and approved the initial complaints and the
17 operative FAC, kept in close contact with counsel to monitor the progress of the litigation, and
18 reviewed and communicated with their counsel regarding the Settlement. Wolfson Decl. ¶ 45. Each
19 Plaintiff put their name and reputation on the line for the sake of the Class, and the recovery would
20 not have been possible without their efforts.

21 In view of these efforts, on behalf of Plaintiffs, counsel will separately petition the Court
22 for approval of service awards in the amount of \$1,500 for each of the three Plaintiffs. SA ¶ 96.
23 This amount is consistent with those approved in other data breach class action settlements.

24 **H. Attorneys’ Fees and Expenses**

25 As part of the Settlement, Plaintiffs’ counsel will separately file a motion for an award of
26 reasonable attorneys’ fees and reimbursement of litigation costs and expenses. SA ¶¶ 99-101.
27 Notably, there is no “free sailing” clause in the Settlement, and any amount sought for payment of
28

1 attorneys' fees will be reasonable, and consistent with the Ninth Circuit's 25% "benchmark"
2 percentage for such awards. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th
3 Cir. 2002). Proposed Class Counsel have expended approximately \$500,763 in lodestar collectively
4 and incurred \$22,888.10 in expenses. Wolfson Decl. ¶ 47; Barnow Decl. ¶ 51. Proposed Class
5 Counsel are not yet certain whether, or in what amount, a multiplier will be sought as they expect
6 a number of additional hours to be expended in this matter prior to the filing of a motion for fees
7 and expenses. In no event will proposed Class Counsel seek more than 25% of the Settlement Fund.
8 No portion of any awarded fees will revert to Kroger. Proposed Class Counsel intend to seek
9 reimbursement of all expenses incurred to date. Any approved Fee Award and Costs will be paid
10 by Kroger out of the Settlement Fund. SA ¶ 99. The Settlement is not conditioned upon the Court's
11 approval of the Fee Award and Costs, or the proposed Service Awards. *Id.* ¶ 101.

12 **I. The Settlement Administrator**

13 The Parties propose that Epiq—an experienced and reputable national class action
14 administrator—serve as Administrator to provide notice; administer and make determinations
15 regarding claim forms; process settlement payments; make distributions; and provide other services
16 necessary to implement the Settlement. SA ¶ 42; *see generally* Azari Decl. The costs of the
17 Administrator will be paid by Kroger out of the Settlement Fund.

18 The Parties selected Epiq as the Administrator following a competitive bidding process led
19 by proposed Class Counsel to identify the most efficient and lowest cost Settlement administration
20 option for the benefit of Class Members. Wolfson Decl. ¶ 23. Proposed Class Counsel considered
21 four different proposals from other potential administrators. With each of the potential settlement
22 administrators, proposed Class Counsel discussed the notice and distribution plans agreed to in the
23 Settlement. *Id.* Proposed Class Counsel—each of whom have litigated hundreds of class actions to
24 settlement since the 1990s—previously have worked with Epiq on different matters. Wolfson Decl.
25 ¶ 23; Barnow Decl. ¶ 22. They also have worked with the other nationally recognized administrators
26 who submitted proposals for this Settlement. The estimated \$740,948 to \$827,299 cost for
27 settlement administration is reasonable. Wolfson Decl. ¶ 23.

1 **V. PRELIMINARY APPROVAL IS APPROPRIATE**

2 **A. The Rule 23 Requirements for Class Certification are Met**

3 Parties seeking class certification for settlement purposes must satisfy the requirements of
 4 Fed. R. Civ. P. 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). “A court considering
 5 such a request should give the Rule 23 certification factors ‘undiluted, even heightened, attention
 6 in the settlement context.’” *Sandoval v. Roadlink USA Pac., Inc.*, No. EDCV 10-00973, 2011 WL
 7 5443777, at *2 (C.D. Cal. Oct. 9, 2011) (quoting *Amchem*, 521 U.S. at 621). At the preliminary
 8 approval stage, “if a class has not [yet] been certified, the parties must ensure that the court has a
 9 basis for concluding that it likely will be able, after the final hearing, to certify the class.” Fed. R.
 10 Civ. P. 23, Adv. Comm. Notes to 2018 Amendment. All the requirements of Rule 23(a) must be
 11 met, and “at least one of the three requirements listed in Rule 23(b).” *Wal-Mart Stores, Inc. v.*
 12 *Dukes*, 564 U.S. 338, 345 (2011).

13 **1. Rule 23(a) Is Satisfied**

14 **i. The Class Is Sufficiently Numerous**

15 There are approximately 3.82 million geographically dispersed Settlement Class Members.
 16 Wolfson Decl. ¶ 36. The Rule 23(a)(1) numerosity requirement is satisfied.

17 **ii. There Are Common Questions of Law and Fact**

18 The commonality requirement is satisfied if “there are questions of law or fact common to
 19 the class.” Fed. R. Civ. P. 23(a)(2); *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589
 20 (9th Cir. 2012) (characterizing commonality as a “limited burden,” which “only requires a single
 21 significant question of law or fact”).

22 Here, numerous common issues of law and fact affect the Class uniformly, including: the
 23 nature of Kroger’s data security practices, whether Kroger knew or should have known that
 24 Accellion’s FTA was unsecure, whether Kroger owed duties of care to Class Members to safeguard
 25 their PII, and whether Kroger breached those duties. Resolution of these and other common
 26 inquiries can be achieved through to common evidence that does not vary from Class Member to
 27 Class Member. Commonality is satisfied.

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iii. The Class Representatives' Claims Are Typical

Rule 23(a)(3) requires that the Class Representatives' claims be typical of those of the Class. "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other Class Members have been injured by the same course of conduct." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (internal quotation marks and citation omitted).

Here, the claims of the named Plaintiffs are typical of the claims of the Settlement Class. Jaramey Stobbe is a Kroger employee, and Ricky Cochran and Alain Berrebi are customers; the Class Members are Kroger employees and customers. Plaintiffs' and Class Members' claims arise from the same nucleus of facts relating to the FTA Data Breach, pertain to a common defendant Kroger, and are based on the same legal theories. Plaintiffs thus satisfy the Rule 23(a)(3) typicality requirement.

iv. Class Representatives and Proposed Class Counsel Adequately Represent Class Members

Rule 23(a)(4) permits certification of a class action only if "the representative parties will fairly and adequately protect the interests of the class," which requires that the named plaintiffs (1) not have conflicts of interest with the proposed Class; and (2) be represented by qualified and competent counsel. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d 597, 607 (9th Cir. 2018).

Plaintiffs and proposed Class Counsel are adequate. First, the proposed Class Representatives have demonstrated that they are well-suited to represent the Settlement Class, have actively participated in the litigation, and will continue to do so. Wolfson Decl. ¶ 44. They do not have any conflicts of interest with the absent Class Members, as their claims are coextensive with those of the Class Members. *Id.*; *Kent v. Hewlett-Packard Co.*, No. 5:09-CV-05341, 2011 WL 4403717, at *1 (N.D. Cal. Sept. 20, 2011) (finding class representatives adequate where their claims coextensive were with those of absent class members, and they had no conflicts).

Second, proposed Class Counsel are highly qualified and experienced in class action and

1 complex litigation, with both firms having expertise and extensive experience in data breach and
2 data privacy class actions. Wolfson Decl. ¶¶ 48-63 and Ex. 1; Barnow Decl. ¶¶ 38-50 and Ex. 2.
3 Proposed Class Counsel have been dedicated to the prosecution of this action and will remain so
4 through final approval. Among other things, they identified and investigated the claims in this
5 lawsuit and the underlying facts, spoke with numerous Class Members, engaged in mediation with
6 Kroger, and successfully negotiated this Settlement. Wolfson Decl. ¶ 17; Barnow Decl. ¶¶ 13-14,
7 17, 36; *see also In re Emulex Corp. Sec. Litig.*, 210 F.R.D. 717, 720 (C.D. Cal. 2002) (a court
8 evaluating adequacy of representation may examine “the attorneys’ professional qualifications,
9 skill, experience, and resources . . . [and] the attorneys’ demonstrated performance in the suit
10 itself”); *Alvarez v. Sirius XM Radio Inc.*, No. CV 18-8605, 2020 WL 7314793, at *8 (C.D. Cal.
11 July 15, 2020) (adequacy of counsel satisfied where class was “represented by Class Counsel who
12 are experienced in class action litigation”). The adequacy requirement is satisfied.

13 **2. Rule 23(b)(3) is Satisfied**

14 Rule 23(b)(3) requires that (1) “questions of law or fact common to the members of the
15 class predominate over any questions affecting only individual members of the class,” and (2)
16 “that a class action is superior to other available methods for the fair and efficient adjudication of
17 the controversy.” Fed. R. Civ. P. 23(b)(3). Both of these requirements are satisfied.

18 **i. Common Issues of Law and Fact Predominate Over Any 19 Potential Individual Questions**

20 The Rule 23(b)(3) predominance element requires that “questions of law or fact common to
21 class members predominate over any questions affecting only individual members.” Fed. R. Civ.
22 P. 23(b)(3). Here, Plaintiffs’ claims depend on whether Kroger had reasonable data security
23 measures in place to protect Plaintiffs’ and Class Members’ PII, and whether Kroger could have
24 prevented unauthorized exposure of Plaintiffs’ PII or mitigated its effects with more adequate third-
25 party risk management practices. These questions can be resolved using the same evidence for all
26 Class Members, including Kroger’s internal documents, testimony of its employees, and expert
27 analysis. *Abante Rooter & Plumbing, Inc. v. Pivotal Payments Inc.*, No. 3:16-CV-05486, 2018 WL
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1 8949777, at *5 (N.D. Cal. Oct. 15, 2018) (“Predominance is satisfied because the overarching
 2 common question . . . can be resolved using the same evidence for all class members and is exactly
 3 the kind of predominant common issue that makes certification appropriate.”).

4 Indeed, the FTA Data Breach affected all Class Members in a uniform fashion,
 5 compromising the similar types of PII for Plaintiffs and the Settlement Class. *In re Anthem, Inc.*
 6 *Data Breach Litig.*, 327 F.R.D. 299, 312 (N.D. Cal. 2018) (“ . . . Plaintiffs’ case for liability depends,
 7 first and foremost, on whether Anthem used reasonable data security to protect Plaintiffs’ personal
 8 information. . . . That question can be resolved using the same evidence for all Class Members
 9 because their personal information was all stored on the same Anthem data warehouse that was the
 10 subject of the breach.”).

11 The issues presented are susceptible to common proof because they focus on Kroger’s class-
 12 wide data security policies and practices, and thus are the type of predominant questions that make
 13 a class-wide adjudication worthwhile. *Id.*; see also *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct.
 14 1036, 1045 (2016) (“When ‘one or more of the central issues in the action are common to the class
 15 and can be said to predominate, the action may be considered proper under Rule 23(b)(3)’”
 16 (citation omitted)). Predominance is satisfied.

17
 18 **ii. A Class Action is the Superior Method to Fairly and
 Efficiently Adjudicate the Matter**

19 Rule 23(b)(3) requires a class action to be “superior to other available methods for the fair
 20 and efficient adjudication of the controversy,” and sets forth the following factors:

21 The matters pertinent to the findings include: (A) the class members’ interest in individually
 22 controlling the prosecution or defense of separate actions; (B) the extent and nature of any
 23 litigation concerning the controversy already begun by or against class members; (C) the
 24 desirability or undesirability of concentrating the litigation of the claims in the particular
 forum; and (D) the likely difficulties in managing a class action.

25 Fed. R. Civ. P. 23(b)(3).

26 Where, as here, a court is deciding the certification question in the proposed class action
 27 settlement context, it need not consider manageability issues because “the proposal is that there be
 28 no trial,” and hence manageability considerations are no hurdle to certification for purposes of

1 settlement. *Amchem*, 521 U.S. at 620.

2 A class action is the only reasonable method to fairly and efficiently adjudicate Class
3 Members' claims against Kroger. *See, e.g., Phillips Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class
4 actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate
5 individually . . . [In such a case,] most of the plaintiffs would have no realistic day in court if a class
6 action were not available."). Resolution of the predominant issues of fact and law through
7 individual actions is impracticable: the amount in dispute for individual class members is too small,
8 the technical issues involved are too complex, and the required expert testimony and document
9 review too costly. *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1123 (9th Cir. 2017).

10 The class device is the superior method of adjudicating consumer claims against Kroger
11 arising from the FTA Data Breach because it promotes greater efficiency, and no realistic
12 alternative exists. Courts routinely recognize this in other data breach cases where class-wide
13 settlements have been approved. *See, e.g., In re Experian Data Breach Litigation*, No. 8:15-cv-
14 01592-AG-DFM (N.D. Cal. May 10, 2019); *In re Yahoo! Inc. Cust. Data Sec. Breach Litig.*, No.
15 5:16-md-02752-LHK (N.D. Cal. July 20, 2019).

16
17 **B. The Proposed Settlement Is Eminently Fair, an Excellent Result for
18 the Class Members, and Should be Preliminarily Approved**

19 The 2018 revisions to Rule 23 confirm the need for a detailed analysis regarding the fairness
20 of a proposed class settlement. "The claims, issues, or defenses of a certified class—or a class
21 proposed to be certified for purposes of settlement—may be settled . . . only with the court's
22 approval." Fed. R. Civ. P. 23(e). Accordingly, a district court may approve a settlement agreement
23 "after a hearing and only on finding that it is fair, reasonable, and adequate . . ." Fed. R. Civ. P.
24 23(e)(2).

25 In making this decision, Rule 23(e)(2) now clarifies that district courts must consider
26 whether:

- 27 (A) the class representatives and class counsel have adequately represented the class;
28 (B) the proposal was negotiated at arm's length;

- 1 (C) the relief provided for the class is adequate, taking into account:
- 2 (i) the costs, risks, and delay of trial and appeal;
- 3 (ii) the effectiveness of any proposed method of distributing relief to the class,
- 4 including the method of processing class-member claims;
- 5 (iii) the terms of any proposed award of attorney’s fees, including timing of
- 6 payment; and
- 7 (iv) any agreement required to be identified under Rule 23(e)(3); and
- 8 (D) the proposal treats class members equitably relative to each other.

9 Fed. R. Civ. P. 23(e)(2). Thus, Rule 23(e) now reflects the factors that courts in this Circuit already

10 considered for settlement approval: “(1) the strength of the plaintiffs’ case; (2) the risk, expense,

11 complexity, and likely duration of further litigation; (3) the risk of maintaining class action status

12 throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and

13 the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a

14 governmental participant; and (8) the reaction of the Class Members to the proposed settlement.”

15 *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 317 (N.D. Cal. 2018) (quoting *In re*

16 *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)).

17 “Prior to formal class certification, there is an even greater potential for a breach of fiduciary

18 duty owed the class during settlement. Accordingly, such agreements must withstand an even

19 higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily

20 required under Rule 23(e) before securing the court’s approval as fair. *In re Bluetooth Headset*

21 *Prods. Liab. Litig.*, 654 F.3d at 946.

22 At the preliminary approval stage, the court “evaluate[s] the terms of the settlement to

23 determine whether they are within a range of possible judicial approval.” *Wright v. Linkus Enters.,*

24 *Inc.*, 259 F.R.D. 468, 472 (E.D. Cal. 2009). Ultimately, “[s]trong judicial policy favors

25 settlements.” *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 576 (9th Cir. 2003)

26 (ellipses and quotation marks omitted) (quoting *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268,

27 1276 (9th Cir. 1992)).

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1. The Strength of Plaintiffs' Case and Possible Monetary Remedies

Plaintiffs believe they have a strong case for liability against Kroger. The operative FAC details the shortcomings in Kroger's data security measures. ECF No. 27 ¶¶ 24, 89-90. Plaintiffs allege that Accellion's FTA product at the heart of the FTA Data Breach was an unsecured, legacy, end-of-life product. *Id.* ¶¶ 28-29. Plaintiffs also allege that Accellion provided notice to its clients, like Kroger, that a newer and more secure Accellion file transfer product called Kiteworks was available, and that clients should migrate to this product. *Id.* ¶¶ 26-27. Plaintiffs allege that Kroger did not promptly do so. *Id.* ¶ 30. Plaintiffs also allege that Kroger entrusted customer and employee PII to Accellion under a duty to make sure that the PII was secure. *Id.* ¶¶ 24, 89-90.

Plaintiffs also believe that they would be able to recover damages on behalf of the Class. The range of potential outcomes is large, however. The scope of damages depends in large part on the scope of class certification, whether various theories of damages would be accepted by the Court (i.e., Benefit of the Bargain and Loss of Value of PII theories), and which causes of action survive. Nonetheless, if applied across all potential class members equally, Plaintiffs' most conservative measure (based on black-market rates of at least \$5 per individual for social security numbers⁴) would yield a figure of \$19,126,000, while more expansive measure (based on at least \$15 of monthly credit monitoring costs⁵) would yield \$57,378,000, and the most expansive measure (based on back market rates of \$70 for health care data⁶) would yield \$267,750,000. Assuming the statutory damages available to California residents, nominal damages to those individuals would total to \$150 million.

These amounts are not certain, however, and the case is subject to numerous risks (*see, infra*, Sec. V.B.2.). Plaintiffs believe that the legal theories behind such larger damage figures are meritorious, but also recognize that they are untested. As a practical matter, Plaintiffs' counsel recognize that taking such large numbers to a jury presents substantial strategic risks. Even a

⁴ See *Premera, supra*, ECF No. 156, p. 20 of 24, Motion for Class Certification.

⁵ See Siciliano Decl. ¶ 7.

⁶ See, *Premera, supra*, ECF No. 156, p. 20 of 24, Motion for Class Certification.

1 number in the mid-hundreds of millions potentially risks offending a jury and leading to a nominal
2 award—or no monetary award at all. *See e.g. Corcoran et al. v. CVS Health Corporation*, No. 4:15-
3 CV-03504, ECF No. 611 (N.D. Cal. June 24, 2021) (unanimous defense verdict where Plaintiffs’
4 counsel urged jury to award 6.3 million CVS Pharmacy customers \$121 million in generic drug
5 price overcharge suit). Moreover, once damages are determined, the jury may be asked to apportion
6 damages between Kroger and Accellion, thus further reducing any award as to Kroger.

7 **2. The Risk, Expense, Complexity, and Potential Class Recovery**

8 This factor overwhelmingly weighs in favor of preliminary approval. As stated above, while
9 Plaintiffs believe their case is a strong one, there is substantial risk. Data breach cases are, by nature,
10 especially risky and expensive. Such cases also are innately complex. *See, e.g., In re Equifax Inc.*
11 *Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800, 2020 WL 256132, at *32-33 (N.D. Ga. Mar.
12 17, 2020) (recognizing the complexity and novelty of issues in data breach class actions). This case
13 is no exception to that rule. It involves nearly four million Settlement Class Members, complicated
14 and technical facts, a well-funded and motivated defendant, and numerous contested issues on class
15 certification and substantive defenses.

16 There are numerous substantial hurdles that Plaintiffs would have to overcome before the
17 Court might find a trial appropriate. First, given the early stage of the litigation, the legal sufficiency
18 of Plaintiffs’ pleading was not tested by a motion to dismiss, including Article III standing.
19 Establishing a cognizable injury tied to Kroger’s conduct (as opposed to, for instance, another data
20 breach or some other cause) can present challenges. *See, e.g., Krottner v. Starbucks Corp.*, 406
21 F.App’x 129 (9th Cir. 2010) (holding that, although plaintiffs established injury-in-fact for standing
22 purposes, they failed to allege cognizable damages in a data breach case); *Pruchnicki v. Envision*
23 *Healthcare Corp.*, 845 F. App’x 613, 614 (9th Cir. 2021) (affirming dismissal of data breach class
24 action for failure to allege cognizable damages).

25 Data breach cases, particularly, face substantial hurdles in surviving even past the pleading
26 stage and are among the most risky and uncertain of all class action litigation. *See, e.g., Hammond*
27 *v. The Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060, 2010 WL 2643307, at *1 (S.D.N.Y. June 25,
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1 2010) (collecting cases). Kroger likely would argue that certification is not appropriate for
2 numerous reasons, including because the compromised Class Member PII is not uniform among
3 class members. Kroger also likely would argue that it is not liable because it retained Accellion in
4 the first place (a supposedly secure third-party data transferor with a file transfer service), was never
5 informed by Accellion that the FTA product was not secure, and even purchased Kiteworks and
6 was in the process migrating to that product. *See, supra*, Section V.B.1. Kroger likely would argue
7 that Accellion is solely at fault for the FTA Data Breach, and thus that Kroger is not liable at all.

8 Were litigation to proceed, there would be numerous expert reports and costly depositions,
9 which would present significant expenses. It is also not certain that the Court would approve
10 Plaintiffs' damages theories. As in any data breach class action, establishing causation and damages
11 on a class-wide basis is largely uncharted territory and full of uncertainty.

12 The California statutory claims also face significant risk of dismissal on the pleadings or an
13 unfavorable disposition at summary judgment. Both statutes are relatively new and remain largely
14 untested in motion to dismiss, summary judgment, and class certification proceedings.

15 For example, California courts have ruled that under the CMIA, a plaintiff may not recover
16 statutory damages due to mere theft of medical information; rather, plaintiffs must allege that an
17 unauthorized person actually viewed the confidential information. *Sutter Health v. Superior Ct.*,
18 227 Cal. App. 4th 1546, 1550 (2014); *see also Regents of University of California v. Superior*
19 *Court*, 220 Cal. App. 4th 549 (2013) (holding that plaintiff did not state claim under CMIA because
20 plaintiff had not alleged that any unauthorized person actually viewed the medical records allegedly
21 stolen). Kroger would likely argue that criminals did not actually view the stolen PII, and it would
22 further rely heavily on its ransom payment and efforts to secure the stolen PII to undercut the legal
23 sufficiency of this claim.

24 Other decisions concerning the CMIA create potential risks for the claim. For example,
25 Kroger would argue that Plaintiffs have not alleged a release of, and that the breach did not
26 compromise, medical history and treatment information—allegations that Kroger would argue are
27 required for CMIA liability. *See Eisenhower Medical Center v. Superior Court (Malanche)*, No.
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1 E058378, 2014 WL 2115216, at *4 (Cal. Ct. App. May 21, 2014) (holding that “under the CMIA
2 a prohibited release . . . must also include information relating to medical history . . . or treatment
3 of the individual.”). Kroger may also assert that it is not a covered entity under the CMIA, and take
4 the position that under Cal. Civ. Code § 56.05(m), it does not meet the definition of a “provider of
5 health care.”

6 The CCPA claim also bears significant risks. This law became effective only on January 1,
7 2020, and there is still very limited decisional law interpreting this statute and analyzing private
8 causes of action brought pursuant to it. Were this litigation to continue, Kroger would attack the
9 merits of this claim. For example, the CCPA’s private cause of action provision, Cal. Civ. Code §
10 1798.150(a)(1), states that liability may be found only where the unauthorized disclosure of
11 protected information occurs “as a result of the business’s violation of the duty to implement and
12 maintain reasonable security procedures and practices. . . .” *Id.* Kroger would likely dispute that it
13 violated any duty, and would argue that it did maintain reasonable data security measures.

14 Kroger may also raise challenges to the CCPA claim on standing grounds for Class
15 Members. *See* Cal. Civ. Code § 1798.150(a)(1) (providing for private cause of action only for
16 individuals who had information under § 1798.81.5(d)(1)(A) impacted in combination with their
17 name); *see also Rahman v. Marriott Int’l, Inc.*, No. SACV2000654, 2021 WL 346421, at *3 (C.D.
18 Cal. Jan. 12, 2021) (dismissing CCPA claim for lack of standing where plaintiff’s more sensitive
19 information, such as credit card numbers, SSN, or passports, was not stolen). Kroger further would
20 dispute standing and injury under the CCPA based upon its claimed cure of the alleged violations.
21 *See, supra*, Sec. III.A.

22 Finally, the CCPA explicitly exempts “medical information” and “providers of health care”
23 that are otherwise covered by the CMIA. *See* Cal. Civ. Code § 1798.145(c)(1)(A)-(B). If litigation
24 were to continue, Kroger would argue that individuals whose medical, health, or pharmacy
25 information was exposed in the FTA Data Breach cannot recover under the CCPA, and that those
26 individuals can only seek recovery under the CMIA. The Settlement avoids the risk of non-recovery
27 under the CCPA, especially in view of the risks inherent to the CMIA claim (discussed *supra*).
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1 The Settlement is a prudent course in view of these high risks. Given that all Class Members
2 will be eligible to elect CMIS or cash payments, the Settlement provides benefits that address all
3 potential harms of a data breach without the substantial risk of continued litigation, which includes
4 the risk of dismissal or judgement against Plaintiffs.

5 **3. The Risk of Maintaining Class Status Through Trial**

6 Plaintiffs' case is still in the pleading stage, and the Parties have not briefed class
7 certification in this action. Class certification presents substantial risk, particularly given that
8 different types of information were affected for different class members. Data breach law is
9 developing so that even if Plaintiffs obtained class certification, there is no guarantee that the class
10 action status would be maintained. Kroger would likely seek a Rule 23(f) appeal of any decision
11 by the Court granting class certification, resulting in additional delay to Class Members. The
12 significant risk of obtaining and maintaining class certification in this case supports preliminary
13 approval.

14 **4. The Amount Offered in Settlement Is Fair**

15 The \$5 million non-reversionary Settlement Fund is an excellent result for the Class. With
16 this fund, all Class Members will be eligible for a Settlement Payment in the form of distribution
17 for the CMIS, Documented Loss Payment, or a Cash Fund Payment. SA ¶¶ 60, 71. The Settlement
18 Fund will be applied to pay all Administrative Expenses, Notice Expenses, the taxes to the
19 Settlement Fund, any Service Awards, and any payment of a Fee Award and Costs. *Id.* ¶ 63. Any
20 funds remaining in the Net Settlement Fund after distribution(s) to Class Members will be
21 distributed in a subsequent Settlement Payment to Class Members. *Id.* ¶ 78.

22 Based on the size of the breach and per-capita figures, the Settlement presents a robust relief
23 package and valuable outcome for the Class compared to other recent data breach class action
24 settlements. *See, e.g., In re The Home Depot, Inc. Customer Data Sec. Breach Litig.*, No. 1:14-MD-
25 02583, 2016 WL 6902351, at *7 (N.D. Ga. Aug. 23, 2016) and ECF No. 181-2 ¶¶ 22, 38 (\$13
26 million settlement for approximately 40 million class members); *In re Target Corp. Customer Data*
27 *Sec. Breach Litig.*, MDL No. 14-2522, 2017 WL 2178306, at *1-2 (D. Minn. May 17, 2017) (\$10
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1 million dollar settlement for nearly 100 million class members); *In re LinkedIn User Priv. Litig.*,
 2 309 F.R.D. 573, 582 (N.D. Cal. 2015) (settlement fund of \$1.25 million for claims related to
 3 approximately 6.4 million LinkedIn users' stolen account passwords). Furthermore, Plaintiffs
 4 successfully obtained substantive and meaningful injunctive relief as part of this Settlement. *See*
 5 *e.g.*, *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1114 (9th Cir. 2020) (inclusion of "enhanced
 6 disclosures and practices changes" in settlement agreement). The chart below demonstrates the
 7 quality of this Settlement as compared to other data breach settlements:
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Case Title	No. of Class Members	Settlement Fund	Amount Per Class Member	Credit Monitoring
<i>Cochran et al. v. The Kroger Co.</i>	3.82M	\$5M	\$1.31	2 years
<i>In re Target Corp. Customer Data Breach Security Litigation</i>	97.5M	\$10M	\$0.10	Documented Cost Reimbursement
<i>In re LinkedIn User Privacy Litig.</i>	6.4M	\$1.25M	\$0.20	N/A
<i>In re The Home Depot Inc. Customer Data Security Breach Litig.</i>	40M	\$13M	\$0.33	18 Months
<i>In re Yahoo! Inc. Customer Data Breach Litigation</i>	194M	\$117.5M	\$0.61	2 years
<i>Adlouni v. UCLA Health Systems Auxiliary, et al.</i>	4.5M	\$2M	\$0.44	2 years
<i>Atkinson, et al. v. Minted, Inc.</i>	4.1M	\$5M	\$1.22	2 years
<i>In re Experian Data Breach Litigation</i>	16M	\$22M	\$1.37	2 years
<i>In re Anthem, Inc. Data Breach Litigation</i>	79.2M	\$115M	\$1.45	2 years
<i>In re Equifax Inc. Data Security Breach Litigation</i>	> 147M	\$380.5M	\$2.59	4 years
<i>In re Premera Blue Cross Customer Data Security Breach Litigation</i>	8.86M	\$32M	\$3.61	2 years
<i>Winstead v. ComplyRight, Inc.</i>	665,689	\$3.025M	\$4.54	2 years

1 Wolfson Decl. ¶ 40. The Settlement amount strongly supports preliminary approval.

2 **5. The Proposed Method of Distribution Is Highly Effective**

3 Rule 23(e)(2)(C)(ii) requires consideration of “the effectiveness of any proposed method of
4 distributing relief to the class, including the method of processing class-member claims.” Fed. R.
5 Civ. P. 23(e). “Often it will be important for the court to scrutinize the method of claims processing
6 to ensure that it facilitates filing legitimate claims. A claims processing method should deter or
7 defeat unjustified claims, but the court should be alert to whether the claims process is unduly
8 demanding.” *Id.*, Advisory Comm. Note to 2018 amendment.

9 To file a claim, Settlement Class Members need only complete a Claim Form (which is in
10 plain language and straightforward to complete) and submit it along with documents supporting
11 their claimed losses. SA ¶¶ 71(c), 81 and Ex. A; Azari Decl. ¶ 21. Claim Forms may be submitted
12 electronically or in hard copy. SA ¶ 81. All claims will be processed by Epiq, an experienced and
13 nationally recognized class action administration firm. *Id.* ¶ 81(b); Azari Decl. ¶ 4. Epiq plans to
14 assign specific case numbers to Settlement Class Members. Azari Decl. ¶ 13. The methods of
15 distributing relief to Settlement Class Members includes both digital and physical check avenues.
16 *Id.* ¶ 23.

17 Following consultation with the Administrator and based upon Class Counsel’s previous
18 experience in and knowledge of similar cases, Class Counsel expect the claims rate in this
19 Settlement to be between 1-3%. Barnow Decl. ¶ 24; Wolfson Decl. ¶ 25; Azari Decl. ¶ 27. The
20 claims rates in previous data breach settlement support this conclusion:

21

22 Case Title	Approx. Class Size	No. of Claims	Claims Rate
23 <i>Gordon, et al. v. Chipotle Mexican Grill, Inc.</i> , No. 1:17-cv-01415 (D. Colo.), ECF 103 at 1 & ECF 124 at ¶ 13	10,000,000	6,354	< 0.1%
24 <i>In re Target Corp. Customer Data Security Breach Litigation</i> , MDL No. 14-2522 (D. Minn.), ECF 615 at ¶¶ 4, 14	97,447,983	225,856	~0.2%
25 <i>In re The Home Depot Inc. Customer Data Security Breach Litigation</i> , No. 1:14-md-02583 (N.D. Ga.), ECF 181-1 at 25 & ECF 245-1 at ¶ 3	40,000,000	127,527	~0.3%

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1	<i>Corona v. Sony Pictures Entertainment, Inc.</i> , No. 2:14-cv-9600 (C.D. Cal.), ECF 145-1 at 11 n.8 & ECF 164 at 2	435,000	3,127	~0.7%
2				
3	<i>In re LinkedIn User Privacy Litig.</i> , No. 12-cv-03088-EJD (N.D. Cal.), ECF 122 at 2 & ECF 145-2 at ¶ 12	6,400,000	47,336	~0.7%
4				
5	<i>In re Banner Health Data Breach Litigation</i> , No. 2:16-cv-2696 (D. Ariz.), ECF 170 at 1, and ECF 195-3 at ¶ 12	2,900,000	39,091	~1.3%
6				
7	<i>In re Anthem, Inc. Data Breach Litig.</i> , No. 5:15-md-02617-LHK (N.D. Cal.), ECF 1007 at 4 & ECF 1007-6 at ¶ 2	79,200,000	1,380,000	~1.7%
8				
9	<i>Adlouni v. UCLA Health Systems Auxiliary, et al.</i> , BC589243 (Cal. Super. Ct.), Wolfson Decl. ¶ 56.	4,500,000	108,736	~2.4%
10				
11	<i>In re Experian Data Breach Litigation</i> , No. 8:15-cv-01592-JLS-DFM (C.D. Cal.), ECF 286-1 at 20 & ECF 309-3 at ¶ 8.	14,931,074	436,006	~2.9%
12				
13	<i>Sheth v. Washington State University</i> , No. 3:17-cv-05511 (W.D. Wash.)	992,327	37,712	~3.8%
14				
15	<i>Winstead v. ComplyRight, Inc.</i> , No. 1:18-cv-4990 (N.D. Ill.), Barnow Decl. ¶ 31.	665,680	28,073	~4.2%
16				
17	<i>In re Premera Blue Cross Customer Data Security Breach Litigation</i> , No. 3:15-md-2633 (D. Or.), ECF 273 at 12-13 & ECF 301 at ¶ 13	8,855,764	803,710	~9.1%
18				
19	<i>In re Equifax Inc. Data Security Breach Litigation</i> , No. 1:17-md-2800 (N.D. Ga.), ECF 739-1 at 20 & ECF 900-4 at ¶ 5	147,000,000	15,000,000	~10.2%

6. The Extent of Discovery Completed and the Stage of the Proceedings

While this matter is still in its early stages, Plaintiffs have diligently developed the facts and legal claims in this case. Plaintiffs conducted confirmatory discovery to establish, *inter alia*, facts relevant to the breach and Kroger's liability, Kroger's reaction to and actions after the breach, and class size. Wolfson Decl. ¶¶ 28-38; Barnow Decl. ¶ 29(a)-(j). Plaintiffs and their counsel have stayed abreast of all material developments involving the FTA Data Breach, including those impacting Kroger. Wolfson Decl. ¶ 13; Barnow Decl. ¶ 13. Counsel gathered the press releases and statements concerning the FTA Data Breach, reviewed the information Kroger has provided on its website about the breach (*see* <https://www.kroger.com/i/accellion-incident> (last visited June 30, 2021)), reviewed Kroger's data breach notification letters, reviewed the Mandiant forensics report

1 (see, *supra*, n.3), and reviewed numerous news stories and other publicly-available sources of
 2 information relating to the FTA Data Breach, including its impact on Kroger. Wolfson Decl. ¶ 13;
 3 Barnow Decl. ¶ 13.

4 The Parties engaged in informal discovery. As part of the negotiations and Settlement, the
 5 Parties engaged in confirmatory discovery to not only verify the relevant facts, but also the fairness
 6 of the Settlement. Wolfson Decl. ¶¶ 28-38; Barnow Decl. ¶ 29(a)-(j). Proposed Class Counsel's
 7 knowledge of facts of this case and of the practice area more broadly informed Plaintiffs' clear
 8 view of the strengths and weaknesses of the case, the decision to go to mediation with Kroger, and
 9 the decision to recommend that the Court grant preliminary approval to the Settlement. Wolfson
 10 Decl. ¶ 43; Barnow Decl. ¶¶ 34.

11 **7. The Experience and Views of Counsel**

12 Proposed Class Counsel include attorneys who have substantial experience in complex class
 13 action litigation, including in data breach and data privacy cases. Wolfson Decl. ¶¶ 48-63 & Ex. 1;
 14 Barnow Decl. ¶¶ 38-50 & Ex 2. For example, Ms. Wolfson has decades of experience in privacy
 15 litigation, serves as co-lead counsel in the ongoing Zoom, Ring, and Google Location History
 16 privacy cases, and served as co-lead counsel both in the *Premera* and *Experian* data breach class
 17 actions, among numerous others. Wolfson Decl. ¶¶ 48-63. Ben Barnow is nationally recognized for
 18 his experience in leading some of the nation's largest consumer class actions and has been
 19 recognized as a *Titan of the Plaintiffs Bar*.⁷ As a court-appointed lead counsel or equivalent
 20 designation, he has successfully led over forty major class actions (including MDLs) where class-
 21 wide recoveries were achieved, resulting in benefits valued in excess of five billion dollars being
 22 made available to class members. This includes leading eight noteworthy privacy class actions
 23 where class settlements were achieved, including, *inter alia*, *In Re: Sony Gaming Networks and*
 24 *Customer Data Security Breach Litigation*, MDL 2258, *In Re: TJX Retail Security Breach*
 25 *Litigation*, MDL No. 1838, *In Re: Countrywide Fin. Corp. Customer Data Security Breach*
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27 ⁷ See Sindhu Sundar, *Titan of the Plaintiffs Bar: Ben Barnow*, LAW360 (Oct. 8, 2014, 7:40
 28 PM), www.law360.com/articles/585655/titan-of-the-plaintiffs-bar-ben-barnow.

1 *Litigation*, MDL No. 1998, *Lockwood v. Certegy Check Services, Inc.*, 07-cv-01434 (M.D. Fla.),
 2 *Rowe v. Unicare Life and Health Insurance Co.*, 2009cv2286 (N.D. Ill.), *Orr v. InterContinental*
 3 *Hotels Group, PLC.*, 17-cv-1622 (N.D. Ga.), *In re: Zappos.com Inc. Customer Data Security*
 4 *Breach Litigation*, 12-cv-325 (D. Nev.) and *Winstead v. ComplyRight*, No. 1:18-cv-4990 (N.D. Ill.).
 5 Barnow Decl. ¶¶ 38-50 & Ex. 2.

6 Proposed Class Counsel fully endorse the Settlement as fair, reasonable, and adequate to
 7 the Class, and do so without reservation. Wolfson Decl. ¶¶ 39, 45; Barnow Decl. ¶¶ 7, 50.

8 **8. The Presence of a Governmental Participant**

9 Although Kroger reports having cooperated with law enforcement in the wake of the FTA
 10 Data Breach, no governmental agency is involved in this litigation. The Attorney General of the
 11 United States and Attorneys General of each State will be notified of the proposed Settlement
 12 pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715, and will have an opportunity to raise
 13 any concerns or objections. Azari Decl. ¶ 28.

14 **9. The Reaction of Class Members to the Proposed Settlement**

15 The Class has yet to be notified of the Settlement and given an opportunity to object, so it
 16 is premature to assess this factor. Before the final approval hearing, the Court will receive and be
 17 able to review all objections or other comments received from Class Members, along with a full
 18 accounting of all opt-out requests.

19 **10. The Settlement Is the Product of Arm's-Length Negotiations** 20 **that Were Free of Collusion**

21 The Court must be satisfied that “the settlement is not the product of collusion among the
 22 negotiating parties.” *In re Bluetooth Headset*, 654 F.3d at 946-47.

23 Plaintiffs achieved the Settlement in contested litigation and through arm's-length
 24 negotiations. Plaintiffs undertook substantial investigation of the underlying facts, causes of action,
 25 and potential defenses to those claims. Wolfson Decl. ¶¶ 2, 13, 28-38.

26 When settlement negotiations began, Plaintiffs and their counsel had a clear view of the
 27 strengths and weaknesses of their case and were in a strong position to make an informed decision
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1 regarding the reasonableness of a potential settlement. The Parties engaged in extensive arm's
2 length negotiations, including a full-day mediation session before a mutually agreed upon mediator,
3 the Hon. Jay C. Gandhi (Ret.) on May 13, 2021. *Id.* ¶ 19.

4 Judge Gandhi, a highly respected and experienced mediator, has extensive experience in
5 class action litigation, both from his time as a magistrate judge in the Central District of California
6 and as a result of mediating many class actions, including multiple data breach cases where a
7 settlement was reached and subsequently approved.⁸ His involvement here further confirms the
8 absence of collusion. *G. F. v. Contra Costa Cnty.*, No. 13-cv-03667, 2015 WL 4606078, at *13
9 (N.D. Cal. July 30, 2015) (“[T]he assistance of an experienced mediator in the settlement process
10 confirms that the settlement is non-collusive.”) (internal quotation marks and citation omitted).

11 *Bluetooth* identified three “signs” of possible collusion: (1) “when counsel receive[s] a
12 disproportionate distribution of the settlement”; (2) “when the parties negotiate a ‘clear sailing
13 arrangement,’” under which the defendant agrees not to challenge a request for an agreed-upon
14 attorney’s fee; and (3) when the agreement contains a “kicker” or “reverter” clause that returns
15 unawarded fees to the defendant, rather than the class. *Bluetooth, supra*, 654 F.3d at 947.

16 None of the *Bluetooth* signs are present here. There is no “free sailing provision” and Class
17 Counsel will not seek fees and expenses that exceed the 25% of the Fund benchmark set by
18 *Bluetooth. Id.* at 942; SA ¶¶ 99-101; *see, supra*, Sec. IV.H. There is no reversion of the Settlement
19 Fund (SA ¶ 62), but rather the Settlement makes every effort to distribute any Residual to the Class.
20 *See id.* ¶ 78. Proposed Class Counsel will apply for fees from this non-reversionary Settlement
21 Fund, so that there was every incentive to secure the largest fund possible.

22 There is no indication or existence of collusion or fraud in the settlement negotiations and
23 the Settlement that is being presented to the Court.

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26 ⁸ *See, e.g., In re Premera Blue Cross Customer Data Sec. Breach Litig.*, No. 3:15-MD-2633,
27 2019 WL 3410382, at *1 (“*Premera*”) (D. Or. July 29, 2019); *In re Banner Health Data Breach*
28 *Litigation*, No. 2:16-cv-02696-PHX-SRB (D. Ariz. Dec. 5, 2019), ECF No. 170, at 6 (parties
engaged in private mediation with Judge Gandhi).

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11. The Proposed Notice Plan is Appropriate

Rule 23 requires that prior to final approval, “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1). For classes certified under Rule 23(b)(3), “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). The Rule provides, “notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.” *Id.*

“The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044 (2005). The best practicable notice is that which is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 252 (2001) (“As a general rule, class notice must strike a balance between thoroughness and the need to avoid unduly complicating the content of the notice and confusing class members.”).

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The notice should provide sufficient information to allow Class Members to decide whether they should accept the benefits of the settlement, opt out and pursue their own remedies, or object to its terms. *Id.* at 251-52. “[N]otice is adequate if it may be understood by the average class member.” *Warner v. Toyota Motor Sales, U.S.A., Inc.*, No. CV 15-2171, 2016 WL 8578913, at *14 (C.D. Cal. Dec. 2, 2016) (quoting 4 Newberg on Class Actions § 11:53, at p. 167 (4th ed. 2013)).

The Notice Plan agreed to by the Parties and approved by the Administrator includes direct notice by emailing or mailing the Summary Notice to all Settlement Class Members, and reminder emails to those for whom email addresses are available. SA ¶¶ 85, 88; Azari Decl. ¶¶ 13-16. The Administrator will design and conduct an internet digital advertising publication notice program and Settlement Website, which will continue through the Claims Deadline. SA ¶ 86; Azari Decl.

1 ¶¶ 17-18. Furthermore, the Summary Notice will be posted on Kroger’s internal intranet called
2 “The Feed,” to which current Kroger associates have access and which they frequently view for
3 company updates and shift schedules. SA ¶ 86.

4 The Long Form Notice is clear, precise, informative, and meets all the necessary standards,
5 allowing Class Members to make informed decisions with respect to whether they remain in or opt
6 out of the Settlement Class, or object to the Settlement. It will include a clear description of the
7 claims and the history of the litigation; a description of the Class; a description of the Settlement
8 and the claims being released; the names of Class Counsel; a statement of the maximum amount of
9 attorneys’ fees that will be sought by Class Counsel; the amount Plaintiffs will seek for Service
10 Awards; the Fairness Hearing date; a description of Class Members’ opportunity to appear at the
11 hearing; a statement of the procedures and deadlines for requesting exclusion and filing objections
12 to the Settlement; and the manner in which to obtain further information. *See In re Prudential Ins.*
13 *Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 496 (D.N.J. 1997), *aff’d*, 148 F.3d 283 (3d Cir.
14 1998); Manual for Complex Litigation § 30.212 (4th ed. 2004) (“MCL”) (Rule 23(e) notice should
15 provide a summary of the litigation and the settlement to apprise class members of the right and
16 opportunity to inspect the complete settlement documents, papers, and pleadings).

17 The proposed Notice Plan represents the best notice practicable. It was reviewed and
18 analyzed to ensure it meets the requisite due process requirements. Azari Decl. ¶¶ 6, 26. Copies of
19 all the notice documents are attached as exhibits to the Settlement Agreement; they are clear and
20 concise, and directly apprise Settlement Class Members of all the information they need to know
21 to make a claim, opt out, or object. Fed. R. Civ. P. 23(c)(2)(B); *see also* Azari Decl. ¶ 21. The
22 Notice Plan is consistent with, and exceeds, other similar court-approved notice plans, the
23 requirements of Fed. Civ. P. 23(c)(2)(B), and the Federal Judicial Center (“FJC”) guidelines for
24 adequate notice.

25 As there is no alternative method of notice that would be practicable here or more likely to
26 notify Class Members, the proposed Notice plan constitutes the best practicable notice to Class
27 Members and complies with the requirements of Due Process.

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12. Appointment of Settlement Class Counsel

Under Rule 23, “a court that certifies a class must appoint class counsel [who must] fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(B). In making this determination, courts consider the following attributes: the proposed class counsel’s (1) work in identifying or investigating potential claims, (2) experience in handling class actions or other complex litigation, and the types of claims asserted in the case, (3) knowledge of the applicable law, and (4) resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

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Here, proposed Settlement Class Counsel have extensive experience prosecuting complex consumer class action cases, and specifically data breach and data privacy cases. Wolfson Decl. ¶¶ 48-63 and Ex. 1; Barnow Decl. ¶¶ 38-50 & Ex. 2. As described above and in their supporting declarations and firm resumes, Proposed Counsel meet all Rule 23(g)(1)(A) factors.

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Accordingly, the Court should appoint Ahdoot & Wolfson, PC, and Barnow and Associates, P.C., as Class Counsel.

13. Settlement Deadlines and Schedule for Final Approval

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In connection with preliminary approval, the Court must set a final approval hearing date, dates for mailing the Notices, and deadlines for objecting to the Settlement and filing papers in support of the Settlement. Plaintiffs propose the following schedule, which the parties believe will provide ample opportunity for Class Members to decide whether to request exclusion or object:

EVENT	DATE
Notice Date (U.S. Mail and email)	Within 30 Days from the Preliminary Approval Order
Deadline to Submit Claim Forms	90 Days from the Notice Date
Deadline to Submit Motion for Attorneys’ Fees, Costs and Incentive Awards	At Least 35 Days Before the Objection Deadline
Deadline to Object and Comment to the Settlement	75 Days from the Notice Date

EVENT	DATE
Deadline to Submit Request for Exclusion	75 Days from the Notice Date
Final Fairness Hearing	To be Determined

VI. CONCLUSION

Plaintiffs, Ricky Cochran, Alain Berrebi, and Jaramey Stobbe respectfully request that the Motion be granted and the Court enter an order: (1) certifying the proposed class for settlement; (2) preliminarily approving the proposed class action Settlement; (3) appointing Plaintiffs as Class Representatives and undersigned counsel as Class Counsel; (4) appointing Epiq as the Settlement Administrator; (5) approving the proposed Class Notice Plan and related Settlement administration documents; and (6) approving the proposed class settlement administrative deadlines and procedures, including setting a final fairness hearing date, and approving the proposed procedures regarding objections, exclusions and submitting Claim Forms.

Dated: June 30, 2021

Respectfully submitted,

/s/ Tina Wolfson

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