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13 *Class Counsel for Plaintiffs and the Class*

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

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

19 Plaintiffs,

20 v.

21 THE KROGER CO. and ACCELLION, INC.,

22 Defendants.

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

**PLAINTIFFS’ NOTICE OF MOTION  
AND MOTION FOR ATTORNEYS’  
FEES AND REIMBURSEMENT OF  
EXPENSES, AND FOR AWARD OF  
CLASS REPRESENTATIVE SERVICE  
PAYMENTS; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

DATE: March 10, 2022  
TIME: 9:00 A.M.  
JUDGE: Hon. Edward J. Davila  
CTRM: 4, 5th Floor

[Filed concurrently with the Declarations of  
Ben Barnow, and Tina Wolfson]

**NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on March 10, 2022, 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 (collectively, “Plaintiffs”), will and hereby do move for: (a) an Order awarding Class Counsel’s attorneys’ fees in the amount of \$1,231,628; and (b) reimbursement of litigation expenses in the amount of \$18,372, which together with attorneys’ fees represents 25% of the \$5,000,000 Settlement Fund recovered on behalf of the Class; and (c) Service Awards of \$1,500 for each of the three Plaintiffs.

Plaintiffs respectfully request that the Court grant this motion because: (a) the requested attorneys’ fees are fair and reasonable because Class Counsel were able to achieve an extraordinary result through a Settlement that provides tangible and immediate benefits to Class Members nationwide in a case that faced extremely high risks if litigation continued, (b) Class Counsel expended extensive and longstanding efforts to create a non-reversionary Settlement Fund of \$5 million; (c) the requested fees comport with Ninth Circuit case law developed in similar common fund litigation; (d) the expenses for which reimbursement is sought are reasonable and necessarily incurred in connection with the prosecution of this Action; and (e) the Service Awards are modest and justified in light of Plaintiffs’ commitment to the case;

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities; the concurrently filed Declarations of Ben Barnow (“Barnow Decl.”) and Tina Wolfson (“Wolfson Decl.”); the Class Action Settlement and Release (the “Settlement”) previously filed with the Court (ECF No. 32), and all papers filed in support thereof; the argument of counsel; all papers and records on file in this matter; and such other matters as the Court may consider.

DATED: January 14, 2022

Respectfully submitted,

/s/ Tina Wolfson  
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*Class Counsel for Plaintiffs and the Class*

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Faced with the risks inherent to data breach lawsuits, Class Counsel expeditiously secured an exceptional \$5 million Settlement<sup>1</sup> that compensates Class Members for their losses and provides meaningful prospective relief which protects against future risks arising from the FTA Data Breach. Class Counsel now respectfully request that the Court award \$1,231,628 in attorneys' fees and reimbursement of \$18,372 in expenses as compensation for their efforts. The requested attorneys' fees and expenses, in the amount of \$1,250,000, amounts to 25% of the \$5,000,000 Settlement Fund, and represent a 2.06 multiplier on the collective current lodestar of \$597,257.50. At the Ninth Circuit's 25% benchmark, the requested fees are fair and reasonable given the concrete monetary relief the Settlement provides, along with its substantive and meaningful injunctive relief.

The Court has discretion to award Class Counsel fees as "a percentage of [the] common fund" resulting from their efforts, and Class Counsel respectfully request such an award here. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB (JSC), 2017 WL 1047834, at \*1 (N.D. Cal. Mar. 17, 2017); *see also Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 489-90 (2016) ("The lodestar method has been . . . criticized for discouraging early settlement and consuming too large an amount of judicial resources in its application."). All the factors considered by Ninth Circuit courts that take the percentage approach support the requested award, including the results achieved, the risk of litigation, Class Counsel's requisite skill, the quality of Class Counsel's work, the contingent nature of their representation, and awards made in comparable cases.

Although not required in a non-reversionary common fund context, a lodestar cross-check further supports the fee request here. *See, e.g., id.* at 506 ("[T]rial courts have discretion to conduct a lodestar cross-check on a percentage fee . . . ; they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee."). Class

---

<sup>1</sup> Unless otherwise noted, all capitalized terms not defined herein have the same meaning ascribed to them in the Class Action Settlement Agreement and Release, Section IV.A (ECF No. 32).

1 Counsel's efforts have been extensive, totaling 828.4 hours, and will continue. As further elaborated  
2 below, Counsel's efforts included, summarily:

- 3 • A thorough pre-filing investigation of all factual and legal issues surrounding the  
4 FTA Data Breach;
- 5 • After other cases relating to the FTA Data Breach were independently filed, Class  
6 Counsel engaged in efforts to coordinate all of the cases and proceed forward in a  
7 collaborative manner;
- 8 • Preparation of a motion to consolidate when efforts to stipulate to consolidate all  
9 of the Accellion FTA Data Breach cases filed in this Court failed;
- 10 • Preparation of the detailed original Complaint and First Amended Complaint;
- 11 • Mediation before the Hon. Judge Jay C. Gandhi (Ret.) of JAMS, including the  
12 exchange of information to prior to the mediation;
- 13 • Engaged in rigorous negotiation to finalize the Settlement's terms, exchanged  
14 numerous drafts of the Settlement Agreement and its exhibits, negotiated a myriad  
15 of details to maximize the benefits to the Class Members, and conducted detailed  
16 confirmatory discovery to ensure that the Settlement is fair, reasonable, and  
17 adequate;
- 18 • Solicited competing bids and negotiated with third-party administrators for  
19 settlement notice and administration, and also solicited competing bids from  
20 alternative providers of credit monitoring and insurance services ("CMIS");
- 21 • Memorialized the Settlement Agreement and prepared all related documents; and
- 22 • Successfully opposed objections and motion for intervention by competing  
23 Plaintiffs' Counsel.

24 In addition, Class Counsel will spend significant additional time on this matter before it  
25 concludes, which is not included in the lodestar to date. Class Counsel will be required to: oversee and  
26 assist with administration of the Settlement and distribution of the Settlement Fund, attend the final  
27 approval hearing, ensure that Kroger complies with the injunctive relief aspects of the Settlement,  
28 respond to objections, and may be required to litigate this matter on appeal.

Based solely on fees incurred to date, the requested fee results in a lodestar cross-check  
multiplier of 2.06, which is within the range of multipliers approved in the Ninth Circuit, and is  
supported here given the complexity of the issues involved, the contingent nature of the representation,  
and the other factors considered by courts undertaking this approach.

Finally, Class Counsel's request is supported by Class Members' reaction so far to the  
Settlement. Although the deadlines to submit an opt-out request, objection, or Claim Form have not

1 passed, as of the date of this filing six weeks have passed since commencement of the dissemination  
 2 of notice. As of January 7, 2022, 38,823 Claim Forms have been submitted, only 11 people opted for  
 3 exclusion, and no Settlement Class Member has submitted an objection (other than those objections  
 4 interposed by competing Plaintiffs' Counsel which the Court overruled).<sup>2</sup> The 11 exclusions represent  
 5 0.0003% of the Class, a strikingly low number. Thus, to date the Class supports the Settlement,  
 6 including the requested fee award.

7 In addition, Plaintiffs respectfully request that the Court approve Service Awards of \$1,500 to  
 8 each of the three Plaintiffs, in recognition of their significant time and effort in pursuing this litigation.  
 9 Plaintiffs actively participated in the prosecution of the case in order to obtain a positive outcome for  
 10 the Class and fulfilled all their duties. No Settlement or recovery would have been possible without  
 11 their vital role.

12 For all of the foregoing reasons and those articulated below, the requested Fee Award and Costs  
 13 and Service Awards are fair and reasonable, and should be approved.

## 14 **II. BACKGROUND**

### 15 **A. Class Counsel Conducted Extensive Factual and Legal Investigations and** 16 **Diligently Litigated the Case**

17 Since this Action was filed in March 2021, Class Counsel persistently advanced and protected  
 18 the interests of the Class. Wolfson Decl. ¶ 8; Barnow Decl. ¶ 3. Before initiating the Action, Class  
 19 Counsel independently conducted an investigation of the factual circumstances of the FTA Data  
 20 Breach, the impact of the breach on FTA Customers, and the potential legal claims and defenses that  
 21 may be raised in this case. Wolfson Decl. ¶ 8; Barnow Decl. ¶ 4. Class Counsel analyzed the applicable  
 22 law, reviewed and analyzed relevant documents and data, and stayed abreast of all material  
 23 developments involving the FTA Data Breach. Wolfson Decl. ¶¶ 8, 10, 25; Barnow Decl. ¶ 6. For  
 24 example, Class Counsel gathered the press releases and statements concerning the breach; reviewed

25 \_\_\_\_\_  
 26 <sup>2</sup> See Declaration of Cameron R. Azari on Implementation and Adequacy of Notice Program ("Azari  
 27 Decl.") ¶¶ 31, 32, submitted in support of the concurrently filed Motion for Final Approval, ECF No.  
 28 104-1. The deadline for Class Members to request exclusion from, or object to, the Settlement is  
 February 18, 2022. The deadline to file a Claim Form is March 5, 2022. The final numbers of submitted  
 Claim Forms, opt-outs, and objections will be reported prior to the March 10, 2022 Final Fairness  
 Hearing.

1 the information Kroger has provided on its website about the breach (*see*  
2 <https://www.kroger.com/i/accellion-incident> (last visited Jan. 14, 2022); reviewed Kroger's data  
3 breach notification letters; reviewed and analyzed the detailed FTA Data Breach forensic report issued  
4 by Accellion's investigator Mandiant; reviewed numerous news stories and other publicly-available  
5 sources of information relating to the breach, including its impact on Kroger; and kept abreast of  
6 developments as they occurred, including news of additional FTA Customers being impacted by the  
7 breach. Wolfson Decl. ¶ 11; Barnow Decl. ¶ 6. In response to the breach, and in order to protect the  
8 interests of Class Members in California, Class Counsel compiled a detailed pre-suit notice letter and  
9 demand, which it delivered to Kroger, as required by the California Consumer Privacy Act, Cal. Civ.  
10 Code §1798.150(b). Wolfson Decl. ¶ 9.

11 Class Counsel also advocated zealously on behalf of the Plaintiffs and Class Members during  
12 the Settlement negotiation process. Wolfson Decl. ¶ 16; Barnow Decl. ¶ 9. After extensive pre-  
13 mediation negotiations and discussions, on May 13, 2021, the Parties attended mediation with Judge  
14 Gandhi. Wolfson Decl. ¶ 17; Barnow Decl. ¶ 9. The mediation session was spirited and hard-fought.  
15 Class Counsel and counsel for Kroger aggressively advocated for each side's positions and views  
16 during the mediation session. Wolfson Decl. ¶ 17; Barnow Decl. ¶ 9. Following the all-day mediation,  
17 Class Counsel reached an agreement in principle to settle this matter, but many of the terms and other  
18 details of the Settlement were yet to be finalized. Wolfson Decl. ¶ 19; Barnow Decl. ¶ 9.

19 During the weeks that followed the mediation, the Parties worked diligently and tirelessly to  
20 reach accord on the remaining details of the Settlement. Wolfson Decl. ¶ 19; Barnow Decl. ¶ 10. After  
21 reaching a settlement in principle, the parties commenced memorializing the full Settlement, which  
22 generated numerous additional rounds of protracted negotiations. Wolfson Decl. ¶ 21; Barnow Decl.  
23 ¶ 11. The parties negotiated the details of each specific aspect of the Settlement Agreement, including  
24 each of its many exhibits. Wolfson Decl. ¶ 21; Barnow Decl. ¶ 11. Class Counsel crafted, negotiated,  
25 and meticulously refined the final notice program and each document comprising the notice, with the  
26 assistance of a class action notice expert, to ensure that the information disseminated to Class  
27 Members is clear and concise. Wolfson Decl. ¶ 23; Barnow Decl. ¶ 15.

28

1           The information gleaned from investigation and research into the facts and potential legal  
2 claims enabled Class Counsel to assess the strengths and weaknesses of this case, analyze potential  
3 damages models that could be utilized at trial, and informed the decision to engage in negotiation with  
4 Defendant's Counsel about attending mediation and later settling the matter. Wolfson Decl. ¶ 25;  
5 Barnow Decl. ¶ 5. Class Counsel's diligence in preparing for mediation, including obtaining  
6 information necessary to analyze all claims and defenses, allowed Class Counsel to negotiate a robust  
7 relief package and valuable outcome for the Settlement Class, and to determine a fair and efficient  
8 structure and distribution plan. Wolfson Decl. ¶ 26; Barnow Decl. ¶ 5.

9           After the Settlement was filed, Class Counsel were faced with an attempt by competing  
10 plaintiffs' counsel to derail the Settlement. Wolfson Decl. ¶ 27; Barnow Decl. ¶ 16. This group of  
11 attorneys objected to the Settlement and filed a motion to intervene. Wolfson Decl. ¶ 27; Barnow  
12 Decl. ¶ 16. These attempts Class required Class Counsel to act quickly and efficiently. Wolfson Decl.  
13 ¶ 27; Barnow Decl. ¶ 16. Indeed, objector counsel filed a motion to intervene only six (6) days prior  
14 to the first preliminary approval hearing in this matter on August 5, 2021, leaving Class Counsel with  
15 little time to react. *See* ECF Nos. 57, 58, 75; Wolfson Decl. ¶ 28; Barnow Decl. ¶ 16. Class Counsel  
16 attempted to meet and confer with these attorneys, but to no avail (Wolfson Decl. ¶ 28), and thus  
17 opposed the motion to intervene and briefed the fact that the objections to the Settlement were without  
18 merit. *See* ECF Nos. 70, 87. After Class Counsel responded to objector counsel's motion to intervene  
19 and having reconvened for a second preliminary approval hearing before Judge Davila on October 28,  
20 2021, the Court granted preliminary approval of the Settlement. ECF No. 98. Class Counsel also  
21 prevailed over objector counsels' motion to intervene, which was denied by the Court. ECF No. 99.

22           After the Settlement received preliminary approval, Class Counsel worked closely with the  
23 Settlement Administrator to implement the Notice Plan, including implementation of the suggested  
24 revisions from the Court to the Claim Form, Summary Notice, and Long Form Notice. Wolfson Decl.  
25 ¶ 29; Barnow Decl. ¶ 15. Class Counsel continues to work closely with the Settlement Administrator  
26 during the ongoing Claims Period. Wolfson Decl. ¶ 29; Barnow Decl. ¶ 15. Class Counsel also  
27 continues to communicate with and assist Class Members who have reached out to Class Counsel  
28 about the Settlement and filing Claim Forms. Wolfson Decl. ¶ 29; Barnow Decl. ¶ 15.

1 Class Counsel has performed various other litigation related work during the pendency of this  
2 matter, included meetings, emails, and phone calls between co-counsel and with counsel for Kroger,  
3 communicating with the Plaintiffs regarding case developments and litigation strategy, attempting to  
4 meet and confer with objecting Plaintiffs' Counsel, and calls with numerous consumers who reached  
5 out to Class Counsel about this litigation. Wolfson Decl. ¶ 30; Barnow Decl. ¶ 7. Class Counsel will  
6 continue to diligently and efficiently litigate this matter through the Final Approval Hearing. Wolfson  
7 Decl. ¶ 31; Barnow Decl. ¶ 7.

8 **B. Class Counsel Engaged in Efforts to Coordinate and Move Separate Cases**  
9 **Together, in an Economic Fashion**

10 Following commencement of this action, Class Counsel took all necessary steps to efficiently  
11 prosecute the claims of the Plaintiffs and the Class Members. Wolfson Decl. ¶ 12; Barnow Decl. ¶ 8.  
12 Immediately after filing this case, counsel for the Parties began a dialogue about case management  
13 issues and engaged in multiple meet-and-confer discussions. Wolfson Decl. ¶ 12; Barnow Decl. ¶ 8.  
14 Plaintiffs' counsel already had been engaging in efforts to coordinate all of the cases filed in this  
15 District relating to the FTA Data Breach, including drafting a stipulation to consolidate all of those  
16 cases and set deadlines for submitting leadership applications. Wolfson Decl. ¶ 12; Barnow Decl. ¶ 8.  
17 After this Action was filed, Plaintiffs' counsel coordinated with Kroger's counsel to facilitate Kroger's  
18 inclusion in the stipulation. Wolfson Decl. ¶ 13; Barnow Decl. ¶ 8. Counsel for Plaintiffs also met and  
19 conferred with attorneys who filed cases relating to the FTA Data Breach, including cases against  
20 Kroger in other jurisdictions (i.e., in the Southern District of Ohio and the Eastern District of  
21 Michigan), to attempt to coordinate all FTA Data Breach actions before one court, but these efforts  
22 were unsuccessful. Wolfson Decl. ¶ 13; Barnow Decl. ¶ 8.

23 In view of the fact that many cases relating to the FTA Data Breach continued to be filed in  
24 multiple courts, two weeks after this action was commenced, on March 31, 2021, attorneys from  
25 Ahdoot & Wolfson, PC ("AW") filed a motion for transfer and centralization pursuant to 28 U.S.C. §  
26 1407 with the United States Judicial Panel on Multidistrict Litigation, seeking to transfer numerous  
27 FTA Data Breach-related actions in four district courts to this Court for centralized proceedings. *In re*  
28

1 *Accellion, Inc., Data Breach Litigation*, MDL No. 3002 (J.P.M.L. 2021), at ECF No. 1 (“JPML  
2 Motion”); Wolfson Decl. ¶ 14.

3 Dialogue between counsel for Plaintiffs and counsel for Kroger continued. Wolfson Decl. ¶  
4 15. On June 7, 2021, the Panel issued an order denying transfer. MDL No. 3002, ECF No. 88; Wolfson  
5 Decl. ¶ 15. That decision notwithstanding, the Parties continued to engage in meet and confer  
6 discussions, including discussions about potential early resolution of this matter and the factual and  
7 legal issues that may inform a settlement. Wolfson Decl. ¶ 15.

8 When efforts to stipulate to consolidate all of the FTA Data Breach cases filed in this Court  
9 failed, AW filed a motion to consolidate those cases, which includes this Action. *See Brown v.*  
10 *Accellion, Inc.*, No. 5:21-01155-EJD (N.D. Cal.), ECF No. 37. The motion to consolidate the Northern  
11 District of California cases remains pending as of the execution date of this filing. Wolfson Decl. ¶ 15.

### 12 **C. Class Counsel Obtained and Reviewed Extensive Information from Kroger**

13 Prior to the mediation session with Judge Gandhi, the Parties exchanged information to  
14 prepare for and facilitate a productive mediation session. Wolfson Decl. ¶ 18; Barnow Decl. ¶ 10. The  
15 Parties therefore communicated their respective positions regarding this litigation with each other and  
16 with the mediator. Wolfson Decl. ¶ 18; Barnow Decl. ¶ 10. Plaintiffs received and analyzed data  
17 relating to the impact of the FTA Data Breach on Kroger, including specific information concerning  
18 the categories of individuals who received breach notification letters from Kroger (e.g., customers,  
19 employees), the nature of the PII impacted, Kroger’s actions after it was notified of the breach, and  
20 the nature and number of Settlement Class Members impacted. Wolfson Decl. ¶ 18; Barnow Decl. ¶  
21 10. With Judge Gandhi’s guidance, the Parties had a productive mediation session. Following  
22 mediation, the Parties continued to engage in extensive settlement discussions and negotiations, both  
23 directly and through the mediator, regarding a myriad of settlement points. Wolfson Decl. ¶ 19;  
24 Barnow Decl. ¶ 11. This process included substantial confirmatory discovery. Wolfson Decl. ¶ 19;  
25 Barnow Decl. ¶ 11.

26 As a result of the confirmatory discovery conducted by the Parties, Class Counsel was not  
27 only able to verify the details about the impact of the FTA Data Breach and information about the  
28 Class Members, but also to ensure that the terms of and relief provided under the Settlement were fair,



1 reasonable, and adequate and based on correct assumptions and facts. Wolfson Decl. ¶ 20; Barnow  
2 Decl. ¶ 13.

3 **D. Class Counsel Engaged in Extensive Settlement Negotiations and Documented**  
4 **and Briefed Approval of the Settlement Agreement**

5 The Parties expended significant efforts in negotiating and ironing out the numerous details of  
6 the Settlement. Following the mediation, the Parties continued to confer and Class Counsel expended  
7 a substantial time finalizing the Settlement’s terms. Wolfson Decl. ¶ 21; Barnow Decl. ¶ 11. During  
8 this period, the Parties exchanged numerous drafts of the Settlement Agreement and its exhibits, and  
9 exhaustively negotiated many details. Wolfson Decl. ¶ 21; Barnow Decl. ¶ 11. These negotiations  
10 continued to be contested and involved detailed discussions regarding every provision of the  
11 Settlement Agreement and ancillary documents and the plan for Class Notice. Wolfson Decl. ¶ 21;  
12 Barnow Decl. ¶ 11.

13 Class Counsel solicited competing bids from separate third-party administrators for settlement  
14 notice and administration. Wolfson Decl. ¶ 22; Barnow Decl. ¶ 14. With each of the potential  
15 settlement administrators, proposed Class Counsel discussed the notice and distribution plans agreed  
16 to in the Settlement. Wolfson Decl. ¶ 22; Barnow Decl. ¶ 14. Class Counsel ultimately negotiated an  
17 agreement with Epiq Class Action and Mass Tort Solutions, LLC (“Epiq”).

18 Class Counsel crafted, negotiated, and meticulously refined the final notice program and each  
19 document comprising the Class Notice (with the assistance of Epiq) to ensure that the information  
20 disseminated to Settlement Class Members is clear and concise. Wolfson Decl. ¶ 23; Barnow Decl. ¶  
21 15. At all times during settlement discussions, the negotiations were at arm’s length. Furthermore, it  
22 was always Class Counsel’s primary goal to achieve the maximum substantive relief possible for the  
23 Settlement Class Members. Wolfson Decl. ¶ 23; Barnow Decl. ¶ 17.

1           **E. Preliminary Approval, Supervision of Settlement Notice, and Responding to**  
 2           **Settlement Class Member Inquiries**

3           After the lengthy process that led to finalization of the Settlement, Class Counsel prepared and  
 4           filed the Motion for Preliminary Approval, which included voluminous supporting documents,  
 5           declarations, and exhibits. ECF Nos. 31, 32.

6           After the Preliminary Approval Order was entered, Class Counsel worked closely with the  
 7           Settlement Administrator to supervise dissemination of Notice to Settlement Class Members. Wolfson  
 8           Decl. ¶ 29; Barnow Decl. ¶ 15. These efforts included reviewing and drafting the Settlement Website’s  
 9           language and format, the script for the automated response to the toll-free number, and the language  
 10          and format of the Notice forms; monitoring exclusion requests and objections; and ensuring prompt  
 11          response to each and every Settlement Class Member inquiry (whether by phone or e-mail) regarding  
 12          the Settlement. Wolfson Decl. ¶ 29; Barnow Decl. ¶ 15.

13          **III. ARGUMENT**

14          **A. The Predominant Method for Determining Attorneys’ Fees in Class Action Cases**  
 15          **that Create a Common Fund Is the Percentage Approach**

16          The Supreme Court has recognized that “a litigant or a lawyer who recovers a common fund  
 17          for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from  
 18          the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also, e.g., Stetson v.*  
 19          *Grissom*, 821 F.3d 1157, 1165 (9th Cir. 2016) (“In the absence of a contractual or statutory basis for  
 20          awarding fees, the district court may award reasonable fees as a matter of federal common law when  
 21          class counsel has recovered a ‘common fund.’”) (*quoting* Fed. R. Civ. P. 23(h)). In deciding whether  
 22          the requested fee amount is appropriate, the Court’s role is to determine whether such amount is  
 23          “fundamentally ‘fair, adequate, and reasonable.’” *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir.  
 24          2003) (*quoting* Fed. R. Civ. P. 23(e)).

25          Where a class settlement results in the creation of common benefits, district courts may use  
 26          either—or both—the “percentage-of-the-fund” or the “lodestar-multiplier” method to determine a  
 27          reasonable fee. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). “Despite  
 28          [courts’] discretion, use of the percentage method in common fund cases appears to be dominant.” *In*

1 *re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008); *see also Vizcaino*, 290 F.3d  
 2 at 1050-51 (“Calculation of the lodestar, which measures the lawyers’ investment of time in the  
 3 litigation, provides a check on the reasonableness of the percentage award”); *Six Mexican Workers v.*  
 4 *Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1994) (affirming percentage award).

5 “The percentage method ‘is easy to calculate; it establishes reasonable expectations on the part  
 6 of plaintiffs’ attorneys as to their expected recovery; and it encourages early settlement, which avoids  
 7 protracted litigation.’” *Laffitte*, 1 Cal. 5th at 490 (citation omitted). Here, the requested fee is fair,  
 8 reasonable, and adequate under either the percentage-of-fund or the lodestar-multiplier approach.

9 **1. The Requested Fee Amount Is Reasonable Under the Percentage-of-  
 10 Fund Method**

11 Under the percentage approach, class counsels’ fees are calculated as a percentage of the  
 12 common benefits generated through their efforts. In the Ninth Circuit, the “benchmark” percentage is  
 13 25%. *See, e.g., Vizcaino*, 290 F.3d at 1048-50; *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d  
 14 934, 949 (9th Cir. 2015).

15 Here, Class Counsel’s efforts generated a non-reversionary common fund of \$5,000,000 for  
 16 the benefit of the Class. The \$5 million cash fund value of the Settlement does not include the value  
 17 of the Settlement’s prospective relief requiring Kroger to take certain remedial and enhanced security  
 18 measures as part of the Settlement or the retail value of the CMIS claimed by Settlement Class  
 19 Members.

20 Class Counsel seeks an award of \$1,231,628 in attorneys’ fees and \$18,372 in costs (for a total  
 21 of \$1,250,000)—an award warranted under either the percentage or lodestar-multiplier approaches,  
 22 given the value of the work performed, the difficulty and risks presented, and the results achieved.

23 **2. The *Vizcaino* Factors Support the Award Requested**

24 In determining the appropriateness of a fee award, the Ninth Circuit directs courts to consider:  
 25 “(1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4)  
 26 the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made  
 27 in similar cases.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1046 (citing *Vizcaino*, 290 F.3d at  
 28 1048-50). A court may also consider the volume of work performed, counsel’s skill and experience,

1 the complexity of the issues faced, and the reaction of the class. *See, e.g., In re Heritage Bond Litig.*,  
2 02-ML-1475 DT, 2005 WL 1594403, at \*18-23 (C.D. Cal. June 10, 2005).

3 **a. Class Counsel Achieved an Excellent Recovery for Plaintiffs**

4 The results obtained for the Settlement Class are the most important factor in determining the  
5 appropriate fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *Vizcaino*, 290 F.3d at  
6 1049; *In re Omnivision*, 559 F. Supp. 2d at 1046; *see also* Federal Judicial Center, Manual for  
7 Complex Litigation, § 27.71, p. 336 (4th ed. 2004) (the “fundamental focus is the result actually  
8 achieved for class members”).

9 Here, Class Counsel’s efforts generated a non-reversionary cash fund of \$5,000,000. This  
10 monetary relief will be distributed to Class Members with no reversion to Kroger. SA ¶¶ 60, 78. This  
11 does not include the value of the Settlement’s prospective relief or the retail value of the CMIS  
12 claimed by Settlement Class Members.

13 As explained in Plaintiffs’ Motion for Preliminary Approval, Plaintiffs believe that they would  
14 succeed in litigation and be able to recover damages on behalf of the Class; however, Class Counsel  
15 recognizes that the range of potential litigation outcomes is large. The scope of damages would depend  
16 in large part on the scope of class certification, whether various theories of damages would be accepted  
17 by the Court (i.e., benefit of the bargain and loss of value of PII theories), and which causes of action  
18 survive. Whether the case would be litigated to a favorable outcome and the amount obtained through  
19 continued litigation are not certain, however, and the case is subject to numerous risks.

20 Here, the \$5 million non-reversionary Settlement Fund is an excellent result that avoids the  
21 uncertainty and the risk of nonpayment presented by continued litigation. With the Settlement Fund,  
22 all Class Members will be eligible for a Settlement Payment in the form of distribution for CMIS, a  
23 Documented Loss Payment, or a Cash Fund Payment. Based on the size of the breach and per-capita  
24 figures, the Settlement presents a robust relief package and valuable outcome for the Class compared  
25 to other recent data breach class action settlements.

26 Class Counsel also achieved substantial non-monetary benefits for the Class. The Ninth  
27 Circuit and other courts have repeatedly held that where, as here, class counsel achieves significant  
28 non-monetary benefits, the court “should consider the value of [such] relief as a relevant circumstance

1 in determining what percentage of the common fund class counsel should receive as attorneys' fees."  
 2 *Staton*, 327 F.3d at 974 (internal quotation marks omitted); *see also Vizcaino*, 290 F.3d at 1049  
 3 (affirming enhanced fee award where "the court found that counsel's performance generated benefits  
 4 beyond the cash settlement fund"); *Linney v. Cellular Alaska P'ship*, No. C-96-3008 DLJ, 1997 WL  
 5 450064, at \*7 (N.D. Cal. July 18, 1997) *aff'd*, 151 F.3d 1234 (9th Cir. 1998) (granting fee award of  
 6 1/3 of common fund where settlement provided additional non-monetary relief).

7 Under the terms of the Settlement, in addition to the non-reversionary cash Settlement Fund  
 8 amount, the Settlement also promises significant remedial measures that Kroger has agreed to  
 9 implement as a result of this litigation, all of which will benefit all Class Members, whether or not  
 10 they submit a Claim Form for monetary relief.

11 **b. Plaintiffs Faced Significant Risks in This Litigation**

12 Risk is a critical factor in determining a fair fee award. *In re Omnivision Techs., Inc.*, 559 F.  
 13 Supp. 2d at 1046-1047 ("The risk that further litigation might result in Plaintiffs not recovering at all,  
 14 particularly a case involving complicated legal issues, is a significant factor in the award of fees")  
 15 (citing *Vizcaino*, 290 F.3d at 1048).

16 Kroger has steadfastly denied Plaintiffs' allegations of wrongdoing, and in continued litigation  
 17 and but for the Settlement, Kroger would have vigorously defended against Plaintiffs' claims. Kroger  
 18 responded to Plaintiffs' CCPA demand letter that it did not violate the CCPA, or had cured any  
 19 violation of the statute. Wolfson Decl. ¶ 10. Kroger also sent notice to all impacted individuals and  
 20 offered two years of credit monitoring and ID theft insurance, reported the incident and worked  
 21 closely with the FBI, and recovered the impacted data and received evidence that any remaining  
 22 copies of the data were deleted. *Id.* Critically, as part of the confirmatory discovery process and during  
 23 settlement negotiations, Kroger confirmed that none of the impacted Settlement Class Members' PII  
 24 was published or offered for sale on the dark web. *Id.*

25 All of these considerations, and others, made continued litigation risky. Indeed, data breach  
 26 cases are, by nature, especially risky and expensive. Such cases are innately complex. *See, e.g., In re*  
 27 *Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800, 2020 WL 256132, at \*32-33 (N.D.  
 28 Ga. Mar. 17, 2020) (recognizing the complexity and novelty of issues in data breach class actions).

1 This case is no exception to that rule. It involves approximately 3.82 million Settlement Class  
2 Members, complicated and technical facts, a well-funded defendant, and numerous contested issues  
3 on class certification and substantive defenses. There are numerous substantial hurdles that Plaintiffs  
4 would have had to overcome before the Court might find a trial appropriate.

5 First, given the early stage of the litigation, the legal sufficiency of Plaintiffs' pleading was not  
6 tested by a motion to dismiss. Data breach cases, particularly, face substantial hurdles in surviving  
7 even past the pleading stage and are among the most risky and uncertain of all class action litigation.  
8 *See, e.g., Hammond v. The Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060, 2010 WL 2643307, at \*1  
9 (S.D.N.Y. June 25, 2010) (collecting cases). Were litigation to proceed, there would be numerous  
10 expert reports and costly depositions, which would present significant expenses. As in any data breach  
11 class action, establishing causation and damages on a class-wide basis is largely uncharted territory  
12 and full of uncertainty.

13 The California statutory claims also face risk of dismissal on the pleadings or an unfavorable  
14 disposition at summary judgment. Both statutes are relatively new and remain largely untested in  
15 motion to dismiss, summary judgment, and class certification proceedings. For example, California  
16 courts have ruled that under the CMIA, a plaintiff may not recover statutory damages due to mere theft  
17 of medical information; rather, plaintiffs must allege that an unauthorized person actually viewed the  
18 confidential information. *Sutter Health v. Superior Ct.*, 227 Cal. App. 4th 1546, 1550 (2014); *see also*  
19 *Regents of University of California v. Superior Court*, 220 Cal. App. 4th 549 (2013).

20 The CCPA claim also bears significant risks. For example, the CCPA's private cause of action  
21 provision, Cal. Civ. Code § 1798.150(a)(1), states that liability may be found only where the  
22 unauthorized disclosure of protected information occurs "as a result of the business's violation of the  
23 duty to implement and maintain reasonable security procedures and practices. . . ." *Id.* Kroger would  
24 likely dispute that it violated any duty. Kroger may also raise challenges to the CCPA claim on standing  
25 grounds for Class Members. *See* Cal. Civ. Code § 1798.150(a)(1) (providing for private cause of action  
26 only for individuals who had information under § 1798.81.5(d)(1)(A) impacted in combination with  
27 their name); *see also Rahman v. Marriott Int'l, Inc.*, No. SACV2000654, 2021 WL 346421, at \*3 (C.D.  
28 Cal. Jan. 12, 2021) (dismissing CCPA claim for lack of standing where plaintiff's more sensitive

1 information, such as credit card numbers, SSN, or passports, was not stolen). Kroger further would  
2 dispute standing and injury under the CCPA based upon its claimed cure of the alleged violations.

3 Finally, the CCPA explicitly exempts “medical information” and “providers of health care”  
4 that are otherwise covered by the CMIA. *See* Cal. Civ. Code § 1798.145(c)(1)(A)-(B). If litigation  
5 were to continue, Kroger would likely argue that individuals whose medical, health, or pharmacy  
6 information was exposed in the FTA Data Breach cannot recover under the CCPA, and that those  
7 individuals can only seek recovery under the CMIA.

8 As in any litigation, Plaintiffs faced a risk that any of these defenses might succeed. Plaintiffs  
9 also faced uncertainty with respect to obtaining and maintaining class certification. While Plaintiffs  
10 believe they could overcome these challenges, any of these defenses, if successful, could end the case  
11 entirely and result in the Settlement Class Members receiving nothing at all. This factor weighs in  
12 favor of the appropriateness of the requested fee award.

13 **c. Successfully Prosecuting This Matter Required Significant Skill**  
14 **and Effort on the Part of Class Counsel**

15 The “prosecution and management of a complex national class action requires unique legal  
16 skills and abilities” that are to be considered when determining a reasonable fee. *In re Omnivision*  
17 *Techs., Inc.*, 559 F. Supp. 2d at 1047 (citation omitted); *see also Vizcaino*, 290 F.3d at 1048 (reasoning  
18 that the complexity of the issues involved and skill and effort displayed by class counsel are among  
19 the relevant factors for determining the proper fee under the percentage approach). This case presented  
20 extraordinary challenges that required extraordinary lawyering. In general, data breach class actions  
21 present relatively uncharted territory, and no data breach case has gone to trial.

22 Class Counsel are experienced litigators who have successfully prosecuted and resolved  
23 numerous large consumer class actions and other complex matters, including in other data breach  
24 cases. Wolfson Decl. ¶¶ 48-61 & Ex. 1; Barnow Decl. ¶¶ 19-28 & Ex. 1. Class Counsel’s skill and  
25 relevant experience were critical to achieving the Settlement here. As discussed herein and in  
26 counsels’ supporting declarations, investigating, prosecuting, and settling this matter required  
27 considerable commitment of time and resources by Class Counsel.

1 Courts also consider “the quality of opposing counsel as a measure of the skill required to  
2 litigate the case successfully.” *In re American Apparel, Inc. S’holder Litig.*, No. 10-cv-06352 MMM  
3 (JCGx), 2014 WL 10212865, at \*22 (C.D. Cal. 2014). Here, the caliber of opposing counsel supports  
4 the requested award, given that Plaintiffs were adverse to one of the best law firms in the country with  
5 virtually unlimited resources at their disposal. *See Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299,  
6 1303 (W.D. Wash. 2001); *see also Wing v. Asarco*, 114 F.3d 986, 989 (9th Cir. 1997) (noting the  
7 district court’s evaluation of class counsel’s “first-rate job”).

8 **d. Class Counsel Assumed Considerable Risk Litigating on an**  
9 **Entirely Contingent Basis**

10 The Ninth Circuit has confirmed that a fair fee award must include consideration of the  
11 contingent nature of the fee. *See, e.g., Vizcaino*, 290 F.3d at 1050. Courts long have recognized that  
12 the public interest is served by rewarding attorneys who assume representation on a contingent basis  
13 with an enhanced fee to compensate them for the risk that they might be paid nothing at all for their  
14 work. *See, e.g., In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994)  
15 (“Contingent fees that may far exceed the market value of the services if rendered on a non-contingent  
16 basis are accepted in the legal profession as a legitimate way of assuring competent representation for  
17 plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.”);  
18 *Vizcaino*, 290 F.3d at 1051 (observing courts reward successful class counsel in contingency cases  
19 “by paying them a premium over their normal hourly rates”). This factor deserves particular weight  
20 under the unique circumstances of this matter.

21 If Class Counsel had been able to negotiate a fee directly with Class Members, a 25%  
22 contingent fee would have been eminently reasonable, if not low, for a case this complex, risky, and  
23 difficult. Given the prospective risks and difficulties, it would have been reasonable for Class  
24 Members to retain counsel at *no cost to them* unless counsel succeeded, in which case counsel would  
25 be entitled to 25% of the total of any fund recovered (after counsel’s expenses). This is especially true  
26 given the willingness of Class Counsel’s law firms to advance more than 828 hours of time and  
27 \$18,372 in costs, with no promise of recovering those funds unless the case was successful.



1 Class Counsel prosecuted this matter on a purely contingent basis, agreeing to advance all  
2 necessary expenses and agreeing that they would only receive a fee if there was a recovery. Wolfson  
3 Decl. ¶ 36; Barnow Decl. ¶¶ 30, 36. To date, Class Counsel have received no compensation at all  
4 litigating this case on behalf of the Class. Wolfson Decl. ¶ 36; Barnow Decl. ¶¶ 30, 36. Class Counsel’s  
5 “substantial outlay,” and the risk that none of it would be recovered, further supports the award of  
6 their requested fees. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1047.

7 **e. Fees Awarded in Comparable Cases Exceed Those Requested Here**

8 Comparing the requested fees to awards in similar cases highlights the reasonableness of this  
9 application. “[I]n most common fund cases, the award exceeds” the 25% benchmark that guides Class  
10 Counsel’s request. *Knight v. Red Door Salons, Inc.*, No. 08–01520 SC, 2009 WL 248367, at \*6 (N.D.  
11 Cal. Feb. 2, 2009). “Empirical studies show that, regardless of whether the percentage method or the  
12 lodestar method is used, fee awards in class actions average around one-third of the recovery.” *Romero*  
13 *v. Producers Dairy Foods, Inc.*, No. 1:05-cv-0484-DLB, 2007 WL 3492841, at \*4 (E.D. Cal. Nov.  
14 14, 2007) (quoting 4 Newberg and Conte, NEWBERG ON CLASS ACTIONS § 14.6 (4th ed. 2007)).

15 “Under the percentage method, California has recognized that most fee awards . . . are 33  
16 percent.” *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG (WMC), 2013 WL 163293, at \*5  
17 (S.D. Cal. 2013). Federal courts in the Ninth Circuit routinely follow California’s approach, awarding  
18 percentage recoveries in excess of the 25% benchmark. *See, e.g., In re Pac. Enters. Secs. Litig.*, 47  
19 F.3d 373, 379 (9th Cir. 1995) (affirming 33% award); *Williams v. MGM-Pathe Comms. Co.*, 129 F.3d  
20 1026, 1027 (9th Cir. 1997) (same); *Syed v. M-I, L.L.C.*, No. 1:12-cv-1718-DAD-MJS, 2017 WL  
21 3190341, at \*8 (E.D. Cal. July 27, 2017) (awarding one-third of \$7 million common fund); *Dearaujo*  
22 *v. Regis Corp.*, No. 2:14-cv-01408-KJM-DB2017, 2017 WL 3116626, at \*13 (E.D. Cal. July 21,  
23 2017) (awarding one-third of common fund); *Bennett v. SimplexGrinnell LP*, No. 11-cv-1854-JST,  
24 ECF No. 278, at 11 (N.D. Cal. Sept. 3, 2015) (awarding 38.8% of common fund); *Lee v. JPMorgan*  
25 *Chase & Co.*, No. 13-cv-511-JLS, 2015 WL 12711659, at \*8-9 (C.D. Cal. Apr. 28, 2015) (awarding  
26 one-third of common fund); *Boyd v. Bank of Am. Corp.*, No. SACV 13–0561–DOC (JPRx), 2014 WL  
27 6473804, at \*10-11 (C.D. Cal. Nov. 18, 2014) (same); *Burden v. Select Quote Ins. Servs.*, No. C 10-  
28 5966 LB, 2013 WL 3988771, at \*5 (N.D. Cal. Aug. 2, 2013) (same); *Barbosa v. Cargill Meat*

1 *Solutions Corp.*, 297 F.R.D. 431, 454 (E.D. Cal. 2013) (same); *Franco v. Ruiz Food Prods., Inc.*,  
 2 No. 1:10-cv-02354-SKO, 2012 WL 5941801, at \*25 (E.D. Cal. Nov. 27, 2012) (same); *Garcia v.*  
 3 *Gordon Trucking, Inc.*, No. 1:10-cv-324-AWI-SKO, 2012 WL 5364575, at \*11 (E.D. Cal. Oct. 31,  
 4 2012) (same); *Singer v. Becton Dickinson Co*, No. 08-CV-821-IEG (BLM), 2010 WL 2196104, at \*8  
 5 (S.D. Cal. June 1, 2010) (awarding 33% and citing two prior, similar Southern District awards); *Stuart*  
 6 *v. Radioshack Corp.*, No. C-07-4499 EMC, 2010 WL 3155645, at \*8 (N.D. Cal. Aug. 9, 2010)  
 7 (awarding one-third of common fund); *Fernandez v. Victoria's Secret Stores, LLC*, No. CV 06-04149  
 8 MMM, 2008 WL 8150856, at \*16 (C.D. Cal. July 21, 2008) (awarding 34% of common fund); *Aguilar*  
 9 *v. Wawona Frozen Foods*, No. 1:15-cv-00093-DAD-EPG, 2017 WL 2214936, at \*9 (E.D. Cal. May  
 10 19, 2017) (awarding 33% of fund); *Emmons v. Quest Diagnostics Clinical Labs, Inc.*, No. 1:13-cv-  
 11 00474-DAD-BAM, 2017 WL 749018, at \*9 (E.D. Cal. Feb. 24, 2017) (awarding 33% of common  
 12 fund); *Wren v. RGIS Inventory Specialists*, No. 06-cv-05778 JCS, 2011 WL 1230826, at \*27-28 (N.D.  
 13 Cal. Apr. 1, 2011) (awarding 42% of \$27 million fund).

14 This Court and its sister district courts routinely grant requests for attorneys' fees that are in  
 15 line with the 25% benchmark. *See, e.g., In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-  
 16 LHK, 2018 WL 3960068, at \*16 (N.D. Cal. Aug. 17, 2018) (approving fee award of 27% of fund); *In*  
 17 *re LinkedIn User Priv. Litig.*, 309 F.R.D. 573, 591 (N.D. Cal. 2015) (finding benchmark fee award of  
 18 amounting to 25% of the settlement fund was appropriate); *In re Apple Inc. Device Performance*  
 19 *Litig.*, No. 5:18-MD-02827-EJD, 2021 WL 1022866, at \*8 (N.D. Cal. Mar. 17, 2021) (granting fee  
 20 award request equal to 26% of the settlement); *Gaston v. FabFitFun, Inc.*, No. 2:20-CV-09534-RGK-  
 21 E, 2021 WL 3362028, at \*8 (C.D. Cal. Apr. 2, 2021) (permitting counsel fees request to be up to 25%  
 22 of Settlement Fund, "which is at the benchmark for a reasonable fee award.").

23 Accordingly, fee awards in comparable cases support the requested fee here.

24 **f. The Position of the Settlement Class**

25 The deadline for Settlement Class Members to exclude themselves (i.e., object or opt out) is  
 26 February 18, 2022. The Class Notice informs Settlement Class Members that Class Counsel will seek  
 27 a fee that, subject to Court approval, could amount to 25% of the Settlement Fund, and the Settlement  
 28 Website makes the full Settlement Agreement available for Class Members' review. As of January 7,

1 2022, only 11 persons have opted for exclusion, and zero objections have been submitted. These  
 2 numbers stand in stark contrast to the more than 2.4 million mailings, and more than 4.7 million e-  
 3 mails (for 2.1 million unique e-mail records) sent and 38,823 Claim Forms that have already been  
 4 submitted. Azari Decl. ¶¶ 12, 14, 31-32.

5 **B. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fees**

6 Application of the lodestar method as a cross-check—or even as a preliminary method of  
 7 calculating fees—confirms the reasonableness of the fees requested. The accompanying declarations  
 8 of Class Counsel set forth the hours of work and billing rates used to calculate the lodestars here. As  
 9 described in those declarations, Class Counsel and their staff have devoted a total of approximately  
 10 828.4 hours to this litigation and have a total lodestar to date of \$597,257.50. Wolfson Decl. ¶¶ 33-34;  
 11 Barnow Decl. ¶¶ 32-33. All of this time was reasonable and necessary for the prosecution of this action.  
 12 Class Counsel took meaningful steps to ensure the efficiency of their work. Wolfson Decl. ¶¶ 38;  
 13 Barnow Decl. ¶ 34. And, as explained further below, these amounts do not include the additional time  
 14 that Class Counsel will have to spend through the Final Approval Hearing and beyond.

15 **1. Class Counsel’s Hourly Rates Are Reasonable**

16 In assessing the reasonableness of an attorney’s hourly rate, courts consider whether the  
 17 claimed rate is “in line with those prevailing in the community for similar services by lawyers of  
 18 reasonably comparable skill, experience and reputation.” *Blum v. Stenson*, 465 U.S. 886, 895-96 n.11  
 19 (1984). Courts apply each biller’s current rates for all hours of work performed, regardless of when  
 20 the work was performed, as a means of compensating for the delay in payment. *In re Wash. Pub.*  
 21 *Power*, 19 F.3d at 1305.

22 Class Counsel here are experienced, highly regarded members of the bar. They have brought  
 23 to this case extensive experience in the area of consumer class actions and complex litigation. Wolfson  
 24 Decl. ¶¶ 48-61 & Ex. 1; Barnow Decl. ¶¶ 19-28 & Ex. 1. Class Counsel’s customary rates are in line  
 25 with prevailing rates in this District, have been approved by courts in this District and other courts  
 26 and/or are paid by hourly-paying clients of the firms. Wolfson Decl. ¶¶ 62-69, 72; Barnow Decl. ¶ 30.  
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1                   **2. The Number of Hours Class Counsel Devoted to the Case was Reasonable**

2                   The number of hours that Class Counsel have billed is reasonable. *See Caudle v. Bristow*  
3 *Optical Co.*, 224 F.3d 1014, 1028 (9th Cir. 2000) (counsel entitled to recover for all hours reasonably  
4 expended). Class Counsel expect to maintain a high level of oversight and involvement in this case,  
5 and will continue to incur significant amounts of time given the future work still needed for  
6 completion of the Settlement, including: attending the final approval hearing, responding to any  
7 requests for exclusion or objections and filing any replies in support of final approval, addressing any  
8 appeals.

9                   **C. Class Counsel Are Entitled to Reimbursement of Their Reasonable Litigation**  
10                   **Expenses**

11                   Under well-settled law, Class Counsel are entitled to reimbursement of the expenses they  
12 reasonably incurred investigating and prosecuting this matter. *See Staton*, 327 F.3d at 974; *In re Media*  
13 *Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) (citing *Mills v. Electric Auto-Lite*  
14 *Co.*, 396 U.S. 375, 291-92 (1970)). To date, Class Counsel have collectively incurred \$18,372 in  
15 unreimbursed litigation costs. This amount does not include internal and other additional costs that  
16 Class Counsel incurred in this litigation but, in an exercise of discretion, do not seek to recover.  
17 Wolfson Decl. ¶ 46; Barnow Decl. ¶ 38.

18                   The expenses for which Class Counsel seek reimbursement were reasonably necessary for the  
19 continued prosecution and resolution of this litigation and were incurred by Class Counsel for the  
20 benefit of the class members with no guarantee that they would be reimbursed. They are reasonable  
21 in amount and the Court should approve their reimbursement.

22                   **D. The Requested Service Awards for Plaintiffs Are Reasonable and Justified**

23                   The Court should grant the modest Service Awards of \$1,500 requested per Plaintiff to  
24 compensate the Class Representatives for the effort and risk entailed in pursuing this litigation, which  
25 has triggered important and positive changes in Kroger's business practices and has secured  
26 significant compensation for Class Members. "It is well-established in this circuit that named  
27 plaintiffs in a class action are eligible for reasonable incentive payments, also known as service  
28 awards." *Viceral v. Mistras Grp., Inc.*, No. 15-cv-02198-EMC, 2017 WL 661352, at \*4 (N.D. Cal.

1 Feb. 17, 2017) (citation omitted). Service awards, which are discretionary, “are intended to  
 2 compensate class representatives for work done on behalf of the class, to make up for financial or  
 3 reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to  
 4 act as a private attorney general.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009);  
 5 *see also Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995).

6 The requested Service Awards here are a fraction of the “presumptively reasonable” \$5,000  
 7 figure often cited in this district and are more than justified by the time Plaintiffs spent on the case  
 8 and the value their efforts conferred on the Class. *Gould v. Rosetta Stone, Ltd.*, No. C 11-01283 SBA,  
 9 2013 WL 5402120, at \*6-7 (N.D. Cal. Sept. 26, 2013); *Jacobs v. Cal. State Auto. Ass’n Inter-Ins.*  
 10 *Bureau*, No. C 07-00362 MHP, 2009 WL 3562871, at \*5 (N.D. Cal. Oct. 27, 2009). Plaintiffs have  
 11 been actively engaged in this Action and were essential to the success achieved. Among other things,  
 12 they provided information to Class Counsel, gathered documents, reviewed pleadings, stayed updated  
 13 about the litigation, and reviewed and approved the Settlement. Wolfson Decl. ¶ 71; Barnow Decl.  
 14 ¶ 40. The Settlement would not have been possible without the effort and commitment of the  
 15 Plaintiffs, who sacrificed their time and put their name on the line for the sake of the Class. Wolfson  
 16 Decl. ¶ 71; Barnow Decl. ¶ 41. Their commitment is notable given the modest size of their personal  
 17 financial stakes in the matter. *See Van Vranken*, 901 F. Supp. at 299 (“In exchange for his  
 18 participation, [named plaintiff] will not receive great personal benefit. He owns a moderately sized  
 19 truck stop and his claim makes up only a tiny fraction of the common fund.”).

#### 20 **IV. CONCLUSION**

21 For all the foregoing reasons, Plaintiffs and Class Counsel respectfully request that the Court  
 22 enter an Order: (a) awarding Class Counsel attorneys’ fees in the amount of \$1,231,628; (b)  
 23 reimbursement of litigation costs in the amount of \$18,372; and (c) awarding the Plaintiffs Service  
 24 Awards in the amount of \$1,500 each for their efforts and commitment on behalf of the Class  
 25 Members.

26 Dated: January 14, 2022

Respectfully submitted,

27 /s/ Tina Wolfson

28 TINA WOLFSON (SBN 174806)

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