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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.
23
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25
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Case No. 5:21-cv-01887-EJD

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT;
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
Cameron Azari and Colleen T. Brown]

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 an Order for Final Approval of Class Action Settlement.

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities; the concurrently filed Declarations of Cameron Azari (“Azari Decl.”) and Colleen T. Brown (“Brown 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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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Ricky Cochran, Alain Berrebi, and Jamey Stobbe request that the Court grant final
4 approval of a nationwide class action settlement (“Settlement”) with Defendant The Kroger Co.
5 (“Kroger”). The Settlement resolves all class claims against only Kroger and the Released Parties on
6 behalf of approximately 3.82 million Settlement Class Members (“Class Members”) relating to
7 Accellion’s File Transfer Appliance (“FTA”) Data Breach.¹

8 The Settlement establishes a non-reversionary cash fund of \$5 million to pay for valid claims.
9 Claimants may elect to receive: (1) a cash payment, calculated in accordance with the terms of the
10 Settlement Agreement (with double the amount to California residents in light of the statutory claims
11 available to them); (2) two years of Credit Monitoring and Insurance Services (“CMIS”); or (3) a
12 payment for reimbursement of Documented Losses of up to \$5,000. The Settlement also provides for
13 robust injunctive relief which includes confirming that Class Members’ sensitive personally identifiable
14 information (“PII”) is secured; dark web monitoring for five years for fraudulent activity relating to
15 Class Members’ PII, and various enhancements to Kroger’s third-party vendor risk management
16 program.

17 The response to the Settlement has been very positive—it delivers tangible and immediate
18 benefits to Class Members that address all the potential harms of the FTA Data Breach, without
19 protracted litigation and the inherent risks of class action litigation. It delivers a fair, adequate, and
20 reasonable resolution for the Class, and merits final approval. Fed. R. Civ. P. 23(e)(2).

21 **II. BACKGROUND**

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

23 In late 2020 and early 2021, Accellion began disclosing to its clients that certain threat actors
24 had breached their data via vulnerabilities in Accellion’s File Transfer Appliance (“FTA”) software.
25 First Amended Complaint (“FAC”), ECF No. 27 ¶ 2. These threat actors were then able to steal sensitive
26

27 _____
28 ¹ Unless otherwise noted, all capitalized terms not separately defined herein have the meaning ascribed to them in the Settlement Agreement.

1 data from many Accellion clients, including corporations, law firms, banks, universities, and other
2 entities. *Id.* ¶ 31. On January 23, 2021, Accellion notified Kroger that it was one such client impacted
3 by the FTA Data Breach. *Id.* ¶ 42. As part of the FTA Data Breach, hacker(s) accessed Kroger’s files
4 containing Plaintiffs’ and Class Members’ PII. *Id.*

5 On February 19, 2021, Kroger publicly confirmed that the PII of certain Kroger pharmacy
6 customers and former and current employees was compromised in the FTA Data Breach. *Id.* ¶ 5. The
7 affected PII included names, email addresses, dates of birth, home addresses, phone numbers, social
8 security numbers (“SSN”), salary information, health benefits information including prescription ID
9 numbers, and prescription information. *Id.* ¶ 1; Declaration of Tina Wolfson (“Wolfson Decl.”), ECF
10 No. 31-005, ¶ 8. As a result of the breach, unauthorized persons accessed sensitive PII of approximately
11 3.82 million Kroger pharmacy customers and current and former employees. *Id.* ¶ 36.

12 On March 17, 2021, this action was filed on behalf of Plaintiffs Ricky Cochran and Alain
13 Berrebi, naming Accellion and Kroger as co-defendants. ECF No. 1. At the time, Jaramey Stobbe
14 already had filed a separate class action in this Court against Accellion only, entitled *Stobbe v. Accellion,*
15 *Inc.*, No. 5:21-cv-01353-EJD (filed February 24, 2021) (“*Stobbe*”). Each of the Plaintiffs received
16 notification from Kroger indicating that their PII was accessed during the FTA Data Breach. Wolfson
17 Decl. ¶ 9.

18 Plaintiffs allege that, among other things, Kroger and Accellion: (a) failed to implement and
19 maintain adequate data security practices to safeguard Plaintiffs’ and Class Members’ PII; (b) failed to
20 prevent the FTA Data Breach; (c) failed to detect security vulnerabilities leading to the FTA Data
21 Breach; and (d) failed to disclose that their data security practices were inadequate to safeguard Class
22 Members’ PII. ECF No. 27 ¶¶ 48, 54, 64-70, 113. Specifically with respect to Kroger, Plaintiffs alleged
23 that it had a duty to, and impliedly promised Plaintiffs and Class Members that it would, protect their
24 sensitive PII from unauthorized disclosure and handle this data securely, and that it failed to do so by
25 entrusting the PII to a third-party file transfer vendor whose products and services were prone to security
26 vulnerabilities that left Class Members’ PII exposed. *Id.* ¶¶ 54, 89.

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1 Plaintiffs' allegations include claims for negligence, breach of implied contract, violations of
2 the California Consumer Privacy Act ("CCPA") and the California Confidentiality of Medical
3 Information Act ("CMIA"). *Id.* ¶¶ 83-169. Plaintiffs seek certification of a nationwide class. ¶ 75.

4 **B. Mediation and Settlement Negotiations**

5 As a result of the Parties' continued meet-and-confer efforts throughout the month of April,
6 they were able to reach an agreement to participate in mediation to attempt to resolve this matter.
7 Wolfson Decl. ¶ 17; Declaration of Ben Barnow ("Barnow Decl."), ECF No. 31-003, ¶ 17. The
8 mediation was scheduled for May 13, 2021 before the Hon. Judge Jay C. Gandhi (Ret.) of JAMS.
9 Wolfson Decl. ¶ 17; Barnow Decl. ¶ 17.

10 Prior to the mediation session, the Parties exchanged information to prepare for and facilitate a
11 productive mediation session. Wolfson Decl. ¶ 18; Barnow Decl. ¶ 18. The Parties communicated their
12 respective positions on the litigation and the Parties' claims and defenses with each other and the
13 mediator. *Id.* Plaintiffs received and analyzed data from Kroger relating to the impact of the FTA Data
14 Breach on Kroger, including specific information concerning the categories of individuals who received
15 breach notification letters from Kroger (e.g., customers, employees), the nature of the PII impacted, and
16 the number of Class Members impacted. *Id.*

17 On May 13, 2021, the Parties participated in a full-day video-conferencing mediation session
18 with Judge Gandhi. Wolfson Decl. ¶ 19; Barnow Decl. ¶ 19. With Judge Gandhi's guidance, the Parties
19 had a productive mediation session characterized by zealous advocacy by counsel for both sides. Late
20 in the day, the Parties reached an agreement in principle to settle the litigation. *Id.*

21 Following the mediation, the Parties continued to work together to finalize the Settlement's
22 terms. Wolfson Decl. ¶ 21; Barnow Decl. ¶ 21. During this time, the Parties exchanged numerous drafts
23 of the Settlement Agreement and its exhibits, negotiating numerous details to maximize the benefits to
24 the Class Members. *Id.* These efforts included (among other things) the distribution plan, how to best
25 provide notice to the Class Members and developing a Notice Plan, selection of a settlement
26 administrator, and selection of a vendor for CMIS. Wolfson Decl. ¶¶ 23-24; Barnow Decl. ¶¶ 22-23.

1 After comprehensive negotiations and diligent efforts, Plaintiffs and Kroger finalized the terms
2 of the Settlement and obtained preliminary approval. Plaintiffs now seek final approval of the
3 Settlement from the Court.

4 **C. Terms of the Settlement**

5 **1. The Class Definition**

6 The proposed Settlement Class is defined as follows:

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

12 SA ¶ 44. The proposed Class is identical to the Nationwide Class defined in the FAC.

13 ECF No. 27 ¶ 75.

14 **2. The Release**

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

20 **3. The Settlement Benefits**

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

24 **a. Cash Fund Payments**

25 Class Members may submit a Claim Form to receive a Cash Fund Payment. The amount of the
26 Cash Fund Payment is calculated in accordance with the terms of the Settlement Agreement. *Id.* ¶ 71(b).
27 In view of the heightened protections afforded to California Class Members under the California
28 statutory claims asserted in this lawsuit (i.e., the CCPA, CMIA), California Class Members who submit

1 valid claims for Cash Fund Payments will receive Settlement Payments that are twice the amount of
2 Settlement Payments made to non-California Class Members. SA ¶ 76(b).

3 In Plaintiffs' Memorandum of Points and Authorities in Support of Preliminary Approval
4 ("Memo ISO Mot. for Prelim. Approval") (ECF No. 31), Class Counsel anticipated that California
5 Claimants will receive approximately \$182 at 1%, \$74 at 2%, and \$36 at 3%, and non-California
6 Claimants will receive approximately \$91 at 1%, \$37 at 2%, and \$18 at 3%. ECF No. 31 at 9. Based on
7 the claims received to date, it is believed that the Cash Fund Payments will fall within these ranges.

8 **b. Credit Monitoring and Insurance Services**

9 Each Settlement Class Member who submits a valid claim may elect to receive CMIS. If a
10 Settlement Class Member chooses the CMIS as her respective Settlement Benefit and already maintains
11 a subscription for a similar product, they have the option to postpone the commencement of the CMIS
12 by 12 months for no additional charge. SA ¶ 71(a).

13 The CMIS protection plan will include the following services: (i) up to \$1 million dollars of
14 identity theft insurance coverage; (ii) three-bureau credit monitoring providing notice of changes to the
15 participant's credit profile; (iii) alerts for activity including new inquiries, new accounts created, change
16 of address requests, changes to public records, postings of potentially negative information, and other
17 leading indicators of identity theft; (iv) customer care and dedicated fraud resolution agent; (v)
18 comprehensive educational resources; and (vi) extended fraud resolution. *Id.*; Barnow Decl. ¶ 28. The
19 retail value of this CMIS is \$15 per month (a total \$360 for the entire two year term) for each subscriber.
20 Declaration of Robert Siciliano, ECF No. 31-4, ¶¶ 7-8.

21 **c. Documented Loss Payment**

22 In the alternative to the CMIS or the Cash Fund Payment, Class Members may seek
23 reimbursement of up to \$5,000 of Documented Losses ("Documented Loss Payment"). To receive a
24 Documented Loss Payment, a Settlement Class Member must submit a valid Claim Form with
25 attestation regarding the amount of the loss supported by reasonable documentary proof. SA ¶ 71.c.
26
27
28

1 **d. Prospective Relief and Changes in Business Practices Attributable**
2 **to the Settlement**

3 The Settlement also promises significant remedial measures that Kroger has enacted or will be
4 enacting as a result of this Settlement, all of which will benefit all Class Members, whether or not they
5 submit a claim. Kroger will confirm that it has fully ended its use of the Accellion FTA and migrated
6 to a new secure file transfer solution. SA ¶ 70. It will undertake measures to secure, or securely destroy,
7 the PII that was subject to and subsequently recovered in the FTA Data Breach, and confirm that this
8 has been completed. *Id.* Kroger also will:

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

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

25 **e. The Settlement's Value to Class Members**

26 The value of the Settlement is significant. The cash fund value of the Settlement is \$5,000,000.
27 This does not include the value of the Settlement's robust prospective relief or the retail value of the
28 CMIS claimed by Participating Class Members.

4. Preliminary Approval

Plaintiffs submitted their Motion for Preliminary Approval of Class Action Settlement on June
30, 2021. ECF No. 31. On July 30, 2021, a Motion to Intervene and in Opposition to Preliminary
Approval of Class Action Settlement ("Motion to Intervene") was filed as well as an administrative
motion to change the date of the preliminary approval hearing. ECF Nos. 57 and 58. The first

1 preliminary approval hearing was held on August 5, 2021, where the Court suggested certain changes
2 to the notices, heard from the proposed interveners, and continued the preliminary approval hearing
3 until October 28, 2021. ECF No. 75. Both Plaintiffs and Kroger filed responses to the proposed
4 intervenors' Motion to Intervene on August 23, 2021, noting the exceptional benefits that the Settlement
5 provides to the Settlement Class and the fairness of the Settlement. ECF Nos. 85 and 87. The proposed
6 intervenors filed a reply to Plaintiffs' and Kroger's responses on September 9, 2021. ECF No. 89. On
7 September 15, 2021, Plaintiffs submitted amended notice documents which addressed the Court's
8 comments from the August 5 hearing. ECF No. 91. The Court held a hearing on October 28, 2021 to
9 further consider Plaintiffs' Motion for Preliminary Approval and proposed intervenors' Motion to
10 Intervene and in Opposition to Preliminary Approval of Class Action Settlement. ECF No. 93.

11 On November 5, 2021, the Court granted Plaintiffs Motion for Preliminary Approval and
12 denied proposed intervenors' Motion to Intervene. ECF Nos. 98 and 99. In its Order denying the Motion
13 to Intervene, the Court stated that the proposed intervenors "fail[ed] to identify a protectable interest
14 that will be impaired if they are unable to intervene." ECF No. 99 at 3-4. The Court also noted that the
15 proposed intervenors "already ha[d] been able to participate in the fairness hearings" and that
16 intervention was unnecessary. *Id* at 5.

17 5. Notice to Class

18 Notice was successfully disseminated to the Class Settlement by Court-approved Settlement
19 Administrator, Epiq Class Action and Mass Tort Solutions, LLC ("Epiq"). Declaration of Settlement
20 Administrator ("Azari Decl.") ¶¶ 9-11. The Settlement Administrator completed distribution of the
21 notices to the members of Settlement Class, in compliance with the Preliminary Approval Order. The
22 multipart notice program was designed to, and did, provide the "best notice that is practicable under the
23 circumstances." *See* Fed. R. Civ. P. 23(c)(2)(B).

24 The notice program succeeded: 4,786,343 class notices were emailed to potential Class
25 Members, and 1,675,422 postcard notices were mailed to potential Class Members. Azari Decl. ¶ 11.
26 As of January 7, 2022, there have been over 341,131 pages viewed on the case website, and 20,348
27 calls to the toll-free information line, further demonstrating the success of the notice program. *Id.* ¶ 27-

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1 28. In addition, at least 27 million targeted impressions will be delivered in the form of social media
2 advertisements. *Id.* ¶¶ 22-23.

3 **6. Class Response**

4 The Settlement Class’ response to the Settlement has been overwhelmingly positive. The
5 deadline to submit claims, opt outs, and any objections to the Settlement is March 5, 2022, which
6 provides substantially more time for Class Members to respond to the settlement than the Court’s
7 recommended guideline of 35 days. As of January 7, 2022, 38,823 claims have been submitted, and the
8 Parties expect the number of claims submitted to increase through the remainder of the claims period.
9 Azari Decl. ¶ 31. To date, no objections to the Settlement have been filed and only eleven (11) Class
10 Members have requested to opt out of the Settlement. *Id.* ¶ 31.

11 **III. ARGUMENT**

12 **A. Legal Standards for Final Approval**

13 Final approval is a multi-step inquiry: first, the Court must certify the proposed settlement
14 class; second, it must determine that the settlement proposal is “fair, reasonable, and adequate;” and
15 third, it must assess whether notice has been provided in a manner consistent with Rule 23 and due
16 process. Fed. R. Civ. P. 23(e)(2); *Adoma v. Univ. of Phoenix Inc.*, 913 F. Supp. 2d 964, 972 (E.D. Cal.
17 2012). These procedures safeguard class members’ due process rights and enable the Court to fulfill its
18 role as the guardian of class interests. The Settlement satisfies each of these requirements.

19 **B. The Court Should Certify the Class**

20 Class certification under Rule 23 is a two-step process. First, the plaintiff must demonstrate
21 that numerosity, commonality, typicality, and adequacy are met. Fed. R. Civ P. 23(a). “Class
22 certification is proper only if the trial court has concluded, after a ‘rigorous analysis,’ that Rule 23(a)
23 has been satisfied.” *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542 (9th Cir. 2013) (quoting *Wal-*
24 *Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). A plaintiff must then establish that one of the
25 bases for certification in Rule 23(b) is met. Here, Plaintiffs must demonstrate that “questions of law or
26 fact common to Class Members predominate over any questions affecting only individual members,
27
28

1 and . . . [that] a class action is superior to other available methods for fairly and efficiently adjudicating
2 the controversy.” Fed. R. Civ. P. 23(b)(3).

3 On November 5, 2021, the Court preliminarily approved the following Class definition:

4 [A]ll residents of the United States who were notified by The Kroger Co. that their PII
5 was compromised as a result of the FTA Data Breach. Excluded from the Settlement
6 Class are: (1) the Judges presiding over the Action, and members of their families; (2)
7 the Defendant Kroger, their subsidiaries, parent companies, successors, predecessors,
8 any entity in which the Defendant Kroger or their parents have a controlling interest,
9 and their current or former officers and directors; (3) Persons who properly execute
and submit a Request for Exclusion prior to the expiration of the Opt-Out Period, i.e.,
within 75 days of the Notice Date; and (4) the successors or assigns of any such
excluded Persons.

10 Preliminary Approval Order ¶ 3.

11 Nothing has occurred that would change the Court’s previous determination that Plaintiffs have
12 satisfied the requirements under Rule 23. First, pursuant to Rule 23(a)(1), there can be no doubt that
13 numerosity is satisfied as it is undisputed that the class consists of approximately 3.82 million Class
14 Members. Pursuant to Rule 23(a)(2), there are questions of law or fact common to the class, including:
15 the nature of Kroger’s data security practices, whether Kroger knew or should have known that
16 Accellion’s FTA was unsecure, whether Kroger owed duties of care to Class Members to safeguard
17 their PII, and whether Kroger breached those duties, among others. Rule 23(a)(3) requires that “the
18 claims or defenses of the representative parties are typical of the claims or defenses of the class.” Here,
19 the claims of the named Plaintiffs are typical of the claims of the Settlement Class. Jaramey Stobbe is
20 a Kroger employee, and Ricky Cochran and Alain Berrebi are customers; the Class Members are Kroger
21 employees and customers. Plaintiffs’ and Class Members’ claims arise from the same nucleus of facts
22 relating to the FTA Data Breach, pertain to a common defendant Kroger, and are based on the same
23 legal theories. Finally, under Rule 23(a)(4), Plaintiffs and their counsel do not have any conflicts of
24 interest with other Class Members and have demonstrated their commitment to prosecute the action
25 vigorously on behalf of the class.

26 The requirements under Rule 23(b) are also satisfied. Plaintiffs seek certification under Rule
27 23(b)(3), which provides that a class action can be maintained where: (1) the questions of law and fact
28 common to members of the class predominate over any questions affecting only individuals; and (2)

1 the class action mechanism is superior to the other available methods for the fair and efficient
2 adjudication of the controversy. *Noll v. eBay*, 309 F.R.D. 593, 604 (N.D. Cal. 2015). Here, Plaintiffs’
3 claims depend on whether Kroger had reasonable data security measures in place to protect Plaintiffs’
4 and Class Members’ PII, and whether Kroger could have prevented unauthorized exposure of Plaintiffs’
5 PII or mitigated its effects with more adequate third-party risk management practices. These questions
6 can be resolved by resort to common evidence for all Class Members, including Kroger’s internal
7 documents, testimony of its employees, and expert analysis. In addition, the class action mechanism is
8 superior for resolving this matter given the very large size of the proposed class weighed against the
9 expense and burden of individual actions. Because Plaintiffs satisfy the Rule 23 requirements, the Court
10 should grant final certification of the Class.

11 **C. The Court Should Grant Final Approval of the Settlement**

12 Rule 23(e) requires the district court to determine whether a proposed settlement is “fair,
13 reasonable, and adequate.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 944 (9th Cir. 2015).
14 To assess the fairness of a class settlement, Ninth Circuit courts consider a number of factors, including:
15 (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and likely duration of future
16 litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in
17 settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience
18 and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of class
19 members to the proposed settlement. *Id.* at 944 (citing *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566,
20 575 (9th Cir. 2004)).

21 **1. The Proposed Settlement Provides A Substantial Recovery, Taking Into** 22 **Account the Costs and Benefits of Continued Litigation**

23 While Plaintiffs believe their case is a strong one, there would be substantial risk in litigating
24 the case. Data breach cases are, by nature, especially risky and expensive. Such cases also are innately
25 complex. *See, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800, 2020 WL
26 256132, at *32-33 (N.D. Ga. Mar. 17, 2020) (recognizing the complexity and novelty of issues in data
27
28

1 breach class actions). This case is no exception to that rule. It involves nearly four million Class
2 Members, complicated and technical facts, and a well-funded and motivated defendant.

3 There are numerous substantial hurdles that Plaintiffs would have to overcome before the Court
4 might find a trial appropriate. First, given the early stage of the litigation, the legal sufficiency of
5 Plaintiffs' pleading was not tested by a motion to dismiss. Kroger likely would argue that certification
6 is not appropriate as different information regarding each class member was accessed by the hacking
7 entity—i.e., the compromised Settlement Class Member PII is not uniform. Establishing a cognizable
8 injury tied to Kroger's conduct (as opposed to, for instance, another data breach or some other cause)
9 can present challenges. *See, e.g., Krottner v. Starbucks Corp.*, 406 F.App'x 129 (9th Cir. 2010) (holding
10 that, although plaintiffs established injury-in-fact for standing purposes, they failed to allege cognizable
11 damages in a data breach case); *Pruchnicki v. Envision Healthcare Corp.*, 845 F. App'x 613, 614 (9th
12 Cir. 2021) (affirming dismissal of data breach class action for failure to allege cognizable damages).
13 This is especially true where, as here, a ransom was paid by the breached entity to protect the PII of the
14 Settlement Class.

15 Data breach cases, particularly, face substantial hurdles in surviving even past the pleading
16 stage and are among the most risky and uncertain of all class action litigation.

17 The \$5 million non-reversionary Settlement Fund is an excellent result for the Settlement Class.
18 With this fund, all Class Members will be eligible for a Settlement Payment in the form of distribution
19 for the CMIS, Documented Loss Payment, or a Cash Fund Payment. SA ¶ 71. The Settlement Fund will
20 be applied to pay all Administrative Expenses, Notice Expenses, the taxes to the Settlement Fund, any
21 Service Awards, and any payment of a Fee Award and Costs. *Id.* ¶¶ 63, 97, 99. Any funds remaining in
22 the Net Settlement Fund after distribution(s) to Class Members will be distributed in a subsequent
23 Settlement Payment to Class Members. *Id.* ¶ 78.

24 Based on the size of the breach and per-capita figures, the Settlement presents a robust relief
25 package and valuable outcome for the Settlement Class compared to other recent data breach class
26 action settlements. *See, e.g., In re The Home Depot, Inc. Customer Data Sec. Breach Litig.*, No. 1:14-
27 MD-02583, 2016 WL 6902351, at *7 (N.D. Ga. Aug. 23, 2016) and ECF No. 181-2 ¶¶ 22, 38 (\$13
28 million settlement for approximately 40 million class members); *In re Target Corp. Customer Data*

1 *Sec. Breach Litig.*, MDL No. 14-2522, 2017 WL 2178306, at *1-2 (D. Minn. May 17, 2017) (\$10
2 million dollar settlement for nearly 100 million class members); *In re LinkedIn User Priv. Litig.*, 309
3 F.R.D. 573, 582 (N.D. Cal. 2015) (settlement fund of \$1.25 million for claims related to approximately
4 6.4 million LinkedIn users’ stolen account passwords). Furthermore, Plaintiffs successfully obtained
5 substantive and meaningful injunctive relief as part of this Settlement. *See e.g., Campbell v. Facebook,*
6 *Inc.*, 951 F.3d 1106, 1114 (9th Cir. 2020) (inclusion of “enhanced disclosures and practices changes”
7 in settlement agreement).

8 The Settlement is a prudent course in view of these high risks. Given that all Class Members
9 will be eligible to elect CMIS or a cash payment, the Settlement provides benefits that address all
10 potential harms of a data breach without the substantial risk of continued litigation, which includes the
11 risk of dismissal or judgement against Plaintiffs.

12 2. **The Extent of Discovery Completed and the Stage of the Proceedings**

13 While this matter is still in its early stages, Plaintiffs have vigorously developed the facts and
14 legal claims in this case. Plaintiffs conducted confirmatory discovery to establish, *inter alia*, facts
15 relevant to the breach and Kroger’s liability, Kroger’s reaction and actions after the breach, and into the
16 number of individuals impacted by the breach. Wolfson Decl. ¶¶ 28–38. Plaintiffs’ counsel has stayed
17 abreast of all material developments involving the FTA Data Breach, including those impacting Kroger.
18 *Id.* ¶ 13. Counsel gathered the press releases and statements concerning the FTA Data Breach, reviewed
19 the information Kroger has provided on its website about the breach, reviewed Kroger’s data breach
20 notification letters, reviewed the Mandiant forensics report compiled and publicly released in response
21 to the FTA Data Breach, and kept abreast with news stories and other publicly-available sources of
22 information relating to the FTA Data Breach, including its impact on Kroger and other FTA Customers.
23 *Id.* ¶ 13.

24 The Parties engaged in informal discovery. As part of the negotiations and Settlement, the
25 Parties engaged in confirmatory discovery to verify not only the details about the impact of the FTA
26 Data Breach and information about the Class Members, but also the fairness of the Settlement. *Id.* ¶¶
27 28–38.

1 Class Counsel’s knowledge of facts of this case and of the practice area more broadly informed
 2 Plaintiffs’ clear view of the strengths and weaknesses of the case, the decision to go to mediation with
 3 Kroger, and the decision to recommend that the Court grant preliminary approval to the Settlement.
 4 Wolfson Decl. ¶ 43; Barnow Decl. ¶ 34.

5 **3. The Proposed Settlement is the Product of a Arm’s-Length Negotiations**
 6 **and is Supported by Experienced Counsel**

7 The Court must also be satisfied that “the settlement is not the product of collusion among the
 8 negotiating parties.” *In re Bluetooth Headset*, 654 F.3d 935, 946-47 (9th Cir. 2011).

9 Plaintiffs achieved the Settlement in contested litigation and through many weeks of arm’s-
 10 length negotiations. In this case Plaintiffs undertook substantial investigation of the underlying facts,
 11 causes of action, and potential defenses to those claims. Wolfson Decl. ¶ 13.

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

17 Judge Gandhi, a highly respected and experienced mediator, has extensive experience with and
 18 is well-versed in class action litigation, both from his time as a magistrate judge in the Central District
 19 of California and as a result of mediating many class actions, including multiple data breach cases where
 20 a settlement was reached and subsequently approved.² Judge Gandhi’s assistance in the settlement
 21 process here further confirms the absence of collusion. *See G. F. v. Contra Costa Cty.*, No. 13-cv-
 22 03667, 2015 WL 4606078, at *13 (N.D. Cal. July 30, 2015) (“[T]he assistance of an experienced
 23 mediator in the settlement process confirms that the settlement is non-collusive.”) (internal quotation
 24 marks and citation omitted).

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

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

6 None of the *Bluetooth* signs are present here. There is no “clear sailing provision” and Class
7 Counsel is not seeking fees in excess of the 25% of the Settlement Fund benchmark set by *Bluetooth*.
8 *Id.* at 942; SA ¶ 101; *see, infra*, Section III.B.5. There is no reversion of the Settlement Fund (SA ¶ 80),
9 but rather the Settlement makes every effort to distribute any Residual to the Class. *See, e.g.*, SA ¶ 78.
10 Any Fee Award and Costs awarded will be paid from this non-reversionary Settlement Fund, such that
11 there was every incentive to secure the largest Settlement Fund possible.

12 There is no indication of collusion or fraud in the settlement negotiations and the Settlement
13 that is being presented to the Court and none exists.

14 Class Counsel include attorneys who have substantial experience in complex class action
15 litigation, including in data breach and data privacy cases. Wolfson Decl. ¶¶ 48–62 & Ex. 1; Barnow
16 Decl. ¶¶ 38–49 & Ex 1. For example, Ms. Wolfson has decades of experience in privacy litigation,
17 serves as co-lead counsel in the ongoing Zoom and Ring privacy cases, and served as co-lead counsel
18 both in the *Premera* and *Experian* data breach class actions, among others. Wolfson Decl. ¶¶ 50–53,
19 59. Ben Barnow is nationally recognized for his experience in leading some of the nation’s largest
20 consumer class actions and has been recognized as a *Titan of the Plaintiffs Bar*.³ As a court-appointed
21 lead counsel or equivalent designation, he has successfully led over forty major class actions (including
22 MDLs) where class-wide recoveries were achieved, resulting in benefits valued in excess of five billion
23 dollars being made available to class members. This includes leading eight noteworthy privacy class
24 actions where class settlements were achieved, including, *inter alia*, *In Re: Sony Gaming Networks and*
25 *Customer Data Security Breach Litigation*, MDL 2258, *In Re: TJX Retail Security Breach Litigation*,

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27 _____
28 ³*See* Sindhu Sundar, *Titan of the Plaintiffs Bar: Ben Barnow*, LAW360 (Oct. 8, 2014, 7:40 P.M.),
www.law360.com/articles/585655/titan-of-the-plaintiffs-bar-ben-barnow.

1 MDL No. 1838, *In Re: Countrywide Fin. Corp. Customer Data Security Breach Litigation*, MDL No.
 2 1998, *Lockwood v. Certegy Check Services, Inc.*, 07-cv-01434 (M.D. Fla.), *Rowe v. Unicare Life and*
 3 *Health Insurance Co.*, 2009cv2286 (N.D. Ill.), *Orr v. InterContinental Hotels Group, PLC.*, 17-cv-1622
 4 (N.D. Ga.), *In re: Zappos.com Inc. Customer Data Security Breach Litigation*, 12-cv-325 (D. Nev.) and
 5 *Winstead v. ComplyRight*, No. 1:18-cv-4990 (N.D. Ill.). Barnow Decl. ¶¶ 40–46. Class Counsel fully
 6 endorse the Settlement as fair, reasonable, and adequate to the Settlement Class, and do so without
 7 reservation. Wolfson Decl. ¶ 63; Barnow Decl. ¶ 50.

8 **4. The Proposed Method of Distribution Is Highly Effective**

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

15 To file a claim, Class Members need only complete a Claim Form and submit it along with
 16 documents supporting their claimed losses. SA ¶ 81(a). Claim Forms may be submitted electronically
 17 or in hard copy. *Id.* All Claim Forms are being processed by Epiq, an experienced and nationally
 18 recognized class action administration firm. *Id.* ¶ 81(b). Epiq has assigned specific case numbers to
 19 Class Members. Azari Decl. ¶ 82(c). The methods of distributing relief to Class Members – both
 20 through digital and physical check avenues – are reasonable. *Id.* ¶ 72.

21 **5. The Proposed Attorney Fee Award is Reasonable**

22 The terms of any proposed attorneys’ fees award, including the timing of payment, is a factor
 23 requiring analysis under Fed. R. Civ. P. 23(e)(2)(C). As set forth in Plaintiffs’ Motion for Attorney
 24 Fees, Expenses, and Service Payments, filed concurrently, Class Counsel is seeking attorneys’ fees and
 25 expenses in the total amount of \$1,250,000, which is equal to the 25% of the Settlement Fund. Plaintiffs
 26 incorporate by reference all arguments in the Motion for Attorneys’ Fees, Expenses, and Service
 27 Payments filed concurrently herewith.

28

1 **6. The Presence of a Governmental Participant**

2 Although Kroger reports having cooperated with law enforcement in the wake of the FTA Data
3 Breach, no governmental agency is involved in this litigation. The Attorney General of the United States
4 and Attorneys General of each State were notified of the proposed Settlement pursuant to the Class
5 Action Fairness Act, 28 U.S.C. § 1715, and will have an opportunity to raise any concerns or objections.
6 Azari Decl. ¶ 8.

7 **7. The Reaction of Class Members to the Proposed Settlement**

8 The Court should consider the reaction of class members to the proposed settlement when
9 determining the Settlement’s fairness. *Churchill Vill.*, 361 F.3d at 575. “It is established that the absence
10 of a large number of objections to a proposed class action settlement raises a strong presumption that
11 the terms of a proposed class action are favorable to the class members.” *Nat’l Rural Telecomms. Coop.*
12 *v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) (collecting cases); *see also In re Fleet/Norstar*
13 *Sec. Litig.*, 935 F. Supp. 99, 107 (D.R.I. 1996).

14 While the notice program reached millions of Kroger customers and employees, and almost
15 40,000 Class Members have already responded, as of January 7, 2022, only 11 requests for exclusion
16 were received and no objections to the Settlement have been filed. Azari Decl. ¶ 31.

17 **8. The Court-Approved Notice Plan Satisfies Due Process and Adequately**
18 **Provided Notice to Class Members**

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

25 Epiq has carried out a thorough individual notice campaign. Epiq provided individual notice to
26 Class Members via email and physical postcards. *Id.* ¶ 11. Epiq located 4,786,343 potentially valid
27 email addresses for 2,107,166 unique Settlement Class Member records. *Id.* ¶ 12. Email notices were
28 sent to all of these email addresses. *Id.* After the initial Email Notice effort, 2,786,735 Email Notices

1 remained undeliverable (for 728,266 unique Class Members. *Id.* ¶ 13. Epiq then sent 1,675,422 Postcard
2 Notices via USPS first class mail to all identified Class Members with an associated physical address
3 for whom a facially valid email address could not be located. *Id.* ¶ 14. Class Members were given the
4 option to have a Long Form Notice and Claim Form mailed to them by requesting them via toll-free
5 telephone number or by mail. *Id.* ¶ 16. As of January 7, 2022, Epiq had mailed 5,982 Long Form Notices
6 and Claim Forms as a result of those requests. *Id.* For Postcard Notices that were returned undeliverable,
7 Epiq re-mails the Postcard Notices to any new address available through USPS information and to
8 addresses Epiq obtains from a third-party address lookup service. *Id.* ¶ 17. As of January 7, 2022, Epiq
9 had re-mailed 3,660 Postcard Notices. *Id.* Epiq is now in the process of sending an Email Reminder
10 Notice to all Class Members who have not submitted a valid Claim Form. *Id.* ¶ 18.

11 In addition to individual notice, Epiq also carried out a robust Internet Notice Campaign. The
12 program includes targeted banner advertising on a selected advertising network and social media, which
13 are targeted to Class Members. *Id.* ¶ 19. The Banner Notice links directly to the Settlement Website and
14 has a graphic of a shopping cart to draw in Class Members' attention. *Id.* The Banner Notices will
15 generate at least 27,000,000 impressions through the Google Display Network and Facebook. *Id.* ¶¶
16 22–23. The Banner Notice Program will continue to run through March 5, 2022. *Id.* ¶ 23. The Summary
17 Notice was also posted on the internal Kroger intranet “The Feed,” which is available to all Kroger
18 associates. *Id.* at 24.

19 As of January 7, 2022, Epiq has received 38,823 Claim Forms. *Id.* ¶ 32. This means that claims
20 have been submitted by just over 1% of the Class Members, with well over a month remaining in the
21 Claims Period. This outcome is comports with the 1%-3% range that Plaintiffs' counsel anticipated and
22 is similar to the claims rates in other data breach settlements. *See* Memo ISO of Mot. for Prelim.
23 Approval, ECF No. 31 at 27–28. In addition, Class Members still have until March 5, 2022 to submit
24 claims and Epiq expects additional claims will be filed during that time. Azari Decl. ¶ 33. The claims
25 rate to date is evidence that the notice program is effective and successful.

26 Kroger also directly provided notice through “The Feed”, “Fresh News”, “the Daily Juice”, and
27 “the Scoop”, all of which constitute Kroger's intranet, email, or newsletter communications to Kroger
28 associates. Declaration of Colleen T. Brown (“Brown Decl.”) ¶ 3. Through these mediums, Kroger

1 associates have access to and frequently view important company updates. *Id.* ¶ 4. On December 20-
2 22, 2021, Kroger informed Kroger associates through “The Feed”, “Fresh News”, “the Daily Juice”,
3 and “the Scoop” of the Settlement and provided notice of the Settlement. *Id.* ¶¶ 5-11.

4 The proposed Notice Plan represents the best notice practicable. It was reviewed and analyzed
5 to ensure it meets the requisite due process requirements. Azari Decl. ¶ 37. Copies of all the notice
6 documents are attached as exhibits to the Azari Declaration; they are clear and concise, and directly
7 apprise Class Members of all the information they need to know to make a claim, opt out, or object.
8 Fed. R. Civ. P. 23(c)(2)(B); *see* Azari Decl. ¶ 34. The Notice Plan is consistent with, and exceeds, other
9 similar court-approved notice plans, the requirements of Fed. Civ. P. 23(c)(2)(B), and the Federal
10 Judicial Center (“FJC”) guidelines for adequate notice.

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

14 **IV. CONCLUSION**

15 Plaintiffs, Ricky Cochran, Alain Berrebi, and Jaramey Stobbe request that this Motion be
16 granted and the Court enter an order: (1) granting final certification of the proposed Settlement Class
17 for settlement; (2) granting final approval of the proposed class action Settlement; (3) finding that
18 notice has been conducted in accordance with the Court-approved notice plan and due process; and
19 (4) dismissing with prejudice Plaintiffs’ and Class Members’ claims against Kroger only.

20
21 Dated: January 14, 2022

Respectfully submitted,

22
23 /s/ Tina Wolfson

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Class Counsel for Plaintiffs and the Class

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2022, I caused to be filed the foregoing document. This document is being filed electronically using the Court’s electronic case filing (ECF) system, which will automatically send a notice of electronic filing to the email addresses of all counsel of record.

Dated: January 14, 2022

/s/ Tina Wolfson
Tina Wolfson