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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

DAVID AMBROSE, on Behalf of Himself
and All Others Similarly Situated,

Plaintiff,

v.

THE KROGER CO,

Defendant.

Case No. 3:20-cv-04009-EMC

STIPULATION OF SETTLEMENT

It is hereby stipulated and agreed, by and between David Ambrose, on behalf of himself and all similarly situated consumers (“Plaintiff”) and The Kroger Co., an Ohio corporation (“Kroger,” or “Defendant”), that the Action (as defined below), is settled on the terms and conditions set forth in this Stipulation of Settlement, including all exhibits attached hereto (the “Stipulation”).

RECITALS

WHEREAS, on June 16, 2020, the named Plaintiff initiated a putative class action in the United States District Court, Northern District of California (the “Court”) against Kroger (the “Complaint”). Plaintiff alleged claims under California consumer protection statutes for injunctive and monetary relief on behalf of a class of similarly situated consumers who purchased Kroger Simple Truth brand disposable plates and bowls based on representations that such products were “compostable.” The Complaint sets forth allegations that the products are not compostable because they allegedly contain perfluoroalkyl and polyfluoroalkyl substances (“PFAS”), which Plaintiff alleged are harmful to humans and do not break down over time. The

1 Complaint is deemed amended to include Kroger Simple Truth brand disposable plates, bowls and
2 platters (hereinafter, the “Products”).

3 WHEREAS, the Complaint in the action alleged that Defendant violated California
4 consumer protection laws by falsely advertising the Products as “compostable” when they
5 allegedly contain PFAS that do not break down over time, thereby contaminating what would
6 otherwise be usable compost. Plaintiff alleges that Defendant’s representations that the Products
7 are “compostable” are unlawful, unfair, and deceptive. These claims were asserted on behalf of
8 Mr. Ambrose himself, a California resident, and a putative class of California consumers that had
9 purchased the Products in reliance on Defendant’s representations that the Products were
10 compostable.

11 WHEREAS, before commencing the Action (defined below) and during litigation, Plaintiff
12 and counsel for Plaintiff conducted a thorough examination and evaluation of the relevant law and
13 facts to assess the merits of Plaintiff’s claims and potential claims and to determine how best to
14 serve the interests of the class.

15 WHEREAS, Plaintiff and Defendant engaged in a mediation on March 23, 2021, and
16 based on discovery, investigation and evaluation of the facts and law relating to the matters
17 alleged in the Complaint, the challenges presented by the Action, and Defendant’s willingness to
18 stipulate that it will revise the labeling for the Products and comply with all federal and state
19 regulations and statutes with respect to the presence of PFAS in products identified as
20 compostable, Plaintiff and counsel for Plaintiff have agreed to dismiss and settle the Action
21 pursuant to the provisions of this Stipulation. That agreement was made after considering, among
22 other things, (1) that Kroger agrees to revise the labeling for the Products to remove the word
23 “compostable;” (2) comply with all federal and state regulations and statutes with respect to the
24 presence of PFAS in products identified as compostable, (3) the benefits available to Plaintiff and
25 the class under the terms of this Stipulation, (4) the risks and uncertainty of litigation, especially in
26 actions such as this, as well as the difficulties and delays inherent in such litigation, and (5) the
27 desirability of consummating this Stipulation promptly to provide effective relief to Plaintiff and
28 the class.

1 WHEREAS, Defendant, denying wrongdoing of any kind whatsoever, and denying the
2 factual allegations in the Complaint (including that its Products contain PFAS), nevertheless has
3 agreed to enter into this Stipulation to avoid further expense, inconvenience, and the distraction of
4 litigation, and to be completely free of further participation in the Action and any further
5 controversy with respect to the Released Claims (as defined below).

6 **I. DEFINITIONS**

7 THE FOLLOWING TERMS SHALL HAVE THE MEANINGS AS SET FORTH
8 BELOW:

9 A. "Action" means the lawsuit captioned *David Ambrose, on behalf of himself and*
10 *those similarly situated v. The Kroger Co.*, Case No. 3:20-cv-04009-EMC in the United States
11 District Court, Northern District of California.

12 B. "Class" means all current and former purchasers of the Products in California who
13 purchased the Products during the Class Period. Excluded from the Class are the judge to whom
14 this case is assigned, any member of the judge's immediate family, and the judge's staff and their
15 immediate families.

16 C. "Class Member" means any Person who is included within the definition of the
17 Class.

18 D. "Class Period" means from June 16, 2016 to the Effective Date (as defined below.)

19 E. "Class Counsel" means the following individuals:

20 Mark N. Todzo, Esq.
21 Ryan Berghoff, Esq.
22 Meredyth Merrow, Esq.
23 LEXINGTON LAW GROUP
24 503 Divisadero Street
25 San Francisco, CA 94117

26 F. "Complaint" means the Complaint filed June 16, 2020 in the Action.

27 G. "Defendant's Counsel" means the following individuals:

28 Gary J. Smith, Esq.
BEVERIDGE & DIAMOND P.C.
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251

1 Roy D. Prather III, Esq.
2 BEVERIDGE & DIAMOND P.C.
3 201 North Charles Street
4 Baltimore, MD 21201

5 H. "Kroger" means The Kroger Co., an Ohio corporation, together with its
6 predecessors, successors, agents, attorneys, legal representatives, parent companies, employees,
7 officers and directors, and all of its subsidiaries and affiliates.

8 I. "Effective Date" means the first date after which *all* of the following events and
9 conditions have been met or have occurred or have been waived by a written agreement of the
10 parties pursuant to Section VIII.C below:

11 (1) All parties have executed this Stipulation;

12 (2) The Court has entered the Preliminary Approval Order (which shall be
13 substantially in the form of **Exhibit A**), and preliminarily approved this Stipulation and the
14 settlement set forth herein;

15 (3) The Court has entered the Final Judgment (which shall be substantially in
16 the form of **Exhibit B**) approving this Stipulation, including all settlement considerations as set
17 forth in this Stipulation, releasing the Released Persons from the Released Claims, and dismissing,
18 with prejudice as to Class Members, the Action with respect to Defendant, and all claims asserted
19 therein while retaining jurisdiction to enforce the terms of the settlement; and

20 (4) There has occurred: (i) the passage of five (5) days from entry of Final
21 Judgment if no formal objections were filed; (ii) in the event one or more formal objections to
22 entry of the Final Judgment are timely filed, the expiration (without the filing or notice of an
23 appeal) of the time to appeal from the Final Judgment; (iii) the final non-appealable dismissal of
24 any appeal from the Final Judgment; (iv) if a ruling or decision has been entered by an appellate
25 court affirming the Final Judgment in a form substantially identical to that of the Final Judgment
26 entered by the Court, the time to petition for review to the United States Supreme Court with
27 respect to such ruling or decision has expired; or (v) if a petition for review to the United States
28 Supreme Court with respect to the Final Judgment has been filed, the petition has been denied or,
if granted, has resulted in affirmance of the Final Judgment in a form substantially identical to the

1 form of the Final Judgment entered by the Court.

2 J. “Execution Date” means the date upon which this Stipulation is fully executed with
3 signatures from Plaintiff and Defendant.

4 K. “Fairness Hearing” means the hearing at or after which the Court will make a final
5 decision whether to approve this Stipulation and the settlement set forth herein as fair, reasonable
6 and adequate.

7 L. “Final Judgment” means the judgment entered by the Court in substantially the
8 form of attached as **Exhibit B** hereto.

9 M. “Modification Period” means the period commencing on the Execution Date and
10 ending nine (9) months later.

11 N. “Person” means any natural person, individual, corporation, association,
12 partnership, trust, or any other type of legal entity.

13 O. “PFAS” means perfluoroalkyl and polyfluoroalkyl substances.

14 P. “Preliminary Approval” shall mean the Court’s entry of an order (the “Preliminary
15 Approval Order”) substantially in the form of **Exhibit A** hereto conditionally certifying the Class
16 for settlement purposes, preliminarily approving this Stipulation and the terms of settlement
17 contained herein, and enjoining the commencement or continued prosecution by any Releasing
18 Party of any Released Claim against any Released Person.

19 Q. “Products” means Kroger Simple Truth Brand disposable plates, bowls and platters
20 advertised, marketed and sold as compostable in the State of California.

21 R. “Released Claims” means and includes any and all claims for injunctive relief,
22 (collectively hereinafter “Claims”) on or prior to the Effective date that were: (1) alleged in the
23 Complaint, and (2) not alleged in the Complaint, to the extent they could have been raised in the
24 Complaint and arise out of or relate to Kroger’s marketing, advertising, and labelling of the
25 Products as “100% compostable” or “compostable.”

26 S. “Released Persons” means the Defendant and its direct and indirect parent,
27 subsidiary and affiliated Persons and the officers, directors, employees, partners, shareholders,
28 agents and any other successors, assigns, attorneys, insurers, or representatives of any of the

1 foregoing Persons. “Released Persons” also includes any past or present manufacturer of the
2 Products.

3 T. “Releasing Party” means plaintiff David Ambrose, each Class Member, and any
4 Person claiming by or through plaintiff or any Class Member as his or her spouse, child, heir,
5 associate, co-owner, attorney, agent, administrator, devisee, assignee, executor, successor,
6 predecessor, or other representative.

7 **II. CERTIFICATION OF PLAINTIFF CLASS**

8 A. The parties stipulate to certification of the Class as defined in Section I.B. above
9 for purposes of effectuating this settlement, and to appointment of Plaintiff as representative of the
10 Class and Class Counsel as counsel for the Class. The parties agree to cooperate in the preparation
11 of such moving papers as the Court shall require to effectuate certification of the Class for
12 settlement purposes.

13 B. Certification of the Class and appointment of the Class representative and Class
14 Counsel by the Court shall be binding only with respect to the settlement of the Action. In the
15 event the Effective Date for any reason does not occur, the certification of the Class and
16 appointment of the Class Representative and Class Counsel shall be vacated, and the Action shall
17 proceed as though the certification and appointments had never occurred.

18 **III. INJUNCTIVE SETTLEMENT RELIEF**

19 In consideration for the release hereinafter set forth, the termination of this Action, and in
20 full and final settlement of all claims by Class Members, Defendant agrees that the Final Judgment
21 shall order the following injunctive relief:

22 A. **Prohibition on Labelling, Advertising and Marketing the Products as**
23 **“Compostable.”**

24 As of the Execution Date and before the end of the Modification Period, Kroger shall
25 modify all its labels, advertising and marketing of the Products to remove the words “100%
26 compostable” or “compostable.”

27 B. **Compliance with All Federal and State Laws Related to PFAS.**

28 As of the Execution Date and before the end of the Modification Period, Kroger shall

1 ensure compliance with all Federal and California state laws regarding the presence of PFAS in
2 products identified as compostable.

3 **C. Enforcement of Injunctive Provisions.**

4 Plaintiff may seek to enforce the injunctive provisions of this Stipulation by motion to the
5 Court pursuant to the Court’s continuing jurisdiction over the Stipulation set forth in Section VI.
6 below.

7 **D. Duration of Injunctive Provisions.**

8 The injunctive provision of Section III. A. of this Stipulation shall remain in effect until
9 and unless: (1) there is further regulatory or legal guidance, in the form of newly promulgated
10 laws or regulations or material amendments to existing laws or regulations, regarding the presence
11 of PFAS in foodware identified as compostable that would permit Defendant to identify the
12 Products as “compostable” or “100% compostable” and be in full compliance with all applicable
13 California and federal laws and regulations; and/or (2) Defendant re-formulates the Products such
14 that they conform to current laws, regulations, and industry standards such as the Biodegradable
15 Products Institute’s *BPI Certification Scheme: Compostable products, resins, and intermediates*
16 (Feb 2019) or another substantially similar standard, regarding the presence of PFAS in foodware
17 identified as compostable.

18 **IV. ATTORNEYS’ FEES, REIMBURSEMENT OF EXPENSES AND INCENTIVE**
19 **AWARD**

20 A. Defendant agrees to pay a total of \$200,000.00 in fees, expenses, costs and
21 incentive awards. Plaintiff and Defendant acknowledge that attorneys’ fees and reimbursement of
22 expenses for Class Counsel, as with the incentive award, are subject to the court’s approval and
23 determination. Defendant agrees not to oppose, and Class Counsel agrees that it shall submit, an
24 application by Class Counsel in an amount of \$195,000.00, or the remainder of \$200,000.00 less
25 the incentive award, subject to the court’s approval. Within thirty (30) days after entry of the
26 Final Judgment, Kroger shall deliver to Mark Todzo, at the address set forth above, a check
27 payable to “LEXINGTON LAW GROUP” in the total amount actually awarded by the Court as
28 attorneys’ fees, expenses and costs but not to exceed \$200,000.00.

1 B. Defendant agrees not to oppose an application by Plaintiff for an incentive award of
2 up to \$5,000.00 and Plaintiff and Class Counsel agree not to apply for an incentive award in
3 excess of \$5,000.00, subject to the Court’s discretion. Within twenty (20) days after the Effective
4 Date, Kroger shall deliver to Mark Todzo, at the address set forth above, a check payable to
5 “David Ambrose” in the total amount awarded by the Court as an incentive award but not
6 exceeding the sum of \$5,000.00. Kroger agrees to pay interest at the rate of five percent (5%) per
7 annum on all unpaid amounts commencing thirty (30) days after the Effective Date and continuing
8 until paid in full.

9 C. In no event shall Defendant be required by Order of the Court to pay more than the
10 \$200,000.00 in fees, expenses and costs (exclusive of any interest) set forth herein or the incentive
11 award for plaintiff Ambrose (exclusive of any interest). Should the Court by Order require
12 Defendant to pay larger amounts, Defendant shall have the right but not the obligation to cancel
13 this Stipulation, terminate the settlement and to proceed as if the settlement had never been
14 executed, and the Stipulation shall be null and void as provided in Section V.B., below.

15 D. Plaintiff represents and warrants that he (1) is not aware of, nor been informed of,
16 any other plaintiff, class member or attorney who intends to bring litigation against Kroger based
17 on the subject matter of the Action; and (2) has not encouraged and will not encourage or provide
18 assistance to any other person or entity to assert or bring any claim or action against Kroger
19 related to the subject matter of the Action.

20 E. Plaintiff and his attorney each represent and warrant that, as of the Execution Date,
21 they (1) are not presently retained by any other individuals with claims against Kroger with regard
22 to the Products; and (2) are not aware of, and have not been informed of, any other plaintiff, class,
23 class member, or attorney who intends to bring litigation against Kroger with regard to the
24 Products. Plaintiff and his counsel further represent and warrant that as of the Execution Date,
25 they have not caused any person or entity to solicit and/or induce any other person or entity to
26 bring, file, or institute a complaint, action, suit, proceeding, claim or demand of any kind or nature
27 whatsoever against Kroger with regard to the Products.

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1 **V. CONDITIONS OF SETTLEMENT AND EFFECT OF DISAPPROVAL,**
2 **CANCELLATION, OR TERMINATION OF STIPULATION**

3 A. The parties agree that neither shall conduct discovery against the other pending the
4 preliminary approval of this Stipulation by the Court, and that, upon the preliminary approval of
5 this Stipulation by the Court as evidenced by entry of the Preliminary Approval Order, all
6 discovery and other proceedings in the Action shall be stayed until further order of the Court,
7 except such proceedings as may be necessary either to implement the Stipulation or to comply
8 with or effectuate the terms of the Stipulation.

9 B. In the event that any of the events or conditions described in Section I.I. hereof
10 either are not met or do not occur, this entire Stipulation shall, upon written notice from Defendant
11 to Plaintiff, become null and void, except that the parties shall have the option to agree mutually in
12 writing to waive the event or condition and proceed with this settlement, in which event the
13 Effective Date shall be deemed to have occurred on the date of said written agreement.

14 **VI. ENFORCEMENT**

15 A. Plaintiff may by motion or application for an order to show cause before this Court
16 seek to enforce the injunctive terms of this Settlement set forth in Section III. Prior to filing any
17 such motion or application, a Plaintiff shall provide Defendant with a written notice setting forth
18 the detailed factual and legal basis for the alleged violation (“Notice of Violation”).

19 B. The Parties shall then meet and confer during the thirty (30) day period following
20 the date the Notice of Violation was sent in an effort to try to reach agreement on an appropriate
21 cure, penalty or related attorneys’ fees related to the alleged violation. After such thirty (30) day
22 period, Plaintiff may, by new action, motion, or order to show cause before this Court, seek to
23 enforce the terms and conditions contained in this Settlement. In any enforcement proceeding, the
24 Court shall not be limited by this Settlement in fashioning remedies for failure to comply with the
25 Final Judgment, and may order compliance with this Settlement by any other method it finds
26 compliant with the law.

27 **VII. DISMISSAL OF ACTION, RETENTION OF JURISDICTION AND RELEASE**

28 A. As soon as practicable after the Execution Date, Class Counsel will take all

1 necessary and appropriate steps to secure the Court's Preliminary Approval and final approval of
2 this settlement, certification of the Class, the entry of the Judgment substantially in the form of
3 **Exhibit B**, and the subsequent dismissal of the Action, with prejudice, as to the Class.

4 B. Upon the Court's final approval of this Stipulation and the settlement set forth
5 herein, the Final Judgment Pursuant to Stipulation shall be entered.

6 C. The Court shall retain jurisdiction with respect to the implementation and
7 enforcement of the terms of this Stipulation, and all Parties hereto submit to the jurisdiction of the
8 Court for purposes of implementing and enforcing the settlement embodied in this Stipulation.

9 D. In consideration of the aforementioned payment and obligations undertaken by
10 Defendant, and save and except only those obligations created or arising from this Stipulation or
11 the attached Final Judgment, Plaintiff, on behalf of himself and the Class described herein, hereby
12 agrees to release and forever discharge the Released Persons from the Released Claims, and
13 stipulates and agrees that she and the Class shall be deemed to be forever barred from initiating,
14 asserting, and/or prosecuting any Released Claims against any Released Party in any court or other
15 forum.

16 **VIII. MISCELLANEOUS PROVISIONS**

17 A. The parties hereto and their undersigned counsel agree to undertake commercially
18 reasonable efforts and to offer their reasonable cooperation to effectuate this Stipulation and the
19 terms of the settlement set forth herein, including taking all steps and efforts contemplated by this
20 Stipulation and any other steps and efforts which may become reasonably necessary by order of
21 the Court or otherwise.

22 B. This Stipulation, together with its attachments, contains the entire agreement
23 among the parties hereto and supersedes any prior agreements or understandings between them.
24 All terms of this Stipulation are contractual and not mere recitals and shall be construed as if
25 drafted by all parties hereto. The terms of this Stipulation are and shall be binding upon each of
26 the parties hereto, their agents, attorneys, employees, successors and assigns, and upon all other
27 Persons claiming any interest in the subject matter hereto through any of the parties hereto,
28 including any Class Member.

1 C. This Stipulation may be amended or modified only by a written instrument signed
2 by counsel for all parties. Amendments and modifications may be made without additional notice
3 to the Class unless such notice is required by the Court.

4 D. This Stipulation shall be subject to, governed by, construed, and enforced pursuant
5 to the laws of the State of California.

6 E. The exhibits to this Stipulation are an integral part of the settlement and are hereby
7 incorporated and made a part of this Stipulation.

8 F. Except as expressly agreed to herein, the parties to this Stipulation shall bear his or
9 its own attorneys' fees, expenses and costs in the Action, including in connection with finalizing
10 this settlement, obtaining court approval of the same, and proceedings subsequent to the same.

11 G. To the extent permitted by law, this Stipulation may be pleaded as a full and
12 complete defense to, and may be used as the basis for an injunction against, any action, suit, or
13 other proceeding which may be instituted, prosecuted, or attempted in breach of or contrary to this
14 Stipulation.

15 H. This Stipulation, whether or not executed and consummated, and any
16 communications exchanged or actions taken pursuant to or during the negotiation of this
17 Stipulation, are for settlement purposes only. Neither the fact of nor the contents of this
18 Stipulation or its exhibits, nor any communications exchanged nor actions taken pursuant to or
19 during the negotiation of this Stipulation, shall constitute or be construed as admissible evidence
20 of the validity of any claim asserted or fact alleged in the Complaint or of any wrongdoing, fault,
21 violation of law or liability of any kind on the part of the Released Parties. This Stipulation is
22 made without prejudice to the rights of Kroger to oppose certification of a class or classes should
23 this Stipulation not be approved or implemented and should the Effective Date not occur.

24 I. The parties warrant and represent that no claim or any portion of any claim
25 referenced or released in this Stipulation has been sold, assigned, conveyed, or otherwise
26 transferred to any other Person.

27 J. This Stipulation shall be deemed to have been executed upon the last date of
28 Execution by all of the parties.

1 K. This Stipulation may be executed in counterparts, each of which shall constitute an
2 original. This Stipulation may be executed by facsimile or email signatures, each of which shall
3 be deemed to be an original.

4 **PLAINTIFF:**

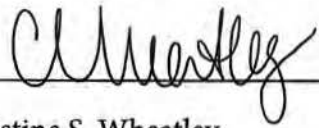
5 DATED: July~~26~~, 2021

7 
8 **DAVID AMBROSE**

9 **DEFENDANT:**

10 DATED: July~~26~~¹⁴, 2021


11 **THE KROGER CO.**

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14 By: Christine S. Wheatley
15 Its: Group Vice President, Secretary,
16 and General Counsel
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1 **COUNSEL:**


2 DATED: July 27, 2021

LEXINGTON LAW GROUP, LLP

3
4 By: 
5 Mark N. Todzo
6 Ryan Berghoff
7 Meredyth Merrow
8 Attorneys for Plaintiffs
9 DAVID AMBROSE, on Behalf of Himself and
10 All Others Similarly Situated

8 DATED: July 26 2021

BEVERIDGE & DIAMOND P.C.

9
10 By: 
11 Gary J. Smith
12 Roy D. Prather III
13 Attorneys for Defendant
14 THE KROGER CO.
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