

**SETTLEMENT AGREEMENT AND  
FULL RELEASE OF ALL CLAIMS**

**I. Overview**

This Settlement Agreement is made and entered into this 23rd day of November, 2022 between Kroger (defined below), on the one hand, and the State of New Mexico (“New Mexico” or the “State”), acting through its Attorney General (the “Attorney General”), on the other hand (together, the “Parties”). This Settlement Agreement is intended by the Parties to fully, finally, and forever resolve, discharge, and settle the Released Claims, upon and subject to the terms and conditions hereof.

WHEREAS, the State filed its second amended complaint in this Action on March 6, 2019, which was served upon Kroger on April 9, 2019,<sup>1</sup> (i) alleging, among other things, that Kroger, among others, violated the law by failing to monitor, report, and abstain from shipping allegedly suspicious orders of opioid pain medications; (ii) alleging, among other things, that Kroger, among others, violated the law by dispensing opioid pain medications without confirming those prescriptions were issued for a legitimate medical purpose; and (iii) asserting Claims for damages, equitable abatement, civil penalties, attorneys’ fees, litigation costs, and other relief.

WHEREAS, the State brought this Action in its sovereign capacity as the people’s attorney in order to protect the public interest, including the interests of the State of New Mexico and its citizens;

WHEREAS, numerous New Mexico Local Governments have filed actions in various forms against Kroger (“Litigating Local Governments”), among others, raising claims or allegations concerning, related to, based upon, or in connection with the Covered Conduct;

WHEREAS, there are numerous New Mexico Local Governments that have not filed actions against Kroger, but may in the future raise claims or allegations concerning, related to, based upon, or in connection with the Covered Conduct (“Local Government Claims”);

WHEREAS, Kroger (i) denies each and all of the Claims and allegations of wrongdoing made by the State in this Action and maintains that it has meritorious defenses in this Action as well as the actions brought by the Litigating Local Governments, and to the Local Government Claims; (ii) denies all assertions of wrongdoing or liability against Kroger arising out of any of the conduct, statements, acts, or omissions alleged, or that could have been alleged, in this Action as well as the actions brought by the Litigating Local Governments, or relating to the Local Government Claims, and contends that the factual allegations made in this Action and in the actions brought by the Litigating Local Governments and in the Local Government Claims relating to Kroger are false and materially inaccurate; (iii) denies that the State, any New Mexico Local Government, or any New Mexico resident was harmed by any conduct of Kroger alleged in this Action as well as in the action brought by Litigating Local Governments or relating to the Local

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<sup>1</sup> The State filed its initial complaint in this Action on September 7, 2017, and filed its first amended complaint in this Action on December 21, 2017, neither of which named Kroger as a party.

Government Claims; (iv) denies liability, expressly denies any wrongdoing, and denies it violated any federal or state common law relating to the Covered Conduct; and (v) maintains that Kroger would be able to successfully defend against the State's claims and allegations at trial in this Action, as well as in connection with the actions brought by the Litigating Local Governments and the Local Government Claims;

WHEREAS, Kroger expressly denies any wrongdoing relating to the Covered Conduct, and expressly denies the allegations of wrongdoing alleged against Kroger in this Action and in the actions brought by the Litigating Local Governments and the Local Government Claims;

WHEREAS, the Parties have each investigated the facts and analyzed the relevant legal issues;

WHEREAS, the Parties have now reached this Settlement, which they believe avoids the expense, delay, and uncertainty of litigation;

WHEREAS, the State has concluded that the terms of the Settlement are fair, reasonable, adequate, and in the best interest of the State of New Mexico and its citizens;

WHEREAS, the Parties agree that neither this Agreement nor any statement made in the negotiation thereof shall be deemed or construed to be a concession as to any claim, an admission, evidence of any violation of any statute or law, evidence of any liability or wrongdoing by Kroger, or evidence of the truth, falsity, merit, or lack of merit of any of the allegations in this Action or any defense thereto;

WHEREAS, this Settlement Agreement is a product of arm's length settlement negotiations between the duly-authorized representatives of the Parties;

NOW, THEREFORE, IT IS HEREBY AGREED by and among the Parties, by and through their respective counsel, that all Released Claims shall be finally and fully settled and released as to the Releasee, as set forth below.

## **II. Definitions**

**A.** "Action" means the lawsuit filed by the State in the First Judicial District Court, County of Santa Fe, State of New Mexico, captioned *State of New Mexico ex rel. Hector Balderas, Attorney General v. Purdue Pharma L.P. et al.* (No. D-101-CV-2017-02541).

**B.** "Agreement," "Settlement," or "Release" refers to this Settlement Agreement and Release.

**C.** "Kroger" means The Kroger Co., and each of its current and former corporate parents, direct and indirect subsidiaries, affiliates, agents, predecessors, and successors; and the current and former directors, officers, and employees of any of the foregoing. As used in this paragraph, "affiliates" means entities directly or indirectly controlling, controlled by, or under common control or ownership, including, but not limited to, the Kroger Co., the Kroger Limited Partnership II d/b/a Peyton's Northern, and Smith's Food & Drug Centers, Inc. d/b/a/ Peyton's

Phoenix. “Kroger” also includes but is not limited to all other entities that have been acquired by Kroger or Kroger-affiliated entities.

**D.** “Claim” means any past, present or future cause of action, claim for relief, cross-claim or counterclaim, theory of liability, demand, derivative claim, request, assessment, charge, covenant, damage, debt, lien, loss, penalty, judgment, right, obligation, dispute, suit, contract, controversy, agreement, parens patriae claim, promise, performance, warranty, omission, or grievance of any nature whatsoever, whether legal, equitable, statutory, regulatory or administrative, whether arising under federal, state, or local common law, statute, regulation, guidance, ordinance, or principles of equity, whether filed or unfiled, whether asserted or unasserted, whether known or unknown, whether accrued or unaccrued, whether foreseen, unforeseen, or unforeseeable, whether discovered or undiscovered, whether suspected or unsuspected, whether fixed or contingent, and whether existing or hereafter arising, in all such cases, including, but not limited to, any request for declaratory, injunctive, or equitable relief, compensatory, punitive, or statutory damages, absolute liability, strict liability, restitution, subrogation, contribution, indemnity, apportionment, disgorgement, reimbursement, attorney fees, expert fees, consultant fees, fines, penalties, expenses, costs, or any other legal, equitable, civil, administrative, or regulatory remedy whatsoever.

**E.** “Claim-Over” means a Claim asserted by any entity that is not a Releasor against a Releasee on the basis of contribution, indemnity, or other claim-over on any theory relating to Claims arising out of or related to Covered Conduct (or conduct that would be Covered Conduct if engaged in by the Releasee) asserted by the Releasor.

**F.** “Covered Conduct” means any and all acts, failures to act, conduct, statements, omissions, events, transactions, or other activity of any kind whatsoever, whether known or unknown and whether discovered or undiscovered, occurring up to and including the Execution Date arising from or related in any way to (i) the discovery, development, manufacture, marketing, promotion, advertising, recall, withdrawal, distribution, dispensing, monitoring, supply, sale, prescribing, use, or abuse of any Opioid; (ii) the characteristics, properties, risks, or benefits of any Opioid; (iii) the reporting, disclosure, non-reporting, or non-disclosure to federal, state, or other regulators of orders placed with the Releasee; (iv) the purchasing, selling, acquiring, disposing of, importing, exporting, applying for quota for, procuring quota for, handling, processing, packaging, supplying, distributing, converting of any precursor or component Opioid products, including, but not limited to, natural, synthetic, semi-synthetic, or chemical raw materials, starting materials, active pharmaceutical ingredients, drug substances, or any related intermediate Opioid products; or (v) diversion control programs or suspicious order monitoring.

**G.** “Cure Period” has the meaning specified in Section VI.C of this Agreement.

**H.** “Execution Date” means the date on which this Agreement is executed by the last Party to do so.

**I.** “Effective Date of the Release” means 30 days after the Execution Date.

**J.** “Global Settlement” means any agreement resolving substantially all litigation and claims brought or threatened to be brought against Kroger by other states and Local Governments

in the United States, including without limitation claims against Kroger in the multi-district litigation *In re: Nationwide Prescription Opiate Litigation*, MDL No. 2804 (N.D. Ohio) and related state court prescription opiate litigation.

K. “Local Government” shall have the same meaning as the New Mexico MOU.

L. “Local Government Claims” means claims or allegations concerning, related to, based upon, or in connection with the Covered Conduct that may in the future be raised or filed by New Mexico Local Governments.

M. “New Mexico MOU” means the New Mexico Opioid Allocation Agreement set forth in Exhibit A of this Agreement.

N. “Notice Designees” has the meaning specified in Section VI.E of this Agreement.

O. “Opioid” means any chemical substance, whether licit or illicit, whether used for medicinal or non-medicinal purposes, and whether natural, synthetic, or semi-synthetic, or any finished pharmaceutical product made from or with such substance that is an opioid or opiate, as well as any product containing any such substance.

P. “Opioid Related Expenditure” shall have the same meaning as it does in the New Mexico MOU.

Q. “Participating Local Government” means any Local Government that executes an agreement as specified in Section IV.G of this Agreement.

R. “Post-Effective Date Sign-on Deadline” means the deadline for New Mexico Local Governments to execute a release, which will be 90 days after the Effective Date.

S. “Promotion” means the publication or dissemination to a Third Party of information that is intended to directly or indirectly increase the use or sale of Opioids.

T. “Releasee” means Kroger as defined herein.

U. “Released Claims” means any and all Claims brought by the State that directly or indirectly are based on, arise out of, or in any way relate to or concern the Covered Conduct occurring prior to the Effective Date of the Release. Without limiting the foregoing, Released Claims include any Claims arising out of, or relating to, in whole or in part, the Covered Conduct, and any such Claims that could be or could have been asserted now or in the future in this Action or in any comparable action or proceeding brought by the State (whether judicial, arbitral, or administrative) or by Participating Local Governments. Released Claims also include all Claims asserted in any proceeding to be dismissed pursuant to this Agreement, whether or not such Claims relate to Covered Conduct. The Parties intend that “Released Claims” be interpreted broadly. This Agreement does not release Claims by private individuals for damages for any alleged personal injuries arising out of their own use of any Opioid or criminal liability on the part of the Releasee.

V. “Releasor” means with respect to the Released Claims: (1) the State of New Mexico, including all of its executive departments, agencies, divisions, boards, commissions, instrumentalities, and officers, including without limitation the New Mexico Attorney General, both as a person and on behalf of all New Mexico citizens, the New Mexico Board of Pharmacy, New Mexico Department of Health, New Mexico Regulation and Licensing Department, and New Mexico Department of Public Safety, and any person in his or her official capacity, whether elected or appointed to lead or serve any of the foregoing, and any agency, person or entity claiming by or through any of the foregoing; (2) Participating Local Governments; and (3) any person or entity acting in a *parens patriae*, sovereign, quasi-sovereign, private attorney general, *qui tam*, taxpayer, or other capacity seeking relief on behalf of or generally applicable to the general public with respect to the State of New Mexico or any Local Government in the State of New Mexico, whether or not any of them participates in this Settlement. Nothing in this definition shall be construed to limit the definition of “Local Government” in subsection K above. Participating Local Governments shall provide an executed release as specified in Section IV.G providing for a release to the fullest extent of the Participating Local Government’s authority, an executed copy of which shall be attached as an exhibit to and deemed to be a part of this Agreement.

W. “Settlement Amount” has the meaning set forth in Section III.A of this Agreement.

X. “Settlement Payment” means Kroger’s payment of the Settlement Amount as provided in this Agreement.

Y. “Third Party” means any person or entity other than Kroger or the State.

### III. Settlement Consideration

A. **Payment of Settlement Amount.** The Releasee shall pay the Releasor the sum of eighty-five million dollars (\$85,000,000) (the “Settlement Amount”) via wire transfer pursuant to wiring instructions previously provided to the Releasee by the Releasor’s outside counsel on the Releasor’s behalf. Such Settlement Payment shall be made no later than 5 p.m. mountain time on November 15, 2022. The Settlement Amount will be allocated as follows:

1. \$32,175,000 to the State’s Restitution account for payment to participating Local Governments, which shall be distributed in accordance with the allocation percentages outlined in the New Mexico MOU and expended solely on abatement efforts as permitted in the New Mexico MOU;
2. \$26,325,000 to the State’s Consumer Settlement Fund for costs associated with abatement of the public nuisance alleged in the State’s complaint, which shall be expended solely on abatement efforts as permitted in the New Mexico MOU;
3. \$25,500,000 in fees to outside counsel for the State; and
4. \$1,000,000 in costs to cover litigation costs incurred by the State.

**B. Negotiation of Terms for Injunctive Relief.** The Parties agree that the consent judgment to be filed by the Parties shall provide that the Court shall retain jurisdiction to enter an amended consent judgment imposing injunctive terms that match but do not exceed the injunctive terms imposed in any executed Global Settlement. If there is no Global Settlement within one year of the Effective Date of the Release, then the Parties will engage a mutually agreeable mediator to assist the Parties in negotiating injunctive relief to apply to the State of New Mexico.

**C. No Other Payments.** Other than the Settlement Amount referenced in Section III.A, the Releasee shall have no obligation to make any further or additional payments in connection with Claims for Covered Conduct or this Settlement Agreement.

**D. Opioid Related Expenditure.** It is the intent of the Parties that the restitution amounts in Sections III.A.1 and III.A.2 be used exclusively for Opioid Related Expenditure.

**E. Taxes.** Each of the Parties acknowledges, agrees, and understands that it is its intention that, for purposes of Section 162(f) of the Internal Revenue Code, the portion of the Settlement Payment allocable to the State's Restitution account and the State's Consumer Settlement Fund (\$58,500,000) constitutes restitution or remediation for damage or harm allegedly caused by the potential violation of a law (within the definition of 26 C.F.R. section 1.162-21(e)(4)(i)) and/or is an amount paid to come into compliance with the law (within the definition of 26 C.F.R. section 1.162-21(e)(4)(ii)). The Parties acknowledge, agree, and understand that only the portion of the Settlement Payment allocable to the State's litigation costs and fees to outside counsel for the State (\$26,500,000) represents reimbursement to the State or other person or entity for the costs of any investigation or litigation, and no portion of the Settlement Amount represents or should properly be characterized as the payment of fines, penalties, or other punitive assessments. The Releasor acknowledges, agrees, and understands that the Releasee may allocate the cost of the Settlement Amount using a reasonable basis. Pursuant to 26 CFR section 1.6050X-1(a) and (b), the State shall complete and file Form 1098-F with the Internal Revenue Service no later than February 28, 2023 (March 31, 2023 if filed electronically), and the State agrees to report the portion of the Settlement Payment allocable to the State's Restitution account and the State's Consumer Settlement Fund (\$58,500,000) as remediation/restitution amounts on that form. Further, pursuant to 26 CFR section 1.6050X-1(c), the State shall promptly furnish a Copy B of such Form 1098-F to the Releasee. Neither Party makes any warranty or representation to the other Party as to the tax consequences of the Settlement Amount or any portion thereof.

**F. Solvency.** The Releasee warrants that, as of the date of this Agreement, it is not insolvent nor will its Settlement Payment or Implementation of Terms for Injunctive Relief render it insolvent within the meaning of and/or for the purposes of the United States Bankruptcy Code. If (i) a case is commenced with respect to the Releasee under Title 11 of the United States Code (Bankruptcy), or a trustee, receiver, or conservator is appointed under any similar law, and (ii) a court of competent jurisdiction enters a final order determining the Settlement Payment to be a preference, voidable transfer, fraudulent transfer, or similar transaction, and (iii) pursuant to an order of a court of competent jurisdiction monies paid by the Releasee pursuant to this Settlement are either not delivered or are returned to the Releasee or the trustee, receiver, or conservator appointed by a court in any bankruptcy proceeding with respect to the Releasee, then the releases given pursuant to this Settlement shall be null and void.

#### **IV. Settlement of Claims, General Release, and Covenant Not to Sue**

**A. Scope.** On the Effective Date of the Release, the State and each Releasor hereby releases the Releasee, and shall be deemed to have fully, finally, forever, and permanently released, remised, acquitted, held harmless, relinquished, and discharged with prejudice all Released Claims brought by Releasor. For the avoidance of doubt, the State agrees that this Settlement Agreement and the releases contained herein shall fully and completely resolve any past, present, future liability that any Releasee may have arising from, relating to or based on the Covered Conduct occurring prior to the Effective Date of the Release, whether in the Action or otherwise. The releases provided for in this Agreement are intended by the Parties to be broad and shall be interpreted so as to give Releasees the broadest bar against any and all Released Claims. This Settlement Agreement is, will constitute, and may be pleaded as a complete bar to any Released Claim asserted against Releasees, whether against the State, any Participating Local Government.

**B. Covenant Not to Sue.** The State, on behalf of itself hereby absolutely, unconditionally and irrevocably covenants not to bring, file, or claim, or to cause, assist, or permit to be brought, filed, or claimed, any Released Claim of any type that could have been asserted regarding the Covered Conduct (that accrue before or after the Execution Date) in any forum whatsoever against the Releasee, and shall be permanently barred and enjoined from instituting, reinstating, maintaining, commencing, or prosecuting any Released Claim against the Releasee, and the Release as set forth herein shall be given full res judicata effect. Each Participating Local Government must agree to a similar covenant not to sue the Releasee.

**C.** In connection with the releases provided for in the Agreement, the Releasor will expressly waive, release, and forever discharge any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States or other jurisdiction, or principle of common law, which is similar, comparable, or equivalent to § 1542 of the California Civil Code, which reads:

**General Release; Extent.** A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

The Releasor may hereafter discover facts other than or different from those which it knows, believes, or assumes to be true with respect to the Released Claims, but the Releasor will expressly waive and fully, finally, and forever settle, release, and discharge, upon the Execution Date, any and all Released Claims that may exist as of such date but which the Releasor does not know or suspect to exist, whether through ignorance, oversight, error, negligence, or through no fault whatsoever, and which, if known, would materially affect the Releasor's decision to enter into the Agreement. This provision does not extend to Released Claims which the Releasor does not know or suspect to exist because of fraud committed by, or willful misrepresentations made by the Releasee in the course of litigating the Action.

**D.** The releases provided for in the Agreement are intended by the Parties to be broad and shall be interpreted so as to give the Releasee the broadest possible bar against any liability

arising from or relating in any way to the Released Claims and extend to the full extent of the power of the Releasor to release its claims. This Settlement Agreement is, will constitute, and may be pleaded as a complete bar to any Released Claim asserted by the Releasor against the Releasee, whether currently pending or in the future.

**E. Dismissal.** As soon as practicable following execution of this Agreement, the Parties will execute and file a consent judgment including a dismissal of the Action with prejudice and with each side bearing their own attorneys' fees and costs. Notwithstanding the foregoing, the consent judgment shall provide that the Court shall retain jurisdiction for purposes of enforcing compliance with the Settlement Agreement. The Parties shall confer and agree as to the final form and time of filing prior to filing the consent judgment.

**F. Statement of Intent.** It is the intent of the Parties that:

1. The payments made under this Agreement shall be the sole payments made by the Releasee involving, arising out of, or related to the Released Claims;
2. Claims by the Releasor against non-Parties should not result in additional payments by the Releasee for the Released Claims, whether through contribution, indemnification, or any other means; and
3. To the extent permitted under New Mexico law, the Settlement meets the requirements of the Uniform Contribution Among Joint Tortfeasors Act and any similar state law or doctrine that reduces or discharges a released party's liability to any other parties. For the avoidance of doubt, it is the intent of the Parties to discharge Kroger from all liability for contribution to any other alleged tortfeasor in the Action and in the actions brought by the Litigating Local Governments for Local Government Claims.

**G.** In addition to the general release and dismissal to be provided by the State set forth in Sections A, B, C, and D, the State shall make reasonable efforts to deliver or arrange to have delivered to Kroger signed agreements from each Local Government by the Post-Effective Date Sign-on Deadline (i.e., within 90 days following the Effective Date). Such agreements shall include: (a) the Local Government's acceptance of the terms and conditions of this Agreement; (b) in the case of a Local Government or Local Government Claim, such Local Government's agreement to implement an immediate cessation of any and all litigation activities relating to such Local Government's lawsuit as to Kroger; (c) in the case of a Litigating Local Government or Local Government Claim, an agreement that the State may represent that the Local Government supports the consent judgment to be entered in this Action; and (d) in the case of a Litigating Local Government or Local Government Claim, such Local Government's agreement to file, within seven (7) days of signing an agreement as defined herein, a notice or stipulation of voluntary dismissal with prejudice of any and all Released Claims asserted by the Local Government against Kroger with each party to bear its own costs.

1. The State agrees to furnish to Kroger copies of signed agreements described in Section IV.G. on a weekly basis. The State further agrees to furnish to Kroger no later than three business days after the Post-Effective Date Sign-on



Deadline a final report listing the Local Governments that have executed the signed agreements described in Section G by the Post-Effective Date Sign-on Deadline and copies of all such signed agreements.

**H. Non-Party Settlement.** To the extent that, on or after the Execution Date of the Agreement, the Releasor settles any Claims arising out of or related to Covered Conduct (or conduct that would be Covered Conduct if engaged in by the Releasee) (“Non-Party Covered Conduct Claims”) it may have against any entity that is not a Releasee (a “Non-Released Entity”) that is, as of the Execution Date of the Agreement, a defendant in the Action or any other action and provides a release to such Non-Released Entity (a “Non-Party Settlement”), including in any bankruptcy case or through any plan of reorganization (whether individually or as a class of creditors), the Releasor will seek to include (or in the case of a Non-Party Settlement made in connection with a bankruptcy case, will cause the debtor to include), unless prohibited from doing so under applicable law, in the Non-Party Settlement a prohibition on seeking contribution or indemnity of any kind from the Releasee or a release from such Non-Released Entity in favor of the Releasee (in a form equivalent to the releases contained in this Agreement) of any Claim-Over. The obligation to seek to obtain the prohibition and/or release required by this subsection is a material term of this Agreement.

**I. Claim-Over.** In the event that the Releasor obtains a judgment with respect to a Non-Party Covered Conduct Claim against a Non-Released Entity that does not contain a prohibition on seeking contribution or indemnity of any kind for the Releasee, or the Releasor files a Non-Party Covered Conduct Claim against a Non-Released Entity in bankruptcy or the Releasor is prevented for any reason from obtaining a prohibition on seeking contribution or indemnity of any kind for the Releasee in a Non-Party Settlement, and such Non-Released Entity asserts a Claim-Over against the Releasee, the Parties shall meet and confer concerning any additional appropriate means by which to ensure that the Releasee is not required to make any payment with respect to Covered Conduct beyond the amounts that will already have been paid by the Releasee under this Agreement.

**J. Reservation of Offset Rights.** To the extent a claim related to Covered Conduct is brought against Kroger by any Native American tribe (or related tribal entity) in New Mexico and a judgment is entered against Kroger, Kroger expressly reserves the right to seek an offset based on the \$85,000,000 Settlement Payment provided to the State, and nothing herein shall be construed to in any way limit Kroger’s ability to seek such an offset. Noting herein shall be construed as the State’s agreement that such an offset is legal, reasonable or justified. Further, nothing herein shall be construed in any way to limit the sovereignty of such Native American tribe or related tribal entity, and the State expressly disclaims any authority over, or ability to release, any such claim made by any such Native American tribe or related tribal entity.

**K. Cooperation.** The Releasor agrees that it will cooperate in good faith with the Releasee to secure the prompt dismissal of any and all Released Claims. The Releasor further agrees, in its sole discretion, to make reasonable efforts to obtain consensual releases from Releasor’s Local Governments relating to the Covered Conduct in exchange for their participation in this Agreement. The Releasor further agrees that it will not oppose any effort by the Releasee to secure the prompt dismissal of any and all Released Claims, including but not limited to any Released Claims or Local Government Claims asserted against the Releasee by New Mexico Local

Governments, whether currently pending or in the future. Provided, however, that Releasor will oppose any effort by Releasee to secure dismissal if such effort is premised upon or involves (i) any material misstatement of Releasor's legal obligations under this Agreement or (ii) any material misstatement regarding the practical or legal effect or impact of this Agreement on Released Claims asserted against Releasee by New Mexico Local Governments.

1. The abatement amount identified in Section III.A.2, 45% of the fees identified in Section III.A.3, and 100% of the costs identified in Section III.A.4 shall be consideration in exchange for a release of any and all claims brought against Kroger and all related entities and affiliates by the State of New Mexico, and shall be non-refundable.
2. For the avoidance of doubt, \$26,325,000 (the amount identified in Section III.A.2), plus 45% of the \$25,500,000 referenced in Section III.A.3 (\$11,475,000) and 100% of the costs in Section III.A.4, for a total of \$38,800,000, is payable to the State of New Mexico and is non-refundable.
3. \$32,175,000 (the amount identified in Section III.A.1) shall be reserved for the Local Governments, and shall be distributed in accordance with the allocation percentages outlined in the New Mexico MOU.
4. To the extent any New Mexico Local Government does not execute a release as specified, Kroger shall be entitled to a credit for each Local Government's allocation amount, as outlined in the New Mexico MOU, of the abatement amount in Section III.A.1, and the State shall return such funds to Kroger within 30 days the Post-Effective Sign-on Deadline. In addition, Kroger shall be entitled to a credit of that Local Government's allocation amount of 55% of \$14,025,000 (55% of the State's attorneys' fees), which shall likewise be paid within 30 days of the Post-Effective Sign-on Deadline.
5. In any action brought by a New Mexico Local Government that fails to release Kroger, if Kroger successfully asserts that the Local Government's claims are extinguished by virtue of the State's settlement with Kroger, Kroger shall return to the State the Local Government's allocation of the abatement amount as outlined in the New Mexico MOU.

**L. Res Judicata.** Nothing in this Agreement shall be deemed to enlarge or reduce the scope of the res judicata or claim preclusive effect that the settlement memorialized in the Agreement, and/or any consent judgment or other judgment entered on the Agreement, gives rise to under applicable law, including but not limited to as to any Released Claims asserted against the Releasee by New Mexico Local Governments, whether currently pending or in the future.

**V. No Admission**

**A.** The Releasor acknowledges and agrees that this Settlement is a compromise of matters involving disputed issues of law and fact. The Releasee is entering into this Settlement solely for the purposes of settlement, to resolve the Released Claims, and thereby avoid significant

expense, inconvenience, and uncertainty. Nothing contained herein may be taken as or deemed to be an admission or concession by the Releasee of (i) any violation of law, regulation, or ordinance in connection with the Covered Conduct or Local Government Claims; (ii) any fault, liability, or wrongdoing by Kroger in relation to the Covered Conduct or Local Government Claims; (iii) the strength or weakness of any claim or defense or allegation made in any other past, present, or future proceeding relating to any Covered Conduct or any Opioid or Local Government Claim; or (iv) any other matter of fact or law.

## **VI. Miscellaneous Provisions**

**A. Use of Agreement as Evidence.** Neither this Agreement, nor any act performed or document executed pursuant to or in furtherance of this Agreement (i) is or may be deemed to be or may be used as an admission of, or evidence of, any Covered Conduct, or of any wrongdoing or liability of the Releasee; or (ii) is or may be deemed to be or may be used as an admission of, or evidence of, any liability, fault, or omission of the Releasee in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal. Neither this Agreement nor any act performed or document executed pursuant to or in furtherance of this Agreement shall be admissible as evidence or otherwise used in any way in any proceeding for any purpose, except to enforce the terms of the Settlement, and except that the Releasee may use this Agreement in any action for any purpose, including, but not limited to, in order to support a claim for contribution and/or indemnification or to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or similar defense or counterclaim, including but not limited to against Released Claims asserted against the Releasee by New Mexico Local Governments, whether currently pending or in the future.

**B. Voluntary Settlement.** This Settlement Agreement is a product of arm's length settlement negotiations between the duly-authorized representatives of the Parties. The Parties represent and warrant that they have been advised by their respective counsel of their rights and obligations under this Settlement Agreement and the accompanying Releases, and enter into this Settlement Agreement and the accompanying Releases freely, voluntarily, and without duress.

**C. Dispute Resolution.** If the Releasor believes that the Releasee is not in compliance with any term of this Settlement, then the Releasor shall (i) provide written notice specifying the reason(s) why the Releasor believes that the Releasee is not in compliance with the Settlement Agreement; and (ii) allow the Releasee at least thirty (30) days to attempt to cure such alleged non-compliance (the "Cure Period"). In the event the alleged non-compliance is cured to the Releasor's satisfaction within the Cure Period, the Releasee shall not have any liability for such alleged non-compliance. The Releasor may not commence a proceeding to enforce compliance with this Settlement Agreement before expiration of the Cure Period. In the event of a dispute regarding whether the Releasee has cured its non-compliance, any such dispute shall be submitted to arbitration before a mediator that the Parties jointly agree to. Neither the State nor Kroger shall unreasonably withhold agreement to a mediator.

**D. Authority to Enter Settlement Agreement.** Each signatory to this Agreement on behalf of a Party specifically represents and warrants that he or she is fully authorized to enter into and to execute this Agreement on behalf of such Party. The Releasee represents that it has the

power and authority to enter into and perform this Agreement, and that the execution and performance of this Agreement has been duly authorized by all requisite corporate or other legal action. The Releasor represents that it is expressly authorized to take all action required or permitted to be taken pursuant to this Agreement to effectuate its terms and to enter into and execute this Agreement. Each Party specifically represents and warrants that this Settlement Agreement constitutes a legal, valid, and binding obligation of such Party. The Releasor agrees that it brought this Action in its sovereign capacity as the people's attorney in order to protect the public interest, including the interests of the State of New Mexico and its citizens. The Releasor specifically represents and warrants that it has concluded that the terms of this Settlement are fair, reasonable, adequate, and in the best interest of the State of New Mexico and its citizens, and that it has satisfied all conditions and taken all actions required by law in order to validly enter into this Settlement. In addition, the Releasor specifically represents and warrants that it has not sold, assigned, or otherwise transferred any Released Claims, or any portion thereof or rights related thereto, to any Third Party.

**E. Notices.** To be effective, all notices under this Agreement shall be in writing and delivered to the persons specified below ("Notice Designees") (i) by e-mail and (ii) by either hand delivery or registered or certified mail, return receipt required, postage pre-paid. Any Party may change its Notice Designee(s) by giving written notice to all other Parties as provided in this paragraph.

**1. Notices to the State shall be delivered to:**

Brian E. McMath, CIPP/US  
Assistant Attorney General  
Consumer & Environmental Protection Division  
NEW MEXICO OFFICE OF THE ATTORNEY GENERAL  
408 Galisteo St.  
Santa Fe, NM 87501  
Direct: (505) 717-3531  
Fax: (505) 318-1050  
Email: bmcmath@nmag.gov

AND

Daniel Alberstone  
BARON & BUDD, P.C.  
15910 Ventura Blvd.  
Suite 1600  
Encino, CA 91436  
Direct: (818) 839-2322  
Fax: (818) 986-9698  
Email: dalberstone@baronbudd.com

**2. Notices to Kroger shall be delivered to:**

Toney Matthews  
Senior Litigation Counsel  
1014 Vine St, Cincinnati, Ohio, 45202  
Telephone: (513) 762-4623  
Email: toney.matthews@kroger.com

AND

Chantale Fiebig  
Weil Gotshal & Mangels LLP  
2001 M Street, NW  
Washington, D.C. 20036  
Telephone: (202) 682-7200  
Email: chantale.fiebig@weil.com

**F. Severability; Reinstatement.** In the event any one or more provisions of this Settlement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Settlement; provided, however, that if the Releasor is required by final order of a court of competent jurisdiction to return the Settlement Payment for any reason, this Agreement, including the releases set forth herein, shall be void ab initio and all rights and remedies of the Parties as they existed immediately prior to the Execution Date shall be reinstated in full.

**G. Successors and Assigns.** This Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the Parties hereto.

**H. Choice of Law.** Any dispute arising from or in connection with the completion and execution of the Settlement Agreement shall be governed by New Mexico law without regard to its choice of law provisions and the Parties agree to venue in the First Judicial District Court, County of Santa Fe, State of New Mexico.

**I. Headings; No Conflict Intended.** The headings used in this Agreement are intended for the convenience of the reader only and shall not affect the meaning or interpretation of this Agreement.

**J. No Party Deemed to Be the Drafter.** None of the Parties hereto shall be deemed to be the drafter of this Agreement or any provision hereof for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter.

**K. Amendment; Waiver.** This Agreement shall not be modified in any respect except by a writing executed by all the Parties hereto, and the waiver of any rights conferred hereunder shall be effective only if made by written instrument of the waiving Party. The waiver by any Party of any breach of this Agreement shall not be deemed or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Agreement.

**L. Execution in Counterparts.** This Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. An executed signature page of this Settlement delivered in PDF format via email shall be as effective as an original executed signature page.

**M. Integrated Agreement.** This Agreement constitutes the entire agreement between the Parties and no representations, warranties, or inducements have been made to any Party concerning this Agreement other than the representations, warranties, and covenants contained and memorialized herein. As such, the Parties represent and warrant that they are not relying on any promises, inducements, or representations other than those provided herein.

**N. Confidentiality.** The terms and conditions of this Settlement Agreement shall remain strictly confidential until December 1, 2022. Any disclosure in violation of this section shall be deemed a material breach of this Agreement, except that the Parties agree that the State shall be permitted to enter into a confidentiality agreement with its Local Governments. Once a Local Government executes the confidentiality agreement, the State may share details of this Settlement with the Local Government. To the extent a Local Government must discuss the terms of this Settlement with their commissions, that will be required to do so in executive session only, per the Open Meetings Act Litigating exception, NMSA 1978 section 10-15-1(H)(7).

IN WITNESS WHEREOF, the Parties hereto, through their fully authorized representatives, have executed this Agreement as of the dates set forth below.

THE KROGER CO.

By: *Chantale Fiebig*  
WEIL GOTSHAL & MANGES LLP  
Chantale Fiebig  
2001 M Street, NW  
Washington, D.C. 20036  
Telephone: (202) 682-7200  
Email: chantale.fiebig@weil.com

HECTOR H. BALDERAS  
NEW MEXICO ATTORNEY GENERAL

By: *Brian E. McMath* 11/23/22  
Brian E. McMath, CIPP/US  
Assistant Attorney General  
NEW MEXICO OFFICE OF THE  
ATTORNEY GENERAL  
408 Galisteo St.  
Santa Fe, NM 87501  
Direct: (505) 717-3531  
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