

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

RON WADE, CARY OWSLEY,  
VINCENT MANGRUEM, FELICIA  
HAWKINS and MICHAEL ELLIOTT,  
et al., on behalf of themselves and all other  
black persons similarly situated,

Plaintiffs,

v.

THE KROGER CO., et al.

Defendants.

Civil No. 3:01 CV-699-R  
Judge Thomas Russell

**CONSENT DECREE**

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NOW COME the parties, Ron Wade, Cary Waymon Owsley, Vincent Mangruem, Felicia Adrian Hawkins, Michael Elliot, Kim Brewer, Gwendolyn Barker, Thomas Brame, Julie Long, Elnora Mays-Jones, Dwight Cummings and Ronald Clayton ("Plaintiffs") by and through their counsel, and Defendants The Kroger Co., Kroger Ltd. Partnership I, KRGP Inc., Kroger General Partnership, and Kroger Texas LP (collectively referred to herein as "Kroger," "Kroger Companies" or "Defendants"), by and through their counsel, agree to request this Court to so order the following Consent Decree.

## **I. INTRODUCTION**

On November 29, 2001, named plaintiffs Ron Wade, Cary Waymon Owsley, Vincent Mangruem, Felicia Adrian Hawkins, and Michael Elliot filed the original complaint alleging that defendant The Kroger Co. discriminated against them on account of their race, African-American, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981 ("Section 1981"). Plaintiffs also alleged recovery on behalf of a class of individuals who allegedly suffered a pattern or practice of race discrimination. Defendant The Kroger Co. subsequently filed an answer, denying the allegations of discrimination contained in the complaint.

On March 12, 2002, plaintiffs filed a motion for leave to file an amended complaint. In their amended complaint, plaintiffs sought to add Kim Brewer, Gwendolyn Barker, Thomas Brame, Julie Long, Elnora Mays-Jones, Dwight Cummings and Ronald Clayton as additional named plaintiffs. Plaintiffs also sought to add Kroger Ltd. Partnership I, Kroger General Partnership, and Kroger Texas LP as additional defendants. On June 6, 2002, the Court granted plaintiffs' motion. Defendants subsequently filed an answer, denying the allegations of discrimination contained in the amended complaint.



On August 16, 2002, plaintiffs filed a motion for leave to file a second amended complaint. In their second amended-complaint, plaintiffs realleged Counts I and II to separate the allegations pertaining to plaintiffs' Title VII and section 1981 claims. Plaintiffs also continued to allege that defendants violated Title VII and Section 1981 by discriminating against a class of African-American employees in several ways, including transferring from part-time and full-time positions, seeking and receiving promotions, general compensation levels, and subjecting them to racial harassment. They asserted that this alleged discrimination has impacted all African-Americans employed by defendants from November 1997 to the present. Plaintiffs have indicated an intention to seek class certification under Fed. R. Civ. P. 23(b)(2) and/or 23(b)(3), and compensatory damages and punitive damages, back pay, and front pay. On January 23, 2003, the Court granted plaintiffs' motion to file their second amended complaint. Defendants subsequently filed an answer, denying the allegations of discrimination contained within the second amended complaint.

After exchanging tens of thousands of pages of documents, multiple databases and multiple reports from experts, the parties engaged in extensive settlement negotiations, both with the Court and with a private mediator. These negotiations culminated in agreement upon the terms contained within this Consent Decree.

## **II. SCOPE OF THE SETTLEMENT CLASS**

The parties agree and acknowledge that, as part of the settlement and for settlement purposes only, the Plaintiffs will move to certify, and the Company will not oppose a class pursuant to Rule 23(b)(2) and 23(b)(3) defined as:

All part-time and full-time African-American employees in Kroger Banner stores in all hourly positions as well as store managerial salaried positions from manager trainee up through and including zone managers who were employed from any time from November 29, 1997 until the date of the preliminary approval of the Consent Decree.

### **III. FINDINGS**

The Court, having carefully examined the terms and provisions of this Consent Decree, and based on the pleadings and the record in this case, finds as follows:

- (a) this Court has jurisdiction over the subject matter of this action and over the Parties for purposes of entering and enforcing this Consent Decree;
- (b) the terms of this Consent Decree are adequate, fair, reasonable, equitable and just; and,
- (c) this Consent Decree conforms with the Federal Rules of Civil Procedure and is not in derogation of the rights or privileges of any person, any Party, or the Class.

### **IV. GOALS, PURPOSES AND GENERAL PROVISIONS OF CONSENT DECREE**

#### **A. Goals Of Consent Decree**

The Parties enter into this Consent Decree to achieve the following goals: (a) to resolve all claims asserted in the Litigation; (b) to ensure that Class Members are fairly compensated for release of their claims; (c) the entry of a Court order specifying certain relief as to Kroger to ensure that effective mechanisms are in place to continue to provide equal employment opportunities and non-discrimination for African-American employees; and (d) to promote and ensure continuing compliance with Kroger's equal employment opportunities by providing periodic reports concerning the implementation of the terms of this Consent Decree and retention of jurisdiction by the Court.

#### **B. Purposes Of The Consent Decree**

The Parties and their counsel, after extensive fact finding, investigation, analysis, and deliberation, firmly believe that the proposed settlement embodied in this Consent Decree is fair, reasonable, adequate, and in the best interests of all the Parties and the Class. The Parties firmly believe that the Consent Decree is consistent with and reaffirms their mutual commitment to the

following goals and purposes: (a) to continue to ensure equal employment opportunities; (b) to prevent discrimination and promote fair treatment for all employees; (c) to expedite potential relief for certain allegedly injured individuals; (d) to avoid further expensive and protracted litigation; (e) to provide finality for potential claims; (f) to create an expedited procedure for implementing programmatic relief pursuant to the terms of this Decree and distributing a monetary settlement to eligible members of the Settlement Class; and (g) to re-affirm all of Kroger Companies' commitment to maintaining a workplace free of discrimination.

**C. The Consent Decree Is Not An Admission Of Liability**

This Consent Decree does not and is not intended to constitute and shall not be deemed to constitute an admission by any and all of Kroger Companies as to the merits, validity, or accuracy of any of the allegations, claims, or defenses in the Litigation, nor shall it be used as a means to require the continuation of any program or action beyond the term of this Consent Decree, except as may be necessary to enforce the terms of this Consent Decree. By entering into this Consent Decree, Defendants do not admit or concede, expressly or impliedly, but instead deny, that they have in any way violated Title VII or Section 1981; the common law of any jurisdiction; any federal, state, or local law, statute, ordinance, regulation, rule, or executive order; or any obligation or duty at law or in equity.

**D. No Court Findings As To Liability**

In agreeing to the terms of this Consent Decree, the Parties acknowledge that neither this Court nor any other court has made any findings or expressed any opinion concerning the merits, validity, or accuracy of any of the allegations, claims, or defenses in the Litigation.

**E. The Consent Decree Is Not Admissible In Any Other Proceeding**

Nothing in this Consent Decree, nor any action taken in implementation thereof, nor any statements, discussions, or communications, nor any materials prepared, exchanged, issued, or

used during the course of the Litigation or in negotiations leading to this Consent Decree, are intended by the Parties to, nor shall any of the foregoing constitute, be introduced, be used, or be admissible in any way in the Litigation, or in any other judicial, arbitral, administrative, investigative, or other proceeding of whatsoever kind or nature as evidence of discrimination on the basis of race, or as evidence of any violation of Title VII; the common law of any jurisdiction; any federal, state, or local law, statute, ordinance, regulation, rule, or executive order; or any obligation or duty at law or in equity. Notwithstanding the foregoing, the Consent Decree may be used by the Plaintiffs or any of Kroger Companies in any proceeding in this Court to enforce or implement the Consent Decree or any orders or judgments of this Court entered into in connection herewith.

#### **F. Termination Of Consent Decree**

If this Consent Decree does not become final or effective in its current form (for whatever reason), this entire Consent Decree shall be vacated, and all provisions contained within the Consent Decree shall become null and void. Further, the parties agree that, in the event the Court does not grant preliminary or final approval to the Consent Decree, or Kroger lawfully exercises its option to void the Consent Decree, Kroger's agreement to this settlement in principle will not preclude it from contesting and opposing any future pleadings, including opposing any future motion of Plaintiffs for class certification under Rule 23 on any basis.

#### **V. JURISDICTION**

The Court has jurisdiction over the Parties and the subject matter of the Litigation. The Litigation asserts claims under Title VII and Section 1981 that, if proven, would authorize the Court to grant the monetary and equitable relief set forth in this Consent Decree.

Venue is proper in this district. This Court shall retain jurisdiction of the Litigation during the term of this Consent Decree for the purpose of entering all orders, judgments and

decrees that may be necessary to implement the relief provided herein. The procedures described below are not intended to diminish this Court's inherent power to enforce any provision of this Consent Decree.

## **VI. EFFECTIVE DATE AND DURATION OF DECREE**

### **- A. Effect Of Consent Decree**

Upon its entry by the Court, the Consent Decree shall constitute an order of the Court and all of its provisions will become enforceable by the Parties in the manner set forth in this Consent Decree. The programmatic relief provisions and agreements contained herein shall be effective upon the Effective Date (as defined below) and shall remain in effect for the Term of the Consent Decree.

### **B. Joint Request For A Court Order**

The Parties agree that they will collectively seek entry of an Order in the form attached hereto and fully incorporated herein as Exhibit A, which dismisses Plaintiffs' class action claims and remaining individual claims in the Litigation against all of Defendant Kroger Companies with prejudice, and without costs to any Party.

### **C. Effective Date**

The "**Effective Date**" of this Consent Decree shall be the latest of:

- (a) if an appeal is filed, (i) the date of final affirmance on an appeal of a judgment approving this Consent Decree ("Judgment"), the expiration of the time to file a petition for or a denial of a writ of certiorari to review a Judgment and, if certiorari is granted, the date of final affirmance of a Judgment following review pursuant to that grant, or (ii) the date of final dismissal of any appeal from a Judgment or the final dismissal of any proceeding on certiorari to review a Judgment; or,

- (b) if no appeal is filed, the expiration date of the time for the filing or noticing of any appeal from a Judgment.

**D. Term of Decree**

This Consent Decree and any order of the Court shall expire and shall be without any force or effect three (3) years from the Effective Date. During the first year of the decree, Kroger shall be permitted to correct any programmatic compliance violations without penalty. If, after the first year, Kroger is found (using the dispute resolution procedures provided for below) to have violated a material term of the decree, then the decree shall be extended 1 year to become a 4-year decree.

**VII. SCOPE OF THE CONSENT DECREE**

**A. Scope Of Consent Decree**

This Consent Decree resolves all class action and individual claims that were or could have been brought in the Litigation.

**B. Exclusive Agreement As To Settlement Terms**

This Consent Decree and the Exhibits hereto constitute the full and exclusive agreement of the Parties with respect to the matters set forth herein, and supercedes all negotiations, representations, comments, contracts and writings prior to the date the Court finally ordered approval of this Consent Decree. No representations or inducements to compromise the Litigation have been made, other than those recited or referenced in this Consent Decree. No waiver and no amendment of any provision of this Consent Decree shall be effective, unless made in writing and signed by the Parties to be bound thereby.

**C. On-Going Best Efforts To Ensure The Settlement**

The Parties agree to make and undertake their Best Efforts on an on-going basis to effectuate, as well as to seek entry of, or if applicable, to defend this Consent Decree from any legal challenge by appeal, collateral attack, objection, or otherwise.

**VIII. DEFINITIONS**

The following terms, when used in this Consent Decree, shall have the following meanings as set forth below. All terms defined in the singular shall have the same meaning when used in the plural, and all terms defined in the plural shall have the same meaning when used in the singular.

**A. “African American”**

“African American” for class membership purposes means all persons having origins in any of the Black racial groups of Africa, and includes individuals who identify as Black or African American, or who identify as more than one race so long as at least one of the races identified is Black or African American.

**B. “Best Efforts”**

“Best Efforts” means taking steps in good faith and reasonably designed to achieve compliance with specified objectives to which the best efforts are directed.

**C. “Claimant”**

“Claimant” means any Class Member who submits a claim through the claims process as set forth in Section XII of the Consent Decree.

**D. “Claim Form”**

“Claim Form” means the form on which a written description of a Claimant’s Eligible Claims is submitted by a Claimant to the Settlement Administrator.

**E. “Class” and “Class Counsel”**

“Class” means all part-time and full-time African-American employees in Kroger Banner stores in all hourly positions as well as store managerial salaried positions from manager trainee up through and including zone managers who were employed from any time from November 29, 1997 until the date of the preliminary approval of the Consent Decree. Class Counsel means counsel appointed by the Court to represent the class, which is Joseph M. Sellers and Julie Goldsmith Reiser of Cohen, Milsten, Hausfield & Toll, P.L.L.C. and Robert L. Wiggins, Jr. and Eric K. Bachman of Wiggins, Childs, Quinn & Pantazis, L.L.C..

**F. “Class Member”**

“Class Members” means any individual member of the Class.

**G. “Counsel of Record”**

“Counsel of Record” means all counsel of record for the Parties and who are signatories to this Consent Decree.

**H. “Court”**

“Court” means the United States District Court for the Western District of Kentucky, Louisville Division, and the Judge thereof having been assigned to preside over the Litigation, or proceedings relevant to the Litigation.

**I. “Day”**

“Day” means a calendar day, unless otherwise noted to be a business day (i.e., Monday through Friday, exclusive of any Federal or State holiday).

**J. “Effective Date”**

“Effective Date” means the latest of:

- (a) if an appeal is filed, (i) the date of final affirmance on an appeal of a judgment approving this Consent Decree (“Judgment”), the expiration of the time



to file a petition for or a denial of a writ of certiorari to review a Judgment and, if certiorari is granted, the date of final affirmance of a Judgment following review pursuant to that grant, or (ii) the date of final dismissal of any appeal from a Judgment or the final dismissal of any proceeding on certiorari to review a Judgment; or,

(b) if no appeal is filed, the expiration date of the time for the filing or noticing of any appeal from a Judgment.

**K. “Eligible Claimant” and/or “Eligible Class Member”**

“Eligible Claimant” and/or “Eligible Class Member” means any Class Member who timely and properly submits to the Settlement Administrator a Claim Form and is entitled to a monetary award from the Settlement Fund under the terms of a Distribution Formula approved by the Court. “Eligible Claimant” and/or “Eligible Class Member” specifically excludes any Class Member who previously executed a valid and enforceable release of her Eligible Claims, unless such release specifically provides for recovery under this Consent Decree.

**L. “Ineligible Claimant”**

“Ineligible Claimant” means any Class Member who submits a Claim Form to the Settlement Administrator and who, for any reason, fails to qualify for a monetary award from the Settlement Fund.

**M. “Kroger” or “Kroger Companies”**

“Kroger” or “Kroger Companies” refers to The Kroger Co., Kroger Ltd. Partnership I, KRGP Inc., Kroger General Partnership, and Kroger Texas LP

**N. “Kroger Banner Stores”**

“Kroger Banner Stores” refers to all stores operating under the Kroger name.

**O. “Litigation”**

“Litigation” means all proceedings relating to or arising from *Wade v. Kroger*, Civil No. 3:01 CV-699-R (W.D. Ky).

**P. “Named Plaintiffs”**

“Named Plaintiffs” means the individual plaintiffs who brought this Litigation, including Ron Wade, Cary Waymon Owsley, Vincent Mangruem, Felicia Adrian Hawkins, Michael Elliot, Kim Brewer, Gwendolyn Barker, Thomas Brame, Julie Long, Elnora Mays-Jones, Dwight Cummings, and Ronald Clayton.

**Q. “Notice”**

“Notice” means the notice of the proposed class settlement that is sent to Class Members pursuant to order of the Court.

**R. “Parties”**

“Parties” means the Named Plaintiffs and Defendants to Case No. 3:01-CV-699-R (W.D. Ky. filed 11/29/01).

**S. “Preliminary Approval”**

“Preliminary Approval” means the entry of the Court’s Order granting preliminary approval of this Consent Decree, which reflects that the Court concludes that the terms of this Consent Decree appear sufficiently fair, reasonable and adequate to the Class as a whole to warrant notice to the Class, an opportunity for Class Members to object or opt out, and a fairness hearing to consider final approval of the Consent Decree.

**T. “Settlement”**

“Settlement” means the settlement terms embodied in this Consent Decree.

**U. “Settlement Administrator”**

“Settlement Administrator” means Settlement Services Inc., 2032-D Thomasville Road, Tallahassee, FL 32308 (“SSI”), or any person subsequently appointed by the Court to implement the duties and responsibilities set forth in the Consent Decree.

**IX. RECOGNITION OF RETAINED MANAGERIAL DISCRETION**

**A. Overall Management Discretion Over The Workplace And Workforce**

Notwithstanding any provision to the contrary in this Consent Decree, all of Kroger Companies shall at all times retain managerial discretion, *inter alia*, to select, hire, assign, transfer, train, promote, compensate, discipline, or terminate any of its employees, including but not limited to any Class Member, within the limits of the law.

**B. Management Discretion Over Compensation And Promotion Decisions**

Nothing in this Decree shall limit, constrain, or infringe upon any of Kroger Companies’ unilateral right to make any and all compensation and promotion decisions affecting its employees (including but not limited to all Class Members) as such decisions, consistent with this Consent Decree, shall remain solely within the managerial discretion of any of Kroger Companies and subject to the limits of the law.

**C. Management Discretion As To Employee Discipline**

Nothing in this Consent Decree shall prevent, limit, constrain, or delay any of Kroger Companies from taking disciplinary action against any employee (including but not limited to any Class Member), consistent with this Consent Decree, up to and including termination of employment, in circumstances where management deems disciplinary action to be appropriate in its judgment within the limits of the law.

**D. Individual Personnel Decisions Not Required**

Nothing in this Consent Decree shall require any of Kroger Companies to make any personnel decision relative to any individual, or from displacing, transferring, or bumping any employee from his or her position.

**E. No Quotas Are Established By The Consent Decree**

Nothing in this Consent Decree shall require that a quota or certain number of employees be hired or promoted in any position or job classification at any of Kroger Companies, as such decisions shall remain solely within the managerial discretion of Kroger Companies and subject to the limits of the law.

**F. Managerial Discretion Over Human Resource Functions**

Nothing in this Consent Decree shall preclude Kroger from independently modifying their existing human resource functions, terms and conditions of employment, programs, procedures, practices, or policies or otherwise adopting any new human resource functions, terms and conditions of employment, programs, procedures, practices, or policies as Kroger Companies may deem appropriate within the limits of the law and the Consent Decree.

**G. The Consent Decree Does Not Require Kroger To Violate Any Law**

Notwithstanding any provision to the contrary in this Consent Decree, Kroger shall not be required to violate any applicable law, ordinance, or regulation as interpreted by controlling judicial authority.

**X. PROGRAMMATIC RELIEF**

**A. No Automatic Injunction**

This Consent Decree shall not operate in any way as an automatic injunction. Kroger agrees to abide by applicable federal and state employment laws including Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Equal Pay Act, and the Americans With

Disabilities Act. Kroger further agrees to comply with applicable collective bargaining agreements (“CBAs”) that were negotiated with the applicable unions pursuant to the requirements of the National Labor Relations Act.

**B. Oversight of Starting Pay For Hourly Employees or “Experience Credit”**

**1. HSRM Function**

The parties acknowledge that the rates of pay for hourly, union employees are negotiated with the applicable union pursuant to the provisions of the National Labor Relations Act and are set forth in the wage schedules contained within each individual collective bargaining agreement (“CBA”). Pursuant to the terms and conditions of employment as established by the Company and unions, a store manager is permitted to set a new employee’s starting pay at a rate based on the new employee’s experience in the retail industry. This process is generally referred to within the Company as “experience credit.” If the Company and unions have established a formula, protocol or procedure for adjusting pay based on experience credit, the parties agree that Kroger will follow said formula, protocol or procedure. If there is no such formula, protocol or procedure, the parties agree that store managers may set starting pay pursuant to experience credit consistent with current pertinent factors, including but not limited to, market factors.

In an effort to ensure that the process of setting starting pay is objective and non-discriminatory, Kroger agrees that each Kroger Division will designate a function within its Human Resources Department to exercise oversight over the setting of starting pay pursuant to “experience credit” in those instances where any applicable CBA allows a store manager to set a new employee’s starting pay at a rate based on the new employee’s experience in the retail industry. This function shall be referred to as the Hourly Starting Rate Monitor (“HSRM”). (Individuals performing the HSRM function also may, and likely will, perform other functions within the applicable Division’s Human Resources Department.)

Specifically, in each Division, store management will notify the HSRM each time that store management proposes to alter the starting rate of pay pursuant to an “experience credit” provision in the applicable CBA. The HSRM will then review the CBA (if applicable), any other applicable formula, protocol or procedure, the proposed starting rate and relevant application to ensure that said proposed starting rate is in accordance with the applicable CBA, formula, protocol or procedure, or other pertinent factors and that the claimed experience fits those requirements. The HSRM shall have the ability to overrule the store management’s decision to allow experience credit.

Nothing in this provision alters or limits the rights of the union or its members from being able to grieve the decision by the HSRM to allow (or disallow) experience credit in setting starting rates of pay. Further, nothing herein requires Kroger to monitor as “experience credit” under the terms of this Consent Decree any agreements between the unions and Kroger to start employees above the first rate of progression due to local job market demands.

## **2. Data Collection for Experience Credit**

Kroger will keep records reflecting the employee identification number and race of all candidates those who receive experience credit, the amount of credit awarded and the person’s pay rate. This information will be provided on an annual basis to Class Counsel, within the parameters previously referenced, namely, that under the terms of the consent decree, the Company will monitor any decisions made regarding the impact of experience credit on starting pay when those decisions pertain only to certain individuals and do not apply across the board.

**C. Minimum Requirements and Data Collection For Entry Into Management Training Program**

**1. Minimum Requirements For Entry Into Management Training Program**

The minimum requirement for internal candidates for consideration as a Management Trainee candidate in any Division shall be possession of a high school diploma or its equivalent. In addition, the candidate must request, complete and submit an application for management training. The mere possession of such qualifications does not guarantee any individual the right to gain entry to the program.

**2. Data Collection For Entry Into Management Training Program**

For management trainees, Kroger will keep records reflecting the employee identification number and race of all candidates within the Division having minimum qualifications considered for, and those selected into, the positions. Kroger will provide Class Counsel with the above-described records on an annual basis throughout the duration of the Consent Decree.

**D. Minimum Requirements and Data Collection for Promotion to Co-Manager**

**1. Minimum Requirements for Promotion to Co-Manager**

In order to be considered for promotion for Management Trainee to Co-Manager, the candidate in question must:

- possess high school degree or equivalent; and
- have successfully completed all aspects of the division's Management Training Program.

**2. Data Collection for Promotion to Co-Manager**

For co-manager promotions, Kroger will keep records of (a) the employee identification number and race of those management trainees within the zone who have completed the management training program and otherwise satisfy the minimum qualifications, and (b) the employee identification number and race of those selected for the position. Kroger will provide

Class Counsel with the above-described records on an annual basis throughout the duration of the Consent Decree.

**E. Minimum Requirements and Data Collection for Promotion to Store Manager**

**1. Minimum Requirements for Promotion to Store Manager**

In order to be considered for promotion to a Store Manager position, the internal candidate must:

- possess high school degree or equivalent;
- have successfully completed the applicable Division's Management Training Program or MD1 program (the MD1 program is synonymous with the Management Training Program and is how the program is regularly referred to within Kroger); and
- have three years of experience as a co-manager (or other position within the same pay level or above) and satisfactory performance appraisals as either a co-manager or another position within the same pay level or above within the Division.

**2. Data Collection for Promotion to Store Manager**

For store managers, Kroger will keep records of (a) the employee identification number and race of those co-managers or other positions within the same pay level or above within the Division who have three years experience and otherwise satisfy the minimum qualifications; and (b) the employee identification number and race of those selected for the position. Kroger will provide Class Counsel with the above-described records on an annual basis throughout the duration of the Consent Decree.

**F. Minimum Requirements and Data Collection for Promotion to Zone Manager**

**1. Minimum Requirements for Promotion to Zone Manager**

In order to be considered for promotion to a Zone Manager position, the internal candidate must:



- possess high school degree or equivalent; and
- have held a store manager position within the Company or a high-level (level 10 or above) Company management position.

## **2. Data Collection for Promotion to Zone Manager**

For zone managers, Kroger will keep records of (a) the employee identification number and race of all store managers or level 10 or above Company management positions within the Division who satisfy the minimum qualifications; and (b) the employee identification number and race of those selected for the position. Kroger will provide Class Counsel with the above-described records on an annual basis throughout the duration of the Consent Decree.

## **XI. DESIGNATION OF SETTLEMENT ADMINISTRATOR**

Subject to Court approval, the parties agree to retain Settlement Services, Inc., or SSI, as the Settlement Administrator. The Settlement Administrator's duties and responsibilities are set forth in this Consent Decree.

## **XII. MONETARY RELIEF TO NAMED PLAINTIFFS AND CLASS MEMBERS**

### **A. Establishment of Settlement Fund**

Kroger shall establish a settlement fund (the "Fund" or the "Settlement Fund") in the gross amount of Sixteen Million Dollars (\$16,000,000) for the purpose of providing individual monetary awards to Class Representatives, and other eligible members of the Settlement Class, and payment of attorneys' fees and costs to Class Counsel, to be distributed in accordance with the provisions of this Consent Decree.

### **B. Administration of Settlement Fund**

Within 30 days of preliminary approval of the decree, Kroger shall transfer the full settlement amount to the Qualified Settlement Fund established by the Settlement Administrator. The account will accrue interest at the customary rate for such commercial bank until all funds

have been paid out of the account, with interest (net of any taxes) to be applied against any tax obligations of Kroger and any left over interest to inure to the benefit of the Settlement Fund. At all times, however, Kroger is responsible for the payment of its portion of employer taxes and such payment shall not be made from the principal of the \$16 million Settlement Fund. Only withdrawals authorized by this Consent Decree may be made from the account. The parties agree that for purposes of the class action settlement, they intend to establish qualified settlement fund pursuant to Section 468(b) of the Internal Revenue Code, which authorizes the establishment of Designated Settlement Funds or Qualified Settlement Funds. Except as noted herein, each Class Member and Representative Plaintiff shall take full and complete responsibility for all tax liability which might be incurred as a result of their receipt of the settlement monies. The Settlement Fund shall become an irrevocable trust under Kentucky law with no reverter upon Final Approval of the Consent Decree and the expiration of any related appeal period. The payments to the class and named Plaintiffs will be allocated 60% to compensatory damages and interest and 40% to wages. The Settlement Fund shall be administered by the Settlement Administrator under the Court's supervision in accordance with Administrative Order No. 1. The oversight of the Settlement Fund shall be the responsibility of the Trustee who shall be appointed in accordance with Administrative Order No. 1 attached as Exhibit E and who shall also serve as Settlement Administrator. The Trustee and Administrator are collectively referred to herein as the "Settlement Administrator." In administering the Settlement Fund, the Settlement Administrator shall be bound by the terms of Administrative Order No. 1, as that order may in the future be supplemented or amended by the Court to administer and carry out the purposes of the Consent Decree, provided that no such supplementation or amendment shall alter the terms of this Consent Decree or any of its Exhibits.

**C. Return of Funds**

If there is no Final Approval of the Consent Decree, the Settlement Administrator shall return to Kroger any funds, including any interest accrued thereon, remaining in the Settlement Fund Account.

**D. Enhancement Awards to Class Representatives**

Each eligible Class Representative bound by the terms of this Decree shall be entitled to an enhancement award in the amount of Thirty Thousand Dollars (\$30,000). The aggregate gross amount of these payments is \$360,000. These payments reflect: (a) the Plaintiff's assumption of the risks and potential liability related to being a Plaintiff, including the potential liability for Kroger's taxable legal costs had Kroger litigated the action to a favorable judgment; and (b) the Plaintiff's assistance to Class Counsel and his/her expenditure of substantial time and effort related to this class action litigation. These payments shall be in addition to payments that will be made to the Plaintiffs as members of the Class pursuant to Section XII below, provided that each and every named plaintiff executes a settlement agreement and release in full (attached as Exhibit B).

Any and all such payments will be allocated 60% to compensatory damages and interest and 40% to wages, and Kroger will deduct all applicable employment taxes, including federal state, local, Social Security, or other applicable deductions. Each named plaintiff shall take full and complete responsibility for any and all personal tax liability which s/he may incur as a result of their receipt of the settlement monies.

To the extent any of the Named Plaintiffs do not sign the agreed upon settlement agreement and release in full or decide to revoke a signed settlement agreement and release in full, this Consent Decree, including the above payment of monetary relief, shall be null and void.

**E. Attorneys' Fees and Costs of Class Counsel**

Payment of Class Counsel's attorneys' fees and costs shall be made from the Settlement Fund, as set forth in Section XVI, below.

**F. Payment of Settlement Administrator's Fees**

All fees, costs and expenses, if any, of the Settlement Administrator shall be paid from the Settlement Fund Account, including the interest on the Settlement Fund Account, except that Kroger will pay those fees, costs and expenses of the Settlement Administrator in excess of \$25,000 related to the Challenge procedure, as described at Section XII, Paragraph H.1.b. herein.

**G. Payment to Settlement Class**

The remainder of the Settlement Fund Account will be distributed to eligible members of the Settlement Class who do not opt out, as set forth below in Section XIII. The distribution of the Settlement Fund Account according to the procedures set forth herein will be the Settlement Administrator's responsibility. The Settlement Administrator shall complete this distribution as soon as practicable, but in no event shall any distributions to the settlement class be made prior to thirty five (35) days after the Effective Date.

**H. Procedure for Distribution of the Settlement Fund**

- 1. The remainder of the Settlement Fund, after allocation of the amounts specified in subsections D-F above, shall be distributed to Class Members by the procedure set forth in this Section: General Description of Payments**

- a. List of Eligible Class Members**

The Parties agree that payments shall be made only to those class members who submit timely claim forms and who satisfied the probationary period, as that term is defined in the relevant collective bargaining agreements. Kroger will provide a list of those class members who have completed their probationary period as well as those who have not, and will provide

that information to the Settlement Administrator within forty-two (42) days of the Preliminary Approval Date. Only those persons whose names are contained in the list of class members who have completed their probationary periods are eligible to be sent a claim form and eligible to file a claim form and receive an award except for those class members who successfully Challenge their designation, as set forth in Section H.1.b below. The administrator will then base the monetary calculation on the returned valid and timely claim forms.

The settlement funds shall be distributed by a ratio of 16 to 84 between salaried employees (16%) and hourly employees (84%), and shall be calculated based on the total number of days each class member was employed by Kroger during the class period (or such other time period for which Kroger has employment tenure data to be agreed upon by the Parties). Based on those calculations, those class members who do not receive a minimum payment of \$50 will not receive any monetary distribution. (However, the class members who will not participate in the monetary distribution nonetheless will be covered by the decree and its class release, and it is the parties' intent and understanding that by configuring the settlement in this manner, Kroger will have the benefit of securing preclusive effect as to the claims of all class members, including claims for alleged damages of any kind, regardless of whether they receive a monetary distribution.) The release will include all claims for alleged damages. Payments will only be made to eligible class members or, in the event a class member is deceased, to his/her estate.

**b. Challenges to the List of Eligible Class Members**

i. If Class Members wish to challenge the determination that they did not complete their probationary period of employment, they will have the right to present such a Challenge. However, Class Members shall not have the right to raise any other claims or contentions in Challenges pursuant to this provision.

ii. Class Members must send their written Challenge (including their name, social security number, position title, store number and address and dates of employment) as well as any documentation supporting the Challenge (such as pay stubs, state or federal tax returns or any dated documentation received from the Company) to the Settlement Administrator, PO Box 10290, Tallahassee, FL 32302-2290, postmarked by no later than thirty (30) days after the date of the Notice.

iii. The Settlement Administrator shall attempt to expeditiously resolve each such Challenge within thirty (30) days after receipt of such Challenge.

Challenges will be resolved without hearing by the Settlement Administrator.

The Settlement Administrator's decision shall be communicated to the Class Member in writing and shall be final, binding and nonappealable.

## **2. Calculations**

The "all in" payment from the Company to the Plaintiffs will be \$16 million. From this total will be subtracted attorneys' fees, costs, payments to the named Plaintiffs, administrative fees, and all other expenses and costs approved by the Court. The resulting amount will be designated the Compensation Fund. Eighty-four percent (84%) of the Compensation Fund will be designated for the benefit of Class Members who held hourly positions during the Class Period and shall be designated the Hourly Compensation Fund; sixteen percent (16%) of the Compensation Fund will be designated for the benefit of Class Members who held management positions during the Class Period and shall be designated the Managerial Compensation Fund. Payments to Class Members will be from either or both the Hourly and Managerial Compensation Funds in the following manner.

Within 30 days after determining the validity of the claims submitted by Class Members (the Claiming Class Members), the Settlement Administrator will determine the sum of gross

payments actually made to Claiming Class Members during the Class Period in managerial positions and in hourly positions. These amounts will be designated Gross Managerial Compensation and Gross Hourly Compensation, respectively. Each Claiming Class Member will be entitled to receive a percentage of either or both the Hourly Compensation Fund and the Managerial Compensation fund based upon the percentage that their own Personal Gross Hourly Compensation represents relative to aggregate Gross Hourly Compensation and the percentage that their own Personal Gross Managerial Compensation represents relative to aggregate Gross Managerial Compensation.

For example, suppose that after deducting attorneys' fees, administrative fees, payments to the named Plaintiffs and other court-approved expenses, \$10 million remains in the Compensation Fund. This will be divided between the Hourly Compensation Fund (\$8.4 million) and Managerial Compensation Fund (\$1.6 million). Suppose that the Claiming Class Members received \$10 million in Gross Hourly Compensation and \$1 million in Gross Managerial Compensation. If Claimant A personally received \$10,000 in Personal Gross Hourly Compensation and \$5,000 in Personal Managerial Compensation, this claimant would be entitled to 0.1 percent ( $\$10,000/\$10 \text{ million}$ ) of the Hourly Compensation Fund, or \$840, plus 0.5 percent ( $\$5,000/\$1 \text{ million}$ ) of \$1.6 million, or \$800. The total payment to Claimant A therefore would be \$1,640.

### **3. Notice**

The Company shall provide to the Settlement Administrator the names, social security numbers, and last known address for all class members, within twenty one (21) days of the entry of the Preliminary Approval Order. In addition, the Company shall provide to the Settlement Administrator Kroger's list of class members who have completed their probationary period as

well as those who have not, within forty two (42) days of the entry of the Preliminary Approval Order.

No more than fifty six (56) days after the Preliminary Order, the Settlement Administrator will mail via USPS first class mail, Notice to all Class Members in the form approved by the Court in the Preliminary Approval Order as well as Claim Forms to the those employees who Kroger has identified as having completed their probationary periods of employment. Those Class Members who have not completed their probationary period of employment will be sent only the Class Notice.

For those Class Members whose notices are returned by the USPS as undeliverable within 30 days of the initial mailing of the notices, the Settlement Administrator will perform one address search and remail notice once to those for whom a potentially new address can be found. The postmark filing deadline for claim forms will be October 14, 2008.

The Notice, a proposed copy of which is attached as Exhibit C, as shall be provided for by the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, will provide a summary of the Consent Decree terms, a description of the method by which class member shares of settlement funds will be computed, the amounts of attorneys' fees and costs payable to and/or sought by class counsel, the process for electing to opt out of the class; and a description of the procedure and timetable for completing computation of the amounts to be distributed to each class member and issuance of payment. A simple claim form will also be included for all non-probationary employees which will inquire about their interest in sharing in the settlement funds and notice of the return date and location.

#### **I. Fairness Hearing**

After the period has passed for return of the claim forms but before computation of the amounts payable to class members, the Court will hold a fairness hearing and consider whether,



after hearing any objections, the settlement terms are fair and reasonable to the class as a whole including, without limitation, the amount of attorneys' fees and costs which the Court shall award to class counsel. In the event the Court approves the settlement as fair and the time for appeal has expired, the Settlement Administrator will complete computation of the amounts to be distributed and will issue and mail checks to Eligible Class Members through the process described herein.

(a) All Class Members who wish to receive a distribution from the Settlement Fund must complete, return, and postmark the Claim Form to the Settlement Administrator no later than October 14, 2008. Only if the Notice and Claim Form is completed, returned, and postmarked on or before October 14, 2008 will the Class Member be considered eligible for a distribution from the Settlement Fund.

(b) Within ten (10) days after the Effective Date of this Consent Decree, the Settlement Administrator will determine the eligibility of those Class Members who submitted timely and proper Notice and Claim Forms for a distribution from the Settlement Fund.

To be eligible for a distribution of the Settlement Fund, the Class Member must:

- (i) not have previously signed a release of the claims stated in the Released Claims; and,
- (ii) be entitled to receive more than a \$50 distribution from the Settlement Fund.

#### **J. Cap on Recovery**

In the event the rate of responses from class members eligible to receive settlement funds is less than 5% of the total number of class members eligible to recover such funds, the parties will agree upon a cap on the recovery each responding class member may receive and, in the

absence of agreement, the parties will present their positions to the Special Master for a binding determination.

**K. Payment to Eligible Class Members**

Within thirty (30) days after the Settlement Administrator determines eligibility of the Class Members for their respective shares of the Settlement Fund, the Settlement Administrator will mail each eligible Class Member a check representing their respective share of the Settlement Fund. Each check will state that the check will be void on a date ninety (90) days from the date of issuance. Each payment shall be allocated 60% to compensatory damages and interest and 40% to wages.

Any Class Member endorsing a settlement check will be deemed to have released their claims.

**L. Tax Withholdings and Reporting**

The Settlement Administrator will inform Kroger of the employer's share of all taxes or contributions (e.g., matching social security, Medicare or other required withholding or payroll taxes) required to be paid. Any employer's share of taxes or contributions (e.g., matching social security, Medicare or other required withholding or payroll taxes) shall be paid by Kroger. The Settlement Administrator will be responsible for preparing and filing all appropriate tax filings and reports (except for any unemployment compensation taxes that may be due, which will be the sole responsibility of Kroger to calculate and pay), including, but not limited to, W-2 and 1099 forms for all Plaintiffs and Class Members for their payments from the Settlement Fund, as well as any required for the Settlement Fund. The Settlement Administrator will be responsible for reporting and remitting to the appropriate taxing authorities the employer's share of taxes or contributions required to be paid by Kroger in a timely manner after receipt of the amount due for those payments from Kroger. In determining the amount of each payment, the Settlement

Administrator will calculate the gross amount of distribution and then deduct all applicable withholding for federal, state, local, Social Security, or other applicable deductions. Each Class Member shall take full and complete responsibility for any and all personal tax liability which s/he may incur as a result of their receipt of the settlement monies.

**M. Remaining Monies In Settlement Fund**

After all payments are made to Eligible Class Members, any monies remaining in the Settlement Fund (because of the settlement fund being reduced due to opt outs, less than anticipated eligibility requests, etc.), or due to uncashed checks or interest earned, will be held in the Settlement Fund for three hundred (300) days after Effective Date. After the expiration of that period of time, any remaining portion of the Settlement Fund shall be provided to one or more nonprofit 501(c) organizations identified by Plaintiffs and agreed to by Kroger that would be eligible to receive *cy pres* distributions.

**N. Undeliverable Checks**

Any checks returned as undeliverable shall be voided and the amount of the check shall be returned to the Settlement Fund, pursuant to Section M above.

**O. Deceased Settlement Class Members**

Any allocation paid to a deceased Class Member shall be made payable to the estate of the deceased Class Member upon timely receipt by the Settlement Administrator of proper written proof of the estate's entitlement to receive the deceased Class Member's assets.

**P. Periodic Statements from Settlement Administrator**

Within thirty (30) days of the final distribution of the monies from the Settlement Fund, the Settlement Administrator shall furnish an accounting of all distributions from the Settlement Fund to the Court with copies to Kroger and Class Counsel.

### **XIII. NOTICE OF OBJECTIONS AND LIMITED RIGHT TO OPT-OUT**

Class Members may object to or opt-out of the class settlement.

#### **A. Objections**

Class Members objecting to the terms of the settlement must do so in writing by **no later than October 14, 2008**. The written objection must be sent to the Settlement Administrator and postmarked on or before October 14, 2008. The Settlement Administrator shall date stamp the original of the objection and forward a copy of the objection to both Kroger and Class Counsel within two (2) business days following receipt. The Settlement Administrator will file the original objections with the Clerk of the Court no later than five (5) business days prior to the scheduled Final Fairness Hearing. The Settlement Administrator shall retain copies of all written objections until such time as it has completed its duties and responsibilities under this Decree.

#### **B. Limited Right to Opt-Out**

Class Members have a limited right to exclude themselves from this Consent Decree. If the request for exclusion is exercised, the right to share in the monetary benefits of this Consent Decree will be forever lost. All Class Members, however, shall be beneficiaries of any injunctive relief agreed to in the Consent Decree, and may not opt-out of those provisions of the settlement.

Any request for exclusion must be in the form of a written "Opt-out" statement sent to the Settlement Administrator. Information on how to opt-out of the settlement shall be made available to Class Members by the Settlement Administrator upon request. A person wishing to opt-out must sign a statement which includes the following language:

"I understand that I am requesting to be excluded from the class monetary settlement and that I will receive no money from the settlement fund created under the Consent Decree entered into by Kroger. I understand that if I am excluded from the class monetary settlement, I may bring a separate legal action seeking damages, but may receive nothing or less than what I would have

received under the class monetary settlement in this case. I also understand that I may not seek exclusion from the class for injunctive (non-monetary) relief and that I am bound by the injunctive provisions of the Consent Decree entered into by Kroger.”

Class Members who do not properly or timely request exclusion (as to the non-injunctive relief aspects of the Consent Decree only) will be barred and precluded from filing, commencing, prosecuting, maintaining, intervening in, participating in (as a Class Member or otherwise) any other lawsuit or settlement based on or relating to the claims, causes of actions, or the facts and circumstances of this lawsuit and the claims released in Section XVIII.A. Class Members who do not properly or timely request exclusion (as to the non-injunctive relief aspects of the Consent Decree only) also will be barred and precluded from receiving any benefits from any other lawsuit, administrative, or regulatory proceeding or court order in any jurisdiction based on or relating to the claims, causes of actions, or the facts and circumstances of this lawsuit and the claims released in Section XVIII.A.

Class Members who timely request exclusion (as to the non-injunctive relief aspects of the Consent Decree only) will not be permitted to object to this Consent Decree or otherwise participate in any further proceedings in this case.

### **C. Submission of Opt-Out Statements**

A Class Member submitting an Opt-out statement shall sign and date the statement and send it to the Settlement Administrator postmarked **no later than October 14, 2008**, as specified in the Preliminary Approval Order. The Settlement Administrator shall date stamp the original of any Opt-out statement and serve copies on both Kroger and Class Counsel within two (2) business days of receipt of such statement. The Settlement Administrator will file the original Opt-out statements with the Clerk of the Court no later than five (5) business days prior to the scheduled Final Fairness Hearing. The Settlement Administrator shall retain copies of all Opt-

out statements until such time as it has completed its duties and responsibilities under this Decree.

**D. Rescission of Class Member Opt-Outs**

The Parties recognize that some Class Members who initially submit Opt-out forms seeking exclusion may, upon further reflection, wish to withdraw or rescind such Opt-out statements. The Parties agree that Class Members shall be permitted to withdraw or rescind their Opt-out statements by submitting a "Rescission of Opt-out" statement to the Settlement Administrator. The Rescission of Opt-out statement shall include the following language:

"I previously submitted an Opt-out statement seeking exclusion from the class monetary settlement. I have reconsidered and wish to withdraw my Opt-out statement. I understand that by rescinding my Opt-out statement I may be eligible to receive an award from the claims settlement fund and may not bring a separate legal action against Kroger seeking damages."

**E. Submission of Rescission Statements.**

A Class Member submitting such a rescission statement shall sign and date the statement and cause it to be delivered to the Settlement Administrator no later than three (3) calendar days prior to the date of the Final Fairness Hearing. The Settlement Administrator shall date stamp the original of any Rescission of Opt-out statement and immediately fax copies to Kroger and Class Counsel no later than the next business day after receipt thereof and shall file the date-stamped originals with the Clerk of the Court no later than one (1) business day prior to the date of the Final Fairness Hearing. The Settlement Administrator shall retain copies of all Rescissions of Opt-Out statements until such time as the Settlement Administrator is relieved of its duties and responsibilities under this Decree.

**F. Defendant's Rescission of Agreement**

If any of the Named Plaintiffs opt out, or if the number of Class Members who opt-out of the Settlement Class in the manner provided for in this Decree exceeds 750, then Kroger, at its

sole option, shall have the right to void this settlement within seven (7) days after the date the Court allows the submission of rescissions of opt-outs. If Kroger exercises this option, all of Kroger's obligations under this Decree shall cease to have any force or effect and any orders entered in connection therewith shall be vacated, rescinded, cancelled, and annulled, and the Parties shall return to the status quo in the litigation as if the Parties had not entered into the Consent Decree. In addition, in such event, the Consent Decree and all negotiations, court orders and proceedings related thereto shall be without prejudice to the rights of any and all Parties hereto, and evidence relating to the Consent Decree and all negotiations shall not be admissible or discoverable in the litigation or otherwise.

#### **XIV. SETTLEMENT ADMINISTRATOR'S DUTIES AND RESPONSIBILITIES**

The Settlement Administrator shall: (1) receive from Kroger the names, social security numbers, last known addresses, and employment tenure of Class members by no later than twenty one (21) days after the Preliminary Approval Order; (2) receive from Kroger the list of class members who have completed their probationary period as well as those who have not, by no later than forty two (42) days after the Preliminary Approval Order; (3) prepare and mail the Notice to Class Members and the Claim form to those Class Members who may be eligible to receive a monetary distribution no later than fifty six (56) days after the Preliminary Approval Order; (4) trace once all Class Member addresses for undeliverable Notice and Claim Forms; (5) seek additional information from Kroger, when appropriate or necessary; (6) respond to eligibility challenges; (7) calculate the amounts due to each Class Member; (8) receive and file opt-out statements, objections and rescissions of opt-out statements; (9) implement the Distribution Procedures; (10) respond to questions from Class Members; and (11) perform any other duties necessary to carry out its responsibilities as set forth in this Decree.

## **XV. PAYMENT OF THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS**

The Settlement Administrator's fees and costs will be paid from the Settlement Fund except for those funds related to the Challenge process described in Section H.1.b for fees in excess of \$25,000. The Company shall pay the Settlement Administrator's fees and costs related to the Challenge process in excess of \$25,000.

## **XVI. PAYMENT FOR ATTORNEYS' FEES, COSTS AND EXPENSES**

Plaintiffs' counsel shall submit an application for attorneys' fees and costs to the Court no later than **fifty-six (56) days after the entry of this Preliminary Approval Order**.

Plaintiffs' counsel will simultaneously provide a copy of the fee petition to the Settlement Administrator and serve a copy upon defendants. At the time of the final approval of the Consent Decree, the Court shall determine the attorney's fees and costs to be paid to plaintiffs' counsel out of the Settlement Fund. Plaintiffs' counsel agrees to seek reasonable fees and costs. Defendants agree not to contest or object to the fee application of Plaintiffs' counsel to the extent it is consistent with the applicable law. All attorney's fees and costs shall be paid from the Settlement Fund of \$16 million within seven (7) days of the Effective Date.

Kroger shall have no obligation under this Consent Decree to pay any money for attorneys' fees and costs to Class Counsel, except as expressly set forth in this Consent Decree. Except as otherwise provided herein, Kroger shall not be liable for any of Named Plaintiffs' costs or attorneys' fees, statutory or otherwise, incurred in this Litigation or during the term of this Consent Decree.

## **XVII. ENFORCEMENT PROCEDURE**

### **A. Special Master**

The parties agree that Nathaniel R. Jones, retired Judge from the U.S. Court of Appeals for the Sixth Circuit, shall serve as the Special Master. The Special Master shall have plenary



authority to decide all issues regarding application, interpretation, and enforcement of this Consent Decree. The Special Master shall be authorized to conduct evidentiary proceedings, pursuant to the Federal Rules of Civil Procedure, and to utilize such other procedures as deemed necessary to effectuate this Consent Decree. The Special Master may allow discovery to take place pursuant to the Federal Rules of Civil Procedure. The Special Master may be removed only by unanimous agreement of the parties, or upon written motion of any party and order of this Court for good cause shown. All fees and costs of the Special Master during the term of the Consent Decree shall be paid by Kroger.

**B. Resolution of Parties' Disputes**

At the request of either party, the Parties shall confer as necessary with regard to any dispute arising under the Decree. The parties shall use their Best Efforts to resolve promptly any dispute regarding the interpretation, implementation or application of the Decree, including Kroger's compliance with any of its provisions, according to the procedures set forth below.

- (i) If either party has good reason to believe that a legitimate dispute exists as to the interpretation, application, or enforcement of any provision of this Decree, the initiating party shall promptly give written notice to the other party, including: (i) a reference to all specific provisions of the Decree that are involved; (ii) a statement of the issues; (iii) a statement of the remedial action sought by the initiating party; and (iv) a brief statement of the specific facts, circumstances and any other arguments supporting the position of the initiating party.
- (ii) Within ten (10) calendar days after receiving such notice, the non-initiating party shall respond in writing to the statement of facts and arguments set forth in the notice and shall provide its written position, including the facts and arguments upon which it relies in support of its position.

- (iii) The Parties shall undertake good faith negotiations, which should include a meeting or meetings by telephone or in person and the exchange of relevant documents and/or other information, to attempt to resolve the issue(s) in dispute or alleged noncompliance. The Parties shall use Best Efforts to resolve the disputed matter(s) within twenty (20) calendar days after the initiating party's receipt of the non-initiating party's response required by subsection b, above.
- (iv) If the Parties fail to resolve any differences or disputes regarding the interpretation, implementation or application of the Decree pursuant to the Dispute Resolution Procedures within such twenty (20) day period, either party may file a motion with the Special Master, with a supporting brief, seeking resolution of the dispute or the issue of non-compliance, such motion shall be limited to the dispute(s) and/or issue(s) as to which the Dispute Resolution Procedures were exhausted
- (v) The Special Master, upon motion, may permit either party to take post-settlement discovery as provided by the Federal Rules of Civil Procedure, however, post-settlement discovery (i) shall only be taken as to matters relevant to the underlying claim of breach, and (ii) shall only be permitted if the Special Master determines that the informal exchange of documents or information has not been sufficient to allow the Parties to present the dispute upon a factual record adequate for a fair determination of the issue. Notwithstanding the forgoing, the presumption shall be that all discovery shall be completed by both sides within 45 calendar days following the filing of the motion provided for in subsection d, above.

- (vi) The non-moving party will have ten (10) calendar days from receipt of the motion to respond by filing a brief with the Special Master and serving it on the moving party.
- (vii) The Special Master shall within 60 calendar days of the filing of the motion provided for in subsection d, above, hold a telephonic or in-person hearing.
- (viii) The Special Master shall, within thirty (30) calendar days after such hearing issue a written determination, including findings of facts, if so requested by any party.
- (ix) Either party may appeal a decision of the Special Master to the Court provided that such an appeal is filed within fourteen (14) calendar days of the Special Master's decision. Any such appeal shall be brought by motion pursuant to the Local Rules of the Court and Federal Rules of Civil Procedure. The decision rendered by the Special Master shall be affirmed unless the Court finds that the Special Master made clearly erroneous findings of fact or wrongly interpreted or applied the terms of this Decree.
- (x) Kroger shall pay for the fees and expenses of the Special Master during the Term of this Decree
- (xi) In the event that either party seeks to appeal any decision of the Special Master, the prevailing party in such appeal shall be entitled to recover its reasonable attorneys' fees, costs and expenses incurred in such appeal from the other party, consistent with applicable standards under Title VII. Whether and to what extent any party is a prevailing party and shall be awarded fees, costs and expenses shall be determined in the sole and absolute discretion of the Court.

## **XVIII. RELEASE OF CLAIMS**

### **A. Class Release**

Upon the Effective Date and except as provided below, Kroger, including its officers, directors, subsidiaries, affiliates, predecessors, and successors, shall be, and shall be deemed to be, fully, finally, and irrevocably released and discharged by the Plaintiffs on behalf of all Class Members who do not opt out of the Litigation in the manner to be specified by the Court in an order granting Preliminary Approval and providing for notice of the settlement embodied in this Consent Decree from any and all allegations and causes of action of employment discrimination based on race prior to the Effective Date that were made in the Litigation.

Specifically, the all-in Settlement Amount, described in Section XII.A of the Consent Decree resolves all race discrimination claims, including hourly workforce claims (both part-time and full-time), salaried workforce claims, and zone manager claims contained within the Second Amended Complaint, including, but not limited to, those sections cited below. *See, e.g.* Second Am. Comp. ¶¶26, 127-149:

- (a) Discrimination on the basis of race in violation of Title VII
  - (i) Kroger follows a policy and practice of restricting African-American employees' employment opportunities to lower job classifications and compensation levels. The systemic means of accomplishing such racial discrimination include, but are not limited to, Kroger's promotion, selection and compensation procedures.
  - (ii) Kroger's selection, pay and promotional procedures incorporate the following racially discriminatory practices: (a) relying upon excessively subjective judgments, procedures and criteria which permit and encourage the incorporation of racial stereotypes and bias by Kroger's predominantly white managerial staff; (b) refusing or failing to provide African-American employees with opportunities to demonstrate their qualifications for advancement; (c) failing to establish or follow procedures, or criteria that reduce or eliminate disparate impact and/or

intentional racial bias and stereotypes in Kroger's decision-making process; (d) refusing to post or announce vacancies or employment opportunities in a manner that allows African-American employees to learn about such opportunities and compete for them before they are filled by white employees or applicants; (e) discouraging applications and expressions of interest by African-American employees; (f) using an informal selection process that does not rely upon formal applications or other safeguards that open the process to competition by African-American employees; (g) pre-selecting white employees before vacancies or opportunities become generally known; and (h) assigning African-American employees to those geographic areas and stores where there is also a low volume of sales and promotional opportunities.

- (iii) Kroger's selection and compensation procedures have a disparate impact on the class.
- (iv) Harassment of African-American employees.

(b) Discrimination on the basis of race under Section 1981

- (i) Kroger follows a policy and practice of restricting African-American employees' employment opportunities to lower job classifications and compensation levels. The systemic means of accomplishing such racial discrimination include, but are not limited to, Kroger's promotion, selection and compensation procedures.
- (ii) Kroger's selection, pay and promotional procedures incorporate the following racially discriminatory practices: (a) relying upon excessively subjective judgments, procedures and criteria which permit and encourage the incorporation of racial stereotypes and bias by Kroger's predominantly white managerial staff; (b) refusing or failing to provide African-American employees with opportunities to demonstrate their qualifications for advancement; (c) failing to establish or follow procedures, or criteria that reduce or eliminate disparate impact and/or intentional racial bias and stereotypes in Kroger's decision-making process; (d) refusing to post or announce vacancies or employment opportunities in a manner that allows African-American employees to learn about such opportunities and compete for them before they are filled by white employees or applicants; (e) discouraging applications and expressions of interest by African-

American employees; (f) using an informal selection process that does not rely upon formal applications or other safeguards that open the process to competition by African-American employees; (g) pre-selecting white employees before vacancies or opportunities become generally known; and (h) assigning African-American employees to those geographic areas and stores where there is also a low volume of sales and promotional opportunities.

(iii) Harassment of African-American employees.

#### **B. Named Plaintiffs' Release**

Each of the Named Plaintiffs shall be required to sign a form of Release attached as Exhibit B to this Consent Decree as a condition of receipt of payment. Upon signing such release, each such individual shall be deemed to have thereby waived, and released Kroger, including its officers, directors, subsidiaries, affiliates, predecessors, and successors, from, any and all claims related to their employment arising at any time up to and including the date such individual signs the form of Release attached to this Decree, including but not limited to any claims for monetary relief of any type and attorneys' fees and costs that he or she asserted in the Litigation, or that he or she might have asserted, or could in the future assert under any cause of action against Kroger arising out of his or her employment or application for employment with Kroger, including but not limited to, any claim under any federal, state or local statute relating to his or her employment relationship with Kroger, including but not limited to, Title VII, Section 1981, and analogous provisions of State laws. This Release shall survive the termination of this Decree. However, this Release and waiver of claims shall not extend to claims based on incidents occurring after the date such Plaintiff signs such Release.

The Settlement Administrator shall provide to Kroger the original of each Named Plaintiff's Release within seven (7) days of receipt and will retain a copy for the Settlement Administrator's records.

### **C. Claims of Vincent Mangruem**

As part of the settlement, all claims of Vincent Mangruem, including his suspension/termination grievance filed by UFCW, Local 1995, on behalf of Mr. Mangruem, currently pending before Arbitrator Samuel Nicholas, as well as his individual complaint, Case No. CV-04-PWG-3541-NE, filed in the United States District Court for the Northern District of Alabama, Northeastern Division and any pending EEOC charges shall be dismissed with prejudice.

### **XIX. DOCUMENT RETENTION**

The parties expressly agree that as of the date of Preliminary Approval, any and all preservation obligations related to the Litigation, shall be terminated in full and neither party shall have any preservation obligation for such records and electronically-stored data from that date forward. Specifically, to comply with its obligations under this Decree, Kroger will retain electronically-stored data from the KERMIT system (Kroger's employment database), as well as relevant records stored in paper form. Any preservation obligations with respect to the Litigation shall be terminated as of the date of Preliminary Approval, except for what is done in the normal course of business.

**XX. KROGER SHALL MAINTAIN A COPY OF THE E-MAIL FILES FOR ITS KEY CUSTODIANS CONTAINING E-MAIL DATA ARCHIVED DURING THE LITIGATION THROUGH THE DATE OF PRELIMINARY APPROVAL THAT WERE PRESERVED IN CONNECTION WITH THE LITIGATION (THE "ARCHIVED E-MAIL"), UNTIL THIS CONSENT DECREE BECOMES FINAL AND EFFECTIVE AND KROGER DETERMINES THAT IT WILL NOT EXERCISE ITS OPTION TO VOID THE CONSENT DECREE**

### **XXI. EFFECTIVE DATE AND DURATION**

The provisions of this Consent Decree and the agreements contained herein shall remain in effect for three (3) years from the Effective Date of this Consent Decree. "Effective Date" means the latest of:

- (a) if an appeal is filed, (i) the date of final affirmance on an appeal of a judgment approving this Consent Decree (“Judgment”), the expiration of the time to file a petition for or a denial of a writ of certiorari to review a Judgment and, if certiorari is granted, the date of final affirmance of a Judgment following review pursuant to that grant, or (ii) the date of final dismissal of any appeal from a Judgment or the final dismissal of any proceeding on certiorari to review a Judgment; or,
- (b) if no appeal is filed, the expiration date of the time for the filing or noticing of any appeal from a Judgment.

However, there shall be no Effective Date and no final, binding Consent Decree until all of the Named Plaintiffs have signed the settlement agreement and release in full described in Section XVIII.B above and less than seven hundred and fifty (750) Class Members have opted-out of this Consent Decree pursuant to Section XIII.F above.



## XXII. REPORTING AND RECORD-KEEPING REQUIREMENTS

A. **Data Reporting Requirements.** As set forth herein by the anniversary of the date on which this Consent Decree is entered, and before each anniversary date thereafter, for the duration of the Consent Decree, Kroger will provide data to the class counsel, for the most recent 12-months for which data are available, sufficient to assess Kroger's performance under the Consent Decree in selecting class members for management training, and promotion to the assistant store manager, store manager and zone manager positions. These assessments will be made with respect to each Kroger division, taking due account of the availability of class members in each zone within each division. The assessment of selections into the management training program will be based on the actual applicant flow for that program. The assessment of promotions into assistant store manager and store manager positions will be based upon the demographic composition of those employed in positions from which these promotions customarily are made, and other objective data regarding the relative qualifications and availability of Class Members. Kroger will make available to class counsel, on an annual basis, its analysis of the data it is required to maintain about experience credit, admission into the management training program and selections for co-manager, store manager and zone manager vacancies.

**B. Statistically Significant Disparities Present in Reported Data.** In the event the class counsel believe that the analysis reveals that statistically-significant disparities exist adverse to African Americans in any year covered by the Consent Decree in the award of experience credit, the selection of candidates for the management training program or selection of candidates for co-manager, store manager or zone manager vacancies, they shall notify counsel for Kroger in writing of such belief and the basis for it. Kroger shall investigate to determine the cause of the disparity and take corrective action, if necessary, following the first year's analysis. Kroger shall notify class counsel of the remedial action it proposes to undertake.

**C. Method of Resolving Disputes Regarding Statistical Data.** In the event Kroger does not concur in the class counsels' expressed view that statistically-significant disparities exist or the plaintiffs contend that the remedial action Kroger proposes to undertake will be insufficient to promptly and fully eliminate the statistically-significant disparities adverse to African Americans and to take measures to minimize the chance such disparities will recur, then either party may invoke the Dispute Resolution Procedures set forth in Section XVII, herein.

**D. Confidentiality.** All information, reports, and documents produced pursuant to this Consent Decree shall be kept confidential and not disclosed in any manner or form to anyone other than the parties in this lawsuit and their experts, the Court and/or the Special Master, unless compelled by law.

### **XXIII. MEDIA AND CONFIDENTIALITY OBLIGATIONS**

The parties have agreed to issue a joint media statement (attached as Exhibit D) (1) after the filing of the joint motion to approve the settlement, and (2) on the day of the Court's final approval of the settlement. Prior to that time, the parties agree to keep the terms of their settlement confidential.

Any further statements to the media by either party, named Plaintiffs or class counsel must be provided to, and approved by, the opposing party in advance of the issuance to the media. Therefore, the parties agree that neither they, named Plaintiffs or class counsel may issue or release statements to the media about the agreement without securing prior advance approval from the opposing party.

Moreover, the named plaintiffs, their counsel, defendants, and their counsel agree not to discuss with any other person or entity other than their immediate family and tax or financial advisor, except as may be directed by the Court, any terms of the settlement other than information as set forth in the agreed upon joint media statement. All parties expressly waive any confidentiality, privilege, or protection (including without limitation the reporter shield protection) covering statements made to the media or third-parties in violation of their respective confidentiality obligations. If one party alleges another party violated this provision, that party shall be subject to full discovery as to the alleged violation.

#### **XXIV. MODIFICATION OF THIS CONSENT DECREE**

No waiver, modification, or amendment of any provision of this Consent Decree shall be effective unless made in writing, approved by all parties to this Consent Decree, and approved by the Court. The parties shall use their best efforts to support and defend this Consent Decree from any legal challenge whether by appeal, collateral attack, or objection.

Whenever possible, each provision and term of this Consent Decree shall be interpreted in such a manner as to be valid and enforceable; provided, however, that in the event that any provision or term of this Consent Decree should be determined to be or rendered invalid or unenforceable (by an Act of Congress, or otherwise), all other provisions and terms of this Consent Decree and the application thereof to all persons and circumstances subject thereto shall remain unaffected to the extent permitted by law. If any application of any provision or term of

this Consent Decree to any person or circumstance should be determined to be invalid or unenforceable, the application of such provision or term to other persons and circumstances shall remain unaffected to the extent permitted by law.

Kroger and Class Counsel shall have the right to seek relevant modification of this Consent Decree to ensure that its purposes are fully effectuated following good faith negotiations as to such modifications. Kroger and Class Counsel may jointly agree to modify the Consent Decree with the approval of the Court.

#### **XXV. INTEGRATION**

This Consent Decree constitutes the complete settlement agreement between the parties in this lawsuit.

#### **XXVI. EXECUTION**

This Consent Decree may be signed in several counterparts, and each such counterpart shall constitute an original. Each party warrants and represents that they have appropriate authority to execute this Consent Decree; that the person executing this Consent Decree has such authority as may be required to bind the party on whose behalf he or she has signed this Consent Decree; and that the promises, commitments, covenants, and releases contained within this Consent Decree are legally valid and binding upon such party.

## XXVII. MISCELLANEOUS PROVISIONS

A. **Calculation of Time.** In computing any period of time prescribed or allowed by this Consent Decree, unless otherwise stated, such computation or calculation shall be made consistent with Rule 4 of the Federal Rules of Civil Procedure.

B. **Persons Bound By Consent Decree.** The terms of this Consent Decree are and shall be binding on Plaintiffs and all members of the Class who do not opt out, their heirs, assigns, spouses and beneficiaries. It is also binding on Kroger and their past, present and future representatives, agents, directors, officers, assigns and successors.

C. **Construction.** The terms of this Consent Decree are the product of joint negotiations and shall not be constructed as having been authored by one Party rather than the other.

D. **Integration.** This Consent Decree constitutes the entire agreement between the Parties hereto with respect to the matters herein and it supersedes all negotiations, representations, comments, letters and memoranda of understanding, contracts and any other writings prior to the date of this Consent Decree.

E. **Authority.** The signatories to this Consent Decree hereby represent and warrant that they have the authority to execute this Consent Decree on behalf of themselves or the company or organization they represent.

F. **Notices.** All notices and other communications required under this Consent Decree shall be in writing and delivered either personally or by depositing the same, postage prepaid, in the United States Mail, addressed to the party hereto to whom the same is directed at the following addresses:

To Class Counsel, Plaintiffs and/or Settlement Class:

Joseph M. Sellers  
Cohen, Milstein, Hausfield & Toll, PLLC  
1100 New York Avenue NW  
West Tower, Suite 500  
Washington, DC 20005

and

Robert L. Wiggins, Jr.  
Wiggins, Childs, Quinn & Pantazis, LLC  
The Kress Building  
301 - 19<sup>th</sup> Street North  
Birmingham, AL 35203

To Kroger:

Keith C. Hult  
Littler Mendelson P.C.  
200 North La Salle Street  
Suite 2900  
Chicago, IL 60601