

## SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into as of this \_\_\_ day of June, 2016, by and between: the State of West Virginia, *ex rel.* Patrick Morrissey, Attorney General (the "State"); and Kroger Co. ("Kroger"), an Ohio corporation.

### R E C I T A L S

WHEREAS, on or about August 10, 2009, the State commenced an action against Kroger and other similarly situated pharmacies in the Circuit Court of Boone County, West Virginia (the "Court"), entitled *State of West Virginia, ex rel. Darrell McGraw, Attorney General v. CVS Pharmacy, Inc. et al*, Civil Action No. 09-C-226 (Hon. William S. Thompson, Judge) (the "Action"); and

WHEREAS, in the Action, the State has alleged that Kroger: (1) has failed to comply with the provisions of the West Virginia Pharmacy Act (the "Pharmacy Act") set forth in West Virginia Code §30-5-12b(g), which provides in part that in connection with the operation of a pharmacy in West Virginia under the circumstances stated in the statute, "[a]ll savings in the retail prices of the [generic] prescription shall be passed on to the purchaser," and "in no event shall such savings be less than the difference in acquisition cost of the brand name product prescribed and the acquisition cost of the substituted product"; and (2) as a result of its alleged failure to comply with West Virginia Code §30-5-12b(g), also has failed to comply with the provisions of the West Virginia Consumer Credit and Protection Act (the "CCPA") set forth in West Virginia Code §46A-6-104 and §46A-7-111(1); and

WHEREAS, Kroger has denied and continues to deny the allegations made by the State, and maintains that the West Virginia Board of Pharmacy (the "BOP") has exclusive jurisdiction to enforce the Pharmacy Act; that, consistent with an advisory opinion issued by the BOP addressing the scope and application of W. Va. Code §30-5-12b(f) and (g), Kroger has not violated said provisions of the Pharmacy Act; that the CCPA does not govern the pricing of generic prescription medications; that Kroger has not violated either the Pharmacy Act or the CCPA; and that the selective prosecution of the Action by the State against only those licensed pharmacies headquartered outside of West Virginia to the exclusion of all other licensed pharmacies operating within the State that price prescription medications in like manner violates the Equal Protection, Due Process and Commerce Clauses of the United States Constitution; and

WHEREAS, the State and Kroger are now desirous of settling and resolving their disputes as heretofore set forth without the need for further litigation;

NOW, THEREFORE, for the valuable consideration described below, the receipt and sufficiency of which hereby are expressly acknowledged, the undersigned parties mutually agree as follows:

#### A G R E E M E N T S

1. Upon execution of this Settlement Agreement, the State shall file with the Court a Motion and Proposed Order of Dismissal with Prejudice of the Action as to Kroger in the form attached hereto as Exhibits A and B.

2. Within thirty (30) days of the filing of the Order of Dismissal, Kroger shall pay to the State the total amount of One Million, Three Hundred and Fifty-Two Thousand, Nine Hundred and Forty-One Dollars and Eighteen Cents (\$1,352,941.18) ("Settlement Payment") by

wire transfer to the Bailey & Glasser LLP Trust Account, as counsel for the State. The State represents and warrants that Bailey & Glasser LLP is fully authorized to receive the Settlement Payment on its behalf and that transmittal of that payment to the Trust Account of Bailey & Glasser LLP shall be deemed as if payment had been made directly to the State. Bailey & Glasser LLP shall hold the Settlement Payment in trust for the State until directed to disperse the same by the State. Kroger shall have no responsibility or liability for the disposition of the Settlement Payment once it has transferred the funds to Bailey and Glasser LLP as set forth above. The Settlement Payment constitutes the total payment Kroger is required to make to the State in connection with this Settlement Agreement; and

3. Not later than twenty four ("24") months after the date of this Settlement Agreement, Kroger shall implement and operate a program for the pricing of generic prescription medications dispensed by its West Virginia stores on a cash basis to residents of the State of West Virginia who are not eligible for insurance coverage and not otherwise entitled to participate in any drug discount program ("Cash Customers"). It is expressly understood and agreed that this program shall not extend to any Kroger customer who is eligible for prescription drug coverage provided by commercial or governmental insurers, Medicare, Medicaid, drug discount programs, or any similar third-party payor.

4. As part of this program, Kroger shall review, at the conclusion of each calendar quarter, its prescription drug sales to Cash Customers for that quarter. As part of that review, Kroger shall calculate (a) the average aggregate gross profit margin, in dollars per prescription filled, it generated by dispensing generic medication to Cash Customers during the quarter; and (b) the average aggregate gross profit margin in dollars per

prescription filled it generated by dispensing branded prescription medication to Cash Customers during that same quarter. If Kroger's review reveals that, for that quarter, (a) exceeded (b), Kroger shall adjust its pricing to Cash Customers during the following quarter in a good faith effort to ensure that (a) no longer exceeds (b). No such adjustment shall be required if the difference between the two profit margins is less than two percent (2%) for the quarter. For so long as the foregoing program is in place, Kroger shall use its best efforts to ensure that, when viewed in their totality, the gross profits earned during a given calendar quarter on sales of generic drugs to Cash Customers do not exceed the gross profits earned on sales of branded prescription drugs to Cash Customers.

5. Kroger's obligation to maintain the aforementioned program will continue for so long as West Virginia Code § 30-5-12b(f) and (g) remain in force and effect in their current form, or for seven (7) years from the date of this Settlement Agreement, whichever first occurs.

6. During the 24 months preceding implementation of the aforementioned program, and for so long as said program remains in effect, the State shall consider Kroger to be in full compliance with the provisions of W. Va. Code § 30-5-12b(f) and (g) and neither the State nor its executive branch nor any of its administrative agencies shall initiate or adjudicate any claims alleging non-compliance with those statutory provisions.

7. Upon the payment by Kroger of the Settlement Payment, the State, on its own behalf and on behalf of its departments, agencies, regulatory boards, and instrumentalities and any person, in their official capacity, elected or appointed to serve the State (all of the foregoing collectively are "Releasers"), shall be deemed to have released and forever discharged Kroger, and all and each of its past and present affiliated and related

corporations and entities, their respective predecessors and successors in interest, and all and each of their respective past and present officers, directors, employees, agents, representatives, insurers, attorneys, consultants, indemnitors, and assigns (all of the foregoing collectively are "Released Parties"), of and from any and all claims, liabilities, demands, actions, and causes of action, of every kind and nature whatsoever, whether known or unknown, existing or not existing, asserted or unasserted, liquidated or unliquidated, absolute or contingent, in law or in equity, which the Releasors have ever had, presently have, or may have or claim to have, against the Released Parties, or any of them, by reason of any of the events, occurrences, allegations, and claims for relief set forth in any pleading, discovery response, motion, or brief in the Action; PROVIDED, that nothing in this Agreement shall operate or be construed as a waiver or release by the State of any claims, liabilities, demands, actions, or causes of action against any other defendant in the Action, or against any other pharmacy in the State of West Virginia.

8. It is expressly acknowledged and agreed that Kroger, at all times, has denied and still denies liability for the events, occurrences, allegations, and claims for relief set forth in the Action, and that the consideration provided to the State is provided and accepted in compromise and full settlement of disputed claims. Neither this Agreement nor the settlement provided for herein is, may be construed as, or constitutes an admission by or against Kroger of any fault, wrongdoing, or liability whatsoever.

9. This Agreement constitutes the entire agreement of the undersigned parties concerning the subject matter hereof. It may not be supplemented or changed orally.

10. No breach of any provision of this Agreement by any party hereto can be waived by any other party hereto, unless expressly done so in writing. Waiver of any one breach shall not be deemed to be a waiver of any other breach of the same or any other provisions hereof.

11. The undersigned parties and their respective counsel have reviewed this Agreement, and the rule of construction to the effect that any ambiguities are to be resolved against the drafting party and acknowledge that the rule shall not be employed in the interpretation of this Agreement.

12. This Agreement shall be binding upon, and shall inure to the benefit of, the successors and assigns of the parties hereto.

13. This Agreement shall be governed by, construed and enforced in accordance with, the laws of the State of West Virginia.

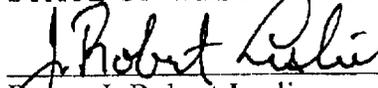
14. Kroger represents and warrants that all corporate consents required to enter into this Agreement have been obtained and otherwise complied with and that its execution of this Agreement fully binds it to the Agreement's terms and conditions. It further represents and warrants that the person signing this Settlement Agreement on its behalf is fully authorized to do so.

15. The State represents and warrants that it is legally authorized to enter into this Agreement and to bind itself and all persons, departments and agencies referenced in Paragraph 7 hereof as if they each had executed this Agreement individually and on their own behalf. It further represents and warrants that the person signing this Settlement Agreement on its behalf is fully authorized.

16. This Agreement may be executed in counterparts, each of which shall be deemed to be one and the same instrument. The undersigned parties shall exchange original signed counterparts.

WHEREUPON the parties have cause this Settlement Agreement to be executed as evidence by the signatures of their authorized representatives on the date shown.

STATE OF WEST VIRGINIA



By: J. Robert Leslie  
Senior Deputy Attorney General  
OFFICE OF THE ATTORNEY GENERAL  
Building 1, Room 26-E, Capitol Complex  
Charleston, WV 25305  
(304) 558-2021  
(304) 558-0140 facsimile  
Dated: June 6, 2016

KROGER CO.

By: Christine Wheatley  
Group Vice President and General Counsel  
Dated: June \_\_, 2016

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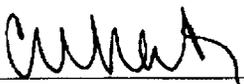
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STATE OF WEST VIRGINIA

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Charleston, WV 25305  
(304) 558-2021  
(304) 558-0140 facsimile  
Dated: June \_\_, 2016

KROGER CO.



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By: Christine Wheatley  
Group Vice President and General Counsel  
Dated: June 8, 2016