



BOARD OF SUPERVISORS
AGENDA LETTER

Agenda Number:

Clerk of the Board of Supervisors
105 E. Anapamu Street, Suite 407
Santa Barbara, CA 93101
(805) 568-2240

Department Name: County Counsel
Department No.: 013
For Agenda Of: July 16, 2024
Placement: Administrative
Estimated Time:
Continued Item: No
If Yes, date from:
Vote Required: Majority

TO: Board of Supervisors
FROM: Department Rachel Van Mullem, County Counsel (805) 568-2950
Director(s)
Contact Info: Rachel Van Mullem, County Counsel (805) 568-2950
SUBJECT: Adoption of a Resolution Authorizing County Counsel to Partially Settle the litigation *County of Santa Barbara v. Purdue Pharma, et al.* (Case No. 1:17-MD-2804) with The Kroger Co.

County Counsel Concurrence

As to form: Yes

Other Concurrence: Risk Management

As to form: Yes

Auditor-Controller Concurrence

As to form: Yes

Recommended Actions:

- a) Adopt a Resolution that approves and authorizes County Counsel or her designee to execute the following agreements to partially settle the litigation *County of Santa Barbara and the People of the State of California v. Purdue Pharma, et al.* (Case No. 1:17-MD-2804):
 - i. Subdivision Participation and Release Form which includes a release of all claims against The Kroger Co. and its "Released Entities" for their conduct complained of in the litigation; and
 - ii. Proposed California State-Subdivision Agreement Regarding Distribution and Use of Settlement Funds, which shall enable the County of Santa Barbara to receive and direct the use of a portion of settlement funds distributed to the State of California for approved opioid abatement activities; and
 - iii. California-Subdivision Backstop Agreement, which will allow the County to pay the contingency fees of Outside Counsel Keller Rohrback from the recovered settlement funds in an amount not to exceed 15% of the County's recovery plus costs.
- b) Determine that the above actions are not a project under the California Environmental Quality Act (CEQA), pursuant to CEQA Guidelines Sections 15378(b)(4) and 15378(b)(5) because they consist of government administrative or fiscal activities that will not result in direct or indirect physical changes in the environment.

Summary Text:

This item is on the agenda for the Board of Supervisors to adopt a Resolution (Attachment A) authorizing partial settlement of the lawsuit filed on behalf of the County of Santa Barbara and the People of California against The Kroger Co. and its Released Entities as that term is defined in the Kroger Settlement Agreement (hereafter referred to as “Kroger”). Through execution of the Subdivision Participation and Release Forms (Attachment B), the County would receive settlement funds via the Proposed California State-Subdivision Agreement Regarding Distribution and Use of Settlement Funds (Attachment C). The California-Subdivision Backstop Agreement (Attachment D) would authorize outside counsel to recover its attorneys’ fees and costs first from a Kroger Attorneys’ Fees and Costs Fund and then, if outside counsel has not fully recovered from that Fund, through the County-received funds up to 15%.

Background:

At the Board of Supervisors’ direction, the Office of County Counsel, with the assistance of outside counsel Keller Rohrbach L.L.P., initiated litigation against distributors and manufacturers of prescription opioids to recover the County’s damages from opioid drug misuse caused by the deceptive marketing and sale of prescription opioids, and to obtain other remedies to mitigate the problem going forward. The lawsuit, filed on February 15, 2019 and incorporated into the opioid Multi-District Litigation in the Northern District of Ohio, alleges that defendants created a public nuisance, and violated California’s Unfair Competition and the False Advertising laws by distributing large volumes of opioids in Santa Barbara County despite knowledge of the growing epidemic caused by opioid misuse, and by failing to prevent and report suspicious opioid orders as required by State and Federal law.

On December 14, 2021, the Board of Supervisors adopted a Resolution to partially settle the lawsuit with opioid manufacturers and distributors Amerisource Bergen Corporation, Cardinal Health, Inc., McKesson Corporation, and Janssen Pharmaceuticals, doing business as Johnson & Johnson (Distributor and Janssen settlement). Through the Distributor and Janssen settlement, the County of Santa Barbara is estimated to receive between \$9.5 Million and \$22.6 Million over 18 years. The County received its first Distributor and Janssen settlement payment in November 2022.

On April 4, 2023, the Board of Supervisors adopted a Resolution to partially settle the lawsuit with Allergan and TEVA, and pharmacy chains CVS, Walgreens, Walmart (the Pharmacy settlement). Through the Pharmacy settlement, the County of Santa Barbara is estimated to receive between \$7.4 to \$18 Million over 15 years. The County has not yet received funds under this settlement.

Through the Kroger settlement, the State of California is estimated to receive up to \$122 Million in opioid abatement funds, with the County of Santa Barbara estimated to receive up to \$1.2 Million over 11 years. The State has agreed to remit 70% of the funds it receives to local jurisdictions to be used on approved future opioid remediation and high impact abatement activities and to remit an additional 15% of the funds to local jurisdictions that initiated litigation to cover the fees and costs of that litigation and for approved abatement activities.

In order for the County to receive funds directly from the Kroger Settlement, it must “opt in” through execution of the Kroger Settlement Participation form and the California State Subdivision Agreement before August 12, 2024. “Opting in” to the settlement agreement releases all claims against Kroger for its past actions related to opioids complained of in the litigation. Under the settlement agreement, Kroger is subject to injunctive relief including, but not limited to: implementing and maintaining a compliance program overseen by an independent compliance department; reporting on number of prescriptions,

disbursement refusals, top prescribers, and “red flags” of prescriptions, patients, and prescribers; mandatory trainings; and the creation of a whistleblower hotline.

The County’s contingency fee agreement with Keller Rohrbach allows for a 17% contingency fee. However, the U.S. District Court Judge overseeing the opioid Multi District Litigation declined to presume that private counsel contingency fee agreements of more than 15% would be considered “reasonable.” As a result, the Kroger Settlement requires that any outside counsel who seeks recovery through the Kroger Attorney Fee Fund, must also agree to cap their contingency fees to 15%. If there are not sufficient funds in the Attorney Fee Fund, outside counsel Keller Rohrbach would be eligible to receive additional fees up to the 15% contingency fee limit from the settlement funds received by the County as a litigating jurisdiction under the Backstop Agreements.

Performance Measure:

N/A

Contract Renewals and Performance Outcomes:

N/A

Fiscal and Facilities Impacts:

Budgeted: N/A

Fiscal Analysis:

Annual receipt of funds will be dealt with through the County’s annual budget process or through budget revisions, as applicable.

Key Contract Risks:

The County must prepare and file annual reports on the use of the funds it receives, which may be audited by the Department of Health Care Services, subject to a five-year statute of limitations from the date on which the expenditure of the funds is reported. The County must expend or encumber the Kroger Settlement funds within 5 years of receipt, or 7 years for capital outlay projects, otherwise the funds will be transferred back to the State.

Staffing Impacts: None.

Special Instructions:

Please forward the Minute Order and a signed copy of the Resolution to Teresa Martinez at tamartinez@countyofsb.org.

Attachments:

- A. Resolution
- B. Subdivision Participation and Release Form
- C. Proposed California State-Subdivision Agreement Regarding Distribution and Use of Settlement Funds
- D. Sample Backstop Agreement (Appendix 3 to the Proposed California State-Subdivision Agreement Regarding Distribution and Use of Settlement Funds)

Authored by: Teresa Martinez, Senior Deputy County Counsel