



## **CITY COUNCIL AGENDA REPORT**

**MEETING DATE:** 7/16/2024

**DEPARTMENT:** City Manager

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### **SUBJECT:**

CONSIDER OPTING INTO A NATIONAL OPIOID SETTLEMENT AGREEMENT WITH KROGER

### **RECOMMENDED ACTION(S):**

1. Opt into the settlement agreement with Kroger and allocate the City's portion of the settlement funds to the County of Orange, and direct the City Manager to execute any documents necessary to implement the action.
  2. Grant the City Manager authority to execute and enter into future agreements related to the nation-wide opioid settlements.
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### **EXECUTIVE SUMMARY:**

States and cities across the United States have brought litigation against regional supermarket pharmacy Kroger Co. related to alleged misconduct to opioids painkillers. A proposed nationwide settlement agreement has been reached that would resolve the legal claims and require Kroger Co. to pay approximately \$1.4 billion.

The City can opt into the settlement agreement, thereby releasing its claims against Kroger Co. The funds are restricted to certain opioid abatement or remediation uses. The City can either allow the funds to be used by the County of Orange or elect to use the funds itself subject to twelve years of reporting requirements to the state. Alternatively, the City can take no action, thereby opting out of the settlements, while maintaining its right to pursue litigation against Kroger Co.

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### **BACKGROUND:**

Litigation brought by states, cities, local political subdivisions, special districts, and tribes across the United States ("subdivisions") against manufacturers and pharmaceutical distributors of opioid painkillers ("opioid distributors") has resulted in settlements requiring the opioid distributors to pay billions of dollars to abate the opioid epidemic. The settlements have totaled over \$20 billion to date. Of this

amount, approximately \$17 billion will be used by participating states and subdivisions to remediate and abate the impacts of the opioid crisis.

- Kroger Settlement: A proposed multi-state settlement with Kroger dated March 22, 2024 (Attachments 1 and 2) has been offered totaling approximately \$1.4 billion (“Kroger settlement”). The proposed settlement also requires Kroger to provide injunctive relief relating to opioid dispensing practices and preventing diversion of prescription opioids.
- Allocation of Funds: California is expected to receive approximately \$120 million and is to distribute these funds pursuant to the proposed Kroger settlement allocation formula. The terms of the Kroger settlement is nearly identical to previous opioid settlement agreements and allocate the funds as follows: 15% to the subdivision fund, 15% to the state fund; and 70% to the abatement accounts fund.
  - Subdivision Fund. 15% percent of the total settlement funds would be allocated to the subdivision fund, which would be allocated among the plaintiffs in the litigation to fund future opioid remediation and to reimburse past opioid-related expenses (which may include fees and expenses related to litigation).
  - State Fund. 15% percent of the total settlement funds would be allocated to the State and used by the State for future opioid remediation.
  - Abatement Accounts Fund. 70% percent of the total settlement funds would be allocated to counties and cities to be used for opioid abatement or remediation uses (such as services to treat opioid use disorder; support people in treatment and recovery; purchase and distribute naloxone; connect people to care; address needs of criminal justice-involved persons, address the needs of communities of color and vulnerable populations including sheltered and unsheltered people disproportionately impacted by substance use disorders; prevent over-prescribing and ensure appropriate prescribing and dispensing of opioids; prevent misuse of opioids, prevent overdose deaths and other harms; provide leadership, planning, and coordination of programs; provide training; and conduct research.)
    - The funds to individual counties are allocated based on opioid deaths per capita, incidence of opioid use disorder, and opioid dosage.

- The funds to cities within a particular county are allocated based on historical spending of cities on various services such as police protection, fire protection, health services, correction services, housing and community development, judicial services, and legal services.
- Management of Funds. Each county and city that receives payment of funds from the settlements must prepare written reports at least annually regarding the use of those funds until the funds are fully expended and for one year thereafter. These reports would also include a certification that all funds received have been used in compliance with the allocation agreements. Further, each county and city would need to track all deposits and expenditures. A county is not responsible for oversight, reporting, or monitoring of funds received by a city within the county that receives direct payment.

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## DISCUSSION:

California counties and cities have been allocated 85% of the total amount allocated to California, which based on best estimates will be approximately \$120 million. Note that in no scenario will California's allocation be so much greater as to make the City's allocation substantively larger.

- City Allocation. The specific amount to be allocated to the City is unknown at this time because it is dependent upon the number of localities that opt into the settlements. The final total amount will be disbursed over 11 years and is likely a lesser amount than the previous settlements.
- Default Distribution. The default distribution of funds in the settlement agreements provides the funds would go directly to the county in which a city is located. A city can elect to have its funds delivered directly to the city by providing notice in the participation agreements. Additionally, a city within a county may opt in or out of direct payment at any time, and it may also elect direct payment of only a portion of its share, with the remainder going to the county, by providing notice to the settlement fund administrators at least sixty days prior to a payment date.
- City-specific considerations. In deciding whether to allow a city's funds to go directly to the county in which a city is located, a city should consider the following: (1) whether the amount of money is substantial enough for the city to have its own impactful and meaningful programs; (2) whether the city offers the services and has the employees to spend the money in

accordance with its prescribed uses; and (3) whether the city wants to engage in the reporting requirements over the course of the next twelve years (eleven years of distribution and an additional year following final distribution).

**Opting In.** The City must opt into the settlement agreement by **August 12, 2024**, which requires the City to release its claims against Kroger Co.

- No opt-in action. If the City takes no action, it will have not opted into the settlement and its allocation of settlement funds will not be paid. The City would still have the opportunity to bring its own action against Kroger if it opts out of the settlement, which is not very realistic.
- Opt-in action. Rubris Incorporated (“Rubris”) has been designated as the Settlement Implementation Administrator responsible for providing notice and managing the collection of participation forms. Rubris also handled the previous national opioid settlements. The City must return the “Subdivision Participation and Release Form” (Attachment 3) to Rubris using electronic signature via DocuSign, manual signature returned via DocuSign, or manual signature returned via electronic mail to [opioidsparticipation@rubris.com](mailto:opioidsparticipation@rubris.com) by August 12, 2024, in order to opt into the settlement.

This is the third of these opioid settlements and it is staff’s understanding that there could be more against other defendants. If previous settlements are indicative, future settlements will continue to be in descending amounts. Thus, there could be some efficacy in granting the City Manager authority to execute any future settlement agreements consistent with City Council direction.

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#### **FISCAL IMPACT:**

There is no fiscal impact to the City based on the recommended actions.

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#### **ATTACHMENTS:**

1. Exhibit A - Proposed Kroger Settlement Agreement
2. Exhibit B - Kroger Counsel Side Letter of March 28, 2024
3. Exhibit C - Subdivision Participation and Release Form

Submitted By: Matthew Richardson, City Attorney  
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