

**IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
FIRST DIVISION**

**STATE OF ARKANSAS, *ex rel.*
TIM GRIFFIN, ATTORNEY GENERAL**

PLAINTIFF

v.

Case No. 23CV-25 _____

KROGER CO.

DEFENDANTS

COMPLAINT

Plaintiff, the State of Arkansas, by and through its Attorney General, Tim Griffin, brings this action against Defendant the Kroger Co. (“Defendant”) pursuant to the State’s *parens patriae* capacity to advance the public interest, the Arkansas Deceptive Trade Practices Act, and the common law of the State of Arkansas and alleges as follows:

I. JURISDICTION AND STATUTORY AUTHORITY

1. This enforcement action is brought by the Attorney General, in the name of the State of Arkansas and in the public interest pursuant to the authority granted by the Arkansas Deceptive Trade Practices Act (ADTPA), Ark. Code Ann. § 4-88-101 *et seq.*, upon the grounds that Defendant has engaged in unfair or deceptive acts and practices in or affecting commerce as declared unlawful by the ADTPA, has been negligent, created a public nuisance, and has been unjustly enriched as prohibited by the common law of the State of Arkansas.

2. This Court has jurisdiction over this action pursuant to Ark. Code Ann. § 16-13-201 as Plaintiff seeks equitable and legal relief, the amount in controversy exceeds two hundred

3. dollars, and this matter brings claims arising under the laws of this State that are not exclusively cognizable in another court.

4. At all times described below, Defendant and its agents have engaged in the sale of “goods” and “services” in Arkansas as defined in Ark. Code Ann. § 4-88-102(4)(7).

5. Plaintiff has reason to believe that Defendant has caused and will cause immediate, irreparable injury, loss, and damage to the State of Arkansas by unlawfully dispensing prescription opioids. Therefore, these proceedings are in the public interest.

II. VENUE

6. Venue is proper in Faulkner County under Ark. Code Ann. §§ 4-88-115, 16-60-101(a) and (c).

III. DEFENDANT

7. This enforcement action is brought by Attorney General Tim Griffin, in the name of the State of Arkansas and in the public interest pursuant to the authority granted by Ark. Code Ann. §§ 25-16-702 *et seq.*, upon the ground that Defendants have engaged in unfair or deceptive acts and practices in or affecting commerce as declared unlawful by the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §§ 4-88-101, *et seq.*, the Arkansas Controlled Substances Act, Ark. Code Ann. §§ 5-64-101, *et seq.*, the Arkansas Alcohol and Drug Abuse Act, Ark. Code Ann. §§ 20-64-101, *et seq.*, and have created a public nuisance prohibited by the common law of the State of Arkansas.

8. Defendant is a corporation organized under the laws of Ohio and has its principal place of business in Ohio, at 1014 Vine Street, Cincinnati, Ohio 45202. Defendant conducts business in the State of Arkansas.

9. Whenever this Complaint alleges that Defendant did any act, it means that Defendant:

- a. Performed or participated in the act; or
- b. Its subsidiaries, officers, successors in interest, agents, partners, trustees, or employees performed or participated in the act on behalf of and under the authority of Defendant.

IV. FACTUAL BACKGROUND

10. The United States saw a nearly four-fold increase in the annual number of opioid pills dispensed by pharmacies between 1999 and 2014. This increase contributed to numerous instances of opioid abuse, dependence, addiction, and overdose deaths in the State of Arkansas. It also contributed to a sharp increase in the use of even more powerful drugs such as fentanyl and heroin, which are sometimes used by themselves, and other times used in combination with prescription opioids. Fentanyl and heroin use exacerbated opioid abuse, dependence, addiction, and overdose deaths in the State of Arkansas.

11. Among the ways that the surge in the use of prescription opioids has caused the current public health crisis is through the diversion of prescription opioids from legitimate distribution channels to illegitimate and illegal channels. Diversion can range from forging prescriptions, to using legitimate prescriptions to obtain pills that can be resold on the street, to obtaining prescriptions from corrupt prescribers who are profiting off of their prescription pads.

12. The federal Controlled Substances Act, along with the State of Arkansas's parallel controlled substances law, was designed to "provide an interlocking trellis of laws which will enable government at all levels to more effectively control the [narcotic and dangerous drug]

problem.” Special Message to the Congress on Control of Narcotics and Dangerous Drugs, Pub. Papers of the Presidents of the United States: Richard Nixon, 1969, at 513, 514 (July 14, 1969).

13. A main objective of these laws was to establish a closed regulatory system for the legitimate handlers of controlled drugs that would prevent controlled substances moving from legitimate channels to illegitimate channels, thereby guarding against diversion.

14. As a dispenser of opioids, Defendant played a crucial role in stopping the diversion of opioids. The law makes pharmacies and pharmacists the last line of defense in preventing the illegal diversion of controlled substances.

15. Specifically, the federal Controlled Substances Act, similar to parallel state law, obligates pharmacies to practice their “corresponding responsibility” to dispense only legitimate prescriptions for controlled substances written for legitimate medical purposes. 21 C.F.R. § 1306.04(a); Arkansas Controlled Substances Act, Ark. Code Ann. § 5-64-101 *et seq.*, Arkansas Alcohol and Drug Abuse Act, Ark. Code Ann. § 20-64-101 *et seq.*

16. To comply with its legal duty to dispense only legitimate opioid prescriptions written for legitimate medical purposes, a pharmacy must, among other things, engage in due diligence to identify opioid prescriptions that have one or more “red flags” that are indicia of diversion and resolve those red flags before dispensing a prescription.

17. Red flags can relate to the prescriber, the patient, and/or the physical prescription itself. Examples of red flags include, but are not limited to: (1) patients who seek to fill opioid prescriptions written by multiple doctors over a short period; (2) patients who seek to pay in cash for an opioid prescription despite having insurance information on file; (3) opioid prescriptions that appear altered or photocopied; (4) opioid prescriptions that contain misspellings or non-

standard abbreviations; or (5) opioid prescriptions written by a doctor located far away from the patient's residence or the pharmacy's location.

18. Chain pharmacy companies like Defendant have unique real-time knowledge of opioid prescriptions dispensed by its thousands of pharmacies across the country. This allows chain pharmacies like Defendant to have access to, and the ability to track, aggregate, and maintain, data related to suspicious opioid prescriptions with red flags. As a result of the red flag data available to Defendant, it has a unique ability to spot and guard against diversion of opioids.

19. Defendant had the resources to implement systems to use its real time knowledge of its pharmacies' opioid ordering volume and prescription red flags to guard against diversion because of its enormous annual revenues. Yet Defendant did not adequately implement such systems.

20. Defendant failed to perform its corresponding responsibility adequately by implementing insufficient controls to identify and resolve signs of diversion, as required by federal and state-controlled substances laws.

21. Defendant had policies with the stated purpose of identifying suspicious opioid orders and conducting due diligence to resolve the suspicion. But Defendant frequently designed, or applied, its policies in such a manner that they were ineffective controls against diversion, thereby violating its legal obligations to guard against diversion of opioids by practicing its corresponding responsibility.

22. The sheer volume of diverted opioids has wreaked havoc throughout the State of Arkansas.

23. Yet for numerous opioid prescriptions in the State of Arkansas that resulted in one or more red flags, Defendant nevertheless dispensed the opioids without first making sufficient

inquiries into the legitimacy of the prescription. Defendant also implemented policies in which its pharmacists were given insufficient time and resources to practice their corresponding responsibility, resulting in Defendant's pharmacists too often ignoring or insufficiently investigating the red flags that they did identify.

24. Year after year as its opioid dispensing increased and the opioid crisis grew, Defendant failed to practice its corresponding responsibility, including dispensing controlled substances without first resolving the red flags presented by suspicious prescriptions.

25. Defendant knew that its internal compliance program was inadequate to fulfill its anti-diversion duties pursuant to state and federal law.

26. Through its actions and inactions in connection with the dispensing of opioids, including those alleged above, Defendant materially contributed to the creation of an opioid addiction crisis that has injured, harmed, and otherwise disrupted the lives of thousands of residents of the State of Arkansas, as well as cost state, county and municipal governments billions of dollars in expenditures to prevent, mitigate and remedy the multitude of different societal harms and injuries caused by the addiction crisis. Defendant knew, or in the exercise of reasonable care and diligence should have known, that its actions and inactions would lead to this result.

V. CAUSES OF ACTION

Count 1: Violations of Arkansas's Deceptive Trade Practices Act

27. Plaintiff incorporates and adopts by reference the allegations contained in the preceding paragraphs as if fully set forth herein.

28. Defendant, in the course of dispensing opioid-containing prescription drugs, engaged in unfair or deceptive acts and practices that are prohibited by the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §§ 4-88-107, 4-88-108.

29. Opioids are “goods” as defined under Ark. Code Ann. § 4-88-102(4); each Defendant is a “person” as that term is defined under Ark. Code Ann. § 4-88-102(5); and distributing and dispensing prescribed drugs are “services” pursuant to Ark. Code Ann. § 4-88-102(7).

30. Defendant’s practices were likely to and did in fact deceive and mislead prescribers into prescribing and consumers into seeking and taking medically unnecessary and in many cases, harmful quantities and strengths of opioids.

31. Defendant’s practices were also unfair to consumers because they caused substantial injury to patients in the form of opioid abuse disorder, overdose and in some cases death, which could not have been reasonably avoided by those consumers, and which did not provide any offsetting benefits.

32. Defendant’s unfair or deceptive acts and practices include, but are not limited to, the following:

- a. Failing to provide effective controls and procedures to guard against diversion of opioids in the State of Arkansas;
- b. Failing to practice its corresponding responsibility and dispensing opioids in the State of Arkansas despite not resolving red flags indicating that a prescription may be for an illegitimate purpose;
- c. Knowingly using deceptive and unconscionable trade practices in violation of Ark. Code Ann. § 4-88-107(a)(1), in general, consisting of making false representations as to the characteristics, uses, benefits, source, sponsorship, approval, or certification of opioids;

- d. Knowingly using deceptive and unconscionable trade practices in violation of Ark. Code Ann. § 4-88-107(a)(8)(B) by taking advantage of consumers who were reasonably unable to protect their own interests due to ignorance.
- e. Engaging, and continuing to engage, in other unconscionable, false, and deceptive acts or practices in business, commerce or trade in violation of Ark. Code Ann. § 4-88-107(a)(10);
- f. Acting, using and employing, and continuing to act, use or employ, deception, fraud or false pretense in connection with the sale, distribution and dispensing of opioids in violation of Ark. Code Ann. § 4-88-108(a)(1); and
- g. Concealing, suppressing and omitting material facts in connection with the sale, distribution and dispensing of opioids with the intent that others, including the State of Arkansas and Arkansas consumers, would rely on that concealment, suppression or omission, in violation of Ark. Code Ann. § 4-88-108(a)(2).

33. As a result of Defendant's deceptive conduct, consumers, including the State of Arkansas, have suffered millions of dollars in payments for products that were either illegal, misrepresented, unfair, and/or harmful to consumers in derogation of the public interest of the State of Arkansas and its citizens.

34. Defendant's actions alleged herein were an inequitable assertion of its power, position, and/or knowledge to the detriment of consumers, including the State of Arkansas, through Defendant's deceptive practices.

35. Because of these violations and Defendant's involvement in the actions described herein, consumers paid for goods that were illegal, deceptive, usurious, oppressive, and the products of an illegal and deceptive scheme involving Defendant and others.

36. As a result of Defendant's knowing violations described herein, consumers suffered substantial damages for which the State of Arkansas is entitled to restitution and other relief under Ark. Code Ann. § 4-88-113(a)(2)(A).

37. Defendant's deceptive trade practices, as outlined above, constitute distinct violations of the ADTPA.

38. The State of Arkansas is also entitled to civil penalties of up to \$10,000.00 for each violation resulting from Defendant's unlawful conduct, investigative costs, and attorneys' fees under Ark. Code Ann. § 4-88-113(a)(3) and (e).

39. Also, the State seeks a permanent injunction against Defendant's future deceptive trade practices under Ark. Code Ann. § 4-88-113(a)(1).

Count 2: Common Law Public Nuisance

40. Plaintiff incorporates and adopts by reference the allegations contained in preceding paragraphs as if fully set forth herein.

41. This action is brought by the State to abate the public nuisance created by Defendant.

42. Defendant has contributed to and/or assisted in creating and maintaining a condition that is harmful to the health of Arkansans or interferes with the comfortable enjoyment of life in Arkansas.

43. Defendant, in the course of dispensing opioid-containing prescription drugs, created a public nuisance by unreasonably interfering with rights common to the general public as

prohibited by the common law of the State of Arkansas. Defendant's acts and practices that unreasonably interfered with rights common to the general public include, but are not limited to, the following:

- a. Failing to provide effective controls and procedures to guard against the diversion of opioids in the State of Arkansas; and
- b. Failing to practice its corresponding responsibility and dispensing opioids in the State of Arkansas despite not resolving numerous red flags indicating that prescriptions may have been for illegitimate purposes.

44. Defendant knew or should have known that its unchecked distribution of opioids would create a public nuisance in derogation of the public interest of the State of Arkansas and its citizens.

45. Defendant engaged in the massive distribution and dispensing of opioids for use by the citizens of the State of Arkansas.

46. Defendant knew or should have known that its distribution and dispensing of opioids would lead to addiction and other adverse consequences and that the community would suffer as a result, in derogation of the public interest of the State of Arkansas.

47. Defendant's actions were, at the least, a substantial factor in opioids becoming widely available and widely used. Without Defendant's actions, opioid use would not have become so widespread, and the enormous public health hazard of opioid overuse, abuse, and addiction that now exists would have been averted.

48. The health and safety of the citizens of the State, including those who use, have used, or will use opioids, as well as those affected by users of opioids, is a matter of great public interest and legitimate concern to the State's citizens and residents.

49. The public nuisance created, perpetuated, and maintained by Defendant can be abated, and further recurrence of such harm and inconvenience can be prevented.

50. Defendant's conduct has affected and continues to affect a considerable number of people within the State of Arkansas and is likely to continue to cause significant harm to those who take opioids, their families, and the community at large.

51. Defendant created or assisted in the creation of the epidemic of opioid use, abuse, and injury, and is liable for abating it.

Count 3: Common Law Negligence

52. Plaintiff incorporates and adopts by reference the allegations contained in preceding paragraphs as if fully set forth herein.

53. At all relevant times, Defendant had a duty to exercise reasonable care in distributing and dispensing highly dangerous opioids in the State of Arkansas. Defendant had a duty to exercise reasonable care under the circumstances, including not causing foreseeable harm to others.

54. By engaging in negligent conduct that created an unreasonable risk of harm to others, Defendant failed to exercise reasonable care to prevent harm to others. On the contrary, reasonably prudent distributors and dispensers of opioids would have anticipated that the scourge of opioid addiction would wreak havoc on communities, and significant costs would be imposed upon the governmental entities of those communities. Reasonably prudent distributors and dispensers know that failing to report and stop suspicious orders would lead to the diversion of the opioids they distribute and dispense.

55. Defendant is part of a limited and regulated class of entities authorized to legally sell, distribute, and dispense controlled substances. This role places a great responsibility upon Defendant in relation to the State of Arkansas and its citizens.

56. Upon information and belief, Defendant failed to exercise reasonable care in failing to prevent the diversion of opioids and therefore repeatedly and negligently breached its duties.

57. The use, abuse, and diversion of opioids resulting in addiction, morbidity, and increased mortality in the State of Arkansas was a foreseeable harm of Defendant's breach of those duties.

58. The State has suffered damages as a direct and proximate result of the negligent failures by Defendant and its employees and/or agents.

Count 4: Common Law Unjust Enrichment

59. Plaintiff repeats and realleges the preceding paragraphs of this Complaint as if fully set forth herein.

60. As a direct and proximate result of the unlawful conduct described herein, Defendant has been and will continue to be unjustly enriched.

61. Defendant has benefited from its unlawful acts by causing millions of illegal and suspicious orders to be distributed and dispensed in violation of its legal duties. It would be inequitable and not in good conscience for Defendant to retain any ill-gotten gains earned as a result of the conduct alleged herein, which gains would not exist but for the payments made by the State and other payors.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter an Order:

- a. That the acts alleged herein be adjudged and decreed to be unlawful in violation of Arkansas statutory and common law;
- b. That Plaintiff recover all measures of damages allowable under State law identified herein and the common law, and that judgement be entered against the Defendant in favor of Plaintiff;
- c. Issuing a permanent injunction prohibiting Defendant, Defendant's officers, agents, servants, employees, attorneys – and any other person in active concert or participation with Defendant – from engaging in unfair or deceptive acts and practices in violation of Ark. Code Ann. § 4-88-113(a);
- d. Ordering Defendant to pay compensatory restitution and remediation as set forth in Ark. Code Ann. § 4-88-113(a)(2)(A-B);
- e. Ordering Defendant to abate the public nuisance by paying compensatory restitution and remediation; and
- f. Ordering Defendant to pay Plaintiff's attorneys' fees and costs of court pursuant to Ark. Code Ann. § 4-88-113 and as provided by law; and
- g. That this Court grant all other relief to which the Plaintiff is entitled.

Respectfully submitted,

TIM GRIFFIN
ATTORNEY GENERAL

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