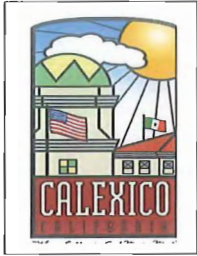


AGENDA
ITEM

9



AGENDA STAFF REPORT

DATE: December 15, 2021

TO: Mayor and City Council

APPROVED BY: Miguel Figueroa, City Manager

PREPARED BY: Carlos Campos, City Attorney

SUBJECT: A Resolution of the City Council of the City of Calexico, California Authorizing the City Manager to Enter into the Settlement Agreements with McKesson Corporation, Cardinal Health, Inc., Amerisource Bergen Corporation, Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc., and Janssen Pharmaceutica, Inc., Agree to the Terms of the State-Subdivision Agreements, and Authorize Entry into the State-Subdivision Agreements with the Attorney General

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Recommendation:

It is recommended that the City Council adopt Resolution 2021-XX, authorizing the City Manager to:

1. Opt into settlement agreement with opioid distributors, Amerisource Bergen, Cardinal Health, and McKesson, and direct the City Manager to execute any documents necessary to implement the action.
2. Opt into settlement agreement with opioid manufacturer, Janssen (owned by Johnson & Johnson), and direct the City Manager to execute any documents necessary to implement the action.

Executive Summary:

Litigation brought by states and cities across the United States against the three largest pharmaceutical distributors of opioid painkillers, Amerisource Bergen, Cardinal Health, and McKesson (the "Distributors"), and the opioid painkiller manufacturer, Janssen (owned by Johnson & Johnson) ("J&J"), has resulted in two proposed settlements totaling approximately \$26 billion dollars.

The City can opt into the settlements, thereby releasing its claims against



the Distributors and J&J, in order to receive at most **\$311,220 paid out over a period of next 18 years**. The funds are restricted to certain opioid abatement/remediation uses. The City can either allow the funds to be used by the County of Imperial or elect to use the funds itself subject to 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 the Distributors and J&J.

Background/Discussion:

A. Allocation of Funds

Litigation brought by states and cities across the United States against the Distributors and J&J has resulted in a proposed settlement totaling approximately \$26 billion dollars. The proposed settlement is broken into two separate deals: (1) the Distributors Settlement (Exhibit A); and (2) the J&J Settlement (Exhibit B.) The Distributors will pay \$21 billion over 18 years and J&J will pay \$5 billion over 7 years.

California is to receive between \$2.269 and \$2.34 billion and is to distribute these funds pursuant to intrastate allocation agreements for both the Distributors Settlement and the J&J Settlement. (Exhibit C and Exhibit D.) As outlined in the Intrastate Allocation Agreements, Settlement Fund payments due to the State of California are allocated as follows: 15% to the State Fund; 70% to the California Abatement Accounts Fund; and 15% to the California Subdivision Fund. This results in the State receiving 15% of the payments allocated to California and local subdivisions receiving the remaining 85%. The percentages paid out to the California Subdivision Fund is reserved for entities that participated in the litigation of the claims giving rise to the settlement agreements. The percentages paid out to local subdivisions that did not litigate, but choose to opt into the settlements comes from the share of the settlement proceeds that are placed in the California Abatement Accounts Fund. Essentially, this means that the City of Calexico, if it chooses to opt into the settlement, is entitled to receive a percentage share from the California Abatement Accounts Fund.

The City of Calexico has been allocated 0.019% of the 70% of the approximate \$2,340,000,000 (i.e., best case scenario), which is equal to **\$311,220**. This total amount will be disbursed over 18 years, which totals approximately **\$17,290 per year**. The first payments are scheduled to occur in the first quarter of 2022 and July 2022. After the receipt of these initial payments, further payments will be received annually thereafter. As stated above, the definite amount is not yet known because of the bonus structure built into the agreements.

The default distribution of funds in the settlement agreements provides that the funds will 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 settlement 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.

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 handle it on its own; (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 nineteen years (eighteen years of distribution and an additional year following final distribution).

B. Use of Received Funds

As outlined by the Distributor and J&J Settlements, funds received from the California Abatement Accounts Fund must be **used for future opioid remediation or abatement**. Exhibit "E" of both the Distribution and J&J Settlements contain a non-exhaustive list of potential uses for received abatement funds. For instance, participating subdivisions may use funds for areas such as services to treat opioid use disorder; support people in treatment and recovery; connect people to care; address needs of criminal justice-involved persons; address the needs of pregnant or parenting women and their families, including babies with neonatal abstinence syndrome; 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. (See Exhibit A, E-1 – E-15 for allowed uses; see Exhibit B, pp. 63-77 for allowed uses.)

The Intrastate Allocation Agreements also provide spending limitations in addition to those provided by the Distributor and J&J Settlements. Under the Intrastate Allocation Agreements, no less than 50% of the funds received in each calendar year will be used for one or more of the following High Impact Abatement Activities:

- (1) the provision of matching funds or operating costs for substance use disorder facilities within the Behavioral Health Continuum Infrastructure Program;
- (2) creating new or expanded Substance Use Disorder ("SUD") treatment infrastructure;
- (3) addressing the needs of communities of color and vulnerable populations (including sheltered and unsheltered homeless populations) that are disproportionately impacted by SUD;
- (4) diversion of people with SUD from the justice system into treatment, including by providing training and resources to first and early responders (sworn and non-sworn) and implementing best practices for outreach, diversion and deflection, employability, restorative justice, and harm reduction; and/or
- (5) interventions to prevent drug addiction in vulnerable youth.

In addition to these requirements, there is also a time limit on the spending of received funds. If funds are not expended or encumbered within **five years of receipt** and in accordance with the settlement agreements and the Intrastate Allocation Agreements, the funds are required to be transferred back to the State.

C. 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. Each county and city will need to track all deposits and expenditures. These reports will also include a certification that all funds received have been used in compliance with the allocation agreements. The California Department of Healthcare and Services (“DHCS”) may review these reports in order to determine compliance with the settlement agreements and the Intrastate Allocation Agreement.

If the DHCS determines that a participating subdivision’s use of abatement funds is inconsistent with the settlement agreements or Intrastate Allocation Agreements, the parties are required to meet and confer. If the meet and confer process does not provide a resolution, the DHCS may conduct an audit, which can lead to a court action if the matter is still not resolved after an audit.

D. Opting In

The City must opt into the settlements by **January 2, 2022**, which requires the City to release its claims against the Distributors and J&J. If the City takes no action, it will have opted out of the settlements and its designated funds will flow to the State. The City would still have the opportunity to bring its own action against the Distributors and J&J.

CONCLUSION:

Unless the City intends to pursue its own litigation against the Distributors and J&J, it is recommended that the City opt into the settlement and elect to receive payments directly.

Fiscal Impact:

Opting into the settlements would have a net positive fiscal impact to the City by allowing the City to receive approximately \$17,290 per year to fund opioid abatement.

Attachment(s):

1. Resolution 2021-XX
2. Exhibit A – Distributor Settlement Agreement
3. Exhibit B – J&J Settlement Agreement
4. Exhibit C – CA Distributors Allocation Agreement
5. Exhibit D – CA J&J Allocation Agreement
6. Exhibit E – Participation Agreement Distributor Settlement
7. Exhibit F – Participation Agreement J&J Settlement

RESOLUTION NO. 2021-_____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CALEXICO, CALIFORNIA, AUTHORIZING THE CITY MANAGER TO ENTER INTO THE SETTLEMENT AGREEMENTS WITH MCKESSON CORPORATION, CARDINAL HEALTH, INC., AMERISOURCEBERGEN CORPORATION, JOHNSON & JOHNSON, JANSSEN PHARMACEUTICALS, INC., ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., AND JANSSEN PHARMACEUTICA, INC., AGREE TO THE TERMS OF THE STATE-SUBDIVISION AGREEMENTS, AND AUTHORIZE ENTRY INTO THE STATE-SUBDIVISION AGREEMENTS WITH THE ATTORNEY GENERAL

WHEREAS, the United States is facing an ongoing public health crisis of opioid abuse, addiction, overdose, and death, forcing the State of California and California counties and cities to spend billions of dollars each year to address the direct consequences of this crisis; and

WHEREAS, pending in the U.S. District Court for the Northern District of Ohio is a multidistrict litigation (“MDL”) being pursued by numerous public entity plaintiffs against the manufacturers and distributors of various opioids based on the allegation that the defendants’ unlawful conduct caused the opioid epidemic; and

WHEREAS, on or about July 1, 2021, a proposed nationwide tentative settlement was reached between the plaintiffs in the MDL and several of the defendants, specifically McKesson Corporation, Cardinal Health, Inc., AmerisourceBergen Corporation (collectively, “Distributors”), and Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc., and Janssen Pharmaceutica, Inc. (collectively, “J&J”) (all collectively, the “Settling Defendants”); and

WHEREAS, as part of the settlement with the Settling Defendants, local subdivisions, including certain cities, that are not plaintiffs in the MDL may participate in the settlement in exchange for a release of the Settling Defendants; and

WHEREAS, copies of the proposed terms of those proposed nationwide settlements have been set forth in the Distributors Master Settlement Agreement and the J&J Master Settlement Agreement (collectively “Settlement Agreements”); and

WHEREAS, copies of the Settlement Agreements have been provided to the City Council with this Resolution; and

WHEREAS, the Settlement Agreements provide, among other things, for the payment of a certain sum to settling government entities in California including to the State of California and Participating Subdivisions upon occurrence of certain events as defined in the Settlement Agreements (“California Opioid Funds”); and

WHEREAS, California local governments in the MDL have engaged in extensive discussions with the State Attorney General's Office ("AGO") as to how the California Opioid Funds will be allocated, which has resulted in the Proposed California State-Subdivision Agreement Regarding Distribution and Use of Settlement Funds- Distributor Settlement and Proposed California State-Subdivision Agreement Regarding Distribution and Use of Settlement Funds- Janssen Settlement (collectively the "Allocation Agreements,") which are agreements between all of the entities identified in the Allocation Agreements; and

WHEREAS, copies of the Allocation Agreements have been provided with this Resolution; and

WHEREAS, the Allocation Agreements allocate the California Opioid Funds as follows: 15% to the State Fund; 70% to the Abatement Accounts Fund; and 15% to the Subdivision Fund. For the avoidance of doubt, all funds allocated to California from the Settlements shall be combined pursuant to Allocation Agreements, and 15% of that total shall be allocated to the State of California (the "State of California Allocation"), 70% to the California Abatement Accounts Fund ("CA Abatement Accounts Fund"), and 15% to the California Subdivision Fund ("CA Subdivision Fund"); and

WHEREAS, under the Settlement Agreements, certain local subdivisions that did not file a lawsuit against the Settlement Defendants may qualify to participate in the Settlement and obtain funds from the CA Abatement Accounts Fund; and

WHEREAS, the City is eligible to participate in the Settlement and become a CA Participating Subdivision by executing a Participation Agreement for each of the settlements; and

WHEREAS, the funds in the CA Abatement Accounts Fund (the 70% allocation) will be allocated based on the allocation model developed in connection with the proposed negotiating class in the National Prescription Opiate Litigation (MDL No. 2804), as adjusted to reflect only those cities and counties that are eligible, based on population or litigation status, to become a CA Participating Subdivision (those above 10,000 in population). The percentage from the CA Abatement Accounts Fund allocated to each CA Participating Subdivision is set forth in Appendix 1 to the Allocation Agreements and provided to the City Council with this Resolution. The City's share of the CA Abatement Accounts Fund will be a product of the total in the CA Abatement Accounts Fund multiplied by the City's percentage set forth in Appendix 1 (the "Local Allocation"); and

WHEREAS, a CA Participating Subdivision that is a city will be allocated its Local Allocation share as of the date on which it becomes a Participating Subdivision. The Local Allocation share for a city that is a CA Participating Subdivision will be paid to the county in which the city is located, unless the city elects to take a direct election of the settlement funds, so long as: (a) the county is a CA Participating Subdivision, and (b) the city has not advised the Settlement Fund Administrator that it requests direct payment at least 60 days prior to a Payment Date; and

WHEREAS, it the intent of this Resolution is to authorize the City to enter into the Settlement Agreements by executing the Participation Agreements and to enter into the Allocation Agreements by executing the signature page to those agreements.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Calexico, California, as follows:

SECTION 1. The above recitals are true and correct and are incorporated herein by this reference.

SECTION 2. The City Manager is authorized to: (1) settle and release the City’s claims against the Settling Defendants in exchange for the consideration set forth in the Settlement Agreements and Allocation Agreements and (2) execute any other documents as may be necessary to fully settle and release the City’s claims against the Settling Defendants.

SECTION 3. That the City Council finds this Resolution is not subject to the California Environmental Quality Act (CEQA) in that the activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty, as in this case, that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

SECTION 4. Severability. If any provision of this Resolution or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications, and to this end the provisions of this Resolution are declared to be severable.

SECTION 5. Effective Date. This Resolution shall become effective immediately.

PASSED, APPROVED, AND ADOPTED by the City Council of the City of Calexico, California, at a regular meeting held on this 15th day of December, 2021.

AYES:
NOES:
ABSENT:
ABSTAIN:

JAVIER MORENO, MAYOR

ATTEST:

GABRIELA T. GARCIA, CITY CLERK

APPROVED AS TO FORM:

CARLOS CAMPOS, CITY ATTORNEY

State of California)
County of Imperial) s.s.
City of Calexico)

I, Gabriela T. Garcia, City Clerk of the City of Calexico, California do hereby certify the above Resolution No. 2021-_____ was approved at a regular City Council meeting held on the 15th day of December 2021, by the following vote to wit:

AYES:
NOES:
ABSENT:
ABSTAIN:

GABRIELA T. GARCIA, CITY CLERK

DISTRIBUTOR SETTLEMENT
AGREEMENT