

City of Hesperia STAFF REPORT



DATE: January 18, 2022
TO: Mayor and Council Members
FROM: Nils Bentsen, City Manager
BY: Eric L. Dunn, City Attorney
SUBJECT: National Opioid Settlements – Permitted Use of Settlement Funds

RECOMMENDED ACTION

It is recommended that the City Council receive and file this report.

BACKGROUND

On December 21, 2021, the City Council approved participation in the National Opioid Settlements. By way of providing background, various states, counties, and cities have been in litigation with the McKesson Corporation, Cardinal Health, Inc., and AmerisourceBergen Corporation. (collectively, the “Distributors”) and Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc., and Janssen Pharmaceutica, Inc. (collectively, the “Manufacturer”) (for purposes of this report, the Distributors and Manufacturer are collectively referred to as the “Settling Defendants”).

The litigation concerns the distribution and manufacture of opioids that have contributed to the opioid addiction epidemic in the United States. Two tentative settlements have been reached with the Distributors and Manufacturer, respectively (“National Opioids Settlements”). The full text of the National Opioid Settlements can be found at the following website under the links entitled “Distributor Master Settlement Agreement” and “J&J Master Settlement Agreement”: <https://nationalopioidsettlement.com>. This website also contains additional detailed information regarding the National Opioid Settlements.

In order to proceed, a “critical mass” of participation by States, cities and counties must be achieved. This critical mass is determined by the Settling Defendants in their sole discretion. If a critical mass is not achieved, then the National Opioids Settlements do not proceed and the litigation continues. Thus, there are two parts to achieving critical mass: first, a critical mass of States must be achieved and, second, a critical mass of cities and counties must be achieved. At this stage, a critical mass of state participation has already occurred. By participating, the City has contributed to the “critical mass” of cities and counties.

ISSUES/ANALYSIS

Assuming there is a critical mass to proceed, the payout amounts under the settlements with the Settling Defendants is contingent upon various factors, including the number of states, cities, and counties participating, with a maximum payout of \$21 billion over the course of 18 years by the Distributors and \$5 billion over no more than nine years by the Manufacturer to all participating entities. A fraction of that amount will be received by California, its counties, and cities. The actual

amount for the City is dependent on a number of variables, including, but not limited to, the number of California cities and counties participating (essentially, the more cities and counties in California participating means more money that could be allocated to the City), whether or not cities later sue the Settling Defendants, and certain actions that may be taken by the State of California. Further, the City's share of the potential amount is determined using three factors: (1) Opioid use disorder; (2) Opioid deaths; and (3) Opioid dosage.

The funds will automatically be allocated to the County unless the City opts to receive the funds directly; however, there are certain reporting and tracking requirements if the City receives the funds directly (see below). If the County receives the City's share of the settlement funds per the Agreements, the County is not required to exclusively spend the funds in the City (however, it should also be noted that funds will probably be used on County programs that are available to all residents of the County). Additionally, the City may opt in and out of receiving the funds directly at any time, provided that this is communicated to the Settlement Fund Administrator at least 60 days prior to a payment date. For example, the City may opt to send the funds to the County for 2022 but may later decide that the 2023 allocation be directly received by the City. At this point in time, there is currently no process set-up for the City to opt to receive the funds directly; however, we have been informed that, if the settlement proceeds and once a settlement fund administrator is chosen, then a procedure will be created.

The National Opioid Settlements will allow for a range of approved abatement uses, which includes a range of intervention, treatment, education, and recovery services. However, the use of funds is restricted to the opioid abatement remediation activities. Attachment 1 of this Report includes the permissible uses for settlement funds. The uses potentially include utilizing the settlements funds to partner with a local nonprofit regarding opioid remediation. For example, on the City may support people with opioid use disorder through evidence-based and evidenced-informed programs or strategies that include programs or strategies that "Engage non-profits, faith-based communities, and community coalitions to support people in treatment and recovery and to support family members in their efforts to support the person with OUD in the family." (See Page E-5 and E-6 of Attachment 1) ("OUD" stands for "opioid use disorder" per the master settlement agreements).

Additionally, 50% of the settlement funds per calendar year must be spent on "high impact abatement activities" as follows:

"In addition to this requirement, no less than 50% of the funds received by a CA Participating Subdivision [i.e., cities and counties] from the Abatement Accounts Fund 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"

The California Department of Health Care Services (“DHCS”) may add to this list (but not delete from it) by designating additional High Impact Abatement Activities. DHCS is also required to make reasonable efforts to consult with stakeholders, including the CA Participating Subdivisions, before adding additional High Impact Abatement Activities to this list.

There are also significant public reporting and tracking requirements on the expenditures for such funds, which may make County receipt and expenditure of such funds more desirable. For example, the State-Subdivision Allocation agreements for the Manufacturer and Distributors would require the following reporting and tracking:

1. Each CA Participating Subdivision (i.e., cities and counties) that receives payments of funds from the settlement must prepare written reports at least annually regarding the use of those funds, until those funds are fully expended and for one year thereafter. These reports will also include a certification that all funds received through the settlement have been used in compliance with the settlement agreements and the allocation agreements. The report will be in a form reasonably determined by DHCS.
2. All CA Participating Subdivisions receiving CA Abatement Accounts Funds must track all deposits and expenditures. Each such subdivision is responsible solely for the settlement funds it receives. However, a county is not responsible for oversight, reporting, or monitoring of settlement funds received by a city within that county that receives direct payment. Unless otherwise exempt, expenditures and uses of settlement funds will be subject to the normal budgetary and expenditure process of the relevant subdivision.

In terms of enforcement, if DHCS believes that the use of settlement funds is inconsistent with the requirements, it must meet and confer with the subdivision (i.e., the City), and if not resolved, DHCS may perform an audit. If the issue is not resolved, DHCS can bring a motion or action in court to resolve the concern or to enforce the terms of the settlement agreement/state-allocation agreement. There are also time limits on expenditure where money not expended or encumbered within 5 years of receipt must be transferred to the State. However, these requirements only apply to the City if it elects to receive direct distribution and does not apply to the City if the funds go to the County.

FISCAL IMPACT

It is estimated that Hesperia’s total share is \$560,985 or approximately \$31,165 per year over 18 years. This figure assumes 100% participation by cities and counties, a decrease of which will decrease the actual amount.

ALTERNATIVE(S)

1. Provide alternative direction to staff

ATTACHMENT(S)

Attachment 1 – Exhibit E of the Master Settlement Agreements