



CITY ATTORNEY'S OFFICE

CITY HALL
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255
TELEPHONE: (408) 777-3403 • FAX: (408) 777-3366
CUPERTINO.ORG

CITY COUNCIL STAFF REPORT

Meeting: December 7, 2021

Subject

Consider adopting a resolution authorizing the City to participate in two proposed settlements to resolve lawsuits that seek to hold certain opioid pharmaceutical supply chain participants accountable for the damage caused by their misfeasance, nonfeasance, and malfeasance

Recommended Action

That the City Council adopt Resolution No. 21-____, authorizing the City Attorney to complete and execute the Settlement Participation Forms to authorize the City of Cupertino's participation in the Distributor and Janssen Settlements, and to take such further actions as necessary to ensure that the City receives settlement proceeds allocated to it under the Distributor and Janssen Allocations Agreements.

Discussion

More than 400 state and local government entities have filed lawsuits against opioids distributors and manufacturers seeking to recover costs incurred due to opioids-related substance abuse disorder. A coalition of state attorneys general entered into negotiations in an attempt to reach a global resolution of litigation with certain defendants.

On July 21, 2021, the attorneys general announced final agreements with Janssen/Johnson & Johnson, a manufacturer of prescription opioids, and the three major pharmaceutical distributors, Amerisource Bergen, Cardinal Health, and McKesson. These agreements¹ include broad releases to resolve legal claims against those companies stemming from actions that fueled the opioid addiction epidemic in return for their payment of up to \$26 billion and also include injunctive relief provisions intended to change the defendants' business practices. The proposed settlements include the following provisions:

¹ The settlement agreements are available at <https://nationalopioidsettlement.com/wp-content/uploads/2021/11/Final-Distributor-Settlement-Agreement-10.22.2021-Exhibit-Updates.pdf> and <https://nationalopioidsettlement.com/wp-content/uploads/2021/11/Janssen-agreement-20211105.pdf>.

1. The three distributors collectively will pay up to \$21 billion over 18 years.
2. Janssen will pay up to \$5 billion over nine years with up to \$3.7 billion paid during the first three years.
3. Janssen will be prohibited from selling opioids for 10 years.
4. Both Janssen and the distributors will be required to make changes to market and distribution practices and take other steps to prevent opioids abuse.

Under the national agreements, California will receive as much as approximately \$2.26 billion in combined settlement payments. The total payment will depend on the extent of participation by cities and counties in the state.

The national settlement agreements provide that each state must negotiate intrastate allocation agreements that allocate funds among the state government and litigating and non-litigating local entities, or otherwise be subject to a default allocation formula specified in the national agreements. Following extensive negotiations, the California Attorney General and local government representatives reached an agreement regarding intrastate allocation agreements for California on October 27, 2021. The separate agreements for the distributor and Janssen/Johnson & Johnson settlements are substantially identical in their material terms.²

The terms of the intrastate allocation agreement are favorable to local governments when compared to the default allocations in the national agreements. Under the intrastate agreement, 70% of the settlement proceeds are allocated to local government entities, including non-litigating entities like the City of Cupertino. The remaining 30% of the funds are split equally between the state and litigating entities, including 51 of California's 58 counties. The deadline to elect to participate in the settlement agreements is January 2, 2022.

Each county's share of the settlement proceeds is based on three widely accepted measures of the severity of the opioid epidemic: (1) prevalence of opioids abuse disorder; (2) opioids deaths; and (3) estimate opioids dosage. Within each county, the share allocated to each jurisdiction is based on ten factors that reflect spending on opioids treatment and prevention.

The national settlements allow state and local governments to spend the settlement proceeds on a wide range of opioids remediation uses. Under the intrastate agreement, 50% of funds allocated to local governments must be spent on five state priorities:

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 treatment infrastructure;
3. addressing the needs of communities of color and vulnerable populations that are disproportionately impacted substance use disorder;

² See Draft Resolution No. 21-____, Exhibits A and B.

4. diversion of people with substance use disorder from the justice system into treatment; and
5. interventions to prevent drug addiction in vulnerable youth.

Under the intrastate allocation agreement, Cupertino will receive up to \$128,592 over a period of 18 years. The actual payment will depend on the degree of participation by litigating and non-litigating entities. If Council declines to participate in the settlement agreements, the City preserves its claims against the defendants but would be required to pursue those claims in litigation.

If Council elects to participate in the settlement agreements, the City has the option of accepting the payments and spending the funds on qualified programs. Alternatively, the City may allocate its payment to the County to fund County opioids remediation programs. If the City elects to receive funds directly, it would be required to report annually to the state Department of Health and Community Services regarding the use of the funds.

We recommend that Council authorize the City to participate in the settlement agreements, given the uncertainty and expense pursuing the City's claims independently would entail. The decision as to whether the City's funds should be allocated to the County does not need to be made at this time.

Environmental Impacts

The proposed Council action is not a project under the requirements of the California Environmental Quality Act, together with related State CEQA Guidelines (collectively, "CEQA") because it has no potential for resulting in physical change in the environment. In the event that the proposed action is found to be a project under CEQA, it is subject to the CEQA exemption contained in CEQA Guidelines section 15061(b)(3) because it can be seen with certainty to have no possibility that the action approved may have a significant effect on the environment. CEQA applies only to actions which have the potential for causing a significant effect on the environment. Where it can be seen with certainty 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. In this circumstance, the proposed action would have no or only a de minimis effect on the environment. The foregoing determination is made by the City Council in its independent judgment.

Prepared by:

Christopher D. Jensen, City Attorney

Reviewed by:

Dianne Thompson, Assistant City Manager

Approved for Submission by:

Greg Larson, Interim City Manager

Attachments:

A - Draft Resolution