



CITY COUNCIL STAFF REPORT

ITEM NO. 5.10

DATE: December 13, 2021

TO: Honorable Mayor and City Council

FROM: Jason Alcalá, City Attorney

SUBJECT: Resolutions authorizing execution of documents and delegating authority to the City Manager to participate in the two national settlement agreements for the National Prescription Opiate Litigation.

RECOMMENDED ACTION

Staff recommends the City Council adopt two resolutions:

1. Authorizing the City Manager to execute all documents and forms for the City of Livermore to participate in the settlement agreement with the distributors in the national prescription opiate litigation, and delegating authority to the City Manager to determine whether to accept or redirect settlement funds allocated to Livermore; and,
2. Authorizing the City Manager to execute all documents and forms for the City of Livermore to participate in the settlement agreement with the manufacturers in the national prescription opiate litigation, and delegating authority to the City Manager to determine whether to accept or redirect settlement funds allocated to Livermore.

SUMMARY

Numerous lawsuits brought by states and local political subdivisions throughout the country have been consolidated in a master case entitled *In Re: National Prescription Opiate Litigation (United States District Court, Northern District of Ohio, Eastern Division, MDL 2804, Case No. 1:17-MD-2804)*. The litigation alleges that manufacturers of prescription opioids grossly misrepresented the risk of long-term use of those drugs and that distributors failed to properly monitor suspicious orders for those drugs – all of which contributed to the current opioid epidemic.

Two national settlements have now been reached with the three largest pharmaceutical distributors McKesson Corporation, Cardinal Health, Inc., and AmerisourceBergen Corporation (“Distributors”), and manufacturers Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc., and Janssen Pharmaceutica, Inc. (“Manufacturers”).

The City of Livermore registered its desire to be Participating Subdivision in those settlement agreements. To participate, the City now needs to execute the Settlement Participation Forms with the settling parties, and the acknowledgements with the State of California accepting the *Proposed California State-Subdivision Agreement Regarding Distribution and Use of Settlements funds*. Livermore's participations in the settlements will help secure funds for the State of California, County of Alameda, and itself to combat the effects of the opioid crisis.

DISCUSSION

The federal government has acknowledged there is an opioid epidemic in the United States. The U.S. Department of Health and Human Services reports that in the late 1990's pharmaceutical companies reassured the medical community that patients would not become addicted to opioid pain relievers and healthcare providers began to prescribe them at greater rates. It is also reported that increased prescription of opioid medications led to widespread misuse of both prescription and non-prescription opioids before it became clear that the medications could indeed be highly addictive.

Numerous lawsuits have been filed throughout the country seeking to address the effects from the public health crisis caused by the opioid epidemic.

The two settlement agreements, one with the Distributors in Attachment 1 and a separate agreement with the Manufacturers in Attachment 2, are the culmination of nearly three years of negotiations among representatives of the State Attorneys General, a court-appointed Plaintiff's Executive Committee and Negotiation Committee comprised of lawyers in the National Prescription Opiate MDL, and counsel for the Distributors and Manufacturers. Those negotiations were facilitated by the Judge assigned to the case along with Special Masters appointed by the Court.

The settlement agreements will obligate, respectively, the Distributors to pay up to \$21 billion over 18 years, and the Manufacturers to pay up to \$5 billion over 9 years, for use by states, counties, and cities participating in the settlement to remediate and abate the impacts of the opioid crisis. The basic terms and conditions in the agreements are substantially similar, provide similar benefits, and impose similar obligations for their different settlement amounts. The settlement agreements also specify the allocation of the settlement money to states, counties, and cities, along with requirements for the administration and expenditure of those funds.

It is important to note that the settlements require sufficient participation by states, subdivisions, and litigants before they will take effect. To document that participation, the states, subdivisions, and litigants need to express their support and agreement with the settlements to ensure there is sufficient participation before the settlement agreements take effect. Attachment 3 contains a chart reflecting that participation process and timeline.

In August 2021, California, along with a majority of the states across the country, agreed to participate in the settlements. California's participation has created the opportunity for Livermore to participate in the settlements.

As directed by the City Council on November 8, 2021, the City of Livermore registered its desire to participate in the settlements to help secure funds for the State of California, County of Alameda, and itself to combat the effects of the opioid crisis. That registration enabled the city to receive the following agreements to join the two settlement agreements.

1. Settlement Participation Form

To join the settlement agreements to receive the settlement proceeds allocated to Livermore, the City of Livermore must execute a Settlement Participation Form. The Settlement Participation Forms are attached as Exhibit A to the resolutions accompanying this staff report - one resolution is for the Distributor settlement agreement, and the other is for the Manufacturer settlement agreement.

By executing these forms, the City is agreeing to bound by the terms and conditions in the respective settlement agreements and is releasing any and all claims it has against the settling parties that are related to their covered conduct. The Distributor's covered conduct can be found in subsection O, section I of the Distributor settlement agreement. The Manufacturer's covered conduct can be found in subsection 16, section I of the Manufacturer settlement agreement.

2. Proposed California State-Subdivision Agreement Regarding Distribution and Use of Settlement Funds

The settlement agreements authorize California to develop a plan to govern the allocation, distribution, and use of the settlement fund payments to California and the cities and counties in the state from both settlements. California has requested Participating Subdivisions sign an acknowledgment to accept the *Proposed California State-Subdivision Agreement Regarding Distribution and Use of Settlement Funds*. The acknowledgements are attached as Exhibit B to the resolutions accompanying this staff report for the respective settlement agreements.

By executing the acknowledgement, the City of Livermore agrees to be bound to the State's distribution and use agreement, which includes the payment of Livermore's share to the County of Alameda to use for future opioid remediation unless the City elects direct payment of all or a portion of its share to Livermore. Livermore does not need to decide now whether or not to receive direct payment, and the choice may likely depend upon the actual amount to be allocated to Livermore.

Therefore, staff recommends the City Council authorize the City Manager to make the determination in his discretion whether Livermore should allow the settlement proceeds to flow to the County or receive a direct payment of all or a portion of its allocation, after considering the costs to receive, administer, and expend the funds locally for opioid remediation. That election is made by providing notice to the Settlement Fund Administrator at least 60 days prior to the payment date. If Livermore elects to receive direct payment of its allocation, it must expend or encumber the funds within 5 years of receipt, and it must prepare and file reports annually regarding the use of the funds. Livermore may change its decision to opt in-or-out of direct payments.

CONCLUSION

Staff recommends the City Council adopt the resolutions authorizing the City Manager to execute the *Settlement Participation Forms and the Proposed California State-Subdivision Agreement Regarding Distribution and Use of Settlement Funds*, along with any and all other documents that may need to be executed to effectuate Livermore's participation in the settlement agreements and the distribution of settlement funds. Staff also recommends the City Council authorize the City Manager to make the determination in his discretion whether Livermore should receive a direct payment of all or a portion of its allocation, after considering the costs to receive, administer, and expend the funds locally for opioid

remediation.

FISCAL AND ADMINISTRATIVE IMPACTS

There are no fiscal or administrative impacts other than staff time to execute and process the documents

The actual amount of settlement funds to be allocated to the City of Livermore is uncertain due to the incentives, adjustments, administrative costs, number of participating states and subdivisions (as well as their status as litigating subdivisions), and other factors that will affect the distribution. However, Livermore has been asked to participate to ensure the State of California and Alameda County receive the greatest allocation possible and to help demonstrate sufficient participation for the agreements to take effect.

Appendix 1 in the *Settlement Participation Forms and the Proposed California State-Subdivision Agreement Regarding Distribution and Use of Settlement Funds* provides an estimate that indicates Livermore's share of the settlement proceeds is estimated to be 0.054% with a weighted allocation percentage is 0.0446740% after consideration the additional apportionment for the Plaintiff Subdivisions and Initial Participating Subdivisions. Based upon those estimates for the weighted allocation, Livermore could be allocated approximately \$446.74 for every \$1,000,000 paid by the settlements to the California abatement accounts fund, that the City can receive directly or redirect to Alameda County of the State of California to utilize with other settlement funds for opioid remediation.

Charts showing the maximum flow/allocation of the settlement proceeds for the Manufacturer and Distributor settlements are attached as Attachments 4 and 5, respectively.

ATTACHMENTS

1. Settlement Agreement with Distributors
2. Settlement Agreement with Manufacturers
3. Chart Showing Participation Process and Timeline.pdf
4. Chart Showing Manufacturers Maximum Flow Allocation
5. Chart Showing Distributor Maximum Flow Allocation
6. Resolution - Distributors
7. Exhibit A - Settlement Participation Form (Distributors)
8. Exhibit B - Proposed California State-Subdivision Agreement (Distributors)
9. Resolution - Manufacturers
10. Exhibit A - Settlement Participation Form (Manufacturers)
11. Exhibit B - Proposed California State-Subdivision Agreement (Manufacturers)

Prepared by: Jason Alcala
City Attorney

Approved by:

A handwritten signature in black ink, appearing to read "Marc Roberts". The signature is fluid and cursive, with a long horizontal stroke extending from the end.

Marc Roberts
City Manager