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To: Speaker Jill Krowinski; President Pro Tempore Rebecca Balint; Jaye Johnson, Governor's Counsel; Senator Randy Brock; Representative Patricia McCoy; Catharine Benham, Joint Fiscal Office; Kristin Clouser, Deputy Secretary of Administration; Senator Jane Kitchel; Representative Mary Hooper; Senator Virginia Lyons; Representative Ann Pugh; Joyce McKeeman, Orange County Assistant Judge; Vermont League of Cities and Towns

From: Deputy Attorney General Joshua Diamond; Assistant Attorney General Jill Abrams

Date: September 14, 2021

Re: Vermont Attorney General's Executive Summary of Opioid Distributors and J&J Settlements

The Vermont Attorney General's Office has been fighting to end the opioid crisis and hold industry accountable for their role in promoting and profiting from the opioid epidemic. As a result of its efforts, both individually and collectively with State Attorneys General and thousands of other state subdivisions (e.g. cities, towns, and counties) settlements have been reached with Opioid Distributors and J&J.

The Distributors. A \$21 billion settlement is being proposed to settle lawsuits by State Attorneys General and thousands of state subdivisions (e.g., cities, towns, and counties) against the three major distributors, McKesson, Cardinal, and Amerisource Bergen (the "Distributors"). Vermont has been in litigation with McKesson and Cardinal, the two largest pharmaceutical distributors into Vermont, for almost 2 ½ years. We allege that the Distributors: distributed large quantities of addictive opioids into Vermont and failed to design and operate effective controls to monitor, identify, report, and prevent the fulfillment of suspicious orders that would create a risk of abuse; colluded in marketing efforts with the opioid manufacturers; and failed to implement effective anti-diversion programs. In so doing, the Distributors violated Vermont's

Consumer Protection Act, created a public nuisance, and otherwise engaged in negligent activities.

In addition to the State's lawsuits, four Vermont towns and cities – Bennington, Brattleboro, Saint Albans, and Sharon – also sued the Distributors.

J&J. A \$5 billion settlement is also being proposed to settle lawsuits and investigations by State Attorneys General and thousands of state subdivisions against Johnson & Johnson and Janssen ("J&J"), including those filed by the four Vermont towns and cities.

The Settlement Agreements for both the Distributors and J&J announced in July 2021 (the "SAs") provide ways for states and their subdivisions across the country to receive money. As explained below, the settlement is designed with incentives for states and subdivision to sign on so that the amount of money received is maximized.

This Executive Summary provides: (i) an overview of the settlement funds that Vermont may receive from the Distributors and J&J (ii) details about how Vermont can maximize the payments under the SAs, (iii) the steps needed to effectuate the settlement, (iv) other mechanics needed for the distribution of settlement monies, and (v) injunctive relief that will be imposed by the SAs. Differences between the Distributor and J&J settlements are noted.

I. The Settlement Funds

Distributors

Of the \$21 billion total settlement figure:

- \$19,045,346,616 is paid over 18 years for use by states and subdivisions to abate or remediate the opioid crisis.
- \$1.671 billion is paid towards attorneys' fees and costs. This includes attorneys' fees for the thousands of subdivisions who have sued.

The SA provides for other offsets, such as money specifically allocated for Tribes (2.58%). A net amount of approximately \$18.5 billion will be paid to states and their subdivisions.¹

The annual payments could be deferred within the 18 years if a Distributor suffers significant, demonstrable financial constraints. The SA also provides that the Distributors may advance some payments, subject to a discount rate for early payment.

¹ Additional reductions from the Distributor and J&J settlement amounts may occur for possible claims for reimbursement of opioid-related expenses by Medicaid and costs associated with the administration of the settlement funds that are not otherwise covered by interest generated from settlement funds held in escrow.

J&J

Of the \$5 billion total settlement figure:

- \$4,264,615,385 is paid over 10 years for use by states and subdivisions to abate or remediate the opioid crisis.
- \$ 465,384,615 is paid towards attorneys' fees and costs (including attorneys' fees for the thousands of subdivisions who have sued), payment to the Tribes, and potential outstanding liability of J&J pending a decision from the Oklahoma Supreme Court. ²

Both Settlements

The settlements are designed to be allocated in 3 "buckets":

- 15% to state subdivisions to be used to abate the opioid crisis (the "Subdivision Fund");
- 15% to states to remediate for past expenses of the opioid crisis or for future abatement (the "State Fund"); and
- 70% to a statewide abatement fund (the "Abatement Fund").

Each state has been allocated a percentage of the total Settlement Fund based on a formula that considers the number of opioid overdose deaths in the state, the number of people in the state with Opioid Use Disorder, the amount of state opioid sales, and population. Vermont's share of the Distributors settlement is .0284% (well over our .019 of the population), or approximately \$53 million over 18 years. Vermont's share of the J&J settlement is .2876050633% of the settlement proceeds, or a total of \$12,265,249 over 10 years.

II. Maximizing Vermont's Payment

The Distributors and J&J SAs are designed to incentivize sign-on by states and their subdivisions with a "Base" amount and four types of "Incentives." These Incentives are labeled A, B, C, and D. The total amount of money that comes into a state (to be shared 15%-15%-70%, as outlined above) depends on the incentive level attained.

Distributors

The Base amount is 55 % of the annual payment. The Incentive payments are A (which provides an additional 40% over the 55% Base payment), B (an additional 25% over the Base payment) C (an additional 15% over the Base payment), and D (an additional 5% over the Base payment). Whether a State qualifies for Incentive A, B, or C depends on the percentage of "Litigating" Subdivisions and "Non-Litigating" Primary Subdivisions that have released their claims. A

² States that sued J&J will receive reimbursement of their counsel fees from a \$67,307,691 fund. Vermont would receive \$262,047 (which is .3893298238% of the \$67,307,691 "Additional Restitution Amount" being paid to states that did not sue J&J) over Years 1-3 in addition to the \$12,265,249 it will receive from the J&J settlement.

Primary Subdivision is one that has a population of over 10,000. The SA has exhibits that identify each Litigating and Primary Subdivisions.³

In Years 1 and 2, all settling states are deemed eligible for the Base plus Incentive A. A state that does not continue to qualify for Incentive A after Year 2 will have its future payments reduced accordingly in Years 3 through 7.

Incentive A is our goal because we receive 95% of our payment every year. For Vermont to receive Incentive A for all 18 years, we need certain entities to sign on to the settlement by May 14, 2024. They are:

- the “Litigating Subdivisions” (Brattleboro, Bennington, Sharon, and St. Albans);
- Vermont towns with a population over 10,000 (Burlington, South Burlington, Colchester, Essex, Essex Junction, Rutland, Milton, and Williston); and
- 12 of our 14 counties (not Grand Isle or Essex).⁴

Any other Vermont subdivision with a population under 10,000 that also signs on will receive its allocated share of the 15% Subdivision Fund. If those other subdivisions do not sign on, their share will go to the 70% Abatement Fund.

Incentives B plus C equal Incentive A. Incentive B (which provides a 25% incentive payment) relates to the number of Litigating Subdivisions that sign on and C (which provides a 15% incentive payment) relates to towns over 30,000 that sign on, plus the number of Litigating Subdivisions that sign on. In Vermont, that would mean that Burlington plus all the Litigating Subdivisions would equal 40%. Incentive D (5% over the Base) begins in Year 6 and is paid to any state in which no subdivisions have brought new litigation or where a subdivision brings a lawsuit after the settlement that does not survive more than 6 months after a Distributor moves to dismiss the case.

There will be a Settlement Administrator that determines the yearly payments, and tells the states, Distributors, and an Enforcement Committee (comprised of settling states and subdivision members) the payment amount for that year 50 days in advance of the payment. States and subdivisions have the right to challenge the Settlement Administrator’s calculations. Challenges must be made 21 days in advance of the payment date.

The effective date of the SA is April 2, 2022. If a state’s consent judgment (the document filed with the Court by the Attorney General regarding our agreement to settle and release our claims against the Distributors) has been entered by the Court by that time, the funds will be released to the state, as well as to the subdivisions that have released their claims. If the Consent Judgement has not yet been entered, the funds will be paid 10 days after its entry.

³ See Exhibits C and G.

⁴ Subdivisions that do not sign on to the SA by January 2, 2022, and wait until May 14, 2024, will forgo receiving direct payments in years 1 and 2. Such payments will revert to the Abatement Fund. *Infra.*, section IV.

The payment date for Year 2 is July 15, 2022, and subsequent annual payments will also be made on July 15.

The Distributors may terminate the SA with a state whose consent judgment has not been entered by Oct. 2, 2022, or whose consent judgment was disapproved by the court and the time to appeal expired.

J&J

The SA provides 11 payments over 10 years, with 2 payments in 2022. The Base payment is 45% of the total and the Bonus is 55%. Similar to the Distributors' SA, there are four different types of Bonus payments identified as A, B, C, and D.

J&J must make its first two payments in July 2022, both of which are base payments. It is noted that while the Distributors provide the maximum payments to all states for 2 payment years, J&J does so only for the first payment year. However, as explained below, it is possible for Vermont to receive its payments for Years 1-4 on an accelerated basis.

Bonus A, which amounts to 50% of the total annual payment, requires sign-on of all Litigating Subdivisions and Nonlitigating Subdivisions with a population over 10,000. This includes the same subdivisions identified for the Distributors.⁵ States and their subdivisions may receive immediate acceleration of base and incentive payments 1-4 upon delivery of settlement agreements and releases of Litigating Subdivisions and Nonlitigating Subdivisions with a population exceeding 10,000 "within 90 days of notice, on or after the Effective Date." Assuming Vermont qualifies for Bonus A, it could receive \$6,547,167 (payments 1-4) within 90 days after Effective Date, which is approximately July 2022. The remaining payments (5-11) would resume in 2025 and continually annually thereafter.

Under Bonus B, a state can get 60% of the Bonus A payment (30% of the total) if all Litigating Subdivisions sign on but can qualify for a portion of Bonus B if Litigating Subdivisions representing 75% of the State's Litigating Subdivisions sign on. There is a sliding scale for the Bonus B payment based on resolution of Litigating Subdivisions' opioid liability claims.

Under Bonus C, a state can get 40% of Bonus A payment (20% of the total). There is a sliding scale based on resolution of the Litigating and Non-Litigating Primary Subdivisions (defined as 30,000 or more). It is in 2 parts. Under the first, a state can receive up to 75% of Bonus C if Litigating and Non-Litigating Primary Subdivisions representing 60% of the Primary Subdivisions' population sign on (above 30k population). Under Part 2, if the State already qualifies under Part 1, it can get an additional 25% of Bonus C if all 10 of its largest subdivisions, by population, sign-on.

Under Bonus D, a state gets an additional 5% of the total available payments starting in Year 5 if no Covered Special Districts in a state filed lawsuits after the Effective Date or survive a motion

⁵ *Supra.*, at p. 4 above.

to dismiss. Covered Special Districts are school, hospital and fire districts subject to certain population thresholds. Vermont has no qualifying Covered Special Districts, and therefore, we should receive Bonus D.

J&J's annual payments are due on July 1 in each year.

J&J may terminate the SA with a state whose consent judgment has not been entered by Oct. 2, 2022, or whose consent judgment was disapproved by the court and the time to appeal expired.

III. Necessary Steps Before Settlement Occurs

A. Key Trigger Dates and Sign-on to the Distributors and J&J Settlements by the State and its Subdivisions

The SAs sign-on are designed in two phases (with the goal of getting maximum participation of states and subdivisions) which are conditions to the Distributors' and J&J's agreements to consummate the settlements. The timing and steps are as follows:

1. State Sign-on

By August 21, 2021, each state must inform the Distributors and J&J whether it agrees to settle. Vermont provided such notice of its agreement to settle. On Sept. 4, 2021, the Distributors and J&J determined there are enough states signing on to move forward.

2. Subdivision Sign-on

Non-Litigating and Litigating Subdivisions both have the opportunity to become "Participating Subdivisions." It is in the interest of all states to get maximum subdivision participation so that the Distributors and J&J go forward with the settlement. Therefore, Litigating and Non-litigating Primary Subdivisions should sign onto the SAs before January 2, 2022.

By September 19, 2021, the States will send written notice of the opportunity to participate in the settlements to the Litigating Subdivisions (Bennington, Brattleboro, Sharon, and St. Albans) and the non-litigating subdivisions listed in Exhibit G to the SAs.⁶ Exhibit G provides the calculation of the relative allocation of funds available to the respective subdivision as a portion of the 15% subdivision settlement bucket.

To help facilitate the acceptance of the settlement by the Distributors and J&J Litigating and Non-Litigating subdivisions with a population over 10,000 should become a "Participating Subdivision," by executing the Subdivision Participation Form (Exhibit. K to the SAs and

⁶ . Exhibit G essentially comprises every Vermont City and Town along with 12 out of the 14 counties (Essex and Grand Isle counties are excluded).

attached to this memo) and return it to the Settlement Fund Administrator by Jan. 2, 2022. Exhibit K says that the subdivision agrees to the terms of the SAs relating to subdivisions, releases its claims against the Released Entities (defined in the SAs), the subdivision will use any monies received for Opioid Remediation Uses (listed in Exhibit E and discussed below), and that it submits to the jurisdiction of the court where the State will file its Consent Judgment (Chittenden County Superior Court). The court has jurisdiction for the limited purpose of overseeing the execution of the agreement.

Vermont subdivisions with populations under 10,000 will be allocated modest sums as part of the subdivision bucket.⁷ If they sign a release, they will receive those sums directly. If they do not sign a release, the sums allocated to them will go to the Abatement Fund.

A subdivision can still become a Participating Subdivision after Jan. 2, 2022, but it will receive fewer payments than it otherwise would have.

States across the country must inform the Distributors and J&J, by January 17, 2022, if there is sufficient subdivision participation to proceed. Whether the numbers are “sufficient” is determined by a formula in the SAs that adds together the subdivisions of all states. The Distributors and J&J will again consider whether to move forward with the SAs after learning how many subdivisions across the country will join the settlement. The Distributors and J&J determine whether sign-on participation is sufficient by February 1, 2022.

As set forth above, 12 out of 14 Vermont counties may receive a portion of the subdivision funds despite Vermont’s unique county governance structure, which is limited to the operation of county courts. Those funds may be contributed to the Abatement Fund so long as the side judges sign releases and directs those funds accordingly.

IV. Other Mechanics for Distribution of Monies

The SAs provides a default mechanism for distributing the Abatement Fund that comprises 70% of the settlement monies. The default mechanism requires the State to designate an agency that will request the monies for approved purposes. Those approved purposes can be found at Exhibit E to the SAs, which is attached to this memo.⁸ These approved purposes include, but are not limited to:

- MAT Treatment; Naloxone for overdoses;
- Treatment for those with opioid use disorder;
- Treatment for mothers and infants with neonatal abstinence syndrome;

⁷ . See Exhibit G for percentages attributed to the requisite subdivisions that are allocated from the 15% Subdivision bucket.

⁸ It is noted that various Vermont agencies and departments provided substantial input into the list of approved abatement purposes. These include the Vermont Department of Health, Vermont Department of Public Safety, and Blueprint for Health.

- Recovery services;
- Prevention programs;
- Expanding syringe service programs;
- Addressing the needs of persons with opioid use disorder or co-occurring conditions who are at risk of, involved in, or transitioning out of the criminal justice system;
- Support for first responders; and
- Related training; research.

In addition, an Advisory Committee must be established to make recommendations to the designated agency for spending of the Abatement Fund. The SAs require that the Advisory Committee be comprised of an equal number of both state and subdivision representatives. The SAs also require that the Advisory Committee have written guidelines for the appointment, removal, and terms of service for its members; a meeting schedule; and a process for receiving input from the cities and town regarding their needs and proposals for abatement. The Settlement Agreement is silent as to who is the assigning authority for the Advisory Committee.⁹

VI. Key Injunctive Terms

Distributors

In addition to the money, we obtained key injunctive terms so that the Distributors' current behavior does not continue. The injunctive relief terms prohibit the shipping of suspicious orders and implement a system designed so regulators know where the drugs are going. It must be put into place by July 2, 2022.

Here is an overview that will be incorporated into court orders requiring Cardinal, McKesson, and AmerisourceBergen to:

- Establish a centralized independent clearinghouse to provide all three distributors and state regulators with aggregated data and analytics about where controlled substances are going and how often, eliminating blind spots in the current systems used by distributors;
- Use data-driven systems to detect suspicious opioid orders from customer pharmacies;

⁹ It is believed that designation of the respective state agency and creation of Advisory Committee can be established by either legislation or an executive order. While this Memorandum does not address the Purdue Bankruptcy, it is contemplated that a similar mechanism will be required for the disbursement of funds for opioid abatement. Other criteria under the terms of the proposed bankruptcy discharge plan include a chair for the advisory committee that is non-voting, representatives who have expertise in areas of public health, substance abuse, and health care equity, and the requirement to meet at least four times annually.

- Terminate customer pharmacies' ability to receive shipments, and report those companies to state regulators, when they show certain signs of diversion;
- Prohibit shipping of and report suspicious opioid orders;.
- Prohibit sales staff from influencing decisions related to identifying suspicious opioid orders; and
- Require senior corporate officials to engage in regular oversight of anti-diversion efforts including the appointment of Chief Diversion Control Officer to oversee injunctive Controlled substance Monitoring Program.

J&J

The injunctive terms include the following:

- J&J will not manufacture or sell any opioids for distribution in the U.S. (except Nucynta because it has an existing manufacturing contract with another company);
- It is not permitted to promote any opioid or opioid product, including products used for the treatment of opioid-induced side effects;
- It is not permitted to promote the treatment of pain except with non-opioids like Tylenol and Motrin; and
- J&J will not directly or indirectly provide financial or other support to a third party that promotes opioids, opioid products or products that treat opioid-induced side effects.