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IN THE CIRCUIT COURT FOR THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

OPIOID MASTER DISBURSEMENT TRUST II, A/K/A OPIOID MDT II, Plaintiff, v. ACE AMERICAN INSURANCE COMPANY, *et al*. Defendants.	Case No. 22SL-CC02974 Division No. 2

OPIOID MASTER DISBURSEMENT TRUST II, A/K/A OPIOID MDT II, Plaintiff, v. AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, *et al*. Defendants.	Case No. 23SL-CC05428 Division No. 2

CONSOLIDATED REPLY OF ASPEN, ACE, AND OLD COLONY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON THE TRUST'S 11 EXEMPLAR OPIOID LAWSUITS & OPPOSITION TO THE TRUST'S CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants Aspen Insurance UK Ltd. ("Aspen"), ACE American Insurance Company ("ACE), and Old Colony State Insurance Company ("Old Colony"), through counsel, respectfully submit the following Consolidated Reply in Support of Their Motion for Summary Judgment on the Trust's 11 Exemplar Opioid Lawsuits (and Old Colony's Joinder in the same) and Opposition to the Trust's Cross-Motion for Summary Judgment against them. In support thereof, Aspen, ACE, and Old Colony state as follows:

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I. INTRODUCTION

This is a straightforward case that calls for a faithful application of plain contractual language, bearing in mind the actual context in which coverage is sought. The insured is Mallinckrodt, which at all relevant times was the nation's largest producer of opioid pills, and the "active pharmaceutical ingredients" used by other companies to make their own opioid pills. From 2007 to 2012, Mallinckrodt obtained insurance from Aspen, ACE, and Old Colony providing two distinct types of coverage:

1) **"Products-Completed Operations Hazard" (or "PCOH") Coverage:** For liability "arising out of" the sale of or "representations" about pharmaceutical products and ingredients, the policies provide ***claims-made coverage***, meaning a policy is triggered only by an underlying claim ***first made*** against Mallinckrodt during that policy's period.

2) **"Occurrence"-Based Coverage:** For liability outside the scope of the PCOH, the policies provide "occurrence"-based coverage, meaning a policy is triggered only when the ***underlying harm*** happens during that policy's period, ***regardless*** of when the claim is made.

The distinction between claims-made and "occurrence" triggers for coverage is critical here. The Trust is seeking coverage for thousands of lawsuits "arising out of" Mallinckrodt's sales of, and "representations" about, opioid products. But it is undisputed that all these lawsuits—including the Trust's 11 hand-selected exemplars—were filed long after the expiration of the 2007-12 policy periods. Because the opioid lawsuits exclusively allege liability within the claims-made coverage of the PCOH, but the lawsuits were not filed against Mallinckrodt until after the policy periods, the lawsuits are not covered by these policies.

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The Trust ***concedes*** that the exemplar lawsuits alleged harm as the result of Mallinckrodt's opioid products, and that such claims are within the PCOH. However, trying to manufacture any coverage it can, the Trust now attempts to argue that Mallinckrodt's "unbranded marketing" falsely touting the safety of opioids ***generally*** in order to increase its sales somehow falls outside the scope of the PCOH coverage. In particular, the Trust claims that because Mallinckrodt's misrepresentations about opioids allegedly led some people to ingest ***other*** companies' pills or heroin, these allegations do not relate to Mallinckrodt's own products, fall outside the scope of the PCOH coverage, and enable the Trust to escape the claims-made requirements of the policies at issue.

The Trust's argument fails on many levels, but the threshold failure is that the PCOH coverage ***encompasses*** Mallinckrodt's marketing of opioids. The ***only basis*** on which the exemplar plaintiffs alleged that Mallinckrodt could be held liable for harm from other companies' products or illicit opioids is because those harms arose from Mallinckrodt's marketing representations as part of a scheme to sell more of its own opioids, including opioid ingredients used in other companies' products. Such a theory of liability—one that is alleged to "aris[e] out of" Mallinckrodt's ***sales and marketing of its products***—is liability ***squarely*** within the PCOH. ***That ends this case as to the Aspen, ACE, and Old Colony policies***.

This conclusion is clear from the plain language of the policies. The PCOH form provides a broad grant of coverage. It extends to liability for claims "seeking damages included within the [PCOH] for all…pharmaceuticals[,]" and defines the PCOH to broadly

include "all 'Bodily Injury'[1]…arising out of 'Your Product'[.]" Not only does the PCOH coverage form use "arising out of" as the causal linchpin—a phrase that requires only a "simple causal connection" under Missouri law[2]—but the definition of "Your Product" also includes both products "manufactured, sold, handled or disposed of" by Mallinckrodt and also any "warranties" and "representations" that Mallinckrodt makes regarding such products. The breadth of this coverage grant is confirmed by reference to the term "pharmaceuticals," which is specifically defined to include the "active pharmaceutical ingredients" (or "APIs") that were produced by Mallinckrodt and sold to ***other*** companies for use in their bulk or generic products.

Here, each of the 11 exemplar complaints specifically alleged that Mallinckrodt's liability arose from the manner in which it tried to sell its opioid products and ingredients, including by making "unbranded marketing" "representations" about opioids generally. Not only did Mallinckrodt allegedly engage in its "unbranded marketing" campaign with the purpose of increasing demand for its opioid products, but "unbranded marketing" about the safety of opioids ***as a whole*** is ***necessarily*** a "representation" about the safety of the

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[1] Whether the underlying opioid claims allege or involve "damages…because of…bodily injury" is not an issue before the Court at this time. Aspen, ACE and Old Colony do not concede that any claims allege "damages…because of…bodily injury [or] property damage" within the meaning of the policies. The weight of authority, including the only two state supreme courts to have addressed the issue, holds that government opioid lawsuits—like the vast majority of the claims against Mallinckrodt—do not satisfy this requirement. *See Westfield Nat'l Ins. Co. v. Quest Pharm., Inc.*, 57 F.4th 558 (6th Cir. 2023); *Acuity v. Masters Pharm., Inc.*, 205 N.E.3d 460 (Ohio 2022); *ACE Am. Ins. Co. v. Rite Aid Corp.*, 270 A.3d 239 (Del. 2022).

[2] *See, e.g., Capitol Indem. Corp. v. 1405 Assocs., Inc.*, 340 F.3d 547, 550 (8th Cir. 2003).

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subset of opioids "manufactured, sold, [or] handled" by Mallinckrodt. Any alleged harm arising from the "unbranded marketing" campaign "aris[es] out of" "Your Product" for both of these reasons, regardless of whether the final drug consumed was produced by Mallinckrodt or someone else. The opioid marketing conduct for which the exemplar plaintiffs sought to hold Mallinckrodt liable is squarely within the PCOH, as held in *Actavis*, *Zogenix*, and the other cases that have considered this issue.

In any other situation, the Trust (or its debtor, Mallinckrodt) would be arguing that the policies' PCOH coverage plainly extends to allegations that Mallinckrodt's representations about opioids gave rise to harm from increased opioid use. But because the opioid lawsuits here were not filed until long after these policies expired, the Trust instead argues that the PCOH coverage does not extend to what the plain language says. The Court should not be misled. For the foregoing reasons, as well as those discussed at length below and in the insurers' opening briefs, the exemplar lawsuits fall firmly within the scope of the PCOH, and Aspen, ACE, and Old Colony are entitled to judgment as a matter of law because none of the 11 exemplar claims were first made during the subject policy periods.

II. ARGUMENT

Under Missouri law, "the party asserting coverage"—here the Trust, standing in Mallinckrodt's shoes—"bears the burden to demonstrate it exists under the policy terms." *Rockhurst Univ. v. Factory Mut. Ins. Co.*, 582 F. Supp. 3d 633, 637 (W.D. Mo. 2022) (citing *United Fire & Cas. Co. v. Titan Contractors Serv.*, 751 F.3d 880, 887 (8th Cir. 2014)). To show that Aspen, ACE, and Old Colony have a duty to indemnify Mallinckrodt,

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as the Trust asserts in its combined opposition and cross-motion, the Trust would have to prove coverage in light of "the facts as they are established at trial or as they are finally determined by some other means." *See Arch Ins. Co. v. Sunset Fin. Servs., Inc.*, 475 S.W.3d 730, 734 (Mo. Ct. App. 2015). The Trust cannot make such a showing on these motions, both because the Trust has not presented any argument that the other requirements for coverage have been satisfied (such as whether the underlying lawsuits seek "damages…because of…bodily injury"), and because discovery has not been completed.

As discussed in the insurers' opening motion and below, the Trust can ***never*** show that there is a duty to indemnify under the Aspen, ACE, and Old Colony policies at issue here because the allegations in the underlying exemplar complaints against Mallinckrodt show that the claims for which the Trust seeks coverage all fall within the PCOH. *See, e.g., Trainwreck W. Inc. v. Burlington Ins. Co.*, 235 S.W.3d 33, 44 (Mo. Ct. App. 2007) (recognizing that where an insurer would have had no duty to defend based on the allegations of the underlying complaint, there can be no duty to indemnify, because the duty to defend is broader). Contrary to the Trust's contentions, the underlying claims alleged against Mallinckrodt—including any "unbranded marketing" claims—entirely "aros[e] out of" Mallinckrodt's products.

A. THE 11 EXEMPLAR LAWSUITS SPECIFICALLY PLEAD DAMAGES THAT "ARISE OUT OF" MALLINCKRODT'S SALES OF, AND "REPRESENTATIONS" ABOUT, ITS OPIOID PRODUCTS AND INGREDIENTS

The Trust's argument for coverage under the Aspen, ACE, and Old Colony policies was fabricated purely for this litigation and was never raised by Mallinckrodt in the five years between the filing of the first opioid lawsuit in 2017 and the Trust's filing of this

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action in 2022. The Trust argues that the claims-made PCOH coverage only applies to claims that allege harms proximately caused by the ingestion of a Mallinckrodt-brand product. But that supposed requirement is found nowhere in the policy language, and the Trust's attempt to narrow the PCOH coverage grant fails based on the plain text.

First, the PCOH coverage endorsement conspicuously does ***not*** confine itself to alleged injury "caused by" a Mallinckrodt product. Instead, the insurance policies make clear that the claims-made PCOH coverage applies to damages because of harm "***arising out of***" "Your Product." *See Fid. & Cas. Co. of New York v. Wrather*, 652 S.W.2d 245, 251 (Mo. Ct. App. 1983) (recognizing that "arising out of" is "very broad, general[,] and comprehensive[,]" "much broader than the words 'caused by'[,]" and does ***not*** mean "the direct and efficient cause of the injuries sustained").

Second, the definition of "Your Product" makes it inescapable that any harm "arising out of" Mallinckrodt's "unbranded marketing" campaign—regardless of whether the harm was proximately caused by ingestion of a Mallinckrodt opioid or another opioid—is within the scope of the PCOH endorsement. The PCOH coverage form applies to harms alleged to "aris[e] out of" Mallinckrodt's products and "representations" about its products. *See* SOF at ¶¶ 41-42. As illustrated in the chart below, the liability alleged against Mallinckrodt—the leading producer of opioids and opioid ingredients in the nation—was rooted in the wrongful manner in which Mallinckrodt tried to sell ***its own opioid products and ingredients***, whether by using "branded" marketing of specific products, or instead "unbranded" marketing to make representations about opioids generally or to escape government regulations. Moreover, even if Mallinckrodt's "unbranded marketing"

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campaign did not reference Mallinckrodt's opioid products by name, any representation regarding the safety of opioids ***as a whole*** necessarily encompassed the ***subset*** of products manufactured by Mallinckrodt. Any of these "simple causal connection[s]," *see Capitol Indem.*, 340 F.3d at 550, are sufficient to bring the allegations of Mallinckrodt's liability for "unbranded marketing" within the PCOH endorsement.

Third, the PCOH coverage form applies to "***all***…pharmaceuticals," and the definition of "pharmaceuticals" includes "active pharmaceutical ingredients" supplied by Mallinckrodt to other companies for use in their own bulk or generic opioid products. *See* SOF at ¶ 46 (emphasis added). This language underscores that liability involving other companies' products can nonetheless "aris[e] out of" Mallinckrodt's products. To interpret this language to the contrary—for example, to read "active pharmaceutical ingredients" to mean just those included in Mallinckrodt's own products—would impermissibly render the inclusion of that term a nullity, since such ingredients would necessarily always be included within the broader definition of "Your Product." *See Brugioni v. Maryland Cas. Co.*, 382 S.W.2d 707, 712 (Mo. 1964) ("A policy of insurance must be construed as a whole and every clause must be given some meaning if it is reasonably possible to do so."). This also makes sense from an underwriting standpoint, given that roughly ***50%*** of Mallinckrodt's business comprised sales of ingredients to other companies, with the other 50% tied to sales of finished dosage opioid pills, both of which the Trust acknowledges gave rise to the liability for which it seeks coverage. *See* SOF at ¶¶ 15-18, 67, 70.

In sum, because Mallinckrodt's liability would not exist but for its conduct in selling or making "representations" about its opioid products and ingredients, such liability must

fall within the PCOH. *See Wrather*, 652 S.W.2d at 251; *Capitol Indem.*, 340 F.3d at 550.[3] In each of the 11 exemplar complaints, the plaintiff ***specifically pleads*** that the basis of Mallinckrodt's liability was its efforts to increase the sales of its opioid products, including by its "unbranded marketing" of opioids generally:

Exemplar Case Name	**Example Allegations**
Mississippi	"In addition to their direct marketing efforts, Defendants [including Mallinckrodt] ***used unbranded, third-party marketing***, which they deployed as part of their national marketing strategies ***for their branded drugs***…Unlike their direct promotional activities, Defendants' unbranded marketing allowed them to evade the oversight of federal regulators and gave them greater freedom to expand their deceptive messages." Ex. B to the Trust's SOF at ¶ 124 (emphasis added).
St. Charles County	"As described below, Mallinckrodt promoted its branded opioids Exalgo and Xartemis XR, and opioids generally, in a campaign that consistently mischaracterized the risk of addiction. Mallinckrodt did so through its website and sales force, ***as well as through unbranded communications*** distributed through the 'C.A.R.E.S. Alliance' it created and led." Ex. C to the Trust's SOF at ¶ 179 (emphasis added). "The Marketing Defendants [defined to include Mallinckrodt] also aggressively promoted opioids through 'unbranded advertising' to generally tout the benefits of opioids without specifically naming a particular brand-name opioid drug. Instead, unbranded advertising is usually framed as 'disease awareness'—encouraging consumers to 'talk to your doctor' about a certain health condition without promoting a specific product and, therefore, without providing balanced disclosures about the product's limits and risks. In contrast, a pharmaceutical company's 'branded' advertisement that identifies a specific medication and its indication (*i.e.*, the condition which the drug is approved to treat) must also include possible side effects and contraindications—what the FDA Guidance on pharmaceutical advertising refers to as 'fair balance.'

[3] *See also Publix Super Markets, Inc. v. ACE Prop. & Cas. Ins. Co.*, No. 8:22-CV-2569-CEH-AEP, 2024 WL 4605991, at *11 (M.D. Fla. Oct. 29, 2024) ("'Arising out of' requires only 'some level of causation greater than coincidence,' and does not equate to proximate cause[,]" and "is more analogous to 'but for' causation.") (citations omitted).

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Exemplar Case Name	**Example Allegations**
	Branded advertising is also subject to FDA review for consistency with the drug's FDA-approved label. ***Through unbranded materials, the Marketing Defendants expanded the overall acceptance of and demand for chronic opioid therapy without the restrictions imposed by regulations on branded advertising***." *Id*. at ¶ 385 (emphasis added).
Georgia	"In an effort to reverse this common medical understanding, each Manufacturer Defendant [defined to include Mallinckrodt] conducted, and continues to conduct, a marketing scheme designed to mislead doctors and patients about the safety and efficacy of opioids for the treatment of chronic pain. The result of this scheme has been the use of opioids by a far broader group of patients who are more likely to become addicted and suffer other adverse effects from the long-term use of opioids. Each Manufacturer Defendant spent, and continues to spend, millions of dollars on promotional activities and materials that falsely deny or trivialize the risks of opioids while overstating the benefits of using them for chronic pain." Ex. D to the Trust's SOF at ¶ 103. "***The goal of Manufacturer and Distributor Defendants was the same: to create a large and excessive market for opioids, to bolster their revenue, to increase their profits, and to grow their share of the prescription painkiller market by unlawfully and surreptitiously increasing the volume of opioids they sold***." *Id*. at ¶ 202 (emphasis added).
Florida	"The crisis has a cause: Defendants [including Mallinckrodt] cooperated to sell and ship ever-increasing quantities of opioids into Florida. To create newfound demand for opioids, Defendants used unfair and misleading marketing—including the use of front groups, 'paid opinion leaders,' and Continuing Medical Education courses ('CMEs')—to convince both doctors and patients that opioids could safely be prescribed for common ailments that cause chronic pain. To meet the artificially inflated demand, Defendants sold, shipped, and dispensed opioids in quantities that could not possibly have been medically justified and in the face of clear evidence that opioids were being diverted for illegitimate uses. ***Defendants' plan succeeded, and they recorded multibillion-dollar profits as a result.***" Ex. E to the Trust's SOF at ¶ 1 (emphasis added).
Brockel	"MALLINCKRODT manufactures, promotes, markets, sells and/or distributes Schedule II controlled substances such as

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Exemplar Case Name	**Example Allegations**
	Oxycodone/Acetaminophen, Morphine Sulfate ER, Oxycodone Hydrochloride, Roxicodone and Methadone HCL. On information and belief, these drugs were prescribed to BROCKEL during the 2010 through 2017 time period." Ex. F to the Trust's SOF at ¶ 17. "***To take advantage of the lucrative market*** for chronic pain patients, the Brand-Name [defined to include Mallinckrodt] and Generic Manufacturer Defendants developed a well-funded marketing scheme based on deception. The Brand-Name and Generic Manufacturer Defendants used both direct marketing and unbranded advertising disseminated by seemingly independent third parties to spread false and deceptive statements about the risks and benefits of long term opioid use. Such statements benefitted not only themselves and the third-parties who gained legitimacy when Defendants repeated those statements, but also other opioid manufacturers. These statements were not only unsupported by, or contrary to the scientific evidence, they were also contrary to pronouncements by and guidance from the FDA and CDC based on that evidence. They also targeted susceptible prescribers and vulnerable patient populations." *Id*. at ¶ 79 (emphasis added). "The Brand-Name and Generic Manufacturer Defendants made, promoted, and ***profited from*** their misrepresentations—individually and collectively—knowing that their statements regarding the risks, benefits, and superiority of opioids for chronic pain were false and misleading." *Id*. at ¶ 215 (emphasis added).
Koechley	"Jimmy was prescribed opioids from each Manufacturer Defendant, including but not limited to morphine, fentanyl, hydrocodone, OxyContin, oxycodone, and Percocet." Ex. G to the Trust's SOF at ¶ 240. "***To establish and exploit the lucrative market*** of chronic pain patients, Manufacturer Defendants [defined to include Mallinckrodt] developed a well-funded, sophisticated, and negligent marketing and/or distribution scheme targeted at consumers and physicians. These Defendants used direct marketing, as well as veiled advertising by seemingly independent third parties to spread misrepresentations about the risks and benefits of long-term opioid use - statements that created the 'new' market for prescription opioids, upended the standard medical practice, and benefited other Defendants and opioid manufacturers. These statements were unsupported by and contrary to the scientific evidence. These statements were also contrary to pronouncements by and guidance from the FDA and

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Exemplar Case Name	Example Allegations
	CDC based on that evidence. They also targeted susceptible prescribers and vulnerable patient populations, including those in Ohio." *Id.* at ¶ 71 (emphasis added). "The Defendants, both individually and collectively, made, promoted, and ***profited from*** their misrepresentations about the risks and benefits of opioids for chronic pain even though they knew that their misrepresentations were false and negligent." *Id.* at ¶ 116 (emphasis added).
Riling	"The Pharmaceutical Defendants [defined to include Mallinckrodt] negligently marketed opioids in West Virginia through unbranded advertising that promoted opioid use generally, but were silent as to a specific opioid. This advertising was ostensibly created and disseminated by independent third parties, but funded, directed, coordinated, edited, and distributed, in part or whole, by these Defendants and their public relations firms and agents." Ex. H to the Trust's SOF at ¶ 51. "The Pharmaceutical Defendants, both individually and collectively, made, promoted, and ***profited from*** their misrepresentations about the risks and benefits of opioids for chronic pain even though they knew that their misrepresentations were false and negligent." *Id.* at ¶ 93 (emphasis added).
Brumbarger	"The Pharmaceutical Defendants [defined to include Mallinckrodt] negligently marketed opioids in Indiana through unbranded advertising that promoted opioid use generally, yet silent as to a specific opioid. This advertising was ostensibly created and disseminated by independent third parties, but funded, directed, coordinated, edited, and distributed, in part or whole, by these Defendants and their public relations firms and agents." Ex. I to the Trust's SOF at ¶ 92. "The Pharmaceutical Defendants, both individually and collectively, made, promoted, and ***profited from*** their misrepresentations about the risks and benefits of opioids for chronic pain even though they knew that their misrepresentations were false and negligent." *Id.* at ¶ 132 (emphasis added).
Paul	"The Pharmaceutical Defendants [defined to include Mallinckrodt] negligently marketed opioids in South Carolina through unbranded advertising that promoted opioid use generally, yet silent as to a specific

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Exemplar Case Name	**Example Allegations**
	opioid. This advertising was ostensibly created and disseminated by independent third parties, but funded, directed, coordinated, edited, and distributed, in part or whole, by these Defendants and their public relations firms and agents." Ex. J to the Trust's SOF at ¶ 92. "The Pharmaceutical Defendants, both individually and collectively, made, promoted, and ***profited from*** their misrepresentations about the risks and benefits of opioids for chronic pain even though they knew that their misrepresentations were false and negligent." *Id*. at ¶ 132 (emphasis added).
Berzinski	The Pharmaceutical Defendants [defined to include Mallinckrodt] negligently marketed opioids in Wisconsin through unbranded advertising that promoted opioid use generally, yet silent as to a specific opioid. This advertising was ostensibly created and disseminated by independent third parties, but funded, directed, coordinated, edited, and distributed, in part or whole, by these Defendants and their public relations firms and agents." Ex. K to the Trust's SOF at ¶ 93. "The Pharmaceutical Defendants, both individually and collectively, made, promoted, and ***profited from*** their misrepresentations about the risks and benefits of opioids for chronic pain even though they knew that their misrepresentations were false and negligent." *Id*. at ¶ 133 (emphasis added).
Alsup	"The Pharmaceutical Defendants [defined to include Mallinckrodt] negligently marketed opioids in ALABAMA through unbranded advertising that promoted opioid use generally, yet silent as to a specific opioid. This advertising was ostensibly created and disseminated by independent third parties, but funded, directed, coordinated, edited, and distributed, in part or whole, by these Defendants and their public relations firms and agents." Ex. L to the Trust's SOF at ¶ 75. "The Pharmaceutical Defendants, both individually and collectively, made, promoted, and ***profited from*** their misrepresentations about the risks and benefits of opioids for chronic pain even though they knew that their misrepresentations were false and negligent." *Id*. at ¶ 111 (emphasis added).

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The Trust does not (because it cannot) dispute that the gravamen of liability alleged against Mallinckrodt in these suits "aris[es] out of" its conduct in selling and making "representations" about opioid products as part of its product marketing scheme. Contrary to the Trust's argument, this is enough to bring the ***entirety*** of these exemplar lawsuits within the scope of the PCOH due to the broad meaning of "arising out of" and the scope of the definition of "Your Product" discussed above. For these reasons, and those discussed below, this alleged conduct falls within the PCOH form regardless of whether it caused an individual to ingest Mallinckrodt's opioid products or other opioids.

B. THE TRUST'S FOUR COUNTERPOINTS IGNORE THE PLAIN LANGUAGE OF THE POLICIES AND FAIL TO REMOVE THE 11 EXEMPLAR LAWSUITS FROM THE SCOPE OF THE PCOH COVERAGE FORM

In its opposition brief, the Trust incorporates the arguments asserted in its reply in support of its motion for summary judgment against AIG, which addresses the "Your Product" ***exclusion*** in certain AIG policies, not the PCOH ***coverage grant*** at issue here.[4] Specifically, the Trust raises four points in an unsuccessful effort to undermine the unambiguous language of the PCOH coverage form. Each point is discussed below.

[4] The Trust argues that because the broad PCOH coverage grant under the ACE, Aspen and Old Colony policies is claims-made, and because applying it as written results in the Trust's inability to trigger coverage in this particular case, the PCOH coverage grant must be treated as an exclusion. *See* Trust's Reply to AIG at 11. But the *Weaver* and *Carroll* cases do not stand for any such rule. In *Weaver v. State Farm Mut. Auto. Ins. Co.*, 936 S.W.2d 818 (Mo. 1997), the court did not even discuss exclusions, while in *In re Est. of Carroll*, 857 S.W.2d 848 (Mo. Ct. App. 1993), the court said nothing about treating a grant of coverage as an exclusion. Giving the text of the PCOH its plain meaning does not "exclude" anything; it merely determines whether a claim falls within either the PCOH or the "occurrence"-based coverage grant. *See, e.g.*, *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. 1997) ("[C]overage clauses are to be read broadly…to afford the greatest possible coverage[.]").

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1. **Whether the PCOH Coverage Applies Is Determined Based on the Root of Mallinckrodt's Liability, Not on Whether Mallinckrodt's Conduct Ultimately Led to Ingestion of a Mallinckrodt Branded or Unbranded Opioid Product**

The Trust argues that because the underlying complaints sought to hold Mallinckrodt liable both for harms from Mallinckrodt opioids and for harms whose immediate cause was other manufacturers' opioids or heroin, some unspecified portion of Mallinckrodt's liability is outside the PCOH.[5] According to the Trust, "[t]he proper analysis is to ask where the bodily injury for which Mallinckrodt was being sued arose from, and the answer here is that any ordinary person of average understanding would say the bodily injury arose from a heroin overdose and not Mallinckrodt's product." *See* Trust's Reply to AIG at 15. The Trust's approach to this analysis flies in the face of well-established case law and the plain language of the policies.

First, by urging the Court to look only at whose pill was allegedly ingested, the Trust is asking the Court to read the phrase "arising out of" as something equivalent to the phrase "caused solely by." Again, this runs counter to the case law establishing that the phrase "arising out of" has a much broader meaning. *See*, *e.g.*, *Wrather*, 652 S.W.2d at 251

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[5] The Trust appears to argue that these are two "independent and distinct" causes of Mallinckrodt's liability, thus implicating the "concurrent cause" rule under *Taylor v. Bar Plan Mut. Ins. Co.*, 457 S.W.3d 340 (Mo. banc 2015). But as discussed above, there are not two "independent and distinct" causes of liability. Rather, all liability can be traced to Mallinckrodt's sales of and "representations" about opioid products. *See Hunt v. Capitol Indem. Corp.*, 26 S.W.3d 341 (Mo. App. E.D. 2000) (rule did not apply where acts were "related and interdependent"). Moreover, *Taylor* and the other cases cited by the Trust (*Braxton*, *Centermark*, *et al.*) dealt with policy ***exclusions***, not a coverage grant. *See*, *e.g.*, *Taylor*, 457 S.W.3d at 347 (framing rule as applying "where an injury was proximately caused by two events—even if one…was subject to an ***exclusion*** clause—if the differing allegations of causation are independent and distinct") (emphasis added).

(recognizing that phrase "arising out of" does ***not*** mean "the direct and efficient cause of the injuries sustained") (internal quotation omitted).

Second, the language of the PCOH coverage form is clear that it applies to "'Claims' or 'Suits' seeking damages included within the [PCOH] for all…pharmaceuticals." *See* SOF at ¶ 40. For this reason, too, the proper inquiry is not whose pill was consumed, but rather the basis on which the lawsuit "seek[s] damages" from Mallinckrodt. As discussed above, to the extent that the exemplar lawsuits seek to hold Mallinckrodt liable for harms from other companies' opioids and illicit opioids such as heroin, they do so on the ***sole basis*** that Mallinckrodt participated in "unbranded marketing" of opioids generally, increasing the demand for opioids across the board. Any alleged harms from Mallinckrodt's involvement in the "unbranded marketing" campaign indisputably "ar[ose] out of Your [*i.e.*, Mallinckrodt's] Product[,]" the definition of which specifically includes "***representations…with respect to the fitness, quality…performance or use of***" Mallinckrodt's products, as well as the more general "***failure to provide warnings or instructions***." *See* SOF at ¶ 42 (emphasis added).

For these reasons, any harm "arising out of" those representations and failures to warn, as part of an "unbranded marketing" campaign or otherwise, unambiguously falls within the scope of the PCOH—even harm from heroin, as several courts have already held in cases involving the same arguments that the Trust is making here. *See The Travelers Prop. Cas. Co. of Am. v. Actavis, Inc.*, 225 Cal. Rptr. 3d 5, 21-22 (Cal. Ct. App. 2017) (holding that "[a]ll of the harm" asserted in underlying opioid lawsuits, including heroin addiction, "stem[med] from [the insured's] ***products*** and what [the insured] ***said and did***

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not say about the products") (emphasis added)[6]; *Zogenix, Inc. v. Federal Insurance Co.*, No. 4:20-cv-06578, 2022 WL 3908529 (N.D. Cal. May 26, 2022) (same). *See also Sentynl Therapeutics, Inc. v. U.S. Specialty Ins. Co.*, No. 21-55370, 2022 WL 706941, at *1-2 (9th Cir. Mar. 9, 2022) (finding that PCOH "embrace[d] claims about what a seller ***said and did not say*** about the products") (emphasis added).[7]

The same principle holds true where (as here) an insured is accused of flooding the market with products alongside other manufacturers: the resulting harms have the requisite "simple causal connection" to the insured's products to fall within the scope of the PCOH. *See Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, 658 F. App'x 955, 958-59 (11th Cir. 2016) (finding that "claims that Anda and other pharmaceutical distributors have so flooded the market with their products that West Virginia suffers from an opioid epidemic" alleged a "causal connection" that was "sufficient to meet the ***low bar***" required of the

[6] In *Actavis*, the court recognized that the alleged "resurgence in heroin use" satisfied the "arising out of" language—notwithstanding that the insured did not produce or market heroin—because the insured's "warranties and representations made as part of [its] campaign to increase the sales of highly addictive opioid painkillers allegedly had the intended effect of increasing their sales, use, and addiction, which led to a dramatic increase in the use of heroin as a cheaper alternative." *See Actavis*, 225 Cal. Rptr. 3d at 22-23. ***These are the very same types of allegations at issue here.*** *See* SOF at ¶ 24.

[7] Contrary to the Trust's attempts to distinguish these cases, *Actavis* ***did*** involve the type of marketing campaign that tried to "persuade[] doctors and patients" that opioids generally were safe and effective (the same as the "unbranded marketing" at issue here), *see Actavis*, 225 Cal. Rptr. 3d at 12, while *Anda*, *Zogenix*, and *Sentynl* simply (and correctly) focused on whether the insured's misconduct "arose out of" its products—an inquiry that is not dependent on the identity of the specific opioid ingested. This is what ACE, Aspen and Old Colony ask the Court to do here. Each of these cases is directly on point.

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phrase "arising out of") (emphasis added).[8] *See also Brazas Sporting Arms, Inc. v. Am. Empire Surplus Lines, Inc.*, 220 F. 3d 1 (1st Cir. 2000) (same in the gun context under Massachusetts law, where other companies' guns were also at issue); *Fibreboard Corp. v. Hartford Accident & Indem. Co.*, 20 Cal. Rptr. 2d 376, 383-86 (Cal. Ct. App. 1993) (rejecting argument that insured's alleged liability was outside PCOH simply because insured could be held liable for harm directly caused by other companies' products and finding that insured's liability still "arose out of" its manufacture and sales of products).

Again, the exemplar pleadings and the record developed to date only confirm these points. For example, the *Mississippi* exemplar complaint specifically alleges that Mallinckrodt's "unbranded, third-party marketing" was "***deployed as part of their national marketing strategies for their branded drugs***"—a point of common sense confirmed by Mallinckrodt's own marketing materials, which show that "unbranded marketing" was utilized to increase market demand in advance of Mallinckrodt's roll-out of its branded opioid products, such as Exalgo. *See* SOF at ¶ 26 (emphasis added), ¶¶ 9-14. Definitionally, this is the ***very purpose*** of "unbranded marketing"—to sell the marketer's own products. *See id.* at ¶¶ 5-8.

Tellingly, ***the Trust has already admitted that Mallinckrodt's liability for unbranded marketing "arose out of" Mallinckrodt's sales of and representations about opioids***. In its parallel lawsuit against Covidien (Mallinckrodt's former parent and the

[8] *See also Beretta U.S.A. Corp. v. Fed. Ins. Co.*, 17 F. App'x 250, 255 (4th Cir. 2001) (same under Maryland law); *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 540 (Fla. 2005) (same under Florida law).

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named insured on the Aspen, ACE, and Old Colony policies at issue), the Trust told another court that Mallinckrodt and Covidien were "incentivized" to engage in "unbranded advertising" and thus "increase the overall opioid market ***because that would increase [their] API [i.e., ingredient] sales to other opioid manufacturers***[,]" *see id*. at ¶ 19 (emphasis added)—the very same other manufacturers whose finished dosage products the Trust points to here. The conclusion that Mallinckrodt's alleged liability for "unbranded marketing" is within the PCOH is also consistent with Mallinckrodt's own averment to the bankruptcy court that the 3,000 underlying opioid lawsuits "***concern[ed] the production and sale of its opioid products***." *See id*. at ¶ 60 (emphasis added). In sum, ***all*** allegations of liability against Mallinckrodt in the underlying lawsuits are for conduct that falls within the PCOH coverage form.

2. <u>The Insurers Are Asking the Court to Apply the Policy as Written to the Allegations of the Exemplar Lawsuits, Not to Retroactively "Deem" a New Source of Mallinckrodt's Liability</u>

The Trust claims that the insurers are asking this Court to "deem Mallinckrodt's liability for bodily injury due to the use of non-Mallinckrodt products as arising out of Mallinckrodt products," and to "deem an unbranded promotional campaign that did not mention Mallinckrodt or Mallinckrodt products, and that dramatically increased the use of all opioid drugs, as being about Mallinckrodt products[.]" *See* Trust's Reply to AIG at 15-16. This is simply not true. As the Trust agrees, the exemplar plaintiffs alleged that Mallinckrodt was liable for harm from other manufacturers' opioids or from illicit opioids only because Mallinckrodt engaged in an "unbranded marketing" campaign. As discussed above, any damages attributable to Mallinckrodt from those other opioids "arise out of"

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Mallinckrodt's products because Mallinckrodt's "unbranded marketing" was how Mallinckrodt marketed and sold ***its own*** opioid products, and because any unbranded representations about the safety of opioids generally, ***as a whole***, necessarily ***were*** representations that encompassed Mallinckrodt's opioid products.

The Trust, not the insurers, selected the 11 exemplar lawsuits now at issue and asked the Court to both analyze the basis of Mallinckrodt's liability in those suits and determine whether it falls within the scope of the PCOH. *See, e.g.*, *Essex Ins. Co. v. Harris*, No. 4:09CV2071 TIA, 2011 WL 4600689, at *13 (E.D. Mo. Sept. 30, 2011) ("To determine coverage issues, Missouri law provides that courts should compare the allegations in the underlying complaint to the language of the insurance policy."). This Court need not "deem" Mallinckrodt's liability as arising from anything other than what was alleged—which was that unbranded marketing was a scheme to avoid the federal oversight of branded marketing, and involved making representations about opioids generally that would increase sales of both Mallinckrodt's finished dosage opioid products and its "active pharmaceutical ingredients" to other companies. On their face, the 11 exemplar complaints allege liability on the part of Mallinckrodt that is clearly encompassed within the broad scope of the PCOH.

3. Interpreting the PCOH Coverage to Apply to Claims "Arising Out of" Mallinckrodt's Pharmaceutical Products Would Not Swallow Coverage for Other Business Liability

The Trust argues that the PCOH provisions at issue should only encompass claims for injury "caused by" physically ingesting a Mallinckrodt opioid pill, and that it would be too broad to read PCOH coverage as encompassing "all opioid-related bodily injury." *See*

Trust's Reply to AIG at 13. The Trust's concerns do not survive even modest scrutiny in light of the claims at issue here.

The Trust's purported concern that the insurers' interpretation is unworkably broad and would create claims-made limitations for any conceivable claim against Mallinckrodt's business ignores the reality that the only claims at issue in this case squarely "aris[e] out of" Mallinckrodt's products, including its efforts to sell those products. As to non-Mallinckrodt opioids, the claims allege that Mallinckrodt is liable for damages only because of the manner in which Mallinckrodt tried to market products that it wanted to sell. There are no claims here with only a tenuous connection to Mallinckrodt's opioid products, and a ruling in the insurers' favor would not have the far-flung impact the Trust suggests.

Additionally, and more simply, this Court's task is to apply the plain language of the contracts to the allegations in the underlying lawsuits at issue here. *See Columbia Mut. Ins. Co. v. Schauf*, 967 S.W.2d 74, 77 (Mo. 1998). The plain language of the PCOH coverage form applies to claims "seeking damages included within the [PCOH] for…all pharmaceuticals." Harms from Mallinckrodt's efforts to sell its pharmaceuticals and from its "representations" about those pharmaceuticals clearly "aris[e] out of" Mallinckrodt's products. There can be no reasonable concern that applying the text as written to the allegations actually before the Court would somehow extend the PCOH form's claims-made requirements to slip-and-falls in a warehouse, invasion-of-privacy claims, or employment discrimination. Those are not the claims before the Court in this case, and the claims that are before the Court do not require it to draw any fine lines.

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4. Interpreting the PCOH Coverage Form as Written Does Not Render Coverage Illusory

Turning logic on its head, the Trust argues that the insurers' interpretation of the broad scope of the claims-made PCOH coverage form "would defeat all coverage under the policies for a company that, like Mallinckrodt, is in the business of manufacturing and selling products." *See* Trust's Reply to AIG at 13.

To the contrary, properly interpreting the PCOH coverage form to insure liability for harm not only directly caused by ingesting a Mallinckrodt opioid product, but also for Mallinckrodt's "representations" in unbranded generic opioid marketing, in fact provides Mallinckrodt with wide-ranging products coverage during each policy period. That the coverage is only available for claims first made and reported during the policy period does not render it "illusory," and instead merely establishes the parameters of which year's policies apply. *See, e.g.*, *Endurance Am. Specialty Ins. Co. v. Brown*, 487 F. Supp. 3d 774, 780 (W.D. Mo. 2020) (finding that coverage was not rendered illusory, even if "narrow[ed]" by policy language, where coverage otherwise existed "for a wide variety of [other] risks"); *McGregor v. Allamerica Ins. Co.*, 868 N.E.2d 1225, 1228 (Mass. 2007) (recognizing that "[a]s long as an insurance policy provides coverage for some acts, it is not illusory simply because it contains a broad exclusion," especially where "not all potential mishaps in [insured's] business" fall within the scope of the exclusion).

III. CONCLUSION

Despite the Trust's efforts to obfuscate the issues, the policies are clear: the liability that Mallinckrodt faced in the 11 exemplar lawsuits hand-selected by the Trust undeniably

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"arises out of" Mallinckrodt's opioid products—including ingredients sold to other opioid companies—and its "representations" about those products, and thus falls within the scope of the policies' PCOH coverage grant. Because there is no dispute that neither the 11 exemplar lawsuits nor any other opioid claims were first made against Mallinckrodt during the Aspen, ACE, and Old Colony policy periods, the Trust's claims for coverage fail, and the insurers are entitled to judgment as a matter of law.

Dated: November 4, 2024

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Consolidated Reply of Aspen, ACE, and Old Colony in support of their Motion for Summary Judgment on the Trust's 11 Exemplar Opioid Lawsuits & Opposition to the Trust's Cross-Motion for Summary Judgment has been served via email on the below counsel of record this 4th day of November, 2024.

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