

**IN THE MISSOURI COURT OF APPEALS EASTERN DISTRICT**

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**Appeal No. ED113635**

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**OPIOID MASTER DISBURSEMENT TRUST II, A/K/A OPIOID MDT II,**

**Plaintiff/Appellant,**

**v.**

**ACE AMERICAN INSURANCE COMPANY, *ET AL.*,**

**Defendants/Respondents.**

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**Appeal from the Circuit Court of St. Louis County, Missouri,**

**21st Judicial Circuit, Second Division**

**Hon. Richard M. Stewart**

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**BRIEF OF RESPONDENTS**

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## INTRODUCTION

This brief does not address the “Products-Completed Operations Hazard *Exclusion*” (“PCOH Exclusion”) contained in Mallinckrodt’s primary layer of insurance, which is addressed in the first instance in the separate brief filed by the affiliated entities American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA (the “AIG Insurers”).<sup>1</sup> Instead, this brief addresses products *coverage* provided by the umbrella and excess layers of insurance issued to Mallinckrodt’s former parent, Covidien, from 2008-2011, which is governed by a “Products-Completed Operations Hazard Claims Made Retained Limit Endorsement” (the “PCOH Claims-Made Endorsement”). The PCOH Claims-Made Endorsement in the higher layers of insurance works in concert with the PCOH Exclusion contained in the primary layer. The primary policies broadly exclude *all* PCOH coverage, while the umbrella and excess policies provide broad coverage for certain PCOH-related liabilities, subject to the condition that it will only apply to claims made against Mallinckrodt and reported to the higher-layer insurers, including Respondents Aspen and Old Colony, during their respective policy periods. The Trust’s brief does not address the interacting components of the PCOH Claims-Made Endorsement, which can be summarized for this brief in three relevant parts:

**First, as a contextual matter:** The PCOH Claims-Made Endorsement specifies that

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<sup>1</sup> The AIG Insurers issued both the primary and umbrella layers of insurance at issue, and Respondents’ policies follow form to the AIG Insurers’ umbrella policies and thus incorporate the PCOH Claims-Made Endorsement contained therein. D486 pp. 3, 5, 11, 13, D521 pp. 2, 4.

it applies to suits that seek “damages included within the Products-Completed Operations Hazard [*i.e.*, the “PCOH”],” which is defined to include ““bodily injury’...arising out of ‘your product,’” “for all...pharmaceuticals.” D504 p. 21 (¶ 40), pp. 23-24 (¶ 41). “Pharmaceuticals” is defined to include “active pharmaceutical ingredients supplied by Mallinckrodt in either Bulk or Dosage quantities, included in Generic Pharmaceuticals, (or) Contract Manufactured Pharmaceuticals.” D504 p. 25 (¶ 46). Therefore, Mallinckrodt, as one of the nation’s largest manufacturers of opioids and active pharmaceutical ingredients, specifically contracted for PCOH coverage—coverage which was otherwise excluded in the primary layer of insurance—that would apply to suits not only seeking damages for Mallinckrodt-branded opioids, but also claiming damages for marketing generic or bulk pharmaceuticals and ingredients.

**Second, for further context:** Pursuant to the PCOH Claims-Made Endorsement’s “Schedule of Designated Entities,” the various Mallinckrodt entities<sup>2</sup> at issue in this appeal are listed with reference to “liability” “included within” the PCOH that “arises out of...[such] pharmaceuticals,” including active pharmaceutical ingredients. The liability does not need to be directly “caused by” such pharmaceuticals.

**Third, the key issue:** By definition, the PCOH includes liability for all “Bodily Injury” alleged to “arise out of” “your product,” which is defined to include Mallinckrodt’s *products* (e.g., branded opioids, generic opioids, and active pharmaceutical ingredients),

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<sup>2</sup> “Mallinckrodt” as used herein refers to the Trust’s bankruptcy debtors, specifically Mallinckrodt plc, Mallinckrodt LLC, Mallinckrodt APAP LLC, Mallinckrodt Enterprises LLC, SpecGx LLC, and SpecGx Holdings LLC.

and “*representations* made at any time with respect to the fitness, quality, durability, performance or use of” those products, and “*failure[s] to provide warnings or instructions*” in connection with those products. D504 pp. 23-24 (¶ 42). The critical phrase is “arising out of,” which Missouri courts interpret broadly to mean “growing out of” or “flowing from,” not “caused by.”<sup>3</sup>

Taking these provisions together and applying them to this case, the PCOH Claims-Made Endorsement grants coverage for any suits seeking damages that “grow out of” or “flow from” Mallinckrodt’s products or misrepresentations or failures to provide warnings relative to products that it was trying to sell, whether Mallinckrodt brands or generic or manufactured pharmaceuticals or ingredients for others. If Mallinckrodt faced such suits, they fall within the PCOH Claims-Made Endorsement and would only be insured if they were first filed against Mallinckrodt during a specific policy’s period, then reported to the insurer during that same period. This is referred to as the “claims-made-and-reported requirement” of the PCOH Claims-Made Endorsement.

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<sup>3</sup> See *Schmidt v. Utilities Ins. Co.*, 182 S.W.2d 181, 183-84 (Mo. 1944) (interpreting phrase “arising out of” to be “very broad, general and comprehensive,” “much broader than the words ‘caused by,’” and rejecting argument that it requires “direct and proximate” causation); *Richards v. Bunkhouse Bar & Grill, LLC*, 719 S.W.3d 810, 819 (Mo. Ct. App. 2025) (recognizing that “‘arising out of’ as used in insurance contracts” means “‘originating from,’ ‘having its origins in,’ ‘growing out of, or ‘flowing from’”). See also *Capitol Indem. Corp. v. 1405 Assocs., Inc.*, 340 F.3d 547, 550 (8th Cir. 2003) (Missouri law) (acknowledging that phrase requires only “simple causal relationship...between the accident or injury and the activity of the insured”); *Colony Ins. Co. v. Pinewoods Enterprises, Inc.*, 29 F. Supp. 2d 1079, 1083 (E.D. Mo. 1998) (recognizing that “an unbroken chain of events need not be established but rather a simple causal relationship must exist between the accident or injury and the activity of the insured”).

In this case, the Trust chose 11 “exemplar” suits that it argued would be representative of the 3,000 opioid suits (the “Opioid Lawsuits”) that had been brought against Mallinckrodt beginning in 2017—years after Respondents’ policy periods. Every one of those 11 exemplars alleged that Mallinckrodt, as the nation’s largest producer of opioids and opioid ingredients (D504 p. 3 (¶ 2)), engaged in misrepresentations, and failures to instruct and warn, as part of its successful scheme to increase the sales of its opioid products. Some of these exemplars listed the Mallinckrodt products that it was trying to sell, while others involved claimants who specifically alleged that they had ingested Mallinckrodt products. These 11 exemplars all seek damages that “arise out of” or “flow from” Mallinckrodt’s products and conduct within the scope of the PCOH Claims-Made Endorsement. However, because the 11 exemplars were not first filed against Mallinckrodt or reported to insurers during the 2008-2011 periods at issue in this brief, none of the 11 exemplars are covered by the 2008-2011 excess policies, as the Circuit Court properly ruled.

The Trust points out that the underlying exemplars alleged that Mallinckrodt—in an effort to “evade the oversight of federal regulators” that govern marketing of named or “branded” opioids—would routinely circumvent this oversight by engaging in “unbranded marketing” of opioids as a class of product, to then create a demand for more of its branded products. D504 p. 11 (¶ 26). As just one example, Mallinckrodt’s own internal documents explained that to increase sales of its opioid Exalgo, Mallinckrodt launched an “Unbranded Message Development” campaign. D504 p. 5 (¶¶ 9-10).

On appeal, the Trust now urges that because Mallinckrodt purposely engaged in “unbranded marketing” that intentionally promoted opioids without naming any brand, this means that Mallinckrodt ultimately faced liability for broad societal harms caused by the ingestion of opioids manufactured by *other* companies, or even illicit drugs like heroin, and that such liability falls outside the coverage governed by the PCOH Claims-Made Endorsement. According to the Trust, then, these claims are free of the “claims-made-and-reported” prerequisite of Respondents’ 2008-2011 excess policies, and would be covered as “Bodily Injury” claims that do not “flow from” or “arise out of” Mallinckrodt’s conduct in distributing or making representations about opioids that it was trying to sell.<sup>4</sup>

The Trust’s arguments on appeal fail for a number of reasons, as set forth below and in the AIG Insurers’ brief. **First and foremost**, every one of its 11 exemplars allege that Mallinckrodt’s “unbranded marketing” involved misrepresentations, failures to warn, and failures to instruct about opioid products as an intentional part of Mallinckrodt’s efforts to increase the sales of its own opioids. D504, pp. 10-11 (¶25). Mallinckrodt’s alleged scheme to push its own opioids onto the public and the societal harms caused by that conduct are the root of every exemplar suit, each of which therefore “arise[s] out of” Mallinckrodt’s “products” and unambiguously falls within the PCOH Claims-Made Endorsement.

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<sup>4</sup> Respondents do not concede that the governmental claims for reimbursement of economic expenditures for societal harms constitute covered “Bodily Injury” claims that may be covered under the policies. That legal question is not at issue in this appeal.

**Furthermore**, the Trust is flat wrong in repeatedly arguing that the PCOH Claims-Made Endorsement applies only to injuries suffered as a result of ingesting a Mallinckrodt branded product. On its face, the PCOH Claims-Made Endorsement applies to liability for harm “arising out of” Mallinckrodt’s products, including representations, warnings, and instructions about generic or bulk opioids not branded to Mallinckrodt, as well as opioid ingredients that it manufactures and sells to other sellers of opioids.

**Furthermore**, the Trust is wrong that the phrase “arising out of” should be given a narrow interpretation because it also appears in the PCOH Exclusion of the primary layer of insurance. The PCOH Claims-Made Endorsement governs a coverage grant, not an exclusion, and the phrase “arising out of” means the same thing regardless of where it appears in the policy.<sup>5</sup> That phrase dictates that coverage is not limited to claims of those who ingested a Mallinckrodt product, but includes even more attenuated claims that “grow out of” or “flow from” Mallinckrodt’s conduct to sell more of its own opioids. This means that even for claims alleging societal harms caused by the products of other companies or illicit heroin, if Mallinckrodt’s alleged liability for those harms “arises out of” the manner in which it tried to sell its opioids, then the alleged liability for those social harms falls squarely within the PCOH Claims-Made Endorsement.

**Finally**, the Trust entirely ignores that every court in the country to have been presented insurance claims premised upon “unbranded marketing” allegations against policyholders has concluded that such claims fall within the scope of the PCOH.

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<sup>5</sup> See, e.g., *1405 Assocs., Inc.*, 340 F.3d at 550.

In sum, the Circuit Court properly ruled that the 11 exemplar suits selected by the Trust presented liability against Mallinckrodt that was alleged to arise from Mallinckrodt's representations made as part of its efforts to sell its opioid products, as was specifically alleged in each suit. The Circuit Court correctly ruled that this liability unambiguously falls within the scope of the PCOH. Because none of the claims were first made or reported during the 2008-2011 periods, the PCOH Claims-Made Endorsement of Respondents' excess policies do not provide coverage for the Opioid Lawsuits.

**I. RESPONDENTS' SUPPLEMENTAL STATEMENT OF FACTS**

**A. The 2008-2011 Umbrella and Excess Coverage at Issue in This Brief**

By way of background, the primary insurance layer that Mallinckrodt purchased from 2008-2011 contained policies that specifically provided no insurance for liability within the PCOH. This is demonstrated on the declarations page of such policies, which prominently state "PRODUCTS COMPLETED OPERATIONS AGGREGATE LIMIT...NOT COVERED," and by the corresponding PCOH Exclusion in such policies. *See, e.g.*, D498 pp. 6, 29.

The umbrella and excess insurance layers at issue in this appeal provided two complementary types of coverage. For claims outside the PCOH Claims-Made Endorsement, the policies provided "occurrence"-based coverage, meaning coverage that is triggered by an accidental injury that occurred during the policy period. *See, e.g.*, D482 p. 42. For claims governed by the PCOH Claims-Made Endorsement, the policies provided coverage, but only on a claims-made-and-reported basis, meaning coverage is triggered only if a claim was both first made against Mallinckrodt and first reported to the insurers

during the policy period. *See, e.g.*, D476 p. 14. Thus, the non-PCOH coverage depended on when an *underlying injury* occurred, while the PCOH coverage depended on when a lawsuit or other claim *was filed* against Mallinckrodt (and reported to the insurers).<sup>6</sup>

Respondents herein are Aspen and Old Colony. Aspen issued two excess insurance policies for the claims-made years 2009-2011. D504 p. 20 (¶ 37). Old Colony issued one excess insurance policy for the claims-made year 2008-2009. D521. The Aspen and Old Colony policies followed form to lead umbrella policies issued by the AIG Insurers, which likewise provided complementary “occurrence”-based coverage for claims outside the PCOH Claims-Made Endorsement and also claims-made-and-reported coverage for claims governed by the PCOH Claims-Made Endorsement. D504 pp. 20-21 (¶ 39), D520 pp. 2-3 (¶ 4).

In the trial court, Aspen, Old Colony, and ACE American Insurance Company moved for summary judgment, arguing that the 11 exemplar suits selected by the Trust were claims within the PCOH Claims-Made Endorsement, and therefore were not covered because they were not claims first made and reported during the insurers’ respective policy periods. The AIG Insurers incorporated arguments from that motion insofar as it addressed the PCOH Claims-Made Endorsement, seeking the same ruling under its 2008-2011

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<sup>6</sup> This requirement reflects an essential part of a policyholder’s bargain with an insurer. *See, e.g., ACI/Boland, Inc. v. U.S. Specialty Ins. Co.*, No. 4:07CV0378 TCM, 2009 WL 90131, at \*8 (E.D. Mo. Jan. 14, 2009) (acknowledging that “a claims made policy allows the insurer to more accurately fix its reserves for future liabilities and compute premiums with greater certainty,” and that “such a policy reduces the potential exposure of the insured, thus reducing the policy cost to the insured”) (internal quotations omitted).

umbrella policies and also under its identical 2003-2007 umbrella policies, while separately moving on the PCOH Exclusion. D497 pp. 43-44. American Guarantee and Liability Insurance Company also filed a summary judgment brief on the same issue for its excess policy covering the year 2004-2005. D491 pp. 1-3, D514 p. 1.

**B. The Trust Does Not Address the Three Components of the PCOH Claims-Made Endorsement Now at Issue.**

Buried in the Trust’s brief is a recognition that “certain of the policies” contain the PCOH Claims-Made Endorsement. *See* Trust’s Brief for Appellant (“Br.”) pp. 21, 24, 26. However, the Trust does not address the provisions of that endorsement that were briefed, argued, and served as the basis for the Circuit Court’s ruling in favor of the umbrella and excess insurers, including Respondents. Instead, the Trust focuses its brief solely on the PCOH Exclusion in the AIG Insurers’ primary policies and ignores the additional contextual language of the PCOH Claims-Made Endorsement previewed above and discussed below.

For the umbrella and excess policies at issue here, the declarations pages to which Respondents follow form show actual *affirmative coverage* for the PCOH claims excluded in the primary layer of insurance. D476 p. 26, D478 p. 14, D482 p. 41. As relevant here, this coverage governed by the PCOH Claims-Made Endorsement essentially contains three key characteristics.

**First**, the policies’ PCOH Claims-Made Endorsement states that its provisions apply to “‘Claims’ or ‘Suits’ seeking damages included within the ‘Products-Completed Operations Hazard,’” defined in relevant part as “‘bodily injury’...arising out of ‘your

product’[,.]” including “*all...pharmaceuticals[.]*” D504 pp. 21, 23 (¶¶ 40-41) (emphasis added). The policies specifically define “pharmaceuticals” to “mean the manufacture, processing, formulation, sale and/or distribution of active pharmaceutical ingredient[s] supplied by Mallinckrodt in either Bulk or Dosage quantities included in Generic Pharmaceuticals, Brand Pharmaceuticals, [and/or] Contract Manufactured Pharmaceuticals[.]” D504 p. 25 (¶ 46). By its plain language, this definition anticipates that the PCOH Claims-Made Endorsement applies to claims involving not only branded products, but also non-branded products and products of other companies that may use Mallinckrodt ingredients. Such active pharmaceutical ingredients sold to other companies comprised approximately *50% of Mallinckrodt’s business*. D504 pp. 6-8 (¶¶ 15-18).

**Second**, the “Designated Entities” portion of the PCOH Claims-Made Endorsement lists each corporate entity “with respect to *liability*, included within the [PCOH], *arising out of its...pharmaceuticals[.]*” D470 p. 46, D476 p. 20, D478 p. 5 (emphasis added). The Trust has used the term “Mallinckrodt” to refer to Mallinckrodt LLC, Mallinckrodt APAP LLC, Mallinckrodt Enterprises LLC, SpecGX LLC, and Spec GX Holdings LLC. D411 p. 2. (¶ 1). This provision reiterates that the PCOH coverage available to such entities applies to any “liability” that simply “*arises out of*” the entity’s products, including “pharmaceuticals,” not just liability “caused by” such products.

**Third, and most importantly**, the policies make clear that what is “included within” the PCOH coverage is “‘Bodily Injury’ *...arising out of* [again, not “caused by”] ‘*Your Product*’[,.]” which is broadly defined to include not just “products...manufactured, sold, handled, distributed or disposed of by” Mallinckrodt (including, among other things,

the “pharmaceuticals” addressed above), but also “*representations* made at any time with respect to the fitness, quality, durability, performance or use of” those products, as well as the more general “*failure to provide warnings or instructions.*” D504 pp. 23-24 (¶ 42) (emphasis added).

Taken together, the test for whether the Opioid Lawsuits fall within the scope of the PCOH Claims-Made Endorsement is whether they allege or involve liability that “arises out of” Mallinckrodt’s products, or representations, warnings, or instructions relating to its products, including but not limited to active pharmaceutical ingredients, as well as generic, branded, or contract-manufactured opioids. It is undisputed that if a claim *does* fall within the scope of the PCOH Claims-Made Endorsement, then it is only covered if it was both first made against Mallinckrodt during the policy period (here between 2008 and 2011) and reported by Mallinckrodt to Respondents during the same policy period.<sup>7</sup> D470 pp. 40-41, D476 pp. 15-16, D477 p. 50, D478 p. 1.

**C. The 11 Exemplar Lawsuits Sought to Hold Mallinckrodt Liable for the Manner in Which Mallinckrodt Marketed and Sold Its Opioids.**

The Trust’s brief does not explain that the Circuit Court’s ruling was based upon the 11 exemplar suits, which fall into three categories—those brought by governmental entities, personal injury plaintiffs, and plaintiffs seeking damages for neonatal abstinence syndrome (“NAS”) in infants—and which the Trust hand-selected as emblematic of all

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<sup>7</sup> In this appeal, the Trust has rightly acknowledged that, with respect to the 11 exemplar suits, “the Policies’ ‘claims-made-and-reported requirements’ for coverage had not been met.” Br. p. 24 (citing D524 pp. 11, 33-34). This demonstrates why the Trust must argue that the 11 exemplar claims do not fall within the PCOH Claims-Made Endorsement.

3,000 Opioid Lawsuits for which it sought coverage. Properly identifying the liability alleged by these claims is integral to this appeal.<sup>8</sup>

As discussed in detail below, all 11 exemplar suits alleged that Mallinckrodt was sued because of its role as one of the world's largest manufacturers and distributors of opioids. Each alleged that Mallinckrodt was liable for various social harms that resulted from the misrepresentations and tactics that Mallinckrodt employed to sell and distribute its opioid products and active pharmaceutical ingredients. Mallinckrodt's "unbranded marketing" campaigns were but one example of the conduct for which Mallinckrodt was allegedly liable. D504 pp. 5-6 (¶¶ 9-14), p. 8 (¶ 19). Each exemplar alleged liability flowing from the manner in which Mallinckrodt tried to sell its opioid products, thus falling squarely within the scope of the PCOH Claims-Made Endorsement regardless of the specific marketing techniques utilized by Mallinckrodt.

**1. The Trust's Four Governmental Entity Exemplars Alleged Liability Flowing From Sales of and Representations About Mallinckrodt Products.**

The first exemplar suit chosen by the Trust was *State of Mississippi v. Purdue Pharma et al.*, filed in November 2019 (after Respondents' policy periods). D411 p. 3 (¶ 7). That suit alleged that Mallinckrodt's unbranded marketing scheme was a strategy employed to increase Mallinckrodt's sales of its own products. D416 pp. 56-57 (¶ 124).

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<sup>8</sup> See *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.").

The suit alleged that Mallinckrodt engaged in making certain *representations about opioids* without any scientific basis and *misrepresented* the risks of abuse of these products. D416 pp. 56-57 (¶ 124). It was specifically alleged that “Mallinckrodt expanded its branded opioid portfolio while also maintaining its role as the leading manufacturer of generic opioids.” D416 p. 225 (¶ 580).

The second exemplar chosen by the Trust was *Florida v. Purdue Pharma et al.*, filed in November 2018 (after Respondents’ policy periods). D411 p. 9 (¶ 15). The *Florida* suit alleged that Mallinckrodt and its co-defendants recorded multi-billion-dollar profits from sales of their products, as a result of “*unfair and misleading marketing*” to sell, ship, and dispense opioids. D419 p. 7 (¶ 1) (emphasis added). Mallinckrodt was specifically alleged to have “spread misinformation about opioids...*to convince doctors to prescribe and consumers to purchase and consume branded and generic opioid products.*” D419 p. 51 (¶ 184) (emphasis added).

The third exemplar chosen by the Trust was *Georgia v. Purdue Pharma et al.*, filed in January 2019 (after the Respondents’ policy periods). D411 p. 8 (¶ 12). The *Georgia* suit alleged that Mallinckrodt’s goal in its marketing conduct was “*to grow their share of the prescription painkiller market* by unlawfully and surreptitiously increasing the volume of opioids they sold.” D418 p. 28 (¶ 102) (emphasis added).

The fourth exemplar chosen by the Trust was *St. Charles County, Missouri v. Purdue Pharma, et al.*, filed in 2018 (after Respondents’ policy periods). D411 pp. 14-15 (¶ 19). The *St. Charles County* suit alleged that “Mallinckrodt promoted its branded opioids Exalgo and Xartemis XR, and opioids generally in a campaign that consistently

mischaracterized the risk of addiction,” including through unbranded marketing. D417 p. 60 (¶ 179), p. 93 (¶ 287). The suit alleged that Mallinckrodt sought to increase the demand for opioids “to increase profit, and grow their share of the prescription painkiller market by unlawfully and surreptitiously increasing the volume of opioids they sold.” D417 p. 143 (¶ 437) (emphasis added).

The Trust is simply wrong in suggesting to this Court that the exemplar suits do not “arise out of” Mallinckrodt’s products and the manner in which it marketed and sold them. Br. pp. 7, 12. They do, as shown above and explained further below.

2. **The Trust’s Two Personal Injury Exemplars Alleged Liability Flowing From Sales of and Representations About Mallinckrodt Products.**

The fifth exemplar chosen by the Trust was *Estate of Brockel v. Couch, et al.*, filed in December 2018 (after Respondents’ policy periods). D411 p. 23 (¶ 23). There, the complaint alleged that specific drugs manufactured, promoted, marketed, and sold by Mallinckrodt, including sulfate ER, oxycodone, hydrochloride, Roxicodone, and Methadone HCL, were prescribed to Brockel. D420 pp. 9-10 (¶ 17). Mallinckrodt was identified as a “Brand-Name Manufacturer Defendant” whose products caused injury to Brockel. D420 p. 14 (¶ 26).

The sixth exemplar chosen by the Trust was *Estate of Koechley v. Purdue Pharma, et al.*, filed in 2018 (after Respondents’ policy periods). D411 p. 26 (¶ 26). The *Koechley* complaint sought damages for a fentanyl overdose and alleged that “Mallinckrodt manufactures, markets, and sells drugs in the United States including generic oxycodone, of which it is one of the largest manufacturers.” D421 p. 13 (¶ 43). The suit alleged that

Mr. Koechley had been prescribed opioids from each “Manufacturer Defendant,” including Mallinckrodt. D421 p. 58 (¶ 240).

As shown above and set forth in more detail below, the Trust is simply wrong in representing to this Court that the claims above do not “arise out of” opioids manufactured or sold by Mallinckrodt. Br. p. 15.

**3. The Trust’s Five NAS Injury Exemplars Alleged Liability Flowing From Sales of and Representations About Mallinckrodt Products.**

The seventh exemplar chosen by the Trust was *Riling v. Purdue Pharma, et al.*, filed in 2019 (after Respondents’ policy periods). D411 p. 29 (¶ 30). The *Riling* suit alleged that A.P. Riling, as a newborn, was diagnosed with NAS, a condition suffered by babies whose mothers were addicted to opioids during pregnancy. D411 p. 29 (¶ 31). The *Riling* complaint alleged the mother had taken pills manufactured by Mallinckrodt. D411 p. 29 (¶ 33.a). The suit further alleged that Mallinckrodt’s opioid product was the “pill of choice” for drug abusers, and that Mallinckrodt used “veiled advertising” to spread misrepresentations about opioids. D422 pp. 8-9 (¶ 31).

The Trust’s last four exemplar suits<sup>9</sup> were also NAS suits. Like *Riling*, each of these suits alleged that the mother had consumed opioids manufactured and distributed by Mallinckrodt. D411 p. 31 (¶ 38.b), p. 35 (¶ 42.b), p. 39 (¶ 46.b), pp. 43-44 (¶ 50.b). Those suits further alleged that Mallinckrodt “negligently marketed opioids...through unbranded

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<sup>9</sup> These suits included *Brumbarger* (D411 p. 30 (¶ 35)), *Paul* (D411 p. 34 (¶ 39)), *Berzinski* (D411 p. 38 (¶ 43)), and *Alsup* (D411 p. 43 (¶ 47)).

advertising that promoted opioid use generally, yet [was] silent as to a specific opioid[,]”and that Mallinckrodt “profited from [such] misrepresentations[.]” D423 p. 26 (¶ 92), pp. 40-41 (¶ 132), D424 p. 26 (¶ 92), pp. 40-41 (¶ 132), D425 p. 26 (¶ 93), pp. 40-41 (¶ 133), D426 p. 22 (¶ 75), pp. 34-35 (¶ 111).<sup>10</sup>

**D. At No Point Did the Policyholder Itself Ever Assert that the Opioid Lawsuits Fell Outside the Scope of the PCOH Claims-Made Endorsement, as the Trust Now Argues.**

When Mallinckrodt was first sued in 2017, it sought coverage under policies in effect *for that policy year*, which—like Respondents’ policies—provided claims-made-and-reported coverage for claims within the PCOH Claims-Made Endorsement. D504 pp. 26-28 (¶¶ 51-54). Tellingly, Mallinckrodt did not report any opioid claims to Respondents under the 2008-2011 policies at issue. D504 p. 26 (¶ 48). In fact, at no time prior to filing for bankruptcy or during the bankruptcy proceedings did Mallinckrodt ever claim that the 3,000 Opioid Lawsuits that it faced fell outside the scope of the PCOH Claims-Made Endorsement and therefore could trigger policies prior to 2017 when the first claim was made. D462 p. 3 (¶ 3).

Mallinckrodt ultimately filed for bankruptcy in October 2020, asking the court to resolve its liability for the thousands of Opioid Lawsuits that it asserted “concern[ed] the production and sale of its opioid products.” D504 p. 29 (¶ 60). After the Trust was established by the bankruptcy court, the Trust filed this action, arguing for the first time—

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<sup>10</sup> The Trust represented to the Circuit Court that these NAS exemplar suits “mirror” each other in their allegations. D410 p. 20.

and contrary to Mallinckrodt’s prior position and statements—that some part of Mallinckrodt’s liability for the Opioid Lawsuits arose from something other than Mallinckrodt’s efforts to sell or market its own products. D504, p. 29 (¶ 62), p. 30 (¶ 66), p. 32 (¶¶ 69-70).

**II. ARGUMENT & RESPONSE TO THE TRUST’S SOLE POINT RELIED ON: THE EXEMPLAR OPIOID SUITS FALL WITHIN THE SCOPE OF THE PCOH CLAIMS-MADE ENDORSEMENT.**

In its sole point on appeal, the Trust asserts that the Circuit Court erred in granting summary judgment for Respondents because, in the Trust’s view, the PCOH Claims-Made Endorsement should only apply to claims that allege damages caused by the actual ingestion of a Mallinckrodt product. *See Br.* pp. 33-35. The Trust argues that its 11 chosen exemplars alleged liability against Mallinckrodt for its “unbranded marketing” of opioids generally. Therefore, according to the Trust, because some of the alleged injuries were not directly tied to the ingestion of a specific Mallinckrodt product, the liability alleged is outside the scope of the PCOH Claims-Made Endorsement and need not satisfy the claims-made-and-reported requirements of Respondents’ policies.

The Trust’s position is wrong for several reasons. First—even setting aside the allegations in many of the exemplars listing Mallinckrodt products by name and averring that the underlying plaintiffs consumed those products—the 11 exemplars each allege that Mallinckrodt’s liability is rooted in misrepresentations made as part of a specific plan to sell its own opioid products, including active pharmaceutical ingredients. The Trust is therefore wrong in arguing that any of the liability sought against Mallinckrodt did not “arise out of” Mallinckrodt’s products and representations about those products.

The Trust is also wrong in arguing that the PCOH Claims-Made Endorsement is intended to only apply to claims involving specific Mallinckrodt products. The PCOH Claims-Made Endorsement unambiguously encompasses claims “arising out of” Mallinckrodt’s conduct related to generic or unbranded opioids and active pharmaceutical ingredients that may be used in the products of other opioid manufacturers.

Finally, and dispositively, the Trust is also wrong in arguing that the phrase “arising out of” in the PCOH Claims-Made Endorsement—and in the PCOH Exclusion addressed separately by the AIG Insurers—should be read to only encompass claims involving individuals who ingested a branded Mallinckrodt product. The phrase “arising out of” means that the PCOH Claims-Made Endorsement broadly applies to any harms or damages for which Mallinckrodt is alleged to be liable, so long as those harms are alleged to flow from Mallinckrodt’s conduct in how it chose to sell or market branded or generic opioids or opioid ingredients. These issues are discussed in more detail below.

**A. The “Arising Out Of” Language in the PCOH Claims-Made Endorsement Provides Coverage for Claims “Flowing From” Mallinckrodt’s Efforts to Sell or Make Representations About Opioid Products and Is Not Limited to Ingestion of a Mallinckrodt-Branded Product.**

The Trust argues that the phrase “arising out of” should be read in narrow isolation as only being “tethered to” the object “your product,” which, according to the Trust, means that the PCOH Claims-Made Endorsement only applies to claims caused by ingestion of a Mallinckrodt-branded product. Br. pp. 34-35.

First, black-letter Missouri law mandates that the phrase “arising out of ‘Your Product’” cannot be read so narrowly as to apply only to the ingestion of Mallinckrodt

opioids. Confoundingly, the Trust appears to recognize that under Missouri law the phrase “arising out of” is to be read “expansively” and does not equate to direct or proximate causation. Br. p. 42 (citing *Schmidt, supra*). However, the Trust then proceeds to argue that this Court should rule that that phrase, as used in the PCOH Claims-Made Endorsement, means that the provision only applies to “liability based on the ingestion of Mallinckrodt opioids.” Br. p. 35.

This is exactly *not* what the phrase “arising out of” means. It means something “much broader than the words ‘caused by,’” and does not require “direct and proximate” causation, but instead refers to liability “growing out of” or “flowing from” Mallinckrodt’s opioid products, including its sale of opioids; rather than requiring an “unbroken chain of events,” it requires only a “simple causal relationship” between Mallinckrodt’s representations to sell its products and the liability alleged against it. *See Schmidt*, 182 S.W.2d at 183-84 (interpreting phrase “arising out of” to be “very broad, general and comprehensive,” “much broader than the words ‘caused by,’” and rejecting argument that it requires “direct and proximate” causation); *Richards*, 719 S.W.3d at 819 (recognizing that “‘arising out of’ as used in insurance contracts” means “‘originating from,’ ‘having its origins in,’ ‘growing out of, or ‘flowing from’”); *1405 Assocs., Inc.*, 340 F.3d at 550 (recognizing that “arising out of” requires only “simple causal relationship...between the accident or injury and the activity of the insured”); *Pinewoods* 29 F. Supp. 2d at 1083 (recognizing that “arising out of” means “an unbroken chain of events need not be established but rather a simple causal relationship must exist between the accident or injury and the activity of the insured”).

Next, the Trust’s limited view of the phrase “arising out of ‘Your Product’” cannot be reconciled with the fact that the term “pharmaceutical,” as used in the PCOH Claims-Made Endorsement, evidences a clear intent for the coverage to encompass claims involving end-products that are *not* those of Mallinckrodt. The endorsement defines the word “pharmaceutical” to include the act of selling or distributing “active pharmaceutical ingredients” used in bulk products, dosage products, generic pharmaceuticals, and pharmaceuticals manufactured under contract to others. D504 p. 25 (¶ 46). In defining “pharmaceutical” to specifically include ingredients sold in bulk, or used in generic opioids or the products of other companies, the PCOH Claims-Made Endorsement contemplates on its face that it will apply to injuries alleged to result from the ingestion of other companies’ finished-dosage opioids. Again, reading the policy as a whole,<sup>11</sup> the phrase “arising out of ‘Your Product’” must be interpreted to apply to claims alleging liability against Mallinckrodt that “grow out of” or “flow from” Mallinckrodt’s acts in how it chose to market and sell its products, even if such acts may have resulted in alleged liability for harm caused by ingestion of another company’s opioid product.

Additionally, the phrase “arising out of” is not only used in the PCOH Claims-Made Endorsement next to the grammatical object phrase “your product,” as the Trust suggests. Br. p. 28. As was presented to the Circuit Court at oral argument, the PCOH Claims-Made Endorsement also states that Mallinckrodt may be subject to the PCOH Claims-Made

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<sup>11</sup> Courts interpret the language of an insurance contract “in the context of the policy as a whole” and according to “its ordinary meaning unless another meaning is plainly intended.” See *Columbia Mut. Ins. Co. v. Schauf*, 967 S.W.2d 74, 77 (Mo. 1998).

Endorsement “with respect to *liability*, included within the [PCOH], arising out of its...pharmaceuticals.” D470 p. 46, D476 p. 20, D478 p. 5 (emphasis added). Once again, this makes clear that the type of *liability* within the PCOH Claims-Made Endorsement is that which “flows from” Mallinckrodt’s opioids and ingredients—including representations made to sell those products and failures to warn about the dangers of those products—even if the claimant’s alleged injury may have been more directly caused by the ingestion of the finished products or generic or bulk opioids of other companies, or illicit opioids like heroin.

This reading of the endorsement’s plain language is consistent with Mallinckrodt’s place in the pharmaceutical industry. It is undisputed that at all relevant times, Mallinckrodt was one of the nation’s largest sellers of opioid ingredients to other pharmaceutical manufacturers and active pharmaceutical ingredient distributors. D504 pp. 7-8 (¶ 18). Therefore, it would make no sense for Mallinckrodt to have obtained PCOH coverage only for liability “based on the ingestion of Mallinckrodt opioids or on warranties or representations about Mallinckrodt’s [specific] opioids” as the Trust now argues. Br. pp. 35-36. Reading the phrase “arising out of” in the context of the PCOH Claims-Made Endorsement and the policies as a whole, it is clear that the endorsement applies to claims that “grow out of” Mallinckrodt’s efforts to sell or market its products or generic pharmaceuticals, including opioid ingredients, and cannot be narrowly interpreted to apply only to claims alleging injury caused by the ingestion of a Mallinckrodt product.

**B. The PCOH Claims-Made Endorsement Is Not an Exclusion for Which the Trust Can Now Narrow the Coverage in a Way Never Sought by Mallinckrodt.**

The Trust presumes throughout its brief that “because the Endorsement restricts coverage, it operates like an exclusion.”<sup>12</sup> Br. p. 31. This, the Trust argues, means that the PCOH Claims-Made Endorsement must be interpreted narrowly and in favor of coverage. Br. pp. 33-38.

The problem with the Trust’s argument is most evidently that the PCOH Claims-Made Endorsement is not an exclusion, but rather provides coverage.<sup>13</sup> Contrary to the Trust’s argument, the PCOH Claims-Made Endorsement in the umbrella and excess layers provided Mallinckrodt coverage for claims “arising out of” its liability tied to selling and marketing opioids, which was a type of liability otherwise categorically excluded by the primary layer of insurance. The fact that the timing of the specific claims at issue happened not to satisfy the claims-made-and-reported prerequisite of the PCOH Claims-Made Endorsement does not mean that the provision was a restriction on coverage tantamount to an exclusion—it just means that the Trust must look to claims-made policies in later years

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<sup>12</sup> The sole case the Trust cites for this proposition, *In re Estate of Carroll*, 857 S.W.2d 848 (Mo. Ct. App. 1993), does not hold that an insuring agreement which limits coverage in a specific instance must be treated as an exclusion under the law.

<sup>13</sup> Where, as here, the policy provision is a *grant* of coverage instead of an *exclusion*, the burden is on the party seeking coverage to prove that coverage terms are satisfied. *See Rockhurst Univ. v. Factory Mut. Ins. Co.*, 582 F. Supp. 3d 633, 637 (W.D. Mo. 2022). As discussed herein throughout, the Trust cannot establish that the prerequisite to coverage is satisfied because none of the Opioid Lawsuits were filed or reported during the 2008-2011 periods.

corresponding to when the opioid lawsuits were filed if the Trust wants to pursue coverage.<sup>14</sup>

In fact, the exact argument raised by the Trust has been rejected by at least one court. In *Fibreboard Corp. v. Hartford Accident & Indem. Co.*, 20 Cal. Rptr. 2d 376 (Cal. Ct. App. 1993), the court examined whether the policyholder’s alleged participation in “collective marketing” of generic products along with other defendants was conduct that fell within the “products hazard” of the policies, which had been previously exhausted. In trying to bring the claims outside of the “products hazard” coverage grant, the policyholder argued that the “products hazard” insuring provision applied in the nature of an exclusion to limit coverage and thus must be construed narrowly against the insurers. *Id.* at 382. The court rejected that approach, as should the Court here, and concluded that the “products hazard” is “one of the classifications to which the liability limits for coverage for bodily injury and property damage apply” and would therefore be treated as a term of coverage, not an exclusion. *Id.*

**C. Each of the Trust’s 11 Selected Exemplar Opioid Lawsuits Satisfies the Test for the PCOH Claims-Made Endorsement, But Was Undisputedly Not a Claim Made or Reported During the 2008-2011 Policy Periods.**

The Trust has represented to this Court that there is no “*causal relationship at all*” between Mallinckrodt’s products and the purported “unbranded marketing” liability

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<sup>14</sup> That said, the insurers believe that there are other reasons that the Opioid Lawsuits are not covered by those policies, including that the harms Mallinckrodt allegedly caused were the result of an alleged scheme to mislead the public, not an accident.

alleged in the exemplar suits.<sup>15</sup> Br. p. 44 (emphasis added). The Trust also wrongly claims that it is not seeking insurance for claims “arising out of” representations about Mallinckrodt products. Br. p. 33. Mallinckrodt seeks to shut the eyes of the law so very tightly as to be blinded to the reality that—even as to those “unbranded marketing” claims—every one of the exemplar suits alleges that Mallinckrodt’s liability for societal harms entirely “flows from,” “grows out of,” and therefore “arises out of” Mallinckrodt’s conduct in how it chose to sell and market its opioids.

**The State of Mississippi** alleged that Mallinckrodt’s *unbranded marketing* was a *strategy to increase sales of branded drugs*, that Mallinckrodt engaged in representations about opioids without any scientific basis, and misrepresented the risks of abuse, and that “Mallinckrodt expanded its branded opioid portfolio while also maintaining its role as the leading manufacturer of generic opioids.” D416 pp. 56-57 (¶ 124), p. 61 (¶¶ 135-36), pp. 94-95 (¶ 226), p. 225 (¶ 580). Of course this suit alleged harm and liability flowing from Mallinckrodt’s sales of and representations about its opioids.

**The State of Florida** alleged that Mallinckrodt “succeeded in recording multibillion-dollar profits, as a result of using unfair and misleading marketing to sell, ship and dispense opioids in quantities that were not medically justified[,]” and that Mallinckrodt “spread misinformation about opioids...*to convince doctors to prescribe and consumers to purchase and consume branded and generic opioid products.*” D419 p. 7 (¶

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<sup>15</sup> This assertion flies in the face of Mallinckrodt’s own representations to the bankruptcy court that the 3,034 then-existing Opioid Lawsuits “*concern[ed] the production and sale of its opioid products.*” D504 p. 29 (¶ 60) (emphasis added).

1), p. 51 (¶ 184) (emphasis added). Of course this suit alleged harm and liability flowing from Mallinckrodt's sales of and representations about its opioids.

**The State of Georgia** alleged that Mallinckrodt “generated billions of dollars in drug sales through [its] deceptive and illegal marketing of opioids[,]” and that “[t]he goal of [Mallinckrodt] was to...grow [its] share of the prescription painkiller market by unlawfully and surreptitiously increasing the volume of opioids [it] sold.” D418 pp. 3-4 (¶ 3), p. 72 (¶ 202) (emphasis added). Of course this suit alleged harm and liability flowing from Mallinckrodt's sales of and representations about its opioids.

**St. Charles County (Missouri)** alleged that “Mallinckrodt promoted its branded opioids Exalgo and Xartemis XR, and opioids generally in a campaign that consistently mischaracterized the risk of addiction and did so through unbranded marketing[,]” that Mallinckrodt increased the demand for opioids to “increase profit, and grow [its] share of the prescription painkiller market by unlawfully and surreptitiously increasing the volume of opioids [it] sold,” and that its “deceptive marketing caused [the] prescribing not only of [its] opioids, but of opioids as a class, to skyrocket.” See D417 p. 60 (¶ 179), p. 93 (¶ 287), p. 143 (¶ 437), p. 144 (¶ 439) (emphasis added). Of course this suit alleged harm and liability flowing from Mallinckrodt's sales of and representations about its opioids.

These allegations unambiguously satisfy the requisite “simple causal relationship” between Mallinckrodt's opioid products (including active pharmaceutical ingredients), its representations about such products (including its unbranded marketing campaign promoting opioids generally), and the liability alleged in the underlying governmental

opioid suits, regardless of whether the plaintiffs' alleged injuries were caused by the ingestion of a Mallinckrodt opioid or another opioid.

The Trust's individual personal injury exemplars also fall within the scope of the PCOH Claims-Made Endorsement but were undisputedly not filed during the policy period.

**In *Brockel***, the plaintiff alleged that "Mallinckrodt manufactures, promotes, markets and sells...Sulfate ER, Oxycodone, Hydrochloride, Roxicodone and Methadone HCL[.]" that "[t]hese drugs were prescribed to [the plaintiff][.]" and that Mallinckrodt, as a "Brand-Name Manufacturer Defendant," "made representations...and used marketing strategies to evade consumer protection laws" and thus sell more of its own products. *See* D420 pp. 9-10 (¶ 17), p. 14 (¶ 26), p. 84 (¶ 274). Mallinckrodt's alleged liability plainly "arose out of" Mallinckrodt's products, and representations about its products, and brings the *Brockel* suit within the PCOH Claims-Made Endorsement.

**In *Koechley*** (involving a fentanyl overdose), the plaintiff alleged that "Mallinckrodt manufactures, markets, and sells drugs in the United States including generic oxycodone, of which it is one of the largest manufacturers[.]" that Mallinckrodt "spread [its] false and negligent statements by marketing [its] branded opioids directly to doctors and patients in Ohio[.]" that Mallinckrodt used "veiled advertising by seemingly independent third parties to spread misrepresentations about the risks and benefits of long-term opioid use," and that the plaintiff was prescribed opioids manufactured by Mallinckrodt and its co-defendants that led to opioid addiction and the fentanyl overdose. D421 p. 13 (¶ 43), p. 18 (¶¶ 71-72), p. 58 (¶¶ 240, 245, 248). Mallinckrodt's alleged liability plainly "arose out of"

Mallinckrodt's products, and representations about its products, and brings the *Koechley* suit within the PCOH Claims-Made Endorsement.

**In *Riling***, the plaintiff alleged that the plaintiff's mother consumed products manufactured by Mallinckrodt, that Mallinckrodt's product was the "pill of choice" for drug abusers and the "clear market leader" among those companies selling generic oxycodone, and that to exploit the market, Mallinckrodt used both direct and "veiled advertising" to make misrepresentations about opioids. D422 pp. 3-4 (¶ 5), pp. 9-11 (¶ 31), pp. 13-14 (¶ 44). Mallinckrodt's alleged liability plainly "arose out of" Mallinckrodt's products, and representations about its products, and brings the *Riling* suit within the PCOH Claims-Made Endorsement.

**In *Brumbarger, Paul, Bezinski, and Alsup***—the NAS claims framed as "mirror" suits by the Trust (D410 p. 20)—the plaintiffs alleged that Mallinckrodt "negligently marketed opioids in [Indiana, South Carolina, Wisconsin, and Alabama, respectively] through unbranded advertising that promoted opioid use generally, yet [was] silent as to a specific opioid[,]" that "[t]his advertising was ostensibly created and disseminated by independent third parties, but funded, directed, coordinated, edited, and distributed, in part or whole, by [Mallinckrodt and its co-defendants] and their public relations firms and agents[,]" and that Mallinckrodt and its co-defendants "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." D423 p. 26 (¶ 92), pp. 40-41 (¶ 132), D424 p. 26 (¶ 92), pp. 40-41 (¶ 132), D425 p. 26 (¶ 93), pp. 40-41 (¶ 133), D426 p. 22 (¶ 75), pp. 34-35 (¶ 111). Mallinckrodt's alleged liability plainly "arose

out of” Mallinckrodt’s products, and representations about its products, and brings the *Brumbarger, Paul, Bezinski, and Alsup* suits within the PCOH Claims-Made Endorsement.

As the Circuit Court recognized, the above allegations are more than enough to bring the entirety of the Trust’s 11 exemplar lawsuits within the scope of the PCOH Claims-Made Endorsement under Missouri’s broad interpretation of the phrase “arising out of” and the policies’ broad definitions of “Your Product” and “pharmaceuticals.” Therefore, because the claims alleging liability for how Mallinckrodt sold and marketed opioids were not made or reported during the 2008-2011 policy periods, the claims are not covered by Respondents’ excess policies.

**D. Mallinckrodt’s “Unbranded Marketing” of Opioids as a Class of Product Logically Encompasses its Own Opioid Products, Including Active Pharmaceutical Ingredients, Even Though Not Mentioned by Name.**

The Trust acknowledges that the exemplar suits all alleged that Mallinckrodt tried to increase its opioid sales by intentionally marketing to avoid references to specific products, and to purposely steer clear of any mention of a Mallinckrodt product. Br. p. 40. The exemplar suits allege that Mallinckrodt did this to avoid the federal oversight that accompanies pharmaceutical marketing by brand name. D416 pp. 56-57 (¶ 124), D420 p. 84 (¶ 274). Because Mallinckrodt intentionally schemed to increase its own opioid sales, in part by marketing without the mention of a named opioid brand, the Trust argues that Mallinckrodt’s liability for its duplicity somehow does not “arise out of” Mallinckrodt’s products or representations about its products. The Trust’s tortured logic is that Mallinckrodt’s intentional masking of its product marketing means there was in fact *no*

*Mallinckrodt product marketing taking place at all.* The Trust is wrong. The fact that “unbranded marketing” is a purposely surreptitious type of marketing to avoid government oversight does not make the marketing any less related to Mallinckrodt products.

Furthermore, the fact that Mallinckrodt’s “unbranded marketing” campaign did not reference Mallinckrodt’s opioid products by name is entirely irrelevant because, as the Circuit Court recognized, any representation regarding the safety of opioids *as a whole* necessarily encompassed the *subset* of products manufactured by Mallinckrodt, thus again unambiguously falling within the scope of the PCOH Claims-Made Endorsement. D541 p. 3 (¶¶ 2-3).

As explained to the Circuit Court and discussed further above, the 11 exemplar suits allege that Mallinckrodt made representations to the consuming public that opioids as a class of product are safe and effective for long-term use. January 31, 2025 Motion Hearing Transcript (“Tr.”) p. 77:15-22. It is undisputed that Mallinckrodt manufactured and sold both finished-dosage opioids like Exalgo and the active pharmaceutical ingredients that go into that type of product. D504 p. 3 (¶ 3). p. 6 (¶ 15). Therefore, the representation that opioids as a class of product are safe and effective necessarily constitutes a “representation” encompassing the subset of opioid “products” that Mallinckrodt manufactured, per the language of the PCOH Claims-Made Endorsement. This is all that is required to bring harms allegedly resulting from “unbranded marketing” within the scope of the PCOH.

**E. Courts Around the Country Have Agreed That Opioid Claims Alleging “Unbranded Marketing” Fall Within the Scope of the PCOH.**

Finally, as also discussed in the AIG Insurers’ brief, this is not the first time that a court has addressed the issues now before this Court. The Trust’s brief entirely ignores the on-point authorities briefed and argued in the Circuit Court, which demonstrate that every court to have been faced with “unbranded marketing” allegations against opioid policyholders has found such allegations to fall within the PCOH.

In *Actavis*, a California court addressed the same question here: whether purported “unbranded marketing” claims against an opioid manufacturer (and co-defendant of Mallinckrodt in the Opioid Lawsuits) fell within the scope of the PCOH. The court agreed that “[a]ll of the harm that is asserted in the lawsuits—narcotics addiction, the public nuisance in the California action and the public health costs, etc. highlighted in the [*City of Chicago* case]—stem from [the insured’s] products and what [the insured] said and did not say about the products.” *The Travelers Prop. Cas. Co. of Am. v. Actavis, Inc.*, 225 Cal. Rptr. 3d 5, 21-22 (Cal. Ct. App. 2017). In so holding, the court rejected the same argument advanced by the Trust here and found that even allegations of illegal heroin use “arose out of” the insured’s opioid products, although of course heroin was not one of the insured’s products. *See id.* at 22-23. As the court recognized, 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.”

*Id.* This well-reasoned analysis applies with equal force here, as materially identical “unbranded marketing” allegations are at issue. *See, e.g.*, D504 p. 10 (¶ 24).

In *Zogenix*, a federal district court reached the same conclusion with respect to another opioid manufacturer’s “unbranded marketing.” *See Zogenix, Inc. v. Federal Insurance Co.*, No. 4:20-cv-06578, 2022 WL 3908529 (N.D. Cal. May 26, 2022). There, the court found that the PCOH was implicated, despite allegations of “unbranded marketing,” such as in the *County of Walker* complaint, which alleged: “In addition to their direct marketing efforts, Manufacturing Defendants used third-party marketing of opioid drugs in general (‘unbranded marketing’), which they deployed as part of their national marketing strategies for their drugs.” *Id.* at 9; D535 p. 49 (¶ 141).

In *Anda*, the Eleventh Circuit held that governmental opioid claims against an opioid manufacturer involving “unbranded marketing” fell within the PCOH, explaining that “[t]he State[’s] 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 phrase “arising out of.” *Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, 658 F. App’x 955, 958-59 (11th Cir. 2016) (California law); *cf. Sentyln Therapeutics, Inc. v. U.S. Specialty Ins. Co.*, No. 21-55370, 2022 WL 706941, at \*1-2 (9th Cir. Mar. 9, 2022) (California law) (holding that a PCOH exclusion applied to subpoenas served on opioid company in connection with “investigation of potential violations of federal law by anyone illegally profiting from opioids,” reasoning that phrase “arising out of” is broad, government investigation was

targeted at entities profiting from sales of opioids, and PCOH “embrace[d] claims about what a seller said and did not say about the products”).

Other courts have employed similar reasoning in analogous circumstances outside the opioid context, recognizing that an injury may “arise out of” an insured’s products, or representations about such products, where the insured’s alleged liability is rooted in its participation in the oversupply of a dangerous product to the consuming public. *See, e.g., Brazas Sporting Arms, Inc. v. Am. Empire Surplus Lines, Inc.*, 220 F. 3d 1 (1st Cir. 2000) (Massachusetts law) (holding that claims against gun manufacturer for flooding market with more guns than could legitimately be purchased fell within scope of PCOH, despite allegations that injuries were caused by insured’s “conduct” and not its “products”); *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) (Florida law) (holding that a PCOH exclusion encompassed claims against insured and other gun manufacturers alleging damages due to gun violence, which court recognized “all originated from [the insured’s] products”).

The fact that Mallinckrodt’s “unbranded marketing” of opioids as a class of product generally may have caused certain individuals to abuse other companies’ opioid products or illicit opioids does not negate the “simple causal relationship” that exists between Mallinckrodt’s liability and its conduct in marketing and making representations to sell its products. In *Fibreboard, supra*, Fibreboard was one of many asbestos product manufacturers having been sued in hundreds of suits, many of which alleged civil conspiracy and market share liability. 20 Cal. Rptr. 2d at 378-79. In the subsequent

coverage dispute, Fibreboard argued that the underlying claims did not fall within the scope of the PCOH because Fibreboard was effectively facing collective liability for harm proximately caused by the products of other companies. *See id.* at 380, 382. In rejecting this argument, the court recognized that (like here) the phrase “arising out of” must be interpreted broadly, ultimately holding that the claims satisfied the requisite causal connection to Fibreboard’s products—even where injuries were proximately caused by another company’s product—because the “gravamen” of the liability was that Fibreboard’s manufacture of its asbestos-containing products resulted in harm. *See id.* at 383-86.<sup>16</sup>

Here, the “simple causal relationship” between Mallinckrodt’s “unbranded marketing” liability and the sales of its own products is even more pronounced than in *Fibreboard*. As made clear by the exemplar allegations detailed above, Mallinckrodt’s alleged liability was rooted in a sales strategy tied to its position as a market leader in the sale of both finished opioid products and active pharmaceutical ingredients, which were, by definition, included within the PCOH Claims-Made Endorsement. The Trust even expressly represented to the Mallinckrodt bankruptcy court that Mallinckrodt and its parent Covidien were “incentivized” to engage in “unbranded advertising” and thus “increase the

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<sup>16</sup> *See also Liggett Grp., Inc. v. Ace Prop. & Cas. Ins. Co.*, 798 A.2d 1024, 1033 (Del. 2002) (North Carolina law) (PCOH exclusion precluded coverage for second-hand smoke claims against insured tobacco company, notwithstanding that alleged injuries also resulted from other tobacco companies’ products); *Eon Labs Mfg., Inc. v. Reliance Ins. Co.*, 756 A.2d 889, 893-94 (Del. 2000) (New York and Illinois law) (rejecting argument that PCOH exclusion did not apply where injuries were caused by combination of both insured’s and other defendants’ drugs, reasoning that the “argument distorts the essential fact that...it is the involvement or presence of [the insured’s] [drug] (including misrepresentations and failure to warn, etc.) that is the basis of the [underlying] suits”).

overall opioid market” specifically “because that would *increase [their] [active pharmaceutical ingredient] sales to other opioid manufacturers.*” D504 p. 8 (¶ 19) (emphasis added).<sup>17</sup>

In sum, the Circuit Court was correct in holding that the Trust cannot circumvent the PCOH Claims-Made Endorsement’s claims-made prerequisite by retroactively recharacterizing “unbranded marketing” allegations in the underlying opioid claims as a source of liability with no “causal relationship at all” to Mallinckrodt’s products and representations about those products. Br. p. 44.

### **III. CONCLUSION**

Mallinckrodt was not named in the 11 exemplars as a radio station, or a newspaper, or for its role as an education provider. Mallinckrodt was specifically named for its role as the nation’s largest seller of opioids and opioid ingredients. That is why the issue is before this Court. The 11 exemplars named many of the opioids that Mallinckrodt was trying to sell, and detailed numerous misrepresentations and omitted warnings in the manner Mallinckrodt tried to sell its opioids—one such manner being “unbranded marketing.” The harms for which Mallinckrodt was allegedly liable all “arise out of” or “grow out of” or “flow from” Mallinckrodt’s conduct to sell branded and generic pharmaceuticals, as well as opioid ingredients, all of which is liability that falls squarely within the PCOH Claims-Made Endorsement. Because neither the 11 exemplars nor any other Opioid Lawsuits were

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<sup>17</sup> See *Moore Auto. Grp., Inc. v. Goffstein*, 301 S.W.3d 49, 54 (Mo. 2009) (recognizing that judicial admissions from another case may be considered as “ordinary admissions against interest” in separate proceedings, even where parties are not identical).

first made against Mallinckrodt and reported to the insurers prior to 2017, the Circuit Court properly ruled that Respondents' 2008-2011 excess policies do not insure the Opioid Lawsuits.

For the foregoing reasons, this Court should affirm the Circuit Court's order granting summary judgment in favor of Respondents.

Date: January 21, 2026

Respectfully submitted,

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## **CERTIFICATE OF SERVICE & COMPLIANCE**

I hereby certify that: (1) pursuant to Missouri Supreme Court Rule 103.08, a copy of the foregoing was served by the Court's electronic filing system on this 21<sup>st</sup> day of January, 2026, on all counsel of record; (2) pursuant to Missouri Supreme Court Rule 55.03(a), I have signed the original copy of this Certificate and the foregoing pleading; (3) the information required by Rule 55.03(a) is included; (4) this brief complies with the formatting, typeface, and word-limit requirements contained in Missouri Supreme Court Rule 84.06(b) and Local Rule 360 in that Respondents' brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO (version 2502) in 13-point font, Times New Roman, and based upon a word count under Microsoft Word for Microsoft 365 MSO (version 2502) contains 9,292 words excluding the cover, tables of content and authorities, certificate of service and compliance, and signature block.

*/s/ Adam H. Fleischer*

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