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,	Case No. 22SL-CC02974
v.	Division 2
ACE AMERICAN INSURANCE COMPANY, ET AL.,	
Defendants.	

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. REGARDING THE SCOPE OF THE PRODUCTS HAZARD (AKA "YOUR PRODUCTS") EXCLUSION AND OPPOSITION TO NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.'S AND AMERICAN HOME ASSURANCE COMPANY'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiff the Opioid Master Disbursement Trust II (the "Trust") respectfully submits this Reply in Support of its Motion for Partial Summary Judgment Against National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") Regarding the Scope of the Products Hazard (aka the "Your Products") Exclusion ("Reply") in certain National Union insurance policies. The Trust was established pursuant to Mallinckrodt's[1] first plan of reorganization to pursue Mallinckrodt's insurance coverage as a fiduciary for the benefit of those harmed by Mallinckrodt's central role in creating and fueling the nationwide opioid crisis, including personal injury victims, states, counties, municipalities, tribal governments, hospitals, and third-party payors, such as treatment centers. This Reply also serves as the Trust's Opposition to National Union's and American Home Assurance Company's ("American Home") (collectively "AIG") Cross-Motion for Summary Judgment ("AIG's Cross-Motion") on the same issue.

INTRODUCTION

The Trust seeks insurance coverage on behalf of countless victims of the nationwide opioid epidemic. The Trust's Motion seeks a ruling on a straightforward, purely legal issue: that the products hazard exclusion in thirteen policies issued by National Union, which expressly applies only to liability because of bodily injury arising out of "your [Mallinckrodt's] products," does not bar coverage for Mallinckrodt's liabilities because of bodily injury arising out of other pharmaceutical manufacturers' opioids and/or illicit opioids like heroin or illegal fentanyl (collectively "non-Mallinckrodt products"). In opposition, AIG raises three primary arguments, each of which is without merit and should be rejected.

[1] Capitalized terms in this Reply shall have the same meaning as in the Trust's Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment Against National Union Fire Insurance Company of Pittsburgh, Pa. Regarding the Scope of the Products Hazard (aka "Your Products") Exclusion (the "Trust's Opening Brief" or "Opening Brief").

First, AIG contends that such a ruling would be an "advisory opinion" until the Trust proves its right to coverage under the AIG policies and the Court determines whether Mallinckrodt had liability arising from non-Mallinckrodt products, licit or illicit. But Missouri courts regularly address exclusions on summary judgment before an insured proves its right to coverage, and Missouri rules encourage partial summary judgment on purely legal issues before facts are fully litigated or resolved. Insurers, doubtless including AIG, pursue summary judgment in these circumstances all the time. Summary judgment at this juncture is especially appropriate as it would promote efficiency, streamline discovery, and encourage settlement, conserving not only judicial resources, but also limited Trust assets that are needed to compensate the various individuals and entities harmed by the opioid crisis, and to pay for opioid abatement programs to address and reduce the impact of addiction and opioid use disorder in communities across the country.

Second, AIG argues that the products hazard exclusion bars coverage for all of Mallinckrodt's opioid-related liability because there would be no liability "but for" its business manufacturing and selling opioid products. But this reading contradicts the plain language of the policies, which expressly bars coverage only for bodily injury arising solely out of "your [Mallinckrodt's] products." Here, the liability facing Mallinckrodt was for opioid-related bodily injury arising not only out of its own opioid products, but also out of non-Mallinckrodt products. As discussed in detail in the Trust's opening brief, Opening Br., at 5–13, Mallinckrodt's liability for bodily injury due to non-Mallinckrodt products resulted from its central role in creating and fueling the nationwide opioid crisis through an unbranded promotional campaign that was not about Mallinckrodt products in particular, but rather promoted opioids as a class of drug. The campaign did not mention Mallinckrodt or any Mallinckrodt products. It was designed to, and did, change the medical consensus regarding the dangers and proper uses of opioids, leading in

particular to massive overprescribing of all brands of opioids, including non-Mallinckrodt opioids, for long-term chronic pain, a concomitant explosion in addiction, and a dramatic increase in the use of illicit opioids.[2]

An ordinary person of average understanding—the touchstone of insurance policy interpretation—would view bodily injury resulting from the use of, say, a Purdue opioid drug as "arising out of" that drug, not a Mallinckrodt product. A person whose son or daughter died of a heroin overdose would say that they died of heroin, not a Mallinckrodt product. The fact that they might seek to hold Mallinckrodt liable for these deaths because of the unbranded promotional campaign does not change these facts. These bodily injuries, and the myriad others like them for which Mallinckrodt was liable and the Trust is seeking coverage here, are not "included within" the products ("your product") hazard of the AIG policies. As demonstrated in the Trust's opening brief, Opening Br., at 21–23, and not meaningfully contested by AIG, bodily injury that is "included within" the products hazard exclusion means bodily injury that is entirely inside the exclusion; that is, that arises solely from a Mallinckrodt product. To the extent that Mallinckrodt was liable because of bodily injury at least in part outside the products hazard exclusion—that is, bodily injury arising from non-Mallinckrodt products—the products hazard exclusion does not bar coverage.

And even if bodily injury were deemed partly attributable to a Mallinckrodt product based on AIG's theory, to the extent the injury was caused by use of a non-Mallinckrodt product, it would be at least partly outside the products hazard, and coverage would not be barred. Indeed, the

[2] *See, e.g.,* St. Charles Compl. Ex. C ¶ 385 ("[Mallinckrodt and other defendants] 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 . . . . Through unbranded materials, [Mallinckrodt and other defendants] expanded the overall acceptance of and demand for chronic opioid therapy . . . .").

immediate cause of the bodily injury would be the non-Mallinckrodt product; the Mallinckrodt product in AIG's theory would be at most a remote cause. Under black-letter law in Missouri—where the default is to coverage—bodily injury with multiple causes is covered as long as at least one of the causes is outside the exclusion. The only legal exception would be if the exclusion stated expressly that it applies if any cause of the injury is within the exclusion in whole or in part, or words to that effect. It is undisputed that the exclusion here does not state such terms. Non-Mallinckrodt products are not within the exclusion, which refers solely to "your [Mallinckrodt's] products."

Moreover, AIG's reading of the products hazard exclusion is so broad that it would render coverage under the policy illusory, because any liability of a product manufacturer like Mallinckrodt would not exist "but for" its business manufacturing and selling products. AIG has not identified a single Missouri case that has adopted such a breathtakingly expansive reading of an exclusion. Doing so would contravene fundamental tenets of policy interpretation in Missouri, under which exclusions must be read narrowly and policies must be interpreted, if reasonably possible, to provide coverage. An ordinary person of average understanding certainly would be surprised to learn that an exclusion for "your product" wiped out coverage for everything relating to a company's manufacturing and sales business. AIG's theory is not supported by either the plain language of the products hazard exclusion or Missouri case law. At the very least, the Trust's construction of the products hazard exclusion is reasonable, and as such it must be adopted here, even if AIG's interpretation also were viewed as reasonable.

Third, AIG contends that the "your work" portion of the products hazard exclusion bars coverage because the unbranded promotional campaign was Mallinckrodt's "work." This is wrong. AIG knows that the "your work" prong of the products hazard exclusion applies to projects

or services an insured provides to its customers, not the running of its own company. Not only does the plain language of the "your work" clause make this clear—for example, it refers to "job sites" and "[m]aterials, parts or equipment furnished in connection" with services provided to customers—but AIG's proposed reading also is untenable because it would eliminate coverage for anything the insured ever did, on the basis that all of its actions are its "work." A reading of the products hazard that would secretly abrogate coverage in this way is beyond the pale, and is contrary to Missouri case law. AIG would not sell many, or perhaps any, policies if it advertised that this is how they operate.

In its Cross-Motion, AIG asserts these same flawed arguments as to the same National Union policies and one additional American Home policy containing a similar exclusion, and also seeks summary judgment with respect to eight additional AIG policies that contain a so-called Products-Completed Operations Hazard Claims-Made Retained Limit Endorsement ("Products Hazard Claims-Made Endorsement"). This endorsement *provides* coverage for bodily injury arising out of Mallinckrodt products, but only for claims made against Mallinckrodt during the policy period. AIG contends that because no opioid claims were made against Mallinckrodt during these policy periods, there is no coverage for opioid claims under these policies, and thus the Products Hazard Claims-Made Endorsement functions as a products hazard exclusion (and it will be referred to as such herein). But AIG's argument misses the mark. The claims-made limitation only applies to claims involving bodily injury "included within" the products hazard. To the extent bodily injury arises out of non-Mallinckrodt products, it is not within the products hazard and coverage is not barred, for all of the reasons given above regarding the limited scope of the products hazard.

For the reasons set forth herein and in the Trust's Opening Brief, the Court should grant the Trust's Motion, deny AIG's Cross-Motion, and rule that to the extent Mallinckrodt's liability was because of bodily injury arising at least in part from non-Mallinckrodt products, it is not within the products hazard exclusions in the 22 policies discussed above and is not barred from coverage.[3] As noted, this is a purely legal question. The actual extent of liability that meets this description is not before the Court and is an issue for another day.

ARGUMENT

I. THE TRUST'S MOTION DOES NOT SEEK AN "ADVISORY OPINION."

AIG contends that the Trust's Motion should be denied because it seeks an "advisory opinion." AIG Responsive Br., at 2. Specifically, AIG argues that the Trust's Motion is premature until the Trust affirmatively establishes its right to coverage under the AIG policies and this Court resolves the factual issue of whether Mallinckrodt had liability for non-Mallinckrodt products. AIG's argument is flatly contrary to Missouri rules and precedent.

An "advisory opinion" is "[a] statement that clarifies the legal rule on a specific matter, provided by a court, administrative agency, or attorney general, without addressing a dispute between parties." *Advisory Opinion*, Justia Legal Dictionary, https://dictionary.justia.com/advisory-opinion (last visited Sept. 17, 2024); *see also State v. Graves*, 619 S.W. 3d 570, 577 (Mo. App. E.D. 2021) (advisory opinions are "those which are based on hypothetical situations and are not necessary for the resolution of the case before the court"). Here, the Trust's Motion raises a live dispute that is crucial to the resolution of the present

[3] AIG's Opposition and Cross-Motion ("AIG Responsive Br.") raise a number of issues that are not before the Court for resolution at this time and are not germane to either the Trust's Motion or AIG's Cross-Motion, such as whether the bodily injury underlying Mallinckrodt's liability arose from an "accident." The Trust will not burden the Court by addressing those issues now, but it reserves its right to do so at the appropriate time, if necessary.

litigation, as underscored by the fact that AIG (and other insurers) have moved for summary judgment on the very same issue.

AIG's position is untenable. If courts could not grant summary judgment on purely legal disputes any time resolution of some other issue might render that legal issue moot, that would preclude any litigant from ever moving for partial summary judgment. Common sense dictates that this cannot be correct. And indeed, such motions are commonplace and approved by the Missouri rules. *See* Mo. Sup. Ct. R. 74.04(a). AIG's approach would also create a chicken-and-egg situation where legal issues could not be resolved until all related factual issues were resolved, but those factual issues could not be resolved until all related legal issues were resolved.

Consistent with Rule 74 and contrary to AIG's argument, courts routinely rule on the applicability of exclusions at the summary judgment stage before coverage has been established, often at the behest of insurers. *See, e.g.*, *Allen v. Cont'l W. Ins. Co.*, 436 S.W.3d 548, 555 (Mo. banc 2014) (granting summary judgment for insurer on the grounds that exclusion applied and expressly reaching that decision "regardless of whether [the relevant acts] constituted an 'accident' or whether the [relevant loss] could constitute 'property damage'" sufficient to satisfy coverage grant); *Manner v. Schiermeier*, 393 S.W.3d 58, 63 (Mo. banc 2013) (deciding summary judgment motion filed by insurer to determine meaning of exclusion); *Doe Run Res. Corp. v. Am. Guarantee & Liab. Ins.*, 531 S.W.3d 508, 510 (Mo. banc 2017) (granting summary judgment for insured on pollution exclusion even though nature of underlying liability was disputed); *Adams v. Certain Underwriters at Lloyd's of London*, 589 S.W.3d 15, 40 (Mo. App. E.D. 2019) (partially affirming summary judgment for insured on applicability of exclusion).

Adhering to this rule makes particular sense here. Deciding the legal issue of the products hazard exclusion's scope will streamline the litigation by letting the parties know what they must

prove, and promote settlement by resolving one of the major issues in the case. This will conserve party and judicial resources. While AIG has virtually unlimited resources, the Trust is concerned as a fiduciary about conserving its limited resources to compensate injured claimants and pay for opioid abatement. AIG should not be permitted to needlessly complicate and delay this case—at great expense—to avoid the legal question of what the products hazard exclusion applies to. AIG's contention that the factual issues must be resolved first is particularly inappropriate given its position that, no matter the facts, the products hazard exclusion must be deemed to apply to all of Mallinckrodt's liability.

The only case AIG cites to support its argument that coverage must be established before an exclusion can be raised on summary judgment is inapposite. In *Hawkeye-Security Ins. Co. v. Davis*, the court refused to determine the meaning of the exclusion that the insured argued created an ambiguity and explained that such a decision would be advisory because, under Missouri law, an exclusion cannot create an ambiguity that expands the coverage grant. 6 S.W.3d 419, 427 (Mo. App. S.D. 1999). Contrary to AIG's contention, the Missouri court did not refuse to interpret the exclusion because it was premature to do so before coverage was established; it refused to do so because the meaning of the exclusion would have no bearing on the summary judgment motion pending before the court that focused on the scope of the coverage grant. In stark contrast to *Hawkeye-Security*, the meaning of the products hazard will help determine the parties' rights under the policies and the scope of available coverage here. Accordingly, the issue is ripe and should be decided now.

The other cases that AIG cites to support its advisory opinion argument more broadly are similarly inapposite. In *Local Union 1287 v. Kansas City Area Transp. Authority*, the Missouri Supreme Court rejected a request to compel arbitration because plaintiff had not satisfied certain

conditions precedent to arbitration, and thus concluded that any ruling on the constitutionality of the arbitration provision would be an impermissible advisory opinion. 848 S.W.2d 462, 464 (Mo. banc 1993). This vindicates the general rule of supreme courts, which is to reach constitutional issues only if doing so is absolutely necessary. This rule obviously has no application here. In any event, *Local Union 1287* actually supports the Trust's position, as the Trust is asking the Court to rule on a policy provision clearly at issue in this litigation. Unlike in *Local Union 1287*, the Court here has not issued any decisions that would render the parties' dispute about the meaning of the products hazard exclusion moot. AIG's citation to *George v. Brewer* is similarly unavailing. 62 S.W.3d 106 (Mo. App. S.D. 2001). There, the plaintiff sold his pharmacy and agreed to a ten-year non-compete clause. When plaintiff sought a declaratory judgment that the non-compete clause was unenforceable, the court held that the case was not ripe because plaintiff had not attempted to open a pharmacy within the non-compete period nor had the defendant threatened to enforce the agreement. *Id*. at 109–110. In other words, the Court made a determination of facts that rendered the parties' dispute unripe, which is simply not the case here. This dispute is live and ready for resolution by the Court.[4]

In sum, the Trust's Motion is permitted under the Missouri Rules of Civil Procedure, and such motions are common in Missouri courts. There is no legal basis that precludes summary judgment at this stage, and no disputed facts prevent the Court from issuing the ruling the Trust seeks. The Trust's motion should be decided now.

[4] *Mid-Century Insurance Company v. Wilburn*, 422 S.W.3d 326 (Mo. App. S.D. 2013) cited by AIG has no bearing on this case as it involved a driver's insurer suing a pedestrian for a declaration that the driver was not entitled to coverage. The court dismissed as the insurance company had sued the wrong person. *Id*. at 330.

II. THE AIG POLICIES' EXCLUSIONS FOR BODILY INJURY ARISING OUT OF "YOUR [MALLINCKRODT'S] PRODUCT[S]" DO NOT EXCLUDE COVERAGE FOR BODILY INJURY ARISING OUT OF NON-MALLINCKRODT PRODUCTS.

A. AIG's Interpretation of the Products Hazard Exclusion Cannot Prevail Unless It Is the Only Reasonable Interpretation.

The Missouri Supreme Court has held that courts should construe insurance policies in accordance with their plain language, apply "the meaning which would be attached by an ordinary person of average understanding," and "resolve[] ambiguities in favor of the insured." *Seeck v. Geico Gen. Ins. Co*., 212 S.W.3d 129, 132 (Mo. banc 2007). Other Missouri courts similarly have held that "an insurance policy is a contract to afford protection to an insured and will be interpreted, if reasonably possible, to provide coverage," *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. banc 1997), and that insureds "are entitled to the broad measure of protection necessary to fulfill their reasonable expectations . . . and their policies should be construed liberally in their favor to the end that coverage is afforded to the full extent that any fair interpretation will allow," *Crossman v. Yacubovich*, 290 S.W.3d 775, 781 (Mo. App. E.D. 2009) (internal quotation marks omitted). Under Missouri law, "coverage clauses are to be read broadly . . . to afford the greatest possible coverage" while exclusionary provisions are construed against the insurer. *Harrison*, 956 S.W.2d at 270. "Missouri . . . *strictly* construes exclusionary clauses against the drafter, who also bears the burden of showing [an] exclusion applies." *Burns v. Smith*, 303 S.W.3d 505, 510 (Mo. banc 2010) (emphasis in original). Insurers bear the burden of establishing that their interpretation of a policy exclusion is the only reasonable one. *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 690 (Mo. banc 2009). If there is any ambiguity, a court must rule in favor of coverage.[5]

Here, the relevant provisions all are exclusions which must be narrowly construed against AIG. This includes not only the products hazard exclusion labeled as such, but also the Products

[5] For a fuller discussion of the rules that govern insurance policy construction, *see generally* Opening Br., at 17–20.

Hazard Claims-Made Endorsement raised in AIG's Cross-Motion, which is not labeled an exclusion but AIG argues must be applied as if it were an exclusion as to certain claims not made during the policy period and therefore must be construed narrowly as a products hazard exclusion for purposes of AIG's Cross-Motion. *In re Estate of Carroll*, 857 S.W.2d 848, 852–853 (Mo. App. W.D. 1993) (finding a "policy of insurance may restrict or confine the coverage of the policy by either an affirmative delimitation of or by an exception to the coverage" and treating as an exclusion a policy provision granting coverage to insured "riding as a passenger and not as a pilot or crew member"); *Weaver v. State Farm Mut. Auto. Ins. Co.*, 936 S.W.2d 818 (Mo. banc 1997) (insurer had burden to prove lack of timely notice).

In sum, AIG can prevail here only if it establishes that its interpretation of the products hazard exclusion is the only reasonable one. *See Jones*, 287 S.W.3d at 690. For the reasons cited herein, AIG cannot come close to meeting this burden.

B. AIG Cannot Meet Its Burden to Establish That the Products Hazard Exclusion Bars Coverage for Bodily Injury Resulting from the Use of Non-Mallinckrodt Products, Because Such Bodily Injury "Arises Out Of" Those Opioids, Not "Your [Mallinckrodt's] Product[s]."

1. The Plain Meaning Demonstrates That the Products Hazard Exclusion Narrowly Applies to Bodily Injury Arising Out of Mallinckrodt's Products, Not Its Business Manufacturing and Selling Products.

The Trust's Motion seeks a ruling that the products hazard exclusion does not bar coverage for Mallinckrodt's opioid liabilities to the extent Mallinckrodt was liable because of bodily injury arising at least in part from non-Mallinckrodt products, licit or illicit. The fundamental reason is that the products hazard exclusion applies only to "'bodily injury' . . . included within" the products hazard—meaning '"bodily injury' . . . arising out of 'your product.'" But as discussed in the Trust's Opening Brief and above, claimants alleged that Mallinckrodt was liable because of bodily injury arising not only from Mallinckrodt's opioids but also from non-Mallinckrodt drugs,

based on the unbranded promotional campaign. Opening. Br., at 8–14; *supra* at 2–3. For example, to the extent that Mallinckrodt was liable as a result of the unbranded promotional campaign for bodily injury due to the use of an illicit opioid like heroin or fentanyl, the cause of the bodily injury was the illicit opioid and not a Mallinckrodt product. Such liability clearly falls outside the plain language of an exclusion for "bodily injury' . . . arising out of 'your product.'"

In response, AIG contends that all of Mallinckrodt's opioid-related liability must be deemed to fall within the products hazard exclusion because "Mallinckrodt would never have faced liability were it not for its business manufacturing, and selling opioid *products*, including what Mallinckrodt stated about opioids generally in their marketing." AIG Responsive Br., at 27 (emphasis in original).[6] This argument grossly overreaches and fails for at least four reasons.

First, it is contrary to the language of the exclusion, which must be construed narrowly, not broadly. The exclusion by its terms narrowly bars coverage only for Mallinckrodt's liability for bodily injury because of a Mallinckrodt ("your") product. AIG is seeking to reframe it to bar coverage for any liability arising out of Mallinckrodt's business as a manufacturer and seller of products. *See* AIG Responsive Br., at 23, 27. In essence, AIG argues that "but for" Mallinckrodt's business manufacturing and selling opioid products, it would not have engaged in the unbranded promotional campaign and would not have been liable because of bodily injury caused by non-Mallinckrodt products. Read this way, the exclusion would encompass any act by Mallinckrodt, as everything Mallinckrodt did was in service of its business manufacturing and selling products and would not have been done "but for" that business.

[6] AIG also cites to correspondence where Mallinckrodt's insurance broker advised it that the AIG policies "contain products/ completed ops exclusions and therefore [it is] unlikely they would apply to opioid claims." But the broker did not state a basis for this view and in any event the broker's views do not govern (and AIG would certainly give no weight to the broker's views if they had supported coverage), and the Court must determine the scope of coverage based on the terms of the policies themselves.

AIG may not convert an exclusion for bodily injury arising from "your [Mallinckrodt's] product" into an exclusion for "all products," including non-Mallinckrodt products. Or an exclusion for bodily injury "related to Mallinckrodt's business manufacturing and selling products." Or an exclusion for "all opioid-related bodily injury." Or an exclusion for bodily injury arising "in whole or in part" from Mallinckrodt products. The problem for AIG is that the products hazard exclusion it wrote and sold to Mallinckrodt is none of these things. It is, by its express terms, far narrower.

AIG may wish with the benefit of hindsight that it had written and sold a broader exclusion than it did. But it is responsible for the language of the exclusion, and it is hardly unsophisticated in drafting policy language. If it wanted a broader exclusion, it was incumbent on it to draft something broader, using language that would have clearly communicated its broad scope to an ordinary person of average understanding. AIG is not entitled to have this Court do that work for it now, at the point of claim. It is particularly inappropriate for an insurer to seek protection from a risk it did not clearly exclude, when the entire function of insurance is to transfer risk from the insured *to* the insurer, not the other way around. The risk of insufficient, vague, or ambiguous language is on the insurer, not the insured. AIG is in the business of selling protection from risk, not selling policies that impose hidden exclusions on unsuspecting insureds.

Second, AIG's interpretation of the products hazard exclusion fails because it would render the coverage promised by AIG's policies illusory. AIG's theory of how the products hazard exclusion operates would defeat all coverage under the policies for a company that, like Mallinckrodt, is in the business of manufacturing and selling products. But fatally for AIG, under Missouri law, an "interpretation of [an] insurance policy which may render a portion of the policy illusory 'should not be indulged in.'" *Hullverson Law Firm, P.C. v. Liberty Ins.*

Underwriters, Inc., 25 F. Supp. 3d 1185, 1191 (E.D. Mo. 2014) (*citing Cano v. Travelers Ins. Co.*, 656 S.W.2d 266, 271 (Mo. banc 1983)). Interpreting an exclusion to swallow up broad swaths of coverage in this manner would impermissibly defeat the reasonable expectations of the insured. *See Harrison*, 956 S.W.2d at 270; *Crossman*, 290 S.W.3d at 781. As would converting an exclusion for bodily injury arising out of "your products" into one that excludes bodily injury arising out of non-Mallinckrodt products.

This is simply not the way the insurance industry interprets products hazard exclusions. For example, as AIG is well aware, the insurance industry routinely treats pollution-related claims against manufacturing companies as outside the products hazard exclusion, even though such claims would not exist "but for" the manufacturers' business manufacturing products. That is, insurers do not argue that pollution-related claims are within the products hazard because the insured would not have polluted if it were not manufacturing products. Insurers have paid untold billions of dollars of pollution claims without invoking products hazard exclusions. AIG should not be heard to do so here.

In its own brief, AIG effectively admits that its "but for" interpretation is a dramatic overreach. It offers as an illustration of what the products hazard exclusion does *not* exclude "a car accident involving the sales force." AIG Responsive Br., at 12, 27. But if AIG's theory were correct, that accident would not be covered because the sales force would never be in a vehicle to sell products "but for" Mallinckrodt's business selling products. The fact that AIG has offered this example shows it is grasping to demonstrate to this Court that there is a limiting principle on its interpretation. But there is not.

Third, AIG seeks to reframe the exclusion as barring coverage for "liability" arising out of Mallinckrodt's products rather than "bodily injury" arising out of Mallinckrodt's products. *See*

AIG Responsive Br., at 23, 27. This sleight of hand is critical to AIG's argument because it cannot prevail under the policies' actual terms. For example, while AIG may argue that Mallinckrodt's liability for a heroin overdose arises from its products, that is not the proper analysis of the policy language. The 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 Seeck*, 212 S.W.3d at 132.

Fourth, AIG's vague contention that "Mallinckrodt's unbranded representations about opioids generally were indisputably 'representations . . . with respect to the fitness, quality, durability, performance, of "your product"'" is without support. AIG Responsive Br., at 27. As an initial matter, AIG's accusation that the Trust "blatantly misstates the policy language" by omitting the language concerning "representations" is meritless, as the Trust quoted this language in its Opening Brief but did not give the language detailed analysis because it has no application here. *See* AIG Responsive Br., at 4; Opening Br., at 15 n.13. Further, AIG's argument should be rejected because it does not cite a single specific representation that Mallinckrodt made about any Mallinckrodt opioid as part of its unbranded promotional efforts, much less explain how any representation was specifically about the "fitness, quality, durability, [or] performance of '[Mallinckrodt's] product.'" On the contrary, as noted above, it is undisputed by AIG that the industry-wide unbranded promotional campaign made no mention of Mallinckrodt or Mallinckrodt products and did not expressly promote Mallinckrodt products, much less make specific representations about Mallinckrodt products. Just as AIG wants this Court to *deem* Mallinckrodt's liability for bodily injury due to the use of non-Mallinckrodt products as arising out of Mallinckrodt products, AIG wants this Court 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, as if the Court had blinders on. The salient point about the unbranded promotional campaign is that it dramatically increased the use of non-Mallinckrodt products and the bodily injury caused by non-Mallinckrodt products, and it rendered Mallinckrodt liable because of that bodily injury. It is Mallinckrodt's liability because of bodily injury resulting from the use of non-Mallinckrodt products, not Mallinckrodt products, that the Trust is seeking coverage for in this case.

2. AIG's Overly Expansive Reading of the Products Hazard Is Contrary to Missouri Law on Construction of Insurance Policies and Is Not Supported by the Cases It Seeks to Rely on.

The Trust's Motion is supported by the Missouri rules of insurance contract construction discussed above. While AIG cites a number of cases that it contends support its virtually limitless interpretation of the products hazard exclusion, it does not cite a single Missouri case that construes an exclusion to effectively eliminate broad swaths of coverage as AIG urges the Court to do here, and the Missouri cases it does cite are inapposite. AIG also cites a number of California cases, but California coverage law is different from Missouri law, as the case AIG most heavily relies on itself demonstrates; and in any event the decisions are not persuasive.

AIG has not cited a single Missouri case that has adopted the broad scope of an exclusion that it urges the Court here to adopt—specifically one that, based on "arising out of" language, would wipe out a broad swath of coverage not clearly and expressly encompassed by the language of the exclusion. It certainly has not pointed to a Missouri case in which a court has held that an exclusion applicable to bodily injury arising out of a manufacturer's product eliminates coverage for everything relating to the manufacturer's business manufacturing and selling products—essentially negating coverage under the policy.

Tellingly, the one case AIG cites that both applies Missouri law and examines policy language restricting the phrase "arising out of" supports the Trust's position, not AIG's. *See Columbia Mut. Ins. Co. v. Schauf*, 967 S.W.2d 74, 78–81 (Mo. banc 1998). *Schauf* concerned a property damage claim under a general liability policy issued to a kitchen painter. The policy excluded coverage for "[t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations." *Schauf*, 967 S.W.2d at 76. The painter accidentally started a fire in the kitchen, which spread to the rest of the house. The insurer argued that since the fire arose from the insured's work, all damage was excluded. The Court disagreed, explaining that "[b]y using the words *particular part*, the provision evidences the intent to narrow the scope of the exclusion as much as possible," despite the "arises out of" language in the exclusion. *Id.* at 80.

Thus, coverage was excluded only for the "particular part" of the property that the painter was working on, and damage outside the kitchen was covered. *Id*. at 81. The Court reached this result even though damage to other parts of the house never would have happened but for the painter's operations on that particular part of the property and therefore arguably arose out of those operations. The case is notable for the court's careful, narrow construction of the exclusion at issue, contrary to the approach AIG would like the Court to take here. Under *Schauf*, AIG's overbroad "but for" analysis should be rejected in favor of a narrow construction of the products hazard exclusion, as written. *See also Braxton v. U.S. Fire Ins. Co.*, 651 S.W.2d 616, 618–19 (Mo. App. E.D. 1983) (exclusion for bodily injury "arising out of the ownership or use of any firearm" did not apply to insured's negligent supervision of employee who shot plaintiff because it did not "stat[e] unequivocally that the exclusion would apply despite the existence of other concurrent or

intervening causes"). While AIG contends that "arising from" has essentially limitless scope and when applied to "your product" essentially eliminates coverage for a product manufacturer, it is notable that the *Schauf* court went to pains to construe the exclusion there narrowly—far more narrowly than the insurer argued was appropriate.

The other cases cited by AIG do not support its position because any discussion of limits on the phrase "arising out of"—such as the "included within" language in the products hazard exclusion at issue here—is conspicuously absent.[7] For instance, *Finn v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, considered whether a law firm's lost fees after a client's trade secrets were stolen "aros[e] out of any misappropriation of trade secret" and applied a "but for" test to find the exclusion applicable even though the damages were "not the sort of damages normally sought in a misappropriation claim." 896 N.E.2d 1272, 1278–79 (Mass. 2008). Having relied on a "but for" analysis applied to an exclusion lacking any limitation on the phrase "aros[e] out of," *Finn* is inconsistent with the Missouri Supreme Court's implicit rejection of a "but for" test in situations, such as here, where policy language limits the application of an exclusion with the phrase "arising out of." *Schauf*, 967 S.W.2d at 78–81.

The line of California cases relied on heavily by AIG concerning coverage for opioid litigations is inapposite for these and other reasons. *See* AIG Responsive Br., at 29–31 (*citing Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, 658 F. App'x 955 (11th Cir. 2016) (applying California law); *Zogenix, Inc. v. Fed. Ins. Co.*, No. 4:20-cv-06578-YGR, 2022 WL 3908529 (N.D. Cal. May 26, 2022); *Sentynl Therapeutics, Inc. v. U.S. Specialty Ins. Co.*, 257 F. Supp. 3d 1203

[7] Moreover, many cases relied on by AIG do not even address products liabilities or other business risks. *See, e.g., Capitol Indem. Corp. v. 1405 Assocs., Inc.*, 340 F.3d 547, 550 (8th Cir. 2003) (exclusion for personal and advertising injury "arising out of" termination of employment or employee-related practices barred coverage for causes of action related to employers' filing of police report alleging employee theft); *Hunt v. Capitol Indem. Corp.*, 26 S.W.3d 341 (Mo. App. E.D. 2000) (lounge owner's negligent failure to protect customer from fatal stabbing by intoxicated patrons arose out of assault and battery, which was excluded); *Capitol Indem. Corp. v. Callis*, 963 S.W.2d 247, 248–50 (Mo. App. W.D. 1997) (same).

(S.D. Cal. 2021)*, aff'd* No. 21-55370, 2022 WL 706941 (9th Cir. Mar. 9, 2022); *Travelers Prop. Cas. Co. of Am. v. Actavis, Inc.*, 16 Cal. App. 5th 1026 (2017), *review dismissed*, *cause remanded sub nom. Traveler's Prop. Cas. Co. of Am. v. Actavis*, 427 P.3d 744 (Cal. 2018)).

Critically, all four of these decisions apply California law, which is at odds with how Missouri courts analyze these policy exclusions. In each case these issues were viewed through the lens of California's minority rule—contrary to Missouri law—that there never can be coverage for an intentional act, even if the result is unintended harm.[8] *See, e.g.*, *Actavis, Inc.*, 16 Cal. App. 5th at 1043 (unintended injury resulting from intentional conduct is not covered). In Missouri, the opposite is true: as long as the specific harm is unintended, the fact that the act leading to it was intended is not a bar to coverage. *See, e.g.*, *White v. Smith*, 440 S.W.2d 497, 508 (Mo. App. 1969) (holding that "damages not intentionally inflicted but resulting from an insured's negligence (and thus constructively foreseeable to him) may be 'caused by accident' and within the coverage afforded by a liability insurance policy").[9] This approach led these courts all to find coverage barred before even reaching any exclusions—for instance *Actavis* found coverage barred simply because the insured's promotional efforts involved intentional acts (a result flatly contrary to Missouri law). 16 Cal. App. 5th at 1043; *White*, 440 S.W.2d at 508. Given that the Actavis court

[8] California law is at odds with Missouri law on other significant insurance-related issues as well. *Compare Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 744 (1993), *reh'g denied and opinion modified* (Feb. 22, 1993) (applying expected and intended defense to coverage if insured knew or should have known that there was a substantial probability that certain consequences will result from his actions) *with Allen v. Cont'l W. Ins. Co.*, 436 S.W.3d 548, 555 (Mo. banc 2014) (applying expected and intended defense only where insured intended both the act causing the property damage as well as the resulting harm).

[9] AIG asserts that Missouri and Massachusetts law are both "generally consistent with California law on the issue of 'occurrence,'" but this is simply incorrect. *See White*, 440 S.W.2d at 508; *Quincy Mut. Fire Ins. Co. v. Abernathy*, 393 Mass. 81, 84 (1984) ("injury which ensues from the volitional act of an insured is still an 'accident' within the meaning of an insurance policy if the insured does not specifically intend to cause the resulting harm or is not substantially certain that such harm will occur."). AIG's own counsel acknowledged as much in an article discussing insurance coverage for opioid claims, which noted that in contrast to California, "[c]ourts in other jurisdictions . . . have found allegations . . . against certain [opioid] defendants sufficient to trigger coverage, primarily because those jurisdictions will find an 'accident' [and thus an "occurrence"] unless there was both deliberate conduct and an intent to cause injury." *See* Christopher St. Jeanos et al., *Insurance Coverage Issues Arising in Connection with the Opioid Crisis*, 63 No. 5 DRI for Def. 56, 60 (May 2021).

decided one of the two issues in the case in a manner directly contrary to Missouri law, this Court should not rush to embrace the other prong of the California court's ruling, which is equally flawed. It also bears note that commentators who represent insurers have observed that the California court's application of the products hazard creates a "relatively low standard" for insurers to meet (quite the understatement, actually). *See* Christopher R. Carroll & Joshua S. Wirtshafter, *Opioid-Related Insurance Coverage Litigation: A Primer on Key Issues Developing in U.S. Courts*, Brief, Summer 2022, at 14, https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2021-22/summer/opioid-related-insurance-coverage-litigation-primer. Such a "low standard" for application of the products hazard is at odds with Missouri's requirements that exclusions be construed narrowly and not applied in favor of an insurer unless that is the only reasonable interpretation.

In addition, none of *Anda*, *Zogenix,* or *Sentynl* involved any discussion that the insureds were liable because of bodily injury arising out of non-Mallinckrodt products.[10] *Anda* only discussed allegations that bodily injury arose out of the overdistribution of opioids through Anda's failure to prevent the diversion of its own drugs. 658 F. App'x at 958 ("[T]he State claims that Anda and other pharmaceutical distributors have so flooded the market with their products that West Virginia suffers from an opioid epidemic."). *Zogenix* similarly focused on allegations concerning the insured's drugs and contained no discussion of bodily injury from drugs other than the insured's. *Zogenix, Inc.*, 2022 WL 3908529, at *9 ("complaint . . . alleges a direct connection between Zohydro, the statements Zogenix made about Zohydro, and the overdose and additions

[10] AIG's citation to *Brazas Sporting Arms, Inc. v. American Empire Surplus Lines Insurance Company*, 220 F.3d 1 (1st Cir. 2000) is similarly flawed. This case involved allegations that a gun manufacturer failed to "regulate and control the distribution and sale of their guns by retail dealers." *Id.* at 3. There are no allegations concerning unbranded promotional activities and no discussion of whether the insured was liable because of bodily injuries arising out of other manufacturers' guns. The same flaw exists with two cases cited by Aspen Insurance UK Ltd. and ACE American Insurance Company in a separate brief they filed. *See Beretta U.S.A. Corp. v. Fed. Ins. Co.*, 17 F. App'x 250, 255 (4th Cir. 2001); *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 540 (Fla. 2005).

caused by Zogenix's products."). *Sentynl* is further inapposite as it involved coverage under a directors' and officers' insurance policy for the cost of defending a government investigation into "potential violations of federal law by anyone illegally profiting from opioids" and did not concern any alleged bodily injury. *Sentynl Therapeutics, Inc.*, 2022 WL 706941, at *1. The policy excluded "[l]oss in connection with a Claim arising out of, based upon or attributable to any goods or products manufactured, produced, processed, packaged, sold, marketed, distributed, advertised or developed by [Sentynl]," and the court unsurprisingly concluded any allegation that Sentynl was "profiting from opioids" would be due to profits on its own products and thus excluded. *Id.*

Finally, *Actavis* is distinguishable because the court there failed to address the central issue here—that the unbranded promotional campaign promoted the use of all opioids generally and never mentioned the insured or its products, meaning liability was due at least in part to bodily injury caused by non-Mallinckrodt products. Instead, after finding coverage barred entirely under California's minority rule against insurance for unintended harm resulting from intentional acts, the court simply assumed that all opioid-related claims against an opioid manufacturer fell within the products hazard exclusion regardless of the actual cause of the bodily injury at issue. Tellingly, the court categorized one type of bodily injury as the "alleged resurgence in heroin use" and concluded that there was a "direct causal connection between those warranties and representations and the resurgence in heroin use." *Actavis, Inc.*, 225 Cal. App. 5th at 1046. But while "alleged resurgence in heroin use" might lead to bodily injuries, it is not in itself a bodily injury. In other words, the *Actavis* court analyzed whether the "alleged resurgence in heroin use" arose out of the insured's products or representations about those products, when it should have analyzed whether bodily injuries caused by heroin use arose out of the insured's products or representations about those products. As discussed above, the answer to that question is no—bodily injury resulting

from ingestion of heroin "arises out of" the heroin, not the insured's products. *See supra* at Section II. Similarly for use of other non-Actavis (or, here, non-Mallinckrodt) products. The *Actavis* court did not consider the connection between non-Actavis products and the bodily injury for which Actavis was held liable, a fatal flaw in its decision. Not only did *Actavis* misread the language and import of the products hazard exclusion, it nowhere considered that its broad reading of the products hazard exclusion would improperly render coverage illusory for a product manufacturer. *Actavis, Inc.*, 225 Cal. App. 5th at 1046–47. This court should not follow such a flawed decision under a different state's law.

The remaining cases cited by AIG are inapposite because, unlike here, there was no question that the injury for which the insured sought coverage arose solely from the insured's product or work. For example, AIG cites *Fibreboard Corporation v. Hartford Accident & Indemnity Company*, for the premise that the court excluded coverage under the products hazard where the liability concerned other companies' asbestos products, but there did not appear to be any allegations that Fibreboard incurred liability for bodily injuries arising out of other manufacturers' products. 16 Cal. App. 4th 492, 505 (1993). Instead, Fibreboard argued that certain of the underlying theories of liability, such as concert in action and civil conspiracy, alleged damages not explicitly tied to Fibreboard's products. *Id.* at 500. The court rejected Fibreboard's argument, finding it "misse[d] the mark" because it focused on the theory of liability or the standard of causation and ignored that even these theories "will require proof that Fibreboard's products were defective" and were thus excluded. *Id*. at 504–505. Here, by contrast, the unbranded promotion claims did not require proof specific to Mallinckrodt's products and focusing

on the products giving rise to the bodily injury alleged in those claims—rather than theories of liability as AIG does—demonstrates that the products hazard exclusion does not apply.[11]

In sum, the cases cited by AIG underscore the merit of the Trust's position or are inapposite. AIG can only prevail if its interpretation is the only reasonable one, which it manifestly is not.

3. Even If the Bodily Injury at Issue Were Deemed to Arise Out of Mallinckrodt Products, Under the Concurrent Cause Rule the Products Hazard Exclusion Would Not Bar Coverage, Because at the Very Least, the Bodily Injury *Also* Arose Out of Non-Mallinckrodt Products.

At best for AIG, claimants sought to hold Mallinckrodt liable because of bodily injury arising out of both covered (non-Mallinckrodt products) and excluded (Mallinckrodt products) causes. Opening Br., at 5–13. In such circumstances, an insurance policy must respond in full as long as the covered and excluded causes are "independent and distinct," which they are here. *See Taylor v. Bar Plan Mut. Ins. Co.*, 457 S.W.3d 340, 347–48 (Mo. banc 2015).[12] Whether concurrent

[11] *See also Cincinnati Ins. Co. v. Intek Corp.*, No. 4:08cv1440 JCH, 2010 WL 716197, at *4 (E.D. Mo. Feb. 24, 2010) (Products hazard exclusion applied where there was no dispute that fire damage was caused by malfunctioning warming plate manufactured by insured); *Scottsdale Ins. Co. v. Aqueous Vapor, LLC*, No. 4:20-00328-CV-RK, 2021 WL 123401 (W.D. Mo. Jan. 12, 2021) (Products hazard exclusion applied where there was no dispute that bodily injury was caused by exploding e-cigarette battery sold by insured); *Cytosol Labs., Inc. v. Federal Ins. Co.*, 536 F. Supp. 2d 80 (D. Mass. 2008) (Products hazard exclusion applied where there was no dispute that source of bodily injuries giving rise to product distributor's product recall claims was insured manufacturer's ophthalmic solution product); *Kinsella v. Wyman Charter Corp*., 417 F. Supp. 2d 159, 165 (D. Mass. 2006) (finding no duty to defend where bodily injury was alleged to have been caused solely by the insured's watercraft, which was expressly excluded under the policy); *Certain Underwriters at Lloyd's, London v. Atlantic Constr. Servs., Inc.*, 102 N.E.3d 428 (Mass. App. Ct. 2018) (unpublished) (coverage was excluded by independent contractors exclusion given that "arising out of" language looks to "the *source* from which the plaintiff's personal injury originates," which was the sidewalk constructed by the independent contractor, not "the specific *theories of liability* alleged in the complaint," which were the insured property owner's failure to warn plaintiff of sidewalk defects) (emphasis in original); *Eon Labs Mfg., Inc. v. Reliance Ins. Co.*, 756 A.2d 889, 892 (Del. 2000) (source of bodily injury was other diet drugs only when combined with insured's generic drug); *Liggett Grp., Inc. v. Ace Prop. & Cas. Ins. Co*., 798 A.2d 1024, 1033–35 (Del. 2002) (Products hazard exclusion barred coverage for tobacco producer where complaints "name [insured] as a defendant because they allege that [insured's] product caused injury," plaintiffs alleged "that the defendant's product, combined with other products" caused injury, and there were no allegations of negligent marketing).

[12] *See also Intermed Ins. Co. v. Hill*, 367 S.W.3d 84 (Mo. App. E.D. 2012); *Braxton v. U.S. Fire Ins. Co.*, 651 S.W.2d 616 (Mo. App. E.D. 1983); *Centermark Props., Inc. v. Home Indem. Co.*, 897 S.W.2d 98, 100–01 (Mo. App. E.D. 1995).

causes are "independent and distinct" is a function of whether they are legally related such that the "essential elements of [the non-excluded claim] asserting a cause of injury can be stated without regard to the essential elements of [the excluded claim] that also is asserted to have caused the same injury." *Hill*, 367 S.W.3d at 89 (internal citation omitted) (finding negligent supervision of an employee and sexual assault by that employee were "independent and distinct" causes of plaintiff's injury).[13] This test is satisfied here because the claims against Mallinckrodt arising out of its unbranded promotional activities did not depend on liability tied to Mallinckrodt's products. Under the foregoing authority, to the extent that the opioid claims are deemed to arise from both a covered cause and an excluded cause, AIG may not rely on the products hazard exclusion to avoid coverage.

Had AIG wished to avoid this "concurrent cause" rule, it easily could have drafted its policy language to provide that if even one concurrent cause was excluded, the exclusion applied. For example, it could have drafted language that said that the exclusion applied to bodily injury "arising in whole or in part out of your product." AIG plainly knew how to do so, as it used this sort of language elsewhere in these very policies.[14] But it chose not to do so here.

[13] Courts apply this test to exclusions with "arising out of" language. *See Cawthon v. State Farm Fire & Cas. Co.*, 965 F. Supp. 1262, 1269 (W.D. Mo. 1997) (insured's negligence removing tree limb with truck was covered, despite exclusion for injury "arising out of the ownership, maintenance, [or] use of a motor vehicle," as "use of the truck was an antecedent, independent factor" that "does not preclude coverage for the negligent plan"); *Centermark Props., Inc.*, 897 S.W.2d 98 at 100–03 (insured's negligent supervision of employee's use of automobile was covered despite exclusion for injury "arising out of the ownership . . . use . . . of (1) any automobile" because "ownership or use of an automobile is incidental, not an essential element of the negligence claim against insured"); *Braxton*, 651 S.W.2d at 619 (insured's negligent supervision of employee who shot customer covered despite exclusion for injury "arising out of the ownership or use of any firearm").

[14] *See, e.g.*, National Union Policy No. GL 509-47-72 Ex. M, at 89 (exclusion in AIG policies for damage caused by fungus "regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence to that 'bodily injury'").

C. AIG Cannot Meet Its Burden to Establish That the "Your Work" Prong of the Products Hazard Exclusion Bars Coverage for Bodily Injury Resulting from the Unbranded Promotional Campaign Because "Your Work" Refers to Projects or Services an Insured Performs for Customers, Not the Operations of the Insured.

In a further overreach, AIG argues that the provision in the products hazard exclusion that bars coverage for bodily injury arising out of "your work" excludes coverage for Mallinckrodt's opioid liability because "your work" includes the operation of the company, such as marketing and promotion of opioids. This would transform a limited exclusion for services or projects performed for Mallinckrodt's customers into one that improperly eliminates *all* coverage under the policies, because everything a company does would be deemed its "work." *See, e.g.*, *Hullverson*, 25 F. Supp. 3d at 1191 (interpretation of a policy that would render coverage illusory is not valid). AIG's argument fails for this reason alone, but also because it is contrary to the plain meaning of the clause and case law construing it.

First, AIG's position regarding the "your work" clause ignores the language of the clause itself, which defines "your work" as "(1) Work or operations performed by you or on your behalf; and (2) Materials, parts or equipment furnished in connection with such work or operations." National Union Policy No. GL 509-47-72 Ex. M, at 28. Much as the comparable term "your product" is a product that the insured manufactures or sells to others, "your work" is a project or service that the insured performs and sells to others, such as building a bridge. This is clear from the fact that "your work" includes "[m]aterials, parts or equipment furnished in connection with such work or operations." Moreover, the fact that "your work" includes "[m]aterials, parts or equipment" clearly contemplates some sort of project being performed for someone else, not the internal operation of a company. If AIG's position that "your work" applies to marketing campaigns for "your product" were correct, the wording would include functions performed as

part of the operation of the company itself—for example, marketing and promotion—not physical things, as here, that typically are furnished when work is performed for others.

This plain meaning is apparent from the fact that the products hazard definition expressly carves out "[w]ork that has not yet been completed or abandoned." National Union Policy No. GL 509-47-72 Ex. M, at 27. In defining when work has been completed, the policy describes three scenarios: "(a) When all of the work called for in your contract has been completed[;] (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site[;] (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project." *Id.* at 27. These scenarios further demonstrate that "your work" means work performed for others, such as construction projects, not general business operations of an insured, such as marketing or promotion. The references to contracts and job sites makes clear that "your work" refers to projects or services provided to others. A company does not have a contract with itself or refer to its offices as a "job site."

AIG has not cited any case supporting its expansive view of the "your work" clause, and its position has been rejected by courts across the country. Just as the term "your product" applies only to products Mallinckrodt has manufactured or sold, the term "your work" applies only to services Mallinckrodt has sold. *See Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 957 F.2d 1153, 1158 (4th Cir. 1992) ("the term 'completed operations hazard' [the predecessor to the term "Your Work"] refers to . . . those policyholders who provide a service in addition to or instead of a particular product"); *City of Park Ridge v. Clarendon Am. Ins. Co.*, 90 N.E.3d 479, 484 (Ill. App. Ct. 2017) ("the term 'products-completed operations hazard' generally applies to construction activities, maintenance, and related trades."). Thus, the term "your work" does not encompass

services or operations that are not directly sold to a customer, such as improper disposal of manufacturing by-products, even if such operations are ultimately aimed at the sale of an insured's products. *Visteon Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 777 F.3d 415, 421 (7th Cir. 2015) (collecting cases); *cf. Baker v. Nat'l Interstate Ins. Co.*, 180 Cal. App. 4th 1319, 1340 (2009) ("We are confident that the common understanding of 'work' includes a person's services performed in return for payment of money.").

Put simply, AIG's argument that the "your work" exclusion applies here is contrary to the plain meaning of the policies and the applicable law.

III. AIG'S CROSS-MOTION SHOULD BE DENIED.

AIG's Cross-Motion seeks the mirror image of the relief sought by the Trust's Motion as to two sets of policies. First, AIG's Cross-Motion seeks a ruling on the same set of policies addressed in the Motion. For the same reasons the Trust asks the Court to grant its Motion, the Trust asks the Court to deny AIG's Cross-Motion as to these policies.

AIG's Cross-Motion also seeks a ruling as to eight additional policies that provide coverage for bodily injury included within the products hazard, but on a claims-made basis under the Products Hazard Claims-Made Endorsement. For bodily injury that is not within the products hazard, the claims remain covered under the policies' general coverage grant, and there is no requirement that the claims be made and reported during the policy period. Here, the bodily injury at issue is not within the products hazard for the reasons detailed above, and so the claims-made requirements of the Products Hazard Claims-Made Endorsement are irrelevant.

While the Trust acknowledges claims-made and occurrence policies operate differently in certain respects, none of that is relevant to the issue before the Court. For purposes of the meaning and scope of the products hazard exclusion, the wording at issue operates in the same way, and the arguments presented throughout this brief (as well as the Trust's Opening Brief) apply with equal

force to both types of coverage. That is, the only question here is identical for both sets of policies: whether the products hazard bars coverage for Mallinckrodt's liability because of bodily injury arising out of non-Mallinckrodt products. For all of the reasons set forth above, the answer is no, and the Court should deny AIG's Cross-Motion.

CONCLUSION

For the reasons set forth above and those set forth in the Trust's Opening Brief, the Trust respectfully requests that the Court grant its Motion and deny AIG's Cross-Motion.

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CERTIFICATE OF SERVICE

Pursuant to Missouri Rule of Civil Procedure 55.03(a), the undersigned hereby verifies that he signed the original foregoing document.

The undersigned hereby certifies that on September 18, 2024, a true copy of the foregoing was served, via electronic filing pursuant to Missouri Rules of Civil Procedure Rule 103.08, to all parties of record, and that a true copy of the foregoing was served via email pursuant to Missouri Rules of Civil Procedure Rule 43.01(c)(1)(D), to all such parties.

/s/ *P. Tyler Connor*
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