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

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

MEMORANDUM OF NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. AND AMERICAN HOME ASSURANCE COMPANY IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendants National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") and American Home Assurance Company ("American Home") (together, the "AIG Insurers"), by and through their undersigned counsel, submit the following Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of Cross-Motion for Summary Judgment, pursuant to Missouri Supreme Court Rule 74.04.

INTRODUCTION

Mallinckrodt was driven into bankruptcy because it was accused in thousands of lawsuits of having engaged in a misleading and deceptive marketing campaign that consistently mischaracterized the addictive nature of its opioid products, which resulted in flooding the market with opioids and in turn fueled the nationwide opioid crisis. Plaintiff here, the Opioid Master Disbursement Trust II ("Trust"), itself has accused Mallinckrodt of being fully aware of the consequences of its misconduct, and fraudulently transferring assets in the face of its known opioid-related exposure.

The Trust now seeks insurance coverage for the opioid-products-related "loss" that Mallinckrodt purportedly "suffered . . . on the effective date of the Plan." which approved a settlement of that liability. (Mot. at 3.) The policies at issue in the Motion are "occurrence"-based—meaning "accident"-based—insurance coverage issued to Mallinckrodt. The Trust is thus seeking to recover vast sums from the AIG Insurers and the other insurer defendants under "accident" insurance issued to a company that the Trust itself has accused of deliberate misconduct, including fraud, in connection with its opioids business.

With more than a year left in the discovery phase of this case, and in the midst of a potential spoliation issue concerning documents from the time period that Mallinckrodt—according to the Trust—was working to fraudulently transfer and protect assets in the face of its known opioid exposure, the Trust opted to file a motion for partial summary judgment regarding the scope of what the Trust calls the "your products" exclusion. Although 20 insurance companies are named as defendants, approximately 100 policies are at issue, and

numerous coverage issues remain in dispute in this action, the Trust's Motion concerns just the AIG Insurers, 13 policies, and a single coverage exclusion.

Worse yet, unlike a typical motion for summary judgment, which seeks to establish—based on a fully developed record after the close of discovery—that undisputed facts warrant summary judgment, here the Trust asks this Court for an impermissible advisory opinion that may apply "to the extent" certain facts are ultimately established. Specifically, the Trust asks, ***if*** it were to show that Mallinckrodt actually faced and settled liability for damages because of bodily injury resulting from opioid products other than its own, and ***if*** the Trust could meet its burden to establish that liability satisfies the threshold terms and conditions to coverage, ***then*** would the "Products-Completed Operations Hazard" ("PCOH") exclusion in the AIG Insurers' policies apply? The Trust offers no admissible evidence on the issue of whether Mallinckrodt actually faced or settled liability in the way the Trust now claims, much less the undisputed facts required to establish that liability for purposes of summary judgment. This of itself mandates denial of the Trust's Motion.

The question the Trust has asked the Court to consider is predicated on the additional assumption that the Trust can establish that the hypothetical liability it posits would satisfy the terms of coverage in the AIG Insurers' policies, which is also hotly disputed. Thus, the Trust asks the Court to assume, hypothetically, that someday it will prove that Mallinckrodt faced and settled liability arising out of something other than Mallinckrodt's own opioid products, and that this hypothetical liability satisfied all other terms of the policies' coverage grant in order to reach the question whether an exclusion would bar coverage for that hypothetical liability. This presents a quintessentially unripe dispute under Missouri law, and the Court should decline to rule on the Trust's hypothetical scenario.

The Trust's Motion for Partial Summary Judgment should be denied even if the Court decides to consider the applicability of the PCOH exclusion to the Trust's posited facts. The application of that exclusion here distills to the following question: whether Mallinckrodt, a company that faced and settled liability as a manufacturer and seller of opioid products, can recover under insurance policies with broad, unambiguous exclusions

that preclude coverage for all injury "arising out of" the company's products, work, or representations and warranties (including a failure to warn) about such products or work. The answer is unequivocally no.

The fourteen AIG policies at issue in the Trust's Motion and this Cross-Motion contain a PCOH exclusion that is identical to exclusions that numerous courts have concluded are clear, unambiguous, enforceable, and ***applicable to opioid-related liability***—the very sort of liability for which the Trust seeks coverage here; precedent the Trust simply ignores. *See, e.g., Traveler's Prop. Cas. Co. of Am. v. Actavis, Inc.*, 16 Cal. App. 5th 1026, 1040-41 (2017). The Trust's Motion does not cite *Actavis* or any of the directly-on-point authority enforcing the PCOH exclusion in identical or indistinguishable circumstances.

The PCOH exclusion precludes coverage for injuries "occurring away from premises you own or rent and ***arising out of*** 'your product' or 'your work[.]'" "Your product" is defined to include both "goods or products . . . manufactured, sold, handled, distributed or disposed of by" Mallinckrodt and certain others, as well as "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your product.'" "Your work" is defined to include "work or operations performed by [Mallinckrodt] or on [its] behalf," and "[w]arranties or representations" about such work. Courts interpreting this language, have held that "arising out of" is a very broad phrase meaning "originating from" or "having its origins in" or "growing out of" or "flowing from," requiring only a simple causal relationship between the accident or injury and the insured's products.

While the Trust again simply ignored both the "arising out of" and "your work" language in the PCOH exclusion, it is beyond serious question that all of the liability for which the Trust seeks coverage originates from, has its origins in, grows out of, or flows from Mallinckrodt's opioid products, work, or representations—specifically, the addictive nature of those products and the improper and in fact illegal way Mallinckrodt marketed those products. For a time, Mallinckrodt was ***the most significant*** manufacturer of opioid products in the United States, as measured by market share, or as the DEA put it, the "kingpin." Put simply, Mallinckrodt would not have been named as a defendant, and would

not be subject to liability at all in the thousands of underlying opioid lawsuits had it not manufactured opioids and engaged in illegal conduct in the way it marketed and sold them. That is all "arising out of" requires.

In an effort to evade the broad language of the PCOH exclusion, the Trust both misrepresents and misinterprets the PCOH. First, the Trust blatantly misstates the policy language, omitting from its argument entirely the language of the exclusion that extends to "representations" about the "performance or use" of Mallinckrodt's opioid products, as well as "[w]ork or operations performed by you or on your behalf." Second, the Trust uselessly asks the Court to fixate on the word "within," while ignoring the "arising out of" language that in fact defines the broad scope of the exclusion.

Based on its flawed definition of the PCOH exclusion, the Trust argues—again, without any admissible evidence or demonstrating that the facts it presents are uncontested—that some of the liability it settled is not excluded because it was for injury caused by other pharmaceutical companies' opioids or illicit opioids, the sale of which allegedly increased by virtue of Mallinckrodt's (and those other manufacturers') unbranded marketing, which promoted opioids "generally" without reference to any one specific product.[1] But the very opioid lawsuits that Mallinckrodt cites to support that position in fact demonstrate that Mallinckrodt's liability "ar[ose] out of" its role as a manufacturer, marketer and seller of opioid products. Mallinckrodt itself stated ***under oath***, in numerous ways, that Mallinckrodt faced a "tidal wave of litigation concerning ***the production and sales of its opioid products***." (Ex. A,[2] Declaration of Stephen A. Welch ¶ 76, *In re*

[1] The Trust's theory based on "unbranded marketing" has also been advanced in one other insurance coverage action, brought by Purdue Pharma and certain of its creditors against several of its insurance companies. *See Purdue Pharma L.P., et al., v. AIG Specialty, et al*., Adv. Pro. No. 21-07005-shl (Bankr. S.D.N.Y.). Gilbert LLP, the Trust's counsel in this case, is among Plaintiffs' counsel in that case as well.

[2] The exhibits identified by ***capitalized letters*** A, B, C, etc. refer to the ***Trust's exhibits*** submitted in connection with the Trust's Motion for Partial Summary Judgment. The exhibits identified by ***numbers*** 1, 2, 3, etc. refer to the ***AIG Insurers' exhibits*** submitted

Mallinckrodt plc, et al., No. 20-12522 (Bankr. D. Del. Oct. 12, 2020) ECF No. 128 ("Welch Dec.") (emphasis added).) The Trust cannot credibly change the story now.

Accordingly, the AIG Insurers respectfully submit that this Court should enter an order denying Plaintiff's Motion for Partial Summary Judgment as unripe. [3] If the Court determines that the applicability of the PCOH exclusion is justiciable at this stage of the litigation, it should deny the Trust's Motion for Partial Summary Judgment on the merits, and instead grant the AIG Insurers' Cross-Motion for Summary Judgment on the AIG policies with PCOH exclusions.[4]

Separately, the AIG Insurers hereby incorporate by reference Defendants Aspen's and ACE's Joint Motion for Summary Judgment on the Trust's 11 Exemplar Opioid Lawsuits. For the reasons stated therein, the AIG Insurers respectfully request that this Court should enter an order granting summary judgment on the eight additional AIG policies with PCOH Claims-Made Endorsements. [5]

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in connection with the AIG Insurers' Opposition and Cross-Motion for Summary Judgment.

[3] For the avoidance of doubt, the defendants in this insurance coverage action have multiple additional defenses to coverage based on other provisions and exclusions in the policies at issue in this Cross-Motion and the other policies at issue in this case. The AIG Insurers reserve their rights to address those defenses, when appropriate and if necessary, in the course of litigation, and generally plan to do so at the close of discovery.

[4] The complete list of AIG policies with PCOH exclusions, which are the subject of this Cross-Motion, is as follows: National Union Policy Nos. GL 187-21-21, GL 650-64-83, GL 436-10-60, GL 270-49-92, GL 96 4-51-88, GL 509-47-72, GL 726-71-72, GL 333-31-10, GL 379-66-74, GL 693-89-45 (covering 2017 – 2018), GL 693-89-45 (covering 2018 – 2019), GL 686-23-54, GL 1728939 (*see* Mot., Appendix A), and Ex. 1, American Home Policy No. GL 159-53-88.

[5] The complete list of AIG policies with the PCOH Claims-Made Endorsement, which are the subject of this Cross-Motion, is as follows: Ex. 2, National Union Policy No. BE2977855; Ex. 3, National Union Policy No. BE2978239; Ex. 4, National Union Policy No. BE2979931; Ex. 5, American Home Policy No. BE4485682; Ex. 6, American Home Policy No. BE9835077; Ex. 7, National Union Policy No. BE2227062; Ex. 8, National

FACTUAL BACKGROUND

A. The National Opioid Epidemic And The Opioid Lawsuits

For most of the twentieth century, because of concerns about addiction, the consensus among medical professionals was that opioids should be "reserved for patients with the most serious conditions, such as cancer." (Ex. 11, Amended Complaint ¶ 35, *Opioid Master Disbursement Tr. II v. Covidien Unlimited Co., et. al.*, No. 22-50433 (Bankr. D. Del. Feb. 14, 2024) ECF No. 61 ("Covidien Compl.").) "[T]o expand the market for opioids and realize blockbuster profits," manufacturers of opioids "needed to create a profound transformation in medical and public perception that would permit the use of opioids not only for acute and palliative care, but also for long periods of time to treat more common aches and pains[.]" (Ex. B, Amended Complaint ¶ 5 *Mississippi v. Purdue Pharma L.P. et al*., No. 25CH1:15-cv-01814 (Miss. Chancery Ct. Nov. 12, 2019) ECF No. 292 ("Mississippi Compl.").) As a result, the nation's largest manufacturers of opioids, "through a common, sophisticated, and highly deceptive marketing campaign that began in the late 1990s, … set out to, and did, reverse the popular and medical understanding of opioids." (*Id*. ¶ 6.) Their efforts "were wildly successful," the "prescribing of opioids to treat chronic pain long-term … is now commonplace," and the U.S. is "awash in opioids." (*Id.* ¶¶ 6, 11.)

Their success had a catastrophic impact. "According to the U.S. Centers for Disease Control and Prevention, … the nation has been swept up in an opioid-induced 'public health epidemic'" (Ex. B, Mississippi Compl. ¶ 14), which has been described as "the worst manmade public health crisis in American history." (Ex. 11, Covidien Compl. ¶ 12.) Indeed, "between 1999 and 2020, more than 564,000 Americans have died from overdoses involving opioids" and "[c]ountless more have become addicted … as a direct result of opioid use." (*Id.* ¶ 4.)

Union Policy No. 27471560; Ex. 9, National Union Policy No. 15972632. *See infra* Section III.

In addition to the devastating loss of life and crisis of addiction, the opioid epidemic also resulted in tremendous economic injury to state and local governments. *See, e.g., St. Charles County, Mo. v. Purdue Pharma L.P., at al*., No. 4:18-cv-01376-NCC (E.D. Mo. Aug. 20, 2018). As a result, states, cities, counties and others have filed thousands of lawsuits (the "Opioid Lawsuits") against the manufacturers, distributors and retailers of opioids, alleging those entities were responsible for the epidemic and resulting economic losses. *See, e.g., id*. The majority of those suits were consolidated for pre-trial purposes in a multi-district litigation proceeding in federal court in the Northern District of Ohio, and the remainder are pending in state courts around the country. *See In re National Prescription Opiate Litig.,* 1:17-md-02804 (N.D. Ohio).

B. Mallinckrodt

Mallinckrodt plc and its affiliates ("Mallinckrodt") are a pharmaceutical company that was originally formed in St. Louis, Missouri in 1867. (Ex. 11, Covidien Compl. ¶ 30.) Mallinckrodt develops, manufactures, and sells pharmaceutical products, including opioids. *Opioid Master Disbursement Tr. II v. Covidien Unlimited Co*., Case No. 20-12522 (JTD), 2024 WL 206682, at *2 (D. Del. Bankr. Jan. 18, 2024). Mallinckrodt's business has generally consisted of two segments: (a) Specialty Generics, and (b) Specialty Brands. (Ex. A, Welch Dec. ¶ 31.) The Specialty Generics segment "developed, manufactured, marketed, promoted, and sold branded and generic opioid pharmaceuticals," while the Specialty Brands segment focused on other (non-opioid) pharmaceutical products. (*Id*. ¶¶ 31, 35-36, 39-40; Amended Petition ¶ 17.) Mallinckrodt, through Specialty Generics, has manufactured and sold opioids in the form of "finished dosage products," which are products as they are "ultimately received by the customer," as well as "active pharmaceutical ingredients" or "APIs," which are ingredients used by Mallinckrodt itself or sold to other manufacturers "to create finished dosage opioid products." (Amended Petition at ¶¶ 2, 80; *see* Ex. A, Welch Dec. ¶ 40.)

"In 2000, Mallinckrodt became a wholly owned subsidiary of Tyco International Ltd. ('Tyco') and one of the primary units in Tyco's healthcare business." (Ex. 11, Covidien Compl. ¶ 31.) Then, in 2007, then-parent "Tyco separated into three publicly

traded companies, including Covidien. As part of [that] transaction, Tyco's healthcare business—including the development, manufacture, marketing, promotion, and sale of opioid pharmaceuticals—became part of Covidien." (*Id*.) At that point, "while Mallinckrodt remained a separate corporate entity on paper, … Mallinckrodt ceased operating as a standalone entity and was considered both internally and externally to be Covidien's pharmaceutical segment." *Opioid Master Disbursement Tr. II*, 2024 WL 206682, at *2.

"[W]hile under Covidien's domination and control, [Mallinckrodt] became the most significant manufacturer, marketer, and producer of opioid products in the United States as measured by market share. According to the [Drug Enforcement Agency ("DEA")], from 2006 to 2012, Mallinckrodt produced 28.9 billion opioid pills—more than 80 pills for each American," which "accounted for at least 23.7% of the national opioid market." (Ex. 11, Covidien Compl. ¶ 33.) *See Opioid Master Disbursement Tr. II*, 2024 WL 206682, at *2. According to the Trust, Mallinckrodt achieved its success through "deceptive marketing and sales efforts [that] caused its profits to skyrocket and were so successful that they led one vice president of sales to refer to [Mallinckrodt's] growing oxycodone business as a 'new economy.'" (Ex. 11, Covidien Compl. ¶ 35.)

As the Trust explained, "[w]ith large levels of production and market share, Mallinckrodt's products had a concomitant role in fueling the nationwide opioid epidemic … 'Everybody thinks of Purdue when they think about the opioid epidemic,' a former DEA supervisor explained. But Mallinckrodt, he said, was up to its 'eyeballs in oxycodone, and they knew exactly what they were doing.'" (*Id.* ¶ 34.) "[I]n March 2011, the Drug Enforcement Administration … called Mallinckrodt 'the kingpin within the drug cartel' of pharma companies driving the opioid epidemic." (*Id*.) *See Opioid Master Disbursement Tr. II*, 2024 WL 206682, at *28.

According to the Trust, "Covidien was fully aware that its products were being abused and aware of the financial and human consequences of that abuse." (Ex. 11, Covidien Compl. ¶ 7.) "On January 7, 2009, Mallinckrodt received the first of what would eventually become many subpoenas from government investigators" regarding its sale of

opioids—this one from the U.S. Attorney's Office in the Northern District of California. *Opioid Master Disbursement Tr. II*, 2024 WL 206682, at *4. Additionally, by November 2011, the DEA had subpoenaed Mallinckrodt for documents relating to its opioids business. (*Id.* ¶ 7.)

In December 2011, Covidien announced the spinoff of Mallinckrodt into a standalone entity, which was completed in 2013. (*See id.* ¶¶ 10, 141.) ***The Trust itself has asserted*** that "Covidien engaged in the spinoff in an attempt to shield the assets of the enterprise's medical device and supplies business from the substantial opioid claims" that Covidien knew would arise from the wrongful conduct undertaken by Mallinckrodt. (*See id.* ¶ 1.) In fact, after reviewing more than 1.3 million documents relating to the opioid-related activities of Covidien and Mallinckrodt, the Trust filed and is currently pursuing a lawsuit against Covidien for what the Trust claims was a deliberate fraudulent transfer of massive opioids liability into, and assets away from, Mallinckrodt. (*See* Ex. 12, Reply In Support of Motion of Opioid Master Disbursement Trust II For Leave to File Amended Complaint ¶ 1, n. 2, *Opioid Master Disbursement Tr. II v. Covidien Unlimited Co., et. al.*, No. 22-50433 (Bankr. D. Del. July 10, 2023) ECF No. 47; Ex. 11, Covidien Compl. ¶ 13.)

Covidien was prescient. Beginning in or around 2017, Mallinckrodt began to be named as a defendant in the Opioid Lawsuits. (*See* Amended Petition ¶ 3.) What began as a trickle became a torrent, and by 2020, "Mallinckrodt's opioid-related liability arising from its products and from its role in creating and perpetuating the opioid crisis, … ultimately led to the filing of more than 3,000 lawsuits against Mallinckrodt around the country seeking massive damages[.]" (*See* Ex. 11, Covidien Compl. ¶ 2.)

Ultimately, on October 12, 2020, in response to "a years-long onslaught of litigation regarding Specialty Generics' production and sale of opioid medications," Mallinckrodt plc and certain affiliated entities filed for bankruptcy. (Ex. A., Welch Dec. ¶ 68; *see also id.* ¶ 76 (Mallinckrodt executive characterizing the Opioid Lawsuits as "an all-consuming tidal wave of litigation ***concerning the production and sales of its opioid products***") (emphasis added); Ex. 13 Revised Opinion (Excerpted) at 2, *In re Mallinckrodt plc, et. al.*, No. 20-12522 (Bankr. D. Del. Feb. 8, 2022) ECF No. 6378

("Confirmation Opinion") (bankruptcy court describing cause of bankruptcy as an "onslaught of litigation ***arising out of [Mallinckrodt's] production of certain drugs***") (emphasis added).)

C. Mallinckrodt's Bankruptcy

The Trust was established to administer the settlement of opioid-related claims and pursue Mallinckrodt's insurance claims. (Ex. 14, Fourth Amended Joint Plan of Reorganization (Excerpted),[6] Art. I(290), IV(T), No. 20-12522 (Bankr. D. Del. June 21, 2022) ECF No. 7670 (the "Plan").) The Trust is entitled to pursue claims and causes of action "based in whole or in part on any conduct or circumstance occurring or existing on or before the Effective Date [of the Plan] and ***arising out of, relating to, or in connection with any opioid product or substance***[.]" (Ex. 14, Plan (Excerpted), Art. IV(T); Art. I(55), (274), (284).)

Under the Chapter 11 plan, Mallinckrodt agreed to "settle" its opioid-related liability in part by paying $1.725 billion to the Trust in total, and paying $450 million of that amount on the Plan's effective date. (*See* Ex. 14, Plan (Excerpted), Art. I(290), (202), (281), Art. IV(W)(2); Ex. 13, Confirmation Opinion (Excerpted) at 34; Ex. 15, Declaration of Jason Goodson, Executive Vice President and Chief Strategy and Restructuring Officer, In Support of Chapter 11 Petitions and First Day Motions (Excerpted) ¶ 81, *In re Mallinckrodt plc, et al.*, No. 23-11258 (Bankr. D. Del. Aug. 28, 2023) ECF No. 16 ("Goodson Dec.").) On August 28, 2023, Mallinckrodt filed a second bankruptcy proceeding, in part because it was unable to meet its obligations to fund the Trust contemplated by the original bankruptcy. (*See* Ex. 15, Goodson Dec. (Excerpted) ¶¶ 8-9). Pursuant to that second plan, in lieu of paying the remaining $1.275 billion outstanding over the next seven years, Mallinckrodt made a final $250 million "settlement" payment to the Trust immediately prior to its second bankruptcy filing. (Ex. 16, Prepackaged Joint

[6] The full title is Modified Fourth Amended Joint Plan of Reorganization (With Technical Modifications) of Mallinckrodt PLC And Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code.

Plan of Reorganization of Mallinckrodt PLC and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code (Excerpted), Art. I(166), Art. IV(R), *In re Mallinckrodt plc, et al.*, No. 23-11258 (Bankr. D. Del. Aug. 28, 2023) ECF No. 17; Goodson Dec. (Excerpted) ¶¶ 9-10.) According to the Trust, "[u]nder the Plan, Mallinckrodt was discharged from its opioid-related liability and suffered a loss on the effective date of the Plan in the full amount of that liability." (Mot. at 3.)

D. The Trust's Coverage Action

On June 16, 2022, the Trust filed a Petition for Declaratory Relief in this Court, and filed a First Amended Petition for Declaratory Relief, which named additional insurers as defendants, on July 28, 2022 (the "Amended Petition"). On December 20, 2023, the Trust initiated a separate but related proceeding by filing another Petition for Declaratory Relief that added several policies to the case, and which was subsequently consolidated into this case (the "Consolidated Petition"). (*See* Order to Consolidate, dated January 30, 2024.) The Trust now seeks declaratory relief with respect to insurance coverage for Mallinckrodt's liability in connection with the Opioid Lawsuits, under approximately 100 insurance policies, issued by 20 insurers, including 33 policies issued by the AIG Insurers and other AIG companies from 1995 to 2021. (*See* Petition ¶¶ 26-44; Amended Petition ¶¶ 27-46, Trust's First Amended Exhibit A; Consolidated Petition at ¶¶ 27-29.)

The case is currently in the middle of discovery and, while many documents and written discovery have been exchanged, a great deal remains to be done. Many categories of highly relevant documents are missing from the Trust's productions to date. These include, for example, Mallinckrodt's documents pre-dating 2011, the period of time during which the Trust claims Covidien was "fully aware that [Mallinckrodt's] products were being abused and aware of the financial and human consequences of that abuse" (Ex. 11, Covidien Compl. ¶ 7); and the identification of the occurrence or occurrences for which the Trust is seeking coverage, a basic and necessary element of its insurance claim.

The defendant insurers have pressed the Trust for the missing categories of information and will continue to do so, including addressing potential spoliation concerns. Indeed, the Trust has represented that "to the extent that responsive pre-2011

[electronically stored information] was not produced, it is because it no longer exists." (Ex. 17, Letter from the Trust, dated June 20, 2024.) The insurers plan to pursue discovery on what connection, if any, exists between the failure to preserve documents pre-dating 2011, and the DEA investigation and Covidien spin-off that took place around the same time. Significant third-party discovery also remains outstanding, and no depositions have been taken in this matter. Fact discovery is not scheduled to close before July 31, 2025. (*See* Second Amended Case Management Order, dated June 18, 2024.)

E. The Trust's Motion For Partial Summary Judgment

On April 16, 2024, the Trust filed 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. The Trust's Motion for "Partial" Summary Judgment deals with only a single insurer, National Union, and just 13 commercial general liability policies covering annual periods between the years 2008 and 2021 (the "National Union Policies"). (*See* Mot., Appendix A.) The Trust's Motion concerns only the PCOH exclusion.

F. The AIG Insurers' Cross Motion

The AIG Insurers now cross-move for summary judgment on the same 13 National Union Policies that are the subject of the Trust's Motion, and one additional policy, American Home Policy No. GL 159-53-88, which contains the exact same PCOH exclusion and covers the period from June 29, 2007 to October 1, 2008. While these policies do not provide PCOH coverage, they provide, subject to their terms and conditions, accident insurance for a number of other risks attendant to operating a large corporate enterprise, such as a car accident involving the sales force or an explosion at a lab. All of the above-referenced AIG policies with the PCOH exclusion are primary policies, meaning that they sit in the first layer of annual insurance "towers," below other policies that provide forms of excess liability insurance (collectively, the "AIG Primary Policies"). In certain years, Mallinckrodt had no primary general liability insurance at all. (*See, e.g.*, Ex. 2, National Union Policy No. BE2977855.)

The AIG Insurers also cross-move on eight additional policies of a different type—six National Union policies and two American Home policies—that contain a Products-Completed Operations Hazard Claims-Made Retained Limit Endorsement ("PCOH Claims-Made Endorsement"), which cover annual periods from 2003 to 2011. Subject to their terms and conditions, these policies do provide coverage for, among other things, claims falling within the definition of the Products-Completed Operations Hazard, but ***only on a claims-made and reported basis***—that is, only when (1) a claim was first made against Mallinckrodt and (2) written notice of the claim was provided by Mallinckrodt to National Union or American Home ***during the policy period*** of the respective policy. In this way, while the policies provide PCOH coverage, they do so in a limited fashion. All of the above-referenced AIG policies with the PCOH Claims-Made Endorsement are umbrella policies, meaning that they sit in the second layer of the towers directly above the primary policies and any self-insured risk retained by Mallinckrodt (collectively, the "AIG Umbrella Policies").

The above-described limitations on PCOH coverage were important in light of Mallinckrodt's growing pharmaceutical business. Pharmaceuticals pose significant risks to insurers. (*See* Ex. 18, Han W. Choi & Jae Hong Lee, Pharmaceutical Product Liability, in PRINCIPLES AND PRACTICE OF PHARMACEUTICAL MEDICINE, Chapter 55, 688 (3d ed. 2011).) "The [products] liability burden on pharmaceutical companies has been described as grossly disproportionate to their sales in comparison with other manufacturing industries." (*Id.*) PCOH exclusions or limitations in liability policies issued to pharmaceutical companies thus were not uncommon around the time the AIG Insurers issued such coverage to Mallinckrodt.

ARGUMENT

Summary judgment is appropriate only if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Mo. Sup. Ct. R. 74.04(c)(6).

I. THE TRUST'S MOTION SHOULD BE DENIED BECAUSE IT IMPERMISSIBLY SEEKS AN ADVISORY OPINION.

The Court should deny the Trust's Motion because the ruling the Trust seeks would be an improper advisory opinion on the applicability of the PCOH exclusion to a hypothetical and hotly contested theory of liability, and based on an assumption that coverage would apply absent the exclusion. "It is well settled that a justiciable controversy must exist in order for a trial court to grant declaratory relief." *Mid-Century Ins. Co. v. Wilburn*, 422 S.W.3d 326, 328 (Mo. App. S.D. 2013). One of the requirements of justiciability is that "the controversy be ripe for judicial determination." *Id*. at 329. "A ripe controversy exists if the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." *Id*.

Where a party seeks a ruling on "a speculative or hypothetical situation that may or may not come to pass," such a dispute is unripe, and a ruling would constitute an advisory opinion. *George v. Brewer*, 62 S.W.3d 106, 109 (Mo. App. S.D. 2001); *see Local Union 1287 v. Kansas City Area Transp. Auth.*, 848 S.W.2d 462,463-64 (Mo. banc 1993). In such a case, the matter is not justiciable, and the court should decline to rule at that time. *See Mid-Century Ins. Co.*, 422 S.W.3d at 330.

The Missouri Supreme Court has explained that "[t]here are at least two sound reasons that courts decline to render advisory, or hypothetical, judgments and opinions." *Local Union 1287*, 848 S.W.2d at 464. The first is that "judicial resources are limited and should not be wasted on disagreements that may never require judicial resolution." *Id*. The second is that, "if a court examines a matter in which facts are not completely developed, it is possible that the court may grant an incorrect judgment" and thus "may take an inappropriate or premature step in the judicial development of the law." *Id*.

The Trust's Motion presents the Court with a hypothetical situation of the precise kind on which Missouri courts must decline to rule: ***If*** the Trust were to show that Mallinckrodt actually faced and resolved liability for damages caused, in part, by "non-Mallinckrodt products" and ***if*** the Trust could meet its burden to establish that any such

liability satisfied the terms and conditions to coverage set forth in the AIG Primary Policies, ***then*** would the PCOH exclusion apply? The Trust, in the midst of substantial ongoing discovery thus asks this Court to peer into the future and render an advisory opinion about an outcome contingent on future events that may or may not come to pass, a request that flouts the rules on ripeness as well as basic insurance law. *See Hawkeye-Security Ins. Co. v. Davis*, 6 S.W.3d 419, 427 (Mo. App. S.D. 1999) (where insureds did not meet their burden of showing a covered "occurrence" within the meaning of the policy, the court declined to rule upon the meaning of an exclusion because "any discussion of this argument would be merely advisory").

A. The Trust Asks For An Opinion Based On An Assumption Of A Key And Hotly Disputed Fact—That Mallinckrodt Faced And Settled Liability Arising From Other Manufacturers' Opioids And Illicit Opioids.

A key factual predicate to the ruling that the Trust seeks—that Mallinckrodt faced and settled liability that in fact arose directly from other companies' opioids or illicit opioids, as the Trust says—has not been established, is purely hypothetical at this time, and is a contested issue of fact. The Insuring Agreement in the AIG Primary Policies provides:

> ***We will pay those sums that the insured becomes legally obligated to pay*** as damages because of "bodily injury" or "property damage" to which this insurance applies. … This insurance applies to "bodily injury" and "property damage" only if: (1) The "bodily injury" or "property damage" is caused by an "occurrence" [defined as "an accident"] that takes place in the "coverage territory"; (2) the "bodily injury" or "property damage" occurs during the policy period; and (3) Prior to the policy period, no insured [identified in the policy] knew that the bodily injury" or "property damage" had occurred in whole or in part.

(Ex. M, National Union Policy No. GL 509-47-72, Section I.1.a-b. at AIGINS-MNK00000812 (emphasis added); *id.*, Section V.13. at AIGINS-MNK00000826.) Thus, the threshold issue for determining whether there is even the potential for coverage, or whether an exclusion to such coverage may apply, is whether the Trust has shown that Mallinckrodt was "legally obligated to pay" the very liability that it now claims is outside

the reach of the PCOH exclusion—that is, liability that actually arose from non-Mallinckrodt opioids.[7]

The Trust acknowledges repeatedly in its Motion that it has not yet established this threshold fact, a fact that is hotly disputed by the parties. The Trust asks the Court for a declaration that, "***to the extent*** Mallinckrodt's liability arose in part from non-Mallinckrodt products," the PCOH exclusion does not apply. (Mot. at 22-23 (emphasis added); *see id.* at 2, 20-22, 29.) Elsewhere, the Trust says that it seeks a "determination by this Court that, ***to the extent*** Mallinckrodt was liable because of bodily injury arising in whole or in part from opioid pharmaceuticals manufactured or sold by other pharmaceutical companies or from illicit opioid drugs," coverage is not precluded. (Mot. at 2 (emphasis added).) Indeed, all of the Trust's statements about the relief it seeks are premised on the same "***to the extent***" hypothetical formulation, including in its proposed order to the Court. (*See., e.g.*, Mot. at 20, 29; *see also* Plaintiff's "[Proposed] Order Granting Plaintiffs Motion for Partial Summary Judgment.")

Thus, the question that the Trust poses to the Court is, in essence: ***Assuming hypothetically*** that the Trust can establish that Mallinckrodt's liability arose in part from "non-Mallinckrodt products"—which it has not done—***would*** the PCOH exclusion apply? This is improper. It is well settled that a court may not rule on an issue contingent on events that may or may not come to pass. *George*, 62 S.W.3d at 109; *Local Union 1287*,

[7] As discussed below (*see* Section II), the Trust's reading of the PCOH exclusion is wrong. The relevant question is *not* whether Mallinckrodt has been found legally liable for harms caused by other manufacturers' opioids or illicit opioids such as heroin, but rather whether Mallinckrodt's liability "ar[ose] out of" Mallinckrodt's own products, its representations about its products, or Mallinckrodt's work—even if other manufacturers' opioids or illicit substances were also involved. As a matter of Missouri law and the plain text of the policies, the harms allegedly resulting from Mallinckrodt's involvement in an unbranded marketing campaign indisputably arose from Mallinckrodt's products, representations, and/or work, and thus there can be no coverage, even if, for example, certain people ultimately turned to heroin because of Mallinckrodt's role in that unbranded marketing.

848 S.W.2d at 463-66. This is a quintessentially unripe issue on which any ruling would be advisory. *Mid-Century Ins. Co.*, 422 S.W.3d at 330.

To be sure, the Trust has not attempted to ripen the issue either. While it has submitted a 50-page "Statement of Uncontroverted Facts"—which, in many cases, are controverted—it offers no evidence on the disputed factual issue of the nature of the liability that Mallinckrodt faced and purportedly "settled" in the course of its bankruptcy proceedings. In fact, the Trust's Statement of Uncontroverted Facts repeats mostly allegations and makes no reference at all to the factual record from the bankruptcies, the factual record from the underlying cases, or the factual record from this case.

On the contrary, the Trust says it "is not seeking a finding of fact here at all with respect to any particular opioid claim against Mallinckrodt," nor any ruling as to "whether any particular opioid claims against Mallinckrodt, or any particular quantum of Mallinckrodt's opioid liability, were outside the products hazard exclusion." (Mot. at 2.) In other words, the Trust asks the Court not to apply the exclusion to a particular set of established facts—just to consider it in the abstract. Thus, the Trust seeks a paradigmatic advisory opinion.

The Trust has given the Court no basis to conclude that the premise of the Trust's argument—that Mallinckrodt was legally obligated to pay for liability arising out of something other than Mallinckrodt's products—is an undisputed fact on which summary judgment could be based. *See* Mo. Sup. Ct. R. 74.04(c)(6). Furthermore, the Trust's premise is flatly incorrect. As demonstrated in detail below in Part II, the record is crystal clear that all of Mallinckrodt's opioids-related liability "arises out of" Mallinckrodt's products or work. Thus, if the Court reaches the issue, not only must the Trust's Motion be denied, but AIG's Cross-Motion must be granted.

B. The Trust's Failure to Address The Threshold Question Of Coverage For The Hypothetical Liability Mallinckrodt Faced Also Renders Its Request For A Ruling On The PCOH Exclusion Unripe and Advisory Under Missouri Law.

Even if the Trust could prove that Mallinckrodt faced and settled liability for harms caused by other companies' products or illicit opioids, there are significant disputes—

disputes that are also a focus of ongoing discovery—as to whether the Trust can meet its burden to overcome all of the other hurdles to coverage that must be resolved before it is proper or necessary to consider any exclusion to coverage. The Trust has not addressed—and may never sufficiently address—the question of whether the terms and conditions to coverage can be satisfied with respect to the hypothetical liability it claims was asserted and resolved through settlement, which is another reason why the issue of any exclusion to coverage is unripe. As the Missouri Court of Appeals has held, ruling on the applicability of a policy exclusion before "first considering whether there was . . . an obligation of indemnity" would be "merely advisory." *Hawkeye-Security Ins. Co.*, 6 S.W.3d at 427.

This conclusion follows the logic of any coverage analysis. To determine whether there is coverage under an insurance policy for liability actually faced and resolved by an insured, a court *begins* with the terms and conditions of the coverage grant, and it is well established the insured bears the initial burden of showing entitlement to coverage. *See Bauer v. AGA Ser. Co*., 25 F.4th 587, 590 (8th Cir. 2022) (applying Missouri law) ("It is the insured's burden to establish coverage under the policy[.]"); *TWA, Inc. v. Associated Aviation Underwriters*, 58 S.W.3d 609, 621 (Mo. App. E.D. 2001) ("The insured has the burden of showing that the loss and damages are covered by the policy[.]"). Only if the insured can establish satisfaction of the terms and conditions to coverage, will a court assess whether any exclusions to coverage apply. *See Bauer*, 25 F.4th at 590. This sequence of events makes sense, given that "an exclusion . . . has no function to endow coverage but serves only to limit the obligation of indemnity undertaken by the policy." *Hawkeye-Security Ins. Co.*, 6 S.W.3d at 427.

The Missouri Court of Appeals decision in *Hawkeye-Security* is instructive. There, the insured sought coverage for damages resulting from a defective construction project. *Id.* at 421. The insured argued, *inter alia*, that exclusionary language in the policy at issue rendered the policy ambiguous so as to require coverage. *Id.* at 426-27. The court refrained from ruling on the exclusion and held that doing so would be "merely advisory." *Id*. The court explained that considering the exclusion "without first considering whether there was an insured event, i.e., an obligation of indemnity undertaken by the policy" would be a

"flawed" analysis. *Id.* at 426-27. The court determined that the evidence before it "[did] not satisfy [the insured's] burden of showing an 'occurrence' within the meaning of the policy" and thus reaching the exclusion was "unnecessary." *Id*. at 427.

Ruling on the PCOH exclusion here would be similarly "flawed." The Court cannot properly reach the question of an exclusion to coverage before addressing the question of whether the Trust established that coverage exists. Here, to show entitlement to coverage, the Trust must first satisfy the terms and conditions provided in the AIG Primary Policies' Insuring Agreements:

> We will pay those sums that the insured becomes legally obligated to pay as damages ***because of "bodily injury" or "property damage" to which this insurance applies. … This insurance applies to "bodily injury" and "property damage" only if: (1) The "bodily injury" or "property damage" is caused by an "occurrence" [defined as "an accident"] that takes place in the "coverage territory"; (2) The "bodily injury" or "property damage" occurs during the policy period; and (3) Prior to the policy period, no insured [identified in the policy] knew that the "bodily injury" or "property damage" had occurred in whole or in part***.

(*E.g.,* Ex. M, National Union Policy No. GL 509-47-72, Section I.1.a-b., at AIGINS-MNK00000812 (emphasis added); *id.,* Section V.13. at AIGINS-MNK00000826.) Presently, the Trust has not put forward any evidence bearing on these prerequisites, much less establishing there is no disputed issues of fact that they have been satisfied. Indeed, as it stands, the Trust's ability to satisfy the terms and conditions to coverage with respect to Covidien's and Mallinckrodt's conduct is just a potential future event—and an unlikely one at that.

For example, as the AIG Insurers will show through full briefing, at the appropriate time and if it becomes necessary, the Trust cannot establish that the liability faced by Mallinckrodt for the vast majority of the Opioid Lawsuits was for damages "because of bodily injury." Indeed, multiple courts have held that the damages sought by government plaintiffs in the Opioid Lawsuits were not "because of bodily injury." *See, e.g.*, *ACE Am. Ins. Co. v. Rite Aid Corp*., 270 A.3d 239, 247 (Del. 2022); *Acuity v. Masters Pharms., Inc*., 205 N.E.3d 460, 473 (Ohio 2022); *Westfield Nat'l Ins. Co. v. Quest Pharms., Inc.*, 57 F.4th 558, 562, 567 (6th Cir. 2023) (U.S. Court of Appeals, Sixth Circuit, applying Kentucky

law); *Allied Prop. Cas. Ins. Co. v. Bloodworth Wholesale Drugs, Inc*., No. 7:22-cv-00113 (WLS), 2024 WL 1313844, at *7 (M.D. Ga. Mar. 27, 2024) (applying Georgia law).

At the appropriate time, and before consideration of the PCOH exclusion, the Court will have to determine whether the same outcome is warranted, whether under Massachusetts or Missouri law, which are in accord in terms of interpreting the "because of bodily injury" requirement. *See, e.g., Stewart v. Royal*, 343 S.W.3d 736, 743 (Mo. App. W.D. 2011); *Vermont Mut. Ins. Co. v. Poirier,* 189 N.E.3d 306, 311 (Mass. 2022) ("damages caused by bodily injury refer to the physical injuries and the money damages required to compensate them.").

To take the "occurrence" requirement as another example, courts that have considered the precise misconduct alleged here—a pharmaceutical manufacturer's deceptive unbranded marketing campaign designed to increase the sale of opioids—have ruled that it does not constitute an "occurrence," which is defined as an "accident." In *Traveler's Property Casualty Co. of America v. Actavis, Inc.*, the California Court of Appeal held that "[t]he allegations that [the insured national pharmaceutical manufacturer] and other the defendants engaged in 'a common, sophisticated, and highly deceptive marketing campaign' aimed at increasing sales of opioids and enhancing corporate profits" did not constitute an "insurable accident." 16 Cal. App. 5th at 1040, review dismissed, cause remanded *sub nom. Traveler's Prop. Cas. Co. of Am. v. Actavis*, 427 P.3d 744 (Cal. 2018) (applying California law). Similarly, in *AIU Insurance Co. v. McKesson Corp.*, the Ninth Circuit held that the Opioid Lawsuits "seek to hold [the insured] accountable for the deliberate manner in which it distributed opioids: by flooding the market, concealing facts, disregarding its duties, and ignoring risks. This is not conduct which [the insured] plausibly could have engaged in by accident[.]" No. 22-16158, 2024 WL 302182, at *2 (9th Cir. Jan. 26, 2024) (applying California law).

Again, at the appropriate time, and certainly before the impact of any exclusion to coverage is considered, the Court will have to determine whether the Trust can establish that the liability faced by Mallinckrodt was caused by an "accident" under Missouri or Massachusetts law, both of which are generally consistent with California law on the issue

of "occurrence." *See Heckadon v. Universal Underwriters Ins. Co.,* 586 S.W.3d 789, 801 (Mo. App. W.D. 2019) ("[I]t is well-settled Missouri law that when a 'liability policy defines occurrence as meaning accident, Missouri courts consider this to mean injury caused by the negligence of the insured."); *accord Utica Mut. Ins. Co. v. Hamel,* 708 N.E.2d 145, 147 (Mass. App. Ct. 1999). Indeed, Missouri courts have held that a "scheme" whereby an insured "misrepresented, misled, and deceived . . . consumers" was not an "occurrence." *Heckadon,* 586 S.W.3d at 804-05; *see also Hawkeye-Security Ins. Co.*, 6 S.W.3d at 426 (insured's conduct was not an "accident" as it "cannot be characterized as 'an undesigned or unexpected event'") (quotations omitted); *accord Utica Mut. Ins. Co.*, 708 N.E.2d at 147.

The significant disputes concerning these coverage issues, coupled with the state of the law, underscore that the Trust will not be able to satisfy its burden and establish coverage for the very conduct that it claims falls outside of the PCOH exclusion. And if there is no coverage, there will be no need to consider the applicability of an exclusion to coverage. *Hawkeye-Security Ins. Co.*, 6 S.W.3d at 427. With coverage (at best) a future contingency, any opinion on an exclusion to coverage would be advisory. *See Hawkeye-Security Ins. Co.*, 6 S.W.3d at 427.

Indeed, were the Court to rule as the Trust asks, there would be no further clarity on whether there is coverage for any claim than if the Court had not ruled at all. This is the hallmark of an unripe dispute. *See Mid-Century Ins. Co.*, 422 S.W.3d at 329 ("A ripe controversy exists if the parties' dispute is developed sufficiently to allow the court . . . to grant specific relief of a conclusive character."). The Court should not expend its resources now to resolve an issue that may never need to be resolved, and should decline to issue the advisory opinion the Trust requests.

II. IF THE COURT REACHES THE ISSUE, THE TRUST'S MOTION SHOULD BE DENIED AND THE AIG INSURERS' CROSS-MOTION SHOULD BE GRANTED BECAUSE THE PCOH EXCLUSION BARS COVERAGE.

If the Court is inclined to address the application of the PCOH exclusion now, the Court must conclude that its bars coverage under the AIG Primary Policies. All fourteen

of the AIG Primary Policies contain an identical Products-Completed Operations Hazard exclusion. The PCOH exclusion is set forth in an endorsement included in each of the policies. It provides in full: "This insurance does not apply to 'bodily injury' or 'property damage' ***included within the 'products-completed operations hazard***.'" (*See, e.g.*, Ex. M, National Union Policy No. GL 509-47-72 at AIGINS-MNK00000836 (emphasis added).) The term "products-competed operations hazard" is defined to "Include[] all 'bodily injury' and 'property damage' occurring away from premises you own or rent and ***arising out of 'your product' or 'your work***[.]'" (*Id.*, Section V.16.a. at AIGINS-MNK00000826 (emphasis added).) "Your Product," in turn, is defined as follows:

> (1) ***Any goods or products***, other than real property, manufactured, sold, handled, distributed or disposed of by (a) You; (b) Others trading under your name; or (c) A person or organization whose business or assets you have acquired; and (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products. . . . [And] [i]ncludes: (1) ***Warranties or representations*** made at any time with respect to the fitness, quality, durability, performance or use of 'your product'; and (2) The providing of or ***failure to provide warnings*** or instructions."

(*Id*., Section V.21. at AIGINS-MNK00000827 (emphasis added).) "Your Work" is defined 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. . . . [And] [i]ncludes (1) ***Warranties or representations*** made at any time with respect to the fitness, quality, durability, performance or use of 'your work', and (2) The providing of or ***failure to provide warnings*** or instructions.

(*Id*., Section V.22. at AIGINS-MNK00000827 (emphasis added).)

In its Motion, the Trust misrepresents the terms of the PCOH exclusion. First, the Trust fails to mention that the definition of "your product" includes "representations or warranties" and "the failure to provide warnings" about "your product" except in a footnote, and the Trust's brief provides no other discussion or analysis of that key part of the definition. (*See* Mot. at 15, n.13.) Second, the Trust fails to acknowledge that the PCOH exclusion applies to "bodily injury" "*arising out of*" "your product"—key language that is broadly defined under both Missouri and Massachusetts law. Instead, the Trust focuses on the "included within" language, and argues that in order to be "included within"

the PCOH, the bodily injury must have arisen "solely" out of Mallinckrodt's products. (Mot. at 21-23, 27, 29.) But "solely" is nowhere in the exclusion, and not one case cited by the Trust supports the suggestion that "solely" should be read into it.

Moreover, it is the scope of the of the Products-Completed Operations Hazard itself that dictates what does or does not fall "within" its parameters, and the Trust presents no authority to support its position that "included within" would curtail the breadth of the "arising out of" language. And finally, the Trust fails to address the fact that the PCOH exclusion also applies to bodily injury arising out of "your work," which is also broadly defined. As discussed below, when the complete and accurate terms of the PCOH exclusion are applied to the Trust's hypothetical alternative theory of liability, it is clear that any harm alleged by the Opioid Lawsuits arises out of Mallinckrodt's products, and coverage is therefore barred by the PCOH exclusion.

A. All Of The Liability Faced By Mallinckrodt In The Opioid Lawsuits "Arises Out Of" Mallinckrodt's "Products."

1. The Meaning Of "Arising Out Of" Is Very Broad Under Settled Law In Missouri And Massachusetts.

"[U]nder Missouri insurance law, 'arising out of' has been interpreted 'to be a very broad, general and comprehensive phrase' meaning 'originating from' or 'having its origins in' or 'growing out of' or 'flowing from.'" *Capitol Indem. Corp. v. 1405 Assocs., Inc.,* 340 F.3d 547, 550 (8th Cir. 2003) (applying Missouri law). Further, "the applicable causation standard" for "arising out of" "is not the strict 'direct and proximate cause' standard applicable in general tort law." *Id*. "Instead, 'arising out of' may be established by a 'simple causal relationship . . . between the accident or injury and the activity of the insured.'" *Id*.; *see also Hunt v. Capitol Indem. Corp*., 26 S.W.3d 341 (Mo. App. E.D. 2000).

As a result, courts applying Missouri law, including the Missouri Supreme Court, have consistently construed "arising out of" exclusions broadly and have regularly held that such exclusions unambiguously preclude coverage. *See Capitol Indem. Corp. v. Callis*, 963 S.W.2d 247, 248-50 (Mo. App. W.D. 1997) (exclusion for injury "arising out

of assault, battery or assault and battery" barred coverage); *1405 Assocs., Inc.,* 340 F.3d at 550 (exclusion for injury "arising out of . . . termination" barred coverage); *Columbia Mut. Ins. Co. v. Schauf*, 967 S.W.2d 74, 78-81 (Mo. 1998) (exclusion for property damage "arising out of" insured's "operations" barred coverage); *see also Cincinnati Ins. Co. v. Intek Corp.*, No, 4:08cv1440 JCH, 2010 WL 716197, at *4 (E.D. Mo. Feb. 24, 2010) (PCOH exclusion precluded coverage for liability arising out of malfunctioning warming plate); *Scottsdale Ins. Co. v. Aqueous Vapor, LLC*, No. 4:20-00328-CV-RK, 2021 WL 123401 (W.D. Mo. Jan. 12, 2021) (PCOH exclusion precluded coverage for injuries arising out of exploding e-cigarette).[8]

Under Massachusetts law,[9] like Missouri law, "[t]he phrase 'arising out of' must be read expansively, incorporating a greater range of causation than that encompassed by

[8] The Trust argues that, if nothing else, the PCOH exclusion is ambiguous. The Trust cites no cases that hold that the language of the PCOH exclusion is ambiguous, and the cases the Trust does cite are inapposite. (*See* Mot. at 27-28 (citing *Burns v. Smith*, 303 S.W.3d 505, 510 (Mo. banc 2010) (deciding whether "business pursuits" exclusion was ambiguous), *Jones v. Mid-Century Ins. Co*., 287 S.W.3d 687, 690 (Mo. banc 2009) (deciding whether underinsured motorist provision was ambiguous), *Fair v. Lighthouse Carwash Sys., LLC*, 961 So. 2d 60 (Miss. Ct. App. 2007) (deciding whether forum selection clause was ambiguous), and *Citizens Ins. Co. of N.J. v. Kansas City Com. Cartage, Inc*., 611 S.W.2d 302, 307 (Mo. App. W.D. 1980) (deciding whether the term "employee" in exclusion in motor truck cargo policy was ambiguous). Further, a multitude of cases in Missouri and Massachusetts have held that the operative language at issue is *unambiguous*. *See Cincinnati*, 2010 WL 716197, at *4; *Scottsdale*, 2021 WL 123401, at *3; *Brazas*, 220 F.3d at 6.

[9] There appears to be no dispute between the parties that Missouri law should control this briefing. Under Missouri choice of law rules, to the extent that there is a conflict of law with a state that has a more significant relationship, the court should consider applying that law. In insurance coverage disputes, the law of the insured's domicile is given significant weight. *See Viacom, Inc. v. Transit Cas. Co*., 138 S.W.3d 723, 725 (Mo. banc 2004). Here, certain of the AIG policies were issued to Mallinckrodt, plc, a Missouri-based company. (*See, e.g.,* Ex. M, National Union Policy No. GL 509-47-72, at AIGINS-MNK00000806.) Certain others were issued to Covidien, Ltd., a Massachusetts-based company. (*See, e.g.,* Ex. 9, National Union Policy No. 15972632.) Certain others were issued to Tyco Healthcare Group LP, also a Massachusetts-based company. (*See, e.g.,* Ex. 1, American Home Policy No. GL 159-53-88, at AIGINS-MNK00014160.) Massachusetts law and

proximate cause under tort law." *Finn v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 896 N.E.2d 1272, 1278 (Mass. 2008); *Kinsella v. Wyman Charter Corp*., 417 F. Supp. 2d 159, 165 (D. Mass. 2006) (same). Indeed, the Supreme Judicial Court of Massachusetts has stated that "'arising out of' denotes a 'causation more analogous to 'but for' causation,' in which the court examining the exclusion inquires whether there would have been personal injuries, and a basis for the plaintiff's suit, in the absence of the objectionable underlying conduct." *Finn*, 896 N.E.2d at 1279; *see also Brazas Sporting Arms, Inc. v. Am. Empire Surplus Lines Ins. Co.*, 220 F.3d 1, 6-7 (1st Cir. 2000); *Certain Underwriters at Llyod's, London v. Atlantic Constr. Servs., Inc.,* 92 Mass. App. Ct. 1123 (Mass. App. Ct. 2018).

Accordingly, Massachusetts courts, like Missouri courts, interpret "arising out of" expansively and assiduously enforce "arising out of" exclusions. *See Kinsella*, 417 F. Supp. 2d at 164 (exclusion for "'bodily injury' . . . arising out of the ownership, maintenance, use or entrustment to others of any . . . watercraft" barred coverage); *Finn*, 896 N.E.2d at 1276 (holding exclusion for "any claim arising out of any misappropriation of trade secret" barred coverage); *Brazas Sporting Arms, Inc. v. Am. Empire Surplus Lines Ins. Co*., 59 F. Supp. 2d 223 (D. Mass. 1999), *aff'd* 220 F.3d 1 (1st Cir. 2000)) (PCOH exclusion barred coverage for gun manufacturers' liability concerning the overproduction of firearms); *Cytosol Labs., Inc. v. Federal Ins. Co*., 536 F. Supp. 2d 80 (D. Mass. 2008) (PCOH exclusion barred coverage for pharmaceutical manufacturer's liability concerning toxins in ophthalmic solution).

Notwithstanding the central importance of the phrase "arising out of" to the meaning of the PCOH exclusion, the Trust undertakes no analysis of "arising out of," makes no mention of the significant body of case law interpreting that phrase, and, notably, does not cite even a single case interpreting a PCOH exclusion. In fact, none of the cases that the Trust cites in support of this argument actually interprets the language at issue. They either adjudicate unrelated issues—for example, auto liability exclusions—or else they do not

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Missouri law are consistent on the issues addressed in this brief, and are cited interchangeably.

adjudicate exclusions at all. (*See, e.g.,* Mot. at 21 (citing *Truck Ins. Exchange v. Prairie Framing*, *LLC*, 162 S.W.3d 64, 86 (Mo. App. W.D. 2005) (deciding whether off-duty employee was an "insured" within the meaning of auto exclusion) and *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. banc 1997) (deciding whether insured was "operat[ing]" a car within the meaning of auto exclusion); *see id.* at 22 (citing *Selimanovic v. Finney*, 337 S.W.3d 30, 34-35 (Mo. App. E.D. 2011) (deciding whether damages element of legal malpractice case was established, which turned on whether employees were "insureds" under relevant policies).) Thus, the case law the Trust cites is inapposite.

2. Any Harm Mallinckrodt Faced In The Opioid Lawsuits "Ari[ses] Out Of" Mallinckrodt's Products And Mallinckrodt's Representations About Its Products.

All of the liability Mallinckrodt faced in the Opioid Lawsuits unquestionably meets the minimal required causal link to Mallinckrodt's "products." As an initial matter, the Trust does not contest—and therefore concedes—that the PCOH exclusion applies at least in part to the liability Mallinckrodt faced in the Opioid Lawsuits. The Trust posits multiple theoretical sources of Mallinckrodt's opioid-related liability, only one of which it contends falls outside the PCOH exclusion, "to the extent" that it exists. The remainder, therefore, are concededly subject to the PCOH exclusion.

The first theory is that Mallinckrodt was held liable for marketing and sales activities that specifically referenced its own products, which resulted in harm from the use of ***its own products***. (*See* Mot. at 1-3.) There is no dispute that such liability is subject to the PCOH exclusion. (*See id.* at 1-3; *id.* at 4 (exclusions are "limited to Mallinckrodt's products"); *id.* at 17 (exclusions "exclude coverage for liability arising out of 'your [Mallinckrodt's] product'"); *see also id.* at 26, 29.) The second theory is that Mallinckrodt was held liable for "unbranded" marketing that references opioids only generally, causing the market to be "flooded" with opioids, which in turn resulted in harm from the use of ***its own products***. (Mot. at 7.) Here, too, the Trust does not dispute that the PCOH exclusion is applicable. (*See id*. at 14, 17, 26, 29.) The third theory is that Mallinckrodt was held liable because, by flooding the market with opioids, Mallinckrodt played a role in creating

an opioid crisis leading to harm from the use of non-Mallinckrodt opioids, such as other pharmaceutical companies' opioids or illicit opioids. It is only this last theory of liability—***if*** such liability even exists—that the Trust argues falls outside the reach of the PCOH exclusion.

The fine distinction that the Trust attempts to draw does not hold up.[10] To interpret "arising out of" within the meaning of an exclusion, a court must examine if there would have been a basis for the suit in the absence of the excluded risk. *See Finn*, 896 N.E.2d. at 1279 (in interpreting an "arising out of" exclusion, a court "inquires whether there would have been personal injuries, and a basis for the plaintiff's suit, in the absence of the objectionable underlying conduct"). 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. *See id.*; *Hunt*, 26 S.W.3d at 344-45 (holding exclusion for injury "arising out of assault, battery, or assault and battery" barred coverage because "[w]ithout the underlying assault and battery, there would have been no injury and therefore no basis for plaintiffs' action"). Moreover, Mallinckrodt's unbranded representations about opioids generally were indisputably "representations . . . with respect to the fitness, quality, durability, performance, of 'your product,'" because Mallinckrodt's opioids are a subset of opioids generally. (Ex. M, National Union Policy No. GL 509-47-72, Section V.22. at AIGINS-MNK00000827.) That alone is enough to bring any liability for harm arising from those representations within the PCOH, regardless of whether the unbranded representations led people to abuse other manufacturers' opioids or illicit opioids such as heroin.

[10] The illogical result of the Trust's argument—that the presence of "other" opioids in the underlying claims means that the PCOH exclusion does not apply—is that insureds that were issued coverage excluding the PCOH, like Mallinckrodt and Purdue Pharma, would be able to get coverage for what neither would be able to get on its own. In other words, Mallinckrodt cannot get coverage for liability arising out of Mallinckrodt's products, and Purdue cannot get coverage for liability arising out of Purdue's products, but both can get coverage for liability that, in some fashion, involves both companies' products.

The bankruptcy record makes clear Mallinckrodt itself understood that its liability "originat[es] from," "ha[s] its origins in," or "grow[s] out of" its business as a producer and seller of opioid "goods or products." *1405 Assocs. Inc.*, 340 F.3d at 550 (applying Missouri law); *Brazas*, 220 F.3d at 6 (applying Massachusetts law). It said so under oath over and over again. For example, Mallinckrodt swore to the bankruptcy court that:

- "Certain Mallinckrodt entities, primarily associated with the Specialty Generics business, have been named in over 3,000 lawsuits ***stemming from the Debtors' production and sale of opioid medications***." (Ex. A, Welch Dec. ¶ 12 (emphasis added).)

- The Mallinckrodt Debtors "have been dragged into an all-consuming tidal wave of litigation concerning ***the production and sales of its opioid products***." (*Id*. ¶ 76 (emphasis added).)

- "[C]ertain of the Debtors have been subject to an increasing number of lawsuits in the United States concerning ***their manufacturing and sale of opioid products***." (*Id*. ¶ 114 (emphasis added).)

Indeed, the Mallinckrodt Debtors expressly admitted that liability relating to their opioid products is why they filed for bankruptcy: "The Debtors commence[d] this chapter 11 proceeding following a years-long ***onslaught of litigation regarding Specialty Generics' production and sale of opioid medications***[.]" (Ex. A., Welch Dec. ¶ 68 (emphasis added).)

Relying on Mallinckrodt's own sworn statements, the bankruptcy court found that "[i]n the years leading up to the commencement of these bankruptcy cases, Debtors faced an onslaught of litigation ***arising out of their production of certain drugs***." (Ex. 13, Confirmation Opinion (Excerpted) at 2 (emphasis added).) It found specifically that "certain Debtors, primarily those on the Specialty Generics side of the business, were named in over 3,000 lawsuits ***stemming from their production and sale of opioid medications***." (*Id*. (emphasis added).) According to the bankruptcy court, these claims were brought by "both governmental entities seeking to abate the opioid crisis they allege Debtors contributed to, as well as private organizations and individuals who were affected

by ***Debtors' opioid products***." (*Id*. at 38 (emphasis added).) Against this factual record, the Trust's argument that Mallinckrodt faced and settled anything other than liability "arising out of" its business producing and selling opioids is simply not credible.

The conclusion that all of the liability "arises out of" Mallinckrodt's "products" and thus is precluded is consistent with the cases that have addressed this exact issue to date—***whether PCOH exclusions apply to all opioid-related liability***. In *Actavis*, the California Court of Appeal held that a PCOH exclusion, which contained the same language at issue here, precluded coverage for the opioid-related liability of a group of pharmaceutical manufacturers affiliated with Actavis, (which was a co-defendant alongside Mallinckrodt in one of the Trust's own "exemplar" complaints that describes both Mallinckrodt and Actavis as the "Marketing Defendants"). (*See* Ex. C, Complaint ¶ 79, *St. Charles County, Missouri v. Purdue Pharma L.P*., at al., No. 4:18-cv-01376-NCC (E.D. Mo. Aug. 20, 2018) ("St. Charles Compl.").) Like here, the underlying Opioid Lawsuits in *Actavis* alleged that the manufacturers engaged in a "highly deceptive marketing campaign designed to expand the market and increase sales of opioid products by promoting them for treating long-term chronic, non-acute, and non-cancer pain—a purpose for which [the insured] allegedly knew its opioid products were not suited." 16 Cal. App. 5th at 1030 (internal quotations omitted). The underlying Opioid Lawsuits also claimed liability for a resurgence in heroin use. *Id.*

The *Actavis* court held that the PCOH exclusion applied, even to liability relating to heroin use, because all of the liability "arose out of" the manufacturer's "products or the alleged statements and misrepresentations made about those products." *Id.* at 1030. The appellate court agreed with the trial court that "'[a]ll of the harm that is asserted in the [Opioid] [L]awsuits—narcotics addiction, the public nuisance in the California action and the public health costs, etc. highlighted in the Chicago [Opioid Lawsuit]—stem from [Actavis affiliate] Watson's products and what Watson said and did not say about the products." *Id.* at 1044; *see also Zogenix, Inc. v. Fed. Ins. Co.*, 4:20-cv-06578-YGR, 2022 WL 3908529, at *9 (N.D. Cal. May 26, 2022) (following *Actavis* and holding that a PCOH exclusion precluded coverage for claims in the Opioid Lawsuits of intentional misrepresentation by an opioids manufacturer).

Likewise, in *Sentynl*, a Southern District of California court held, and the Ninth Circuit affirmed, that the PCOH exclusion precluded coverage for liability relating to a government investigation into the insured's opioid business. *Sentynl Therapeutics*, *Inc. v. U.S. Specialty Ins. Co.*, 527 F. Supp. 3d 1203, 1209 (S.D. Cal. 2021), *aff'd* No. 21-55370, 2022 WL 706941 (9th Cir. Mar. 9, 2022). The court concluded that "legal claims for marketing practices tied to the known dangers of opioids . . . 'arise out of' opioids, despite the lack of a product-centric liability theory." *Id.; see also Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, 658 F. App'x 955, 956-59 (11th Cir. 2016) (holding the "causal connection between Anda's products and the injuries alleged by the State is sufficient to meet the low bar set by California law" on the meaning of "arising out of" and affirming summary judgment for the insurers). These cases compel the same result here. All of the liability at issue arises out of Mallinckrodt's products, or what Mallinckrodt said and did not say about the products, which falls squarely within the meaning of the PCOH exclusion.

Even the allegations in the Trust's own "exemplar complaints" in the Opioid Lawsuits show that the underlying plaintiffs were seeking to hold Mallinckrodt liable for its role in the opioid crisis as a business producing, marketing and selling opioid products—that is, "arising out of" its products. The exemplar complaints emphasize Mallinckrodt's prominence as a manufacturer and seller of opioid products. (*See* Ex. B, Mississippi Compl. ¶ 48 ("Mallinckrodt is the largest U.S. supplier of opioid pain medications and among the top ten generic pharmaceutical manufacturers in the United States based on prescriptions."); Ex. D, Complaint ¶ 28, *Georgia v. Purdue Pharma L.P. et al*., No. 19-A-00060-8 (Ga. Super. Ct. Jan. 3, 2019) ("Georgia Compl.") (same); Ex. E, Amended Complaint ¶ 26, *Florida v. Purdue Pharma L.P. et al*., No. 2018-CA-001438 (Fla. Cir. Ct. Nov. 16, 2018) ("Florida Compl.") ("Mallinckrodt manufactures four branded opioids . . . Mallinckrodt is also one of the largest manufacturers of generic opioids[.]").)

The complaints allege that Mallinckrodt "promoted its branded opioids Exalgo and Xartemis XR, and opioids generally, in a campaign that consistently mischaracterized the risk of addiction. Mallinckrodt did so through its website and sales force, as well as through unbranded communications[.]" (Ex. B, Mississippi Compl. ¶ 581; Ex. C, St. Charles

Compl. ¶ 179.) Mallinckrodt's "sales representatives distributed [unbranded] third-party marketing material" to their "target audience"—doctors—so that they would prescribe more of their products. (Ex. F, Third Amended Complaint ¶¶ 81, 85, 87-99 *Estate of Brockel v. Couch, et al.*, No. 2017-CV-902787 (Al. Cir. Ct. Dec. 5, 2018) ("Brockel Compl.").)

The goal of this marketing was to increase sales of ***Mallinckrodt's products***, as "Defendants would not spend billions of dollars on marketing to physicians if they did not believe that such efforts were successful in generating prescriptions. For that reason, they devote substantial resources to marketing their drugs to prescribers and then meticulously tracking their return on that investment." (Ex. B, Mississippi Compl. ¶ 93; *see also* Ex C., St. Charles Compl. ¶ 426.) The Trust itself has explained one rationale for unbranded marketing: Mallinckrodt was "incentivized to increase the overall opioid market because that would increase" the sale of Mallinckrodt's "active pharmaceutical ingredients" "to other opioid manufacturers." (Ex. 11, Covidien Compl. ¶¶ 30, 92)

These marketing efforts were allegedly successful as "Defendants each experienced a material increase in sales, revenue, and profits from the fraudulent, misleading, and unfair market activities[.]" (Ex. B, Mississippi Compl. ¶ 625.) At bottom, the complaints allege that Mallinckrodt's marketing, its objective, and the profitable results all flowed from its opioid products, and thus the resulting liability it faced for that conduct "arises out of" its products. The minimal causal connection required by "arising out of" is surely met here: harm arising from "unbranded" marketing intended to sell more of Mallinckrodt's products indisputably originates from Mallinckrodt's products. *See Cincinnati*, 2010 WL 716197, at *4; *Scottsdale*, 2021 WL 123401, at *3; *Brazas*, 220 F.3d at 6.

That Mallinckrodt's marketing activities may have led to harm relating to the use of illicit opioids or other manufacturers' opioids does not alter the conclusion that the PCOH exclusion applies. *See Actavis*, 16 Cal. App. 5th at 1030 (claims alleging harm from other non-Actavis opioids, including illicit opioids, were still subject to the PCOH exclusion). As the *Actavis* court concluded:

> The alleged resurgence in heroin use, also arises out of Watson's [an affiliate of Actavis] products. Heroin is not, of course, a product made or distributed by Watson, but that fact is not dispositive. The Products Exclusions extend . . . to bodily injury arising out of warranties or representations made by Watson in connection with its products. The complaints allege a direct causal connection between those warranties and representations and the resurgence in heroin use: Watson's warranties and representations made as part of [their marketing] 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. at 1046.

The Trust's own exemplar complaints expressly allege the same close link between the use of Mallinckrodt's products and the use of illicit opioid products. One complaint alleges that there is a "well established relationship between the use of prescription opiates and the use of non-prescription opioids—like heroin and illicit . . . fentanyl[.]" (Ex. D, Georgia Compl. ¶ 238.) Another complaint alleges that "[t]he strongest risk factor for a heroin use disorder is prescription opioid use." (Ex. I, Class Action Complaint ¶ 283, *Brumbarger v. Purdue Pharma L.P.*, *et al*., No. 1:19-op-45469 ¶ 283 (N.D. Ohio June 14, 2019) ECF No. 1.) Still another alleges, "Individuals addicted to prescription opioids often transition to heroin due to its lower cost, ready availability, and similar high." (Ex. C, St. Charles Compl. ¶ 615.) This alleged connection directly refutes the Trust's argument that any theoretical liability for harm from illicit opioids or opioids produced by other manufacturers does not "arise out of" Mallinckrodt's "products."

The Supreme Court of Delaware's decision in *Eon* is also instructive here. In *Eon*, a diet drug manufacturer sought coverage for underlying claims asserting fraud, misrepresentation, and other causes of action in connection with the marketing and sale of its diet drug. *Eon Labs Mfg., Inc. v. Reliance Ins. Co*., 756 A.2d 889, 892 (Del. 2000). The insured manufacturer conceded that certain claims based solely on the use of its product were barred by the PCOH exclusion but argued that certain "combination claims" alleging injuries caused by its diet drug and another company's drug were not. *Id*. The court rejected this argument, explaining that it "distorts the essential fact that in all of the cases,

it is the involvement or presence of [the insured's product] (including misrepresentations and the failure to warn, etc.) that is the basis of the" combination claims. *Id.* at 893.

As the court held, the fact that the combination claims "also involved the products of others does not negate the application of the 'arising out of' language." *Id*. at 894 (granting summary judgment for the insurer); *see also Fibreboard Corp. v. Hartford Accident & Indem. Co*., 16 Cal. App. 4th 492, 505 (1993) (holding PCOH exclusion barred coverage for liability concerning other companies' asbestos products, as the "gravamen" of the claims were that the insured "manufactured, sold and distributed defective asbestos products"); *Liggett Grp., Inc. v. Ace Prop. & Cas. Ins. Co*., 798 A.2d 1024, 1035 (Del. 2002) (holding PCOH exclusion barred coverage for liability involving other companies' tobacco products).

Mallinckrodt itself and its sophisticated insurance broker, Marsh, also agreed with [redacted], contrary to what the Trust now argues. By 2020, Mallinckrodt was aware of the complaint in the St. Charles County Opioid Lawsuit, and many others like it, and provided notice of those Opioid Lawsuits to the AIG Insurers and others. (*See* Ex. 10, Email Correspondence regarding Notice, at AIGINS-MNK00003257 – 3258.) As the Trust itself has asserted, there is no doubt that the St. Charles County complaint—and many, if not the majority, of the roughly 3,000 Opioid Lawsuits in which Mallinckrodt had been named as a defendant—included unbranded marketing allegations. (*See, e.g.,* Ex. C, St. Charles Compl., ¶¶ 179, 180, 292, 385.) Yet, in April 2020, Mark Huddleston, Senior Director of Risk Management at Mallinckrodt, the "insurance buyer" at Mallinckrodt; and Kenneth Boland, Senior Vice President of Claims at Marsh, discussed the fact that the AIG Primary Policies [redacted] and agreed it would make sense to [redacted]. (*See* Ex. 19, Email Correspondence, at MNK_INS_011072711-14.) The Trust's attempt now to reverse course is simply not credible.

B. The Liability At Issue Also "Arises Out Of" Mallinckrodt's "Work."

Although the Trust fails to mention it, let alone explain to the Court why it does not apply, the PCOH exclusion also precludes coverage for injuries "arising out of" "***your work***," meaning "work or operations performed by [Mallinckrodt]" as well as "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work" and the "providing of or failure to provide warnings or instructions." (Ex. M, National Union Policy No. GL 509-47-72, Section V.16, V.22 at AIGINS-MNK00000826-27 (emphasis added).) This provision too bars coverage for all liability faced by Mallinckrodt in the Opioid Lawsuits, including the Trust's hypothetical alternative theory of liability.

Language in a liability policy "must be given its plain meaning without unduly straining the language." *Hawkeye-Security Ins. Co.*, 6 S.W.3d at 424 (affirming summary judgment for the insurer on duties to defend and indemnify); *accord Finn*, 896 N.E.2d at 1277 (Mass. 2008). "If the language of an insurance policy is unequivocal, it should be given its plain meaning, even if it restricts coverage." *Hunt*, 26 S.W.3d at 342 (internal citations omitted); *Finn*, 896 N.E.2d at 1277 (An insurance policy "whose provisions are plainly and definitely expressed in appropriate language must be enforced in accordance with its terms.") Other courts to have considered the meaning of "your work," albeit in different contexts, have applied that particular part of the PCOH exclusion to preclude coverage. *Cincinnati Ins. Co. v. U.S. Seamless, Inc*., No. 3:15-cv-1, 2016 U.S. Dist. LEXIS 138028, at *10 (D.N.D. Mar. 30, 2016) (granting summary judgment for the insurer).

The plain meaning of the term suggests that a business's marketing activities are a part of its "work." Mallinckrodt's liability here likewise "originat[es] from," "ha[s] its origins in," "grow[s] out of," or "flow[s] from" Mallinckrodt's "work." *1405 Assocs., Inc.,* 340 F.3d at 550; *Colony Ins. Co. v. Pinewoods Enters., Inc.*, 29 F. Supp. 2d 1079, 1083 (E.D. Mo. 1998); *Brazas*, 220 F.3d at 6. Thus, the liability Mallinckrodt faced in the Opioid lawsuits, including the Trust's hypothetical alternative theory of liability, also "arises out of" Mallinckrodt's "work."

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In short, even assuming *arguendo* that Mallinckrodt did face and settle liability concerning some measure of harm caused by the increased sale and consumption of non-Mallinckrodt opioids as a result of Mallinckrodt's "unbranded marketing," the broad PCOH exclusion captures such activities in one or more of its many component parts. Such liability arises out of Mallinckrodt's products, including representations, warranties, or failures to warn about its product; and/or its work.

III. THE AIG INSURERS' CROSS-MOTION ON THE PRODUCTS-COMPLETED OPERATIONS HAZARD CLAIMS-MADE ENDORSEMENT SHOULD LIKEWISE BE GRANTED.

Separate and apart from the AIG Primary Policies containing endorsements with the PCOH *exclusion*, the AIG Insurers move for summary judgment on eight AIG Umbrella Policies that present a related but different issue regarding the "Products-Completed Operations Hazard." The AIG Umbrella Policies present the same issues that are the subject of Aspen's and ACE's Joint Motion for Summary Judgment on the Trust's 11 Exemplar Opioid Lawsuits ("Aspen and ACE's Motion"), which is hereby incorporated by reference. As discussed in Aspen and ACE's Motion, these policies ***provide coverage*** for claims within the definition of the Products-Completed Operations Hazard, ***but only on a claims-made and reported basis***—that is, only if ***during the policy period***, (1) a claim was first made against Mallinckrodt, and (2) written notice of the claim was provided by Mallinckrodt to National Union or American Home.

For all of the reasons discussed in Aspen and ACE's Motion and the additional reasons presented here, neither requirement was met. The liability at issue here falls within the PCOH definition, which is the same as the definition in the AIG Primary Policies, for all of the reasons discussed above (*see supra* at Section II) and in Aspen and ACE's Motion. Regarding the claims-made requirement, it is undisputed that the opioid-related claims at issue were not first asserted against Mallinckrodt until 2017. (*See* Amended Petition, ¶ 3 (dating opioid-related cases "[b]etween 2017 and October 12, 2020" (the date on which Mallinckrodt filed for bankruptcy)).) This was long after the policy periods of the AIG Umbrella Policies had lapsed, the last of which expired in 2011. (*See* Ex. 9,

National Union Policy No. 15972632.) It also is undisputed that Mallinckrodt did not provide notice to National Union or American Home during any of the policy periods of the AIG Umbrella Policies, 2003 to 2011. (*See* Ex. 20, Affidavit of Lowell J. Chase; Ex. 10, Email Correspondence regarding Notice, at AIGINS-MNK00003257 – 3258.)

Because the notice requirements of the AIG Umbrella Policies were not met, coverage is likewise barred, and the AIG Insurers are entitled to summary judgment, with respect to the eight AIG Umbrella Policies as well.

CONCLUSION

For the foregoing reasons, the AIG Insurers respectfully request that this Court enter an order denying Plaintiff's Motion as unripe; alternatively, the AIG Insurers respectfully request that the Court enter an order denying Plaintiff's Motion and granting the AIG Insurers' Cross-Motion on the AIG Primary Policies. Separately, the AIG Insurers respectfully request that this Court enter an order granting the AIG Insurers' Cross-Motion on the AIG Umbrella Policies.

Dated: July 17, 2024
St. Louis, MO

Respectfully Submitted,

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I hereby certify that on July 17, 2024, the foregoing was electronically filed with the Clerk of the St. Louis County Circuit Court by operation of the Court's electronic filing system with copies served upon all counsel of record and sent via email to the following:

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