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

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

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

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

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Plaintiff, the Opioid Master Disbursement Trust II, also known as the Opioid MDT II (the "Trust"), as successor in interest to Mallinckrodt plc and certain related entities ("Mallinckrodt"), respectfully submits this Memorandum of Law in Support of Plaintiff's 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.

The National Union policies provide sweeping coverage for all amounts that Mallinckrodt becomes legally obligated to pay because of bodily injury. The policies do not have opioid exclusions. The policies do contain limited exclusions for bodily injury included within the so-called products hazard, which in turn is defined as bodily injury arising from "[redacted]"—which in turn are defined as [redacted]. But these exclusions do not apply to bodily injury arising in whole or in part from opioid pharmaceuticals not manufactured or sold by Mallinckrodt, or from illicit opioid drugs. This is a key distinction because Mallinckrodt was alleged to be liable not only for bodily injury arising out of its own opioid drugs, it also was alleged to be liable for bodily injury arising from other manufacturers' opioid pharmaceuticals and illicit opioid drugs as a result of Mallinckrodt's central role in creating and fueling the opioid crisis through the unbranded promotion of opioid drugs generally. Thus, Mallinckrodt was responsible nationally, in large part, for the widespread misuse and abuse of ALL opioid drugs, including opioids manufactured by other drug companies and illicit opioid drugs. Bodily injury arising in whole or in part from non-Mallinckrodt opioid drugs is not within the products hazard, and the National Union policies therefore cover Mallinckrodt's liability for such bodily injury.

Notwithstanding the expressly limited scope of the products hazard ("your products") exclusions, however, National Union has taken the position that the Trust's coverage claims are

barred by those exclusions. This motion seeks a straightforward 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, National Union's contractual obligation to cover such liability is not eliminated by the products hazard exclusions in the National Union policies. This is a purely legal question amenable to an efficient resolution on a motion for partial summary judgment.

It bears emphasis that the Trust is not seeking a ruling on whether any particular opioid claims against Mallinckrodt, or any particular quantum of Mallinckrodt's opioid liability, were outside the products hazard exclusion. Indeed, the Trust is not seeking a finding of fact here at all with respect to any particular opioid claim against Mallinckrodt or the amount of its opioid liability. The extent of Mallinckrodt's liability arising out of non-Mallinckrodt products is a question for another day. But resolving the straightforward, threshold legal question posed by this motion now will focus and make more efficient the litigation of this case, streamline fact and expert discovery, and, by resolving the parties' disputes on this key issue, potentially foster settlement.[1]

In support of its motion, the Trust respectfully states as follows:

INTRODUCTION

Certain Mallinckrodt entities (the "Mallinckrodt Debtors") filed for bankruptcy in 2020 in large measure because they were major defendants in the nationwide opioid mass tort litigation.[2] The Trust was created by the 2022 Fourth Amended Plan of Reorganization (the "Plan") of

[1] The Trust has brought this motion against National Union because it is the only insurer that squarely raised the products hazard exclusion as a defense to coverage in its answer to the Trust's petition. But the Trust believes that most, if not all, of the other insurers in the case will seek to raise the same issue as a coverage defense. The Trust reserves all of its rights as to whether the other insurers have waived this defense by not raising it in a timely manner.

[2] A complete list of the Mallinckrodt Debtors is available at https://restructuring.ra.kroll.com/Mallinckrodt/ and is incorporated herein by reference.

Mallinckrodt plc, et al. Under 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; and the Opioid Mass Tort Claims (as that term is defined in the petition in this case) were channeled to, and Mallinckrodt's opioid liabilities were transferred to and assumed by, the Trust and various separate trusts described in the petition. Among other assets, the Plan transferred to the Trust all of Mallinckrodt's rights to insurance coverage for Mallinckrodt's liability for opioid-related claims ("Opioid Mass Tort Claims" as defined in the petition in this case) and was empowered by the Plan to pursue and recover the proceeds of Mallinckrodt's insurance coverage. Trust assets, including insurance proceeds, will be used to compensate individuals and entities harmed by Mallinckrodt's role in the opioid crisis and to pay for resulting opioid abatement efforts.

As context for this motion, opioid mass tort claims asserted against Mallinckrodt prior to the filing of its bankruptcy petition alleged two separate bases for Mallinckrodt's opioid liability. First, underlying claimants alleged that Mallinckrodt was liable because of bodily injury caused by its own opioid pharmaceuticals—that is, opioid drugs that it manufactured or sold. Second, claimants alleged that Mallinckrodt was liable because of bodily injury caused in whole or in part by other manufacturers' opioid pharmaceuticals and illicit opioids—that is, products that Mallinckrodt did not manufacture or sell—because of Mallinckrodt's role in creating and fueling the nationwide opioid crisis through its widespread and concerted unbranded opioid promotional campaign. The phrase "unbranded promotional campaign" refers to Mallinckrodt's promotional activities that did not identify specific or brand name opioid products by manufacturer, but rather deceptively promoted the use of opioid drugs generally as safe and effective for chronic pain. Indeed, as noted, the unbranded promotional campaign did not mention specific Mallinckrodt drugs, or that Mallinckrodt was behind the promotion of opioid drugs generally. The unbranded

promotional campaign sought to increase the use of opioid pain medications as a class of drug, without limitation to Mallinckrodt's products.

With respect to the second basis of liability, liability for non-Mallinckrodt products, the pre-petition claims alleged that the unbranded promotional campaign changed the longstanding medical consensus regarding the risks and proper uses of opioids, including, in particular, the use of opioids to treat long-term chronic pain. These claims alleged further that this led to over-prescribing and excessive use and abuse of opioid pain medications generally, including non-Mallinckrodt opioid pain medications, which in turn led to abuse of illicit opioids, such as heroin and fentanyl. The heart of the pre-petition claims was that Mallinckrodt's unbranded promotional campaign caused widespread bodily injury, including addiction, overdose, and death, due to the misuse and abuse of not only Mallinckrodt opioid medications, but also medications of other manufacturers and illicit opioids. The claimants asserted that Mallinckrodt therefore was liable, in whole or in part, because of bodily injury arising from the misuse and abuse of non-Mallinckrodt opioid drugs.

The insurance policies at issue in this motion are standard-form, insurer-drafted policies that provide broad coverage for "[redacted]". National Union seeks to avoid its broad coverage obligations by citing a limited exclusion for "[redacted]". This motion is directed at the straightforward legal question of whether Mallinckrodt's liability because of bodily injury arising in whole or in part from non-Mallinckrodt opioids due to the unbranded promotional campaign is barred by the products hazard exclusions in the National Union policies. Because those exclusions are expressly and unambiguously limited to Mallinckrodt products, by

definition the exclusions do not—and cannot—apply to Mallinckrodt's liability because of bodily injury caused in whole or in part by non-Mallinckrodt products.

Under fundamental rules of insurance contract construction observed in Missouri and nationwide, insurers bear the burden of establishing that their construction of policy language that they contend excludes coverage is the only reasonable one. Otherwise, the exclusions do not apply. For the foregoing reasons, and as discussed more fully below, National Union cannot meet this burden here. The Trust respectfully requests that the Court grant this motion by ruling that the products hazard exclusions do not apply to any of Mallinckrodt's liability because of bodily injury arising in whole or in part from non-Mallinckrodt opioid drugs.

FACTUAL BACKGROUND

The Trust sets forth the following facts to provide the context for this motion and to demonstrate that the motion raises for resolution a real issue in this case. For the most part, the factual background provides examples of the factual allegations in opioid lawsuits filed against Mallinckrodt prior to its bankruptcy filing ("pre-petition claims"). These facts are not in dispute, because they merely quote or summarize allegations in the underlying complaints. The Trust is not seeking any factual findings as to the veracity of these allegations or the other contextual information set forth below, as none are necessary to resolve the simple and purely legal issue raised here.

A. The Opioid Mass Tort Claims

Mallinckrodt faced more than 3,000 pending opioid-related civil actions when it filed for bankruptcy on October 12, 2020 (the "Bankruptcy"). Declaration of Stephen A. Welch,[3] Chief

[3] At the time he submitted this declaration, Mr. Welch was the Chief Transformation Officer for Mallinckrodt. In this role he was responsible for overseeing the operations of Mallinckrodt's specialty generics brand, which primarily produced Mallinckrodt's opioid drugs. *Id.* ¶ 3.

Transformation Officer, in Support of Chapter 11 Petitions and First Day Motions Ex. A ¶ 12, ECF No. 128 ("Welch Decl.").[4] These underlying lawsuits were asserted by a wide variety of individuals and entities, including personal injury victims, states, counties, municipalities, tribal governments, hospitals, and third-party payors such as treatment centers and insurance companies. *See* Welch Decl. Ex. A ¶ 15.

Although the underlying plaintiffs were diverse, their claims shared a common core of factual allegations. They alleged that "[Mallinckrodt] Debtors, along with other opioid manufacturers, engaged in misleading marketing that overstated the benefits of opioid products and understated their risks." Welch Decl. Ex. A ¶ 77. That is, the claims against Mallinckrodt alleged that, through their promotion of opioid pharmaceuticals, including the use of unbranded advertising, paid speakers including key opinion leaders ("KOLs")[5], and industry-funded organizations posing as neutral and credible professional societies, Mallinckrodt and others in the opioid industry changed the prevailing practices in the medical community concerning the use of opioid drugs for the treatment of chronic pain, and the perception of the risks posed by opioid drugs in that context. *See, e.g.*, Amended Complaint Ex. B ¶ 234, Mississippi v. Purdue Pharma L.P. et al., No. 25CH1:15-cv-01814 (Miss. Chancery Ct. Nov. 12, 2019), ECF No. 292 ("Mississippi Am. Compl."). These unbranded promotional efforts were focused on opioid drugs generally; they were not specific to Mallinckrodt's products. *See, e.g., id.* ¶¶ 131–32; Complaint Ex. C ¶¶ 179–81, 385, St. Charles County, Missouri v. Purdue Pharma L.P., at al., No. 4:18-cv-

[4] All exhibits referenced herein are attached to Plaintiff's Statement of Uncontroverted Facts 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, which is being filed contemporaneously with this memorandum of law.

[5] Claims against Mallinckrodt allege that key opinion leaders were medical experts "paid to deliver deceptive messages [about opioids] because of their ability to influence their peer prescribers." *See, e.g.*, Amended Complaint Ex. E ¶ 124, Florida v. Purdue Pharma L.P. et al., No. 2018-CA-001438 (Fla. Cir. Ct. Nov. 16, 2018) ("Florida Am. Compl."). They further allege that key opinion leaders "appear[ed] to be independent, neutral actors in order to lend legitimacy to their opinions, making doctors and their patients more likely to accept their claims." *Id.*

01376-NCC (E.D. Mo. Aug. 20, 2018), ECF No. 1 ("St. Charles Compl."). Indeed, the promotional campaign did not mention Mallinckrodt or Mallinckrodt's products. *Id.* As a result of this conduct, "manufacturers, distributors, and pharmacies flooded the market with opioids, increasing diversion of opioid products . . . thus increasing addiction, misuse, and abuse." Welch Decl. Ex. A ¶ 77. This, in turn, the claimants alleged, led to the opioid epidemic as a whole, including the increased use of and addiction to not only opioids manufactured, marketed, or sold by other pharmaceutical companies, but also illicit opioids, such as heroin and fentanyl, distributed through black-market channels. *See, e.g.*, Complaint Ex. D ¶¶ 3, 232, Georgia v. Purdue Pharma L.P. et al., No. 19-A-00060-8 (Ga. Super. Ct. Jan. 3, 2019) ("Georgia Compl."). Based on these and other similar allegations, the pre-petition claimants sought to hold Mallinckrodt liable because of bodily injury allegedly caused not only by Mallinckrodt's products, but also by other manufacturers' products and illicit opioid drugs. *See, e.g.*, Florida Am. Compl. Ex. E ¶¶ 69, 109, 121, 124, 129, 195–96, 198, 206. These suits sought to hold Mallinckrodt liable for the role the unbranded promotional campaign played in changing the medical consensus and public perception regarding the risks and proper uses of opioid pharmaceuticals generally, and the resulting bodily injury due to addiction not only to Mallinckrodt products, but also to non-Mallinckrodt opioid drugs. *Id.* In addition, in many instances, the pre-petition claims sought to hold Mallinckrodt jointly and severally liable with other manufacturers and distributors for injuries caused by opioids that were not Mallinckrodt's products. *Id.* ¶¶ 417, 473. A review of exemplar pre-petition claims illustrates the foregoing.

1. Exemplar Allegations Asserted by State Governmental Entities[6]

Numerous states filed pre-petition enforcement actions against Mallinckrodt asserting that Mallinckrodt was liable, due to the unbranded promotional campaign, because of bodily injury arising from non-Mallinckrodt opioid pharmaceuticals. For example, Mississippi alleged among other things that Mallinckrodt (and other companies in the opioid industry) sought to "change the medical and general consensus supporting chronic opioid therapy *so that* doctors would prescribe and governmental payors, such as the State, would pay for long-term prescriptions of opioids to treat chronic pain." Mississippi Am. Compl. Ex. B ¶ 7 ¶ 599 (emphasis in original). Mississippi sought damages against Mallinckrodt (and other defendants) on this basis. *Id.* ¶ 22. Similarly, the State of Florida stated in its Amended Complaint that each manufacturer defendant "promoted its own branded and generic products, and also, individually and jointly, including through front organizations, promoted unfounded and mutually reinforcing misrepresentations about the safety and efficacy of opioids in general." *See* Florida Am. Compl. Ex. E ¶ 417. The distributor defendants, Florida alleged, then "promoted opioids directly, and promoted unfounded representations about opioids through studies and through their trade organizations." *Id.* Florida alleged that, "[t]hese misrepresentations collectively caused the dramatic increase in branded and generic opioid prescribing and use", and that each defendant was "jointly and severally liable for abating" the opioid epidemic. *Id.* ¶¶ 417, 473. In other words, Florida sought to hold Mallinckrodt accountable for not only its own actions regarding its own products, but also for those of other

[6] The discussion of the exemplar allegations drawn from complaints in the pre-petition opioid lawsuits against Mallinckrodt is not intended to prove the extent of Mallinckrodt's liability for non-Mallinckrodt products, but rather to demonstrate that at least some of the lawsuits allege such liability and, therefore, that whether National Union's policies with "products-hazard" exclusions bar coverage for Mallinckrodt's opioid liability is a real issue in this lawsuit. National Union has been provided with all of the complaints in the prepetition lawsuits, including those discussed here, through discovery in this case.

opioid defendants whose actions were not tied directly or exclusively to Mallinckrodt's products. *See, e.g.*, Florida Am. Compl. Ex. E ¶ 120, 194, 195, 196, 198, 199, 206.

In addition, numerous states alleged that Mallinckrodt was liable because of bodily injury the claimants alleged was caused by illicit opioid drugs, including heroin and illegal fentanyl, which of course were not Mallinckrodt products. For example, in its complaint, the State of Georgia asserted that the deceptive promotion of opioids by Mallinckrodt, through the unbranded promotion of opioids generally, "fueled" the opioid crisis and that, "the rates of opioid-related substance abuse, hospitalization, death, [and] costs to the State of Georgia" "track[ed] the rates of prescription, sale, and distribution of opioid products." *See* Georgia Compl. Ex. D ¶¶ 3, 232. Georgia asserted that because of the "well-established relationship between the use of prescription opiates and the use of non-prescription opioids—like heroin and illicit (that is, illegally manufactured) fentanyl"—the actions of Mallinckrodt and others to increase the prescription and use of opioids, through unbranded promotion, among other tactics, resulted in the "skyrocket[ing]" of "[h]eroin overdose deaths . . . as those addicted to prescription opioids . . . switch[ed] to a cheaper alternative to meet their addiction demands." *Id.* ¶¶ 76, 238. These allegations are echoed in other pre-petition lawsuits. *See, e.g.*, Florida Am. Compl. Ex. E ¶¶ 69, 419; Mississippi Am. Compl. Ex. B ¶¶ 17, 622, 623, 662(f–g).

2. Exemplar Allegations by Local Governmental Entities

In addition to the pre-petition lawsuits filed by various states, thousands of local governmental entities (consisting of counties, cities, and other municipalities) asserted pre-petition claims against Mallinckrodt. These allegations often mirrored those brought by the states. For instance, St. Charles County, Missouri, asserted claims against Mallinckrodt and other opioid-related entities in a lawsuit it filed in federal district court in Missouri. *See* St. Charles Compl. Ex. C. In its complaint, St. Charles County asserted that Mallinckrodt and other opioid

manufacturers promoted their own opioid products specifically as well as opioids generally. *Id.* ¶ 145. St. Charles County's complaint asserted that each manufacturers' conduct "contributed to an overall narrative that aimed to—and did—mislead doctors, patients, and payors about the risk and benefits of opioids" and led to an increase in prescriptions—and thus, sales—of opioids overall. *Id.* Similar to Mississippi's complaint, St. Charles County also alleged that Mallinckrodt used the C.A.R.E.S. Alliance (which it created and funded) to engage in unbranded promotional activities designed to increase the sale of opioids generally. *Id.* ¶¶ 179–181. St. Charles County further asserted that Mallinckrodt, along with other opioid manufacturers, utilized a front group called the Alliance for Patient Access to deceptively promote opioid use (and thus increase sales of opioid products generally) by criticizing prescription monitoring programs (which are designed to curb diversion of opioids) and policies enacted in response to the prevalence of "pill mills",[7] and advocated for the widespread prescribing of opioids for treatment of pain generally. *Id.* ¶¶ 324, 326–329. St. Charles County also alleged that Mallinckrodt, and other manufacturers, used another front group, called the U.S. Pain Foundation, to lobby against efforts to reduce the limits on over-prescription of opioids. *Id.* ¶ 332. St. Charles County sought damages based on this conduct, alleging that, "Defendants' conduct in promoting opioid use, addiction, abuse, overdose and death has had severe and far-reaching public health, social services, and criminal justice consequences, including the fueling of addiction and overdose from illicit drugs such as heroin." *See id.* ¶¶ 21, 858 (alleging that Mallinckrodt's actions "damaged and continues to damage [St. Charles County] in an amount to be determined at trial").

[7] "Pill mills", often operated under the label of a "pain clinic", are facilities that "issue high volumes of opioid prescriptions under the guise of medical treatment." *See* St. Charles Compl. Ex. C ¶ 17. Typically, the doctors running pill mills will prescribe opioids without any medical exam or testing in exchange for cash payments. *See The Ugly Truth About Pain Mills in the United States*, Northpoint Recovery (Aug. 16, 2022), https://www.northpointrecovery.com/blog/ugly-truth-pill-mills-united-states/ (last visited Nov 2, 2023).

3. Exemplar Allegations Asserted by Personal Injury and Neonatal Abstinence Syndrome Claimants

Pre-petition claims asserted by Personal Injury ("PI") and Neonatal Abstinence Syndrome ("NAS")[8] victims also sought to hold Mallinckrodt liable for damages because of bodily injury caused by Mallinckrodt's unbranded promotional campaign and opioid drugs other than those manufactured by Mallinckrodt. A review of several of these claims is illustrative.

a. Exemplar Allegations by Personal Injury Claimants

As one example, in The Estate of Bruce Brockel v. Couch, et al., Mallinckrodt, along with other opioid manufacturers, pharmacies, and individual doctors, were named as defendants in a lawsuit brought by the estate of Bruce Brockel ("Brockel"), who was addicted to opioids and tragically committed suicide because of his addiction. *See* Third Amended Complaint Ex. F, Estate of Brockel v. Couch, et al., No. 2017-CV-902787 (Al. Cir. Ct. Dec. 5, 2018) ("Brockel Am. Compl."). According to prescription records attached to Brockel's complaint, Brockel used opioids manufactured by Mallinckrodt as well as other opioid manufacturers. *Id.* ¶¶ 9, 17, 45; *id.* at Exs. 2–7. Brockel alleged that Mallinckrodt and other opioid manufacturers "used both direct marketing and unbranded advertising disseminated by seemingly independent third parties to spread false and deceptive statements about the risks and benefits of long-term opioid use." *Id.* ¶ 79. Brockel alleged that Mallinckrodt and other opioid manufacturers "worked with each other and with the Front Groups and KOLs they funded and directed to carry out a common scheme to deceptively market opioids by misrepresenting the risks, benefits, and superiority of opioids to

[8] In the opioid context, neonatal abstinence syndrome is a condition suffered by babies exposed to opioid drugs *in utero* because of their mothers' use of opioids during pregnancy. It is a clinical diagnosis that is "a consequence of the abrupt discontinuation of chronic fetal exposure to substances that were used or abused by the mother during pregnancy." *See* Complaint Ex. I ¶ 2, Brumbarger v. Purdue Pharma L.P. et al., No. 1:19-op-45469-DAP (N.D. Ohio June 14, 2019), ECF No. 1 ("Brumbarger Compl."). Such exposure generally causes lasting, and in most cases severe, health effects.

treat chronic pain." *Id*. ¶ 98. Brockel alleged that these statements caused an increase in the prescriptions of opioids generally. *Id*. ¶¶ 79, 99.

As another example, in Kris Koechley, Administrator of the Estate of James P. Koechley, v. Purdue Pharma, Inc., *et al.*, Mallinckrodt, along with other opioid manufacturers, pharmacies, and individual doctors, were named as defendants in a lawsuit brought by the estate of James Koechley ("Jimmy" or "Koechley"), who was addicted to opioids and tragically died of a fentanyl overdose. *See* Complaint Ex. G at ¶¶ 16, 248, Kris Koechley v. Purdue Pharma, *et al*., No. G-4801-CI-0201803741-000 (Ohio Ct. Comm. Pl. Sept. 17, 2017) ("Koechley Compl."). Koechley alleged that the decedent was prescribed opioids manufactured by numerous entities, including Mallinckrodt. *Id*. at ¶ 240. Koechley alleged that Mallinckrodt, and other opioid manufacturers, used "both direct marketing, as well as veiled advertising by seemingly independent third parties to spread misrepresentations about the risks and benefits of long-term opioid use—statements that created the "new" market for prescription opioids, upended the standard medical practice, and benefited other Defendants and opioid manufacturers." *Id*. at ¶ 71. Koechley further alleged that Mallinckrodt, and other opioid manufacturers, "disguised their own role in the negligent marketing of chronic opioid therapy by funding and working through third parties like Front Groups and KOLs", and "never disclosed their role in shaping, editing, and approving the content of information and materials disseminated by these third parties." *Id*. at ¶¶ 117, 118. Koechley alleged that these unbranded marketing efforts "benefitted other Defendants and opioid manufacturers." *Id*. at ¶ 71. Finally, Koechley alleged that Mallinckrodt was jointly and severally liable with other opioid manufacturers. *See, id*. at ¶ 14, Prayer for Relief.

b. Exemplar Allegations by Neonatal Abstinence Syndrome Claimants

NAS claims filed in the tort system prior to Mallinckrodt's bankruptcy alleged similar conduct and injuries. For example, in Andrew G. Riling and Beverly Riling, as Next Friends of A.P. Riling, a Minor Child Under the Age of 18 v. Purdue Pharma L.P., *et al*., the guardians of A.P. Riling, a minor diagnosed with NAS at birth, filed suit against Mallinckrodt and others seeking to hold those entities liable because of bodily injury suffered by A.P. Riling by, among other things, Mallinckrodt's unbranded promotional campaign. *See, e.g.*, Ex. H, Riling v. Purdue Pharma L.P., *et al*., No. 2:18-cv-01390 (S.D. W.Va. Oct. 29, 2018). The guardians asserted that, during her pregnancy, A.P. Riling's mother consumed opioids manufactured by Mallinckrodt and other opioid manufacturers. *Id*. at ¶ 5. The guardians alleged that Mallinckrodt and other manufacturers "negligently marketed opioids in West Virginia through unbranded advertising that promoted opioid use generally, but were silent as to a specific opioid." *Id*. at ¶ 51. This unbranded advertising was alleged to have been used to "create the false appearance that the negligent messages came from an independent and objective source." *Id*. at ¶ 52. The guardians further alleged that Mallinckrodt and other opioid manufacturers used key opinion leaders and front groups to "promote a pro-opioid message and to promote the opioid industry pipeline." *Id*. at ¶¶ 51, 52. The guardians sought to hold Mallinckrodt liable for damages caused by its negligent efforts in this regard. *Id*. at Count II.

As another example, in Brumbarger v. Purdue Pharma L.P. et al., No. 1:19-op-45469-DAP (N.D. Ohio 2019), the guardian of Baby J.B.B. filed suit against certain Mallinckrodt affiliates and others making similar allegations regarding the deceptive promotion of opioids generally. *See* Brumbarger Compl. Ex. I ¶¶ 92, 93, 95, 100, 133, 169, 172. The complaint alleged, among other things, that Mallinckrodt provided substantial funding to "purportedly neutral organizations"

which spread false messaging about opioids generally. *Id.* ¶ 169. This and other unbranded promotional activities "contributed to a vast increase in opioid overuse and addiction." *Id.* ¶ 172. With respect to Baby J.B.B., the complaint alleged that because of this conduct, Baby J.B.B. "was born addicted to opioids", and "will require years of treatment and counseling to deal with the effects of prenatal exposure." *Id.* ¶ 1. The complaint alleged that Baby J.B.B.'s mother consumed, among other opioids, Norco and Opana, OxyContin, Dilaudid, and MS Contin, which were manufactured and sold by Allergan plc, Endo Pharmaceuticals, and Purdue Pharma L.P. *Id.* ¶ 4. The complaint made no express allegations that Baby J.B.B.'s mother consumed products manufactured or sold by Mallinckrodt. *Id.* The guardian of Baby J.B.B. sought, among other relief, compensatory damages for Mallinckrodt's and other pharmaceutical companies' alleged conduct that resulted in the injuries to Baby J.B.B. *Id.* at 27.

The allegations in Brumbarger mirror numerous other lawsuits that were commenced by guardians of other babies who were diagnosed with NAS at birth. *See* Complaint, Ex. J at ¶¶ 1, 4, 27, 92, 93, 95, 100, 133, 169, 172, Paul v. Purdue Pharma, L.P. et al., No. 1:19-op-45467 (N.D. Ohio 2019); Complaint, Ex. K at ¶¶ 1, 4, 27, 93, 94, 96, 97, 101, 134, 170, 173, Bezinski v. Purdue Pharma L.P., No. 1:19-op-45503 (N.D. Ohio June 17, 2019); Complaint, Ex. L at ¶¶ 1, 4, 27, 75, 76, 78, 79, 83, 112, 148, 151, Alsup v. McKesson Corp., et al., No. 1:20-op-45083 (N.D. Ohio Mar. 3, 2020).

B. The Relevant Policy Language

The National Union policies[9] are standard-form policies drafted by the insurance industry and promulgated by National Union that provide sweeping coverage for all amounts that the insured becomes legally obligated to pay as damages because of bodily injury (including death)

[9] The National Union policies that are at issue in this motion are listed in Appendix A.

during the policy period caused by an occurrence as defined in the policies.[10] This includes opioid-related liability. The National Union policy forms and the products hazard exclusions specify that they were drafted by the Insurance Services Office, Inc., commonly known as ISO. ISO is an insurance industry organization established more than 50 years ago and comprised of approximately 1,400 domestic property and casualty insurers that promulgates various standard insurance policies that are utilized by insurers throughout the country, including National Union.[11]

The National Union policies do not contain opioid-exclusions. They do exclude coverage for "[redacted] *See* National Union Policy No. GL 509-47-72 Ex. M, at 32 ("[redacted]") (the "[redacted]").[12] The National Union policies define the products hazard, in relevant part, as "[redacted]." *See id.* at 21. The policies define "[redacted]", in turn, as "[redacted]" *See id.* at 22.[13] In other words, the definition of "your product" consists of the products of the insured, which includes those of Mallinckrodt, but does not include products of other pharmaceutical companies, or illicit opioids.

[10] In typical language, the insurers promise broadly to pay "[redacted]." *See, e.g.*, National Union policy No. GL 509-47-72 Ex. M, at 7.

[11] *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993) ("Insurance Services Office, Inc. (ISO), an association of approximately 1,400 domestic property and casualty insurers . . . , is the almost exclusive source of support services in this country for CGL insurance. ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms.").

[12] Similar to the base policy forms, the products hazard exclusions are also standard-form language drafted by ISO.

[13] "[redacted]" *See* National Union Policy No. GL 509-47-72 Ex. M, at 22. For the same reasons discussed throughout this memorandum, including that Mallinckrodt was alleged to be liable for bodily injury arising from non-Mallinckrodt opioids due to the unbranded promotional campaign, National Union cannot rely on this language as a bar to coverage here.

The National Union policies do not contain any exclusions for bodily injury arising out of products manufactured or sold by entities or persons other than Mallinckrodt, such as bodily injury arising from other manufacturers' opioid products or illicit opioids alleged to have resulted in whole or in part from Mallinckrodt's unbranded promotional campaign.

C. National Union's Denial of Coverage

National Union has denied coverage for the Opioid Mass Tort Claims on numerous grounds. Among them is National Union's contention that coverage is barred by the products hazard exclusions in its policies. *See* Defendants AIG Insurance Company – Puerto Rico, AIG Specialty Insurance Company, American Home Assurance Company, and National Union Fire Insurance Company of Pittsburgh, Pa.'s Answer to the First Amended Petition, Ex. N ¶ 134. Specifically, in its answer to the petition, National Union denied the Trust's assertion that the products hazard exclusion in the National Union policies does not apply to Opioid Mass Tort Claims that seek to hold Mallinckrodt liable for bodily injury arising out of other manufacturers' products or illicit drugs. Prior to that, in a letter sent in response to Mallinckrodt's notice of certain Opioid Mass Tort Claims, AIG, National Union's parent, denied coverage based on its position that, "[c]overage does not exist under the Policies for the Lawsuits pursuant to the 'Exclusion-Products-Completed Operations Hazard' Endorsement." Letter from AIG to Mallinckrodt Pharmaceuticals (Dec. 10, 2020), Ex. O, at 3.

LEGAL STANDARDS REGARDING SUMMARY JUDGMENT

Missouri's summary judgment practice is governed by Missouri Supreme Court Rule 74.04. Under Rule 74.04, after an action has been pending for thirty days, as this one has been, "a party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment upon all or any part of the pending issues." Mo. Sup. Ct. R. 74.04(a). "If the motion, the response,

the reply and the sur-reply show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith." Mo. Sup. Ct. R. 74.04(c)(6).

Summary judgment is appropriate here because the issue presented is one of pure contract interpretation, which is a question of law that may be resolved by summary judgment. *Pelopidas, LLC v. Keller*, 633 S.W.3d 383 (Mo. App. E.D. 2021). The Trust is asking the Court only to determine whether National Union's products hazard exclusions, which by their express terms only exclude coverage for liability arising out of "your [Mallinckrodt's] product", apply to Mallinckrodt's liability (joint and several or otherwise) because of bodily injury caused in whole or in part by other manufacturers' opioid products or illicit opioid drugs that Mallinckrodt did not manufacture or sell. The extent of such liability, a factual question, is an issue for another day.

RULES OF INSURANCE CONTRACT CONSTRUCTION

Under fundamental rules of insurance contract construction in Missouri, the meaning of an insurance policy is a question of law, and insurance policies must be construed in accordance with their plain language. *Selimanovic v. Finney*, 337 S.W.3d 30, 35 (Mo. App. E.D. 2011). Each policy provision must be read in the context of the policy as a whole, and every word in the policy must have meaning and be given effect. *Id.*; *Baker v. Keet-Rountree Dry Goods Co.*, 2 S.W.2d 733, 739 (Mo. banc 1928) ("In interpreting an insurance policy, as in any other contract, effect must be given to every phrase and word in it, if possible."); *see also Purk v. Farmers Ins. Co., Inc.*, 628 S.W.3d 714, 719 (Mo. App. E.D. 2021), *transfer denied* (June 28, 2021), *transfer denied* (Oct. 5, 2021) (when interpreting an insurance policy, courts must consider the entire policy and not just isolated provisions). In construing the terms of an insurance policy, Missouri courts apply "the meaning which would be attached by an ordinary person of average understanding if

purchasing insurance . . . and resolve[] ambiguities in favor of the insured." *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007) (internal citations omitted).

Missouri courts construe insurance policies "to grant coverage rather than defeat it", because the "insured purchases coverage for protection." *Truck Ins. Exchange v. Prairie Framing, LLC*, 162 S.W.3d 64, 86 (Mo. App. W.D. 2005) (internal citations omitted); *accord Centermark Props., Inc. v. Home Indem. Co.*, 897 S.W.2d 98, 100–01 (Mo. App. E.D. 1995) (an "insurance contract is designed to furnish protection; therefore it will be interpreted to grant coverage rather than defeat it") (citing *Am. Fam. Mut. Ins. Co. v. Turner*, 824 S.W.2d 19, 21 (Mo. App. E.D. 1991)). 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) (quoting *Amidano v. Donnelly*, 260 N.J. Super. 148, 155, 615 A.2d 654, 658 (App. Div. 1992)). Applying these rationales, where a policy provision is reasonably susceptible of two interpretations, the one that favors the insured must be applied. *Centermark*, 897 S.W.2d at 100–01 (citing *Braxton v. U.S. Fire Ins. Co.*, 651 S.W.2d 616, 619 (Mo. App. E.D. 1983)).

In the light of the foregoing, under Missouri law it is axiomatic that coverage-granting provisions must be construed broadly, while exclusions must be read narrowly against the insurer, to afford the greatest possible coverage. *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. banc 1997); *Gibbs v. Nat'l Gen. Ins. Co.*, 938 S.W.2d 600, 605 (Mo. App. S.D. 1997); Additionally, exclusionary clauses are strictly construed against the insurer because they are drafted by or on behalf of insurers and promulgated by them. *Burns v. Smith*, 303 S.W.3d 505, 510 (Mo. banc 2010). Policy language that an insurer contends limits or excludes coverage may

be enforced only if it is "clear and unambiguous within the context of the policy as a whole." *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 221 (Mo. banc 2014) (quoting *Todd v. Missouri United Sch. Ins. Council*, 223 S.W.3d 156, 162–63 (Mo. banc 2007)).

These principles are not mere theoretical constructs. They are a cornerstone of the risk-transfer bargain between insurers and insureds. They reflect the fact that insurers, working in concert in industry groups, such as ISO, and individually, expend substantial efforts and resources to draft and refine insurance policy language that they then promulgate to their customers as a *fait accompli*. *See Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 801–02 (Ky. 1991) ("Standard form insurance policies such as this are recognized as contracts of adhesion because they are not negotiated; they are offered to the insurance consumer on essentially a "take it or leave it" basis without affording the consumer a realistic opportunity to bargain."); *State Farm Mut. Auto. Ins. v. Johnson*, 320 A.2d 345, 347 (Del. 1974) (noting that, "the terms of an insurance policy are not talked out or bargained for as in the case of contracts generally" and, instead, are "adhesion contract[s], not a truly consensual agreement"). It is a fundamental principle of contract law that the language of a contract must be construed broadly in favor of the non-drafting party, and that ambiguities must be construed against the drafter. *See Burns*, 303 S.W.3d at 510; *see also Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 690 (Mo. banc 2009); *accord Fair v. Lighthouse Carwash Sys., LLC*, 961 So. 2d 60 (Miss. Ct. App. 2007). This principle applies with even more force in the insurance context, where the basis of the bargain between the insurer and the insured is to transfer risk and uncertainty from the insured to the insurer, *see, e.g., S.E.C. v. Life Partners, Inc.*, 898 F. Supp. 14, 18–19 (D.D.C. 1995) (the "central purpose of insurance" is "to transfer risk from the insured to the insurer"), and where insurers are in the business of drafting standard-form

insurance policies, such as the National Union policies at issue here, and their customers, such as Mallinckrodt, are not.

Because the policy language at issue here consists of exclusions, National Union bears the burden of establishing that its interpretation of the exclusions is the only reasonable one. As discussed below, National Union cannot reasonably contend that the exclusions in its policies for bodily injury arising from "your product" apply to Mallinckrodt's liability because of bodily injury arising from non-Mallinckrodt products due to the unbranded promotional campaign. It certainly cannot demonstrate that the only reasonable construction of the exclusions, read narrowly, clearly and unambiguously excludes coverage for bodily injury caused by non-Mallinckrodt opioid drugs due to the promotion of opioids in general. On the contrary, although National Union and not the Trust bears the burden of persuasion on exclusions, it is clear, based on the plain language of the products hazard exclusions, that they do not apply to Mallinckrodt's liability because of bodily injury caused by non-Mallinckrodt opioids. For these and other reasons, as set forth below, the Trust's motion should be granted.

ARGUMENT

This motion seeks a declaration that to the extent the opioid mass tort claims against Mallinckrodt arose in whole or in part from opioid pharmaceuticals not manufactured or sold by Mallinckrodt or from illicit opioid drugs, such liability is not excluded by products hazard exclusions found in the National Union policies, which apply only to "[Mallinckrodt's] product[s]."

I. The Products Hazard in the National Union Policies Applies Solely to "Your [Mallinckrodt's] Product[s]", and Thus to the Extent That Mallinckrodt's Liability Arose in Whole or in Part from Non-Mallinckrodt Products, the Products Hazard Exclusion Does Not Bar Coverage

As noted above, the National Union Policies exclude coverage for "[redacted]". *See* National Union Policy No. GL 509-47-72 Ex. M, at 32. The products-hazard is defined as "[redacted]" *See id.* at 21. "Your product" is defined in relevant part as "[redacted] *Id.* at 22. "[Y]our product" does not include products manufactured or sold by other pharmaceutical companies or producers of illicit opioid products. *Id.* Thus, under the plain language of the National Union policies, the products hazard exclusion does not bar coverage for Mallinckrodt's liability arising from the unbranded promotional campaign or otherwise which led to the abuse of non-Mallinckrodt products.[14]

To the extent that National Union contends that the exclusion applies because Mallinckrodt's liability arose in some measure from Mallinckrodt's products, that would have it exactly backwards. In Missouri, under the coverage-promoting rules discussed above, courts construe insurance policies "to grant coverage rather than defeat it." *Truck Ins. Exchange*, 162 S.W.3d at 86 (internal citations omitted). Exclusions must be read narrowly against the insurer, to afford the greatest possible coverage. *See, e.g.*, *Harrison*, 956 S.W.2d at 270. In other words, the default is to coverage, not non-coverage. This reflects the fundamental essence of

[14] Similarly, the products hazard exclusion does not bar coverage to the extent that Mallinckrodt was jointly and severally liable with other manufacturers because of bodily injury arising from opioids, because such joint and several liability is premised, in part, on bodily injury allegedly caused at least in part by non-Mallinckrodt products. This motion applies to such liability for all of the same reasons set forth in this motion.

insurance, which is to transfer risk from the insured to the insurer and, thus, protect the insured from that risk. Under these legal principles, to the extent Mallinckrodt's liability arose in part from non-Mallinckrodt products, the "your product" products hazard exclusions do not apply, and coverage is not barred.

The plain language of the policies supports this. It excludes only "[redacted]" *See* National Union Policy No. GL 509-47-72 Ex. M, at 32 (emphasis added). As noted above, every word in the National Union policies must have meaning and be given effect. *See Selimanovic*, 337 S.W.3d at 35; *Baker*, 2 S.W.2d at 739; *Purk*, 628 S.W.3d at 719.

To be "within" the products hazard, the bodily injury giving rise to Mallinckrodt's liability must be due solely to "[Mallinckrodt's] products." "Within" means entirely inside. For example, the Merriam-Webster online dictionary defines "within" to mean "in or into the interior: INSIDE"; "a function word to indicate enclosure or containment"; or "a function word to indicate a situation or circumstance in the limits or compass of", such as "not beyond the quantity, degree, or limitations of", "in or into the scope or sphere of" (emphasis in original).[15] Thus, for the products hazard exclusion to apply, the bodily injury giving rise to Mallinckrodt's liability must be "not beyond . . . the limitations of" the "product hazard." It must not arise from anything other than Mallinckrodt's products. To the extent that the liability arose from bodily injury resulting from opioid pharmaceuticals not manufactured or sold by Mallinckrodt or from illicit opioid drugs,

[15] *Within*, Merriam-webster.com, https://www.merriam-webster.com/dictionary/within (entry 1, 2) (last visited Nov. 2, 2023) (first Google search result for the "definition of within"); *see also, e.g.*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/within (entry 2) ("inside or not beyond (a particular area, limit, or period of time)") (last visited Nov. 2, 2023). "When construing an insurance policy, [the Court] must give words their plain meaning, consistent with the reasonable expectations, objectives, and intent of the parties . . . and [i]n so construing, [the Court] may consult standard dictionaries." *Chase Resorts, Inc. v. Safety Mut. Cas. Corp.*, 869 S.W.2d 145, 150 (Mo. App. E.D. 1993).

whether because of Mallinckrodt's unbranded promotional campaign or otherwise, such liability is not "within" the products hazard, and the exclusion simply does not apply.

The word "included" in the phrase "included within" reinforces this conclusion. Merriam-Webster defines the term "included" as "to take in or comprise as a part of a whole or group" or "to contain between or within."[16] The "whole" here remains the products hazard, and bodily injury arising from non-Mallinckrodt products is not "a part of" or "contain[ed] . . . within" that whole.

Thus, under the plain language of the exclusion, bodily injury arising in whole or in part from non-Mallinckrodt opioids is not "included within" the products hazard, and liability because of that bodily injury is not excluded by the National Union policies.

II. Had National Union Wished to Exclude Liability for Bodily Injury That Arises from Both Mallinckrodt and Non-Mallinckrodt Products, It Had to Do So in Clear and Unmistakable Language, but It Did Not

"It is incumbent upon an insurer to express its exclusions in clear and unambiguous terms." *Jones v. Columbia Mut. Ins. Co.*, 700 S.W.2d 187, 188 (Mo. App. S.D. 1985). This is particularly true where, as here, the coverage grant is expressed in sweeping terms. *See Ins. Co. of N. Am. v. Gen. Aviation Supply Co.*, 283 F.2d 590, 592 (8th Cir. 1960) (applying Missouri law and holding that, "[h]aving affirmatively expressed the coverage in a broad promise to defend and to indemnify, it was incumbent on the [insurer] to define the exclusions from that promise in clear terms").

National Union easily could have drafted a broader exclusion than it did. For example, the products hazard exclusion could have been written to exclude bodily injury "in whole or in part within" the products hazard. Indeed, National Union used this precise language in other exclusions—for example, in fungi and bacteria exclusions that appear in certain of its policies, but

[16] *Included*, Merriam-webster.com, https://www.merriam-webster.com/dictionary/included (last visited Nov. 2, 2023) (first Google search result for the "definition of within"); *see also, e.g.*, Dictionary.com, https://dictionary.com/browse/included (entry 1) ("being part of the whole; contained; covered") (last visited Nov. 2, 2023).

not in the "your product" exclusions. Those exclusions state expressly that the policies exclude coverage for "[redacted]" *See* National Union Policy No. GL 509-47-72 Ex. M, at 84. Insurers commonly use such language to broaden the scope of an exclusion. *See, e.g.*, *Berkley Nat'l Ins. Co. v. Granite Telecomms. LLC*, 617 F. Supp. 3d 77, 82 (D. Mass. 2022) (analyzing bacteria exclusion which precluded coverage for bodily injury "that would not have occurred, in whole or in part, but for the actual, alleged, or threatened . . . exposure to . . . any 'fungi' or bacteria on or within a building or structure"); *Am. Guar. & Liab. Ins. Co. v. Law Offices of Richard C. Weisberg*, 524 F. Supp. 3d 430, 439 (E.D. Pa. 2021) (analyzing exclusion which precluded coverage for claims "arising out of, in whole or in part": a) "an Insured's or former Insured's capacity or status as . . . an officer, director, partner, shareholder, manager, or employee of a business organization"; b) "[a]ny liability of any Insured resulting from any oral or written contract or agreement . . . "; or, c) "[a]ny actual or alleged acts or omissions by any Insured . . . in connection with any investment in why [sic] any Insured has an interest"); *Great West Cas. Co. v. XTO Energy, Inc.*, No. 1:16-cv-387, 2019 WL 96300, at *6 (D. N.D. Jan. 3, 2019) (analyzing hydrofracking exclusion which excluded "'"Bodily injury' . . . arising, in whole or in part, out of 'hydrofracking' or the storage or disposal of any 'flowback', by any 'insured' or by any other person or entity"); *Burlington Ins. Co. v. Alan*, No. C 12–03372, 2013 WL 1819996, at *3 (N.D. Cal. Apr. 30, 2013) (analyzing exclusion that precluded coverage for bodily injury "[a]rising in whole or in part our of any 'assault' or 'battery' committed or attempted by any person"); *USF Ins. Co. v. Clarendon Am. Ins. Co.*, 2006 WL 8434403, at * 6 (C.D. Cal. Jan 30, 2006), *order amended and superseded*, 452 F. Supp. 2d 972 (C.D. Cal. 2006) (analyzing absolute earth movement exclusion which excluded "Bodily injury or property damage claimed, in whole or in

part, to arise from . . . earth movement, whether the earth movement is combined by any other cause") (emphasis omitted); *Franklin v. Pro. Risk Mgmt. Servs., Inc.*, 987 F. Supp. 71, 76 (D. Mass. 1997) (analyzing exclusion that excluded "any claim for damages based *in whole or in part* on a claim of undue familiarity") (emphasis in original); *see, e.g.*, *Peerless Ins. Co. v. Gonzalez*, No. CV 950553119S, 1996 WL 521163, at *5 (Conn. Super. Ct. Sept. 4, 1996) (holding that a lead exclusion that excluded from coverage bodily injury "arising in whole or in part out of . . . use or existence of, exposure to, or contact with lead or lead contained in goods, products or materials" was "broad in its sweep"). National Union is not entitled to have its exclusions re-written to be broader than they are by their express terms.

Or, National Union could have defined the products hazard by reference to "any products" rather than "your product." Under fundamental rules of insurance contract construction, the fact that National Union said "your product" rather than "any product" means that non-Mallinckrodt products are not included in the exclusion. *See Allied World Specialty Ins. Co. v. City of Ferguson, Missouri*, No. 4:18CV000827 SRC, 2019 WL 4040134, at *3 (E.D. Mo. Aug. 27, 2019) (recognizing the doctrine of *expressio unius est exclusio alterius*[17] in Missouri); *see also Helberg v. Nat'l Union Fire Ins. Co.*, 657 N.E.2d 832, 835 (Ohio Ct. App. 1995) ("[a]pplying the time-honored maxim of construction, *expressio unius est exclusio alterius*, the inclusion of specific things implies the exclusion of those not mentioned" to reject the insurers' attempt to broaden a policy exclusion to include circumstances not addressed in exclusion).

Alternatively, National Union could have included anti-concurrent-cause language in the policies, which makes express that a loss is excluded from coverage if it results from a combination of covered and excluded causes. National Union knew how to do this as well—it used such clauses

[17] *Expressio unius est exclusio alterius* is a canon of construction which means "expressing one item of an associated group or series excludes another left unmentioned." *Id.*

in other exclusions in its policies. For example, it used such language in fungi exclusions that provide that they apply "[redacted]" (emphasis added). *See* National Union Policy No. GL 509-47-72 Ex. M, at 84. Having failed to use such well-known and easily available language in the "your product" exclusion, National Union is not entitled to have this Court construe its policies as if it did.

In short, having used limited exclusionary language, National Union cannot expand the exclusions at the point of claim and with the benefit of hindsight so as to swallow coverage for bodily injury that is not within the exclusions. National Union cannot add in-whole-or-in-part or anti-concurrent-cause language to its policies now, or pretend that the language is there when it is not. *See U.S. Fid. & Guar. Co. v. Hill*, 722 S.W.2d 609, 610–11 (Mo. App. W.D. 1986) ("if the language of an insurance policy is clear and unambiguous then a court does not have the power to rewrite the policy, but must construe it as written."). National Union cannot take an exclusion that expressly applies only to bodily injury arising from "your [Mallinckrodt's] products" and apply it to exclude claims based on bodily injury arising from other products for which Mallinckrodt is also alleged to be liable. Doing so not only would violate the intent as expressed in the clear language of the insurance contracts, it also would be contrary to the blackletter rules of insurance contract construction discussed above, under which the default where the insurer has not made its supposed meaning clear is to provide coverage, not to exclude it. Indeed, by defining the exclusion as turning in relevant part on "your product" rather than any products, National Union communicated to its insureds a distinctly limited scope of exclusion that it cannot now foreswear. As stated by the United States Court of Appeals for the Second Circuit in an oft-quoted caution nearly fifty years ago, when insurance companies elect not to use specific exclusionary language,

they "act[] at their own peril." *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1001 (2d Cir. 1974).

III. Even If the Products Hazard Exclusions Were Deemed Not to Be Clearly Inapplicable to Mallinckrodt's Liability Because of Bodily Injury Arising Out of Other Manufacturers' Products or Illicit Opioids, at Best for National Union They Would Be Ambiguous and Therefore Must Be Construed Against National Union and in Favor of Coverage

While the Trust believes that the products hazard exclusions are clearly limited to Mallinckrodt's liability because of bodily injury arising solely out of its own products and do not apply to Mallinckrodt's liability because of bodily injury arising in whole or in part from other manufacturers' products or illicit opioids due to its unbranded promotional campaign, at best for National Union the products hazard exclusions are ambiguous in this regard and must be construed against it.

In Missouri, "[a]n ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy. Language is ambiguous if it is reasonably open to different constructions." *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010) (quoting *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007)). When insurance policy language is ambiguous, Missouri courts "resolve[] ambiguities in favor of the insured" and adopt the insured's construction. *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 690 (Mo. banc 2009) (quoting *Seeck*, 212 S.W.3d at 132); *accord Fair v. Lighthouse Carwash Sys., LLC*, 961 So. 2d 60 (Miss. Ct. App. 2007) (holding that clause which failed to include clear, unequivocal language expressly prohibiting litigation in forums other than the one designated in the forum selection clause was "open to two opposing, yet reasonable interpretations", and thus it would be interpreted against the business, such that the forum selection clause was held to be permissive in nature). Terms limiting coverage are to be construed most strongly against the insurer and in favor of the insured because "[i]t is incumbent upon the insurer to express its intention within such clauses by clear

and unambiguous terms." *Citizens Ins. Co. of New Jersey v. Kansas City Com. Cartage, Inc.*, 611 S.W.2d 302, 307 (Mo. App. W.D. 1980) (citing *State ex rel. Mills Lumber Co. v. Trimble*, 327 Mo. 899, 39 S.W.2d 355, 358 (1931)). To prevail here, National Union, which bears the burden of establishing that its exclusion unambiguously applies to exclude all coverage for all alleged liability, must demonstrate that its interpretation of the exclusion is the only reasonable one; *Jones*, 287 S.W.3d at 690 (noting that where policy is reasonably open to different constructions, it is ambiguous, and must be construed against the insurer).

At best for National Union, the products hazard exclusions at issue here are ambiguous because the Trust's construction of the clause is at the very least reasonable for all of the reasons set forth above. Because ambiguous clauses must be construed in the Trust's favor, even if the products hazard" exclusions were deemed to be ambiguous, they would have to be construed in the Trust's favor. Under that standard, the exclusions cannot bar coverage here.

CONCLUSION

For the foregoing reasons, under the plain language of the National Union policies, the products hazard exclusions do not apply to Mallinckrodt's liability because of bodily injury arising in whole or in part out of other manufacturers' products or illicit opioids, due to the unbranded promotional campaign or otherwise. National Union simply did not state, in clear and unmistakable terms as it was obligated to do, that the products hazard exclusion would apply to such liability. It did not state, in clear and unmistakable terms as it was obligated to do, that the products hazard exclusion would apply to mixed claims involving bodily injury arising from both Mallinckrodt and non-Mallinckrodt products, although it knew how to do so and, indeed, did so with other exclusions in these and other policies. And, even if the products hazard exclusion were ambiguous in this regard, under fundamental rules of insurance contract construction, it would have to be construed narrowly against the insurer and in favor of coverage, such that National

Union could not prevail because its proposed construction of the policy language is not the only reasonable one. National Union simply cannot carry its burden here, and its reliance on the products hazard exclusion to avoid its coverage obligations must be rejected.

The Trust therefore respectfully requests that the Court grant this motion and rule that to the extent Mallinckrodt was liable because of bodily injury resulting in whole or in part from opioid pharmaceuticals manufactured or sold by other pharmaceutical companies or from illicit opioid drugs, whether as a result of Mallinckrodt's substantial role in creating and fueling the opioid crisis through the unbranded promotion of opioid drugs generally or otherwise, such liability is not excluded by products hazard exclusions found in the National Union policies, which apply only to bodily injury arising solely from "your [Mallinckrodt's] product[s]."

Dated: April 16, 2024
St. Louis, MO

RIEZMAN BERGER, P.C

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APPENDIX A

Insurer	Policy Number	Policy Period Start Date	Policy Period End Date
National Union Fire Insurance Company of Pittsburgh, PA	GL 187-21-21	11/15/2008	11/15/2009
National Union Fire Insurance Company of Pittsburgh, PA	GL 650-64-83	11/15/2009	11/15/2010
National Union Fire Insurance Company of Pittsburgh, PA	GL 436-10-60	11/15/2010	11/15/2011
National Union Fire Insurance Company of Pittsburgh, PA	GL 270-49-92	11/15/2011	11/15/2012
National Union Fire Insurance Company of Pittsburgh, PA	GL 964-51-88	11/15/2012	11/15/2013
National Union Fire Insurance Company of Pittsburgh, PA	GL 509-47-72	6/28/2013	6/28/2014
National Union Fire Insurance Company of Pittsburgh, PA	GL 726-71-72	6/28/2014	6/28/2015
National Union Fire Insurance Company of Pittsburgh, PA	GL 333-31-10	6/28/2015	6/28/2016
National Union Fire Insurance Company of Pittsburgh, PA	GL 379-66-74	6/28/2016	6/28/2017
National Union Fire Insurance Company of Pittsburgh, PA	GL 693-89-45	6/28/2017	6/28/2018
National Union Fire Insurance Company of Pittsburgh, PA	GL 693-89-45	6/28/2018	6/28/2019
National Union Fire Insurance Company of Pittsburgh, PA	GL 686-23-54	6/28/2019	6/28/2020
National Union Fire Insurance Company of Pittsburgh, PA	GL 1728939	6/28/2020	6/28/2021

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 March 27, 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 the attached service list.

/s/ P. Tyler Connor
P. Tyler Connor, MBN 69049

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