IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
MALLINCKRODT PLC, *et al.*,	Case No. 20-12522 (JTD)
Debtors.[1]	(Jointly Administered)

THE OFFICIAL COMMITTEE OF OPIOID RELATED CLAIMANTS' OBJECTION TO THE DEBTORS' MOTION SEEKING APPROVAL OF THE DISCLOSURE STATEMENT

The Official Committee of Opioid Related Claimants (the "OCC")[2] appointed in the chapter 11 cases (the "Chapter 11 Cases") of the above-captioned debtors and debtors in possession (the "Debtors"), by and through its undersigned counsel, hereby submits this objection (the "DS Objection")[3] to the *Motion of Debtors for Entry of Order (I) Approving the Disclosure Statement and Form and Manner of Notice of Hearing Thereon, (II) Establishing Solicitation Procedures, (III) Approving the Form and Manner of Notice to Attorneys and Solicitation Directive, (IV) Approving the Form of Ballots, (V) Approving Form, Manner, and Scope of Confirmation Notices, (VI) Establishing Certain Deadlines in Connection with Approval of Disclosure Statement, and*

[1] A complete list of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' claims and noticing agent at http://restructuring.primeclerk.com/Mallinckrodt.

[2] Capitalized terms used but not defined herein shall have the meaning assigned to such terms in the *Joint Plan of Reorganization of Mallinckrodt plc and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [ECF No. 2074] (the "Plan") or the related disclosure statement [ECF No. 2075] (the "Disclosure Statement"), as applicable.

[3] Contemporaneously herewith, the OCC has filed *The Official Committee of Opioid Related Claimants' Statement and Reservation of Rights Regarding the Debtors' Solicitation Procedures Motion* (the "Statement & Reservation of Rights"), which may be supplemented in the near term to address additional noticing issues to the extent that such issues remain unresolved. For the avoidance of doubt, this DS Objection addresses only the OCC's concerns regarding the adequacy of the Disclosure Statement and the confirmability of the Plan, not the Debtors' proposed solicitation procedures, which are addressed by the Statement & Reservation of Rights and any further objection filed in connection with the same. The OCC has raised each issue addressed in this DS Objection as well as numerous issues related to the proposed solicitation procedures with the Debtors and understands that the Debtors are continuing to consider potential resolutions. Accordingly, it is possible—and the OCC hopes—that portions of these objections may become moot by the time of the hearing on the Disclosure Statement.

Confirmation of Plan, and (VII) Granting Related Relief [ECF No. 2200] (the "DS Motion"). In support of this DS Objection, the OCC states as follows.

PRELIMINARY STATEMENT

1. The Debtors' proposed Disclosure Statement cannot be approved—indeed, no disclosure statement for the current Plan could be. The Disclosure Statement does not merely fail to provide adequate information about the Plan, although the OCC submits that significant information is absent from the current filed version. Rather, no amount of additional disclosure could cure three fundamental flaws with the Debtors' proposed restructuring, each of which—standing alone—renders the Plan patently unconfirmable.

2. *First*, the Plan proposes to channel to a trust (the "Opioid Trust") the claims of the OCC's constituents—namely thousands of individuals, institutions, States and political subdivisions across the country harmed by the Debtors in connection with their role in perpetuating the ongoing opioid crisis (the "Opioid Claimants" and such underlying claims, the "Opioid Claims").[4] A channeling injunction such as that set forth in section IV.G of the Plan (the "Opioid Channeling Injunction") typically is granted only after a debtor demonstrates both (i) the need for such an injunction and (ii) the presence of safeguards to protect those who will be forced to accept limited recoveries, including the consent of such parties. These Debtors have not—and cannot—meet this burden.

[4] Opioid Claimants include no fewer than 11 distinct (public and private) constituencies: (i) the federal government; (ii) the 50 States, Territories and other political subdivisions of the United States; (iii) political subdivisions of the States; (iv) Native American tribes; (v) personal injury victims (including children diagnosed upon birth with neonatal abstinence syndrome ("NAS")); (vi) a putative class representing the interests of children diagnosed upon birth with NAS seeking a medical monitoring fund; (vii) hospitals; (viii) third party payors, including health insurance companies and employer and government-sponsored health insurance plans administered by these companies; (ix) purchasers of private insurance; (x) emergency room physicians; and (xi) independent public school districts.

3. Channeling injunctions are most appropriate in the asbestos context, as recognized by a provision of the Bankruptcy Code enacted specifically for such cases. *See* 11 U.S.C. 524(g). Specifically, channeling injunctions routinely are applied in asbestos cases because the extensive latency period between asbestos exposure and the manifestation of mesothelioma and related ailments can result in a series of injuries over a long time horizon. In turn, debtors may need to channel all such claims to protect an operating business against indefinite and mounting liability and ensure the availability of a continued profit stream to pay future claimants. The OCC is aware of no evidence of a similar latency period with respect to opioid exposure.[5] Nor have the Debtors offered any other explanation as to why the Opioid Channeling Injunction is necessary.

4. With respect to appropriate safeguards, a debtor seeking a channeling injunction may follow one of two paths: (i) justifying such an injunction on equitable grounds, including "overwhelming" support from affected parties and other appropriate safeguards to protect the interests of channeled claimants; or (ii) adopting the streamlined "safe harbor" approach enacted by Congress for asbestos-related cases, which also requires the imposition of safeguards. The Debtors have not attempted to meet the codified standard under the asbestos safe harbor or provided alternative safeguards to justify the injunction on equitable grounds. Indeed, the Opioid Channeling Injunction has been stripped of ***virtually all*** of the safeguards case law requires to protect the holders of channeled claims. Perhaps most importantly, there does not appear to be the broad support from Opioid Claimants (other than the Public Opioid Claimants that have signed onto the RSA) that would be required to justify imposition on either basis.

[5] As stated previously, the OCC's consent to the provisional appointment of the Future Claimants Representative does not represent or otherwise signal the OCC's concession, or a finding by this Court, that any "true future" claims properly represented by a Future Claimants Representative exist in these cases.

5. *Second*, the Plan seeks to impose sweeping nonconsensual third party releases (the "Nonconsensual Opioid Releases") on Opioid Claimants. The Third Circuit permits a court to impose such releases (absent consent) only where the released parties are making a contribution to the estates that is "critical to the success of the plan," not as an additional form of consideration involuntarily extracted from one constituency and paid to another. The Nonconsensual Opioid Releases do not reflect contributions by the beneficiaries against which claims are being released. And the Debtors will be unable to show at confirmation that these releases—some of which pertain to claims that do not threaten the Debtors—are "critical to the success of the Plan."[6]

6. The specific terms of the Nonconsensual Opioid Releases also go far beyond anything the Third Circuit has cognized, operating to release the claims of objecting creditors that: (i) the Debtors have deliberately declined to provide with notice of the Chapter 11 Cases; (ii) may receive no recovery at all under the Plan; and (iii) will not receive a mutual release from the Debtors in return. The paradoxical and problematic result is that an Opioid Claimant may: (a) give up potentially valuable claims against third parties; (b) receive nothing under the Plan; and yet (c) remain the target of potential future litigation by the Debtors. Moreover, the burden of the Nonconsensual Opioid Releases is not distributed evenly among the Opioid Claimants—instead, the Plan excludes a limited group of supportive governmental claimants from certain releases, while extracting broader releases only from Opioid Claimants that ***did not*** provide advance consent. Despite the dramatic alteration the Nonconsensual Opioid Releases would work on the rights of

[6] While the Debtors explicitly acknowledged in connection with their efforts to obtain approval of a key employee incentive plan that third-party releases remained an open issue, the Disclosure Statement contains no information representing even an attempt to justify the Nonconsensual Opioid Releases under applicable law. At a minimum, the Disclosure Statement must describe the settlement and reservation of rights pursuant to which the Debtors agreed to produce information regarding the conduct of their employees to assist the OCC in its investigation of the third-party releases. *See Order (I) Approving the Q4 2020 Payment Under the 2020 Key Employee Incentive Plan, (II) Approving the Debtors' 2021 Key Employee Incentive Plan, and (III) Granting Related Relief* [ECF No. 1954] ¶ 4. Unfortunately, under the current discovery schedule, the OCC will not be in a position to make a final determination on the appropriateness of releases for individual directors and officers before mid-July, as contemplated by the order.

Opioid Claimants, the Disclosure Statement contains no justification for requiring claimants that did not sign onto the RSA and do not otherwise consent to such terms to grant such releases.

7. *Third*, the Plan fails to perform one of its most basic functions, which is to "specify the treatment of any class . . . that is impaired under the plan." 11 U.S.C. § 1123(a)(3). Indeed, the Opioid Trust at the heart of the Plan is nothing more than a blank slate on which it is contemplated (or hoped) that the specific treatment for Opioid Creditors' claims will later be written. The Plan and Disclosure Statement do not explain to Opioid Claimants the recoveries they can expect to receive. Instead, Debtors have elected to provide—for the benefit of all ***other*** creditors—assurances regarding what Opioid Claimants ***will not*** receive by identifying, but not quantifying, the maximum consideration that will be paid to Opioid Claimants in the aggregate, namely $1.6 billion in cash (over up to seven years), as well as certain non-cash consideration (including warrants, insurance proceeds and causes of action) (collectively, the "Opioid Trust Consideration"). After establishing the aggregate Opioid Trust Consideration, however, the Plan and Disclosure Statement fail to: (i) provide information regarding the allocation of the Opioid Trust Consideration among the various Opioid Claimant constituencies, which has been the purview of the still ongoing mediation (the "Allocation Mediation") for the last three months[7]; (ii) describe the distribution procedures and other protocols by which claims channeled to the Opioid Trust will be adjudicated and become entitled to distributions; or (iii) value the non-cash consideration that will be transferred to the Opioid Trust.

8. As the fiduciary for all Opioid Claimants, the OCC is engaged in an extensive investigation into whether the proposed Opioid Trust Consideration is appropriate. This

[7] *See Order (A) Appointing a Mediator and (B) Granting Related Relief* [ECF No. 1381] (establishing a process to determine the relative allocation of the Opioid Trust Consideration between and among the various groups of public and private Opioid Claimants).

investigation includes, among other things, an assessment of the value (if any) received by the Specialty Generics entities in return for guaranteeing the funded debt obligations incurred by the Specialty Branded entities following Mallinckrodt's spinoff from Covidien plc in 2013 and, in turn, the propriety of the Debtors' proposed settlement of intercompany claims. As will be discussed in the OCC Position Letter (defined below), the Debtors incurred much of their funded debt through a series of acquisitions to grow the Specialty Brands business following their spin-off from Covidien plc in 2013. These obligations were guaranteed by a number of Specialty Generics entities, which provided liens on substantially all of their assets as collateral for the debt acquisition. It is not clear whether the Specialty Generics received ***any*** (let alone reasonably equivalent) value in exchange for such guaranties.

9. In connection with its ongoing investigation, the OCC is evaluating, among other things, any disproportionate intercompany claims that may accrue to the benefit of the Specialty Generics Debtors (and their creditors, including Opioid Claimants) as a result of these transactions. This investigation remains ongoing, and therefore the OCC—unlike many other parties in interest—is reserving judgment on the propriety of the Opioid Trust Consideration until its investigation is complete. The OCC submits that Opioid Claimants are entitled to the OCC's conclusions and views in advance of being required to vote on any Plan, a core principle of informed consent with which the Debtors cannot disagree. But even more critically, the Debtors themselves have made no disclosure of their own views regarding either the total quantum of Opioid Claims or the value of the Opioid Trust Consideration.[8] Without information on the ***actual***

[8] Specifically, to the extent the Debtors intend to solicit votes before the OCC's investigation is complete, they should be required to reveal their (presumably fully-formed) views for creditors to scrutinize in determining how to vote on the Plan. In its present form, the Disclosure Statement does not describe or even reference ***any*** investigation by the Disinterested Managers of the Specialty Generics Debtors regarding the proposed "clean-slate" settlement of intercompany liabilities, or the basis on which the Debtors have concluded that an effective "whitewash" of all such

treatment available to them under the Plan—namely, the treatment of their claims, as opposed to a cap on the value provided to the amorphous set of classes to which they belong—Opioid Claimants cannot (and, indeed, cannot be expected) to judge whether the Plan is fair and cast their votes accordingly.

10. Each of these three deficiencies standing alone—and even more so in the collective—form a chasm over which any attempt by the Debtors to convert the partial deal they have struck with a subset of their creditors into a comprehensive plan of reorganization cannot cross. Accordingly, this Court should deny approval of the Disclosure Statement until a plan is proposed that: (i) modifies the contemplated channeling of Opioid Claims to comport with applicable law; (ii) narrows the nonconsensual third party releases contemplated by the Plan and applies them equally to all claimants; and (iii) provides sufficient information for each Opioid Claimant to make an informed determination based on an understanding of the recoveries to which such claimant will (or will not) be entitled.

11. Finally, compounding these fundamental deficiencies, the Disclosure Statement fails to provide creditors with information that the OCC believes should be disclosed in connection with the voting process. In an effort to avoid unnecessary motion practice, however, the OCC does not intend to address these issues in this DS Objection or any other related filing. Instead, the Debtors have agreed to include in their solicitation materials a letter from the OCC (the "OCC Position Letter") conveying its perspective on a variety of issues that it believes are not adequately described in the Disclosure Statement.[9]

liabilities is appropriate treatment for the Specialty Generics Debtors. This is particularly troubling in light of the lack of cooperation the OCC has received in its investigation from the Disinterested Managers.

[9] For the avoidance of doubt, the OCC's determination not to include in this DS Objection, the OCC Position Letter or elsewhere a list detailing each of the informational deficiencies in the Disclosure Statement is by no means a concession that the Disclosure Statement is otherwise adequate. It is rather a recognition that: (i) certain Opioid

OBJECTION

12. At its core, the Plan—which largely reflects the deal struck between the Debtors and certain creditor constituencies prepetition—proposes a reorganization of the Debtors' capital structure that: (i) reinstates the Debtors' secured debt facilities; (ii) gives the equity in the reorganized business to the Debtors' unsecured noteholders; (iii) provides cash consideration to general unsecured creditors; and (iv) establishes an Opioid Trust to be funded with $1.6 billion in cash (to be paid over seven years) and certain non-cash consideration that will serve as the sole recovery for all Opioid Claimants. In exchange, the Debtors propose to emerge from chapter 11 free from the sweeping opioid and non-opioid liability that hobbled the company prior to the commencement of these cases and any such liability that may arise in the future.

13. To achieve this freedom, and to insulate the Debtors' financial creditors from having their recoveries diluted by liability to the victims of the Debtors' conduct, the Debtors propose to have this Court bless (i) a broad channeling injunction that will prevent all Opioid Claimants—present and future—from seeking any recovery against the Reorganized Debtors and certain related parties and (ii) nonconsensual third-party releases that do not comport with applicable law. Either of these mechanisms, standing alone, would render the Plan patently unconfirmable. *In re Am. Capital Equip., LLC*, 688 F.3d 145, 154-5 (3d Cir. 2012) (citing *In re Monroe Well Serv.*, 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987)) (A plan will be considered "patently unconfirmable," and thus cannot be approved, where (a) confirmation defects cannot be overcome by creditor voting results and (b) those defects concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing.). Further compounding these deficiencies, the Plan and Disclosure Statement fail to provide Opioid

Claimants are already bound to vote in favor of the Plan under the RSA; and (ii) the remaining majority of Opioid Claimants will look to the OCC, and not to the Debtors, for guidance.

Claimants with ***any*** information regarding how their individual claims will be treated and thus fails to satisfy even the most basic requirements imposed by the Bankruptcy Code.

14. In view of the foregoing, the Disclosure Statement should not be approved unless and until the Plan and Disclosure Statement are modified to address these concerns.

I. The Channeling Injunction Cannot Be Approved Under Applicable Law

15. A channeling injunction is extraordinary relief and must, at bare minimum, satisfy the basic requirements applicable to any release of third-party claims of "fairness, necessity to the reorganization, and specific factual findings to support these conclusions." *See In re N. Am. Refractories Co.*, Case No. 02-20198, 2007 Bankr. LEXIS 4721, at *36–7 (Bankr. W.D. Pa. Nov. 13, 2007) (citing *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214 (3d Cir. 2000)). Courts have interpreted this test to mean that a channeling injunction may be imposed only if: (i) the case presents extraordinary circumstances justifying the need for such relief; (ii) the channeling injunction is fair and reasonable and provides appropriate safeguards; and (iii) the plan offers fair consideration to the affected creditors. *In re TK Holdings Inc.*, Case No. 17-11375 (Bankr. D. Del. 2017) ("*Takata*"), Transcript of February 16, 2018 Hearing [ECF No. 2109] at 176:9–176:24–177:4 (the "*Takata* Confirmation Transcript"). The Channeling Injunction, in its current form, will preclude the Debtors from satisfying this test.

16. As drafted, the Plan purports to deprive ***all*** holders of Opioid Claims and Opioid Demands, if any, of recourse against the Debtors, Reorganized Debtors and various other parties. The Plan does this by channeling all Opioid Claims to a Opioid Trust that is devoid of essential safeguards, including broad consent. Indeed, only the Opioid Claimant groups that have signed onto the RSA—namely the attorneys general for 45 States and 5 Territories, the Governmental

Plaintiff Ad Hoc Committee (the "Governmental Plaintiffs Committee")[10] and certain political subdivisions and other entities represented by the Multi-State Governmental Entities Group[11] (collectively, the "RSA Public Opioid Claimants")—have consented to the contemplated Opioid Channeling Injunction.[12] This level of support simply is not sufficient to overcome the legal hurdles associated with a broad channeling injunction, particularly absent other necessary safeguards.

A. The Debtors Are Unable To Present Information Justifying Their Need for a Channeling Injunction

17. Channeling injunctions are intended primarily to address catastrophic future liability for products that cause harm after a long latency period. *See, e.g.*, *Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 653 (6th Cir. 2002); *In re Kaiser Aluminum Corp.*, Case No. 02-10429, 2006 Bankr. LEXIS 3945, at *49–50 (Bankr. D. Del. Feb. 6, 2006). The paradigm for this is asbestos, which can remain in use for decades and only manifest in injuries decades later. As such, Congress included in the Bankruptcy Code specific provisions for imposing channeling injunctions to address asbestos claims based on evidentiary findings that asbestos imposes these risks categorically on its former manufacturers and distributors. *See* 11 U.S.C. 524(g); H.R. Rep. No. 103-835 (1994), at 40–41.

18. Moreover, even with a product like asbestos that is known as a matter of law to cause harm after a lengthy latency period, debtors are required to make an independent showing

[10] The Governmental Plaintiffs Committee comprises seven States and the court-appointed Co-Lead Counsel on behalf of the Court appointed Plaintiffs' Executive Committee (the "PEC") in the MDL. *First Amended Verified Statement Pursuant to Bankruptcy Rule 2019* [ECF No. 496].

[11] The Multi-State Governmental Entities Group comprises approximately 1,318 entities—1,245 counties, cities and other municipal entities, nine tribal nations, 13 hospital districts, 16 independent public school districts, 33 medical groups, and two funds—across 38 States and Territories. *Verified Statement of the Multi-State Governmental Entities Group Pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure* [ECF No. 337] ¶ 1.

[12] Notably, the RSA Public Opioid Claimants do not represent the interests of all public-side Opioid Claimants, which also include, States, political subdivisions, Native American Tribes independent public school districts throughout the nation and other public entities that did not agree to the terms of the RSA.

that ***they*** are likely to face the type of liability that would impact feasibility years into the future. 11 U.S.C. § 524(g)(2)(B)(ii)(I)–(III). Upon such a showing, debtors may be permitted to establish a trust and channeling injunction—to place an appropriate amount (*i.e.*, "a majority") of their residual future value in the hands of present and future asbestos claimants, while shielding the go-forward business from liability. 11 U.S.C. § 524(g)(2)(B)(i)(III) (requiring a trust to be funded by "a majority of the voting shares" of the debtors protected by a channeling injunction, or their parents or debtor subsidiaries).

19. The Debtors have not—and presumably cannot—demonstrate that the Opioid Channeling Injunction, in its present form and absent the safeguards discussed below, is appropriate and necessary to their reorganization.

B. The Plan Contains None of the Safeguards Required To Protect the Holders of Channeled Claims

20. Once a debtor has established the need for a channeling injunction, a court must determine whether the proposed injunction is "fair and reasonable" and whether the plan at issue offers "fair consideration" to the affected classes of creditors. *Takata* Conf. Tr. at 176:9–176:24–177:4. To determine whether a channeling injunction is "fair and reasonable," the *Takata* court assessed whether five ***conjunctive*** factors were met: (i) an identity of interest among the debtors and any third parties receiving the benefit of the channeling injunction; (ii) a substantial contribution by such third parties to the reorganization; (iii) a the injunction and releases are essential to the reorganization; (iv) a substantial majority of creditors agree to the injunction, specifically, the impacted class, or classes, has "overwhelmingly" voted to accept the proposed plan treatment; ***and*** (v) there are sufficient mechanisms to ensure that the affected classes receive fair consideration. *Id.* at 173:9-176:23.

21. In lieu of attempting to enshrine this equitable inquiry into statutory language, Congress allowed asbestos debtors to meet a streamlined series of safeguards (the "524(g) Safe Harbor") in light of the acknowledged tendency of asbestos to give rise to a need for a channeling injunction. Such companies can forego demonstrating certain elements of the need for a channeling injunction, because Congress has already made the determination that asbestos poses these long-term risks to feasibility *per se*. *See* H.R. Rep. 103-835, at 40–41 (1994). Instead, the 524(g) Safe Harbor sets out mandatory factors which, if satisfied, compel the determination that a plan meets the relevant equitable factors to support a channeling injunction.

22. While the Third Circuit has endorsed a "flexible approach" to the required safeguards, *see Continental Airlines*, 203 F.3d at 212, the Debtors fail to meet even the baseline established by the 524(g) Safe Harbor and thus fail, *a fortiori*, the equitable test required when a debtor seeks to impose an injunction under Bankruptcy Code section 105. Indeed, the Debtors proposed path towards confirmation does not include any attempt to achieve the 75% support threshold required by Bankruptcy Code section 524(g)(2)(B)(ii)(IV)(bb), much less the "overwhelming support" required under non-asbestos case law.[13] Nor does the Plan contain any of the other safeguards that traditionally protect holders of channeled claims against *de facto* subordination to financial creditors. As such, the Plan in its current form cannot be approved.

C. The Plan Does Not Provide "Fair Consideration" to Channeled Opioid Claimants

23. Critically, the 524(g) Safe Harbor provides a basic mechanism for ensuring fair consideration—it requires that a trust established to pay claims and demands have, or have the right to acquire, majority voting interests in the debtors that are the subject of the channeling

[13] As a result of the Debtors' decision not to solicit proofs of claim from Opioid Claimants, even the most overwhelming voting outcome cannot meet this factor if the voting pool likely will be drawn from the RSA Public Opioid Claimants (which have already bound themselves to vote in favor of the Plan).

injunction. 11 U.S.C. § 524(g)(2)(B)(i)(III). This ensures that affected creditors may have access to the future value of reorganized debtors and prevents financial creditors from taking advantage of a temporarily low valuation to cut tort claimants off at a low residual value. Here, rather than providing the Opioid Trust with voting control over the reorganized business and paying fixed amounts to financial creditors, the Debtors attempt to cabin present and future opioid liability at a fixed cash value and a limited asset pool and hand the future value of the business to their investors. This alters significantly the relative entitlement of tort claimants and residual equity holders to future revenue stream typically contemplated by channeling injunction plans. Nothing in this structure provides Opioid Claimants with comparable assurance that they will not be cut off from significant future value.

24. If the Debtors believe that some mechanism in the Plan satisfies the requirements for imposition of a channeling injunction—including by ensuring that Opioid Claimants will receive fair consideration—they must present it now, and explain it in the Disclosure Statement. If not, the Plan cannot be confirmed and should not be sent out for solicitation.

II. The Nonconsensual Opioid Releases Contravene Third Circuit Precedent

25. The Nonconsensual Opioid Releases require each Opioid Claimant to release each Debtor, Reorganized Debtor and Protected Party[14] from a broad universe of claims and causes of action.[15] These releases cannot be approved for two reasons: *first*, they seek to release parties that

[14] Certain language in the Nonconsensual Opioid Releases refers not to Protected Parties, but to the "Released Parties" that are the subject of the releases by holders of non-Opioid Claims. The OCC believes that this is a typographical error. For the avoidance of doubt, to the extent that the Debtors intend to compel Opioid Claimants to grant a release of this still broader group, the Nonconsensual Opioid Releases would extend that much further beyond the limits imposed by the Third Circuit.

[15] The "Protected Parties" that benefit from the Nonconsensual Opioid Releases include not only the Debtors and the Reorganized Debtors, but also all affiliates of the Debtors that have not commenced chapter 11 cases, together with their current and former officers, directors, employees, professionals and other advisors and representatives. Plan § I.A.210.

cannot be released; and *second*, they seek to extract releases from parties that cannot be bound by them.

26. The Third Circuit has not "broadly sanction[ed] the permissibility of nonconsensual third-party releases in bankruptcy reorganization plans." *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 (3d Cir. 2019). Rather, it has "set forth exacting standards that must be satisfied if such releases and injunctions are to be permitted, and suggest[ed] that courts considering such releases do so with caution." *Id.* While the Third Circuit has not been called upon to endorse a specific test for evaluating whether third-party releases are justified in a given case, it has indicated that such releases are permitted if at all only where "necessary and given in exchange for fair consideration." *In re Continental Airlines*, 203 F.3d at 214 n.11. The meaning of "fair consideration" remains an open question, but it need not be resolved here because the Plan cannot meet this standard in any sense—the Protected Parties receiving releases are not providing ***any*** consideration and even if they were, such consideration cannot possibly flow to Opioid Claimants that may receive nothing (but give much) under the yet-to-be determined Opioid Trust distribution mechanics.[16]

A. The Debtors Seek To Protect Parties that Are Not Providing Consideration

27. The Third Circuit has drawn narrow lines around the type of "consideration" that may justify the imposition of nonconsensual third-party releases. *See In re Continental Airlines*, 203 F.3d at 211–214. Without establishing a bright-line rule, the *Continental* court noted that "even the most flexible tests" consider third-party releases permissible only in the face of

[16] The first factor—necessity—largely overlaps with the analysis of the Opioid Channeling Injunction. For the avoidance of doubt, the OCC reserves all rights to argue at or before confirmation that the Nonconsensual Opioid Releases are not necessary to the success of the Plan.

"[s]ubstantial financial contributions from non-debtor co-liable parties [that] provide[] compensation to claimants . . . and [make] reorganizations feasible." *Id.* at 213–14.

28. By contrast, the Protected Parties benefitting from the Nonconsensual Opioid Releases include affiliates, officers, directors and professionals of the Debtors and/or other third parties, ***none of which (whom) is providing anything to the Debtors, their estates or the Opioid Trust***. The notion that "the service of the Protected Parties before and during the Chapter 11 Cases to facilitate the Opioid Settlement," Plan § IX.D at 86, constitutes sufficient consideration for releases is exactly the argument that the Third Circuit rejected in *Continental*. 203 F.3d at 215 ("[W]e have found no evidence that the non-debtor D&Os provided a critical financial contribution to the Continental Debtors' plan that was necessary to make the plan feasible in exchange for receiving a release of liability for Plaintiffs' claims."). Third-party releases must be earned with new consideration, not provided by professionals and debtors to themselves as a tip for their services.[17]

B. The Nonconsensual Opioid Releases Cannot (I) Bind Creditors That May Receive Nothing Under the Plan or (II) Arbitrarily Favor RSA Signatories

29. As discussed in greater detail below, the terms of the Opioid Trust—including the criteria pursuant to which Opioid Claims will be evaluated and compensated—remain unwritten such that Opioid Claimants can have no certainty of receiving ***any*** consideration under the Plan. The Debtors nevertheless seek to deem each Opioid Claimant to have released the Protected Parties from liability, regardless of whether the eventual trust distribution protocols will entitle such claimant to any recovery at all.

[17] Beyond their failure to provide new consideration, some of the Protected Parties are among those alleged to have been the cause of the operational issues and liability that forced the Debtors into chapter 11 in the first place.

30. Even if the Debtors are able to establish at confirmation that each Protected Party provided consideration that was vital to implementation of the Plan, none of that consideration will flow to Opioid Claimants that do not receive a recovery. Thus, the releases imposed on such creditors cannot, in any sense, be treated as "given for fair consideration," as required by the Third Circuit.[18] Moreover, the Debtors intend to impose the Nonconsensual Opioid Releases on Opioid Claimants against which the Debtors are not even prepared to release their own claims. *See* Plan § IV.B (Debtor Release only applies to "Released Parties"); *Id.* § I.A.215 (definition of "Released Party," which does not include all Opioid Claimants). As a result, the Plan could leave many Opioid Claimants entirely worse off than before the Chapter 11 Cases—***they may be required to give up potentially valuable claims against the Debtors and the Protected Parties, while receiving no consideration and still remaining subject to potential lawsuits against them by the Debtors***.

31. In addition, the Nonconsensual Opioid Releases do not apply equally to all Opioid Claimants. Specifically, the definition of Protected Parties excludes certain sales and marketing consultants, including McKinsey & Company and its affiliates (collectively, "McKinsey"),[19] that have received investigative demands from State Attorneys General (the "Excluded Consultants"), but solely for the benefit of the Supporting Governmental Opioid Claimants.[20] The result is that, with respect to the Excluded Consultants, the Nonconsensual Opioid Releases are

[18] Indeed, while this issue cannot be analyzed without the benefit of fact discovery in advance of confirmation and, therefore, is not ripe for consideration at this phase of the Chapter 11 Cases, the Third Circuit has suggested that "fair consideration" may be substantially in excess of the "any consideration at all" standard that the Debtors fail to meet. *See In re Continental Airlines*, 203 F.3d at n.17 (factors to be considered include "whether the plan pays all or substantially all of the affected parties' claims").

[19] McKinsey was engaged to assist with and advise on sale and spin options for Covidien's pharmaceutical business and the ultimate 2013 spinoff and provided general portfolio and business development strategies for the Debtors' opioid and other businesses.

[20] The Supporting Governmental Opioid Claimants, as defined in the Plan, include both the RSA Public Opioid Claimants and any governmental entities that sign the RSA at a later date. *See* Plan § I.A.248.

disproportionately nonconsensual—that is, the Supporting Governmental Opioid Claimants that agree to support the imposition of the Nonconsensual Opioid Releases are excluded from the full breadth of their reach. There can be no basis for this disparate treatment of Opioid Claimants. This is true regardless of whether the Supporting Governmental Opioid Claimants are to be freed from forced releases of the Excluded Consultants as a favor, or whether the excessive scope of the releases is being used as a cudgel to threaten other Opioid Claimants. This unusual and unbalanced application of the Nonconsensual Opioid Releases undercuts any argument that releasing the Protected Parties is critical to the success of the Plan. It is simply not credible that the releases needed for the Debtors to consummate the Plan are coterminous with the universe of claimants that did not agree to support a particular economic deal. As such, the Debtors must explain in the first instance why the Excluded Consultants must be released by ***all*** parties, or accept that they need not be released by ***any*** parties.

32. Unless and until the Plan is modified to (i) exclude those who provide nothing to the reorganization from the scope of the Protected Parties; (ii) exclude creditors who end up receiving nothing from the Opioid Trust from the scope of the Nonconsensual Opioid Releases (or, alternatively, extend the scope of the Debtor Releases to all holders of channeled claims); and (iii) apply the Nonconsensual Opioid Releases evenly to all parties, regardless of voting status, the Plan will remain patently unconfirmable, and the Disclosure Statement cannot be approved.

III. The Plan Makes No Provision for the Treatment of Individual Opioid Claims

33. Bankruptcy Code section 1123(a)(3) requires that a plan "specify the treatment of any class of claims . . . that is impaired under the Plan." For convenience, the general requirement that a plan specify treatment of claims in any given class may sometimes be fulfilled in the aggregate. For example, the Debtors' Plan provides (as is common in complex chapter 11 plans) that ***each Holder*** of a Class 5 (Guaranteed Unsecured Notes) Claim will receive "***its pro rata share***

of (i) the Takeback Second Lien Notes and (ii) 100% of New Mallinckrodt Ordinary Shares, subject to dilution." Plan § III.B.5 (emphasis added). "Pro Rata Share" is a defined term, referring to the ratio between an individual Class 5 Claim and the total number of Class 5 Claims—a number that is easily calculated based on the amount of Guaranteed Unsecured Notes the Debtors issued, the applicable interest rate and the amount of notes held by a particular claimant. It is because this calculation can be made that the Debtors may treat funded debt in the aggregate.

34. But no such calculation is possible for Opioid Claims. Indeed, the Plan and Disclosure Statement fail to achieve the fundamental goal of specifying the treatment to which Opioid Claimants are entitled for at least three reasons. *First*, the Plan and Disclosure Statement fail to provide any allocation of the aggregate consideration proposed for Opioid Claims—*i.e.*, the Opioid Trust Consideration[21]—among the various Opioid Claimant constituencies, which has been the subject of the ongoing and still unresolved Allocation Mediation. *Second*, the Plan and Disclosure Statement fail to include the distribution protocols that will classify and allow claims ***within*** a given constituency based on a variety of factors to be compared among purportedly similarly situated claimants. And *third*, the Plan and Disclosure Statement fail to provide Opioid Claimants with sufficient information to value the non-cash Opioid Trust Consideration, including warrants, insurance proceeds and causes of action.

35. With respect to allocation among the various Opioid Claimant constituencies, the OCC is hopeful that the ongoing Allocation Mediation will result in a fair resolution of the numerous complex legal and factual issues that underlie the relative entitlements of the many groups harmed by the Debtors' products. But unless and until such a resolution is reached—or

[21] As noted above, the Opioid Trust Consideration includes: (i) $1.6 billion in cash paid on an extended seven-year timeline; (ii) warrants of uncertain value; (iii) litigation claims of uncertain value; and (iv) insurance rights of uncertain value.

otherwise proposed by the Debtors—Opioid Claimants cannot possibly assess their proposed treatment under the Plan.

36. Similarly, the Plan and Disclosure Statement must contain adequate information regarding the procedures that will govern the relative entitlement of individual Opioid Claimants within a group, and thus the distributions they can expect to receive with regard to their claims. Specifically, debtors that seek to establish a trust into which tort claims are channeled often satisfy applicable due process concerns by permitting the holders of such claims to pursue litigation against the trust. *See In re W.R. Grace & Co.*, 729 F.3d 311, 323 (3d Cir. 2013). This process complies with the requirements of due process so long as the trust does not run out of money, because creditors are entitled to the same recovery against the trust that they would have received from the company. *See id.* at 324.[22] By contrast, because the Debtors here will—by their own admission—be funding the Opioid Trust with far less than the total amount of Opioid Claims, the Opioid Trust will be required to have some mechanism for evaluating the claims asserted and paying reduced amounts to creditors. This is meant to be accomplished by the Opioid Trust Documents, which will govern "submission, resolution and distribution procedures in respect of all Opioid Claims (including Opioid Demands)." Plan § I.A.185.

37. The relevant Opioid Trust Documents, upon information and belief, will include: (i) an allocation of value ***among*** the various opioid claimant constituencies; and (ii) trust distribution protocols that will classify and allow claims ***within*** a given constituency based on a variety of factors to be compared among purportedly similarly situated claimants. As noted, the

[22] The requirement of Bankruptcy Code section 524(g)(2)(B)(i)(III) that a trust have control over the voting securities of the applicable reorganized debtors ensures in such a context that the trust will be no less feasible as an emerging entity than the reorganized debtors would have been. Without the information requested in this section, Opioid Claimants cannot judge for themselves whether the Opioid Trust will have the funds needed to pay even the limited amounts to which they will be entitled under the Opioid Trust Documents.

first aspect—inter-constituency allocation—is the subject of the still-ongoing Allocation Mediation. Without the context of this allocation among Opioid Claimant constituencies, the $1.6 billion headline number for the Opioid Trust is, at best, misleading. But more significantly, it is the trust distribution protocols that will govern each Opioid Claimant's actual entitlement to recover from the Opioid Trust. These documents—which will contain the actual information required by Bankruptcy Code section 1123(a)(3)—must be made available to Opioid Claimants ***before solicitation begins***, and not added to the materials in a plan supplement as an afterthought.[23]

38. This concern cuts across public and private constituency lines, because even a favorable allocation to a given constituency cannot in itself determine whether a member of that group receives a favorable recovery. Indeed, West Virginia has argued in a standalone objection to the Disclosure Statement that the Debtors' "fail[ure] to provide any information regarding allocation of the Opioid Trust Consideration to holders of allowed Opioid Claims" means it is unable to cast an informed vote on the Plan. *See Objection of the State of West Virginia to Disclosure Statement for Joint Chapter 11 Plan of Reorganization of Mallinckrodt Plc and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [ECF No. 2373] ¶ 12.

39. There can be no dispute that this information is essential to Opioid Claimants' deliberation on the fairness of their proposed treatment. The Plan cannot be confirmed with a blank line in place of treatment for hundreds of thousands of Opioid Claimants, nor does the fact that these documents remain subject to ongoing negotiation between and among Opioid Claimant

[23] This precise issue was recently raised by the court in the *Purdue* bankruptcy cases. *See Purdue*, Transcript of May 12, 2021 Hearing at 35:23–36:2 ("There's certain aspects of the plan supplements that I think need to be provided to people earlier that go to how their claim will actually be the process for dealing with their claim in a trust."). In *Purdue*, the debtors filed proposed trust distribution procedures for five separate classes of opioid claimants at least a month prior to the hearing on their disclosure statement. *See Notice of Filing of Plan Supplement Pursuant to the First Amended Joint Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors* [ECF No. 2732]; *id., Notice of Filing of Second Plan Supplement Pursuant to the First Amended Joint Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors*, *In re Purdue Pharma L.P.*, Case No. 19-23649 (Bankr. S.D.N.Y., ECF No. 2737].

constituencies somehow justify their omission from the Disclosure Statement the Debtors are so desperate to prosecute at this time. Regardless of whether such procedures ultimately are agreed to among the various groups of Opioid Claimants or proposed independently by the Debtors, any votes cast without this critical information would need to be resolicited. *See* Fed. R. Bankr. P. 3019(a).

40. Finally, the Plan and Disclosure Statement must contain sufficient information to enable Opioid Claimants to value the non-cash Opioid Trust Consideration, including warrants, insurance proceeds and causes of action, and to assess whether such consideration will be distributed equitably. As noted above, the OCC is in the process of investigating the value of this consideration and related issues, and hopes to conclude (or substantially conclude) this investigation before the voting deadline. Specifically, the Plan—and thus the proposed Opioid Trust Consideration to which Opioid Claimants will be entitled—turns on a settlement of all intercompany claims among the Debtors, but fails to provide any justification for this proposed resolution. The OCC has serious concerns regarding the incurrence of the Debtors' funded debt in connection with a series of acquisitions by Specialty Brands, which debt was guaranteed and secured by a number of Specialty Generics entities. Accordingly, the OCC is investigating what, if any, value flowed to Specialty Generics in these transactions, and assessing whether Specialty Generics is entitled to disproportionately large intercompany claims against its co-Debtors. The value of those claims would accrue to the benefit of the Specialty Generics Debtors (and their creditors, including Opioid Claimants).

41. Upon completion of its investigation, the OCC will inform Opioid Claimants of its views, including as to the appropriateness of the Opioid Trust Consideration, and whether the OCC intends to object to confirmation of the Plan on these or any other grounds. But without this

information—or at the very least, the Debtors' views of this value—Opioid Claimants will not be in a position to make an informed decision and, therefore, cannot be asked to vote on the Plan.

RESERVATION OF RIGHTS

42. The OCC reserves all rights with respect to the Disclosure Statement and the Plan, including but not limited to the right to (i) amend or supplement this DS Objection and/or the Statement & Reservation of Rights and any subsequent objection filed regarding the Debtors' solicitation procedures, (ii) submit additional briefing (including a sur-reply should the Debtors produce additional information or amend the Disclosure Statement or the Plan following the date hereof) and (iii) take discovery, examine witnesses and appear and be heard at any hearing in respect of the Disclosure Statement or the Plan.

CONCLUSION

43. For the foregoing reasons, and the reasons set forth in the Statement & Reservation of Rights and any subsequent objection filed regarding the Debtors' solicitation procedures, the OCC respectfully requests that the Court decline to approve the Disclosure Statement.

Dated: May 21, 2021
Wilmington, Delaware

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