In re Mallinckrodt Plc, et al., Case No. 20-12522 (JTD)

OCC Plan Position Letter

To all holders of claims against Mallinckrodt Plc and its affiliated debtors and debtors in possession (collectively, the "Debtors" or "Mallinckrodt") arising directly or indirectly from: (i) exposure to the Debtors' opioid products; or (ii) the Debtors' role in perpetuating the opioid crisis (collectively, "Opioid Claimants" and such underlying claims, "Opioid Claims"):

We write this letter as lead counsel to, and on behalf of, the Official Committee of Opioid Related Claimants (the "OCC") appointed in Mallinckrodt's bankruptcy cases (the "Chapter 11 Cases") to express the OCC's views on the Debtors' *Joint Plan of Reorganization of Mallinckrodt PLC and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [ECF No. 2916] (as amended, the "Plan").[1]

The OCC consists of the following ***unpaid*** and ***volunteer*** members:

1. the husband of a personal injury victim who suffered from opioid use disorder and died from cardiorespiratory arrest as a result of taking opioid medications;
2. a third party payor and trade association for 35 independent health insurance companies collectively insuring 110 million members;
3. the mother of a child diagnosed upon birth with Neonatal Abstinence Syndrome ("NAS") due to fetal opioid exposure and a plaintiff in an action against Mallinckrodt seeking to establish a medical monitoring program for children born addicted to opioids and secure compensation for those children;
4. a personal injury victim who suffered from opioid use disorder;
5. a health system with 89 hospital campuses spread throughout 30 States in rural, suburban and urban communities;
6. an emergency room physician who has provided emergency opioid treatment services; and
7. the mother of a child who died from an opioid overdose and other children in recovery from opioid use disorder, as well as the grandmother and guardian of a child diagnosed upon birth with NAS due to fetal opioid exposure.

As set forth herein, the OCC does not object to the results that were reached at the conclusion of inter-Opioid Claimant allocation mediation (the "Mediation"), but has not yet completed its investigation regarding the sufficiency of the aggregate value being provided to Opioid Claimants under the Plan. Therefore, the OCC is not yet in a position to recommend that Opioid Claimants vote to either accept or reject the Plan. The OCC is continuing to do its work, and at the appropriate time, will file a supplemental letter or objection on the Court's docket setting forth its final position in respect of the Plan.

In addition, although the Plan sets forth the aggregate allocations being made available to various categories of Opioid Claimants, there is no information publicly available that explains the procedures by which such value will be allocated among individual claimants within each category. These procedures—called trust distribution procedures (or "TDPs")—will be made available in or around mid-July.[2]

The deadline to vote on the Plan (the "Voting Deadline") is September 3, 2021.

In view of the foregoing, the OCC encourages Opioid Claimants ***not to vote on the Plan until such time as (i) the OCC discloses its final position and (ii) the TDPs are made public***, at which point claimants will be able to make a more informed decision on the Plan.

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[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan.

[2] The TDPs will be filed by the earlier of (i) 30 days after entry of an order approving the Debtors' Disclosure Statement or (ii) July 21, 2021.

The OCC urges Opioid Claimants to review the Plan and Disclosure Statement currently on file, but not to make a decision regarding how to vote on the Plan until these two critical pieces of information are available. Given the Voting Deadline of September 3, Opioid Claimants have ample time to wait for both of these pieces of critical additional information prior to casting their votes.

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By way of introduction, each member of the OCC was duly appointed in Mallinckrodt's Chapter 11 Cases by the Office of the United States Trustee (the "U.S. Trustee")[3] in recognition of the crucial role that Mallinckrodt's opioid liability has played in its determination to seek bankruptcy protection, and thus the need for the OCC to serve as an independent fiduciary for and representative of the interests of all Opioid Claimants.[4] As discussed in this letter, Opioid Claimants are a diverse group of at least 11 distinct constituencies, including governmental and other public entities as well as private institutions and individuals.[5] Although the original members of the OCC are all private individuals and corporations, the OCC has demonstrated its commitment to upholding its fiduciary duties to ***all*** Opioid Claimants since the beginning of these cases, including its duties to governmental creditors (which, based on the U.S. Trustee's interpretation of Bankruptcy Code section 1102 and longstanding practice, are not permitted to be appointed to official creditor committees). Indeed, shortly after the OCC's formation, both Thornton Township High School District 205, a public school district in Illinois (on behalf of a putative class of independent public school districts), and certain Native American Tribes requested to join the OCC in an *ex officio* (non-voting) capacity. The OCC granted both requests. Ultimately, while Thornton Township High School District 205 joined the OCC and remains an *ex officio* member, the Native American Tribes determined not to join the OCC.

In connection with its fiduciary obligations to all Opioid Claimants, the OCC is charged with ensuring that all Opioid Claimants are treated fairly, both substantively (in terms of recovery) and procedurally (in terms of opportunity to participate meaningfully in the cases). Accordingly, this letter will provide a brief overview of (i) the background of the Chapter 11 Cases, including Mallinckrodt's role in the opioid crisis and its pre-bankruptcy agreement with certain of its creditors; (ii) the OCC's approach to the Chapter 11 Cases; (iii) the OCC's role in Mediation to determine an appropriate allocation among various public and private Opioid Claimant groups of assets to be transferred to a master distribution trust (the "Opioid MDT II" and such assets, the "Opioid MDT II Assets")—and then, in turn, to various creditor trusts for specified abatement purposes and distribution to personal injury claimants ("PI Opioid Claimants")—under the Plan; (iv) the OCC's extensive investigation into estate claims in an effort to maximize value for Opioid Claimants; and (v) the OCC's current view of the Plan.

For the reasons explained in this letter, the OCC is not in a position at this time to determine whether the OCC supports the Plan; and, therefore, the OCC is unable to provide guidance to Opioid Claimants as to whether they should vote in favor or against the Plan. Moreover, because the TDPs have not been filed publicly, the OCC believes that Opioid Claimants should not yet make a decision regarding whether to support the Plan.

Once the OCC is able to complete its investigation and further assess the allocation of value between Opioid Claimants and the Debtors' other creditors, the OCC intends to supplement this letter with a submission

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[3] The U.S. Trustee is an arm of the United States Department of Justice tasked with determining whether to appoint a fiduciary committee (or multiple committees) of unsecured creditors in chapter 11 cases to represent the interests of unsecured creditors in the cases.

[4] In Mallinckrodt's Chapter 11 Cases, the U.S. Trustee determined to appoint both the OCC, which represents the interests of all Opioid Claimants, and a general unsecured creditors' committee (the "UCC"), which represents the interests of all other general unsecured creditors. To avoid confusion or overlap, the OCC and the UCC determined to split the unsecured creditor constituency such that the OCC would owe fiduciary obligations solely to Opioid Claimants and the UCC would not owe fiduciary obligations to Opioid Claimants, but solely to all other unsecured creditors.

[5] These distinct groups include: (i) the Federal Government; (ii) the 50 States 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 at birth with NAS); (vi) a putative class representing the interests of children diagnosed 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.

to the Bankruptcy Court indicating its final position in respect of the Plan. In addition, Opioid Claimants will be able to access to the TDPs by the earlier of (i) 30 days after entry of an order approving the Debtors' Disclosure Statement or (ii) July 21, such that they will be in a position to make an informed decision about the recoveries that they may receive from the applicable trust.

The Voting Deadline is **September 3, 2021** and, as such, Opioid Claimants have ample time before needing to cast their votes.

I. OVERVIEW AND BACKGROUND OF THE CHAPTER 11 CASES

Mallinckrodt's bankruptcy has occurred against the backdrop of the opioid crisis, which is the single worst man-made epidemic—and other than the COVID-19 pandemic, the defining public health crisis—of this generation. It has resulted in half a million deaths and ruined countless other lives, in addition to thousands of children suffering from fetal opioid exposure. Indeed, a few sentences cannot do justice to the horrors of the opioid crisis and the human toll wrought by the conduct of opioid manufacturers, distributors and retail pharmacies that participated in the opioid crisis, including, the OCC believes, the Debtors' products and actions. Therefore, the OCC will not attempt to explain in this letter the widespread harm and devastation to individuals and families alike with which many readers of this letter are all too familiar. Suffice it to say that this tragic backdrop, coupled with the many complex legal issues to which it has given rise, has made these Chapter 11 Cases among the most complex, difficult, important, emotional and painful imaginable.

A. *The Opioid Crisis Resulted in Extensive Litigation Against Opioid Manufacturers and Pushed Mallinckrodt and Others into Bankruptcy*

In addition to the tragic human toll, the opioid crisis has resulted in extensive litigation. More than a dozen opioid manufacturers, distributors and retail pharmacies have been named as defendants in thousands of lawsuits brought by numerous and varied plaintiff groups. These lawsuits seek to hold defendants responsible for creating or perpetuating the opioid crisis. In 2017, much of this litigation was centralized in the United States District Court for the Northern District of Ohio, in a single multi-district litigation entitled *In re National Prescription Opiate Litigation*, Case No. 17-2804 (the "MDL").

The lawsuits against, among others, Mallinckrodt have been brought by a wide variety of plaintiff groups, including the following:

1. the United States Department of Justice (the "DOJ");
2. the States (through their attorneys general);
3. political subdivisions of the States (including cities and counties);
4. Native American Tribes;
5. a putative class of independent public school districts ("Public Schools");
6. personal injury victims;
7. mothers/guardians of children diagnosed with NAS upon birth;
8. hospitals;
9. third party payors (including health insurance providers and benefits plans);
10. a putative class of guardians for children born with NAS (the "NAS Monitoring Class") seeking establishment of a medical monitoring program to monitor the effect of *in utero* exposure to opioids;
11. a putative class of purchasers of private health insurance (the "Ratepayers") who allege that they were forced to pay increased premiums to account for the impact of the opioid crisis; and
12. a putative class of independent emergency room physicians.

Collectively, the damages claimed by these plaintiff groups against various opioid manufacturers, distributors and retail pharmacies amount to ***trillions*** of dollars. Litigating these cases has been hugely expensive for many of the

defendants, and they would not have the means to pay judgments in full if entered against them in the amounts asserted. The media has reported that some of these defendants are in the process of negotiating settlements. Other defendants continue to litigate. And still others—Insys Therapeutics, Inc. ("Insys"), Purdue Pharma L.P. ("Purdue") and Mallinckrodt—have filed for bankruptcy protection.

B. *Mallinckrodt's Specific Role in the Opioid Crisis*

Although Mallinckrodt's conduct has not garnered the attention or media coverage received by Purdue and its shareholders—the Sackler family—the OCC believes Mallinckrodt also has played a substantial role in perpetuating the opioid crisis, and at various points in time manufactured more opioids than its more notorious counterpart. Indeed, by some estimates, ***Mallinckrodt produced 30% of the opioids manufactured in the United States between 2006 and 2012—as compared to roughly 10% by Purdue***.[6] In addition, Mallinckrodt promoted branded opioid products until at least 2015 and continues to sell branded opioids.[7] Subject to its ongoing investigation, the OCC contends that in connection with its sale of branded products, Mallinckrodt engaged in many of the same problematic marketing tactics as Purdue in an effort to increase sales of their opioid products, including promoting false and dangerous narratives about opioid safety, diminishing the risk of abuse and encouraging sales representatives to engage in aggressive sale tactics.

Unlike Purdue, however, Mallinckrodt is a "full-service" pharmaceutical company that has operated—and continues to operate—two distinct businesses: Specialty Brands and Specialty Generics.[8] Specialty Brands develops, manufactures and sells branded products geared towards managing autoimmune and rare diseases in specialty areas such as neurology, rheumatology, nephrology, pulmonology and ophthalmology, as well as immunotherapy and neonatal respiratory critical care therapies and non-opioid analgesics. Specialty Generics manufactures and sells opioid products such as hydrocodone and oxycodone, as well as the active pharmaceutical ingredients for products like these.[9] Given their role in the ongoing opioid crisis, certain of these Specialty Generics entities were named as defendants in the multitude of opioid-related lawsuits filed in State and federal court in recent years. This staggering liability, among other factors, ultimately caused Mallinckrodt to file for bankruptcy protection.

Importantly, and notwithstanding Mallinckrodt's role in perpetuating the opioid crisis, Mallinckrodt's Chapter 11 Cases are distinguishable in certain important ways from the bankruptcy cases commenced by prior opioid manufacturers, including Insys and Purdue. *First*, Mallinckrodt's Specialty Brands business accounted for a far more significant percentage of the Debtors' revenue than the Specialty Generics business in the years leading up to the Chapter 11 Cases—meaning that today a predominant amount of Mallinckrodt's revenue is generated by its non-opioid businesses.[10] *Second*, unlike Insys and Purdue, Mallinckrodt had approximately $5.29 billion in funded debt obligations as of the Petition Date, $3.63 billion of which was secured by collateral (and thus may be entitled to recovery ***ahead of*** substantially all of the Debtors' unsecured creditors—including Opioid Claimants—pursuant to applicable bankruptcy law). *Finally*, much of this funded debt was incurred by Mallinckrodt in connection with growing the Specialty Brands business following Mallinckrodt's spin off from Covidien plc in

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[6] *See, e.g.*, Jared S. Hopkins & Joseph Walker, WALL STREET JOURNAL, *New Details Emerge over Mallinckrodt's Role in Opioid Crisis* (Aug. 25, 2019) (analyzing ARCOS Retail Drug Summary Reports published by the United States Department of Justice, Drug Enforcement Administration, Diversion Control Division, *available at* deadiversion.usdoj.gov/arcos/retail_drug_summary).

[7] The Debtors' website currently lists RoxicodoneTM as a non-promoted branded opioid. *See* https://www.mallinckrodt.com/products/generics/non-promoted-brands/opioid-products/.

[8] The Specialty Generics Debtors include Mallinckrodt Equinox Finance Inc., Mallinckrodt Enterprises Holdings, Inc., Mallinckrodt ARD Finance LLC, Mallinckrodt Enterprises LLC, Mallinckrodt LLC, SpecGx LLC, SpecGx Holdings LLC, Mallinckrodt APAP LLC and WebsterGx Holdco LLC.

[9] The Debtors also sell Methadose, a product known generically as methadone, which has been the subject of litigation in Canada.

[10] For example, in 2019, Specialty Brands generated $2.4 billion in net sales, while Specialty Generics generated $738.7 million, with hydrocodone and oxycodone products accounting for approximately 20% of Specialty Generics' total sales.

2013. Specifically, Mallinckrodt engaged in a series of acquisitions of pharmaceutical brands wholly unrelated to opioids or other Specialty Generics products and, in connection with these transactions, incurred significant funded debt obligations. 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. As discussed in further detail below, the OCC is in the process of evaluating these transactions to determine, among other things, what value (if any) such Specialty Generics entities received in return for providing these guarantees.

C. *Mallinckrodt's Prepetition Agreement with Certain Opioid Claimants*

Prior to commencing the Chapter 11 Cases, the Debtors negotiated and agreed to a restructuring support agreement (the "RSA") with certain of their creditors regarding the terms of a proposed restructuring of the Debtors' businesses and liabilities. The Opioid Claimants that agreed to the RSA include the attorneys general for 45 States and 5 territories and the Governmental Plaintiff Ad Hoc Committee (the "Governmental Plaintiffs Committee").[11] The RSA was also agreed to by a substantial number of the Debtors' non-opioid unsecured creditors, consisting of 84% of the holders of the Debtors' guaranteed unsecured note obligations. After the Debtors filed for chapter 11 protection, certain political subdivisions and other entities represented by the Multi-State Governmental Entities Group[12] (collectively, the "RSA Public Opioid Claimants") joined the RSA as well, as did certain of the Debtors' secured creditors.[13] None of the "Private Opioid Claimants," which include holders of hospital claims, third-party payor claims, ratepayer claims, emergency room physician claims, NAS monitoring claims and personal injury claims, have signed or currently support the RSA. In addition, the UCC does not support the RSA.

As discussed in further detail herein, the RSA—the terms of which form the basis of the Debtors' proposed Plan—contemplates a restructuring of the Debtors' businesses that: (i) reinstates the Debtors' secured debt facilities; (ii) leaves the equity in the reorganized business to the Debtors' guaranteed unsecured noteholders; and (iii) ***most importantly for Opioid Claimants***, establishes a trust (referred to in the Plan and the Disclosure Statement as the Opioid MDT II) to be funded with $1.6 billion in cash (paid over seven years) and certain non-cash assets, including warrants, insurance rights and certain estate causes of action, that will serve as the ***sole*** recovery to all Opioid Claimants. In exchange for such treatment, the RSA contemplates that Opioid Claims will be "channeled" to the Opioid MDT II and then to various specific creditor trusts, which—in turn—will make distributions to Opioid Claimants based on Court-approved TDPs, which, as noted above, have not yet been filed publicly. This process will enable Mallinckrodt to emerge from bankruptcy free from the sweeping opioid and non-opioid liability that crippled the company prior to the commencement of the Chapter 11 Cases, as well as certain liability that could arise in the future.

Since its formation, the OCC and its advisors have been engaged in an extensive investigation of the RSA and the value contemplated to be transferred to the MDT II to determine whether such value is sufficient to compensate Opioid Claimants for the harm caused by Mallinckrodt's opioid business and products. This investigation remains ongoing and, therefore, the OCC is not presently in a position to recommend that Opioid Claimants either support or reject the Plan.

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[11] 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].

[12] The Multi-State Governmental Entities Group (the "MSGE 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.

[13] Notably, the RSA Public Claimants do not represent the interests of all public-side Opioid Claimants (collectively, the "Public Opioid Claimants"), which include States, political subdivisions, Native American Tribes and independent public school districts throughout the nation and other public entities that have not agreed to the terms of the RSA.

II. THE OCC'S GENERAL APPROACH TO THE CHAPTER 11 CASES

From the outset, the OCC has made clear that it believes there are two fundamental pillars to a successful outcome in these cases.[14]

1. ***Determining a Fair Allocation***: Negotiating or otherwise determining a fair and appropriate allocation between and among all Private Opioid Claimants and Public Opioid Claimants.

2. ***Maximizing Value***: Determining whether the total value proposed to be allocated to Opioid Claimants (in the aggregate) under the Plan is fair and appropriate relative to the strengths of their respective claims and the other facts of these cases, primarily by investigating the terms of the RSA and proposed Plan.

These goals—each of which is addressed in further detail below—must be viewed through a unique lens that did not apply in prior bankruptcy cases filed by opioid manufacturers. Specifically, early in the Chapter 11 Cases, the Debtors determined not to seek a bar date for Opioid Claimants (*i.e.*, a date by which claimants must file a proof of claim indicating that they believe they are entitled to value from the Debtors) and, instead, sought the appointment of a future claimants representative (the "FCR") to represent the interests of ***future*** personal injury claimants (*i.e.*, holders of personal injury claims that may arise in the future, as a result of actions taken by the Debtors in the past, and are not otherwise represented in the Chapter 11 Cases).[15] In connection with this decision, the Debtors also determined at the beginning of the Chapter 11 Cases not to pursue a broad noticing program akin to those conducted in the chapter 11 cases of Purdue and Insys to solicit Opioid Claimants to file proofs of claim.

The OCC believed—and continues to believe—that these decisions by the Debtors give rise to unusual due process concerns and may result in decreased participation in the cases by Opioid Claimants other than those that have already agreed to the RSA. Indeed, these concerns were particularly acute given the successful utilization in the bankruptcy cases of Purdue and Insys of the standard (and in the case of Purdue, virtually unprecedented in scope) bar date and noticing process. As such, the OCC has worked—and will continue to work—with the Debtors to ensure that all Opioid Claimants, not just those already involved in the Chapter 11 Cases, are apprised of key issues and have the opportunity to participate.[16]

Specifically, and as you may soon see, the Debtors will be conducting a broad community and media outreach program—which will include television commercials, internet and other social media advertisements and other forms of publication notice to community organizations that serve to support individuals harmed by the opioid crisis—as part of their efforts to solicit Opioid Claimants' votes on the Plan. These advertisements and notices will direct claimants to websites where they can obtain ballots to cast their votes and additional information regarding the Plan and will also provide contact information for the advisors to the OCC to the extent Opioid Claimants would like to reach out with any questions or concerns. The outreach will also make clear that the Debtors will not require

[14] The OCC is also very concerned with issues of public health and safety, as well as transparency in these cases. To a significant extent, however, the Public Claimants have controlled these issues, and have permitted very little input from the OCC. Nonetheless, the OCC is satisfied with the terms of Mallinckrodt's voluntary business injunction and the appointment of a monitor to enforce such injunction. The OCC is still reviewing the terms of the post-Effective Date document repository outlined in the current draft of the Plan, and has provided comments and suggestions to the Debtors and the Public Claimants. These comments have not yet been accepted.

[15] *See Motion of Debtors for Entry of an Order Appointing Roger Frankel, as Legal Representative for Future Claimants, Effective as of the Petition Date* [ECF No. 189].

[16] In view of these concerns, the OCC filed *The Official Committee of Opioid Claimants' (I) Request for Adjournment of or, in the Alternative, Objection to Motion of Debtors to Appoint Future Claimants Representative and (II) Cross-Motion to Compel Debtors to Establish Bar Date and Noticing Program for Opioid Claimants* [ECF No. 658], but adjourned such cross-motion and agreed to the provisional appointment of the FCR in an effort to reach consensus regarding the underlying issues through the Mediation process, thereby obviating the need to prosecute the OCC's objection and request for the establishment of a bar date for Opioid Claimants. Thereafter, following a mediated resolution of many of the allocation issues among Opioid Claimants, the OCC agreed to the permanent appointment of the FCR and to the withdrawal of its cross-motion seeking the establishment of a bar date.

Opioid Claimants to file proofs of claim or any other forms evincing their injuries, but that such process will occur in the future through the various creditor trusts. The OCC and the Debtors have worked together to formulate this noticing process, and the OCC will continue to monitor the results between now and the Voting Deadline and work with the Debtors to recalibrate the program, if necessary.

III. DETERMINING A FAIR ALLOCATION AMONG OPIOID CLAIMANTS

Despite the fact that no bar date has been established for Opioid Claimants to file proofs of claim, the OCC and the various organized Opioid Claimant groups in these cases do have a general understanding of the size and scope of the various Opioid Claimant constituencies. These organized Opioid Claimant groups also have views regarding the relative strength of their claims as compared to the strength of the claims of other Opioid Claimant constituencies. Therefore, in order to avoid costly, time consuming and value destructive litigation among constituencies, the OCC and its advisors worked with the Debtors and these numerous Opioid Claimant groups to organize a mediation process to promote agreement between and among the Public and Private Opioid Claimants in respect of the allocation of the Opioid MDT II Assets (whether that be the current value comprising $1.6 billion in cash and certain non-cash consideration contemplated by the RSA and the Debtors' proposed Plan or some other amount ultimately agreed to by the parties or ordered by the Bankruptcy Court). The OCC understood that without such an agreed allocation, creditors would compete against one another for value in costly and time-consuming litigation of all against all, which, in turn, could significantly delay creditor recoveries to compensate victims and abate the opioid crisis.

Working with various Opioid Claimant groups in the Chapter 11 Cases, the OCC and the Debtors were able to build consensus that a mediation process should be commenced to address value allocation among Opioid Claimants. Following discussions regarding the appropriate scope of the mediation, the identity of the mediator and the participants in such mediation, the parties agreed that Kenneth Feinberg would be appointed as mediator (the "Mediator")[17] to preside over the Mediation regarding allocation of the Opioid MDT II Assets. The parties then turned to negotiating and drafting a form of order to govern the process. As reflected in the *Order (a) Appointing a Mediator and (b) Granting Related Relief* [ECF No. 1381] (the "Mediation Order"), the parties agreed that the purpose of the Mediation was solely to determine the relative allocation of the value of the Opioid MDT II between and among the various groups of Public and Private Opioid Claimants. The Mediation Order also identified the various parties to the Mediation (collectively, the "Mediation Parties").[18] The OCC, the Ad Hoc Group of Personal Injury Claimants and the NAS Committee also agreed to the provisional appointment of the FCR, solely for the purpose of participating in the Mediation on behalf of future opioid claimants to ensure that the rights of such creditors, if any, were protected.

The OCC's objective for the Mediation was to work with the various other Mediation Parties to help to facilitate an outcome that was (i) fair and appropriate and (ii) the product of a fair and reasoned process. Accordingly, the OCC attended numerous mediation sessions and engaged in discussions with various Mediation Parties regarding an appropriate allocation.

Ultimately, after more than four months of negotiations, virtually all (but not all) of the Mediation Parties were able to reach consensus regarding an allocation of the Opioid MDT II Assets. Specifically, as set forth in the

[17] Mr. Feinberg is a world-renowned mediator, with whom almost all of the advisors to the Mediation Parties have had prior experience with in other complex mass tort cases, including most recently the chapter 11 cases of *Purdue Pharma* et al.

[18] The Mediation involved representatives of the Debtors and nearly all significant Opioid Claimant constituencies, including: (i) the OCC; (ii) the NAS Committee; (iii) the Ad Hoc Group of Personal Injury Claimants; (iii) the Governmental Plaintiffs Committee; (iv) the MSGE Group; (v) counsel to Life Point Health System and counsel to various hospitals, including a putative class of hospital claimants; (vi) counsel to a putative class of emergency room physicians; (vii) counsel to Blue Cross and Blue Shield Association, various third party payors and health insurance carrier plaintiffs; (viii) counsel to Thornton Township High School District 205 and certain other public school districts as representatives of a putative class of school district class claimants; (ix) counsel to the putative classes of purchases of private health insurance represented by Stevens & Lee, P.C.; and (x) the Federal Healthcare Agency Opioid Claimants (as defined in the Mediation Order).

Plan, the Mediation Parties agreed to a split of the Opioid MDT II Assets of approximately 80% to the Public Opioid Claimants and approximately 20% to the Private Opioid Claimants, which funds will be further distributed from the Opioid MDT II to various abatement trusts as well as a separate trust established for the benefit of PI Opioid Claimants (the "PI Trust"), with separate trusts for both NAS and non-NAS PI Opioid Claimants. Importantly, all of the value that Opioid Claimants will be receiving under the Plan—other than any value to be received by Personal Injury Claimants—will be utilized for abatement of the opioid epidemic. This bedrock principle of both the Purdue and Mallinckrodt bankruptcy cases is important and socially valuable, and the OCC is pleased by this outcome. These allocation agreements are reflected in the Plan and described in further detail therein. The Mediation did not result in full consensus, however, and certain parties—including the DOJ (asserting various healthcare agency claims)—have not reached agreement with the other Mediation Parties on the allocation (if any) they will receive under the Plan. The OCC is disappointed that there is not complete resolution, and hopes that there will be further negotiation regarding such claims that will result in consensus.[19]

To be clear, it would be incorrect to say that the OCC believes that the outcome of the Mediation is the same result that would have been achieved through litigation or through other dispute resolution forums. That being said, the allocation outcomes achieved through the Mediation generally mirror the outcomes reached in a similar mediation conducted recently in the Purdue chapter 11 cases, and were (for the most part) negotiated by the same representatives of the various Opioid Claimant constituencies. Although the facts and circumstances of Mallinckrodt's Chapter 11 Cases are different than those of Purdue's cases—and such differences perhaps should have led to different allocation results—these differences are relatively small when considered in the context of the overall landscape of these various cases. Moreover, the total quantum of value being offered to Opioid Claimants in Mallinckrodt's Chapter 11 Cases is significantly smaller than the value being offered to similarly situated claimants in the Purdue bankruptcy cases. As such, the OCC does not object to the results of the Mediation, particularly in light of the numerous complex issues that exist among various Opioid Claimant groups and the costly and time consuming litigation that inevitably would result between and among such groups absent consensual resolution of these allocation issues. Nor does the OCC believe, given the circumstances of these Chapter 11 Cases, that any limited modifications that ***might*** result from disputing the outcome of the Mediation would justify the time, effort and resources that would be involved in doing so.

IV. THE OCC'S ONGOING INVESTIGATION[20]

As noted above, the RSA (and thus the current proposed Plan) proposes to settle all Opioid Claims by channeling such claims into the Opioid MDT II (and from there to various specified creditor trusts) and limiting recoveries in respect of such claims to the Opioid MDT II Assets, comprising $1.6 billion in cash (paid over seven years) and certain other non-cash assets. The non-cash Opioid MDT II Assets include (i) warrants to acquire shares in the reorganized Debtors, (ii) certain insurance rights and (iii) fraudulent transfer and other estate causes of action arising out of Opioid Claims, including in connection with the 2013 spinoff by Covidien—which is now owned by Medtronic plc (together with its affiliates, "Medtronic")—of opioid and other businesses to Mallinckrodt in exchange for shares in Mallinckrodt (the "Covidien Spinoff") and other prepetition transactions. Under the Plan, the Opioid MDT II would serve as the sole source of recourse for Opioid Claimants on account of Opioid Claims.

As the fiduciary for all Opioid Claimants, and in an effort to maximize value for such claimants, the OCC is charged with, among other things, evaluating: (i) the Debtors' proposed RSA and Plan, including the proposed settlement of Opioid Claims by channeling such claims to the Opioid MDT II; (ii) the manner in which the RSA

[19] The OCC believes that if no agreement is reached, the DOJ may attempt to assert its alleged rights against the MDT II and the various specific Opioid Claimant trusts, thereby delaying or reducing distributions that would otherwise be made to Opioid Claimants.

[20] This section contains references to various Bankruptcy Court orders and filings submitted by the OCC and other parties in interest. For the sake of brevity, this letter does not include citations to every such filing. To the extent any claimant would like to review any of the cited materials, such claimant may find them on the public docket (*available at* https://restructuring.primeclerk.com/mallinckrodt/Home-DocketInfo) or should feel free to reach out to counsel to the OCC to obtain copies of such documents.

and Plan allocate the Debtors' value among various unsecured creditors, including the Opioid Claimants; and (iii) weighing the value of claims the RSA and Plan propose to release in exchange for the transfer of value to the Opioid MDT II. As such, the OCC has been engaged in an extensive investigation into these matters, including by conducting robust discovery of the Debtors and other parties in interest in possession of information essential to the OCC's investigation. The OCC's discovery efforts and analysis are summarized in this section.

In considering the fairness and propriety of the allocation of value proposed under the RSA and Plan (as between Opioid Claimants and all other creditors), the OCC is evaluating a number of important factors, including, but not limited to, the following: (i) the total enterprise value of the Debtors (including considering the size of the "pie" available for distribution to various categories of creditors); (ii) whether the secured debt obligations of certain Mallinckrodt entities can be avoided, which would free value for distribution to such entities' unsecured creditors, including Opioid Claimants;[21] (iii) whether Mallinckrodt entities in addition to those that currently are defendants in pending opioid litigations may have direct liability to Opioid Claimants, which would potentially make the assets of those additional Mallinckrodt entities available to satisfy Opioid Claims; (iv) the value of so-called "intercompany" claims held by Mallinckrodt entities that have direct liability to Opioid Claimants that could be brought against other Mallinckrodt entities that arguably do not have direct liability to Opioid Claimants; (v) the merits of claims asserted by other unsecured creditors against Mallinckrodt entities; (vi) the total value of Opioid Claims (which value, arguably, is astronomical); (vii) whether value can be brought back into Mallinckrodt from various third parties through litigation; (viii) whether the entire Mallinckrodt enterprise should be "substantively consolidated," thereby making all of the Debtors' value (rather than just the value of the opioid entities) available for Opioid Claimants; and (ix) the value of potential insurance proceeds. Simultaneously, the OCC is analyzing whether the Debtors' guaranteed unsecured noteholders—which have asserted claims throughout Mallinckrodt's corporate structure, including but not limited to non-opioid entities—are receiving recoveries that violate applicable bankruptcy law. Only once these investigations and analyses have been completed will the OCC be able to provide guidance as to whether the OCC recommends that Opioid Claimants vote to support or reject the Plan. If the OCC recommends rejection, it likely will file formal objections and prosecute such objections at the hearing to consider confirmation of the Plan, currently scheduled for mid-September 2021.

A. *OCC Discovery Served on the Debtors*

Beginning in December 2020, the OCC served discovery requests on the Debtors and began engaging in multiple weekly phone calls and formal and informal correspondence regarding discovery-related issues to ensure that the Debtors produce documents necessary for the OCC's investigation.[22] During the first two months of this process, the OCC believes that the Debtors refused to provide much of the discovery required for the OCC to conduct an adequate investigation. Accordingly, on February 24, 2021, the OCC filed a motion with the Bankruptcy Court under Rule 2004 of the Federal Rules of Bankruptcy Procedure ("Rule 2004" and such motion, the "Rule 2004 Motion"), seeking authority to serve formal discovery upon the Debtors. Thereafter, the Debtors and the OCC agreed to settle the Rule 2004 Motion by entering into a so-ordered stipulation establishing certain disclosure requirements and deadlines. The Court entered the discovery stipulation on May 6, 2021.

[21] As part of its efforts to evaluate the RSA, the OCC investigated the merits and value of potential causes of action arising from these secured debt obligations. Based on its investigation, the OCC prepared (i) a proposed complaint asserting claims, on behalf of certain Mallinckrodt opioid entities, to avoid these secured debt obligations as constructive fraudulent transfers and (ii) a draft motion seeking derivative standing to prosecute these claims on behalf of the relevant opioid entities. In an effort to resolve these claims without costly and disruptive litigation, the OCC shared the draft proposed complaint on a confidential basis with all relevant parties, including the Debtors, the administrative/collateral agents for the secured lenders, the secured lenders themselves and other parties in interest. Though the OCC has not yet filed the draft motion and proposed complaint, it remains ready to commence this litigation and pursue vigorously its right to derivative standing and, ultimately, the merits of the claims in the proposed complaint.

[22] On December 19, 2020, the OCC provided the Debtors with informal document requests addressing these and other issues. Thereafter, on December 24, 2020, February 25, 2021 and April 1, 2021, the OCC provided the Debtors with lists of certain documents that are more easily gathered through targeted searches for specific documents or categories of documents where such searching is likely to be more productive than broad searches of electronically stored information.

To date, and pursuant to the terms of the stipulation, the Debtors have produced 535,213 documents to the OCC, over half of which the OCC believes were produced in prepetition litigation and thus did not require the Debtors to conduct additional review. Discovery efforts, including potential depositions, to obtain the materials and information the OCC requires to conduct a robust investigation into the proposed terms of the Plan remain ongoing.

B. *OCC Discovery Served on the Specialty Generics Independent Directors*

In addition to seeking discovery from the Debtors, the OCC has sought information from the purported disinterested managers of the Specialty Generics Debtors, which comprise the segment of the Debtors' business that manufactures and distributes the Debtors' opioid products. More than a year before seeking bankruptcy protection, Mallinckrodt appointed two individuals, Marc Beilinson and Sherman Edmiston III (together, the "Designated Managers") to the board of managers or directors, as applicable, of the Specialty Generics entities. Because the Designated Managers were appointed solely to the boards of the Specialty Generics entities—which include all of the entities engaged in the Debtors' opioid business—the Designated Managers owe fiduciary duties solely to the Specialty Generics entities and their stakeholders. In February 2020, the Designated Managers also were tasked with pursuing a potential intercompany settlement between Specialty Generics and other affiliates (the "Intercompany Settlement"), which, upon information and belief, was neither completed nor consummated, but which the OCC believes could have been a source of material value to the creditors of the Specialty Generics Debtors (and thus their creditors, including Opioid Claimants).

On February 3, 2021, the OCC sent an initial set of informal diligence requests to the Designated Managers seeking information related to the Intercompany Settlement and any other work that the Designated Managers may have conducted to consider historical transactions affecting the value of the Specialty Generics Debtors. These informal requests were formally served on May 12, 2021. In addition, the OCC has sought information concerning what work, if any, the Specialty Generics Debtors and the Designated Managers may have done to evaluate the RSA, as such an analysis should have included a valuation of Opioid Claims and the consideration proposed to settle those claims.

To date, the Specialty Generics Debtors have produced 1,277 documents to the OCC. The OCC also conducted a deposition of a representative of the Specialty Generics Debtors on May 21, 2021.

C. *OCC Discovery Served on Covidien*

On January 21, 2021, the Debtors informed the OCC that they were not in possession of certain key documents concerning the Covidien Spinoff, or certain documents concerning the opioid businesses prior to the Covidien Spinoff. Instead, the Debtors explained that those documents had remained with Covidien, and thus are now in the possession of Medtronic (which acquired Covidien in 2015).[23] Such materials include documents critical to the OCC's ability to investigate the facts surrounding the Covidien Spinoff and the value offered to the Opioid Claimants under the RSA and proposed Plan.

Upon learning this information, the OCC promptly contacted counsel for Medtronic on January 22, 2021 and provided a copy of the discovery requests initially served on the Debtors. Since that time, the OCC has met and conferred with counsel for Medtronic multiple times and exchanged discovery correspondence. Medtronic has agreed to review approximately 50,000 emails (not including attachments) and certain ad hoc documents for production and to produce board materials to the OCC. On June 2, 2021, the Court entered the *Order Approving*

[23] Specifically, following the Covidien Spinoff, certain documents, information and email accounts were transferred to Mallinckrodt and are now in the possession of the Debtors. Certain other documents, information, and email accounts (including all board materials), however, remained with Covidien and are now in the possession of Medtronic.

Stipulation Regarding Discovery Between the Official Committee of Opioid Related Claimants and Medtronic [ECF No. 2653], which memorializes the discovery agreements between Medtronic and the OCC.

Medtronic, however, disclaimed any responsibility to seek documents from advisors to Covidien in connection with the Covidien Spinoff (the "Spinoff Advisors").[24] The OCC believes that the Spinoff Advisors are likely to possess documents of critical relevance to the OCC's evaluation of potential claims related to the Covidien Spinoff, including documents concerning valuation, strategic alternatives, roadshow materials, assessment of opioid risks and liabilities and other documents that the Debtors and Medtronic have indicated they do not possess and cannot provide. Accordingly, the OCC moved the Bankruptcy Court for authority to serve subpoenas under Rule 2004 in connection with the foregoing. On May 12, 2021, the Court granted the OCC's Rule 2004 motion against the Spinoff Advisors. Efforts to obtain discovery materials from the Spinoff Advisors remain ongoing.

D. *Analysis of Potential Estate Causes of Action*

In addition to an in-depth factual analysis of all of the discovery materials that have been and will continue to be produced by the Debtors, the Designated Managers, Medtronic and the Spinoff Advisors, the OCC is simultaneously conducting extensive legal and financial analysis to determine the nature, extent and value of potential claims that could be brought on behalf of the Debtors' estates against various parties involved in the Covidien Spinoff and other prepetition transactions. Such claims could include, among others, constructive and intentional fraudulent conveyance, breach of fiduciary duty and unjust enrichment.

To the extent viable—and ultimately successful—the OCC believes these actions could result in increased value for Opioid Claimants and other creditors. The OCC must complete this analysis to be in a position to evaluate fully whether the treatment of Opioid Claimants contemplated by the RSA and proposed Plan is appropriate.

V. THE OCC CANNOT TAKE A POSITION ON THE PLAN AT THIS TIME

As discussed above, the OCC's primary objectives in the Chapter 11 Cases are to (a) facilitate a fair and appropriate allocation of value among Private and Public Opioid Claimants and (b) assess the total value available to all claimants and the value proposed to be provided to Opioid Claimants, primarily by investigating the terms of the RSA and proposed Plan, and determine whether the value proposed to be provided to Opioid Claimants is appropriate.

The OCC believes the allocation resolutions achieved through the Mediation are reasonable, particularly in light of the numerous and complex issues that would need to be litigated among Opioid Claimants in the absence of such a consensual resolution. The OCC's investigation into potential estate claims and causes of action and other issues that could increase the value available to all Opioid Claimants, however, remains ongoing. Indeed, in the coming weeks, the OCC will continue its factual and legal analysis regarding such claims and likely will seek to depose certain individuals who were involved in or are in possession of critical information regarding relevant pre-bankruptcy transactions. Specifically, the OCC will be focused on determining whether, based on its analysis, the value that may be recoverable as a result of the various causes of action and insurance proceeds—when added to the $1.6 billion in cash over seven years and contemplated warrants—is a fair outcome for Opioid Claimants.

[24] Upon information and belief, the Spinoff Advisors include: (i) Goldman Sachs and JPMorgan, which served as co-financial advisors to Covidien in connection with the Covidien Spinoff; (ii) Houlihan Lokey, which served as a consultant to Covidien in connection with the Covidien Spinoff; (iii) Bain & Company, which assessed the risks of certain opioid products and formulations prior to the Covidien Spinoff and was also identified as a potential financial sponsor for the Covidien Spinoff; (iv) McKinsey & Company, which was engaged to assist with and advise on sale and spin options for Covidien's pharmaceutical business and the ultimate Covidien Spinoff and provided general portfolio and business development strategies for the Debtors' opioid and other businesses; (v) Morgan Stanley, which provided a potential transaction analysis and valuation regarding the Covidien Spinoff; and (vi) Duff & Phelps, which the Debtors have identified as another significant advisor in connection with the Covidien Spinoff.

In light of these issues, the OCC is not in a position at this time to determine whether the OCC ultimately will support the Plan or whether the OCC believes that all Opioid Claimants should vote in favor of the Plan.

After the OCC is able to complete its investigation and further assess the allocation of value to various Opioid Claimant groups, the OCC intends to supplement this letter by filing a supplemental letter or objection with the Bankruptcy Court indicating its final position in respect of the Plan prior to the September 3, 2021 Voting Deadline. In addition, the OCC recommends that all Opioid Claimants defer voting on the Plan until the TDPs are available for public review.

Therefore, the OCC urges Opioid Claimants to review the Plan and Disclosure Statement now, but to defer making a decision regarding how to vote on the Plan until both (i) the TDPs are filed publicly and (ii) the OCC's position on the Plan is determined and made available to all Opioid Claimants.