PUBLIC VERSION OF ADV. DOCKET NO. 26

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re: MALLINCKRODT PLC, *et al.*, Debtors.[1]	Chapter 11 Case No. 20-12522 (JTD) (Jointly Administered)
OPIOID MASTER DISBURSEMENT TRUST II, Plaintiff, v. COVIDIEN UNLIMITED COMPANY (formerly known as Covidien Ltd. and Covidien plc), COVIDIEN GROUP HOLDINGS LTD. (formerly known as Covidien Ltd.), COVIDIEN INTERNATIONAL FINANCE S.A., COVIDIEN GROUP S.À R.L., and DOE DEFENDANTS 1-500, Defendants.	Adv. Proc. No. 22-50433 (JTD)

COVIDIEN'S REPLY BRIEF IN SUPPORT OF
ITS MOTION TO DISMISS THE COMPLAINT

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March 31, 2023

[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. The Debtors' mailing address is 675 McDonnell Blvd., Hazelwood, Missouri 63042.

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PRELIMINARY STATEMENT

The Trust's opposition ("Opp.") to Covidien's motion to dismiss ("MTD") is long on words but short on substance.[2] The opposition describes the horrors that we now know, *today*, opioid addiction caused and recounts Mallinckrodt's sales of opioids. But this is not an action against Mallinckrodt nor a suit concerning conduct that occurred in the last few years. It is, instead, an action against Covidien, which was merely a direct or indirect parent of its Mallinckrodt subsidiaries for six years during Mallinckrodt's decades-long production of opioids, before Covidien spun-off Mallinckrodt 10 years ago, in 2013, to separate Mallinckrodt's pharmaceutical business from Covidien's distinct medical devices and supplies businesses.

The Trust does not dispute that, at the time of the transfers at issue—2013 and earlier—there was not even a *single* opioid lawsuit pending against Mallinckrodt. Nor does it dispute that, while the DEA served a subpoena on Mallinckrodt regarding its procedures for monitoring suspicious orders before the spin closed, Covidien had made the decision to sell or spin-off Mallinckrodt more than a year earlier (and fully disclosed the subpoena in its contemporaneous SEC filings). The opposition does not point to a single allegation in the Complaint (or any that the Trust could add in an amended pleading) that any member of Covidien's board of directors, which authorized the spin, foresaw that one day, long in the future, Mallinckrodt would face unprecedented opioid litigation based on a public-nuisance theory that had not yet seen the light of day. Indeed, the Trust does not claim that *anyone* at Covidien (let alone its board) had any special ability to peer into a crystal ball and anticipate the tidal wave of opioid litigation that would first begin only some four years later. To the contrary, the Trust alleges that all the supposed "red flags" that the Complaint cites were, in the Trust's own words, "public

[2] Capitalized terms not defined herein have the meanings set forth in Covidien's motion to dismiss.

information." Compl. § V.A. (at 62). Yet, the market, armed with all that information, assessed Mallinckrodt as massively solvent at the time of the spin.

The Trust urges that it should nonetheless be allowed to move forward and take discovery. That is not how litigation works in federal court. A plaintiff must plead claims that are both legally tenable and plausible—and with specificity for claims for intentional-fraudulent transfer—before it can burden both the defendant and the court with the substantial costs that discovery and additional motion practice require. That is especially true where, as here, the Trust has already had the benefit of extensive Rule 2004 discovery taken by the Official Committee of Opioid Related Claimants ("OCC") in Mallinckrodt's bankruptcy proceedings, yielding nearly a million documents and 15 depositions, including tens of thousands of documents from Covidien and numerous spinoff advisors that were entirely about the spinoff, as well as substantial discovery from the underlying opioid litigation, including another million-plus documents and 43 depositions that Mallinckrodt has publicly released. MTD at 5. And the Trust's assertion that it should be afforded slack as a supposed "newcomer" to the matter ignores the reality that the Trust is run by designees of the key opioid-claimant committees—the OCC, the Governmental Plaintiff Ad Hoc Committee, and the Multi-State Governmental Entities Group—and represented by many of the same law firms that represented those committees during the bankruptcy proceedings.

But the most fundamental reason why the Trust should not be permitted to go on a fishing expedition is that its claims, as pled, are legally defective. The Trust's arguments to the contrary are meritless. The Complaint should be dismissed.

ARGUMENT

I. THE TRUST'S FRAUDULENT-TRANSFER CLAIMS SHOULD BE DISMISSED

A. The Claims (Counts I-IV) Are All Time-Barred

The Trust does not dispute that Delaware and any other state whose law might conceivably apply provide a four-year statute of repose for fraudulent-transfer claims. Here, the most recent transfers at issue took place in 2013, more than seven years before Mallinckrodt filed for bankruptcy and, hence, more than three years after the statute of repose expired. *See* MTD at 14-24. The Trust thus concedes that its claims are time-barred unless an exception to the four-year statute of repose applies. None does, the Trust's arguments to the contrary notwithstanding.

1. The Narrow Discovery Rule Exception Is Inapplicable

The Trust cites the so-called discovery rule, but even if it were applicable (it is not) it would toll the four-year statute of repose only for the Trust's *intentional* fraudulent-transfer claims, not its *constructive* fraudulent-transfer claims. *See* MTD at 16. As discussed below, the Trust's intentional-fraudulent transfer claims fail on the merits, but, in any event, the discovery rule would not render those claims timely because the challenged transfers (and the facts that supposedly rendered them fraudulent) were reasonably discoverable when they were publicly disclosed in 2013 (or earlier). *See id.* at 16-18. The Trust's counter arguments are specious.

The Trust does not dispute that the transfers were publicly disclosed at the time of the spinoff in 2013. It argues only that certain opioid or asbestos claimants were not injured (indeed, some were not born), or did not discover their injuries, until the year preceding Mallinckrodt's 2020 bankruptcy filing. *See* Opp. at 23-27. That argument fails because, under the plain language of the statute, the one-year discovery rule does not run from the date of the claimant's *injury* or its discovery, but rather from when "the *transfer* … was or could reasonably have been discovered." Del. Code Ann. tit. 6, § 1309(1) (emphasis added); *accord* Mass. Gen. Laws Ann.

ch. 109A § 10(a); Mo. Ann. Stat. § 428.049(1); UFTA § 9(a); UVTA § 9(a). The relevant question is thus whether the *transfer itself* was "hidden" or instead "reasonably discover[able]," not whether any claimant's injury was reasonably discoverable more than a year before the claimant sued (or, in this case, more than a year before Mallinckrodt filed for bankruptcy). *See In re Nat'l Serv. Indus., Inc.*, 2015 Bankr. LEXIS 2029, at *21 (Bankr. D. Del. June 18, 2015); *In re Our Alchemy, LLC*, 642 B.R. 155, 163 (Bankr. D. Del. 2022).

In *National Service Industries,* for example, the debtor faced substantial asbestos liability. Yet, in determining whether DUFTA's discovery rule applied, the court did not consider when the asbestos claimants discovered their injuries. Rather, it examined merely whether the underlying transfers were reasonably discoverable and held that they were not but only because the defendants had "*secretly* looted the [d]ebtor." 2015 Bankr. LEXIS 2029, at *22-23 (emphasis added). Other courts have likewise focused on whether the *transfers* themselves were concealed or instead were reasonably discoverable from publicly available information, not on when a claimant's injury was discovered. *See Burkhart v. Genworth Fin., Inc.*, 250 A.3d 842, 860-61 (Del. Ch. 2020) (holding that DUFTA's one-year discovery rule began to run by 2017 when SEC filings disclosed facts making fraudulent transfers in 2012-2014 reasonably discoverable); *Alchemy*, 642 B.R. at 165; *In re J & M Sales, Inc.*, 2021 Bankr. LEXIS 2268, at *102-103 (Bankr. D. Del. Aug. 20, 2021).[3]

The Trust's argument flies in the face of not merely the statutory language and the cases construing it, but the purpose of the statute of repose. Statutes of repose "protect[] defendants by creating a finite period within which a defendant can be sued for a particular transaction." *J & M*

[3] Although this Court stated in *J & M Sales* that DUFTA § 1309(1)'s discovery rule runs from "the injury or the discovery of the injury," the Court focused on whether the allegedly fraudulent *transfers* were reasonably discoverable, not on whether the creditors' injuries were. 2021 Bankr. LEXIS 2268, at *102-103 & n.138.

Sales, 2021 Bankr. LEXIS 2268, at *68-69. And in the fraudulent-transfer context, the statute's "extinguishment of claims serves an important purpose": "'Because a voidable transfer … may injure all of a debtor's many creditors, there is need for a uniform and predictable cutoff time.'" *Id.* at *70 (quoting Unif. Fraudulent Transfer Act, § 9 cmt. 1). The discovery rule promotes that statutory goal by extending the four-year period, if at all, only until such time as any concealed transfers have become reasonably discoverable, thereby maintaining "a uniform and predictable cutoff time" for the creditor body as a whole to bring suit. *Id.* Here, Mallinckrodt's creditors included opioid claimants who knew enough to bring more than 3,000 actions against Mallinckrodt beginning in 2017, yet none ever served Covidien with a complaint alleging that the transfers that were publicly disclosed in connection with the 2013 spinoff were fraudulent. The Trust's proposed rule, by contrast, would eviscerate the statute of repose, transforming it into an indefinite, unpredictable, and non-uniform statute of limitations: even where, as here, the transfers were undisputedly disclosed at the time they were made, the time to sue would nonetheless be extended for so long as any individual claimant could claim to have been injured at any time in the future, with no practical limit at all.[4]

The Trust's fallback argument—that the one-year discovery rule runs from when the supposedly fraudulent nature of the transfers, and not merely the transfers' existence, could have been reasonably discovered—fares no better. The argument is contrary to the words of the statute, which extends the period of repose only from when "*the transfer* … was or could

[4] The two cases the Trust cites are inapposite because they were decided under different statutes with more liberal discovery rules than under the laws of Delaware, Massachusetts or Missouri (and the UFTA and UVTA) that Plaintiff cites. Compl. ¶ 213; Opp. at 10 n.6. *Lippe* applied a pre-UFTA version of New York's fraudulent-conveyance statute, which did not contain any statute of repose. *See Lippe v. Bairnco Corp.*, 225 B.R. 846, 853 (S.D.N.Y. 1998) (citing N.Y. C.P.L.R. §§ 203(g), 213(8), the statute of limitations for common-law fraud claims). *G-I Holdings* followed *Lippe* in a case applying New Jersey law, which tolled the statute until the transfer actually "*was discovered* by the claimant," not from when it could *reasonably* have been discovered. *See In re G-I Holdings, Inc.*, 313 B.R. 612, 634 (Bankr. D.N.J. 2004) (emphasis added).

reasonably have been discovered." Del. Code Ann. tit. 6, § 1309(1) (emphasis added). But, even if the statute extended the period until one year after the supposedly fraudulent nature of the transfer was discoverable, the discovery rule could not salvage the Trust's intentional fraudulent-transfer claims. Not only were the transfers themselves publicly disclosed in SEC filings at the time of the spin, but all the so-called "red flags" that Mallinckrodt might someday face massive opioid litigation were, by the Trust's own admission, also "public information" at the time (and certainly nothing in the Complaint suggests that the supposed "fraud" only became reasonably discoverable within one year of the bankruptcy filing in October 2020). *See* MTD at 7-11, 16-17. The discovery rule is accordingly inapplicable as a matter of law. *See, e.g., Burkhart*, 250 A.3d at 860-61 (holding DUFTA's discovery rule inapplicable where parent company's SEC filings disclosed plan to separate debtor-subsidiary's financially troubled business from parent's more profitable affiliates more than one year before suit, making allegedly fraudulent transfers "reasonably … discover[able]" under "inquiry notice standard").

2. <u>The New Jersey Government Creditors Do Not Render the Claims Timely</u>

The Trust also cannot salvage its time-barred claims by seeking to step into the shoes of New Jersey governmental creditors because those entities (i) would be time-barred and (ii) would lack standing to avoid any of the challenged transfers in any event.

The New Jersey governmental entities could not have brought a timely fraudulent-transfer claim when Mallinckrodt filed for bankruptcy because, as this and other Courts in this District have held, the statute of repose under DUFTA (and similar statutes) expressly applies to state governmental creditors. *J & M Sales*, 2021 Bankr. LEXIS 2268, at *72-73; *In re Maxus Energy Corp.*, 641 B.R. 467, 546-548 (Bankr. D. Del. 2022); Del. Code Ann. tit. 6, §§ 1301(4), (9), 1309(1)-(2) (extinguishing untimely claims of any "creditor" that is a "government or governmental subdivision or agency"). To the extent that the two decisions the Trust cites hold

that UFTA's statute of repose, as enacted in New Jersey, does not apply to state governmental creditors (*N.J. Dep't Env't. Prot. v. Caldeira*, 794 A.2d 156, 163-164 (N.J. Sup. Ct. 2002); *G-I Holdings*, 313 B.R. at 636), those decisions are contrary to both *J & M Sales* and *Maxus*.

They are also irrelevant. The law of New Jersey law does not apply here. As a substantive matter, the Trust does not allege that the relevant Mallinckrodt entities that made the challenged transfers were based in, or transferred their property from, New Jersey. To the contrary, the Trust asserts that the Mallinckrodt entities were headquartered in Missouri, and it also cites the law of Delaware and Massachusetts (where Covidien's U.S. operations were headquartered), not New Jersey. *See* Compl. ¶¶ 30, 132, 213; Opp. at 10 n.6; *see also, e.g.*, *In re FAH Liquidating Corp.*, 572 B.R. 117, 129-130 (Bankr. D. Del. 2017) (holding § 544(b) claims time-barred after applying Delaware's "most significant relationship" choice of law standard to determine which state's fraudulent-transfer law applied, looking to the location of the transferred property and where the debtor and transferee were headquartered and centered their relationship). And even if the statute of repose were viewed as procedural, not substantive, that would simply mean that a Delaware court would look to Delaware's borrowing statute and apply the *shorter* of DUFTA's statute of repose—four years—or the statute of repose or limitations of the state where the claim accrued. Del. Code Ann. tit. 10, § 8121; *Perkins v. Proctor & Gamble Co.*, 2022 WL 1125388, at *2 (3d Cir. Apr. 15, 2022); MTD at 37-38.

Moreover, even if their claims were not time-barred, the New Jersey governmental creditors the Trust identifies (the New Jersey Division of Medical Assistance and Health Services, and a few additional municipalities not named in the Complaint, Opp. at 28) could not have avoided any of the challenged transfers because they would have lacked standing to do so. Only a "creditor" of the "debtor" that "made" the transfer may sue to avoid it. *See, e.g.*, Del.

Code Ann. tit. 6, §§ 1301(3)-(4), (6), 1304(a), 1305(a). Here, none of the New Jersey entities the Trust identifies filed a proof of claim against Mallinckrodt International Finance S.A. ("MIFSA"), the only Mallinckrodt debtor that the Complaint alleges made any of the challenged transfers, including the $721 million in Note Proceeds. Instead, by the Trust's own admission, the New Jersey creditors filed claims only against two other Mallinckrodt debtors—Mallinckrodt plc and Mallinckrodt LLC—neither of which is alleged to have made any of the challenged transfers. *See* Compl. ¶ 217; Opp. 28. Accordingly, the Trust cannot step into the New Jersey creditors' shoes and seek to avoid any of the challenged transfers. *See* MTD at 19-21.

The Trust cannot cure this fatal defect by claiming that the 64 separate Mallinckrodt debtors were purportedly "a single economic enterprise" or "alter egos." Opp. at 29-30. The Complaint's conclusory allegations would be insufficient to disregard the Mallinckrodt debtors' corporate separateness under non-bankruptcy law. *See infra* pp.32-35; MTD at 21, 41-43. And, under controlling Third Circuit precedent, in the absence of substantive consolidation—which Mallinckrodt's plan expressly did *not* do (MTD at 21 n.25)—bankruptcy law likewise respects the corporate separateness of separate, but affiliated, legal entities. *In re Owens Corning*, 419 F.3d 195, 210-212 (3d Cir. 2007); MTD at 21. Similarly, the Trust's unsupported plea to "collapse" [REDACTED] (Opp. at 29) cannot save the day for it. As a legal matter, collapsing the steps of a transaction does not consolidate separate corporate entities. *See, e.g.*, *United States v. Tabor Ct. Realty Corp.*, 803 F.2d 1288, 1302 (3d Cir. 1986) (collapsing two steps by which loan proceeds (i) passed through debtor (ii) to parent, into single transaction to hold debtor received no value for liens it gave lenders; not consolidating debtor and parent).

[REDACTED]

[REDACTED]

[REDACTED].[5]

3. The IRS Also Does Not Make the Claims Timely

Nor can the Trust step into the shoes of the IRS to save its time-barred claims. *First*, the Trust faces the same problem as to the IRS as it does with respect to New Jersey: the IRS is not a creditor holding an allowable claim against MIFSA, and none of the other Mallinckrodt debtors against which the IRS filed a proof of claim is alleged to have made the challenged transfers. MTD at 19-21. The Trust's only response—that all the Mallinckrodt debtors were purported alter egos and the [REDACTED] should be collapsed (Opp. at 35)—fails, as just discussed.

Second, even if the IRS were a creditor of a relevant Mallinckrodt debtor, the Trust still could not step into its shoes and try to avoid the challenged transfers because the IRS's tax claims arose *after* those transfers had occurred. *See* MTD at 20 n.23, 22 n.27; Opp. 31 n.24. That is fatal to the Trust's position because, as the Trust all but concedes (*id.* at 31-32), the Internal Revenue Code does not give the IRS a ten-year "look back" period from the petition date to avoid transfers made before its claims arose; the statute merely provides the IRS a "look-forward" period to file suit within ten years *after* the claim arises and the IRS assesses the tax. 26 U.S.C. § 6502(a)(1); MTD at 22-23. And as the Trust's own authorities recognize (Opp. at 34), "to satisfy the standing requirements of Section 544 [of the Bankruptcy Code], the same creditor that has an allowed unsecured claim on the Petition Date must also have been a creditor of the transferor on the Transfer Date." *In re Allou Distribs., Inc.*, 392 B.R. 24, 34 (Bankr. E.D.N.Y. 2008); *see also, e.g.*, *In re Omansky*, 2022 WL 4281472, at *7 (Bankr. S.D.N.Y. Sept.

[5] The Trust's reliance on *Tronox* is misplaced. Unlike here, the trustee there identified triggering creditors holding claims against the debtor that made the challenged transfers, and the court also found that all of the debtors were operated as one "consolidated entity." *In re Tronox Inc.*, 503 B.R. 239, 276, 294-295 (Bankr. S.D.N.Y. 2013).

15, 2022) ("Section 544(b)(1) requires that a triggering creditor's allowable, unsecured claim date back from the time of the challenged conveyance."); *Cohen v. Sikirica*, 487 B.R. 615, 628 (W.D. Pa. 2013) (same); 5 *Collier on Bankruptcy* ¶ 544.06[1] (same). Because none of the IRS's proofs of claim assert claims that arose before the spinoff, the IRS is not a triggering creditor into whose shoes the Trust can step to avoid any of the challenged transfers.[6]

Recognizing that this is the law, the Trust posits (Opp. at 33-34) that the IRS may have been a creditor when the challenged transfers occurred. But the Trust engages in rank speculation, merely pointing to two passing allegations in the Complaint that unspecified "profits" were allegedly earned, at some unspecified time, by "Mallinckrodt," a term defined to include all 64 separate Mallinckrodt debtors plus "certain nondebtor affiliates." Compl. Preamble & ¶¶ 33, 50. That does not come close to plausibly showing that the IRS was a creditor of any Mallinckrodt debtor that made any of the challenged transfers when those transfers were made. Indeed, the only such transferor identified in the Complaint, MIFSA, [REDACTED] [REDACTED] and incorporated in Luxembourg.[7] The Complaint includes no allegation that any Mallinckrodt entity, let alone MIFSA, [REDACTED] [REDACTED], was failing to pay its income taxes back in 2013.

As a last resort, the Trust urges the Court to depart from the well-established case law mandating that the triggering creditor under § 544(b) must have had a claim against the debtor when the debtor made the challenged transfer, citing a few cases noting that state law allows

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[6] The Trust's contention (Opp. at 31-32) that the IRS need not have *assessed* the taxes before the transfers were made misses the point. Assessment occurs long after a tax claim first arises or is incurred. 26 U.S.C. § 6501(a)-(c). Standing turns on whether the IRS's tax claims *arose* before the transfer, not on any later assessment.

[7] *See* [REDACTED]; Millar Decl., Ex. 2 (Form 10-12B/A) at F-54; Ex. 8 (Separation Agreement) art. I (definition of MIFSA). The Trust fares no better in pointing to the Complaint's allegations regarding the tax liabilities arising before Tyco's 2007 spinoff of Covidien. Those taxes were allegedly owed by "*Covidien*," not Mallinckrodt, and the Tax Matters Agreement that allegedly shifted certain of Covidien's taxes to Mallinckrodt merely made Mallinckrodt contractually "liable *to Covidien*," not the IRS. Compl. ¶¶ 187-189.

future creditors to avoid transfers in certain circumstances. Opp. at 32-34. But even outside of bankruptcy, only a pre-existing creditor can set aside a transfer that left the debtor balance-sheet insolvent, and hence the Trust's claims based on balance-sheet insolvency would fail. *See, e.g.*, Del. Code Ann. tit. 6, § 1305(a). In any event, Mallinckrodt filed for bankruptcy and the federal law that therefore applies, § 544(b), imposes its own standing requirement that the triggering creditor must have had a claim against the debtor at the time of the transfer.

In that regard, the Trust fails to cite a single case holding that a trustee may circumvent the statute of repose by invoking the IRS's rights to avoid transfers made before the IRS's tax claims even arose.[8] Indeed, this case illustrates the danger of such an approach. Although the Trust tries to brush over the point, the vast bulk of the IRS's tax claims by dollar amount were for payroll taxes incurred on the eve of Mallinckrodt's bankruptcy filing, much of which had not even come due by then.[9] As this Court has observed, "virtually every business entity that files for bankruptcy will have accrued but unpaid payroll taxes because those taxes are not yet due to be paid to the IRS." *In re J & M Sales*, 2022 WL 532721, at *3 n.7 (Bankr. D. Del. Feb. 22,

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[8] In all of the Trust's cases, either (i) the IRS was alleged to be a creditor at the time of the challenged transfers (or failed to qualify as a triggering creditor), or (ii) the IRS was not cited as a triggering creditor at all. *See, e.g.*, *In re Tops Holding II Corp.*, 646 B.R. 617, 652-657 (Bankr. S.D.N.Y. 2022) (denying motion to dismiss claim under N.Y. Deb. & Cred. Law § 273, which requires plaintiff to be a creditor at the time of the transfer, while rejecting argument that IRS tax claim must have been *assessed*, as opposed to incurred, before the transfer); *In re CVAH, Inc.*, 570 B.R. 816, 821 (Bankr. D. Idaho 2017) ("Trustee alleges that, at the time the payments were made, CVAH was indebted to IRS … and could not pay its tax liabilities."); *In re Polichuk*, 506 B.R. 405, 420 & n.12 (Bankr. E.D. Pa. 2014) ("The IRS has alleged that … the Internal Revenue Service … was an actual creditor of the Debtor at the time the transfers at issue occurred[.]"); *In re Heritage Org., L.L.C.*, 2008 WL 5215688, at *4-5 (Bankr. N.D. Tex. Dec. 12, 2008) (IRS had "claim in existence prior to the first alleged fraudulent transfer," which occurred within the four-year statute of repose); *In re Greater Se. Cmty. Hosp. Corp. I.*, 365 B.R. 293, 306, 311 & n.39 (Bankr. D.D.C. 2006) (holding trustee failed to show that the IRS was a creditor on the petition date and noting "persuasive" argument that IRS would be time-barred anyway if its tax claims arose after four-year statute of repose expired); *In re Liquid Holdings Grp., Inc.*, 2019 WL 3380820, at *2-3 & n.2 (Bankr. D. Del. July 25, 2019) (IRS not cited as a triggering creditor); *accord Sikirica*, 487 B.R. at 628; *Allou Distribs*, 392 B.R. at 28-29; *In re Healthco Int'l, Inc.*, 195 B.R. 971, 980 (Bankr. D. Mass. 1996); *In re RCM Glob. Long Term Cap. Appreciation Fund, Ltd.*, 200 B.R. 514, 523-524 (Bankr. S.D.N.Y. 1996); *In re Plassein Int'l Corp.*, 352 B.R. 36, 40 (Bankr. D. Del. 2006) (not addressing §544(b) triggering-creditor standing or statute of repose).

[9] *See* MTD at 22 n.27; Millar Decl., Ex. 13 (IRS proofs of claim).

2022). Yet, if a trustee need only show that such payroll taxes were outstanding on the petition date, without also having to show that the IRS was a creditor at the time the debtor made the challenged transfers, the trustee could claim to have an unlimited look-back period—going back not merely ten years before the petition date, but conceivably decades or longer—in almost every case. "That cannot be what Congress had in mind when enacting Section 544(b)." *Id.*

B. The Trust's Intentional Fraudulent-Transfer Claims (Counts I And III) Fail

The Complaint fails to state a claim for intentional fraudulent transfer. Because "an intentional fraudulent transfer claim … requires 'actual intent,' a company's intent may be established only through the 'actual intent' of the individuals 'in a position to control the disposition of [the transferor's] property.'" *In re Trib. Co. Fraudulent Conv. Litig.*, 10 F.4th 147, 161 (2d Cir. 2021) (quoting *In re Roco Corp.*, 701 F.2d 978, 984 (1st Cir. 1983)), *cert. denied sub nom. Kirschner v. FitzSimons*, 142 S. Ct. 1128 (2022). The Trust does not dispute that Covidien's board of directors was the only corporate actor that had the legal authority to approve the spinoff. Accordingly, the Trust "was required to plead allegations," with specificity as required by Rule 9(b), "that gave rise to a strong inference that [Covidien's board of directors] had the 'actual intent to hinder, delay, or defraud'" Mallinckrodt's creditors when the board approved the spinoff. *Id.* at 160.

The Complaint utterly fails to do so. Indeed, the Trust all but concedes the point; its opposition fails to point to any allegation in the Complaint—because there is none—that any Covidien director, much less a majority of directors, foresaw that Mallinckrodt would face massive opioid litigation years in the future and intentionally spun off Mallinckrodt to avoid that then-non-existent litigation. The Trust merely responds that Rule 9(b) permits fraudulent intent to "be alleged generally." Opp. at 9. But the Complaint does not even do that much; it does not name a single Covidien director, much less allege any director's intent, generally or otherwise.

In any event, to survive a motion to dismiss, the Trust must do more than merely make the conclusory allegation that Covidien's board had fraudulent intent (though it has not even done that); it must allege *specific facts* that plausibly support the conclusion that Covidien's board actually had such intent. This Court and others have dismissed intentional fraudulent-transfer claims at the pleading stage where, as here, the claims were not supported by any such allegations. *See, e.g.*, *J & M Sales*, 2021 Bankr. LEXIS 2268, at *95 ("[d]espite the Trustee's allegation that the Conway Acquisition was made with the actual intent to hinder, delay, or defraud creditors[,] no facts have been advanced to support that conclusion"); *In re AgFeed USA, LLC*, 546 B.R. 318, 336-339 (Bankr. D. Del. 2016) ("the complaint does not sufficiently allege facts regarding the circumstances constituting fraud," but "merely … alleg[es] that each transfer was made … with actual intent to hinder, delay, or defraud"; "a party asserting a claim for actual fraud must allege sufficient facts to satisfy the heightened requirement of FRCP 9(b)"); *Tribune*, 10 F.4th at 162 (affirming dismissal of complaint that failed to allege facts "sufficient to raise a strong inference of actual fraudulent intent").

Unable to allege that Covidien's *board* acted with actual intent to defraud Mallinckrodt's creditors, the Trust contends that it need only allege that Covidien's (or Mallinckrodt's) *officers* had such intent. Opp. at 9. That, too, is wrong on both the law and the alleged facts.

As a legal matter, the Trust must allege that Covidien's *directors*, not merely its (or Mallinckrodt's) officers, acted with fraudulent intent, because only Covidien's board was "'in a position to control the disposition of [the transferor's] property'" in the spinoff. *Tribune*, 10 F.4th at 161 (quoting *Roco*, 701 F.2d at 984). *Tribune* held that the alleged fraudulent intent of the debtor's CEO and other senior officers could *not* be imputed to the debtor because, as here, only the debtor's board had legal authority to approve the challenged transaction (a merger), and

there were no allegations the officers so dominated the board as to control its decision. 10 F.4th at 161-162. The Trust has no meaningful response. Remarkably, its brief does not even acknowledge *Tribune*. Instead, it cites a single lower court decision rejecting the "control" test, *In re Lyondell Chem. Co.*, 554 B.R. 635 (S.D.N.Y. 2016), but it fails to acknowledge that *Lyondell* is no longer good law following the Second Circuit's contrary holding in *Tribune*. And both another Circuit and two other bankruptcy judges in this District have applied the same "control" test as the Second Circuit endorsed in *Tribune*. *See Roco*, 701 F.2d at 984; *Maxus*, 641 B.R. at 515-516 & n.139 (applying control test, citing *Tribune*); *In re Elrod Holdings Corp.*, 421 B.R. 700, 709-712 (Bankr. D. Del. 2010) (refusing to impute minority directors' fraudulent intent to debtor because majority of directors lacked such intent).[10]

The Trust's officer-imputation argument also fails on the alleged facts. Even if the intent of Covidien's or Mallinckrodt's officers were relevant (and it is not), the Complaint fails to allege that any such officers acted with actual intent to hinder, delay or defraud Mallinckrodt's creditors. The few allegations the Trust cites (Compl. ¶¶ 155, 157, 162-163, ███) merely allege a handful of instances in which a few individuals (who appear to be primarily mid-level managers rather than executive officers) were allegedly aware of public media reports or suspected occurrences of diversion or abuse of Mallinckrodt opioids. None of those allegations plausibly suggests that any of those individuals contemplated that these isolated matters heralded

[10] *In re Pers.l & Bus. Ins. Agency*, 334 F.3d 239 (3d Cir. 2003), cited by the Trust (Opp. at 9), is not to the contrary. That decision did not consider which corporate actor's intent may be imputed to the debtor to establish an intentional fraudulent-transfer claim where, as here, only the board could approve the transfers. Rather, it merely reasoned that when the estate sues on the debtor's own pre-bankruptcy claims, the fraudulent intent of the debtor's sole actor—its sole shareholder, CEO, and representative—could be imputed to the debtor for actions the CEO took in the ordinary course of the debtor's business (obtaining insurance-premium financing for insurance-broker clients). *Id.* at 241-244. Removing any doubt regarding the limited the scope of its ruling, the Third Circuit specified that the imputation principles it discussed in that case do *not* apply in the fraudulent-transfer context. *Id.* at 244-247.

the massive wave of opioid litigation that would emerge only years later, or sought (or were in any position) to cause Covidien to spin off Mallinckrodt to evade that litigation.

Finally, the Trust cannot save its intentional fraudulent-transfer claims by resort to the so-called "badges of fraud." Many of the seven badges the Trust claims to be met here concern elements of a claim for constructive, not intentional, fraudulent transfer; some are common to every spinoff and are likewise inadequate to support a claim for intentional fraudulent transfer; and the others are not supported by any factual allegations in the Complaint or are pled, if at all, only through conclusory allegations that do not satisfy Rule 9(b)'s particularity requirement:

- *Transfer to insider*. That Covidien was the parent company of some Mallinckrodt entities and controlled the decision to spin them off "could not support a finding of intent in a spin-off since they are a feature of every spinoff transaction." *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc.*, 761 F.3d 409, 435 (5th Cir. 2014); *Tribune*, 10 F.4th at 162. Undertaking a spinoff—a legitimate corporate transaction—is not inherently "suspect," unlike the sorts of extraordinary insider transfers at issue in *J & M Sales*, which the Trust cites, where insider family members caused the family-controlled debtors to pay dividends and excessive rent to the family and the family's unrelated companies during the debtors' precipitous slide into bankruptcy. 2021 Bankr. LEXIS 2268, at *100-101.

- *Sued or threatened with suit before transfer*. The Complaint fails to allege that *any* opioid lawsuit was pending or threatened against Mallinckrodt at the time of the spinoff.[11] The Complaint likewise acknowledges that the DEA issued its first subpoena in November 2011, [REDACTED] . *See* Compl. ¶¶ 172, [REDACTED], 181; MTD at 9-10. And the DEA's suspicious-order investigation, which settled for a mere $35 million in 2017, was not what pushed Mallinckrodt into bankruptcy when it filed three years later, in 2020, under the weight of a wave of 3,000 opioid lawsuits asserting public-nuisance causes of action. *Id.*

- *Transfer of substantially all of the debtor's assets*. The Complaint fails to allege that the Mallinckrodt debtors transferred most of their assets, alleging only a transfer by MIFSA of $721 million, whereas Mallinckrodt plc, MIFSA and the Mallinckrodt subsidiaries received or retained a pharmaceutical business allegedly worth $3.3 billion. *See* Compl. ¶¶ [REDACTED]-185, 205, 223(g). The Trust's contention that this badge is met because Covidien retained assets allegedly worth 80% of the overall Covidien-Mallinckrodt assets—*i.e.*, that Covidien kept its non-pharmaceutical businesses—fails because, in every spinoff, the parent retains those businesses it does not spin-off. And the Complaint fails to allege that

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[11] Contrary to the Trust's suggestion (Opp. 13 n.11), the 50 opioid claims in which Covidien has been named (but not served) were not filed until 2019 or later, six years or more after the spinoff. MTD at 48.

Mallinckrodt ever owned Covidien and its non-pharmaceutical businesses and "transferred" any of those assets to begin with. *See* MTD at 36-37; *infra* pp.26-27.

- *Concealment of the transfer*. The Complaint fails to allege the transfers were concealed, instead acknowledging that Coviden publicly announced the spinoff 18 months before the transaction closed; that it also disclosed all of the challenged transfers in the SEC filings for the spinoff; and that the circumstances supposedly rendering the transfers "fraudulent"—the purported knowledge of future opioid liability arising from the DEA subpoena, published studies, and opioid-related governmental fines imposed on other companies—were matters of "public knowledge." *See* Compl. ¶¶ 147-175; MTD at 7-11, 16-17; *In re Fedders N. Am., Inc.*, 405 B.R. 527, 545 (Bankr. D. Del. 2009) ("concealment" badge not met where challenged loan transaction "was disclosed in a public filing with the SEC"); *Verizon*, 761 F.3d at 435 ("concealment" badge not met where "material information relating to the spin[-]off was actually disclosed to the market").

- *Debtor's retention of property transferred after the transfer*. This badge applies only where "[t]he *debtor* retained possession or control of the property transferred after the transfer." 6 Del. Code An. tit. 6, § 1304(b)(2) (emphasis added); *Maxus*, 641 B.R. at 516-517. Here, there is no suggestion that *Mallinckrodt*—the debtor—retained property it purported to transfer in the spin. Just the opposite, the Complaint alleges that MIFSA transferred to Covidien, and did *not* retain, the $721 million and other assets.

That leaves only two additional supposed badges—that the transfers allegedly left Mallinckrodt insolvent and that it supposedly did not receive reasonably equivalent value. But those badges merely state the elements of a constructive fraudulent transfer and are accordingly, as matter of law, "insufficient to support a claim for actual fraudulent conveyance." *J & M Sales*, 2021 Bankr. LEXIS 2268, at *95. In any event, the Trust's conclusory allegations are untethered from both the indisputable facts and settled law. The capital markets valued Mallinckrodt as worth many billions of dollars more than its liabilities following the spin. Mallinckrodt issued more than $1 billion in *unsecured* debt in the spin,[12] and its stock traded on the New York Stock Exchange at a market capitalization of $2.5 billion immediately after the spin, an equity valuation that *increased* in the next two years to between $8.0 to $10.4 billion.

[12] The Trust's argument that even insolvent companies can obtain loans by giving lenders "security interests" (Opp. at 13-14) fails because Mallinckrodt obtained more than $1 billion in wholly *unsecured* loans here.

See MTD at 3, 9 n.8. The Trust's suggestion that this contemporaneous, objective assessment of ample solvency and more than reasonably equivalent value is irrelevant (Opp. at 13-17 & n.13) flies in the face of controlling Third Circuit law. In determining the value of a company, "[t]he price of [its] stock in a liquid market is presumptively the one to use in judicial proceedings" because "[m]arket capitalization … reflects all the information that is publicly available about a company at the relevant time of valuation," is "objective," and is not infected with improper "hindsight." *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 631, 633 (3d Cir. 2007).[13]

Finally, the Trust's suggestion that it should not have to satisfy the normal standards for pleading a claim of intentional fraudulent transfer because it was not around at the time of the transfers is meritless. As discussed, the Trust had access to extensive pre-suit discovery. *See* MTD at 5; *In re Old CarCo LLC*, 435 B.R. 169, 192 (Bankr. S.D.N.Y. 2010) ("There is no justification to relax the particularized standard required for intentional fraud claims" where, as here, "Rule 2004 discovery was conducted that allowed access to numerous documents, as well as the depositions of many witnesses"). And, under any standard, "relaxed" or not, this Complaint falls far short. The Trust's intentional fraudulent-transfer claims should be dismissed.

[13] The few out-of-Circuit and lower-court decisions the Trust cites (Opp. at 14-16) are readily distinguishable. In *Tronox*, the plaintiff not only alleged, but proved, that the defendant had hidden material information it knew from the markets, and the court distinguished *Campbell Soup* on that basis. *See Tronox*, 503 B.R. at 291, 297-301 (although "Defendants were acutely aware of the legacy liabilities" from pending environmental and tort litigation at the time of the challenged transfer, the company's "financial statements omitted … critical contingencies and potential liabilities" and "there was no contention that Tronox's financial statements issued in connection with the IPO … disclosed all of the legacy liabilities"). In contrast, the Complaint admits that whatever supposed "red flags" existed regarding Mallinckrodt's sale of opioids were matters of public knowledge. *See* MTD at 7-11, 17. *W.R. Grace* is likewise inapposite. There, the debtor had already been sued in tens of thousands of asbestos actions before it made the challenged transfers. *In re W.R. Grace & Co.*, 281 B.R. 852, 856-857, 862 (Bankr. D. Del. 2002). Here, Mallinckrodt had not been sued even once for opioid liability before the spin.

C. The Trust's Claims Challenging The Spinoff As A Fraudulent Transfer (Counts I-II) Are Barred By the Bankruptcy Code's Securities Safe Harbor

The Trust's claims to claw back the securities-related transfers that Covidien allegedly received in the spinoff are barred by Bankruptcy Code § 546(e) because the transfers were (i) qualifying "settlement payments" and "transfer[s] … in connection with a securities contract," (ii) made to qualifying entities. The Trust's arguments to the contrary are without merit.

1. The spinoff transfers were both safe-harbored "settlement payments" and "transfer[s] made … in connection with a securities contract"

The Trust's sole argument concerning the safe harbor's qualifying-transfer requirement is that the spinoff transfers cannot be "settlement payments" or "transfer[s] made … in connection with a securities contract" because the spinoff included "multiple transactions, … *not all* of which involved the transfer of securities in exchange for cash." Opp. at 36 (emphasis added). That makes no sense. That Covidien's spinoff of Mallinckrodt may have involved additional activities is beside the point. The dispositive point is that the transfers challenged here were securities transactions. MIFSA undisputedly paid $721 million to repurchase some of its shares from Covidien, and a debtor's "payment for [its] shares … is … a settlement payment." *In re Resorts Int'l, Inc.*, 181 F.3d 505, 515-516 (3d Cir. 1999), *abrogated in part on other grounds by Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018); *In re Plassein Int'l Corp.*, 590 F.3d 252, 258-259 (3d Cir. 2009). Similarly, the purported transfer of Covidien and the shares of its non-pharmaceutical subsidiaries (assuming *arguendo* there was such a "transfer"; *but see infra* p.26-27) was undisputedly part of the spinoff in which Covidien plc correspondingly transferred the (remaining) shares of MIFSA and the pharmaceutical subsidiaries to Mallinckrodt plc. Thus, the alleged transfer of Covidien and the shares of its non-pharmaceutical subsidiaries was likewise a "settlement payment" as a "transfer of … securities made to complete a securities transaction." *Resorts*, 181 F.3d at 515; MTD at 30-31. Moreover,

while it would suffice that they were "settlement payments," these transfers were also qualifying transfers on the alternative ground that they were "made … in connection with a securities contract," the Separation and Distribution Agreement. *See* MTD at 31-32. The Trust all but admits as much. *See* Opp. at 37.

A recent decision in this District is squarely on point. In *In re Quorum Health Corp.*, 2023 WL 2552399 (Bankr. D. Del. Mar. 16, 2023), the court dismissed fraudulent-transfer claims brought under § 544 to avoid a payment of cash by a spun-off subsidiary (which later filed bankruptcy) to its parent in the spinoff. The court held that § 546(e) barred the claim because the payment was a "transfer made … in connection with a securities contract"—the separation and distribution agreement for that spin. *See id.* at *4-6 & n.18.

The Trust's authorities provide it no support. *Merit Management* instructs that the safe-harbor inquiry should focus on the "transfer that the trustee seeks to avoid," rather than other component parts of the transaction. *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 892-893 (2018). The transfers that the Trust seeks to avoid here—MIFSA's payment of the $721 million and the purported transfer of Covidien and the shares of its non-pharmaceutical subsidiaries—are precisely what fall within the safe harbor. So, too, *Mervyn's* merely held that the challenged transfer there—a transfer of real estate assets, not securities—did not fall within the safe harbor, even if a separate transfer in the broader transaction might have. *In re Mervyn's Holdings, LLC*, 426 B.R. 488, 493-494, 500 (Bankr. D. Del. 2010). The opposite is true here: the Trust is challenging the transfers that *do* fall within the safe harbor, not others that may not.

2. The spinoff transfers were made "by" and "to" safe-harbored entities because Covidien plc and MIFSA were both "financial participants"

The safe harbor's only other requirement—that one of the parties to the transfer was a qualifying entity—is also doubly met because Covidien plc and MIFSA both qualified as a

"financial participant," since each had "securities contracts" or "swap agreements" with aggregate values exceeding the requisite dollar thresholds of $1 billion in face amount or $100 million on a mark-to-market basis. MTD at 32-36. The Trust's arguments in opposition fail.

Covidien plc. Covidien plc had three sets of qualifying contracts with more than sufficient aggregate value to qualify it as a "financial participant."

Separation and Distribution Agreement. The Separation and Distribution Agreement alone qualifies Covidien as a financial participant. Neither of the Trust's objections has merit.

First, although the Trust does not dispute that the Separation and Distribution Agreement was a "securities contract," it contends that this contract cannot count to make Covidien a "financial participant" because the Code defines that term to exclude an agreement "with … an affiliate," and the Agreement was with Mallinckrodt plc, a supposed "affiliate" of Covidien plc. 11 U.S.C. § 101(22A)(A); Opp. at 37-38. Not so. Mallinckrodt plc was never a subsidiary of Covidien. It was formed as a new independent holding company to own the Mallinckrodt subsidiaries after they were spun-off from Covidien. Before the spin, Mallinckrodt plc's shares were owned by seven nominee companies, in trust for an Irish corporate services provider, not by Covidien. *See* Millar Decl., Ex. 2 (Form 10-12B/A) at 178, 192. Mallinckrodt plc accordingly was not an "affiliate" of Covidien plc, as defined in the Code, 11 U.S.C. § 101(2), because Covidien never owned its shares (or operated its business or assets under a lease or operating agreement). The Separation Agreement therefore counts under the "financial participant" definition.

Second, the Trust contends that the Separation and Distribution Agreement fails to meet the requisite dollar thresholds. To the contrary, it meets both statutory thresholds, though either one alone would suffice. The Trust does not dispute that the "actual principal amount" of the

Agreement was at least $721 million, the amount MIFSA agreed to pay to repurchase a portion of its shares from Covidien plc. The Agreement further provided that, [redacted] Mallinckrodt plc would assume tax liabilities that the Complaint itself alleges were "estimated to be in the hundreds of millions of dollars." *See* Compl. ¶¶ [redacted], 189. And, according to the Trust, the Agreement also provided for the transfer of Covidien and its non-pharmaceutical subsidiaries which the Complaint itself alleges were worth "$20 billion." *See id.* ¶¶ 1, 12, 223(c), (g), 224, 236; MTD at 34. The Trust objects that the amounts of these assumed tax liabilities and non-pharmaceutical businesses cannot be determined on a motion to dismiss because they are not stated on the face of the Agreement. Opp. at 38-39. But those alleged values come right out of the Complaint, and they mean that under the Trust's own allegations Covidien easily qualified as a "financial participant" under the Code's definition of that term, which specifies that any entity that has at least $1 billion in face amount of securities contracts so qualifies.

The Separation and Distribution Agreement also met the requisite dollar threshold under the alternative $100 million mark-to-market test. The market value of a contract to pay $721 million in cash is $721 million. The Trust objects (Opp. at 39) that mark-to-market valuations often require expert testimony that cannot be resolved on a motion to dismiss, citing *In re Samson Res. Corp.*, 625 B.R. 291 (Bankr. D. Del. 2020). But unlike the open swap positions at issue in *Samson*, *see id.* at 302-303, no expert testimony is required to conclude that the market value of $721 million in cash is $721 million. *See Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973) ("market value" is "what a willing buyer would pay in cash to a willing seller" (internal quotation marks and citations omitted)).

Swap agreements. Covidien plc also qualified as a "financial participant" under the $1 billion face-value test because it had swap agreements with a notional principal amount of $1.2 billion at the time of the spin. MTD at 34. The Trust does not dispute that swap agreements in that amount would meet the test, but it contends that whether Covidien in fact had pending swaps in that amount cannot be resolved on a motion to dismiss. That is incorrect. Contrary to the Trust's contention, the Court may consider on a motion to dismiss Covidien's 10-Q attesting to its swap positions. *See NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1331 (3d Cir. 2002); *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000). Thus, in *Quorum Health*, in which the court granted a motion to dismiss fraudulent-transfer claims as barred by the safe harbor, the court took judicial notice of facts disclosed in the transferee-parent company's 10-K filings, although those filings were not relied upon or integral to the complaint, to hold that the parent was a "financial participant." 2023 WL 2552399, at *6-8; *accord In re Am. Home Mortg. Holdings, Inc.*, 388 B.R. 69, 85-87 (Bankr. D. Del. 2008) (relying on 10-Q outside complaint to hold transferee was safe-harbored stockbroker). Nor does this question require expert discovery. Unlike *Samson*, which (as noted) valued swaps under the mark-to-market value test, the swaps here qualify under the "notional principal amount" test—a test that, as the Trust itself acknowledges (Opp. at 38-39), does not require valuation evidence but simply looks to the swaps' face amount.

Also unavailing is the Trust's objection that Covidien's 10-Q does not establish, as between Covidien plc and its subsidiaries, which entities were parties to the swaps. Opp. at 41. According to the Complaint, Covidien plc and its subsidiaries were a "single economic enterprise" and "alter egos" whose "corporate separateness … should be disregarded." Compl. ¶¶ 132, 146. The Trust cannot have it both ways. If it is going to take the position that Covidien

plc and its subsidiaries were a single entity, then that single entity's $1.2 billion in swap holdings qualifies it as a financial participant and the Trust's spinoff fraudulent-transfer claims are barred.

Debt-securities contract. The Trust's objections to Covidien plc's third qualifying contract, a $750 million debt-securities contract entered into shortly before the spinoff, also fail. MTD at 35. As with the swap agreements, the Trust's argument (Opp. at 42) that the Court cannot consider Covidien's SEC filings attaching the contract is wrong as a matter of law.

The Trust's further argument (Opp. at 42) that this agreement does not qualify as a "securities contract" is likewise without merit. The contract undisputedly provided Covidien International Finance S.A. an option to redeem (and the noteholders an option to sell) the debt securities at a price of $750 million plus a premium, which Covidien plc guaranteed. The contract accordingly falls squarely within the definition of a "securities contract" as a "contract for … an option to purchase or sell … a[] … security." 11 U.S.C. § 747(7)(A)(i); *In re Quebecor World (USA) Inc.*, 719 F.3d 94, 98-99 (2d Cir. 2013) (holding that a contract providing the issuer an option to repurchase its debt securities is a "securities contract"), *abrogated in part on other grounds by Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018); *Quorum*, 2023 WL 2552399, at *7-8 (holding that parent of spun-off debtor was a "financial participant" because SEC filings showed parent completed a private offering of $1.4 billion in notes, which was a qualifying "securities contract" with a total gross dollar value exceeding $1 billion).[14]

[14] Although the contract in *Quorum* provided for the purchase and sale of notes, rather than an option to purchase (or sell) notes as here, both fall within the definition of "securities contract" as a "contract for the purchase [or] sale … of a security … or … an option to purchase or sell any such security." 11 U.S.C. § 741(7)(A)(i). The Trust's reliance on *Qimonda* and *MPM* is misplaced because neither decision identified any similar option granted in the agreements at issue for either party to purchase a security. *See In re Qimonda Richmond, LLC*, 467 B.R. 318, 323 (Bankr. D. Del. 2012); *In re MPM Silicones, LLC*, 2014 WL 4436335, at *21 (Bankr. S.D.N.Y. Sept. 9, 2014), *aff'd sub nom. U.S. Bank N.A. v. Wilmington Sav. Fund Soc'y, FSB (In re MPM Silicones, LLC),* 531 B.R. 321 (S.D.N.Y. 2015), *aff'd in part, rev'd in part on other grounds and remanded sub nom. Momentive Performance Materials Inc. v. BOKF, NA (In re MPM Silicones, L.L.C.)*, 874 F.3d 787 (2d Cir. 2017).

The Trust's alternative argument that the contract does not count because the counterparties were affiliates of Covidien plc (Opp. at 42) starts from a false premise. The counterparty to the contract was Deutsche Bank Trust Company Americas, as trustee for third-party holders of the debt securities. *See* Millar Decl., Ex. 15 (Covidien plc Form 8-K), Ex. 4.1.

Also without merit is the Trust's final argument that the contract is a guarantee whose amount is limited to damages measured under Bankruptcy Code § 562, supposedly requiring further fact development. The definition of "securities contract" provides that the guarantee of a securities contract is itself a "securities contract," although the amount of such contract may "not … exceed" any "damages … measured in accordance with section 562." 11 U.S.C. § 741(7)(A)(xi). That damages limitation on the amount of the contract is inapplicable here because section 562 never came into play. Section 562 applies only if the contract has been rejected by the trustee in bankruptcy or liquidated, terminated or accelerated by the financial participant. *Id.* § 562(a). Here, the contract was not with any Mallinckrodt debtor and hence could not have been rejected in the bankruptcy proceedings, nor has Covidien plc liquidated, terminated or accelerated the contract in response to the bankruptcy. Accordingly, no damages have been determined under section 562, and the corresponding damages limitation simply does not apply to the $750 million principal amount of this contract.

MIFSA. While the safe harbor's qualifying-entity requirement is fully met because Covidien plc qualified as a "financial participant," that requirement is independently satisfied because MIFSA also qualified as a "financial participant." As discussed, the Trust does not dispute that the Separation and Distribution Agreement was a "securities contract" and that it had a "market" value of $721 million, since that was the amount that MIFSA paid in cash to repurchase its shares. It thus easily meets the $100 million mark-to-market test, thereby

qualifying MIFSA as a "financial participant" on that basis alone. But MIFSA also qualified as a "financial participant" under the alternative $1 billion face amount test because, in addition to the $721 million Separation and Distribution Agreement, MIFSA was party to a second "securities contract" with a principal amount of at least an additional $900 million—the debt-securities contract it entered into in connection with the spinoff giving it the option to redeem its debt securities for $900 million plus a premium. MTD at 35-36. The Trust's objections with respect to MIFSA's debt-securities contract mirror its objections to Covidien plc's debt-securities contract and fail for the same reasons just discussed. *See also* Millar Decl., Ex. 16 (Covidien plc Form 8-K), Ex. 4.1 (MIFSA's contract was not with an affiliate, but Deutsche Bank Trust Company Americas, as trustee for third-party holders of the debt securities).

The Trust's alternative argument—that MIFSA, as a debtor, cannot qualify as a "financial participant"—is contrary to the statute's text and the weight of authority, including the only decision from this district. As Judge Shannon has explained, "Congress knows how to exclude the debtor from defined terms," but it failed to do so in the definition of "financial participant," providing instead that a "financial participant" is any "entity" (not an "entity *other than the debtor*") having the requisite agreements "with the debtor *or any other entity* (other than an affiliate)." *Samson*, 625 B.R. at 299-301 (emphasis in original); *accord In re Taylor, Bean & Whitaker Mortg. Corp.*, 2017 WL 4736682, at *5-6 (Bankr. M.D. Fla. Mar. 14, 2017). The sole contrary decision the Trust cites (the district court's ruling in *Tribune*) is from outside this Circuit and is unpersuasive for the reasons set forth in *Samson*. 625 B.R. at 299-301.

Finally, the Trust's contention that the safe harbor is a fact-intensive affirmative defense that cannot be resolved on a motion to dismiss is misguided. If the safe harbor is really going to provide safety, it needs to cut off claims that fall within its terms at the outset of litigation, so as

not to expose securities participants to undue risk and cost. The courts have so held. The Third Circuit has affirmed the grant of a motion to dismiss based on the safe harbor, as has the Second Circuit, where, as here, the complaint and documents cognizable on a motion to dismiss showed that the safe harbor barred the claims. *See Plassein*, 590 F.3d at 254-256; *In re Trib. Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 75 & n.5, 97 (2d Cir. 2019), *cert denied sub nom., Deutsche Bank Tr. Co. Ams. v. Robert R. McCormick Found.*, 141 S. Ct. 2552 (2021).[15]

D. The Trust Cannot Avoid The Purported Transfer Of Covidien And Its Non-Pharmaceutical Subsidiaries In The Spinoff

The Trust's fraudulent-transfer claims should be dismissed to the extent that the Complaint seeks to avoid the supposed "transfer of Covidien and its [non-pharmaceutical] subsidiaries" (Compl. ¶¶ 224, 236) because the Complaint fails to plead an essential element of that claim: that the Mallinckrodt debtors ever owned the purportedly "transferred" entities—Covidien and its non-pharmaceutical subsidiaries—in the first place. That is fatal to the Trust's claims because the Trust must allege that there was a "transfer of an interest *of the debtor* in property" to state a claim. 11 U.S.C. § 544(b)(1) (emphasis added); *Begier v. IRS*, 496 U.S. 53, 58 (1990); *accord, e.g.*, Del. Code Ann. tit. 6, §§ 1304(a), 1305(a); MTD at 36-37. A fraudulent-transfer claim must be dismissed where, as here, the complaint fails to plead such "a transfer … by [the] debtor"; "transfers by non-debtors are not fraudulent transfers." *Crystallex Int'l Corp. v. Petróleos de Venez., S.A.*, 879 F.3d 79, 84-90 (3d Cir. 2018).

The Trust's opposition brief implicitly concedes the point. It points to no allegation in the Complaint asserting that Mallinckrodt ever owned Covidien and its non-pharmaceutical

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15 For the same reason, if the Court were to conclude that any fact issues exist that cannot be resolved on this motion to dismiss, it should direct the parties to proceed with targeted discovery and expedited summary judgment motions limited to application of the safe harbor, which could fully and promptly dispose of the Trust's fraudulent-transfer claims to avoid the transfers, without the need for the parties to incur the substantial expense, time, and burden that full-blown discovery regarding the spinoff would entail.

subsidiaries and transferred them—because there is none. To the contrary, the Complaint alleges that Covidien was the parent that owned the spun-off Mallinckrodt subsidiaries, not vice versa. Rather, the Trust's sole argument is that Mallinckrodt and Covidien purportedly were a single economic enterprise and alter egos. Opp. at 17-22. That argument fails for numerous reasons.

To begin with, even a meritorious veil-piercing or alter-ego claim does not state a claim for fraudulent transfer. The veil-piercing and alter-ego doctrines allow creditors of a subsidiary to disregard the parent's limited liability as a shareholder and assert their claims against the parent. They do not make the parent's assets property of the subsidiary, as would be required for Mallinckrodt's creditors (or the Trust here) to state a fraudulent-transfer claim for any purported transfer of Covidien's assets. *See, e.g.*, *Owens Corning*, 419 F.3d at 205-206 ("where a subsidiary is so dominated by its corporate parent as to be the parent's 'alter ego,' the 'corporate veil' of the subsidiary can be … 'pierced,'" "mak[ing] shareholders liable for corporate wrongs"; distinguishing veil-piercing claims from "fraudulent transfer [claims, which] bring back to the transferor debtor assets improperly transferred to another (often an affiliate)"). Indeed, saying that the *subsidiary* owns the *parent*'s assets is irreconcilable with the basis for asserting an alter-ego or veil-piercing claim—i.e., that the *parent* dominated the *subsidiary* and used the subsidiary's assets as the parent's own property, not the other way around.[16]

In any event, as discussed below (*see infra* Section III), the Complaint fails to allege the exceedingly rare facts required to sustain a claim for veil-piercing or alter-ego liability.

[16] The Trust's reliance (Opp. at 17-18) on *Crystallex,* 879 F.3d 79, is misplaced. That decision merely suggested in dicta that a *parent*'s creditor might avoid a transfer by a dominated *subsidiary* that was the parent's alter ego, not that the subsidiary's creditors could avoid a transfer by the parent. In any event, *Crystallex* did not address that question because the complaint at issue did not allege a transfer by any alter ego of the debtor. *See id.* at 84-85 & n.7. The Trust's only other authorities (Opp. at 18 n.14) applied the laws of Georgia, South Carolina, Nevada, and Alabama, none of which is alleged to apply here.

Accordingly, the Trust's fraudulent-transfer claims to avoid the purported "transfer" of Covidien and its subsidiaries should be dismissed.

II. THE TRUST'S CLAIM FOR BREACH OF FIDUCIARY DUTY (COUNT V) IS TIME-BARRED AND FAILS TO STATE A CLAIM

A. The Claim Is Time-Barred

The Trust implicitly concedes that its breach of fiduciary claim is time barred if Delaware or Irish law applies, *see* MTD at 37-38, arguing instead only that Massachusetts law applies and that its claim is timely under the law of that state. Opp. at 45-46. That argument is triply wrong.

First, the Trust concedes that Delaware's choice-of-law rules apply (Opp. at 45), but then proceeds to disregard them at each turn. The Trust thus ignores the dispositive legal principle: under Delaware's choice-of-law rules, a statute of limitations is procedural and accordingly governed by the law of the forum, Delaware, which has a three-year statute of limitations for breach of fiduciary duty claims—meaning the Trust's claim expired in 2016, three years after the spinoff. *See Gavin v. Club Holdings, LLC*, 2016 WL 1298964, at *3 (D. Del. Mar. 31, 2016); Del. Code Ann. tit. 10, § 8106; MTD at 37-38. Indeed, even where, as here, the claim arguably arose outside of Delaware, Delaware's borrowing statute applies the *shorter* of Delaware's three-year period or the period under the law where the claim arose. Del. Code Ann. tit. 10, § 8121; MTD at 38. The Trust's only response is that the Delaware borrowing statute should be disregarded because, the Trust says, it is not guilty of forum shopping. Opp. at 46. That argument is foreclosed by both the words of the statute and controlling Third Circuit law. Nothing in the borrowing statute limits its application to cases in which the plaintiff is guilty of forum shopping. Del. Code Ann. tit. 10, § 8121. The Third Circuit has thus held that the borrowing statute applies even in the absence of forum-shopping, explaining that "[w]hile there is no indication in this case that [the plaintiff] sought a tactical advantage by filing suit in the

District of Delaware, the plain language of the [Delaware] borrowing statute applies just the same." *Perkins v. Procter & Gamble Co.*, 2022 WL 1125388, at *2 n.*** (3d Cir. Apr. 15, 2022) (citing *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.,* 866 A.2d 1, 16-17 (Del. 2005)).[17] *Perkins* is dispositive and requires the dismissal of the Trust's fiduciary duty claim.

Second, even if the limitations period were not procedural and instead the law of the jurisdiction that applies in assessing the substantive elements of the claim also governed with respect to the limitations period, the Trust's claim would still be time barred. The Trust claims that Covidien breached a fiduciary duty that it supposedly owed Mallinckrodt plc, the new holding company formed in connection with the spin. Mallinckrodt plc was incorporated in Ireland and, under the internal affairs doctrine, the law of the jurisdiction of incorporation normally applies to a fiduciary duty claim. This matters because, as set forth in the motion to dismiss, the Trust's claim would be untimely under Irish law, a proposition the Trust does not dispute. Instead, the Trust again disregards Delaware's choice-of-law rules in contending that the internal affairs doctrine does not apply here to determine where the Trust's claim arose because the Trust is not suing a director or officer of Mallinckrodt plc. Opp. at 45 n.39. That argument, like the Trust's others, disregards controlling law. The internal affairs doctrine governs *any* "issues relating to internal corporate affairs"—including not only "the relationships *inter se* of the corporation, its directors, officers and shareholders," *Salzberg v. Sciabacucchi*,

[17] *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 866 A.2d 1, 16-17 (Del. 2005), cited by the Trust (Opp. at 46), is not to the contrary. On the facts of that case, *Saudi* declined to impose the borrowing statute because its application there would have *rewarded* forum shopping. The plaintiff had strategically filed in Delaware, knowing that the defendant's counterclaim would be time-barred under Delaware law. *Id.* at 17. Since then, several courts have applied the borrowing statute even when the plaintiff was not guilty of forum shopping, so long as doing so would not reward forum shopping. *See, e.g., TL of Fla., Inc. v. Terex Corp.*, 54 F. Supp. 3d 320, 327 (D. Del. 2014); *TrustCo Bank v. Mathews*, 2015 WL 295373, at *8 (Del. Ch. Jan. 22, 2015); *see also Huffington v. T.C. Grp., LLC*, 2012 WL 1415930, at *9 (Del. Super. Ct. Apr. 18, 2012) ("*Saudi Basic* did not create a broad rule banning the use of the borrowing statute in all situations except for the 'typical' [forum-shopping] scenario.").

227 A.3d 102, 128 (Del. 2020)—but also the "*[s]teps taken in the course of the original incorporation*," i.e., the very "promotion" of a corporation that forms the basis of the Trust's claim here. *In re PHP Healthcare Corp.*, 128 F. App'x 839, 843 (3d Cir. 2005) (per curiam) (quoting *Restatement (Second) of Conflict of Laws* § 302 cmt. a (1971) (emphasis added)). The Trust's claim is therefore time barred, whether Irish or Delaware law applies.

Third, the claim would also be time barred even if Massachusetts law applies. As the Trust concedes (Opp. at 46), Massachusetts has a three-year statute of limitations, which had long expired by the time Mallinckrodt filed for bankruptcy seven years after the spin. The Trust's sole response is that, under the "adverse domination" doctrine, the running of the statute was tolled "until the facts giving rise to liability become known to a stockholder or disinterested director." *Id.* But Mallinckrodt plc was formed in June 2013, and it immediately became an independent, publicly owned company, governed by a board of directors comprised of a majority of directors who were not former or current directors, officers or employees of Covidien.[18] Moreover, even if the Complaint alleged that any pertinent facts were withheld from the public—and, as discussed, it does not, instead expressly alleging that "the high demand for Mallinckrodt's generic opioids in the black market was public knowledge" prior to the spin (Compl. ¶ 121)—it does not allege that Covidien knew more about the liability and litigation risks presented by Mallinckrodt's sale of opioids than Mallinckrodt's own management knew. If anyone could have predicted the future of opioid litigation that had not even begun by the time of the spin and Mallinckrodt's potential exposure, it was Mallinckrodt itself.

In short, there is no credible argument that the fiduciary duty claim is timely.

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[18] *See* Millar Decl., Ex. 2 (Form 10-12B/A) at 112-115 (immediately following the spin, seven of Mallinckrodt's nine directors were not former or current directors, officers, or employees of Covidien); *see also id.* at 111 ("Upon completion of the separation, none of our executive officers will be executive officers or employees of Covidien.").

B. The Complaint Fails To State A Claim For Breach of Fiduciary Duty

The Trust concedes that Covidien did not owe any fiduciary duties to any of the Mallinckrodt subsidiaries that were spun off. Opp. at 47-48; MTD at 39. And the Trust's claim that Covidien breached a fiduciary duty supposedly owed to Mallinckrodt plc, as a promoter of Mallinckrodt plc's formation, fails as a matter of law.

The Trust's contention (Opp. at 47) that Covidien breached its duty by purportedly stripping Mallinckrodt plc of assets fails because, as the Complaint acknowledges (Compl. ¶¶ 9, ███), Covidien formed Mallinckrodt plc as a new parent company to acquire the stock of the Mallinckrodt subsidiaries in the spinoff, and hence Mallinckrodt plc had no assets—and nothing that could be "stripped"—before the spinoff. Likewise, the Trust's claim that Covidien failed to disclose "the true nature and scope of the opioid-related liabilities that were being left with the Debtors" (Opp. at 47) fails for the reasons just discussed—whatever Covidien supposedly knew about those potential liabilities was, according to the Complaint itself, a matter of "public knowledge" and, in any event, was best understood, if by anyone, by Mallinckrodt itself.

The Complaint also fails to allege any facts showing that Covidien obtained any "secret profits" in the formation of Mallinckrodt plc, as required to state a claim for breach of fiduciary duty by a supposed "promoter." *See* MTD at 40. The SEC filings for the spinoff disclosed the $721 million that MIFSA paid to Covidien, the prior Cash Transfers, the other supposed transfers, and the *mutual* indemnities granted by the parties—indemnities that ran *in favor of* Mallinckrodt plc as to Mallinckrodt's most-significant known environmental liability, which Covidien plc assumed. *Id.* The Trust's breach of fiduciary duty claim should be dismissed.

III. THE TRUST'S REIMBURSEMENT, INDEMNIFICATION OR CONTRIBUTION CLAIM (COUNT VI) HAS NO BASIS IN LAW

As Covidien set forth in its motion to dismiss, the Trust fails to state a claim for reimbursement, indemnification, or contribution from Covidien—for all of Mallinckrodt's own opioid liability and bankruptcy expenses—because the Complaint fails to plead any factual or legal basis for such an extraordinary claim. MTD at 40-41. The Trust's sole argument in response is that such liability could exist under an alter-ego theory. Opp. at 48-50. But the Trust has not remotely pled what would be required to state a claim for such extraordinary relief.[19]

A corporation's "'veil may be pierced' only in extraordinary circumstances," where "'the corporate form would otherwise be misused to accomplish … wrongful purposes.'" *Trinity Indus., Inc. v. Greenlease Holding Co.*, 903 F.3d 333, 365 (3d Cir. 2018) (quoting *United States v. Bestfoods*, 524 U.S. 51, 62 (1998)); MTD at 42. Indeed, while he declined to dismiss alter-ego claims based on the extraordinary allegations in the case before him, Judge Shannon recently articulated the demanding legal standard for such claims, which the Trust does not come close to meeting here: "a plaintiff must allege facts demonstrating the parent corporation's complete domination and control of the subsidiary 'to the point that [the subsidiary] no longer has legal or independent significance of [its] own'" and that "the [subsidiary] is a sham and exists for no other purpose than as a vehicle for fraud." *Quorum*, 2023 WL 2552399, at *14-15 (quoting

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[19] The Trust has not even shown that it has standing to bring a claim for alter-ego or veil-piercing liability. To establish standing, the Trust must show (among other things) that "the [Mallinckrodt] debtor[s] could have asserted the claim on [their] own behalf under state law." *In re Emoral, Inc.*, 740 F.3d 875, 879 (3d Cir. 2014) (internal quotation marks and citation omitted); *In re TPC Grp., Inc.*, 2023 WL 2168045, at *5-6 (Bankr. D. Del. Feb. 22, 2023); *In re Maxus Energy Corp.*, 571 B.R. 650, 656-659 (Bankr. D. Del. 2017). Ignoring this requirement, the Trust fails to identify what law it is invoking, much less show that Mallinckrodt could have brought an alter-ego or veil-piercing claim outside bankruptcy under that law, notwithstanding that some states do not permit a debtor to do so. *See* MTD at 42. But even assuming the Trust could establish standing, its claim would still fail as discussed in text.

Wallace ex rel. Cencom Cable Income Partners II, L.P. v. Wood, 752 A.2d 1175, 1180 (Del. Ch. 1999)).

Far from alleging such a fraudulent abuse of the corporate form here, the Trust merely alleges that Covidien and the Mallinckrodt subsidiaries [REDACTED], had overlapping officers and directors, and used consolidated financial statements and an integrated cash management system. Opp. at 19-20. Such common arrangements, which facilitate corporate efficiencies, "are consistent with the parent's investor status" and "should not give rise to direct liability" of the parent. *Bestfoods*, 524 U.S. at 72; *see, e.g.*, *Trinity*, 903 F.3d at 364 (that parent's "accountants, actuaries, and lawyers" "[h]elp[ed] with administrative work is consistent with a typical parent-subsidiary relationship"); *Teleglobe Commc'ns Corp.*, 493 F.3d 345, 69 (3d Cir. 2007) ("parent companies often centralize the provision of legal services to the entire corporate group in one in-house legal department"); *Owens Corning*, 419 F.3d at 213-214 (refusing to disregard corporate separateness of parent and its subsidiaries based on lack of separate financials for subsidiaries).[20]

[REDACTED] —but also insufficient to establish alter-ego liability. "Alter ego status cannot be inferred whenever a shareholder withdraws some monies from a corporation"; even where such "withdrawals may be

[20] The Trust's reliance (Opp. at 19-20) on *Blair v. Infineon Techs. AG*, 720 F. Supp.2d 462, (D. Del. 2010), is misplaced. The court there applied a "more lenient" "alter ego standard for piercing the corporate veil" applicable to ERISA claims. *See id.* at 471. Moreover, in contrast to the run-of-the-mill parent-subsidiary relationships alleged here, the parent in that case allegedly "carri[ed] out the group's management and corporate functions," "prevented [the subsidiaries] from honoring obligations to their employees," "misdirected funds, exercised crippling control, and purposely siphoned profits from the Qimonda subsidiaries in favor of propping up [the parent] Qimonda AG," including "forcing [the subsidiaries] to give 87% of their revenue to [the parent]." *Id.* at 472-473.

voidable … as fraudulent conveyances, … they [do not] justify piercing the corporate veil," absent a "show[ing] that [the corporation] was a sham [that the shareholder] manipulated in fraud of its creditors." *Kaplan v. First Options of Chi., Inc.*, 19 F.3d 1503, 1521-1523 (3d Cir. 1994) (reversing finding of alter-ego liability even though shareholder siphoned substantial funds and disregarded corporate formalities), *aff'd*, 514 U.S. 938 (1995).[21]

Similarly, the Trust's contention that Covidien and Mallinckrodt allegedly used a common name or branding in marketing opioids (Opp. at 20) provides no basis for veil-piercing or alter-ego liability. Affiliated corporations frequently market their products under a common corporate name or logo (e.g., Ford, GM, Citi, GE), but that does not make them alter egos. *See, e.g.*, *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 266-267 (D. Del. 1989) (rejecting alter-ego claim despite allegations that parent and subsidiary used the same corporate name).

Finally, as the Trust acknowledges (Opp. at 18), even if the Trust had alleged facts showing that Covidien and the Mallinckrodt subsidiaries were operated as a single entity (and it has not), it would still need to show that "an overall element of injustice or unfairness … [is]

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[21] The few cases the Trust cites as purportedly sustaining alter-ego liability based on "siphoning of funds" (Opp. at 18-19) involved extreme shareholder domination and are readily distinguishable. *See Trs. of Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v Lutyk*, 332 F.3d 188, 195-196 (3d Cir. 2003) (sustaining alter-ego liability where sole shareholder, president, and director of closely held corporation drained the company's assets while it was deeply insolvent; disregarded corporate formalities; commingled the company's assets with the shareholder's own; "freely [took] funds from the company accounts as he saw fit and when he saw fit"; "employed members of [his] family for substantially inflated compensation"; and used "corporate funds … to pay entertainment expenses for [the shareholder] and his daughter," including "yacht and golf club fees"); *Soroof Trading Dev. Co. v. GE Microgen, Inc.*, 283 F.R.D. 142, 150-152 (S.D.N.Y. 2012) (parent provided all of subsidiary's financing; subsidiary had no employees; parent's own employees operated the subsidiary; parent used the subsidiary's earnings from creditor to pay parent's own employees; parent then directed subsidiary's dissolution, leaving creditor with nothing; and hence subsidiary's "corporate form ha[d] been erected for a fraudulent purpose—*i.e.*, to solicit funds … on behalf of [the subsidiary] when, in fact, such funds [were] to be used for [the parent's] benefit" (internal quotation marks omitted)); *Bridas S.A.P.I.C. v. Gov't of Turkm* , 447 F.3d 411, 420 (5th Cir. 2006) (foreign-government-controlled corporation was government's alter ego where government financed the company; company "was grossly undercapitalized with … $17,000, a paltry sum to finance oil and gas exploration and production"; there was an "absence of any financial statement or balance sheet for [the company]"; the company's "revenues were diverted to a State Oil and Gas Fund"; the government "changed the law to prevent [the company's] assets from being seized by a creditor"; the "[company] maintain[ed] what amount[ed] to a 'zero balance,' … rel[ying] exclusively upon [the government] to service its debts"; and "the Government … exercised its power as a parent entity to deprive [the creditor] of a contractual remedy").

present" to impose veil-piercing or alter-ego liability. *In re Foxmeyer Corp.*, 290 B.R. 229, 235-236 (Bankr. D. Del. 2003) (internal quotation marks and citation omitted). The Trust has failed to do so. The only alleged "injustices" the Trust cites are the alleged fraudulent transfers and Mallinckrodt's alleged opioid misconduct. Opp. at 22. As discussed, the Trust's fraudulent-transfer claims fail as a matter of law but, even if they were viable, neither they nor Mallinckrodt's alleged wrongdoing in selling opioids could provide the "injustice" required for alter-ego liability. That element of alter-ego liability requires "a showing of fraud or something like fraud." *Mobil*, 718 F. Supp. at 268. And, critically, the "underlying cause of action"—like the alleged fraudulent transfers and opioid misconduct the Trust cites here—"does not supply the necessary fraud or injustice." "To hold otherwise would render the fraud or injustice element meaningless, and would sanction bootstrapping"; rather, "[t]he law requires that fraud or injustice be found in the defendants' use of the corporate form." *Id.* at 268-269; *Quorum*, 2023 WL 2552399, at *15 (defendant must have "created a sham entity designed to defraud investors and creditor[s]" (internal quotation marks omitted)). That requirement is not met here because the Trust has not alleged any facts showing that Covidien formed the Mallinckrodt subsidiaries at all (they pre-existed by many decades Covidien's acquisition of those subsidiaries in 2007; *see* MTD at 6-7), let alone that it did so to orchestrate a fraud on Mallinckrodt's creditors.

IV. THE TRUST'S CLAIMS TO SUBORDINATE OR DISALLOW COVIDIEN'S INDEMNIFICATION PROOFS OF CLAIM SHOULD BE DISMISSED

A. The Trust's Equitable-Subordination Claim (Count VII) Fails

The Trust's claim to equitably subordinate Covidien's indemnity claims under the Separation and Distribution Agreement fails to state a claim for numerous reasons. For one, the Trust's opposition brief, like its Complaint, fails to cite anything inequitable about Covidien's indemnification claim. The Trust does not and cannot dispute that the Separation and

Distribution Agreement provided for mutual indemnifications, with Mallinckrodt indemnifying Covidien for liability and costs arising out of Mallinckrodt's business, but with Covidien similarly indemnifying Mallinckrodt for liability and costs arising out of Covidien's business (and for any environmental expenses arising out of Mallinckrodt's own operation of a facility in Maine); that such mutual indemnifications are standard in spinoffs; and that, in fact, Covidien has spent far more indemnifying Mallinckrodt (as much as $187 million relating to the Maine facility) than the $15,000 or so in legal fees Covidien has incurred to date relating to opioid litigation for which it is seeking indemnification. Instead, the Trust contends that Covidien engaged in "inequitable conduct" by allegedly directing the supposed fraudulent transfers, breaching its supposed fiduciary duty to Mallinckrodt plc, and allegedly treating Mallinckrodt as a "mere instrumentality" of Covidien. Opp. at 52-53. But, for the reasons discussed, those claims all fail.

In any event, Covidien's supposed "misconduct" has nothing to do with its proof of claim for indemnification. The Trust fails to allege that Covidien did anything in obtaining a standard, mutual indemnity right under the Separation and Distribution Agreement that gave it an unfair leg up on Mallinckrodt's other creditors. The Trust's contention (Opp. at 51 n.43, 53-54) that it need not show that Covidien harmed other creditors' relative claim positions is wrong. To state a claim for equitable subordination, the Complaint must (among other things) show that "the higher priority creditor … engaged in inequitable conduct" that "injured a lower priority creditor or unfairly advantaged the misbehaving creditor," *In re John Varvatos Enters. Inc.*, 2022 WL 2256017, at *2 (3d Cir. June 23, 2022), or that subordination is necessary "to undo or to offset *any inequality in the claim position* of a creditor that will produce injustice or unfairness to other creditors *in terms of the bankruptcy results,*" *In re Winstar Commc'ns, Inc.*, 554 F.3d 382, 411

(3d Cir. 2009) (internal quotation marks and citations omitted) (emphasis added). Covidien did nothing to elevate the priority of its claim or obtain an unequal share of distributions by obtaining a standard indemnity right that, if allowed, will simply allow Covidien to share pro rata with other general unsecured creditors with opioid-related claims under Mallinckrodt's confirmed plan of reorganization.

Under these circumstances, subordinating Covidien's claim would be "inconsistent with the Bankruptcy Code," which requires that general unsecured claims in the same class receive the same treatment. *Varvatos*, 2022 WL 2256017, at *2; 11 U.S.C. § 1123(a)(4). The Trust's equitable-subordination claim should be dismissed.

B. The Trust's Equitable-Disallowance Claim (Count VIII) Seeks Relief The Code Does Not Permit

The Trust's equitable-disallowance claim not only has no basis in fact—as discussed, the Complaint does not allege anything inequitable about Covidien's proof of claim for indemnification—but also no basis in law. The Bankruptcy Code provides that a bankruptcy court "shall" allow a claim, "except to the extent" that it falls under one of nine enumerated bases for disallowance, none of which permits disallowance on "equitable" grounds. 11 U.S.C. § 502(b). The Supreme Court has held that the statute means what it says: claims "will be allowed in bankruptcy unless they are *expressly* disallowed" under "§ 502(b)." *See Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 452 (2007) (emphasis added). If the drafters of the Code had intended to include equity as a basis for disallowance, they could and would have so specified. *Compare* 11 U.S.C. § 510(c) (providing solely for "equitable *subordination*," not equitable disallowance, of claims (emphasis added)). They did not, and numerous decisions, including two in this District, have accordingly rejected equitable disallowance as a cause of action. *See* MTD at 47.

The Trust's reliance (Opp. at 55-56) on *Pepper v. Litton*, 308 U.S. 295 (1939), is misplaced. *Pepper* was decided under the former Bankruptcy Act, which generally granted bankruptcy courts the equitable power to allow and disallow claims and did not confine the court's authority to disallow claims to an exclusive list of explicit statutory exceptions, as § 502(b) does under the current Bankruptcy Code. *See id.* at 303-305 & nn.7, 9, 12 (citing §§ 2(2), 57(k) of former Bankruptcy Act); Bankruptcy Act of July 1, 1898, ch. 541, §§ 2(2), 57, 30 Stat. 544, 545, 561, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 401(a), 92 Stat. 2549, 2682; *Citicorp Venture Cap., Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982, 991 n.7 (3d Cir. 1998) (noting that *Pepper* authorized equitable disallowance "under *pre-Code* law" (emphasis added)). And where, as here in the modern Bankruptcy Code, Congress has expressed its intent in the plain language of the statute, the statute's text must be applied as written. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms" and "reference to legislative history and to pre-Code practice is hardly necessary").[22] The Trust's equitable-disallowance claim should be dismissed.

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[22] Contrary to the Trust's suggestion (Opp. at 56), the Third Circuit did not hold in *Citicorp* that equitable disallowance is permitted, but rather found it "unnecessary … to resolve the issue as to whether equitable 'disallowance' remains an available remedy" under the Bankruptcy Code because the committee had requested equitable subordination under § 510(c) instead. *See Citicorp*, 160 F.3d at 991 n.7. Similarly, while *Washington Mutual* suggested that equitable disallowance might be available in an extreme instance, it concluded that the claims before it were also disallowable under § 502(b)(1) and applicable non-bankruptcy law. *In re Wash. Mut., Inc.,* 461 B.R. 200, 256-259 (Bankr. D. Del. 2011), *vacated in part on other grounds*, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012). And *In re Adelphia Commc'ns Corp.*, 365 B.R. 24, 71 (Bankr. S.D.N.Y. 2007), *aff'd in part sub nom. Adelphia Recovery Tr. v. Bank of Am., N.A.*, 390 B.R. 64 (S.D.N.Y. 2008) (Opp. at 55), which relied on conflicting legislative history, is unpersuasive for the reasons discussed in *In re LightSquared Inc.*, 504 B.R. 321 (Bankr. S.D.N.Y. 2013), *see id.* at 335-344, which both Judge Silverstein and Judge Carey endorsed. *See* Millar Decl., Ex. 19 (*Elk Petroleum*) at 2-3; *In re Hercules Offshore, Inc.*, 565 B.R. 732, 760 & n. 214 (Bankr. D. Del. 2016).

C. The Trust's Claim To Disallow Covidien's Indemnification Claims Under Section 502(d) Of The Bankruptcy Code (Count IX) Fails

For the reasons discussed above and in Covidien's motion to dismiss, the Trust's fraudulent-transfer claims fail as a matter of law. Accordingly, there is no avoidable transfer to support the disallowance of any claim of Covidien under section 502(d).

D. The Trust's Claim To Disallow Covidien's Indemnification Claims Under Section 502(e)(1)(B) (Count X) Should Be Dismissed

After arguing that the Court should ignore the plain language of the Code and authorize by judicial fiat an equitable-disallowance remedy nowhere provided in the statute, the Trust does an about-face and argues that the Court must follow the literal language of the Code. Noting that § 502(e)(1)(B) uses the mandatory term "shall," the Trust contends that the Court must disallow the portion of Covidien's indemnification claim that remains contingent.[23] Opp. at 57-58. But it is the Trust that ignores the words of the statute. The Code does require that the Court disallow contingent indemnification claims, but only if they remain contingent "*as of the time of allowance or disallowance*." 11 U.S.C. § 502(e)(1)(B) (emphasis added). Nothing in the statute requires the Court to make a determination as to allowance or disallowance now. And, given Covidien's statutory right of reconsideration expressly preserved in the Plan, waiting to see if the currently contingent portions of the claim become liquidated over the Trust's life will save all parties (and the Court) time and expense. Indeed, the Trust itself apparently agrees with this course of action, as it has publicly stated that it intends to ask Covidien "to agree to defer any objection to its claims at this time until such time (if ever) as these claims actually need to be liquidated." *See* Periodic Report of the Opioid Master Disbursement Trust II, D.I. 8554-1, at 4. Count X should be dismissed.

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[23] The Trust cannot and does not argue that the relatively small portion of Covidien's claim that has already been liquidated (*see* MTD at 48) should be disallowed under §502(e)(1)(B).

CONCLUSION

For the foregoing reasons and those set forth in Covidien's motion to dismiss, the Complaint should be dismissed.

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