IN THE UNITED STATES BANKRUPTCY COURT
FOR THE 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 OPPOSITION TO THE MOTION OF OPIOID MASTER DISBURSEMENT TRUST II FOR LEAVE TO FILE AMENDED COMPLAINT

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June 29, 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[2]

Leave to amend the complaint should be denied because the plaintiff, the Opioid Master Disbursement Trust II (the "Trust"), unduly delayed making its request to amend the complaint, requiring Covidien to incur substantial expense working on its papers and preparing for oral argument on its motion to dismiss the complaint. In any event, amendment would be futile.

The Trust admits that it has had access to whatever "new" documents it claims to have obtained from Mallinckrodt since at least February of this year, and that it obtained many of those "new" documents even earlier, in September of last year, before it even filed its original complaint. Yet the Trust and its counsel never informed Covidien or the Court that it intended to seek leave to amend the complaint until a mere seven business days before the hearing scheduled for argument on Covidien's motion to dismiss the Complaint—well after Covidien had incurred significant time and expense briefing and preparing for argument and long after the parties had coordinated with the Court to schedule argument on that motion.

Leave to amend the Complaint should also be denied because the proposed amendment would be futile. For the reasons set forth in Covidien's motion to dismiss and reply brief, the Complaint fails to state a claim. The proposed amended complaint does nothing to cure the complaint's myriad deficiencies.

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[2] Capitalized terms not otherwise defined herein shall have the meanings given such capitalized terms in Covidien's motion to dismiss the Complaint ("MTD") and its reply brief in support thereof ("Reply").

ARGUMENT

I. LEAVE TO AMEND THE COMPLAINT SHOULD BE DENIED BECAUSE THE TRUST UNDULY DELAYED ITS REQUEST TO AMEND THE COMPLAINT

Leave to amend should be denied because the Trust's "delay in seeking amendment is undue." *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 272-273 (3d Cir. 2001). "[T]he question of undue delay requires that [the Court] focus on the movant's reasons for not amending sooner." *Id.* at 273. Although the Trust could have filed its motion (or at least notified Covidien and the Court that it intended to do so) long before, it waited to do so until the last minute, on the eve of argument on Covidien's motion to dismiss the Complaint, in disregard of the time and resources devoted by Covidien and the Court to moving forward on the Trust's existing complaint. Under these circumstances, the motion can and should be denied.

The Trust argues that courts routinely grant leave to amend on a plaintiff's first request, particularly where the plaintiff obtained additional documents after it filed its initial complaint. Mot. at 6-10. That may be true in a typical case. But this case is anything but typical.

This is a suit in which the Trust is seeking to undo a spinoff that occurred a decade ago as an alleged fraudulent transfer. Covidien spun off Mallinckrodt in 2013, seven years before Mallinckrodt filed for bankruptcy. The transaction was widely publicized at the time and fully disclosed in filings with the Securities and Exchange Commission. Thereafter, Mallinckrodt operated as an independent public company, whose stock traded on the New York Stock Exchange with a multi-billion-dollar market capitalization for years. It was not until four years after the spinoff that private and governmental plaintiffs first began filing lawsuits against Mallinckrodt asserting claims arising out of its opioid business. More than 3,000 lawsuits were ultimately filed, many advancing a "public nuisance" theory of liability that was unheard of at the time of the spin. Most of the suits were consolidated into a multi-district litigation in a

federal district court in Ohio (the "MDL"). Many of the nation's leading plaintiffs' lawyers represented opioid plaintiffs in the MDL. The plaintiffs took extensive document and deposition discovery of Mallinckrodt. But, while it was public knowledge that Covidien previously owned Mallinckrodt and had spun it off, no opioid plaintiff ever saw fit to sue and serve Covidien asserting claims arising out of Mallinckrodt's underlying opioid business during the six short years of its roughly 150-year business life that it was an independent subsidiary of Covidien.

Nonetheless, when Mallinckrodt ultimately filed for bankruptcy in 2020—three years after the wave of opioid litigation commenced in 2017 (and as noted, seven years after Covidien spun off Mallinckrodt in 2013)—the opioid claimants' representatives took the opportunity to investigate potential claims against Covidien. An Official Committee of Opioid Related Claimants (the "OCC") was appointed in the bankruptcy, and additional ad hoc committees of opioid plaintiffs were likewise formed, including the Governmental Plaintiff Ad Hoc Committee and the Multi-State Governmental Entities Group (together with the OCC, the "Opioid-Claimant Committees"). The Governmental Plaintiff Ad Hoc Committee included the court-appointed plaintiffs' executive committee that led the efforts in the MDL. The OCC and other Opioid-Claimant Committees and/or their members were represented by leading law firms, including many of the plaintiffs' lawyers who had been actively involved in the MDL and underlying opioid litigation against Mallinckrodt.

During the bankruptcy proceedings, Mallinckrodt provided the Opioid-Claimant Committees more than a million documents produced in discovery and 43 depositions taken in the underlying opioid litigation against Mallinckrodt. Those documents and deposition transcripts became publicly available on a dedicated website by May 2022—well before the Trust filed its complaint and more than a year before it filed its motion to amend. *See* MTD at 5.

The OCC also took extensive Rule 2004 discovery during the bankruptcy proceedings, including specifically to investigate potential claims against Covidien. The OCC received tens of thousands of documents from Covidien, as well as the advisors to the spinoff (including Goldman Sachs, JPMorgan, Morgan Stanley, McKinsey, Bain and Houlihan Lokey) —all of which were focused on the spinoff and the relationship between Covidien and Mallinckrodt prior to the spin. It also obtained some 800,000 additional documents from Mallinckrodt and deposed 15 current and former Mallinckrodt directors, officers and auditors. Again, all of this occurred before the Trust filed its complaint. *See Declaration of Philip D. Anker in Support of Covidien's Opp. Mot. Opioid Master Disbursement Trust II Leave File Am. Compl.*, filed contemporaneously herewith ("Anker Decl."), ¶¶ 2-4; MTD at 5.

The Trust makes much of the fact that it was not formed until June 2022, when Mallinckrodt's confirmed plan of reorganization went effective. But the Trust is not the newcomer it claims to be. The Trust's trustees were designated by the OCC and the other Opioid-Claimant Committees. And the Trust is represented by many of the same law firms that represented the OCC and the other Opioid-Claimant Committees in the Mallinckrodt bankruptcy. Simply put, for all intents and purposes, the Trust is a continuation of the Opioid-Claimant Committees that have been actively involved in Mallinckrodt's bankruptcy proceedings since the very beginning of the bankruptcy case in 2020.

Likewise, the Trust obfuscates when it suggests that it has received additional documents from Mallinckrodt since it filed its complaint last October. The Trust admits that it began receiving those documents on a rolling basis in September 2022, a month before it filed the complaint. Mot. ¶ 14. It also admits that Mallinckrodt completed its rolling productions on February 27, 2023. *Id.* Thus, the Trust has had whatever "new" documents it received from

Mallinckrodt since at least February of this year, and potentially since much earlier. Indeed, as noted, the Trust and its Opioid-Claimant Committee predecessors have had access to millions of Mallinckrodt documents for years, many of which have been publicly available since before the Trust was created. *See* MTD at 5.

Yet the Trust never uttered a word to Covidien or the Court of the Trust's intention to move to amend the complaint until the evening of Thursday, June 15, 2023, when the Trust filed its motion—a mere seven business days before argument on Covidien's motion to dismiss was scheduled to occur.

The Trust's delay in doing so is undue. Indeed, it is extraordinary. In December 2022—more than six months ago—the Court approved a briefing schedule on Covidien's motion to dismiss.[3] The briefing schedule was not the Court's own invention. It reflected negotiations and an agreement between counsel for Covidien and counsel for the Trust. Under that schedule, Covidien's opening brief was due in late December 2022, the Trust's opposition brief was due on February 28, 2023, and Covidien's reply brief was due on March 31, 2023. *See* Anker Decl. ¶¶ 5-6. The parties met those deadlines. *See id.* ¶ 7.

The Trust admits that by the time its opposition brief was due on February 28, Mallinckrodt had completed its rolling production of documents. Mot. ¶ 14. According to the Trust, it had received over 1.3 million documents from Mallinckrodt over the prior six months—from September 2022 through February 2023—and its professionals had been "continuously reviewing these extensive productions." *Id.* at ¶¶ 14-15, 30. The Trust could have reached out to Covidien at any point during that period to inform Covidien that it was reviewing Mallinckrodt's

[3] *See Order Approving Stipulation Between Opioid Master Disbursement Trust II and Covidien Defendants*, D.I. 11.

production and considering amending its complaint. It did not. Instead, the Trust went ahead and filed its brief opposing Covidien's motion to dismiss on February 28. *See* Anker Decl. ¶ 7.

Indeed, in its February 28 opposition brief, the Trust noted that "most of the Debtors' production of documents relating to the Spinoff occurred after the Trust filed its complaint, and the production of hundreds of thousands of documents has been occurring on a rolling basis over the past several weeks and was completed only earlier this month." Opp. at 7. But the Trust did not argue that this was a reason why it should be granted leave to *amend* its complaint. Rather, it argued that this was a reason why that complaint should not be *dismissed*. *Id.* The Trust thus made clear to Covidien and the Court that it was going forward with its original complaint.

As a result, Covidien and its professionals expended significant time and resources to prepare its reply (a 40-page brief) in support of Covidien's motion to dismiss the complaint. Covidien filed that brief on March 31, 2023. At no point during the month that Covidien worked to prepare that brief did the Trust reach out to indicate that it intended to move for leave to amend its complaint. *See* Anker Decl. ¶ 7.

The Trust continued to hide the ball. After the completion of briefing, the Court's scheduling order provided for the parties to contact the Court to schedule oral argument on Covidien's motion to dismiss. In early April, Covidien's counsel contacted the Trust's lawyers to discuss dates that would work for both sides. Having done so, on April 7, counsel for Covidien contacted the Court's Chambers and proposed potential dates for argument on the motion to dismiss—dates to which the Trust's counsel had agreed in discussions with Covidien's counsel. On April 25, Covidien filed a notice of motion and hearing [D.I. 31] announcing that the Court had scheduled argument on June 27. Again, at no point during this period did the Trust

ever inform Covidien or the Court that the Trust intended to move to amend the complaint. Instead, it went forward with scheduling argument on the complaint. *See* Anker Decl. ¶¶ 9-10.

As a result, Covidien and its professionals incurred considerable further time and expense preparing for argument on the motion to dismiss—something that was entirely foreseeable to the Trust. *See* Anker Decl. ¶ 10. The Trust could likewise anticipate that the Court may have similarly spent time and resources preparing for argument. Yet—again—the Trust did not give anyone a heads up that it intended to move for leave to amend the complaint. Instead, it waited until after 6:30 p.m. on Thursday, June 15, right before a holiday weekend, to file its motion, barely a week in advance of the long-scheduled hearing on the argument for Covidien's motion to dismiss. *See* Anker Decl. ¶ 11.

The Trust obviously did not write its proposed amended complaint overnight. Rather, it plainly had been working on the amendments for weeks, and it presumably made the decision to seek leave to amend even before then. *See* Mot. ¶ 20 (stating that the proposed amended complaint "is considerably longer" than the original). Indeed, the Trust admits that by "May 24, 2023, the Trust sent Mallinckrodt's counsel … 31 documents that Mallinckrodt designated as privileged and that contained information that the Trust sought to use in its Amended Complaint."[4] Clearly, the Trust had already advanced far down the path toward amending its complaint by that point.

In short, the Trust could have and should have informed Covidien and the Court long before June 15—mere days away from the hearing on Covidien's motion to dismiss—that it intended to seek leave to amend (or was at least considering doing so). The Court would be justified in concluding that the Trust has acted in bad faith and has "sandbagged" Covidien. But

[4] *See Motion of Opioid Master Disbursement Trust II to (1) Seal Certain Confidential Information and (2) Use Certain Privilege-Designated Information, in the Amended Complaint* [D.I. 35] at 7, ¶ 23.

the Court need not so determine to find that the Trust's delay is unreasonable and certainly "undue."

Other courts have denied leave to amend a complaint in such circumstances. While the procedural posture in every case differs, the Third Circuit has repeatedly held that a district court is well within its discretion in denying leave to amend where, as here, the plaintiff waited until the eve of a key proceeding in the case to seek such leave and did not even bother to notify the defendant or the court that it was working on an amendment, forcing both the defendant and the court to spend unnecessary time and effort to prepare. *See, e.g.*, *CMR D.N. Corp. & Marina Towers Ltd. v. City of Phila.*, 703 F.3d 612, 630-631 (3d Cir. 2013) (affirming denial of leave to amend because the plaintiff "delayed filing the motion until after it had filed several briefs on the … point" and "[n]one of those filings, which occupied the District Court's time over the course of several months, mentioned the width restriction" raised in the motion to amend); *Jallad v. Madera*, 784 F. App'x 89, 95 (3d Cir. 2019) (affirming denial of motion filed four days before trial); *O'Neill v. City of Phila.*, 289 F. App'x 509, 512-513 (3d Cir. 2008) (affirming denial of motion filed one day before trial); *In re Digital Island Sec. Litig.*, 2002 WL 31667863, at *1 (D. Del. Nov. 25, 2002) (denying leave to amend, explaining that "[w]hen faced with the defendants' motion to dismiss, the plaintiffs would have been well within their rights to request leave to amend" and that, "[i]nstead, they chose to oppose the motion, in its entirety, without seeking such relief."), *aff'd*, 357 F.3d 322 (3d Cir. 2004).

As the Third Circuit has instructed, "[w]hile we are cognizant of the liberal amendment policy of the Rules, it is also true that they give district courts discretion to deny a motion in order to forestall strategies that are contrary to both the general spirit of the federal rules and the liberal amendment policy of Rule 15(a)." *CMR*, 703 F.3d at 630-631 (internal quotation marks

omitted). The Federal Bankruptcy Rules, like the Federal Rules of Civil Procedure, are meant to "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding." Fed. R. Bankr. P. 1001; Fed. R. Civ. P. 1. In a legal system where each side pays its own fees, courts have considerable discretion to prevent one party from unduly running up the expenses of the other party and causing undue delay in the resolution of the case. *CMR*, 703 F.3d at 630-631; *Cureton*, 252 F.3d at 276 (motions to amend "are committed to the District Court's sound discretion").

By contrast, none of the cases the Trust cites involved circumstances like those at issue here. *See, e.g., In re Woodbridge Grp. of Cos.*, 2021 WL 5774217, at *5 (Bankr. D. Del. Dec. 6, 2021) (motion was not filed on eve of a hearing, nor had parties expended time and expense briefing and preparing for argument on a motion to dismiss, nor had plaintiff been actively reviewing documents during all of that time without mentioning intent to file motion); *Arthur v. Maersk, Inc.*, 434 F.3d 196, 209-210 (3d Cir. 2006) (permitting amendment to assert claim against new party); *Adams v. Gould Inc.*, 739 F.2d 858, 869-870 (3d Cir. 1984) (permitting amendment to conform complaint to legal theory previously raised on same facts).

Leave to amend should be denied because of the Trust's undue delay.

II. LEAVE TO AMEND SHOULD BE DENIED BECAUSE THE PROPOSED AMENDMENT WOULD BE FUTILE

"Futility is also a sufficient ground to deny leave to amend. 'Futility' means that the complaint, as amended, would fail to state a claim upon which relief could be granted." *In re Merck & Co., Inc. Sec. Derivative & ERISA Litig.*, 493 F.3d 393, 400 (3d Cir. 2007) (citations omitted). "In assessing 'futility,' the District Court applies the same standard of legal sufficiency as applies under Rule 12(b)(6)." *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000). "[I]f a

claim is vulnerable to dismissal under Rule 12(b)(6)" and "the amendment would not cure the deficiency," leave to amend should be denied. *Id.*

This rule is dispositive here. The amended complaint would assert the same claims as the existing complaint: (1) fraudulent transfer, (2) breach of fiduciary duty, (3) reimbursement, indemnification, or contribution, and (4) subordination or disallowance of Covidien's claims for indemnification.[5] As set forth in Covidien's motion to dismiss, all of those claims fail to state a claim. None of the new allegations would cure the fatal defects.

A. The Fraudulent Transfer Claims Would Still Fail

The claims are time-barred. All of the fraudulent-transfer claims (Counts 1-IV)[6] are time-barred under the four-year statute of repose, which expired long before Mallinckrodt filed for bankruptcy. No exception suggested by the Trust applies. The proposed amended complaint does nothing to cure this deficiency.

The one-year "discovery rule" exception for intentional fraudulent-transfer claims does not apply because the challenged transfers were amply discoverable when they were publicly disclosed at the time of the spinoff in 2013. The Trust's sole response is that a few asbestos or opioid creditors were born or allegedly did not discover their injuries until the eve of bankruptcy. *See* Opp. at 23-27. That argument fails because the discovery rule does not run from the date of the claimant's injury or its discovery, but rather from when the underlying "transfer" was reasonably discoverable. *See* MTD at 16-18; Reply at 3-6. The amended complaint would not cure this deficiency, but rather would simply repeat the same legally insufficient allegations about the opioid and asbestos claimants' alleged injuries. *See* Am. Compl. ¶¶ 306-308.

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[5] The amended complaint would separate the Complaint's four avoidance counts into eight counts, but it would still seek to avoid the same transfers and obligations as the existing Complaint. *See* Mot. at 8 n.6.

[6] Counts I-IV would be subdivided into Counts I-VIII in the amended complaint.

The Trust's only other argument—that it can step into the shoes of New Jersey governmental entities and the IRS to bring timely claims—also fails. The Trust cannot step into the shoes of New Jersey or the IRS to avoid any of the challenged transfers because neither New Jersey nor the IRS was a creditor of any Mallinckrodt debtor alleged to have made the transfers. *See* MTD at 19-21; Reply at 6-9. The amended complaint would not cure that deficiency; it adds no new allegation showing that New Jersey or the IRS was a creditor of any transferor. *See* Am. Compl. ¶¶ 309-311. Furthermore, even if New Jersey and the IRS were creditors of the relevant Mallinckrodt transferor, the claims would still fail. New Jersey's claim would be untimely because the relevant statute of repose expressly applies to state governmental creditors. MTD at 18-19; Reply at 6-7. The amended complaint's continued reliance on New Jersey would run into that same legal impediment. And the Trust likewise cannot step into the IRS's shoes to avoid the challenged transfers because its claims arose long after—not before—the challenged transfers, mostly for current payroll taxes accruing at the time of the bankruptcy filing. *Id.* at 22-24; Reply at 9-12. The amended complaint would add no new allegations showing that the IRS's claims arose before the spinoff (*see* Am. Compl. ¶ 309), and hence it would not cure this defect either.

The intentional fraudulent-transfer claims fail. The intentional fraudulent-transfer claims (Counts I and III)[7] fail because the complaint includes no alleged facts showing that Covidien's board of directors acted with "actual intent" to hinder, delay, or defraud Mallinckrodt's creditors when it approved the spinoff. MTD at 24-27; Reply at 12-15. The amended complaint would not cure this deficiency. Even as amended, the complaint still would not allege any facts showing that any director foresaw that Mallinckrodt would face potentially

[7] These counts would be subdivided into Counts I, III, V, and VII in the amended complaint.

ruinous public-nuisance opioid litigation years in the future, much less that the board decided to spin-off Mallinckrodt to shield Covidien from that then-non-existent litigation.

Rather, the amended complaint's only new allegation about the board is that it considered the very different risk posed by the DEA's scrutiny of Mallinckrodt's suspicious order monitoring ("SOM") program. Am. Compl. ¶¶ 205-206. As the complaint acknowledges, the SEC filings for the spinoff disclosed the DEA's subpoena of Mallinckrodt's SOM program and the risk that it could result in fines or penalties for "substantial amounts of money." *Id.* ¶ 207 (quoting the Form 10). And Mallinckrodt settled that investigation in 2017 for $35 million, not billions of dollars. *Id.* ¶ 239. The DEA's investigation did not drive Mallinckrodt into bankruptcy, and there is no suggestion that the board contemplated the orders-of-magnitude-greater risk of the yet-to-emerge public-nuisance litigation that allegedly ultimately did, or that the board decided to spin-off Mallinckrodt because of that non-contemplated threat.

Nor would the amended complaint cure this legal defect through its new allegations about Covidien's and Mallinckrodt's officers. As a legal matter, the complaint must allege that Covidien's directors, not merely its officers, had fraudulent intent, because only Covidien's board of directors had the legal authority to approve the spinoff and cause the transfers to be made. *See* MTD at 24-27; Reply at 13-14. And as a factual matter, the handful of new allegations in the amended complaint would fail to allege that any of Covidien's (or Mallinckrodt's) officers had any fraudulent intent in any event. Rather, the new allegations merely allege that some of the officers were aware of media and analyst reports about opioid abuse (just as the general public was), or that they reviewed internal reports about Mallinckrodt's opioid sales growth. Am. Compl. ¶¶ 208-216. That is utterly insufficient to state a claim. *See* Reply at 14-15. No facts are alleged showing that any officer contemplated that Mallinckrodt

would face an avalanche of opioid litigation years in the future, much less that any officer believed that Mallinckrodt should be spun off to protect Covidien from such litigation *and* so dominated Covidien's board of directors as to cause the board to approve the spin for that reason.

The only other new allegations in the amended complaint regarding Covidien's purported "knowledge" of future opioid liability are, if anything, even more deficient. The new allegations would cite a few additional items of "public information" about (i) opioid abuse; (ii) another subpoena and a lawsuit against a few other opioid defendants; and (iii) regulatory attention to opioids.[8] The amended complaint would also note the DEA's follow-on subpoena in 2012, and an earlier subpoena Mallinckrodt received in 2009, both of which were publicly disclosed in the SEC filings for the spinoff, just as the DEA's 2011 subpoena was.[9] And the amended complaint would add a few snippets from reports by Covidien's advisors and internal presentations noting the publicly-known regulatory focus on opioids, or the need to ensure that Mallinckrodt would have an appropriate capital structure (including standard, basic advice regarding fraudulent transfer law) and the treatment of "contingent liabilities."[10] But the Trust cannot and does not allege that those contingent liabilities concerned opioids; there were zero opioid lawsuits pending against Mallinckrodt at the time. Moreover, the amended complaint, like the original complaint, incorporates the parties' Separation and Distribution Agreement, which makes clear that *Covidien assumed* Mallinckrodt's largest known "contingent liability" at the time: Mallinckrodt's potential environmental liability for pending lawsuits concerning a legacy

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[8] *See* Am. Compl. ¶¶ 190, 197, 200 (media and government reports about opioid abuse); *id.* ¶¶ 199, 201 (a subpoena and a lawsuit against other opioid manufacturers or distributors); *id.* ¶¶ 202-203 (proposals to increase regulation of opioids); *id.* ¶¶ 229-231, 234 (alleged awareness by Mallinckrodt and Covidien of government and media reports about opioid abuse and regulation); *see* MTD at 7-11 (citing similar allegations in existing complaint).

[9] *See* Am. Compl. ¶¶ 235, 241; Millar Decl., Ex. 2 (Form 10) at 78, F-38, F-60.

[10] *See* Am. Compl. ¶¶ 257-270, 301-304.

Mallinckrodt plant and pollution of the Penobscot River in Maine, a liability for which Covidien ultimately committed to pay $187 million in 2022 to resolve. MTD at 2-3, 12-13. A board intent on shedding a spun company's liabilities does not retain the spun company's largest known legacy liability.

Finally, the amended complaint would not cure these deficiencies by resort to the "badges of fraud." The amended complaint would rely on the same badges as the existing complaint, *see* Am. Compl. ¶¶ 316, 335, 352, 368, which fail to state a claim for the reasons set forth in Covidien's motion to dismiss. *See* MTD at 27-28; Reply at 15-17.

At bottom, the Trust's entire theory of fraudulent transfer is premised on impermissible hindsight: that based on what we know *now*, Covidien's board and the market supposedly *should have* foreseen back in 2013 what ultimately happened, even if the board did not actually contemplate anything of the sort when it made the legitimate business decision to spin-off Mallinckrodt's pharmaceuticals business from Covidien's very different medical-device and medical-supplies businesses, and even if the market, armed with all the same "public information" about opioid risks that the board allegedly had, actually valued Mallinckrodt as amply solvent with a $2.5 billion market capitalization at the time of the spin. The Trust's flawed theory of fraudulent transfer fails as a matter of law. As Judge Shannon recently held in granting judgment for the defendants in a $7.2 billion fraudulent-transfer suit, fraudulent transfers must be evaluated based on the "circumstances as they existed at the time of the challenged transfer," not on plaintiff's theories "constructed a decade after the fact, 'with the benefit of hindsight,' and 'for the purpose of litigation.'" *In re Samson Resources Corp.*, 2023 WL 4003815, at *26, *29 (Bankr. D. Del. June 14, 2023) (quoting *In re Hechinger Inv. Co. of Del.*, 327 B.R. 537, 548 (D. Del. 2005)); *id.* at *1 ("It is black letter law in this Circuit that the

gold standard for determining the value of an asset is to sell it in an open and fair market. … Buyers and sellers may be right or wrong about what the future may hold, but the value is fixed and conclusively established by the price paid at closing" by "market participants" "plac[ing] their own money on the line").

The spinoff transfers are barred by section 546(e)'s safe harbor. The securities safe harbor under Bankruptcy Code section 546(e) bars the fraudulent-transfer claims (Counts I and II) to avoid the securities-related transfers that Covidien received in the spinoff. *See* MTD at 29-36; Reply at 18-26. The amended complaint would do nothing to cure this legal prohibition on avoidance. It would seek to recover the same transfers arising out of the same securities transaction and would still fall within the safe harbor based on the same terms of the Separation and Distribution Agreement and the parties' other securities contracts cognizable on a motion to dismiss. *See id.*

The claim to avoid the purported "transfer" of the non-pharmaceuticals business fails. The fraudulent-transfer claims to avoid the supposed "transfer of Covidien and its direct and indirect subsidiaries" (Counts I and II) fail because the Complaint fails to allege that the Mallinckrodt debtors ever owned Covidien and its non-pharmaceutical subsidiaries and hence fails to state a necessary element of the claim, i.e., that there was a fraudulent "transfer of an interest *of the debtor* in property." 11 U.S.C. § 544(b) (emphasis added); MTD at 36-37; Reply at 26-28. The amended complaint would not cure this defect either. The Trust still cannot and does not allege that Mallinckrodt ever owned Covidien or its non-pharmaceutical subsidiaries. Rather, the amended complaint would merely reiterate the same flawed argument that the Trust made in support of its existing Complaint: that Covidien and Mallinckrodt were purportedly "alter egos of one another" and "[a]s such, Mallinckrodt had an equitable interest in Covidien's

medical device and supplies business that it involuntarily transferred to Covidien." Am. Compl. ¶ 316(c). That argument fails as a matter of law because even a meritorious veil-piercing or alter-ego claim does not state a claim for fraudulent transfer. *See* Reply at 27. And in any event, the argument fails because the amended complaint still does not allege the extraordinary facts required to sustain a claim for veil-piercing or alter-ego liability. *See infra* Section II.C.

B. The Breach of Fiduciary Duty Claim Would Still Fail

The claim is time-barred. The breach of fiduciary duty claim (Count V)[11] is time-barred under Delaware's three-year statute of limitations (and Ireland's six-year statute). *See* MTD at 37-39; Reply at 28-30. Again, the amended complaint could not and would not cure this legal deficiency. Indeed, even under the Trust's argument that Massachusetts law governs, the claim would be time-barred under that state's three-year statute of limitations. *See id.* The amended complaint would not allege any new facts to support the Trust's failed argument for tolling under the "adverse domination" doctrine. It would still be the case that any "adverse domination" ended when Mallinckrodt became an independent public company, governed by a board with a majority of disinterested directors, in June 2013.

The breach of fiduciary duty claim fails to state a claim. The Complaint fails to state a claim that Covidien breached any duty owed to Mallinckrodt plc because (i) Mallinckrodt plc was a newly formed holding company that had no assets that could have been "stripped" in the spinoff, and (ii) Covidien did not breach any duty of disclosure or obtain any "secret profits" in the spinoff because whatever Covidien knew about Mallinckrodt's purported opioid risks was admittedly a matter of "public knowledge" (and best understood, if by anyone, by Mallinckrodt itself), and all of the challenged transfers were fully disclosed in the SEC filings for the spinoff.

[11] Count V would be re-numbered as Count IX in the amended complaint.

See MTD at 39-40; Reply at 31. The amended complaint would not allege any new facts to cure any of these fatal defects as well.

Finally, even if the amended complaint established grounds for breach of fiduciary duty, the claim would still fail because Mallinckrodt released any such claim under the Separation and Distribution Agreement. On this non-avoidance claim, the Trust is suing in Mallinckrodt's shoes, *see* MTD at 41-42, and hence it is bound by Mallinckrodt's release. Under the Separation and Distribution Agreement, Mallinckrodt assumed the liabilities arising out of its pharmaceutical business and "release[d] … Covidien … from any and all Liabilities whatsoever … arising from any acts or events occurring or failing to occur … on or before the Effective Time" of the spinoff.[12] Although Mallinckrodt rejected the Separation and Distribution Agreement in the bankruptcy, rejection is merely a breach that excuses the estate from future performance; rejection did not rescind the release that Mallinckrodt gave to Covidien seven years before the bankruptcy filing. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1661-1663 (2019). Only a fraudulent-transfer claim could avoid Mallinckrodt's pre-petition release, *see id.* at 1663, and, as discussed above, the Trust's fraudulent-transfer claims fail. Accordingly, the Trust is bound by Mallinckrodt's release, and its claim for breach of fiduciary duty fails as a matter of law.

C. The Reimbursement, Indemnification, or Contribution Claim Would Still Fail

The claim for reimbursement, indemnification, or contribution from Covidien for all of Mallinckrodt's own opioid liability and bankruptcy expenses (Count VI)[13] fails to state a claim because the Complaint does not and cannot allege any facts remotely sufficient to sustain the

[12] *See* Millar Decl. Ex. 8 (Separation and Distribution Agreement) §§ 2.1(a)(ii), 4.1(a), (d)-(e).

[13] Count VI would be re-numbered as Count X in the amended complaint.

sole theory the Trust advanced in support of such relief—that Covidien is purportedly liable for Mallinckrodt's own liabilities under a veil-piercing or alter-ego theory. *See* MTD at 6-7, 42-43; Reply at 32-35. To obtain the extraordinary relief of alter ego or veil-piecing, the Trust must plead facts establishing that (i) "the parent corporation[] [exercised] complete domination and control of the subsidiary to the point that the subsidiary no longer has legal or independent significance of its own," and (ii) "that the corporate structure cause[d] fraud or similar injustice," i.e., "that the corporation is a sham and exists for no other purpose than as a vehicle for fraud." *In re Quorum Health Corp.*, 2023 WL 2552399, at *14-15 (Bankr. D. Del. Mar. 16, 2023) (internal quotation marks and alterations omitted).[14] The amended complaint fails to allege facts sufficient to meet either requirement.

The amended complaint fails at the very first step: the new allegations still would not allege facts showing that Covidien and the Mallinckrodt subsidiaries functioned as a single entity "to the point that [Mallinckrodt] no longer ha[d] legal or independent significance of [its] own." *Quorum*, 2023 WL 2552399, at *14. That notion is belied by the facts that the amended complaint itself acknowledges: when plaintiffs, represented by some of the nation's leading tort lawyers, brought 3,000 suits arising out of the opioid business, they served suit on *Mallinckrodt*, not Covidien. Am. Compl. ¶ 286; MTD at 48. In the real world, plaintiffs had no trouble distinguishing Mallinckrodt from Covidien, which was merely a direct or indirect parent of Mallinckrodt for six years during Mallinckrodt's long history as an independent company that had been selling opioids since 1898. Am. Compl. ¶¶ 30-31.

[14] *Accord Kaplan v. First Options of Chi., Inc.*, 19 F.3d 1503, 1521 (3d Cir. 1994) ("The corporate veil is pierced only when the corporation was an artifice and a sham to execute illegitimate purposes" (internal quotation marks omitted)), *aff'd*, 514 U.S. 938 (1995); *Trinity Indus., Inc. v. Greenlease Holding Co.*, 903 F.3d 333, 365-367 (3d Cir. 2018) (alter-ego applies only when "the corporation was established to defraud its creditors or [an]other improper purpose," "a burden that is notoriously difficult for plaintiffs to meet" (internal quotation marks omitted)).

Not surprisingly, then, the only new allegations that the Trust can muster merely allege additional details about the relationship between Covidien and Mallinckrodt that are of the sort common to many parent-subsidiary relationships. The amended complaint would thus provide more alleged specifics about the use of consolidated financial statements and an integrated cash management system, including the work done to create separate financials for Mallinckrodt in the spinoff (the so-called "disentanglement" of Covidien and Mallinckrodt). *See, e.g.* Am. Compl. ¶¶ 143-144, 146-147, 152-153, 156. It would also allege more details about the use of shared corporate services, such as finance, accounting, information technology, and shared foreign distribution channels, as well as the "disentanglement" work done to replicate those services for a stand-alone Mallinckrodt in the spinoff (with a post-spin wind-down of some shared services under standard "transition services agreements"). *Id.* ¶¶ 145, 148-149, 151-154, 156-159. The amended complaint would likewise add further alleged details about the use of common branding or corporate logos in some circumstances (and the confusion among some employees over such issues). *Id.* ¶¶ 174-183. Finally, the amended complaint would allege additional examples of Covidien's oversight, as the parent company of its wholly owned Mallinckrodt subsidiaries, regarding "the ultimate decisions" about Mallinckrodt and the spinoff, including the selection of Mallinckrodt's initial board members and CEO. *Id.* ¶¶ 160-173.

None of these details matter. The are all the grist of typical parent-subsidiary arrangements and, as a matter of law, do not establish the extreme disregard of the corporate form required for veil-piercing or alter-ego liability. *See* MTD at 42-43; Reply at 33-34.[15]

The amended complaint also fails at the second step: even if it alleged facts establishing Covidien and Mallinckrodt as a single entity, the amended complaint would still fail to state a claim for alter ego or veil piercing because it fails to allege any facts showing that the corporate form was abused to carry out a "fraud or similar injustice." *Quorum*, 2023 WL 2552399, at *15. The amended complaint's continued reliance (Am. Compl. ¶¶ 185-188) on the underlying claims of fraudulent transfer and Mallinckrodt's alleged opioid misconduct to satisfy this "fraud" element fails because "[t]he underlying cause of action does not supply the necessary fraud or injustice." *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268-269 (D. Del. 1989). Rather, the "fraud or injustice [must] be found in the defendants' use of the corporate form," *id.*, i.e., the Trust must allege that the Mallinckrodt entities were "established to defraud … creditors or [for] [an]other improper purpose," *Trinity*, 903 F.3d at 366-367, or that Covidien "created a sham entity designed to defraud investors and creditor." *Quorum*, 2023 WL 2552399, at *15 (internal quotation marks omitted); Reply at 34-35. The amended complaint fails to do so. There are no allegations that Covidien formed the Mallinckrodt subsidiaries, which existed long before Covidien acquired them, much less that it did so to defraud Mallinckrodt's creditors.

[15] The amended complaint's repetitious statements that Mallinckrodt acted "while under the domination and control of Covidien" (*e.g.*, Am. Compl. ¶¶ 35, 38) are legal conclusions entitled to no deference on a motion to dismiss. Similarly, the amended complaint's semantic rewording of phrases like "Mallinckrodt's opioid business" as "Covidien's opioid business" or "Covidien's pharmaceuticals business" (*id.* ¶¶ 33, 51) does not change the substantive facts acknowledged by the complaint that it was Mallinckrodt that manufactured and sold opioids. *See, e.g.*, *id.* ¶ 34 (discussing "*Mallinckrodt's* 30mg oxycodone tablet"); *id.* ¶ 36 (discussing the "opioids … that *Mallinckrodt* manufactured"); *id.* ¶ 239 ("the DEA subpoenaed *Mallinckrodt* for documents related to its suspicious orders monitoring program") (emphases added).

Finally, even if the amended complaint established grounds for veil piercing or alter ego, the claim would still fail because Mallinckrodt released any such claim under the Separation and Distribution Agreement. As with the breach of fiduciary duty claim, the Trust is suing on this non-avoidance claim in Mallinckrodt's shoes. *See* MTD at 41-42. Accordingly, the Trust is bound by Mallinckrodt's release for the same reasons discussed above, *see supra* Section II.B, and the Trust's claim for reimbursement, indemnification or contribution fails as a matter of law.

D. The Claims to Subordinate or Disallow Covidien's Indemnification Claims Would Still Fail

The equitable subordination count fails to state a claim. The equitable-subordination claim (Count VII)[16] fails to state a claim because it fails to cite anything inequitable about Covidien's indemnification claim. Not only do its allegations of fraudulent transfer, breach of fiduciary duty, and alter ego fail for the reasons discussed, but the claim would fail in any event because the complaint 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 unsecured creditors. *See* MTD at 44-46; Reply at 35-37. The proposed amended complaint does not allege any facts showing that Covidien did anything to elevate its claim in right of priority or distribution from the bankruptcy estate (*see* Am. Compl. ¶¶ 395-401), and it plainly did not, as its right to indemnification is merely a general unsecured claim.

The equitable disallowance count asserts a non-existent cause of action. The equitable-disallowance claim (Count VIII)[17] fails to state a claim because there is no such cause of action under the Bankruptcy Code. *See* MTD at 46-47; Reply at 37-38. The amended complaint obviously cannot cure this legal defect.

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[16] Count VII would be re-numbered Count XI in the amended complaint.

[17] Count VIII would be re-numbered Count XII in the amended complaint.

The section 502(d) disallowance count is inapplicable. This disallowance claim (Count IX)[18] fails because it falls with the fraudulent-transfer claims, which fail as discussed above. *See* MTD at 47; Reply at 39. The amended complaint would fail for the same reason.

The section 502(e) disallowance count seeks relief that is unavailable or unwarranted. This disallowance claim (Count X)[19] fails because Covidien's indemnification claim is liquidated in part and because the contingent portion need not be allowed or disallowed now, rather than held in abeyance to see if it becomes liquidated over the potentially long life of the Trust. *See* MTD at 47-50; Reply at 39. The amended complaint would not cure this deficiency either.

CONCLUSION

The Motion should be denied.

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/s/ R. Craig Martin

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and

[18] Count IX would be re-numbered Count XIII in the amended complaint.

[19] Count X would be re-numbered Count XIV in the amended complaint.

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