IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
MALLINCKRODT PLC,	:	Case No. 20-12522 (JTD)
Reorganized Debtor.[1]	:	
OPIOID MASTER DISBURSEMENT TRUST II,	:	
Plaintiff,	:	Adversary Proceeding
v.	:	No. 22-50433 (JTD)
COVIDIEN UNLIMITED COMPANY, *et al.*,	:	
Defendants.	:	

REPLY IN SUPPORT OF MOTION OF OPIOID MASTER DISBURSEMENT TRUST II FOR LEAVE TO FILE AMENDED COMPLAINT

Justin R. Alberto (No. 5126)
Patrick J. Reilley (No. 4451)
COLE SCHOTZ P.C.
500 Delaware Avenue
Suite 1410
Wilmington, Delaware 19801
Telephone: (302) 652-3131
Facsimile: (302) 652-3117
jalberto@coleschotz.com
preilley@coleschotz.com

Seth Van Aalten
Anthony De Leo
COLE SCHOTZ P.C.
1325 Ave. of the Americas
19th Floor
New York, New York 10019
Telephone: (212) 752-8000
Facsimile: (212) 752-8393

Kevin C. Maclay (admitted *pro hac vice*)
Todd E. Phillips (admitted *pro hac vice*)
Jeffrey A. Liesemer
(admitted *pro hac vice*)
Serafina Concannon
(admitted *pro hac vice*)
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W., Suite 1100
Washington, DC 20005
Telephone: (202) 862-5000
Facsimile: (202) 429-3301

Co-Counsel for the Opioid Master Disbursement Trust II

[1] The Reorganized Debtor in this chapter 11 case is Mallinckrodt plc. On May 3, 2023, the Court entered an order closing the chapter 11 cases of the Reorganized Debtor's debtor affiliates. A complete list of the debtor affiliates in these Chapter 11 cases may be obtained on the website of the Reorganized Debtor's claims and noticing agent at http://restructuring.ra.kroll.com/Mallinckrodt. The Reorganized Debtor's mailing address is 675 McDonnell Blvd., Hazelwood, Missouri 63042.

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Plaintiff, the Opioid Master Disbursement Trust II ("**Trust**"), by and through its undersigned counsel, hereby submits this reply in support of the *Motion of the Opioid Master Disbursement Trust II for Leave to File Amended Complaint* ("**Motion to Amend**") and in response to *Covidien's Opposition to the Motion of the Opioid Master Disbursement Trust II for Leave to File Amended Complaint* ("**Opposition**").[1] Adv. D.I. 41. As explained below and in the Motion to Amend, the Court should grant the Trust leave to file the Amended Complaint.

REPLY ARGUMENT

I. COVIDIEN'S ACCUSATIONS OF UNDUE DELAY AND PREJUDICE ARE UNSUBSTANTIATED AND WITHOUT MERIT

1. Without evidence, Covidien tries to portray the Trust's Motion to Amend as a nefarious, eleventh-hour scheme that was intended to derail and delay its allegedly preordained victory on its Motion to Dismiss. Opp. at 6-7. In doing so, Covidien distorts the factual and procedural history of this proceeding. Covidien asserts that the Trust unduly delayed filing its Motion to Amend because it began receiving the Debtors' rolling production of hundreds of thousands of documents as far back as September of last year. Opp. at 4. But *receiving* documents and properly *reviewing* and *analyzing* documents are different propositions: receipt is instantaneous; reviewing and analyzing hundreds of thousands of documents takes time—lots of time—even with sizeable document review teams engaging in multiple levels of review.[2] Covidien, however, is trying to convince the Court that, because the Trust's review of the documents was not as instantaneous as its receipt of the documents, the Trust must have engaged in undue delay. Opp. at 5-6. Covidien's argument, on its face, is specious. Covidien has

[1] Capitalized terms not otherwise defined shall have the meaning ascribed in the Motion to Amend. Adv. D.I. 33. Pleadings filed in *In re Mallinckrodt plc*, No. 20-bk-12522 (JTD) (Bankr. D. Del.) are referred to with the citation "**D.I. __.**" Pleadings filed in this Adversary Proceeding are referred to with the citation "**Adv. D.I. __.**"

[2] The Trust's professionals have been diligent in reviewing the relevant documents—over 1.3 million documents that the Debtors produced to the Trust on a rolling basis between September 2022 and February 27, 2023, **90%** of which were produced ***after*** October 11, 2022—and indeed are still reviewing them.

provided *no* evidence that the Trust lacked diligence in reviewing and analyzing the rolling production of hundreds of thousands of documents, the vast majority of which were produced *after* the Trust filed its original Complaint.[3]

2. Covidien asserts that the Trust was required to give it sufficiently advance notice of the Motion to Amend but fails to cite *any* authority to support its assertion. Opp. at 5-7. Nor could it do so because no such requirement exists under the applicable rules.[4] In addition, the cases Covidien cites do not mention any obligation of a party to inform its adversary that it is intending to move to amend. *See* Opp. at 8. The cases are also inapposite: unlike here, the parties in those cases sought leave to amend years into the litigation and/or days before trial, or the courts denied leave on the basis of futility or because a party attempted to introduce a new theory of liability many years after litigation had commenced.[5] By contrast, courts have routinely granted leave to amend during the pendency of a motion to dismiss, including after the parties completed briefing.[6]

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[3] Taking several months to revise an already hefty Complaint to add information from those documents, which led to an additional 38 pages and 127 paragraphs, is not "undue" delay. *See, e.g.*, *ProFoot, Inc. v. MSD Consumer Care, Inc.*, No. 11-cv-7079 (MLC)(LHG), 2014 WL 12621965, at *4 (D.N.J. Feb. 7, 2014); *Pulchalski v. Franklin Cnty.*, No. 15-cv-1365, 2016 WL 1363764, at *2 (M.D. Pa. Apr. 6, 2016); *In re L'Oreal Wrinkle Cream Mktg. Pracs. Litig.*, No. 2415, 2015 WL 5770202, at *2 (D.N.J. Sept. 30, 2015).

[4] *See* Fed. R. Civ. P. 15; Bankr. L.R. 7007-1.

[5] *See CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 629 (3d Cir. 2013) (motion to amend sought three years after the original complaint was filed, and the court found that amendment would change the theory of liability); *Jallad v. Madera*, 784 F. App'x 89, 95 (3d Cir. 2019) (motion to amend came two years after the complaint was filed and four days before trial); *In re Digit. Island Sec. Litig.*, No. Civ.A.02-57-GMS, 2002 WL 31667863, at *2 (D. Del. Nov. 25, 2002) (motion to amend denied where plaintiffs admitted their complaint was deficient but did not move to amend until after the court had ruled on the motion to dismiss). *In re Digit. Island Sec. Litig.*, 357 F.3d 322, 337 (3d Cir. 2004) (affirming denial of leave to amend on the basis of futility).

[6] *See Acupac Packaging Inc. v. Devonshire Indus. Ltd.*, No. CV 20-15933 (MCA)(LDW), 2021 WL 2520122, at *2 (D.N.J. June 8, 2021) (stating that "plaintiff's decision to bring the instant motion to amend after the motion to dismiss was fully briefed is not in itself indicative of bad faith or an intent to delay the proceedings. . . . Nor does the fact that plaintiff waited three months after the motion to dismiss was filed to seek leave to amend justify denial of the motion"); *SG Equip. Fin. USA Corp. v. Kimball Elecs., Inc.*, No. CV 20-6005, 2021 WL 1143378, at *3 (E.D. Pa. Mar. 25, 2021) (granting motion to amend complaint after motion to dismiss had been fully briefed); *cf. Dole v. Arco Chem. Co.*, 921 F.2d 484, 486, 488 (3d Cir. 1990) (holding that a trial court abused its discretion in denying plaintiff's motion to amend where summary judgment motions were pending; although defendant characterized the motion to amend as a "dilatory attempt to avoid summary judgment," the Third Circuit held that there was no

3. Covidien's accusation that the Trust "continued to hide the ball" about its intent to file the Motion to Amend (Opp. at 6) is scurrilous and unfounded. And the self-serving declaration of Mr. Anker, who apparently insists on serving as both advocate *and* witness, does nothing to substantiate the accusation and should be rejected. Moreover, Covidien's assertion that it "incurred considerable further time and expense preparing for argument on the motion to dismiss" in vain (Opp. at 7) is nonsense because the Court still intends to hear argument on the motion to dismiss.[7] Accordingly, Covidien cannot be heard to argue that it was prejudiced.

4. Federal Rule of Civil Procedure 15 provides that "the court should freely give leave when justice so requires."[8] In the interests of justice, the Trust, through its Amended Complaint, is presenting to this Court as many relevant facts as it can garner from the hundreds of thousands of documents that have been produced to it. For all of these reasons, Covidien's Objection should be overruled.

II. BECAUSE THE AMENDED COMPLAINT STATES PLAUSIBLE CLAIMS AGAINST COVIDIEN, GRANTING LEAVE TO AMEND WOULD NOT BE FUTILE

5. The standard for assessing futility is the "same standard for legal sufficiency as applies under Rule 12(b)(6)." *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000). Under the Rule 12(b)(6) standard, the Court must assume all "factual allegations to be true, construe those truths in the light most favorable to the plaintiff, and then draw all reasonable inferences from

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prejudice to defendant on the sole basis that it would need to redraft its summary judgment motion); *Selvaggi v. Point Pleasant Beach Borough*, Civ. No. 22-00708 (RK)(JBD), 2023 WL 3794884, at *4 (D.N.J. June 2, 2023) (rejecting defendant's argument that it would suffer undue prejudice if the plaintiff were allowed to amend its complaint because "the parties ha[d] already briefed a motion to dismiss").

[7] *See Cordance Corp. v. Amazon.com, Inc.*, 255 F.R.D. 366, 371 (D. Del. 2009) ("In proving prejudice, the non-moving party 'must do more than merely claim prejudice; it must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendments been timely.'") (quoting *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989)). Covidien has not shown—and cannot show—that it has been deprived of its opportunity to present argument on its Motion to Dismiss. Its claims of prejudice are therefore spurious.

[8] Fed. R. Civ. P. 15(a)(1)(B).

them."[9] The complaint's factual allegations must simply be enough "to raise a right to relief above the speculative level."[10] At 144 pages, 412 paragraphs, and relying on extensive documentary evidence, the Amended Complaint raises the Trust's right to relief far beyond the speculative level. Covidien's efforts to rebut the Amended Complaint's allegations do not make leave to amend futile.[11] Indeed, if an explanation is plausible, a complaint survives a Rule 12(b)(6) motion to dismiss, regardless of whether there is a more plausible alternative explanation.[12]

A. The Amended Complaint Sufficiently Pleads Intentional Fraudulent Transfer Claims

6. Covidien insists that, at the pleadings stage, the Amended Complaint must have direct evidence of each Covidien board member's *subjective* intent to hinder, delay, or defraud creditors. Opp. at 12. But Covidien's argument is unsupportable because it is contrary to *more than 450 years* of fraudulent transfer law.[13] Proving subjective fraudulent intent with direct evidence is *never* required because vanishingly rare is the debtor who proclaims, *I intend to harm my creditors!*[14] Instead, circumstantial evidence—or "badges of fraud"—is sufficient to

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[9] *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 790 (3d Cir. 2016); *see also United States ex rel. Customs Fraud Investigations, LLC. v. Victaulic Co.*, 839 F.3d 242, 256 (3d Cir. 2016) (The Court "must . . . refrain from engaging in any credibility determinations.").

[10] *Uronis v. Cabot Oil & Gas Corp.*, 49 F.4th 263, 268 (3d Cir. 2022) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

[11] A defendant's rebuttal of a plaintiff's contentions with its own does not entitle the defendant to dismissal of the action. *Deere & Co. v. AGCO Corp.*, No. CV 18-827-CFC, 2019 WL 668492, at *5-6 (D. Del. Feb. 19, 2019); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 341 n.42 (3d Cir. 2010).

[12] *Doe v. Princeton Univ.*, 30 F.4th 335, 344 (3d Cir. 2022).

[13] Parliament enacted the Statute of 13 Elizabeth in 1571. *Thompson v. Jonovich (In re Food & Fibre Prot., Ltd.)*, 168 B.R. 408, 418 n.12 (Bankr. D. Ariz. 1994).

[14] *See Liquidation Tr. of Hechinger Inv. Co. of Del., Inc. v. Fleet Retail Fin. Grp. (In re Hechinger Inv. Co. of Del.)*, 327 B.R. 537, 550-51 (D. Del. 2005) ("Direct evidence of fraudulent intent . . . is often unavailable and courts usually rely on circumstantial evidence, including the circumstances of the transaction, to infer fraudulent intent."), *aff'd*, 278 F. App'x 125 (3d Cir. 2008).

establish actual intent to hinder, delay, or defraud,[15] and the Amended Complaint identifies at least seven of those badges. Am. Compl. ¶¶ 316, 335, 352, 368. The Amended Complaint also details the extraordinary lengths by Covidien to minimize any accessible paper regarding opioid-related legal risks and its burgeoning opioid liability. *See id*. ¶¶ 245-46. Covidien cannot sweep the written record under the rug and then claim lack of evidence at the pleadings stage.

7. Covidien's reliance on the out-of-circuit *Tribune* decision to argue that the Trust must have direct evidence of each board member's subjective intent is misplaced. In *Tribune*, a special committee of independent directors had approved the transaction at issue, and the Second Circuit found that the trustee did not allege facts sufficient to show that the intent of senior management could be imputed to the *independent* special committee.[16] Here, Covidien had ***no*** special committee of independent directors approving the challenged transfers, which makes *Tribune* wholly inapposite.

8. Covidien asserts that the intentional fraud claims are insufficiently pled because they are premised on "impermissible hindsight" as "there were zero opioid lawsuits pending against Mallinckrodt at the time." Opp. at 13-14. But you do not need a weatherman to forecast rain if you see storm clouds on the horizon. And, as laid out in the Amended Complaint, Covidien saw the gathering opioid storm. Covidien's officers and board had actual knowledge of the extent of the burgeoning opioid liabilities. Am. Compl. ¶¶ 205-34. For example, in reviewing updates about the marketing and sales of opioid products, Covidien's board expressed concerns about opioid liability. *Id.* ¶¶ 205-06. Throughout the industry, before the Spinoff, legal and regulatory action was being taken against prescribers, distributors, and even manufacturers,

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[15] *See, e.g.*, *Crystallex Int'l Corp. v. Petróleos De Venezuela, S.A.*, 879 F.3d 79, 89 (3d Cir. 2018); *In re Physiotherapy Holdings, Inc.*, No. 13-12965(KG), 2016 WL 3611831, at *15 (Bankr. D. Del. Jun. 20, 2016).

[16] *Kirschner v. Large S'holders. (In re Trib. Co. Fraud. Conv. Litig.)*, 10 F.4th 147, 155-56, 161 (2d Cir. 2021).

including Purdue Frederick's agreement to pay $600 million in fines and various other payments to settle civil claims relating to its sale and marketing of OxyContin. *Id*. ¶ 194. Covidien (and later Mallinckrodt) knew that it too would be facing significant, and potentially existential, legal and regulatory threats. *See, e.g.*, *id*. ¶ 244. In sum, Covidien saw its opioid pharmaceuticals business as radioactive and toxic and knew that, to protect its profitable medical supplies and devices business from the effects of opioid-related legal and regulatory actions, it would have to sell or spin that business off, which it did. *Id*. ¶¶ 8-10. For these reasons, the Amended Complaint sufficiently pleads claims of intentional fraudulent transfer.

B. The Trust's Claims Are Not Time Barred

9. Contrary to Covidien's assertions (Opp. at 10-11), the Amended Complaint adequately pleads that the Trust can step into the shoes of multiple triggering creditors whose claims have the benefit of the UFTA's discovery rule or a statute of limitations that is longer than the UFTA's four-year lookback period. Am. Compl. ¶¶ 305-11; Adv. D.I. 24 at 23-35.

10. *Discovery Rule*. Covidien asserts that the UFTA's one-year discovery rule is not available to the Trust because, if anyone knew of or could have discovered the transfer at the time it was made, then the claim is barred. Opp. at 10. Covidien's argument is contrary to the UFTA's plain text, which provides that a claim must be brought "within one year after the transfer . . . was or could reasonably have been discovered *by the claimant*."[17] Here, the Amended Complaint alleges that, within the one year prior to Mallinckrodt's bankruptcy filing, children were born with NAS, individuals were injured from direct opioid exposure, and individuals were diagnosed with an asbestos-related disease. Am. Compl. ¶¶ 307-09. Until that one-year period, these individuals did not know of their injuries, did not know they held claims

[17] UFTA § 9 (emphasis added).

against Mallinckrodt, and therefore could not have reasonably discovered the fraudulent nature of the voidable transfers challenged in the Amended Complaint.[18] Accordingly, these creditors have the benefit of the one-year discovery rule. Covidien's argument that the public disclosure of the Spinoff in its SEC filings in 2013 triggered the discovery rule (Opp. at 10) is equally without merit because it did not disclose the *fraudulent nature* of the transaction.[19]

11. *New Jersey Governmental Creditors*. Covidien argues that New Jersey and its political subdivisions are subject to the UFTA's four-year statute of repose. Opp. at 11. But this ignores binding New Jersey law. The New Jersey Supreme Court held that the 10-year limitations period in N.J. Stat. Ann. § 2A:14-1.2 applies to the fraudulent transfer claims of New Jersey, its agencies, and political subdivisions.[20] Only New Jersey law can define the fraudulent transfer rights of New Jersey governmental creditors. Accordingly, the Trust can step into their shoes and have the benefit of the 10-year limitations period available under New Jersey law.

12. *Internal Revenue Service*. Covidien's assertion that the Trust cannot step into the shoes of the IRS because the IRS allegedly did not hold a claim against Mallinckrodt before or at the time of the challenged transfers (Opp. at 11) is unavailing. Creditors holding claims that postdate the challenged transfer may still seek avoidance based on intentional fraud.[21] Moreover, the IRS *did* hold a claim before or at the time of the challenged transfers because claims for income taxes arise at the close of every tax year,[22] and the Amended Complaint

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[18] *See G-I Holdings, Inc. v. Those Parties Listed on Exhibit A (In re G-I Holdings, Inc.)*, 313 B.R. 612, 640 (Bankr. D.N.J. 2004); *Lippe v. Bairnco Corp.*, 225 B.R. 846, 846-56 (S.D.N.Y. 1998), *on reargument in part*, 229 B.R. 598 (S.D.N.Y. 1999).

[19] *See, e.g.*, *Miller v. Anderson Media Corp. (In re Our Alchemy, LLC)*, 642 B.R. 155, 163 (Bankr. D. Del. 2022) (Dorsey, J.) ("The discovery rule extends the time in which a claimant may file a claim by one year after the plaintiff knew or could have reasonably discovered the transfer and its fraudulent nature.").

[20] *See State Dep't of Env't Prot. v. Caldeira*, 794 A.2d 156, 164 (N.J. 2002).

[21] *See* UFTA § 4(a).

[22] *See In re Conn. Motor Lines, Inc.*, 336 F.2d 96, 105 (3d Cir. 1964).

alleges that Mallinckrodt was profitable at the time of the transfers, meaning it owed taxes. Am. Compl. ¶ 35. Covidien's insistence that the Court should *presume* that Mallinckrodt was not making any money at the time is untenable and contrary to the Rule 12(b)(6) standard. Additionally, the Tax Matters Agreement between Mallinckrodt and Covidien, allocating pre-2007 tax liability, also shows that the IRS had a claim predating the transfers, and some of those tax liabilities were attributable to Mallinckrodt. Am. Compl. ¶¶ 275-78. Finally, Covidien's suggestion that the Trust is relying on claims of the IRS for payroll taxes is wrong because none of the proofs of claim to which the Trust has specifically pointed are for payroll taxes.[23]

13. Covidien argues that New Jersey and the IRS cannot be triggering creditors because they are not creditors of Mallinckrodt entities that are alleged to have made the challenged transfers. Opp. at 11. The Court should reject this argument because the more than 200 transactions comprising the Spinoff should be collapsed into a single transfer by all Mallinckrodt entities.[24] In addition, the Amended Complaint sufficiently alleges that Covidien and its subsidiaries, including the Mallinckrodt subsidiaries, operated as a single economic entity and were alter egos of one another. Am. Compl. ¶¶ 140-88. Thus, a creditor of one entity was a creditor of all entities.[25]

C. The Amended Complaint Is Not Barred by Section 546(e)'s Safe Harbor

14. Covidien's section 546(e) arguments raise issues of fact and rely on documents outside the four corners of the Amended Complaint and thus are not appropriate for resolution on

[23] *See* Adv. D.I. 24 at 31 n.24. And, even if the Trust were relying on allowable unsecured claims for payroll taxes, such reliance would be immaterial because the plain text of § 544(b)(1) does not exclude unsecured payroll taxes as a basis for a trustee's derivative standing.

[24] *See United States v. Tabor Ct. Realty Corp.*, 803 F.2d 1288, 1302-03 (3d Cir. 1986).

[25] *See ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278, 336 (S.D. Tex. 2008).

a motion to dismiss or motion to amend.[26] In addition, many of the agreements that Covidien points to, such as the Separation and Distribution Agreement, are with affiliates and therefore cannot make either Covidien or Mallinckrodt a "financial participant."[27]

D. The Trust Has Adequately Pled Its Claims to Avoid the Transfer of Covidien's Non-Pharmaceuticals Businesses

15. According to Covidien, the Amended Complaint fails to allege that Mallinckrodt had an interest in the Covidien non-pharmaceuticals businesses that were transferred in the Spinoff. Opp. at 15. The face of the Amended Complaint shows that Covidien's argument is wrong. Am. Compl. ¶¶ 10, 313, 320, 366. The UFTA permits fraudulent transfer claims arising out of nondebtor transfers where the plaintiff can establish that the nondebtor and the debtor are alter egos.[28] The Amended Complaint adds significant new factual allegations that Mallinckrodt and Covidien were a single economic entity and alter egos, including allegations showing that there was a lack of financial separation between Covidien and Mallinckrodt (Am. Compl. ¶¶ 143-47); a lack of operational separation between them (*id*. ¶¶ 148-59); Covidien's domination and control of Mallinckrodt (*id*. ¶¶ 160-73); individuals within and outside Covidien expressing confusion over which entities they were dealing with or employed by (*id*. ¶¶ 174-83); and the years it took to disentangle Mallinckrodt from Covidien and to set up Mallinckrodt's reporting as an independent company (*id.* ¶¶ 146-54, 157-59). Because Covidien and Mallinckrodt were a single economic entity and alter egos, Mallinckrodt had an equitable interest

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[26] *See* Adv. D.I. 24 at 36-44; *Kravtiz v. Samson Energy Co. (In re Samson Res. Corp.)*, 625 B.R. 291, 303 (Bankr. D. Del. 2020); *FTI Consulting Inc. v. Sweeney (In re Centaur, LLC*), No. 10-10799 (KJC), 2013 WL 4479074, at *4 (Bankr. D. Del. Aug. 19, 2013); *Zazzali v. AFA Fin. Grp., LLC*, No. ADV 10-54524 PJW, 2012 WL 4903593, at *11 (Bankr. D. Del. Aug. 28, 2012).

[27] *See* Adv. D.I. 24 at 37-44. Also, it is far from clear that the dollar amounts on which Covidien relies to fit within the definition of "financial participant" are notional or actual principal amounts or gross mark-to-market positions, which are what the "financial participant" definition requires. *See id*. at 37-41.

[28] *See, e.g.*, *Crystallex Int'l Corp.*, 879 F.3d at 86; *Maxus Liquidating Tr. v. YPF S.A. (In re Maxus Energy Corp.)*, 641 B.R. 467, 559-60 (Bankr. D. Del. 2022); *Slone v. Brennan (In re Fisher)*, No. 03-33161, 2006 WL 1452498, at *3 (Bankr. S.D. Ohio Jan. 20, 2006), *aff'd*, 362 B.R. 871 (S.D. Ohio 2007), *aff'd*, 296 F. App'x 494 (6th Cir. 2008).

in Covidien's non-pharmaceuticals businesses at the time of the Spinoff. *Id*. ¶ 10. Covidien's arguments to the contrary are unavailing.

E. The Amended Complaint Sufficiently Pleads Covidien's Breach of Fiduciary Duty as a Promoter

16. Covidien's assertion that the Trust's claim of breach of fiduciary duty as a promoter is time-barred (Opp. at 16) is unavailing because the Amended Complaint sufficiently alleges that the statute of limitations has not run. Although breach of fiduciary duty claims are subject to a three-year limitations period under Massachusetts law,[29] under the adverse domination doctrine, the limitations period does not begin to run until the facts giving rise to liability become known to a stockholder or disinterested director that could have brought suit on behalf of the corporation.[30] Here, Covidien itself selected the individuals who would serve as Mallinckrodt plc's officers and directors, even selecting a former Covidien employee to serve as Mallinckrodt's CEO. Am. Compl. ¶ 384. Moreover, the Amended Complaint alleges that "Covidien breached its duties to act in good faith by failing to disclose to Mallinckrodt plc … *and its future shareholders* all material facts regarding Mallinckrodt plc, including . . . the true nature and scope of the opioid-related liabilities that were being left with the Debtors." *Id*. ¶ 387 (emphasis added). The question of whether and when Mallinckrodt plc had sufficiently disinterested directors and when those directors (and stockholders) received knowledge of the relevant facts to assert a promoter liability claim against Covidien is a fact-specific inquiry and

[29] Under Delaware's conflicts-of-law principles, Massachusetts law applies. *See Smith v. Weinshanker (In re Draw Another Circle)*, 602 B.R. 878, 894 (Bankr. D. Del. 2019) (applying most significant relationship test); Adv. D.I. 24 at 45-46; Am. Compl. ¶ 142.

[30] *Aiello v. Aiello*, 852 N.E.2d 68, 78-79 (Mass. 2006).

will require additional discovery.[31] At this stage of the proceeding, however, the Amended Complaint alleges a plausible promoter-liability claim that is not time-barred.

17. Covidien contends that the Amended Complaint fails to state a promoter liability because it lacks allegations that Covidien stripped assets or failed any duty to disclose because whatever Covidien knew about Mallinckrodt's purported opioid risks was a matter of "public knowledge." Opp. at 16-17. The argument lacks merit. As a single economic entity and alter egos, the Debtors had an equitable interest in Covidien's non-pharmaceuticals businesses that they were stripped of in connection with the Spinoff. Am. Compl. ¶¶ 10, 140-88.[32] Covidien formed Mallinckrodt plc so that the latter would receive only a portion—*i.e.*, a stripped-down portion—of the Covidien enterprise. Covidien controlled all aspects of the Spinoff, including the timing of when the pharmaceuticals assets would be separated from the non-pharmaceutical ones. As a matter of economic substance and effect, it is not relevant that Mallinckrodt plc received the stripped-down portion only after the stripping took place.[33] The Court should reject Covidien's efforts to put form over substance.[34]

18. As for "public knowledge," Mallinckrodt plc was an empty vessel when Covidien formed it in April 2013, before the Spinoff closed. Am. Compl. ¶ 271. In addition to information in the public domain, there was internal information available only to Covidien, such

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[31] Covidien has asserted that, at the time of the Spinoff, Mallinckrodt plc's directors were not former directors, officers, or employees of Covidien, thereby suggesting that they were disinterested from the start. But this has no bearing on the adverse domination doctrine unless those directors had knowledge of the facts that would have enabled them to sue Covidien. *See Aiello*, 852 N.E.2d at 80-81 (discussing limitations on the adverse domination doctrine that apply *when a non-wrongdoer director has knowledge of the wrongdoing*).

[32] *See In re Maxus Energy Corp.*, 641 B.R. at 506 (recognizing that equitable alter ego principles permitted a claim that parent and grandparent corporations were liable for stripping assets from and stranding liabilities with a subsidiary).

[33] *See InterGen N.V. v. Grina*, 344 F.3d 134, 149 (1st Cir. 2003) ("Federal common law emphasizes the equitable character of the alter ego doctrine, instructing federal courts that 'the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy[.]'").

[34] *See, e.g.*, *Giuliano v. Schnabel (In re DSI Renal Holdings), LLC*, 617 B.R. 496, 504 (Bankr. D. Del. 2020) (stating that courts "examine the substance, rather than the form, of the transactions" (citations omitted)).

as the failure of the suspicious order monitoring program and the extensive diversion of Mallinckrodt opioid products, that was within Covidien's knowledge *before* it formed Mallinckrodt plc in April 2013. *Id*. ¶¶ 7, 204-44. Covidien, not Mallinckrodt plc, understood the true reasons for the Spinoff and controlled every aspect of the Spinoff. *See id*. ¶¶ 166-70. The Amended Complaint therefore sufficiently alleges that Covidien had relevant knowledge that it failed to disclose to Mallinckrodt plc.

F. The Amended Complaint Sufficiently Pleads the Trust's Claim for Reimbursement, Indemnification, and Contribution

19. As an alter ego of Mallinckrodt, Covidien is jointly and severally liable with the Debtors for all opioid-related liability and claims borne by or asserted against the Debtors. On this basis, the Amended Complaint asserts claims against Covidien for reimbursement, indemnification, or contribution. Am. Compl. ¶¶ 390-94.

20. Covidien argues that the Amended Complaint fails to establish that Covidien and Mallinckrodt functioned as a single entity to the point that Mallinckrodt had no legal or independent significance of its own. Opp. at 18. The plain text of the Amended Complaint refutes this assertion. *E.g.*, Am. Compl. ¶¶ 174-84. And the fact that, *after the Spinoff*, opioid plaintiffs were serving their lawsuits on Mallinckrodt and not Covidien (Opp. at 18) is irrelevant because Covidien and Mallinckrodt were ostensibly separated by then and Mallinckrodt was obviously the opioid pharmaceuticals business that emerged from the Spinoff.[35]

21. Covidien contends that the Trust's alter ego theory fails because the Amended Complaint does not allege facts that Covidien carried out a fraud or injustice. Opp. at 20. Once again, the plain text of the Amended Complaint refutes this contention. Am. Compl. ¶¶ 185-88.

[35] Moreover, at the time, there was no need to sue Covidien because it was not until Mallinckrodt filed chapter 11 in 2020 that opioid claimants discovered that Mallinckrodt had insufficient unencumbered assets to compensate them in full.

Covidien asserts that, under *Mobil Oil Corp. v. Linear Films, Inc.*,[36] the underlying cause of action cannot satisfy the "fraud or injustice" element. Opp. at 20. But, in *Mobil Oil*, the court was rejecting the notion that "[a]ny breach of contract and any tort—such as patent infringement—is, in some sense, an injustice."[37] The Trust is not relying on any breach of contract or tort, such as patent infringement, to satisfy the fraud or injustice prong. Instead, its claims to avoid fraudulent transfers fit within the category of "fraud or something like it."[38] Moreover, the Amended Complaint lays out in great detail Mallinckrodt's opioid-related misconduct, while under Covidien's domination and control, which fueled the nationwide opioid epidemic. Am. Compl. ¶¶ 5-6, 35-139. The Amended Complaint thus establishes fraud and injustice in spades. Covidien's related arguments that the fraud or injustice prong is an inflexible standard that the Amended Complaint fails to meet is contrary to caselaw. Opp. at 20. "Alter ego is an equitable remedy that does not require identical and rigid application in all circumstances" and, as such, "[t]here is no cut and dry test."[39]

22. Covidien asserts that the Amended Complaint cannot establish alter ego liability because it merely asserts details "common to many parent-subsidiary relationships" and the "grist of typical parent-subsidiary arrangements." Opp. at 19-20. But what arrangements are "common" or "typical" are factual issues that cannot be resolved on a motion to dismiss. And Covidien's mere say-so is not enough. In making this argument, Covidien is asking this Court to

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36 718 F. Supp. 260 (D. Del. 1989).

37 *Id*. at 268.

38 *Id*. (citations omitted).

39 *In re Maxus Energy Corp.*, 641 B.R. at 506.

draw inferences *in its favor*, which is contrary to the Rule 12(b)(6) standard. At this stage of the proceeding, Covidien is not entitled to *any* inferences in its favor.[40]

23. Covidien's argument that Mallinckrodt released its non-avoidance claims under the Separation and Distribution Agreement (Opp. at 17, 21) is unavailing. The intentional wrongdoing that the Amended Complaint alleges renders the Separation and Distribution Agreement's purported release unenforceable.[41] This misconduct "can be explicit, as when it is fraudulent, malicious, or prompted by the sinister intention of one acting in bad faith. Or when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit."[42] Similarly, "[u]nder Massachusetts law, a release . . . is not effective to bar suits for gross negligence, or intentional or reckless conduct."[43]

G. The Amended Complaint Provides Sufficient Grounds for Subordinating or Disallowing Covidien's Claims

24. *Equitable Subordination*. Through its domination and control of its Mallinckrodt pharmaceuticals business (Am. Compl. ¶¶ 160-73), Covidien caused and is responsible for the misconduct that gave rise to the opioid liabilities (*id*. ¶¶ 35-139) for which Covidien asserts a right to indemnification. As a matter of equity, Covidien should not be allowed to receive indemnification for opioid-related liabilities it is responsible for, when opioid claimants will not be receiving 100 cents on the dollar from the Debtors.

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[40] See *Connelly*, 809 F.3d at 790 (At the motion to dismiss stage, the Court must "assume all . . . factual allegations to be true, construe those truths in the light most favorable to the plaintiff, and then draw all reasonable inferences from them.").

[41] *See Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 544 B.R. 75, 87 (Bankr. S.D.N.Y. 2016) (noting that, under New York law, "there is an exception to the general enforceability of limitation on damages [and liabilities] provisions in contracts if the breaching party's misconduct 'smacks of intentional wrongdoing.'") (quoting *Kalisch-Jarcho, Inc. v. City of New York*, 448 N.E.2d 413, 416 (N.Y. 1983))).

[42] *Kalisch-Jarcho, Inc.*, 448 N.E.2d at 416 (footnotes and citation omitted).

[43] *Demoulas v. Demoulas Super Mkts., Inc.*, No. CIV. A. 90-2927(B), 1995 WL 476772, at *70 (Mass. Super. Ct. Aug. 2, 1995) (citation omitted).

25. *Equitable Disallowance*. For the same reasons supporting the Trust's claim for equitable subordination, Covidien's indemnification claims should be equitably disallowed. Covidien cannot deny the existence of the longstanding remedy of equitable disallowance.[44] And, contrary to Covidien's assertions (Opp. at 21), the Amended Complaint makes sufficient factual allegations of inequitable conduct by Covidien as an insider, including at least seven badges of fraud that establish claims for intentional fraudulent transfer (Am. Compl. ¶¶ 316, 335, 352, 368) and Covidien's breach of fiduciary duty as a promoter (*id*. ¶¶ 382-89). In addition, the Court may draw a reasonable inference of illegality where, for example, Mallinckrodt, while under Covidien's domination and control, failed to properly monitor and stop suspicious opioid orders, contrary to the Controlled Substances Act. *Id*. ¶¶ 99-139.

26. *Section 502(d) Disallowance*. The Court should reject Covidien's challenge to the Trust's request for claims disallowance under 11 U.S.C. § 502(d) because, as discussed above and in its opposition to Covidien's motion to dismiss,[45] the Trust has sufficiently pled its fraudulent transfer claims in both its original Complaint and its Amended Complaint.

27. *Section 502(e) Disallowance*. Because Covidien concedes that it holds contingent and unliquidated indemnification claims, it does not—and cannot—argue that the Amended Complaint's request for disallowance under 11 U.S.C. § 502(e)(1)(B) is legally insufficient. Moreover, Covidien's request that the Court defer ruling on the Trust's demand for disallowance in abeyance in case Covidien's claims become liquidated (Opp. at 22) is no ground for dismissal.

CONCLUSION

For the reasons explained above and in the Motion, the Court should grant the Trust leave to file the Amended Complaint.

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[44] *See Pepper v. Litton*, 308 U.S. 295 (1939); Adv. D.I. 23 at 51-57.

[45] *See supra* paras. 6-8; Adv. D.I. 23 at 8-37.

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COLE SCHOTZ P.C.
/s/ Justin R. Alberto
Justin R. Alberto, Esq. (No. 5126)
Patrick J. Reilley, Esq. (No. 4451)
500 Delaware Avenue, Suite 1410
Wilmington, Delaware 19801
Telephone: (302) 652-3131
Facsimile: (302) 652-3117
jalberto@coleschotz.com
preilley@coleschotz.com

Seth Van Aalten, Esq.
Anthony De Leo, Esq.
1325 Avenue of the Americas, 19th Floor
New York, NY 10019
Telephone: (212) 752-8000
Facsimile: (212) 752-8393
svanaalten@coleschotz.com
adeleo@coleschotz.com

-and-

CAPLIN & DRYSDALE, CHARTERED
Kevin C. Maclay, Esq. (admitted *pro hac vice*)
Todd E. Phillips, Esq. (admitted *pro hac vice*)
Jeffrey A. Liesemer, Esq. (admitted *pro hac vice*)
Quincy M. Crawford, III, Esq. (admitted *pro hac vice*)
Serafina Concannon, Esq. (admitted *pro hac vice*)
One Thomas Circle, NW, Suite 1100
Washington, DC 20005
Tel: (202) 862-5000
Fax: (202) 429-3301
kmaclay@capdale.com
tphillips@capdale.com
jliesemer@capdale.com
mcrawford@capdale.com
sconcannon@capdale.com

Co-Counsel to the Opioid Master Disbursement Trust II