

captioned adversary proceeding (“**Adversary Proceeding**”), the redacted form of which is attached hereto as **Exhibit B** (“**Proposed Redacted Complaint**”), and to use certain information designated as privileged in the Amended Complaint, to which Mallinckrodt plc, the above-captioned reorganized debtor (“**Reorganized Debtor**,” and together with its debtor affiliates, “**Mallinckrodt**” or “**Debtors**”) has consented. In support of this Motion to Seal, the Trust respectfully states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated as of February 29, 2012 (Sleet, C.J.). This is a core proceeding under 28 U.S.C. § 157(b)(2). In accordance with Local Rule 9013-1(f), the Trust consents to the Court’s entry of a final order in the Adversary Proceeding if it is later determined that, absent the consent of the parties, the Court cannot enter final orders or judgments herein consistent with Article III of the United States Constitution.

2. Venue is proper under 28 U.S.C. §§ 1408 and 1409.

3. The statutory and legal predicates for the relief requested herein are Bankruptcy Code sections 105(a) and 107(b), Bankruptcy Rule 9018, and Local Rule 9018-1.

BACKGROUND

I. THE CHAPTER 11 CASES AND THE ADVERSARY PROCEEDING

4. On October 12, 2020, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in this Court (“**Bankruptcy Cases**”).

5. On April 27, 2021, the Court approved the Confidentiality and Protective Order (“**Protective Order**”). D.I. 2125. The Protective Order governs the exchange of confidential

information in the Bankruptcy Cases and related proceedings, including this Adversary Proceeding. D.I. 2125-1 (Protective Order) ¶ 1.

6. On March 2, 2022, the Court entered an order confirming the Modified Fourth Amended Plan of Reorganization (with Technical Modifications) (“**Plan**”). D.I. 6660.³ The Plan provided for the establishment of the Trust, which was created for the benefit of individuals and entities, including individuals who suffered bodily injuries, including addiction, overdose, other sickness and disease, and death, and babies born with neonatal abstinence syndrome, due to the opioid products that Covidien and Mallinckrodt marketed and sold, as well as for the benefit of all states and territories, their political subdivisions, Native American tribes, hospitals, emergency room physicians, insurance ratepayers, and third-party payors, that hold claims against Mallinckrodt based on its role in creating, perpetuating, and exacerbating the opioid crisis. The Trust’s purpose is to, among other things, “enforce, pursue, prosecute, compromise, and/or settle the Assigned Third-Party Claims and Assigned Insurance Rights[.]” *See* Plan art. IV.T. The Plan defines “Assigned Third-Party Claims” to include the “Assigned Medtronic Claims,” which, as relevant here, are causes of action that belonged to the Debtors against Medtronic plc and/or its subsidiaries.⁴ *See* Plan art. I.A.57.

³ The effective date of the Plan occurred on June 16, 2022. *See* D.I. 7652.

⁴ Specifically, the Plan defines “Assigned Medtronic Claims” as “all Causes of Action of the Debtors against Medtronic plc and/or its subsidiaries, and each of their predecessors, successors, and assigns, including all Avoidance Actions of the Debtors against such parties; provided, that the Debtors or Reorganized Debtors shall be entitled to assert any and all Causes of Action solely in defense against claims or Causes of Action asserted by Medtronic plc and/or its subsidiaries, or any of their predecessors, successors, or assigns, against the Debtors or Reorganized Debtors (as applicable), solely to the extent that any such Causes of Action asserted in defense by the Debtors or Reorganized Debtors (a) are not asserted as the basis for any setoff or recoupment by the Debtors or Reorganized Debtors (as applicable), (b) would not result in any recovery of money or property by the Debtors or Reorganized Debtors (as applicable), or (c) would otherwise not impair the Opioid MDT II’s ability to (i) recover the full amount of damages on account of the Assigned Medtronic Claims or (ii) assert any Assigned Medtronic Claims as the basis for reducing the Opioid MDT II’s or the Opioid Creditor Trusts’ liability to any Opioid Claimant.” Plan art. I.A.56.

7. On October 11, 2022, the Trust filed its original complaint (“**Complaint**”) asserting Assigned Medtronic Claims against Covidien Unlimited Company, Covidien Group Holdings, Ltd., Covidien International Finance S.A., and Covidien Group S.à r.l. (collectively, “**Defendants**” or “**Covidien**”). Adv. D.I. 2.

8. On October 14, 2022, the Trust filed the *Opioid Master Disbursement Trust II’s Motion to Seal Certain Confidential Information in the Opioid Master Disbursement Trust II’s Complaint*. Adv. D.I. 5.

9. On November 3, 2022, the Court entered the *Order Authorizing the Filing Under Seal Certain Confidential Information in the Opioid Master Disbursement Trust II’s Complaint*. Adv. D.I. 8.

10. On December 20, 2022, the Court entered the *Order Approving Stipulation Between Opioid Master Disbursement Trust II and Covidien Defendants*. Adv. D.I. 11. The approved stipulation provided terms governing Defendants’ acceptance of service, a briefing schedule for Defendants’ motion to dismiss, and page limits for the same and related briefs.

11. On December 23, 2022, Defendants filed *Covidien’s Motion to Dismiss the Complaint* (“**Motion to Dismiss**”), seeking dismissal of all counts of the Complaint. Adv. D.I. 13.

12. On February 28, 2023, the Trust filed the *Opposition of the Opioid Master Disbursement Trust II to Covidien’s Motion to Dismiss the Complaint*. Adv. D.I. 23.

13. On March 31, 2023, Defendants filed *Covidien’s Reply Brief in Support of its Motion to Dismiss the Complaint*. Adv. D.I. 26.

14. On April 7, 2023, Defendants filed the *Notice of Completion of Briefing* regarding the Motion to Dismiss. Adv. D.I. 29.

15. On April 25, 2023, Defendants filed the *Notice of Motion and Hearing*, notifying the parties that the Court scheduled a hearing on the Motion to Dismiss for June 27, 2023. Adv. D.I. 31. The Court recently announced that the hearing on the Motion to Dismiss will be rescheduled.

16. On June 15, 2023, the Trust filed the *Motion of Opioid Master Disbursement Trust II for Leave to File Amended Complaint* (“**Motion to Amend**”). Adv. D.I. 33. The Motion to Amend attached the Amended Complaint under seal.⁵ Adv. D.I. 33-2.

II. INFORMATION DESIGNATED AS CONFIDENTIAL OR PRIVILEGED USED IN THE AMENDED COMPLAINT

17. On May 30, 2022, the Debtors filed the *Motion of Debtors Pursuant to 11 U.S.C. §§ 105(a), 363(b), and 1142(b) for Entry of an Order (I) Approving, and Authorizing the Debtors’ Entry Into, the Opioid MDT II Cooperation Agreement and (II) Granting Related Relief* (“**Motion to Approve Cooperation Agreement**”). D.I. 7531. Covidien did not file an objection to the Motion to Approve Cooperation Agreement.

18. On June 6, 2022, the Court entered an Order approving the Opioid MDT II Cooperation Agreement (“**Cooperation Agreement**”), an agreement between the Trust and the Debtors. See D.I. 7586. Under the Cooperation Agreement, the Debtors agreed to transfer to the Trust, among other things, “all Documents or information that are ‘reasonably necessary’ to pursue and/or litigate any Assigned Claims,” including the claims alleged in this Adversary Proceeding. D.I. 7586-1 (Cooperation Agreement) § 1.1(a).

19. Between September 2022 and February 27, 2023, the Debtors produced over 1.3 million documents to the Trust under the Cooperation Agreement, many of which pertain to the

⁵ See Adv. D.I. 34 (letter to the Honorable John T. Dorsey).

Assigned Medtronic Claims. The Trust received the vast majority of these documents after it filed the Complaint.⁶ Additionally, the Trust received documents from certain advisors to the spinoff of Mallinckrodt (the “**Spinoff**”), including Bain & Company, Inc. (“**Bain**”), and documents from Covidien.

20. These documents were designated as “Confidential” or “Highly Confidential” (together, “**Confidential Information**”) in accordance with the Protective Order, as modified by the Cooperation Agreement.⁷ Additionally, Mallinckrodt designated some of the documents that it produced to the Trust under the Cooperation Agreement as privileged (“**Privilege-Designated Information**”).⁸ Based on its review of these documents, the Trust added facts to the Amended Complaint that support the Trust’s claims against Covidien.

21. Under the Cooperation Agreement, both Mallinckrodt and the Trust “share ownership of all applicable privileges,” (D.I. 7586-1 § 1.3(a)), but Mallinckrodt “alone shall control all applicable privileges, protections, or other immunities that may attach” to the Privilege-Designated Information. *Id.* § 1.3(b).

22. As such, the Cooperation Agreement provides that if the Trust intends to disclose, use, communicate, or share Privilege-Designated Information, it must provide 30 days’ notice to Mallinckrodt (“**Privileged Disclosure Notice**”). *Id.* § 1.3(d). If Mallinckrodt agrees “that the use or disclosure of the [Privilege-Designated Information] is reasonably required to preserve, secure,

⁶ For example, the Cooperation Agreement identified different categories of documents to be produced to Plaintiff, including as relevant to this Adversary Proceeding, privileged documents (Schedule B), documents relating to opioids (Schedule C), and documents relating to the Spinoff (Schedule F). The Trust received over 50,000 Schedule B documents (88% of the total number of Schedule B documents produced), over 400,000 Schedule C documents (100% of the total number of Schedule C documents produced), and approximately 350,000 Schedule F documents (79% of the total number of Schedule F documents produced), after October 11, 2022, the date the Trust filed its Complaint.

⁷ The Cooperation Agreement modifies the Protective Order by permitting the Trust to disclose information designated as “Confidential” or “Highly Confidential” to certain persons. *See* D.I. 7586-1 § 3.2.

⁸ The Trust reserves all rights to challenge the privilege designations of any documents designated as privileged at a later date.

prosecute, or obtain the benefit of the Assigned Claims,” then it must consent to the Trust’s use of the documents. *Id.* Absent consent, the Trust can move the Court for permission to use the documents. *Id.*

23. In accordance with the Cooperation Agreement, on May 24, 2023, the Trust sent Mallinckrodt’s counsel the required Privileged Disclosure Notice, which identified 31 documents that Mallinckrodt designated as privileged and that contained information that the Trust sought to use in its Amended Complaint.⁹ These documents, in addition to the recently produced documents designated as confidential, support allegations in the Amended Complaint that (1) Covidien’s board of directors monitored its pharmaceuticals business and expressed concerns about opioid liability (Adv. D.I. 33-2 ¶¶ 205-06); (2) high-level officers within Covidien had knowledge of significant opioid liabilities (*id.* ¶¶ 212-13); (3) reports of abuse and diversion of Mallinckrodt’s opioid products circulated widely within Covidien (*id.* ¶¶ 229, 232); (4) Covidien faced mounting pressure from governmental investigations into its opioid business (*id.* ¶¶ 238, 243); (5) Covidien took deliberate steps to minimize any accessible paper trail regarding opioid-related legal risks and burgeoning opioid liability (*id.* ¶¶ 245-46); (6) Covidien dominated and controlled Mallinckrodt (*id.* ¶¶ 168-69); (7) there was confusion of identity between Covidien and Mallinckrodt (*id.* ¶ 180); (8) Covidien had concerns about fraudulent transfer liability prior to the Spinoff (*id.* ¶¶ 301-04); (9) Covidien was aware of public information concerning opioids (*id.* ¶¶ 203-04); (10) Covidien designed the Spinoff to benefit itself at Mallinckrodt’s expense (*id.* ¶ 278); (11) Covidien’s pharmaceuticals business paid “key opinion leaders” to disseminate false and misleading information (*id.* ¶ 87); (12) Covidien and Mallinckrodt lobbied against state and federal restrictions on opioids and opposed oversight from legislators (*id.* ¶¶ 89-91); and (13) Covidien’s

⁹ Ultimately, the Trust incorporated into its Amended Complaint information from 23 of the documents designated as privileged, all of which predate the Spinoff.

pharmaceuticals business did not properly monitor and failed to stop suspicious orders (*id.* ¶¶ 110, 120).

24. On May 30, 2023, Mallinckrodt’s counsel informed the Trust that it consented to the use of the Privilege-Designated Information in the Amended Complaint, on the condition that any reference to or description of the Privilege-Designated Information be redacted, the unredacted Amended Complaint be filed under seal, and that the only party seeing the unredacted Privilege-Designated Information will be Covidien.

25. Mallinckrodt’s counsel also noted the existence of the Separation and Distribution Agreement (“**Separation Agreement**”) that Mallinckrodt and Covidien had entered into on June 28, 2013, in connection with the Spinoff. D.I. 4699-1 (Separation Agreement). The Separation Agreement contains a provision stating that, in the event of a dispute between Covidien and Mallinckrodt, Mallinckrodt is prevented from “seek[ing] any waiver of attorney-client privilege with respect to any communications relating to advice given prior to the Effective Time by counsel to Covidien or any Person that was a subsidiary of Covidien prior to the Distribution Date [June 28, 2013], regardless of any argument that such advice may have affected the interests of both Parties” (“**Putative Non-Waiver Provision**”).¹⁰ D.I. 4699-1 § 11.16. In other words, the

¹⁰ The Putative Non-Waiver Provision states in full:

Attorney-Client Privilege. Mallinckrodt agrees that, in the event of any Dispute or other litigation, dispute, controversy or claim between Covidien or a member of the Covidien Group, on the one hand, and Mallinckrodt or a member of the Mallinckrodt Group, on the other hand, Mallinckrodt will not, and will cause the members of its Group not to, seek any waiver of attorney-client privilege with respect to any communications relating to advice given prior to the Effective Time by counsel to Covidien or any Person that was a subsidiary of Covidien prior to the Distribution Date, regardless of any argument that such advice may have affected the interests of both Parties. Moreover, Mallinckrodt will, and will cause the members of its Group to, honor any such attorney-client privilege between Covidien and the members of its Group and its or their counsel, and will not assert that Covidien or a member of its Group has waived, relinquished or otherwise lost such privilege. For the avoidance of doubt, in the event of any litigation, dispute, controversy or claim between Covidien or a member of its Group, on the one hand, and a third party other than a member of the Mallinckrodt Group, on the

Separation Agreement, which was executed while Mallinckrodt was under Covidien's domination and control, purports to forbid Mallinckrodt from using privileged documents, including in a dispute with Covidien.

26. Because, as discussed below, the Putative Non-Waiver Provision is unenforceable, Covidien is barred by res judicata from objecting to the Trust's use of the Privilege-Designated Information as it did not object to the Court's approval of the Cooperation Agreement, and the crime-fraud exception applies, the Trust may use the Privilege-Designated Information in the Amended Complaint, and asks the Court for permission to do so out of an abundance of caution.

ARGUMENT

I. THE COURT SHOULD GRANT THE MOTION TO SEAL

27. Sufficient cause exists for the Court to grant the requested relief because the Trust received the Confidential Information pursuant to the Protective Order. Courts in this Circuit and elsewhere have granted requests to file information under seal where such information, as here, was subject to a non-disclosure agreement or protective order. *See, e.g., City of Sterling Heights Gen. Emps.' Ret. Sys. v. Prudential Fin., Inc.*, No. 2:12-cv-05275 (MCA) (LDW), 2016 WL 234838, at *2-4 (D.N.J. Jan. 19, 2016) (granting motions to seal exhibits, citing the application of non-disclosure agreements to the documents as one factor); *Ramirez v. Temin & Co., Inc.*, No. 20 CIV. 6258 (ER), 2020 WL 6781222, at *4 (S.D.N.Y. Nov. 18, 2020) ("When a document is protected by a non-disclosure agreement, it will serve as an additional, although not dispositive,

other hand, Covidien shall retain the right to assert attorney-client privilege with respect to any communications relating to advice given prior to the Distribution Date by counsel to Covidien or any Person that was a subsidiary of Covidien prior to the Distribution Date.

D.I. 4699-1 § 11.16.

factor in determining whether the document contains confidential information or a trade secret and therefore should be sealed.”).

28. Furthermore, the Court should permit the Trust to file under seal those parts of the Amended Complaint that reference the Privilege-Designated Information, as Courts have routinely authorized the filing of information designated as privileged under seal. *See Pal v. Univ. of Med. & Dentistry of N.J.*, No. 2:11-cv-06911-SRC-CLW, 2013 WL 4607160, at *3 (D.N.J. Aug. 29, 2013) (authorizing the filing of information designated as privileged under seal); *Novo Nordisk A/S v. Sanofi-Aventis U.S. LLC*, No. CV 07-3206(MLC), 2008 WL 11510570, at *1 (D.N.J. Jan. 22, 2008) (authorizing a plaintiff to redact certain exhibits that contained privileged documents); *cf. Centifanti v. Nix*, 865 F.2d 1422, 1432 (3d Cir. 1989) (noting that a party filed allegedly privileged documents under seal).

29. Accordingly, the Court should grant the Trust’s request to file under seal those portions of the Amended Complaint that describe the Confidential Information and Privilege-Designated Information.

II. THIS COURT SHOULD AUTHORIZE THE TRUST’S USE OF PRIVILEGE-DESIGNATED INFORMATION IN THE AMENDED COMPLAINT

30. The Court should permit the Trust to use the Privilege-Designated Information in the Amended Complaint. Where a parent and subsidiary shared a privilege as to certain information, the adverse litigation exception permits one of the parties to use such information in a dispute against the other party. Courts have viewed contract provisions that have forced parties to waive the adverse litigation exception as unenforceable. In addition, because Covidien did not timely object to the Cooperation Agreement, which permits the Trust to use documents that the Debtors produced to it in this Adversary Proceeding, it is now barred under *res judicata* from collaterally attacking it. Finally, the Trust may use the Privilege-Designated Information under

the crime-fraud exception to privilege because the Trust has alleged intentional fraud against Covidien.

A. The Adverse Litigation Exception Permits the Trust to Use the Privilege-Designated Information Against Covidien, and the Putative Non-Waiver Provision Is Unenforceable

1. The Adverse Litigation Exception Permits the Trust to Use the Privilege-Designated Information Against Covidien

31. Courts around the country hold that co-parties who were represented by the same counsel cannot invoke the attorney-client privilege against each other if and when their interests become adverse. *See Off. Comm. of Unsecured Creditors v. Fleet Retail Fin. Grp. (In re Hechinger Inv. Co. of Del.)*, 285 B.R. 601, 612 (D. Del. 2002) (“Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences . . . will remain secret from each other, and those confidential communication [sic] are not within the privilege in subsequent adverse proceedings between the co-clients.”); *Fabick, Inc. v. FABCO Equip., Inc.*, 296 F. Supp. 3d 1022, 1032 (W.D. Wis. 2017) (privilege arising out of a joint representation was “effectively waived” in light of plaintiff suing defendant under the adverse litigation exception); *In re Mirant Corp.*, 326 B.R. 646, 649 (Bankr. N.D. Tex. 2005) (“It is well established that, in a case of a joint representation of two clients by an attorney, one client may not invoke the privilege against the other client in litigation between them arising from the matter in which they were jointly represented.”); *Neighborhood Dev. Collaborative v. Murphy*, 233 F.R.D. 436, 441 (D. Md. 2005) (“there is no dispute that parties to a joint representation are barred from asserting the attorney-client privilege against one another”); *Bass Pub. Ltd. Co. v. Promus Cos. Inc.*, 868 F. Supp. 615, 620 (S.D.N.Y. 1994) (“Where there is a joint attorney-client privilege, there is no expectation that confidential information will be withheld from joint clients as there is no privilege between them.”).

32. As the Third Circuit has noted, “[t]he great caveat of the joint-client privilege is that it only protects communications from compelled disclosure to parties outside the joint representation. When former co-clients sue one another, the default rule is that all communications made in the course of the joint representation are discoverable.” *Teleglobe USA Inc. v. BCE Inc. (In re Teleglobe Commc’ns Corp.)*, 493 F.3d 345, 366 (3d Cir. 2007), *as amended* (Oct. 12, 2007).

33. Here, New York law governs the interpretation of the Separation Agreement (D.I. 4699 § 11.2), and New York courts have recognized and routinely apply this adverse litigation exception to the attorney-client privilege. *See Feighan v. Feighan*, 180 A.D.3d 873, 874 (N.Y. 2d Dept. 2020) (“Generally, when an attorney represents two or more parties with respect to the same matter, the attorney-client privilege may not be invoked to protect confidential communications concerning the joint matter in subsequent adverse proceedings between the clients.”); *Arkin Kaplan Rice LLP v. Kaplan*, 107 A.D.3d 502, 502 (N.Y. 1st Dept. 2013) (under New York law, otherwise privileged documents may be used when jointly represented clients subsequently sue one another); *In re McCormick*, 287 A.D.2d 457, 457 (N.Y. 2d Dept. 2001) (“The attorney-client privilege may not be raised to prevent disclosure of communications relevant to the common interest of former joint clients in subsequent litigation[.]”) (internal citations omitted); *Goldberg v Am. Home Assur. Co.*, 80 A.D.2d 409, 413, 439 N.Y.S.2d 2 (1st Dept. 1981) (“[W]hen an attorney acts for two different parties having a common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties[.]”); *In re Friedman*, 64 A.D.2d 70, 84, 407 N.Y.S.2d 999 (2d Dept 1978) (“[i]f two or more persons consult an attorney in regard to a matter of common interest, nothing that is said by the parties or the attorney is deemed confidential in an action arising subsequently thereto between the parties

or their personal representatives.”) (alteration in original) (internal citation and quotation marks omitted).

34. Where, as here, legal counsel performs work for a parent corporation and a wholly owned subsidiary, courts have “found that the parent-sub subsidiary relationship is like a joint representation.” *Madison Mgmt. Grp., Inc. v. Fogel (In re Madison Mgmt. Grp., Inc.)*, 212 B.R. 894, 896 (Bankr. N.D. Ill. 1997); *Teleglobe*, 493 F.3d 345 (citing with approval *Polycast Tech. Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47, 49 (S.D.N.Y. 1989) (which found there was a joint interest relationship “when a parent’s officer and general counsel affirmatively advised [a] subsidiary on how to comply with [a] merger agreement to which parent and subsidiary were both parties”); *Robinson Mech. Contractors Inc. v. PTC Grp. Holding Corp.*, No. 1:15-CV-77 SNLJ, 2017 WL 2021070, at *2 (E.D. Mo. May 12, 2017) (noting that Delaware courts have found that parent corporations and their wholly owned subsidiaries are able to invoke joint representation for attorney-client privileged documents (citing *Teleglobe*, 493 F.3d at 366); *Mirant*, 326 B.R. at 648 (outside counsel performed work for both parent and subsidiary when preparing a spinoff); *cf. Valente v. Pepsico, Inc.*, 68 F.R.D. 361, 367 (D. Del. 1975) (“This Court has long adhered to the rule that house counsel are to be treated in the same fashion as outside counsel with respect to activities in which they are engaged as attorneys.”).

35. Courts have also found that the adverse litigation exception applies with respect to a trust, where a trust succeeds to the interest of a subsidiary. *See Maxus Liquidating Trust v. YPF S.A. (In re Maxus Energy Corp.)*, 617 B.R. 806, 818 (Bankr. D. Del. 2020) (ordering debtor’s former parent to produce to the liquidating trustee documents in a fraudulent transfer action that were prepared by shared employees of the parent company and the debtor); *Newsome v. Lawson*, 286 F. Supp. 3d 657, 664 (D. Del. 2017) (in an action by liquidating trustee and successor-in-

interest of a subsidiary against corporate counsel who had represented both the subsidiary and its parent, counsel could not withhold privileged communications from the trustee that had arisen out of the joint representation, even though the non-party parent refused to consent to the disclosure).

36. Here, prior to the Spinoff, Mallinckrodt was wholly owned and controlled by Covidien and operated as its pharmaceuticals division. Adv. D.I. 33-2 (Amended Complaint) ¶ 32. In addition, the Privilege-Designated Information predating the Spinoff solely relates to subjects in which Mallinckrodt had a common interest with Covidien, such as actions taken by the pharmaceuticals division prior to the Spinoff and legal issues concerning opioids and potential liabilities arising from opioids that relate to Mallinckrodt. *See id.* ¶¶ 110, 120, 205-06, 238, 243. At the time that this Privilege-Designated Information was created, Mallinckrodt shared in-house counsel with Covidien.

37. Other Privilege-Designated Information relates to the actions that Covidien took when preparing for the Spinoff, including determining what assets and liabilities to assign to Mallinckrodt, drafting the information statement about the Spinoff, and assessing whether the transaction would be subject to a fraudulent conveyance action. *Id.* ¶¶ 301-04. As in *Polycast*, 125 F.R.D. at 49, the legal advice related to an agreement to which Covidien and Mallinckrodt were both parties (D.I. 4699-1 at 70-71), and in connection with which Mallinckrodt did not have independent legal counsel, and instead was jointly represented with Covidien by the counsel that Covidien hired. *See Adv. D.I. 33-2* ¶¶ 168-69.

38. Moreover, that Mallinckrodt retained the Privilege-Designated Information after the Spinoff also demonstrates that Mallinckrodt had a common interest in the subject matter of the documents designated as privileged. *Cf. Sec. Inv. Prot. Corp. v. Stratton Oakmont, Inc.*, 213 B.R. 433, 438 (Bankr. S.D.N.Y. 1997) (“when [parties] face one another in litigation, neither can

reasonably be allowed to deny to the other the use of information which [it] already has by virtue of the former's own disclosure.”).

39. In this Adversary Proceeding, the Trust “is the successor in interest to [Mallinckrodt]” for purposes of pursuing litigation against Covidien. D.I. 7586-1 § 1.3(a). Therefore, the adverse litigation exception applies to the Trust.

2. *The Separation Agreement's Putative Non-Waiver Provision Is Unenforceable*

40. The Putative Non-Waiver Provision is contrary to law and public policy, and thus unenforceable. *See In re Ginn-LA St. Lucie Ltd., LLLP*, 439 B.R. 801, 804-06 (Bankr. S.D. Fla. 2010) (applying New York law and holding that an agreement to shield attorney-client information from disclosure even if an adversity of interest subsequently arises among the parties is *void ab initio*, and “[t]he ability of such provisions to shield wrongdoers at the expense of a debtor's creditors renders their enforcement in bankruptcy proceedings against public policy”). Indeed, the Third Circuit has affirmatively noted that “the only case . . . found^[11] dealing with such an agreement is *In re Mirant Corp.*, 326 B.R. 646, 652 . . . (applying Georgia law), in which the Bankruptcy Court refused to give [the agreement] effect.”¹² *Teleglobe*, 493 F.3d at n. 23.

41. Here, Covidien's conduct has brought immeasurable harm to the opioid creditors, and it would be unjust and inequitable for Covidien to be permitted to siphon off billions of dollars

¹¹ *Ginn-LA* was decided subsequently to *Mirant* and *Teleglobe*.

¹² In *Mirant*, the debtor's former parent announced its intention to divest itself of the debtor and hired a law firm to represent both the parent and subsidiary in the divestiture. 326 B.R. at 647-48. Both the parent and subsidiary agreed that the law firm would protect the confidentiality of the information shared with the law firm, and that the law firm would render confidential advice to both parties, even if the advice were adverse to one of the parties. *Id.* at 648. After the former subsidiary filed for bankruptcy, it sought discovery from the law firm. *Id.* at 647. The court found that the agreement limiting the use of confidential information was unenforceable to prevent disclosure of information to a party to the joint representation. *Id.* at 652. The Court also found it especially troubling that the agreement, “whatever its facial value, was entered into when [the debtor] was still under the control of [its former parent].” *Id.*

The Third Circuit also noted that although the Restatement (Third) of the Law Governing Lawyers states that such agreements may be permissible, “the drafters concede finding no direct authority for that proposition.” *Teleglobe*, 493 F. 3d at 379 (citing Restatement (Third) of the Law Governing Lawyers § 75(2), cmt. e).

in value from Mallinckrodt and then contractually bar Mallinckrodt from preventing disclosure of relevant information in a suit by the Trust, as Mallinckrodt's successor-in-interest, against Covidien. As in *Ginn-LA*, such a contract is especially inappropriate in a bankruptcy proceeding, where the debtor has a duty to marshal the assets of the estate for the benefit of creditors. 439 B.R. at 805-06; *see also Claybrook v. Morris (In re Scott Acquisition Corp.)*, 344 B.R. 283, 290 (Bankr. D. Del. 2006) (“[T]he trustee has the duty to marshal the assets of the estate so that they can be distributed to creditors on a *pro rata* basis.”) (internal quotation omitted).

42. If the Court were to deny the Trust's request to use the Privilege-Designated Information in a lawsuit against Covidien, that would undermine the purpose and terms of the Cooperation Agreement, which unequivocally provides that the Debtors must produce documents to the Trust so that it can use those documents to pursue assigned claims for the benefit of creditors, including against Covidien. Moreover, the Cooperation Agreement makes clear that the Trust may be permitted to use the Privilege-Designated Information in the Amended Complaint.

43. Furthermore, the Trust has alleged that, prior to the Spinoff, Covidien dominated and controlled Mallinckrodt to an extent that made Covidien and Mallinckrodt alter egos of one another. Adv. D.I. 33-2 ¶¶ 140-88. It would be especially unjust to enforce a provision that Covidien forced upon Mallinckrodt at a time when Covidien was exercising domination and control over its pharmaceuticals division. *Cf. Trs. of Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188, 193 n.6 (3d Cir. 2003) (noting that “[t]he alter ego doctrine is a ‘tool of equity’” and is a mechanism for “remedying the ‘fundamental unfairness [that] will result from a failure to disregard the corporate form’”) (second alteration in original) (internal citations omitted).

44. Accordingly, the Putative Non-Waiver Provision purportedly forbidding Mallinckrodt—and now, the Trust—from waiving privilege in the event of a dispute with Covidien is contrary to law and public policy and is thus unenforceable.

B. Even If the Court Finds That the Putative Non-Waiver Provision Is Enforceable, The Trust Should Be Permitted to Use the Privilege-Designated Information Because Any Objection by Covidien Is Barred by Res Judicata and the Crime-Fraud Exception Applies

1. Covidien Is Barred by Res Judicata from Objecting to the Trust's Use of the Privilege-Designated Information Under the Cooperation Agreement

45. Although Covidien had appeared through counsel in the Bankruptcy Cases (D.I. 2412), and filed limited objections to the Debtors' disclosure statement for its first plan of reorganization (D.I. 2389) and to the Debtors' first amended joint plan of reorganization (D.I. 4699), Covidien never objected to the Debtors' Motion to Approve Cooperation Agreement, which provides that the Debtors must produce documents to the Trust, including privileged documents, that are reasonably necessary for it to pursue claims against Covidien. Covidien also did not object to the Court's confirmation of the Plan, which contemplated the Cooperation Agreement being entered into. *See* D.I. 6660-1 Art. IV.O. As such, any attempt by Covidien at this juncture to object to the Trust's use of the Privilege-Designated Information in the Amended Complaint would be barred by the doctrine of res judicata, which serves to prevent a party from relitigating a matter that has been adjudicated on the merits by a competent court.¹³ *See, e.g., Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152 (2009) (holding that final orders of the bankruptcy court have res judicata effect) (citations omitted); *In re G-I Holdings*, 568 B.R. 731, 765 (Bankr. D.N.J. 2017)

¹³ Moreover, because Mallinckrodt rejected the Separation Agreement in the Bankruptcy Cases, it was never assigned to the Trust, and therefore the Trust's use of the Privilege-Designated Information in the Amended Complaint is also not a breach of the Separation Agreement. *See Rejected Contract Schedule*, D.I. 6002-1 at 12 (rejecting Separation Agreement); *Permacel Kansas City, Inc. v. Kohler Co.*, No. 08-00804-CV-W-FJG, 2010 WL 2516924, at *3 (W.D. Mo. June 14, 2010) ("A rejected executory contract cannot be assigned to a third party") (citing 11 U.S.C. § 365(f)(2)).

(once an order becomes final, it is res judicata as to the parties and those in privity with them, including an order of the bankruptcy court). Accordingly, Covidien is barred by res judicata from objecting to the Trust's use of the Privilege-Designated Information in the Amended Complaint.

2. *The Trust May Use Privilege-Designated Information in the Amended Complaint Because It Is Subject to the Crime-Fraud Exception to the Attorney-Client Privilege*

46. Finally, the Trust's use of the Privilege-Designated Information in the Amended Complaint is permissible on the full, sufficient, and independent basis that the Trust may disclose such information under the crime-fraud exception to the attorney-client privilege. Under New York law, the crime-fraud exception applies where the party seeking to use privileged communications demonstrates "a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime." *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 180 F. Supp. 3d 273, 281-82 (S.D.N.Y. 2016) (quoting *In re New York City Asbestos Litig.*, 109 A.D.3d 7, 10 (1st Dep't 2013)). "[T]here need only be a reasonable basis for believing that the objective was fraudulent." *Madoff*, 319 F.R.D. at 107 (citations and internal quotations omitted); *see also Methyl*, 180 F. Supp. 3d at 282 ("[A] court will find the crime fraud exception applicable where 'a prudent person ha[s] a reasonable basis to suspect the perpetration or attempted perpetration of a . . . fraud.' In addition, 'the moving party must also establish probable cause that the disputed communications 'were intended in some way to facilitate or to conceal the [fraudulent] activity.'" (alterations in original).

47. The crime-fraud exception applies to fraudulent transfer claims. *See Methyl*, 180 F. Supp. 3d at 283 (finding that communications were subject to the crime-fraud exception where there was "sufficient factual support for the allegation that the . . . restructuring was a fraudulent

scheme to deprive creditors of . . . profitable assets.”); *Transcon. Refrigerated Lines, Inc. ex rel. Young v. New Prime, Inc.*, No. 1:13-CV-2163, 2014 WL 2471936, at *13 (M.D. Pa. June 3, 2014) (“Because each communication, or document reflecting a communication, pertains to the furtherance of an allegedly fraudulent transfer, each is subject to the crime-fraud exception.”); *Jones v. Tauber & Balser, P.C.*, 503 B.R. 162, 187 (N.D. Ga. 2013) (applying the crime-fraud exception based on “prima facie evidence of a fraudulent transfer” to a liquidating trustee’s intentional fraudulent transfer).

48. Here, because the Trust is pursuing fraudulent transfer claims against Covidien in the Amended Complaint (*see* Adv. D.I. 33-2 ¶¶ 312-18; 331-36; 348-53; 365-70), the crime-fraud exception permits the Trust to use the Privilege-Designated Information in the Amended Complaint.

COMPLIANCE WITH LOCAL RULE 9018-1(d)

49. Pursuant to Local Rule 9018-1(d)(iii), the Trust and counsel for the Reorganized Debtor conferred in good faith regarding the Trust’s proposed redactions to the Amended Complaint of information from documents that the Debtors produced to the Trust and designated as “Confidential” or “Highly Confidential.” The Reorganized Debtor agreed to the Trust’s proposed redactions. *See* Del. Bankr. L.R. 9018-1(d)(iii).

50. Additionally, the Trust and counsel for Covidien conferred in good faith regarding the Trust’s proposed redactions to the Amended Complaint of information from documents that Covidien produced to the Trust and designated as “Confidential” or “Highly Confidential.” Covidien agreed to the Trust’s proposed redactions. *See* Del. Bankr. L.R. 9018-1(d)(iii).

51. Additionally, Bain produced documents designated as “Confidential,” and the Trust describes information from one of these confidential documents in its Amended Complaint. The Trust and counsel for Bain have conferred in good faith regarding the Trust’s proposed redaction

of that information from the Amended Complaint, and Bain agreed to the proposed redaction. *See* Del. Bankr. L.R. 9018-1(d)(iii).

NOTICE

52. The Trust will provide notice of this Motion to Seal to (i) the U.S. Trustee; (ii) counsel for Mallinckrodt; (iii) counsel for Defendants; and (iv) counsel for Bain. In light of the nature of the relief requested herein, the Trust submits that no other notice is necessary.

CONCLUSION

For the foregoing reasons, the Trust respectfully requests that the Court enter an Order, substantially in the form attached hereto as **Exhibit A**, (a) authorizing the Trust to file under seal the Confidential Information in the Amended Complaint, including the Privilege-Designated Information, (b) approving the redactions reflected in the Proposed Redacted Complaint, (c) finding that the Trust is authorized to use the Privilege-Designated Information in the Amended Complaint, and (d) granting any such other and further relief as is just and proper.

Dated: June 21, 2023
Wilmington, Delaware

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