IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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

COVIDIEN'S MOTION TO DISMISS THE COMPLAINT

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December 23, 2022

[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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Defendants Covidien Unlimited Company, Covidien Group Holdings Ltd., Covidien International Finance S.A. and Covidien Group S.à.r.l. ("Covidien") respectfully submit this motion, pursuant to Fed. R. Civ. P. 8, 9(b), and 12(b)(6) as incorporated through Fed. R. Bankr. P. 7008, 7009, and 7012(b), to dismiss the complaint (the "Complaint") filed by the Opioid Master Disbursement Trust II ("Plaintiff" or the "Trust").

PRELIMINARY STATEMENT

This case should never have been brought. It asserts claims that are untimely, implausible, barred by state and federal law, and otherwise legally deficient.

Plaintiff's belated fraudulent-transfer claims—brought more than nine years after Covidien and Mallinckrodt parted ways in a spinoff that closed in June 2013—present a classic example of what the law does not permit: litigation by hindsight. The Complaint does not allege that a *single* opioid lawsuit was pending against Mallinckrodt at the time of the spinoff. Not until *2017*—four years after the 2013 spinoff—did a series of then-novel "public nuisance" suits first begin to be filed by governmental entities, commencing the wave of widespread opioid litigation. Mallinckrodt's bankruptcy did not follow for another three years, until *2020*, more than seven years after the spinoff.

Nothing in the Complaint so much as suggests, let alone plausibly alleges, that Covidien knew back in 2013 that the pharmaceutical business then-operated by its Mallinckrodt subsidiaries would, years later, face allegedly ruinous opioid litigation, much less that any such supposed knowledge was the reason for the spinoff. None of Mallinckrodt's creditors, in whose shoes Plaintiff now stands, ever sued Covidien claiming that the 2013 spinoff was a "fraudulent transfer." Indeed, to this day, none has ever served Covidien with a complaint asserting that Covidien has any liability arising from Mallinckrodt's sale of opioids.

To the contrary, the very documents the Complaint cites, obtained through extensive discovery provided in these bankruptcy proceedings by Covidien and the multiple sophisticated advisors for the spinoff, demonstrate that Covidien began exploring in 2010 either selling Mallinckrodt or spinning it off to Covidien's own shareholders for perfectly legitimate reasons—to separate Mallinckrodt's pharmaceuticals business from Covidien's fundamentally different medical-devices and medical-supplies businesses. Acting on the advice of prominent financial and legal advisers (including Goldman Sachs, JP Morgan, Morgan Stanley, Bain, McKinsey and Wachtell Lipton), Covidien designed the spinoff to allow each company's management to focus on its own business to maximize value for shareholders and creditors alike. The documents show that Covidien took numerous steps to ensure that Mallinckrodt would be well positioned as a stand-alone company when it was spun off. Indeed, in the years leading up to the spinoff, Covidien invested *more than one hundred million dollars* to upgrade Mallinckrodt's manufacturing plants, develop Mallinckrodt's pharmaceuticals pipeline, hire its senior management, and fund its strategic pharmaceutical acquisitions.

Moreover, the Separation and Distribution Agreement for the spinoff, which the Complaint repeatedly references, included *mutual* indemnification obligations by which Covidien and Mallinckrodt each indemnified the other for liabilities and costs arising out of the indemnitor's business. The only exception to this standard provision worked in *Mallinckrodt's* favor, as Covidien assumed Mallinckrodt's most significant, known contingent exposure at the time, potential environmental liability arising out of a manufacturing site in Maine operated by

Mallinckrodt. (This contingent liability eventually became fixed, and Covidien committed to pay at least $187 million in 2022 to resolve the matter.[2])

Covidien's efforts to ensure Mallinckrodt would emerge from the spinoff as a solvent, stand-alone company with adequate capitalization were confirmed by one of the market leaders for solvency analyses, Houlihan Lokey, which rendered an unqualified solvency opinion in connection with the spinoff after taking account of the only then-known contingent liabilities that Mallinckrodt would retain. Mallinckrodt's ample solvency at the time of the spin was also confirmed by the actions of numerous senior officers and directors, who not only left Covidien for Mallinckrodt but who then stayed with the company for many years. Indeed, as the Complaint acknowledges (¶ 135), Mark Trudeau, who had been the President of the pharmaceutical division at Covidien, agreed to become the CEO of Mallinckrodt based on his assessment that Mallinckrodt's value exceeded its liabilities by at least $2 billion.

The capital markets shared that assessment. Mallinckrodt issued more than *$1 billion* in unsecured debt in connection with the spinoff. And its stock began trading on the New York Stock Exchange, with a market capitalization of *$2.5 billion* immediately following the spin—*i.e.*, the market valued Mallinckrodt's assets as worth $2.5 billion more than its liabilities. The company's market capitalization thereafter *increased*, rising in 2014 and 2015 to between $8.0 to $10.4 billion. This market-based, contemporaneous, objective measure of Mallinckrodt's ample solvency at the time of the spinoff (and for years thereafter) renders Plaintiff's claims that Mallinckrodt was doomed to fail from the start implausible and untenable. *See VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 631-634 (3d Cir. 2007) (affirming judgment dismissing suit

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[2] Order on Consent Decree and Proposed Bar Order, Docket No. 1180, *Maine People's Alliance v. Holtrachem Mfg. Co.*, No. 1:00-cv-00069-JAW (D. Me. Aug. 4, 2022).

to avoid spinoff as a fraudulent transfer because spun-off company's large market capitalization after the spinoff established that it was solvent at the time).

Plaintiff's fraudulent-transfer claims are also legally defective. *First*, the claims are time-barred under the applicable four-year statute of repose, which extinguished Plaintiff's fraudulent-transfer claims years before Mallinckrodt's bankruptcy. No exception Plaintiff cites applies: the discovery rule did not extend the time to sue to challenge the transfers, which were publicly disclosed at the time of the spinoff; nor could any of Mallinckrodt's government creditors (in whose shoes Plaintiff purports to stand) have brought a timely claim when Mallinckrodt filed for bankruptcy in October 2020. *Second*, Plaintiff's intentional fraudulent-transfer claims fail to allege at all, let alone with the particularity required under Rule 9(b), that any member of Covidien's board of directors—the only corporate body that had legal authority to approve the spinoff—acted with actual fraudulent intent in authorizing the challenged transfers, much less that a majority of the directors did. *Third*, Plaintiff's claims to claw back the transfers that Covidien received in the spinoff, a large public securities transaction, are barred by the Bankruptcy Code's "safe harbor" for securities settlement payments and transfers made in connection with a securities contract. *Finally*, Plaintiff's claims to avoid the purported "transfers" of the medical-devices and medical-supplies businesses that Covidien retained in the spinoff fail to state a claim because the Complaint does not allege that any Mallinckrodt entity in bankruptcy ever owned those businesses (and hence had anything to "transfer") in the first place.

Numerous legal deficiencies similarly require dismissal of Plaintiff's remaining claims. The claim for breach of a fiduciary duty that supposedly arose when Covidien "promoted" the spinoff is time-barred and, in any event, fails to state a claim. The claim for reimbursement of all of Mallinckrodt's own liabilities and expenses does not meet the most basic pleading

requirements. And Plaintiff alleges no basis to disallow or subordinate Covidien's contract-law claims asserted in the bankruptcy that flow from the plain terms of the Separation and Distribution Agreement.

The Complaint should be dismissed.

STATEMENT OF FACTS[3]

Before filing its Complaint, Plaintiff had access to nearly a million documents produced in the bankruptcy by Mallinckrodt (800,000 documents), Covidien (70,000 documents), and numerous advisors to the spinoff (4,500 documents), including Goldman Sachs, JPMorgan, Morgan Stanley, McKinsey, Bain, and Houlihan Lokey. Plaintiff also had the benefit of depositions that the Official Committee of Opioid Related Claimants (the "OCC") took in the bankruptcy of 15 current and former Mallinckrodt directors, officers and their auditors, Deloitte & Touche.[4] And Plaintiff likewise had access to some 1.4 million documents and 43 depositions from the underlying opioid litigation that Mallinckrodt had publicly released.[5] Yet, the Complaint does not allege that, prior to the spinoff, any Covidien director, any Covidien advisor, or anyone else associated with Covidien anticipated the unprecedented avalanche of opioid

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[3] On this motion to dismiss, the Court may consider (1) the Complaint, (2) "documents incorporated into the [C]omplaint by reference," (3) "matters of public record," (4) "matters of which a court may take judicial notice," and (5) documents "that a defendant attaches as an exhibit to a motion to dismiss" if they are "undisputedly authentic" and "the [plaintiff's] claims are based [on them]." *Est. of Roman v. City of Newark*, 914 F.3d 789, 796-97 (3d Cir. 2019). The Court may also consider documents filed with the Securities and Exchange Commission ("SEC"), whether or not relied upon in the Complaint, that are properly subject to judicial notice. *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1331 (3d Cir. 2002); *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000). Covidien is filing with this brief the Declaration of Joel Millar ("Millar Decl.") attaching documents that the Court may consider on this motion, including the Separation and Distribution Agreement for the spinoff, SEC filings made in connection with the spinoff, and other documents on which Plaintiff's claims are based or that are subject to judicial notice.

[4] *See Notice of Filing of Letter of the Official Committee of Opioid-Related Claimants in Supp. of First Am. Joint Plan of Reorganization of Mallinckrodt plc and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code*, [D.I. 4535] Ex. A (Supp. OCC Plan Position Letter), p.1.

[5] *See* https://www.industrydocuments.ucsf.edu/opioids/collections/mallinckrodt-litigation-documents/ (Opioid Industry Documents archive for "Mallinckrodt Litigation Documents").

litigation that began only years later, much less that any such unforeseen litigation was the reason for the spinoff.

Instead, the Complaint spills most of its ink describing Mallinckrodt's alleged role in the opioid epidemic. Compl. ¶¶ 24-131. But Plaintiff fails to tie those allegations to Covidien's decision to spin-off Mallinckrodt. Of the more than 100 paragraphs describing Mallinckrodt's alleged misconduct, Covidien is mentioned in only four. *See id.* ¶¶ 29, 39, 55, 57 (citing two emails and one sales meeting, and stating that Covidien was Mallinckrodt's parent).

Lacking any facts suggesting that Mallinckrodt's alleged misconduct had anything to do with the spinoff, Plaintiff instead offers the conclusory assertion that Covidien and its subsidiaries, including Mallinckrodt, "operated as a single economic enterprise," purportedly making Mallinckrodt the "alter ego" of Covidien. Compl. ¶¶ 132, 146. But instead of alleging the extraordinary facts required to clear the exceedingly high bar for alter-ego (or veil-piercing) liability, Plaintiff alleges only the sort of run-of-the-mill interrelationships that exist in any corporate family of parent and subsidiaries. The Complaint thus alleges that (i) Covidien provided "shared corporate services" to Mallinckrodt, "including information technology, finance, human resources, corporate compliance, communications, and government affairs functions," *id.* ¶ 132; (ii) cash was handled through "an integrated cash management system," *id.* ¶ 141; and (iii) Covidien and its subsidiaries were "managed by the board of directors of Covidien plc," which "made the ultimate decisions about Mallinckrodt," *id.* ¶¶ 134, 138-139, 142.

If anything, the Complaint confirms the separateness of Mallinckrodt and Covidien. It explains that Mallinckrodt and its pharmaceutical business were, for the vast majority of their century-old existence, independent from Covidien. Mallinckrodt (or its predecessor) dates back

to the nineteenth century, and it manufactured and marketed opioid pharmaceutical products for decades, since at least 1995. Compl. ¶ 30. Mallinckrodt was a stand-alone company until it was acquired by Tyco International Ltd. ("Tyco") in 2000. *Id.* ¶ 29. It only became a subsidiary of Covidien in 2007, when Tyco separated its healthcare businesses from its other operations, forming Covidien. *Id.* Mallinckrodt and its affiliates thereafter continued to operate as distinct legal entities—as "direct or indirect subsidiaries of Covidien"—from 2007 until they were spun off in 2013. *Id.* ¶¶ 7, 29, 195. In short, over Mallinckrodt's long existence beginning in the 1800s, Covidien was merely its direct or indirect parent company for six years, and Mallinckrodt manufactured and sold opioids long before and long after that brief period.

The Complaint is devoid of any factual allegations that, during those six short years, anyone at Covidien (let alone anyone in its senior management or on its board of directors) thought that Mallinckrodt might someday face massive opioid litigation that could imperil its solvency, much less that Covidien decided to spin-off Mallinckrodt to avoid that possibility. While the Complaint cites the declaration of Mallinckrodt's chief transformation officer that Mallinckrodt faced more than 3,000 opioid-related cases *when it filed for bankruptcy in October 2020*, it fails to acknowledge the declaration's disclosure that this "tidal wave of litigation" only began "[o]ver the *last three years*" before Mallinckrodt's bankruptcy filing—i.e., *in 2017*.[6]

Instead, Plaintiff simply offers the conclusory assertion that, at the time of the spinoff, "Mallinckrodt and Covidien had actual knowledge of the extent of their *future* opioid liabilities." Compl. § V.B (emphasis added). But rather than allege that Covidien had any secret, inside knowledge that no one else in the industry or the market did, the Complaint alleges that

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[6] *See Decl. of Stephen A.Welch, Chief Transformation Officer, in Supp. of Chapter 11 Petitions and First Day Mots.*, D.I. 128 ¶ 76.

Covidien's supposed "knowledge" that Mallinckrodt would face a future "tidal wave of litigation" stemmed from—in Plaintiff's words—"**Public Information on Opioid Liabilities Before the Spinoff**." *Id.* § V.A (emphasis in original). That "public information" consisted of (i) published studies of opioid abuse and related costs, *id.* ¶¶ 148-149, 152-153; (ii) a handful of publicly disclosed settlements and fines paid by other opioid manufacturers or distributors (all of which, other than Purdue, were for less than $50 million), *id.* ¶¶ 150-151, 154; (iii) news articles, online blogs, and other public reports regarding the potential for diversion of prescription opioids, *id.* ¶¶ 156, 159-160, 165, 168; (iv) publicly reported acknowledgements by Mallinckrodt of a risk of abuse of its opioid medication Exalgo in an application for its approval by the Food and Drug Administration, *id.* ¶¶ 157, 161; (v) Mallinckrodt's and Covidien's supposed awareness of available statistics on opioid overdoses in the United States, *id.* ¶ 162; and (vi) Mallinckrodt's public disclosures in its Form 10 for the spinoff that Mallinckrodt held a significant market share of controlled substances and opiate oral solids, *id.* ¶ 174.

The Complaint fails to allege any facts indicating that, at the time of the spinoff, Covidien had any greater insight into the future than the public securities markets did. At most, Plaintiff alleges that some Mallinckrodt sales or compliance employees were aware of a handful of instances of suspected diversion of Mallinckrodt's opioid products, but the Complaint also asserts that "the high demand for Mallinckrodt's generic opioids in the black market was public knowledge." Compl. ¶ 121. In any event, the Complaint does not allege that any employees' supposed suspicions were communicated to Covidien's board of directors that approved the spinoff, or that anyone at Covidien contemplated that such isolated instances presaged the massive wave of public-nuisance litigation that emerged only years later. *Id.* ¶¶ 158, 162-163.

In an effort to provide some semblance of a factual basis for its extraordinary claims, Plaintiff plays up the subpoena issued by the Drug Enforcement Agency (the "DEA") to Mallinckrodt in November 2011 as a supposed watershed event in which "Covidien saw the writing on the wall," causing Covidien "[w]ithin weeks" to "decide[] to spin off its Mallinckrodt business in an attempt to avoid its opioid liabilities." Compl. ¶¶ 147, 173, 176, 183. [REDACTED] , 181.[7]

In any event, the DEA subpoena did not portend the massive civil litigation that ensued years later. Rather, as the Complaint acknowledges, the DEA's limited investigation into Mallinckrodt's suspicious order monitoring programs resulted in a settlement in 2017—four years after the spinoff—in which Mallinckrodt acknowledged only that "certain aspects of Mallinckrodt's system to monitor and detect suspicious orders did not meet [DEA] standards." Compl. ¶¶ 125-130, 172. The settlement was for $35 million. *Id.* ¶ 125-126 & n.52. It did not remotely threaten Mallinckrodt's solvency even then, four years after the spinoff; Mallinckrodt maintained a billion-dollar-plus market capitalization for at least another year, throughout 2018.[8]

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[7] To the extent that this Motion refers to redacted portions of the Complaint filed under seal, Covidien understands that those redactions (other than those in paragraphs 210 and 211) were based on documents that Covidien produced in discovery in Mallinckrodt's bankruptcy case. Covidien does not see a need to maintain confidentiality as to documents that Covidien produced that are referenced in the Motion (and accordingly has not redacted such documents to the extent they are attached to the Millar Declaration) or the corresponding redacted portions of the Complaint. *See Order Entering Confidentiality and Protective Order*, dated Apr. 27, 2021, Case No. 20-12522 [ECF 2125-1] Ex. 1 ¶ 11. Nonetheless, out of an abundance of caution, Covidien has redacted the portions of this Motion that refer to redacted portions of the Complaint in accordance with the *Order Authorizing the Filing Under Seal Certain Confidential Information in the Opioid Master Disbursement Trust II's Complaint*, dated Nov. 3, 2022, Case No. 22-50433 [ECF No. 8] ¶ 3.

[8] *See* Millar Decl., Ex. 1 (Bloomberg stock price data for Mallinckrodt plc). Mallinckrodt's market capitalization following the spinoff was (i) $2.514 billion on Sept. 27, 2013, (ii) $10.433 billion on Sept. 26, 2014, (iii) $7.959 billion on Sept. 25, 2015, (iv) $5.214 billion on December 30, 2016, (v) $1.947 billion on Dec. 29, 2017, and (vi) $1.329 billion on Dec. 28, 2018. *Id.* The Court may take judicial notice of stock price data on a motion to

Moreover, neither Mallinckrodt nor Covidien hid the existence of the subpoena. To the contrary, the publicly filed SEC Form 10 for the spinoff, which the Complaint itself cites (¶¶ 174-175), disclosed both the DEA subpoena that the Complaint cites and a follow-on subpoena, also from the DEA, that the Complaint ignores. The Form 10 explained that "[o]n November 30, 2011 and October 22, 2012, we [Mallinckrodt] received subpoenas from the DEA requesting production of documents relating to our SOM [suspicious order monitoring] program."[9] The Form 10 went on to discuss the risk that "[w]e [Mallinckrodt] are or may be involved in various legal proceedings and certain government inquiries and investigations, including … compliance with laws relating to marketing and sales or controlled substance distribution practices, including those relating to the establishment of suspicious order monitoring ('SOM') programs," which "may involve claims for, or the possibility of fines and penalties involving substantial amounts of money." Compl. ¶ 175 (quoting Form 10 Information Statement at 25-26). Yet, with full knowledge of the subpoenas, and the potential for litigation concerning the diversion of opioids, the market concluded that Mallinckrodt was solvent by billions of dollars when the spinoff closed. *See supra* note 8.

The same public disclosures also explained the business reasons for the spinoff. When Covidien publicly announced the spin in December 2011 (in documents filed with the SEC that the Complaint cites), Covidien noted that it had "evaluated whether to separate these businesses for several years, due to the major differences between the medical products and pharmaceutical industries"; it continued that, "[w]hile both businesses hold industry-leading positions, they have

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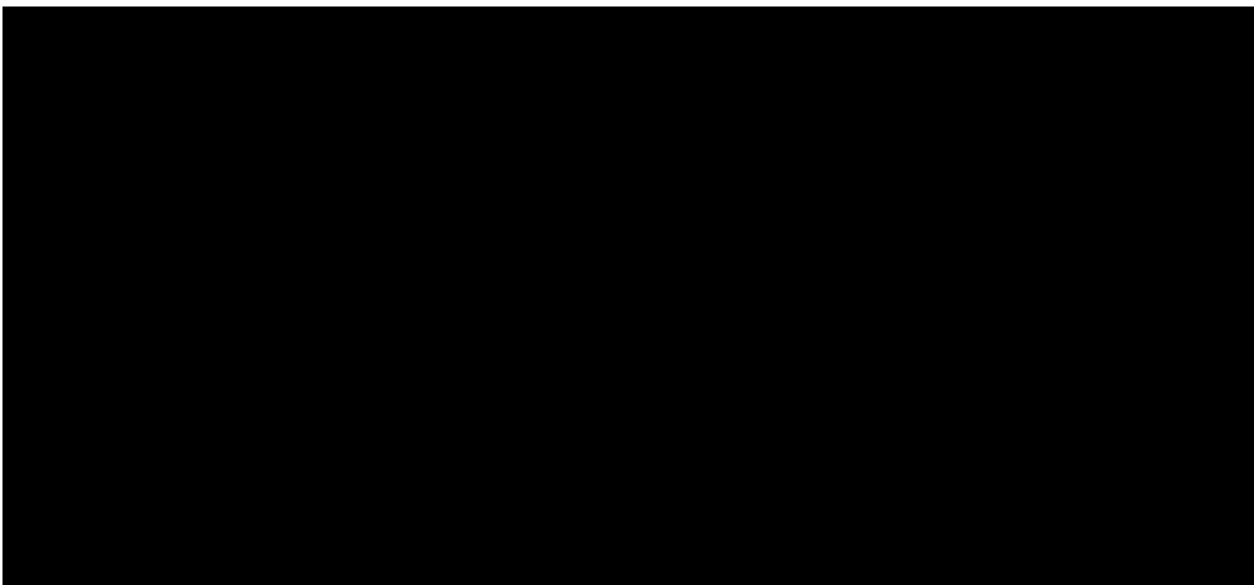
dismiss. *See supra* n.3; *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1331 (3d Cir. 2002); *Ieradi v. Mylan Lab'ys, Inc.*, 230 F.3d 594, 600 n.3 (3d Cir. 2000).

[9] Millar Decl., Ex. 2 (Mallinckrodt plc, Amendment No. 5 to Form 10 (June 5, 2013), Ex. 99.1 (Information Statement)) [hereinafter "Form 10"] at 78.

distinctly different business models, sales channels, customers, capital requirements and talent bases," and the spinoff "would give both businesses greater flexibility to focus on and pursue their respective growth strategies, while potentially providing shareholders with greater value over the longer term."[10] Mallinckrodt's Form 10 similarly explained that Covidien was spinning off Mallinckrodt "to allow each of the Pharmaceuticals business and Covidien's other businesses to focus on its own strategic and operational plans," "to pursue the capital structure that is most appropriate for its business," to "set new investor expectations … based on their unique investment identities," and to "increase the effectiveness of the equity-based compensation programs."[11]

The rest of the Complaint contains only conclusory assertions and cherry-picked snippets from other documents taken out of context.



[10] Compl. ¶ 173 & n.91; Millar Decl., Ex. 3 (Covidien plc Form 8-K, filed Dec. 15, 2011), Ex. 99.2 (Press Release) at 1.

[11] Compl. ¶ 174 & n.92; Form 10 at 14-15.

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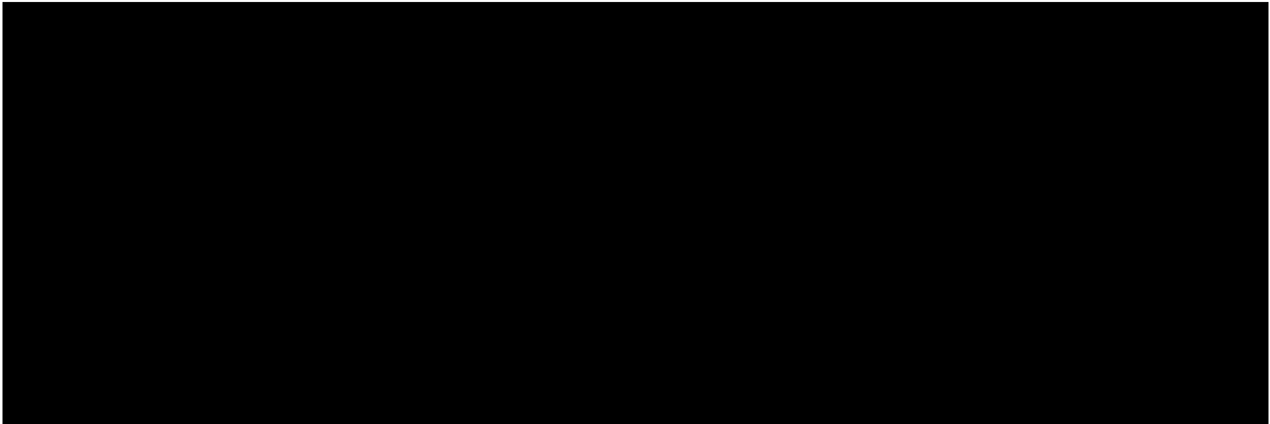

The Complaint nonetheless asserts that Covidien caused Mallinckrodt to make several alleged fraudulent transfers before spinning it off: (i) transfers of $867 million in cash in 2010, 2011 and 2012, which the Complaint acknowledges were made as part of ordinary "'cash management' and funding arrangements" (the "Cash Transfers"); (ii) the purported "transfer" of Covidien's non-pharmaceuticals businesses that Covidien retained in the spinoff; and (iii) $721 million in cash that a Mallinckrodt subsidiary, Mallinckrodt International Finance S.A. ("MIFSA") paid to its then-parent company Covidien plc to redeem a portion of its shares (the "Note Proceeds"). Compl. ¶¶ 181-186. The Complaint further alleges that Covidien caused Mallinckrodt to assume certain Covidien tax liabilities under a legacy Tyco tax sharing agreement, and to undertake a standard obligation under the parties' Separation and Distribution Agreement to indemnify Covidien for liabilities arising out of Mallinckrodt's pharmaceuticals business. *Id.* ¶¶ 187-195. But, as noted, the Complaint ignores the inconvenient facts evident from the same agreement incorporated in the Complaint: Covidien assumed a corresponding

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indemnity obligation to Mallinckrodt for Covidien's retained businesses and also assumed *Mallinckrodt*'s largest known contingent exposure at the time, potential environmental liabilities arising out of pending lawsuits relating to a legacy Mallinckrodt manufacturing plant and pollution of the neighboring Penobscot River in Maine.[15]

Left with nothing else to say, Plaintiff resorts to mischaracterizing the documents it cites and the record of Mallinckrodt's bankruptcy proceedings. Plaintiff claims, for example, that Mallinckrodt acknowledged that it was insolvent at the time of the spinoff. *Id.* ¶ 203. It admitted no such thing. The testimony of Mallinckrodt's chief transformation officer from a 2021 bankruptcy hearing that the Complaint cites merely noted that *another party* in the Chapter 11 case, the OCC, a committee advocating for the opioid plaintiffs, had raised "questions" during the bankruptcy case regarding Mallinckrodt's solvency at the time of the spinoff.[16] Plaintiff next asserts that this Court has already held that Mallinckrodt was "hopelessly insolvent" at the time of the spin. *Id.* ¶ 205. That, too, is false. This Court merely rejected an argument by Mallinckrodt shareholders that Mallinckrodt remained solvent *more than seven years after* the spinoff, when it filed for bankruptcy in October 2020.[17]

[15] *See* Complaint ¶ 190 & n.96 (citing Separation and Distribution Agreement by and between Covidien plc and Mallinckrodt plc dated as of June 28, 2013, D.I. 4699-1); Millar Decl., Ex. 8 (Mallinckrodt plc Form 8-K, filed July 1, 2013), Ex. 2.1 (Separation and Distribution Agreement) §§ 2.1(a)(iv), 2.3(b)(iii), 4.3; Form 10 at 164, F-39, F-40.

[16] *See* Trial Phase II (Day #1) Hr'g Tr. (Dec. 6, 2021) [D.I. 5740] at 61:23-62:8 (Stephen Welch).

[17] *See* Disclosure Statement Hr'g Tr. (June 16, 2021) [D.I. 2930] at 73:13-76:20.

Simply put, Plaintiff's outlandish claims are not only unsupported by any well-plead factual allegations, but they are also contradicted by the very documents and record of the bankruptcy proceedings that Plaintiff incorporated in the Complaint.

ARGUMENT

I. PLAINTIFF'S FRAUDULENT-TRANSFER CLAIMS SHOULD BE DISMISSED

A. Plaintiff's Fraudulent-Transfer Claims (Counts I-IV) Are Time-Barred

1. The Four-Year Statute of Repose For Fraudulent-Transfer Claims Expired Years Before Mallinckrodt Filed for Bankruptcy

Plaintiff's fraudulent-transfer claims are untimely. Plaintiff stands in the shoes of Mallinckrodt's creditors. Any fraudulent-transfer claims those creditors could have brought to avoid the transfers in the 2013 spinoff were extinguished by 2017, and any claims challenging the earlier Cash Transfers were extinguished even before then.

Plaintiff brings its fraudulent-transfer claims under Section 544(b) of the Bankruptcy Code. As such, it is subject to all the same defenses that would be applicable to Mallinckrodt's

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creditors. Hence, "if [Mallinckrodt's] creditor[s] … [are] barred from recovery because of the running of a statute of limitations prior to the commencement of the case, the trustee is likewise … barred." *See In re J & M Sales, Inc.*, 2021 Bankr. LEXIS 2268, at *65-66 (Bankr. D. Del. Aug. 20, 2021) (Dorsey, J.).

Plaintiff's claims are time-barred because any fraudulent-transfer claims that Mallinckrodt's creditors might have brought on the bankruptcy petition date in 2020 to avoid transfers made in 2013 (or earlier) would by then have been long time-barred under the applicable statute of repose. All of the laws referenced in the Complaint prohibit creditors from commencing a fraudulent-transfer claim more than four years after the debtor made the transfers, including the laws of Delaware, Missouri (where Mallinckrodt was headquartered), and Massachusetts (where Covidien's U.S. operations were headquartered), as well as both uniform statutes. *See* Del. Code Ann. tit. 6, § 1309(1)-(2); Mass. Gen. Laws Ann. ch. 109A § 10; Mo. Ann. Stat. § 428.049; Unif. Voidable Transactions Act ("UVTA") § 9; Uniform Fraudulent Transfer Act ("UFTA") § 9; *In re Our Alchemy, LLC,* 642 B.R. 155, 163 (Bankr. D. Del. 2022) (Dorsey, J.) ("Under … DUFTA … there is a four-year statute of repose for fraudulent transfer claims.").

The straightforward application of these statutes extinguished Plaintiff's claims years ago. They should be dismissed. *See Our Alchemy*, 642 B.R. at 163 (granting motion to dismiss trustee's fraudulent-transfer claim as time-barred under Delaware four-year statute of repose); *J & M Sales, Inc.*, 2021 Bankr. LEXIS 2268, at *74-75 (same).

2. Plaintiff's Contentions That Its Claims Are Timely Fail

Recognizing the obvious problem, the Complaint suggests three ways in which Plaintiff may contend that its claims are timely. Each fails.

a. The narrow discovery rule exception to the four-year statute of repose is inapplicable

Plaintiff is not helped by the "discovery rule," a limited exception to the statute of repose permitting an intentional fraudulent-transfer claim to be filed within the later of (1) four years after the transfer occurred, or (2) one year after "the transfer … was or could reasonably have been discovered by the claimant." *See* Del. Code Ann. tit. 6, § 1309(1); *accord* Mass. Gen. Laws Ann. ch. 109A § 10(a); Mo. Ann. Stat. § 428.049(1); UVTA § 9(a); UFTA § 9(a). As a threshold matter, the discovery rule applies only to intentional fraudulent-transfer claims and thus cannot salvage Plaintiff's constructive fraudulent-transfer claims (Counts II and IV). *See, e.g.*, Del. Code Ann. tit. 6, § 1309(1)-(2); *Our Alchemy*, 642 B.R. at 163.

In any event, no creditor could have invoked the discovery rule and filed a timely action on the petition date, even for intentional fraudulent transfer. By its terms, the discovery rule's one-year period begins to run from when "the transfer … was or could reasonably have been discovered." *See* Del. Code Ann. tit. 6, § 1309(1). Here, the transfers Plaintiff seeks to claw back "could reasonably have been discovered" when they were publicly disclosed in 2013. Mallinckrodt and Covidien each filed reports with the SEC about the spinoff, including a lengthy Form 10 Information Statement that attached copies of the Separation and Distribution Agreement and the other transaction documents governing the spinoff. Those filings, which the Complaint itself references, disclosed the transfers, including Mallinckrodt's payment of the

$721 million in Note Proceeds, Covidien's retention of the medical-devices and medical-supplies businesses, and the earlier Cash Transfers.[19]

Moreover, those same filings, as well as other public information available at the time of the spinoff, disclosed the very circumstances that the Complaint alleges rendered the transfers "fraudulent." For example, the SEC filings for the spin disclosed the then-pending DEA subpoena that Plaintiff asserts should have been a "red flag" that Mallinckrodt might someday face substantial opioid-related litigation. *See supra* p.10. All the published economic studies regarding opioids and the governmental fines that had been imposed on other companies (but not on Mallinckrodt) that the Complaint cites were likewise, by definition, matters of public record. Indeed, as noted, the Complaint goes to great length to describe all of this publicly disclosed data under the heading "**Public Information on Opioid Liabilities Before the Spin-off**."[20]

Under these circumstances, the discovery rule does not apply as a matter of law. *See, e.g., Our Alchemy*, 642 B.R. at 163 (holding that the discovery rule applies only "[i]f the fraud is hidden"); *Burkhart v. Genworth Fin., Inc.*, 250 A.3d 842, 860-61 (Del. Ch. 2020) (holding discovery rule inapplicable and dismissing fraudulent-transfer complaint as time-barred where defendant parent company's Form 10-K filings disclosed company's plan to separate subsidiary from its more profitable affiliates more than one year before suit).

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[19] *See* Form 10 at 14-15, 157-159, 163-167 (disclosing spinoff and separation of Mallinckrodt's pharmaceuticals business from Covidien's remaining businesses); *id.* at 176 (disclosing MIFSA's transfer of the Note Proceeds to Covidien); *id.* at F-7 (disclosing the Cash Transfers of $104.0 million, $258.1 million, and $505.0 million in "net transfers to parent" Covidien plc for 2012, 2011 and 2010, respectively); Millar Decl., Ex. 8 (Mallinckrodt plc Form 8-K, filed July 1, 2013)) & Ex. 2.1 (attaching Separation and Distribution Agreement disclosing all of the challenged spinoff transfers, including in §§ 2.1-2.3, 2.15); Millar Decl., Ex. 11 (Covidien plc Form 10-Q for period ended June 28, 2013, filed Aug. 6, 2013) at 7-8, 24-25, 34, 41-42 (disclosing spinoff and separation of Mallinckrodt's pharmaceuticals business from Covidien's medical-devices and medical-supplies businesses); *id.* at 14, 43-44 (disclosing MIFSA's transfer of the Note Proceeds to Covidien); Millar Decl., Ex. 12 (Covidien plc Form 8-K for June 28, 2013, filed July 1, 2013) & Ex. 2.1 (attaching Separation and Distribution Agreement).

[20] *See* Compl.¶¶ 147-175.

Nor can Plaintiff invoke the discovery rule by asserting that some opioid and asbestos claimants may not have been injured, or may not have discovered their injuries, until sometime within a year before Mallinckrodt filed for bankruptcy. *See* Compl. ¶¶ 213-215. The one-year discovery rule does not run from the date of the claimant's *injury* or its discovery, but rather from when "the *transfer* … was or could reasonably have been discovered." Del. Code Ann. tit. 6, § 1309(1) (emphasis added); *accord* Mass. Gen. Laws Ann. ch. 109A § 10(a); Mo. Ann. Stat. § 428.049(1); UVTA § 9(a); UFTA § 9(a). As this Court has explained, "because [Delaware Code] Section 1309 is not triggered by the date of the injury or its discovery but is instead triggered by … the making of a transfer …, it is a statute of repose." *J & M*, 2021 Bankr. LEXIS 2268, at *69. "Unlike statutes of limitations, which … do not begin to run until a cause of action has accrued … [or] discovery of the injury, statutes of repose start upon the occurrence of a specific event and may expire before a plaintiff discovers he has been wronged[.]" *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 199 (3d Cir. 2007).

b. Claims of state government creditors are likewise time-barred

Plaintiff also cannot avoid the statute of repose by stepping into the shoes of Mallinckrodt's state-government creditors and asserting their supposed governmental immunity to time-bar defenses under the *nullum tempus* doctrine. That doctrine "does not apply where the statute expressly provides that it runs against the government." *J & M*, 2021 Bankr. LEXIS 2268, at *72. The statutes Plaintiff cites here—the UVTA and UFTA, including as enacted in Delaware (Compl. ¶ 213), Missouri and Massachusetts—so expressly provide. They define a "creditor" whose claim is extinguished if not brought within the four-year statute of repose to include a "person" that is a "government or governmental subdivision or agency." Del. Code Ann. tit. 6, § 1301(4), (9); *accord* UVTA § 1(4), (11); UFTA § 1(4), (9); Mass. Gen. Laws Ann. ch. 109A § 2; Mo. Ann. Stat. § 428.009(4), (9).

This Court has accordingly dismissed as time-barred fraudulent-transfer claims brought by a bankruptcy trustee, standing in the shoes of state-government creditors, where—like Plaintiff here—the trustee bought suit more than four years after the debtor made the challenged transfers. *See J & M*, 2021 Bankr. LEXIS 2268, at *73-75; (holding *nullum tempus* doctrine inapplicable to state-governmental entities under Delaware Code § 1309); *see also In re Maxus Energy Corp.*, 641 B.R. 467, 546-548 (Bankr. D. Del. 2022) (holding *nullum tempus* inapplicable to state-government creditors under Ohio and Wisconsin fraudulent-transfer statutes mirroring those in Delaware, Missouri and Massachusetts). The same analysis applies here.

In any event, the only state-government creditor the Complaint identifies—the New Jersey Division of Medical Assistance and Health Services (Complaint ¶ 217) —could not have avoided the alleged transfers even if it had brought a timely claim. As the Complaint acknowledges, that entity filed a proof of claim against Mallinckrodt plc (*id.*), which did not make any of the challenged transfers; Mallinckrodt plc was formed shortly before the spinoff to *receive* (not transfer) the subsidiaries comprising the pharmaceuticals business (*id.* ¶¶ 184, 256).[21]

c. The IRS was not a creditor into whose shoes Plaintiff can step to avoid any of the challenged transfers

Plaintiff's final theory for circumventing the statute of repose—that it can step into the shoes of the Internal Revenue Service and invoke its supposed federal governmental immunity to time-bar defenses (*see* Complaint ¶ 216)—similarly fails.

First, the IRS was not a creditor of the Mallinckrodt debtor that allegedly made the challenged transfers, and hence the IRS could not have sued to avoid those transfers. In

[21] The New Jersey Division also filed a proof of claim against one other Mallinckrodt entity, Mallinckrodt ARD LLC (Claim No. 48628), but the Complaint does not allege that this entity made any of the challenged transfers. *See infra* part I.A.2.c.

particular, the IRS did not file a proof of claim in the bankruptcy against MIFSA, which was the only Mallinckrodt entity that the Complaint alleges made any of the challenged transfers, including the $721 million in Note Proceeds paid to Covidien.[22] The Bankruptcy Code therefore precludes Plaintiff from invoking the IRS's rights because the IRS was not a creditor holding a "claim … allowable under [Code] section 502" against MIFSA. 11 U.S.C. § 544(b)(1); *In re J & M Sales Inc.*, 2022 WL 532721, at *3-4 (Bankr. D. Del. Feb. 22, 2022) (Dorsey, J.) (holding that trustee could not invoke IRS's rights to bring a fraudulent-transfer claim where the IRS did not file a proof of claim against the debtor).

Second, Plaintiff cannot rely on proofs of claim the IRS filed against *other* debtors as a basis to step into the IRS's shoes. While the Complaint refers to claims filed by the IRS (¶ 216), it fails to acknowledge that the IRS filed a proof of claim against only six of the 64 separate Mallinckrodt debtors. None of those six is alleged to have made any of the challenged transfers.[23] The IRS was thus not a creditor of any debtor that is relevant here—i.e., a debtor that allegedly transferred its assets in fraud of its creditors. The IRS accordingly is not a creditor into whose shoes Plaintiff can step to claw back any such transfers.

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[22] *See* Compl. ¶¶ 185, 223(f); *see infra* note 23 (discussing bankruptcy proofs of claim).

[23] Millar Decl., Ex. 13 (IRS proofs of claim). The IRS filed proofs of claim against: (1) Mallinckrodt Enterprises LLC, (2) ST US Holdings LLC, (3) Mallinckrodt Equinox Finance LLC, (4) Mallinckrodt Critical Care Finance LLC, (5) Mallinckrodt ARD Holdings Inc, and (6) ST Shared Services LLC. The Debtors likewise did not list any IRS claims against MIFSA in their schedules of liabilities. They listed claims only against Mallinckrodt Enterprises LLC, Mallinckrodt Pharmaceuticals Ireland Limited, MEH, Inc., SpecGx LLC, and ST Shared Services LLC. *Schedules of Asset and Liabilities for Mallinckrodt Enterprises LLC* [D.I. 982], Schedule E/F Part 1 at 134, 136 (p.181 & 183 of 258); *Schedules of Asset and Liabilities for Mallinckrodt Pharmaceuticals Ireland Limited* [D.I. 982], Schedule E/F Part 1 at 13 (p.52 of 184); *Schedules of Asset and Liabilities for MEH, Inc.* [D.I. 1033], Schedule E/F Part 1 at 1 & Part 2 at 4 (p.36 & 41 of 150); *Schedules of Asset and Liabilities for SpecGx LLC* [D.I. 1049], Schedule E/F Part 1 at 9 & Part 2 at 61 (p.90 & 159 of 1110); *Schedules of Asset and Liabilities for S ST Shared Services LLC* [D.I. 1053], Schedule E/F Part 1 at 114, 122 (p.162 & 170 of 343). Moreover, because the IRS claims were listed as "contingent" and/or "unliquidated," they are not deemed to be filed proofs of claim and hence are not "allowable," as section 544(b) requires. *See* 11 U.S.C. § 1111(a).

Finally, Plaintiff cannot avoid this result by pretending that the Mallinckrodt debtors were a single consolidated entity, as it does in alleging that "Mallinckrodt" or the "Debtors" made the alleged transfers of the non-pharmaceuticals business that Covidien retained in the spinoff and the earlier Cash Transfers.[24] The "Debtors" were 64 distinct entities. In accordance with the fundamental rule that bankruptcy law respects corporate separateness, *see In re Owens Corning*, 419 F.3d 195, 210-212 (3d Cir. 2007), Mallinckrodt's plan of reorganization specified that the Mallinckrodt debtors would *not* be substantively consolidated and, instead, were and would remain separate corporate entities.[25] This Court's order establishing the deadline for filing proofs of claim likewise instructed that any creditor had to file a separate proof of claim against each debtor liable to it, as the IRS did in filing claims against only six of the 64 debtors.[26] To step into the IRS's shoes, therefore, Plaintiff was required to (i) identify which specific Mallinckrodt debtor made the challenged transfers and (ii) allege that the IRS filed a proof of claim against that specific debtor. Because Plaintiff has failed to do so, it cannot use the IRS to resuscitate its time-barred claims. *See Adelphia Recovery Tr. v. Bank of Am., N.A.*, 390 B.R. 80, 92-97 (S.D.N.Y. 2008) (dismissing fraudulent-transfer claims where trustee invoked rights of creditors that did not have claims against the specific debtors that made the challenged transfers, but rather that held claims only against other debtors in the same affiliated—but not substantively consolidated—corporate group), *aff'd*, 379 F. App'x 10 (2d Cir. 2010).

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[24] *See* Compl. ¶¶ 181, 239, 245 and introductory paragraph defining "Mallinckrodt" and "Debtors."

[25] *See Findings of Fact, Conclusions of Law, and Order Confirming Fourth Amended Joint Plan of Reorganization (with Technical Modifications) of Mallinckrodt plc and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [D.I. 6660], Ex. A (Plan) [D.I. 6660-1] [hereinafter, "Plan"] § IV.FF ("No Substantive Consolidation").

[26] *See Order (A) Establishing Bar Dates and Related Procedures for Filing Proofs of Claim and (B) Approving Form and Manner of Notice Thereof* [D.I. 667] ¶ 16 ("All filed proofs of claim must … specify by name and case number [of] the Debtors against which the Proof of Claim is filed[.]").

Moreover, even if the IRS were a creditor of the relevant debtor, Plaintiff still could not step into its shoes to avoid the challenged transfers because the IRS's tax claims arose long *after* those transfers occurred. Indeed, most of the claims are for payroll taxes incurred shortly before Mallinckrodt's bankruptcy filing in October 2020.[27] Plaintiff's argument thus turns on the remarkable proposition that it can step into the shoes of the IRS and avoid transfers made more than seven years before the IRS's tax claims first arose. That is wrong.

To begin with, it is wrong as a matter of tax law. The 10-year period set forth in the Internal Revenue Code is not a "look-back" period allowing the IRS to challenge transfers made before its tax claims arose. Rather, it is a "look-forward" period giving the IRS ten years after a tax is assessed (or after it is incurred) to sue to collect. The statute thus provides that a "tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun … within 10 years *after* the *assessment* of the tax." 26 U.S.C. § 6502(a)(1) (emphasis added); *id.* § 6901(a)(1)(A) (same as to suits against taxpayer's transferee); *see In re Omansky*, 2022 WL 4281472, at *9 (Bankr. S.D.N.Y. Sept. 15, 2022) (the "applicable [IRS] statute of limitations … is ten years from the date of assessment of the relevant taxes"); *In re Webster*, 629 B.R. 654, 676-677 (Bankr. N.D. Ga. 2021) (concluding IRC § 6502 is a "forward-looking statute of limitations," not a "lookback period"; "Considering the focus on assessment in case law and the statutory text, the Court cannot find that § 6502 operates to avoid transfers up to ten years prior to the petition irrespective of the status of tax liability or assessment."); *In re Taylor, Bean*

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[27] *See* Millar Decl., Ex. 13 (IRS proofs of claim). The IRS filed claims for payroll taxes ("WT-FICA") totaling more than $12 million against Mallinckrodt Enterprises LLC and ST Shared Services LLC for tax periods dated June 30, 2020, September 30, 2020, and December 31, 2020. The earliest claim the IRS filed against any Mallinckrodt debtor was for interest of $155,929.66 on a corporate income tax against ST US Holdings LLC for the tax period ended Sept. 30, 2014 (and which was not assessed until September 23, 2019). The only other IRS claims totaled less than $400,000 against Mallinckrodt Enterprises LLC and three other debtors for tax periods in 2017, 2018 and 2019 (and which were not assessed until 2018 and 2020).

& Whitaker Mortg. Corp., 2018 WL 6721987, at *6 (Bankr. M.D. Fla. Sept. 28, 2018) ("Plaintiff … implies that any transfers made within ten years before the Petition Date are potentially avoidable when stepping into the shoes of the IRS. … [H]owever, the ten-year period appears to be a look-forward period rather than a lookback period.").

Plaintiff's argument is also contrary to bankruptcy law. Even if the Internal Revenue Code provided a ten-year lookback period (as a small number of bankruptcy courts have held with little explanation), Plaintiff still could not step into the IRS's shoes to challenge transfers made before the IRS's claims arose. "Section 544(b)(1) requires that a triggering creditor's allowable, unsecured claim date back from the time of the challenged conveyance." *Omansky*, 2022 WL 4281472, at *7. The *Omansky* court accordingly permitted a trustee to step into the shoes of the IRS to challenge otherwise time-barred claims only where—unlike here—"[t]here [was] no question that the Debtor had outstanding assessed tax liability and that the IRS was an unsecured creditor of the Debtor *at the time of the [challenged] transaction*." *Id.* (emphasis added); *see also, e.g.*, *In re Allou Distribs., Inc.*, 392 B.R. 24, 34 (Bankr. E.D.N.Y. 2008) (For the trustee "to satisfy the standing requirements of Section 544, the same creditor that has an allowed unsecured claim on the Petition Date must also have been a creditor of the transferor on the Transfer Date."); 5 *Collier on Bankruptcy* ¶ 544.06[1] (the "triggering creditor must be the same creditor on both the transfer date and the date of commencement of the case").

Plaintiff fares no better under the approach adopted by a few courts that have held the tax liability need not have been *assessed* before the debtor made the challenged transfer. *See, e.g.*, *In re Tops Holding II Corp.*, 2022 WL 6827457, at *13-15 (Bankr. S.D.N.Y. Oct. 12, 2022). Here, the tax liabilities for which the IRS ultimately filed a proof of claim had not been *incurred* by the time of the 2013 spinoff; indeed, most were payroll taxes that had not even come due by

the date in 2020 when Mallinckrodt filed for bankruptcy. As this Court has observed, nothing in the Bankruptcy Code suggests that in such a circumstance a bankruptcy trustee can step into the shoes of the IRS and avoid transfers that occurred long before the IRS' claim first arose:

> "Payroll taxes accrue as wages are paid, but a deposit for those taxes is not due to the IRS until some period of time later …. As a result, virtually every business entity that files for bankruptcy will have accrued but unpaid payroll taxes because those taxes are not yet due to be paid to the IRS. Under the Trustee's theory, therefore, every business bankruptcy case would automatically have a ten-year lookback period for fraudulent transfers under Section 544(b). That cannot be what Congress had in mind when enacting Section 544(b)."

J & M, 2022 WL 532721, at *3 n.7.

Plaintiff's fraudulent-transfer claims are time-barred and should be dismissed.

B. Plaintiff's Intentional Fraudulent-Transfer Claims (Counts I And III) Should Be Dismissed Because The Complaint Fails To Allege With Particularity That The Spinoff Or Cash Transfers Were Made With Actual Intent To Defraud Mallinckrodt's Creditors

Even if Plaintiff's intentional fraudulent-transfer claims were not time-barred, they could not survive. Plaintiff fails to allege at all, let alone with the particularity required under Rule 9(b), that Covidien's board of directors—the only corporate body having authority to approve Covidien's spinoff of Mallinckrodt—acted with "actual intent" to hinder, delay or defraud Mallinckrodt's creditors in authorizing the spinoff and the challenged transfers.

"An intentional fraudulent conveyance claim must be pled with specificity, as required by Fed. R. Civ. P. 9(b)." *In re Tribune Co. Fraudulent Conveyance Litig.*, 10 F.4th 147, 159 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1128 (2022); *see In re Zohar III, Corp.*, 631 B.R. 133, 169-170 (Bankr. D. Del. 2021) (same). The plaintiff must allege facts showing, with the requisite particularity, that the transferor had "*actual* intent" to hinder, delay or defraud creditors, not merely that it purportedly "should-have-known" the challenged transfers would harm creditors.

Tribune, 10 F.4th at 159-160. And where, as here, the transferor is a corporation, the plaintiff must so allege with particularity that the corporate agents that had the legal authority to authorize the transfer—not some other, lower-level employees—acted with that fraudulent intent. *Id.*

The reason for this rule of law rule is clear. Because "an intentional fraudulent transfer claim … requires 'actual intent,'" courts must "look to state law to determine who has the authority to act on behalf of a corporation" and "therefore whose actions to review to see whether there was fraudulent intent." *Tribune*, 10 F.4th at 160-161. Under Covidien's Articles of Association, as well as under the law of both Ireland (where Covidien plc was incorporated) and Delaware, only Covidien's board of directors had the legal authority to approve the spinoff. *See* Millar Decl., Ex. 14 (Covidien plc Form 8-K, filed March 26, 2013), Ex. 3.1 (Covidien's Articles of Association as amended by special resolutions dated March 13, 2012 and March 20, 2013) arts. 71, 102; Companies Act 1963 (Act No. 33/1963) (Ir.), § 25; Del. Code Ann. tit. 8, §§ 141(a), 251, 271; *Tribune*, 10 F.4th at 160.[28] Thus, Plaintiff "was required to plead allegations that gave rise to a strong inference that [Covidien's board of directors] had the 'actual intent to hinder, delay, or defraud'" Mallinckrodt's creditors. *Id.*

The Complaint does not allege *anything* about the knowledge or intent of a single Covidien director, and it certainly does not allege specific facts showing that any director foresaw, years ahead of time, that Mallinckrodt would someday face a massive, once-in-a-generation, wave of public-nuisance opioid litigation. *Supra* pp.5-14. And, most critically, the Complaint does not contain a single factual allegation suggesting that any member of Covidien's

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[28] As is typical with Irish corporations that spin-off subsidiaries, the spinoff took the form of an interim "dividend in specie" to Covidien's shareholders, which required the approval of Covidien's board under Covidien's Articles of Association. *See* Form 10 at 157; Millar Decl., Ex. 14 (Covidien Articles) art. 102. This Court may take judicial notice of the Articles of Association, which were filed with the SEC. *See id.*; *supra* note 3.

board, let alone a majority, decided to spin-off Mallinckrodt to shield Covidien from that yet-to-emerge avalanche of litigation. *Id.*

Plaintiff's allegations regarding the earlier 2010-2012 Cash Transfers are even flimsier. Aside from alleging the bare fact that the transfers were made, and one entirely conclusory assertion that they were made "with the intent to keep the funds out of the reach of Opioid Claimants," the Complaint contains *no* allegations about the Cash Transfers. Compl. ¶¶ 181-182.

Plaintiff cannot cure its pleading failures by pointing to the Complaint's allegations of Mallinckrodt's alleged misconduct in marketing opioids and monitoring suspicious orders. The Complaint does not allege that any of Mallinckrodt's sales or compliance employees who allegedly engaged in such misconduct, or who were allegedly aware of instances of suspected diversion and abuse of Mallinckrodt's opioids, ever believed that Mallinckrodt would face potentially ruinous opioid litigation, let alone that any such employee believed that Covidien should spin-off Mallinckrodt because of it.

In any event, the alleged knowledge or intent of any such employee cannot be imputed to Covidien to establish it spun-off Mallinckrodt with fraudulent intent. "A court 'may impute any fraudulent intent of [an actor] to the transferor'" only "'[if the actor] was in a position to control the disposition of [the transferor's] property.'" *Tribune*, 10 F.4th at 160-161 (quoting *In re Roco Corp.*, 701 F.2d 978, 984 (1st Cir. 1983))). Because "an intentional fraudulent transfer claim … requires 'actual intent,' a company's intent may be established only through the 'actual intent' of the individuals 'in a position to control the disposition of [the transferor's] property.'" *Tribune*, 10 F.4th at 161 (quoting *Roco Corp.*, 701 F.2d at 984); *see also Maxus Energy*, 641 B.R. at 515-516 & n.139 (applying this "control" test and citing *Tribune*).

Thus, where, as here, the challenged transfers could not have occurred without the approval of the transferor's board of directors, it is the directors' intent, not the intent of sales or compliance employees, that matters. There is no precedent under fraudulent-transfer law for imputing the intent of sales-level personnel to a corporation with respect to the company's decision to engage in a transaction like the spinoff requiring board approval. Indeed, in *Tribune*, the Second Circuit held that even the intent of senior management could not be imputed to the company in such a context. It affirmed the dismissal (at the pleadings stage) of the plaintiff's intentional fraudulent-transfer claims, even though Tribune's executive team, including its CEO, allegedly acted with fraudulent intent in the challenged LBO transaction. The management team's fraudulent intent could not be imputed to Tribune, the court of appeals held, because Tribune's board of directors was the only corporate actor having the power to control the transfers that occurred in the LBO, and there were no allegations that the managers dominated the board. *Tribune*, 10 F.4th at 160-161; *see also In re Elrod Holdings Corp.*, 421 B.R. 700, 709-712 (Bankr. D. Del. 2010) (holding that intentional fraudulent-transfer claims failed because fraudulent intent of two of debtor's directors could not be imputed to debtor where majority of its independent directors approved the challenged transfers).[29]

Finally, Plaintiff's invocation of the so-called "badges of fraud" fails. Most of Plaintiff's allegations concern only two badges—(i) that the transfers were made when Mallinckrodt was allegedly insolvent, and (ii) that Mallinckrodt supposedly did not receive reasonably equivalent value in exchange for the transfers. Compl. ¶¶ 223(c), (e)-(i), 241(b), (e)-(h). "These two

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[29] In a different context, the Third Circuit has recognized that the fraudulent conduct of a corporation's sole owner, officer and representative may be imputed to the corporation for purposes of barring a suit by the corporation against third parties for the corporation's fraud under the *in pari delicto* doctrine. But the Third Circuit has also recognized that such more liberal imputation principles do not apply in the fraudulent-transfer context. *See In re Pers. & Bus. Ins. Agency*, 334 F.3d 239, 242-246 (3d Cir. 2003).

alleged badges of fraud … are insufficient to support a claim for actual fraudulent conveyance" because they "merely state the definition of a claim for constructive fraudulent transfer." *J & M*, 2021 Bankr. LEXIS 2268, at *95. The other alleged badges of fraud—that Covidien was the parent company of some Mallinckrodt entities and hence an insider, and that Covidien controlled the decision to spin-off Mallinckrodt, Compl. ¶¶ 223(a)-(b), 241(a), (c)—are true in every spinoff of a subsidiary and thus carry little weight. *See U.S. Bank Nat'l Ass'n v. Verizon Commc'ns*, 761 F.3d 409, 435 (5th Cir. 2014) (affirming holding that badges of fraud alleging insider relationship and other facts that "are a feature of every spin[-]off transaction" could not support finding of fraudulent intent); *Tribune*, 10 F.4th at 162 (holding that badges of fraud were insufficient to infer fraudulent intent where they alleged facts that are "generally" present in "most" cases). And the alleged badge of fraud that Covidien's plan to spin-off Mallinckrodt was "concealed" (Compl. ¶¶ 223(d), 241(d)) is contradicted by the Complaint's acknowledgement that the spinoff was publicly announced 18 months before the closing; that all of the challenged transfers were publicly disclosed in the Form 10; and that the supposed "red flags" regarding opioid abuse were matters of "public knowledge." *See supra* pp.7-11.

In short, Plaintiff's intentional fraudulent-transfer claims do not come close to meeting the requisite pleading standard. They should be dismissed. *See, e.g.*, *Tribune*, 10 F.4th at 160-162 (affirming grant of a motion to dismiss intentional fraudulent-transfer claims because there were no allegations that Tribune's board of directors had actual intent to hinder, delay, or defraud Tribune's creditors when it approved a leveraged buyout that transferred $8 billion to Tribune's shareholders).

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

Plaintiff's claims in Counts I and II to claw back the securities-related transfers that Covidien allegedly received in the spinoff are also precluded by the safe harbor set forth in Section 546(e) of the Bankruptcy Code. Congress enacted that safe harbor to protect securities transactions from being unwound years later by a bankruptcy trustee. *See In re Tribune Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 92 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 2552 (2021). That is precisely what Plaintiff seeks to do here: it seeks to claw back (i) $721 million that MIFSA paid to buy back its shares from its then-parent Covidien plc and (ii) Covidien and the shares of the non-pharmaceutical subsidiaries that were allegedly "transferred" in the spinoff transaction. Compl. ¶¶ 185, 223(c), 224, 236.[30] Section 546(e) bars Plaintiff from doing so because the transfers meet (indeed, doubly meet) both of the safe harbor's requirements: (1) they were not only "settlement payments," but also "transfer[s] made … in connection with a securities contract," and (2) they were made "by or to (or for the benefit of)" qualifying market participants because the transferor and transferee in the challenged securities transactions—MIFSA and Covidien plc—were both parties to securities contracts of sufficient value to qualify as safe-harbored "financial participants." 11 U.S.C. § 546(e).[31]

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[30] As discussed below (*see* part I.D), Plaintiff fails to allege facts showing that Mallinckrodt ever owned and "transferred" Covidien's non-pharmaceutical subsidiaries to Covidien. But even if Plaintiff had alleged such a transfer, the safe harbor would bar Plaintiff from clawing back the transferred companies.

[31] Section 546(e) provides in relevant part that:

> "Notwithstanding section[] 544 … of this title, the trustee may not avoid a transfer that is a … settlement payment … made by or to (or for the benefit of) a … financial participant, … or that is a transfer made by or to (or for the benefit of) a … financial participant … in connection with a securities contract …."

11 U.S.C. § 546(e). The safe harbor's only exception—for intentional fraudulent transfers that were made within two years before the bankruptcy and that are sought to be avoided under section 548(a)(1)(A)—is inapplicable with respect to the alleged transfers here because the spinoff occurred more than seven years before Mallinckrodt's bankruptcy. *See id*. ("the trustee may not avoid … except under section 548(a)(1)(A)"); *id.* § 548(a)(1)(A). Recognizing as much, Plaintiff does not purport to invoke section 548(a)(1)(A).

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

<u>*Settlement payment*</u>. A "settlement payment" is any "transfer of cash or securities made to complete a securities transaction." *In re Resorts Int'l, Inc.*, 181 F.3d 505, 514-515 (3d Cir. 1999) (construing definition of "settlement payment" in 11 U.S.C. § 741(8)), *abrogated in part on other grounds by Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018); *In re Plassein Int'l Corp.*, 590 F.3d 252, 257-259 (3d Cir. 2009) (same).[32]

The challenged spinoff transfers were "settlement payments." *First*, the $721 million that MIFSA paid Covidien was a settlement payment because MIFSA paid those funds to redeem—*i.e.*, buy back—a portion of its shares from Covidien plc.[33] A payment of cash for stock is a quintessential "settlement payment." *See Resorts*, 181 F.3d at 515-516 (debtor's "payment for [its] shares … is … a settlement payment"); *Plassein*, 590 F.3d at 258-259 (debtor's payments for shares of privately held companies were settlement payments).

Second, the purported transfers of Covidien and the shares of its non-pharmaceutical subsidiaries were also settlement payments because they too were allegedly made to complete a securities transaction—the spinoff. Specifically, the Complaint alleges that Covidien and the shares of its non-pharmaceutical subsidiaries were transferred as part of the spinoff in which Covidien also transferred the shares of the pharmaceutical subsidiaries to Mallinckrodt plc and spun off Mallinckrodt plc's shares to Covidien's shareholders.[34] The alleged transfers of the

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[32] The Third Circuit's construction of the statutory term "settlement payment" in *Resorts* and *Plassein* remains good law. Although the Supreme Court in *Merit Management* abrogated a separate ruling in *Resorts*, the Court expressly stated it was not addressing the meaning of "settlement payment." 138 S. Ct. at 892 & nn.5-6.

[33] *See* Compl. ¶¶ 185, 224, 236; Millar Decl. Ex. 8 (Separation and Distribution Agreement) § 2.15(b) ("MIFSA shall redeem a portion of its equity interest for an amount in cash … represent[ing] the net proceeds of the Senior Notes Offering").

[34] *See* Compl. ¶¶ 185, 223(a)-(c), 224, 236; *see also* Millar Decl., Ex. 8 (Separation Agreement) §§ 2.1-2.3, 2.15(b), 3.1-3.4.

shares in the non-pharmaceutical subsidiaries to Covidien were accordingly settlement payments because they were "transfer[s] of … securities made to complete [the] securities transaction." *Resorts*, 181 F.3d at 515; *see Bevill, Bresler & Schulman Asset Mgmt. Corp. v. Spencer Sav. & Loan Ass'n*, 878 F.2d 742, 752-753 (3d Cir. 1989) (transfer of securities was a "settlement payment"); *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc.*, 892 F. Supp. 2d 805, 815 (N.D. Tex. 2012) (spinoff was a securities transaction, and hence spun-off debtor's transfer of cash to parent in spinoff was a "settlement payment" that "'completed a securities transaction'"), *aff'd*, 761 F.3d 409 (5th Cir. 2014); *In re DSI Renal Holdings, LLC*, 617 B.R. 496, 505-506 & n.39 (Bankr. D. Del. 2020) (transfer of shares was a "settlement payment"); *In re Nat'l Forge Corp.*, 344 B.R. 340, 346-351, 366 (W.D. Pa. 2006) (debtor's transfer of cash to parent to fund parent's purchase of stock from its shareholders was a "settlement payment").

<u>*Transfer made in connection with a securities contract*</u>. While it suffices that the spinoff transfers were "settlement payments," they also satisfy the safe harbor's first requirement on the independent ground that they were "transfer[s] made … in connection with a securities contract." 11 U.S.C. § 546(e).

The spinoff transfers were made in connection with a "securities contract," namely, the Separation and Distribution Agreement. The Bankruptcy Code defines a "securities contract" broadly to include (i) any "contract for the purchase [or] sale … of a security," (ii) "any repurchase … transaction on any such security," and (iii) "any other agreement or transaction that is similar to [such] an agreement." 11 U.S.C. § 741(7)(A)(i), (vii). The Separation and Distribution Agreement easily falls within this definition because it was a contract for the "purchase" or "repurchase" of a security (or a "similar" agreement or transaction). As discussed,

the Separation and Distribution provided for MIFSA to buy back its shares for $721 million.[35] And it also purportedly provided for the transfer of the shares in the non-pharmaceutical subsidiaries that Covidien retained, with Covidien's corresponding transfer of the shares of the pharmaceutical subsidiaries to Mallinckrodt plc. Compl. ¶¶ 223-224, 236. The Separation and Distribution Agreement was accordingly a "securities contract," and hence the spinoff transfers satisfy the safe harbor's first requirement on this alternative ground because the transfers were made "in connection with" that "securities contract." 11 U.S.C. § 546(e); *Tribune*, 946 F.3d at 81 (debtor's payments to redeem its shares were "transfer[s] made … in connection with a securities contract"); *In re Samson Res. Corp.*, 2022 WL 3135288, at *2-3, 5 (Bankr. D. Del. Aug. 4, 2022) (same); *DSI Renal*, 617 B.R. at 505-506 & n.39 (transfer of shares pursuant to restructuring agreement was "in connection with a securities contract"); *see also In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d 411, 421-422 (2d Cir. 2014) (section 546(e) "sets a low bar for the required relationship between the securities contract and the transfer," "merely requir[ing] that the transfer have a connection to the securities contract" or be "related to" it).[36]

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

Section 546(e)'s second (and only other) requirement—that at least one of the parties to the transfer was a qualifying entity—is also doubly met because Covidien plc (now Covidien

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[35] *See* Complaint ¶ 185; Millar Decl., Ex. 8 (Separation and Distribution Agreement) § 2.15(b); *supra* p.30. The Separation and Distribution Agreement expressly provided for MIFSA to "redeem" its shares, and hence it was a contract for the "purchase" or "repurchase" of those shares, since the "term 'redemption,' in the securities context, means 'repurchase.'" *Tribune*, 946 F.3d at 80.

[36] The safe harbor also bars any claim Plaintiff may assert to claw back payments Mallinckrodt allegedly made on account of the Tyco-related tax liabilities Mallinckrodt assumed under the Separation and Distribution Agreement. *See* Complaint ¶¶ 187-189, 224, 236; *id.* p.105 ¶ E. As part of the consideration exchanged in the spinoff for Covidien's transfer of the shares in the pharmaceutical business to Mallinckrodt, any payments on the assumed tax liabilities were settlements payments and/or transfers made in connection with a securities contract (the Separation and Distribution Agreement).

Unlimited Company)[37] and MIFSA both qualified as "financial participants."[38] The Bankruptcy Code defines a "financial participant" in relevant part as an entity that, at the time it entered into a securities contract like the Separation and Distribution Agreement here, has a combination of "securities contracts" or "swap agreements" outstanding with an aggregate face amount (notional or principal) of at least $1 billion, or "mark-to-market" positions of at least $100 million. 11 U.S.C. §§ 101(22A)(A), 101(53B), 741(8).[39] The contracts or agreements can be with the debtor or with any other entity. *See id.* § 101(22A)(A); *Samson*, 2022 WL 3135288, at *4-5; *In re Samson Res. Corp.*, 625 B.R. 291, 298-301 (Bankr. D. Del. 2020). Both Covidien plc and MIFSA were "financial participants" because each had such "contracts" or "agreements" in excess of the dollar threshold.

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[37] Although Plaintiff purports to assert fraudulent-transfer claims against all four Covidien entities named in the Complaint, the Separation and Distribution Agreement incorporated in the Complaint makes clear that it was the ultimate parent company, then known as Covidien plc and now known as Covidien Unlimited Company, that received the $721 million paid by MIFSA in connection with the spinoff. *See* Compl. ¶¶ 185, 190 n.96; Millar Decl. Ex. 8 (Separation and Distribution Agreement) § 2.15(b); *id.* Ex. 16 (Covidien plc Form 8-K, filed Apr. 12, 2013) at Item 2.03.

[38] One or both of Covidien plc and MIFSA also were safe-harbored "financial institutions," as defined in the Bankruptcy Code. 11 U.S.C. § 101(22). Because that issue may require some factual development, Covidien is not addressing it here, but will at a later stage of the case as and if necessary.

[39] Section 101(22A)(A) defines "financial participant" to mean:

> "[A]n entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) [including securities contracts or swap agreements] with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition."

11 U.S.C. § 101(22)(A); *id.* § 561(a)(1)-(6) (listing securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, and master netting agreements).

Covidien plc. Covidien plc was a "financial participant" because it had at least three sets of contracts with an aggregate value exceeding $100 million in mark-to-market positions and $1 billion in face amount.

First, Covidien plc was a party to the Separation and Distribution Agreement, which as discussed was a "securities contract." That agreement, alone, had the requisite $100 million mark-to-market and $1 billion face values. It provided for the redemption and transfer of MIFSA's shares in exchange for MIFSA's payment of $721 million and Mallinckrodt plc's assumption of liabilities, including alleged Covidien tax liabilities "estimated to be in the hundreds of millions of dollars."[40] And, according to the Complaint, it further provided for the purported transfer of Covidien's medical-devices and medical-supplies businesses, which were allegedly worth billions of dollars.[41]

Second, Covidien plc and its subsidiaries also had qualifying "swap agreements," including foreign currency forward and option contracts, with a notional amount exceeding $1.2 billion.[42] *See* 11 U.S.C. § 101(53B)(A)(i)(III) (defining "swap agreement" to include "a currency swap, option, future, or forward agreement"); *Samson*, 2022 WL 3135288, at *5 & n.26 (debtor was "financial participant" because it had "swap agreements" with the requisite value); *DSI Renal*, 617 B.R. at 505-506 & n.39 (defendant-counterparty was "financial participant" based on its audited financial statements for period when transfer was made).

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[40] *See* Compl. ¶ 185, 189; Separation Agreement §§ 2.1, 2.3(a)(ii), 2.11, 2.15(b).

[41] *See* Compl. ¶¶ 1, 12, 223(c), (g), 224, 236 (alleging transfer of the businesses retained by Covidien having assets of $20 billion).

[42] *See* Millar Decl., Ex. 11 (Covidien plc Form 10-Q, filed Aug. 6, 2013), at 15 ("At June 28, 2013, the Company had foreign currency forward and option contracts outstanding with a notional amount of $1.212 billion."); *id.* at 7 (defining "Company" to mean Covidien plc and its subsidiaries). On this motion to dismiss, the Court may consider documents filed with the SEC. *See supra* note 3; *In re American Home Mortg. Holdings, Inc.*, 388 B.R. 69, 85-86 (Bankr. D. Del. 2008) (considering Lehman's Form 10-Q on motion to dismiss complaint seeking declaration as to whether Lehman was a safe-harbored "stockbroker").

Finally, Covidien plc was a party to yet another qualifying "securities contract" with a principal amount of another $750 million. That contract, guaranteed by Covidien plc and Covidien Ltd., provided Covidien International Finance S.A. ("CIFSA") the option to redeem (and the noteholders the option to sell) debt securities (notes) that CIFSA had issued at a redemption price equal to the securities' principal amount of $750 million plus a premium.[43] The contract was thus a "securities contract" because it was a "contract for … an option to purchase or sell … a[] … security," namely, the redeemable CIFSA notes. *See* 11 U.S.C. § 741(7)(A)(i); *id.* § 101(49)(A)(i) (defining "security" to include "note"); *In re Quebecor World (USA) Inc.*, 719 F.3d 94, 98-99 (2d Cir. 2013) (note purchase agreement providing issuer and its affiliates an option to repurchase the notes was a "securities contract"), *abrogated in part on other grounds by Merit,* 138 S. Ct. 883 (2018); *Tribune*, 946 F.3d at 80-81 (agreement providing for debtor's redemption of its equity securities was a "securities contract").

Accordingly, Covidien plc was a safe-harbored "financial participant."

MIFSA. Although section 546(e)'s second requirement is fully satisfied because Covidien plc was a "financial participant," it is also met because MIFSA was likewise a "financial participant."[44] In addition to the Separation and Distribution Agreement, which provided for MIFSA to redeem its shares for $721 million, MIFSA was a party to another securities contract with a principal amount of at least an additional $900 million. That contract,

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[43] *See* Millar Decl., Ex. 11 (Covidien plc Form 10-Q, filed Aug. 6, 2013), at 14 ("On May 16, 2013, Covidien International Finance S.A. (CIFSA) … issued $750 million aggregate principal amount of 2.95% senior notes due June 2023. The notes are fully and unconditionally guaranteed by both Covidien plc and Covidien Ltd."); *id.* Ex. 15 (Covidien plc Form 8-K, filed May 16, 2013), Ex. 4.1 (Eighth Supplemental Indenture dated as of May 16, 2013 for $750 million of 2.95% Senior Notes due 2023 among CIFSA as issuer, Covidien plc and Covidien Ltd. as guarantors, and Deutsche Bank Trust Company Americas, as trustee) § 1.3 (CIFSA option to redeem notes); *id.* § 1.4(3)(a) (noteholder option to sell notes to CIFSA upon change of control).

[44] A debtor may qualify as a "financial participant" under § 101(22A). *See Samson*, 625 B.R. at 299-301 & n.36; *In re Taylor, Bean & Whitaker Mortg. Corp.*, 2017 WL 4736682, at *5-6 (Bankr. M.D. Fla. Mar. 14, 2017).

executed in connection with the spinoff, provided MIFSA the option to redeem debt securities (notes) that MIFSA had issued at a price equal to the securities' principal amount of $900 million plus a premium.[45] Because MIFSA thus had securities contracts with an aggregate value exceeding the statutory thresholds, it too was a "financial participant."

The spinoff transfers thus fall within section 546(e)'s safe harbor. Plaintiff's fraudulent-transfer claims should be dismissed.

D. Plaintiff Cannot Avoid The Purported Transfer Of Covidien And Its Non-Pharmaceutical Subsidiaries In The Spinoff Because The Complaint Fails To Allege That Mallinckrodt Ever Owned Covidien Or Its Separate Subsidiaries

Plaintiff's fraudulent-transfer claims should also be dismissed to the extent that the Complaint seeks to avoid the supposed "transfer of Covidien and its direct and indirect subsidiaries." Compl. ¶¶ 224, 236. Plaintiff does not allege that the purportedly transferred property—Covidien and its non-pharmaceutical subsidiaries—ever belonged to Mallinckrodt. The claim, therefore, is devoid of the most basic element of a fraudulent-transfer claim: that the debtor actually transferred something that it owned.

Creditors cannot claw back property that never belonged to the debtor in the first place. To the contrary, to state a claim for fraudulent transfer, Plaintiff must allege that there was a "transfer of an interest of *the debtor* in property." 11 U.S.C. § 544(b)(1) (emphasis added). Only "property that would have been part of the [debtor's] estate had it not been transferred before the commencement of bankruptcy proceedings" may be recovered. *Begier v. IRS*, 496 U.S. 53, 58 (1990). "If the transfer did not involve property of the debtor," "the trustee cannot … recover [it]." *In re Dreier LLP*, 429 B.R. 112, 125 (Bankr. S.D.N.Y. 2010); 5 *Collier on*

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[45] *See* Millar Decl., Ex. 16 (Covidien plc Form 8-K, filed Apr. 12, 2013), Ex. 4.1 (Indenture dated as of April 11, 2013 for 3.5% Senior Notes due 2018 and 4.75% Senior Notes due 2023 among MIFSA as issuer, CIFSA as guarantor, and Deutsche Bank Trust Company Americas as trustee) § 3.05 (MIFSA option to redeem notes); *id.* § 4.08(a) (noteholder option to sell notes back to MIFSA upon change of control).

Bankruptcy ¶ 548.03[2][a] ("[I]f a third party makes a transfer …, there is no fraudulent transfer because the third party's property … would not be available to the debtor's creditors.").

This rule of law bars Plaintiff's fraudulent-transfer claims to avoid the purported transfer of Covidien and its non-pharmaceutical subsidiaries because the Complaint fails to allege that Mallinckrodt ever owned Covidien and its subsidiaries. Just the opposite: the Complaint alleges that Covidien was the parent of the various Mallinckrodt subsidiaries that it spun off. Compl. ¶¶ 7, 19-22, 29, 195. And to the extent that the Complaint could be read to allege that some of Covidien's subsidiaries moved in the corporate organizational chart at the time of the spinoff, *id.* ¶¶ 223(c), 224, 236, it fails to allege that Mallinckrodt ever owned those subsidiaries to begin with. Accordingly, Plaintiff's claims to claw back the entire Covidien enterprise, which Mallinckrodt never owned, fails as a matter of law.

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

The Complaint's fiduciary duty claim—that Covidien was a "promoter" of Mallinckrodt and breached its supposed duty of good faith—is both untimely and legally deficient.

A. Plaintiff's Claim For Breach Of Fiduciary Is Time-Barred

The claim is untimely because, by Plaintiff's own admission, it accrued no later than June 28, 2013 (Compl. ¶ 258), the date of the spinoff, more than seven years before Mallinckrodt filed for bankruptcy.

In determining the applicable statute of limitations, the conflict-of-laws rules of Delaware, the forum state, apply. *In re PHP Healthcare Corp.*, 128 F. App'x 839, 843 (3d Cir. 2005). Under those rules, a statute of limitations is procedural, not substantive, and thus Delaware courts generally apply the limitations period of the forum, Delaware. *See Gavin v. Club Holdings, LLC*, 2016 WL 1298964, at *3 (D. Del. Mar. 31, 2016). But where, as is

arguably the case here, the claim arose outside of Delaware, Delaware's "borrowing statute" specifies that the applicable limitations period is the "*shorter*" of the "time limited by the law of [Delaware], or the time limited by the law of the state or country where the cause of action arose." Del. Code Ann. tit. 10, § 8121 (emphasis added); *see Perkins v. Procter & Gamble Co.*, 2022 WL 1125388, at *2 (3d Cir. Apr. 15, 2022); *TL of Fla., Inc. v. Terex Corp.*, 54 F. Supp. 3d 320, 327 (D. Del. 2014); *TrustCo Bank v. Mathews*, 2015 WL 295373, at *8 (Del. Ch. Jan. 22, 2015). Here, Plaintiff's claim for breach of fiduciary duty arguably arose in Ireland, since the Mallinckrodt entity formed in the spinoff—Mallinckrodt plc—was incorporated under Irish law and, under the internal affairs doctrine, as applied in Delaware, a claim for breach of fiduciary duty is usually deemed to arise in the jurisdiction where the company was incorporated. *See Coleman v. Taub*, 638 F.2d 628, 629 n.1 (3d Cir. 1981); *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1115 (Del. 2005).

But whether Delaware or Irish law applies, Plaintiff's fiduciary duty claim is untimely. In Delaware, claims for breach of fiduciary duty are subject to a three-year statute of limitations, and hence Plaintiff's claim expired in 2016, three years after the spinoff. *See* Del. Code Ann. tit. 10, § 8106; *see, e.g.*, *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998) ("It is well-settled under Delaware law that a three-year statute of limitations applies to claims for breach of fiduciary duty."), *aff'd*, 725 A.2d 441 (Del. 1999). While Delaware law is controlling (because it provides the "shorter" period under the borrowing statute), the claim would also be untimely even if Irish law governed. In Ireland, claims for breach of fiduciary duty are subject to a six-year statute of limitations, *see* Statute of Limitations Act 1957 (Act No. 6/1957) § 11(2)(a) (Ir.); *Komady Ltd. v. Ulster Bank Ireland Ltd.* [2014] IEHC 325 (Ir.), and

hence Plaintiff's claim would have expired in 2019, six years after the spinoff and well before Mallinckrodt filed for bankruptcy. Plaintiff's fiduciary duty claim is thus time-barred.

B. Plaintiff's Fiduciary-Duty Claim Fails Because A Parent Company Does Not Owe A Fiduciary Duty To Its Wholly-Owned Subsidiaries And The Complaint Does Not Otherwise Allege That Covidien Acted In Bad Faith Or Injured Mallinckrodt plc

Even if Plaintiff's fiduciary duty claim were timely, it would fail to state a claim. In both Delaware and Ireland, a parent does not owe a fiduciary duty to its subsidiary simply by virtue of the parent-subsidiary relationship. *See Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 191 (Del. Ch. 2006) ("Under settled principles of Delaware law, a parent corporation does not owe fiduciary duties to its wholly-owned subsidiaries or their creditors."), *aff'd*, 931 A.2d 438 (Del. 2007); *In re Essar Steel Minn. LLC*, 602 B.R. 600, 608 (Bankr. D. Del. 2019) (holding that corporate parents do not owe fiduciary duties to subsidiaries, even when the subsidiaries are insolvent); *Fyffes plc v. DCC plc* [2005] IEHC 477 (Ir.) p.180 ("The company and its shareholders are separate legal entities and the courts normally cannot infer from the degree of control exercised by a shareholder a relationship of principal and agent or beneficiary and trustee between the shareholders and the company."). This rule applies fully when the parent "promotes" the spinoff of a subsidiary. *See Verizon Commc'ns*, 761 F.3d at 438-439 (holding that "the distinction between a parent and a parent-promoter is a distinction without a difference" and that the parent company's role as promoter of wholly-owned subsidiary it spun off did not give rise to fiduciary duties to the subsidiary under Delaware law); *see also Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826 (S.D.N.Y. 1996), *aff'd,* 110 F.3d 892 (2d Cir. 1997). Thus, to the extent Plaintiff is asserting the claim on behalf of the Mallinckrodt subsidiaries that were spun off, the claim fails.

Evidently recognizing as much, Count V does not purport to assert a claim on behalf of any of the pre-existing Mallinckrodt subsidiaries. Instead, it claims that Covidien breached a fiduciary duty supposedly owed to Mallinckrodt plc, the new parent company formed in the spinoff to acquire the stock of the Mallinckrodt subsidiaries. *See, e.g.,* Compl. ¶ 256. But precisely because Mallinckrodt plc did not exist before the spinoff, it had no assets before the spin and no such assets could have been transferred away from it in the spin.

Moreover, the Complaint fails to allege that Covidien obtained any "secret profit" or otherwise acted in bad faith in its dealings with Mallinckrodt plc. The few cases holding a promoter liable to a "promoted" company for breach of fiduciary duty have generally done so only where the promoter derived "secret profits" from the transaction that it hid, or otherwise acted without full disclosure.[46] That is certainly not the case here, as the SEC filings for the spinoff disclosed the $721 million to be paid to Covidien by MIFSA, the prior Cash Transfers, the mutual indemnities granted by the parties, and the other supposed transfers. *See supra* pp.7-11, 16-17.

Accordingly, Plaintiff's claim for breach of fiduciary duty fails as a matter of law.

III. PLAINTIFF'S REIMBURSEMENT, INDEMNIFICATION OR CONTRIBUTION CLAIM (COUNT VI) IS GROUNDLESS

Plaintiff's claim for reimbursement, indemnification, or contribution is breathtaking. It seeks to hold Covidien responsible for all of *Mallinckrodt's* opioid-related expenses and liabilities, including those arising out of Mallinckrodt's post-spin activities, as well as the administrative expenses of *Mallinckrodt's own* bankruptcy proceeding. Yet, the claim fails to meet the most basic pleading requirements: it does not set forth any factual allegations or legal

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[46] *See Gladstone v. Bennett*, 153 A.2d 577, 582 (Del. 1959) ("where the corporation deals with a promoter with full knowledge of all facts, courts will not set aside the transaction, since in such cases there is no secret or undisclosed property") (citing *Henderson v. Plymouth Oil Co.*, 141 A. 197, 205 (Del. 1928)).

basis to impose such extraordinary liability. Fed. R Civ. P. 8(a)(2); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Plaintiff's claim for reimbursement consists of only five paragraphs. Compl. ¶¶ 263-267. It pleads nothing more than Plaintiff's desired outcome: "Covidien is jointly and severally liable with the Debtors for all opioid-related liability and claims borne by or asserted against the Debtors." *Id.* ¶ 266. It alleges no facts showing why Covidien bears any such liability. Indeed, it alleges no facts at all, other than that Mallinckrodt has incurred costs in the opioid-related litigation filed against Mallinckrodt and in its bankruptcy case. *Id.* ¶¶ 264-265. Plaintiff's "unadorned, the-defendant-unlawfully-harmed-me accusation" is precisely the sort of "formulaic" "labels and conclusions" that the Supreme Court has held "will not do." *Ashcroft,* 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555); *id.* at 678-679 ("legal conclusions … must be supported by factual allegations"; it does not "suffice [to] tender[] 'naked assertion[s]' devoid of 'further factual enhancement'" (quoting *Twombly*, 550 U.S. at 557)).

Count VI does not even identify the legal cause of action Plaintiff is asserting. At most, other parts of the Complaint include a few conclusory statements that Covidien and Mallinckrodt "operated as a single economic enterprise," that "the Debtors were alter egos of Covidien," and that "the corporate separateness of the Debtors, Covidien, and their non-pharma affiliates should be disregarded." Compl. ¶¶ 132, 146.

If alter ego or veil piercing is Plaintiff's theory for holding Covidien liable for Mallinckrodt's opioid liability and bankruptcy expenses, Plaintiff has not pled the required elements for such a claim. As a threshold matter, Plaintiff has not shown that it even has standing to bring a claim for alter-ego or veil-piercing liability. Any such claim would not be for avoidance of a transfer and hence Plaintiff would have to assert the rights of Mallinckrodt, not its

individual creditors. *See* 11 U.S.C. § 541(a)(1); *Caplin v. Marine Midland Grace Tr. Co. of N.Y.*, 406 U.S. 416 (1972). Plaintiff would lack standing to bring such a claim under the law of some states, which permit only creditors, not the debtor itself, to pierce the corporate veil or hold an affiliate liable as the alter ego of the debtor.[47] But, of course, Plaintiff has not pled what law it is invoking.

In any event, Plaintiff fails to plead the exceedingly rare facts needed to disregard corporate separateness. "[R]especting entity separateness is a fundamental ground rule," and "the general expectation of state law and of the Bankruptcy Code … is that courts respect entity separateness absent compelling circumstances." *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005) (quotation omitted). There is a strong "presumption that a corporation, even when it is a wholly owned subsidiary of another, is a separate entity." *Mellon Bank, N.A., v. Metro Commc'ns Inc.*, 945 F.2d 635, 643 (3d Cir. 1991). A corporation's "'veil may be pierced' only in extraordinary circumstances, such as when 'the corporate form would otherwise be misused to accomplish certain wrongful purposes.'" *Trinity Industries, Inc. v. Greenlease Holding Co.*, 903 F.3d 333, 365 (3d Cir. 2018) (quoting *United States v. Bestfoods*, 524 U.S. 51, 62 (1998)); *see also In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 371 (3d Cir. 2007) ("It is a bedrock principle of corporate law … that courts must respect entity separateness unless doing so would work inordinate inequity.").[48]

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[47] *See, e.g.*, *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1250-1252 (9th Cir. 2010) (holding that debtor's estate lacked standing to bring alter-ego claims under California law); 5 *Collier on Bankruptcy* ¶ 541.07[5] (the "standing of the trustee to bring" an action "under a theory of alter ego" "generally depends upon whether, under nonbankruptcy law, the debtor would have had standing" to bring the claim).

[48] The law in Ireland is to the same effect. *See, e.g.*, *Re Frederick Inns Ltd.* [1991] ILRM 582 (Ir.) at 587 (explaining that a "fundamental attribute of a company in Irish law" is that a "company is a legal entity distinct from its members" and that "this principle … appl[ies] to the relationship between holding companies and subsidiaries and to transactions between them and third parties"; "except where circumstances enable a court to discover an agency or trustee relationship between them, a holding company is not treated as owner of its subsidiaries' assets"

As discussed above, Plaintiff has not alleged the "extraordinary circumstances" required to establish that Mallinckrodt was Covidien's "alter ego" or that any "veil should be pierced." To the contrary, the Complaint admits that Covidien was only a direct or indirect parent company of the Mallinckrodt subsidiaries for six years of Mallinckrodt's century-plus existence. *See supra* pp.6-7. And, unlike Mallinckrodt, which ultimately faced more than 3,000 lawsuits arising out of its sale of opioids, Plaintiff does not and cannot allege that Covidien has ever been served with a single complaint asserting that it has any such liability.

Instead, Plaintiff merely alleges the standard sorts of arrangements that exist all the time between a parent and its subsidiaries—that Covidien and Mallinckrodt shared corporate services and an integrated cash management system, and that Covidien's board of directors exercised high-level oversight over the ultimate business decisions of Mallinckrodt. *See supra* p.6. Those allegations of run-of-the-mill corporate interactions are not remotely sufficient to justify disregarding the corporate form. Activities that "are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability" of the parent. *Bestfoods*, 524 U.S. at 72. Courts have routinely rejected alter-ego or veil-piercing claims in these circumstances.[49] Plaintiff's claim for reimbursement, indemnification or contribution should similarly be dismissed.

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and "the liabilities of companies which are members of the same group are those of the individual companies which incur them").

[49] *See, e.g.*, *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 267-268 (D. Del. 1989) (explaining that parent's approval of subsidiary's expenditures merely demonstrated that parent and subsidiary were "closely connected" and did not warrant veil piercing); *In re Suboxone (Buprenorphine Hydrocloride & Naloxone) Antitrust Litig.*, 2017 WL 4810801, at *11 (E.D. Pa. Oct. 25, 2017) (allegations of parent's receipt of assets from subsidiary's sales, use of consolidated financial statements, and overlapping directors and officers did not "allow any reasonable inference that [the parent] exercises a greater than normal degree of control over [the subsidiary], such that [it] is [the parent's] 'alter ego'"); *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175 (9th Cir. 1980) (rejecting as insufficient alter-ego allegations that parent had "general executive responsibility[ies]" for the subsidiary's operations, approved major policy decisions, and worked closely with subsidiary on approving other decisions).

IV. PLAINTIFF'S CLAIMS TO SUBORDINATE OR DISALLOW COVIDIEN'S INDEMNIFICATION CLAIMS SHOULD BE DISMISSED

In the last four Counts of the Complaint (Counts VII-X), Plaintiff asks this Court to subordinate or disallow two proofs of claim Covidien filed in Mallinckrodt's bankruptcy case for indemnification (or contribution) of any defense costs and liabilities Covidien has incurred or may incur arising out of Mallinckrodt's business operations, including with respect to certain asbestos, environmental, and opioid matters.[50] Covidien is entitled to such indemnification under the express terms of the Separation and Distribution Agreement, just as Mallinckrodt was entitled to indemnification under the same agreement for costs arising out of Covidien's business—and for the environmental litigation arising out of Mallinckrodt's own facility in Maine, which Covidien defended and agreed to pay at least $187 to resolve in 2022. *See supra* pp.2-3, 12-13. Plaintiff's claims to subordinate or disallow Covidien's claims are baseless.

A. Plaintiff's Equitable-Subordination Claim (Count VII) Should Be Dismissed Because Plaintiff Has Not Alleged A Plausible Claim Of Inequitable Conduct Or Harm To The Relative Rights Of Other Creditors In The Bankruptcy

Plaintiff first asserts that Covidien's claims should be equitably subordinated under section 510(c) of the Bankruptcy Code. Equitable subordination is "an extraordinary remedy which is applied sparingly." *In re Optim Energy, LLC*, 527 B.R. 169, 175 (D. Del. 2015). It is appropriate only where each of three elements is met: "(1) the higher priority creditor must have engaged in inequitable conduct, (2) that conduct injured a lower priority creditor or unfairly

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This case is thus distinguishable from *J & M Sales*, in which this Court denied a motion to dismiss a veil-piercing claim. There, unlike here, the complaint alleged numerous, detailed facts supporting a claim to pierce the corporate veil of a family-owned group of closely held companies. 2021 Bankr. LEXIS 2268, at *122-126 (alleging family defendants "failed to observe corporate formalities" and "corporate boundaries," "controlled … the Debtors … to enrich [the defendants]," used the "Debtors' employees [to] routinely perform[] services for the benefit of the [family's separate companies] and [for the defendant] personally," and "[the family's] authoritarian management style, coupled with the absence of any independent board members, created a complete lack of oversight").

[50] *See* Millar Decl, Ex.17 & 18 (attaching Covidien proofs of claim).

advantaged the misbehaving creditor, and (3) claim subordination would not be inconsistent with the Bankruptcy Code." *In re John Varvatos Enters. Inc.*, 2022 WL 2256017, at *2 (3d Cir. June 23, 2022). The Complaint does not satisfy any of these elements, much less all three.

First, Plaintiff has not plausibly alleged any "inequitable conduct." Even where the creditor was an insider, courts generally recognize only "three categories of misconduct which may constitute inequitable conduct …: (1) fraud, illegality, and breach of fiduciary duties; (2) undercapitalization; or (3) claimant's use of the debtor as a mere instrumentality or alter ego." *United States v. State St. Bank & Tr. Co.*, 520 B.R. 29, 82 (Bankr. D. Del. 2014). Here, there was no fraud—both Covidien and Mallinckrodt publicly disclosed the spinoff and made publicly available with their SEC filings the Separation and Distribution Agreement that gives rise to Covidien's proofs of claim; there is nothing "illegal" about a spinoff or mutual indemnifications; and there was no breach of any fiduciary duty, as discussed above. Nor was Mallinckrodt undercapitalized; as discussed, it emerged from the spinoff as a public company capable of raising more than a billion dollars in unsecured debt and with its equity worth several billions of dollars. And, as also discussed, Plaintiff has alleged no facts to support a claim that Mallinckrodt was a mere instrumentality or alter ego of Covidien.

Second, nothing Covidien did "injured a lower priority creditor." Equitable subordination is designed "to undo or to offset any inequality in the claim position of a creditor that will produce injustice or unfairness to other creditors in terms of the bankruptcy results." *In re Winstar Commc'ns, Inc.*, 554 F.3d 382, 411 (3d Cir. 2009); *accord In re John Varvatos Enters., Inc.,* 2021 WL 4133656, at *6 (D. Del. Sept. 10, 2021), *aff'd*, 2022 WL 2256017 (3d Cir. June 23, 2022); *In re Mid-Am. Waste Sys., Inc.*, 284 B.R. 53, 68 (Bankr. D. Del. 2002). Accordingly, even where (unlike here) a creditor has engaged in misconduct, its claim will not

be equitably subordinated unless that misconduct harmed "the relative positions of [other] creditors in a bankruptcy context"—*i.e.*, where the offending creditor's misconduct elevated its priority in right of repayment in the bankruptcy proceeding. Nothing of the sort happened here. Covidien is asserting general unsecured claims for indemnification without any priority over other claims in the bankruptcy proceedings.

Finally, equitable subordination of Covidien's claim would be inconsistent with the basic structure of the Bankruptcy Code under which general unsecured claims are normally treated the same. 11 U.S.C. § 726. Equitable subordination "is not a mechanism to be used by courts to alter the statutory scheme in an effort to reach a result the court considers more equitable than the distribution scheme provided for in the Bankruptcy Code." *In re Zohar III, Corp.*, 639 B.R. 73, 93–94 (Bankr. D. Del. 2022), *aff'd,* 2022 WL 3278836 (D. Del. Aug. 11, 2022), *appeal filed*, No. 22-2695 (3d Cir. Sept. 15, 2022).

B. Plaintiff's Equitable-Disallowance Claim (Count VIII) Should Be Dismissed Because There Is No Such Cause Of Action Under The Bankruptcy Code

Plaintiff's next claim—for "equitable disallowance" of Covidien's proofs of claim—fails for an even more basic reason: The Bankruptcy Code provides no such cause of action.

By its express terms, section 510(c) permits only the "equitable *subordination*" of a claim, not the "disallowance" of a claim. 11 U.S.C. § 510(c) (emphasis added). Nor does any other provision of the Bankruptcy Code permit a claim to be disallowed on "equitable" grounds. To the contrary, the Code specifies that the bankruptcy court "shall allow" a claim "except to the extent" it falls within one of nine statutorily specified bases for disallowance, none of which is that the court considers the claim "inequitable." 11 U.S.C. § 502(b); *see Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.,* 549 U.S. 443, 449 (2007) (holding that claim could not be disallowed on ground falling outside of section 502(b)'s nine grounds). And it is settled law that

"whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of" the Bankruptcy Code. *Law v. Siegel*, 571 U.S. 415, 421 (2014).

Accordingly, the vast majority of courts have rejected equitable disallowance as a cause of action or remedy under the Code. The decisions so holding include two opinions issued by bankruptcy judges in this District. *See* Millar Decl., Ex. 19 (Letter Ruling, *In re Elk Petroleum, Inc.*, No. 19-11157 (Bankr. D. Del. Sept. 15, 2019), ECF No. 511 (Silverstein, J.)); *In re Hercules Offshore, Inc.*, 565 B.R. 732, 760 (Bankr. D. Del. 2016) (Carey J.); *see also, e.g., In re Bernard L. Madoff Investment Sec. LLC*, 515 B.R. 117 (Bankr. S.D.N.Y. 2014); *In re LightSquared Inc.,* 504 B.R. 321, 339 (Bankr. S.D.N.Y. 2013). The Court should follow suit and dismiss Count VIII.

C. Plaintiff's Claim To Disallow Covidien's Indemnification Claims Under Section 502(d) Of The Bankruptcy Code (Count IX) Should Be Dismissed Because Covidien Has Not Received Any Avoidable Transfers

Plaintiff next invokes Section 502(d), which disallows a claim of a creditor that received an avoidable transfer unless and until the creditor returns the transferred property to the estate. 11 U.S.C. § 502(d). But, for the reasons previously discussed, Plaintiff's fraudulent-transfer claims fail as a matter of law. Thus, there is no allegedly avoidable transfer to support the disallowance of any of Covidien's claims under section 502(d). Count IX should be dismissed.

D. Plaintiff's Claim To Disallow Covidien's Indemnification Claims Under Section 502(e)(1)(B) (Count X) Should Be Dismissed Because Covidien's Claims Are Liquidated In Part, And Any Part Of the Claims That Currently Remains Contingent Need Not And Cannot Be Permanently Disallowed Now

Finally, Plaintiff seeks to disallow Covidien's claims for indemnification as "contingent" reimbursement claims under section 502(e)(1)(B) of the Bankruptcy Code. Compl. ¶¶ 281-284. This claim fails for two independent reasons.

First, Covidien's claims are not contingent to the extent they seek indemnification for legal expenses that Covidien has already incurred. For example, while Covidien has not been served with a complaint in any underlying opioid litigation, it has incurred modest expenses in connection with 50 actions in which it has been named as a defendant (but not served) as one of many defendants in a laundry list of current or former affiliates of Mallinckrodt.[51]

Second, the remaining, contingent portions of the claims are perfectly legitimate, and there is no reason why they should be disallowed (or allowed) now. Beyond the limited expenses that it has already incurred, Covidien is hopeful that it will not need to incur any additional amounts in the future. But, if it is brought into any of the underlying opioid, asbestos or other litigation arising out of Mallinckrodt's pharmaceutical business, it will have an absolute contractual right to indemnification under the Separation and Distribution Agreement for all defense costs and any liability.

There is no reason why this Court should address these portions of the claims today rather than wait to see if they become liquidated in the future. Under Mallinckrodt's Chapter 11 plan, the Trust is to be funded by Mallinckrodt through cash payments payable over the next eight years. *See* Plan § I.A.281. If any portion of Covidien's claims remain contingent years from now when the Trust is about to be dissolved, the claims can be addressed then.

That approach makes especially good sense because any disallowance of the claims at this time would be subject to reconsideration if and when any portions of the claim later became liquidated. Section 502(j) of the Bankruptcy Code so provides, as does Mallinckrodt's plan. *See* 11 U.S.C. § 502(j); Plan § IV.Y.2. Indeed, Covidien initially objected to the proposed plan

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[51] *See* Millar Decl. Ex. 17 (Claim No. 52633), addendum ¶ 11(a) (setting forth incurred expenses of $45,000); *id.*, Ex. 18 (Other Opioid Claim No. 5) addendum ¶ 17 (setting forth incurred expenses of $15,400). The court presiding over 48 of the 50 actions in which Covidien has been named recently announced that it will dismiss those actions.

because it purported not to preserve Covidien's right under Section 502(j) to seek reconsideration of any disallowed claims.[52] Mallinckrodt and the OCC agreed to amend the plan to preserve those rights, and the plan as confirmed expressly so provides. *See id.* ("[A]ny disallowance of any Other Opioid Claim … shall be subject to reconsideration upon the filing, at any time, of a motion by the holder of such Claim under section 502(j) of the Bankruptcy Code."). Accordingly, Plaintiff's effort to permanently disallow the contingent portions of Covidien's claims contravenes both the Bankruptcy Code and the very terms of the plan to which Mallinckrodt and the OCC agreed to resolve Covidien's objection. Plaintiff's claims are without merit and should be dismissed.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed.

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[52] *See Limited Objection of Covidien Limited to First Amended Joint Chapter 11 Plan of Reorganization of Mallinckrodt plc and its Debtor Affiliates Under Chapter 11 of The Bankruptcy Code* [D.I. 4699] pp. 3-6.

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