PUBLIC VERSION OF ADV. DOCKET NO. 23

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

OPPOSITION OF THE OPIOID MASTER DISBURSEMENT TRUST II TO COVIDIEN'S MOTION TO DISMISS THE COMPLAINT

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[1] A complete list of the Reorganized Debtors in these chapter 11 cases may be obtained on the website of the Reorganized Debtors' claims and noticing agent at http://restructuring.primeclerk.com/Mallinckrodt. The Reorganized Debtors' mailing address is 675 McDonnell Blvd., Hazelwood, Missouri 63042.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiff, the Opioid Master Disbursement Trust II ("**Trust**"), by and through its undersigned counsel, hereby opposes *Covidien's Motion to Dismiss the Complaint*, which was filed by Defendants[1] in the above-titled adversary proceeding on December 23, 2022 ("**Motion**"), ECF No. 13. For the reasons explained below, the Court should deny the Motion. [2]

PRELIMINARY STATEMENT

In classic "blaming the victim" fashion, Covidien feigns outrage while demanding dismissal of the Trust's Complaint. "This case should never have been brought," Covidien blusters in its opening salvo. Motion at 1. But it is Covidien's conduct that is outrageous here. As the Complaint lays out in detail, Covidien and Mallinckrodt, its former pharmaceutical arm, engaged in blatant misconduct to boost sales of opioid painkillers and thereby helped create the nationwide opioid epidemic—one of the worst manmade public health disasters in history. Covidien then siphoned well over a billion dollars in value from the Mallinckrodt business, and spun it off. And Covidien did so after saddling Mallinckrodt with a share of its tax liabilities and an alleged obligation to indemnify Covidien for opioid claims. These are all textbook fraudulent transfers that should be avoided for the benefit of opioid creditors.

Covidien now lodges its motion to dismiss, seeking to escape responsibility for its role in the opioid crisis and for the fraudulent transfers described in the Complaint. The standard on a motion to dismiss is well established. This Court evaluates the legal sufficiency of the Complaint and the plausibility of its claims, while accepting all factual allegations in the Complaint as true and drawing all reasonable inferences in the Trust's favor. Moreover, the Court's review is limited to the four corners of the Complaint and the documents attached to or relied upon in the Complaint.

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[1] Defendants Covidien Unlimited Company, Covidien Group Holdings Ltd., Covidien International Finance S.A., and Covidien Group S.à r.l. are hereinafter referred to, collectively, as "**Covidien**."

[2] Capitalized terms not otherwise defined shall have the meaning ascribed in the Complaint. ECF No. 2.

Covidien's Motion ignores these controlling principles of law. The Motion relies on documents outside the four corners of the Complaint (*e.g.*, pp. 34-35), raises factual issues that cannot be resolved on a Rule 12(b)(6) motion (*e.g.*, pp. 32-35), and tries to cast matters in the light most favorable to Covidien (*e.g.*, pp. 2-3). In addition, the Motion advances grounds for dismissal that are without legal merit. Covidien's attempts to introduce documents outside the Complaint are both improper as a legal matter and an implicit acknowledgement that the four corners of the Complaint state plausible claims. Furthermore, its attempts to dismiss the Complaint under the statute of limitations and 11 U.S.C. § 546(e) are unavailing as a matter of law.

In its 106 pages and 285 numbered paragraphs, the Complaint sets forth detailed factual allegations to support every element of each claim and to present plausible and timely claims, far exceeding the required standards for pleading causes of action. For all the reasons stated herein, the Motion should be denied.

FACTUAL BACKGROUND

According to the Centers for Disease Control and Prevention, between 1999 and 2020, more than 564,000 Americans died from overdoses involving opioids. Compl. ¶ 4. Countless more have become addicted or suffered other health problems as a direct result of opioid use. *Id.* Families have lost loved ones. Children exposed to opioids in utero have been born with neonatal abstinence syndrome ("**NAS**"). *Id.* Communities have been ravaged. Americans became addicted to their prescribed drugs and turned to pill mills and street drugs to feed those addictions. *Id.* In addition to its tragic human costs, the opioid crisis has resulted in staggering financial costs. *Id.* The financial toll of the opioid epidemic is estimated to be in the trillions. *Id.* ¶¶ 4, 203.

From 2007 to 2013, Mallinckrodt and Covidien played a substantial role in the opioid epidemic. [redacted] Given their

outsized market share, Covidien and Mallinckrodt's opioids comprised a large percentage of the opioids that were diverted and abused throughout the nation. *Id.* ¶¶ 5, 29-32. Indeed, according to the Drug Enforcement Administration, Covidien and Mallinckrodt were the "kingpin within the drug cartel" causing the opioid epidemic. *Id.* ¶ 167.

[redacted] Ultimately, more than a quarter of those top prescribers were convicted of crimes or faced disciplinary action. *Id.* ¶ 66. Covidien and Mallinckrodt used websites and other media to promote false and misleading information about the efficacy of their opioid products and opioids generally while downplaying the attendant risks of addiction and abuse. *Id.* ¶¶ 71-78. They also paid "key opinion leaders" to disseminate false and misleading information about the dangers of prescribing opioids. *Id.* ¶¶ 79-83. Moreover, Covidien and Mallinckrodt failed to meet their legal obligations to design and implement an effective system to detect and report suspicious opioid orders, *i.e.* those likely to lead to diversion of its products to be sold for recreational use and abuse. *Id.* ¶ 91.

Covidien and Mallinckrodt's role in creating and perpetuating the opioid crisis gave rise to enormous opioid liability that dwarfed the companies' assets. Recognizing the anticipated and escalating liability from its opioid-related misconduct, Covidien engaged in several fraudulent transfers. First, starting in 2010, it siphoned approximately $867 million in cash from the

Mallinckrodt business. Compl. ¶¶ 9, 181. [redacted] Fourth, in connection with the Spinoff, Covidien shifted hundreds of millions of dollars in tax liability onto Mallinckrodt and imposed on Mallinckrodt an alleged obligation to indemnify Covidien for all opioid-related liabilities. *Id.* ¶¶ 187-195.

This was actionable misbehavior that harmed Mallinckrodt's creditors. Accordingly, the Trust has filed its Complaint against Covidien to avoid and recover the fraudulent transfers. In addition, the Trust's Complaint asserts common-law claims against Covidien for damages. *Id.* ¶¶ 255-267. And, because Covidien is not an innocent creditor and should not share in or dilute the distributions to other opioid claimants, the Complaint seeks disallowance or subordination of Covidien's opioid-related indemnification claims. *Id.* ¶¶ 268-284.

STANDARD OF REVIEW

Covidien attempts to turn the standard of review for a motion to dismiss on its head. *See* Motion at 8-14. Rather than accepting the facts alleged in the light most favorable to the Trust, Covidien presents the facts in the light most favorable to Covidien. *See id.* at 2-3. In this regard, Covidien ignores harmful facts alleged in the Complaint that demonstrate its liability and asks that this Court accept alternative explanations for its conduct. *See id.* at 9, 11-13. The Federal Rules of Civil Procedure and Third Circuit law provide otherwise.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). This plausibility standard set forth under Fed. R. Civ. P. 8(a) requires only a "showing" that the pleader is entitled to relief. *Schuchardt v. President of the United States*, 839 F.3d 336, 347 (3d Cir. 2016). The complaint is not required to be "rich with detail." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211-12 (3d Cir. 2009). The complaint's factual allegations must simply be enough "to raise a right to relief above the speculative level." *Uronis v. Cabot Oil & Gas Corp.*, 49 F.4th 263, 268 (3d Cir. 2022) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

If an explanation is plausible, the complaint survives a motion to dismiss under Rule 12(b)(6), regardless of whether there is a more plausible alternative explanation. *Doe v. Princeton Univ.*, 30 F.4th 335, 344 (3d Cir. 2022). For pleading purposes, a defendant's rebuttal of a plaintiff's contentions with its own does not entitle the defendant to dismissal of the action. *Deere & Co. v. AGCO Corp.*, 2019 WL 668492, at *5-6 (D. Del. Feb. 19, 2019); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 341 n.42 (3d Cir. 2010).

When evaluating a motion to dismiss, the reviewing court must assume all "factual allegations to be true, construe those truths in the light most favorable to the plaintiff, and then draw all reasonable inferences from them." *Connelly*, 809 F.3d at 790 (citations omitted). The Court "must . . . refrain from engaging in any credibility determinations." *United States ex rel. Customs Fraud Investigations, LLC. v. Victaulic Co.*, 839 F.3d 242, 256 (3d Cir. 2016). Even factual allegations that are "unrealistic," "nonsensical," "chimerical," and "extravagantly fanciful" must still be taken as true. *Iqbal*, 556 U.S. at 681; *Connelly*, 809 F.3d at 789.

A "district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings." *Doe*, 30 F.4th at 342 (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)). In deciding a Rule 12(b)(6) motion, a court "must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Alpizar-Fallas v. Favero*, 908 F.3d 910, 914 (3d Cir. 2018) (citations omitted).

Covidien's attempt to hold the Trust to a higher standard because it had access to certain Rule 2004 discovery before it filed the Complaint is without merit. Motion at 2, 5. "Although a Rule 2004 examination is obviously an investigatory device and it is conducted under oath, it should not be confused with discovery or a discovery deposition." *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 268 (3d Cir. 2013) (quoting *In re J & R Trucking, Inc.*, 431 B.R. 818, 821 (Bankr. N.D. Ind. 2010)); *see also In re Dinubilo*, 177 B.R. 932, 942 (E.D. Cal. 1993) (noting that a Rule 2004 examination "is not a substitute for discovery authorized in either adversary proceedings or contested matters which is governed by [Rule] 9014" (alteration in original) (citations omitted)).

Prior to confirmation in *Mallinckrodt*, the Official Committee of Opioid-Related Claimants ("**OCC**") only conducted due diligence of the relative strength of the Assigned Medtronic Claims that were later assigned to the Trust.[3] The OCC never represented, nor considered, the documents sought under Rule 2004 to be a substitute for discovery that would be available if and when claims were actually litigated; rather, the Rule 2004 discovery was sought so that the OCC could conduct an "evaluation of the deal proposed" by the Debtors.[4] In addition, the Trust was formed on June 16, 2022, the Plan's effective date, and thus had less than four months to hire counsel, review

[3] The Official Committee of Opioid Related Claimants' Motion for an Order Pursuant to Bankruptcy Rule 2004 and Delaware Local Bankruptcy Rule 2004-1 Authorizing and Directing Examination of Certain Advisors ¶¶ 7-9, *In re Mallinckrodt plc*, No. 20-12252 (JTD) (Bankr. D. Del. May 5, 2021), ECF No. 2199-1.

[4] *Id.* ¶ 9.

documents, and then prepare and file its Complaint by October 12, 2022, the last day of the § 546(a) limitations period. The lion's share of documents made available to the Trust before the Complaint was filed were unrelated to the Spinoff. Moreover, most of the Debtors' production of documents relating to the Spinoff occurred after the Trust filed its Complaint, and the production of hundreds of thousands of documents has been occurring on a rolling basis over the past several weeks and was completed only earlier this month.[5] (As a result, the Trust's legal team is continuing to review these productions.) These final productions have included, only very recently, Mallinckrodt's privileged documents related to the Spinoff, which may end up being among the most relevant and helpful.

Covidien touts the thousands of documents it produced in response to the OCC's Rule 2004 requests. Motion at 5. But quantity does not automatically translate into quality or responsiveness. Numerous documents produced by Covidien, including board minutes, were redacted. Yet Covidien never delivered a privilege log in connection with the production. Accordingly, the Trust has no information regarding the validity of those redactions. Nor does the Trust have any information regarding which documents Covidien withheld completely, much less the basis on which they were withheld or whether they were properly withheld. Additionally, no Covidien witness was deposed by the OCC. The only former Covidien officer who received any questions related to the Spinoff was Mark Trudeau, who joined Covidien *after* it decided to spin off Mallinckrodt. Mr. Trudeau was asked only a couple of cursory questions about the Spinoff. Covidien's assertions are thus not only legally irrelevant, but also factually inaccurate.

[5] *See* Opioid MDT II Cooperation Agreement at 2, *In re Mallinckrodt plc*, No. 20-12252 (JTD) (Bankr. D. Del. May 5, 2021), ECF 7586-1 (detailing the process of the Debtors turning over records to the Trust).

ARGUMENT

I. THE COMPLAINT ALLEGES PLAUSIBLE CLAIMS FOR FRAUDULENT TRANSFERS (COUNTS I-IV)

A. The Complaint Presents Plausible Claims for Intentional Fraudulent Transfer

1. Rule 9(b)'s Specificity Requirement Is Satisfied

Federal Rule of Civil Procedure 9(b) requires a party to plead the "who, what, when, where and how" of the events giving rise to fraud. *In re Aspect Software Parent, Inc.*, 578 B.R. 718, 723 (Bankr. D. Del. 2017) (quoting *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 217 (3d Cir. 2002)). Courts apply a more "liberal" and "relaxed" view of its requirements when the claim is brought by a bankruptcy trustee since a trustee is an outsider to the transaction who must plead fraud from second-hand knowledge. *See In re Nortel Networks, Inc.*, 469 B.R. 478, 498 (Bankr. D. Del. 2012); *In re Charys Holding Co.*, 2010 WL 2774852, at *3 (Bankr. D. Del. July 14, 2010); *see also In re Craftmatic Sec. Litig.*, 890 F.2d 628, 645 (3d Cir. 1989).

The Trust's intentional fraudulent transfer claims provide the details required by Rule 9(b). Covidien has displayed no confusion or uncertainty about the specific transactions that the Trust is challenging. As to the Cash Transfers, the Complaint identifies the amount of cash transferred, the year the cash was transferred, and the parties engaging in the transfers. Compl. ¶ 181. [redacted] In addition, the Complaint identifies the original tax sharing agreement that gave rise to Covidien's tax liabilities and the Tax Matters Agreement whereby Covidien transferred those liabilities to Mallinckrodt. *Id.* ¶¶ 187-188. The Complaint also alleges that these transfers were made with the specific intent to keep the cash out of the hands of opioid creditors and that Mallinckrodt did not receive reasonably equivalent value

in exchange. *Id.* ¶¶ 181-182, 186. The descriptions of the transfers, therefore, more than satisfy the requirements of Rule 9(b).

2. The Trust Adequately Alleges Circumstantial Evidence of Covidien's Intent to Hinder, Delay, or Defraud

Covidien argues that the intentional fraudulent transfer claims should be dismissed because the Trust fails to allege that the Covidien board of directors had a specific intent to defraud opioid creditors. Motion at 25-27. That argument lacks merit. Rule 9(b) provides that intent "may be alleged generally." Since debtors very rarely confess that they intended to hinder, delay, or defraud creditors, intentional fraudulent transfer cases commonly rely on circumstantial evidence to prove the requisite intent. *See In re Victor Int'l, Inc.*, 97 F. App'x 365, 369 (3d Cir. 2004); *see also In re Hechinger Inv. Co. of Del.*, 327 B.R. 537, 550-51 (D. Del. 2005) ("Direct evidence of fraudulent intent . . . is often unavailable and courts usually rely on circumstantial evidence, including the circumstances of the transaction, to infer fraudulent intent."), *aff'd sub nom. In re Hechinger Inv. Co. of Del., Inc.*, 278 F. App'x 125 (3d Cir. 2008).

Moreover, an intent to defraud by Covidien officers, as opposed to directors, is sufficient to state a claim. The "fraud of an officer of a corporation is imputed to the corporation when the officer's fraudulent conduct was (1) in the course of his employment, and (2) for the benefit of the corporation." *In re Pers. & Bus. Ins. Agency*, 334 F.3d 239, 242-43 (3d Cir. 2003) (quoting *In re Jack Greenberg, Inc.*, 212 B.R. 76, 83 (Bankr. E.D. Pa. 1997)). "This is true even if the officer's conduct was unauthorized . . . but clothed with apparent authority of the corporation." *Id.* at 243. "The underlying reason is that a corporation can speak and act only through its agents and so must be accountable for any acts committed by one of its agents within his actual or apparent scope of authority and while transacting corporate business." *Id.*; *see also In re Lyondell Chem. Co.*, 554 B.R. 635, 649-51 (S.D.N.Y. 2016) (rejecting argument that plaintiff had to plead intent of board

and using intent of officer to uphold fraudulent transfer claims against the corporation). Here, there are factual allegations that, at a minimum, some of Covidien and Mallinckrodt's officers knew of the opioid-related misconduct within the organization that would give rise to significant liabilities. Compl. ¶¶ 155, 157, 162-163, 169. And the Court may reasonably infer from the well-pled allegations that the Spinoff was devised and implemented at the highest levels of Covidien. *See, e.g., id.* ¶¶ 135, 177-180, 183-184.

When pleading an intentional fraudulent transfer claim, parties also may rely on badges of fraud to survive a motion to dismiss. *See Crystallex Int'l Corp. v. Petróleos De Venezuela, S.A.*, 879 F.3d 79, 89 (3d Cir. 2018) (finding that badges of fraud can be used to allege "actual intent" to hinder, delay or defraud any creditor of the debtor in a fraudulent transfer); *In re Physiotherapy Holdings, Inc.*, 2016 WL 3611831, at *15 (Bankr. D. Del. June 20, 2016). The presence or absence of any particular badge is not conclusive, and multiple badges in the same transaction can provide conclusive evidence of fraud. *See MSKP Oak Grove, LLC v. Venuto*, 839 F. App'x 708, 712 (3d Cir. 2020).

Covidien incorrectly asserts that the Complaint identifies only two badges of fraud. Motion at 26-27. To the contrary, the Complaint identifies and describes no fewer than seven badges of fraud explicitly listed in the Uniform Fraudulent Transfer Act ("**UFTA**").[6] Compl. ¶¶ 223(a)-(i), 241(a)-(h); *see Klein v. Weidner*, 729 F.3d 280, 284 (3d Cir. 2013) (listing non-exclusive badges of fraud under the Pennsylvania UFTA).

- *Transfer to or for the benefit of an insider:* At the time of the Spinoff, Covidien was the direct or indirect parent company of the Debtors and dominated and controlled the Debtors

[6] When addressing state fraudulent transfer law, this opposition will refer to the UFTA since that uniform law has been adopted in Delaware, Massachusetts (where Covidien was headquartered), and Missouri (where Mallinckrodt is headquartered). *See* Mass. Gen. Laws ch. 109A, §§ 1-12; 6 Del. C. §§ 1301-11; Mo. Stat. §§ 428.005-59. The Trust is doing so for ease of reference and is not yet specifying which fraudulent transfer law of which state controls here. *See, e.g., In re Oakwood Homes Corp.*, 340 B.R. 510, 525-26 (Bankr. D. Del. 2006) (holding that a complaint need not identify a particular state's fraudulent transfer law to survive a motion to dismiss).

such that the Debtors were alter egos or mere instrumentalities of Covidien. Compl. ¶¶ 223(a), 241(a). Covidien used its control over the Debtors to perpetrate the Spinoff to the detriment of the Debtors' estates and the Opioid Claimants. *Id.* Recognizing that this primary badge of fraud is directly on point, Covidien argues that this Court should provide it "little weight" because it applies in all spinoffs of subsidiaries. Motion at 28. To the contrary, this Court has found that payments to insiders are "consistently suspect" and such allegations are sufficient to survive motions to dismiss. *In re J & M Sales, Inc.*, 2021 Bankr. LEXIS 2268, at *101 (Bankr. D. Del. Aug. 20, 2021).[7]

- *Sued or threatened with suit*: Covidien announced the Spinoff only two weeks ***after*** it received notice of a DEA subpoena investigating Mallinckrodt and Covidien's opioid-related practices. Compl. ¶ 223(e); *see In re Heritage Org., L.L.C.*, 413 B.R. 438, 476 n.25 (Bankr. N.D. Tex. 2009) (finding an IRS letter and subpoena put a defendant on notice that it "had been threatened with suit at the time of the [t]ransfers"). The initiation of this governmental investigation was an impetus for the Spinoff and the fraudulent transfers. Compl. ¶ 223(e). As for the Cash Transfers, Covidien was aware of the burgeoning opioid-related liabilities and governmental investigations of opioid companies when the transfers were made. *Id.* ¶¶ 155-175, 241(e).

- *Transfer of substantially all assets:* The Spinoff resulted in a transfer of substantially all of the Covidien–Mallinckrodt assets.[8] Compl. ¶ 223(g). Specifically, in connection with the Spinoff, Covidien received or retained more than 80% of the total assets but Mallinckrodt retained all the opioid liabilities. *Id.*; *see In re Maxus Energy Corp.*, 641 B.R. 467, 520 (Bankr. D. Del. 2022) (finding a transfer of "less than a majority" of a debtor's assets is sufficient for this badge and that a series of smaller transfers could be part of a strategy to remove assets from the reach of creditors (citations omitted)).

- *Insolvency:* Mallinckrodt was insolvent at the time of the Cash Transfers and Spinoff. Compl. ¶¶ 196-211, 223(i), 241(h); *see also infra* part III.B.1. Covidien concedes that the Trust has identified this badge. Motion at 27-28.

- *Lack of reasonably equivalent value:* The consideration, if any, received by Mallinckrodt in connection with the Cash Transfers and Spinoff was not reasonably equivalent in value to the rights and property that Mallinckrodt relinquished, including the loss of the Note Proceeds. Compl. ¶¶ 186, 223(h), 241(g). Nor was reasonably equivalent value given in exchange for the Tax Liability and Putative Indemnity Obligations imposed on Mallinckrodt. *Id.* ¶¶ 189, 195, 223(h); *see Maxus Energy Corp.*, 641 B.R. at 521 ("It is a badge of fraud if [d]ebtor did not receive reasonably equivalent value for the transfers to [d]efendants."); *Merrill Lynch Bus. Fin. Servs., Inc. v. Kupperman*, 441 F. App'x 938, 941

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[7] Covidien's reliance on *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc.*, 761 F.3d 409 (5th Cir. 2014) is misplaced because that case arose from a different procedural posture: there, the plaintiff appealed the district court's summary judgment rulings and its findings of fact and conclusions of law following a bench trial. *Id*. at 416. Indeed, before those rulings, the district court had denied the defendants' motion to dismiss the plaintiff's fraudulent transfer claims for cash and contractual obligations transferred in connection with a spinoff. *See U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, 2012 WL 3100778, at *9 (N.D. Tex. July 31, 2012).

[8] *See infra* part I.C. (establishing that Covidien and Mallinckrodt were a single economic enterprise and alter egos); Compl. ¶¶ 132-146.

n.1 (3d Cir. 2011) (applying the New Jersey UFTA). Covidien also concedes that the Trust has identified this badge. Motion at 27.

- *Lack of disclosure or concealment:* The fraudulent nature of the Cash Transfers and Spinoff was not disclosed. Compl. ¶¶ 223(d), 241(d). Before it was publicly announced, the Spinoff was kept secret under the "Project Jameson" codename. *Id.* ¶¶ 177, 223(d). Although the Spinoff was publicly announced on December 15, 2011, the entire purpose of the Spinoff and the prejudicial effect it would have on present and future creditors, including Opioid Claimants, were never disclosed but instead remained concealed. *Id.* A fraudulent transfer may be concealed if material information is omitted. *See, e.g.*, *Maxus Energy Corp.*, 641 B.R. at 517-18 (finding this badge survived summary judgment where the plaintiff alleged that the defendant "only made limited disclosures about the scope of . . . potential environmental obligations" and noting that "the trial court must determine what the appropriate disclosure should have been and whether it was made").
- *Retaining possession or control:* The Cash Transfers and Spinoff enabled Covidien to retain direct or indirect ownership of valuable cash assets and the subsidiaries comprising the medical device and supplies business. Compl. ¶¶ 223(c), 241(b); *Maxus Energy Corp.*, 641 B.R. at 516 (refusing to grant summary judgment in a fraudulent transfer case where the plaintiff alleged "that while there was a new corporate entity . . . , a new intercompany payment arrangement, and a new board and management for that entity . . . , that d[id] not alter the control"); *In re Tronox Inc.*, 503 B.R. 239, 283 (Bankr. S.D.N.Y. 2013) (finding control retained where the parent company "effectively controlled . . . [the subsidiary] until the final spinoff" and installed former employees to run the new company).

The Trust, therefore, has sufficiently alleged the requisite intent to hinder, delay, or defraud creditors, chiefly Opioid Claimants. And it has supported the allegation with no fewer than seven badges of fraud.[9] When coupled with the "relaxed" and "liberal" standard of pleading that applies to bankruptcy trustees, the Trust has more than met the pleading requirements.

B. The Complaint Presents Plausible Claims for Constructive Fraudulent Transfer

The notice pleading standard of Rule 8(a) applies to claims for constructive fraudulent transfer. *In re Glencoe Acquisition, Inc.*, 2015 WL 3777972, at *2 (Bankr. D. Del. June 16, 2015);

[9] *See MSKP Oak Grove, LLC v. Venuto*, 875 F. Supp. 2d 426, 436-37 (D.N.J. 2012) ("In the instant action, the Court finds that, while only four badges of fraud are adequately alleged to be present, the Court concludes that these four, in combination, are sufficient to state a claim for intentional fraud."); *In re Appleseed's Intermediate Holdings, LLC*, 470 B.R. 289, 300 (D. Del. 2012) ("Here, Plaintiff adequately alleges four badges of fraud, which permits the inference of actual fraudulent intent."); *see also United States v. Patras*, 544 F. App'x 137, 144 (3d Cir. 2013).

In re Autobacs Strauss, Inc., 473 B.R. 525, 567 n.131 (Bankr. D. Del. 2012).[10] As explained below, the Trust has met this standard.

1. The Trust Has Sufficiently and Plausibly Pled That Mallinckrodt Was Insolvent at the Time of the Challenged Transactions

As detailed in the Complaint, Covidien and Mallinckrodt's opioid-related misconduct resulted in liabilities that dwarfed Mallinckrodt's assets at all times between 2010 and 2013 when the fraudulent transfers were made. Compl. ¶¶ 33-131, 196-206. Covidien argues that Mallinckrodt could not have been insolvent because it had a positive market cap, was able to raise funds in the open market, and received a solvency opinion in connection with the Spinoff. Motion at 9. It also alleges that no opioid claims had been asserted against Mallinckrodt at the time of the Spinoff, that Covidien (allegedly) was not aware of any such claims or potential claims, and that Covidien has never been served in any opioid-related litigation.[11] *Id.* at 8-9, 14, 48. These assertions raise factual issues that are not subject to resolution on a motion to dismiss and, by and large, are legally irrelevant when it comes to insolvency.

The definition of balance-sheet insolvency in the UFTA does not include or refer to a debtor's market cap or whether lenders were willing to lend to the debtor. UFTA § 2(a). Access to capital does not mean a debtor is solvent. Indeed, the concepts of distressed lending and debtor-in-possession financing (including in Mallinckrodt's case) are premised on the extension of credit to insolvent companies. To understand the reasoning behind a lender's decision to extend credit

[10] While the 2005 decision in *In re Oakwood Homes Corp.*, 325 B.R. 696, 698 (Bankr. D. Del. 2005) reached the opposite conclusion, subsequent cases have rejected its conclusion, holding that the Rule 8(a) plausibility standard applies to constructive fraudulent transfers. *See, e.g.*, *In re Pitt Penn Holding Co.*, 2011 WL 4352373, at *3 (Bankr. D. Del. Sept. 16, 2011); *In re Charys Holding Co.*, 443 B.R. 628, 632 n.2 (Bankr. D. Del. 2010); *In re AstroPower Liquidating Tr.*, 335 B.R. 309, 333 (Bankr. D. Del. 2005).

[11] Covidien acknowledges that it was ***named*** as a defendant in multiple opioid lawsuits even if it was never served. Motion at 48. Covidien also was under investigation by governmental entities, which had been imposing substantial penalties on other opioid companies.

to an insolvent company, the trier of fact would need to evaluate a multitude of factors, including the terms of the loan, security interests, and guarantees; the relative interest rates available at the time; and numerous other considerations. None of these inquiries is appropriate on a motion to dismiss. *See In re Tops Holding II Corp.*, 646 B.R. 617, 672 (Bankr. S.D.N.Y. 2022) ("[T]he rationale for, and information supporting, the hundreds of millions of dollars of loans to Tops during the period at issue cannot at this stage render the Complaint's constructive fraudulent transfer allegations implausible.").

Whether Mallinckrodt was able to continue business operations after the Spinoff is irrelevant to whether Mallinckrodt was balance-sheet insolvent when the Cash Transfers and Spinoff occurred. Covidien conflates insolvency and bankruptcy. The UFTA voids transfers of insolvent companies whether or not they are in bankruptcy. *See* UFTA § 2 (defining "insolvency"). Bankruptcy is a legal status caused by the filing of a bankruptcy petition. *See* 11 U.S.C. § 301. A company can be insolvent without filing for bankruptcy. *See, e.g.*, *In re Parmalat Sec. Litig.*, 501 F. Supp. 2d 560, 577 n.108 (S.D.N.Y. 2007) ("Simply because a company is insolvent does not mean it necessarily will file for bankruptcy."). The *Tronox* case is instructive. There, the court noted that the debtors' ability to survive for several years following the challenged transaction, and to complete an initial public offering (IPO) and to issue $350 million in unsecured bond debt, was insufficient to establish solvency at the time of the transaction. *See Tronox*, 503 B.R. at 315. In rejecting the claim that the "market" demonstrated that the company was solvent, the court noted that the company did not disclose any of the tort liabilities that made it insolvent in its financial statements. *Id.*

Whether Covidien's officers and directors knew about or foresaw Mallinckrodt's opioid-related liabilities is both factually contested and legally irrelevant for purposes of

constructive fraud. The Complaint alleges that Covidien and Mallinckrodt's liability was known throughout Covidien and provides examples of information circulated throughout the company, demonstrating that the knowledge was widely held. Compl. ¶¶ 155-175. Further, whether a claim exists for these purposes does not depend on whether a company has knowledge of it. It depends on whether the company engaged in the conduct that gave rise to the claim. *See SEC v. Antar*, 120 F. Supp. 2d 431, 443 (D.N.J. 2000) (even though securities fraud occurred in 1980s and defendant was not found liable therefor until 1998, defendant possessed this unliquidated debt at the time of the 1991 and 1997 transfers, which rendered him insolvent), *aff'd*, 44 F. App'x 548 (3d Cir. 2002).

Additionally, tort claims can be used to determine a company's solvency at the time of a fraudulent transfer even if the claims are brought after the fraudulent transfers occurred. In assessing the company's solvency at the time of the transfer, Judge Wolin found that it was appropriate to consider unfiled asbestos claims arising from asbestos exposures that occurred pre-transfer, even if the parties were unaware of the claims at the time of the transfer. *See In re W.R. Grace & Co.*, 281 B.R. 852, 862 (Bankr. D. Del. 2002). The court rejected the defendant's argument that its knowledge of liability at the time of the transfer was relevant. The UFTA, said the court, "makes no mention of the debtors knowledge or reasonableness of estimation in relation to its own insolvency." *Id.* at 857. The question is whether "the debtor was insolvent on the transaction date regardless of what it may have thought, reasonably or otherwise." *Id.* at 859.

The UFTA defines "[d]ebt" as "liability on a claim." UFTA § 1(5). A "claim," in turn, is defined broadly as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, [or] undisputed." UFTA § 1(3). The question is whether creditors had "a right to payment" at the time of the transfers. The court in *Grace* stated: "It is reasonable to conclude that of the tens of thousands of persons making

claims for asbestos personal injury against W.R. Grace after the 1998 transfer date, substantial numbers of them had viable claims against the company prior to that time." 281 B.R. at 862. The claims were not "contingent" because there were no other external events left to occur to make the debtor liable for those claims. *Id.* at 863. The fact that a claim is unknown does not make it contingent. *Id.*[12] The court found that "[e]very element of liability was already present and had been for many years." *Id.* at 865.

Additionally, Covidien's reliance on the "solvency" opinion by Houlihan Lokey (Motion at 3) is misplaced, especially on a motion to dismiss. [redacted] Thus, the mere existence of a solvency opinion does not make the Trust's insolvency and constructive fraud claims implausible. *See Tops II Holding Corp.*, 646 B.R. at 640 (disregarding solvency opinion that complaint alleged was flawed in formulation and on its face); *In re LSC Wind Down, LLC*, 610 B.R. 779, 787 n.41 (Bankr. D. Del. 2020) (noting that it was not appropriate for the court to consider a solvency opinion at the motion to dismiss stage). At most, it would suggest a question of fact for trial.

[12] Similarly, the claims against Mallinckrodt were not contingent claims. The Complaint alleges that Mallinckrodt's wrongful and tortious conduct occurred at all times between 2006 and 2013. Compl. ¶¶ 31, 36-131. The Complaint alleges that hundreds of billions of dollars in damages were directly and proximately caused by Mallinckrodt's pre-Spinoff conduct. *Id.* ¶¶ 196, 202-204. The deaths, opioid-disorders, health care costs, and other damages had been realized even before the Spinoff. *Id.* ¶¶ 6, 131, 196-197. Pre-Spinoff studies put these damages in the hundreds of billions of dollars. *Id.* ¶¶ 148-149, 152-153. No further actions by Mallinckrodt or anyone else were necessary to give creditors their claims against Mallinckrodt.

2. The Trust Has Sufficiently Pled That Covidien Failed to Provide Reasonably Equivalent Value

The Complaint alleges that the fraudulent transfers in question were made without reasonably equivalent value. Compl. ¶¶ 186, 189, 223(h), 241(g). (Indeed, in certain instances, particularly as to the Cash Transfers, it does not appear that *any* value was given in exchange. *Id.* ¶¶ 9, 12, 181-182, 241(g).) Determining whether a debtor received reasonably equivalent value is inappropriate to resolve on a motion to dismiss because the issue "requires case-by-case adjudication" that "depends on 'all the facts of each case.'" *In re BMT-NW Acquisition, LLC*, 582 B.R. 846, 858 (Bankr. D. Del. 2018) (citations omitted).[13]

C. The Trust Can Assert Fraudulent Transfer Claims to Avoid the Spinoff Because Covidien and Mallinckrodt Operated as a Single Economic Enterprise and Were Alter Egos

Covidien argues the Trust's claims relating to the Spinoff are implausible because Mallinckrodt never owned Covidien's medical device and supply businesses and therefore a property interest of a debtor was never transferred. Motion at 36-37. But the Complaint adequately alleges that Mallinckrodt had interests in the Covidien businesses that were fraudulently transferred because the Complaint supplies grounds for disregarding the corporate form. *See, e.g.*, *Crystallex*, 879 F.3d at 86 (indicating that the Delaware UFTA and Bankruptcy Code allow for

[13] *See also, In re R.M.L., Inc.*, 92 F.3d 139, 153 (3d Cir. 1996) (requiring the application of a factual "totality of the circumstances" test in determining whether reasonably equivalent value was exchanged for a transfer); *In re Green Field Energy Servs., Inc.*, 2015 WL 5146161, at *8 (Bankr. D. Del. Aug. 31, 2015) ("Given the wide number of variables to consider, and the less stringent pleading requirements of Rule 8(a)(2) to constructive fraud claims, '[t]he issue of "reasonably equivalent value" requires a factual determination that cannot be made on a motion to dismiss.'" (alterations in original) (citations omitted)). The Third Circuit's decision in *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624 (3d Cir. 2007) is distinguishable and of no help to Covidien. First and foremost, unlike the case at bar, *VFB* did not involve any mass-tort liability. Moreover, unlike the procedural posture here, where only the legal sufficiency of the Complaint is being tested, the Third Circuit's decision in *VFB* was rendered after "a lengthy bench trial" in the district court, in which valuation experts testified. *Id*. at 629. Further, the Third Circuit's holding with respect to market capitalization was an *evidentiary ruling* under the deferential standard of review for clear error. *See id*. at 631-32. Contrary to what Covidien suggests, *VFB* does ***not*** stand for the proposition that post-spin market capitalization is in all cases a *per se* legal defense.

fraudulent transfer claims arising out of nondebtor transactions where alter ego claims are sufficiently pled).[14]

1. Legal Standard for Veil-Piercing Claims

The Trust can assert a claim for alter ego / veil-piercing by alleging "(1) that the parent and the subsidiary . . . operated as a single economic entity[,] and (2) that an overall element of injustice or unfairness . . . [is] present." *In re Foxmeyer Corp.*, 290 B.R. 229, 235 (Bankr. D. Del. 2003) (alterations in original) (citations omitted). Events that permit the corporate veil to be pierced include "failure to observe corporate formalities, non-payment of dividends, insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant shareholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders." *Kaplan v. First Options of Chi., Inc.*, 19 F.3d 1503, 1521 (3d Cir. 1994) (citations omitted). While these factors are useful, any single one of them is not determinative. *See United States v. Golden Acres, Inc.*, 702 F. Supp. 1097, 1104 (D. Del. 1988).

Courts routinely hold that siphoning of funds by a dominant entity from a subordinate entity supports alter ego liability. *See, e.g., Trs. of Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188, 199 (3d Cir. 2003) (siphoning of funds by sole shareholder

[14] *See also U.S. Cap. Funding VI, Ltd. v. Patterson Bankshares, Inc.*, 137 F. Supp. 3d 1340, 1366-67 (S.D. Ga. 2015) (stating that "many states, including Georgia, have found that a 'transfer' [under the UFTA] may occur even if the debtor was not a party to, or did not carry out, the transfer. . . . states have recognized that a transfer carried out by an 'alter ego' or a 'mere instrumentality' of a judgment debtor is sufficient to constitute a transfer by the debtor itself"); *In re Derivium Cap., LLC*, 437 B.R. 798, 814 (Bankr. D.S.C. 2010) (denying summary judgment where a plaintiff had alleged fraudulent transfers under South Carolina law because there was sufficient evidence to support a claim that the fraudulent transfers were made by debtor's alter ego), *aff'd*, 716 F.3d 355 (4th Cir. 2013); *Magliarditi v. TransFirst Grp., Inc.*, 450 P.3d 911 (Nev. 2019) (unpublished table decision) (stating that "an alter ego of a judgment debtor is a 'debtor' under . . . [the Nevada UFTA], and a transfer between alter egos or between the judgment debtor and an alter ego is a 'transfer' under NUFTA"); *Thompson Props. v. Birmingham Hide & Tallow Co.*, 839 So. 2d 629, 633-34 (Ala. 2002) (finding a transfer made by a third party may be considered a transfer "made by a debtor" when the third party can be considered "one and the same" at the time of the transfer).

was "most egregious" factor supporting the piercing of the corporate veil); *Soroof Trading Dev. Co. v. GE Microgen, Inc.*, 283 F.R.D. 142, 152 (S.D.N.Y. 2012) (holding that complaint sufficiently pleaded alter ego liability, reasoning that parent's siphoning of funds from subsidiary "indicates . . . that [parent and subsidiary were] operating as a unified economic entity" (citations omitted)). "Intentionally bleeding a subsidiary to thwart creditors is a classic ground for piercing the corporate veil." *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 420 (5th Cir. 2006).[15]

2. The Complaint Sufficiently Alleges That Covidien and Mallinckrodt Operated as a Single Economic Enterprise

The Complaint devotes 15 full paragraphs laying out detailed factual allegations demonstrating that Covidien and its direct and indirect subsidiaries (including the Mallinckrodt entities) were a single economic enterprise under Covidien's domination and control. Compl. ¶¶ 132-146. In *Blair v. Infineon Technologies AG*, 720 F. Supp. 2d 462, 466, 472 (D. Del. 2010), the court found that a plaintiff had sufficiently pleaded alter ego in relation to a spinoff. Among the indicia of alter ego were shared "general support services," financial reporting on a consolidated basis, a common severance plan across entities, one entity installing its own officers

[15] At the pleadings stage, it is not necessary for the Trust to specify which jurisdiction's laws apply to its alter ego allegations or claims. Most courts addressing the issue have held that a complaint need not identify a particular state's law to survive dismissal under Rule 9(b). *See Oakwood Homes Corp.*, 340 B.R. at 525-26 (stating that "a properly pleaded claim . . . need not specify under which law it arises" (citations omitted)); *see also, e.g.*, *AT&T Corp. v. Walker*, 2006 WL 2927659, at *4 (W.D. Wash. Oct. 12, 2006); *In re CVEO Corp.*, 2004 WL 2049316, at *3 (Bankr. D. Del. Sept. 13, 2004). "Although it is common to draft complaints with multiple counts, each of which specifies a single statute or legal rule, nothing in the Rules of Civil Procedure requires this." *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992); *see also Albert v. Carovano*, 851 F.2d 561, 571 n.3 (2d Cir. 1988) (en banc) ("Factual allegations alone are what matters."). Although "the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation," different conflicts principles apply where, as here, "the rights of third parties *external* to the corporation are at issue." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983) (citations omitted) (determining that federal common law and international law governed alter ego question). Thus, the determination of what jurisdiction's law applies to the Trust's alter ego claims or allegations is best left to the end of discovery, when the parties and the Court have access to all the facts needed to make informed choice-of-law decisions. *See Shah v. Inter-Continental Hotel Chi. Operating Corp.*, 314 F.3d 278, 282 (7th Cir. 2002).

and board members as the officers and board members of another entity, and the siphoning of funds from subsidiaries. Here, the Complaint alleges similar indicia, [redacted]; financial reporting on a consolidated basis (*id*. ¶ 140); "a commonality of officers or directors" (*id*. ¶ 144); the selection of a former Covidien employee to serve as Mallinckrodt's CEO (*id*. ¶ 257); [redacted]

The Complaint also alleges other indicia of alter ego. For example, Covidien plc maintained an integrated cash management system in which cash was periodically swept from subsidiaries and deposited into one of two cash pools. *Id.* ¶ 141. The cash was then distributed from the pools to the various Covidien entities as necessary to meet their needs regardless of the source of cash. *Id.*

Covidien presented itself to the world as a single, unified enterprise. "Even when employees worked for a Mallinckrodt entity, they indicated that they ultimately worked for Covidien (or worked simultaneously for the entities)." *Id.* ¶ 143. "Prior to the spinoff, employees working on opioid issues had email signatures that identified them as employees of either Covidien or both Covidien and Mallinckrodt." *Id.* "Moreover, in 2010, the Covidien name and brand was used in connection with opioid sales marketing materials, demonstrating a commonality of corporate insignias and logos regardless of corporate boundaries." *Id.* ¶ 145. These and other acts alleged in the Complaint "demonstrate common branding, marketing, and control over opioid products, and fail to distinguish between the various Covidien entities." *Id.* The Complaint alleges

sufficient facts to make out a plausible claim that Covidien and Mallinckrodt were a single economic enterprise and thus alter egos of one another.[16]

Covidien tries to diminish these factual allegations by asserting that the Complaint merely describes "the standard sorts of arrangements that exist all the time between a parent and its subsidiaries" and "run-of-the-mill corporate interactions." Motion at 43. Covidien's unsubstantiated characterizations are not appropriate on a motion to dismiss. "The purpose of a motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case." *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 407 (D. Del. 2007) (citing *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993)). Here, the Court should accept the Trust's factual allegations, construe the Complaint in the light most favorable to the Trust, and reject Covidien's *ipse dixit* conclusory assertions. *See Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008).[17]

[16] Covidien relies on three Third Circuit decisions for the unremarkable proposition that veil-piercing is the exception, not the rule. Motion at 42 (citing *Trinity Indus., Inc. v. Greenlease Holding Co.*, 903 F.3d 333 (3d Cir. 2018), *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345 (3d Cir. 2007), and *Mellon Bank, N.A. v. Metro Commc'ns Inc.*, 945 F.2d 635 (3d Cir. 1991)). But repeating such bromides does nothing to undercut the Trust's position that this case ***is*** an exception that justifies veil-piercing or alter ego treatment. Covidien also fails to explain how the facts of *Trinity*, *Teleglobe*, and *Mellon Bank* are in any way analogous to the facts presented here. Indeed, *Teleglobe* arose in the context of a privilege dispute, and the court was analyzing intra-group information sharing between corporate parents and subsidiaries as joint clients of legal services, which makes the case inapposite. 493 F.3d at 369, 371. The procedural postures of *Trinity* and *Mellon Bank* were different as well. *Trinity* was a non-bankruptcy appeal that occurred after eight years of litigation in the district court. 903 F.3d at 341-42, 346. *Mellon Bank* was decided post-judgment, not on a motion to dismiss. 945 F.3d at 638.

[17] Covidien cites to several decisions that are inapposite because they arose outside the bankruptcy context and did not involve fraudulent transfers. *See* Motion at 42-43, 43 n.49. In *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268 (D. Del. 1989), the court determined that patent infringement was not the type of wrong that justified veil-piercing. In *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 2017 WL 4810801, at *1 (E.D. Pa. Oct. 25, 2017), the plaintiffs alleged violations of antitrust statutes and unfair trade and consumer protection laws. In *Kramer Motors, Inc. v. Brit. Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980), the court affirmed dismissal for lack of personal jurisdiction; there was no appeal of a motion to dismiss for failure to state a claim. *Re Frederick Inns Ltd.* [1991] ILRM 582 (Ir.) concerned whether four entities could pay down the tax liabilities of six other entities. And, in *United States v. Bestfoods*, 524 U.S. 51 (1998), the Supreme Court held that a corporate parent may be charged with CERCLA liability for its subsidiary's actions when the corporate veil is pierced (*id*. at 63-64), a ruling that hardly forecloses veil-piercing. In addition, *Bestfoods* occurred well after the motion to dismiss stage. *Id*. at 58.

3. The Complaint Alleges the Overall Element of Injustice or Unfairness

The Cash Transfers and Spinoff, done while Mallinckrodt was under Covidien's domination and control, "impaired" and "reduced" the recourse of creditors against Mallinckrodt. Compl. ¶¶ 9, 213-215. When Mallinckrodt entered chapter 11, Opioid Claimants were left with a diminished estate that was unable to pay their claims—estimated to total trillions of dollars (*id.* ¶ 196)—in full. *See In re Mallinckrodt plc*, 639 B.R. 837, 854 (Bankr. D. Del. 2022) (noting that all classes of opioid claims under the Mallinckrodt plan are impaired). Covidien should not be permitted to evade responsibility for disadvantaging opioid victims and their recoveries.

Additionally, the Complaint lays out in great detail Mallinckrodt's opioid-related misconduct while under Covidien's domination and control. That misconduct fueled the nationwide opioid epidemic, resulting in innumerable overdose deaths, and gave rise to countless opioid claims. *See* Compl. ¶¶ 25, 33-131. "Through deceptive marketing and willful disregard of its duties to report and block suspicious orders, Mallinckrodt," while under Covidien's domination and control, "encouraged the widespread and unnecessary overprescribing of its opioids and willfully turned a blind eye to the diversion of opioids to the black market where they could be sold 'on the street' for purposes of recreation and abuse." *Id.* ¶ 5. This led to across-the-board injuries to claimants, including "individuals who suffered addiction, illness and death as a result of Mallinckrodt's opioids; hospitals and insurance companies burdened with increased expenses associated with opioid-related health problems; and states, municipalities, and tribal governments that have incurred, and continue to incur, hundreds of billions of dollars or more in costs to address and alleviate the social and public health problems caused by Mallinckrodt's conduct." *Id.* ¶ 6. Given that the opioid epidemic was fueled in significant part by Covidien's own actions, it would be unfair and unjust to allow Covidien to hide behind corporate forms and escape accountability.

For all the reasons explained above, the Complaint makes a sufficiently factual and plausible case for alter ego and veil-piercing.

II. APPLICABLE LAW POSES NO TIME BAR TO AVOIDANCE OF THE CASH TRANSFERS AND THE SPINOFF

The Trust seeks to avoid the Cash Transfers and the Spinoff by derivatively asserting the avoidance rights available to Mallinckrodt's unsecured creditors under applicable nonbankruptcy law in accordance with § 544(b) of the Bankruptcy Code. These unsecured creditors of Mallinckrodt include victims of opioid-related misconduct, asbestos claimants,[18] the New Jersey Division of Medical Assistance and Health Services, and the Internal Revenue Service.[19] Compl. ¶¶ 212-218. Covidien argues that the avoidance rights of these creditors are time-barred under the UFTA's statute of repose. Motion at 14-15. For the reasons explained below, Covidien's arguments should be rejected.

A. The Trust Can Assert the Rights of Certain Tort Victims Under the One-Year Discovery Rule

Under the UFTA, transfers made with the intent to hinder, delay, or defraud creditors are fraudulent as to creditors, "whether the creditor's claim arose before or after the transfer was made[.]" UFTA § 4(a). The UFTA further provides, in relevant part, that intentional fraudulent transfer claims may be brought "within one year after the transfer or obligation was or could

[18] Under Mallinckrodt's Plan, "Asbestos Claims" were placed in Class 6(c), an impaired class, and each holder of an Allowed Asbestos Claim is to receive a pro rata share of the Asbestos Claims Recovery. *See* Plan art. III.B.6.c. The fact that Asbestos Claims are to be treated separately from Opioid Claims under the Plan is immaterial for purposes of § 544(b) because the avoidance rights of triggering creditors are determined as of the Petition Date and not based on how those creditors' claims are subsequently treated in the reorganization. *See, e.g.*, *In re Bayou Steel BD Holdings, L.L.C.*, 642 B.R. 371, 383-84 (Bankr. D. Del. 2022); *In re MTE Holdings LLC*, 2022 WL 3691822, at *6 (Bankr. D. Del. Aug. 24, 2022).

[19] To survive a motion to dismiss, the Trust does not need to identify a specific triggering creditor under § 544(b). *In re DBSI, Inc.*, 476 B.R. 413, 426 (Bankr. D. Del. 2012) ("[A]t the motion to dismiss stage, 'courts do not generally require a trustee to plead the existence of an unsecured creditor by name'" under § 544(b). (citations omitted)); *Appleseed's*, 470 B.R. at 301 (denying motion to dismiss where plaintiff identified four types of unsecured creditors that existed at the time of the transfer and rejecting argument that the complaint had to identify unsecured creditor by name).

reasonably have been discovered by the claimant." *Id.* § 9(a). Thus, a one-year "discovery rule" is embedded in the UFTA's time limitation for pursuing intentional fraudulent transfer claims. This one-year period has not run for children born within one year of the Petition Date with NAS as a result of being exposed to opioids in utero or for individuals who became addicted to opioid painkillers within one year of the Petition Date. Nor has the one-year period run for Mallinckrodt's asbestos creditors who did not discover their asbestos-related injuries sooner than one year before the Petition Date.

Covidien argues that it is the discovery of the transfer, not the bodily injury, that is relevant. Motion at 18. Covidien also argues that the discovery rule "does not apply as a matter of law" because the Spinoff "could reasonably have been discovered" when the Spinoff was publicly disclosed in 2013. *Id.* at 16. These arguments are incorrect, as shown by prior case law. *See, e.g.*, *In re G-I Holdings, Inc.*, 313 B.R. 612, 636-37 (Bankr. D.N.J. 2004); *Lippe v. Bairnco Corp.*, 225 B.R. 846, 846-56 (S.D.N.Y. 1998), *on reargument in part*, 229 B.R. 598 (S.D.N.Y. 1999).

In *Lippe*, the trustees of a creditors' trust, acting on behalf of a bankrupt asbestos producer, brought suit against the debtor, its holding company, and affiliates for, *inter alia*, fraudulent conveyance under 11 U.S.C. § 544(b) and sections 273-276 of the New York Debtor and Creditor Law. 225 B.R. at 850-51. The defendants moved for summary judgment under the statute of limitations. *Id.* at 850. The court held, *inter alia*, that New York's two-year discovery rule prevented dismissal of the § 544(b) claim to the extent that the claim asserted the rights of asbestos victims whose injuries were diagnosed no earlier than two years before the debtor's bankruptcy filing:

> [T]he claimants identified by plaintiffs could not possibly have been on notice of any alleged fraud or loss if they had no reason to know that they were afflicted with an asbestos-related injury. These individuals could not have known that they had been injured at all until their injuries started to manifest themselves . . . .

> Accordingly, asbestos-victim claimants who were unaware of any asbestos injury prior to the two years before Keene filed for bankruptcy are not barred from asserting an actual fraud claim against any of the corporate defendants because the actual fraud claim is not time-barred. This category of claimants can be considered "actual creditors" pursuant to § 544(b) and they can attack any of the Transactions pursuant to NYDCL § 276.

Id. at 855.

Similarly, in *G-I Holdings*, the asbestos creditors committee sought leave of the bankruptcy court to pursue a fraudulent transfer action on behalf of the debtor's estate. The committee argued that it could step into the shoes and assert the avoidance rights of asbestos claimants under § 544(b) and that the discovery rule in the New Jersey UFTA operated in favor of asbestos victims whose diseases had not become manifest until one year before the debtor's bankruptcy filing. *G-I Holdings*, 313 B.R. at 636. Finding *Lippe* persuasive, the court in *G-I* agreed with the committee, explaining that "any party that recently discovered an asbestos-related injury could not possibly have been on notice of any alleged fraud if they had no reason to know that they were affected with an asbestos-related injury." *Id.* at 640.

Here, as in *Lippe* and *G-I*, Mallinckrodt's asbestos claimants whose asbestos injuries were diagnosed no earlier than one year before the Petition Date could not have been on notice of the fraudulent nature of the Cash Transfers and the Spinoff that occurred from 2010 through 2013.[20] The Complaint alleges that some of the asbestos claims asserted against Mallinckrodt "pertain to individuals who were diagnosed with an asbestos-related disease within one year prior to the Petition Date." Compl. ¶ 215. Similarly, children born with NAS, and individuals injured from

[20] Covidien is incorrect when it suggests that the one-year discovery period begins to run when a transaction is publicly disclosed. "It is generally held that the one-year discovery period commences when the *fraudulent nature* of the transfer is discovered, rather than when the transfer itself is discovered." Peter Spero, *Fraudulent Transfers, Prebankruptcy Planning and Exemptions* § 4:24 (2022) (footnote omitted) (citing cases); *see also, e.g.*, *JPMorgan Chase Bank, N.A. v. Ballard*, 213 A.3d 1211, 1240 (Del. Ch. 2019) (holding that the one-year discovery period starts "when . . . [the creditor] discovered or reasonably could have discovered the fraudulent nature of the transfers").

direct opioid exposure, no earlier than one year before the Petition Date had no reason to know or any basis to discover that they had been defrauded when the Cash Transfers and Spinoff occurred. *See id.* ¶ 214. Under the one-year discovery rule, these recent asbestos claimants, NAS children, and other opioid victims have timely claims to avoid intentional fraudulent transfers.

The cases cited by Covidien in connection with the discovery rule are inapposite because the parties pursuing fraudulent transfer claims in those cases were not seeking to assert the rights of tort victims. In *Our Alchemy*, the chapter 7 trustee was asserting the rights of the debtor, which was a creditor of ANConnect, the entity that engaged in the alleged fraudulent transfers. *See In re Our Alchemy, LLC*, 642 B.R. 155, 160 (Bankr. D. Del. 2022). In *J & M Sales*, the chapter 7 trustee identified state government agencies as his triggering creditors under § 544(b), not tort victims. *See J & M Sales*, 2021 Bankr. LEXIS 2268, at *69. Moreover, this Court's statements—quoted by Covidien—about the UFTA statute of repose pertained to the trustee's *constructive* fraud claims, to which the discovery rule does not apply. *See id.* at *64-65. In *Burkhart*, the fraudulent transfer plaintiffs were insurance policyholders and insurance agents who were seeking to avoid and recover assets of a life insurance company that had been siphoned off by the company's owners. *See Burkhart v. Genworth Fin., Inc.*, 250 A.3d 842, 845-56 (Del. Ch. 2020). As policyholders and agents, these plaintiffs knew that they had rights and potential claims against the insurance company and therefore, according to the *Burkhart* court, should have been alert to the "red flags" that would have caused them to "suspect wrongdoing." *Id.* at 859-60. Covidien fails to show how the *Burkhart* plaintiffs are analogous to asbestos victims, children with NAS, and other opioid victims, whose injuries had not manifested until the year before Mallinckrodt's bankruptcy filing.[21]

[21] Additionally, Covidien's reliance on the *Exxon Mobil* decision (Motion at 18) is misplaced because it was a securities fraud matter, not a fraudulent transfer proceeding with tort victims as triggering creditors, and the statute of

For all the reasons explained above, Covidien's discovery-rule arguments should be rejected. The Trust has standing to assert timely claims for intentional fraudulent transfer in Counts I and III of the Complaint.

B. Stepping into the Shoes of New Jersey and Its Political Subdivisions, the Trust Can Assert Intentional and Constructive Fraud Claims That Are Timely

Covidien argues that the UFTA's four-year statute of repose applies to state-government creditors and thereby renders the fraudulent transfer claims of those creditors time-barred. Motion at 18. That argument, however, is unavailing as to the State of New Jersey. In *State Department of Environmental Protection v. Caldeira*, 794 A.2d 156 (N.J. 2002), the Supreme Court of New Jersey rejected the argument that the four-year limitations period in the New Jersey UFTA applied to the fraudulent transfer claims of a state-government agency. *Id.* at 164. It held that the 10-year limitations period in N.J. Stat. Ann. § 2A:14-1.2 applied to those claims instead. *Id.*[22]

As alleged in the Complaint, the New Jersey Division of Medical Assistance and Health Services ("**NJ Division of Health Services**") filed a proof of claim against Mallinckrodt plc, asserting a nonpriority unsecured claim of approximately $48 million arising from the alleged underpayment of certain Medicaid rebates during the period of January 2013 through June 2020. Compl. ¶ 217. Under § 544(b), the Trust wields all avoidance rights derived from the NJ Division of Health Services, including the benefit of the 10-year limitations period applicable to state agencies under New Jersey law. *See G-I Holdings*, 313 B.R. at 636 (permitting the creditor to

repose at issue there was 28 U.S.C. § 1658(b), not the limitations provision in the UFTA. *See In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 199 (3d Cir. 2007).

[22] In *J & M Sales*, this Court reached a conclusion different from *Caldeira*, holding that the four-year limitations period in the UFTA applied to fraudulent transfer claims of state-government agencies. But *J & M Sales* is distinguishable because the chapter 7 trustee there was asserting the rights of Ohio, Pennsylvania, New Mexico, and Arizona. 2021 Bankr. LEXIS 2268, at *71. Here, the *Caldeira* decision defines the rights of New Jersey government agencies.

"step into the shoes" of a New Jersey state-government agency for purposes of § 544(b) and take advantage of the ten-year limitations period).

In addition, the Complaint alleges that "one or more other governmental units . . . held allowable unsecured claims against one or more of the Debtors as of the Petition Date" and that these "governmental units include those holding Opioid Claims." Compl. ¶ 218. The governmental units with opioid-related claims include Atlantic County, New Jersey, which filed a proof of claim in an unliquidated amount against Mallinckrodt LLC (Claim No. 52683); Bergen County, New Jersey, which filed a proof of claim in an unliquidated amount against Mallinckrodt plc; the Borough of Paramus, New Jersey, which filed a proof of claim in the amount of $250,000 against Mallinckrodt LLC (Claim No. 3597); and the City of Clifton, New Jersey, which also filed a proof of claim in the amount of $250,000 against Mallinckrodt LLC (Claim No. 4013). All of these localities have the benefit of the 10-year limitations period under New Jersey law because the applicable statute defines the term "State" to include "political subdivisions." N.J. Stat. Ann. § 2A:14-1.2.c.; *see also Gloucester City Bd. of Educ. v. Am. Arb. Ass'n*, 755 A.2d 1256, 1265 (N.J. Super. Ct. App. Div. 2000) (recognizing that city board of education was subject to the 10-year statute of limitations). The Trust wields all avoidance rights of these New Jersey localities that, because of the 10-year limitations period under New Jersey law, are timely. Compl. ¶ 218.

Covidien asserts that the NJ Division of Health Services does not qualify as a § 544(b) triggering creditor because Mallinckrodt plc was allegedly technically not a transferor of property in the Spinoff. Motion at 19. This ignores the fact that several New Jersey localities filed proofs of claim against Mallinckrodt entities other than Mallinckrodt plc. In addition, Covidien's argument is beside the point. In fraudulent transfer cases, courts look to the substance, not the form, of the challenged transaction. *See, e.g.*, *In re DSI Renal Holdings, LLC*, 617 B.R. 496, 504

(Bankr. D. Del. 2020) (stating that courts may "examine the substance, rather than the form, of the transactions" (citations omitted)). As a corollary to that principle, in transactions involving multiple, related steps—[redacted]—courts may collapse all the steps into one integrated transfer. *See, e.g.*, *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1302-03 (3d Cir. 1986) (finding that, when a series of transactions were "part of one integrated transaction," courts may look "beyond the exchange of funds" and "collapse" the individual transactions).[23] And governing this single integrated transfer was the Separation Agreement, whose sole Mallinckrodt signatory was Mallinckrodt plc. Compl. ¶ 190.

In these respects, the Spinoff is analogous to the one successfully avoided in the *Tronox* case. There, the defendants pointed out that Tronox Inc., a newly formed holding company, engaged in the transfers comprising the challenged IPO and spinoff but that its direct creditors did not "include any environmental or tort creditors whose claims predate[d] the year of its formation." *Tronox*, 503 B.R. at 276. Thus, argued the defendants, there were no triggering creditors that could challenge the fraudulent transfer. The *Tronox* court, however, rejected the defendants' suggestion that there must be a triggering creditor for each transferring debtor in part because "fraudulent conveyance law looks at substance, not form." *Id.* (citations omitted). As the court explained, "Defendants cannot escape liability because they structured some of the challenged transactions to take place in a newly-created holding company." *Id.* So too, here, Covidien should not be

[23] *See also Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206, 209, 212, 215 (3d Cir. 1990) (finding "abundant" evidence that multiple transactions "were, as a factual matter, in reality a single transaction functioning as a subterfuge"); *In re Millennium Lab Holdings II, LLC*, 2019 WL 1005657, at *6 (Bankr. D. Del. Feb. 28, 2019) ("The Third Circuit has recognized the collapsing doctrine in the context of assessing a defendant's liability on a fraudulent transfer claim.").

permitted to escape liability because it structured the Spinoff in a way that it could assert its newly created holding company, Mallinckrodt plc, was not a transferor.

There are other reasons to look to the substance of the Spinoff as a single integrated transaction, and not to its form. As detailed in part I.C. above, Covidien plc and its subsidiaries, including Mallinckrodt, operated as a single economic enterprise. *See also* Compl. ¶¶ 132-146. The Covidien entities were therefore alter egos of the Mallinckrodt entities, and vice-versa, or were mere instrumentalities of Covidien. *Id.*; *see also ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278, 336 (S.D. Tex. 2008) (determining that debtor-in-possession ASARCO had standing to avoid and recover fraudulent transfer, even though the transfer was made by affiliate SPHC, because ASARCO and SPHC were found to be alter egos).

In addition, the Bankruptcy Code defines the term "transfer" broadly to include any "mode, direct or *indirect*, absolute or conditional, voluntary or *involuntary*, of disposing of *or parting with*" property or property interests. 11 U.S.C. § 101(54)(D) (emphasis added); *see, e.g.*, *In re Majestic Star Casino, LLC*, 716 F.3d 736, 762 n.27 (3d Cir. 2013) (stating that Congress intended the Bankruptcy Code's definition of transfer to be "as broad as possible" (citations omitted)); *In re Physiotherapy Holdings, Inc.*, 2017 WL 6524524, at *3 n.5 (D. Del. Dec. 21, 2017) (noting that the Bankruptcy Code's definition of "transfer" is "broad"). Thus, in the Spinoff, with Mallinckrodt being an alter ego of Covidien (Compl. ¶¶ 132-146), Mallinckrodt directly and indirectly, and involuntarily, parted with its interests in the Covidien medical supply and device businesses, to the detriment of Mallinckrodt creditors, including the New Jersey governmental units that have the benefit of the 10-year statute of limitations. On these grounds, the Trust can derivatively wield the rights of these governmental units and assert intentional and constructive fraud claims that are timely.

C. Wielding the Rights of the Internal Revenue Service, the Trust Can Assert Intentional and Constructive Fraud Claims That Are Timely

The Complaint alleges that various state and federal taxing authorities, including the IRS, "filed several claims in the Debtors' Bankruptcy Case." Compl. ¶ 216. These include several proofs of claims asserting unsecured claims against various Mallinckrodt entities for unpaid taxes, interest, and penalties.[24] Based on the proofs of claims filed by the IRS, "the Trust wields all avoidance rights derived from the IRS as of the Petition Date" (*id.* ¶ 216), including the benefit of the 10-year limitations period set forth in 26 U.S.C. § 6502(a); *Maxus Energy Corp.*, 641 B.R. at 543-45 (holding that the trustee may stand in the shoes of the federal EPA and is therefore not subject to state-law statutes of repose).

Covidien argues that the Trust does not have the benefit of a full 10-year lookback from the Petition Date because § 6502(a) is a "look-forward" statute insofar as the 10-year limitations period does not start to run until "the assessment of the tax" occurs. Motion at 22 (quoting § 6502(a)(1)(A)). Covidien asserts that none of the claims filed by the IRS denotes a tax assessment date preceding the Cash Transfers and the Spinoff. *Id.* at 22 n.27. Even if Covidien's reading of the statute were correct, the Trust's fraudulent transfer claims still would be timely. Covidien overlooks the numerous decisions finding the IRS's fraudulent transfer actions to be timely even though the challenged transfers occurred ***before*** the tax assessment date and, in some cases, more than 10 years before the IRS filed its fraudulent transfer action. *See, e.g.*, *United States*

[24] The IRS's proofs of claim include Claim No. 1000 against Mallinckrodt Equinox Finance LLC for penalties and interest in the amount of $226,164.84 (this unsecured claim arises from the tax period ending December 31, 2018 and was assessed on August 10, 2020); Claim No. 1001 against Mallinckrodt Enterprises LLC for a penalty in the amount of $298.80 (this unsecured claim arises from the tax period ending December 31, 2019 and was assessed on November 23, 2020); Claim No. 1002 against Mallinckrodt Critical Care Finance LLC for a penalty in the amount of $2,693.43 (this unsecured claim arises from the tax period ending October 31, 2017 and was assessed on July 9, 2018); and Claim No. 1004 against ST US Holdings LLC for corporate income taxes in the amount of $155,929.66 (this unsecured claim arises from the tax period ending September 30, 2014 and was assessed on September 23, 2019). Contrary to what Covidien suggests, ***none*** of the aforementioned claims are for payroll taxes and therefore do not implicate this Court's *dictum* in *J & M Sales*, which Covidien quotes at length on page 24 of its Motion.

v. Green, 201 F.3d 251, 252-53 (3d Cir. 2000) (challenged transfer made in 1981, assessment made in 1991, and fraudulent transfer action filed in 1992); *United States v. Halpern*, 2015 WL 5821620, at *1 (E.D.N.Y. Oct. 5, 2015) (challenged transfer made in 2004, assessment made in 2005, and fraudulent transfer action filed in 2015).[25] Essential in those cases was the fact that the IRS commenced the fraudulent transfer actions within the limitations period after tax assessment. Here, the proofs of claim filed by the IRS include tax assessment dates of 2018, 2019, and 2020, and the Debtors entered chapter 11 on October 12, 2020—that is, within the 10-year limitations period—which means, even under Covidien's reading of the statute, the IRS's avoidance claims are timely.

Covidien next argues that the Trust's fraudulent transfer claims are untimely because the filed claims of the IRS did not arise before the Cash Transfers and the Spinoff occurred. Motion at 23. But this argument fails under the UFTA's plain terms. Under section 4(a) of the UFTA, transfers made with intent to hinder, delay, and defraud creditors, and certain transfers made without reasonably equivalent value given in exchange, are voidable by a creditor regardless of "*whether the creditor's claim arose before or after the transfer*." UFTA § 4(a) (emphasis added). In *In re Greater Southeast Community Hospital Corp.*, 365 B.R. 293 (Bankr. D.D.C. 2006), the court rejected an argument identical to Covidien's as holding "little water" because the Illinois version of section 4(a) of the UFTA "allows future creditors to utilize its remedies." *Id.* at 305 (citing 740 Ill. Comp. Stat. 160/5); *see also In re CVAH, Inc.*, 570 B.R. 816, 842 (Bankr. D. Idaho

[25] *See also United States v. Bodwell*, 1996 WL 757285 (E.D. Cal. July 26, 1996) (challenged transfers made in 1983 and 1984, assessments made in 1985, and fraudulent transfer action filed in 1995); *United States v. Bushlow*, 832 F. Supp. 574 (E.D.N.Y. 1993) (challenged transfer made in 1977, assessment made in 1983, and fraudulent transfer action filed in 1988); *United States v. Fernon*, 640 F.2d 609 (5th Cir. Unit B 1981) (challenged transfer made in 1965, assessment made in 1968, and fraudulent transfer action filed in 1974); *United States v. Perrina*, 877 F. Supp. 215 (D.N.J. 1994) (challenged transfer made in 1985, assessment made in 1987, and fraudulent transfer action filed in 1992); *United States v. Tranakos*, 778 F. Supp. 1220 (N.D. Ga. 1991) (challenged transfers made from 1980 through 1985, assessment made in 1986, and fraudulent transfer action filed in 1988).

2017) (holding that the "IRS need not have been a creditor at the time of the transfers" to assert claims under the Idaho version of section 4(a)); *In re Plassein Int'l Corp.*, 352 B.R. 36, 40 (Bankr. D. Del. 2006) (section 1304(a) of the Delaware UFTA applies to "future creditors"). Thus, the Trust can assert claims under section 4(a) of the UFTA without alleging that the IRS was a creditor at the time of the Cash Transfers and the Spinoff.

Moreover, this Court may reasonably infer from the Complaint that the IRS *was* a creditor at the time of the Cash Transfers and the Spinoff, which enables the Trust to assert constructive fraud claims under section 5 of the UFTA. Among other things, the Complaint alleges that "Mallinckrodt's deceptive marketing and sales efforts caused its profits to skyrocket." Compl. ¶ 33. The Complaint further alleges, *inter alia*, that Mallinckrodt's strategy of keeping patients on higher doses of opioid painkillers for longer periods of time "ensured steady business and profits for Mallinckrodt." *Id.* ¶ 50. With those profits come claims for income taxes, which arise at the close of every tax year, including the tax years that immediately preceded the Cash Transfers and Spinoff. *See In re Conn. Motor Lines, Inc.*, 336 F.2d 96, 105 (3d Cir. 1964) (holding that the tax on income is due when the taxable year ends); *In re Polichuk*, 506 B.R. 405, 427 (Bankr. E.D. Pa. 2014) ("Federal income tax liability arises at the close of the tax year.").[26] In addition, the Complaint expressly refers to U.S. income tax liabilities arising prior to Tyco's 2007 spinoff of Covidien—defined as "Pre-2007 Spinoff Tax Liabilities"—and Covidien was on the hook for part of those liabilities. Compl. ¶ 187. These tax liabilities remained outstanding during the 2010-

[26] It is immaterial if the taxes arising at the close of these tax years were never assessed. "It is not the assessment, but the statutory obligation to account for, collect, or pay the tax due, that gives rise to tax liability." *Polichuk*, 506 B.R. at 427 (citations omitted). "Thus, the lack of an assessment does not prevent the IRS from holding a claim which may serve as the foundation for the Trustee's use of 11 U.S.C. § 544(b) to invoke the IRS' extended statute of limitations." *Id.* at 428 (citing *In re Heritage Org., L.L.C.*, 2008 WL 5215688, at *4-5 (Bankr. N.D. Tex. Dec. 12, 2008)); *see also Tops Holding II Corp.*, 646 B.R. at 655 ("'[T]he IRS's status as a creditor of the debtor is not dependent on the assessment of the tax' at all." (alteration in original) (citations omitted)).

2012 Cash Transfers and the 2013 Spinoff as Covidien imposed a portion of the tax liabilities—estimated to be in the hundreds of millions of dollars—directly on Mallinckrodt. *Id.* ¶ 189. With these allegations, the Court may reasonably infer that the IRS was a creditor of Covidien and Mallinckrodt at the time of the Cash Transfers and the Spinoff.

It is not necessary that a claim held by a creditor at the bankruptcy filing be the one held by that creditor at the time of the fraudulent transfer. *See In re Liquid Holdings Grp., Inc.*, 2019 WL 3380820, at *3 (Bankr. D. Del. July 25, 2019) (finding a creditor that held different claims against the debtor on the date of the transfer and the petition date provided the trustee with standing to pursue a § 544(b) claim) (citing *Cohen v. Sikirica*, 487 B.R. 615, 628 (W.D. Pa. 2013)); *Tops Holding II Corp.*, 646 B.R. at 651; *In re RCM Glob. Long Term Cap. Appreciation Fund, Ltd.*, 200 B.R. 514, 523 (Bankr. S.D.N.Y. 1996); *In re Healthco Int'l, Inc.*, 195 B.R. 971, 980 (Bankr. D. Mass. 1996); *see also CVAH, Inc.*, 570 B.R. at 841 (noting that "defendants are wrong in suggesting that . . . [the IRS's] petition date claim must be 'identical' in dollar amount to the claim it held at the time of the transfer"); *In re Allou Distribs., Inc.*, 392 B.R. 24, 34 (Bankr. E.D.N.Y. 2008) (stating that "a triggering creditor must be the same creditor on both the Transfer Date and the Petition Date, but need not hold the same claim at these two essential points in time"). Indeed, creditors can avoid a constructive fraudulent transfer "even if the debt in existence at the time of the transfer was replaced by new debt." *Tops Holding II Corp.*, 646 B.R. at 651. Thus, it is of no consequence that the IRS's claims existing at the time of the Cash Transfers and the Spinoff are not the same as the claims filed in the *Mallinckrodt* bankruptcy. The Complaint sufficiently alleges that the IRS was a creditor at the time of the challenged transfers and on the *Mallinckrodt* Petition Date. Accordingly, the Trust may step into the IRS's shoes and assert constructive fraud claims under section 5 of the UFTA without being subject to the UFTA's statute of repose.

As with the other governmental creditors, Covidien argues that the Trust cannot step into the IRS's shoes because the Complaint fails to show the IRS filed a claim against a Mallinckrodt entity that directly made a transfer. Motion at 19-21. As explained above, based on the *Tronox* and *ASARCO* decisions, it is not necessary for the Trust to identify a triggering creditor for each transferring debtor because the Complaint alleges facts showing that the Covidien and Mallinckrodt entities operated as a single economic enterprise and were alter egos of one another. Compl. ¶¶ 132-146.[27] Moreover, as noted above, Covidien's argument is incompatible with the UFTA's and the Bankruptcy Code's broad definition of "transfer" and makes no sense given that this Court can and should collapse the over 200 steps comprising the Spinoff into a single transaction. *See supra* part II.B. Accepting Covidien's argument would put form over substance, which is the opposite of what the Court should do in fraudulent transfer cases. *See, e.g.*, *Tronox*, 503 B.R. at 276 (stating that "fraudulent conveyance law looks at substance, not form"). For all the reasons explained above, the IRS is a proper triggering creditor that the Trust can rely on to assert the intentional and constructive fraudulent transfer claims in the Complaint, and those claims are timely.

[27] The *Owens Corning* and *Adelphia* decisions, cited on page 21 of the Motion, are of no help to Covidien. Neither decision addressed whether an estate representative could rely on the IRS as a triggering creditor in order to assert timely fraudulent transfer claims. At issue in *Owens Corning* was whether a chapter 11 plan could "deem" the debtors as substantively consolidated for confirmation purposes. *In re Owens Corning*, 419 F.3d 195, 216 (3d Cir. 2007). Here, the Trust is not seeking substantive consolidation of the Debtors, and the fact that the Debtors were not substantively consolidated under their plan is irrelevant since the Trust's avoidance rights under § 544 are defined as of the Petition Date, not the confirmation date. *See, e.g.*, *In re Mirant Corp.*, 675 F.3d 530, 534 (5th Cir. 2012) (stating that "a trustee's right to avoid a transfer is tested at the petition date"). In *Adelphia*, the court held that the post-confirmation trust could not invoke the avoidance rights of creditors when those creditors had been paid in full under the chapter 11 plan. *Adelphia Recovery Tr. v. Bank of Am., N.A.*, 390 B.R. 80, 91 (S.D.N.Y. 2008), *aff'd*, 379 F. App'x 10 (2d Cir. 2010). Unlike the situation here, the court's analysis in *Adelphia* did not address any assertion that the debtors were alter egos or operating as a single economic enterprise (although the court did mention that veil-piercing claims had been disallowed under the plan and by separate order of the bankruptcy court). *See id*. at 96. Moreover, *Adelphia* appears to have been wrongly decided since it is contrary to *Moore v. Bay*, 284 U.S. 4 (1931) and numerous other cases holding that recovery of an avoided transfer is not limited to the amounts of creditors' claims. *See In re Physiotherapy Holdings, Inc.*, 2017 WL 5054308, at *7 (Bankr. D. Del. Nov. 1, 2017) (citing cases).

III. COVIDIEN'S RELIANCE ON SECTION 546(e) IS MISPLACED

In general, § 546(e) applies when two requirements are met: (1) there is a *qualifying transaction* (*e.g.*, a settlement payment or a transfer made in connection with a securities contract) and (2) there is a *qualifying participant* (*e.g.*, the payment or transfer was "made by or to (or for the benefit of) a . . . financial institution"). *In re Nine W. LBO Sec. Litig.*, 482 F. Supp. 3d 187, 197 (S.D.N.Y. 2020). Neither is satisfied here.

A. Because the Spinoff Involved More Than the Transfer of Securities and Settlement Payments, the § 546(e) Safe Harbor Does Not Apply

In an effort to argue that the Spinoff is a qualifying transaction, Covidien argues that the "challenged spinoff transfers" were "settlement payments" because they were a "securities transaction." Motion at 30. In particular, Covidien asserts that the transfer of $721 million in Note Proceeds to Covidien was structured as a buyback of shares from Covidien plc and thus was a settlement payment. *Id.*

The problem with Covidien's argument is that the transfer of the Note Proceeds was *only one part* of the multiple transactions comprising the Spinoff, not all of which involved the transfer of securities in exchange for cash. As alleged in the Complaint, [redacted] When applying § 546(e), the Court should not look at each discrete step of the transfer (*e.g.*, A→B→C→D) but should consider instead the "overarching transfer" to be avoided (*e.g.*, A→D). *See Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 888, 897 (2018).[28] In *In re Mervyn's Holdings, LLC*, 426 B.R. 488 (Bankr.

[28] The fact that the Spinoff involved transfers of "Mallinckrodt plc's shares to Covidien's shareholders" (Motion at 30) is irrelevant because the Trust is not seeking to avoid the issuance of those shares to Covidien shareholders. *See*

D. Del. 2010), Judge Gross rejected the defendants' argument—similar to Covidien's—that, because the challenged transaction involved a "settlement payment," as defined in the Bankruptcy Code, it was safe-harbored under § 546(e). *Id.* at 499-500. Judge Gross noted that the overall transaction involved steps outside the scope of § 546(e)—chiefly, real estate transfers—and concluded that "because of the multiple conveyances made surrounding the . . . [transaction], section 546(e) does not apply." *Id.* at 500. Similarly, here, this Court should consider the overall Spinoff as a whole and, in doing so, determine that the Spinoff cannot be reduced to a mere securities trade in which a settlement payment was made. Thus, on the strength of *Merit* and *Mervyn's*, the Spinoff is not a settlement payment and therefore is not protected under § 546(e).

B. Covidien Cannot Establish Itself as a "Financial Participant"

Covidien argues that there is a qualifying transaction because the Separation Agreement, which governed the Spinoff, is a "securities contract" and that there is a qualifying participant because Covidien fits within the Bankruptcy Code's definition of "financial participant." Motion at 33-34. Even if, for the sake of argument, the Separation Agreement falls within the Bankruptcy Code's definition of "securities contract" (*i.e.*, a qualifying transaction), Covidien's claim that it qualifies as a "financial participant" because it is a party to the Separation Agreement fails. This is because a securities contract cannot make Covidien a "financial participant" when the contract is *between affiliates*. *See* 11 U.S.C. § 101(22A) (defining a "financial participant" as a debtor that entered into qualifying "agreements or transactions with . . . any other entity (other than an affiliate)"). The Separation Agreement was executed between Covidien plc and Mallinckrodt plc. Compl. ¶ 190. Mallinckrodt plc was an affiliate of Covidien plc when the agreement was signed. *See* UFTA § 1(1)(d) (defining "affiliate" to include a "person who . . . controls substantially all of

Merit, 138 S. Ct. at 897 (stating that "the relevant transfer for purposes of the § 546(e) safe harbor is the same transfer that the trustee seeks to avoid").

the debtor's assets"); *see also* Compl. ¶ 135 (noting that the Spinoff was "driven distinctly from Covidien"). Because Covidien signed the Separation Agreement with its affiliate, Covidien cannot rely on that agreement to establish its status as a financial participant.

In addition, the definition of "financial participant" only covers entities with qualifying transactions or agreements[29] at two high-dollar thresholds: (1) those with a total gross dollar value of not less than $1 billion in *notional or actual principal amount outstanding*; and (2) those with *gross mark-to-market positions*[30] of not less than $100 million. 11 U.S.C. § 101(22A)(A). Covidien argues that, because the Separation Agreement provided for the transfer of tax liabilities and the assets of Covidien's medical device and medical supply businesses, the "value" of those liabilities and assets should be counted toward the dollar thresholds in the "financial participant" definition. Motion at 34. But the value of assets and collateral transferred under a contract cannot be considered as notional or principal amounts outstanding or a gross mark-to-market position.

Both "notional principal amount outstanding" and "actual principal amount outstanding" refer to the nominal or face amount owed under a contract. "Notional principal amount" is used in certain swap agreements and other risk management products. Leslie B. Samuels, *Observations on the Taxation of Global Securities Trading*, 45 Tax L. Rev. 527, 613 n.15 (1990). In such agreements, the parties agree to make periodic payments determined by applying a fixed or floating interest rate to a *specified* notional principal amount. *Id.* The notional principal amount serves only as a reference for determining payments and is generally not actually borrowed or loaned

[29] The definition of "financial participant" recognizes securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, and master netting agreements as qualifying agreements or transactions. 11 U.S.C. § 101(22A) (citing 11 U.S.C. § 561(a)).

[30] The Bankruptcy Code does not define the term *gross mark-to-market position*, but the relevant legislative history indicates that the term derives from the Federal Reserve's Regulation EE (12 C.F.R. part 231). *See* H.R. Rep. No. 109-31(l), at 130-31 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 191. Under Regulation EE, *gross mark-to-market positions* is defined as "the sum of the absolute values of positions in those contracts, adjusted to reflect the market values of those positions in accordance with the methods used by the parties to each contract to value the contract." 12 C.F.R. § 231.2(f).

between the parties, which is why it is referred to as "notional." *Id.* As the notional amount is used to calculate payments due under an instrument, it is a specific value defined in the instrument and not a valuation of any assets or collateral associated with the instrument.

In a similar vein, "actual" principal amount outstanding refers to the face amount owing under a contract rather than the market value of any assets transferred or sold under the contract. *See* Black's Law Dictionary (11th ed. 2019) (defining "principal" as "the amount of a debt, investment, or other fund, not including interest, earnings, or profits"). An obvious example would be the principal amount of a promissory note that would reflect the total amount borrowed, not the accrued interest or the value of the collateral pledged to secure the note.

Unlike the notional or principal amounts outstanding, which may be ascertainable on the face of an instrument, an entity's "gross mark-to-market position" cannot be determined by simply reviewing the terms of the instrument. Rather, determining the gross mark-to-market position may require reviewing trade confirmations and other records, such as hedge books, as of specific dates. *See In re Samson Res. Corp.*, 625 B.R. 291, 303 (Bankr. D. Del. 2020) (describing the data an expert witness reviewed to determine value of defendant's mark-to-market positions). Indeed, the valuation of an entity's mark-to-market positions requires expert-witness testimony to calculate. *See id.* at 303-04 (noting that defendant submitted expert testimony to establish gross mark-to-market positions, which included expert's analysis of books and trade confirmations). Thus, the value of a defendant's gross mark-to-market position is a fact-intensive inquiry requiring expert analysis; it is therefore not proper to consider on a motion to dismiss. *See In re Westinghouse Sec.*

Litig., 90 F.3d 696, 709 n.9 (3d Cir. 1996).[31] Accordingly, Covidien has failed to properly establish that the Separation Agreement makes it a "financial participant."[32]

Covidien claims that it and its subsidiaries are parties to qualifying swap agreements[33] with notional amounts exceeding $1.2 billion. Motion at 34-35. Those agreements are well outside the scope of what the Court can properly consider on a motion to dismiss because they are neither mentioned in the Complaint, attached to the Complaint, matters of public record, nor form the basis of any of the Trust's claims. *See Wolfington v. Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 197 (3d Cir. 2019). Covidien tries to avoid the issue by relying on statements contained in a Form 10-Q filing with the SEC.[34] While SEC filings "may be considered for purposes of determining what statements were made, such documents may not be considered for the truth of matters asserted within them." *Collins & Aikman Corp. v. Stockman*, 2009 WL 1530120, at *22 (D. Del. May 20, 2009), *report and recommendation adopted in part, rejected in part on other grounds*, 2009 WL 3153633 (D. Del. Sept. 30, 2009); *see also McCullough v. Advest, Inc.*, 754 F. App'x 109, 111 (3d Cir. 2018) (The court "may consider 'the *fact* that . . . regulatory filings contained certain information, without regard to the truth of their contents.'" (alteration in

[31] In fact, Judge Shannon denied a defendant's summary judgment motion on this very issue, finding a genuine issue of material fact existed regarding whether the defendant's expert had properly calculated the defendant's gross mark-to-market positions. *See Samson Res. Corp.*, 625 B.R. at 303-04.

[32] Covidien cites *In re Samson Res. Corp.*, 2022 WL 3135288, at *1 (Bankr. D. Del. Aug. 4, 2022), and *DSI Renal Holdings, LLC*, 617 B.R. at 498, as support for its claim that Covidien qualifies as a "financial participant." But both cases were decided on summary judgment motions, not motions to dismiss. Indeed, the *Samson* court had previously rejected a similar summary judgment motion, determining that the trustee should be permitted to complete discovery in connection with the declarations submitted by the Samson defendants to demonstrate whether particular debtor-defendants had the requisite agreements or transactions to meet the definition of "financial participant" under § 101(22A). 2022 WL 3135288, at *2.

[33] In general, a swap agreement is "a contract between two parties . . . to exchange . . . cash flows at specified intervals, calculated by reference to an index . . . [and basing the payments] on a number of indices including interest rates, currency rates and security or commodity prices." *Thrifty Oil Co. v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 322 F.3d 1039, 1042 (9th Cir. 2003); *see also* 11 U.S.C. § 101(53B) (defining the types of contracts as "swap agreement[s]").

[34] *See* Motion at 34 n.42 (citing Covidien plc Form 10-Q filed Aug. 6, 2013).

original) (citation omitted)). As this Form 10-Q cannot be accepted for the "truth" asserted by Covidien, it is certainly not proper for the Court to consider on a motion to dismiss.

Even if it were appropriate to consider on a motion to dismiss, which it is not, Covidien's Form 10-Q does not establish that Covidien itself is a party to all the referenced agreements. Nor does it show that none of Covidien's affiliates are counterparties to the agreements—both facts that must be established in order for the contracts to be potentially qualifying agreements under the definition of "financial participant." *See* § 101(22A)(A) (citing agreements that an entity "has" as the relevant focus of analysis and excluding agreements between an entity and an affiliate).

Moreover, the valuation of the swap agreements is an issue that would require additional discovery and expert analysis. *See Samson Res. Corp.*, 625 B.R. at 303 (Bankr. D. Del. 2020) (denying summary judgment and holding that trustee was entitled to discovery regarding veracity of expert witness's valuation of defendants' swap agreements); *Samson Res. Corp.*, 2022 WL 3135288, at *5 (detailing expert testimony on how he valued swap agreements and option contracts). Factual issues requiring discovery and expert analyses are not a proper basis for granting a motion to dismiss. *See Westinghouse*, 90 F.3d at 709 n.9.

To attempt to establish itself and MIFSA each as a "financial participant," Covidien relies on two corporate indentures[35] that, it asserts, are "securities contracts" as defined by the Bankruptcy Code. The first indenture, dated May 16, 2013, was executed, *inter alia*, by Covidien International Finance S.A. ("**CIFSA**"), Covidien plc (as guarantor), and Covidien Ltd. (as guarantor) ("**Covidien Indenture**"). Motion at 35 n.43. The second indenture, dated April 11, 2013, was executed, *inter alia*, by Mallinckrodt International Finance S.A. ("**MIFSA**") and CIFSA ("**MIFSA Indenture**"). Motion at 36 n.45. Neither indenture supplies a basis for granting

[35] A "corporate indenture" is a "document containing the terms and conditions governing the issuance of debt securities, such as bonds or debentures." Black's Law Dictionary (11th ed. 2019).

Covidien's Motion for the following full and independent reasons, any one of which defeats this argument:

First, the Covidien Indenture and MIFSA Indenture are outside the four corners of the Complaint. Neither indenture is mentioned in the Complaint, is attached to the Complaint, nor forms the basis of any of the Trust's claims. [redacted], the Complaint does not refer to or rely on the indenture itself. Accordingly, the indentures cannot be properly considered on a motion to dismiss. That alone is sufficient to end the analysis in the Trust's favor.

Second, Judge Walrath has determined that an indenture does not fall within the definition of "securities contract" in the Bankruptcy Code. *See In re Qimonda Richmond, LLC*, 467 B.R. 318, 323 (Bankr. D. Del. 2012) (concluding that, while indentures are *contracts*, they are not *securities contracts* as defined by the Bankruptcy Code).[36] This, again, shows that Covidien's reliance on the two indentures to argue it and MIFSA are each a "financial participant" is misplaced.

Third, both indentures were signed by affiliates. When they entered into the Covidien Indenture, CIFSA and Covidien Ltd. appear to have been subsidiaries of Covidien plc and therefore affiliates. So too, when MIFSA and CIFSA entered into the MIFSA Indenture, they also appear to have been subsidiaries of Covidien and were thus affiliates. Securities contracts between affiliates are not qualifying agreements that can make an entity a "financial participant." *See* 11 U.S.C. § 101(22A)(A) (to qualify as a "financial participant," an "entity" must have entered into a

[36] *See also In re MPM Silicones, LLC*, 2014 WL 4436335, at *21 (Bankr. S.D.N.Y. Sept. 9, 2014) (finding that indentures at issue "are not contracts for the purchase, sale or loan of a security; they instead set forth the terms under which the underlying notes will be governed and the role of the trustees in connection therewith"), *aff'd*, 531 B.R. 321 (S.D.N.Y. 2015), *aff'd in part, rev'd in part on other grounds and remanded sub nom. In re MPM Silicones, L.L.C.*, 874 F.3d 787 (2d Cir. 2017).

qualifying transaction with "the debtor or any other entity (*other than an affiliate*)") (emphasis added).

Fourth, additional facts are needed to value the Covidien Indenture, and those facts, even if they were readily available, cannot be considered on a motion to dismiss since they are outside the four corners of the Complaint. Covidien plc is a party to the Covidien Indenture as a guarantor. Although the definition of "securities contract" appears to contemplate that certain guaranties may qualify as such, the definition limits the value of those guaranties not to "exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562." 11 U.S.C. § 741(7)(A)(xi). Covidien does not address how damages would be calculated under the indenture and thus how the indenture would be valued, which is its burden to demonstrate. Faced with the similar question of whether defendants as guarantors of swap agreements fit within the definition of "financial participant," Judge Shannon held that a more developed record was needed to value the swap agreement in question and denied the defendants' motion for summary judgment under § 546(e). *Samson Res. Corp.*, 625 B.R. at 304.

Fifth, as a debtor in bankruptcy, MIFSA cannot be a "financial participant." *See In re Tribune Co. Fraudulent Conveyance Litig.*, 2019 WL 1771786, at *9 (S.D.N.Y. Apr. 23, 2019), *aff'd on other grounds*, 10 F.4th 147 (2d Cir. 2021). To qualify as a "financial participant," an "entity" must have entered into a qualifying transaction with "the debtor or any other entity (other than an affiliate)." 11 U.S.C. § 101(22A)(A). If the "entity" described in the first part of the definition could include the "debtor," the inclusion of the term "debtor" in the second part "would be puzzling." *Tribune*, 2019 WL 1771786, at *9. Although Covidien cites to two cases taking the contrary view (Motion at 35 n.44), *Tribune* is the better reasoned decision, and the Court should

follow it on this issue. Moreover, when there is a close question of law on an issue, a motion to dismiss should be denied.[37]

As shown throughout this section, Covidien continually relies on facts outside of the four corners of the Complaint to attempt to utilize § 546(e). This is not surprising, as the § 546(e) safe harbor is an affirmative defense that "requires a determination of fact and is not suitable for disposition on a motion to dismiss." *In re Centaur, LLC*, 2013 WL 4479074, at *4 (Bankr. D. Del. Aug. 19, 2013); *see also Zazzali v. AFA Fin. Grp., LLC*, 2012 WL 4903593, at *11 (Bankr. D. Del. Aug. 28, 2012) ("[I]t is premature to dismiss this count on the basis of the 546(e) defense" because "the defense is a fact-based inquiry."). Only where the elements of § 546(e) are clearly established on the face of the complaint should a court consider the safe harbor at the motion to dismiss stage. *See, e.g.*, *In re Plassein Int'l Corp.*, 366 B.R. 318, 323–25 (Bankr. D. Del. 2007), *aff'd*, 388 B.R. 46 (D. Del. 2008), *aff'd*, 590 F.3d 252 (3d Cir. 2009). Here, the elements are not established on the face of the Complaint, which explains Covidien's attempts to rely on documents outside the Complaint's four corners. Covidien's reliance is improper, *see Jiangsu Beier Decoration Materials Co. v. Angle World LLC*, 52 F.4th 554, 562 (3d Cir. 2022), and its arguments raise factual issues that cannot be resolved on a motion to dismiss.[38]

For all the reasons set forth above, Covidien's § 546(e) arguments are unavailing.

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[37] *See, e.g.*, *Levy v. Gen. Elec. Co.*, 2015 WL 7722389, at *3 (D. Conn. Nov. 30, 2015) (ruling that, in "light of the unsettled state of the law, plaintiff has stated a plausible claim for breach of an express warranty"); *Caban v. Seafood*, 2015 WL 13548369, at *2 (D.P.R. Sept. 16, 2015) (stating that court could not dismiss claims under Rule 12(b)(6) standard "when uncertainty exists as to the law this court should apply"); *Shore v. Magical Cruise Co.*, 2014 WL 3687100, at *4 (M.D. Fla. July 24, 2014) (stating that "given the unsettled state of the law, the Court will for now deny the motion to dismiss"); *FDIC v. Willetts*, 882 F. Supp. 2d 859, 870 (E.D.N.C. 2012) (denying motion to strike argument because of unsettled law).

[38] Covidien asserts that it and MIFSA are also safe-harbored because they are "financial institutions," as defined in the Code, but, because of the factual issues involved, will make that argument later in the proceeding. Motion at 33 n.38. The Trust reserves the right to oppose that argument if Covidien raises it.

IV. THE COMPLAINT ALLEGES A PLAUSIBLE BASIS FOR BREACH OF FIDUCIARY DUTY BY COVIDIEN AS A PROMOTER (COUNT V)

Count V of the Complaint asserts a claim against Covidien for breach of fiduciary duty as a promoter. Covidien challenges the timeliness and plausibility of this claim as alleged in the Complaint. None of its arguments has merit.

A. The Trust's Claim Is Timely

The Trust's breach of fiduciary duty claim is not time-barred. Under Delaware's conflicts of law principles, the Court looks to which state has the most significant relationship to the Trust's claim, relying on the factors set forth in the Restatement (Second) of Conflict of Laws.[39] *See In re Draw Another Circle.*, 602 B.R. 878, 894 (Bankr. D. Del. 2019). The factors include: "(a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and of business of the parties; and (d) the place where the relationship, if any, between the parties is centered." Restatement (Second) of Conflict of Laws § 145; *see also Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202 (3d Cir. 2013) (applying the same Restatement "most significant relationship" test and outlining the same factors in applying them to a false representation claim).

Factors (b), (c), and (d) favor the application of Massachusetts law. Massachusetts is where Covidien was headquartered at all relevant times and where the Covidien representatives responsible for devising and implementing the Spinoff and its associated transactions were located. Compl. ¶ 132. Thus, Massachusetts is where the conduct causing the injury occurred and where Covidien's fiduciary relationship with Mallinckrodt plc was conceived and centered.

[39] Covidien attempts to argue that the internal affairs doctrine should govern under Delaware's choice of law analysis, which would require the application of Irish law. Motion at 38. However, the internal affairs doctrine only applies to breach of fiduciary duty claims brought against an officer or director of a corporation. *See* Restatement (Second) of Conflict of Laws § 309 (1971).

While breach of fiduciary duty claims are subject to a three-year limitations period under Massachusetts law, Massachusetts recognizes adverse domination as an equitable tolling doctrine where a company is under the control of culpable directors and officers. *See Aiello v. Aiello*, 852 N.E.2d 68, 78-79 (Mass. 2006). The limitations period does not begin to run until the facts giving rise to liability become known to a stockholder or disinterested director that could have brought suit on behalf of the corporation. *Id.* at 81-82. Covidien itself selected the individuals who would serve as Mallinckrodt plc's officers and directors, even selecting a former Covidien employee to serve as Mallinckrodt's CEO. Compl. ¶ 257. The question of whether and when Mallinckrodt plc had sufficiently disinterested directors and when those directors received knowledge of the relevant facts is a fact-specific inquiry and will require additional discovery.

In addition, when the Spinoff closed on June 28, 2013, Mallinckrodt had not completely severed all ties to Covidien. After the Spinoff, Covidien continued to provide worldwide finance, accounting, treasury, customer service, supply chain planning, sales, information technology, and global sourcing services, among others, to Mallinckrodt under a Transition Services Agreement. Compl. ¶ 137. Covidien was thus in a position to leverage the wide-ranging services it was providing to continue its domination and control of Mallinckrodt.

Covidien argues that Delaware's borrowing statute requires that, among all possible limitations periods, the shorter one must be applied. Motion at 37-38. The Delaware Supreme Court has recognized that the purpose of that statute is to prevent forum shopping for a longer limitations period in Delaware. *See Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 16-17 (Del. 2005). Here, there is no evidence or allegation of forum shopping and the Trust does not seek the benefit of Delaware's statutes of limitations. Accordingly, Delaware's borrowing statute is not implicated and does not apply to this proceeding.

B. The Complaint Alleges a Promoter Liability Claim That Is Plausible

Under Massachusetts law, an entity that forms a corporation, directs the formalities of its incorporation, and provides the resources or secures initial cash capital is that corporation's promoter. *See Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 89 N.E. 193, 201 (Mass. 1909), *aff'd*, 225 U.S. 111 (1912). Promoters are fiduciaries to the companies they form. *See Whaler Motor Inn, Inc. v. Parsons*, 363 N.E.2d 493, 497 (Mass. 1977). A promoter has a duty of full and complete disclosure to the company being promoted and is not permitted to obtain a "secret profit." *See In re Access Cardiosystems, Inc.*, 340 B.R. 127, 147 (Bankr. D. Mass. 2006).

The Complaint alleges that Covidien "formed, organized, and registered" Mallinckrodt plc. Compl. ¶ 256. The Complaint also alleges that "Covidien determined what assets, liabilities and business lines the newly formed Mallinckrodt plc would hold within . . . [its] corporate umbrella." *Id.* Thus, the Complaint sufficiently establishes Covidien as Mallinckrodt plc's promoter.

Additionally, the Complaint alleges that Covidien breached its fiduciary duty by stripping what would become Mallinckrodt plc of assets and profitable business lines and imposing certain liabilities on Mallinckrodt plc without providing reasonably equivalent value in exchange. *Id.* ¶ 259. In conjunction with these acts, Covidien "fail[ed] to disclose . . . all material facts . . . including, without limitation, the true nature and scope of the opioid-related liabilities that were being left with the Debtors." *Id.* ¶ 260.

All of these facts, taken as true, are sufficient to demonstrate that Covidien owed Mallinckrodt plc fiduciary duties as a promoter and breached those duties. Accordingly, the Complaint alleges a promoter liability claim that is plausible.

Covidien's arguments to the contrary are unavailing. Covidien's argues that it did not owe any fiduciary duties to its former subsidiaries that were spun off. Motion at 39. But the fiduciary duty being alleged here is not the one between Covidien plc as parent and Mallinckrodt plc as

subsidiary but rather the one between Covidien plc as promoter and Mallinckrodt plc as the promoted company.[40] Thus, the fiduciary duty challenged by Covidien on this count is different from the fiduciary duty alleged in the Complaint. Accordingly, Covidien's arguments are inapposite and should be rejected.

V. THE GROUNDS SUPPORTING THE TRUST'S CLAIM FOR REIMBURSEMENT, INDEMNIFICATION OR CONTRIBUTION ARE SUFFICIENT (COUNT VI)

Count VI of the Complaint seeks an award of reimbursement, indemnification, or contribution by or from Covidien for (1) payments of liability and defense costs made by one or more of the Debtors on or before the Petition Date in connection with, or as a result of, opioid-related subpoenas, investigations, litigation, judgments, and settlements; and (2) payments made by one or more of the Debtors to satisfy (a) the costs of administering their chapter 11 reorganization and (b) the obligations under their confirmed Plan. Compl. ¶ 267. The Complaint alleges that Covidien is jointly and severally liable with the Debtors for all opioid-related liabilities of the Debtors and that the Debtors have incurred sums in excess of their fair share on account of, or as a result of, those liabilities. *Id.* ¶ 266. Moreover, Covidien is jointly and severally liable because, as the Complaint alleges, at times relevant to these transactions, "Covidien dominated the finances, policies, and business practices of Mallinckrodt, so that the Debtors had no separate existence of their own." *Id.* ¶ 146. "Thus, the Debtors were alter egos of Covidien and their non-pharmaceutical affiliates and/or were mere instrumentalities of Covidien." *Id.* Accordingly, "the

[40] In addition to applying non-Massachusetts law, the cases Covidien cites on page 39 of its Motion all involve parent-subsidiary relationships. *See Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 191 (Del. Ch. 2006) (stating that parent corporation does not owe fiduciary duties to its wholly owned subsidiaries), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007) (unpublished table decision); *In re Essar Steel Minnesota LLC*, 602 B.R. 600, 608 (Bankr. D. Del. 2019) (same); *Fyffes plc v. DCC plc* [2005] IEHC 477 (Ir.) p. 180 (same); *U.S. Bank Nat'l Ass'n*, 761 F.3d at 438 (recognizing that, while parents of wholly owned subsidiaries do not owe fiduciary duties unless the subsidiary becomes insolvent, promoters of a corporation owe it fiduciary duties).

corporate separateness of the Debtors, Covidien, and their non-pharma affiliates should be disregarded." *Id.*

Covidien argues that the Trust lacks standing to pursue alter ego or veil-piercing claims. Motion at 41-42. But the argument is without merit because those claims were property of Mallinckrodt's estate and were expressly transferred to the Trust as "Assigned Medtronic Claims" under the Plan. Compl. at 2 (citing Plan art. IV.W.6, at 97).[41]

> In order for a cause of action to be considered "property of the estate," the claim must be a "general one, with no particularized injury arising from it." On the other hand, if the claim is specific to the creditor, it is a "personal" one and is a legal or equitable interest only of the creditor. A claim for an injury is personal to the creditor if other creditors generally have no interest in that claim.

In re Emoral, Inc., 740 F.3d 875, 879 (3d Cir. 2014) (quoting *Bd. of Trs. of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 170 (3d Cir. 2002)). The Third Circuit in *Emoral* found successor liability claims to be estate property. *Id.* at 882. Applying the *Emoral* framework, courts within the Third Circuit have held that alter ego claims were property of the estate and therefore the trustee (or other estate representative) had standing to pursue those claims. *See, e.g.*, *Harrison v. Soroof Int'l, Inc.*, 320 F. Supp. 3d 602, 619 (D. Del. 2018); *In re Maxus Energy Corp.*, 571 B.R. 650, 660 (Bankr. D. Del. 2017); *see also In re Bldgs. by Jamie, Inc.*, 230 B.R. 36, 43 (Bankr. D.N.J. 1998) ("The majority of the courts . . . that have addressed the issue of authority to pursue an alter ego action on behalf of a corporate debtor have also held that the trustee has standing.").[42]

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[41] "Assigned Medtronic Claims" include "*any claims* [or] causes of action . . . *of any kind or character whatsoever*" that Mallinckrodt holds "against Medtronic plc and/or its subsidiaries," including Covidien. Plan art. I.56 at 7, art. I.68 at 8 (emphasis added).

[42] Covidien's reliance on *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972), is misplaced because there the Supreme Court was not addressing an alter ego claim that was general in relation to all creditors. The Supreme Court in *Caplin* held that the trustee in reorganization lacked standing to pursue the claims of debenture holders against an indenture trustee. *Id.* at 416-17. In other words, "the Court in *Caplin* held that the claim against the indenture trustee was property of the debenture holders, not of the estate, and thus was not subject to the trustee's mandate to collect and reduce to money the property of the estate." *In re Maxus Energy Corp.*, 2019 WL 4343722, at

Here, the alter ego claim of the Trust is a general claim and was thus held by the estate. *See Maxus Energy Corp.*, 571 B.R. at 660 (alter ego claims are general claims). The factual allegations necessary to demonstrate alter ego are not unique or specific to any particular creditor. *See Harrison*, 320 F. Supp. 3d at 624 (finding that facts alleged to prove an alter ego claim were not unique to any particular plaintiff). In addition, Covidien's actions in effecting the Cash Transfers and the Spinoff harmed countless creditors generally, especially thousands of opioid claimants. Compl. ¶ 11. Moreover, if the Trust were to prevail on its alter ego claims, the Trust and its creditor-beneficiaries would benefit overall. *Id.* ¶¶ 11-12. For these reasons, the Trust has standing to pursue an alter ego claim here.

Covidien asserts that the Complaint fails to plead facts sufficient to state a plausible alter ego claim. Motion at 42-43. This is incorrect. As set forth in part I.C. above, the Complaint provides detailed allegations to support the claim that Covidien and its direct and indirect subsidiaries (including the Mallinckrodt entities) were a single economic enterprise under Covidien's domination and control and thus alter egos. Compl. ¶¶ 132-146.

VI. COVIDIEN'S ASSERTED INDEMNIFICATION CLAIMS SHOULD BE SUBORDINATED OR DISALLOWED

On two occasions in 2021, Covidien filed pleadings with this Court asserting rights to indemnification by the Debtors for any opioid-related liability or defense costs under the Separation Agreement or common law. *Id.* ¶¶ 193-194, 269. Covidien has also filed a proof of claim asserting in large part contingent claims for indemnification related to opioid liabilities. Motion at 44 & n.50. As explained below, the Complaint seeks disallowance or subordination of

*7 (D. Del. Sept. 12, 2019). The Ninth Circuit's decision in *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248 (9th Cir. 2010), is similarly unhelpful to Covidien. There, the Ninth Circuit concluded that, under California law, a bankruptcy trustee does not have standing to assert an alter ego claim on behalf of all creditors. *Id.* at 1252. Here, however, no party alleges that California law applies.

any and all claims of Covidien that have been channeled to the Trust so that those claims will be treated as "No Recovery Opioid Claims" under the Plan.

A. Covidien's Assertions Against Equitable Subordination Lack Merit

Count VII of the Complaint asks this Court to equitably subordinate, pursuant to § 510(c) of the Bankruptcy Code, any and all of Covidien's claims. Compl. ¶ 274. Before ordering equitable subordination, most courts require a showing involving three elements: (1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to creditors or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the Bankruptcy Code. *Citicorp Venture Cap., Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982, 986-87 (3d Cir. 1998).[43] Covidien challenges the sufficiency of the Complaint with respect to all three elements. Motion at 45-46. But, as shown below, Covidien's arguments are unavailing and should be overruled.

1. Covidien's Inequitable Conduct

As to inequitable conduct, the threshold question is whether Covidien was an insider during the relevant period. "When the claimant is an insider, the standard for finding inequitable conduct is much lower." *United States v. State St. Bank & Tr. Co.*, 520 B.R. 29, 81 (Bankr. D. Del. 2014) (citing *In re Mid-Am. Waste Sys., Inc.*, 284 B.R. 53, 70 (Bankr. D. Del. 2002)). "A claim arising from the dealings between a debtor and an insider is to be rigorously scrutinized by the courts."

[43] Contrary to Covidien's suggestion, a creditor need *not* be "the higher priority creditor" to equitably subordinate its claim. Motion at 44 (citing *In re John Varvatos Enters. Inc.*, 2022 WL 2256017, at *2 (3d Cir. June 23, 2022)). *Varvatos* applied the elements from an earlier binding Third Circuit case, *In re Winstar Commc'ns, Inc.*, 554 F.3d 382 (3d Cir. 2009), which made no mention of a higher priority creditor. *See id*. at 411. The only reason the *Varvatos* court mentioned a "higher priority creditor" was because the class of unsecured judgment creditors sought to subordinate the claim of a senior secured creditor so that the class's unsecured claims could be paid in full. *See Varvatos*, 2022 WL 2256017, at *1. Moreover, *Varvatos* itself says it is "not an opinion of the full Court" and "does not constitute binding precedent." *Id.* at 1 n.*.

Winstar, 554 F.3d at 412.[44] Covidien cannot dispute that it was an insider of Mallinckrodt when the Cash Transfers and Spinoff occurred and when Covidien imposed on Mallinckrodt the Putative Indemnity Obligations that form the basis of Covidien's asserted indemnification claims. The Complaint asserts in numerous paragraphs that Covidien was the parent holding company of Mallinckrodt. Compl. ¶¶ 1, 19, 29, 184, 221, 223(a). On this basis, Covidien fits the Bankruptcy Code's definition of "affiliate" and, in turn, the Code's definition of "insider." 11 U.S.C. § 101(2)(A), (31)(E). Because it was an insider of Mallinckrodt, Covidien's actions warrant rigorous scrutiny. *See Winstar*, 554 F.3d at 413; *State St. Bank*, 520 B.R. at 81.

"Courts have generally recognized three categories of misconduct which may constitute inequitable conduct for insiders: (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." *State St. Bank*, 520 B.R. at 82 (quoting *Mid-Am. Waste Sys., Inc.*, 284 B.R. at 70)). The Complaint sets forth factual allegations for each of these categories. First, the Complaint makes factual allegations, including identifying at least seven badges of fraud, that establish claims for intentional fraudulent transfer. Compl. ¶¶ 219-225, 238-243. The Complaint also makes factual allegations and asserts a claim for breach of fiduciary duty by Covidien as a promoter. *Id.* ¶¶ 255-262. The Court may also draw a reasonable inference of illegality where, for example, Mallinckrodt, while under Covidien's domination and control, failed to properly monitor and stop suspicious opioid orders, contrary to the Controlled Substances Act. *Id.* ¶¶ 91-131; *see also id.* ¶ 198 (noting that the U.S. Justice Department "allege[d] violations of federal law, including the Controlled Substances Act").

[44] By contrast, in cases involving non-insiders, "the circumstances supporting . . . [an equitable subordination claim] are few and far between." *State St. Bank*, 520 B.R. at 87. Thus, "evidence of more egregious conduct such as fraud, spoliation or overreaching is necessary." *Winstar*, 554 F.3d at 412 (citations omitted).

Second, the Complaint alleges that "Covidien extracted the cash at a time when Mallinckrodt was *undercapitalized and insolvent* and with the intent to keep the funds out of the reach of Opioid Claimants." Compl. ¶ 182 (emphasis added); *see also id.* ¶ 186 ("Covidien knew that Mallinckrodt was undercapitalized and insolvent when it engaged in the debt transactions."). The Complaint also includes an entire section setting forth facts on which the Court can reasonably infer that Mallinckrodt was insolvent—and thus undercapitalized—at the time of the challenged transactions. *Id.* ¶¶ 196-211. To dispute this, Covidien points to matters outside the four corners of the Complaint, such as the asserted fact that Mallinckrodt was "capable" of raising unsecured debt after the Spinoff (Motion at 45), but these matters are not appropriate for the Court's consideration on a motion to dismiss.[45]

Third, the Complaint sets forth detailed facts on which the Court may draw reasonable inferences in the Trust's favor that Covidien used Mallinckrodt as an alter ego or mere instrumentality. Compl. ¶¶ 132-146. Covidien's assertion to the contrary that the Trust has alleged "no facts" to support an inference of alter ego or mere instrumentality (Motion at 45) is empty rhetoric and patently refuted by the Complaint; it should therefore be rejected.

2. Resulting Harm to Creditors

As alleged in the Complaint and explained above (*see supra* part I.C.3), Covidien's inequitable conduct resulted in injury to creditors, particularly Opioid Claimants. Compl. ¶¶ 9, 213-14. The fraudulent transfers made by Mallinckrodt, while under Covidien's domination and control (Compl. ¶¶ 132-146), "impaired" and "reduced" the recourse of creditors against Mallinckrodt, especially the recourse of Opioid Claimants. *Id.* ¶¶ 9, 213-215. Moreover, the Complaint sets forth in detail Covidien's opioid-related misconduct that fueled the nationwide

[45] And, as discussed above, such extraneous matters are irrelevant to the insolvency analysis. *See supra* part I.B.1.

opioid epidemic, resulting in injuries estimated in the trillions of dollars. *See* Compl. ¶¶ 33-131. The Complaint thus identifies specific injuries resulting from Covidien's inequitable conduct so as to satisfy the second element for equitable subordination.

3. Consistency with the Bankruptcy Code

Covidien argues that equitable subordination of its claim "would be inconsistent with the basic structure of the Bankruptcy Code under which general unsecured claims are normally treated the same." Motion at 46 (citing 11 U.S.C. § 726).[46] "Normally treated the same" does not mean *always* treated the same. Otherwise, equitable subordination, as codified in § 510(c) of the Bankruptcy Code, would be a dead letter, contrary to controlling tenets of statutory construction. *See Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1939 (2022) (stating that statutes must be construed to give effect to all provisions). Unlike the situation in *United States v. Noland*, 517 U.S. 535 (1996), which is oft-cited in connection with this element of equitable subordination,[47] the Trust is not seeking to subordinate an entire category of claims; only one claim should be subordinated here—Covidien's. Covidien is not an innocent creditor. It dominated and controlled Mallinckrodt in a way that fueled the opioid epidemic and disadvantaged creditors. In connection with the Spinoff, it imposed on Mallinckrodt the Putative Indemnity Obligations, which form the basis of its claims here.[48] Covidien should not be permitted to share in any of the Trust's distributions to holders of Other Opioid Claims and thereby dilute their recoveries. For the reasons set forth above, the Complaint alleges a plausible claim for equitable subordination.

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[46] Section 726's waterfall provision applies in chapter 7 liquidations, not chapter 11 reorganizations. *See* 11 U.S.C. § 103(b).

[47] *See, e.g.*, *Citicorp*, 160 F.3d at 990; *Mid-Am. Waste Sys., Inc.*, 284 B.R. at 73.

[48] Covidien implies that, because Mallinckrodt received an indemnification right under the Separation Agreement, Mallinckrodt received reasonably equivalent value in exchange for the Putative Indemnity Claims. Motion at 2-3, 12-13, 44. But reasonable equivalence requires "case-by-case adjudication" and ultimately "a factual determination," which is "not a proper issue to decide on a motion to dismiss." *BMT-NW Acquisition*, 582 B.R. at 858 (citations omitted).

B. Equitable Disallowance Is a Longstanding and Viable Remedy

Count VIII of the Complaint seeks equitable disallowance of Covidien's claims. In *Pepper v. Litton*, 308 U.S. 295 (1939), the Supreme Court upheld the district court's equitable *disallowance* of claims held by the bankrupt company's controlling shareholder on the ground that the shareholder, *inter alia*, engaged in a "deliberate and carefully planned" scheme of fraudulent transfers to prevent the company from paying its "just debt" to a non-insider creditor. *See id*. at 301. The Court concluded that the district court had properly exercised its "broad equitable powers" to disallow the claim. *Id.* at 311-13.

In *Pepper*, the Supreme Court presented disallowance and subordination as separate and distinct remedies by making references to "disallowance ***or*** subordination" (or substantially similar wording) no fewer than eight times. *See id*. at 296, 302-03, 306, 310-11 (emphasis added). And Congress did not overrule *Pepper* when it enacted the Bankruptcy Code. It did quite the opposite. The relevant legislative history states that the provision now codified as § 510(c) "is intended to codify case law, such as *Pepper v. Litton* . . . , and is not intended to limit the court's power in any way . . . *Nor does this subsection preclude a bankruptcy court from completely disallowing a claim in appropriate circumstances*." H.R. Rep. No. 95-595, at 359 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6315 (emphasis added). Thus, there is no basis for concluding from the legislative history that, by expressly addressing equitable subordination in § 510, Congress intended to foreclose equitable disallowance as a remedy. *See In re Adelphia Commc'ns Corp.*, 365 B.R. 24, 71 (Bankr. S.D.N.Y. 2007) (denying motion to dismiss and determining that equitable disallowance remained a viable cause of action and equitable subordination is not an exclusive remedy for wrongdoing), *aff'd in relevant part sub nom. Adelphia Recovery Tr. v. Bank of Am., N.A.*, 390 B.R. 64 (S.D.N.Y. 2008).

Without acknowledging *Pepper*, Covidien argues that equitable disallowance cannot be a viable cause of action because the Bankruptcy Code does not expressly provide for it. Covidien asserts equitable disallowance does not appear as one of the nine specified bases for disallowing claims under § 502(b). Motion at 46. But "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midatlantic Nat'l Bank v. N.J. Dep't of Env't Prot.*, 474 U.S. 494, 501 (1986). As shown above, equitable disallowance was an element of pre-Code law that Congress never manifested a specific intent to abrogate when it enacted the Bankruptcy Code.[49]

To be sure, Covidien cites four cases, including two from this district, as support for its assertion that the "vast majority of courts" have not accepted equitable disallowance as an action or remedy authorized under the Code. Motion at 47 (citing cases). But none of the cited cases is a circuit-level decision. There is also countervailing authority. In *Citicorp*, a case addressing equitable subordination, the Third Circuit refused to endorse the district court's conclusion that the bankruptcy judge was "without authority to fashion a 'disallowance' remedy" and left the door open for another day to resolve the issue. 160 F.3d at 991 n.7. In *Washington Mutual*, Judge Walrath found, on the strength of the *Citicorp* and *Adelphia* cases cited above, that the Court "does have the authority to disallow a claim on equitable grounds 'in those extreme instances—perhaps

[49] The *Travelers* and *Law v. Siegel* cases are of no help to Covidien. *See* Motion at 46-47 (citing *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443 (2007) and *Law v. Siegel*, 571 U.S. 415 (2014)). Neither case addresses equitable disallowance, and they certainly do not overrule *Pepper*. *Travelers* dealt with whether a court can allow a claim for postpetition attorneys' fees that were provided for in a prepetition contract. In *Adelphia Recovery Trust v. Bank of America, N.A.*, 390 B.R. 64, 76 (S.D.N.Y. 2008), the district court found nothing in *Travelers* to "suggest the abandonment of *Pepper v. Litton*." The Supreme Court in *Siegel* held that a trustee could not invoke § 105(a) of the Code to pay administrative expenses out of exempt property when § 522(k) of the Code expressly prohibits such payments. *Siegel* has not sounded the death knell for equitable disallowance. At least one post-*Siegel* court denied summary judgment on an equitable disallowance claim upon finding that the debtor had stated a plausible basis for such relief and noting that "[i]t is clear from *Pepper* that 'the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt[cy] estate.'" *In re Minkina*, 639 B.R. 24, 30 (Bankr. D. Mass. 2022) (quoting *Pepper*, 308 U.S. at 308).

very rare—where it is necessary as a remedy.'" *In re Wash. Mut., Inc.*, 461 B.R. 200, 257 (Bankr. D. Del. 2012) (citations omitted), *vacated in part on other grounds*, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012).

For the reasons set forth above, equitable disallowance remains viable, and the Court should preserve Count VIII and deny Covidien's Motion. The best Covidien can show is that the law is unsettled and bankruptcy courts are divided on the issue of equitable disallowance. But, at this early pleading stage, that should cut against Covidien, not the Trust.[50] This Court should deny the Motion, as the Trust at this nascent stage is entitled to the benefit of the doubt.

C. With Plausible Fraudulent Transfer Claims Alleged, the Trust's Request for Disallowance Under § 502(d) Should Be Preserved (Count IX)

Because Covidien is the transferee of transfers that are avoidable under § 544(b), Count IX of the Complaint seeks to disallow any and all claims of Covidien under § 502(d) of the Bankruptcy Code. Covidien argues that the Trust's avoidance claims "fail as a matter of law" (Motion at 47), but as shown above, the Complaint sets forth plausible and timely claims for intentional and constructive fraudulent transfer under § 544(b), which, in turn, defeat Covidien's Motion. Accordingly, this Court should overrule Covidien's objection to Count IX.

D. Under § 502(e)(1)(B), Covidien Cannot Dispute That Its Contingent Claims Are Subject to Disallowance (Count X)

In accordance with § 502(e)(1)(B), Count X of the Complaint seeks to disallow any contingent claim of Covidien for opioid-related indemnification that has been channeled to the Trust. Section 502(e)(1)(B) provides in relevant part that "the court *shall* disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on . . . the claim of a

[50] *See supra* note 37.

creditor, to the extent that . . . such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim." 11 U.S.C. § 502(e)(1)(B) (emphasis added).

Covidien does not—and cannot—challenge the plausibility of Count X. Indeed, Covidien concedes in its Motion that it has claims that are disallowable under the statute. Covidien asserts that "it is entitled to indemnification under the express terms of the Separation and Distribution Agreement," which would allegedly give rise to a claim for reimbursement or contribution. Motion at 44; *see also In re Caribbean Petrol. Corp.*, 2012 WL 1899322, at *3 (Bankr. D. Del. May 24, 2012) (stating that "indemnification claims are disallowable under section 502(e)(1)(B) because they are functionally the same as claims for reimbursement and contribution" (citations omitted)), *aff'd*, 566 F. App'x 169 (3d Cir. 2014). Covidien acknowledges that it has been named as a defendant in (but not served with) complaints asserting claims for tort liabilities arising from Mallinckrodt's opioid business, which would make it "liable with the debtor . . . on the claim of a creditor." *See* Motion at 48 & n.51; Compl. ¶¶ 193-194. And, apart from the "modest expenses" (*i.e.*, $15,400) incurred in connection with these complaints, Covidien concedes that the "remaining . . . portions" of its indemnification claims are "contingent" and therefore disallowable under § 502(e)(1)(B). Motion at 48. Because Covidien cannot challenge—and essentially concedes—the plausibility of Count X, the Motion should be denied.

Covidien asserts that these contingent indemnification claims are "perfectly legitimate" and therefore should not be disallowed. *Id.* But it makes no difference under the plain terms of the statute if the contingent claims are "legitimate": contingent indemnification claims still must be disallowed under § 502(e)(1)(B).

As a last resort, Covidien pleads for delay, arguing that this Court should "wait to see" if its contingent claims become "liquidated in the future" and thus placed beyond the reach of

§ 502(e)(1)(B). *Id.* Covidien asserts that there is no point in disallowing its contingent claims now because, if its indemnification claims become liquidated in the future, it could ask this Court to reconsider the previous disallowance under 11 U.S.C. § 502(j). *Id.* at 49. Indeed, Covidien asserts that it negotiated for its § 502(j) rights to be preserved under the Mallinckrodt Plan. *Id.*[51]

The fatal flaw in Covidien's arguments is that § 502(e)(1)(B) uses the mandatory "shall" to command disallowance of contingent indemnification claims, even if reconsideration under § 502(j) might be available in the future. *See In re Caribbean Petrol. Corp.*, 566 F. App'x 169, 175 (3d Cir. 2014) (affirming the disallowance of contingent claims under § 502(e)(1)(B) while noting that § 502(j) allows for reconsideration); *see also Aetna Cas. & Sur. Co. v. Ga. Tubing Co.*, 1995 WL 429018, at *4 (S.D.N.Y. July 20, 1995), *aff'd*, 93 F.3d 56 (2d Cir. 1996); *In re Drexel Burnham Lambert Grp., Inc.*, 146 B.R. 92, 94 (S.D.N.Y. 1992). Courts, including Judge Gross, have rejected arguments substantially similar to Covidien's and disallowed contingent claims, even where the right to seek § 502(j) reconsideration was preserved by court order. *See Caribbean Petrol. Corp.*, 2012 WL 1899322, at *4-5, 5 n.2 (disallowing claims even though the right to seek § 502(j) reconsideration was preserved by court order); *In re Agway, Inc.*, 2008 WL 2827439, at *2 (Bankr. N.D.N.Y. July 18, 2008) (rejecting argument that deferring § 502(e)(1)(B) disallowance would alleviate the need to file § 502(j) motions to reconsider). For all the reasons noted above, this Court should overrule Covidien's arguments against Count X.

CONCLUSION

The Trust has filed a detailed Complaint laying out Covidien and Mallinckrodt's actionable misconduct, and the voluminous allegations therein must be taken as true for purposes of the

[51] Covidien appears to ignore that its preserved right to seek reconsideration under § 502(j) *presupposes* a previous "disallowance of any Other Opioid Claim." Motion at 49 (quoting Plan art. IV.Y.2). Thus, Covidien's putatively preserved right under § 502(j) cannot justify the delay it seeks.

Motion. The Complaint plausibly demonstrates that Covidien and Mallinckrodt together are substantially responsible for the trillions of dollars in damages caused to Mallinckrodt's creditors and that they engaged in efforts to shield assets from those creditors.

Covidien's fruitless attempts to rely on documents outside of the Complaint and on inapplicable technical legal arguments cannot defeat the Trust's legitimate efforts to remedy some of those harms through pursuit of the Complaint and recover the value of those wrongfully transferred assets.

For the reasons set forth above, the Court should deny the Motion and grant such other and further relief as this Court deems just and appropriate.

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Dated: February 28, 2023
Wilmington, Delaware

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