PROPOSED REDACTED VERSION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

COVIDIEN'S MOTION FOR SUMMARY JUDGMENT
BASED ON THE SECTION 546(e) SAFE HARBOR

R. Craig Martin (DE 5032)
DLA PIPER LLP (US)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
Telephone: (302) 468-5700
Facsimile: (302) 394-2341
Email: craig.martin@us.dlapiper.com

Philip D. Anker (*pro hac vice*)
Peter G. Neiman (*pro hac vice*)
Ryanne E. Perio (*pro hac vice*)
Allyson Pierce (*pro hac vice*)
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center, 250 Greenwich Street
New York, N.Y. 10007
Telephone: (212) 230-8800

-and-

Howard M. Shapiro (*pro hac vice*)
Joel Millar (*pro hac vice*)
2100 Pennsylvania Ave. NW
Washington, D.C. 20037
Telephone: (202) 663-6100

Attorneys for Covidien Limited, Covidien Group Holdings Ltd., Covidien International Finance S.A., and Covidien Group S.à.r.l.

July 10, 2024

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

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PRELIMINARY STATEMENT

The Covidien Defendants are entitled to summary judgment based on Section 546(e)'s safe harbor. The Trust is seeking to unwind Covidien's spinoff of Mallinckrodt, a securities transaction, and to claw back the consideration that Covidien allegedly received for its transfer of the shares in the pharmaceuticals business to Mallinckrodt. But Congress enacted the safe harbor to protect securities transactions like this one from being challenged years later in bankruptcy, as the Trust's lawsuit seeks to do. *See In re Tribune Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 92 (2d Cir. 2019); *In re Resorts Int'l*, 181 F.3d 505, 515-516 (3d Cir. 1999), *abrogated in part on other grounds by Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018).

This Court has already held that Covidien's spinoff of the Mallinckrodt entities owned by Covidien (together with the newly-formed holding company, "Mallinckrodt") was a qualifying securities transaction, satisfying the first of Section 546(e)'s two requirements. *See* Opinion, D.I. 57 ("Op.") at 29-30. Section 546(e) has only one other requirement, that Covidien qualify as a "financial participant": defined by the Code as having securities, swap, or forward contracts outstanding at the time of the spinoff or in the 15 months culminating in Mallinckrodt's bankruptcy filing, with an aggregate value of at least $1 billion in notional or actual principal amount or $100 million in mark-to-market positions. The evidence submitted with this motion establishes that Covidien—a major company that actively raised billions of dollars of capital and transacted for billions more in the securities and derivatives markets—falls well within the definition of a "financial participant." The safe harbor applies.

The Amended Complaint treats the four defendants (the "Covidien Defendants") as a single entity, but even if viewed separately, each of the Covidien Defendants qualifies as a "financial participant." Three of the defendants, Covidien International Finance S.A. ("CIFSA"), Covidien Limited (formerly "Covidien plc"), and Covidien Group Holdings Ltd. (formerly "Covidien Ltd."), were parties at the time of the spinoff to securities contracts granting call and put options for debt securities for an aggregate principal amount of $5 billion, far in excess of the $1 billion principal-amount test. All three entities also met the test within 15 months of Mallinckrodt's October 12, 2020, bankruptcy filing because some of those same contracts remained outstanding at that time, with an aggregate principal amount exceeding $1.2 billion. The analysis differs slightly as to the fourth defendant, Covidien Group S.à.r.l. ("Covidien Sarl"), but the outcome is the same: that entity had currency forward and swap contracts outstanding within 15 months of the bankruptcy with an aggregate notional amount exceeding $2.5 billion, as well as securities contracts for the purchase, or option to purchase, shares of other companies that exceeded the alternative $100 million mark-to-market positions test by hundreds of millions of dollars.

The Covidien Defendants are entitled to summary judgment on each claim asserted by the Trust for an affirmative recovery from Covidien under Section 546(e). The Court has already held that the spinoff transfers challenged in Count I were qualifying securities transactions because they were made "in connection with a securities contract," the Separation Agreement for the spinoff. 11 U.S.C. § 546(e); Op. at 29. The transfers challenged in Counts II and III—Mallinckrodt's alleged payments on tax and indemnity obligations it assumed under the Separation Agreement—were also qualifying transfers made in connection with the same securities contract. As to Count IV, the Trust itself claims that the $867 million in pre-spin cash transfers were made in contemplation of the spinoff (as the Trust must contend, since it could not conceivably prove those dividends or other transfers were made with fraudulent intent if they were simply ordinary-course transfers from a subsidiary to a parent). Finally, because

Mallinckrodt released Covidien under the Separation Agreement from the reimbursement alter-ego claim asserted in Count V, that claim also fails, unless Mallinckrodt's release can be avoided as a fraudulent transfer—which it cannot, since that release, too, was a "transfer made … in connection with a securities contract," the Separation Agreement.

Accordingly, summary judgment should be granted for the Covidien Defendants on the Trust's affirmative claims. The Trust's only other claims object to Covidien's proofs of claim against the bankruptcy trusts. With only those claims remaining, the Trust's objections should then be addressed in the normal bankruptcy claims process. This meritless lawsuit should be brought to a prompt and efficient end.

STATEMENT OF FACTS

A. The Spinoff Transaction And Documents

The separation and spinoff of Mallinckrodt from Covidien was a securities transaction governed by a Separation and Distribution Agreement between Covidien plc and Mallinckrodt plc dated June 28, 2013 ("Separation Agreement").[2] Under the agreement, Mallinckrodt International Finance S.A. ("MIFSA") redeemed some of its equity securities from its then-parent company, Covidien plc, for $721 million.[3] Covidien transferred the remaining equity securities of MIFSA, which owned the subsidiaries holding the pharmaceuticals business, to newly formed Mallinckrodt plc, while Covidien retained its subsidiaries holding the medical-devices and medical-supplies businesses.[4] Mallinckrodt plc then issued its shares to Covidien plc's shareholders to complete the spinoff.[5]

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2 *See Declaration of Benjamin Wood* ("Wood Decl."), filed herewith, ¶ 5 & Ex. 1 (Separation Agreement).

3 *See* Wood Decl. ¶¶ 5-7 & Ex. 1 (Separation Agreement) § 2.15(b); Amended Complaint, D.I. 59, 61 ("Amended Complaint"), ¶ 273.

4 *See* Wood Decl. ¶¶ 5-7 & Ex. 1 (Separation Agreement) §§ 2.1-2.3.

5 *See* Wood Decl. ¶¶ 5-7 & Ex. 1 (Separation Agreement) §§ 3.1-3.4.

The Separation Agreement contained broad mutual releases by which Mallinckrodt plc and its then-existing subsidiaries, on the one hand, and Covidien plc and its then-existing subsidiaries, on the other hand, released each other from all liabilities and claims existing or arising at or before the spinoff, other than those expressly carved out in the agreement, including significant environmental liabilities of the pharmaceutical business that Covidien assumed.[6]

On the same date, Covidien plc and Mallinckrodt plc entered into a Tax Matters Agreement (the "Tax Matters Agreement").[7] Although nominally separate documents, the Tax Matters Agreement was integrated into the Separation Agreement, which provided that the two "shall be considered one and the same agreement."[8] The Tax Matters Agreement allocated certain tax liabilities between Covidien and Mallinckrodt.[9] [redacted]. Am. Compl. ¶ 277 ("Tax Liability").

The Trust further alleges that in the years immediately before the spinoff (2010-2012), "[w]hile Covidien was trying to sell Mallinckrodt and contemplated the spinoff," Covidien caused its then-Mallinckrodt subsidiaries to transfer a total of $867 million in cash to Covidien. Am. Compl. ¶ 254.

B. Facts Specific To Section 546(e)'s Safe Harbor For "Financial Participants"

The Covidien Defendants' qualification as "financial participants" turns on the contracts they had outstanding at any of three relevant points in time: (i) the spinoff date when the parties entered into the Separation Agreement, June 28, 2013 ("Spin Date"), (ii) Mallinckrodt's

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[6] *See* Wood Decl. ¶¶ 8-9 & Ex. 1 (Separation Agreement) §§ 4.1(a)-(e), Ex. 3.

[7] *See* Wood Decl. ¶ 10 & Ex. 4 (Tax Matters Agreement).

[8] *See* Wood Decl. ¶ 10 & Ex. 1 (Separation Agreement) § 11.1(a); *id.* art. I (definition of "Ancillary Agreement").

[9] *See* Wood Decl. ¶ 10 & Ex. 4 (Tax Matters Agreement) art. II.

bankruptcy filing date, October 12, 2020 ("Petition Date"), or (iii) any date during the 15 months preceding the Petition Date (July 12, 2019, to October 12, 2020). All such qualifying dates are referred to as "Relevant Dates" in this motion.

CIFSA. On the Spin Date, CIFSA had notes outstanding with an aggregate principal amount of $5.0 billion.[10] CIFSA had previously issued the notes in the securities markets, pursuant to indentures with an unaffiliated third party, Deutsche Bank Trust Company Americas, as trustee for the investors who purchased the notes.[11]

The indentures and the notes granted options to purchase and sell the notes at a price equal to the outstanding principal amount of the notes plus interest and premiums.[12] Specifically, the indentures and notes gave CIFSA a "call" option to "redeem"—i.e., purchase or repurchase—the notes prior to their maturity dates at a price equal to the greater of (i) the notes' outstanding principal amount or (ii) the present value of the remaining principal and future interest payments, plus any previously accrued and unpaid interest.[13] The indentures and the notes also gave the noteholders a "put" option to sell the notes back to CIFSA: the noteholders had the right, upon a "Change of Control Triggering Event," to require that CIFSA "purchase" the notes at a "repurchase price" equal to 101% of the notes' outstanding principal amount, plus any accrued and unpaid interest.[14] Because the price CIFSA would have to pay to redeem or

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10 *See* Wood Decl. ¶¶ 11-12 & Ex. 5 (Covidien plc 10-K) at 83, & Schedule 1.

11 *See* Wood Decl. ¶ 12-14 & Exs. 6-12 (Base and Supplemental Indentures).

12 *See* Wood Decl. ¶¶ 15-17.

13 *See id.* ¶ 15 & Ex. 11 (Eighth Supplemental Indenture) § 1.3 & Ex. A (notes) ¶ 5; Ex. 10 (Seventh Supplemental Indenture) § 1.3 & Ex. A (notes) ¶ 5; Ex. 9 (Sixth Supplemental Indenture) § 1.3 & Ex. A (notes) ¶ 5; Ex. 8 (Fourth Supplemental Indenture) § 1.1(6) & Ex. A (notes) ¶ 5; Ex. 7 (Third Supplemental Indenture) § 1.1(6) & Ex. A (notes) ¶ 5.

14 *See* Wood Decl. ¶ 16 & Ex. 11 (Eighth Supplemental Indenture) § 1.4(3)(a) & Ex. A (notes) ¶ 6; Ex. 10 (Seventh Supplemental Indenture) § 1.4(3)(a) & Ex. A (notes) ¶ 6; Ex. 9 (Sixth Supplemental Indenture) § 1.5(3)(a) & Ex. A (notes) ¶ 7; Ex. 8 (Fourth Supplemental Indenture) § 1.3(3)(a) & Ex. A (notes) ¶ 6; Ex. 7 (Third Supplemental Indenture) § 1.3(3)(a) & Ex. A (notes) ¶ 6.

purchase the notes upon an exercise of the options was equal to at least the outstanding principal amount of the notes—$5.0 billion on the Spin Date—plus premiums and interest, CIFSA's option contracts qualify it as a "financial participant" as of the Spin Date.[15]

Some of those same notes remained outstanding through at least April 24, 2020, a date within 15 months of Mallinckrodt's bankruptcy filing, with an aggregate principal amount of $1.213 billion and corresponding call and put options for the purchase of those notes for that principal amount, plus premiums and interest.[16] Accordingly, CIFSA was also a "financial participant" on that Relevant Date (and all preceding Relevant Dates back to July 12, 2019).[17]

Covidien plc and Covidien Ltd. Covidien plc and Covidien Ltd. were both also parties—as guarantors—to the same indentures and notes discussed above for CIFSA.[18] The indentures and the notes provided that Covidien plc and Covidien Ltd. guaranteed the "complete performance of the obligations contained in such Security."[19] Thus, each "jointly and severally," "absolutely, unconditionally and irrevocably guarantee[d] to the holder of the Security … the payment of principal of, premium, if any, and interest on, such Security in the amounts and at the time when due and payable," including if and when the notes' due date was advanced by an early "call for redemption."[20] Accordingly, because CIFSA plc and Covidien Ltd. guaranteed CIFSA's option contracts discussed above, Covidien plc and Covidien Ltd. each qualified as a

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15 *See* Wood Decl. ¶ 17.

16 *See id.* ¶ 18 & Ex. 13 (Medtronic 10-K) at 80, & Schedule 2.

17 *See* Wood Decl. ¶ 19.

18 *See id.* ¶¶ 12-13, 20.

19 *See* Wood Decl. ¶ 21 & Ex. 11 (Eighth Supplemental Indenture) Ex. A (Guarantee) & (notes) ¶ 16; Ex. 10 (Seventh Supplemental Indenture) Ex. A (Guarantee) & (notes) ¶ 16; Ex. 9 (Sixth Supplemental Indenture) Ex. A (Guarantee) & (notes) ¶ 17; Ex. 8 (Fourth Supplemental Indenture) Ex. A (Guarantee) & (notes) ¶ 16; Ex. 7 (Third Supplemental Indenture) Ex. A (Guarantee) & (notes) ¶ 16; Ex. 12 (Fifth Supplemental Indenture), §§ 1.1-1.2 & Annexes C-D; Ex. 6 (Base Indenture) § 15.01; Ex. 12 (Fifth Supplemental Indenture), § 1.1(15).

20 *See supra* note 19.

"financial participant" on the Spin Date, and on April 24, 2020, another Relevant Date.[21] Those indentures and notes remained outstanding on those Relevant Dates and had not been accelerated, terminated, or liquidated.[22] Nor had they been rejected in bankruptcy by Mallinckrodt, which was not a party to them.[23]

Covidien Sarl. On another Relevant Date within 15 months of Mallinckrodt's bankruptcy filing, April 23, 2020, Covidien Sarl had currency forward and swap contracts outstanding with a total gross dollar value in excess of $2.5 billion in notional amount (and in excess of $1 billion on many other Relevant Dates).[24] Through these contracts, Covidien Sarl contracted to buy or sell a foreign currency, such as Euros, Japanese Yen, and Chinese Yuan, in exchange for U.S. dollars on a subsequent settlement date at an agreed exchange rate—the "forward" rate.[25] These contracts allowed Covidien Sarl to hedge its currency exchange-rate risk on anticipated foreign-currency-denominated transactions and changes in the value of foreign-currency-denominated assets and liabilities by locking in an exchange rate at the forward rate.[26] Covidien Sarl's counterparties in the forward and swap contracts were unaffiliated with Covidien: Barclays, BNP Paribas, Citibank, Deutsche Bank, Bank of America, JPMorgan Chase, Goldman Sachs, and Mizuho.[27]

The terms of each contract were set forth in an ISDA Master Agreement between Covidien Sarl and the applicable global bank, which provided the general provisions governing each transaction, and a trading confirmation executed at the time of each transaction, which

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21 *See* Wood Decl. ¶ 22.

22 *See id.* ¶ 23.

23 *See id.* ¶ 23.

24 *See Declaration of Tim Husnik* ("Husnik Decl."), filed herewith, ¶¶ 7, 13.

25 *See id.* ¶ 6.

26 *See id.*

27 *See id.* ¶ 8.

specified the specific economic terms of the forward or swap.[28] The notional amount of each contract was the amount of foreign currency that Covidien Sarl contracted to buy or sell on the settlement date, expressed in the U.S. dollar equivalent of such amount at the forward exchange rate.[29] The aggregate notional amount for all currency forward and swap contracts that Covidien Sarl had outstanding on April 23, 2020, was $2,528,812,039.68 (U.S. dollars).[30] Covidien Sarl also had currency forwards and swaps outstanding on many other Relevant Dates within 15 months of the Petition Date in excess of the $1 billion threshold to be a "financial participant."[31]

Moreover, Covidien Sarl also had contracts to acquire the shares of other medical-technology companies, or options to do so, outstanding on various Relevant Dates within 15 months of the Petition Date, for amounts far greater than the alternative "financial participant" threshold of mark-to-market positions of $100 million.[32] Those agreements included:

- ***Acquisition of Digital Surgery Limited***. On February 12, 2020, Covidien Sarl entered into a Share Purchase Agreement to purchase 100% of the shares of Digital Surgery Limited for a purchase price of $[redacted] million, subject to certain closing adjustments, plus up to $[redacted] million contingent upon the achievement of specified milestones. Covidien Sarl paid $[redacted] at closing, plus $[redacted] million in milestone payments, for a total of $[redacted] million.[33]

- ***Acquisition of Medicrea International***. On July 15, 2020, Covidien Sarl entered into an agreement to make a public tender offer to purchase up to all shares of Medicrea International for €7 Euros per share. A total of [redacted] shares were tendered by shareholders, giving Covidien Sarl more than 90% ownership of Medicrea. At closing, Covidien Sarl paid €[redacted] for the shares. The U.S. dollar equivalent of the purchase price was $[redacted] million at contract signing and $[redacted] million at closing, based on the exchange rates on those dates.[34]

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28 *See id.* ¶¶ 8-9 & Exs. 1-9.

29 *See* Husnik Decl. ¶¶ 9-12 & Ex. 9.

30 *See* Husnik Decl. ¶ 13 & Exs. 10-11.

31 *See* Husnik Decl. ¶ 7.

32 *See Declaration of Ron Garber* ("Garber Decl."), filed herewith, ¶¶ 5-15.

33 *See id.* ¶¶ 6-8 & Exs. 1-17.

34 *See* Garber Decl. ¶¶ 9-11 & Exs. 18-20.

- [redacted] ***Acquisition Option Agreement***. On June 16, 2020, Covidien Sarl entered into an Acquisition Option Agreement granting Covidien Sarl an option to purchase all shares of [redacted] for a purchase price of $[redacted] million, subject to certain adjustments (adding [redacted]'s cash and [redacted]; less certain [redacted] liabilities, a $[redacted] million fee, and an amount attributable to Covidien Sarl's holdings; and plus or minus net working capital). Although the sale did not close, the closing adjustments were not expected to reduce the $[redacted] million purchase price materially. The option remained outstanding through at least the Petition Date.[35]

Covidien Sarl's counterparties for these contracts were not Covidien affiliates, but rather third-party companies, their shareholders, or both.[36]

ARGUMENT

A party is entitled to summary judgment if it "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056. The Covidien Defendants bear the burden of demonstrating "the absence of a genuine issue of material fact," *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), but the Trust cannot defeat summary judgment based on mere conjecture and denials. *Schoch v. First Fid. Bancorp.*, 912 F.2d 654, 657 (3d Cir. 1990). Here, given the ample evidence presented, there is no genuine dispute of material fact, and the Covidien Defendants are entitled to judgment as a matter of law under Section 546(e).

I. SECTION 546(e)'s SAFE HARBOR APPLIES

A. The Safe Harbor Applies If Two Requirements Are Met: The Challenged Transfer (1) Was A Settlement Payment Or Transfer Made In Connection With A Securities Contract, And It Was Made (2) To A Financial Participant

Section 546(e) has two requirements: the challenged transfers were (1) "settlement payments" or "transfer[s] made … in connection with a securities contract," (2) "by or to (or for

[35] *See* Garber Decl. ¶¶ 12-15 & Exs. 21-22.

[36] *See* Garber Decl. ¶ 6 & n.2, ¶ 10, ¶ 13 & n.10.

the benefit of)" a qualifying participant, including a "financial participant." 11 U.S.C. § 546(e); Op. at 27.

Summary judgment is commonly granted to defendants (or the complaint is dismissed) where, as here, those two requirements are met. *See In re Samson Res. Corp.*, 2022 WL 3135288, at *4-5 (Bankr. D. Del. Aug. 4, 2022) (Shannon, J.) (granting summary judgment to defendant under § 546(e)); *In re DSI Renal Holdings, LLC*, 617 B.R. 496, 505-506 (Bankr. D. Del. 2020) (Owens, J.) (same); *see also In re Quorum Health Corp.*, 2023 WL 2552399, at *7-8 (Bankr. D. Del. Mar. 16, 2023) (Shannon, J.) (granting motion to dismiss under § 546(e)).

B. <u>The Safe Harbor's First Requirement Is Met</u>

The Court has already held that Section 546(e)'s first requirement is met with respect to the transfers challenged in Count I. *See* Op. at 29 ("The transfer of the Note Proceeds and the Non-Pharma Assets in exchange for MIFSA's shares constitutes a settlement payment under Section 546(e) of the Code. … It also constitutes a transfer made in connection with a securities contract, namely the Separation Agreement."). As discussed in Section II below, it is also met with respect to each of the other transfers that the Trust seeks to avoid.

C. <u>The Safe Harbor's Second Requirement Is Met</u>

1. An Entity Qualifies As A Financial Participant If It Had Qualifying Financial Contracts With An Aggregate Value Of $1 Billion Notional Or Actual Principal Amount Or $100 Million In Mark-to-Market Positions Outstanding At Any One Of Three Relevant Points In Time

The Bankruptcy Code defines a "financial participant" as an entity that had high-value financial contracts outstanding at one of three relevant points in time. 11 U.S.C. § 101(22A)(A). Qualifying financial contracts include a "securities contract," "swap agreement" or "forward contract," each as defined in the Code. *Id.* The contracts may be "with the debtor or any other entity," "other than an affiliate." *Id.* The value of the contracts, when "aggregated across counterparties," must meet one of two tests: the contracts must have either (1) "a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding," or (2) "gross mark-to-market positions of not less than $100,000,000." *Id.* Finally, the safe harbor applies if the entity had contracts with the requisite value outstanding at any one of three points in time: (1) "at the time [the entity] enters into a securities contract," (2) "*or* at the time of the date of the filing of the petition," (3) "*or* on any day during the 15-month period preceding the date of the filing of the petition." *Id.* (emphases added). The test need be met on only one of those dates, not all of them. *See Quorum*, 2023 WL 2552399, at *7-8 (parent of bankrupt spun-off company was a financial participant based on securities contract outstanding two months before petition date); *Samson*, 2022 WL 3135288, at *4-5 (debtor's swaps on petition date and prior month made it a financial participant).

Accordingly, the Covidien Defendants qualify as financial participants if they had qualifying financial contracts of the requisite value outstanding at any of the following dates: (1) June 28, 2013 (the Spin Date), when the parties entered into the Separation Agreement (a "securities contract"), (2) October 12, 2020 (the Petition Date), when Mallinckrodt filed for bankruptcy, or (3) any date within the 15 months before the Petition Date, i.e., July 12, 2019 through October 11, 2020 (each, a Relevant Date). They did.

The Amended Complaint treats the four Covidien Defendants as one, collectively defining them as "Covidien." Am. Compl. ¶¶ 1, 23. Other than identifying each and noting that Covidien plc owned Covidien Ltd., which owned CIFSA, which owned Covidien Sarl (*id.* ¶¶ 20-23), the Amended Complaint includes no meaningful substantive allegations distinguishing one defendant from any other. Instead, it describes all four as "Mallinckrodt's former parent holding companies" (*id.* ¶ 1), attributes all the relevant actions to "Covidien," and asserts that, prior to the spinoff, "Covidien and its various subsidiaries … operated as a single economic enterprise" (*id.* ¶ 140). Given the Trust's own theory of the case, it should suffice as a matter of law that any of the Covidien Defendants (or all of them in combination) met the test for a "financial participant" on a Relevant Date. But, in any event, all four did individually as well.

2. CIFSA Qualified As A Financial Participant

CIFSA was a financial participant because it had securities contracts (i) on the Spin Date in the principal amount of at least $5 billion and (ii) on April 24, 2020, another Relevant Date, in the principal amount of more than $1.2 billion. All "financial participant" requirements are met.

First, CIFSA's contracts were qualifying "securities contracts." The indentures and notes granted call and put options giving (i) CIFSA the option to redeem the notes and (ii) the noteholders the right upon a change of control to require that CIFSA purchase the notes, for a price equal to the notes' outstanding principal amount plus accrued interest and applicable premiums. The notes were "securities," 11 U.S.C. § 101(49),[37] and the call and put options to buy or sell the notes were "contract[s] for … an option to purchase or sell … any … security," "including any repurchase … transaction on any such security," or any "agreement or transaction that is similar to" such an agreement. *See id.* § 741(7)(A)(i), (vii). Courts have held that similar contracts granting options to purchase outstanding notes were securities contracts. *See In re Quebecor World (USA) Inc.*, 719 F.3d 94, 98-99 (2d Cir. 2013) (note purchase agreement providing that affiliate could purchase issuer's notes from noteholders by complying with the provisions giving issuer a prepayment option to redeem the notes was a "securities contract").[38]

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[37] *Id.* § 101(49)(a)(i), (iv) & (v) (defining "security" to include a "note," "bond" and "debenture"); *Quorum*, 2023 WL 2552399, at *7 (holding "private offering of senior secured notes" were securities contracts).

[38] In *Quebecor*, the option was exercised by an affiliate of the note-issuer, and hence the Second Circuit did not address whether the contract would have qualified as a securities contract if the issuer itself had redeemed the notes. 719 F.3d at 99. But the Second Circuit removed any doubt when it subsequently held that an issuer's contract to "redeem" its own securities (shares there) is a "securities contract." *In re Tribune Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 80-81 (2d Cir. 2019) ("The term 'redemption,' in the securities context, means 'repurchase.'").

Second, the contracts were not with CIFSA's affiliates, but rather with Deutsche Bank, as trustee for the noteholders. *Third*, the contracts were outstanding on at least two Relevant Dates, the Spin Date and April 24, 2020, within 15 months of the Petition Date. Although CIFSA had completed the initial sale of the notes before the spinoff, the call and put options to repurchase the notes remained outstanding on both the Spin Date and April 24, 2020 (and preceding dates).

Fourth, the contracts met the $1 billion principal amount test on both of those dates. As the Trust has conceded, the Bankruptcy Code's $1 billion "actual principal amount" test "refers to the face amount owing under a contract."[39] At the Spin Date, the contracts granted options to CIFSA to repurchase, and to the noteholders to sell, the notes for a purchase price equal to the aggregate outstanding principal amount of the notes of $5 billion, plus premiums and interest. The test was also met on April 24, 2020 (and preceding Relevant Dates), when some of those option contracts remained outstanding to purchase the notes for an aggregate principal amount of more than $1.2 billion, plus premiums and interest. CIFSA was a "financial participant."

3. Covidien plc And Covidien Ltd. Each Qualified As A Financial Participant

Each of Covidien plc and Covidien Ltd. was also a financial participant. *First*, Covidien plc's and Covidien Ltd.'s guarantees of the CIFSA indentures and notes were "securities contracts." The guarantees fully guaranteed all of CIFSA's obligations under the indentures and notes, including the call and put options to purchase the notes. Covidien plc's and Covidien

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The Trust's earlier reliance in its opposition to Covidien's motion to dismiss on *In re Qimonda Richmond LLC*, 467 B.R. 318 (Bankr. D. Del. 2012) (Walrath, J.), is misplaced. Although the court held on the facts of that case that the industrial-revenue bond indenture there was not a "securities contract," the opinion gives no indication that any party ever argued that the indenture qualified as a securities contract by reason of any call or put option to purchase the bonds; perhaps for that reason, the opinion does not include any discussion of the statutory text defining a "securities contract" to include an "option to purchase or sell" a security. *Id.* at 323. The Trust's reliance on *MPM* is unavailing for the same reason. *See In re MPM Silicones, LLC*, 2014 WL 4436335, at *21 (Bankr. S.D.N.Y. Sept. 9, 2014), *aff'd*, 531 B.R. 321 (S.D.N.Y. 2015), *aff'd in part and rev'd in part on other grounds*, 874 F.3d 787 (2d Cir. 2017).

[39] *See Opp'n of Opioid Master Disbursement Trust II to Covidien's Mot. to Dismiss Compl.*, [D.I. 23], at 39.

Ltd.'s guarantees of those contracts, therefore, fall within the express terms of the Code's "securities contract" definition, which includes "any guarantee" of a securities contract. *See* 11 U.S.C. § 741(7)(A)(xi) (defining "securities contract" to include "any … credit enhancement related to any" securities contract, "including any guarantee … by or to a … financial participant in connection with any" securities contract). Courts have accordingly held that guarantees of securities contracts are themselves "securities contracts." *See, e.g.*, *In re Lehman Bros. Holdings Inc.*, 469 B.R. 415, 438-439 (Bankr. S.D.N.Y. 2012).

Second, the counterparties to the CIFSA indentures, notes and guarantees were unaffiliated third parties, Deutsche Bank and the noteholders. *Third*, the guarantees, like the underlying indentures and notes, were outstanding on at least two Relevant Dates, the Spin Date, and April 24, 2020 (and preceding dates), which was within 15 months of the Petition Date.

Finally, the guarantees exceeded the $1 billion principal amount test on both of those dates. Covidien plc and Covidien Ltd. each guaranteed, jointly and severally, full performance of all obligations under the notes, including CIFSA's obligation, if it gave notice calling the notes, to redeem the notes when they subsequently came due on the redemption date, as well as CIFSA's obligation to purchase the notes if the noteholders exercised their put option. Covidien plc and Covidien Ltd. thus each stood behind the options to purchase the notes for $5 billion and $1.2 billion (plus premiums and interest), respectively, on those Relevant Dates.

The Trust's earlier suggestion in its opposition to Covidien's motion to dismiss that the $1 billion principal test might not be met for Covidien plc and Covidien Ltd. is incorrect as a matter of law. The Trust acknowledged the language in the "securities contract" definition providing that a guarantee of a securities contract is itself a "securities contract," but highlighted the words that follow in the definition: "but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562." *See* 11 U.S.C. § 741(7)(A)(xi).[40] That damages-measure exception has no application here. Rather, it applies only when a party asserts a claim for damages after a bankrupt debtor rejects the guaranteed securities contract, or a party terminates, liquidates, or accelerates the contract, making clear that any such claim against the debtor in bankruptcy may not exceed the amount measured in accordance with Bankruptcy Code Section 562. There was no such rejection, termination, or the like here, nor any claim for damages. In this case, therefore, the value of the guarantee "securities contracts" for purposes of the "financial participant" definition is the outstanding principal amount of the securities contracts that were guaranteed—which as discussed, easily exceeded the $1 billion principal test.

The Bankruptcy Code makes this clear. Specifically, the Code provision cross-referenced in the "guarantee" subclause (xi) of the "securities contract" definition—Section 562—governs the measure of damages "*[i]f* the trustee rejects a … securities contract" "or *if* a … financial participant" "liquidates, terminates, or accelerates such contract." *See* 11 U.S.C. § 562(a) (emphases added). In such a case, Section 562 specifies the date on which such damages are to be measured. *Id.* § 562(a)-(c) ("damages shall be measured as of the earlier of … the date of such rejection; or … the date … of such liquidation, termination, or acceleration," or "the earliest subsequent date … on which there are commercially reasonable determinants of value"). But in the absence of such a termination, Section 562 and its damages measure have no relevance. *See In re Lehman Bros. Holdings Inc.*, 594 B.R. 564, 569-573 (Bankr. S.D.N.Y. 2018) (holding that Section 562 was inapplicable and did not limit the amount recoverable, even

[40] *See Opp'n of Opioid Master Disbursement Trust II to Covidien's Mot. to Dismiss Compl.*, [D.I. 23], at 43.

against a debtor in bankruptcy, on a guarantee of a securities contract because the securities contract and guarantee had not been unilaterally terminated).

Here, Section 562 never came into play. The Covidien indentures, notes and guarantees were not rejected in bankruptcy—Mallinckrodt was not even a party to them. Nor did any party terminate, liquidate, or accelerate them. And no party asserted any claim for damages arising out of the contracts, against either Covidien or Mallinckrodt. Rather, the guarantees and option contracts on the notes remained fully outstanding on the Spin Date and April 24, 2020, in the principal amount of at least $5 billion and $1.2 billion, respectively.

If there were any doubt, the Third Circuit has ended it. *See In re HomeBanc Mortgage Corp.*, 945 F.3d 801, 811-813 (3d Cir. 2019) (construing a parallel provision in another safe harbor defining a "repurchase agreement," which similarly provides that "any guarantee" or other "credit enhancement" of a repurchase agreement is itself a "repurchase agreement," "but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562"); 11 U.S.C. § 101(47)(A)(v). Although the dispute in that case involved a different safe harbor, which exempted the liquidation of repurchase agreements from the Bankruptcy Code's automatic stay (11 U.S.C. § 559), the case turned on whether the exception in the parallel "credit enhancement"/"guarantee" provision limiting damages to Section 562's measure applied. The Third Circuit held that the damages-measure exception did *not* apply because the non-debtor party had not asserted a legal claim for damages against the debtor arising out of the repurchase agreement. *HomeBanc*, 945 F.3d at 812-813.

In particular, *HomeBanc* concerned collateral securing a repurchase agreement. Like the guarantees here, the collateral was a "credit enhancement" of a safe-harbored contract (a repurchase agreement there) and hence itself qualified as a "repurchase agreement." But the bankruptcy trustee argued that the collateral qualified as a "repurchase agreement" only to the extent of any damages measured in accordance with Section 562, citing the parallel damages-measure exception. The trustee accordingly argued that Bear Stearns had violated the automatic stay by liquidating the collateral in amounts that exceeded Bear Stearns' commercially reasonable damages as measured under Section 562. *See* 945 F.3d at 805-810.

The Third Circuit rejected that argument. It construed the "not to exceed the damages … measured in accordance with section 562" exception as serving only to limit a non-debtor's claim in bankruptcy against the debtor for damages if that party has asserted such a claim. *See HomeBanc*, 945 at 811-813. Because Bear Stearns had not asserted any damages claim, Section 562 and the corresponding damages-measure exception in the "credit enhancement"/"guarantee" provision of the "repurchase agreement" definition did not apply. *See id.* at 813. The Third Circuit accordingly held that Bear Stearns had not violated the automatic stay by liquidating the full amount of the collateral, because the collateral was a "credit enhancement" qualifying as a safe-harbored "repurchase agreement," and the damages-measure exception did not apply to place any limit on the value that was entitled to safe-harbor protection. *See id.*

The Third Circuit's holding applies to this case with equal force. "A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). The Section 562 damages-measure exception in the "credit enhancement"/"guarantee" clause of the "repurchase agreement" definition is identical to the parallel exception in the "securities contract" definition. There is no reason why those provisions should be construed differently. Accordingly, the principal amount of the guarantee "securities contracts" here likewise should not be limited by the damages-measure exception in the "securities contract" definition, since the dispute here, too, does not concern any "damages" claims for breach of the guarantee of the notes option contracts asserted by the Covidien Defendants against Mallinckrodt.[41]

In sum, Covidien plc and Covidien Ltd. were each a financial participant because each had securities contracts meeting the $1 billion test at both the Spin Date and on April 24, 2020, another Relevant Date.

4. Covidien Group S.à.r.l. Qualified As A Financial Participant

Covidien Sarl qualified as a "financial participant" on two independent grounds: (i) it had currency forward and swap contracts with an aggregate notional amount in excess of $2.5 billion on April 23, 2024, within 15 months of the Petition Date, and (ii) it had securities contracts to purchase shares, or options to do so, with mark-to-market positions in excess of $100 million on several Relevant Dates within that period.

Currency forwards and swaps. *First*, the currency contracts were qualifying "swap agreements" and "forward contracts." The Bankruptcy Code defines a "swap agreement" to include "a currency swap … or forward agreement," "a … forward … foreign exchange … agreement," and any "similar" "agreement or transaction that is … the subject of recurrent dealings in the swap or other derivatives markets … and … is a forward [or] swap … on one or more … currencies." 11 U.S.C. § 101(53B)(A)(i)(II)-(III), (ii)(I)-(II). The Code likewise defines a "forward contract" to include "a contract … for the purchase, sale, or transfer of a commodity … or any similar good, article, service, right, or interest which is presently or in the

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[41] The Trust's prior reliance in its opposition to Covidien's motion to dismiss on *In re Samson Resources Corp.*, 625 B.R. 291 (Bankr. D. Del. 2020), is misplaced. Considering a parallel Code provision defining a "swap agreement" to include a guarantee of a swap agreement, the Court did not address whether—much less hold that—the parallel Section 562 damages-measure exception in that definition applied and limited the value of the swap guarantees even if no party had terminated or liquidated the contract or asserted a claim for damages under the guarantee against the debtor. Instead, the court denied summary judgment because the record was too undeveloped and did not indicate the value of the swaps or if they had been terminated, liquidated, or accelerated. *Id.* at 304.

future becomes the subject of dealing in the forward contract trade … with a maturity date more than two days after the date the contract is entered into," as Covidien Sarl's currency forwards provided.[42] *Id.* § 101(25)(A).

Second, Covidien Sarl's contract counterparties were not Covidien affiliates, but major global banks. *Third*, the contracts were outstanding on April 23, 2020, a Relevant Date within 15 months of the Petition Date (as well as on many other Relevant Dates within that period). *Fourth*, the aggregate notional amount of the contracts exceeded $2.5 billion, well in excess of the $1 billion threshold. Covidien Sarl therefore qualified as a "financial participant."

Share purchase contracts. Covidien Sarl also independently qualified as a financial participant based on its acquisition and option contracts to purchase the shares of other medical-technology companies. *First*, the agreements were qualifying "securities contracts" as "contract[s] for the purchase [or] sale … of a security" or "option to purchase or sell any such security." 11 U.S.C. § 741(7)(A)(i). *Second*, the contracts were not with Covidien affiliates, but third-party companies and/or their shareholders. *Third*, the contracts were outstanding on various Relevant Dates within 15 months of the Petition Date. *Fourth*, the aggregate value of the contracts exceeded the $100 million mark-to-market positions test on those Relevant Dates.

For instance, on February 12, 2020, Covidien Sarl had outstanding a contract to purchase the shares of Digital Surgery Limited for $[redacted] million (the amount Covidien Sarl has paid). Likewise, from July 15, 2020, through the Petition Date, Covidien Sarl had an outstanding contract to purchase the shares of Medicrea International through a public tender offer for at least €[redacted] million Euros (the amount Covidien Sarl paid for the tendered shares in November 2020), or $[redacted] million to $[redacted] million based on the exchange rates at the times of contract signing

[42] *See* Husnik Decl. ¶¶ 9-13 & Exs. 9-11 (settlement "Value Dates" more than two days after "Trade Dates").

and closing, respectively. And Covidien Sarl's aggregate mark-to-market positions were even higher during that time, because Covidien Sarl also had a contract outstanding from June 16, 2020, through the Petition Date giving it the option to purchase the shares of [redacted] for $[redacted] million, subject to closing adjustments.

These contracts exceeded the $100 million mark-to-market test by hundreds of millions of dollars. As the term suggests, "mark-to-market positions" refers to the "market" value of the "positions," *i.e.*, the market value of the shares being purchased or offered for sale under the contracts. *See, e.g.*, *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 894 F.3d 339, 349 (D.C. Cir. 2018) (observing that Financial Accounting Standards Board's standards "requir[e] 'mark-to-market' accounting reflecting fair market value of investment assets").

The prices Covidien Sarl agreed to pay for the shares under its acquisition and option contracts—prices negotiated at arm's length in transactions with unaffiliated third parties—were, by definition, the "market" values of the shares. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973) ("Market value" is "what a willing buyer would pay in cash to a willing seller."); *In re Samson Resources Corp.*, 2023 WL 4003815, at *1 (Bankr. D. Del. June 14, 2023) ("It is black letter law in this Circuit that the gold standard for determining the value of an asset is to sell it in an open and fair market. … [T]he value is fixed and conclusively established by the price paid at closing."), *certification of direct appeal denied*, 2024 WL 2390401 (D. Del. May 23, 2024); *id.* at *25-26 (granting trial judgment for defendants on $7.2 billion fraudulent-transfer claim because purchase price of debtor's stock in arm's length sale between third parties established its fair market value).[43]

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[43] *See, also, e.g.*, H.R. Rep. No. 109-31(I), at 131, *reprinted in* 2005 U.S.C.C.A.N. 88, 191 (2005) ("financial participant" definition was "derived from threshold tests contained in Regulation EE promulgated by the Federal Reserve Board"); 12 C.F.R. § 231.2(f) (Regulation EE: "Gross mark-to-market positions in one or more financial contracts means the sum of the absolute values of positions in those contracts, adjusted to reflect the market values

II. SECTION 546(e)'S SAFE HARBOR IS A BAR TO ALL OF THE TRUST'S CLAIMS FOR AFFIRMATIVE RECOVERY AGAINST COVIDIEN

A. Count I: Transfers In The Spinoff

The Court has already held that the spinoff transfers challenged in Count I were qualifying securities transactions, satisfying Section 546(e)'s first requirement. Op. at 29-30. Because the Covidien Defendants were financial participants, as discussed above, the second requirement is also met. Section 546(e) applies, and summary judgment should be granted for Covidien on Count I.

B. The Remaining Counts Seeking Affirmative Recovery

Although the parties and the Court did not previously address whether Section 546(e) also bars the Trust's remaining claims, the Covidien Defendants' qualification as financial participants leaves only one question remaining as to those claims—whether they challenge transfers that constitute "qualifying transactions" under Section 546(e). Because each claim seeking affirmative recovery challenges such a qualifying transaction, Section 546(e) bars those claims too.

1. Counts II-III: Tax And Indemnity Obligations And Payments

Section 546(e) bars Counts II and III to the extent that they seek to recover any payments that Mallinckrodt allegedly made on account of the tax and indemnity obligations that it assumed in the spinoff. *See* Am. Compl. ¶¶ 277, 330 & Prayer for Relief ¶ E (seeking to recover "all payments that Mallinckrodt made on account of the avoided Tax Liability"). Those alleged payments fall within the safe harbor because they were "transfer[s] made … in connection with a securities contract," the Separation Agreement. 11 U.S.C. § 546(e); Op. at 29-30.

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of those positions in accordance with the methods used by the parties to each contract to value the contract."); *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 806 F. Supp.2d 662, 666 (S.D.N.Y. 2011) (noting that a repurchase agreement seller "marks[s]-to-market the price of the security on its balance sheet").

The Trust itself acknowledges in the Amended Complaint that any tax payments were made in connection with the Separation Agreement. It concedes that Mallinckrodt executed the Tax Matters Agreement and assumed the Tax Liability "[i]n connection with the spinoff," and that "all payments that Mallinckrodt made on account of the avoided Tax Liability" were "transferred in connection with, or as a result of, the Spinoff." Am. Compl. ¶¶ 276-277 & Prayer for Relief ¶ E. And the Tax Matters Agreement was part of the Separation Agreement. *See* Wood Decl. Ex. 1 (Separation Agreement) ¶ 11.1(a) (both were "one and the same agreement"). Any alleged payments on the Tax Liability were thus made "in connection with" the Separation Agreement.

The "in connection with" standard is not a demanding one. "Section 546(e) sets a low bar for the required relationship between the securities contract and the transfer sought to be avoided." *In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d 411, 421-422 (2d Cir. 2014). A transfer need not be made "pursuant to" the contract, but rather the statute "merely require[s] that the transfer have a connection to the securities contract." *Id.* Any transfer that is "related to" or "associated with" the contract suffices. *Id.*[44] This case law is consistent with Supreme Court and Third Circuit precedent construing the term "in connection with" broadly in other federal statutes. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 84-85 (2006) (securities statute: "in connection with" the purchase or sale of securities has been given "a broad interpretation"); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 710 (3d Cir. 2022) (oil drilling statute: "'[i]n connection with' is 'broad'"), *cert. denied*, 143 S. Ct. 2483 (2023).

[44] *See also, e.g.*, *Petr v. BMO Harris Bank N.A.*, 95 F.4th 1090, 1101 (7th Cir. 2024) (recognizing "broad construction of the phrase" "in connection with" in construing §546(e)); *Crescent Resources Litig. Trust v. Duke Energy Corp.*, 500 B.R. 464, 476 (W.D. Tex. 2013) ("Section 546(e)'s 'in connection with' language "is by its own terms very broad" and "has been interpreted to mean 'related to an agreement'" (quotation omitted)); *In re Lehman Bros. Holdings, Inc.*, 469 B.R. 415, 442 (Bankr. S.D.N.Y. 2012) (construing "the phrase 'in connection with'" in §546(e) "broadly to mean 'related to'").

This "low bar" is easily met here. Any payments of the Tax Liability assumed in the spinoff were made pursuant to the Separation Agreement and thus were amply "related" to it.

That any such payments may have been made after the spinoff closed does not change the analysis. "Section 546(e) contains no temporal requirement," and "the passage of time, however long, does not categorically eliminate any connection." *Petr v. BMO Harris Bank N.A.*, 95 F.4th 1090, 1101 (7th Cir. 2024). Courts have thus held that transfers made after a securities contract's execution or closing were nonetheless "in connection with" the contract where, as here, the transfers related to the securities contract. *See id.* (debtor's payment of a loan that had financed a stock purchase was "in connection with" a securities contract, although the payment was made a month after the stock purchase closed); *Madoff*, 773 F.3d at 421-422 (customers' "subsequent withdrawals from their accounts" with stockbroker were made "in connection with" securities contracts the customers had previously executed); *In re Lehman Bros. Holdings, Inc.*, 469 B.R. 415, 424-425, 428-430, 441-443 (Bankr. S.D.N.Y. 2012) (debtor's transfers of cash to its bank were made "in connection with" the parties' previously executed securities contracts).

To be sure, Section 546(e) expressly bars only the avoidance of "*transfers*," and Counts II and III also seek to avoid Mallinckrodt's incurrence of the underlying *obligations* to pay the Tax Liability and to indemnify Covidien. Am. Compl. ¶¶ 275-284, 324, 330. But even if Section 546(e) may not apply to Mallinckrodt's incurrence of the underlying *obligations*, it does apply to any *payments* that Mallinckrodt allegedly made on account of those obligations, since the payments were "transfers," and they were made "in connection with" a securities contract. *See Lehman*, 469 B.R. at 443-446 (even if §546(e) did not bar avoidance of debtor's *obligation* guaranteeing a securities contract, it barred avoidance of *transfers* on account of the obligation).

To the extent that Counts II and III seek to avoid the underlying tax and indemnity *obligations* themselves, no practical purpose would be served except possibly to provide the Trust an argument for objecting to Covidien's proofs of claim in Mallinckrodt's underlying 2020 bankruptcy case. Mallinckrodt's bankruptcy plan discharged Mallinckrodt from its tax and indemnity obligations and relegated Covidien to filing a proof of claim against the bankruptcy trusts for any tax or indemnity liability Mallinckrodt had. As discussed below, if the only claims that survive the safe harbor are the Trust's objections to Covidien's proofs of claim, those objections should be handled through the bankruptcy claims process, not this litigation.

2. Count IV: Pre-Spin Cash Transfers Of $867 Million

Section 546(e) bars Count IV, which seeks to avoid and recover $867 million in cash transfers that Mallinckrodt allegedly made from 2010 through 2012 when, according to the Trust, "Covidien was trying to sell Mallinckrodt and contemplated the spinoff." Am. Compl. ¶¶ 254, 331-336. That the Trust itself has asserted that the $867 million was paid in connection with the spinoff is not surprising. If, instead, these payments were ordinary-course dividends and cash-management transfers that subsidiaries pay or make to their parents every day, the Trust's claim to avoid them would fail on the merits, because there could be no claim that Covidien caused them as part of a scheme to defraud the Debtors' future creditors. The Trust is thus left to contend that the cash transfers were made in contemplation of the (supposedly fraudulent) spinoff. But under that theory of the case, the Trust's claim to avoid those transfers is foreclosed by Section 546(e) because the transfers were, according to the Trust itself, made "in connection with" the Separation Agreement for the spinoff.

As discussed above, the "in connection with" standard is extremely broad and simply requires that a transfer be related to a securities contract. There is no temporal limitation, and the transfer need not be contemporaneous with the execution or closing of the securities contract, so long as the transfer has some connection with the contract. *See supra* Part II.B.1; *Petr*, 95 F.4th at 1101; *Madoff*, 773 F.3d at 421-422; *Lehman*, 469 B.R. at 441-443. The very premise of Count IV is that the pre-spin transfers were made in contemplation of the spinoff, which was effectuated by the Separation Agreement. The Trust's claim to recover those transfers is thus barred by the safe harbor.

3. Count V: Reimbursement Alter-Ego Claim

Section 546(e) also forecloses Count V, which seeks reimbursement, indemnification, or contribution of amounts Mallinckrodt paid in prepetition opioid litigation and its bankruptcy case under an alter-ego theory. Although Section 546(e) does not *directly* bar this alter-ego claim—which is not an avoidance claim within Section 546(e)'s scope—the safe harbor does so *indirectly*, by precluding the Trust from avoiding Mallinckrodt's release of the alter-ego claim under the Separation Agreement. Unless the release is avoided, the Trust is bound by it, because the Trust is bringing the alter-ego claim as the bankruptcy successor to Mallinckrodt and is therefore "subject to the same defenses as could have been asserted by the defendant had the action been instituted by the debtor," Mallinckrodt. *Off. Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 356 (3d Cir. 2001) (quotation omitted); 11 U.S.C. § 541(a)(1). Because Mallinckrodt would be barred by its release under the Separation Agreement from bringing any alter-ego claim against Covidien, the Trust, standing in Mallinckrodt's shoes, is barred as well. And because Section 546(e) blocks the Trust from seeking to undo that release as an alleged fraudulent transfer, the alter-ego claim fails.

Mallinckrodt's release of the alter-ego claim is readily apparent. The Separation Agreement contained broad mutual releases by which Mallinckrodt and Covidien each released the other from liability for any potential claims it had at the time of the spinoff. Just as Covidien did with respect to any claims it might have, Mallinckrodt "release[d] … Covidien and the members of the Covidien Group [and] their respective Affiliates … from *any and all Liabilities whatsoever* … arising from *any* acts or events occurring or failing to occur … or *any* conditions existing … on or before the Effective Time" of the spinoff.[45] That all-encompassing language covers the purported alter-ego claim that the Trust now brings in Mallinckrodt's shoes, which is based on Covidien's alleged pre-spin conduct in operating Covidien and Mallinckrodt as a supposed "single economic entity" before Mallinckrodt was spun off.

The release is enforceable notwithstanding Mallinckrodt's rejection of the Separation Agreement in its bankruptcy. Rejection "constitutes a breach of … contract," 11 U.S.C. § 365(g)(1), not an avoidance or rescission of the contract. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1661-1663 (2019). Because rejection merely "has the same effect as a breach outside bankruptcy," it "cannot rescind rights that the contract previously granted." *Id.* at 1666 (rejection of trademark license did not rescind license that debtor gave licensee before bankruptcy). Mallinckrodt's rejection of the Separation Agreement therefore did not rescind the release that Mallinckrodt gave Covidien years before it filed for bankruptcy.

Accordingly, unless the Trust can undo the release as a fraudulent transfer—and it cannot due to the safe harbor—Mallinckrodt's release bars the alter-ego claim. The Trust's prior contention that the release is unenforceable is meritless.[46] The Trust's argument rests on a few inapposite cases, which limited enforcement of *prospective* releases of *future* fraud or intentional wrongdoing.[47] Those cases are irrelevant to the release of an *existing* claim like Mallinckrodt's purported alter-ego claim here arising out of its *past* life as a Covidien subsidiary before the spin.

45 *See* Wood Decl. ¶ 8 & Ex. 1 (Separation Agreement) §§ 4.1(a), (d)-(e) (emphasis added); *id.* art. I (defining "Liabilities" broadly to include "any … claim," "whether … asserted or unasserted, liquidated or unliquidated, foreseen or unforeseen, known or unknown").

46 *See Reply Br. in Supp. of Mot. of Opioid Trust II for Leave to File Am. Compl.*, D.I. 47, at 14.

47 *See, e.g., Kalisch-Jarcho, Inc. v. City of New York*, 448 N.E.2d 413, 416 (N.Y. 1983) (holding that construction contract exculpating New York City from damages for future delays was enforceable under New York

Mutual-release provisions in spinoff agreements like the Separation Agreement are common and enforceable. As one treatise explains, "[w]hen one company spins off a subsidiary or division, the common practice is for the parent company and the spun-off entity to execute a broad mutual release of claims and liabilities based upon or arising from their former affiliation and dealings. The intent is to create a complete break in the relationship and avoid vexatious legal entanglements over past deeds and deals."[48] For example, in another spinoff by a medical-device company (Abbott) of its pharmaceuticals business (AbbVie) that occurred in the same year, 2013, the separation agreement likewise included broad mutual releases between the parent and spun-off subsidiary. *In re AbbVie Inc. Stockholder Derivative Litig.*, 2015 WL 4464505, at *2 (Del. Ch. July 21, 2015). Market data shows that spinoff agreements nearly always contain mutual releases between the companies.[49] As the Delaware Chancery Court observed in the *AbbVie* case, "[w]here a corporation creates and then spins off a subsidiary, there is obvious business value in a clean break between the new entity and the old, including through mutual general releases of liability between the entities …." *Id.* at *1, *5-6.

Mutual releases are standard because they help effectuate the crux of a spin—the separation and allocation of assets and liabilities between the parent and spun-off subsidiary. The point of a spinoff is for the parent to separate a subsidiary that it spins off to its own shareholders. The same shareholders thus continue to own the same group of assets and liabilities immediately after the spinoff as beforehand, simply restructured in a new way that can

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law where delays were not due to intentional wrongdoing); *Demoulas v. Demoulas Super Mkts., Inc.*, 1995 WL 476772, at *70 (Mass. Super. Ct. Aug. 2, 1995) (shareholders' waiver in shareholders' agreement of right to bring derivative action for future breaches of fiduciary duty was unenforceable under Massachusetts law).

[48] *See* 11 Simon M. Lorne & Joy Marlene Bryan, *Acquisitions and Mergers: Negotiated and Contested Transactions* § 3:67.50 (2024).

[49] *See* Practical Law Corporate & Securities, *What's Market: Spin-Offs* (2024) Practice Note 5-605-5041 (providing links to separation agreements for seven "high profile" spinoffs that have closed in the past year, all of which contained mutual releases), https://us.practicallaw.thomsonreuters.com/5-605-5041.

unlock value for the shareholders by enabling each of the newly separate companies to focus on its core business. Accordingly, as the owners of the enterprise, the parent and its shareholders may allocate the assets and liabilities between the parent and spun-off subsidiary—including through mutual-release provisions—as they deem best. The only limitation is that they may not do so in a way that harms creditors' ability to be repaid in violation of the fraudulent-transfer laws—subject, of course, to the limitations of those laws, including Section 546(e)'s safe harbor.

Courts have accordingly rejected claims by spun-off subsidiaries that spinoff separation agreements are purportedly unenforceable, as the Trust contends here. For example, in *Aviall, Inc. v. Ryder System, Inc.*, 110 F.3d 892 (2d Cir. 1997), the Second Circuit held that a spun company was bound by a dispute-resolution provision in a spinoff separation agreement governed by New York law (like the Separation Agreement here[50]), rejecting arguments that the contract was invalid. *Id.* at 896-897. Although the spun-off subsidiary "played no role in the drafting of the Distribution Agreement and had no power to bargain over its terms," "that in no way points to any infirmity in the contracting process, for [the parent] was obligated to draft those terms in the manner most advantageous to its shareholders, who would also be the shareholders of [the spun subsidiary] immediately following the spin-off." *Id.* at 896 (citing *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171 (Del. 1988)).[51] That is consistent with the bedrock corporate-governance principle that wholly owned subsidiaries are created and managed for the benefit of the parent and its shareholders, subject only to the constraints of creditors' rights under fraudulent-transfer law. *See, e.g.*, *Anadarko*, 545 A.2d at

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50 *See* Wood Decl. Ex. 1 (Separation Agreement) § 11.2(a).

51 *See also Chemours Co. v. DowDuPont Inc.*, 2020 WL 1527783, at *14 (Del. Ch. Mar. 30, 2020) ("parent-subsidiary contracts" are "routinely enforced" "*not* because they reflect arms'-length bargaining between a parent and its subsidiary—which of course they do not—but because the parent determines they are desirable *for the parent*, and subsidiary fiduciaries 'are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders'" (quoting *Anadarko*, 545 A.2d at 1174)), *aff'd*, 243 A.3d 441 (Del. 2020).

1174-1177 (rejecting spun-off subsidiary's claims that agreements were voidable as one-sided in favor of the parent; "in a parent and wholly-owned subsidiary context," the "parent does not owe a fiduciary duty to its wholly owned subsidiary" and "the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders"); *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 173, 197-200 (Del. Ch. 2006) (explaining that "[w]holly-owned subsidiary corporations are expected to operate for the benefit of their parent corporations," except as limited by fraudulent-transfer law's protections for creditors), *aff'd*, 931 A.2d 438 (Del. 2007).

Accordingly, Mallinckrodt's release of Covidien in the Separation Agreement bars the Trust's alter-ego claim, unless the release can be avoided as a fraudulent transfer. But Section 546(e) would block any such fraudulent-transfer claim because the release was a "transfer … in connection with a securities contract." *First*, the release was a "transfer" because it disposed of Mallinckrodt's property, its alleged alter-ego cause of action. *See* 11 U.S.C. § 101(54)(D) (defining "transfer" as any "voluntary or involuntary … disposing of or parting with … property; or … an interest in property"); *In re World Health Alternatives Inc.*, 385 B.R. 576, 596-597 (Bankr. D. Del. 2008) (noting "the unremarkable proposition that a debtor's release of a cause of action … is a transfer of property of the debtor").[52] *Second,* that "transfer" was made "in connection with a securities contract," the Separation Agreement. The release was a term of the Separation Agreement and part of the consideration exchanged in the repurchase and transfer of

[52] *See also Peterson v. Imhof*, 2017 WL 1837856, at *10 (D.N.J. May 8, 2017) (Code's "broad definition of 'transfer' includes an agreement to release a counterparty"); *In re e2 Commc'ns, Inc.*, 320 B.R. 849, 855-857 (Bankr. N.D. Tex. 2004) ("the release of claims … is itself a transfer of property")); *In re FBN Food Servs., Inc.*, 185 B.R. 265, 271-273 (N.D. Ill. 1995) (debtor's release of claims was a transfer), *aff'd*, 82 F.3d 1387 (7th Cir. 1996).

MIFSA's shares and its pharmaceutical subsidiaries to Mallinckrodt plc. Thus, Section 546(e) would bar any effort to avoid the release, and the alter-ego claim fails as a matter of law.

4. Count VII: Disallowance Under Bankruptcy Code Section 502(d)

Because Section 546(e) bars the Trust's fraudulent-transfer claims in Counts I-IV, there are no avoidable transfers that could support disallowance of Covidien's proofs of claim under Bankruptcy Code § 502(d), as Count VII seeks. This claim fails as well.

5. The Only Remaining Counts—Counts VI And VIII—Seek To Subordinate Or Disallow Covidien's Claims Against The Mallinckrodt Bankruptcy Trusts And Can Be Resolved Through The Normal Bankruptcy Claims Process

The remaining Counts VI and VIII seek subordination or disallowance of Covidien's proofs of claim. Although Section 546(e) does not apply to those claims, they seek no affirmative recovery from Covidien, but only to deny Covidien's claims for recovery from the bankruptcy trusts. If only those claims objections remain, they should then be resolved in the normal bankruptcy claims process, without the expense and burden of this lawsuit.

CONCLUSION

Summary judgment should be granted in the Covidien Defendants' favor on Counts I, IV, V, and VII. Summary judgment should also be granted in the Covidien Defendants' favor on Counts II and III to the extent that they seek to recover any payments allegedly made on the assumed Tax Liability and indemnity obligations. In all other respects, Counts II, III, VI and VIII should be dismissed, without prejudice to any grounds the Trust may have to object to Covidien's proofs of claims in the bankruptcy claims-allowance process.

Respectfully submitted,

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/s/ R. Craig Martin

R. Craig Martin (DE 5032)
DLA PIPER LLP (US)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
Telephone: (302) 468-5700
Facsimile: (302) 394-2341
Email: craig.martin@us.dlapiper.com

and

Philip D. Anker (*pro hac vice*)
Peter G. Neiman (*pro hac vice*)
Ryanne E. Perio (*pro hac vice*)
Allyson Pierce (*pro hac vice*)
WILMER CUTLER PICKERING HALE
AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, N.Y. 10007
Telephone: (212) 230-8800
Facsimile: (212) 230-8888

and

Howard M. Shapiro (*pro hac vice*)
Joel Millar (*pro hac vice*)
WILMER CUTLER PICKERING HALE
AND DORR LLP
2100 Pennsylvania Ave. NW
Washington, D.C. 20037
Telephone: (202) 663-6100
Facsimile: (202) 663-6363

Attorneys for Covidien Limited, Covidien Group Holdings Ltd., Covidien International Finance S.A., and Covidien Group S.à.r.l.