

PROPOSED REDACTED VERSION

IN THE UNITED STATES BANKRUPTCY COURT DISTRICT OF DELAWARE

In re:	Chapter 11
MALLINCKRODT PLC, <i>et al.</i> ,	Case No. 20-12522 (JTD)
Debtors. ¹	(Jointly Administered)
OPIOID MASTER DISBURSEMENT TRUST II,	
Plaintiff,	
v.	Adv. Proc. No. 22-50433 (JTD)
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.	

DECLARATION OF RON GARBER

I, Ron Garber, hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief:

1. I submit this declaration in support of *Covidien's Motion for Summary Judgment Based on The Section 546(e) Safe Harbor* submitted on behalf of Covidien Limited (f/k/a Covidien Unlimited Company and f/k/a Covidien plc) ("Covidien plc"), Covidien Group Holdings Ltd. (f/k/a Covidien Ltd.) ("Covidien Ltd."), Covidien International Finance S.A. ("CIFSA"), and Covidien Group S.à.r.l. ("Covidien Sarl") (collectively, the "Covidien Defendants") in the litigation brought by the Opioid Master Disbursement Trust II (the "Trust") identified in the caption set out above.

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

2. I am a Senior Legal Director, Business Development, at Medtronic, Inc. In that role, my responsibilities include advising and representing Medtronic and its subsidiaries, including Covidien Group S.à.r.l., in connection with mergers, acquisitions, investments, and divestitures, including with respect to Medtronic's corporate development and ventures programs to acquire and/or invest in other medical-technology companies. I have held this position since April 2022.

3. I began my tenure at Medtronic in November 2017. Prior to my current role, I served as M&A Legal Counsel from November 2017 to May 2022. Prior to joining Medtronic, I was an associate and shareholder at Fredrikson & Byron, P.A. for seven years in the Mergers & Acquisitions practice group, and before that I was an associate at Davis Polk & Wardwell LLP in New York for three years. I am also a co-founder, President and Board Chair at The Yaya Foundation for 4H Leukodystrophy, a rare disease patient organization fighting for patients with 4H leukodystrophy and their families, where I have served for the past 6 years. I hold a J.D. from the University of Michigan Law School and a Bachelor's Degree in Business Administration and Management from the University of Michigan.

4. This declaration is based on my personal knowledge, my review of relevant documents, and my experience and knowledge of the mergers, acquisitions, and investment activities of Medtronic and its subsidiaries, including Covidien Group S.à.r.l. If called upon to testify, I would testify to the facts set forth herein.

Covidien Group S.à.r.l.'s share purchase agreements and options

5. Covidien Group S.à.r.l. ("Covidien Sarl") has historically made investments in and/or acquired other medical-technology companies. These investments and acquisitions provide Covidien Sarl and its affiliates access to new technologies and products, beyond those

generated by internal research and development efforts, to further the enterprise's strategic objectives and strengthen its businesses as a medical-technology company. On various dates during the 15-month period preceding October 12, 2020, when I understand that Mallinckrodt filed for bankruptcy, Covidien Sarl had outstanding contracts to acquire the shares of other companies, or options to do so. Among others, those contracts included the following transactions discussed below.

6. ***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, an unaffiliated company based in the United Kingdom. A true and correct copy of the *Share Purchase Agreement for the Sale and Purchase of the Entire Issued Share Capital of Digital Surgery Limited among the Persons Listed in Schedule 1 as Sellers, Covidien Group S.à.r.l. as Buyer, and Digital Surgery Limited as the Company, Dated February 12, 2020* (the "Digital Surgery SPA") is attached as **Exhibit 1**. The Digital Surgery SPA provided for Covidien Sarl to purchase all of the shares of Digital Surgery Limited from the selling shareholders. *See* Ex. 1 (Digital Surgery SPA) §§ 2.1-2.4. The shareholders and Digital Surgery Limited were third parties, not affiliates of Covidien Sarl.²

7. Pursuant to the Digital Surgery SPA, the agreed purchase price for the shares was \$[REDACTED] million, subject to certain adjustments at closing, plus up to \$[REDACTED] million in additional consideration contingent upon the achievement of specified milestones. *See* Ex. 1 (Digital Surgery SPA) §§ 3.1, 3.3 & Schedule 8. After the closing adjustments to the purchase price payable at closing were made on an estimated basis, Covidien Sarl paid an estimated purchase

² Covidien Sarl had previously made a \$25 million loan to Digital Surgery on October 7, 2019, and held a warrant issued the same day to subscribe for up to \$20 million worth of shares, but Covidien Sarl did not own any of Digital Surgery Limited's shares when it entered into the Digital Surgery SPA.

price of \$ [REDACTED] for the shares at closing. *See id.* §§ 3.4-3.6; **Exhibit 2** (Funds Flow) at “Consideration” tab (showing “Estimated Closing Consideration” of \$ [REDACTED]); **Exhibits 3, 4, 5, and 6** (Funds Transfer receipts).³ Following a post-closing calculation of the closing adjustments to the purchase price payable at closing on a final basis, the final purchase price for the shares was determined to be \$ [REDACTED]. Covidien Sarl accordingly made a “true up” payment of \$ [REDACTED] to the shareholders for the additional amount not paid at the initial closing. *See* Ex. 1 (Digital Surgery SPA) §§ 4.7-4.9; **Exhibit 7** (Pro Forma Completion Statement) at “Consideration” tab (showing “Final” closing consideration of \$ [REDACTED] with a payment “Due to Seller” of \$ [REDACTED]); **Exhibits 8** (Funds Transfer receipt).⁴

8. As noted, the Digital Surgery SPA provided that the purchase price for the shares included not only the amount paid at closing, but also additional payments to the shareholders due after closing if certain milestones were achieved (referred to in the SPA as the “Rollover Consideration”). *See* Ex. 1 (Digital Surgery SPA) §§ 3.1, 3.3 & Schedule 8. The Rollover Consideration was payable in [REDACTED] [REDACTED], if specified milestones were achieved by the applicable due dates. *See id.* Schedule 8 § 3.2. To date, Covidien Sarl has paid the selling shareholders an additional \$ [REDACTED] million in Rollover Consideration as follows:

a. [REDACTED]
[REDACTED]

³ Exhibit 2 attaches a true and correct copy of the Funds Flow memorandum for the closing. Exhibits 3, 4, 5 and 6 each attaches a true and correct copy of a Funds Transfer receipt from Citibank evidencing the payments Covidien Sarl made at closing.

⁴ Exhibit 7 attaches a true and correct copy of the final Funds Flow memorandum for the post-closing true-up. Exhibit 8 attaches a true and correct copy of a Funds Transfer receipt from Citibank evidencing the additional true-up payment Covidien Sarl made to the shareholders.

[REDACTED]

[REDACTED]⁵

b. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁶

c. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷

9. *Acquisition of Medicrea International.* On July 15, 2020, Covidien Sarl entered into a Tender Offer Agreement to make a public tender offer to purchase all shares of Medicrea International, an unaffiliated company based in France. A true and correct copy of the *Tender*

⁵ [REDACTED]

⁶ [REDACTED]

⁷ [REDACTED]

Offer Agreement Between Covidien Group S.à.r.l. and Medicea International, Dated July 15, 2020 (the “Medicea Tender Offer”) is attached as **Exhibit 18**.

10. The Medicea Tender Offer provided for Covidien Sarl to purchase the shares of Medicea International from all shareholders who elected to tender their shares in the offer. *See* Ex. 18 (Medicea Tender Offer) § 2.2.2(ii). The tendering shareholders and Medicea International were third parties, not affiliates of Covidien Sarl.

11. Pursuant to the Medicea Tender Offer, the tender offer purchase price for the shares was seven (7) Euros per share. *See* Ex. 18 (Medicea Tender Offer) § 2.2.2(ii). The Tender Offer Agreement was outstanding from July 15, 2020, through November 13, 2020, when the tender offer closed. A total of [REDACTED] shares were tendered by shareholders, giving Covidien Sarl more than 90% ownership of Medicea. On November 13, 2020, Covidien Sarl paid to Euronext, as centralization agent, for the payment for the shares tendered to the Medicea Tender Offer a total of € [REDACTED]. *See* **Exhibit 19** (Flow of Funds Memorandum) at 1-2; **Exhibit 20** (Funds Transfer).⁸ The U.S. dollar equivalent of that payment was \$ [REDACTED] based on the Euro/U.S. dollar exchange rate of 1.1413 U.S. dollars per Euro at the date of entry into the Medicea Tender Offer on July 15, 2020, and \$ [REDACTED] based on the Euro/U.S. dollar exchange rate of 1.1836 U.S. dollars per Euro at the time of closing on November 13, 2020.⁹

⁸ Exhibit 19 attaches a true and correct copy of the Flow of Funds Memorandum for the tender offer closing. Exhibit 20 attaches a true and correct copy of a Citibank Funds Transfer receipt showing a transfer from Covidien Sarl’s account on November 13, 2020 of € [REDACTED] in “Payment for Medicea Shares Tendered to Public Offer.” That payment included a brokerage fee of € [REDACTED], in addition to the payment of € [REDACTED] for the tendered shares. *See* Ex. 19 (Flow of Funds Memorandum) at 1.

⁹ The exchange rates are based on the historical exchange rates for July 15, 2020, and November 13, 2020, respectively. These rates were obtained by members of the foreign-currency team for Medtronic and its subsidiaries, including Covidien Group S.à.r.l., from historical exchange-rate data available through licensed access to Refinitive FXall in the Refinitiv EIKON platform, a third-party foreign-currency trading platform owned by the London Stock Exchange Group.

12. [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] an unaffiliated company based in [REDACTED]. A true and correct copy of the *Acquisition Option Agreement by and among Covidien Group S.à.r.l., [REDACTED], The Company Shareholders and [REDACTED] as Securityholders' Representative* Dated as of June 16, 2020 (the “[REDACTED] Acquisition Agreement”) is attached as **Exhibit 21**.

13. Pursuant to the [REDACTED] Acquisition Agreement, [REDACTED] and its shareholders granted Covidien Sarl an irrevocable option to “acquire right, title, and interest in all of the Company Securities,” which were defined to include the “Company Shares,” “Company Options” and “Company Warrants.” See Ex. 21 ([REDACTED] Acquisition Agreement) §§ 2.1, 2.4. [REDACTED] and its shareholders were third parties, not affiliates of Covidien Sarl.¹⁰

14. Under the [REDACTED] Acquisition Agreement, the purchase price for the shares was \$ [REDACTED] million, subject to certain closing adjustments. Those adjustments provided for an increase to the purchase price equal to [REDACTED] [REDACTED] issued to Covidien Sarl on June 16, 2020, for \$ [REDACTED] million (with a possible increase to \$ [REDACTED] million)—i.e., a potential increase of approximately \$ [REDACTED] million or more—plus [REDACTED]’s cash at closing; less certain of [REDACTED]’s liabilities at closing, a \$ [REDACTED] million

¹⁰ At the time it entered into the [REDACTED] Acquisition Agreement, Covidien Sarl owned [REDACTED] Preferred B-1 Shares, representing [REDACTED] % of [REDACTED]’s outstanding equity securities and a [REDACTED] % stake on a fully diluted basis. See Ex. 21 (Acquisition Option Agreement) Disclosure Schedule “[REDACTED] - Cap Table.” Covidien Sarl also agreed to make a loan of \$ [REDACTED] to [REDACTED] on June 16, 2020 (and potentially up to \$ [REDACTED] million more), pursuant to a Secured Promissory Note. See Exhibit 22, which attaches a true and correct copy of the Secured Promissory Note dated June 16, 2020, issued by [REDACTED] to Covidien Group S.à.r.l. See *id.* § 1(a) (providing for a first tranche of the loan in the amount of \$ [REDACTED] to be paid upon execution of the Note and concurrently with the [REDACTED] Acquisition Agreement).

Representative Reimbursement amount, and a pro rata amount attributable to Covidien Sarl's holdings at closing; and plus or minus the Net Working Capital (as defined in the Agreement) at closing. *See* Ex. 21 (██████████ Acquisition Agreement) § 2.10(a); Ex. 22 (Secured Promissory Note) § 1(a). The ██████████ acquisition did not close, and thus the exact amounts of the adjustments were not determined. However, my expectation is that if the transaction had closed, the closing adjustments would not have resulted in a material reduction of the base \$████ million purchase price and that the magnitude of the adjusted purchase price at closing would have remained in the range of \$████ million and been substantially higher than \$████ million.

15. The ██████████ Acquisition Agreement was outstanding from June 16, 2020, through at least October 12, 2020, the date of Mallinckrodt's bankruptcy filing. *See* Ex. 21 (██████████ Acquisition Agreement) §§ 2.1, 10.1(f) & Ex. D (providing that acquisition option could be exercised for a period of 90 days after notice of the "Milestone Achievement" regarding FDA 510(k) clearance of ██████████ and specified steps toward commercial production and product testing).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.


Executed on: 6/28/24 
Minneapolis, Minnesota Ron Garber

EXHIBIT 1

FILED UNDER SEAL

EXHIBIT 2

FILED UNDER SEAL

EXHIBIT 3

FILED UNDER SEAL

EXHIBIT 4

FILED UNDER SEAL

EXHIBIT 5

FILED UNDER SEAL

EXHIBIT 6

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EXHIBIT 7

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EXHIBIT 19

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EXHIBIT 20

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EXHIBIT 21

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EXHIBIT 22

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