# REDACTED VERSION OF D.I. 153

## IN THE UNITED STATES BANKRUPTCY COURT
## FOR THE DISTRICT OF DELAWARE

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| In re:<br><br>MALLINCKRODT PLC, *et al.*,<br><br>Reorganized Debtors.[1] | Chapter 11<br><br>Case No. 20-12522 (JTD) |
| OPIOID MASTER DISBURSEMENT TRUST II,<br>Plaintiff,<br>v.<br><br>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,<br>Defendants. | Adv. Proc. No. 22-50433 (JTD) |

## COVIDIEN'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT BASED ON THE SECTION 546(e) SAFE HARBOR

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January 31, 2025

[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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This motion turns on the words of the Bankruptcy Code. Under a straightforward application of Section 546(e) to the undisputed facts, the safe harbor bars the Trust's claims to claw-back the consideration the Covidien Defendants received for their spin-off of Mallinckrodt.

Perhaps recognizing as much, the Trust not only seeks to rewrite the statute, but asks this Court to ignore the Code altogether. It asserts that Defendants orchestrated fraudulent transfers and that no safe harbor should get in the way of a recovery for opioid claimants. Opp. at 1, 3-5. The evidence is overwhelming that Covidien undertook the spin for perfectly legitimate business reasons—to separate medical-device and pharmaceuticals businesses that did not complement each other, in order to enhance the prospects for both—and not to avoid opioid liability that was not on the horizon at the time. But, for purposes of this Motion, all that matters is that the Court cannot disregard the policy judgment that animated Congress' enactment of the safe harbor any more than it can ignore the words of the statute. "[S]ection 546[e] is at the intersection of 'two important national legislative policies … on a collision course'—the policies of bankruptcy and securities law." *In re Resorts Int'l, Inc.*, 181 F.3d 505, 515 (3d Cir. 1999). Congress decided that the bankruptcy policy of avoiding transfers for the benefit of creditors should prevail if the transfers were intentional fraudulent conveyances made within two years of the bankruptcy filing. *See* 11 U.S.C. § 546(e) (excepting § 548(a)(1)(A)). But for all other transfers—like those here, made seven years before Mallinckrodt's bankruptcy—Congress determined that the securities policy of fostering the financial markets and capital formation must prevail. *Id.*

The Trust's request that the Court not apply the safe harbor because the Covidien Defendants are medical-device companies seeks as well to substitute the Trust's policy judgment for Congress'. Congress could have limited the safe harbor to "financial institutions" and "stockbrokers," but it did not. Instead, it chose to protect "financial participants," which it defined as any entity—irrespective of its business—that has securities, forward, or swap agreements meeting the dollar thresholds. Accordingly, Judge Shannon recently held that a hospital company was a "financial participant" (based on a $1.4 billion notes offering) and dismissed fraudulent transfer claims to claw-back transfers the hospital received in its spinoff of its (later bankrupt) subsidiary, because those transfers were made "in connection with a securities contract," i.e., the separation and distribution agreement for that spin. *In re Quorum Health Corp.*, 2023 WL 2552399, at *4-8 (Bankr. D. Del. Mar. 16, 2023).

The same result should follow in this case. As the Supreme Court and Third Circuit have both held, courts should apply the Bankruptcy Code's safe-harbor provisions in accordance with "the plain language of the safe harbor." *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 583 U.S. 366, 378, 385-386 (2018); *Resorts Int'l*, 181 F.3d at 515. Those principles compel that summary judgment be granted in the Covidien Defendants' favor here.

## I. THE COVIDIEN DEFENDANTS ARE FINANCIAL PARTICIPANTS

### A. CIFSA

The Trust's sole argument as to why CIFSA does not qualify as a "financial participant"—that the indentures were not "securities contracts"—ignores the statute's text. A "securities contract" includes "an option to purchase or sell any … security." 11 U.S.C. § 741(7)(A)(i). There is no factual dispute that the indentures provided such an option: The notes were "securities," and the indentures provided an "option" (i) for CIFSA to buy those notes (an option it, in fact, later exercised), and (ii) for the noteholders to sell the notes to CIFSA upon a change of control.[2] The Trust's proffered expert, Dr. Risler, so conceded at deposition:

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[2] *See* Covidien's Mot. Summ. J. [D.I. 93, 103] ("SJ Mot.") 5-6, 12; Decl. Benjamin Wood [D.I. 94] ("Wood Decl.") ¶¶ 15-18, Exs. 7-11; Decl. Joel Millar Support Covidien's Mot. Summ. J. ("Millar Decl.), filed herewith, Ex. 1 (Tr. 30(b)(6) Dep. Covidien) ("30(b)(6) Tr.") at 31:6-21, 33:21-25, 34:6-18; *id.*, Ex. 2 (Errata 30(b)(6) Dep., Wood) ("Wood Errata") at 2; Opp. Covidien's Mot. Summ. J. [D.I. 146, 147] ("SJ Opp.") 7-8 & n.7.

> Q. Okay. And, similarly, on the call option that you found to be embedded in the bond indenture, that option gave CIFSA the right to buy the bonds back from the holders in certain circumstances, right?
> A. That is correct.
> Q. CIFSA wasn't obligated to exercise that right, it was an option?
> A. That is, indeed. That is an option.[3]

The indentures and notes accordingly fall squarely within the definition of "securities contract" as "contract[s] for … an option to purchase or sell any … security." 11 U.S.C. § 741(7)(A)(i). The Trust argues that the options were not standalone contracts that traded on a securities exchange. Nothing in the statute required them to be. If Congress had intended to impose an exchange-traded requirement, it would have said so—as it did elsewhere in the same definition with respect to a different type of option. *See id.* § 741(7)(A)(ii) (defining "securities contract" to include "any option entered into on a national securities exchange relating to foreign currencies"). Instead, Congress defined "securities contract" to include any "option" to buy or sell a "security." *Id.* § 741(7)(A)(i).[4] And if that were not sufficient, Congress also included within the definition of a "securities contract" (i) "any repurchase … transaction on any … security," (ii) "any option to enter into any agreement or transaction referred to in this subparagraph," and (iii) "any other agreement or transaction that is similar" to any such agreement. *Id.* § 741(7)(A)(i), (vii), (ix). The indentures easily fall within those broad terms.

The case law so confirms. The Second Circuit has held that contracts granting an option to repurchase outstanding notes are "securities contracts." *See In re Quebecor World (USA) Inc.*, 719 F.3d 94, 98-99 (2d Cir. 2013); SJ Mot. 12 & n.38. The Trust responds that the contracts in *Quebecor* were note purchase agreements, not indentures. SJ Opp. 8 n.8. But, as with its other

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[3] Millar Decl., Ex. 3 (Tr. Dep. Risler) ("Risler Tr."), at 27:2-12; *id.* at 23:22-24:10, 24:18-25:23 (conceding indentures' put options were also options); SJ Opp. 9 (admitting that the indentures contained "embedded options").

[4] Congress' inclusion of the exchange-traded requirement in one subpart of § 741(7), and exclusion of it in another, must be presumed to have been intentional. *See BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 537 (1994).

arguments, that distinction ignores the words of the statute. A "securities contract" includes any "contract" providing "for the purchase [or] sale … of a security … *or* … *an option to purchase or sell any … security*" or "*any repurchase … transaction on any … security*." 11 U.S.C. § 741(7)(A)(i) (emphasis added). In *Quebecor*, the contracts provided the issuer—as here—an option to repurchase the notes (and also permitted its affiliates to purchase the notes under the same provisions). 719 F.3d at 96-97. *Quebecor* held that "[t]he NPAs were clearly 'securities contracts' because they provided for both the original purchase and"—as relevant here—"the 'repurchase' of the Notes." *Id.* at 98-99 (quoting § 741(7)(A)(i)). CIFSA's indentures likewise provided options to "'repurchase' … the Notes," *id.*, and hence were also "securities contracts."

The Trust asserts that *Qimonda* and *MPM Silicones* held that indentures are not securities contracts.[5] But neither case considered whether options to buy or sell securities would render an indenture a "securities contract." There is not a single sentence in either opinion discussing the issue. Under settled law, opinions that do not consider a legal issue (whether because it was not argued or otherwise) are not persuasive, let alone binding, authority on that issue; indeed, one court has so held with respect to another issue *Qimonda* did not address.[6]

Finally, the Trust's objection that many indentures include securities options provides no basis to ignore the statute. *Resorts* held that LBO payments were "settlement payments" under

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[5] SJ Opp. 8 (citing *In re Qimonda Richmond, LLC*, 467 B.R. 318, 323 (Bankr. D. Del. 2012); *In re MPM Silicones, LLC*, 2014 WL 4436335, at *21 (Bankr. S.D.N.Y. Sept. 9, 2014)).

[6] *See In re Lehman Bros. Holdings Inc.*, 602 B.R. 564, 583-584 (Bankr. S.D.N.Y. 2019) (party's reliance on *Qimonda* to "support … argument that guarantees are not securities contracts" was "misplaced" because "*Qimonda Richmond*[] does not discuss this narrow issue"); *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430, 439-440 (3d Cir. 1992) (decision allowing contributory negligence defense in product-liability suit was "not persuasive authority" because it "did not mention the distinction … between negligence and products liability suits" and "seemingly overlooked the fact that contributory negligence is not a defense in a products liability suit"); *In re Essar Steel Minn., LLC*, 47 F.4th 193, 200 (3d Cir. 2022) (holding that prior Third Circuit precedent that analyzed whether post-confirmation bankruptcy proceedings were within the bankruptcy court's non-core "related to" jurisdiction were irrelevant to whether those same proceedings might come, instead, within a bankruptcy court's core "arising in" jurisdiction, because "[w]e never addressed whether these proceedings could also qualify as core").

the statute's "broad" language, noting that a "payment for shares during an LBO is obviously a common securities transaction." 181 F.3d at 515-516. The Third Circuit thus viewed the fact that the securities transaction was common as, if anything, a plus factor for applying a safe harbor Congress designed to protect the securities markets. *Quorum* likewise held that a hospital company was a "financial participant" because its notes offering was a standard "securities contract." 2023 WL 2552399, at *6-8. So, too, the CIFSA securities options were common "securities contracts" under the statute's plain words. CIFSA was a "financial participant."

**B. <u>Covidien plc and Covidien Ltd.</u>**

The Trust's only argument against Covidien plc's and Covidien Ltd.'s status as "financial participants"—that their guarantees of the indentures were not "securities contracts"—fails for the same reason: it disregards the statute. The Trust notes that the guarantees were not themselves option contracts. But a "securities contract" is defined to include, not only an "option to purchase or sell" a security, but also "any *guarantee*" of such a contract. 11 U.S.C. § 741(7)(A)(i), (xi) (emphasis added). SJ Mot. 13-14. The indentures were "securities contracts," and Covidien plc and Covidien Ltd. each undisputedly guaranteed CIFSA's obligations thereunder, including in respect of the call and put options.[7] The guarantees were accordingly "securities contracts" under the definition of that term that Congress enacted.

The Trust is also incorrect that the guarantees fall outside the "financial participant" definition because they were purportedly contracts between affiliates. They were not. Covidien plc and Covidien Ltd. provided the guarantees to *Deutsche Bank and the noteholders*, not CIFSA. *See supra* note 7. The indentures' call and put options likewise ran between CIFSA and the noteholders. *Id.* Covidien plc and Covidien Ltd. (and CIFSA) were accordingly "financial

[7] *See* SJ Mot. 5-7, 13-14; Wood Decl. ¶¶ 12-14, 20-23, Exs. 6-12; 30(b)(6) Tr. at 31:22-34:5; Wood Errata at 2; SJ Opp. 12-13; Risler Tr. at 27:21-29:8 (conceding each guaranteed CIFSA's option obligations).

participants" because the guarantees (and indentures) were "securities contracts" "with … *any other entity* (other than an affiliate)"—i.e., Deutsche Bank and the noteholders. 11 U.S.C. § 101(22A)(A) (emphasis added). That reading is reinforced by the words that follow: entities are financial participants if they have securities contracts "with … any other entity (other than an affiliate) [of $1billion] (*aggregated across counterparties*)." *Id.* (emphasis added). Because the guarantees were with unaffiliated counterparties, and they undisputedly exceeded $1 billion (SJ Mot. 13-18; SJ Opp. 11-13), Covidien plc and Covidien Ltd. were financial participants.

### C. <u>Covidien Group S.à.r.l.</u>

***Currency forwards and swaps***. The Trust argues that Covidien Sarl's currency forward contracts do not qualify it as a "financial participant" because the contracts supposedly did not meet the $1 billion "notional" test. The Trust concedes that Covidien *did* have more than $1 billion in "notional amount" of currency forward contracts outstanding on the Relevant Dates, including contracts to purchase or sell $2.5 billion in foreign currencies on April 23, 2020.[8] But, putting all of its weight on a single word in the statutory definition—"principal"—the Trust contends that currency forward contracts can never have any "notional or actual principal amount." 11 U.S.C. § 101(22A)(A). Rather, in the Trust's telling, the term "notional *principal* amount" supposedly applies solely to instruments that provide periodic payments of interest on the principal, and currency forwards, by definition, never do. SJ Opp. 17-19.

Once again, the Trust's reading cannot be squared with the statute's text. Section 101(22A) nowhere specifies that the instrument must pay "interest"; that word simply does not appear in the definition. As for "principal," that term can, of course, refer to the amount

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[8] *See* SJ Opp. 17-19; Risler Tr. at 31:21-34:16 ("Q: … You agree that the notional amount of S.A.R.L.'s FX forward agreements was greater than $1 billion? A. From my recollection, I believe so but – and, yes, it's in my report, Section 5.1."); SJ Mot. 7-8, 18-19; Decl. Timothy Husnik [D.I. 95, 104] ("<u>Husnik Decl.</u>") ¶¶ 7-13, Exs. 1-11.

borrowed under a loan, or the notional amount of a swap, on which periodic interest payments are calculated. But "principal" has a broader meaning that applies to the face amount of a broad range of instruments, whether or not they pay interest. *See, e.g.*, Black's Law Dictionary (12th ed. 2024) (defining "principal" to mean "[t]he amount of a debt, investment, or other fund, not including interest, earnings, or profits").

The same expert the Trust proffered, Dr. Risler, could not point to anything in the financial literature supporting his claim that "notional principal amount" applies solely to instruments paying periodic interest and that, therefore, common debt instruments that include no such interest (e.g., zero coupon bonds) would not be covered by the safe harbor.[9] In fact, the financial literature and the uncontroverted evidence all confirm that "notional principal amount" is regularly used to describe the face amount of debt and other instruments that do not pay interest—including currency forward contracts—and that, in any event, the price for currency forward contracts, including those at issue in this case, is based on interest rates.[10]

But the Court need not rely on such literature or evidence to resolve the legal question presented here. Under settled principles of statutory interpretation, courts should construe a statute by "look[ing] to both 'the language itself [and] the specific context in which that language is used.'" *Merit*, 583 U.S. at 378. Here, both the statutory text and its context make clear that

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[9] Risler Tr. at 36:19-39:4, 42:8-45:18, 53:16-54:4.

[10] *See, e.g.*, Millar Decl., Ex. 4 (Shani Shamah, *A Foreign Exchange Primer* 81 (2d ed. 2008)) (in non-deliverable "foreign currency forward contract," "[a] (notional) principle amount, … [is] agreed"); *id.*, Ex. 5 (Alphabet Inc., Form 10-K, year ended Dec. 31, 2019), 66-67 (reporting "notional principal" of "foreign currency forwards and option contracts"); *id.*, Ex. 6 (Apple Inc., Form 10-K, year ended Sept. 28, 2013), 58-59 (reporting "notional principal amounts" of "foreign exchange contracts," including "foreign currency forward and option contracts"); 30(b)(6) Tr. at 91:10-95:8, 96:4-14, 96:18-99:25 (testimony of Mr. Husnik, Senior Treasury Director in charge of foreign currency risk-management at Covidien and affiliates for $15 billion in foreign revenues, that he and counterparts in currency forward markets use "notional amount" and "notional principal amount" synonymously, and that the price of a currency forward is derived in part from the difference in the two currencies' interest rates); Millar Decl., Ex. 7 (Errata 30(b)(6) Dep., Husnik) at 2. "Notional principal amount" is also used for other non-interest-bearing instruments. *See, e.g.*, Millar Decl., Ex. 8 (John C. Hull, *Options, Futures, and Other Derivatives* (9th ed. 2014)), at 180 (volatility swap); *id.* at 572 (credit default swap); *id.* at 767 (equity swap).

Congress intended the term "notional or actual principal amount" to apply to currency forward contracts. The Bankruptcy Code defines a "financial participant" to mean "an entity that … has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) … of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding …." 11 U.S.C. § 101(22A)(A). Congress thus contemplated that "notional or actual principal amount" would be a relevant measure of value for *each* of the six types of contracts listed in section 561(a). One such type is a "forward contract." *Id.* § 561(a)(3). Another is a "swap agreement," *id.* § 561(a)(5), which is defined to include "a currency … forward agreement," *id.* § 101(53B)(A)(i)(III).

The Trust's reading would write these provisions out of the statute. It would also write out many other categories of contracts that Congress specified could meet the $1 billion test. For example, "securities contracts" to buy or sell shares or bonds do not provide periodic interest payments. 11 U.S.C. § 101(22A)(A); *id.* § 561(a)(1). Nor do commodity contracts, forward contracts, swap agreements for equity index swaps, weather swaps, emissions swaps, and so on. *Id.* § 561(a)(2), (3), (5); *id.* § 101(53B)(A)(i)(IV), (VIII), (IX). The Trust's reading would give no effect to any of these provisions, contrary to "longstanding canons of statutory construction" that courts "must normally seek to construe Congress's work so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant." *Ysleta del Sur Pueblo v. Texas*, 596 U.S. 685, 698-699 (2022) (internal quotation marks omitted).

This Court recognized this basic rule in *In re Mallinckrodt plc*, 2024 Bankr. LEXIS 2058 (Bankr. D. Del. Sept. 5, 2024). There, the Trust argued that under accounting principles, the securities contract at issue—an extension of credit to settle securities transactions—could not have a mark-to-market position. The Court rejected that argument, explaining that "I cannot simply ignore that the statute expressly includes extensions of credit as the type of agreement whose value could be determined by reference to mark-to-market position." *Id.* at *44-45.

Other courts as well have held that contracts that do not pay periodic interest nevertheless met the $1 billion test. *See Quorum*, 2023 WL 2552399, at *6-8 & n.34 (securities contract for notes offering); *In re Lancelot Inv. Fund, L.P.)*, 467 B.R. 643, 655-656 (Bankr. N.D. Ill. 2012) (equity option agreements), *aff'd*, 729 F.3d 741 (7th Cir. 2013).[11]

Finally, applying the statute in accordance with its terms is consistent with its purpose. "The legislative history of § 101(22A) provides … that this section: 'adds a new definition of 'financial participant' to limit the potential impact of insolvencies upon other major market participants… This change will help prevent systemic impact upon the markets from a single failure.'" *In re Samson Res. Corp.*, 625 B.R. 291, 301 n.36 (Bankr. D. Del. 2020) (quoting H.R. Rep. No. 109-31(I), 130-131). Reading § 101(22A) to qualify Covidien Sarl as a "financial participant" based on contracts that obligated it to pay $2.5 billion to bank counterparties in the currency markets fosters that purpose.

***Share purchase contracts***. The Trust's arguments also fail with respect to the second, independent ground on which Covidien Sarl qualifies as a "financial participant"—that it had contracts or options to purchase the shares of other medical-technology companies with more than $100 million in mark-to-market positions. SJ Mot. 8-9, 19-20. The Trust argues that the $100 million mark-to-market test was not met because U.S. GAAP accounting rules provide that shares are not recorded on a purchaser's accounting statements until after the purchase closes, and hence a share-purchase agreement can never have a mark-to-mark position. SJ Opp. 13-17.

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[11] The Trust's reliance (SJ Opp. 19) on an IRS regulation defining "notional principal contracts" is misplaced; it says nothing about the Bankruptcy Code's definition of a "financial participant." *Cf. Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 339 n.4 (2d Cir. 2011) ("This case calls on us to interpret a provision of the Bankruptcy Code. It makes little sense to look to a definition from a different statutory scheme[.]").

Yet again, the Trust seeks to re-write the statute. A "contract for the purchase [or] sale … of a security" and "an option to purchase or sell any … security" are both contracts that Congress specified could be valued by reference to the mark-to-market position test. 11 U.S.C. §§ 101(22A)(A), 561(a)(1), 741(7)(A)(i). The Trust's contention that those contracts can never have a mark-to-market position would render those statutory provisions unintelligible, once more contravening settled principles of statutory construction. *Ysleta*, 596 U.S. at 698-699. And, again, the Court's decision in *Mallinckrodt* is instructive. As noted, the Court there rejected the Trust's argument that under "accounting principles," the securities contract at issue "[could] not have a mark-to-market position," because that would "ignore that the statute expressly includes [such contracts] as the type of agreement whose value could be determined by reference to mark-to-market position." 2024 Bankr. LEXIS 2058, at *44-45.

Indeed, the Trust's proffered expert, Mr. Davis, admitted that his opinion is limited solely to how "mark to market" is used in accounting and that he did not consider how "mark to market" is used in other contexts, such as by risk managers or regulators that use "mark to market" to value positions, measure risk, and facilitate market and regulatory functions.[12] Accounting rules are not determinative. *See In re Borden Chems. & Plastics Operating Ltd. P'ship*, 336 B.R. 214, 219, 223 (Bankr. D. Del. 2006) (FASB accounting rule that commodity purchase agreement was not a forward contract was "immaterial as to how the Agreement is

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[12] Millar Decl., Ex. 9 (Tr. Dep. Davis) ("Davis Tr.") at 22:9-12, 23:10-13, 24:8-22, 25:8-12. *See, e.g.*, *id.*, Ex. 10 (Fed. Hous. Fin. Agency, *Enterprise Non-Performing Loan Sales Report* 4 (Dec. 2023)) (requiring loan modification evaluation for borrowers with "mark-to-market LTV [loan-to-value] ratio above 115 percent"); *id.*, Ex. 11 (ISDA, *Hidden in Plain Sight? Derivatives Exposures, Regulatory Transparency and Trade Repositories* 3 (Oct. 2023)) ("Mark-to-market Valuation: A key metric of market risk exposure – the mark-to-market (MtM) value of a trade – is also available to regulators through trade repositories" and "updated … on a daily basis."); *id.*, Ex. 12 (*The Handbook of Loan Syndications and Trading* 411 (2d ed. 2022)) ("the LSTA established a dealer quote-based secondary mark-to-market (MTM) process to value loans at a price indicative of where they would presumably trade"); *id.*, Ex. 13 (Peter Fortune, *Margin Requirements Across Equity-Related Instruments: How Level Is the Playing Field?*, New Eng. Econ. Rev. 31, 38 (2003)) ("The [Chicago Board Options Exchange] requires that option contracts be marked to market daily" for margin calls).

treated under the [Bankruptcy] Code"; holding such agreement was a "forward contract" under § 546(e)).[13]

Under the plain wording of the statute, Covidien Sarl met the $100 million "mark-to-market positions" test. The test measures the value of a "position" by assigning it its "market" value. 11 U.S.C. § 101(22A)(A); *accord* SJ. Mot. 20 n.43 (citing legislative history that test was derived from Federal Reserve Board regulations, which define "mark-to-market positions" by reference to "the market values of those positions"). The undisputed evidence establishes that (i) the Digital Surgery, Medicrea, and [redacted] contracts were all "securities contracts," (ii) they were outstanding on Relevant Dates, (iii) they each provided for the purchase of shares at prices in excess of $100 million, (iv) those prices were negotiated at arm's length, and (v) those prices accordingly represented the fair "market" value of the shares.[14] Covidien Sarl's acquisition contracts accordingly met the test and qualified it as a financial participant.

## II. THE TRANSFERS WERE QUALIFYING SECURITIES TRANSACTIONS

### A. <u>Count I: Transfers In The Spinoff</u>

The Court should reject the Trust's effort to relitigate the Court's holding that the spinoff transfers were qualifying transactions under § 546(e). SJ Opp. 20-23; SJ Mot. 10. The Trust argues that because the spinoff involved "231 separate transactions," not all of which "constituted settlement payments," the Court cannot "reduce the multistep spinoff into a single settlement payment or transfer made in connection with a securities contract." SJ Opp. 20-22. That is the same argument the Trust made on the motion to dismiss. Opp. Covidien's Mot.

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[13] The Trust's reliance on *JPMorgan Chase & Co. v. Comm'r*, 458 F.3d 564 (7th Cir. 2006), is misplaced. That case construed a federal tax statute, not the Bankruptcy Code. *Id.* at 568. *See supra* note 11.

[14] SJ Mot. 8-9, 19-20; SJ Opp. 14-15; Decl. Ron Garber [D.I. 96, 105] ¶¶ 5-15, Exs. 1-22; 30(b)(6) Tr. at 62:7-63:9, 64:15-67:22, 68:15-69:18, 70:19-24; Millar Decl., Ex. 14 (Errata 30(b)(6) Dep., Garber] at 2; Davis Tr. at 28:9-14, 29:13-31:21 (no opinion disputing that the contract purchase prices were negotiated at arm's length and represented the shares' fair value).

Dismiss [D.I. 23] at 36-37. The Court rejected that argument, holding that "the safe harbor inquiry should focus on the 'transfer that the trustee seeks to avoid' rather than the component parts of the transaction." Opinion [D.I. 57] ("Op.") at 29 (citing *Merit* and Covidien's Reply Brief [D.I. 26, 27] at 19); *Merit Mgmt.,* 583 U.S. at 377-378.[15] As the Court held, the transfers that the Trust *is* seeking to avoid are precisely what falls within the safe harbor: "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." Op. at 29-30.

The Court need not consider whether "law of the case" bars the Trust from rearguing these points. On the merits, this Court was correct. Indeed, the Trust's own expert conceded that the $721 million that MIFSA paid to redeem its stock was a settlement payment.[16] And the only evidence this Court needs to determine that the Separation Agreement was a "securities contract" is that agreement itself. It provided that "MIFSA shall redeem a portion of its equity interest for … cash." Op. at 29-30 (quoting Separation Agreement ¶ 2.15(b)). The Separation Agreement accordingly falls squarely within the definition of "securities contract" as a contract "for the purchase [or] sale … of a security" or "repurchase … on any such security." *Id.* at 29 (quoting 11 U.S.C. § 741(7)(A)(i)). Indeed, in *Quorum*, Judge Shannon reached the same conclusion, holding that a spinoff separation agreement was a "securities contract" because it likewise provided for the spun-off subsidiary to pay cash for shares. 2023 WL 2552399, at *5-6.

If the Trust now seeks to avoid the spinoff's 231 preliminary steps—even though it failed to identify those transfers in its complaint (Am. Compl. ¶¶ 312-317)—that argument fails. The Trust concedes that 30% of those steps were settlement payments. SJ Opp. 21. And even if the

15 *See also* Covidien's Mot. Dismiss [D.I. 13, 15] 30-32; Covidien's Reply Br. [D.I. 26, 27] 18-19.

16 *See* Davis Tr. at 58:5-12; *see also* SJ Mot. 3, 10; Wood Decl. ¶¶ 5-7, Ex. 1 (Separation Agreement).

others were not, they were all "transfer[s] made … in connection with a securities contract." 11 U.S.C. § 546(e) (protecting "settlement payment[s] … or … *transfer[s] made in connection with a securities contract*" (emphasis added)). All 231 steps were set forth in a plan attached to the Separation Agreement and required by it, easily satisfying the "in connection with" standard's "low bar" that the transfers "have a connection" or be "related to" the securities contract.[17] *In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d 411, 421-422 (2d Cir. 2014); SJ Mot. 22-23; *Quorum*, 2023 WL 2552399, at *5-6 (transfers "referenced directly in and [that] occurred pursuant to the [spin separation agreement]" were "in connection with a securities contract").[18]

Finally, there is no merit to the Trust's suggestion (SJ Opp. 22-23) that the Court should disregard the statute's plain language because the spinoff was a private transaction, and its avoidance would not affect the public securities markets. The Third Circuit has rejected that very argument, explaining that the safe harbor's "broad" text makes no distinction between public and private securities transactions. *In re Plassein Int'l Corp.*, 590 F.3d 252, 258-259 (3d Cir. 2009); *Quorum*, 2023 WL 2552399, at *11 (holding § 546(e) protected spinoff transfers).

### B. Counts II-III: The Post-Spin Tax And Indemnity Payments

The Trust's argument (SJ Opp. 28-30) that § 546(e) does not bar avoidance of any tax or indemnity payments fails for the same reason: any such payments were made "in connection with" the Separation Agreement. Again, the indisputable terms of the Separation Agreement

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[17] *See* Wood Decl. Ex. 1 (Separation Agreement) ¶ 2.1(a) & Schedule 2.1(a); Davis Tr. at 46:4-12 (conceding that the 231 transactions were "executed in connection with the Separation Agreement").

[18] The Trust's reliance (SJ Opp. 21-22) on *Mervyn's* is misplaced as explained in this Court's opinion on the motion to dismiss. Op. 29 (citing Covidien's argument that "*Mervyn's* ... merely held that a challenged transfer of real estate, not securities, did not fall within the safe harbor, even if a separate transfer in a broader transaction might have"); Covidien Reply [D.I. 26, 27] 19. The Trust's reliance (SJ Opp. 20-22) on *Tops* and *GBG* fails for the same reason; each merely held that the different transfers at issue in those cases did not come within the safe harbor. *See In re Tops Holding II Corp.*, 646 B.R. 617, 680-682 (Bankr. S.D.N.Y. 2022) (complaint sought to avoid dividends, not prior notes issuances); *In re GBG USA Inc.*, 2024 WL 5114996, at *19-22 (Bankr. S.D.N.Y. Dec. 16, 2024) (complaint sought to avoid dividends, not prior sale of shares); *cf. Quorum*, 2023 WL 2552399, at *6 (distinguishing *Tops* on that basis).

provide all the necessary evidence. The indemnity was set forth in the Separation Agreement, and the Tax Matters Agreement was expressly made part of the Separation Agreement. SJ Mot. 4, 22; Wood Decl. ¶¶ 8-10, Ex. 1 (Separation Agreement) ¶¶ 4.1, 11.1(a). Any tax or indemnity payments were thus made pursuant to the Separation Agreement and hence "in connection with" it. SJ Mot. 22-23. The Trust does not need discovery on the timing or amount of any such payments, since all were necessarily made in connection with the Agreement. In any event, Covidien already responded to the Trust's interrogatories attesting that the questioned tax payments totaled approximately $252,944.[19]

### C. <u>Count V: Reimbursement Alter-Ego Claim</u>

Finally, the Trust's argument (SJ Opp. 23-28) that § 546(e) does not preclude its alter ego claim fails. Mallinckrodt released that claim under the Separation Agreement, and the safe harbor bars the Trust from avoiding the release. SJ Mot. 25-30. The Trust does not dispute that the Separation Agreement's release covers the alter ego claim asserted by the Trust in Mallinckrodt's shoes, nor that the release was a "transfer" made "in connection with" the Separation Agreement, and hence protected from avoidance under § 546(e). Rather, the Trust argues only that, even though the release cannot be avoided as a fraudulent transfer, it may be unenforceable under some other, unspecified law. That argument cannot be right.

The Trust's argument rests on a few inapposite cases concerning *exculpatory* clauses, which limit liability or damages for *future* conduct. The Trust's cases merely recognize exceptions to the enforceability of *exculpatory* clauses if they resulted from unequal bargaining power or would immunize a party from liability for future fraud or intentional wrongdoing.[20]

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[19] *See* Millar Decl., Ex. 15 (Covidien Defs.' Objs. & Resps. Pl.'s First Set of Interrogatories) 18-19.

[20] *See In re Lyondell Chem. Co.*, 544 B.R. 75, 84-90 (Bankr. S.D.N.Y. 2016) (loan contract limiting damages for future breaches); *Kalisch-Jarcho, Inc. v. City of New York*, 448 N.E.2d 413, 416-417 (N.Y. 1983) (construction

By contrast, courts routinely enforce releases of claims for *past* conduct, including claims sounding in tort or alleged wrongdoing. *See, e.g.*, *Kulkarni v. Arrendondo & Co.*, 56 N.Y.S.3d 351, 352 (App. Div. 2017) (a "release … may encompass … fraud claims"); *Lucio v. Curran*, 139 N.E.2d 133, 136 (N.Y. 1956) (enforcing release of claims "in tort for … allegedly wrongful conduct"). Mutual releases in spinoffs, like those in the Separation Agreement by which both Mallinckrodt and Covidien released the other from all claims arising out of *pre-spin* events, are held to be fully enforceable even though, by definition, a parent's spin of its own subsidiary is not an arms'-length transaction. SJ Mot. at 25-29. As cases like *Aviall* and *Anadarko* make clear, the reason is because, under settled corporate law, parents of wholly owned subsidiaries may allocate the value of the collective enterprise—including through release provisions—in the interests of the parent's shareholders, subject only to the protections that fraudulent-transfer law provides for creditors. *See id.*[21] And those protections, in turn, are subject to § 546(e)'s safe harbor that controls here. Because it bars avoidance of the release, the Trust's alter-ego claim fails as a matter of law.

## CONCLUSION

Summary judgment should be granted in the Covidien Defendants' favor on Counts I and V and on Counts II and III to the extent they seek to recover any tax or indemnity payments.

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contract exculpating city from damages for future delays); *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365, 1370-1371 (N.Y. 1992) (contract exculpating fire-alarm provider from liability for future negligence); *Silver Leaf, LLC v. Tasty Fries, Inc.*, 51 F. App'x 366, 367, 370 (3d Cir. 2002) (exculpatory clause limiting liability for future breach); *Dominici v. Between the Bridges Marina*, 375 F. Supp. 2d 62, 64, 69-70 (D. Conn. 2005) (same); *Falcone v. MarineMax, Inc.*, 659 F. Supp. 2d 394, 396, 400 (E.D.N.Y. 2009) (same); *In re Transcolor Corp.*, 296 B.R. 343, 351 n.6, 373 (Bankr. D. Md. 2003) (same). The cases cited in footnote 26 of the Trust's brief likewise involved exculpatory clauses. *See Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 203 & n.3 (Ohio 1998) ("Exculpatory agreements … release, or 'exculpate,' another from potential tort liability for future conduct").

[21] The Trust's cases (SJ Opp. 24-26) are inapposite. *Teleglobe*, *Direct Response Media*, and *Scott Acquisition* do not address the enforceability of releases. And *Northwestern* (SJ Opp. 24-25) merely stands for the proposition that "[i]f a release is obtained by fraud, it is unenforceable under Montana law." 313 B.R. 595, 603 (Bankr. D. Del. 2004). The Trust does not allege that Covidien fraudulently induced Mallinckrodt to enter into the release; rather, it alleges that Covidien engaged in fraudulent transfers to hinder, delay, or defraud Mallinckrodt's creditors.

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Respectfully submitted,

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