UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: MALLINCKRODT PLC, Reorganized Debtor.[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.	Adversary Proceeding No. 22-50433 (JTD)

OPPOSITION OF THE OPIOID MASTER DISBURSEMENT TRUST II TO COVIDIEN'S MOTION FOR SUMMARY JUDGMENT BASED ON THE SECTION 546(E) SAFE HARBOR

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

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Plaintiff, the Opioid Master Disbursement Trust II ("**Trust**"), by and through its undersigned counsel, hereby opposes Covidien's Motion for Summary Judgment Based on the Section 546(e) Safe Harbor, which was filed by defendants Covidien Unlimited Company ("**Covidien plc**"), Covidien Group Holdings Ltd. ("**Covidien Ltd.**"), Covidien International Finance S.A. ("**CIFSA**"), and Covidien Group S.à r.l. ("**Covidien Sarl**," and collectively, "**Defendants**")[1] in the above-titled adversary proceeding on July 10, 2024 ("**Motion**") (D.I. 93). For the reasons explained below, the Court should deny the Motion.[2]

PRELIMINARY STATEMENT

As detailed in the Amended Complaint, Defendants, through their (now former) pharmaceutical arm Mallinckrodt, engaged in blatant misconduct to boost sales of opioid painkillers and thereby helped create the nationwide opioid epidemic—one of the worst manmade public health disasters in history. Defendants then siphoned well over a billion dollars in value from the Mallinckrodt business and spun it off. And Defendants did so after saddling Mallinckrodt with a share of their tax liabilities and an alleged obligation to indemnify Defendants for opioid-related claims. These are all textbook fraudulent transfers that should be avoided and recovered for the benefit of opioid creditors.

Defendants now lodge their Motion, seeking to escape responsibility for their role in the opioid crisis and for the fraudulent transfers described in the Amended Complaint. Although Defendants are medical device companies (and were also pharmaceutical companies), they argue they are immune from liability because they are "financial participants" protected from avoidance

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

[2] Capitalized terms not otherwise defined shall have the meanings ascribed to them in the Amended Complaint. D.I. 59 ("**Am. Compl.**").

claims by the affirmative defense set forth in 11 U.S.C. § 546(e) ("**Section 546(e)**"). None of them, however, comes close to qualifying as a financial participant.

In trying to manufacture a Section 546(e) defense, Defendants mischaracterize several of their financial transactions to improperly claim that Defendants qualify as a "financial participant." For three of the four defendants (CIFSA, Covidien Ltd., and Covidien plc), Defendants argue that they have indentures that qualify as securities contracts, but the bankruptcy courts in Delaware and the Southern District of New York have already found that indentures are not securities contracts – and no courts have found to the contrary. In any case, this Court should deny the Motion because the Covidien affiliates are parties to the indentures.

As for the fourth defendant, Covidien Sarl, Defendants attempt to use three negotiated purchase agreements to support an argument that they have over $100 million in "mark-to-market positions," but the negotiated purchase agreements they rely on are the opposite of mark-to-market positions, and the Trust has presented unrebutted expert testimony on this point. Finally, Covidien Sarl argues that it qualifies as a financial participant because it has currency forward contracts and swaps with a notional amount in excess of $1 billion, but Covidien Sarl did not provide any evidence of swaps, and all the currency forward contracts are FX forwards that do not have a "notional principal amount," as would be required to be a financial participant.[3] Thus, the Motion fails to demonstrate that any of the Defendants is a financial participant and therefore should be denied.

Additionally, this Court should deny the Motion as Defendants have failed to show the existence of a qualifying transaction. Defendants single out one component part of the spinoff—

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[3] The expert declaration of Dr. Franck Risler is annexed hereto as **Exhibit 1** ("**Risler Decl.**"). The expert declaration of Guy Davis is annexed hereto as **Exhibit 2** ("**Davis Decl.**"). Defendants did not put forward any experts to rebut the conclusions of Dr. Risler and Mr. Davis.

i.e., the share redemption—and argue that the entire spinoff is a qualifying transaction because of that single component. The spinoff, however, had 231 individual steps, and the great majority of those steps did not involve settlement payments. The transfer of Defendants' entire business enterprise was a fraudulent transfer such that the multistep spinoff cannot be reduced to a single component step.

Defendants' arguments as to specific counts of the Amended Complaint fare no better. As detailed below in part VI, Defendants have formally withdrawn the Motion as to Count IV (Avoidance of Cash Transfers). And, as explained in parts V and VII below, Counts II (Avoidance of Indemnity Obligations), III (Avoidance of Tax Liability), VI (Equitable Subordination), VII (Disallowance of Claims Under Section 502(d)), and VIII (Disallowance of Contingent Indemnity Claims) of the Amended Complaint do not involve securities contracts and Defendants have wholly failed to meet their burden to show otherwise.

Defendants' argument that a release bars Count V (Reimbursement, Indemnification, and Contribution) as a matter of law is also without merit. Count V is not an avoidance claim under 11 U.S.C. § 544(b)(1) and it embodies an alternative theory of liability that cannot be dismissed on Section 546(e) grounds. In addition, numerous grounds exist to invalidate the release apart from allegations of fraudulent transfer.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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

Defendants and Mallinckrodt's tortious conduct fueled the opioid epidemic. Mallinckrodt, under Covidien's domination and control, encouraged their sales representatives to relay misleading claims about opioids' benefits, while downplaying the risks of addiction. Am. Compl. ¶¶ 44-47. They used tactics designed to keep patients on opioids at higher doses for longer periods of time. *Id.* ¶¶ 48-50. They marketed their branded opioid product Exalgo as "abuse-deterrent," even after the FDA concluded in 2010 that Exalgo *increased* the risk of abuse. *Id.* ¶¶ 51-59. Mallinckrodt, under Covidien's domination and control, also intentionally targeted physicians known to be high opioid prescribers. *Id.* ¶¶ 63-70. They used websites and other media to promote false and misleading information about the efficacy of their opioid products and opioids generally while downplaying the attendant risks of addiction and abuse. *Id.* ¶¶ 71-78. They also paid "key opinion leaders" to disseminate false and misleading information about the dangers of prescribing opioids. *Id.* ¶¶ 79-83. Moreover, Defendants and Mallinckrodt failed to meet their legal obligations to implement an effective system to detect and report suspicious opioid orders, *i.e.* those likely to lead to diversion of its products to be sold for recreational use and abuse. *Id.* ¶ 99.

Defendants and Mallinckrodt's role in creating and perpetuating the opioid crisis gave rise to enormous opioid liability that dwarfed the companies' assets. Recognizing the anticipated and escalating liability from its opioid-related misconduct, Defendants engaged in several fraudulent transfers. First, starting in 2010, Defendants siphoned approximately $867 million in cash from the Mallinckrodt business. Second, unable to sell the Mallinckrodt business to a third party that would assume its opioid liabilities, Defendants spun off that business to newly formed Mallinckrodt plc to separate Covidien's valuable medical device and supply business from the escalating opioid liabilities. Third, in connection with the spinoff, Defendants shifted hundreds of millions of dollars in tax liability onto Mallinckrodt and imposed on Mallinckrodt an alleged obligation to indemnify Covidien for all opioid-related liabilities.

This was actionable misconduct that harmed Mallinckrodt's creditors. Accordingly, on October 11, 2022, the Trust filed its complaint against Defendants, *inter alia*, to avoid and recover the fraudulent transfers. D.I. 1. On December 23, 2023, Defendants moved to dismiss the original complaint on various grounds, including Section 546(e). Covidien's Motion to Dismiss the Complaint, D.I. 15. On January 18, 2024, this Court denied in part and granted in part the motion to dismiss. Importantly, in its ruling on the motion to dismiss, this Court rejected Defendants' Section 546(e) arguments, concluding that Defendants had failed to show on the face of the complaint that they were each a "financial participant," as defined in the Bankruptcy Code. Op. at 30-31, D.I. 57. The Trust filed its Amended Complaint on February 8, 2024. D.I. 59.

On July 10, 2024, Defendants filed their Motion seeking summary judgment on all causes of action in the Amended Complaint on Section 546(e) grounds. D.I. 93. The Motion, *inter alia*, alleges that each Defendant qualifies as a "financial participant" under the Code and that this Court previously decided that the spinoff was a qualifying transaction. *Id.* at 5-18. Defendants subsequently withdrew their Motion as to Count IV of the Amended Complaint, which relates to the cash transfers. D.I. 145.

STANDARD OF REVIEW

A party is only entitled to summary judgment where it can show that "there is no genuine dispute as to any material fact and [that it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden to demonstrate the absence of any material issues of fact. *Yurecka v. Zappala*, 472 F.3d 59, 62 (3d Cir. 2006) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). A fact is material where it could impact the outcome of the proceeding, *Orexo*

AB v. Actavis Elizabeth LLC, 371 F. Supp. 3d 175, 180 (D. Del. 2019) (citing *Lamont v. New Jersey*, 637 F.3d 177, 181 (3d Cir. 2011)), and a dispute of material fact is genuine where a reasonable jury could find in favor of the nonmoving party. *MobileMedia Ideas, LLC v. Apple Inc.*, 209 F. Supp. 3d 756, 759 (D. Del. 2016) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986)). In conducting these analyses, the Court must draw all reasonable inferences in favor of the nonmoving party, without weighing the evidence or making credibility determinations. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

ARGUMENT

A defendant only receives the benefit of Section 546(e) when two requirements are met: (1) there is a qualifying transaction (*e.g.*, a settlement payment or a transfer made in connection with a securities contract) and (2) there is a qualifying participant (*e.g.*, the payment or transfer was "made by or to (or for the benefit of) a . . . financial participant"). 11 U.S.C. § 546(e); Op. at 27. Neither requirement is satisfied here. No Defendant comes close to qualifying as a "financial participant" under the Code. Defendants also fail to demonstrate a qualifying transaction and fail to show that certain causes of action are related to a securities contract. Although the Court stated in its decision on Covidien's motion to dismiss that the transfers were a settlement payment,[4] it later noted that: "I haven't yet ruled on the question of whether or not my decision . . . is law of the case."[5] For the reasons explained below, this decision should be revisited. *See infra* part III & note 22. Accordingly, the Court should deny the Motion in its entirety.

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[4] Op. at 29-30.

[5] Hr'g Tr. at 3:22-25, Sept. 19, 2024.

I. NONE OF DEFENDANTS IS A "FINANCIAL PARTICIPANT" UNDER THE CODE

No Defendant qualifies as a "financial participant" for purposes of Section 546(e). The definition of "financial participant" only covers entities with qualifying transactions or agreements that satisfy two high-dollar thresholds: (1) those with a total gross dollar value of not less than $1 billion in notional or actual principal amount outstanding; and (2) those with gross mark-to-market positions of not less than $100 million. *See* 11 U.S.C. § 101(22A)(A). The same definition recognizes securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, and master netting agreements as qualifying transactions or agreements. *See id*. (citing 11 U.S.C. § 561(a)). For the reasons explained below, the transactions or agreements that Defendants rely on in their Motion fail to make them financial participants.

A. CIFSA's Trust Indentures Do Not Make It a "Financial Participant"

Defendants argue that CIFSA is a "financial participant" because it was a party to seven trust indentures (collectively, "**CIFSA Indentures**"). Mot. at 5-6, 12-13.[6] But the CIFSA Indentures cannot make CIFSA a "financial participant" because a trust indenture is not a "securities contract," as defined in § 741(7) of the Bankruptcy Code. The CIFSA Indentures are not contracts "for the purchase, sale, or loan of a security . . . ." 11 U.S.C. § 741(7)(A)(i). Like other trust indentures, the CIFSA Indentures are documents setting forth the terms of the securities—here, the CIFSA-issued notes—and the duties and responsibilities of the indenture trustee for those securities. The CIFSA Indentures do not include the hallmarks of a purchase or sale agreement: most notably, they do not include an actual buyer of securities, or the terms of a sale, including a commitment to purchase at a particular price or the number of securities to be

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[6] The CIFSA Indentures are attached as Exhibits 6-12 of the Declaration of Benjamin Wood (D.I. 94), which accompanied the Motion.

purchased. On the contrary, the CIFSA Indentures are signed only by the issuer, the guarantors, and the indenture trustee, not a buyer of securities.[7]

The two courts that have addressed whether an indenture qualifies as a "securities contract" have determined that it does not. In one of the cases, Judge Walrath determined that an indenture does not fall within the definition of "securities contract" in the Bankruptcy Code. *See EPLG I, LLC v. Citibank (In re Qimonda Richmond, LLC)*, 467 B.R. 318, 323 (Bankr. D. Del. 2012) (concluding that, while indentures are contracts, they are not securities contracts as defined by the Bankruptcy Code). Citing the *Qimonda* decision, the Bankruptcy Court for the Southern District of New York also held that indentures do not qualify as securities contracts. *See In re MPM Silicones, LLC*, No. 14-22503-rdd, 2014 WL 4436335, at *21 (Bankr. S.D.N.Y. Sept. 9, 2014) (finding that indentures at issue "are not contracts for the purchase, sale or loan of a security; they instead set forth the terms under which the underlying notes will be governed and the role of the trustees in connection therewith"), *aff'd*, 531 B.R. 321 (S.D.N.Y. 2015), *aff'd in part, rev'd in part on other grounds, and remanded*, 874 F.3d 787 (2d Cir. 2017). Covidien does not identify any caselaw to the contrary and admitted in its Rule 30(b)(6) deposition that it was not aware of any occasion where an indenture was used to support a Section 546(e) defense.[8]

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[7] Section 741(7) of the Code contains a lengthy and detailed list of what qualifies as a "securities contract." For example, it includes "a contract for the purchase, sale, or loan of a security" and "any option entered into on a national securities exchange relating to foreign currencies." 11 U.S.C. § 741(7)(A)(i)-(ii). The list, however, does not mention indentures and unsecured notes. *See id.* Indeed, a "note" is included in the Code's definition of "security" but not in the definition of "securities contract." *Compare* § 101(49)(A)(i) (defining "security") with § 741(7) (defining "securities contract").

[8] 30(b)(6) Deposition of Covidien Unlimited Company, Covidien Grp. Holdings Ltd., Covidien Int'l Fin. S.A., Covidien S.A.R.L., (Nov. 13, 2024) (annexed hereto as **Exhibit 3**) at 24:1-4 ("Q. Are you aware of any company that has been found to be a financial participant by virtue of their being a party to an indenture? A. I'm not aware."). Defendants' reliance on *In re Quebecor World (USA) Inc.*, 719 F.3d 94, 98-99 (2d Cir. 2013), is misplaced. Defendants argue that *Quebecor* stands for the proposition that a note purchase agreement providing for the repurchase of notes qualifies as a "securities contract." Mot. at 12. But *Quebecor* does not address indentures or guarantees of indentures. *See* 719 F.3d at 99.

Since Defendants rely solely on the CIFSA Indentures for their argument that CIFSA is a financial participant, this Court should deny the Motion as to CIFSA.

B. The CIFSA Indentures Are Not "Option Contracts" That Can Satisfy the "Financial Participant" Definition

Defendants argue that the CIFSA Indentures fall within the Code's definition of "securities contract" because the indentures are allegedly "contracts granting options" as they (1) allow the noteholders to sell the CIFSA-issued notes back to CIFSA under certain defined circumstances, (2) allow the noteholders to require CIFSA to repurchase the notes upon a "change of control triggering event," and (3) allow CIFSA to call or redeem the notes early. Mot. at 5-6, 12-13. These arguments strain credulity. As shown below, almost all indentures, including the indentures in *Qimonda* and *MPM Silicones*, have the same or similar embedded "options." Also as shown below, these embedded options are fundamentally different from the exchange-traded options that qualify as securities contracts.

1. *The Qimonda and MPM Silicones Indentures Have the Same Embedded Options as the CIFSA Indentures*

Defendants suggest that *Qimonda* and *MPM Silicones* are inapposite because there is no indication that the indentures in those cases had any call or put options to purchase the bonds. Mot. at 12-13 n.38. Their argument is without merit. The indentures examined in the *Qimonda* and *MPM Silicones* cases had call or put features that were substantially the same as those found in the CIFSA Indentures. *See* Risler Decl. ¶¶ 6.1-6.8. The *Qimonda* indenture contained three embedded call features that allowed the company to modify payment flows and the amount of the debt under pre-specified circumstances. *Id.* ¶¶ 6.1-6.5. The Solutia indenture in *MPM Silicones* contained both embedded put and call options, including a change-of-control put feature, which granted noteholders the right to require Solutia to repurchase its notes at 101% of the principal amount, plus accrued and unpaid interest, if a change of control occurred. *Id.* ¶ 6.8 (citing App'x

D § 4.08); Mot. at 5-8. Both the call and put features in the Solutia indenture operated like those in the CIFSA Indentures, allowing for modifications to the payment flow and amount of the debt under pre-specified circumstances. *Id.* ¶ 6.9. Further, contrary to what Defendants suggest, the court in *MPM Silicones* did acknowledge the embedded options when it found that the indenture was not a securities contract. *See MPM Silicones*, 2014 WL 4436335 at *11 (noting optional and mandatory redemption provisions in the indenture at issue).

2. *The Embedded Options Do Not Share the Features of Exchange Traded Options*

Defendants' argument that indentures with put and call features are "options" and therefore qualify as a "securities contract" under the Code relies on a logical fallacy. The argument starts with the premise that the CIFSA Indentures contain embedded put and call "options" that can be exercised by certain parties in defined circumstances. The second premise is that there are exchange-traded options in the derivatives markets that satisfy the Code's definition of "securities contract." Defendants then ask this Court to conclude from these premises that the CIFSA Indentures must be treated as a "securities contract" in the same manner as exchange-traded options. This conclusion logically fails because the embedded options in the CIFSA Indentures are different in kind from, and do not share any of the features of, exchange-traded options. The embedded options are nothing more than standard provisions in an indenture.

In his declaration, the Trust's expert, Dr. Franck Risler, explains that the embedded put and call options in the CIFSA Indentures are not distinct "option contracts" and should not be treated as such. Risler Decl. ¶ 3.2. First, the embedded call and put features of the CIFSA Indentures are integral to the notes associated with those indentures and cannot be separated from the notes. *Id*. ¶ 3.3. Unlike standalone options that can be bought, sold, or transferred separately, the embedded call and put features of the CIFSA Indentures are inseparable components of the notes themselves. *Id*. These features cannot be detached or traded independently. *Id*. This differentiates indentures from standalone derivatives like exchange-traded options, which can be bought or sold separately. *Id*.

Moreover, the CIFSA-issued notes, together with the embedded features, form a single financial instrument that is priced and traded as a whole in the market. *Id.* ¶ 3.5. Unlike option contracts, which provide their holders with exposure to the underlying asset without requiring direct ownership, only noteholders are entitled to the embedded put feature under a change-of-control scenario, and only CIFSA has the right to exercise the embedded call features. *Id.* The requirement of direct note ownership underscores the inseparable nature of the embedded call and put features from the notes. *Id.*

Importantly, only the note issuer (*i.e.*, CIFSA) can exercise the embedded call features, making them non-tradeable, unlike over-the-counter call option contracts negotiated between counterparties and typically subject to ISDA[9] rules or exchange-traded options. Risler Decl. ¶ 3.15. And CIFSA's obligation to repurchase the notes upon exercise of the embedded put feature cannot be transferred to or assumed by other market participants. This means that CIFSA's repayment obligation cannot be traded by other market participants, unlike standard put option contracts. *Id.* ¶ 3.19. In sum, the embedded options in the CIFSA Indentures should not allow Defendants to make a false equivalency between the indentures and exchange-traded options.

C. The Guarantees to the Indentures Do Not Qualify Covidien plc and Covidien Ltd. as Financial Participants

Defendants assert that Covidien plc and Covidien Ltd. qualify as "financial participants" under the Code solely because they are "guarantors" of the CIFSA Indentures and the CIFSA

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[9] ISDA stands for International Swaps and Derivatives Association, the trade organization overseeing the trading rules of over-the-counter derivatives.

Indentures are each a "securities contract." Mot. at 13-18. This argument fails because, as set forth above, the CIFSA Indentures do not fit within the Code's definition of "securities contract." *See supra* part I.A. Accordingly, even if Covidien plc and Covidien Ltd. could piggyback on the CIFSA Indentures, they cannot qualify as a "financial participant" because none of the CIFSA Indentures qualify as a "securities contract."

Covidien plc and Covidien Ltd. also fail to qualify as a financial participant for two additional reasons. First, contracts between affiliates are not qualifying agreements that can make an entity a financial participant. *See* 11 U.S.C. § 101(22A)(A) (providing that, to be a "financial participant," an "entity" must have entered into a qualifying transaction with "the debtor or any other entity (*other than an affiliate*)") (emphasis added). When they entered into the CIFSA Indentures, CIFSA was a wholly owned subsidiary of Covidien Ltd. and Covidien plc, which made these entities affiliates of one another.[10] Risler Decl. ¶ 2.4. Accordingly, Covidien plc and Covidien Ltd. are not eligible to be a "financial participant" under the Code.

Defendants argue that the affiliate exclusion does not apply because Deutsche Bank, a nonaffiliate, was a party to the CIFSA Indentures as trustee for the noteholders. Mot. at 13. But Defendants provide no case support for their argument. And their argument defies the statute's plain terms: nothing in the definition of "financial participant" suggests that the affiliate exclusion does not apply if nonaffiliates are also included in the transaction. *See* 11 U.S.C. § 101(22A)(A).

Second, Covidien plc's and Covidien Ltd.'s guarantor obligations do not qualify as option contracts or securities contracts. The guarantees are non-tradable and cannot be bought or sold as financial instruments in the marketplace. Risler Decl. ¶ 4.4. Option holders have the right, not the

[10] The fact that CIFSA, Covidien Ltd., and Covidien plc are affiliates is also an independent ground for finding CIFSA is not a financial participant. In addition, prior to the spinoff, these Covidien entities were affiliates of the Mallinckrodt entities that comprised the Covidien pharmaceuticals business, thus further bolstering their exclusion as affiliates from the "financial participant" definition. *See* 11 U.S.C. § 101(2)(A).

obligation, to buy or sell assets according to the option contract. The CIFSA Indentures make it clear that Covidien plc and Covidien Ltd. are obligated to absolutely and unconditionally guarantee CIFSA's obligations as to the notes. *Id.* ¶ 4.5. Guaranteeing CIFSA's note obligations is fundamentally distinct from holding option contracts, and Covidien Ltd. and Covidien plc are nothing more than affiliated guarantors. *Id.* ¶ 4.8.

D. Covidien Sarl Does Not Qualify as a Financial Participant

Defendants argue that Covidien Sarl meets the Code's definition of "financial participant" based on three purchase agreements that allegedly amount to "mark-to-market positions in excess of $100 million[.]" Mot. at 18. Defendants further contend that Covidien Sarl is also a financial participant because it had "currency forward and swap contracts with an aggregate notional amount in excess of $2.5 billion on April 23, 2024[.]" *Id*. For the reasons explained below, none of these arguments has merit.

1. The Three Purchase Agreements Are Not Mark-to-Market Positions

The term "mark to market" derives from principles of mark-to-market accounting—which is a method to adjust the value of an asset on a regular basis to reflect its current or updated fair market value.[11] It is an accounting system "in which the securities are 'marked' to their market value at the end of each year." *JPMorgan Chase & Co. v. Comm'r of Internal Revenue*, 458 F.3d 564, 568 (7th Cir. 2006). "Mark-to-market accounting is generally limited to investments held for trading purposes and for certain derivative instruments[.]"[12] None of the three purchase agreements is a mark-to-market position. Instead, the prices and figures in each contract were

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[11] "Market to Market", CFI, https://corporatefinanceinstitute.com/resources/valuation/mark-to-market (last visited Dec. 19, 2024).

[12] SEC, Report and Recommendations Pursuant to § 133 of the Emergency Economic Stabilization Act of 2008: Study on Mark-to-Market Accounting at 7 (available at https://www.sec.gov/files/marktomarket123008.pdf).

negotiated by the parties, did not fluctuate with changing market values, and were not entered on the books of Covidien Sarl until closing.

The "authoritative guidance for corporate acquisitions in U.S. GAAP is provided in Accounting Standards Codification ("**ASC**") 805 'Business combinations.'" Davis Decl. ¶ 16.[13] This guidance does not "permit (or require) the purchaser to recognize assets or liabilities relating to an outstanding purchase agreement (or option) until the transaction closes. Once closed, the purchaser recognizes the assets acquired and liabilities assumed at their fair value. Accordingly, there is no mark-to-market process applicable to an outstanding purchase agreement." *Id.* (footnote omitted).

In addition, ASC 815, "Derivatives and Hedging," provides guidance on accounting of derivative instruments and hedge positions and states that derivative instruments must be accounted for using the mark-to-market method. *Id.* ¶ 17. Importantly, ASC 815-10-15-74 specifies that purchase agreements and options to purchase corporations are *not considered derivative instruments* and are therefore *excluded from mark-to-market accounting*. *Id.*[14]

Defendants cite *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, which notes that mark-to-market accounting is required to reflect "fair market value of investment assets." 894 F.3d 339, 349 (D.C. Cir. 2018) (citation omitted). But the fact that mark-to-market accounting is used to reflect the fair market value of certain assets, such as exchange-traded securities, does not

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[13] Regulators and courts accept the Financial Accounting Standards Board's ("**FASB**") accounting standards "as authoritative." *See, e.g.*, *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 159-60 n.4 (2d Cir. 2000) (recognizing that "[t]he SEC treats the FASB's standards as authoritative"); *see also New Eng. Carpenters Guaranteed Annuity & Pension Funds v. DeCarlo*, 122 F.4th 28, 43 n.9 (2d Cir. 2023) ("The Accounting Standards Codification ('ASC') is the 'source of authoritative generally accepted accounting principles,' commonly referred to as 'GAAP,' published by the [FASB] 'to be applied by nongovernmental entities[.]'" (quoting *FASB, Accounting Standards Codification: Overview and Background*, 105-10-05-1 (2020), https://asc.fasb.org/1943274/2147479442); *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 677-78 & n.22 (6th Cir. 2005) (relying on FASB GAAP standards and recognizing that such standards are treated as "authoritative" by the SEC).

[14] PwC interpretive guidance under ASC 815 "Derivatives and hedging," updated March 2024 at 3-28. FASB, ASC 815-10-15-74, retrieved Oct. 15, 2024 from https://asc.fasb.org/.

mean that every contract that has fair market value reflected in its negotiated price is a mark-to-market position. Here, *fair market value* means the contract prices that Covidien Sarl and its counterparties, as a willing buyer and seller, agreed to in arm's length transactions, without temporal or financial duress. *See Branch v. Ernst & Young U.S.*, 311 F. Supp. 2d 179, 181 (D. Mass. 2004) ("'Fair value' is the negotiated price that a willing and sophisticated buyer would pay for an asset in an arm's-length transaction in which neither the buyer nor the seller is acting under temporal or financial duress.") (citation omitted); *In re Appraisal of Columbia Pipeline Grp., Inc.*, No. 12736-VCL, 2019 WL 3778370, at *17 (Del. Ch. Aug. 12, 2019), *judgment entered*, 2019 WL 4541463 (Del. Ch. 2019) (stating that, on three occasions, "the Delaware Supreme Court has endorsed using the deal price in an arm's-length transaction as evidence of fair value") (footnote omitted). Accordingly, Defendants' efforts to confine *fair market value* to mean only "mark-to-market positions" is unavailing.[15]

The three purchase agreements Covidien Sarl relies on to purportedly show that it has more than $100 million in "mark to market positions" are set forth in the declaration of Covidien attorney Ron Garber.[16] Notably, the Garber declaration does not assert that any of the three purchase agreements are mark-to-market positions. Mr. Garber also admitted in deposition that all the figures in the following purchase agreements were negotiated between the private parties to those agreements. Ex. 3 at 50-52, 67.

[15] An analogy to this are squares and rectangles: all squares are rectangles, but not all rectangles are squares. Thus, just because Defendants contend that mark-to-market value is always fair market value does not mean the reverse is true.

[16] *See* Decl. of Ron Garber (D.I. 96) ("**Garber Decl.**").

a. The Digital Surgery Purchase Agreement

Covidien Sarl's first agreement is a "Share Purchase Agreement" to purchase 100% of the shares of Digital Surgery Limited for [redacted] plus post-closing adjustments based on milestones. Garber Decl. ¶¶ 6-8. The milestones were focused, in large part, on specific product development goals and employee retention metrics. Davis Decl. ¶ 21. Market share, financial performance, or investment returns did not influence these milestone payment obligations. *Id.*

If, under a purchase agreement, the purchaser owes the seller an earn-out or similar contingent future consideration, those obligations are treated as contingent liabilities (ASC 450, "Contingencies"). *Id.* ¶ 18.[17] ASC 450-20-25-2 provides that, when the purchase transaction closes, the purchaser records a contingent liability in its books only if the triggering event is probable and the financial obligation is reasonably estimable. *Id.* Before closing, however, the obligation does not exist and therefore is not recorded in the purchaser's balance sheet. *Id.* Here, consistent with these accounting principles, Covidien Sarl did not recognize any newly acquired asset on its financial statement when it executed the Digital Surgery agreement. *Id.* ¶ 21. Because no assets were recognized, there were no assets that could be valued at "mark to market" (or any other method of valuation) and thus no "mark to market positions." *Id.* at 22.

b. The Medicrea International Tender Offer Agreement

The second agreement is a tender offer agreement negotiated between Medicrea International and Covidien Sarl. The agreement provided that Covidien Sarl would purchase a controlling interest in the company at a tender price of €7 per share. Garber Decl. ¶¶ 9-11. Garber admitted in deposition that the parties had negotiated the tender price. Ex. 3 at 51. [redacted] Garber Decl. ¶¶ 9-11.

[17] PwC interpretive guidance under ASC 450 "Contingencies," Nov. 2023. FASB, retrieved October 15, 2024 from https://asc.fasb.org/.

[redacted] Davis Decl. ¶ 24. [redacted] *Id.* [redacted] *Id.* [redacted] *Id.* ¶ 25. Covidien Sarl had no entries related to the Medicrea acquisition prior to the closing date. *Id.* Because there were no accounting entries made prior to closing, there were no mark-to-market positions created by the Medicrea agreement. *Id.*

c. [redacted] <u>Acquisition Option Agreement</u>

The [redacted] acquisition option agreement gave Covidien Sarl the option to purchase all the shares of [redacted] Garber Decl. ¶¶ 12-15. The parties to that agreement negotiated the purchase price. Ex. 3 at 52. No journal entries were made to reflect Covidien Sarl's obligations when the [redacted] agreement was signed on June 16, 2020, and the transaction never closed. Davis Decl. ¶ 27. Covidien Sarl did not record or recognize an asset when it signed the agreement or at any time thereafter. *Id.* Accordingly, the [redacted] agreement cannot be treated as a mark-to-market position. *Id.*

2. Covidien Sarl's FX Forward Contracts Do Not Have Notional Principal Amounts

Defendants assert that Covidien Sarl is a "financial participant" because it "had currency forward and swap contracts outstanding with a total gross dollar value in excess of $1.0 billion in notional amount."[18] But their assertion fails for two reasons. First, "notional amount" is not the correct metric for determining whether an entity is a "financial participant." The "financial participant" definition refers to the "notional or actual *principal* amount outstanding[.]" 11 U.S.C. § 101(22A)(A) (emphasis added). "Notional principal amount" is used in certain swap agreements

[18] Decl. of Tim Husnick (D.I. 95) ("**Husnick Decl.**") ¶¶ 7-13.

and other risk management products. Leslie B. Samuels, *Observations on the Taxation of Global Securities Trading*, 45 Tax L. Rev. 527, 613 n.15 (1990). In such agreements, the parties agree to make periodic payments determined by applying a fixed or floating interest rate to a *specified* notional principal amount. *Id*. The notional principal amount serves as a reference for determining payments and is generally not actually borrowed or loaned between the parties, which is why it is referred to as "notional."

The financial literature makes clear that "notional principal amount" is a financially recognized term of art.[19] For example, NASDAQ defines a "notional principal amount" as "the predetermined dollar principal on which the exchanged interest payments are based" in "an interest rate swap[.]"[20] The Corporate Financial Institute defines "notional principal amount" as "the predetermined dollar amount in an interest rate swap on which interest payments are based. It is the face value that is used to calculate interest payments on financial instruments."[21] In trying to establish Covidien Sarl as a financial participant, Defendants fail to show that the instruments they rely on have a notional principal amount.

Second, Defendants assert that Covidien Sarl has "currency forward and swap contracts," but this is not an accurate description of the instruments they are relying on. The exhibits to Mr. Husnick's declaration do not include any swap contracts. *See* Risler Decl. ¶ 5.2; Husnick Decl.,

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19 "When construing a statute, technical terms of art should be interpreted by reference to the trade or industry to which they apply." *Verizon Wireless (VAW) LLC v. Kolbeck*, 529 F. Supp. 2d 1081, 1094 (D.S.D. 2007) (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372 (1986)). Indeed, "where Congress has used technical words or terms of act, it is proper to explain them by reference to the art or science to which they are appropriate." *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 441 n.43 (5th Cir. 2021) (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974)); *see also Lee v. United States*, No. 94–1597, 1995 WL 527373, at *2 (6th Cir. 1995) ("Rules of [statutory] construction require courts . . . to recognize that specific language controls general language.") (citing *Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)).

20 "Notional Principal Amount", NASDAQ, https://www.nasdaq.com/glossary/n/notional-principal-amount, (last visited on Dec. 19, 2024).

21 "Notional Principal Amount", CFI, https://corporatefinanceinstitute.com/resources/fixed-income/notional-principal-amount/, (last visited Dec. 19, 2024).

Ex. 9, 11. In addition, those exhibits feature a specific type of forward contract known as an "FX forward."[22] An FX forward contract is an agreement between two parties to purchase or sell a specific quantity of currency for a predetermined price on a specific date in the future. Risler Decl. ¶ 5.2. As such, FX forwards do not involve the computation and payment of interest based on a notional principal amount. *Id.* ¶ 5.5.

As expected for non-interest-bearing instruments, the trade confirmations for Covidien Sarl's FX forwards do not include terms related to interest payments (like coupon rate or payment frequency). *Id.* For FX forwards, the term "notional amount" typically refers to the amount of currency to be purchased or sold as specified in the contracts. *Id.* ¶ 5.6. Given that FX forwards are non-interest-bearing instruments, the notional amount in an FX forward contract should not be construed as a notional principal amount, where the latter is used to calculate periodic interest payments for interest-bearing instruments. *Id.* Indeed, in its regulations, the Internal Revenue Service excludes FX forward contracts from its definition of "notional principal contracts"—*i.e.*, contracts with notional principal amounts. *See* 26 C.F.R. § 1.446-3(c)(1)(i) & (ii); Risler Decl. ¶ 5.6 n.48. Because FX forwards are not contracts or instruments involving notional principal amounts, Covidien Sarl cannot qualify as a financial participant by relying on them. Accordingly, the Motion should be denied as to Covidien Sarl.

II. THE COURT MUST EXAMINE THE SECTION 546(E) AFFIRMATIVE DEFENSE FOR EACH DEFENDANT SEPARATELY

Defendants urge this Court to dismiss all four Defendants if any one Defendant can show it is a financial participant because the Amended Complaint refers to Defendants collectively as "Covidien" and asserts an alter ego claim. Mot. at 1-2. Defendants' argument is without merit.

[22] Mr. Husnick admitted in deposition that all the Covidien Sarl transactions were FX forwards and not swaps as alleged in the Motion. Ex. 3 at 86.

"The *alter ego* doctrine is a sword, not a shield, the basis for a cause of action, not a defense." *Lumpkin v. Envirodyne Indus., Inc.*, 933 F.2d 449, 460 (7th Cir. 1991); *see also Communist Party v. 522 Valencia, Inc.*, 41 Cal. Rptr. 2d 618, 626 (Cal. Ct. App. 1995) (stating that alter ego "is not a doctrine that allows the persons who actually control the corporation to disregard the corporate form"). Defendants are asserting Section 546(e) *as a defense* and therefore cannot invoke alter ego for their benefit. Accordingly, Defendants—which deny the Trust's alter ego allegations—cannot invoke alter ego to try to expand the Section 546(e) defense for the benefit of all.

III. THE SPINOFF IS NOT A QUALIFYING TRANSACTION

Defendants argue that Covidien's spinoff of Mallinckrodt is a qualifying transaction under Section 546(e) because only *one* step in the multistep spinoff transaction—*i.e.*, Mallinckrodt International Finance S.A.'s payment of $721 million to Covidien plc to redeem its shares—constituted a "settlement payment." *See* Mot. at 10. But the Trust's avoidance claims are not focused on that share redemption; rather, the Trust is seeking avoidance of the *entire* multistep spinoff. *See* Am. Compl. ¶¶ 312-17. "[T]he only relevant transfer for purposes of the [Section 546(e)] safe harbor is the transfer that the trustee seeks to avoid . . . . If a trustee properly identifies an avoidable transfer . . . the court has no reason to examine the relevance of the component parts when considering a limit to the avoiding power[.]" *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 538 U.S. 366 (2018). Defendants thus cannot use one component part of the spinoff—*i.e.*, the share redemption—to distill and reduce the multistep spinoff into a single settlement payment or transfer made in connection with a securities contract.[23] *See Hurwitz v. Fung Holdings (1937) Ltd.*

[23] Contrary to what Covidien asserts (Mot. at 10), this Court's prior ruling on Covidien's motion to dismiss does not foreclose the Trust's argument here. As this Court noted at a recent hearing, "I haven't yet ruled on the question of whether or not my decision on the . . . motion to dismiss, where I said that the transfers were settlement payments under the settlement agreement, is law of the case." Hr'g Tr. at 3:22-25, Sept. 19, 2024. Indeed, the Court reached its prior conclusion on the qualifying-transaction issue in connection with determining the sufficiency of the Trust's complaint, and the conclusion was not necessary to the Court's ultimate ruling that the Trust's complaint could not be dismissed on Section 546(e) grounds. *See, e.g., Calhoun v. Yamaha Motor Corp.*, 216 F.3d 338, 343 n.9 (3d Cir.

(In re GBG USA Inc.), No. 21-11369 (MEW), 2024 WL 5114996 (Bankr. S.D.N.Y. Dec. 16, 2024) (criticizing "Defendants [that] . . . want to re-define the relevant transactions" and noting that "[s]o long as the Trustee identifies the necessary elements for avoidance, however, a Court has no reason to look beyond the particular transfer that a Trustee has challenged").

Covidien's pharmaceuticals business was so firmly embedded in the Covidien enterprise group that it required Covidien to complete 231 separate transactions to isolate the Mallinckrodt pharmaceuticals business and then spin it off. *See* Davis Decl. ¶¶ 9 & n.1, 39, Ex. 4 (Project Jameson Final Step Plan). This complex series of transactions involved eight workstreams, 141 legal entities, and took over fourteen months. *Id.* ¶ 60. Nevertheless, the Trust's expert, Mr. Guy Davis, determined that only 69 (or 30%) of the 231 transactions constituted settlement payments and only 13% of the transactions were settlement payments that involved Defendants. *Id.*

The Court's decision in *Mervyn's Holdings, LLC v. Lubert-Adler Group (In re Mervyn's Holdings, LLC)*, 426 B.R. 488 (Bankr. D. Del. 2010) is instructive. There, Judge Gross found that the challenged transactions were not safe-harbored and noted that the defendant's "attempt to have this Court apply section 546(e) to a single conveyance within the entire transaction is not persuasive." *Id.* at 499-500. Judge Gross noted that the overall transaction involved steps outside the scope of § 546(e)—chiefly, real estate transfers—and concluded that "because of the multiple conveyances made surrounding the . . . [transaction], section 546(e) does not apply." *Id.* at 500.

Additionally, in *Halperin v. Morgan Stanley Investment Management, Inc. (In re Tops Holding II Corp.)*, Judge Drain rejected the defendants' argument that § 546(e) safe-harbored

2000) (statement in prior decisions that the court "could have exercised subject matter jurisdiction over the . . . action pursuant to the admiralty provision of section 1333" was not law of the case as "this determination was not necessary to either court's ultimate holding . . . . It therefore does not possess a binding effect on us pursuant to the 'law of the case' doctrine.") Accordingly, the Court's prior statement regarding the qualifying-transaction issue at the motion-to-dismiss stage is not law of the case.

certain dividend transfers where the dividends were part of an integrated transaction that started with the issuance of private notes and ended with the payment of dividends. 646 B.R. 617, 678-82 (Bankr. S.D.N.Y. 2022). Judge Drain concluded that, under *Merit Management*, courts cannot consider distinct steps (in an integrated transaction) "independently of the overall transaction." *Id*. Judge Drain emphasized that "A→D must be shown to fit within the safe harbor if the plaintiff is seeking to avoid transfer D; showing A→B is safe-harbored is unavailing[.]" *Id*.

Based on *Mervyn's* and *Tops Holding*, Defendants cannot contend that one share redemption that arguably is a "settlement payment" brings the entire spinoff within Section 546(e)'s safe harbor. Nor is it tenable for them to argue that the Separation and Distribution Agreement[24] governing the spinoff constitutes a "securities contract" when only 30% of the 231 transactions comprising the spinoff can be characterized as settlement payments. Accordingly, the spinoff cannot be characterized as a "transfer made . . . in connection with a securities contract[.]" 11 U.S.C. § 546(e).

Moreover, the steps comprising the spinoff that the Trust seeks to avoid were private transactions among affiliates within the Covidien enterprise group. The purpose of Section 546(e) is to "protect[ ] the market from systemic risk and allow[ ] parties in the securities industry to enter into transactions with greater confidence" and thereby prevent "one large bankruptcy from rippling through the securities industry[.]" *Grede v. FCStone, LLC*, 746 F.3d 244, 252 (7th Cir. 2014); *see also Kirschner v. Robeco Cap. Growth Funds (In Re Nine W. LBO Sec. Litig.)*, 87 F.4th 130, 146 (2d Cir. 2023), *cert. denied sub nom. Stafiniak v. Kirschner*, 144 S. Ct. 2551 (2024) ("Congress enacted the safe harbor in 1982 to shield certain transfers that, if avoided by trustees, could trigger

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[24] Separation and Distribution Agreement by and Between Covidien plc and Mallinkrodt plc, dated June 28, 2013 ("**Separation Agreement**").

systemic risk in financial markets . . . Interpreting the safe harbor as broadly as defendants suggest would limit the avoidance power even where it would not threaten the financial system." (citations omitted)). Because the steps comprising the spinoff were private transactions within the Covidien group, the Trust's avoidance claims do not implicate or pose systemic risk to public securities markets, nor could these claims cause "ripple effects" throughout "the securities industry." Accordingly, an additional reason to reject the Defendants unprecedented interpretation is that it would not advance Section 546(e)'s acknowledged purpose. The Motion should be denied.

IV. THE TRUST'S CLAIM FOR REIMBURSEMENT, INDEMNIFICATION, AND CONTRIBUTION IS NOT BARRED BY SECTION 546(E)

Defendants' argument that the Court should dismiss Count V for reimbursement, indemnification, and contribution rests on a faulty premise and would require the parties to establish facts that go beyond the limited discovery permitted for the Motion. *See* Mot. at 25.[25] Defendants insist that the Trust must "undo" Mallinckrodt's release of Defendants in the Separation Agreement "as a fraudulent transfer" in order for Count V to proceed but assert that Mallinckrodt's release cannot be avoided because of the Section 546(e) safe harbor. Mot. at 26. But Count V is not an avoidance claim under 11 U.S.C. § 544(b)(1) and it embodies an alternative theory of liability that cannot be dismissed on Section 546(e) grounds. The Trust does not need the bankruptcy avoidance power to overcome the Mallinckrodt release.

Exculpation clauses purporting to limit liability may not be enforceable where the provision was "the result of unconscionable conduct or unequal bargaining power between the

[25] Also, Covidien previously argued that the Trust should not be allowed to file an Amended Complaint as to Count V because the release in the Separation Agreement barred Count V as a matter of law and that the release could only be avoided by a fraudulent transfer claim. Covidien's Opposition to the Motion of the Opioid Master Disbursement Trust II for Leave to File Amended Complaint. D.I. 41 at 17, 21. While the Court did not directly address the argument, it granted the Trust's motion for leave to amend with respect to its reimbursement, indemnification, and contribution claim, thus implicitly overruling the argument that this issue could be decided without any further factual discovery and as a pure matter of law. *See* Op. at 91.

parties." *Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 544 B.R. 75, 85 (Bankr. S.D.N.Y. 2016).[26] The *Lyondell* court explained that where "there is a defect in the negotiation process such that a disparity in bargaining power denied one party a meaningful choice" or there is "such a disparity of bargaining power that the agreement does not represent a free choice on the part of the plaintiff[,]" those provisions may not be enforceable. *See id.* (quoting *SI Commc'ns, Inc. v. Nielsen Media Research*, 181 F. Supp. 2d 404, 412 (S.D.N.Y. 2002)).

The Amended Complaint contains factual allegations that Covidien dominated and controlled Mallinckrodt beyond what is customary in a parent-subsidiary relationship, which, based on *Lyondell*, would support a finding that the Mallinckrodt release is not enforceable. *See* Am. Compl. ¶¶ 160-73. For instance, the Trust alleged that the spinoff and Separation Agreement were not the result of any arms-length bargaining (*id.* ¶ 170), that Defendants refused to allow Mallinckrodt its own legal counsel leading up to the spinoff (*id.* ¶ 169), and that Defendants made all decisions concerning the spinoff (*id.* ¶ 168). Yet, because these allegations are not directly pertinent to Section 546(e), the Trust has not yet had the opportunity to take full discovery on them. Accordingly, summary judgment would be inappropriate.

Additionally, courts have recognized that a purported release can be void where the defendant engaged in a fraudulent scheme that encompassed the drafting of the agreement containing the release language. For example, in *Magten Asset Management Corp. v.*

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[26] The Separation Agreement is governed by New York law. *See* Decl. of Benjamin Wood, Ex. 1 ¶ 11.2(a). Exculpatory clauses are analogous to releases, as such clauses are a form of release. *See Am. Stores Props., Inc. v. Spotts, Stevens & McCoy, Inc.*, 648 F. Supp. 2d 700, 705 n.8 (E.D. Pa. 2009) ("An exculpatory clause is a release from liability for one's own contractual or tortious breaches."); *accord Patterson v. PowderMonarch, LLC*, 926 F.3d 633, 638 n.2 (10th Cir. 2019) (noting that Colorado courts treat exculpatory clauses and releases as "interchangeable"); *Degliomini v. ESM Prods., Inc.*, 253 A.3d 226 (Pa. 2021) (using the terms "release" and "exculpatory agreement" interchangeably); *McGrath v. SNH Dev., Inc.*, 969 A.2d 392 (N.H. 2009) (same); *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 203 n.3 (Ohio 1998) ("The words 'release,' 'waiver' and 'exculpatory agreement' have been used interchangeably by the courts."). Black's Law Dictionary defines an exculpatory clause as "[a] contractual provision relieving a party from liability resulting from a negligent or wrongful act." *Exculpatory Clause*, Black's Law Dictionary (12th ed. 2024).

Northwestern Corp. (In re Northwestern Corp.), the court held that a release would be ineffective where it was obtained by a defendant that intentionally and fraudulently concealed the fact that its financial condition was much worse than publicly reported. *See* 313 B.R. 595, 602-03 (Bankr. D. Del. 2004) (holding that fact issues surrounding defendant's knowledge of likely failure of the transaction, and whether the information provided to the public was in fact false, rendered resolution on a motion to dismiss improper); s*ee also Nat'l City Bank of Minneapolis v. Lapides (In re Transcolor Corp.)*, 296 B.R. 343, 373 (Bankr. D. Md. 2003) ("Certain exculpatory provisions . . . that purport[ ] to insulate [a defendant] from liability will not be enforced by this Court because these provisions are unenforceable in a court of equity in light of the fraud, misrepresentation, bad faith and intentional wrongdoing committed by one who asserts the clause as a defense."). The Trust has pointed to evidence that Covidien engaged in a fraudulent scheme to insulate itself from its opioid liabilities and to hinder, delay, or defraud the Debtors' creditors, including opioid claimants. *See* Am. Compl. ¶¶ 204-58, 286-95, 301-04. The Court found these allegations credible at the motion-to-dismiss stage. *See* Op. at 65 ("I find that the Trust has pled facts that support the presence of seven of the statutory badges of fraud. . . . the totality of the circumstances supports the reasonable inference that Covidien's board of directors possessed the requisite intent to hinder, delay, or defraud the Debtors' creditors in approving the Spinoff.").

Thus, the enforceability of the Mallinckrodt releases turns on evidence not currently before this Court. Additionally, the evidence going to the unenforceability of the Mallinckrodt release may overlap with the evidence establishing an intentional fraudulent transfer. But that does mean the release must be undone as a fraudulent transfer in order to find the release unenforceable. *Cf. TPC Grp. Litig. Pls. v. SK Second Rrsv. L.P. (In re Port Neches Fuels, LLC)*, 660 B.R. 177, 196 (D. Del. 2024) (Andrews, J.) (allowing claimants to pursue a tort claim for negligent undertaking "although reliant on facts that might also support a claim for veil piercing" even though veil-piercing claims had been released under the plan of reorganization).

The cases cited by Defendants to support the argument that the release agreement is enforceable because a wholly owned subsidiary only owes a fiduciary duty to a parent (Mot. at 28-29) are inapposite because that principle does not apply where a company is insolvent, as the Trust has alleged (*see*, *e.g.*, Am. Compl. ¶¶ 6, 285-304). *See In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 367 (3d Cir. 2007), *as amended* (Oct. 12, 2007) ("[I]f the subsidiary is insolvent, we require the same in the interest of protecting the subsidiary's creditors"); *Burtch v. Seaport Cap., LLC (In re Direct Resp. Media, Inc.)*, 466 B.R. 626, 649 (Bankr. D. Del. 2012) ("Under Delaware law, when a wholly-owned subsidiary is insolvent, the officers and directors of that subsidiary owe fiduciary duties to that subsidiary and its creditors."); *In re Scott Acquisition Corp.*, 344 B.R. 283, 288 (Bankr. D. Del. 2006) (citing *Geyer v. Ingersoll Publ'ns Co.,* 621 A.2d 784, 787 (Del. Ch. 1992) ("Under Delaware law, creditors of an insolvent corporation are owed fiduciary duties").

Moreover, the Mallinckrodt release that Defendants seek to shield under Section 546(e) is unenforceable as a matter of public policy. Under what is commonly referred to as the "bad faith" exception, courts refuse to allow defendants to limit their liability for willful misconduct or grossly negligent acts. *See Kalisch-Jarcho, Inc. v. City of New York*, 448 N.E.2d 413, 416-17 (N.Y. 1983) ("[A]n exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit." (citation omitted));[27] *Lyondell*, 544 B.R. at 87 (recognizing

[27] As noted previously, the Separation Agreement is governed by New York law. *See supra* note 25.

and citing same); *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365, 1371 (N.Y. 1992) (observing that the public policy of New York provides that gross negligence can be invoked to pierce an agreed-upon contractual limitation of liability where such negligence smacks of intentional wrongdoing and "evinces a reckless indifference to the rights of others" and denying summary judgment). Again, the Trust has put forth sufficient factual allegations that Defendants sought to hinder, delay, or defraud the Debtors' creditors that, if proven, would rise to the level of "reckless indifference to others" that would render the Mallinckrodt release invalid. *See* Am. Compl. ¶¶ 204-58, 286-95, 301-04. But, again, such evidence is not before the Court because of Defendants' insistence that the Court hear their Section 546(e) defenses first.

Each of these potential bars to the enforceability of the Mallinckrodt release raise questions of fact that will be critical to resolving these issues. Courts have observed that the determination of the enforceability of an exculpatory clause is a fact-intensive inquiry. *See, e.g.*, *Silver Leaf, LLC. v. Tasty Fries, Inc.*, 51 F. App'x 366, 370 (3d Cir. 2002) (recognizing that "the bad faith exception to the general validity of exculpatory contract clauses under New York law is a matter of some complexity" and "the question of bad faith is particularly fact sensitive"); *Dominici v. Between the Bridges Marina*, 375 F. Supp. 2d 62, 69–70 (D. Conn. 2005) ("The public policy concerns with exculpatory clauses are instead best channeled into a fact-specific examination of whether [defendant] engaged in overreaching, or gross misconduct."); *Falcone v. MarineMax, Inc.*, 659 F. Supp. 2d 394, 400 (E.D.N.Y. 2009) (declining to determine enforceability of exculpatory clause and finding summary judgment premature as additional factual development of the issues were required).

As set forth more fully in the Trust's Rule 56(d) declaration attached as **Exhibit 4**, the factual issues pertaining to whether the Mallinckrodt release is enforceable against the Trust go beyond the limited discovery afforded the Trust at this stage, which was limited to Section 546(e) and did not address the issues related to the release. *See* Hr'g Tr. at 27:24-28:3, Sept. 5, 2024 ("The [T]rust is certainly free to argue . . . that there are other potential issues that need to be raised, factual issues that can't be decided on summary judgment[.]"). For these reasons, summary judgment on Count V should be denied.

V. SECTION 546(E) DOES NOT PREVENT AVOIDANCE OF THE TAX AND INDEMNITY OBLIGATIONS OR PAYMENTS MADE PURSUANT TO THOSE OBLIGATIONS

Defendants' argument that Section 546(e) bars Counts II and III of the Amended Complaint to the extent they seek to avoid and recover payments that Mallinckrodt made on account of the tax and indemnity obligations imposed on it by Defendants is without merit. Defendants have conceded that the *obligations* imposed on Mallinckrodt relating to the Tax Matters Agreement and the indemnification provisions of the Separation Agreement are not covered by Section 546(e). Mot. at 23.[28] Defendants nonetheless assert that the safe harbor protects any *payments* made pursuant to the indemnification and tax obligations imposed on Mallinckrodt. *Id.* at 21-22. This argument is without merit.

For the reasons set forth in part III above, the Separation Agreement and resulting spinoff are not a qualifying transaction protected by Section 546(e). In addition, Defendants have not argued the Tax Matters Agreement is itself a securities contract—nor could they. Instead, with respect to the Tax Matters Agreement, Defendants argue that any payments made must be made "in connection with" a securities contract—*i.e.*, the Separation Agreement. *Id.* at 22. But the Tax Matters Agreement allocates tax liabilities that long predated the spinoff, as they originated from

[28] Defendants' argument that avoiding the tax and indemnity obligations would serve no "practical purpose," (Mot. at 23) is not grounds for denying the relief the Trust is entitled to, and it is not for Defendants to decide the "practical purpose" of any such relief.

Defendants' separation from Tyco in 2007. Am. Compl. ¶¶ 275-77. The payments made under the Tax Matters Agreement arose from obligations predating the Separation Agreement and potentially happened years after the spinoff occurred.

The Supreme Court has rejected such an open-ended reading of Section 546(e). *See Maracich v. Spears*, 570 U.S. 48, 59-60 (2013) (noting because "[t]he phrase 'in connection with' is essentially 'indeterminat[e]' because connections, like relations, 'stop nowhere[,]'" it must be interpreted under "a limiting principle consistent with the structure of the statute and its other provisions"); *see also Delaware v. BP Am. Inc.*, 578 F. Supp. 3d 618, 640 (D. Del. 2022) ("[A]s the Supreme Court has observed, [t]he phrase 'in connection with' provides little guidance without a limiting principle.'"). Section 546(e) is an exception to fraudulent transfer actions, and such "exceptions ought not operate to the farthest reach of their linguistic possibilities if that result would contravene the statutory design." *Maracich*, 570 U.S. at 60.

As for any payments made on account of Mallinckrodt's purported tax and indemnity obligations, it is important to analyze when such payments arose and when such payments were made.[29] As Defendants' cited case observes, "[o]f course, a more temporally attenuated transaction is less likely to have been 'made in connection with' a given securities contract." *Petr Tr. for BWGS, LLC v. BMO Harris Bank N.A.*, 95 F.4th 1090, 1101 (7th Cir. 2024); *see also City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 710 (3d Cir. 2022) ("But however broad, the statute must stop. . . . 'in connection with' must have 'outer bounds.' Otherwise, connections, like

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29 In *Hurwitz*, a court recently found that a $196 million dividend payment was not a payment made "in connection with a securities contract" where the defendant argued that "the amount of the . . . dividend was conceived by reference to the expected proceeds" of the sale of certain subsidiaries for over $1 billion dollars that allegedly included a sale of securities. 2024 WL 5114996. The court found that the dividend payment was "*not* made to complete a securities transaction" and rejected the argument "that somehow the motivation for the transfers was a sale . . . six months earlier, of the stock of a subsidiary." *Id.* So too here, the tax and indemnity payments made after the Separation Agreement closed were not done "in connection with" a securities contract. (And, as noted above, the Separation Agreement is not a "securities contract" to begin with. *See supra* part III.).

relations, stop nowhere.”). As to whether Mallinckrodt made any tax or indemnity payments, the Trust needs more information, as set out more fully in its Rule 56(d) Declaration. Ex. 4. The Trust has virtually no information about such payments, including when they were made, how much they were, and whether they were made at all. But Defendants have refused to provide any such discovery into tax and indemnity payments under this Motion. Such information would be necessary for the Defendants to be able to meet their burden of showing that the payments in question are related to a security contract.

VI. THE DEFENDANTS HAVE WITHDRAWN THE MOTION AS TO COUNT IV OF THE AMENDED COMPLAINT

Count IV of the Amended Complaint seeks avoidance of Covidien’s fraudulent transfers of approximately $867 million in cash. *See* Am. Compl. ¶¶ 331-36. On December 17, Defendants formally withdrew their Motion as to Count IV. *See* D.I. 145. Accordingly, the Court should not grant summary judgment on Count IV.

VII. SECTION 546(E) DOES NOT BAR COUNTS VI, VII, AND VIII OF THE AMENDED COMPLAINT

Defendants’ only argument for dismissing Count VII (disallowance under § 502(d)) on summary judgment is that the Court should grant summary judgment on Counts I-IV. Mot. at 30. Because the Trust has established those Counts I-IV cannot be dismissed on summary judgment, the Court should decline to grant summary judgment on Count VII. Finally, Defendants concede that Counts VI and VIII, which seek equitable subordination and statutory disallowance respectively, are not barred by Section 546(e). *Id.* Summary judgment as to those counts, therefore, should be denied.

CONCLUSION

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

Respectfully submitted,

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