

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: Chapter 11
Case No. 20-12522 (BLS)

MALLINCKRODT PLC,
Reorganized Debtor.
.

OPIOID MASTER DISBURSEMENT Adversary Proceeding
TRUST II, No. 22-50433 (BLS)

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 Courtroom No. 1
1-500, 824 Market Street
Wilmington, Delaware 19801

Defendants.
Friday, May 9, 2025
10:05 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

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Agenda

Item 1: Covidien's Motion for Summary Judgment Based on the Section 546(e) Safe Harbor (Filed July 10, 2024 [Sealed]; Adv. Docket No. 93]) (Filed July 15, 2024 [Redacted]; Adv. Docket No. 103]) 4

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1 (Proceedings commenced at 10:05 a.m.)

2 THE CLERK: All rise.

3 THE COURT: Please be seated. Good morning. Good
4 to see everybody this morning.

5 Mr. Reilley, good morning. It's good to see you.

6 MR. REILLEY: Good morning, Your Honor. Nice to
7 see you.

8 Patrick Reilley from Cole Schotz on behalf of the
9 Opioid Master Disbursement Trust II.

10 Your Honor, turning to the hearing agenda, the
11 only matter going forward is oral argument on Covidien's
12 motion for summary judgment. My co-counsel, Monty Crawford
13 and Jeffrey Liesemer --

14 THE COURT: Welcome, gentlemen. Good to see you.

15 MR. REILLEY: -- will present on behalf of the
16 Trust.

17 THE COURT: Okay.

18 MR. REILLEY: We understand Your Honor has a hard
19 stop today at 12 o'clock.

20 THE COURT: I can push it a little bit, but I
21 would like to try to comply with that. I have a lunch
22 meeting, so if we're still going, you know, I'm not going to
23 just get up and walk out.

24 MR. REILLEY: Okay.

25 THE COURT: But I thought it was helpful, because

1 I know there's a lot of material to cover.

2 I actually appreciate getting, in advance, the
3 decks that the parties have prepared and, other than that,
4 I've certainly been through all the materials.

5 And one thing -- this is a little unusual,
6 because, obviously, this matter has been transferred from
7 Judge Dorsey who had put a lot of time and attention into it,
8 now to me and we had, I thought, a helpful status conference
9 a month and a half ago, and I will assure counsel that I've
10 had the opportunity to get up to speed. I'm no Dorsey, but
11 I'm going to do my level best.

12 MR. REILLEY: Thank you, Your Honor.

13 So, unless there are any other housekeeping items
14 to address, I'd propose to cede the podium to Mr. Anker.

15 THE COURT: That sounds just fine.

16 Mr. Anker, good morning. Welcome.

17 MR. ANKER: Good morning, Judge Shannon.

18 And I am no Judge Shannon, but I will do my best,
19 as well.

20 (Laughter)

21 THE COURT: Also, just as a -- obviously, we're
22 going to be here for, you know, basically, a couple of hours.
23 If there's, at any point, anybody wants to take a break, just
24 so you know, we're happy to do so. I'm happy to oblige.

25 MR. ANKER: Your Honor, for the record, Philip

1 Anker, WilmerHale, for the four Covidien Defendants. I'm
2 joined by my colleague, Joe Millar.

3 THE COURT: It's good to see you, Mr. Millar.

4 MR. ANKER: His daughter woke up yesterday or this
5 morning with COVID. He has tested negative, but just as a
6 precaution, he is wearing a mask.

7 THE COURT: There's a lot of that going around.

8 MR. ANKER: There is.

9 And I'm joined by Craig Martin --

10 THE COURT: Good to see you, Mr. Martin. Good to
11 see you up and around.

12 MR. MARTIN: Good morning, Your Honor.

13 MR. ANKER: Your Honor, happy to proceed in any
14 order you would like. My job is to try to persuade you, not
15 persuade myself. But in the absence of a different direction
16 by you, let me tell you the order in which I'd propose to go
17 and approximate time. I will say I hope to reserve some time
18 for rebuttal. I should also note --

19 THE COURT: It's reserved.

20 MR. ANKER: -- you did get the deck, but I'm happy
21 to hand up hard copies if --

22 THE COURT: I have a hard copy.

23 MR. ANKER: Okay. Thank you, Your Honor.

24 I'm going to start with, as Your Honor knows,
25 there's two requirements, the so-called qualifying

1 transaction and the qualifying participant. I'm going to
2 start with qualifying transaction, though. I'm going to
3 spend relatively, hopefully less time on it.

4 The fact that the trust has put it at the very end
5 of its slides, I think, is one of those implicit hints: it's
6 really not their strong argument. I'm not sure she have any
7 strong arguments, but that certainly isn't one. I'm then
8 going to move to qualifying participant and that -- with
9 respect to both of those subjects, I'm going to cover the
10 avoidance counts --

11 THE COURT: Uh-huh.

12 MR. ANKER: -- and then finally move to the alter-
13 ego claim, which is not an avoidance count and the analysis
14 is somewhat different.

15 Let me start with qualifying transaction, but let
16 me start -- and I'm not going to go through 48 slides --

17 (Laughter)

18 MR. ANKER: -- I hope that's helpful for Your
19 Honor -- but let me start, as I suggested, I'm not going
20 through all of them, with Slide 6.

21 THE COURT: Can I share with you, actually, you
22 raised a point that we were actually talking about in my
23 chambers. I do find, actually, that these decks are often
24 very helpful, because they kind of summarize what are often
25 stacks of pleadings and arguments, but I appreciate getting

1 them in advance, because if I don't have it in advance, I
2 have no idea how long this deck is and I had a guy in front
3 of me and he said in about 30 slides -- and we had been going
4 for 25 minutes -- and he said, in about 30 slides I'll get to
5 that. And I just thought, that was dreadful, so...

6 MR. ANKER: I often tell young lawyers, and I
7 meant what I said at the beginning, about I want to be
8 responsive to where you want to go, telling a judge "I'll get
9 to that later" is about the dumbest thing to say to Your
10 Honor.

11 THE COURT: No, actually, in fairness, I had given
12 him that option, because I knew that it was coming up, I just
13 didn't want to forget it.

14 MR. ANKER: Understood.

15 THE COURT: And I may do that to you today.

16 MR. ANKER: That's fine.

17 Let me go to Slide 6 --

18 THE COURT: Sure.

19 MR. ANKER: -- and I think you're going to hear
20 this, and I want to start here because it is thematic for all
21 of the points. Our position is this matter is controlled by
22 the law. There really are not disputes of fact, and the law
23 is what the Congress wrote, not what some expert in financial
24 accounting says, but what congress wrote. And I'm going to
25 come back to that theme over and over again.

1 I note that the cases we cite here are not simply
2 two plain lien cases, but the U.S. Supreme Court and the
3 Third Circuit dealing with 546(e). So if there was any
4 notion that 546(e) is the exception to the rule and it should
5 be construed in a different way, the Supreme Court and the
6 Third Circuit has put that to rest.

7 Let's start with the qualifying transaction and
8 let's start with the first set of transfers at issue:
9 Count 1, the stem of transfers. The payment of cash to
10 redeem stock and the transfer of sort of the alleged transfer
11 of the Covidien assets away from Mallinckrodt. As you know,
12 Judge Dorsey, at the motion to dismiss stage held that both,
13 even though only one would be required, that it was both --
14 those were both settlement payments and transfers in
15 connection with the securities contract.

16 THE COURT: Was that the law of the case for our
17 purposes today?

18 MR. ANKER: It is.

19 And in fairness to the other side, Your Honor can
20 reconsider, so I will spend two minutes if you want me to, on
21 the subject.

22 THE COURT: Sure.

23 MR. ANKER: Let's start with a basic point, which
24 is, what Merit Management says is you focus on the transfers
25 that are the subject of the Plaintiff's complaint. The

1 Plaintiff acts as if somehow, mysteriously, these are not
2 transfers that are the subject of the complaint.

3 Let's look at paragraph 317 of the complaint.
4 Paragraph 317 -- and I hate to say it, but I'm not sure I
5 have a slide on this.

6 THE COURT: That's okay.

7 MR. ANKER: Shame on me.

8 THE COURT: I have the complaint.

9 MR. ANKER: Paragraph 317, which is Count 1, which
10 is the end of Count 1 says, accordingly -- and I'm going to
11 skip a few words:

12 "... the Trust is entitled to avoid the transfers
13 of assets or property made in connection with the spin-off,
14 including, without the limitation on the transfer of Covidien
15 and its direct and indirect subsidiaries, as well as the note
16 proceeds."

17 That's the 721 million. If Mr. Crawford wants to
18 stand up and say, I will never seek recovery of those, then
19 we can move on. But that's what he's seeking recovery on
20 and, therefore, that is the subject.

21 THE COURT: Okay.

22 MR. ANKER: So, are those transfers, settlement
23 payments?

24 It's a payment of cash and a transfer of assets in
25 exchange for the redemption, which courts have held is a

1 purchase of stock. It's exactly like your case in Quorum.
2 It's exactly like several other cases. It's exactly what
3 Resorts says is a settlement payment.

4 Indeed, if there were any doubt, let's look at
5 what the Trust's own expert said. Let's go to Slide 9. And
6 I'd note, they put a lot of emphasis on their slides on their
7 experts. The question was: Was the redemption, was the
8 payment of the \$721 million a settlement payment?

9 Answer, one word, one syllable: Yes.

10 That, it seems to me, ends the analysis there.

11 THE COURT: Yeah.

12 MR. ANKER: They say, but what about all these
13 steps, the so-called --

14 THE COURT: The 231.

15 MR. ANKER: I was going to say 321, but I think
16 I'm being dyslexic; I think Your Honor is right, it's 231.

17 Let's go back, again, to what the statute says.
18 I'm going to go back to my plain reading of the statute. The
19 statute covers, not only settlement payments, but also
20 transfers in connection with the securities contract. That's
21 on Slide 14. The two terms are separated by the word "or,"
22 disjunctive, and as the Supreme Court has said, and we have
23 these on Slides 15 and 16, when Congress says you can meet a
24 test with A or B, you have to give both, A and B meaning, and
25 B can't mean the same thing as A.

1 So in transfer in connection with a securities
2 contract, even if it is not, in and of itself, a settlement
3 payment, is covered. So let's focus on the 231 stips. Those
4 were transfers that were preliminary stips to enable the
5 redemption of a stock.

6 How do we know that? Because the agreement says
7 so on its face.

8 Let's turn to Slide 17. Slide 17 provides -- it's
9 quoting from the separation agreement, and that's the
10 document that covers the spin-off:

11 "On or prior to the distribution date, in
12 accordance with the plan set forth in Schedule 2.1(a),
13 Covidien shall transfer various assets."

14 And Schedule 2.1(a), if you have it, it's here and
15 it's (indiscernible) is exactly those 231 stips. So those
16 were stips that were not only pursuant to, not only in
17 connection with, but required by -- and, again, their own
18 expert, Slide 18, has conceded that very point.

19 Your Honor, I appreciate the argument made on the
20 other side that says in connection with has to have some
21 limits. I'm reminded of seeing 6 degrees of separation from
22 Kevin Bacon. But whatever the outer limits are, transfers
23 made, pursuant to, required by the very agreement that
24 provides for the transfer of the securities, are in
25 connection with that security transaction.

1 That brings us -- and, by the way, no case holds
2 to the contrary -- that brings us to Count 2 and Count 3.
3 Count 2 and Count 3 seek to recover, to the extent they were
4 made, tax payments and indemnity payments.

5 THE COURT: And let me ask you -- and this may be
6 a dumb question, but I'm going to ask it -- the counts are
7 for actual fraud, so, as a general proposition, I operate
8 from the assumption that 546(e) protects transfers, but it
9 wouldn't necessarily protect an actually fraudulent transfer.
10 So, how do I deal with whether or not 546(e) disposes of
11 this?

12 Do you have to prove that these weren't actually
13 fraudulent?

14 MR. ANKER: No, no.

15 THE COURT: Okay. Go on. Walk me through that.

16 MR. ANKER: Sure.

17 THE COURT: It may be such a foundational question
18 that I missed it, but I appreciate your guidance.

19 MR. ANKER: I appreciate it, and this issue has
20 been litigated.

21 So if you look at the language of 546(e), it says,
22 "except for 548(a)(1)(A)." 548(a)(1)(A) has a two-year
23 limit --

24 THE COURT: So we're not capturing, necessarily,
25 state law. Okay.

1 MR. ANKER: And, indeed, Your Honor, that issue,
2 early on in the 546(e) jurisprudence -- I can't give you the
3 cites at hand right now, but if you want them, we'll get them
4 to you --

5 THE COURT: No, I understand.

6 MR. ANKER: -- every court has said 546(e)
7 protects actual fraudulent transfers if they are outside the
8 two-year window of 548(a)(1)(A) and, here, the transfers were
9 seven years before the bankruptcy filing.

10 THE COURT: Okay. Thank you for the
11 clarification.

12 MR. ANKER: On the tax matters agreement and the
13 indemnification, let me make one concession here. If the
14 Trust is seeking to avoid obligations, as opposed to
15 transfers, I acknowledge 546(e) doesn't cover that. But we
16 wouldn't have so many lawyers in this courtroom.

17 The obligations were pursuant to a separation and
18 distribution agreement that's been rejected. We have a
19 general unsecured claim on the bankruptcy for those. What's
20 at issue is -- what they're trying to do is affirmatively
21 recover money for transfers.

22 The tax matters agreement is part of the
23 separation agreement. That's clear. Slide 19 so provides,
24 and, again, these are the terms of the agreement. They can't
25 be argued with. And the indemnity, as well, is set forth on

1 Slide 19, is part of the separation agreement.

2 They say, okay, but -- so the analysis, Your
3 Honor, is the same. These are payments, if they were made,
4 it's tax payments, indemnity payments, pursuant to, required
5 by the very agreement that is the separation agreement that
6 gives rise to the spin-off --

7 THE COURT: But is the indemnity obligation, is
8 that a transfer?

9 MR. ANKER: If a payment is made. Not the
10 obligation.

11 I agree, Your Honor, and that's the point I was
12 trying to make.

13 THE COURT: Yeah.

14 MR. ANKER: If they are arguing -- arguing that
15 they can avoid the obligation is honestly -- how do I put
16 this politely? -- it is not something we should be spending
17 our time on. Because, again, the obligation comes out of an
18 agreement they've rejected, the Debtor rejected in its first
19 bankruptcy. All we have is a rejection claim, which we will
20 get paid pennies on the dollar.

21 If there are payments that were made in
22 indemnification, if there were tax payments -- and there
23 were -- we've provided discovery, about 230,000, those were
24 transfers. Those were payments.

25 And what I'm arguing is those transfers can't be

1 avoided because they were pursuant to or required by. In
2 their slides, they suggest that, well, maybe the payments
3 were made years later. Okay, so what? I mean, let's try to
4 use some common sense here.

5 The first mortgage I think my wife and I took out
6 was a 30-year mortgage. I think we paid it off before 30
7 years, but imagine you didn't. Is there seriously going to
8 be an argument that in year 30 when you make that final
9 payment, that payment is not in connection with the mortgage?
10 Of course it's in connection with the mortgage. You're
11 making it because the mortgage required it.

12 So, too, the payments here, tax payments,
13 indemnity payments were made only because, only because the
14 agreement required it. Indeed -- and sometimes people make
15 slips, but let's see what their own language and a moment of
16 candor said. Let's look at Slide 21.

17 In connection with the spin-off, Defendants
18 shifted hundreds of millions of dollars of tax liability on
19 Mallinckrodt and imposed on Mallinckrodt an alleged
20 obligation to indemnify. That should be dispositive.

21 Let me now go on, unless Your Honor wants, to the
22 financial participants. Let me just say one last thing.

23 We have -- we withdrew our motion. I hope Your
24 Honor picked this up as to Count 4. The allegations in the
25 complaint are that those payments -- these were pre-spin-off

1 cash payments --

2 THE COURT: Uh-huh.

3 MR. ANKER: -- this is 800-some-million dollars
4 (indiscernible) were in connection with the spin.

5 But we're at summary judgment and we actually
6 looked at the facts and the facts are that they were ordinary
7 course, day-to-day transfers which occurs in company after
8 company with conglomerates where money goes up from
9 subsidiaries to parents and then brought back down to the
10 subs, the subs needs to pay their debts. On given those
11 facts, we're not contending that 546(e) bars their claim.
12 They obviously aren't fraudulent transfers and we may be back
13 here on another motion. We've given them the documents six
14 months ago and I don't understand how that claim has not been
15 dismissed, but we will deal with that at a later date.
16 That's the one and only cash payment where transfer of
17 assets --

18 THE COURT: That's outside of the scope of the --

19 MR. ANKER: It's outside of this motion.

20 So, let's go to qualified participant, and I'm
21 going to come back to my theme. The complaint treats the
22 four different Covidien entities as one. I think that means
23 as long as any of them is a financial participant, it's good
24 enough, but let's assume I'm wrong on that. Let's take them
25 through one at a time.

1 THE COURT: Okay.

2 MR. ANKER: Let's start with what I call CIFSA,
3 Covidien -- I'll blow the abbreviation of it -- Covidien
4 something financials S.A. Let's start there, that's the
5 first one. CIFSA was a party on a date that matters, the
6 date of the spin, as well as many dates after, to agreements,
7 indentures that gave it an option to buy back the notes.

8 I'm going to go back to my basic theme, which is,
9 let's read the statute.

10 Can we call up Slide 24.

11 The Code defines a securities contract to include,
12 among other things, a contract where the purchase sale or
13 loan of a security or option on any of the foregoing,
14 including an option to purchase or sell any such security --

15 THE COURT: So, let me ask you a question.

16 If I were to follow, for example, Judge Walrath's
17 ruling about the difference between an indenture and
18 securities contract for purposes of 546(e), does the
19 existence of the embedded options change that analysis?

20 MR. ANKER: It does.

21 THE COURT: Walk me through that.

22 MR. ANKER: Let me be clear.

23 Judge Walrath, they point out that if you look in
24 the deep bowels of the record in that case, you will find
25 that there were options there, but the point was never argued

1 and Judge Walrath never reached it. And I do submit, Your
2 Honor, that when you have a choice, do I follow the express
3 language of what Congress wrote in deciding what Congress
4 meant or do I follow a case that never addressed an issue,
5 but maybe, maybe if someone had made an argument, it could
6 have come up?

7 I submit you address the former, not the latter.
8 You don't need to say that Judge Walrath was wrong. She was
9 right on the arguments that were made. I mean, Your Honor, I
10 thought about this today -- we're going to get to this in a
11 while -- which is, is there a requirement on the notional
12 principal amount that interest be paid?

13 And I said to myself, you know, Judge Shannon had
14 the Quorum Health case and that was an agreement to purchase
15 and issue debt securities. The securities may have paid
16 interest, but the agreement didn't. Should I argue that
17 Judge Shannon has already decided this? Your Honor has
18 already decided the issue. I don't think I can make that
19 argument to you, because it wasn't presented to you; you
20 never had a chance to deal with it.

21 And we cited -- and it's a case that's near and
22 dear to my heart -- Essar Steel. I mean, I have been in
23 front of the Third Circuit, among other places, and made the
24 argument that there is core arising in jurisdiction when you
25 talk about whether a plan of reorganization can provide

1 third-party releases -- this is pre-Purdue -- and I would get
2 (indiscernible) from my adversaries saying, No, the Third
3 Circuit has always decided the question under related-to
4 jurisdiction. That must mean, implicitly, there's no arising
5 under, and the Third Circuit in Essar Steel said, no, we've
6 never dealt with that issue. The fact that we previously
7 dealt with different arguments that might be raised this same
8 issue, if we didn't address the issue is not on point.

9 So, I do not submit that Judge Walrath was wrong
10 in that case or Judge Drain was wrong. I submit the issue
11 was not in front of them. So look at the language of the
12 statute.

13 And then, if there were any doubt, look at the
14 next subprovision it says any option, any, any option, not
15 any option, other than an option that's an indenture, any
16 option other than an option that's issued on a Tuesday or a
17 Wednesday or whatever other distinction they're going to
18 make.

19 My argument is really pretty simple. "Any option"
20 means any option. It's really as simple as that. The notes
21 were securities and the indentures granted an option. And,
22 again, let's look at the documents, Slide 25 -- and I'm only
23 going to look on the (indiscernible) side of the company's
24 ability, but the same analysis on the flipside.

25 THE COURT: Sure.

1 MR. ANKER: The offered securities will be subject
2 to redemption at the option of the company. That's the very
3 word.

4 And, again, did their experts dispute any of this,
5 since we've heard so much about how significant their experts
6 are? Let's look at Slide 27.

7 We asked, my partner Peter Neiman asked:

8 "On the call option, you found to be embedded in
9 the bond indenture, that option gave CIFSA the right to buy
10 back the bonds from the holders of certain circumstances,
11 right?

12 "That is correct.

13 "Question: CIFSA wasn't obligated to exercise
14 that right. It was an option?

15 "Answer: That is, indeed, that is an option."

16 The Trust argued in its papers -- it doesn't make
17 the point on its slides -- that, well, this option wasn't,
18 itself, tradeable. It wasn't tradeable on an exchange.
19 There's nothing in this language, in the statute that
20 requires that it be.

21 And if there were any doubt, let's look at
22 Slide 29. Congress wrote in 741 that a securities contract
23 means:

24 "Any contract for the purchase, sale, or loan, or
25 option on any of the foregoing, including an option to

1 purchase or sell any such security."

2 That's Sub (1), or (2):

3 "An option entered into an international
4 securities exchange relating to foreign currencies."

5 That -- I think it's strong language -- that
6 makes 100 percent clear, 100 percent clear that if it's
7 relating to a foreign currency, it has to be tradeable on a
8 national securities exchange. If it's any other kind of
9 option, including the kind of option at issue here, to buy or
10 sell stock, it doesn't need to trade on an exchange at all.
11 Congress could not have been any more clear here.

12 And, Your Honor, if you are going to look at a
13 case, while it's not an indenture, the Second Circuit's
14 decision in Quebecor is all about an option to repurchase and
15 finding it dispositive.

16 Let's move on to Covidien PLC and Covidien Ltd.
17 They guaranteed the obligations under the indenture and,
18 again, there's no dispute what the facts are. Let's go to --
19 or the law -- let's go -- well, there is a dispute on the
20 law, but there's not a dispute about what the statute says.

21 Let's go to Slide 31.

22 Securities contract means, and if you go a little
23 bit beyond 1 in the hole to romanette 11, any security
24 agreement or arrangement or other credit enhancement relating
25 to any agreement or transaction referred to in this

1 subparagraph, including any guaranty. Again, my basic
2 position is Congress says what it means in the statute. It
3 means what it says.

4 Here, the guaranty is expressly guaranteed the
5 obligation if there was a call for redemption, the option
6 obligation.

7 THE COURT: How do I deal with the argument
8 that 546(e) carves out agreements with affiliates?

9 We have the Trust arguing that, here, obviously,
10 the guaranty obligations or the argument that these are
11 transfers and transactions with affiliates --

12 MR. ANKER: Sure.

13 THE COURT: -- how do I deal with that --

14 MR. ANKER: Sure.

15 THE COURT: -- argument that's in the papers?

16 MR. ANKER: I think you deal with it in several
17 different ways or common sense and just reading of the
18 statute.

19 Let's look at what the -- let's think about what a
20 guaranty is. A guaranty is an obligation backstopping the
21 primary obligor running to a third party. Let's look here to
22 see whether that's the language of this guaranty. Let's look
23 at Slide 33. This is the language of the guaranty.

24 Each of the two entities jointly and severally
25 guarantee to each holder of such security and to the trustee.

1 It's not a guaranty running to the parent. It's a
2 guaranty -- I'm sorry -- to the other Covidien entity -- it's
3 a guaranty running to the parties to whom the obligation
4 would run. If there's any question that the statutory
5 language, Your Honor, let's look at the language you're
6 talking about, which is 101(22)(a)(A), Slide 34.

7 It provides that there has to be a billion dollars
8 in notional or actual principal amount outstanding aggregated
9 across counterparties. The counterparty is the indenture
10 trustee, that's with whom the guaranty is given, and the
11 noteholders. And, indeed, Your Honor, think about how self-
12 defeating this would be. I am not going to argue to you that
13 there has never been a guaranty given by anyone to
14 backstopping an obligation where the primary obligor was not
15 an affiliate. I'm sure that's occurred.

16 But 99 percent of the guaranties --

17 THE COURT: Sure.

18 MR. ANKER: -- that I'm aware of occur in this
19 situation. You know, the principal shareholder guarantees
20 the obligation of his company. The parent guarantees the
21 obligations of the subs.

22 And so you have a statute that expressly provides
23 for guarantees and yet under their reading, 99 percent of
24 guarantees wouldn't apply. The other thing I would say is,
25 let's look at the statute language. It says that it applies

1 to obligations -- to guaranties not including where the
2 contract is not with the affiliate.

3 There certainly wasn't a contract with the third
4 parties, Deutsche Bank and the noteholders. So, for all
5 those reasons, that argument couldn't work.

6 And then, Your Honor, again, this is how my brain
7 works. I think in my own life, I'm going to go back to the
8 mortgage example. I take it the argument is that when my
9 wife and I signed a promissory note and jointly and severally
10 agreed to pay the mortgage company whatever we paid, that was
11 really a contract by me with my wife. That wasn't a contract
12 with the lender. That was a contract with my wife, and she's
13 an affiliate. She's my wife.

14 Come on. That's -- no one in common sense would
15 view that as a contract with your spouse. That's a contract
16 with the third party.

17 The other -- I'm going to skip over some things
18 that I think are pretty simple. Let me move on from the
19 guaranty, then, to the last Covidien entity, unless Your
20 Honor has questions about that, which is Covidien Group
21 S.a.r.l.

22 THE COURT: S-a-r-l, right.

23 MR. ANKER: S.a.r.l. satisfies the test for two
24 wholly independent reasons. First, it has notional amount of
25 currency forwards well over a billion dollars -- I think it's

1 two and a half billion -- and it also was a party to
2 agreements to purchase stock well over the hundred million in
3 the market test. Again, no dispute about what the documents
4 say, no dispute about the facts, dispute about the law.

5 Their argument is -- and I give them credit for
6 being creative -- their argument is the first test isn't met
7 because it says notional principal amount and apparently
8 under their view, there's no notional principal amount in an
9 instrument unless the instrument pays interest.

10 Well, let's, again, go back to my first
11 principals, the words of the statute.

12 THE COURT: Okay.

13 MR. ANKER: Let's go to Slide 35.

14 It says that the term "financial participant" is
15 an entity that has one-word agreement or transactions,
16 described in paragraphs 1, 2, 3, 4, 5, or 6 of Section 561.
17 So any of those -- any of those, if it has those, and not
18 less than a billion dollars in notional or actual principal
19 amount, you're satisfied.

20 So, now, let's go to paragraphs 1, 2, 3, 4, 5,
21 and 6 of Section 561 and let's see how many of those provide
22 for payment of interest. Let's go to the next slide,
23 Slide 37.

24 We start with the securities contract. I agree to
25 buy stock from Mr. Millar. I agree to pay him \$40 a share

1 for his shares of idea. I'm not paying interest, yet
2 Congress obviously thinks that a securities contract has a
3 notional principal amount. A commodity contract, the same.

4 But, then, if there were any doubt, forward
5 contracts, exactly what we're talking about here, forward
6 contracts, that answers the question. And I will cite here
7 to Judge Dorsey's decision in the other Mallinckrodt
8 adversary involving this trust where they put in an extra
9 report and it said we claimed that one of our clients met the
10 test for -- in this case, the market test of a hundred
11 million, because it had outstanding loans to purchase
12 securities. And their expert said, well, that doesn't pay
13 interest, either.

14 And let's look at what Judge Dorsey said. This is
15 Slide 38. The Trust argument is that as a matter of
16 Generally Accepted Accounting Principles alone, cannot have a
17 mark-to-market position. I'm going to skip some words.
18 And -- I won't skip words. Cannot have a mark-to-market
19 position and, thus, a party relying on a loan to establish
20 that it meets the threshold must use the one-billion,
21 notional or actual principal amount and not the hundred-
22 million-dollar mark-to-market amount.

23 But even if I accept the underlying proposition as
24 true, I cannot simply ignore that the statute expressly
25 includes extensions of credit as the type of agreement whose

1 value can be determined by reference to the mark-to-market
2 position. So, too, Congress has expressly provided that
3 forward agreements are the type of agreement that is measured
4 by either in both the billion-dollar notional and the
5 hundred-million-dollar mark-to-market.

6 Let's move to the second of the two. By the way,
7 the word "interest" that they say is a requirement, it
8 nowhere appears in the statute. Let's go to the second of
9 the two, which is the purchase agreements. They concede that
10 there were arm's-length agreements that S.a.r.l. was a party
11 to on a relevant date to buy stock of companies for more than
12 a hundred million dollars.

13 But their answer is, well, as a matter of
14 accounting, you don't mark-to-market until you actually close
15 the contract. I'm going to repeat myself. The statute says
16 that the test for a hundred million dollars applies to
17 securities contracts; contracts that purchase stock. They're
18 just saying that it never applies to a contract to purchase
19 stock. That can't be.

20 Judge Dorsey's analysis and the plain words of the
21 statute matter.

22 Your Honor, I'm going to give another example and
23 this one, unfortunately, doesn't involve my wife and me,
24 because I wish I had this kind of money. I wish I were
25 Warren Buffett.

1 But I want to think about what they're arguing. I
2 looked up this morning, as I woke up, what is the company on
3 earth with the largest market cap? It's Microsoft. They
4 just went ahead of Apple a few days ago. Three point two
5 four trillion -- trillion -- trillion.

6 Imagine that Warren Buffett -- maybe he'd have to
7 take out some loans to do it; even he doesn't have 3.24
8 trillion -- entered into -- made a tender offering and
9 entered into an agreement to buy 100 percent of the stock of
10 Microsoft. Is that a securities contract?

11 In their analysis, the answer is no. Their answer
12 is no. Why? It didn't meet the notional test for a very
13 simple reason: it doesn't pay interest. Warren Buffett is
14 agreeing to pay 3.24 trillion; he's not agreeing to pay 10
15 percent interest on top of the 3.24 trillion.

16 And it doesn't meet the mark-to-market test
17 because until you close, there's no mark-to-market for that
18 contract.

19 Your Honor, I don't normally say this in court,
20 but give me a break. That is not a serious argument about
21 how to read a statute; obviously, that is a securities
22 contract.

23 So, let me now move, unless Your Honor has
24 questions, to the alter-ego point.

25 THE COURT: Let's turn to alter-ego.

1 MR. ANKER: Pardon me, Your Honor?

2 THE COURT: Let's turn to alter-ego.

3 MR. ANKER: Okay. Let me start with what I think
4 is a really important point here, Your Honor, and it's a
5 point on which we agree. This is not an avoidance claim.
6 And what that means is it's not a claim being brought by the
7 Trust standing in the shoes of the estate and creditors.
8 It's standing in the shoes of the Debtor, of Mallinckrodt.

9 Mallinckrodt, the separation and distribution
10 agreement, had a full release. There is no argument. We can
11 pull up the slide, Slide 42, but I'm not going to spend time
12 on it because they are not arguing -- they've never argued
13 that this release, which covers the (indiscernible) fraud,
14 somehow does not cover an alter-ego claim.

15 There's no question that a release is a transfer
16 for fraudulent transfer purposes, but that transfer can't be
17 avoided because it was in the separation and distribution
18 agreement, securities contract. It was pursuant to that
19 contract. It was embedded in that contract. And that can't
20 be avoided because of 546(e). We are more than two years
21 outside.

22 None of that is disputed. Their argument is that
23 there may be other potential causes of action that allow for
24 the undoing of the release and, therefore, the assertion of
25 the alter-ego claim.

1 What theories?

2 Again, this is a claim brought in the name of and
3 in the shoes of the Debtor. They point to exculpatory
4 clauses. Those are clauses about future conduct. If I enter
5 into an agreement with Mr. Millar and I say you need to give
6 me advance permission to defraud you, there's case law that
7 says I can't do that.

8 There's also case law, and they found a few cases
9 in New York involving, like, corporations imposing on workers
10 and completely a different set of facts. The other theory
11 they have is a fraudulent inducement or somehow uneven
12 bargaining power. Of course there was uneven bargaining
13 power. There wasn't bargaining.

14 It was a spin. A spin is when a parent owns a
15 sub. And as Your Honor held in, I think, one of the Essar
16 Steel decisions and as Delaware Courts, including Trenwick,
17 Kenmores, and others have said, there is no duty owed by a
18 parent to a sub. Parents enter into agreements with subs all
19 the time and they're totally enforceable, not because there's
20 equal bargaining power, but because the parent gets to manage
21 the sub for the benefit of the parent.

22 We've cited case after case after case that says
23 that. Let me give an extreme example and it explains why
24 this can't -- you can't have a theory outside the fraudulent
25 transfer world. Imagine that you have a parent and you have

1 a wholly-owned subsidiary and the subsidiary is making money
2 hand over fist. It's incredibly valuable. It's worth -- I'm
3 going to stick with Microsoft -- 3.24 trillion and has no
4 liabilities. It's wonderful.

5 And the parent wakes up the next day and says, you
6 know what? We'd rather just have this be a division, not a
7 separate corporation. We hereby direct you, subsidiary, to
8 dissolve tomorrow and dividend up all your assets. We're
9 effectively imposing a death penalty on you.

10 The subsidiary has no claim. The subsidiary has
11 no cause of action.

12 If the company is left unable to pay its debts,
13 then maybe creditors have a remedy. That remedy is called
14 fraudulent transfer law and that remedy is subject to 546(e).
15 So there is no fraudulent inducement theory.

16 Let me also say one other thing on the fraudulent
17 inducement theory. Again, this is a claim brought in the
18 shoes of Mallinckrodt. Mallinckrodt -- even if the legal
19 theory could otherwise stand -- Mallinckrodt didn't know it
20 was selling opioids? I picked up the complaint in the other
21 case, which is a case about conduct against Mallinckrodt --

22 THE COURT: Right.

23 MR. ANKER: -- for share repurchases. It's all
24 about how Mallinckrodt knew what it was doing and it was
25 selling opioids all over the world.

1 I mean, I am reminded of, you know, my favorite,
2 probably my favorite movie of all time Casablanca, where
3 Peter Lorre, who's being handed the money --

4 THE COURT: Shocked.

5 MR. ANKER: -- says, I'm shocked -- shocked
6 there's gambling here.

7 The notion -- the notion that Mallinckrodt could
8 bring a --

9 THE COURT: That wasn't Peter Lorre.

10 MR. ANKER: Claude Rains?

11 THE COURT: Claude Rains.

12 (Laughter)

13 MR. ANKER: I stand corrected, Your Honor.

14 (Laughter)

15 MR. ANKER: Peter Lorre was killed early in the
16 movie.

17 THE COURT: He was.

18 MR. ANKER: Okay. At least he was in the movie.
19 At least that part I had right.

20 THE COURT: Just as an aside, did you know that
21 they wrote that as they were filming it?

22 MR. ANKER: I did not know that.

23 THE COURT: They did not have a full script. It's
24 just an amazing story.

25 MR. ANKER: It is an amazing movie.

1 THE COURT: But we digress.

2 MR. ANKER: It is an amazing movie.

3 But the bigger point is this, a subsidiary does
4 not have a cause of action against its parent, for the parent
5 causing it to enter into agreements that favor, allegedly
6 favor the parent over the subsidiary.

7 THE COURT: Right. The argument is done -- your
8 argument is the harm is done, if any, to creditors of the
9 subsidiary entity and --

10 MR. ANKER: The remedy is fraudulent transfer and
11 that remedy doesn't work here because 546(e) blocks the plan.

12 Your Honor, I'd love to reserve a few minutes.
13 It's a quarter of 11:00 and I've been talking about 40
14 minutes, but I'm happy to answer any questions Your Honor
15 has.

16 THE COURT: No, I don't have any questions and, as
17 I said, I would certainly give you the opportunity to
18 respond.

19 Why don't we do this, let's just take five
20 minutes --

21 MR. ANKER: Sure.

22 THE COURT: -- and then we'll reconvene.

23 Do we need to -- Dana, do we need give somebody
24 else privileges to get on?

25 (No verbal response)

1 THE COURT: Okay. We can take care of that and I
2 will see everybody in five minutes.

3 MR. ANKER: Thank you, Your Honor.

4 THE COURT: Stand in recess.

5 (Recess taken at 10:47 a.m.)

6 (Proceedings resumed at 10:57 a.m.)

7 THE CLERK: Please rise.

8 THE COURT: Please be seated.

9 Good morning, again.

10 MR. CRAWFORD: Good morning, Your Honor.

11 THE COURT: Welcome.

12 MR. CRAWFORD: Your Honor, Monty Crawford, Caplin
13 Drysdale, on behalf of the trust.

14 THE COURT: Good to see you. Welcome.

15 MR. CRAWFORD: Thank you.

16 I'm here with my colleague, Mr. Jeffrey Liesemer.

17 THE COURT: Good to see you, Mr. Liesemer.

18 MR. LIESEMER: Good to see you, Your Honor.

19 MR. CRAWFORD: And I'd also like to point out, Ms.
20 Peacock is here with us today as one of the trustees --

21 THE COURT: Very good.

22 MR. CRAWFORD: -- of the trust.

23 THE COURT: Thank you very much. Thank you for
24 coming.

25 MR. CRAWFORD: Thank you.

1 Your Honor, today, I will be addressing the
2 arguments relating to whether or not any of the Defendants
3 qualify as financial participants. I will also be addressing
4 questions relating to the specific causes of action.

5 THE COURT: Uh-huh.

6 MR. CRAWFORD: Mr. Liesemer, after I finish
7 talking, will be addressing the questions of whether or not
8 there's a qualifying transaction. So, contrary to Mr.
9 Anker's suggestion, we put that part of the PowerPoint last,
10 because we didn't care about that part of the cause of
11 action, it's simply because Mr. Liesemer will be speaking
12 after I'm speaking --

13 THE COURT: Okay. That's perfectly fine. Thanks
14 for the heads-up.

15 MR. CRAWFORD: -- in this instance. And before we
16 get to the argument, just to update Your Honor as well on an
17 issue related to the discovery mediator, we had suggested
18 James Patton as a potential discovery mediator. Mr. Anker
19 agreed. So, we have agreed that James Patton will be the
20 discovery mediator in this case. We should have a proposed
21 stipulation to you in the next few days.

22 THE COURT: That will be great. I will look for
23 that. Thank you.

24 MR. CRAWFORD: Before moving onto the question of
25 whether or not the defendants qualifies as a financial

1 participant, a couple of things in overview. First, and I'm
2 sure Your Honor is aware having reviewed the docket in this
3 case but this motion was filed at the very beginning of the
4 case before anyone could take any discovery. The
5 understanding was at that time that this motion would be
6 limited solely to the issue of 546(e). The only discovery
7 that was going to be allowed was discovery on the financial
8 participant issue.

9 There were several hearings early on. We
10 requested discovery relating to the release issue. We
11 requested discovery relating to the tax matters issue and
12 Judge Dorsey said we're going to limit it only to the
13 financial participant issue. You are free to file. If you
14 look at the transcript, I said I just want to make sure that
15 when I get to summary judgment, Your Honor, we're not going
16 to be held responsible for not producing information in
17 response to the release. He's like I'm not going to hold you
18 responsible for that.

19 This is the September 5th hearing, page 18 and 19.
20 I am not going to hold you responsible, file a 56(d)
21 declaration, I understand I am only allowing discovery on
22 financial participant issues only and I won't hold you
23 responsible if you don't produce evidence beyond that point.
24 So, because you were not here earlier --

25 THE COURT: Right.

1 MR. CRAWFORD: -- I want to make sure of that. We
2 were very limited in what we could do and Judge Dorsey also
3 said if you can't have dismissal on the basis of 546(e) then
4 that is it. You know, that is the only grounds for dismissal
5 for this early, early motion.

6 Another thing we didn't hear much as a point of
7 overview from Mr. Anker was the burden of proof. This is
8 their motion. It's a motion for summary judgment. It's
9 their burden of showing that there are no disputes of
10 material fact. All inferences come in on the side of the
11 trust and, you know, I might suggest that anyone who feels
12 the need to send out a 48-page PowerPoint is not really
13 indicative of showing no dispute to material fact. A lot of
14 complicated facts, a lot of issues that are here.

15 If we go to the next slide, Your Honor, this is a
16 very interesting case for summary judgment. It's a very rare
17 case where the non-movant is the only party to submit expert
18 declarations on a summary judgment motion. We have presented
19 the expert declaration of Dr. Frank Risler, the head of the
20 derivatives practice at FTI and has 25 years of practice in
21 the industry.

22 THE COURT: So, how do I deal with Mr. Anker's
23 argument that we don't get to expert testimony because if you
24 look at the words of the statute my documents fall within
25 those parameters and, therefore, somebody's testimony -- I

1 think his phrase was somebody's testimony -- expert testimony
2 can't overcome what Congress has said. So, how do I deal
3 with that argument? I am familiar with this case and I agree
4 with you that it is unusual to have a non-moving party
5 actually be the one that is presenting the expert testimony.

6 MR. CRAWFORD: I would suggest here, Your Honor,
7 to deal with it in the following way: we are dealing with
8 very technical terms of art throughout this case. I will
9 deal with it and specific examples as we move along but
10 judges are not intended to be experts in what qualifies and
11 what doesn't qualify as a mark to market transaction. Judges
12 are not expected to be experts and qualified in understanding
13 exactly what does and does not constitute a financial
14 instrument that has a notional principal amount.

15 There is case law that says that courts can look
16 to how those terms or art are used in the industry and
17 understanding those terms and how I should apply those terms
18 in reading the statute, right, because these are complicated
19 technical financial terms that have specific meanings in the
20 industry. So, it's entirely appropriate for the trust to say
21 we're going to present expert testimony to show you what
22 these terms mean, and how they're used, and how they're
23 understood in the industry.

24 They could have brought in someone to say a
25 purchase agreement is not a mark to market contract. They

1 were unable to present or chose not to present an expert to
2 say that. So, we would say in that case we have created, in
3 terms of this issue of how to analyze how these terms are
4 understood, in the industry for purposes of these contracts.
5 This is evidence that comes in on the side of the trust.

6 The last point, Your Honor, before we go to the
7 financial participant issue is I would -- you know, we hear
8 this talk about, oh, this is all just Mallinckrodt. You
9 know, Covidien didn't know. Your Honor, Covidien -- Judge
10 Dorsey found, in response to the motion to dismiss, and I'm
11 sure you have read the opinion at length, substantial
12 domination and control of Covidien over Mallinckrodt.
13 Mallinckrodt was even allowed to hold their own lawyers in
14 drafting this. They asked if they could have their own
15 counsel and they were told no.

16 Covidien's opioid business was the largest opioid
17 company in the United States. Over 23.7 percent for the
18 seven years leading up to this of the opioid market share was
19 held by Covidien's opioid business. It was significantly
20 larger than Purdue Pharma. The DEA, the United States DEA
21 called Covidien's opioid business "the kingpin of the drug
22 cartel" fueling the opioid crisis. Yet Covidien somehow has
23 remained the sole company. Has basically received no -- not
24 been held to account for its conduct.

25 Your Honor, let me turn to the issue of financial

1 participant.

2 THE COURT: Sure.

3 MR. CRAWFORD: (Indiscernible) relies solely on
4 indentures. Indentures are not a securities contract. It is
5 not a contract for the sale, purchase or loan of a security.
6 The indentures are not include on the list of agreements that
7 qualify as a security -- everyone knows the indentures are.
8 They can just keep talking these long list of security
9 contracts. You know what is not on that list, indentures are
10 not on that list.

11 THE COURT: Let me ask a kind of a dumb question
12 about the mechanics of this transaction because we typically
13 we have an indenture that governs the rights, and duties, and
14 obligations of bonds for example.

15 MR. CRAWFORD: Correct.

16 THE COURT: So, how is it that when Judge Walrath,
17 for example, parsed between them and said, hang on, you have
18 got an indenture but you don't have -- there is no indenture
19 that doesn't have some sort of financial transaction
20 associated with it. So, how do they not, sort of, travel
21 together?

22 MR. CRAWFORD: So, Your Honor, in this case when
23 we look at the Quebecor decision, for example, that was a
24 note purchase agreement. The trouble is this all relates to
25 the timing of everything, Your Honor, right. The timing of

1 such that for purposes of 546(e) you can only look at
2 transactions and contracts within certain defined periods of
3 time. And if they had a note purchase agreement within that
4 time period and that contract you would have seen that before
5 you, right. Quebecor orders a note purchase agreement and
6 this is not a note purchase agreement, this is the underlying
7 indenture.

8 So, while a note purchase agreement, like
9 Quebecor, may qualify in certain circumstances as a
10 qualifying transaction for 546(e) they were like -- these
11 facts aren't before Your Honor for summary judgment, exactly
12 when those took place. Our research suggests it took place
13 in like 2007, six years before this happened. So, they're
14 way out of the timeframe. I'm sure if they had them there's
15 no doubt Mr. Anker would be putting every single one of them
16 before you, right. He has not done so. We can only assume
17 it's because he cannot do so. And there is certainly -- it's
18 their burden and they have not presented evidence of note
19 purchase agreements.

20 That is when both the Silicones decision, MPM
21 Silicones and Quebecor, when you look at it people raise
22 Quebecor in that case. They said, hey, isn't this -- Judge
23 Drain was like no, right, that is a note purchase agreement.
24 That was an actual purchase of securities under a note
25 purchase agreement. Judge Drain said this is an indenture,

1 right. They talk about, oh, you're pulling out these make-
2 whole provisions out of the bowels of the indenture. Not at
3 all, Your Honor.

4 If you read the MPM Silicones decision Judge Drain
5 discusses at length the make-whole provisions, the
6 acceleration provisions. It's the entire case, right. They
7 discussed them at length. He was well aware they had make-
8 whole provisions and yet they still found it was an
9 indenture -- this contract is an indenture, it is not a
10 securities contract.

11 THE COURT: Okay.

12 MR. CRAWFORD: You may recall, Your Honor, a case
13 that you decided, In Re Trico Marine (2011). You were
14 actually asked to look at what do I do with a make-whole
15 provision and an indenture proceeding. Your conclusion was
16 it's a liquidated damages clause, right. They're saying, no,
17 no, it's an options contract that allows us -- you know,
18 they're arguing for an extreme expansion of 546(e) that any
19 option of any contract anywhere now wants everyone to
20 have 546(e). That would be a gross expansion of the statute.

21 You examined the question of whether or not this
22 make-whole provision, what do I do with it. You are like
23 it's a liquidated damages clause. They can't point to a
24 single decision that says, oh, this make-whole provision,
25 this change of control provision, this is an options

1 contract. This is not what this is. It's an options
2 contract. It's a liquidated damages clause. The other -- the
3 change in control those are basically -- those are default
4 and acceleration provisions. They're standard terms of an
5 indenture.

6 There are features that cannot be bought, sold or
7 transferred separately. You can't transfer change of control
8 provision, a make-whole provision. They are embedded parts
9 of an option that an indenture needs to be considered
10 holistically as an individual contract. And, Your Honor, we
11 just think that this is a very easy decision for you to make.

12 Judge Drain said indentures is not a securities
13 contract. Judge Walrath said an indenture is not a
14 securities contract. Simply follow those decisions. An
15 indenture is not a securities contract and that is just
16 simply the end of the matter.

17 THE COURT: Options don't change the analysis
18 either.

19 MR. CRAWFORD: No, they don't because it's not --
20 when you talk about options -- this is, again, taking the
21 testimony from our expert, Mr. Frank Risler, right, when
22 people understand what an option is, right, they understand
23 option and we don't really have to exchange options but it's
24 still a separate agreement that can be bought or sold.

25 THE COURT: An option is a thing.

1 MR. CRAWFORD: It's a separate thing.

2 THE COURT: The point is an option is actually a
3 thing --

4 MR. CRAWFORD: Yes.

5 THE COURT: -- and the indenture simply creates a
6 right.

7 MR. CRAWFORD: It creates a right. It's a thing
8 that can be bought or traded separately. Here only
9 (11:09:32) could argue. You know, if you did this almost
10 every contract that has any sort of optionality whatsoever
11 now becomes subject to 546(e) and that simply cannot be the
12 case.

13 Let me -- and similarly, the statements from our
14 expert -- you know, if you read our experts report and you
15 read the deposition he makes it very clear and states over
16 and over again, yes, there is language in here with
17 optionality but the market does not consider these provisions
18 in the indenture, these make-whole provisions, to not
19 consider them to be options contracts. They are not options
20 in the sense of what we are talking about here. The fact
21 that there is some optionality they're just part of the
22 indenture as a whole.

23 THE COURT: Okay.

24 MR. CRAWFORD: Now we get to the guaranteed
25 portion and this relates to Covidien Ltd., and Covidien PLC.

1 The first point to remember here, Your Honor, is that if you
2 hold the indenture as not a securities contract then the
3 claim falls to SIFSA but it also automatically falls to
4 Covidien PLC because they're piggy backing on it, right.

5 So, if you follow Judge Drain, you follow Judge
6 Walrath and say, look, an indenture is not a securities
7 contract, that just handles the matter for all three of them.
8 Again, a very easy decision to write. You don't have to
9 reach any of these other issues. You don't have to reach
10 whether or not there is a qualifying transaction, you don't
11 reach count five and count two, its simply two courts have
12 looked at this, they've already decided indenture is not
13 securities contracts. I'm not going to change that law and
14 that is the end of the matter, very simple decision.

15 Even if this Court decides were going to go
16 against what Judge Walrath said, I'm now going to decide
17 every agreement that has some sort of optionality language,
18 qualifies as a securities contract and greatly expand 546(e)
19 we would still argue, even in that situation, that for
20 Covidien PLC and Covidien Ltd., they do not qualify as
21 financial participants because of the affiliate exception.
22 There is no question the guarantee is a contract. It is also
23 undisputed that SIFSA, Covidien PLC, and Covidien Ltd., are
24 affiliates.

25 Now, the argument, of course, is that they say,

1 well, Deutsche Bank is the indenture trustee and so they're
2 also a party. They also say it because it's a contract with
3 a noteholder. The noteholder is not a party to the
4 indentures, right. This goes back to there's a note purchase
5 agreement where the noteholders are parties to that. We
6 don't have note purchase agreements here. We have an
7 indenture. So, the only other party is Deutsche Bank, the
8 indenture trustee.

9 THE COURT: Right, the beneficiary of the
10 guarantee.

11 MR. CRAWFORD: Yeah, but here the contract -- he
12 keeps talking about look at the words of the statute. The
13 statute doesn't say a contract exclusively with affiliates.
14 He's trying to read exclusivity into this definition where it
15 doesn't exist. He says, well, most of the guarantees would
16 probably be with affiliates and because most of the
17 guarantees with affiliates we have to read exclusivity into
18 the statute or it doesn't exist.

19 So, our first argument on that would be that is
20 not what the statute says. You can't come up here and say
21 listen to the words, look at the words of the statute, you
22 have to follow the words and then when the words don't
23 benefit you say but don't look at the words here, add a word
24 in because that would be helpful to my client. There is no
25 question this is a contract with affiliates, its excluded.

1 There is a reason why you shouldn't put in the
2 exclusivity exception, why you shouldn't read it in because
3 if you do you will create a loophole that will swallow the
4 rule and make this exception illusory. Any case now if you
5 write an opinion that says, oh, any time there is a non-
6 affiliate the affiliate exception doesn't apply because it
7 has to be exclusive.

8 In the future you will see these corporations and
9 they will be like, well, we can make these transfers between
10 our various subsidiaries, I will do a billion dollar transfer
11 on an (indiscernible) between sub one and sub two but, you
12 know what, I'm going to tie into that on a subcontractor, a
13 little hundred dollar contract with a third party and, guess
14 what, now I have the -- now I'm protected because I had this
15 opinion now that says all I have to do is add a non-third
16 party and I can get rid of the affiliate exception that way.
17 That cannot be the rule.

18 So, if that can't be the rule one of two things
19 has to be true; either any contract between affiliates don't
20 count, which we believe would be the case here, or you would
21 have to say we have to look each case by case at the nature
22 of the transaction.

23 THE COURT: Which is then a factual inquiry.

24 MR. CRAWFORD: A fact intensive inquiry. We would
25 argue there are substantial facts here that really the

1 guarantee -- they're not guaranteeing Deutsche Bank in this
2 case, right. The guarantee isn't applying to them. The
3 guarantee is we're guaranteeing SIFSA and what they're doing
4 there.

5 We cited the Renegade Holdings, Middle District of
6 North Carolina, where the benefit of the guarantee, quite
7 frankly, is for SIFSA and Covidien Ltd., right, because once
8 they issue the guarantee it's going to increase their stock
9 price, they do it for their own benefit. Anyway, your point,
10 Your Honor, is it's a factual dispute at that point. So, if
11 you can't write an opinion that says once you have any non-
12 affiliate that automatically it becomes a factual dispute and
13 so, therefore, Covidien PLC, Covidien Ltd., kind of qualify
14 as a matter of law without any factual dispute as to
15 financial participants.

16 Okay, Your Honor, let's turn to Covidien Saral.
17 We will start with the three purchase agreements to start.
18 Mark to market accounting is a method of measuring fair value
19 that can fluctuate over time. One of the errors and issues I
20 think that we have here is the argument by Mr. Anker, well,
21 certain things are securities contracts, they have to be a
22 securities contract. Not every contract that is a securities
23 contract that qualifies you for the purposes of financial
24 participant for purposes of 546(e).

25 There are plenty of securities contracts that

1 exist that don't make you a financial participant, right.
2 So, it's just a subcategory of this. In this case, for \$100
3 million of mark to market you have to meet that specific
4 definition. I'm not saying it can't be a securities contract.
5 I'm saying it has to be within that specific definition.

6 A corporate purchase agreement is not recorded
7 until it closes and because of that it's not something that
8 fluctuates over time. For example, if I agree to a purchase
9 agreement on June 1st to buy a company --

10 THE COURT: Sure, I mean that was the --

11 MR. CRAWFORD: I'm going to go to his example.

12 THE COURT: Yeah, well, I want you to test the
13 example when you get a chance.

14 MR. CRAWFORD: I will test it right now. I will
15 use it as my example. If I was Berkshire Hathaway and I
16 bought all of the stock of Microsoft on the open market on
17 June 1st, right, and then stock goes up and down, I have it
18 on July 1st, it's a mark to market transaction, right,
19 because I buy it over time. But if I go to Microsoft --
20 which this is why it's a bad example, right, if somehow one
21 person already owned all the stock from Microsoft and I went
22 and negotiated and said I am going to buy Microsoft for \$35.2
23 billion and we're going to them up, right, okay, that's fine.

24 I can't put that on my accounting statements. I
25 can't put that on my books and records until the date of

1 closing, right. Once I put it on my books and records, the
2 date of closing, its put on the market at that exact point in
3 time, right. Now it's a private situation. It's not
4 fluctuating over time. If I buy it on the open market and I
5 hold it -- so the example would be if you have a stock
6 portfolio and you have on May 1st, it says it's worth a
7 thousand --

8 THE COURT: I want you to tinker with the analysis
9 a little bit.

10 MR. CRAWFORD: Sure.

11 THE COURT: When you think about it, it gets a
12 little upside down. It might be better if somebody went to
13 Warren Buffet with that whole portfolio of entirely owned
14 companies and said I would like to buy -- I think they own
15 CSX, the rail company, I would like to buy that. So, you are
16 going to offer \$100 billion to Warren Buffet to buy CSX from
17 him. So, we don't have the fiction of multiple -- you know,
18 broadly publicly held.

19 MR. CRAWFORD: Yeah, what to buy 100 percent of
20 it.

21 THE COURT: Walk me through that.

22 MR. CRAWFORD: Yeah, sure. In that case he is
23 absolutely right that is a securities transaction. Not
24 disputing that that is a securities transaction. The
25 question is, is it a mark to market transaction. Undre the

1 rules, when I agree to buy it -- let's say I agree to buy it
2 on June 1st, I close it on June 30th, right, the date in
3 which I buy it, right, I can't record it because the
4 accounting rules say when you're dealing with the purchase of
5 a company, right, the rules are you record it only at the
6 time the purchase closes. So, nothing appears on my books
7 and records on the date I sign the agreement to buy it.
8 Again, mark to market is something that you have to look at
9 how to it compares from the beginning to the end. So, you
10 have to have a beginning point and an end point.

11 The rules for purchase agreements, for purchases
12 of a company, under the gap rules, they specifically say
13 purchases of companies are not mark to market transactions.
14 There's a specific rule that says you cannot do what they're
15 saying to do. Now, I agree, you are not a hundred percent
16 bound by the accounting rules but this is evidence of how
17 these items are treated, right. Quite frankly, its
18 un rebutted evidence. They have not presented evidence to the
19 contrary. So, when you close the transaction on June 20th,
20 then you right on your books the value I have of this company
21 is now X but it's at a single point in time.

22 So, for mark to market, well, where did it
23 fluctuate. Where did you change it. When did you mark it
24 from one market to another market? I didn't. I didn't
25 change it, I just put it on as a single dot. It's a dot, not

1 a line --

2 THE COURT: Right.

3 MR. CRAWFORD: -- because it's a dot it's not mark
4 to market. It's a securities transaction but it's not a mark
5 to market transaction. Every one of their three transactions
6 fall under that category. Right, we have presented expert
7 testimony about it. We have presented the gap rules that
8 back up the expert testimony about it.

9 So, at the very least we would say that this
10 creates a factual dispute. Again, going back to why we
11 listen to experts, Your Honor, this is complicated
12 information. How do we treat mark to market transactions?
13 What is a mark to market transaction, what qualifies -- what
14 doesn't qualify. We are the only person to present expert
15 testimony about how one goes about and looks at that sort of
16 thing. We feel that we have met our burden for purposes of
17 summary judgment. They could have brought an expert in to
18 say that is not how this works in mark to market.

19 I will also point out, Your Honor, their own
20 person who signed the declaration for these transactions that
21 declaration does not say the mark to market transactions.
22 They would not even write down in their own declaration this
23 is a mark to market transaction. So, not only do they not
24 have an expert their own declarant wasn't able to say it.

25 So, for them to come up and say as a matter of law

1 there, obviously, mark to market transactions is wrong and
2 for them to come up and say, well, clearly, securities
3 contracts, it has to include securities contracts, it does
4 include securities contracts. It just doesn't include
5 securities contracts when you purchase a corporation with a
6 negotiated price. That is all we are saying. This
7 subcategory isn't mark to market. It's not. It's just very
8 obviously not.

9 Let's go to FX Ford because we have a similar
10 problem here, Your Honor, where, again, when they keep
11 talking about, we have to look at the language of the statute
12 but what they're proposing is for this Court to ignore the
13 language of the statute. So, you have to have either a
14 notional or actual principal amount, right. It doesn't say
15 either a notional amount or actual principal amount, right.
16 Notional and actual both modify principal.

17 In their briefs they say, well, principal really
18 just means the amount. Well, if that were the case they're
19 now asking this Court to read the statute to meaning a
20 notional amount, amount, right.

21 THE COURT: Well, how do I deal with that where we
22 have securities agreements all the time that don't
23 necessarily have an interest component. And what you're
24 saying is -- I mean, you are each accusing the other side of
25 adding words either to exclude it or to modify and to say

1 other than interest. How do I -- I am butchering your
2 argument but you get my drift.

3 MR. CRAWFORD: No, that is a fair question. That
4 is the argument they're making and I will explain to you why
5 we're consistent with the statute and why they're not.

6 THE COURT: I'd like your thoughts.

7 MR. CRAWFORD: First, the financial participant
8 statute gives you a choice. It's an or, right. You have to
9 either have a contract that has a notional principal amount
10 or \$100 million mark to market transaction. They're working
11 under the assumption that when they give the list of the
12 seven different categories that can apply, that all seven
13 categories have to fit into both categories, right. There is
14 no reason for that.

15 Some of these categories might fit into one
16 category, some of these categories may fit into another
17 category, right. If FX Ford -- you know, some of these Fords
18 they may very well, in some cases, be mark to market
19 transactions, right, in which case they would fit into that
20 category. So, we're not making any of the language
21 superfluous.

22 What they are proposing is they're telling you,
23 you have to remove the word "principal" from notional
24 principal amount. I am not asking to change nay words in the
25 statute. We are just saying its one or the other. That is a

1 completely reasonable interpretation of the statute. They
2 are asking you to remove the word "principal" from the
3 statute as if it didn't exist and we have a couple arguments
4 with respect to that, Your Honor.

5 First off, that would be an enormous expansion
6 of 546(e). There is a reason why the word principal is up
7 there. For example, if I just want to do a notional trade --
8 take FX Ford for an example. For one week I'm going to do a
9 billion-dollar FX Ford comparing US dollars to Euros, right.
10 My exposure on that might just be a million dollars or two
11 million dollars because there's not really a big exchange
12 rate differential often times between euros and dollars,
13 right.

14 So, that is a million- or two-million-dollar risk.
15 That is not a -- we're talking about the point of having a
16 billion dollar amount up there. It would expand it to so many
17 mid-size and small size companies. The number of companies
18 qualifying for 546(e) would be enormous. You would be
19 creating an enormous expansion of the statute.

20 THE COURT: Okay.

21 MR. CRAWFORD: Notional principal means you have
22 to be paying interest on a billion-dollar transaction. That
23 is a big deal. That is why it is so high. You are paying
24 interest on a billion dollar transaction. It's a term of
25 art, Your Honor. Notional principal is a term of art.

1 We quoted the NASDAQ statute where it says
2 notional principal relates to an interest rate swap. Here is
3 the interesting point, Your Honor. When they talk about the
4 FX Fords in the reply brief, at footnote 10, they quote this
5 book "Options, Futures, and other Derivatives." They don't
6 actually look up the definition of notional principal there
7 but they point to other examples in the book to try and
8 suggest FX Fords don't count.

9 Well, we decided -- we got this book actually from
10 the Library of Congress. We pulled it up and I'm like I
11 wonder if there is a definition of notional principal in here
12 and, you know what, Your Honor, there is. It says the
13 notional principal, in their authoritative text is the
14 principal used to calculate payments in an interest rate
15 swap.

16 So, their own book, their own authority say that
17 notional principal is for an interest rate swap. So, they're
18 own book, their own authority says that notional principal is
19 for an interest rate swap, right. That is what it is for
20 and this is not an interest rate swap. So, by their own
21 authority it just doesn't apply. And if you adopted their
22 definition of it just being a notional amount you did two
23 things. One, you are removing a word from the statute that
24 doesn't exist.

25 This is how they try and do that. They're like,

1 well, we're not saying remove the word "principal."
2 Principal means amount. That is where I get back to, it's
3 the same thing as removing it because now you're saying its
4 notional amount. It simply doesn't make any sense; whereas
5 our definition of saying you look at it one way versus the
6 other could be one of the two statutes makes perfect sense.

7 The second part of the argument, of course, is
8 that FX Fords do not have notional principal amounts. We
9 have unrebutted expert testimony on this point that FX Fords
10 do not have notional principal amounts because they don't
11 involve the computation of interest. They try and suggest,
12 well, that is -- we dispute that they may or may not compute
13 interest. Now we're getting into the kind of factual
14 disputes, Your Honor, that can't be resolved on summary
15 judgment but not only do we have unrebutted expert testimony
16 -- they could have brought in an expert to say they don't
17 have interest, but they didn't, but not only do we have an
18 expert saying they don't interest we cited to the IRS
19 regulations which say FX Fords are excluded from contracts
20 with notional principal amounts. The IRS has basically said
21 these don't count. These aren't notional principal.

22 So, again, it's very clear that these do not
23 qualify. The point I made earlier, Your Honor, about you
24 would greatly expand the definition of who is a financial
25 participant if you only look at the notional amounts that is

1 what we have here, right. We have companies like Covidien
2 Saral who are medical supply companies which really wouldn't
3 be considered financial participants.

4 All of a sudden, their definition, they're being
5 called up as major financial participants in the marketplace
6 because they're greatly expanding the definition so large it
7 would catch up companies like Covidien Saral and put them in
8 the same category as JPMorgan. And if you write that opinion
9 you're just enormously expanding 546(e) beyond what it was
10 ever intended.

11 Your Honor, I would like to turn now to count
12 five. Apparently under Mr. Anker's standard, because he put
13 this at the end of his presentation, this also means this is
14 the one that he believes leased in, in this case. So, just
15 holding him to his own standard, Your Honor, that, you know,
16 we will call that an admission against interest right there.

17 What we would say, you know, first and foremost a
18 claim for reimbursement indemnification contribution it's not
19 an avoidance claim, right. 546(e) doesn't apply. The rules
20 of this motion, when they were told at the very beginning,
21 you can only move to dismiss on 546(e) grounds because no
22 discovery has been taken off. 546(e) does not apply to a
23 non-avoidance claim. So, it cannot be dismissed on 546(e)
24 grounds and that should just be the end of the matter. That
25 should absolutely just be the end of the matter but even

1 if --

2 THE COURT: Well, I want you to walk me through
3 the discussion that we had --

4 MR. CRAWFORD: I will.

5 THE COURT: -- a moment ago that was about
6 indemnity and the mortgage, and at the end, even though, you
7 know, it's a release, it's not dollars and cents and interest
8 in principal that is getting paid. By the end, after 29
9 years if there is a demand on the indemnity, I think the
10 argument was, look, this is an obligation, financial
11 obligation made in connection with a securities contract.
12 How do I deal with that?

13 MR. CRAWFORD: I think, Your Honor, that argument
14 was being made in connection with the indemnity -- count two
15 for the indemnity --

16 THE COURT: Oh, actually, you are right.

17 MR. CRAWFORD: -- and count three, the tax matters
18 agreement. I promise, Your Honor, I will just turn to that
19 now and I will come back to the release.

20 THE COURT: Okay.

21 MR. CRAWFORD: We will turn to that now but that
22 is a separate argument as to those counts. He put those
23 counts at the beginning --

24 THE COURT: Thank you for clarifying.

25 MR. CRAWFORD: -- so he feels stronger about

1 those. He put count five at the end because he knows that
2 one doesn't really have a basis for success.

3 For the tax indemnity agreements our first
4 argument, counts two and three, is that they relate to
5 obligations, right, and so you can't dismiss under 546(e)
6 because 546(e) doesn't apply to obligations. So, as a legal
7 matter, we just say that on that ground you can't move for
8 summary judgment.

9 Again, we were not given any discovery on these
10 claims. This is before any discovery is taking place. So, we
11 would just say that 546(e) doesn't apply. They have to show
12 they're entitled to judgement as a matter of law on 546(e)
13 and they cannot do so. But even if we go beyond that, Your
14 Honor, and we look into his example, we would say, for
15 example, the case they cite is the BMO Harris case to start
16 with. And in that BMO Harris case the payment that was made
17 in connection with a securities contract was one month later
18 and the Court said that is, obviously, made in connection
19 with a securities contract.

20 Even that case said if it was made at a later
21 date, obviously, the further along in time the more
22 attenuated you are that calls it into question. So, it's
23 not -- the mortgage example is not applicable here, right,
24 because even in the BMO Harris they're like, you know, as you
25 start to move further away, we're not going to necessarily

1 agree that this is in connection with anymore.

2 Your Honor, we cited the GBG USA, which was
3 decided in December 2024. I think that was a Southern
4 District of New York case or Bankruptcy Court of New York
5 case. They -- that case involved a payment that was made six
6 months after a securities payment. The Court there said six
7 months later, you know, we find this was not made in
8 connection with a securities contract.

9 So, the question then becomes when are the tax
10 payments made in this case. We haven't had full discovery on
11 that yet. I don't know if it was one month, five months, five
12 years. The tax payments related to a transaction with Tyco
13 in 2007. There is a whole host of financial issues that
14 relate to that. The Courts have consistently held that
15 temporal proximity matters. Once temporal proximity matters
16 then it's a factual dispute on the question of temporal
17 proximity. And once we get discovery on that, perhaps at a
18 later time, Your Honor, we can come back and have the
19 argument on the in connection with standard.

20 THE COURT: Okay.

21 MR. CRAWFORD: Okay, so going back to the claim
22 for reimbursement indemnification and contribution. This,
23 Your Honor, is basically seeking to hold them responsible.
24 We talked earlier about they were the companies who dominated
25 and controlled. They were the leading opioid marketer in the

1 country for seven years. This simply seeks to hold them
2 accountable to say, look, there was costs incurred in
3 defending opioid litigation and costs incurred with the
4 bankruptcy of Mallinckrodt that resulted from opioid
5 litigation and you need to pay your fair share for that.

6 It's a claim -- again, because it's not an
7 avoidance claim 546(e) doesn't apply. Their argument seems
8 to be, well, the only possible way you can avoid a release is
9 by showing fraud. That is just simply not true. If you look
10 at the presentation we provided, it was actually very
11 interesting a December 2024 case, this is the Applewhite
12 case. The Applewhite case cites several other cases within
13 it. We cite to New York law, Your Honor, because the
14 separation agreement says its governed by New York law. So,
15 New York law is the operative law applying to whether or not
16 we're going to set aside this release and the language there
17 says the standard in New York for setting aside a release is
18 one of falling far short of actual fraud.

19 If the standard in New York is falling short of
20 fraud that just ends the matter, right, because we don't have
21 to shortfall. It means there is other possible grounds to set
22 aside the release that aren't fraud. Their entire argument
23 rests on the assumption that we have to show fraud because
24 that is the only way that they can somehow tie it to 546(e).
25 They're arguing that we have to show a fraudulent so that

1 546(e) limits the only possible way to get around the
2 release. We note there's plenty of other reasons. Fraud on
3 the inducement, unconscionability --

4 THE COURT: Failure of consideration.

5 MR. CRAWFORD: -- there is a host of potential. No
6 discovery, right, allegations in the complete are replete
7 with sufficient allegations that would allow us to avoid this
8 release but we filed a Rule 56(d). Again, this is why they
9 put this at the end of their chart. Rule 56(d) and so
10 there's plenty of reasons why this is not something that can
11 be held as a matter of law in any way shape or form. As a
12 matter of law there's no way that we would be able to get
13 this release even if you look past the part that 546(e)
14 doesn't apply to these types of claims.

15 Finally, Your Honor, they spent four pages of the
16 PowerPoint talking about cases between a parent and a
17 subsidiary. The difference, Your Honor, is that when the
18 subsidiary is insolvent none of those arguments apply. We
19 have alleged in this case at the time of the transfer the
20 subsidiary was hopefully insolvent.

21 THE COURT: So that duties were owed to creditors.

22 MR. CRAWFORD: To the -- the duties were twofold,
23 both to the subsidiary itself and to the creditors. The case
24 we cite is In Re Direct Response Media, 466 B.R. 626
25 (Delaware Bankruptcy Court 2012). Officers and directors owe

1 duties to creditors and the subsidiary when its insolvent,
2 right. He talks about, oh, well the companies can just send
3 all of the money up, no.

4 In a case like this where the subsidiary owed the
5 many victims of the opioid crisis to the tens of thousands of
6 people who died and suffered, well, that money is gone to
7 them. They do not have the right to pull that money up and
8 away from them. At that point in time once the company is
9 insolvent, they have their fiduciary duties, their breach of
10 fiduciary duty, lots of other claims that are involved and
11 those cases do not apply to insolvent subsidiaries.

12 So, finally, Your Honor, let's go to count four.
13 This is the case transfer claim. Again, since we were denied
14 discovery in this case what happened with the cash transfer
15 claim was we pointed out that these transfers -- we had
16 identified a large amount of transfers that we believe -- he
17 says, well, obviously, ordinary course. There has been no
18 discovery on that.

19 What we have seen has suggested they are not
20 ordinary course transfers by any stretch of the imagination.
21 So, that is a factual dispute there. But what happened was
22 2010 and 2012 Covidien was trying to sell its opioid
23 business, not spin it off. They were trying to sell it.
24 They keep talking about, oh, no one was thinking about
25 opioids; that is all they were thinking about was opioids.

1 They kept trying to sell the opioid division and every time
2 they found a buyer what happened was they would get their
3 price or they would say to the buyer you have to assume our
4 opioid liabilities and every time the buyer would say I
5 absolutely am not assuming your opioid liabilities and then
6 they would say if you're not going to assume our opioid
7 liabilities we're not interested.

8 So, we're like we wanted to say in order to find
9 out if this was a connection with 546(e) we wanted to know,
10 were the cash transfers in connection with the spin or these
11 sales. They then said, well, we would rather not give you
12 discovery on that right now, we're just going to withdraw
13 that claim.

14 It's not just count four that is withdrawn, Your
15 Honor. If you look at count seven, count seven is for
16 disallowance or proof of claims under 502(d). The reason
17 they give for summary judgment on that claim is that because
18 you were going to grant summary judgment on counts one, two,
19 three and four that that claim no longer applied. Once you
20 withdraw the claim for count four you are withdrawing the
21 motion for summary judgment as to count seven as well.

22 So, count seven is also moot at this point because
23 the reason they gave you for summary judgment of count seven
24 no longer applies. And for count six and for count eight
25 they basically admit in their motion there is no ground for

1 546(e) and they just ask you to kind of dismiss out of the
2 goodness of heart, which leads to counts four, six, seven and
3 eight. There is no basis for summary judgment to any of
4 those four claims.

5 Your Honor, unless you have any additional
6 questions on these particular aspects that I am here to speak
7 with you on I would like to turn the podium over to my
8 colleague, Mr. Liesemer, to talk about the questions of the
9 underlying transaction.

10 THE COURT: Very good.

11 MR. CRAWFORD: Thank you.

12 THE COURT: Mr. Liesemer. That is a lot of paper.

13 (Laughter)

14 MR. LIESEMER: I'm going to do my best, Your
15 Honor, to keep it short. Good morning, Your Honor. Jeffrey
16 Liesemer, Caplin & Drysdale.

17 THE COURT: Good to see you, Your Honor.

18 MR. LIESEMER: I am going to talk about the
19 qualifying transaction issue, especially in terms of how it
20 relates to count one and we're going to talk about both the
21 issue regarding settlement payments and transfers in
22 connection with securities contracts. I am going to hit both
23 points.

24 THE COURT: Okay.

25 MR. LIESEMER: I want to first address Your

1 Honor's question about whether Judge Dorsey's statement, in
2 his opinion on the motion to dismiss, is law of the case.
3 It's not. Judge Dorsey even said in September of last year
4 at a status conference that he hadn't determined whether that
5 statement was law of the case.

6 We got to how the law of the case is determined.
7 Judge Dorsey was evaluating the sufficiency of the complaint
8 and he was trying to determine, because they were raising
9 a 546(e) defense whether there was that affirmative
10 defense, 546(e) on the face of the complaint. That is all he
11 was evaluating. He came to the conclusion, based on his
12 interpretation of the complaint, I don't think it was the
13 correct interpretation, and let's talk about why, but based
14 on his interpretation determining the sufficiency and whether
15 there was a defense on its face, he determined that there was
16 a qualifying transaction on the face of the complaint but he
17 didn't reach the same conclusion with respect to qualifying
18 participant and that is why his actual holding was that the
19 complaint could not be dismissed based on 546(e).

20 So the statement regarding qualifying transaction
21 that was not necessary to his ultimate holding and we have a
22 case that we cited from the Third Circuit, Calhoun v. Yamaha
23 Motor, which is cited at page 20, note 23 in our opposition
24 brief that says that if the determination is not necessary to
25 the ultimate holding its not law of the case. So, it's not

1 law of the case and I will move on.

2 We are looking -- rather than evaluating the
3 sufficiency of the complaint, Your Honor, today we are going
4 to talk about the evidence and that's why I brought that big
5 stack of documents. Hopefully I can get through them very
6 quickly and efficiently but today it's the evidence and we're
7 going to talk about what the evidence says about the spinoff
8 transaction and the separation of the Mallinckrodt Pharma
9 business from Covidien.

10 First, I want to turn to the Mirant Management
11 (phonetic) case because I think it's very dispositive here.
12 In Mirant Management the court said that, and I will get to
13 the facts of the case in a moment, its incumbent on the
14 trustee or, here, the trust as the estate representative to
15 frame or define what the transfer is. That is the first step
16 before you do the 546(e) analysis.

17 Although this isn't an unlimited prerogative that
18 the trust has as the estate representative its, nevertheless,
19 the trust that gets to define it; not Covidien. As long as
20 the transfer, as defined by the trustee, has the
21 characteristics of a fraudulent transfer, any component parts
22 of the fraudulent transfer are not relevant and I'm referring
23 to pages 381 and 382 of the Mirant decision in the US
24 Reports.

25 So, Covidien -- these little pieces that Covidien

1 is referring to are not relevant because we're talking about
2 something broader. Now let me talk about the facts of the
3 Mirant case. Mirant involved a shareholder buyout. We had
4 the two racinos and one racino was buying out the shareholder
5 of the other racino and the court illustrated the facts as
6 steps A, B, C and D.

7 In Mirant Management, which was one of the
8 shareholders, said that, well, in step C you had a transfer
9 of the purchase money from one financial institution to the
10 other --

11 THE COURT: Yeah, from bank to bank.

12 MR. LIESEMER: Exactly, that is protected by
13 546(e). Then step D you had the bank holding the purchased
14 money in escrow transfer it to Mirant and the other
15 shareholders. So the Supreme Court said that that was not
16 enough and, indeed, responding to Mr. Anker's argument that,
17 well, you need to do all these transfers before you go to
18 MIFSA's redemption of the shares. In Mirant you had to do A
19 and B before you even go to C and before you even got to D.
20 The Supreme Court said it's not relevant.

21 I think on Judge Drain's decision in the Tops
22 Holding case in which he also said the relevant transfer A to
23 D and just because A and B is protected under 546(e) that is
24 still not availing.

25 So, let's turn to how Mirant applies to the

1 Mallinckrodt spin-off. In order to do that I would like to
2 hand up to the Court two documents --

3 THE COURT: Okay.

4 MR. LIESEMER: -- which Covidien has seen before.
5 The first document is the separation and distribution
6 agreement between Covidien PLC and Mallinckrodt PLC. This is
7 just the agreement itself. It's not all the schedules and
8 exhibits that were in the closing binder. The closing binder
9 is 5,000 pages and I didn't want to put that on the Court.
10 So, this is just the agreement. The second document I'm
11 going to hold up to the Court is Schedule 2.1(a) of the --

12 THE COURT: Right.

13 MR. LIESEMER: -- of the --

14 THE COURT: Mr. Anker referenced that --

15 MR. LIESEMER: Right, of the --

16 THE COURT: -- and I have it in the submissions.

17 MR. LIESEMER: -- exactly, exactly right.

18 THE COURT: Yeah.

19 MR. LIESEMER: So, I will hand this up to the
20 Court for the benefit of another copy, and this one outlines
21 the steps of the --

22 THE COURT: The 231 steps.

23 MR. LIESEMER: Exactly.

24 THE COURT: Okay.

25 MR. LIESEMER: May I approach the bench, Your

1 Honor?

2 THE COURT: Of course. Thank you. Do you have a
3 set for my clerk as well?

4 MR. LIESEMER: Sure.

5 THE COURT: Thanks so much.

6 (Pause)

7 MR. LIESEMER: So, if -- I invite the Court's
8 attention to Schedule 2.1(a), which is the final step plan.
9 I will not show it up on the screen because I believe this
10 is -- it could be (indiscernible) as a confidential document,
11 but as the Court will leaf through it, it has various
12 diagrams of how all the movements of the various entities and
13 the assets were moved around in order to extract the
14 Mallinckrodt pharmaceutical business, or the pharmaceutical
15 business that became Mallinckrodt, from Covidien. This was a
16 tall exercise because it involved all these 231 steps that
17 are out here, it took 14 months to accomplish that before the
18 spinoff was completed in June 28th, 2023, it involved 141
19 legal entities, this was just a massive exercise that had to
20 happen.

21 Now, Your Honor will probably notice just a few
22 pages in, there is one step per page and the first step
23 begins at step 1.1.0, and the last step to complete the
24 separation of Mallinckrodt from Covidien is step 8.5.

25 We had our expert, Mr. Guy Davis of FTI

1 Consulting, study the final step plan, and he determined that
2 only 69 of the 231 steps, or 30 percent of the steps,
3 constituted what could be characterized as a settlement
4 payment, and only 13 of those steps -- 13 percent of those
5 steps were apparent settlement payments that involve the
6 defendants in this proceeding.

7 Covidien has not challenged or rebutted Mr.
8 Davis's findings, but I think 30 percent --

9 THE COURT: So how do I deal at a high level with
10 Mr. Anker's argument that, look, these are complex corporate
11 transactions that happen all the time and it is, at the end
12 of the day, all for the purpose of effecting this transaction
13 in which ownership or control or an interest is going to be
14 exchanged for money by a settlement payment, and even though
15 there may be lines that say, look, step 81 is the delivery of
16 executed, you know, UCC-1s or something else, that's not a
17 transfer, et cetera, how do I -- I think he's -- he's got an
18 argument, I'd like you to just sort of take it on directly.

19 MR. LIESEMER: Well, let's go back to what the
20 Court in Merit said, I think it's slide 19. The court
21 explained that the transfers defined by the trustee that a
22 trustee may not avoid is specified to be a transfer that is
23 either a settlement payment or made in connection with a
24 securities contract, not a transfer that involves, not a
25 transfer that comprises, but a transfer that is a securities

1 transaction covered by 546(e).

2 Now, Covidien is pointing out just two steps of
3 the final step plan and it's toward the end. The first step
4 is the redemption of MFSA of its shares from Covidien PLC,
5 and that's step 8.1. The second step, as I understand it, is
6 Covidien's transfer of the remaining MFSA shares over to
7 Mallinckrodt PLC, and that's step 8.5. And so Covidien says
8 those two steps are settlement payments and they define the
9 entire 231 transaction, but all the steps do not constitute a
10 settlement payment. They're only highlighting two of the
11 steps. Remember, it's what the Supreme Court said the type
12 of transfer that a trustee may not avoid is a transfer that
13 is a settlement payment and it -- or is made in connection
14 with a securities contract, not a transfer that involves, not
15 a transfer that comprises.

16 So, when -- our definition of the transfer, and
17 it's the separation of Covidien -- yeah, Covidien from
18 Mallinckrodt, our definition of it is from step 1.1.0 through
19 step 8.5. It's not all these consecutive steps that you get
20 to point to in order to isolate them as settlement payments
21 and then say 546(e) applies to everything. So, Merit
22 Management rejects the argument that these two steps in
23 isolation can protect the entire spinoff and the entire
24 transfer.

25 And we allege in the complaint that we're seeking

1 all the transfers that comprise the separation that's in
2 paragraph 317 in the amended complaint, in prayer for relief
3 B at page 136 of the amended complaint, and the complaint
4 requests to receive all the value of Covidien. Now, we have
5 an including in there that says the note proceeds, but that's
6 just including. The trust wants all the value of the
7 Covidien as of the spinoff date. So, the argument that this
8 is one big settlement payment fails.

9 So let me turn to the argument that this is a
10 transfer in connection with the securities contract, which
11 also fails. Covidien asserts that the entire separation and
12 distribution agreement is a securities contract as defined
13 because one provision in the separation agreement,
14 Section 2.15(b), calls on MFSA to redeem its stock from
15 Covidien PLC. But, again, the trust is seeking to avoid the
16 entire separation of Covidien from Mallinckrodt, and that is
17 actually expressed earlier in the agreement under
18 Section 2.1(a), which is on the screen.

19 Now, I'm not going to read this weighty provision
20 word for word, but I will try to paraphrase. It says that,
21 accordance with the plan and structure set forth in
22 Schedule 2.1(a), which is this entire final step plan --

23 THE COURT: Right.

24 MR. LIESEMER: -- that they refer to as the plan
25 of reorganization, to the extent not previously affected

1 pursuant to the steps of the plan of reorganization, Covidien
2 shall, and shall cause its applicable subsidiaries to assign,
3 transfer, convey, and deliver to Mallinckrodt, or the
4 applicable Mallinckrodt designees, the direct or indirect
5 right, title, and interest in and to all of the Mallinckrodt
6 assets. Defined term, assets is broadly defined in the
7 agreement, but this is referring to a transfer of assets, not
8 securities, right? This is a separation of the assets of the
9 pharmaceutical business from Covidien.

10 So, again, I think the --

11 THE COURT: And I think your point is, were there
12 assets other than stock that were transferred?

13 MR. LIESEMER: Yes.

14 THE COURT: Okay.

15 MR. LIESEMER: So, to read the separation
16 agreement Covidien's way saying that the agreement is a
17 securities contract because it includes a section providing
18 for share redemption is contrary to Merit Management in the
19 way the trust is defining the transfer.

20 Also, the substance of the transfer as expressly
21 framed in 2.1(a) is a transfer of assets, not securities.
22 And it is well know that, under fraudulent conveyance law,
23 courts look to the substance of the transaction, not its
24 form, and Your Honor said so in the Jevic Holding case back
25 in 2011.

1 So this makes the Mallinckrodt case different from
2 Your Honor's decision in Quorum Health. In fact, Covidien's
3 argument is kind of this mirror image of what the litigation
4 trustee was arguing in --

5 THE COURT: In Quorum.

6 MR. LIESEMER: -- in Quorum. In Quorum, the
7 litigation trustee sought to avoid only the so-called
8 spinoff -- remember, it was \$1.2 billion, in which Quorum
9 paid the proceeds from incurred debt to its parent, CHS, in
10 exchange for stock and other equity interests of the
11 transferred entities. And at the time the trustee was sort
12 of, like Covidien here, cherry-picking what the transfer
13 constituted. And the trustee was saying, oh, this is a
14 dividend, so it's not for the purchase and sale of a
15 security. And Your Honor said, well, what about the
16 separation agreement here, this SDA that says that the
17 dividend was in partial consideration for these -- for the
18 stock and other equity interests of the transferred entities.

19 And so Your Honor actually rejected that argument
20 and found it to be a qualifying transfer, but the transfer,
21 as defined by the litigation trustee -- or as modified by
22 Your Honor because Your Honor thought it wasn't persuasive to
23 say that in partial consideration was just self-serving
24 language, I think that was the trustee's argument in there.
25 The Quorum -- as defined by Your Honor, the Quorum transfer

1 is analogous to MFSA's redemption of its shares from
2 Covidien.

3 Your Honor determined that the Quorum spinoff
4 dividend was a qualifying transaction, but the Mallinckrodt
5 case is different here because the trust is not seeking to
6 avoid only MFSA's redemption of its shares, but rather the
7 entire separation of Mallinckrodt from Covidien. That
8 separation may have included or comprised steps that could
9 have in isolation been a qualifying transfer, but the
10 separation was not in and of itself a qualifying transaction,
11 and the two steps that Covidien is highlighting never could
12 have happened without the other steps, the majority of which
13 our expert found were not settlement payments.

14 So let's turn to the definition of securities
15 contract in 741(7).

16 THE COURT: Okay.

17 MR. LIESEMER: Section 741(7) defines securities
18 contract in relevant part as a contract for the purchase,
19 sale, or loan of a security. In similar contexts, courts
20 have interpreted the word for as signifying the purpose or
21 reason for something. For example, in Gruber v. PPL
22 Retirement Plan, 520 F.App'x. 112, a 2013 decision, the Third
23 Circuit interpreted the "for" in the phrase "any employer
24 subsidy for early retirement" as signifying the purpose of
25 the subsidy.

1 Similarly, in Hover v. Marx (ph), 993 F.3d 1353, a
2 2021 decision, the Eleventh Circuit interpreted the word for
3 in the statutory phrase "an action brought for injury
4 suffered" as expressing a proceeding initiated with the
5 purpose of obtaining redressable wrong.

6 Here, the purpose or reason of the separation and
7 distribution agreement was not to redeem shares, although
8 that was a facet of it, rather it was to separate the assets
9 and, as Covidien hoped, the liabilities of Mallinckrodt from
10 Covidien, and that is the transfer that we are challenging
11 and that's the transfer that's relevant, and it's not. And
12 so the separation agreement is not a securities contract when
13 the statutory text is read -- is given its fair reading and
14 the "for" is understood to be a purpose and the reason for
15 it.

16 So, on that basis, the Mallinckrodt spinoff is not
17 a qualifying transaction.

18 Now, before I finish, Your Honor, I want to -- I
19 detected some confusion in the room about mark-to-market, so
20 I was perhaps hoping to clarify.

21 So, the statute, the definition of financial
22 participant refers not just to mark-to-market value, but
23 mark-to-market positions, right? That's the statute, that's
24 the word that the statute uses. Positions meaning like a
25 long position, you buy and hold the securities with the

1 expectation that the security -- the value of the security is
2 going to go up, or a short position, you borrow the security,
3 sell it high, hopefully, to buy it back low, and then return
4 it to the lender of the security. Those are positions and,
5 while those positions are open, for example in a long
6 position, before the stock is sold, the only way to value
7 that position is mark-to-market by reference with the
8 securities trading in the market. So, I get my stock
9 portfolio monthly statement and it gives a balance at the end
10 of that statement that is a mark-to-market value of my long
11 position and my stock portfolio.

12 So that is different from these purchase
13 agreements because these purchase agreements don't reflect a
14 long position or a short position, they were just agreements
15 to buy stock at a certain price. And of course, yes, there
16 is market data out there that might inform the purchase
17 price, but it's still the purchase price. It's the contract
18 price, it's not a position, and it's not in reference to
19 anything that's going on in the market, and that's why the
20 purchase agreements were not -- are not relevant here and do
21 not get Covidien S.A. R.L. into the category of financial
22 participant.

23 I want to comment on one more thing --

24 THE COURT: Sure.

25 MR. LIESEMER: -- because Mr. Anker highlighted a

1 quote from Judge Dorsey in his SRP decision, and I think that
2 quote deserves some context because there --

3 THE COURT: Remind me of the quote.

4 MR. LIESEMER: So this was --

5 THE COURT: I don't need the particular quote, but
6 --

7 MR. LIESEMER: No, no, no, I just want to give the
8 context. I mean, he cites to the Mallinckrodt decision --

9 THE COURT: Oh, oh, okay.

10 MR. LIESEMER: -- in what we call the share
11 repurchase. This was on the motion to dismiss, the
12 defendants' motion to dismiss, slash, motion for summary
13 judgment.

14 And I think the quote deserves context because
15 when we were arguing that, we were looking at essentially an
16 account that was set up in which the defendant had borrowed
17 money. And the argument was, because it was below the
18 billion, it didn't satisfy actual principal amount, and the
19 loan doesn't have any sort of mark-to-market value, although
20 it's not clear from Judge Dorsey's decision. How I
21 interpreted how he reached that decision was that he looked
22 at this loan that we were arguing about and said this is a
23 margin loan and, in a margin loan, you either take cash and
24 buy long positions in securities --

25 THE COURT: Right.

1 MR. LIESEMER: -- or you borrow the securities
2 themselves in order to do a short sale, and from that basis
3 he saw that there was a mark-to-market position with respect
4 to that margin loan. We have nothing like this here, but I
5 think the margin loan needs to be put in context.

6 So, with that, Your Honor, unless Your Honor has
7 any questions, I will cede the podium.

8 THE COURT: I do not have questions.

9 Mr. Anker, if you'd like a minute before we start.
10 I'll give you the time you need for rebuttal. I've tinkered
11 with my timeline, they're not going anywhere. Would you like
12 a minute or are you ready to start?

13 MR. ANKER: I'm (indiscernible) --

14 THE COURT: Okay. And, again, you're not under
15 the gun. I appreciate counsel on both sides --

16 MR. ANKER: I appreciate that, Your Honor.

17 THE COURT: -- working with my calendar.

18 MR. ANKER: I appreciate it.

19 Let me go back to first principles in the order in
20 which I think you addressed these issues.

21 THE COURT: Okay.

22 MR. ANKER: And so I'm going to start with
23 Mr. Liesemer's comments about whether we have a qualifying
24 transaction, and let me start where there's common ground, I
25 think that's helpful to a court.

1 Merit Management says focus on the transfers, or
2 transfer, that the plaintiff is seeking to recover, seeking
3 to avoid. The plaintiff is seeking to avoid the \$721 million
4 in payments. They have conceded that is a settlement
5 payment. It is in Count 1, explicitly, the note proceeds.
6 You can't say, well, gee, because we're seeking to avoid
7 other things that somehow this one that is a settlement
8 payment just sneaks out and we ignore it. Two, they are
9 seeking to recover and avoid all of the steps he just told
10 you.

11 Now, I will tell you, I didn't read the complaint
12 to say that, but let's assume that it's a fair reading of the
13 complaint.

14 THE COURT: Okay.

15 MR. ANKER: Yes, they have an expert giving a
16 legal opinion that those steps are not settlement payments.
17 Let's put aside that they're not qualified as law, they're
18 not lawyers who tell me what the law is, it doesn't matter.
19 The statute says or -- the statute, two types of transactions
20 are protected -- or a transfer in connection with a
21 securities contract. They spent almost no time on the latter
22 point.

23 These were all steps, the SPA says it clearly, so
24 that -- to use Mr. Liesemer's words -- to separate out the
25 two businesses, so then the stock could be transferred to the

1 new Mallinckrodt public company. In the words of their own
2 expert, it was for -- those steps were all for the purpose of
3 doing a securities transaction. Look at slide 18 of our
4 slides, they were, in their own words, required, they were
5 required steps, every one of them.

6 So the answer is, the cash payment of 721 million
7 is covered and the various steps are covered because they
8 were precedent steps leading to and required to occur to do
9 the ultimate transaction, which is a securities transaction.
10 And no case has ever held that steps taken to effectuate a
11 securities transaction are -- effectuate a securities
12 contract are not a securities contract.

13 I heard Mr. Liesemer make a clever argument. He
14 said, well, is it really a securities contract because it
15 provides for other things. Not every single provision in the
16 contract is about the payment of cash for a security. I'm
17 going to use his colleague Mr. Crawford's words.
18 Mr. Crawford told us that you shouldn't read exclusivity into
19 a statute. The definition of a securities contract is a
20 contract for the purchase or sale of a security, it doesn't
21 say and nothing else. And of course it can't say that
22 because there's always going to be transfers like this.

23 So, any contract that includes a purchase or sale
24 of a security is a securities contract, and that means all
25 transfers that are in connection with it, i.e. pursuant to it

1 are covered. There's no case to the contrary. That also
2 covers why Counts 2 and 3 we have settlement payments or
3 transfers in connection with securities contracts.

4 Let's again get common ground. Mr. Crawford said
5 in his argument there are obligations there, 546(e) does not
6 prevent the avoidance of an obligation. I thought I said it
7 in my opening, I'll say it now, I agree with that. What
8 we're talking about is payments that were made, payment --
9 tax payments. We did give them the discovery, they have it,
10 but it doesn't matter. The point is those payments were made
11 pursuant to the terms required by the separation and
12 distribution agreement.

13 I didn't hear Mr. Crawford, although you asked him
14 to, to respond to the 30-year hypothetical. Does anyone in
15 their -- anyone, is he going to stand up here and say you
16 have a 30-year mortgage and, at year 30, you make the final
17 payment to pay it off that that is not in connection with
18 that securities contract, that's the test. And it can be one
19 month later, six months later, 30 years later, 500 years
20 later, if the contract calls for it, that's what it is. And
21 there's no allegation in this case, no allegation whatsoever
22 in this case that the transfers of the -- any indemnity
23 transfers and any tax transfers were made for any reason
24 other than the contract cauldron.

25 Do you think Mallinckrodt, having been spun off

1 from Covidien, just said, hey, what the heck, let's make a
2 gift to Covidien? Let's just make a tax payment we're not
3 obligated to make. Of course not. Those payments were made,
4 and there's no allegation to the contrary, because the
5 contract required that they be made.

6 THE COURT: Okay.

7 MR. ANKER: I'll only say one last thing. He
8 cited to -- Mr. Crawford cited to the GBG case, I would urge
9 the Court to look at that case. That is a case --

10 THE COURT: The GBG case?

11 MR. ANKER: GBG. It's Judge Wiles' decision, 666
12 B.R. 115, September '24.

13 THE COURT: Okay.

14 MR. ANKER: That's a case in which a securities
15 transaction occurred, a raising of money occurred, and many
16 months later, six months later there was a transfer made.
17 And you know what? They didn't even use the proceeds of the
18 earlier payment; it wasn't required to be made.

19 Let me read to you from Judge Wiles' decision. In
20 this case, the \$196 million of transfers that GBG made to
21 GBGH were not made to complete a securities transaction --
22 and I stress not because the word is italicized in Judge
23 Wiles' decision. Defendant's sole argument is that somehow
24 the motivation for the transfers was a sale of GBG six months
25 earlier of the stock of a subsidiary, but those sale proceeds

1 were not even used to fund the dividend. The sale proceeds
2 had already been paid to GBG's creditors.

3 That is not a case holding -- and I litigated in
4 front of Judge Wiles the other major decision he issued in
5 (indiscernible) recently, the Trade Finance Fund case, and in
6 that case he said, if I can find the quote, that a transfer
7 made pursuant to a securities contract is in connection with
8 the contract, and that's exactly true of the tax payments.

9 That case, Your Honor, is In re -- I call it Trade
10 Finance -- it's In re IIG Global Trade Finance. I'm looking
11 at the slip op which he handed me, I hope we can get you the
12 cite in one second, but I will read you the relevant portion.

13 "Section 546(e) does not apply unless the
14 challenged transfer is itself a transfer to a protected party
15 that is a settlement payment or a transfer pursuant to a
16 securities contract."

17 All of the transfer here were transfers pursuant
18 to a securities contract, the separation and distribution
19 agreement.

20 And, Your Honor, I think we cited the case, but
21 we'll get you the B.R. cite of that decision, if we haven't.

22 THE COURT: That would be fine.

23 MR. ANKER: Okay. Let me now move to the
24 qualifying participant. I'm going to take these in order.

25 I heard Mr. Liesemer talk about how you really

1 shouldn't look at decisions that don't really deal with
2 issues and give them weight. And I was thinking, oh, my, I
3 thought I was the one making that argument. They're telling
4 you that Judge Walrath and Judge -- Your Honor, the cite
5 to -- excuse me, the cite to Judge Wiles' decision is 2024
6 WL 4751276.

7 THE COURT: 4751276?

8 MR. ANKER: Correct, Your Honor.

9 THE COURT: Thank you.

10 MR. ANKER: They're arguing in other parts of
11 their argument that decisions that don't really address
12 issues are not binding -- they wouldn't be binding in any
13 event, but are not precedent and on point. They're right,
14 they're absolutely right on that. And it is simply a fact --
15 and they've not pointed to any language, there is not a
16 sentence in Judge Walrath's decision in Kamonda, not a
17 sentence in Judge Drain's decision dealing with the option.

18 I heard Mr. Crawford say it's not an option
19 contract; it's not an option contract. That would be a good
20 point if the word contract occurred in the statute, but if
21 you look at -- if you look at the relevant slide, which I
22 think may be number 18 -- it's number --

23 THE COURT: 24 --

24 MR. ANKER: -- 24 --

25 THE COURT: -- I'm there.

1 MR. ANKER: -- by my counting. A securities
2 contract means a contract for the purchase or sale of a
3 security including any option to purchase, and then it has a
4 separate nine in the hole, any option to enter into any such
5 agreement. An option, by the terms of the statute, is itself
6 a securities contract.

7 Let's talk about the guaranties. It is true, of
8 course, that when the guaranty was given by the two Covidien
9 affiliates they were guaranteeing an obligation of CIFSA --

10 THE COURT: Right.

11 MR. ANKER: -- but the guaranty ran to, the
12 payment obligation ran to --

13 THE COURT: Deutsche Bank.

14 MR. ANKER: -- Deutsche Bank and -- and -- the
15 noteholders, and that is literally in the language, slide 33,
16 each of Covidien PLC and Covidien Unlimited jointly and
17 severally guarantee to each holder of each security, and to
18 the trustee on behalf of each such holder, to due and
19 punctual payment.

20 Now, Mr. Crawford is right when he says a guaranty
21 from a parent helps a subsidiary borrow at lower cost of
22 money, by way of example, it also is a benefit to the
23 noteholders and the lenders, otherwise they wouldn't insist
24 on it. But, Your Honor, whatever doubt there might be -- and
25 I come back to this -- you've got to focus -- we've got to

1 focus on the language of the statute.

2 If you go to the next slide, Congress told you the
3 way to look at this. One billion in notional principal
4 amount, quote, "aggregated across counterparties."

5 So the question is when you ask us was this a
6 contract with an affiliate or is it a contract with a third
7 party, you look at who the counterparties are. The
8 counterparty is the person who is -- who can sue me. The
9 person who can sue me when I give a guaranty is the obligee,
10 the noteholder, the indenture trustee. The primary obligor
11 can't sue the guarantor, it's just the opposite. If a
12 guarantor makes payment of a primary obligor's obligation, he
13 can sue the primary obligor. The primary obligor is
14 primarily obligated, that's why the word primary is used. So
15 that applies here.

16 And I still haven't heard an answer to the
17 hypothetical, is it really the case that when I borrowed
18 money to buy my house with my wife that that was a contract
19 with my wife, not a contract with the bank. A remarkable
20 proposition.

21 Let's turn to the last one, S.A. R.L. First, you
22 asked Mr. Crawford to deal with your hypothetical -- or my
23 hypothetical, and he dealt with part of it, but not the other
24 part of it, but not the other part of it. I want to come
25 back because he hasn't responded. And let's take it the way

1 you did. Someone goes to Berkshire Hathaway and says, you
2 know, one of your portfolio companies is -- and I forget the
3 example you gave, Your Honor, CSX?

4 THE COURT: Yeah, the -- I know he owns the train
5 company. I like trains.

6 MR. ANKER: I'd like to buy that. And this
7 person, let's call him Olan (ph) Musk.

8 THE COURT: Okay.

9 MR. ANKER: I'm -- when you deal with rich people
10 who are going to be entering in these contracts, right?

11 THE COURT: Actually, I work for the Government,
12 let's pick somebody else.

13 MR. ANKER: Okay.

14 (Laughter)

15 THE COURT: It could just get complicated, that's
16 all I'm saying.

17 (Laughter)

18 MR. ANKER: I could say Mark Zuckerberg, but I'm
19 not sure that's going to be any better.

20 THE COURT: Yeah.

21 MR. ANKER: All right, a former client of mine --
22 I hope he's not going to get angry that I'm using his name
23 here, but he's not been in politics recently -- Eddie
24 Lampert.

25 THE COURT: Okay.

1 MR. ANKER: Rich guy, rich guy. Eddie Lampert
2 calls up Warren Buffet and says, I want to buy CSX from you,
3 I'll buy it for \$90 a share, that ends up to a trillion
4 dollars.

5 THE COURT: Sure.

6 MR. ANKER: Okay? Under their analysis, neither
7 test is met because it's not an over-a-billion-dollars
8 notional. Why? Because the contract doesn't provide for
9 payment of interest. Eddie Lampert in my hypothetical has
10 said I'll buy it for a trillion dollars, not a trillion plus
11 interest thereon, and the hundred million dollar mark-to-
12 market test doesn't apply -- isn't satisfied in their world
13 because, until that contract is actually closed and you have
14 the --

15 THE COURT: Funds.

16 MR. ANKER: -- Mr. Lampert owns the stock, there's
17 nothing on mark-to-market. If that's right, how in the world
18 does the test begin with a securities contract?

19 Let's go to 761, what the different terms are.
20 I'm sorry -- yeah, that's it. The \$1 billion test and the
21 \$100 million test apply to a securities contract. Securities
22 contracts, under their argument, don't satisfy either test.
23 That can't be. Case after case holds, Congress isn't deemed
24 to create nullities, Congress is deemed to create statutes
25 that work. Almost all of these contracts are contracts

1 that -- a forward contract, a commodity contract, a
2 repurchase agreement, none of those provide for the payment
3 of interest, none of those would be marked on the books under
4 their theory of mark-to-market, so that can't be right.

5 I'll make one other point about mark-to-market.

6 And we put this in our brief, I didn't mention it earlier.

7 If you look at the legislative history of I think it's

8 546(e), the relevant provision, it says that mark-to-market

9 came out of the Feds Regulation EE, and Regulation EE -- I'm

10 sorry, Your Honor -- Regulation EE provides by its terms that

11 mark-to-market is simply market value.

12 Reg EE says -- I apologize, Your Honor -- oh, I

13 see, I'm sorry. Reg EE provides that gross mark-to-market

14 positions -- and I'm quoting -- "gross mark-to-market

15 positions in one or more financial contracts means the sum of

16 the absolute value of the positions in those contracts

17 adjusted to reflect the market value of those positions."

18 That's all it is, market value.

19 Let's go to the other alternative, and we only

20 have to meet one of the two, which is the FX contracts. I'm

21 sorry, I did cover that -- no, the FX contracts.

22 Mr. Crawford suggested we are reading the word principal out

23 of the statute, that we're reading it as if it says notional

24 amount, not notional principal amount. No, we're reading

25 principal to mean the face amount of an obligation.

1 Your Honor, here's an example that I think Your
2 Honor probably has dealt with many times is zero coupon bond.
3 A zero coupon bond, by definition, does not pay interest.

4 THE COURT: Does not pay interest.

5 MR. ANKER: Right. We asked in deposition
6 discovery of their expert, is it your position that a zero
7 coupon bond has no notional principal amount? Answer, yes.

8 Their argument would take zero coupon bonds out of
9 the entire statute. I think we've got the cite in our -- in
10 a footnote, admittedly, in our reply paper. That can't be
11 right.

12 Mr. Crawford makes a big deal of the fact that we
13 didn't put in experts. I'll say a few things. One, shame on
14 me, I don't actually like to spend my client's money on
15 things that I don't think are necessary. We've got a statute
16 and we have documents. But, second, we put fact witnesses
17 in. You know who are FX witness was? Tim Husnik, who's done
18 this; not a hired gun expert academic, but someone who spends
19 every day of his life for the last 20 years, the last 20
20 years, trading and running the foreign currency business for
21 Covidien and Mallinckrodt. His testimony, we've cited it
22 again in footnotes, is that no one in the business
23 distinguishes between -- thinks notional amount isn't
24 notional principal amount.

25 And in case one thinks that we're -- he's crazy,

1 we cited, and we stopped at the letter A, Apple's 10-Ks that
2 list forward contracts and talks about the notional amount.
3 And other companies, there's a second one also with an A, and
4 we stopped.

5 So there's plenty of evidence, but at the end of
6 the day, at the end of the day, Your Honor -- I can almost
7 anticipate their response -- well, Your Honor, that's for
8 trial, that's not something you can decide at summary
9 judgment. What you can do at summary judgment, Your Honor,
10 is look at the words of the statute, and they're right up
11 here right now, a securities contract includes, 3, a forward
12 contract. Under their argument, no, it doesn't.

13 Congress answered the question and it's Congress's
14 meaning that matters, and that is the quote from Judge
15 Dorsey.

16 I'm not sure what -- I'm not sure I followed
17 Mr. Liesemer's argument, but that was exactly our case here.
18 The trust put in an expert declaration that said the type of
19 contract we were relying on in the other case, there it was a
20 margin loan agreement, doesn't meet the mark-to-market test
21 because it's not something that under GAAP is adjusted to be
22 mark-to-market, and Judge Dorsey didn't fight that. He said
23 that premise may be right, but it doesn't matter because I
24 can't ignore the words of the statute. That's what Judge
25 Dorsey said, that is in our slides, and it is dispositive.

1 Let me get to the last point, which is the alter
2 ego argument. What 546(e) does is it precludes the trust
3 from avoiding the release. You didn't hear Mr. Crawford
4 stand up and say the release, if unavowed, doesn't cover the
5 alter ego claim, you didn't hear him stand up and say this
6 isn't a claim somehow of the company, it is a claim standing
7 in the shoes of the debtor and only standing in the shoes of
8 the debtor, Mallinckrodt.

9 So what you're left with, Your Honor, is the
10 proposition that as a legal matter there are ways to set
11 aside a release in a spin even not for the benefit of
12 creditors, not through fraudulent transfer law, but for the
13 benefit of the company itself, the subsidiary, and I submit
14 that is not the law. I think you looked puzzled -- and I
15 don't mean to -- if I misread Your Honor, I misread Your
16 Honor, but I saw you and I thought you were puzzled by the
17 argument about insolvency, and with good reason. Your
18 Honor's own decision in Essar Steel held that there is no
19 duty that a parent holds to its subsidiary even if the
20 subsidiary is insolvent.

21 I apologize, Your Honor, I should have it at my
22 fingerprints, but --

23 THE COURT: That's okay, I'm familiar with the
24 cite.

25 MR. ANKER: But it's Your Honor's own decision,

1 Essar Steel, 602 B.R. 600. "Courts have consistently held
2 that parent corporations do not owe fiduciary duties to their
3 wholly-owned subsidiary. The Court is persuaded by several
4 other courts that have addressed similar arguments and
5 declined to recognize a duty owed by a parent to an insolvent
6 wholly-owned subsidiary."

7 So the question you have to wrestle with is, are
8 there potential legal theories under which the SpinCo,
9 Mallinckrodt -- not the creditors of Mallinckrodt,
10 Mallinckrodt itself could undo the release that it gave and
11 that it received. And what I submit to you is that the law
12 of New York, we've cited the cases, the law of Delaware is to
13 the contrary.

14 Your Honor, Mr. Crawford said they didn't allow
15 Mallinckrodt to have their own lawyers. That is true with
16 every spin that has ever occurred. That's what a spin is.
17 The parent dictates the terms to the subsidiary, the parent
18 tells the subsidiary I want you to -- I'm going to spin you
19 off, and the reason is because the same shareholders own the
20 company one day later. The one and only one -- and a parent
21 has a right to say I want to have two separate companies or I
22 want -- that's the spin -- or I want a parent and a
23 subsidiary. And the party whose interests, the ox that can
24 get gored, the party whose interests that matter is the -- is
25 of the creditors -- that's right, the creditors of the sub,

1 and the creditors of the sub have a remedy, it's called for
2 fraudulent transfer law, but that's the remedy and that's the
3 only remedy, and Congress here said this cannot be a
4 fraudulent transfer because 546(e) blocks it.

5 THE COURT: Okay.

6 MR. ANKER: I think with that, Your Honor, that's
7 what I wanted to cover, and I appreciate Your Honor giving us
8 more time and I apologize if we intruded on your lunch.

9 THE COURT: No, no apology is necessary.

10 Look, both the briefing and the argument were
11 predictably excellent and helpful, and I appreciate the time.
12 I'm going to take the matter under advisement. I have,
13 obviously, the benefit of the submissions and, frankly, the
14 demonstratives that the parties used today helped kind of
15 frame the issues and for that I thank the parties.

16 But with that, we will take it under advisement,
17 and I wish you all a happy and healthy weekend.

18 We stand in recess. Thank you.

19 COUNSEL: Thank you, Your Honor.

20 (Proceedings concluded at 12:27 p.m.)
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CERTIFICATION

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of our knowledge and ability.

/s/ William J. Garling

May 12, 2025

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Certified Court Transcriptionist
For Reliable

/s/ Tracey J. Williams

May 12, 2025

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/s/ Mary Zajackowski

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