IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: MALLINCKRODT PLC, *et al.*, Reorganized Debtors.	Chapter 11 Case No. 20-12522 (JTD) (Jointly Administered)
OPIOID MASTER DISBURSEMENT TRUST II, Plaintiff, v. ARGOS CAPITAL APPRECIATION MASTER FUND LP, *et al.*, Defendants.	Adversary Proceeding No. 22-50435 (JTD)

[REDACTED] DEFENDANT VIRTU AMERICAS LLC'S OPENING BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PURSUANT TO THE PROTOCOL ORDER RELATING TO CONDUITS, NON-TRANSFEREES, "STOCKBROKERS," "FINANCIAL INSTITUTIONS," "FINANCIAL PARTICIPANTS," AND DISSOLVED ENTITIES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

PRELIMINARY STATEMENT

Between August 2015 and April 2018, Mallinckrodt plc ("Mallinckrodt") repurchased over 35 million shares of its stock on the open market over U.S.-based exchanges (the "Share Repurchases" or the "Share Repurchase Program"). Through this adversary proceeding, Plaintiff Opioid Master Disbursement Trust II (the "Trust") seeks to unwind those transactions—which were settled as many as 8.5 years ago—including approximately [redacted] in transactions involving Defendant Virtu Americas LLC ("VAL") and two of its predecessors, KCG Americas LLC ("KCGA") and Virtu Financial BD LLC ("VFBD," and together with VAL and KCGA, the "Virtu Entities"). The Virtu Entities seek dismissal from this action pursuant to Section 546(e) of the Bankruptcy Code on the ground that any Share Repurchases executed with VAL and its predecessors are safe harbored: the Share Repurchases are inarguably "settlement payments" and transactions made "in connection with a securities contract," and VAL and its predecessors clearly qualify as both "financial participants" and "stockbrokers."

Section 546(e) of the Bankruptcy Code was enacted to avoid costly and prolonged attempts to unwind long-settled transactions with major market participants. In recognition of this statutory intent, more than ***fourteen months ago***, the parties to this action agreed to, and the Court so-ordered, the Protocol Order Relating to Conduits, Non-Transferees, "Stockbrokers," "Financial Institutions," "Financial Participants," and Dissolved Entities (D.I. 185) (the "Protocol"), which contemplated an expedited process for dismissal of safe-harbored Defendants. Notably, despite Section 546(e)'s two-prong inquiry, the Protocol only requires a Defendant to show it is a ***qualifying participant***—the Protocol correctly presumed the Share Repurchases were ***qualifying transactions***, leaving only the qualifying participant prong open for resolution on a Defendant-by-Defendant basis.

The process has been anything but expedited. There can be no reasonable dispute that the Virtu Entities qualify as financial participants and stockbrokers. Virtu Financial, Inc. ("VFI"), VAL's ultimate parent company, is a leading market maker in the securities market, and provides competitive bids and offers in over 25,000 securities, at over 235 venues, in 37 countries worldwide. VAL—VFI's primary U.S. subsidiary—is a global market maker and registered U.S. broker-dealer regulated by the United States Securities and Exchange Commission ("SEC") and Financial Industry Regulatory Authority ("FINRA"). Declaration of Cindy Lee (Ex. B[1]) ("Lee Decl."), Ex. 1 at 11. Pursuant to the Protocol, over the course of months, VAL provided the Trust with numerous documents consisting of thousands of pages, including audited financial statements, filings with SEC, sworn declarations, detailed financial records, Master Stock Loan Agreements ("MSLAs"), Master Service Agreements ("MSAs"), and FINRA reports. VAL exchanged months of correspondence with the Trust, met and conferred with the Trust multiple times, and responded to each one of the Trust's multitude of questions. Discovery exchanged during the Protocol process has made it abundantly clear that VAL should be dismissed from this action. Indeed, if VAL and its predecessors do not count as financial participants or stockbrokers, it is hard to imagine who does qualify.

Despite this, after providing the Trust with the discovery it requested, on March 7, 2024, the Trust informed VAL that it somehow lacked sufficient information to determine whether the Virtu Entities qualified as financial participants or stockbrokers. Moreover, despite engaging with VAL for months, the Trust informed VAL for the first time in its March 7 letter that even if VAL and its predecessors were qualifying participants, dismissal was suddenly inappropriate

[1] References to "Ex. __" refer to the Exhibits attached to the Transmittal Declaration of Sabrina M. Hendershot submitted herewith.

because the Virtu Entities' Share Repurchases were not qualifying transactions under the Bankruptcy Code. According to the Trust, the Mallinckrodt Share Repurchases were now void *ab initio* under Irish law.

This novel theory is a complete red herring. Even if the Share Repurchase Program was contrary to Irish law, it is not exempt from the safe harbor protections of Section 546(e). The transfers at issue were still "settlement payments" and/or transfers "made in connection with a securities contract," and the purpose of Section 546(e) is to insulate otherwise voidable transactions from the Trust's avoidance power. The Trust is attempting to invent an exception to the safe harbor that cannot be found in the text of Section 546(e). The sole purpose of the safe harbor is to exempt certain types of transactions from the scope of the trustee's avoidance power, whether that power arises under domestic or foreign law.

The argument is also procedurally improper, waived for purposes of this motion, and contrary to Third Circuit law. The Trust did not plead any claim to void the Share Repurchases under Irish law. The Trust pleaded claims to void the Share Repurchases under U.S. federal and state law, with no mention anywhere of this new Irish law avoidance theory. The Trust's attempt to insert a new, un-pled claim under foreign law as a purported ground to defeat the safe harbor is improper. Moreover, the Trust waived the argument by failing to assert it in a timely manner—waiting six months from the beginning of the Protocol process with the Virtu Entities to raise it—and by entering into the Protocol which presumed that the Share Repurchases were qualifying transactions. Lastly, the out-of-circuit case law on which the Trust relies is directly contrary to decades-old precedent from the Third Circuit Court of Appeals. *See Bevill, Bresler & Schulman Asset Mgmt. Corp.* v. *Spencer Sav. & Loan Ass'n*, 878 F.2d 742 (3d Cir. 1989); *In*

re Resorts Int'l, Inc., 181 F.3d 505 (3d Cir. 1999). The Trust's arguments are meritless. For the reasons set forth herein, the Virtu Entities respectfully request dismissal from this action.

BACKGROUND

A. The Parties

1. VAL and Its Predecessors

The Amended Complaint alleges that VAL and two of its predecessors, KCGA and VFBD, participated in the Share Repurchase Program that Mallinckrodt pursued between August 4, 2015 and April 23, 2018. *See* Amended Complaint (D.I. 209) ("AC") ¶¶ 58, 92.

VAL is an institutional brokerage firm which acts as a market maker both internationally and in the U.S., providing liquidity in numerous markets by quoting, buying, and selling securities and other financial instruments. Lee Decl. ¶ 5. The firm generates revenues by capturing the bid/ask spread. *Id.* The services VAL provides are integral to the creation and maintenance of efficient markets. *See id.* VAL was formed in 2009, originally was named Knight Clearing Services LLC, and subsequently was renamed several times—first Knight Execution & Clearing Services LLC, then KCGA, and finally in 2017, VAL. *Id.*; *see also* Ex. F, Ex. 36, at 1–3; *see also Virtu KCG Holdings LLC* v. *Li*, 2018 WL 734667, at *1 n.2 (D.N.J. Feb. 6, 2018) (noting that "KCG Americas LLC was renamed Virtu Americas LLC").

VFBD is a predecessor entity of VAL. VFI is VAL's parent company, and explained the relationship between VAL and VFBD in its Form 10-K for the year ended December 31, 2020, filed on February 25, 2021:

> We [VFI and its subsidiaries] conduct our U.S. equities and options market making and provide execution services through VAL, our SEC-registered broker-dealer. ***VAL is regulated by the SEC and its designated examining authority is the Financial Industry Regulatory Authority, Inc. ("FINRA").*** VAL is also registered as a floor trader firm with the Commodity Futures Trading

> Commission ("CFTC"). ***As part of the Company's integration efforts, the Company consolidated the operations of its other historical U.S. broker-dealer subsidiaries. Specifically, the broker-dealer activities of Virtu Financial BD LLC and Virtu Financial Capital Markets LLC were consolidated within VAL as of December 31, 2019 and the SEC registrations were withdrawn in March 2020.*** Subsequently, the Company consolidated the broker-dealer activities of Virtu ITG LLC and Virtu Alternet Securities within VAL as of June 1, 2020 and the SEC registrations were withdrawn in August 2020.

Lee Decl., Ex. 1 at 11 (emphases added). Before the consolidation, VFBD bought and sold securities and engaged in securities borrowing and lending activities with external counterparties, business which VAL continued post-consolidation. Lee Decl. ¶ 21.

2. Debtor Mallinckrodt

Mallinckrodt is a global pharmaceutical company and a top manufacturer of pharmaceuticals and opioid medications. AC ¶ 2. Mallinckrodt-produced opioids were used throughout the country, and the company ultimately faced wide-ranging litigation regarding the production and sale of its opioids. *Id.* ¶¶ 5–6. Mallinckrodt first filed for bankruptcy on October 12, 2020 (the "Petition Date"). *See* Chapter 11 Voluntary Petition, *In re Mallinckrodt Plc*, No. 20-bk-12522 (Bankr. D. Del. 2020) (D.I. 1). The order confirming the operative Plan of Reorganization (the "Plan") was entered on March 2, 2022. *See* Fourth Am. Joint Plan of Reorganization at 90, *In re Mallinckrodt Plc*, No. 20-bk-12522 (Bankr. D. Del. 2020) (D.I. 6660-1).

3. The Trust

The Trust—which serves as the plaintiff in this action—was created pursuant to Mallinckrodt's confirmed Plan in Mallinckrodt's first bankruptcy action. Pursuant to the Plan, the Trust received "the exclusive right, authority, and discretion to determine and to initiate, file, prosecute, enforce, abandon, settle, compromise, release, withdraw, or litigate to judgment"

claims against current or former stockholders of Mallinckrodt from whom Mallinckrodt repurchased its own stock in connection with the Share Repurchase Program. *Id.* at 45, 96.

B. The Share Repurchase Program

The Trust alleges that between August 2015 and April 2018, Mallinckrodt paid approximately $1.6 billion to repurchase over 35 million shares of its common stock from public stockholders. AC ¶ 271. Mallinckrodt's Board of Directors authorized the Share Repurchase Program, pursuant to which Mallinckrodt entered into a series of purchase agreements (the "Purchase Agreements") with Goldman Sachs & Co. and Morgan Stanley & Co. (the "Brokers") acting as its agents. *Id.* ¶¶ 270, 274. In accordance with the Purchase Agreements, the Brokers repurchased Mallinckrodt's own stock on the open market over U.S.-based exchanges, allegedly including from the Virtu Entities. *Id.* ¶¶ 58, 92, 275–276. The Trust alleges that Mallinckrodt did not have enough cash on hand to fund the Share Repurchases. *Id.* ¶ 327.

The Trust initiated this adversary proceeding on October 12, 2022. *See* D.I. 1. In the initial complaint, the Trust sought to avoid the Share Repurchase as actual and/or constructive fraudulent transfers under 11 U.S.C. §§ 544(b) and 550(a), the UFTA, 28 U.S.C. § 3304(b)(1)(A) and/or other applicable state law. *Id.* ¶¶ 215–52. VAL was named as a defendant twice, first as "Virtu Americas LLC a/k/a KCG Americas LLC" and also as "Virtu Americas LLC a/k/a/ Virtu Financial BD LLC." *Id*. at 2. On October 24, 2023, the Trust filed the Amended Complaint which asserted no new claims but added additional defendants, including KCGA.[2] AC ¶¶ 58, 92.

[2] With respect to the Virtu Entities, the Amended Complaint purported to name KCGA as a separate defendant, rather than as an "a/k/a" entity for VAL (as in the original Complaint). Regardless, only VAL is relevant. KCGA is VAL's former name—it is not a separate entity. VFBD was merged into VAL in December 2019.

C. The Parties Enter the Protocol and VAL Seeks Dismissal

1. The Protocol

On December 28, 2022, the Court entered an Order Enlarging the Time to Effect Service of Process and Approving Preliminary Case Management Procedures (D.I. 93) (the "Case Management Order"). The Case Management Order directed, *inter alia*, the parties to commence "reasonable and good-faith negotiation of protocols to address, efficiently and without undue cost" the defense that any Defendant is safe harbored under Section 546(e) of the Bankruptcy Code, or is a dissolved entity not capable of being sued. *Id.* ¶ 6(c).

Despite the express mandate of the Case Management Order, the Trust initially opposed the inclusion of the enumerated Section 546(e) defenses in the protocol, requiring Defendants to seek this Court's direction. D.I.s 121, 132, 141. After hearings on February 28, and April 19, 2023 (D.I.s 121, 157), the parties agreed to the Protocol which was so-ordered over a year ago on May 15, 2023. *See* D.I. 185-1.

The Protocol provides a process for Defendants to show that they are qualifying institutions whose transactions are protected by the safe harbor in Section 546(e). The Protocol does not require Defendants to address whether the Share Repurchases were qualifying transactions.[3] *See id.* Indeed, the conclusion that the Share Repurchases—which involved the purchase of stock on an open securities market pursuant to the Purchase Agreements—were qualifying transactions under Section 546(e) as "settlement payments" or transfers "in connection with a securities contract" was so clear to all parties, there was no need to require

[3] Under Paragraph 2 of the Protocol, a "Defense" "shall mean that the Defendant is or was a Conduit, Non-Transferee …, 'Dissolved Entity' …, or 'Financial Institution,' 'Financial Participant,' 'Stockbroker,' or any other type of entity identified in Section 546(e) of the Bankruptcy Code." D.I. 185-1 ¶ 2 (citing Section 101 of the Bankruptcy Code).

further proof on that issue. The design of the Protocol thus correctly presupposed that the Share Repurchases are both "settlement payments" and transactions "in connection with a securities contract" (namely, the Purchase Agreements), leaving only the question of whether any Defendant is a qualifying institution entitled to safe harbor protection to determine whether Section 546(e) applies to particular Defendants.

Under the Protocol, a Defendant can establish that it was a qualifying participant by providing the Trust with a declaration and supporting documentation showing that it meets the relevant statutory definition. *Id.* ¶ 5. The declaration must be accompanied by "documents sufficient to establish the factual basis for the claimed Defense(s)," and a "written explanation of why, under applicable law, the Declaration and the Supporting Documentation establish the Defense(s)." *Id.* ¶ 6.

The Trust has 45 days after a Defendant's submission to determine whether to dismiss the Defendant without prejudice, or to notify the Defendant in writing why it will not. *Id.* ¶ 9. Further, if the Trust "believes, in good faith" additional information "is necessary for it to determine whether the Defendant has established the claimed Defense," the Trust may request, within the 45-day period, additional information from the Defendant. *Id*. If such a request is made, the Trust has 45 days from submission of the additional information to make its determination. *Id.*

If the Trust refuses to dismiss the Defendant, the parties must meet and confer. *Id.* ¶ 11(a). If the meet and confer still does not resolve the parties' dispute, the Defendant may file a "Protocol-Based Motion" for dismissal based on the asserted defenses that "may include for consideration by the Court (i) the declaration, (ii) Supporting Documentation, and (iii) any other

evidence that the Plaintiff and the defendant exchanged during the process outlined in paragraphs 5–10." *Id.* ¶ 11(b).

2. VAL Seeks Dismissal Under the Protocol, Which the Trust Unreasonably Denies

Section 546(e) provides a complete defense to the claims asserted against VAL and its predecessors. On July 7, 2023, VAL made a comprehensive submission to the Trust under the Protocol which included a declaration from VFI's Deputy CFO, 13 exhibits consisting of public SEC filings and FINRA reports, and a letter from counsel explaining why VAL should be dismissed. Exs. A, B. The submission described VAL's corporate history and that KCGA and VFBD were VAL's predecessors, and that therefore only VAL's status as a qualifying participant was relevant. Ex. A at 2; Lee Decl. ¶¶ 5–6, 11, 15.

Further, VAL produced a Statement of Financial Condition and Report of Independent Registered Public Accounting Firm ("Statement of Financial Condition") which showed that as of December 31, 2019, VAL held over $1.44 billion in notional or actual principal amount outstanding in futures, options, and forwards. *See, e.g.*, Lee Decl. ¶ 10; Ex. B., Ex. 2 at 18. Further, the declaration explained that during the relevant period, KCGA was not a distinct entity for purposes of assessing its status as a financial participant—KCGA is just the prior name of VAL. *See* Lee Decl. ¶ 5. Likewise, the declaration explained that VFBD was not a distinct entity for purposes of assessing its status as a financial participant because it had been consolidated into VAL during the relevant period. *Id.* ¶¶ 6, 15. Accordingly, because VAL was a financial participant, KCGA and VFBD were too.

Further, VFBD's October 24, 2019 Financial and Operational Combined Uniform Single Report ("FOCUS Report") showed that it independently qualified as a financial participant. The

FOCUS Report showed that as of October 24, 2019, VFBD held at least $1.33 billion in notional or actual principal amount in outstanding securities contracts and options. Lee Decl. ¶ 14; Ex. B, Ex. 3 at 1 ¶ 3(B)(2), *id.* at 2 ¶ 7(F), *id.* at 3 ¶ 19(B)(2). Finally, VFI's and the Virtu Entities' Form 10-Ks and FINRA BrokerCheck Reports showed that each of the Virtu Entities were SEC registered broker-dealers with customers, and in the ordinary course of business engaged in effecting transactions in securities for the account of others and therefore qualified as stockbrokers. Lee Decl. ¶¶ 16–21; Ex. B, Exs. 1, 4–9.

On August 21, 2023, the Trust sent a letter asking for additional information. *See* Ex. C at 1. While the materials submitted on behalf of the Virtu Entities showed that they easily surpassed the threshold required to qualify as financial participants and stockbrokers under Section 546(e), VAL provided even more documentation, including another explanatory letter from counsel and additional business records, including, among other things, VAL's stock loan and stock borrow transaction level history as of December 31, 2019, VFBD's stock loan and stock borrow transaction level history as of September 30, 2019, organizational charts, MSLAs, and MSAs. Ex. D; Ex. F.

The VAL stock loan and stock borrow transaction data show that as of December 31, 2019, excluding transactions with affiliates, VAL's total position was [redacted], consisting of [redacted] in stock borrows and [redacted] in stock loans. Ex. D, Ex. 15 at 2. VAL also provided certain of its and its predecessor's MSLAs—the contracts governing the stock borrows and loans—with a sampling of its largest counterparties ([redacted]). Ex. D, Ex. 19; Ex. F, Exs. 24–35. Finally, VAL provided documents describing VAL's various name changes over time

showing that KCGA was its corporate name prior to changing it to VAL in 2017. Ex. F, Ex. 36 at 3.

The Virtu Entities also provided stock loan and stock borrow transaction data for VFBD, which showed that as of September 30, 2019, excluding transactions with affiliates, VFBD had [redacted] in stock loans and borrows. *See* Ex. D, Ex. 14; Ex. F, Ex. 14.

On March 7, 2024, the Trust refused to dismiss VAL, arguing that the Share Repurchases were not transfers made "in connection with a securities contract" because they were void *ab initio* under Irish law, and inexplicably asserting that the Virtu Entities provided "insufficient information" to establish that they were financial participants or stockbrokers. Ex. E at 2. The Trust also argued that VAL and VFBD had not provided sufficient information to identify affiliate transactions. *Id*. at 8–9.

On April 24, 2024, VAL provided even more information to the Trust in a further attempt to avoid motion practice. Ex. F. Specifically, VAL explained that it had already identified affiliate transactions in VAL's stock loan and stock borrow transaction history (*see* Ex. D, Ex. 15 at 2), and provided a replacement exhibit for VFBD's stock loan and stock borrow transaction level history that identified transactions with affiliates. Ex. F, Ex. 14.

Despite VAL's efforts and all of the information provided, the Trust still has refused to dismiss VAL.

ARGUMENT

Section 546(e) of the Bankruptcy Code provides an absolute safe harbor against avoidance actions:

> [T]he trustee ***may not avoid*** a transfer that is a … settlement payment … made by or to (or for the benefit of) a … stockbroker [or] financial participant … or that is a transfer made by or to (or for the benefit of) a … stockbroker [or] financial

> participant … in connection with a securities contract … that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

11 U.S.C. § 546(e) (emphasis added).

The purpose of Section 546 is "to limit the potential impact of insolvencies upon other major market participants." H.R. REP. 109-31(I), 130, 2005 U.S.C.C.A.N. 88, 191. Courts have explained that payments to and from "commodities and securities firms … provide certainty as to each transaction's consummation, speed to allow parties to adjust the transaction to market conditions, finality with regard to investors' stakes in firms, and thus stability to financial markets." *In re Trib. Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 90 (2d Cir. 2019) (citing H.R. Rep. No. 97-420 (1982); H.R. Rep. No. 95-595 (1977)). In other words, certain market participants are sufficiently large and central to the proper functioning of securities and commodities markets that Congress has exempted them from avoidance actions arising from routine transactions that are central to their business, including those at issue in this case.

To qualify for safe harbor protection, two requirements must be met: (1) the transaction must involve a "qualifying participant" (i.e., as relevant here, the challenged transfer must be "made by or to (or for the benefit of)" a "stockbroker" or a "financial participant"), and (2) the challenged transaction must be a "qualifying transaction" (i.e., as relevant here, a "settlement payment" or transfer "made in connection with a securities contract"). *See In re Quorum Health Corp.*, 2023 WL 2552399, at *5 (Bank. D. Del. Mar. 16, 2023). If both of these conditions are satisfied, the fraudulent transfer claims must be dismissed.

For purposes of this Protocol motion,[4] VAL will not address the merits of the underlying fraudulent transfer claim. Rather, VAL seeks dismissal from this action pursuant to the Protocol

[4] VAL reserves all rights and defenses should the Court deny its motion.

because it and its predecessors are qualifying participants—they are "financial participants" and "stockbrokers" as those terms are defined in the Bankruptcy Code—and the Share Repurchases were qualifying transactions—they were "settlement payments" and/or transfers "made in connection with a securities contract." Dismissal with prejudice is warranted on that basis.

I. The Virtu Entities Are Qualifying Participants

A. The Virtu Entities Are "Financial Participants"

VAL and its predecessors qualify for safe harbor protection because they are "financial participants." A financial participant is an entity which, on the petition date, or on any day during the 15-month period preceding the petition date:

> has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding … or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties).

11 U.S.C. § 101(22A).

Among the agreements or transactions described in Section 561(a) are "securities contracts," "forwards contracts," and "swap agreements." Under Section 101(53B)(A), futures and options qualify as "swap agreements." Further, a "securities contract[], as defined in section 741(7)," 11 U.S.C. § 561(a)(1), "means (i) a contract for the purchase, sale, or *loan* of a security, … including an option to purchase or sell any such security… [or] (x) a *master agreement* that provides for an agreement or transaction referred to [previously]," 11 U.S.C. § 741(7) (emphases added). The Bankruptcy Code defines "security" to include, among other things, stocks, notes, bonds, and "other claim[s] or interest[s] commonly known as 'securit[ies].'" 11 U.S.C. § 101(49). Therefore, stock loans and borrowings, governed by master agreements, qualify as securities contracts.

Mallinckrodt's Petition Date was October 12, 2020. Thus, the 15-month lookback period is July 12, 2019 through October 12, 2020 (the "Lookback Period"). The safe harbor does not require a party to show that it was a "financial participant" at the time of the challenged Share Repurchases—it is sufficient to prove its status on any day during the Lookback Period, even if the transactions at issue occurred before that time. *In re Samson Resources Corp.*, 2022 WL 3135288, at *4 (Bankr. D. Del. Aug. 4, 2022) ("[W]hether an entity is a financial participant is not determined on the transfer date, but on the dates set forth in the Bankruptcy Code's definition of financial participant at § 101(22A)."); *see also* H.R. REP. 109-31(I), 131, 2005 U.S.C.C.A.N. 88, 191 ("It is intended that the 15-month period be measured with reference to the 15 months preceding the filing of a petition by or against the debtor.").

To determine if a defendant satisfies the definition, courts typically rely on financial statements, including those filed with the SEC. *E.g.*, *In re DSI Renal Holdings, LLC*, 617 B.R. 496, 506 n.39 (Bankr. D. Del. 2020) (relying on financial statements to determine if defendant qualified as a financial participant); *In re Am. Home Mortg. Holdings, Inc.*, 388 B.R. 69, 86–87 (Bankr. D. Del. 2008) (relying on a statement of financial condition); *In re Quorum Health Corp.*, 2023 WL 2552399, at *7 (finding defendant was a "financial participant" through "judicial notice of the information in … SEC filings [which demonstrated] a private offering of senior secured notes in the amount of $1.462 billion"). Courts may also rely upon sworn declarations. *Luria* v. *Hicks*, 2017 WL 4736682, at *3–5 (Bankr. M.D. Fla. Mar. 14, 2017) (granting judgment for defendant based on sworn declaration attesting that defendant had over $100 million mark-to-market in outstanding repurchase agreements). During the Protocol process, the Virtu Entities supplied precisely these types of documents to the Trust, and more, to demonstrate their status as financial participants.

VAL has provided, among other evidence, audited financial statements publicly filed and subject to review and audit by the SEC, FINRA reports, and a sworn declaration explaining the documents. After their initial round of disclosures, the Virtu Entities produced additional documents going far beyond the typical financial statements and regulatory filings, including VAL's stock loan and stock borrow transaction level history as of December 31, 2019, VFBD's stock loan and stock borrow transaction level history as of September 30, 2019, organizational charts, MSLAs, and MSAs. The Trust has argued that the Court may not take "judicial notice" of facts recited in these documents for their truth on a motion to dismiss. But judicial notice is irrelevant where, as here, the parties have stipulated that this Court may consider the documents on their merits, which Paragraph 11(b) of the Protocol expressly allows the Court to do. *See* D.I. 185-1 ¶11(b). In any event, the Delaware Bankruptcy Court has held that a company's public filings are "one, ***if not the only***, source for the information the Court requires in order to determine whether" a statutory safe harbor applies. *In re Am. Home Mortg. Holdings, Inc.*, 388 B.R. at 85 (emphasis added); *see also In re Quorum Health Corp.*, 2023 WL 2552399, at *7 (finding "it appropriate to take judicial notice of the information in the [defendant's] SEC filings for purposes of determining whether [defendant] meets the Code's definition of a 'financial participant'"); Fed. R. Evid. 803(6). All of the documents cited in this motion were provided to the Trust pursuant to the Protocol, and may be considered in connection with this motion.

1. VAL is a Financial Participant

As part of the Protocol discovery process, VAL produced a Statement of Financial Condition, which was filed with the SEC, dated as of December 31, 2019. *See, e.g.*, Lee Decl. ¶ 10, Ex. B, Ex. 2 at 18. This Statement of Financial Condition was VAL's most recently audited year-end financial statement before the Petition Date, and fell within the Lookback Period. *See*

id. The Statement of Financial Condition was audited, verified by VAL as accurate, filed with the SEC, and subject to further review and audit by the SEC.[5] Ex. D at 5; Lee Decl. ¶ 9. The Statement of Financial Condition showed that VAL held over $1.44 billion in notional or principal amount outstanding in futures, options, and forwards—higher than the $1 billion threshold necessary to qualify as a financial participant under 11 U.S.C. § 101(22A).

In response to requests from the Trust, VAL also provided additional data that supplied an independent basis to conclude that VAL was a financial participant during the Lookback Period. VAL provided reports showing the principal amounts by counterparty for all of its stock loan and stock borrow transactions as of December 31, 2019. Ex. D, Ex. 15 at 2. The stock loan and stock borrow transaction data show that as of December 31, 2019, excluding transactions with affiliates, VAL's total position was [redacted], consisting of [redacted] in stock borrows and [redacted] in stock loans. *Id.* VAL also provided certain of its and its predecessor's MSLAs—standard form contracts that govern stock lending between the parties—with a sampling of its largest counterparties ([redacted]). Ex. D, Ex. 19; Ex. F, Exs. 24–35. The contracts set forth the framework for terms on which the "Borrower or Lender" of securities "may … initiate a transaction in which Lender will lend Securities to Borrower," pursuant to the MSLA. *Id.* Finally, VAL also provided corporate records showing clearly that VAL was previously named KCGA, and changed its name to VAL in 2017. Ex. F, Ex. 36 at 3.

[5] As explained above, the Statement of Financial condition is exactly the kind of filing courts rely upon to determine whether a party meets the definition of "financial participant." *See, e.g.*, *In re Am. Home Mortg. Holdings, Inc.*, 388 B.R. at 85; *In re Quorum Health Corp.*, 2023 WL 2552399, at *7 & nn.42–46; *In re Nine W. LBO Sec. Litig.*, 482 F. Supp. 3d 187, 203 nn. 20, 22 (S.D.N.Y. 2020).

As explained above, courts typically rely on financial statements to determine if a defendant satisfies the definition. *See In re Quorum Health Corp.*, 2023 WL 2552399, at *7. Accordingly, the Court may determine that VAL was a financial participant on the basis of its Statement of Financial Condition alone because it shows the total amount in notional or actual principal amount outstanding of futures, options, and forwards was over $1.44 billion. *Id.*; 11 U.S.C. § 101(53B)(A); 11 U.S.C. § 561(a)(1).

But should the Court conclude that more is required, the stock loan and stock borrow documentation provides an independent basis to reach the same conclusion. As explained above, stock loans and stock borrows are "securities contracts" and thus can be relied upon for purposes of determining a party's status as a financial participant because they show the total amount of futures and options. *See supra* p. 13. Indeed, the Trust has never argued otherwise. The Trust has therefore conceded that stock loan and stock borrow transactions are sufficient to meet the financial participant test. The stock loan and stock borrow data show that VAL held well over $1 billion in notional or principal amount outstanding as of December 31, 2019, which is sufficient to conclude that VAL is a "financial participant" that is eligible for safe harbor treatment under Section 546(e).

2. KCGA is Simply VAL's Old Name and Because VAL is a Financial Participant, KCGA is Too

The financial participant safe harbor also applies to KCGA because KCGA and VAL are the same entity. In 2017 (before the Lookback), KCGA was renamed VAL. *See supra* p. 16. The Trust appeared to acknowledge this fact in the initial complaint, alleging that VAL was "also known as" KCGA. *See* D.I. 4 (complaint naming "Virtu Americas LLC a/k/a KCG Americas LLC"). Thus, during the Lookback Period, KCGA is the same entity as VAL for purposes of

assessing its status as a financial participant—it had changed its name to VAL by that time. *See Ozan Lumber Co.* v. *Davis Sewing Mach. Co.*, 284 F. 161, 164 (D. Del. 1922), *aff'd*, 292 F. 135 (3d Cir. 1923) (holding that where there "is but a mere change in the corporate name of the debtor, or a change in the corporate powers, [] the identity of the debtor corporation is not thereby lost."); *see also Delaware Dep't of Transp.* v. *Mactec Eng'g & Consulting, Inc.*, 2011 WL 6400285, at *1 (Del. Super. Dec. 14, 2011) ("A change of name does not alter the identity of a corporation, and it does not affect its liability… 'A change of name by a corporation has no more effect upon the identity of a corporation than a change of name by a natural person has upon the identity of such person.'") (quoting 6 Fletcher Cyc Corp. § 2465); 18A Am. Jur. 2d *Corporations* § 234 (2022) ("A corporate name change does not make a new corporation but only gives the corporation a new name.").

3. VFBD Also Qualifies as a Financial Participant

VFBD is not a named Defendant in this Adversary Proceeding, but is identified in the caption as an "a/k/a" name for VAL. *See* D.I. 4 (complaint naming "Virtu Americas LLC a/k/a Virtu Financial BD LLC"). As described above, VFI's Form 10-K for 2020 explained that in December 2019, VFBD's business was consolidated into VAL. Lee Decl. ¶¶ 6, 15, Ex. B, Ex. 1 at 11. After the entities were consolidated, they became the same company. *See* Edward P. Welch et al., *Folk on the Delaware General Corporation Law* § 259.01 (7th ed. 2022-1 Supp.) (explaining that in a consolidation "the old corporations have their identity absorbed into that of … one into which they were merged"); *Argenbright* v. *Phoenix Fin. Co. of Iowa*, 187 A. 124, 126 (Del. Ch. 1936) (same). Accordingly, VFBD qualifies as a financial participant due to VAL's status as a financial participant post-consolidation with VFBD. *See In re Quorum Health Corp.*, 2023 WL 2552399, at *7.

But even if VFBD were considered independently, it would still qualify as a financial participant pre-consolidation with VAL. In their initial submission to the Trust, the Virtu Entities provided VFBD's October 24, 2019 FOCUS Report, showing that VFBD held at least $1.33 billion in notional or actual principal amount in outstanding securities contracts and options as of October 24, 2019. *See, e.g.*, Lee Decl. ¶ 14; Ex. B, Ex. 3 at 1 ¶ 3(B)(2), *id.* at 2 ¶ 7(F), *id.* at 3 ¶ 19(B)(2). As set forth in Ms. Lee's Declaration, a FOCUS Report is filed with the SEC: it is a financial statement that reports on a broker-dealer's financial and operating conditions. Lee Decl. ¶ 13. Pursuant to Section 17 of the Securities Exchange Act of 1934 and SEC Rule 17a-5, all regulated broker-dealers that are registered with the SEC must file FOCUS Reports. *Id*. Indeed, the Trust provides no reason to question the veracity or reliability of VFBD's FOCUS Report, which was verified by VFBD as accurate, filed with the SEC, and subject to further review and audit by the SEC. *See* Lee Decl. ¶ 13.

The Court may find that VFBD was a financial participant based on its October 24, 2019 FOCUS Report. Although VFBD was consolidated into VAL in December 2019, its October 24, 2019 report also reflects its financial condition within the applicable Lookback Period. As of October 24, 2019, VFBD had $1.33 billion in notional or actual principal amount outstanding, consisting of: (i) $620,589,643 in securities borrowed (Ex. B, Ex. 3 at 1 ¶ 3(B)(2)); (ii) $3,063,268 options owned at market value (*id.* at 2 ¶ 7(F)); and (iii) $710,043,099 in securities loaned (*id.* at 3 ¶ 19(B)(2)). As explained above, securities loans and borrows each qualify as "securities contracts," and options qualify as "swap agreements" under Section 561(a). These totals therefore are sufficient to prove VFBD's status as a financial participant during the Lookback Period, on an independent basis, before it was consolidated into VAL. *See supra* 13.

Further, in response to requests from the Trust, VFBD also provided its stock loan and stock borrow balances by counterparty as of September 30, 2019. Ex. F, Ex. 14. That data, which shows that as of September 30, 2019, excluding transactions with affiliates, VFBD had [redacted] in stock loans and borrows, provides another basis to find that VFBD was a financial participant. *Id*.

B. The Virtu Entities Qualify As Stockbrokers

VAL and its predecessors are qualifying participants under Section 546(e) for the additional reason that they are "stockbrokers," in addition to being financial participants. Under Section 101(53A) of the Bankruptcy Code, a stockbroker is an entity that has a customer and "is engaged in the business of effecting transactions in securities for the account of others; or with members of the general public, from or for such person's own account." Under Section 741 of the Bankruptcy Code, a "customer" is an:

> (A) entity with whom a person deals as principal or agent and that has a claim against such person on account of a security received, acquired, or held by such person in the ordinary course of such person's business as a stockbroker, from or for the securities account or accounts of such entity (i) for safekeeping; (ii) with a view to sale; (iii) to cover a consummated sale; (iv) pursuant to a purchase; (v) as collateral under a security agreement; or (vi) for the purpose of effecting registration of transfer; and (B) entity that has a claim against a person arising out of (i) a sale or conversion of a security received, acquired, or held as specified in subparagraph (A) of this paragraph; or (ii) a deposit of cash, a security, or other property with such person for the purpose of purchasing or selling a security.
>
> 11 U.S.C.A. § 741.

Courts have held that registered broker-dealers by definition have customers. *See In re Am. Home Mortg. Holdings, Inc.*, 388 B.R. at 86–87 ("As a registered broker-dealer, by definition, Lehman Brothers has 'customers.' Therefore, Lehman Brothers meets the second element of the definition of 'stockbroker.'"); *see also In re U.S. Mortgage Corp.*, 492 B.R. 784,

820 (Bankr. D.N.J. 2013) ("In the supplemental letter submitted to the Court on April 5, 2013, counsel for Vining Sparks stated that Vining Sparks is a registered securities broker-dealer with FINRA and the SEC. There is no question or dispute that Vining Sparks is a stockbroker."); *In re Enron Corp.*, 341 B.R. 451, 458 (Bankr. S.D.N.Y. 2006) (defendants were "stockbrokers" based on "records of various public or quasi-public bodies"). If a party is a stockbroker, it is a qualifying participant under the safe harbor. It is irrelevant whether the specific transactions at issue (here, the Share Repurchases) were transactions executed in its capacity as a stockbroker (*see In re Stewart Finance Co.*, 367 B.R. 909, 919 (Bankr. M.D. Ga. 2007)):

> There is no requirement in the Code sections with which the Court is concerned here that require the transferor … to be a 'customer' of the 'stockbroker' for purposes of the transfers in question. Section 546(e)'s requirements are clear and unambiguous—a transfer is protected from avoidance by a bankruptcy trustee where the transfer was a margin payment or settlement payment made to a stockbroker. Section 101(53A) is clear and unambiguous that a stockbroker is a person who has at least one customer, as that term is defined in § 741(2), and who engages in the business of effecting transactions in securities.

Each of the Virtu Entities were stockbrokers during the Share Repurchase Program. All were SEC-registered broker-dealers regulated by FINRA, and in the ordinary course of business, were engaged in effecting transactions in securities for the account of others or with members of the general public from or for their own accounts, thus satisfying the Bankruptcy Code's definition of "stockbroker." Lee Decl. ¶¶ 16–21 & Exs. 4–13.

VAL is listed as a "brokerage firm regulated by FINRA" on FINRA's BrokerCheck webpage. *See VIRTU AMERICAS LLC*, BrokerCheck, https://brokercheck.finra.org/firm/summary/149823 (cited at Lee Decl. ¶ 17 n.2); *see also* Lee Decl. ¶¶ 16–18. VAL's BrokerCheck Report shows that KCGA was a registered-broker-dealer before it was renamed VAL. Lee Decl. ¶ 17 n.2. VFBD—which no longer is in operation—is listed as a "previously

registered brokerage firm" on FINRA's BrokerCheck. *Id.* ¶ 20 n.3.[6] And VFI's Form 10-K for year-end 2020 states that VAL is its "SEC-registered broker-dealer," and that VFBD was a "broker dealer" until its operations were consolidated into VAL in December 2019. Ex. B, Ex. 1 at 11. VFBD's SEC registrations were withdrawn in March 2020. *Id.*

Accordingly, VAL should be dismissed for the additional reason that the Virtu Entities were stockbrokers during the Relevant Period.

II. The Mallinckrodt Share Repurchases Are Qualifying Transactions

A. The Share Repurchases Are Settlement Payments and Transfers Made in Connection With a Securities Contract

The Share Repurchases—which involved Mallinckrodt's transfer of cash to repurchase its publicly traded stock—are quintessential "settlement payments" under the Bankruptcy Code. *See* 11 U.S.C. § 741(8). A "settlement payment" is simply "the transfer of cash or securities made to complete a securities transaction." *Resorts*, 181 F.3d at 515, *abrogated in part on other grounds by Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883 (2018); *see also In re Plassein Int'l Corp.*, 590 F.3d 252, 258 (3d Cir. 2009) (same). The Third Circuit has held that the definition of settlement payment is "extremely broad" and generally refers to "the transfer of cash or securities made to complete a securities transaction." *Resorts*, 181 F.3d at 515; *see also In re Mallinckrodt plc*, 2024 WL 206682, at *15 (Bankr. D. Del. Jan. 18, 2024) (same). Courts have held that similar transactions, such as a cash payment to stockholders in connection with a leveraged buy-out, were settlement payments. *See Resorts*, 181 F.3d at 516; *see also Enron Creditors Recovery Corp.* v. *Alfa, S.A.B. de C.V.*, 651 F.3d 329, 335 (2d Cir. 2011) ("*Enron II*") (holding that redemption payments were settlement payments).

[6] *See VIRTU FINANCIAL BD LLC*, BrokerCheck, https://brokercheck.finra.org/firm/summary/148390.

And, even if the Share Repurchases were not settlement payments (they are), they are transfers made in connection with a securities contract—i.e., the Purchase Agreements between Mallinckrodt and its Brokers. A "securities contract" is defined to include "a contract for the purchase, sale, or loan of a security" and "any other agreement or transaction that is similar to an agreement or transaction" for the purchase, sale, or loan of a security. 11 U.S.C. § 741(7). The definition of "securities contract" is "very broad in its application and encompasses virtually any contract for the purchase or sale of securities" as well as "a wide array of related contracts, including security agreements[.]" *In re Lehman Bros. Holdings Inc.*, 469 B.R. 415, 438 (Bankr. S.D.N.Y. 2012).

Moreover, the transfer need merely "relate to" or be "associated with" the relevant securities contract. *In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d 411, 421 (2d Cir. 2014). There is no "temporal" requirement, *Lehman Bros.*, 469 B.R. at 442, nor is there any requirement for the transferee to be party to the contract. *See Bernard L. Madoff Inv.*, 773 F.3d at 418–19 ("Few words in the English language are as expansive as 'any' and 'similar.'"). There can be no question that the Share Repurchases relate to the Purchase Agreements between Mallinckrodt and its Brokers. Indeed, the Trust's own Amended Complaint alleges that the Share Repurchases were made pursuant to Purchase Agreements, which authorized the Brokers to repurchase Mallinckrodt's stock, including from the Virtu Entities. AC ¶¶ 274–76 (alleging that Mallinckrodt "entered into [the Purchase Agreements] … in connection with the share repurchases").

B. The Trust's Irish Law Argument Fails as a Matter of Law

In seeking to argue that the transactions are not settlement payments or transfers in connection with a securities contract, the Trust has advanced a last ditch argument that the Share

Repurchases should not be considered qualifying transactions because they purportedly are void *ab initio* under Irish law. According to the Trust, under *In re Enron Corp*., 323 B.R. 857 (Bankr. S.D.N.Y. 2005) ("*Enron I*") and *In re TriGem Am. Corp.*, 431 B.R. 855 (Bankr. C.D. Cal. 2010), transactions that are void under the law in which the debtor is incorporated cannot be settlement payments. *See* Ex. E at 2–7. The Trust claims that under Irish law (where Mallinckrodt was incorporated), the Share Repurchases were void because Mallinckrodt did not have profits available for distribution due to its potential opioid liability. *Id.* at 3–7. That argument does not work.

***First*,** the Trust made no claim in the Complaint or Amended Complaint to void the transactions under Irish law. Conversely, the Amended Complaint affirmatively asserts claims pursuant to U.S. federal and state law.[7] The Trust cannot insert new, un-pled allegations as a defense to dismissal. *See In re F-Squared Inv. Mgmt., LLC*, 2019 WL 4261168, at *1 (Bankr. D. Del. Sept. 6, 2019) ("I will not permit the excessive liberty taken in the Trustee's answering brief and unwarranted reply brief to add facts nowhere found in the complaints."). Moreover, the Trust cannot, on the one hand, assert avoidance claims under U.S. law, and on the other hand, argue that the entire Share Repurchase Program was void under Irish law.

***Second*,** the Trust has waived the argument. If the Trust intended to argue that the Share Repurchases were not qualifying transactions, it was required to make that clear from the outset. Whether the Share Repurchases are qualifying transactions should not have been in dispute, and

[7] *See* AC Count I (seeking to avoid and recover transfers pursuant to 11 U.S.C. §§ 544(b) and 550(a), the UFTA, and/or other applicable state law), Count II (seeking to avoid and recover transfers pursuant to 28 U.S.C. § 3304(b)(1)(A) or other applicable law), Count III (seeking to avoid and recover transfers pursuant to 11 U.S.C. §§ 544(b) and 550(a), the UFTA, and/or other applicable state law), Count IV (seeking to avoid and recover transfers pursuant to 28 U.S.C. §§ 3304(a)(1) and (b)(1)(B) or other applicable law).

in any event is a gating issue common to all Defendants. Instead, the Trust voluntarily entered into the Protocol which was intended to provide a streamlined process for dismissal of Defendants with safe harbor defenses. Despite Section 546(e)'s two-prong inquiry, the Protocol, which was highly negotiated, only requires Defendants to show they are qualifying participants.

In fact, under Paragraph 9 of the Protocol, the Trust may only ask for discovery from the Defendants if the Trust in "good faith" believes that additional information is necessary to help it determine whether the Defendants are qualifying participants. *See* D.I. 185-1, ¶ 9.[8] The Trust requested voluminous additional discovery from the Virtu Entities allegedly towards that end.[9] The Virtu Entities undertook the time, burden, and expense of making multiple submissions under the Protocol just to be told that the materials provided were irrelevant because the Share Repurchases were not qualified transactions. It is not "good faith" for the Trust to change course now—after learning that the Virtu Entities were qualifying participants—and refuse to dismiss the Virtu Entities irrespective of whether they are qualifying participants. ***At minimum***, the Trust was required to raise the issue when VAL informed the Trust in its July 7, 2023 submission that there was "no dispute that the contracts at issue are securities contracts." Ex. A at 2. Accordingly, the argument should be deemed waived.

Third**,** the Trust also failed to meet its burden to raise the issue that Irish law applies or to prove the substance of Irish law. Under Fed. R Civ. P. 44.1, as incorporated by Fed. R. Bankr. P. 9017, any party that "intends to raise an issue about a foreign country's law must give notice by

[8] D.I. 185-1, ¶ 9 ("Within the 45-day period, Plaintiff may make a request to the Defendant for additional information that Plaintiff believes, in good faith, is necessary for it to determine whether the Defendant has established the claimed Defense."); *see also supra* n.3 (explaining that Paragraph 2 of the Protocol defines "Defense" to mean certain qualifying participants).

[9] *See* Ex. C at 2 n.3 ("For the avoidance of doubt, this letter is the Trust's request for additional information under paragraph 9 of the Protocol.").

a pleading or other writing." The party raising an issue of foreign law must "carry both the burden of raising the issue that foreign law may apply in an action, and the burden of adequately proving foreign law to enable the court to apply it in a particular case." *Bel-Ray Co.* v. *Chemrite Ltd.*, 181 F.3d 435, 440 (3d Cir. 1999); *see also Ferrostaal, Inc.* v. *M/V Sea Phx.*, 447 F.3d 212, 218 (3d Cir. 2006) ("Ferrostaal had the burden of establishing Tunisian law and showing that it differs from United States law. It did not carry that burden.") (citation omitted); *Carlisle Ventures, Inc.* v. *Banco Espanol de Credito*, *S.A.*, 176 F.3d 601, 604–05 (2d Cir. 1999) (reversing and remanding damages award where foreign law expert provided "only very limited support," citing "no cases or legal authority to support his construction" of a Spanish statute); *Nineveh Invs. Ltd.* v. *United States*, 2017 WL 6017681, at *2 (E.D. Pa. Dec. 5, 2017) (holding that plaintiff had failed to prove "the substance of Bahamian law and consequently has failed to carry its burden of adequately proving foreign law"). The Trust did not provide notice to VAL of its intent to rely on Irish law in its Complaint or Amended Complaint, by motion, during the negotiation of the Protocol, or at any time prior to the Trust's March 7, 2024 letter. Moreover, the Trust provides no evidence of Irish law other than its self-serving citation to an Irish statute in its March 7 letter. Accordingly, the Trust has failed to meet its burden under Fed. R Civ. P. 44.1.

Fourth*, *Enron I and *TriGem* are not binding. Neither case is from this jurisdiction, and, if read the Trust's way, they would overturn years of Third Circuit precedent. Indeed, approximately 35-years ago in *Bevill, Bresler & Schulman*, 878 F.2d at 749, 751–52, the Third Circuit interpreted the term "settlement payment" under federal law to mean the "payment of cash to the dealer by the purchaser," which "encompasses transfer of the purchased securities to the purchaser from the dealer." The court did not look to the law in which the debtor was

incorporated to determine whether the payment was valid. A decade later, in *Resorts*, the Third Circuit held that even though an underlying transfer was contrary to Delaware law "and, at least arguably, created an illegal contract"[10] under the DGCL, the payments made to complete the transaction met the statutory definition of settlement payments. 181 F.3d at 513 n.5, 515–16. Thus, in the Third Circuit, it is irrelevant whether the underlying payment is void under the laws of the debtor's state of incorporation.

The Trust's argument—that application of the safe harbor depends on whether the underlying transaction was void under the law of the state where the debtor is incorporated—is also contrary to the basic purpose and structure of the safe harbor. Section 546(e) is itself an exception to a trustee's statutory avoidance powers. The Trust's proffered exception to that exception is found nowhere in the text of the statute. As the Supreme Court has recognized repeatedly, Congress does not hide elephants in statutory mouseholes—and here, there is not even a mousehole. *Whitman* v. *American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

The safe harbor is clearly set forth as a broad exception to the avoidance power, which has only one explicit limitation for actual fraudulent transfer claims asserted under Section 548(a)(1)(A). The Court should decline to read a substantial loophole into Section 546(e) where none exists, particularly where doing so is plainly contrary to the entire purpose of the statute, which is designed to promote stability in financial markets by removing certain types of transactions from the trustee's statutory avoidance power. *Trib. Co.*, 946 F.3d at 90.

[10] Indeed, under Delaware law, contracts that "violate a statute" or a corporation's governing documents are void *ab initio*—they are not merely voidable. *See Southpaw Credit Opportunity Master Fund, L.P.* v. *Roma Rest. Holdings, Inc.*, 2018 WL 658734, at *5 (Del. Ch. Feb. 1, 2018); *STAAR Surgical Co.* v. *Waggoner*, 588 A.2d 1130, 1136 (Del. 1991) ("Stock issued without authority of law is void and a nullity.").

The Trust's creative reading of *Enron I* and *TriGem* should therefore be rejected. Indeed, if *Enron I* and *TriGem* reflected a stark change in the law, it is puzzling that the argument would be made for the first time in this jurisdiction over 15 years later.

***Fifth*,** the Trust's reading is contrary to the plain language of the statute and Congress's intent "to limit the potential impact of insolvencies upon other major market participants." *See supra* 12. If every major market participant had to first consider whether a transaction was void under the laws of the state (or foreign state) in which a party was incorporated, Section 546(e) would have no effect and Congress's expressed intent would be flouted.

***Sixth*,** the Second and Ninth Circuits do not interpret *Enron I* or *TriGem* in the same manner as the Trust. Indeed, *Enron I* is an outlier in the Second Circuit. Several subsequent cases have interpreted Section 546(e) with the same breadth as the Third Circuit, and without any analysis regarding whether the underlying transaction was voidable in the debtor's state of incorporation. *E.g.*, *Enron II*, 651 F.3d at 334; *In re Nine W. LBO Sec. Litig.*, 87 F.4th 130, 150 (2d Cir. 2023). And, other circuits have outright questioned whether *Enron I* is good law. *See Peterson* v. *Enhanced Investing Corp. (Cayman) Ltd. (In re Lancelot Invs. Fund, L.P.)*, 467 B.R. 643, 653 (Bankr. N.D. Ill. 2012) (holding that *Enron I* "may not be strong precedent given the Second Circuit's recent broad interpretation of the safe harbor provision in *Enron [II]*"); *Bernard L. Madoff Inv.*, 773 F.3d at 417–22; *see also* D.I. 215 17–19.

Moreover, *TriGem* did not even concern Section 546(e) and its protection for "settlement payments," but instead Section 546(g), a separate protection for transfers made in connection with swap agreements. The case also involved an extreme set of facts where the court believed the transaction was intended to evade regulators. *TriGem*, 431 B.R. at 858–59, 866.

CONCLUSION

For the foregoing reasons, the Virtu Entities respectfully request dismissal from this action.

Dated: July 26, 2024

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

/s/ Daniel A. Mason
Daniel A. Mason (#5206)
Sabrina M. Hendershot (#6286)
1313 North Market Street, Suite 806
Post Office Box 32
Wilmington, DE 19899-0032
(302) 655-4410
dmason@paulweiss.com
shendershot@paulweiss.com

-and-

Andrew Gordon *(admitted pro hac vice)*
William A. Clareman *(admitted pro hac vice)*
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
agordon@paulweiss.com
wclareman@paulweiss.com

Counsel to Virtu Americas LLC