IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

MOTION OF MORGAN STANLEY CAPITAL SERVICES LLC FOR SUMMARY JUDGMENT PURSUANT TO THE PROTOCOL ORDER RELATING TO CONDUITS, NON-TRANSFEREES, "STOCKBROKERS", "FINANCIAL INSTITUTIONS", "FINANCIAL PARTICIPANTS", AND DISSOLVED ENTITIES

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Pursuant to the *Protocol Order Relating to Conduits, Non-Transferees, "Stockbrokers", "Financial Institutions", "Financial Participants", and Dissolved Entities* agreed to by the parties and entered by Judge Dorsey on May 15, 2023 [D.I. 185-1] (the "Protocol Order")[1], Defendant Morgan Stanley Capital Services LLC ("MSCS") files this motion ("Motion") for summary judgment on the claims brought by the Opioid Master Disbursement Trust II (the "Trust") against MSCS in the above-captioned adversary proceeding (the "Adversary Proceeding").

PRELIMINARY STATEMENT

1. This is another straightforward motion for summary judgment pursuant to the Protocol Order and Section 546(e) of the Bankruptcy Code. The Trust seeks to recover alleged Share Repurchase proceeds from MSCS, just as it did from the defendants that were the subject of this Court's *Memorandum Opinion and Order* [D.I. 460] (the "Dismissal Order"). In the Dismissal Order, Judge Dorsey held that the Share Repurchases are qualifying transactions for the purpose of Section 546(e). And the Trust concedes that MSCS is a "financial participant" and thus a "qualifying participant" for the purpose of the safe harbor. There is literally nothing new for this Court to decide.

2. Nevertheless, MSCS has no choice but to file this Motion because the Trust refuses to dismiss it—even pursuant to an agreed stipulation that would allow the Trust to rename MSCS as a defendant if the Dismissal Order is reversed on appeal. The Trust's refusal is based solely on the same flawed argument that Judge Dorsey already rejected in the Dismissal Order—that the Share Repurchases are not qualifying transactions because they are void under Irish law. That argument is just as wrong today as it was when the Court rejected it in the Dismissal Order, and

[1] Unless otherwise defined, terms have the meanings provided in the Protocol Order. "Share Repurchases" mean "Share Repurchase Transactions" as defined in the Protocol Order.

the Trust's unwillingness to agree to a dismissal stipulation that would preserve its rights if the Dismissal Order is reversed on appeal is baffling.

3. For these reasons, explained more fully below, the Court should grant the Motion and enter an order dismissing MSCS from this Adversary Proceeding with prejudice.

BACKGROUND

I. The Mallinckrodt Share Repurchases

4. The Amended Complaint alleges that between August 2015 and April 2018, Mallinckrodt allegedly paid $1.6 billion to public shareholders on the open market to repurchase over 35 million shares of its common stock from public shareholders—the Share Repurchases. *See* D.I. 209 ("Am. Compl.") ¶¶ 7, 271. In this Adversary Proceeding, the Trust seeks to claw back from the defendants, including MSCS, the payments that the defendants allegedly received in connection with the Share Repurchases as fraudulent transfers. *Id.* ¶¶ 63, 271, 352, 363.

II. The Protocol Order

5. On December 28, 2022, Judge Dorsey entered a Case Management Order, which, among other things, required the parties to negotiate a protocol to "address, efficiently and without undue cost, the defense that any Defendant is a conduit, non-transferee, 'stockbroker,' 'financial institution' or 'financial participant.'" D.I. 93 ¶ 6(c).

6. On May 12, 2023, the Trust and many of the defendants submitted a proposed version of the Protocol Order [D.I. 184-1], which Judge Dorsey entered on May 15, 2023 [D.I. 185-1]. The "purpose of the Protocol Order was to enable the swift and efficient resolution of certain statutory defenses likely to be asserted by many of the defendants," including the Section 546(e) defense. Dismissal Order at 4. The Protocol Order is a "process for the parties to exchange information and, if necessary, obtain a prompt ruling from the Court without the need for full discovery on all issues in the case." *Id.*

7. Under the Protocol Order, defendants may provide the Trust with a declaration and supporting documentation showing that the defendant qualifies for one of the listed defenses, which include the Section 546(e) safe harbor. *See* Protocol Order ¶¶ 2, 5. Within 45 days of receiving a defendant's submission, the Trust must either (i) "file a notice of dismissal (without prejudice) . . . in the form of Appendix B to this Protocol [Order]," or (ii) "notify the Defendant in writing that it is unwilling to dismiss the Defendant and state the grounds upon which such position is based." *Id.* ¶ 9. The Trust also can "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." *Id.* If the Trust makes such a request, it then has an additional 45 days to consider any additional information provided by the defendant. *Id.*

8. In the event the Trust declines to dismiss a defendant, the defendant may file a Protocol-Based Motion seeking its dismissal from the Adversary Proceeding. *See id.* ¶ 11.b. That Protocol-Based Motion may rely on any information exchanged by the Trust and the defendant pursuant to the Protocol Order. *Id.* ¶ 11.b.

III. The Dismissal Order

9. Between December 2023 and February 2024, several defendants, which made submissions pursuant to the Protocol Order before MSCS was named as a defendant in the Amended Complaint, filed Protocol-Based Motions asserting, among other defenses, Section 546(e) defenses. *See* D.I. 215, 217, 242, 286. After completion of briefing and oral argument, on September 5, 2024, Judge Dorsey entered the Dismissal Order granting the motions. *See* D.I. 460. Judge Dorsey construed the Protocol-Based Motions as motions for summary judgment, allowing him to consider all evidence exchanged between the parties pursuant to the Protocol Order. *Id.* at 4. His Dismissal Order included two holdings relevant here.

10. *First*, Judge Dorsey held that the Share Repurchases were "settlement payments" and thus "qualifying transactions" for purposes of the Section 546(e) defense. *See id.* at 9-13.[2] Judge Dorsey recognized that under settled Third Circuit precedent, the term "settlement payment" is "extremely broad" and is "the transfer of cash or securities made to complete a securities transaction." *Id.* at 9 (quoting *Lowenschuss v. Resorts Int'l, Inc. (In re Resorts Int'l, Inc.)*, 181 F.3d 505, 515 (3d Cir. 1999), *abrogated on other grounds by Merit Mgmt. Grp., LP v. FTI Consulting, Inc.,* 583 U.S. 366 (2018)). Judge Dorsey then applied that precedent to hold that the Share Repurchases, which involved the payment of cash for stock on national securities exchanges, were "settlement payments." *See id.* at 9-13. Judge Dorsey also rejected the Trust's argument that the Share Repurchases were not settlement payments because they were supposedly "void" under Irish law. *See id.* at 10-13. He noted that the principal case relied on by the Trust was not the law in the Third Circuit, was not even good law in its own Circuit, and was easily distinguishable from this case because the transactions at issue were materially different from the Share Repurchases. *See id.*

11. *Second*, Judge Dorsey held that each of the moving defendants that were asserting a Section 546(e) defense had established that it was a "qualifying participant." *See id.* at 14-25. Relevant to the instant motion, Judge Dorsey held that each defendant asserting that it was a "financial participant" met its initial burden by producing a financial statement and declaration showing that it exceeded one or more of the statutory thresholds under 11 U.S.C. § 101(22A), and that the Trust failed to provide any evidence to rebut each such showing. *Id.* at 20-25.

[2] Judge Dorsey therefore did not reach the moving defendants' alternative arguments that the Share Repurchases were qualifying transactions because they were "transfers made in connection with a securities contract" or that the Trust had waived the right to argue that the Share Repurchases were not qualifying transactions.

IV. MSCS's Protocol Submission

12. On December 20, 2024, MSCS[3] made a submission to the Trust pursuant to the Protocol Order showing that it was a financial participant as defined in 11 U.S.C. § 101(22A)(A). *See Decl. of Ross E. Firsenbaum in Support of Motion of Morgan Stanley Capital Services LLC for Summary Judgment Pursuant to the Protocol Order Relating to Conduits, Non-Transferees, "Stockbrokers", "Financial Institutions", "Financial Participants", and Dissolved Entities*, dated March 4, 2025 (the "Firsenbaum Decl."), Ex. 1.

13. MSCS's submission included a declaration from an Executive Director at Morgan Stanley Services Group, Inc. that attached a redacted copy of MSCS's audited financial statement for the year ended December 31, 2019 (the "Audited Financial Statement") showing that as of December 31, 2019, MSCS had, among other securities positions:

a) mark-to-market interest rate derivative contract positions of $[redacted], including $[redacted] in assets and $[redacted] in liabilities, with notional amounts of $[redacted], including $[redacted] in assets and $[redacted] in liabilities;

b) mark-to-market credit derivative contract positions of $[redacted], including $[redacted] in assets and $[redacted] in liabilities, with notional amounts of $[redacted], including $[redacted] in assets and $[redacted] in liabilities;

[3] Dismissed Defendant Morgan Stanley ("MS") and non-party Morgan Stanley & Co. LLC ("MSCO") also joined in the submission and showed that (a) MS was a "non-transferee" with respect to the alleged Share Repurchases, and (b) MSCO was a "stockbroker" pursuant to 11 U.S.C. § 101(53A), a "financial participant" pursuant to 11 U.S.C. § 101(22A)(A), and a "commodity broker" pursuant to 11 U.S.C. § 101(6). *See* Firsenbaum Decl., Exs. 1 & 2. The Trust agreed that MS was a non-transferee and filed a stipulation and notice of dismissal as to MS on February 3, 2025. *See* D.I. 525. The Trust also agreed that MSCO was a "financial participant" for purposes of the Section 546(e) safe harbor. *See* Firsenbaum Decl., Ex. 5 at 2.

c) mark-to-market foreign exchange derivative contract positions of $[redacted], including $[redacted] in assets and $[redacted] in liabilities, with notional amounts of $[redacted], including $[redacted] in assets and $[redacted] in liabilities; and

d) mark-to-market equity derivative contract positions of $[redacted], including $[redacted] in assets, and $[redacted] in liabilities, with notional amounts of $[redacted], including assets of $[redacted] and liabilities of $[redacted]. *See* Firsenbaum Decl., Ex. 2 ¶ 5 & Ex. A at 20, Note 4; *see also id.* ¶ 5 & Ex. A at 25, Note 5.

The declaration and Audited Financial Statement further confirmed that of those positions, approximately $[redacted] were with affiliates. *See id.*, Ex. 2 ¶ 10 & Ex. A at 19, Note 3.

14. On January 30, 2025, the Trust informed MSCS by letter that it agreed that MSCS had satisfied its burden to establish that it was a financial participant, and thus, a qualifying participant for purposes of Section 546(e). *See* Firsenbaum Decl., Ex. 5 at 2. However, the Trust refused to dismiss MSCS, despite the Dismissal Order, repeating its argument, already rejected by Judge Dorsey, that the Share Repurchases were void under Irish law and "therefore are not qualifying transactions protected under § 546(e) of the Bankruptcy Code." *Id*. That issue is the subject of the Trust's current appeal from the Dismissal Order. *See* D.I. 528 ¶ 1.

15. Prior to receiving the Trust's letter, on January 22, 2025, undersigned counsel for MSCS (and other defendants) wrote to the Trust proposing that the Trust and affected defendants enter into a stipulation, to be approved by this Court, that would provide for the dismissal of defendants like MSCS without prejudice and that would provide, if the Dismissal Order were reversed on appeal, for the automatic reinstatement of the Trust's claims against such defendants.

See Firsenbaum Decl., Ex. 3. Counsel for the Trust responded on January 25, 2025, stating that its client would not so agree. *See id.*, Ex. 4. Accordingly, MSCS is filing this Motion.

ARGUMENT

16. The Amended Complaint purports to assert intentional and constructive fraudulent transfer claims against MSCS pursuant to 11 U.S.C. § 544 of the Bankruptcy Code. Am. Compl. ¶¶ 351-84. Section 546(e) provides an absolute safe harbor against these claims:

> *Notwithstanding section[] 544* . . . of this title, the trustee may not avoid a transfer that is a . . . settlement payment . . . made by or to (or for the benefit of) a . . . financial institution, financial participant . . . or that is a transfer made by or to (or for the benefit of) a . . . financial institution, 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); *see also* Dismissal Order at 8.

17. The safe harbor applies where two requirements are met: (1) there is a qualifying transaction (*i.e.*, a settlement payment or transfer made in connection with a securities contract); and (2) there is a qualifying participant (*i.e.*, the transfer was made by or to (or for the benefit of), any of certain defined entities listed in the section, including a financial institution and financial participant). *See* Dismissal Order at 8; *see also* 11 U.S.C. § 546(e); *Golden v. Cmty. Health Sys., Inc. (In re Quorum Health Corp.)*, 2023 WL 2552399, at *5 (Bank. D. Del. Mar. 16, 2023). Both prongs are satisfied here.

I. The Share Repurchases Are Qualifying Transactions

18. As Judge Dorsey has already held, the Share Repurchases were settlement payments and thus qualifying transactions for purposes of Section 546(e). *See* Dismissal Order at 9-13.

19. The Trust continues to maintain the position that the Share Repurchases were "void" under Irish law and, hence, not qualifying transactions. *See* Firsenbaum Decl., Ex. 5. But

Judge Dorsey rejected that very argument in the Dismissal Order. *See* Dismissal Order at 10-12. Judge Dorsey recognized that under controlling Third Circuit precedent, the term settlement payment is "extremely broad" and includes any "transfer of cash or securities made to complete a securities transaction." *Id.* at 9 (quoting *Lowenschuss*, 181 F.3d at 515). Applying that precedent, Judge Dorsey held that the Share Repurchases, which involved the payment of cash for stock, are settlement payments and thus qualifying transactions for purposes of the Section 546(e) safe harbor. *See id.* at 9-13. Judge Dorsey also declined to follow *Enron Corp. v. Bear, Stearns Int'l Ltd. (In re Enron Corp.)*, 323 B.R. 857 (Bankr. S.D.N.Y. 2005) ("*Enron I*"), because *Enron I* does not remain good law even in its own Circuit, given the Second Circuit's subsequent decision in *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011) ("*Enron II*"), because *Enron I* is in any event contrary to the law of this Circuit, and because the transfers at issue in *Enron I* were factually distinguishable from the Share Repurchases. *See* Dismissal Order at 10-13.

20. The Dismissal Order is the law of the case, so it should apply here. *McDuffy v. Marsico*, 572 F. Supp. 2d 520, 524 (D. Del. 2008) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." (internal quotations omitted)).[4] It is, in any event, correct for the reasons noted.

II. MSCS Is A Financial Participant

21. The Bankruptcy Code defines "financial participant" as any entity that: (a) "at the time it enters into a securities contract," "at the time of the date of the filing of the petition," or

[4] MSCS incorporates by reference the alternative arguments set forth in Section I of the Argument Section of *Motion to Dismiss the Amended Complaint as to Defendants Citadel Securities LLC and Susquehanna Securities, LLC Pursuant to the Protocol Order Relating to Conduits, Non-Transferees, "Stockbrokers," "Financial Institutions," "Financial Participants," and Dissolved Entities* [D.I. 215] as to why the Share Repurchases are qualifying transactions and why the Trust waived the right to argue otherwise. *See* D.I. 215 ¶¶ 31-52.

"on any day during the 15-month period preceding the date of the filing of the petition" (b) "has one or more [securities contracts] . . . 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 (aggregated across counterparties)" or "has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties)," excluding agreements with affiliates. 11 U.S.C. § 101(22A)(A).

22. MSCS has demonstrated that it is a financial participant, and indeed the Trust agrees. *See* Firsenbaum Decl., Ex. 5 at 2. The Audited Financial Statement shows that as of December 31, 2019, a date within 15 months of the petition date (October 12, 2020), MSCS had outstanding securities contracts and swap agreements exceeding the $100 million mark-to-market and $1 billion notional thresholds by hundreds of billions of dollars in multiple ways. *See supra* ¶ 6. The Trust so concedes.

CONCLUSION

23. For these reasons, MSCS respectfully requests that the Court enter the proposed order submitted herewith as **Exhibit A** granting the relief requested by the Motion and dismissing MSCS from this Adversary Proceeding with prejudice.

Dated: March 4, 2025
Wilmington, Delaware

By: /s/ Maria Kotsiras

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Exhibit A

Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

ORDER GRANTING MOTION OF MORGAN STANLEY CAPITAL SERVICES LLC FOR SUMMARY JUDGMENT PURSUANT TO THE PROTOCOL ORDER RELATING TO CONDUITS, NON-TRANSFEREES, "STOCKBROKERS", "FINANCIAL INSTITUTIONS", "FINANCIAL PARTICIPANTS", AND DISSOLVED ENTITIES

This matter having come before the Court on the *Motion of Morgan Stanley Capital Services LLC for Summary Judgment Pursuant to the Protocol Order Relating to Conduits, Non-Transferees, "Stockbrokers", "Financial Institutions", "Financial Participants", and Dissolved Entities,* filed on March 4, 2025 by Defendant Morgan Stanley Capital Services LLC (the "Motion") in the above-captioned adversary proceeding (the "Adversary Proceeding") seeking dismissal from the Adversary Proceeding pursuant to the *Protocol Order Relating to Conduits, Non-Transferees, "Stockbrokers", "Financial Institutions", "Financial Participants", and Dissolved Entities* [D.I. 185-1] (the "Protocol Order"); and the Court having considered the Motion, any objection to the Motion, any reply in support of the Motion, and all other papers filed

in support of or opposition to the Motion; and the Court having held any hearing on the Motion and having considered the arguments made by counsel for the parties; and the Court having determined that the legal and factual bases set forth in the Motion, briefs in support, and the declarations in support of the Motion establish just cause for the relief requested in the Motion; and this Court having subject matter jurisdiction to consider and to determine the Motion in accordance with 28 U.S.C. § 1334; and this Court having found that due and sufficient notice was given under the circumstances; and after due deliberation and sufficient cause appearing therefor, it is hereby ORDERED that:

1. The Motion is GRANTED as set forth herein.

2. Pursuant to the Protocol Order, Morgan Stanley Capital Services LLC is hereby dismissed from the Adversary Proceeding.

3. The Trust's claims against Morgan Stanley Capital Services LLC in the Amended Complaint [D.I. 205] are dismissed with prejudice.

CERTIFICATE OF SERVICE

I, Maria Kotsiras, do hereby certify that on March 4, 2025, a copy of the foregoing **Motion of Morgan Stanley Capital Services LLC for Summary Judgment Pursuant to the Protocol Order Relating to Conduits, Non-Transferees, "Stockholders," "Financial Institutions," "Financial Participants," and Dissolved Entities** was served on the parties listed below *via* email.

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