REDACTED PUBLIC VERSION OF ADV. DOCKET NO. 550

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
MALLINCKRODT PLC,	:	Case No. 20-12522 (BLS)
Reorganized Debtor.[1]	:	
OPIOID MASTER DISBURSEMENT TRUST II,	:	
Plaintiff,	:	
vs.	:	Adversary Proceeding No. 22-50435 (BLS)
ARGOS CAPITAL APPRECIATION MASTER FUND LP, *et al*.,	:	
Defendants.	:	**Re: Adv. D.I. 537**

PLAINTIFF'S OPPOSITION TO MOTION OF DEFENDANT SG AMERICAS SECURITIES, LLC FOR SUMMARY JUDGMENT

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Dated: March 4, 2025

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

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Plaintiff, the Opioid Master Disbursement Trust II ("**Trust**"), by and through its undersigned counsel, hereby objects to and opposes (by this "**Opposition**") the Motion of SG Americas Securities, LLC for Summary Judgment Pursuant to the Protocol Order Relating to Conduits, Non-Transferees, "Stockbrokers," "Financial Institutions," "Financial Participants," and Dissolved Entities [Adv. D.I. 537][2] ("**Motion or Mot.**"). For the reasons explained below, the Court should deny the Motion.

PRELIMINARY STATEMENT

It is a core tenet of bankruptcy that creditors must be paid in full before distributions are made to shareholders. In Mallinckrodt's situation, the opposite occurred. For years, the Debtors engaged in wrongful practices in connection with their opioid painkillers. These practices were widespread, ranging from aggressive marketing that led to the overprescribing of opioids to the Debtors' failure to properly monitor and block suspicious orders for their opioid drugs. As a result of this wrongful conduct, Mallinckrodt accumulated an enormous class of opioid-related creditors holding claims with an aggregate total of multiple billions of dollars, if not trillions. And, while the Debtors' wrongful practices were continuing, the scrutiny of their regulators increasing, and their legal exposure widening, Mallinckrodt decided it was high time to pay its shareholders. From 2015 through 2018, Mallinckrodt engaged in a program by which it repurchased approximately 36 million of its own shares, for close to $1.6 billion and received no value in return for those repurchases. Consequently, opioid creditors (and other unsecured creditors) were left holding an empty bag, and the absolute priority rule was upended. The Trust commenced this proceeding for

[2] As used herein, citations to "**D.I. __**" refer to documents filed in *In re Mallinckrodt plc*, No. 20-12522 (BLS) (Bankr. D. Del.). Citations to "**Adv. D.I. __**" refer to documents filed in the above-captioned adversary proceeding.

the benefit of creditors to claw back much of the value that Mallinckrodt fraudulently transferred to shareholders through its repurchase trades.

The Trust is a statutory trust formed under the Modified Fourth Amended Joint Plan of Reorganization (With Technical Modifications) of Mallinckrodt plc and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code [D.I. 7670] ("**Plan**"). The Trust is charged with, among other things, investigating and prosecuting claims for the benefit of the Debtors' unsecured creditors, which include the many victims of the nationwide opioid epidemic that the Debtors were instrumental in causing.[3] These victims include individuals who suffered bodily injuries through addiction, overdose, other sickness and disease, and death, as well as babies born with neonatal abstinence syndrome (which means they suffer from withdrawal symptoms from opioids when they are born). The Trust is also pursuing these claims for the benefit of all States and territories, their political subdivisions, Native American tribes, hospitals, emergency room physicians, insurance ratepayers, and third-party payors, that hold claims against the Debtors based on their role in causing, perpetuating, and exacerbating the opioid crisis. Many States, thousands of counties and other municipalities, Native American tribes, and other opioid victims are relying on the Trust to provide the much-needed funding for the purpose of abating the opioid scourge in communities across the country and to compensate victims.

Among the beneficiaries of Mallinckrodt's share repurchases was defendant SG Americas Securities, LLC ("**Movant**"), which received a windfall of over [redacted] in exchange for worthless shares. To skirt accountability for its windfall, Movant has filed its Motion requesting dismissal from this proceeding based on the 11 U.S.C. § 546(e) affirmative defense. The § 546(e)

[3] Under the Plan, the Trust received, among other assets, certain claims and causes of action of the Debtors (*see* Plan art. IV.W.6 at 93), including certain claims and causes of action against defendants in this proceeding that arise from Mallinckrodt's prepetition repurchases of ordinary shares. *See id*. art. I.A.56 at 7.

defense requires proof of both (1) a qualifying transaction and (2) a qualifying participant.[4] After reviewing the information Movant provided under the Protocol and based on Chief Judge Dorsey's Memorandum Opinion and Order [Adv. D.I. 460] ("**Opinion**"), the Trust is not challenging Movant's status as a "qualifying participant."

The only issue relevant to the Motion is whether there existed a qualifying transaction—an issue the Trust is currently appealing in this proceeding.[5] Movant's contention that it had "no choice but to file this Motion because the Trust refuses to dismiss it"[6] is unsupported. Instead of wasting the parties' and Court's time and resources, Movant could have awaited resolution of the appeal. And Movant's demand that the Trust *consent* to Movant's dismissal, while its appeal is pending, is irrelevant to the core issue presented in the Motion and constitutes an unreasonable and unprecedented departure from procedural norms. As such, the Trust rejected Movant's demand, and this Court should give it no weight in deciding the Motion.

As to the issue at hand, a "qualifying transaction" must be either a "settlement payment" or a "transfer made . . . in connection with a securities contract[.]" 11 U.S.C. § 546(e). As the Trust previously argued in response to other defendants' motions to dismiss and for summary judgment based on § 546(e),[7] the Companies Act 2014 of Ireland ("**Companies Act**" or "**Irish Law**"), which applies to Mallinckrodt under the internal affairs doctrine, provides that share repurchases or redemptions are void *ab initio* when a company does not have profits available for distribution. Here, when Mallinckrodt engaged in its share repurchases, it lacked the necessary

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4 *See Opioid Master Disbursement Tr. II v. Covidien Unlimited Co. (In re Mallinckrodt plc)*, No. 22-50433, 2024 WL 206682, at *14 (Bankr. D. Del. Jan. 18, 2024); *Bankr. Est. of Norske Skogindustrier ASA v. Cyrus Cap. Partners, L.P. (In re Bankr. Est. of Norske Skogindustrier ASA)*, 629 B.R. 717, 757 (Bankr. S.D.N.Y. 2021).

5 *See* Am. Notice of Appeal of Opioid Master Disbursement Tr. II, Adv. D.I. 519-01.

6 *See* Mot. at 1.

7 *See, e.g.*, Pl.'s Opp'n to Mot. to Dismiss Citadel Sec. and Susquehanna Sec. from Am. Compl., Adv. D.I. 263, pt. I.

profits available for distribution to repurchase its shares because of its substantial opioid liabilities. As such, the share repurchases were void under Irish Law and cannot serve as qualifying transactions, thus making Movant's § 546(e) defense unavailing.

The Trust recognizes that the Opinion determined the share repurchases were qualifying transactions and rejected the Trust's argument to the contrary. The Trust submits this Opposition to make its record and preserve the qualifying-transaction issue for any other appeal that may become necessary to pursue.[8]

FACTUAL BACKGROUND

I. MALLINCKRODT'S OPIOID-RELATED MISCONDUCT AND SHARE REPURCHASE PROGRAM

1. Mallinckrodt and its direct and indirect subsidiaries are a global pharmaceutical enterprise, which, among other things, was the largest producer and seller of opioid medications in the United States, and one of the largest in the world. Amended Complaint [Adv. D.I. 205] ("**Am. Compl.**") ¶ 2.

2. Before entering chapter 11, Mallinckrodt engaged in aggressive and deceptive marketing of opioids. *Id*. ¶¶ 103, 124-34. Mallinckrodt's army of sales representatives was trained to use false and misleading statements to sell opioids. *Id*. ¶¶ 135-38, 142-49. Mallinckrodt also intentionally targeted doctors who were known to be high prescribers of opioids to sell its products and many of those doctors later faced criminal or disciplinary action for overprescribing opioid painkillers. *Id*. ¶¶ 193-226. Mallinckrodt also sought to shift the perception that opioids were

[8] *See United States v. Sok*, 115 F.4th 251, 258 (3d Cir. 2024) (emphasizing the importance of litigants "preserv[ing] specific arguments for appeal, not merely issues."); *Penn Eng'g & Mfg. Corp. v. Peninsula Components, Inc.*, No. 19-513, 2023 WL 4139375, at *4 (E.D. Pa., 2023) (noting the need to "ensure[ ] that a court may make its determinations with the benefit of a full and complete evidentiary record."); *United States ex rel. Luzaich v. Catalano*, 401 F. Supp. 454 (E.D. Pa. 1975) ("It is by now well established that the federal Constitution requires that when the right to appeal a judicial order is granted, there must be a record of sufficient completeness to permit 'proper consideration of (appellant's) claims' and 'adequate and effective appellate review.'") (quoting *Mayer v. City of Chicago*, 404 U.S. 189 (1971)).

dangerous and highly addictive by sponsoring front groups that encouraged prescribers to give patients opioids long-term to treat chronic pain. *Id.* ¶¶ 186-92. And it worked in concert with industry peers to persuade prescribers, patients, and regulators that opioids were safe and effective treatments for chronic pain, despite knowing that opioids were highly addictive and ineffective at treating such pain. *Id.* ¶ 178. Mallinckrodt also failed to implement necessary and required systems to detect and report suspicious orders of opioids. *Id.* ¶¶ 193-236. Mallinckrodt's failure to properly monitor and report suspicious orders resulted in the massive diversion of its opioids to the black market for recreational use and abuse and exposed it to significant legal liability. *Id.* ¶ 215. Mallinckrodt's wrongful conduct led the Drug Enforcement Administration to call it "the kingpin within the drug cartel" of companies driving the opioid epidemic. *Id.* ¶ 2.

3. Mallinckrodt's wrongful acts and omissions ultimately resulted in an "all-consuming tidal wave of litigation," with more than 3,000 lawsuits filed against it and its debtor-affiliates around the country. *Id.* ¶¶ 6, 257. After filing for bankruptcy on October 12, 2020, Mallinckrodt itself estimated that it had "[opioid-related] liability in excess of $30 billion" based on the settlements it had entered into before it filed chapter 11. *Id.* ¶ 264.[9]

4. While Mallinckrodt was manufacturing and selling opioids, promoting a false and dangerous narrative to change the medical consensus regarding the proper uses and risks of opioid drugs, and incurring crushing opioid-related liability, it also implemented its repurchases or redemptions of its ordinary shares, thereby favoring its shareholders over its creditors. Am. Compl. ¶ 7. Mallinckrodt's board of directors authorized the share repurchases on four separate occasions: (a) on January 22, 2015, it authorized $300 million of share repurchases; (b) on November 19, 2015, it authorized $500 million; (c) on March 16, 2016, it authorized $350 million;

[9] *See also* Hr'g Tr. at 63:3-5, *In re Mallinckrodt plc*, No. 20-12522 (Bankr. D. Del. Dec. 6, 2021) (Welch direct).

and (d) on March 1, 2017, it authorized $1 billion. *Id.* ¶ 270. The share repurchases occurred between August 4, 2015 and April 23, 2018. In total, Mallinckrodt repurchased approximately 35.57 million shares for approximately $1.6 billion. *Id.* ¶ 271.

5. Among the beneficiaries of the share repurchases was Movant, which received at least [redacted] from Mallinckrodt in connection therewith. *Id.* ¶ 80.

6. Mallinckrodt authorized the share repurchases in part to artificially inflate the market price of its shares during a period of consistent, dramatic decline in Mallinckrodt's value due to its opioid business. *Id.* ¶ 273. Even aside from the substantial opioid liabilities it had when the share repurchases occurred, Mallinckrodt did not have enough cash on hand to fund the share repurchases and had to engage in a series of intercompany loans and complex intercompany transactions to obtain sufficient funds. *Id.* ¶ 327. As a result of Mallinckrodt's staggering opioid liabilities and its general liquidity issues, Mallinckrodt did not have sufficient distributable reserves when it engaged in the share repurchases, rendering them void under Irish Law. *Id.* ¶¶ 317, 335.

II. MOVANT'S DISMISSAL REQUESTS

7. On October 12, 2022, the Trust filed its original complaint. Adv. D.I. 1. Among the named defendants was Movant.

8. On May 15, 2023, Judge Dorsey approved the Protocol, which permits defendants to submit to the Trust a request for voluntary dismissal based on, among other things, defendant's purported status as a non-transferee or a dissolved entity, or the securities safe harbor under § 546(e) of the Bankruptcy Code. The Protocol has no deadline by which defendants may bring submissions under it, or any deadline by which defendants must file dispositive motions if the Trust declines to voluntarily dismiss them. *See* Protocol Order Relating to Conduits, Non-

Transferees, "Stockbrokers", "Financial Institutions", "Financial Participants", and Dissolved Entities ("**Protocol**"), Adv. D.I. 185-1 ¶ 11.

9. On October 24, 2023, the Trust filed the Amended Complaint and again named Movant as a defendant. Adv. D.I. 205.

10. On November 18, 2024, Movant requested that the Trust dismiss it under the Protocol on the ground that it is a "financial participant" and that the share repurchases were qualifying transactions under 11 U.S.C. § 546(e). *See* Adv. D.I. 538, Ex. 1. As to the qualifying-transaction prong, Movant merely asserted that the "Share Repurchases at issue here were qualifying transactions for the purposes of Section 546(e)" and that the Opinion held as such. *Id.* (citations omitted).

11. On December 17, 2024, in accordance with the Protocol, the Trust informed Movant that it agreed that Movant had satisfied its burden to establish that it is a "financial participant" but declined to dismiss Movant on the ground that the share repurchases were void under Irish Law and "therefore are not qualifying transactions protected under § 546(e) of the Bankruptcy Code." *See* Adv. D.I. 538, Ex. 3 at 1-2.

12. On January 22, 2025, Movant answered the Trust's December 17th letter and demanded that the Trust *consent* to Movant's dismissal by stipulation, even though the Trust *opposes* dismissing Movant based on the qualifying-transaction prong and even though the Trust is appealing Chief Judge Dorsey's ruling on the qualifying-transaction issue. *See* Adv. D.I. 538, Ex. 5. On January 25, 2025, the Trust rejected Movant's dismissal demand as "baffling[,] . . . . unorthodox[,] and unprecedented." *See id.* Ex. 6.

13. Although Movant did not have a deadline to file its Motion, and therefore could have chosen not to file it until the appeal was decided, Movant filed its Motion on February 18, 2025. *See* Adv. D.I. 537.

ARGUMENT

14. The only relevant, disputed issue before the Court is whether the share repurchases were qualifying transactions under § 546(e) because they were void *ab initio* under Irish Law. The Trust acknowledges that Chief Judge Dorsey in his Opinion determined that the share repurchases were qualifying transactions; the Trust submits its arguments again in this Opposition to make its record and preserve the qualifying-transaction issue for appeal.

I. MALLINCKRODT'S SHARE REPURCHASES ARE NOT QUALIFYING TRANSACTIONS

A. The Share Repurchases Do Not Constitute a "Settlement Payment" Because They Were Void *Ab Initio* Under Irish Law

15. Transfers to repurchase or redeem a company's shares do not qualify as a "settlement payment" when applicable law renders those transfers void. *See Enron Corp. v. Bear, Stearns Int'l Ltd.* (*In re Enron Corp.*), 323 B.R. 857, 877 (Bankr. S.D.N.Y. 2005); *cf. also Cooper v. Centar Invs. (Asia) Ltd* (*In re TriGem Am. Corp.*), 431 B.R. 855, 865 (Bankr. C.D. Cal. 2010) (relying on *Enron* in refusing to apply § 546(g) swap agreement safe harbor where transaction was structured to try to evade Korean law); Barbara Black, *Corporate Dividends & Stock Repurchases* § 6:19 (Feb. 2022 Update) ("An agreement by a corporation to purchase its own shares is void and unenforceable if the statute prohibits the corporation from purchasing its shares.").

16. Under *Enron*, the relevant question is whether "there is a valid underlying securities transaction from which a settlement payment can flow." *Enron*, 323 B.R. at 877. If not, "there is no settlement payment to which to apply the protection of section 546 of the Bankruptcy Code." *Id.* The *Enron* court found that, when distributions from an insolvent corporation are "prohibited"

and considered void under applicable law, the distributions are "a complete nullity, [and] there would be no resulting settlement payment." *Id.* at 876.

1. Irish Law Governed Mallinckrodt's Share Repurchases

17. Under the internal affairs doctrine, the law of the state of incorporation governs a corporation's relationship with its shareholders, including share repurchases or redemptions. *See In re PHP Healthcare Corp.*, 128 F. App'x 839, 843-44 (3d Cir. 2005) (noting that law of state of incorporation governs questions relating to a corporation's share redemptions); *Castel S.A. v. Wilson*, No. CV 19-09336-DFM, 2023 WL 6295774, at *32 (C.D. Cal. Sept. 27, 2023) (holding that the law of the state of incorporation governed a dispute regarding repurchase or redemption of stock); *100079 Canada, Inc. v. Stiefel Laboratories, Inc.*, No. 11-22389-Civ-SCOLA, 2011 WL 13116079, at *9 (S.D. Fla. Nov. 30, 2011) (same); Restatement (Second) of Conflict of Laws § 302 cmt. a (1971) (providing that law of the state of incorporation governs a corporation's purchase or redemption of outstanding shares of its stock).

18. Mallinckrodt was formed and registered as a public limited company under the laws of the Republic of Ireland on January 9, 2013. Harkin Decl. ¶ 4.[10] Accordingly, under the internal affairs doctrine, Irish Law applied to Mallinckrodt's share repurchases. *Id*. ¶ 8.

2. Under Irish Law, Mallinckrodt Was Required to Fund Its Share Repurchases from Profits Available for Distribution, or Else the Share Repurchases Would Be Void

19. Section 105 of the Companies Act provides that an Irish PLC may purchase or redeem its shares only if, *inter alia*, the purchases or redemptions are funded out of profits available for distribution. Companies Act § 105(2); Harkin Decl. ¶¶ 9-10. "Profits available for distribution" are a company's "accumulated, realised profits, so far as not previously utilised by

[10] Citations to "**Harkin Decl**." refer to the Declaration of Anne Harkin, which is annexed hereto as **Exhibit 1**.

distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made." Companies Act § 117(2); Harkin Decl. ¶ 11. If the share repurchase or redemption does not comply with section 105 of the Companies Act, the repurchase or redemption is "**void**" under Irish Law. Companies Act § 102(3) (emphasis added); Harkin Decl. ¶ 13 (emphasis added).

20. Irish case law clarifies that profits available for distribution "must mean profits calculated in accordance with the relevant applicable accountancy standards." *In re Irish Life & Permanent plc* [2009] IEHC 567 [H. Ct.] § 7.10 (Ir.);[11] *see also Wilson (Inspector of Taxes) v Dunnes Stores (Cork) Ltd* [1976] WJSC-HC 1470 [H. Ct.] (Ir.) (concluding the proper interpretation of the term "profits" must be determined by the context in which it is used).[12] For Mallinckrodt, those standards were the United States Generally Accepted Accounting Principles ("**U.S. GAAP**"), because, when the share repurchases occurred, Mallinckrodt filed consolidated group financial statements that it prepared in accordance with U.S. GAAP. *See* Companies Act § 279 (permitting an Irish company to avail itself of U.S. GAAP where the company's securities are listed on U.S. stock exchanges for a transitional period ending December 31, 2020); Shaked Decl. ¶ 33 & n.35.[13] Mallinckrodt's individual financial statements were prepared in accordance with the Irish Generally Accepted Accounting Principles ("**Irish GAAP**"), which is the Financial Reporting Standard applicable in the United Kingdom and the Republic of Ireland ("**FRS 102**").[14]

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[11] A copy of the *Irish Life* decision is annexed hereto as **Exhibit 2**.

[12] A copy of the *Wilson* decision is annexed hereto as **Exhibit 3**.

[13] Citations to "**Shaked Decl.**" refer to the Declaration of Israel Shaked, which is annexed hereto as **Exhibit 4**.

[14] *See* Harkin Decl. ¶ 20. Mallinckrodt's individual financial statements were prepared in accordance with an older version of Irish GAAP for the financial years ending September 26, 2014 and September 25, 2015, and in accordance with FRS 102 for the financial years ending September 30, 2016 and December 29, 2017. *Id.* In addition, on June 29, 2017, Mallinckrodt filed interim accounts for the period up to March 31, 2017, which were prepared in accordance with FRS 102. *Id.* The section relating to recognition of liabilities of uncertain timing or amount (Section 21 of FRS

3. Mallinckrodt's Share Repurchases Were Void Because It Did Not Have Profits Available for Distribution When It Made Those Repurchases

21. Under Irish Law, Mallinckrodt's share repurchases were void *ab initio* because, when it engaged in those repurchases, it did not have the necessary profits available for distribution. Am. Compl. ¶¶ 327-42; Shaked Decl. ¶¶ 99-103.

22. Under U.S. GAAP, Mallinckrodt's opioid liabilities constituted "probable" and "reasonably estimable" contingent liabilities that it was required to, but did not, account for in its financial statements. Shaked Decl. ¶¶ 4, 41, 47, 104. (FRS 102 has or applies a substantially similar standard looking to whether the liabilities are probable and reasonably estimable.[15]) When the opioid liabilities are correctly accounted for, Mallinckrodt did not have profits available for distribution when it engaged in the share repurchases. *Id.*

23. In his declaration, Professor Israel Shaked explains that "according to U.S. GAAP, a company is required to accrue a loss for a contingent liability if, based on information available at the time, it is probable that a liability will be incurred and the amount of that liability is reasonably estimable." Shaked Decl. ¶ 31. He concludes that Mallinckrodt's liabilities were probable when Mallinckrodt repurchased its shares. *Id.* ¶¶ 36-46.

24. Professor Shaked finds that, based on information available to it at the time, Mallinckrodt's opioid liabilities were reasonably estimable when it engaged in the share repurchases. Shaked Decl. ¶¶ 47-84. He estimates that Mallinckrodt's opioid liabilities as of December 31, 2015, were between $49.0 billion and $77.1 billion. *Id.* ¶ 72. Additionally, he estimates that Mallinckrodt's opioid liabilities as of December 31, 2016, were between $54.7

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102) did not change the existing rules of Irish GAAP. *See* Declaration of Damien Malone ("**Malone Decl.**") ¶ 11, which is annexed hereto as **Exhibit 5**.

[15] *See* Malone Decl. ¶ 5; Shaked Decl. ¶¶ 32-33. Indeed, FRS 102 has a lower threshold for determining "probable" because it is defined under those statutes as "more likely than not." Malone Decl. ¶ 7; Shaked Decl. ¶ 32.

billion and $84.7 billion. *Id.* ¶ 76. Further, he estimates that Mallinckrodt's opioid liabilities as of December 31, 2017 were between $58.6 billion and $89.6 billion. *Id.* ¶ 81.

25. Professor Shaked concludes that Mallinckrodt's retained earnings each year is the best measure of its profits available for distribution. Before accounting for opioid liabilities, Mallinckrodt's retained earnings were –$193 million in 2014, $250 million in 2015, $529 million in 2016, $2.589 billion[16] in 2017, and –$1.018 billion in 2018. *Id.* ¶ 102. Each year, Mallinckrodt's profits available for distribution were significantly below its probable and reasonably estimable opioid liabilities, as the following table shows:

($ Millions)	As of December,				
	2014	2015	2016	2017	2018
Retained Earnings	$ (193)	$ 250	$ 529	$ 2,589	$ (1,018)
- Adjustment for one-time, non-cash Item	-	-	-	(1,055)	(1,055)
- Opioid Liability	(44,633)	(48,956)	(54,678)	(58,611)	(58,611)
Profits Available for Distribution	**(44,827)**	**(48,706)**	**(54,149)**	**(57,077)**	**(60,683)**

26. Professor Shaked thus summarizes his conclusions as follows:[17]

(a) At the time Mallinckrodt repurchased its shares, Mallinckrodt's opioid liabilities were probable.

(b) At the time Mallinckrodt repurchased its shares, Mallinckrodt's opioid liabilities were reasonably estimable.

(c) As Mallinckrodt's opioid liabilities were probable and reasonably estimable, Mallinckrodt should have accrued a contingent liability.

[16] Moreover, in fiscal year 2017, at least $1.5 billion of the retained earnings were attributable to a one-time recognized income tax benefit and were not profits available for distribution. *See* Mallinckrodt plc, Annual Report (Form 10-K), at 49-50, 101 (Dec. 29, 2017).

[17] Shaked Decl. ¶ 4.

(d) If Mallinckrodt had correctly accrued a contingent liability at the time of the share repurchases, Mallinckrodt would not have had sufficient profits available for distribution to conduct the share repurchases.[18]

(e) Mallinckrodt repurchased over $1.5 billion of its own shares without sufficient profits available for distribution to do so.

27. Because Mallinckrodt did not have profits available for distribution from which to fund its share repurchases, its entire share repurchase program was void *ab initio* under Irish Law. Thus, under *Enron*, Mallinckrodt's share repurchases did not constitute a "settlement payment" under § 546(e). Movant therefore lacks a qualifying transaction and does not have the benefit of the § 546(e) defense.

B. Mallinckrodt's Share Repurchases Were Not Transfers Made "in Connection with a Securities Contract"

28. For the same reasons noted above, Mallinckrodt's share repurchases were not "transfer[s] made . . . in connection with a securities contract[.]" 11 U.S.C. § 546(e). In *Enron*, the court examined whether the safe harbor in § 546(g) protected a transfer allegedly made "in connection with a swap agreement." 323 B.R. at 878 (quoting 11 U.S.C. § 546(g)). Because the entire transaction was void under applicable law, the "in connection with" language in § 546(g) did not apply. *Id*. ("If it is determined that the transaction violated Oregon law, the agreement would be a nullity and have no legal effect. As a consequence, the transfer would not have been made under or in connection with a swap agreement and it would not be protected from avoidance under section 546(g) of the Bankruptcy Code."). This reasoning applies with equal force to the "in connection with" language in § 546(e). *See id.* at 877 ("An agreement

[18] Indeed, in 2014 and 2018, Mallinckrodt did not have profits available for distribution *even before* accounting for opioid liabilities.

that is void under controlling state law has no legal force or effect and carries no enforceable obligations."). Because Mallinckrodt's share repurchases were nullities, there were no transfers made in connection with any valid securities contract. Accordingly, this Court should determine that Movant has not established the requisite elements for its § 546(e) defense and deny the Motion.

C. Under Third Circuit Jurisprudence, Void Transactions (as Opposed to Merely Voidable Ones) Must Be Recognized and Treated as Nonexistent Even if There Is a Federal Policy That Favors Upholding or Enforcing the Transaction

29. Recognizing that a void transaction cannot form the basis of a qualifying transaction under § 546(e) is consistent with a long line of cases in the Third Circuit distinguishing between void contracts and voidable contracts. *See, e.g.*, *MZM Constr. Co. v. New Jersey Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 405-06 (3d Cir. 2020) (noting difference between an "agreement [that is] 'void *ab initio*'" that renders the contract "as if it never existed" and an agreement that is voidable, where the party [still] has the option of enforcing the contract).[19] The Third Circuit itself has adhered to the distinction between *void* and *voidable* contracts in finding that a party was not entitled to arbitration where the contract containing the arbitration clause was void. *See Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107-09 (3d Cir. 2000) ("This Court's jurisprudence supports distinguishing between void and voidable contracts."). Indeed, the Third

[19] *See also Friedman v. Yula*, 679 F. Supp. 2d 617, 625 (E.D. Pa. 2010) ("A voidable contract is capable of being affirmed or rejected at the option of one of the parties . . . . However, a contract that is void *ab initio* is null from the beginning.") (quotations omitted); *Bertram v. Beneficial Consumer Disc. Co.*, 286 F. Supp. 2d 453, 459 (M.D. Pa. 2003) ("[T]he traditional distinguishing factor between voidable and void contracts is that the former vests a party with the power to elect either to ratify or to disaffirm the contract."); *Mack v. Progressive Corp.*, No. 23-2430, 2024 WL 1120377, at *5 (E.D. Pa. Mar. 14, 2024) ("[T]here is a distinction between a contract being void, where the contract itself is non-existent, or voidable, where the contract is in some way legally operative, but one or more of the parties may avoid the contract's legal effect."); *State College Area School Dist. v. Royal Bank of Canada*, No. 4:10-CV-1823, 2013 WL 12142576, at *2 (M.D. Pa. Jan. 7, 2013) ("[A] contract is void *ab initio* where one contracting party lacked authority or capacity to enter into the agreement in the first instance; a contract is voidable if there is some procedural defect or other conduct tainting the contracting circumstances, but the parties otherwise maintain authority to enter into the agreement."); *see also* Restatement (Second) of Contracts § 7 cmt. a (1981) (A "voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance." In contrast, a void contract "is not a contract at all; it is the 'promise' or 'agreement' that is void of legal effect.").

Circuit in *Sandvik* reached this conclusion despite the strong public policy favoring arbitration in which the Federal Arbitration Act is grounded. *See id.* at 104 (recognizing that the Federal Arbitration Act "establishes a strong federal policy in favor of compelling arbitration over litigation"); *see also Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."). *Sandvik* thus teaches that a void contract must be recognized and treated as such, even if there is a strong public policy that favors upholding or enforcing the contract. *See Sandvik AB*, 220 F.3d at 101 (concluding that "there may be no arbitration if the agreement to arbitrate is nonexistent").

30. Here, as in *Sandvik*, despite § 546(e)'s policy of preserving settlement payments and securities transactions from avoidance, the Court should uphold the distinction between void and voidable transactions, recognizing that there are no share repurchases to protect under § 546(e) because they were void *ab initio* and therefore nonexistent under Irish Law. *See, e.g.*, *Wilmington Sav. Fund Soc'y, FSB v. PHL Variable Ins. Co.*, No. CV 13-499-RGA, 2014 WL 1389974, at *12 (D. Del. Apr. 9, 2014) ("A court may never enforce agreements void *ab initio*, no matter what the intentions of the parties") (citation omitted); *cf. Contemp. Indus. Corp. v. Frost*, 564 F.3d 981, 988 (8th Cir. 2009) (finding that *Enron* does not support argument that § 546(e) does not preempt Nevada law because appellant failed to cite authority indicating that Nevada would consider the transaction void, rather than voidable).

II. MOVANT'S ARGUMENTS AGAINST APPLYING IRISH LAW FAIL

A. *Enron* Remains Good Law

31. Movant contends that *Enron* is no longer good law in the Second Circuit, but that argument is wrong. Contrary to Movant's assertion,[20] the decision in *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011) ("***Enron II***"), is not inconsistent with *Enron*. The Second Circuit in *Enron II* addressed a different issue—whether redemption of commercial paper is a "settlement payment" under § 546(e). *See id*. at 330. In doing so, the Second Circuit stated that the term "settlement payment" encompasses even "uncommon payments" and held that the phrase "commonly used in the securities industry" was a catchall phrase that did not limit the other forms of settlement payments encompassed by § 546(e). *Id.* at 335-36. But the bankruptcy court in *Enron* did not base the relevant portion of its analysis on the "commonly used" catchall phrase. Instead, the ultimate focus of its decision was "whether or not there is a valid underlying securities transaction from which a settlement payment can flow. If there is no valid securities agreement under the controlling state law, there is no settlement payment to which to apply the protection of section 546 of the Bankruptcy Code." *Enron*, 323 B.R. at 877.

32. Further, Chief Judge Dorsey did not find that *Enron* was no longer good law but rather called it "questionable" and then went on to analyze the issue "even if *Enron I* remains good law[.]" Opinion at 11-12. Movant thus misstates the "law of the case" by claiming the Court found that "*Enron I* does not remain good law." Mot. at 5. Moreover, as stated above, the Trust in its current appeal is challenging the Opinion on the Irish Law ruling. The Trust reiterates its

[20] Mot. at 5.

intent to preserve its arguments on the qualifying-transaction issue and make its record so that its rights are fully protected if the Opinion is overturned.

B. Section 546(e) Does Not Preempt Irish Law

1. Section 546(e) Contains No Express Language Preempting Irish Law

33. The Court should not apply § 546(e) to negate the effect of Irish Law. The text of § 546(e) contains no express preemptory language stating that it must be applied "[n]othwithstanding any otherwise applicable nonbankruptcy law," as exists in other provisions of the Bankruptcy Code.[21] By contrast, for example, the Third Circuit in *In re Federal-Mogul Global Inc.* ruled that the "notwithstanding" clause in Code § 1123(a) demonstrated a "clear congressional intent" to expressly preempt conflicting state law and thus held that § 1123 preempts anti-assignment clauses in insurance policies, thereby allowing such policies to be transferred to a § 524(g) trust. *See* 684 F.3d 355, 375, 382 (3d Cir. 2012).

34. Section 546(e), on the other hand, contains no such preemptory language. *See United States v. Lavin*, 942 F.2d 177, 184 (3d Cir. 1991) ("As always, the most authoritative indicators of what Congress intended are the words that it chose in drafting the statute."). Indeed, Judge Gross recognized that, while "certain other Code provisions expressly preempt state law by incorporating phrases such as 'notwithstanding any applicable law' . . . [n]o such language is included in section 546(e)." *PAH Litig. Tr. v. Water Street Healthcare Partners L.P. (In re Physiotherapy Holdings, Inc.)*, No. 13-12965 (KG), 2016 WL 3611831, at *9 (Bankr. D. Del. June 20, 2016). He concluded that "[t]he absence of this ['notwithstanding'] phrase in section 546(e)

[21] *See, e.g.*, 11 U.S.C. § 1123 (providing that "[n]otwithstanding any otherwise applicable nonbankruptcy law," a plan must specify and provide certain information); *id*. § 1142 (providing that "[n]otwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court"); *id*. § 541(c) (providing that an interest of the debtor in property becomes property of the estate "notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law").

constitutes strong evidence that Congress did not intend that section to preempt state-law avoidance claims."[22] *Id*. at *9 (quotation and citations omitted). Judge Gross thus concluded that there was no basis for finding express preemption under the facts of that case. *Id*. at *10.

35. In *Integrated Solutions Inc. v. Service Support Specialties, Inc.*, the Third Circuit held that the trustee could not assign the debtor's tort claims in contravention of applicable state law, stating that the applicable Code provisions lacked the clear congressional intent to preempt state-law restrictions on transferring estate property. 124 F.3d 487, 493 (3d Cir. 1997). The Third Circuit observed that "once a property interest has passed to the estate, it is subject to the same limitations imposed upon the debtor by applicable nonbankruptcy law." *Id*. at 492 (citing cases); *see also Kent's Run P'ship, Ltd. v. Glosser*, 323 B.R. 408, 422 (W.D. Pa. 2005) ("Federal bankruptcy law is designed to work in conjunction with state property law; thus, absent specific federal preemption, state law determines the nature and extent of the debtor's property rights."); *In re Fresh–G Rest. Intermediate Holding, LLC*, 580 B.R. 103, 113 (Bankr. D. Del. 2017) (Sontchi, J.) ("Without express language within the Bankruptcy Code evincing a Congressional intent to supersede state law, the Third Circuit has been previously unwilling to infer federal preemption within the bankruptcy context."). The same principles apply here. Because § 546(e) contains no express language preempting applicable nonbankruptcy law, the statute should not be applied in a manner that overrides the effect of Irish Law. If Movant believes that § 546(e) should override Irish Law or any other applicable nonbankruptcy law, it should seek a remedy from Congress, not the courts.

[22] Although in *Golden v. Community Health Systems, Inc. (In re Quorum Health Corp.)*, this Court declined to follow the reasoning of *Physiotherapy Holdings* with respect to § 546(e)'s preemption of state law fraudulent transfer claims, *see* No. 20-10766 (BLS), 2023 WL 2552399, at *11 (Bankr. D. Del. Mar. 16, 2023), the narrow preemption of specific causes of action at issue in *Quorum* is not comparable to the preemption of an otherwise neutral law of corporate governance that renders a particular transaction void. *See Enron*, 323 B.R. at 877 ("As a matter of public policy, a bankruptcy court could not give legal significance to an agreement that is a nullity under state law.").

2. Moreover, the Presumption Favoring State—or Foreign—Law Defeats § 546(e) Preemption Here

36. There exists a strong presumption against Bankruptcy Code preemption of state—or foreign—law that Movant cannot rebut. "Even in instances of express preemption, the presumption in favor of state law applies, requiring [the court] to accept 'a plausible alternative reading . . . that disfavors preemption.'" *Federal-Mogul*, 684 F.3d at 368-69 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)); *LaSala v. Bordier et Cie*, 519 F.3d 121, 138-39 (3d Cir. 2008) (noting that courts do not presume Congress intended to preempt foreign law through a federal statue absent clear congressional intent). Indeed, courts have recognized that "the presumption against displacing state law by federal bankruptcy law is just as strong in bankruptcy as in other areas of federal legislative power." *Pac. Gas & Elec. Co. v. California ex rel.*, 350 F.3d 932, 943 (9th Cir. 2003).

37. Although federal law typically determines the standards for applying the Bankruptcy Code, federal courts look to state law to determine the parties' underlying rights and obligations in bankruptcy. *See Butner v. United States*, 440 U.S. 48, 54 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law."). "Corporations are generally creatures of state law, . . . and state law is well equipped to handle disputes involving corporate property rights . . . . Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Rodriguez v. FDIC*, 589 U.S. 132, 137 (2020) (quotations and citations omitted). Indeed, even though the Constitution grants Congress the power to "establish . . . uniform laws on the subject of bankruptcies throughout the United States[,]"[23]

[23] U.S. Const. art. I, § 8, cl. 4.

> the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different States. For example, the Bankruptcy Act recognizes and enforces the laws of the states affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the act is not alike in all the states.

Butner, 440 U.S. at 54 n.9 (quoting *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918)).

38. This deference to applicable nonbankruptcy law applies with even more force when it comes to corporate law. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations[.]"); *Freedman v. Redstone*, 753 F.3d 416, 430 (3d Cir. 2014) ("This presumption against preemption is heightened in areas traditionally occupied by the states, such as corporate law[.]"), *overruled in part on other grounds by In re Cognizant Tech. Sols. Corp. Derivative Litig.*, 101 F.4th 250 (3d Cir. 2024).

39. Here, the presumption against preemption exists because Irish Law governed the share repurchases and rendered them void *ab initio* because Mallinckrodt did not have the requisite profits available for distribution when it repurchased its shares. In addition, there is no preemptive language to suggest that Congress intended § 546(e) to displace an otherwise neutral law of corporate governance that renders a particular transaction void. Movant cannot overcome the strong presumption against preemption here.

3. A Finding of Implied Preemption Is Similarly Inappropriate

40. There is no basis to find implied preemption. The court in *Enron* concluded that there was no implied preemption of a law rendering a share repurchase void under § 546(e). *See Enron*, 323 B.R. at 876 ("As a complete nullity, there would be no resulting settlement payment. This consequence is not a result of the bankruptcy filing, it is simply a function of state law that was not preempted by 546(e).").

41. Moreover, the same presumption against preemption would defeat any assertion of implied preemption. *See Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 249 (3d Cir. 2008) (applying the "traditional presumption" against preemption to claims of implied preemption); *see also Torres v. Precision Indus., Inc.*, 995 F.3d 485, 491 (6th Cir. 2021) ("Because preemption can trammel upon state sovereignty, courts apply a 'strong presumption' against implied preemption in fields that States traditionally regulate."). As explained above, Movant cannot rebut the strong presumption against preemption of an otherwise neutral law of corporate governance that renders a particular transaction void.

CONCLUSION

For the reasons set forth above, the Court should deny the Motion.

[*Signature of counsel appears on following page.*]

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Respectfully submitted,

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