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.	:	
ARGOS CAPITAL APPRECIATION MASTER FUND LP, *et al.*,	:	
Defendants.	:	

MOTION TO DISMISS THE AMENDED COMPLAINT AS TO DEFENDANT BARCLAYS CAPITAL INC. 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 entered on May 15, 2023 [D.I. 185-1] (the "Protocol Order"), Defendant Barclays Capital Inc. ("BCI") moves to dismiss the claims brought against it by the Opioid Master Disbursement Trust II (the "Trust") in the above-captioned Adversary Proceeding.

PRELIMINARY STATEMENT

1. This is yet another straightforward motion for dismissal under the Protocol Order and the Bankruptcy Code's "safe harbor," Section 546(e). Defendants Citadel Securities LLC ("Citadel Securities"), Susquehanna Securities, LLC ("Susquehanna Securities"), T. Rowe Price Associates, Inc. and several funds managed by TRP (the "TRP Defendants"), Rock Creek MB, LLC, RIEF Trading LLC, GF Trading LLC, and RIEF RMP LLC (the "Renaissance Funds"), and Tower Research Capital LLC ("Tower Research"), Spire X Trading LLC ("Spire X"), and Latour Trading LLC ("Latour"; collectively with Tower Research and Spire X, the "Tower Defendants") have already filed motions to dismiss pursuant to the Protocol Order. *See* D.I. 215 (the "CS/SSLLC Motion"); *see also* D.I. 217 (the "TRP Motion"); D.I. 242 (the "Renaissance Motion"); D.I. 286 (the "Tower Motion"; and collectively with the CS/SSLLC Motion, TRP Motion, and Renaissance Motion, the "Pending Protocol Motions").[1]

2. The Pending Protocol Motions address legal issues that are common with BCI's arguments for dismissal under the Protocol Order and Section 546(e), so BCI will avoid repeating those arguments and will, instead, incorporate them by reference. In particular, BCI incorporates the arguments set forth in the Pending Protocol Motions demonstrating why the Share Repurchases were both "settlement payments" and "transfers made in connection with a

[1] Unless otherwise defined, defined terms in this Motion have the same meanings as in the CS/SSLLC Motion.

securities contract," and thus "qualifying transactions" pursuant to Section 546(e). BCI shows in this motion (the "Motion") how it, like Citadel Securities, Susquehanna Securities, the Renaissance Funds, and Spire X and Latour, has demonstrated that it is a "financial participant" and thus a qualifying participant as well. BCI has provided the Trust with a sworn declaration and an audited financial statement filed with the U.S. Securities and Exchange Commission (the "SEC"), confirming that, on a statutorily relevant date, it had *three different types* of outstanding securities contracts that each independently exceeded the statutory thresholds for a financial participant by *billions* of dollars.[2]

3. Nevertheless, the Trust has refused to dismiss BCI pursuant to the Protocol Order. The Trust has offered no valid basis to dispute the information that BCI has provided or otherwise to refuse to dismiss it from the Adversary Proceeding. The Court should grant the Motion, dismiss BCI from the Adversary Proceeding, and grant such other relief as it deems just and proper.

BACKGROUND

A. BCI

4. BCI is a registered broker-dealer with the SEC and the Financial Industry Regulatory Authority, Inc. ("FINRA"), a futures commission merchant registered with the Commodity Futures Trading Commission ("FCM"), a municipal advisor registered with the SEC and Municipal Securities Rulemaking Board, and a member of the Securities Investor Protection Corporation. Declaration of Ross E. Firsenbaum, dated January 30, 2024 (the "Firsenbaum Decl."), Ex. 2 ¶ 2. BCI's client base includes money managers, insurance companies, pension

[2] BCI is also a "stockbroker," another category of market participant protected by Section 546(e). *See* 11 U.S.C. § 101(53A). Because it so easily qualifies as a financial participant, BCI simply reserved its right in its submissions, if ever necessary, to assert that it is a stockbroker as well.

funds, hedge funds, depository institutions, corporations, trust banks, money market and mutual funds, domestic and international governmental agencies and central banks. *Id.*

5. In its capacity as a registered broker-dealer and FCM, BCI engages in a broad range of primary and secondary securities markets and futures brokerage activities. *Id.* It is an underwriter, placement agent and/or dealer for corporate debt and equity securities, municipal securities, government and agency securities, mortgage-backed-related instruments, other asset-backed securities, collateralized loan obligations, listed options and futures. *Id.*

6. BCI also serves as a prime broker providing clearance, settlement, and financing services to its clients. *Id.* BCI is a member of several securities and commodities exchanges, and is also a primary dealer in US government securities. *Id.* In addition, BCI provides strategic and financial advisory services to its corporate clients. *Id.*

B. The Mallinckrodt Share Repurchases

7. BCI incorporates by reference Section B of the Background Section of the CS/SSLLC Motion. *See* D.I. 215 ¶ 10.

C. The Protocol Order

8. BCI incorporates by reference Section C of the Background Section of the CS/SSLLC Motion. *See id.* ¶¶ 11-17.

D. BCI's Protocol Submission

9. On August 25, 2023, BCI made its initial submission to the Trust pursuant to the Protocol Order. *See* Firsenbaum Decl., Ex. 1 (the "BCI Initial Protocol Submission"). The BCI Initial Protocol Submission demonstrated that BCI was a "financial participant" as defined by the Bankruptcy Code and included the following documentation:

a. The audited financial statements of BCI for the calendar year 2019 showing that, as of December 31, 2019, BCI had outstanding non-affiliate put and call

options with gross mark-to market positions of $4.880 billion in assets and $5.155 billion in liabilities, with a gross notional value of $ 286.731 billion, *see* Firsenbaum Decl., Ex. 2 ¶ 5 & Ex. A at 15;

b. The same audited financial statements, also showing that as of December 31, 2019, BCI had outstanding repurchase agreements with non-affiliates with net mark-to-market positions of $25.615 billion, *see* Firsenbaum Decl., Ex. 2 ¶ 6 & Ex. A at 25, 33; and

c. The same audited financial statements, also showing that as of December 31, 2019, BCI had outstanding reverse repurchase/resale agreements with non-affiliates with net mark-to-market positions of $9.199 billion, *see* Firsenbaum Decl., Ex. 2 ¶ 7 & Ex. A at 25, 33.

10. The BCI Initial Protocol Submission also included a sworn declaration from a BCI Managing Director familiar with BCI's financial statements attesting to the accuracy of audited financial statements. *Id.*, Ex. 2 ¶¶ 1, 3, 5. Thus, BCI provided the Trust with documentation and a sworn declaration demonstrating that it surpassed both applicable statutory thresholds by billions of dollars in three different ways. *Id.*, Ex. 2.

11. The Trust waited 42 days before responding to the BCI Initial Protocol Submission. *See id.*, Ex. 3. The Trust did not dispute that the Share Repurchases were "qualifying transactions." *See generally id.*, Ex. 3. The Trust also provided no basis to question the accuracy of BCI's audited financial statements (or the sworn declaration of a BCI Managing Director). *See id*. Instead, it argued that the Court would not take judicial notice of BCI's audited financial statements on a motion to dismiss and made 6 requests for documents and information in connection with BCI's showing that it was a "financial participant." *See id.*, Ex. 3

at 2-3. The Trust requested, among other documents and information, copies of all options contracts and repurchase and reverse repurchase agreements giving rise to the billions of dollars of outstanding positions described above; documents supporting the statement that the outstanding positions were not with affiliates; the "precise calculations" of the mark-to-market and notional values of the outstanding positions described above; the dates on which BCI entered into each such position; the date on which BCI closed each such position; copies of all agreements that show that BCI was a party to each such transaction; and organizational charts. *See id.*, Ex. 3 at 5-6. The Trust did not explain why it purported to need this information, or how the requested information was relevant to any identified concerns of the Trust with BCI's showing of its status as a financial participant. *See generally id.*, Ex. 3.

12. Nevertheless, on December 8, 2023, BCI responded with a seven-page letter pointing the Trust to the specific portions of the audited financial statements that BCI already provided to the Trust and that already answered many of the Trust's questions. *See id.*, Ex. 4. Specifically, BCI directed the Trust to Note 14 of its audited financial statements, which identified BCI's transactions with affiliates and which omitted all put and call options, repurchase agreements, and reverse repurchase agreements, thus showing that none of them were with affiliates. *See id.*, Ex. 4 at 4-5; *see also id.*, Ex. 2 at Ex. A at 33-34. BCI also directed the Trust to pages 18 and 20 of its audited financial statements, which identified the notional value and mark-to-market positions of the put and call options, repurchase agreements, and reverse repurchase agreements (to the extent such values were calculated), and described in detail how such values were calculated. *See id.*, Ex. 4 at 5-6.

13. On January 22, 2024— 45 days following BCI's supplemental submission—the Trust informed BCI that it would not dismiss it from the Adversary Proceeding. *Id.*, Ex. 5. For

the first time, the Trust argued that the alleged Share Repurchases were not "settlement payments" and thus not qualifying transactions. *Id.*, Ex. 5 at 2-6. Without providing any factual basis to question their accuracy, the Trust also maintained that BCI's financial statements—which were audited by KPMG LLP, one of the world's leading public auditing firms, *id.*, Ex. 2 at Ex. A at 1—were insufficient to establish that BCI was a financial participant. *Id.*, Ex. 5 at 6-8.

14. Undersigned counsel met and conferred with the Trust's counsel on January 25, 2024, in accordance with the Protocol Order. The meet-and-confer did not resolve the dispute.

ARGUMENT

15. The Amended Complaint (D.I. 209) purports to assert constructive and intentional fraudulent transfer claims pursuant to Section 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 participant . . . or that is a transfer made by or to (or for the benefit of) a . . . 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).[3]

16. The safe harbor applies where two requirements are met: (1) that there is a "qualifying transaction" (*i.e.*, a "settlement payment" or transfer "made in connection with a securities contract"), and (2) that there is a "qualifying participant" (*i.e.*, the transfer was made by or to (or for the benefit of), among others, a "financial participant"). *Golden v. Cmty. Health*

[3] Although section 546(e) does not bar a claim pursuant to section 548(a)(1)(A) of the Bankruptcy Code, the Amended Complaint does not purport to bring such a claim, presumably because the alleged transfers at issue occurred outside two-year reach-back period under that section.

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

17. BCI incorporates by reference Section I of the Argument Section of the CS/SSLLC Motion. It demonstrates why all of the alleged Share Repurchases were both "settlement payments" and transfers "made in connection with a securities contract," and, in any event, that the Trust has waived any argument to the contrary. *See* CS/SSLLC Mot. ¶¶ 31-52.

18. In addition, this Court recently held at the motion to dismiss stage in a separate adversary proceeding brought by the Trust, *Opioid Master Disbursement Trust II v. Covidien Unlimited Co. (In re Mallinckrodt plc),* No. 22-50433 (JTD), 2024 WL 206682 (Bankr. D. Del. Jan. 18, 2024) ("*Covidien*"), that Mallinckrodt's payments to Covidien (and other transfers) in exchange for shares of Mallinckrodt stock were qualifying transactions under Section 546(e) both because they were settlement payments and transfers in connection with a securities contract. *See id.* at *15 (citing *Lowenschuss v. Resorts Int'l, Inc. (In re Resorts Int'l, Inc.)*, 181 F.3d 505, 515 (3d Cir. 1999), noting the Code's "extremely broad" definition of settlement payment, and stating that "[i]n the securities industry, a settlement payment is generally the transfer of cash or securities made to complete a securities transaction"). The same is true for the Share Repurchases. *See* CS/SSLLC Mot. ¶¶ 31-46.

II. BCI Is A Qualifying Participant

19. The Bankruptcy Code defines "financial participant" as any entity that: (a) "at the time it enters into a securities contract . . . [or] repurchase agreement," "at the time of the date of the filing of the petition," or "on any day during the 15-month period preceding the date of the filing of the petition" (b) "has one or more [securities contracts or repurchase] agreements . . . 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) in one or more such agreements or transactions," excluding agreements with affiliates. 11 U.S.C. § 101(22A)(A). The term "securities contract" includes any "contract for the purchase[or] sale . . . of a security," or "option on any of the foregoing, including an option to purchase or sell any such security," *id.* § 741(7)(A)(i), with "security," in turn, defined to include "stock," *id.* § 101(49)(A)(ii).

20. BCI has demonstrated that it is a "financial participant." It has provided financial statements, audited by a big-four public auditing firm, showing that, as of December 31, 2019—a date within 15 months of the petition date (October 12, 2020)—it had outstanding non-affiliate (a) put and call options; (b) repurchase agreements; and (c) reverse repurchase agreements, each with a notional value well in excess of $1 billion and mark-to-market positions well in excess of $100 million. *See* Firsenbaum Decl., Ex. 2 at Ex. A; *id.*, Ex. 2 ¶¶ 5-7. Specifically, the following chart sets forth the values of such outstanding transactions in BCI's audited financial statements:

Outstanding Position (non-affiliates)	**Notional Value**	**Mark-to-Market Value**
Put and call options	$286.7 *billion*	$4.880 *billion* (assets) $5.155 *billion* (liabilities) $10.035 (gross)
Repurchase agreements	N/A	$25.615 *billion* (net)
Reverse repurchase/resale agreements	N/A	$9.199 *billion* (net)

See id. Thus, while the statutory test merely requires that BCI's *total* outstanding contracts as of a relevant date exceed one of the two statutory thresholds, BCI has shown that it had *three*

different types of outstanding positions that *each, on its own*, exceeded a statutory threshold by *billions* of dollars (and the put and call options exceeded *both* statutory thresholds by billions of dollars). *See id.*

21. The Trust has provided no basis to question the accuracy of BCI's audited financial statements filed with the SEC, or its confirming declaration *sworn under penalty of perjury* attesting to the accuracy of such document. Instead, it makes three arguments to attempt to justify its refusal to dismiss such defendants from the Adversary Proceeding. Each is without merit.

22. *First*, the Trust argues that it lacks the "evidentiary basis it needs to verify the accuracy of" the audited financial statements. *See* Firsenbaum Decl., Ex. 5 at 6. That argument is a makeweight. The Trust offers no basis to question the accuracy of financial statements *audited by independent auditors* and further supported by a *sworn declaration under penalty of perjury* from a BCI Managing Director attesting to their accuracy. There is no need, for example, for the Trust to demand and review copies of all the contracts underlying BCI's outstanding options, repurchase, or reverse repurchase positions, organizational charts, or schedules providing counterparties to the positions. If the point of such requests was to determine whether any of the transactions at issue were with affiliates, BCI's audited financial statements filed with the SEC answer that very question. *See* Firsenbaum Decl., Ex. 2 at Ex. A at 33-34; *see also id.*, Ex. 4 at 4-5.

23. Moreover, the Trust's argument, if accepted, would render the Protocol Order a nullity. The Protocol Order calls for a defendant to "attach[] as Exhibit[s] . . . supporting documentation showing that [it is a financial participant]," and it expressly authorizes the Court to consider that evidence. *See* D.I. 185-1 ¶¶ 5-6, 11 & app. A ¶ 3. The audited financial

statements filed with the SEC provided by BCI demonstrate that it exceeded the statutory thresholds by billions of dollars. And BCI, as required by the Protocol Order, provided a sworn declaration attesting to the accuracy of those audited financial statements. *See* D.I. 185-1 ¶ 5 & app. A. Under the express terms of the Protocol Order, nothing more is required to show that BCI is a financial participant and thus qualifying participant.

24. The Trust argues that it is "the black-letter law in this Circuit and elsewhere that 'courts may take judicial notice of public records to acknowledge that the facts contained in the records existed in the public realm at that time . . . [but] [t]he court may not . . . consider the truth of the information in the records.'" Firsenbaum Decl., Ex. 5 at 7 (quoting *Mervyn's LLC v. Lubert–Adler Grp. IV, LLC (In re Mervyn's Holdings, LLC)*, 426 B.R. 488, 496 (Bankr. D. Del. 2010)). The Trust relies on *Covidien*, where this Court declined to take judicial notice of facts in Covidien's SEC filings on a motion to dismiss filed pursuant to a Rule 12(b)(6), not pursuant to the Protocol Order. *See* 2024 WL 206682, at *13.

25. The Trust is wrong on the law in this Circuit, *see* CS/SSLLC Mot. ¶¶ 58-61, and about any applicability of this Court's decision in *Covidien* here. To start, courts in this Circuit (and elsewhere) *have* taken judicial notice of facts contained in SEC filings for their truth when deciding whether Section 546(e) applies on a Rule 12(b)(6) motion. *See Quorum Health*, 2023 WL 2552399, at *7. There, Judge Shannon took judicial notice of SEC filings for precisely the same purpose as here: to establish that the defendant was a "financial participant" under Section 546(e). He wrote:

> Because SEC filings are required by law to be filed with the SEC, no serious questions as to their authenticity can exist. Generally, SEC filings are relevant not to prove the truth of their contents, but only to determine what the documents stated. The Third Circuit, however, *has taken judicial notice of facts in an SEC filing (not just the existence of the document) when considering a motion to dismiss*. In this case, the Court *finds it appropriate*

> *to take judicial notice of the information in the [defendant's] SEC filings for purposes of determining whether [the defendant] meets the Code's definition of a "financial participant."* Those filings demonstrate that [defendant] completed a private offering of senior secured notes in the amount of $1,462 billion on February 6, 2020 (just 2 months prior to the petition date).

Id. (emphasis added) (internal citations and quotations omitted); *see also In re Nine West LBO Sec. Litig.*, 482 F. Supp. 3d 187, 203 (S.D.N.Y. 2020) (taking judicial notice of SEC filings to find that defendants were registered investment companies and thus "financial institutions"), *aff'd in relevant part Kirschner v. Robeco Cap. Growth Funds - Robeco BP US Premium Equities (In re Nine West LBO Sec. Litig.),* 87 F.4th 130 (2d Cir. 2023). Judge Shannon cited the Third Circuit's decision in *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000), for the proposition that the Third Circuit *does* take judicial notice, for the truth of the matters asserted, of SEC filings, such as those here, the accuracy of which has not been reasonably disputed by the Plaintiff. *See Quorum Health*, 2023 WL 2552399, at *7 & nn.42, 43. Indeed, the Trust concedes in its opposition to the CS/SSLLC Motion that Judge Shannon "took judicial notice of the contents of an SEC statement," and that the Third Circuit has done the same. *See* D.I. 269 ¶ 60 (citing *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147, 151 n.5 (3d Cir. 2019), in which the Third Circuit took judicial notice of fact contained in defendant's Form 8-K filed with the SEC).

26. The circumstances that have caused courts in certain circumstances to refuse to take judicial notice of SEC filings for the truth of the matters asserted are not present here. In *Covidien*, this Court relied on *NAHC, Inc. Sec. Litig.*, 306 F.3d 1314 (3d Cir. 2002), *Oran*, 226 F.3d at 289, and *Tracinda Corp. v. DaimlerChrysler AG (In re DaimlerChrysler AG Sec. Litig.)*, 197 F. Supp. 2d 42, 53-54 (D. Del. 2002), in declining to take judicial notice of Covidien's SEC filing on a 12(b)(6) motion. *See* 2024 WL 206682, at *15-16. But, as this Court noted, those Third Circuit cases "involved allegations of securities fraud arising out of alleged misrepresentations made in

the defendants' SEC filings," *see id.*, thus directly called into question the accuracy of the defendant's statements.[4] Here, in contrast, the only allegation in the Complaint about BCI (or any other defendant) is that it sold shares of Mallinckrodt stock on the open market, which allegedly happened to be purchased by Mallinckrodt. Am. Compl. ¶¶ 17, 18. There is no allegation calling into question the accuracy of BCI's financial statement. *See Quorum Health*, 2023 WL 2552399, at *7 & n.43 (recognizing that because "SEC filings 'are required by law to be filed with the SEC, no serious questions as to their authenticity can exist.'" (quoting *Oran*, 226 F.3d at 289)); *see also Nine West*, 482 F. Supp. 3d at 202-203 (taking judicial notice of shareholder defendants' SEC filings to find that defendants were registered investment companies and thus "financial institutions" for purposes of a 12(b)(6) motion).

27. In any event, this Court's ruling in *Covidien* does not apply here. Neither this Motion nor any of the Pending Protocol Motions is a Rule 12(b)(6) motion. Rather, these Motions seek dismissal *pursuant to the Protocol Order*, which provides for the defendants to provide evidence and expressly authorizes this Court to consider when ruling on a Protocol-Based Motion any such evidence. *See* D.I. 185-1 ¶ 11(b); *see also supra* ¶ 23. The Trust's position that the Court should now ignore the evidence provided by BCI pursuant to the Protocol Order would betray the entire purpose of the Protocol Order—to streamline, efficiently and without undue delay and cost, the process by which the parties (and ultimately the Court) can

[4] In *Oran*, the Third Circuit quoted language from an out-of-circuit decision noting that "documents alleged to contain the various misrepresentations or omissions and are relevant not to prove the truth of their contents but only to determine what the documents stated," but nevertheless proceeded to take judicial notice of the defendants' trading activity disclosed in their Forms 4 and 5 for the truth of their contents (i.e., that the trading activity disclosed had in fact occurred). *See* 226 F.3d at 289-90 ("Taken together, the SEC disclosures merely reveal that the individual officer-defendants engaged in trading activity during various months in both 1996 and 1997; they do not demonstrate any concerted insider effort to dispose of shares during the Class Period. Consequently, we do not believe that the individual defendants' trading patterns establish the requisite strong inference of scienter.").

decide individualized, threshold defenses to the Trust's claims, including those pursuant to Section 546(e). That process is precisely what the Federal Rules require. *See* Fed. R. Civ. P. 1 ("[The Rules] should be construed, administered, and employed by the court and *the parties* to *secure the just, speedy, and inexpensive determination of every action and proceeding*.") (emphasis added)); Fed. R. Bankr. P. 7001.

28. Moreover, BCI is not asking the Court to take judicial notice of its SEC filing. As authorized by the Protocol Order, BCI is relying on a *sworn declaration* attesting to the truth of the relevant facts set forth in its SEC filing. *See* Firsenbaum Decl., Ex. 2. Having submitted proof of the fact at issue, judicial notice is not at issue here at all. *See, e.g.*, *Gen. Elec. Cap. Corp. v. Lease Resol. Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997) ("Judicial notice is premised on the concept that certain facts or propositions exist which a court may accept as true *without requiring additional proof*.") (emphasis added)).

29. *Third*, the Trust argues that the Court must disregard BCI's purportedly "conclusory" and "self-serving" declaration. *See* Firsenbaum Decl., Ex. 5 at 8. But as with the Trust's other arguments, this contention has no teeth. The declaration is obviously not "conclusory"—it, among other things, confirms the accuracy of the audited financial statements, explains how none of the agreements at issue were with affiliates and how the values of the positions were calculated. *See* Firsenbaum Decl., Ex. 2 ¶ 6-7.

30. Moreover, the Trust relies on inapplicable cases addressing affidavits submitted in connection with motions for summary judgment.[5] This Motion is brought pursuant to the *Protocol Order*, which allows a Defendant to provide the Trust with a "sworn declaration

[5] *See, e.g.*, *Frantz v. Nationwide Ins. Co.*, 2021 WL 2014990, at *3 (M.D. Pa. May 19, 2021); *Rowello v. Healthcare Benefits, Inc.*, 2013 WL 6576449, at *5 (D.N.J. Dec. 13, 2013); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

substantially in the form attached hereto as Appendix A." D.I. 185-1 ¶ 5; *see also id.* ¶ 6 & app. A. The template Declaration only requires a Defendant to assert that it "believes that it was a 'financial participant,' as defined by 11 U.S.C. § 101(22A)" and "attach[] . . . supporting documentation showing that [defense]." *Id.* app. A ¶¶ 2(d), 3. BCI did just that. It provided a sworn declaration from a Managing Director that provided facts showing that BCI is a financial participant, along with supporting documentation.

31. *Finally*, the cases cited by the Trust are easily distinguishable (and in many cases support dismissal). In one case, the contested declaration or affidavit was inconsistent with prior statements made by the affiant. *See, e.g.*, *Frantz*, 2021 WL 2014990, at *3 (rejecting declaration submitted in support of summary judgment motion that contradicted affiant's deposition testimony). The Trust has not presented any evidence showing any inconsistencies or otherwise calling into question the accuracy of BCI's sworn declaration and audited financial statements. In the Trust's other cases, the movant's declaration or affidavit was uncorroborated. *See Rowello*, 2013 WL 6576449, at *5 (rejecting affidavit submitted in opposition to summary judgment motion where movant provided supporting testimony, evidence, and other documentation supporting movant's version of events, and the opposing party's declaration relied solely on his "belief" and uncorroborated facts not in the record); *see also Lujan*, 497 U.S. at 888-89 (rejecting affidavit submitted in opposition to summary judgment motion that assumed key facts). Here, by contrast, BCI provided a sworn declaration attesting to facts based on a Managing Director's personal knowledge and his review of BCI's financial statements audited by a leading accounting firm. *See* Firsenbaum Decl., Ex. 2. Yet the Trust has provided no counter-evidence, much less even a single reason to call into question the accuracy of BCI's audited financial statements or sworn declaration.

CONCLUSION

32. For these reasons, BCI respectfully requests that the Court enter the proposed order submitted herewith as Exhibit A granting the relief requested by the Motion and dismissing BCI from the Adversary Proceeding.[6]

[6] BCI does not now seek an award of attorneys' fees and costs from the Trust, recognizing that it operates for the benefit of opioid victims. But the Trust's refusal to dismiss BCI pursuant to the Protocol Order meets the standard for such an award. *See Doe v. Keane*, 117 F.R.D. 103, 104-05 (W.D. Mich. 1987) (granting request for attorneys' fees when plaintiff was presented with pre-motion evidence that claim failed as a matter of law but continued to pursue claims); *see also Brown v. Chinen*, 2010 WL 1783573, at *1, *5 (D. Haw. Feb. 26, 2010) (similar). Should this Court agree that BCI is entitled to dismissal pursuant to the Protocol Order, and should the Trust nevertheless continue to pursue claims against it, BCI reserves its rights to seek an award of the fees and costs it incurred negotiating the Protocol Order, making submissions to the Trust pursuant to the Protocol Order, and moving to dismiss pursuant to the Protocol Order.

Dated: January 30, 2024
Wilmington, Delaware

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