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 JANE STREET CAPITAL, LLC 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"), Jane Street Capital, LLC ("Jane Street") moves to dismiss the claims brought against it by the Opioid Master Disbursement Trust II (the "Trust") in this Adversary Proceeding.

PRELIMINARY STATEMENT

1. This is a 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"), several funds managed by T. Rowe Price Associates, Inc. (the "TRP Funds"), Rock Creek MB, LLC, RIEF Trading LLC, GF Trading LLC, and RIEF RMP LLC (the "Renaissance Funds"), 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"), and Barclays Capital Inc. ("BCI") have already filed motions seeking dismissal 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"); D.I. 288 (the "BCI Motion"; collectively, the "Pending Protocol Motions").[1]

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

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

with a securities contract," and thus "qualifying transactions" pursuant to Section 546(e). Jane Street shows in this motion why it, like Citadel Securities, Susquehanna Securities, the Renaissance Funds, Spire X, Latour, and BCI, has plainly demonstrated that it is a "financial participant" and thus a qualifying participant as well. Jane Street has provided the Trust with two sworn declarations and an audited financial statement filed with the Securities and Exchange Commission ("SEC") showing that, on a statutorily relevant date, it had outstanding mark-to-market options contract positions of $569 million, including written put options contracts with an aggregate notional value of $2.7 billion. Those amounts vastly exceed both statutory thresholds for a "financial participant" (although exceeding only one would suffice).

3. Nevertheless, the Trust has refused to dismiss Jane Street, just as it has refused to dismiss Citadel Securities, Susquehanna Securities, the TRP Funds (as defined in the TRP Motion), the Renaissance Funds, Spire X and Latour, and BCI pursuant to the Protocol Order. The Trust has offered no valid basis to dispute the information that Jane Street has provided or otherwise to refuse to dismiss Jane Street. The Court should grant the Motion, dismiss Jane Street from this Adversary Proceeding and grant such other relief as it deems just and proper.

BACKGROUND

A. Jane Street

4. Jane Street is a market-maker and broker-dealer registered with the SEC. Declaration of Ross E. Firsenbaum, dated January 26, 2024 ("Firsenbaum Decl."), Ex. 2 ¶ 2. Jane Street engages primarily in trading businesses, including U.S. ETF market-making and related bond and commodity trading, options trading, and other similar securities trading. *Id.*

B. The Mallinckrodt Share Repurchases

5. Jane Street incorporates by reference Section B of the Background Section of the CS/SSLLC Motion.

C. The Protocol Order

6. Jane Street incorporates by reference Section C of the Background Section of the CS/SSLLC Motion.

D. Jane Street's Protocol Submission

7. On July 12, 2023, Jane Street made its initial submission to the Trust pursuant to the Protocol Order. *See* Firsenbaum Decl., Ex. 1 (the "Jane Street Protocol Submission"). The Jane Street Protocol Submission included its audited financial statement for the calendar year 2019 filed with the SEC showing that, as of December 31, 2019, Jane Street had outstanding mark-to-market options contract positions of $569 million, including written put options contracts with an aggregate notional value of $2.7 billion. *Id.*, Ex. 1 at 2; *id.*, Ex. 2 ¶ 5 & Ex. A. The submission also included a declaration from Jane Street's President and Chief Compliance Officer attesting to the accuracy of its audited SEC filing. *Id.*, Ex. 2 ¶ 1. Thus, although it only needed to satisfy one of the two statutory tests to qualify as a "financial participant," Jane Street showed that its options contracts surpassed both thresholds—a total gross dollar notional amount of at least $1,000,000,000 or mark-to-market positions of at least $100,000,000. *Id.*, Exs. 1 & 2.

8. The Trust waited 44 of the 45 days it was allowed under the Protocol Order, Protocol Order ¶ 9, before responding on August 25, 2023. *See id.*, Ex. 3. The Trust did not dispute that the Share Repurchases were "qualifying transactions," but instead made seven requests for documents and information regarding Jane Street's "financial participant" showing. *See id.*, Ex. 3. The Trust provided no basis to question the accuracy of Jane Street's

documentation (or sworn declaration). *See id.*, Ex. 3 at 1-2. It merely argued that the Court would not take judicial notice of Jane Street's audited financial statement. *Id*.

9. On October 9, 2023, Jane Street responded with a seven-page letter and a second sworn declaration. Firsenbaum Decl., Exs. 4 & 5. The letter explained and cited supporting legal authority showing that the audited financial statement filed with the SEC is precisely the kind of document that courts take judicial notice of on motions to dismiss. *Id.*, Ex. 4 at 2-3 (citing cases). Although not required by the Protocol Order, Jane Street also provided additional information:

a. An explanation that the options in the audited financial statement were traded on securities exchanges, and thus the terms of the underlying options contracts are standardized and set by the Options Clearing Corporation, meaning there were no bespoke contracts to produce;

b. The method used to calculate the value of the options contracts (even though that valuation method was already described in detail in the audited financial statement); and

c. Confirmation that none of the options contracts were with affiliates of Jane Street. *Id.*, Ex. 4 at 4-7.

10. Yet, on November 21, 2023—43 days after Jane Street's supplemental submission and 132 days after its initial Protocol Submission—the Trust informed Jane Street that it would not dismiss it from the Adversary Proceeding. *Id.*, Ex. 6. For the first time, the Trust argued that the alleged Share Repurchases from Jane Street were not "settlement payments" and thus not qualifying transactions. *Id.*, Ex. 6 at 2-6. The Trust also maintained that Jane Street's audited financial statement filed with the SEC and sworn declarations were insufficient to establish that

it was a financial participant, reprising its position that the Court cannot take judicial notice of SEC filings, but without providing any factual basis to contest their accuracy. *Id.*, Ex. 6 at 6-7.

11. Undersigned counsel timely met and conferred with the Trust's counsel on December 7, 2023, in accordance with the Protocol Order. The meet-and-confer did not resolve the dispute.

ARGUMENT

12. 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).[2]

13. 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 Sys., Inc. (In re Quorum Health Corp.)*, 2023 WL 2552399, at *5 (Bank. D. Del. Mar. 16, 2023). Both prongs are satisfied here.

[2] 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.

I. The Share Repurchases Are Qualifying Transactions

14. Jane Street 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.

15. 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 the "[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. Jane Street Is A Qualifying Participant

16. 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 "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).

17. Jane Street has amply demonstrated that it is a “financial participant.” Its audited financial statement for 2019, filed with the SEC, shows that as of December 31, 2019, a date within 15 months of the petition date (October 12, 2020), Jane Street had outstanding mark-to-market options contracts positions of $569 million, including written put options contracts with an aggregate notional value of $2.7 billion. Firsenbaum Decl., Ex. 1 at 2; *id.*, Ex. 2 ¶ 5. Jane Street thus exceeded the $1 billion notional or actual principal amount outstanding threshold required by the statute by $1.7 *billion*, and its options positions exceeded the $100 million statutory mark-to-market threshold by $469 *million*. *Id.*, Ex. 1 at 2; *id.*, Ex. 2 ¶ 5.

18. The Trust has not provided any basis to question the accuracy of either Jane Street’s audited financial statement filed with the SEC, or the two confirming declarations *sworn under penalty of perjury* provided by Jane Street. Rather, the Trust merely argued that this Court cannot accept Jane Street’s showing as a matter of law. But this argument fails for the same reasons provided in the Pending Protocol Motions. *See* CS/SSLLC Mot. ¶¶ 57-62; *see also* TRP Mot. ¶ 49. Courts routinely take judicial notice of such documents on motions to dismiss. *See, e.g.*, *Quorum Health*, 2023 WL 2552399, at *7 (granting motion to dismiss based on SEC filing showing that defendant exceeded statutory threshold for financial participant status); *In re Nine West LBO Sec. Litig.*, 482 F. Supp. 3d 187, 203 & n.20 (S.D.N.Y. 2020) (granting motion to dismiss based on 82 defendants’ SEC filings showing they were registered investment companies and thus “financial institutions”), *aff’d in relevant part by* 87 F.4th 130 (2d Cir. 2023). And, importantly, this motion is brought pursuant to the Protocol Order, which expressly authorizes the Court to consider such documents, especially where, as here, the Trust had not provided any

basis to question their accuracy. Indeed, the Protocol Order would be a nullity if the Trust could simply refuse to accept audited financial statement and sworn declarations.

19. In recent filings and responses to other Defendants' submissions pursuant to the Protocol Order, the Trust has cited *Covidien* to support its position that the Court should not take judicial notice of SEC-filed audited financial statements. *See, e.g.*, D.I. 269 ¶ 62. The Trust is wrong on the law of this Circuit, *see* CS/SSLLC Mot. ¶¶ 58-61, and about any applicability of this Court's decision in *Covidien* here. To start, as just explained, 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 a 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 at 203 (taking judicial notice of SEC filings to find that defendants were registered investment companies and thus "financial institutions"). 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 *did* take judicial notice 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).

20. The circumstances that have caused courts in certain circumstances to refuse, in the context of a Rule 12(b)(6) motion, 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 cases "involved allegations of securities fraud arising out of alleged misrepresentations made in the defendants' SEC filings," *see id.*, thus directly calling into question the accuracy of the defendant's statements.[3] Here, in contrast, the only allegation in the Amended Complaint about Jane Street (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, 56. There is no allegation calling into question the

[3] 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.").

accuracy of Jane Street's audited financial statement. On this very basis, in *Quorum Health*, Judge Shannon explained why facts contained in a defendant's SEC filings could be considered for their truth where, as here, the other party has not provided any basis to question the accuracy of those facts. *See* 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)). And Judge Shannon is not alone. *See 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).

21. 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, those 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* ¶ 18. The Trust's position that the Court should now ignore the evidence provided by Jane Street 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 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.

22. Moreover, Jane Street is not asking the Court to take judicial notice of its SEC filing. As authorized by the Protocol Order, Jane Street 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)).

CONCLUSION

23. For these reasons, Jane Street respectfully requests that the Court enter the proposed order submitted herewith as Exhibit A granting the relief requested by the motion and dismissing Jane Street from the Adversary Proceeding.[4]

[4] As noted above, Jane Street 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 Jane Street 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 Jane Street is entitled to dismissal pursuant to the Protocol Order, and should the Trust nevertheless continue to pursue claims against it, Jane Street 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: February 6, 2024
Wilmington, Delaware

By: /s/ Jeremy W. Ryan

Jeremy W. Ryan (No. 4057)
Andrew L. Brown (No. 6766)
POTTER ANDERSON CORROON LLP
1313 N. Market Street, 6th Floor
Wilmington, Delaware 19801
Telephone: (302) 984-6000
Email: jryan@potteranderson.com
abrown@potteranderson.com

-and-

Philip D. Anker *(admitted pro hac vice)*
Noah A. Levine *(admitted pro hac vice)*
Ross E. Firsenbaum *(admitted pro hac vice)*
Michael McGuinness *(admitted pro hac vice)*
Austin M. Chavez *(admitted pro hac vice)*
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, New York 10007
Telephone: (212) 230-8000
Email: philip.anker@wilmerhale.com
noah.levine@wilmerhale.com
ross.firsenbaum@wilmerhale.com
mike.mcguinness@wilmerhale.com
austin.chavez@wilmerhale.com

Counsel to Defendant Jane Street Capital, LLC