SULLIVAN & CROMWELL LLP

TELEPHONE: 1-212-558-4000
FACSIMILE: 1-212-558-3588
WWW.SULLCROM.COM

125 Broad Street
New York, New York 10004-2498

LOS ANGELES • PALO ALTO • WASHINGTON, D.C.
BRUSSELS • FRANKFURT • LONDON • PARIS
BEIJING • HONG KONG • TOKYO
MELBOURNE • SYDNEY

October 22, 2024

The Honorable John T. Dorsey
United States Bankruptcy Court for the District of Delaware
824 N. Market Street, 5th Floor
Wilmington, Delaware 19801

Re: *Alameda Research Ltd. et al.* v. *Michael Giles et al.*, Adv. Pro. No. 23-50380

Dear Judge Dorsey:

We write on behalf of Plaintiffs in the above-captioned adversary proceeding in response to Defendants' *Notice of Supplemental Authority in Further Support of Defendants' Motion to Dismiss the Complaint* [Adv. D.I. 285] filed on October 18, 2024. Plaintiffs have reviewed the submission with Defendants' interpretation of the Second Circuit's non-binding summary order in *In re Boston Generating LLC*, 2024 WL 4234886 (2d Cir. Sept. 19, 2024), and the summary order itself. The Court should disregard the submission and *In re Boston Generating* for at least three reasons.

First, Defendants' submission violates Local Rule 7007-1(b), which prohibits "additional briefs, affidavits or other papers in support of or in opposition to" a fully briefed motion to dismiss from being "filed without prior approval of the Court." Del. Bankr. L.R. 7007(1)(b). The rule provides the limited exception "that a party may call to the Court's attention and briefly discuss pertinent cases decided after a party's final brief is filed or after oral argument." *Id.* But Defendants' submission goes beyond "briefly" discussing a "pertinent" case and instead purports to interpret the decision and engages in impermissible advocacy. The Court should therefore disregard the submission for failure to comply with Local Rule 7007-1(b). *See In re Quantum Foods, LLC*, 558 B.R. 111, 116 (Bankr. D. Del. 2016) ("The local rule prevents endless rounds of briefing or prejudice to an opposing party.").

Second, as Plaintiffs explained in their brief in opposition to Defendants' motion to dismiss, Western Alliance Bank's purported role in the transaction at issue here should be disregarded under the Supreme Court's controlling decision in *Merit Management*. Adv. D.I. 153 at 20-25. In *Merit Management*, the Supreme Court held that "the relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the

overarching transfer that the trustee seeks to avoid," and, accordingly, Western Alliance Bank's role "is simply irrelevant to the analysis under § 546(e)." *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893-95 (2018). The Second Circuit's summary order in *Boston Generating* directly conflicts with the Supreme Court's clear holding in *Merit Management*, and relying on it would abrogate the *Merit Management* decision.

Third, even if this Court were to consider *Boston Generating*, the out-of-circuit, non-binding decision is not precedential and in any event does not militate in favor of dismissal. *See* 2d Cir. Local R. 32.1.1(a) ("Rulings by summary order do not have precedential effect"); *see also* 2d Cir. Internal Operating P. 31.1.1 (summary orders may be issued when decision is unanimous and "each panel judge believes that no jurisprudential purpose is served by an opinion"). The *Boston Generating* court found that an agency relationship existed by virtue of the interactions between the parties and the court's interpretation of the relevant agreements. *See In re Boston Generating*, 2024 WL 4234886, at *3. But the agreements underlying the decision in *In re Boston Generating* are materially different from, and do not contain the pertinent language included in, the agreements at issue in this proceeding, which specifically disclaim any agency relationship. *Compare In re Boston Generating*, 12-ap-01879 (MEW) (Bankr. S.D.N.Y.), ECF Nos. 272-1 at 163-414, 290-1, *with* Adv. D.I. 179-1 ("Paying Agent undertakes to perform the duties set forth herein, each of which is ***ministerial and non-fiduciary*** in nature") and Adv. D.I. 101-4 ("Escrow Agent shall be obligated only to perform the duties specifically set forth in this Agreement, which shall be deemed ***purely ministerial in nature***, and ***shall under no circumstances be deemed to be a fiduciary*** to Any Party or any other person.") (emphases supplied). The agreements at issue in *Boston Generating* contained no such disclaimers, which under the Second Circuit's decisions could mean that an agency relationship might exist. *See In re Tribune Co. Fraudulent Conveyance Litig.*, 946 F.3d 66, 79 (2d. Cir. 2019) (defining agency at common law by reference to a fiduciary relationship); *In re Nine West LBO Sec. Litig.*, 87 F.4th 130, 149 (2d Cir. 2023) ("To further expand the scope of § 546(e) and § 101(22)(A) and immunize transactions in which a bank took only purely ministerial action, made no payments, and had no discretion would not further Congress's purpose."). At bottom, agency is a question of fact that should be reserved for the factfinder, and the Court should disregard Defendants' invitation to speculate as to Western Alliance Bank's role at the pleading stage. *See Lang* v. *Morant*, 867 A.2d 182, 186 (Del. 2005).

For the reasons set forth herein, the Court should disregard Defendants' *Notice of Supplemental Authority in Further Support of Defendants' Motion to Dismiss the Complaint* and the Second Circuit's summary order in *In re Boston Generating*.

Respectfully,

Justin J. DeCamp