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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re Genesis Global Holdco, LLC, *et al*.,[1] Debtors.	Chapter 11 Case No. 23-10063 (SHL)
GEMINI TRUST COMPANY, LLC, for itself and as agent on behalf of the Gemini Lenders, Plaintiff, v. GENESIS GLOBAL CAPITAL, LLC, GENESIS GLOBAL HOLDCO, LLC, and GENESIS ASIA PACIFIC PTE. LTD., Defendants.	Adv. Proc. No. 23-01192 (SHL)

GEMINI TRUST COMPANY, LLC'S MOTION TO DISMISS COUNTERCLAIMS IV AND VI IN THEIR ENTIRETY AND COUNTERCLAIM VII INSOFAR AS IT PERTAINS TO THE ADDITIONAL COLLATERAL

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's tax identification number (as applicable), are: Genesis Global Holdco, LLC (8219); Genesis Global Capital, LLC (8564); Genesis Asia Pacific Pte. Ltd. (2164R). For the purpose of these Chapter 11 Cases, the service address for the Debtors is 175 Greenwich Street, 38th Floor, New York, NY 10007.

Plaintiff/Counterclaim Defendant Gemini Trust Company, LLC ("Gemini") submits this motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Counterclaims IV and VI in their entirety, and Counterclaim VII insofar as it pertains to the Additional Collateral, as asserted in the *Answer, Affirmative Defenses, and Counterclaims of Genesis Global Capital, LLC* ("GGC"), *to the Complaint.* [Adv. Proc. Docket No. 10] (the "Answer" and the "Counterclaims".) Gemini respectfully alleges:

Relief Requested

1. By this Motion to Dismiss, Gemini seeks dismissal of Counterclaims IV and VI in their entirety, and Counterclaim VII insofar as it pertains to the Additional Collateral as asserted by GGC in its Counterclaims.

2. On October 27, 2023, Gemini filed a complaint against Defendants GGC, Genesis Global Holdco, LLC, and Genesis Asia Pacific Pte. Ltd. (collectively, "Genesis" or the "Debtors") asserting four counts: (i) declaratory judgment that Gemini is entitled to set off the proceeds of its foreclosure of the collateral transferred to Gemini in August 2022 (the "Initial Collateral); (ii) declaratory judgment that Gemini has a secured interest in certain additional shares of Grayscale Bitcoin Trust (the "Additional Collateral"); (iii) declaratory judgment that the Additional Collateral is not property of any Debtor's estate; and (iv) claim for the imposition of a constructive trust over the Additional Collateral.

3. On November 21, 2023, GGC filed its *Answer, Affirmative Defenses and Counterclaims to the Complaint*. [Adv. Proc. Docket No. 10].

4. For the reasons set forth in Gemini's memorandum of law in support of the Motion to Dismiss (the "Memorandum of Law"), filed contemporaneously herewith and incorporated herein by reference, Gemini now seeks dismissal of (i) Counterclaim IV, which seeks a declaration

that Gemini does not hold a secured interest in the Additional Collateral; (ii) Counterclaim VI, which seeks to avoid the transfer of Additional Collateral as an avoidable preference under 11 U.S.C. § 547(b); and (iii) Counterclaim VII insofar as it seeks to recover the Additional Collateral under 11 U.S.C. § 550(a) based on GGC's allegation of an avoidable preference.

5. Consistent with the schedule adopted by this Court, Gemini intends to file a motion to dismiss addressing the Counterclaims as they pertain to the Initial Collateral on the separate deadline established by this Court.

Prayer for Relief

WHEREFORE, Gemini respectfully prays that this Court dismiss Counterclaims IV and VI in their entirety, and Counterclaim VII insofar as it pertains to the Additional Collateral.

Conclusion

For the foregoing reasons, Gemini respectfully requests entry of the proposed order attached hereto as **Exhibit A**, (i) granting Gemini's Motion to Dismiss; (ii) dismissing Counterclaims IV and VI of GGC's Counterclaims in entirety and Counterclaim VII insofar as it pertains to the Additional Collateral; and (iii) granting such other and further relief as may be necessary and proper.

Dated: December 18, 2023
New York, New York

Respectfully submitted,

/s/ Daniel I. Forman

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Exhibit A

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re Genesis Global Holdco, LLC, *et al*.,[1] Debtors.	Chapter 11 Case No. 23-10063 (SHL)
GEMINI TRUST COMPANY, LLC, for itself and as agent on behalf of the Gemini Lenders, Plaintiff, v. GENESIS GLOBAL CAPITAL, LLC, GENESIS GLOBAL HOLDCO, LLC, and GENESIS ASIA PACIFIC PTE. LTD., Defendants.	Adv. Proc. No. 23-01192 (SHL)

ORDER DISMISSING GENESIS GLOBAL CAPITAL, LLC'S COUNTERCLAIMS IV AND VI IN THEIR ENTIRETY AND COUNTERCLAIM VII INSOFAR AS IT PERTAINS TO THE ADDITIONAL COLLATERAL

Upon Gemini Trust Company, LLC's Motion to Dismiss Counterclaims IV and VI in Their Entirety and Counterclaim VII Insofar as It Pertains to the Additional Collateral (the "Motion to Dismiss")[2] in the above-captioned adversary proceeding, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b) (the "Bankruptcy Rules"); and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and that the Court may enter a final order

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's tax identification number (as applicable), are: Genesis Global Holdco, LLC (8219); Genesis Global Capital, LLC (8564); Genesis Asia Pacific Pte. Ltd. (2164R). For the purpose of these Chapter 11 Cases, the service address for the Debtors is 175 Greenwich Street, 38th Floor, New York, NY 10007.

[2] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Motion to Dismiss.

consistent with Article III of the United States Constitution; and the Court having considered the Motion to Dismiss and the Memorandum of Law; and notice of the Motion to Dismiss having been given in accordance with the Bankruptcy Rules and the Local Bankruptcy Rules for the Southern District of New York; and it appearing that no other further notice need be provided; and the Court having held a hearing to consider the Motion to Dismiss; and upon the record of the hearing; and after due deliberation and sufficient cause appearing therefor:

IT IS HEREBY ORDERED THAT:

1. The Motion to Dismiss is GRANTED as set forth herein.

2. Counterclaims VI and VI and Counterclaim VII insofar as it pertains to the Additional Collateral fail to state a claim upon which relief may be granted.

3. Counterclaims IV and VI as filed by Genesis Global Capital, LLC are dismissed in their entirety.

4. Counterclaim VII as filed by Genesis Global Capital, LLC is dismissed insofar as it pertains to the Additional Collateral.

5. This Court shall retain jurisdiction with respect to any other matters, claims, rights or disputes arising from or related to the Motion to Dismiss or the implementation, interpretation or enforcement of this Order.

Dated: _____, 2024
New York, New York

_____
HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re Genesis Global Holdco, LLC, *et al*.,[1] Debtors.	Chapter 11 Case No. 23-10063 (SHL)
GEMINI TRUST COMPANY, LLC, for itself and as agent on behalf of the Gemini Lenders, Plaintiff, v. GENESIS GLOBAL CAPITAL, LLC, GENESIS GLOBAL HOLDCO, LLC, and GENESIS ASIA PACIFIC PTE. LTD., Defendants.	Adv. Proc. No. 23-01192 (SHL)

MEMORANDUM OF LAW IN SUPPORT OF GEMINI TRUST COMPANY, LLC'S MOTION TO DISMISS COUNTERCLAIMS IV AND VI IN THEIR ENTIRETY AND COUNTERCLAIM VII INSOFAR AS IT PERTAINS TO THE ADDITIONAL COLLATERAL

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's tax identification number (as applicable), are: Genesis Global Holdco, LLC (8219); Genesis Global Capital, LLC (8564); Genesis Asia Pacific Pte. Ltd. (2164R). For the purpose of these Chapter 11 Cases, the service address for the Debtors is 175 Greenwich Street, 38th Floor, New York, NY 10007.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Plaintiff/Counterclaim Defendant Gemini Trust Company, LLC ("Gemini") respectfully submits this memorandum of law in support of its motion to dismiss (the "Motion") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, filed contemporaneously herewith, in which Gemini moves to dismiss Counterclaims IV and VI in their entirety, and Counterclaim VII insofar as it pertains to the Additional Collateral, as asserted in the *Answer, Affirmative Defenses, and Counterclaims of Genesis Global Capital, LLC ("GGC"), to the Complaint* [Adv. Proc. Docket No. 10] (the "Answer" and the "Counterclaims").

PRELIMINARY STATEMENT[2]

Gemini brought this adversary proceeding in response to the Debtors' wrongful retention of the Additional Collateral, which GGC unconditionally pledged as security for GGC's borrowing from the Earn Users. In November 2022, via the Second Amendment to the Security Agreement, GGC pledged certain GBTC shares to Gemini to secure those loans. Gemini thus has a secured interest in this Additional Collateral pursuant to the Security Agreement and Second Amendment.

As explained in detail in Gemini's opposition to the Debtors' motion to dismiss, also filed today, the Debtors' attempts to evade GGC's obligations under the Second Amendment are unavailing. The plain terms of the Second Amendment foreclose the Debtors' argument that GGC never "pledged" the Additional Collateral (such that the Additional Collateral therefore never became "collateral") because GGC wrongfully refused to transfer it. The Debtors' strained reading of the Second Amendment would directly contradict the parties' clear intent in entering into the Second Amendment.

Under these circumstances, the Court can and should dismiss GGC's Counterclaim IV, which seeks a declaration that Gemini does not hold a secured interest in the Additional Collateral.

[2] Capitalized terms not otherwise defined herein shall have the meanings given to them in the Complaint.

GGC's Counterclaim IV is the mirror-image of Count II of Gemini's complaint and should be dismissed for the same reasons the Court should deny the Debtors' motion to dismiss Count II of Gemini's complaint.[3] Counterclaim IV (like the Debtors' motion to dismiss) rests on the Debtors' mistaken premise that Gemini could not take a secured interest in the Additional Collateral if it was not transferred to Gemini by GGC. Because that understanding of the Second Amendment is wrong as a matter of law, Counterclaim IV should be dismissed.

The Court should also dismiss Counterclaim VI, which seeks to avoid the transfer of the Additional Collateral as an avoidable preference under 11 U.S.C. § 547(b), and Counterclaim VII insofar as it seeks to recover the Additional Collateral under 11 U.S.C. § 550(a) based on GGC's allegation of an avoidable preference. Those claims are barred by the safe harbor in 11 U.S.C. § 546(e). As the Debtors' own legal positions in this case demonstrate, that transfer is subject to the safe harbor because it is a transfer to Gemini (which qualifies as a financial institution) by GGC (which qualifies both as a financial participant and as a forward contract merchant) made in connection with a securities contract and in connection with forward contracts. *See* 11 U.S.C. § 546(e).

BACKGROUND

The following background is drawn from the allegations of the Counterclaims, documents referenced or relied upon therein, and matters of which the Court may take judicial notice. *See, e.g., Vengalattore v. Cornell Univ.*, 36 F.4th 87, 102 (2d Cir. 2022).

A. The Gemini Earn Program And GGC's Pledge Of Collateral

Prior to the Debtors' bankruptcy filing, GGC "provided lending and borrowing services for digital assets and fiat currency." *Am. Disclosure Statement with Respect to the Am. Joint Plan*

[3] *See* Gemini's opposition to the Debtors' motion to dismiss, [Adv. Proc. Docket No.14], filed contemporaneously herewith.

of Genesis Global Holdco, LLC et al., Under Chapter 11 of the Bankruptcy Code [Docket No. 1031] (the "Am. Disclosure Statement"), at 25. As part of that business, GGC entered into the Gemini Earn Program, under which participants (the "Earn Users") could choose to loan digital assets to GGC in return for a fee. Counterclaims ¶ 15. Gemini is a trust company organized under the laws of New York; Gemini operates a cryptocurrency platform allowing its users to buy, sell, and store cryptocurrencies. *Id.* ¶ 14. In connection with the Gemini Earn Program, Gemini acts as custodian and authorized agent of the Earn Users pursuant to tripartite Master Loan Agreements ("MLAs") between individual Earn Users as lender, GGC as borrower, and Gemini as custodian and authorized agent. *Id.* ¶ 15.

GGC did not initially pledge collateral in connection with its borrowings from Earn Users. But in August 2022—in the midst of broad turmoil in the cryptocurrency market and in the aftermath of the collapse of one of the Debtors' major counterparties, Singapore-based hedge fund Three Arrows Capital—Gemini sought collateral from GGC as security for Earn Users' loans to GGC. Counterclaims ¶¶ 1-3, 18-19; *see also Adversary Complaint* (the "Complaint") *[Adv. Proc. Docket No. 1]* ¶ 23; Answer ¶ 23. On August 15, 2022, GGC entered into a Security Agreement with Gemini, pursuant to which GGC pledged 30,905,782 GBTC shares (the "Initial Collateral") to Gemini for the benefit of Earn Users. *See* Counterclaims ¶¶ 1, 19; Compl. Ex. 1, Security Agreement. GGC transferred the Initial Collateral to Gemini on or about August 18, 2022. Counterclaims ¶ 23.

Following the execution of the Security Agreement, GGC faced increasing financial difficulties and demands from counterparties. Counterclaims ¶ 24. On October 13, 2022, Gemini provided GGC 30 days' notice of its intention to terminate the Gemini Earn Program. *Id.* That deadline was later extended to November 22, 2022. Compl. ¶ 37; Answer ¶ 37.

During this period, GGC and Gemini entered into two amendments to the Security Agreement. Counterclaims ¶¶ 25, 31. The first of those amendments (the "First Amendment"), dated November 7, 2022, provided that the term of the Security Agreement, which had been scheduled to terminate on November 15, 2022, would be extended until GGC had fully paid what it owed under the Gemini Earn Program. *See* Counterclaims ¶¶ 22, 25-26. The First Amendment to the Security Agreement thus extended the term of the Security Agreement to cover the extended deadline for termination of the Gemini Earn Program.

Following the First Amendment to the Security Agreement, Gemini requested that GGC pledge additional collateral to further secure GGC's obligations under the Gemini Earn Program. Counterclaims ¶ 30. On November 10, 2022, GGC's ultimate parent company, Digital Currency Group, Inc. ("DCG") agreed to deliver an additional 31,180,804 GBTC shares (the "Additional Collateral") to GGC, and GGC agreed to provide those shares to Gemini to serve as additional collateral for loans that Earn Users had made to GGC pursuant to a second amendment to the Security Agreement (the "Second Amendment"). Counterclaims ¶ 31; Compl. Ex. 4, Second Amendment to Security Agreement.

B. GGC's Default And Refusal To Deliver The Additional Collateral

On November 16, 2022, GGC suspended withdrawals under the Gemini Earn Program. Counterclaims ¶ 37. That same day, Gemini informed GGC via e-mail that it had foreclosed on the Initial Collateral through "a private sale to us in accordance with Section 9-610 of the Uniform Commercial Code at the market price of $9.20 per share as of 4:00 PM EST for total proceeds of $284,333,194.40" and stated that "[s]uch amount, less the cost and expenses of foreclosure, will be applied as set forth in Section 3(b) of the Security Agreement to the Secured Obligations." *Id.* ¶ 38.

According to GGC, following Gemini's foreclosure on the Initial Collateral, DCG delivered the Additional Collateral to GGC on November 22, 2022. *Id.* ¶ 35. But GGC has since refused to deliver the Additional Collateral to Gemini. *Id.* ¶ 36. Instead, GGC alleges that it has maintained the Additional Collateral with its transfer agent, Continental Stock Transfer & Trust Company, and has commingled the Additional Collateral with other holdings of GBTC. *Id.*

C. The Present Dispute

Gemini's complaint, filed in this proceeding on October 27, 2023, asserts claims in respect of both the Initial Collateral and the Additional Collateral. In particular, Count I seeks a declaratory judgment that Gemini conducted a valid foreclosure on the Initial Collateral and that, as a result, the Earn Users' unsecured deficiency claim against GGC should be set off by the proceeds of that foreclosure ($284,333,194.40). Compl. ¶¶ 66-67. Count II seeks a declaratory judgment that Gemini has a secured interest in the Additional Collateral pursuant to the Second Amendment to the Security Agreement. *Id.* ¶¶ 72-75. In the alternative, Count III seeks a declaratory judgment that the Additional Collateral is not property of any Debtors' estate, *id.* ¶ 79; and Count IV seeks the imposition of a constructive trust over the Additional Collateral for the benefit of Gemini and the Earn Users, *id.* ¶ 85.

On November 21, 2023, the Debtors filed a motion under Rule 12(b)(6) seeking dismissal of the complaint in its entirety as to Genesis Holdco LLC ("Holdco"), and Genesis Asia Pacific Pte. Ltd. ("GAP"), and seeking dismissal of Counts II, III, and IV (*i.e.*, Gemini's claims pertaining to the Additional Collateral) as to GGC. GGC answered and asserted affirmative defenses as to Count I (with respect to the Initial Collateral), and asserted counterclaims in respect of both the Initial Collateral and the Additional Collateral.

In compliance with the scheduling order entered on December 18, 2023 [Adv. Proc. Docket No. 13] (the "Scheduling Order"), this Motion addresses three of GGC's counterclaims in respect

of the Additional Collateral.[4] In Counterclaim IV, GGC seeks a declaratory judgment that Gemini does not hold a valid security interest in the Additional Collateral (the mirror image of Count II in Gemini's complaint, which is the subject of the Debtors' pending motion to dismiss and Gemini's opposition filed contemporaneously herewith). Counterclaims ¶ 67. In Counterclaim VI—which is pleaded in the alternative to Counterclaim IV, *see id.* ¶ 76—GGC seeks a declaratory judgment that GGC's pledge of Additional Collateral is avoidable as a preferential transfer under 11 U.S.C. § 547(b). Counterclaims ¶ 84. Based on GGC's allegation of an avoidable preferential transfer, Counterclaim VII seeks to recover the Additional Collateral from Gemini pursuant to 11 U.S.C.§ 550(a). Counterclaims ¶ 88.

LEGAL STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable in adversary proceedings through Bankruptcy Rule 7012, a bankruptcy court may dismiss a party's counterclaim if the pleading does not "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Gowan v. Patriot Grp., LLC (In re Dreier LLP)*, 452 B.R. 391, 406 (Bankr. S.D.N.Y. 2011) (internal quotations omitted). In resolving a motion to dismiss, a court may consider the pleading's allegations, documents referenced or relied upon therein, and matters susceptible to judicial notice. *See, e.g.*, *Vengalattore*, 36 F.4th 87 at 102.

[4] Consistent with the Scheduling Order, Gemini intends to file a motion to dismiss addressing the Counterclaims as they pertain to the Initial Collateral on the separate deadline established by this Court.

ARGUMENT

I. COUNTERCLAIM IV SHOULD BE DISMISSED BECAUSE THE DEBTORS' ALLEGATIONS DEMONSTRATE THAT GEMINI HAS A SECURITY INTEREST IN THE ADDITIONAL COLLATERAL

In Counterclaim IV, GGC seeks a declaration that Gemini does not have a secured interest in the Additional Collateral. GGC's claims that its own wrongful conduct—that is, its refusal to deliver the Additional Collateral to Gemini—means that the Additional Collateral was never pledged to Gemini under the Security Agreement. But GGC's premise is wrong. As a matter of law, it conflicts with the plain language of the Security Agreement and the parties' manifest intent. Because Counterclaim IV's allegations offer no legally cognizable basis to conclude that Gemini lacks a security interest in the Additional Collateral, Counterclaim IV should be dismissed.[5]

A. The Additional Collateral Was "Pledged" And Became Collateral The Moment That GGC Received It

GGC does not dispute that the purpose of the Second Amendment was to provide collateral as security for Earn Users' loans to GGC. To the contrary, GGC concedes that it "agreed to pledge" the Additional Collateral to Gemini for the benefit of Earn Users. Counterclaims ¶ 31. Despite entering into an agreement that provided Gemini with an "absolute and unconditional" security interest in the Additional Collateral, Compl. Ex. 1, Security Agreement § 4, GGC now suggests that Gemini has no security interest in the Additional Collateral because GGC never "pledged" the GBTC shares to Gemini, given GGC's refusal to transfer the GBTC shares to Gemini. Counterclaims ¶ 66.

[5] In its opposition to the Debtors' motion to dismiss, also filed today, Gemini has explained that its claim for a declaratory judgment that Gemini holds a security interest in the Additional Collateral cannot be dismissed for the alternative reason that the Security Agreement is, at a minimum, ambiguous as to whether the Additional Collateral would be pledged only upon delivery to Gemini. *See Gemini's Mem. of Law in Opp'n to Debtors' Mot. to Dismiss*, at 14-15, [Adv. Proc. Docket No. 14]. We acknowledge that if the Court determines that the Security Agreement is ambiguous as to the requirements to establish a security interest, then both Gemini's Count II and the Debtors' Counterclaim IV should survive these dueling motions to dismiss.

That narrow reading of the Security Agreement is foreclosed, as a matter of law, because it focuses myopically on a single definition, while largely ignoring the rest of the contract. *See Williams Press, Inc. v. State*, 37 N.Y.2d 434, 440 (1975) (courts must read contracts as a whole to give each clause its intended purpose; the "meaning of a writing may be distorted where undue force is given to single words or phrases"). GGC's interpretation also is at odds with the clear intent of the parties, is unreasonable, and would render the Second Amendment largely meaningless. The Court should accordingly reject GGC's interpretation. *See Norma Reynolds Realty, Inc. v. Edelman*, 29 A.D.3d 969, 969 (App. Div. 2006) ("[t]he fundamental precept of contract interpretation is that written agreements are construed in accordance with the parties' intent"); *Macy's Inc. v. Martha Stewart Living Omnimedia, Inc.*, 127 A.D.3d 48, 54 (N.Y. App. Div. 2015) (contracts should not be interpreted to produce an absurd result, such as one rendering the contract commercially unreasonable); *see also C.P. Apparel Mfg. Corp. v. Microfibers, Inc.*, 210 F. Supp. 2d 272, 275-76 (S.D.N.Y. 2000) (rejecting defendants' interpretation of contract where it rendered most, if not all, of the agreement meaningless).

The parties intended for the Second Amendment to provide Gemini with a secured interest in the Additional Collateral, *i.e.*, the GBTC shares specified in the agreement. The Security Agreement is clear that none of (1) GGC's status as the "pledgor," (2) the Additional Collateral being considered collateral, or (3) Gemini's secured interest in that collateral was dependent on GGC transferring the collateral to Gemini. That conclusion is evidenced by, among other things:

- the definition of GGC as the "Pledgor" (Compl. Ex. 1, Security Agreement at 1);
- the second "whereas" clause in the Security Agreement, which states that GGC, "the Pledgor has agreed to pledge to" Gemini "certain collateral to secure the Pledgor's obligations under" the MLAs (Compl. Ex. 1, Security Agreement at 1);
- Section 1 of the Security Agreement, which is entitled "Transfer of Collateral"

(Compl. Ex. 1, Security Agreement § 1);

- Section 5 of the Security Agreement, in which GGC represented and warranted that it was the "sole owner" of "the Collateral" and had "the right to transfer the Collateral, free and clear of any security interest, lien, encumbrance, or other restrictions" (Compl. Ex. 1, Security Agreement § 5(b)); and

- the first "whereas" clause in the Second Amendment, which states that GGC, as pledgor, through the Security Agreement, "agreed to pledge to" Gemini "certain collateral to secure Pledgor's obligations under" the MLAs (Compl. Ex. 4, Second Amendment at 1).

The definition of GGC as the "Pledgor" and the "whereas" clauses in both the Security Agreement and Second Amendment reflect the parties' intention that GGC was pledging the specified GBTC shares in its possession—upon execution of the Security Agreement with respect to the Initial Collateral and upon receipt from DCG with respect to the Additional Collateral—and that Gemini was to have an "absolute and unconditional" security interest in those shares. Furthermore, if the Additional Collateral became "collateral" only upon transfer from GGC to Gemini, it would not have made any sense to discuss the "Transfer of Collateral" in Section 1 of the Security Agreement. Speaking of a "Transfer *of* Collateral"—as opposed to a transfer of assets that would become Collateral upon transfer—confirms the parties' understanding that the GBTC shares would *already* be Collateral at the time they were transferred to Gemini. Nor would GGC have been able to represent or warrant that it was the "sole owner" of "the Collateral" or that it had the "right to transfer the Collateral, free and clear of any security interest, lien, encumbrance, or other restriction." That is because, if the Additional Collateral became "collateral" only after GGC transferred the GBTC shares to Gemini—as GGC now alleges—GGC would not have been the "sole owner" of the shares. Nor would GGC have been able to transfer the shares.

It is no answer, as GGC contends, that Section 2 of the Security Agreement, regarding "The Pledge," defines "Collateral" in part by reference to shares transferred by GGC to Gemini, including shares "credited to the GTC Account." By including reference to the GGC transfers, the

parties merely addressed the possibility (under Section 6 of the Security Agreement and Section 3 of the Second Amendment) that GGC might receive back a portion of the collateral pursuant to a "Collateral Return Request" or provide additional collateral pursuant to a "Collateral Top-Up Request." Occurrence of either event would alter the number of GBTC shares that Gemini was holding as collateral. But the fact that the collateral might have changed *in the future* does not mean that Gemini never had a secured interest in the initial GBTC shares specified in the Security Agreement and Second Amendment. The plain language of the agreements shows that the parties intended the security interest to be effective as soon as GGC received the Additional Collateral, and not only after GGC completed the initial transfer of the shares. Considering the Security Agreement and Second Amendment as a whole, the Court should give effect to that intent. *See W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162-63 (N.Y. 1990) (reviewing contract "as a whole to determine its purpose and intent").

B. Even If A Transfer Were Required, DCG's Transfer Of The Additional Collateral Resulted In A Pledge Of The Additional Collateral

Even if GGC's myopic focus on Section 2 of the Security Agreement were proper (and it is not), dismissal of Counterclaim IV is warranted because *DCG's* transfer of the GBTC shares specified in the Second Amendment unquestionably resulted in a pledge of the Additional Collateral.

GGC alleges that, because *GGC* never transferred the Additional Collateral *to Gemini*, GGC never pledged the GBTC shares as security and the shares never became "collateral" under the Security Agreement. *See* Counterclaims ¶ 66. But that contention misreads Section 2's clear language, which does not require a transfer *by* GGC at all. To the contrary, Section 2 contemplates that the Additional Collateral could be transferred not only by GGC to Gemini, but also "***on behalf***

of *[GGC] . . .* ***for the benefit of*** *[Gemini] or the [Earn Users]*." Counterclaims ¶ 20 (emphasis added).

Here, GGC specifically acknowledges that DCG delivered the Additional Collateral on November 22, 2022. *Id.* ¶ 35. And the language of the Second Amendment itself confirms that this delivery was done on behalf of GGC, to permit GGC to satisfy its obligation to pledge the Additional Collateral to Gemini. *See* Compl. Ex. 4, Second Amendment to Security Agreement § 1. For precisely the same reason, DCG's delivery to GGC was done for the benefit of Gemini and the Earn Users—that is, the ultimate holders of a security interest in the Additional Collateral under the terms of the Second Amendment. *Id.*

Thus, even accepting GGC's view that the GBTC's status as collateral is determined exclusively by Section 2 of the Security Agreement, DCG's transfer constituted a pledge of the Additional Collateral, which in turn gave rise to Gemini's security interest in the Additional Collateral. As a matter of law, under the plain terms of the Security Agreement, GGC is not entitled to a declaration that Gemini does not hold a security interest in the Additional Collateral, and Counterclaim IV should be dismissed.

II. COUNTERCLAIM VI SHOULD BE DISMISSED BECAUSE THE SECOND AMENDMENT IS PROTECTED FROM AVOIDANCE BY SECTION 546(e)'S SAFE HARBOR

After claiming in Counterclaim IV that the lack of a transfer precludes this Court finding that Gemini had a security interest in the collateral, Debtors' Counterclaim VI seeks, in the alternative, to avoid the *transfer* of the Additional Collateral pursuant to the Second Amendment as a preferential transfer under Section 547(b) of the Code. But that claim is barred by the safe harbor embodied in Section 546(e), which prohibits avoidance of a "transfer made by or to (or for the benefit of)," *inter alia*, a forward contract merchant or a financial participant (each, a "Qualifying Participant") in connection with a forward contract or securities contract (each, a

"Qualifying Transaction"). *See* 11 U.S.C. § 546(e); *Fairfield Sentry Ltd. v. Theodoor GGC Amsterdam (In re Fairfield Sentry Ltd.)*, Adv. Proc. No. 10-03496 (SMB), 2020 Bankr. LEXIS 3489, at *13-14 (Bankr. S.D.N.Y. Dec. 14, 2020) (noting that a safe-harbor defense turns on a "qualifying participant" and a "qualifying transaction").

The preconditions for Section 546(e)'s safe harbor are satisfied here, as evidenced by GGC's own allegations in its Counterclaims and other information that is properly subject to judicial notice, including the Debtors' own admissions in the course of this Chapter 11 case. Counterclaim VI must therefore be dismissed. *See, e.g.*, *Kirschner v. Robeco Cap. Growth Funds – Robeco BP US Premium Equities (In re Nine W. LBO Sec. Litig.)*, No. 20-3257-cv (L), 2023 U.S. App. LEXIS 31258, at *29 (2d Cir. Nov. 27, 2023) (affirming, in part, decision granting motion to dismiss under Section 546(e)'s safe harbor); *Enron Corp. v. Bear, Stearns Int'l Ltd. (In re Enron Corp.)*, 323 B.R. 857, 869 (Bankr. S.D.N.Y. 2005) (in resolving Rule 12(b)(6) motion, relying on public records and SEC filings to evaluate defendants' status as qualifying entities for purposes of safe-harbor defense).

A. Gemini And GGC Are Qualifying Participants For Purposes Of Section 546(e)

Gemini is a Qualifying Participant for purposes of Section 546(e)'s safe harbor because it qualifies as a "financial institution." 11 U.S.C. § 546(e). In addition, GGC is a Qualifying Participant because it qualifies as both (1) a "financial participant" and (2) a "forward contract merchant." *Id.*

1. Gemini Is A Financial Institution

Section 101(22) of the Bankruptcy Code defines "financial institution," in relevant part, as "an entity that is a . . . trust company." 11 U.S.C. § 101(22). As GGC acknowledges, "Gemini is a trust company organized under the laws of New York." Counterclaims ¶ 14. Thus, Gemini is a

financial institution under Section 101(22) and is a Qualifying Participant for purposes of Section 546(e).

2. GGC Is A Financial Participant

Section 101(22A) of the Bankruptcy Code defines "financial participant," in relevant part, as an entity that "at the time of the date of the filing of the petition, has one or more [securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, or master netting 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) at [the time of the date of the filing of the petition] or any day during the 15-month period preceding the date of the filing of the petition." 11 U.S.C. § 101(22A). Under this definition, GGC qualifies as a financial participant because it was a party to forward contracts of a total value well in excess of $1,000,000,000 on the petition date.

The Debtors have elsewhere effectively conceded as much. In the Debtors' objection to the proof of claim filed by the Joint Liquidators of Three Arrows Capital, the Debtors explained that the contracts pursuant to which the Debtors operated their lending business can qualify as forward contracts. *Debtors' Second Omnibus Objection (Substantive) to Claim Nos. 523, 526, 527, 981, 982 and 990 Pursuant to 11 U.S.C. §502 and Fed. R. Bankr. P. 3007 (No Liability)* [Bankr. Dkt. No. 658], (the "3AC Claim Objection"). In particular, a "forward contract" is defined as "a contract . . . for the purchase, sale, or transfer of a commodity . . . with a maturity date more than two days after the date the contract is entered into." 11 U.S.C. § 101(25)(A). Indeed, assuming that the assets at issue qualify as commodities (as the Debtors argued is the case with respect to all forms of cryptocurrencies and digital assets, *see* 3AC Claim Objection ¶ 144), the requirements for a forward contract are readily satisfied here. *See In re Nat'l Gas Distribs., LLC*, 556 F.3d 247, 255 (4th Cir. 2009). *First*, as the Debtors explained, the loaned asset is properly understood to be the

subject of a lending contract. *See id.* at 259; 3AC Claim Objection ¶ 145. *Second*, the Debtors' lending and borrowing arrangements qualify because the loans did not require delivery within two days of origination. *See In re Nat'l Gas Distribs., LLC*, 556 F.3d at 260; 3AC Claim Objection ¶ 147. As the Debtors explained, agreements that do not specify a maturity date—such as the open-term agreements that governed a significant portion of the Debtors' borrowing—satisfy that requirement. *See* 3AC Claim Objection ¶ 148 (citing *In re MBS Mgmt. Servs., Inc.*, 690 F.3d 352, 355-57 (5th Cir. 2012)). *Third*, the loan agreements specify fixed price, quantity, and time terms because they must identify the amount borrowed, an interest rate, and either a fixed maturity or open term. *See In re Nat'l Gas Distribs., LLC*, 556 F.3d at 260; 3AC Claim Objection ¶ 149. *Fourth*, these arrangements were unquestionably related to the financial markets, because the Debtors (including GGC) were in the business of lending and borrowing. *See In re National Gas Distribs., LLC*, 556 F.3d at 260; 3AC Claim Objection ¶ 150.

In light of the vast size of the Debtors' lending and borrowing business, there can be no doubt that GGC qualifies as a financial participant under these settled legal principles. The Debtors have stated that "[b]etween October 21, 2021 and January 19, 2023, Genesis had a lending and borrowing relationship with approximately 1,065 unaffiliated counterparties with which it engaged in either lending or borrowing of digital assets, or both." 3AC Claim Objection ¶ 155 n.49. The Debtors have also stated that "Genesis originated approximately $309,000,000 in loans per day, $2,000,000,000 in loans per week, and $8,000,000,000 in loans per month." *Id.*

It is unnecessary to endorse the Debtors' suggestion that *all* cryptocurrencies are commodities under the Commodity Exchange Act (and hence under the Bankruptcy Code, *see* 11 U.S.C. § 761) to confirm that GGC is a financial participant. On the petition date, GGC had outstanding borrowings with external counterparties in excess of $1.26 billion denominated in

Bitcoin, the characterization of which as a commodity is uncontroversial. *See Notice of Summary of the Debtors' Schedule and Statements,* [Bankr. Docket No. 187], at 8 (reporting third-party borrows of $1,260,447,000 denominated in Bitcoin); 3AC Claim Objection ¶ 141 (observing that "both Bitcoin and ETH are subject to futures listed on regulated, designated contract markets, including the Chicago Mercantile Exchange . . . and therefore are presumptively classified as commodities under Section 761"). GGC therefore qualifies as a financial participant because it had more than $1,000,000,00 in forward contracts outstanding on the petition date.

3. GGC Is A Forward Contract Merchant

GGC qualifies as a forward contract merchant because it is "an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity . . . or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade." 11. U.S.C. § 101(26). As the Debtors have acknowledged, GAP satisfies that definition because its "business was to enter into digital asset loans and loans secured by digital assets, and to borrow and loan digital assets with comparably favorable rates of arbitrage." 3AC Claim Objection ¶ 155. That conclusion also extends to GGC, which operated the same sort of lending and borrowing business in other geographic locations. *See* Am. Disclosure Statement at 25 (noting that GGC "provided lending and borrowing services for digital assets and fiat currency"); *id.* at 26 ("The Company's lending and borrowing service was offered primarily through two entities serving different geographies: GGC and GAP.").

B. GGC's Pledge Of The Additional Collateral Pursuant To The Second Amendment Is A Qualifying Transaction For Purposes Of Section 546(e)

GGC's pledge of the Additional Collateral pursuant to the Second Amendment is a Qualifying Transaction for purposes of Section 546(e) because that transfer was (1) made in

connection with a securities contract and (2) made in connection with forward contracts. 11 U.S.C. § 546(e).

1. The Additional Collateral Was Pledged In Connection With A Securities Contract

The Debtors' 3AC Claim Objection confirms that the Second Amendment is properly characterized as a securities contract. There, the Debtors addressed transfers by 3AC to GAP that are materially identical to the transfer of the Additional Collateral that is at issue here. In particular, 3AC had transferred 22.37 million GBTC shares to GAP—which the Debtors referred to as the "GBTC Transfers"—as collateral to secure digital asset loans and in connection with margin calls related to those loans. 3AC Claim Objection ¶ 134(b). Citing the pledge agreements pursuant to which 3AC had pledged the GBTC shares as collateral, the Debtors explained that those GBTC Transfers were "protected under Section 546(e) because they were executed in connection with the Digital Asset Loans [*i.e.*, loans of cryptocurrency assets], which are also securities contracts within the meaning of Section 741(7) of the Bankruptcy Code because, by their terms, they call for the 'loan of a security,' namely GBTC." 3AC Claim Objection ¶ 153 n.48; *see also id.* ¶ 137 (explaining that GAP's pledge agreements with 3AC were securities contracts).

In the Second Amendment, GGC pledged the identical security (GBTC shares) as part of an identical economic arrangement—that is, a pledge of collateral to secure underlying borrowing of cryptocurrency assets from the Earn Users. It therefore follows that GGC's transfer of the Additional Collateral was made in connection with a securities contract, and is thus a Qualifying Transaction for purposes of Section 546(e).

2. The Additional Collateral Was Pledged In Connection With Forward Contracts

The 3AC Claim Objection also demonstrates that GGC's pledge of the Additional Collateral pursuant to the Second Amendment was a transfer in connection with forward contracts.

As explained above, the Debtors have taken the position that the borrowing of cryptocurrency assets—of the sort that GGC engaged in with the Earn Users as part of the Debtors' lending and borrowing business—qualifies as a forward contract under the Code. At least when the loan is denominated in Bitcoin, that conclusion is uncontroversial. *See supra* at 11-15.

GGC's pledge of the Additional Collateral pursuant to the Second Amendment was made in connection with GGC's underlying borrowing of digital assets from Earn Users—just as 3AC had posted collateral to secure its borrowing from GAP, in transactions that the Debtors argued were subject to Section 546(e)'s safe harbor. *See* 3AC Claim Objection ¶¶ 134(b), 144(c). In addition, the Bankruptcy Code provides that "security agreement[s]" are "forward contracts" for purposes of Section 546(e), if they are "related to any agreement or transaction referred to in subparagraph (A) [*i.e.*, forward contracts], (B), (C), or (D)." 11 U.S.C. § 101(25)(E). Section 101(50), in turn, defines a "security agreement" as an agreement which "creates or provides for a security interest," 11. U.S.C. § 101(50), *i.e.*, "a lien created by an agreement." 11. U.S.C. § 101(51) (defining "security interest"). If GGC's underlying borrowing from Earn Users qualifies as forward contracts (as the Debtors have maintained) then Section 101(50)'s definition would make clear that the Security Agreement and the Second Amendment are themselves forward contracts. *See* 3AC Claim Objection ¶ 152 (drawing this conclusion with respect to 3AC's pledge agreements, which were "related" to the loan term sheets that memorialized 3AC's borrowing).

* * *

In sum, simply applying the Debtors' own legal positions to the facts as alleged in GGC's Counterclaims compels the conclusion that the pledge of the Additional Collateral was a transfer made both to a Qualifying Participant (*i.e.*, a transfer to Gemini, a financial institution) and by a Qualifying Participant (*i.e.*, a transfer by GGC, which is both a financial participant and a forward

contract merchant), and was a Qualifying Transaction (*i.e.*, a transfer made in connection with a securities contract and in connection with forward contracts). Counterclaim VI should thus be dismissed as a matter of law under Section 546(e)'s safe harbor.

III. COUNTERCLAIM VII SHOULD BE DISMISSED INSOFAR AS IT PERTAINS TO THE ADDITIONAL COLLATERAL BECAUSE GGC'S PREFERENCE CLAIM FAILS AS A MATTER OF LAW

Counterclaim VII is a claim for recovery of avoidable transfers under 11 U.S.C. § 550(a). As to the Additional Collateral, that claim is premised exclusively on GGC's assertion that GGC is entitled to avoid its pledge of the Additional Collateral as a preferential transfer under Section 547(b). *See* Counterclaims ¶ 86. As we have explained, however, GGC's preference claim as to the Additional Collateral fails as a matter of law and should be dismissed. *See supra* at 11-18. Thus, Counterclaim VII should also be dismissed insofar as it pertains to the Additional Collateral. *See* 11 U.SC. § 550(a) (authorizing recovery only "to the extent that a transfer is avoided").

CONCLUSION

For the foregoing reasons, Gemini respectfully requests that this Court dismiss Counterclaim IV and Counterclaim VI in their entirety, and Counterclaim VII insofar as it pertains to the Additional Collateral.

Dated: December 18, 2023

Respectfully submitted,

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