Daniel I. Forman
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019
Telephone: (212) 728-8000
Facsimile: (212) 728-8111

-and-

Mark T. Stancil (admitted *pro hac vice*)
Donald Burke (admitted *pro hac vice*)
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, DC 20006
Telephone: (202) 303-1000
Facsimile: (202) 303-2000

Anson B. Frelinghuysen
Carl W. Mills
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
Telephone: (212) 837-6000

Counsel to Gemini Trust Company, LLC

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)

REPLY IN SUPPORT OF GEMINI TRUST COMPANY, LLC'S MOTION TO DISMISS COUNTERCLAIMS I AND III IN THEIR ENTIRETY AND COUNTERCLAIM VII INSOFAR AS IT PERTAINS TO THE INITIAL 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

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

The Debtors' Opposition to Gemini's Motion to Dismiss [Adv. Proc. Docket No. 32] (the "Opposition" or "Opp.") offers no sound reason to avoid dismissal of Counterclaims I and III in their entirety and Counterclaim VII insofar as it pertains to the Initial Collateral.[2] Indeed, the Opposition presumes that (largely retail) creditors should be punished precisely because their agent's actions have *preserved* this Court's practical ability to rule on the collateral dispute that is presented for decision in this proceeding. Such a rule is not only legally baseless and (to our knowledge) unprecedented, but adopting it here would encourage parties in future Chapter 11 cases to actively frustrate the orderly disposition of assets.

As to Counterclaim I, dismissal is warranted because GGC's allegations show that Gemini foreclosed on the Initial Collateral. Critically, GGC does not deny that a secured party may foreclose by taking title to pledged securities and applying the value of those securities to reduce the debtor's outstanding liability. GGC's attempts to dispute whether this occurred fall short. In particular, when Gemini foreclosed on November 16, 2022, it promptly notified GGC of the foreclosure, identified the proceeds of the foreclosure down to the last cent, and stated that GGC would be liable only for the deficiency that remained after application of those proceeds. Even under GGC's understanding of the law, those facts establish a foreclosure. Indeed, there can be no doubt that GGC would now be insisting that a foreclosure occurred if the value of the GBTC shares had subsequently declined—that is, a scenario in which refusing to recognize Gemini's foreclosure would produce a larger deficiency claim against the GGC estate. There is simply no basis—in the law or basic fairness—for GGC's insistence that Gemini and hundreds of thousands of (largely

[2] Capitalized terms not otherwise defined herein shall have the same meanings given to them in Gemini's Memorandum of Law in Support of Gemini Trust Company, LLC's Motion to Dismiss Counterclaims I and III in their Entirety and Counterclaim VII insofar as it Pertains to the Initial Collateral [Adv. Proc. Docket No. 24] (the "Opening Memorandum" or "Opening Memo.").

retail) Earn Users should be whipsawed because the value of the GBTC shares has appreciated over time.

As to Counterclaim III (and the portion of Counterclaim VII that pertains to the Initial Collateral), GGC's attempt to avoid the First Amendment as a constructively fraudulent transfer should be rejected. As GGC tacitly acknowledges, its avoidance theory is directly foreclosed by "the *per se* rule consistently applied in this District, which provides that a debtor's grant of a security interest in its assets to a lender who has previously given the debtor a cash loan may not be considered a fraudulent conveyance." *Geron v. Palladin Overseas Fund, Ltd. (In re AppliedTheory Corp.)*, 330 B.R. 362, 363 (S.D.N.Y. 2005) (*In re AppliedTheory Corp. II*). GGC thus tries to change the subject by arguing that it is actually seeking to avoid an obligation created by the First Amendment, rather than a transfer of an interest in its property. But that unprecedented argument fails at the outset: The First Amendment did not require GGC to do anything, so it cannot be understood as involving any incurrence of a new obligation by GGC. Moreover, GGC's argument would be self-defeating, because if there was no transfer then there would be no logical or legal basis for GGC's attempt to recover the Initial Collateral under Section 550(a) of the Bankruptcy Code. GGC's argument would also introduce entirely arbitrary distinctions between economically identical transactions, and if taken seriously it would drain any practical significance from the settled rule that a transfer of collateral to secure an antecedent debt is not a constructive fraud. GGC's claims seeking to avoid the First Amendment and recover the Initial Collateral should accordingly be dismissed.

I. COUNTERCLAIM I SHOULD BE DISMISSED BECAUSE GGC IS NOT ENTITLED TO A DECLARATION THAT GEMINI DID NOT FORECLOSE ON THE INITIAL COLLATERAL

A. GGC's Allegations Do Not Support The Requested Declaration That Gemini Did Not Foreclose

GGC does not dispute Gemini's showing (Opening Memo. 11-12) that a secured party may effect a sale and disposition under the UCC by taking title to pledged securities and applying the value of the those securities to reduce the debtor's outstanding liability. *See Burns v. Anderson*, 123 F. App'x 543, 547-48 (4th Cir. 2004). GGC nonetheless insists (Opp. 9-14) that the allegations of its Counterclaims, if accepted as true, show that no foreclosure took place. But GGC offers no legally sound basis for that conclusion.

1. GGC appears to contend (Opp. 11, 13) that its Counterclaims do not demonstrate a foreclosure because they do not include an allegation that Gemini reduced GGC's outstanding debts to Earn Users by the value of the Initial Collateral at the time of the foreclosure. But that contention is answered by Gemini's November 16, 2022, foreclosure notice—which GGC has acknowledged receiving and the text of which GGC does not dispute. In that notice, Gemini promptly and unequivocally identified the amount of proceeds generated by the foreclosure ($284,333,194.40) and explained that, because "the net proceeds of the collateral [were] less than the secured obligations," GGC "remain[ed] liable *for any deficiency*." Adv. Proc. Docket 9-4 at 2 (GGC's filing attaching Gemini's foreclosure notice) (emphasis added); *see also* Opp. 7-8. Gemini thus made clear that GGC would *not* remain liable for the portion of its obligations to Earn Users that was discharged by the foreclosure—that is, exactly "[t]he reduction of outstanding debt" that GGC describes as "an essential component of a credit bid." Opp. 13.

Indeed, as Gemini has previously explained (Opening Memo. 2-3)—and GGC pointedly fails to contest—GGC would surely have agreed with Gemini's reading of the foreclosure notice

if the value of the GBTC shares today was below their foreclosure value. GGC does not even pretend that if it had been in the Debtors' financial interest to hold Gemini and the Earn Users to the higher foreclosure value, the Debtors would nonetheless have proceeded as though no foreclosure occurred and offered the Earn Users an increased deficiency claim to offset the post-foreclosure diminution in the value of the GBTC shares. (As Gemini has explained (Opening Memo. 2, 8), this is not some trivial counterfactual: Shortly before the Debtors' bankruptcy filing, GBTC shares were trading *below* the $9.20 per share market price that prevailed at the time of Gemini's foreclosure.)

GGC's concession not only highlights the opportunism of the Debtors' position in this litigation, but also demonstrates the fundamental illogic of rejecting Gemini's foreclosure notice, as GGC proposes to do here. For starters, if Gemini's notice was sufficient to expose Gemini and the Earn Users to the *risk* of post-foreclosure diminution in the value of the GBTC shares, then basic fairness and equity dictate that they should also receive the *benefit* of post-foreclosure appreciation. Moreover, Gemini's prompt notice to GGC of the fact and amount of the foreclosure eliminated any possibility that *Gemini* could wait to see which way the financial wind was blowing and then opportunistically react to changes in the market value of the GBTC shares. That is, Gemini could not have sought to proceed as though no foreclosure occurred if the value of the shares declined, while retaining the option to retroactively declare a foreclosure if the value of the shares increased. Instead, Gemini's prompt notice locked in the result in real-time—no matter what happened to the market value of the GBTC shares after the foreclosure. Under these circumstances, GGC can identify no functional purpose that would be served by requiring additional allegations about application of the foreclosure proceeds against GGC's outstanding liabilities to the Earn Users.

GGC separately quibbles (Opp. 13) with the phrasing of Gemini's Complaint, in which Gemini alleged that it is "holding $284.3 million in proceeds from that foreclosure for the benefit of Earn Users." Compl. ¶ 5. But that phrasing merely recognizes the reality that the value of the GBTC shares has not yet been distributed to the Earn Users, and the practical need to arrive at a calculation of the Earn Users' deficiency claim against the GGC estate in light of the Debtors' challenges to the fact and manner of Gemini's foreclosure. *See id.* The statement in Gemini's Complaint comes nowhere close to conceding that Gemini did not foreclose on the Initial Collateral—especially in light of the Complaint's abundant allegations that Gemini *did* conduct a valid foreclosure. *See id.* ¶¶ 5, 10, 43-46, 66. In any event, the relevant pleading for purposes of Gemini's Motion to Dismiss is not Gemini's Complaint, but rather GGC's Counterclaims. Because the Counterclaims' allegations demonstrate that GGC is not entitled to its requested declaration that Gemini did not foreclose, dismissal of Counterclaim I is warranted.[3]

2. GGC briefly gestures at a handful of additional arguments to avoid dismissal. None has merit.

GGC suggests, without explanation, that a valid foreclosure was possible only if Gemini "identif[ied] the Earn Users as the purchasers of the collateral." Opp. 11. But GGC cites no UCC provision imposing such a requirement, and none exists. In any event, GGC acknowledges that the phrasing of Gemini's foreclosure notice—that Gemini had foreclosed on the Initial Collateral by

[3] GGC also errs in suggesting (Opp. 8-9 & n.6) that Gemini has somehow conceded that no foreclosure occurred by filing the Master Claim for the full amount of the Earn Users' loans to GGC, rather than reducing that amount by the proceeds of Gemini's foreclosure. As Gemini's Opening Memorandum explained (at 12 n.6), Gemini asserted the full amount of the Earn Users' loans as a protective matter, in light of the Debtors' challenges to the fact and manner of Gemini's foreclosure. The Master Claim affirmatively and unequivocally alleged that "Gemini foreclosed on the [Initial] Collateral" on November 16, 2022. Master Claim Annex ¶ 4. There is no basis for GGC's suggestion that Gemini could have backed away from that allegation if the value of the GBTC shares had declined.

a private sale "to us"—is entirely compatible with a foreclosure in which a reduction in GGC's outstanding indebtedness to the Earn Users served as the relevant proceeds. *See id.* at 10.

GGC also insists that "Gemini would have had to distribute the [Initial] Collateral to the Earn Users" in order to effectuate a foreclosure. Opp. 11. Again, however, GGC cites no legal authority for that proposition. And Gemini's Opening Memorandum explained (at 3, 12) that whether Gemini was in compliance with an obligation to distribute the GBTC shares (or their value) to the Earn Users is an issue between Gemini and the Earn Users, as to which GGC has no conceivable stake, and a decision as to when to distribute the proceeds of a foreclosure does not bear on the conceptually distinct question of whether a foreclosure occurred in the first place. GGC's Opposition offers no argument in response. Nor does GGC grapple with the perverse incentives that its proposed rule would create, by requiring an agent to immediately distribute value from a foreclosure to hundreds of thousands of individual creditors despite the possibility of legal challenges to the agent's actions or disputes about how to allocate the foreclosure value. Indeed, this case illustrates the extreme risks of that approach, as the Debtors have not only challenged whether a foreclosure occurred, but also sought to recover the Initial Collateral itself as an avoidable transfer. One can only imagine the different tune that the Debtors would be singing now if Gemini had immediately distributed the GBTC shares (or their value), leaving the Debtors to pursue their avoidance claims against hundreds of thousands of individual Earn Users.

Finally, GGC vaguely adverts (Opp. 11-12 & n.9) to the possibility of securities or banking regulatory concerns associated with a foreclosure on the Initial Collateral. But GGC does not explain how any such regulatory concerns would actually prohibit a transaction in which Gemini foreclosed on the Initial Collateral for the benefit of the Earn Users. If anything, the existence of any such concerns would further undermine GGC's suggestion that Gemini was required to

distribute the GBTC shares to hundreds of thousands of Earn Users immediately in order to effectuate a valid foreclosure—particularly where the parties defined Gemini's remedies in the event of a default by GGC in the broadest possible terms. *See* Compl. Ex. 1, Security Agreement § 3(a)(i) (authorizing Gemini to "liquidate any or all Collateral through one or more public or private sales *or other dispositions*") (emphasis added); *id.* § 3(a)(ii) (authorizing Gemini to "exercise any rights and remedies available to [Gemini] or the [Earn Users] under applicable law").

B. Dismissing Counterclaim I Would Serve A Useful Purpose

Retreating from the merits of its request for declaratory relief, GGC contends (Opp. 14-15) that Gemini's arguments for dismissal should be disregarded because resolving them would (in GGC's view) serve no purpose. That contention is incorrect.

As an initial matter, there is no inconsistency between Gemini's request for dismissal of Counterclaim I and Gemini's decision not to move for summary disposition of Count I of Gemini's Complaint. Contrary to GGC's suggestion (Opp. 14), those two claims are not mirror images of one another: Gemini's Count I seeks a declaration that (i) Gemini validly foreclosed on the Initial Collateral and (ii) the foreclosure generated $284,333,194.40 in proceeds for application against GGC's obligations to the Earn Users. *See* Compl. ¶¶ 62-67. By contrast, GGC has disaggregated those two questions, with Counterclaim I seeking a declaration that Gemini did not foreclose on the Initial Collateral (*see* Counterclaims ¶ 50) and Counterclaim II seeking, in the alternative, a determination that Gemini's foreclosure violated applicable law and a corresponding award of damages (*see id.* ¶ 58). Seeking dismissal of Counterclaim I thus provides a straightforward procedural mechanism to resolve, as a matter of law, the question whether Gemini foreclosed on the Initial Collateral under the facts that GGC has alleged. Once that issue is resolved, whether Gemini's foreclosure generated the amount of proceeds Gemini contends potentially implicates

factual issues beyond the allegations of the parties' pleadings, which explains why Gemini has not (yet) sought a summary disposition on Count I of its Complaint.

Resolving the fundamental question of whether Gemini foreclosed at all at this stage would also serve a useful purpose, by bringing greater clarity to the parties' legal relations, helping to frame further proceedings in this case, and narrowing the range of potential litigation outcomes. And because Counterclaim I can readily be disposed of as a matter of law, for all of the reasons discussed above and in Gemini's Opening Memorandum, there would be no sound justification for declining to adjudicate Gemini's Motion to Dismiss on the merits.

II. GGC'S CONSTRUCTIVE-FRAUD THEORY FAILS AS A MATTER OF LAW

This Court should also reject GGC's attempt to avoid the First Amendment to the Security Agreement as a constructively fraudulent transfer. Nothing in GGC's Opposition undermines Gemini's showing that Counterclaim III should be dismissed as a matter of law, as should Counterclaim VII insofar as it relates to the Initial Collateral (and thus depends on GGC's avoidance claim in Counterclaim III).[4]

A. The First Amendment Is Not Subject To Avoidance Under Section 548

GGC's Opposition does not contest "the *per se* rule consistently applied in this District, which provides that a debtor's grant of a security interest in its assets to a lender who has previously given the debtor a cash loan may not be considered a fraudulent conveyance." *In re AppliedTheory Corp. II*, 330 B.R. at 363; *see also, e.g.*, *In re Pfeifer*, No. 12-13852 (ALG), 2013 WL 3828509, at *3 & n.3 (Bankr. S.D.N.Y. July 23, 2013); *In re M. Silverman Laces, Inc.*, No. 01 Civ.6209 (DC), 2002 WL 31412465, at *6 (S.D.N.Y. Oct. 24, 2002). Instead, GGC principally contends (Opp. 16-18) that the per se rule is inapplicable because its Counterclaims supposedly seek to

[4] *See* Opp. 24-25 (single-paragraph argument acknowledging that the resolution of Counterclaim VII, insofar as it relates to the Initial Collateral, turns on Counterclaim III).

avoid the incurrence of an obligation by GGC pursuant to the First Amendment, rather than a transfer of an interest in GGC's property. That attempt to evade the straightforward application of this jurisdiction's per se rule is meritless and should be rejected.

1. GGC is simply incorrect that, pursuant to the First Amendment, GGC "incurred a further obligation in connection with a transfer of collateral that had already happened." Opp. 17. As this Court has explained, "[a]lthough the Bankruptcy Code does not define an 'obligation,' 'it presumably means [a] formal binding agreement or acknowledgment of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons; esp., a duty arising by contract.'" *In re Firestar Diamond, Inc.*, 643 B.R. 528, 542 (Bankr. S.D.N.Y. 2022) (quoting *In re Asia Global Crossing, Ltd.*, 333 B.R. 199, 203 (Bankr. S.D.N.Y 2005), and ultimately, Black's Law Dictionary 1104 (8th ed. 2004)). "Considering the ordinary common meaning of obligation, it is essentially a contract or promise to perform some act or do something in the future." *Id.* (quoting *In re Zetta Jet USA, Inc.*, 2021 WL 3721477, at *14 (Bankr. C.D. Cal. Aug. 17, 2021)).

In light of that common-sense understanding, GGC did not incur any new obligation pursuant to the First Amendment because the First Amendment did not require GGC to *do* anything. Rather, by extending the termination date of the Security Agreement, the First Amendment eliminated *Gemini's* obligation to return the Initial Collateral on the original deadline of November 15, 2022. *See* Opp. 7 (redlined comparison of original Security Agreement to First Amendment). As GGC elsewhere recognizes, that change can also be understood as an "elimination of GGC's *right* to the return of that collateral on November 15, 2022." *Id.* 24-25 (emphasis added). It therefore could conceivably be evaluated as a *transfer* of an interest in GGC's property. *See* 5 *Collier on Bankruptcy* ¶ 548.03[1] (explaining that, for purposes of Section 548, the concept of a "transfer" includes "transactions in which the debtor terminates or modifies

intangible property rights, such as contract rights or releases of causes of action"). But without some agreement by GGC to "perform some act or do something in the future," *In re Firestar Diamond, Inc.*, 643 B.R. at 542, the First Amendment cannot possibly be understood to involve any incurrence of a new *obligation* by GGC.

GGC's insistence that no transfer occurred is also belied by the remedy it seeks (recovery of the Initial Collateral from Gemini) and the purported legal basis for that relief (Section 550(a) of the Bankruptcy Code). *See* Counterclaims ¶ 88. As a logical matter, if the First Amendment did not transfer to Gemini some incremental property interest in the Initial Collateral, there is no reason that avoiding the First Amendment would require the Initial Collateral to be returned to GGC. And Section 550(a) would certainly provide no legal support for that result, since that statute authorizes recovery only "to the extent that *a transfer* is avoided," and limits recovery to the "property *transferred*" (or "the value of *such* property"). 11 U.S.C. § 550(a) (emphasis added). If there is no "transfer" and thus no "property transferred," Section 550(a) would be inapplicable by its plain terms and GGC would have no possible basis for seeking recovery of the Initial Collateral.

Moreover, accepting GGC's unprecedented distinction between pledging new collateral to secure an antecedent debt and extending the duration of an existing pledge would also produce arbitrary distinctions between similar transactions, without any plausible rationale. For example, GGC appears to accept (because it does not contest) that there can be no constructive-fraud liability when a debtor transfers new collateral to secure an antecedent debt, thereby converting a previously unsecured obligation into a secured one, but GGC argues for a different result when a debtor extends the duration of a security agreement and thereby extends the time during which an already secured obligation will remain secured. In both scenarios, however, the effect of the transaction would be to permit a lender that might otherwise have been unsecured at the time of a

default to recover from the collateral pledged to secure its existing loan. In light of the economic equivalence of the two transactions, there is no apparent reason that they should be evaluated differently for purposes of a constructive fraud claim. Indeed, GGC does not even suggest any such reason for treating the two scenarios differently.

GGC also appears to accept that there would be no constructive fraud liability if Gemini had returned the Initial Collateral on November 15, 2022, as originally contemplated, and then GGC had immediately returned the Initial Collateral pursuant to a new security agreement. In that scenario, the second step would unquestionably involve a transfer of property to secure an antecedent debt, subject to the per se rule that GGC does not challenge. But there is no reason that a different legal analysis should apply when the parties agreed to effectuate precisely the same economic result by extending the duration of the existing Security Agreement through the First Amendment, instead of the roundabout mechanism of a return of the Initial Collateral followed by immediate re-delivery to Gemini.

Finally, GGC's argument is untenable because, if taken seriously, it would prove far too much. On GGC's (mistaken) logic, *any* transaction in which a debtor secures an antecedent debt could be disaggregated into (i) the transfer of a property interest in the collateral and (ii) a supposedly distinct "obligation" to leave the pledge of collateral in place. The debtor could then always seek avoidance by arguing that it is seeking to unwind not the transfer of collateral (which is insulated by the per se rule that GGC does not challenge), but rather the debtor's supposedly distinct "obligation" to maintain the pledge. To state the obvious, that would drain all practical significance from the per se rule that securing an antecedent debt is not a constructive fraud. GGC's argument should be rejected because it leads inevitably to that illogical conclusion.

2. GGC also contends (Opp. 18-21) that dismissal of its constructive-fraud theory would be unwarranted even if the First Amendment is analyzed as a transfer. But GGC responds only to an argument that Gemini has not pressed, and it has no answer to Gemini's argument that a transfer to secure an antecedent debt cannot be avoided as a constructive fraud.

Seizing on a footnote in Gemini's Opening Memorandum, GGC suggests (Opp. 19) that Gemini has sought dismissal on the ground that Gemini's agreement to delay termination of the Earn Program constituted consideration in exchange for the First Amendment. But that footnote could not be clearer that Gemini noted the inaccuracy of GGC's allegations about the absence of consideration only "[f]or the sake of context." Opening Memo. 13 n.7. Indeed, Gemini emphasized that "this factual issue *is not relevant* to the disposition of this Motion." *Id.* (emphasis added). GGC's argument that the existence and value of the consideration supporting the First Amendment present factual questions is thus entirely beside the point.

As for the argument that Gemini has actually pressed, GGC's Opposition is effectively silent. To be sure, GGC has sought to sidestep this jurisdiction's consistent body of case law holding that securing an antecedent debt is not a constructive fraud on the (mistaken) ground that this case involves only the incurrence of an obligation, rather than a transfer. *See* pp. 8-10, *supra*. But when GGC presents its alternative argument—which is premised on analyzing the First Amendment *as a transfer*—it does not return to those cases at all, let alone explain how its attempt to avoid the First Amendment can be reconciled with the settled proposition that securing an antecedent debt is not a constructive fraud. As those cases explain, GGC's focus on whether the First Amendment was supported by *new* consideration is legally misplaced. The Code defines "value" to include "securing of a present or *antecedent* debt of the debtor." 11 U.S.C. § 548(d)(2)(A) (emphasis added); *see also Geron v. Palladin Overseas Fund, Ltd. (In re*

AppliedTheory Corp.), 323 B.R. 838, 841-42 (Bankr. S.D.N.Y.), aff'd, 330 B.R. 362 (S.D.N.Y. 2005) (*In re AppliedTheory Corp. I*). In other words, "[p]ast consideration"—*viz.*, the loan proceeds that the debtor accepted in exchange for taking on an antecedent debt—serves as "good consideration" for a subsequent transaction securing that debt. *In re AppliedTheory Corp. I*, 323 B.R. at 842 (quoting *Pereira v. Dow Chem. Co. (In re Trace Int'l Holdings, Inc.)*, 301 B.R. 801, 805 (Bankr. S.D.N.Y. 2003)).

Rather than engaging with the relevant case law, GGC cites only inapposite cases that fail to advance its argument. For the most part, those cases state only general propositions regarding constructively fraudulent transfers, and did not involve transactions that secured an antecedent debt owed by the debtor.[5] The sole exception is *Solomon v. Stillwater Nat'l Bank & Tr. Co. (In re Solomon)*, 299 B.R. 626 (B.A.P. 10th Cir. 2003), an out-of-jurisdiction case in which the court expressly departed from the per se rule that securing an antecedent debt is not a constructive fraud. *See id.* at 636. GGC does not advocate for that position here, and *Solomon* is distinguishable in any event because—as the court in that case emphasized—the debtor had collateralized its guaranty of a third party's loan, and had not received the proceeds from the underlying loan. *See id.* at 637 ("We question the soundness of applying the per se rule in those cases where the debtor received no loan proceeds from the antecedent debt and only provides the security for a third

[5] *See In re Jesup & Lamont, Inc.*, 507 B.R. 452, 457 (Bankr. S.D.N.Y. 2014) (subsidiary pledged funds as collateral for debt owed by its parent); *Togut v. RBC Dain Correspondent Servs. (In re S.W. Bach & Co.)*, 435 B.R. 866, 870-73 (Bankr. S.D.N.Y. 2010) (broker-dealer transferred valuable right to manage customer accounts for no consideration); *Nisselson v. Empyrean Inv. Fund L.P. (In re MarketXT Holdings Corp.)*, 376 B.R. 390, 397-401 (Bankr. S.D.N.Y. 2007) (transactions in which debtor disposed of stock); *Feltman v. Wells Fargo Bank, N.A. (In re TS Emp., Inc.)*, 597 B.R. 494, 510-11 (Bankr. S.D.N.Y. 2019) (debtor paid "punitive" fees to lender in exchange for brief forbearance on outstanding loan amounts, rather than pledging collateral to secure that pre-existing debt); *Leibowitz v. Parkway Bank & Tr. Co. (In re Image Worldwide, Ltd.)*, 139 F.3d 574, 576 (7th Cir. 1998) (while insolvent, debtor guaranteed debts owed by corporate affiliate); *Silverman v. Actrade Cap., Inc. (In re Actrade Fin. Techs., Ltd.)*, 337 B.R. 791, 804-05 (Bankr. S.D.N.Y. 2005) (fact issue as to whether challenged payments satisfied antecedent debt owed by debtor); *Picard v. Estate of Chais (In re Bernard L. Madoff Inv. Sec. LLC)*, 445 B.R. 206, 225-27 (Bankr. S.D.N.Y. 2011) (complaint adequately pled that withdrawals from Ponzi scheme were subject to avoidance because they did not satisfy antecedent debts owed to defendants).

party's antecedent debt."); *see also In re AppliedTheory Corp. I*, 323 B.R. at 844 (discussing *Solomon*'s holding, but adhering to this jurisdiction's rule that "the granting of a security interest in respect of antecedent debt constitutes reasonably equivalent value or fair consideration, at least in those cases where the antecedent debt is borrowed money that was actually received – as opposed to a mere guaranty"). Here, by contrast, GGC itself borrowed from the Earn Users and thus received the proceeds from the underlying loans that it agreed to secure. The per se rule is therefore plainly applicable.

B. The First Amendment Is Protected From Avoidance By Section 546(e)(5)'s Safe Harbor

GGC's Opposition also fails to undermine Gemini's safe-harbor defense to avoidance of the First Amendment under Section 546(e)(5) of the Bankruptcy Code.

1. GGC first contends (Opp. 21-22) that Section 546(e)(5) is inapplicable because GGC is seeking to avoid the incurrence of an obligation, rather than a transfer, and Section 546(e)(5) is limited to claims seeking to "avoid a transfer." 11 U.S.C. § 546(e)(5). As explained above, however, the First Amendment cannot be characterized as involving the incurrence of an obligation by GGC. *See* pp. 8-10, *supra*. Moreover, even if GGC were correct that its "avoidance claim concerns an obligation, not a transfer" (Opp. 22), that would simply furnish an additional reason to dismiss GGC's claim to recover the Initial Collateral under Section 550(a) of the Code. *See* Counterclaims ¶ 88 (seeking to recover the Initial Collateral from Gemini "[p]ursuant to 11 U.S.C. § 550(a)). As explained above, p. 10, *supra*, Section 550(a) authorizes recovery only "to the extent that *a transfer* is avoided," and limits recovery to the "property *transferred*" (or "the value of *such* property"). 11 U.S.C. § 550(a) (emphasis added). Without a transfer, GGC would have no conceivable basis for recovery of the Initial Collateral under Section 550(a).

2. GGC also rehashes (Opp. 22-24) the arguments it advanced in opposition to Gemini's safe-harbor defense with respect to the Additional Collateral, incorporating by reference its combined opposition and reply brief addressing the Additional Collateral. Rather than belaboring these arguments, Gemini likewise incorporates by reference its own reply brief on the Additional Collateral. *See Reply 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* [Adv. Proc. Docket No. 28]. For present purposes, Gemini adds only that GGC is presumptuous in relying on "skepticism" (Opp. 23) that it claims to have detected in the Court's questioning at the January 18, 2024, oral argument. This Court has now ruled on the parties' motions with respect to the Additional Collateral without reaching Gemini's safe-harbor arguments. *See* Adv. Proc. Docket No. 35, at 33 n.21.

* * * * *

For the foregoing reasons and those stated in Gemini's Opening Memorandum, Gemini's Motion to Dismiss should be granted, Counterclaim I and Counterclaim III should be dismissed in their entirety, and Counterclaim VII should be dismissed insofar as it pertains to the Initial Collateral.

Dated: February 8, 2024

Respectfully submitted,

/s/ Daniel I. Forman

Anson B. Frelinghuysen
Carl W. Mills
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
Telephone: (212) 837-6000

Daniel I. Forman
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019
Telephone: (212) 728-8000
Facsimile: (212) 728-8111

-and-

Mark T. Stancil (admitted *pro hac vice*)
Donald Burke (admitted *pro hac vice*)
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, DC 20006
Telephone: (202) 303-1000
Facsimile: (202) 303-2000

Counsel to Gemini Trust Company, LLC