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**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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

**GEMINI TRUST COMPANY, LLC'S MEMORANDUM OF LAW IN OPPOSITION TO THE DEBTORS' MOTION TO DISMISS**

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Gemini Trust Company, LLC ("Gemini") respectfully submits this memorandum of law in opposition to the Motion to Dismiss Counts II, III, and IV of the Complaint as to Genesis Global Capital, LLC and All Counts as to Genesis Global Holdco, LLC and Genesis Asia Pacific Pte. Ltd. (ECF No. 9, the "Motion"), filed on November 21, 2023 by Genesis Global Capital, LLC ("GGC"), Genesis Holdco LLC ("Holdco"), and Genesis Asia Pacific Pte. Ltd. ("GAP")[1] (collectively, "Genesis" or the "Debtors").

## PRELIMINARY STATEMENT

The Debtors' Memorandum of Law in Support of the Motion (ECF No. 9-1, "Mem.") confirms that the Debtors have wrongfully withheld the Additional Collateral that GGC unconditionally pledged as security for the loans that Earn Users made to GGC.[2] As the Complaint alleges in detail, through the Second Amendment to the Security Agreement, GGC pledged certain GBTC shares to Gemini to secure those loans. Gemini has a secured interest in the shares pursuant to the Security Agreement and Second Amendment. GGC's interest in the GBTC shares was extremely narrow: it was limited to transferring the shares to Gemini. Neither GGC nor the other Debtors had any equitable interest in the shares. The shares are therefore not property of any Debtors' estate.

The Debtors' interpretation of the Second Amendment—*i.e.*, that GGC never "pledged" the Additional Collateral, and that the Additional Collateral therefore never became "collateral," because GGC wrongfully refused to transfer it to Gemini—would lead to a result directly contrary to the parties' intent in entering into the Second Amendment. On the other hand, as detailed below,

1. The Complaint refers to Genesis Asia Pacific Pte. Ltd. as "Genesis Asia." Given Debtors' reference in its memorandum to this as entity as "GAP," Gemini, for consistency, uses the same abbreviation herein.

2. Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Complaint.

Gemini's interpretation of the Second Amendment is consistent with the plain language of that agreement and in keeping with the parties' intent: Gemini's security interest was effective as to collateral in GGC's possession—the Initial Collateral as soon as the parties executed the Security Agreement and the Additional Collateral as soon as GGC received it from DCG. Even if the Debtors were correct that a transfer was required for the GBTC shares to be pledged and be considered collateral, DCG's transfer of the specified GBTC shares on behalf of GGC for the benefit of Gemini satisfied that requirement. The Complaint clearly pleads facts that state a claim supporting a security interest in the Additional Collateral. At worst, the agreement is ambiguous on this point, precluding dismissal.

The Complaint also pleads facts—uncontroverted in the Motion—establishing that the Debtors have no equitable interest in the Additional Collateral, such that it is appropriate to conclude that the Additional Collateral is not property of any Debtor's estate.

In the alternative, and because the Debtors challenge the validity of the Second Amendment, the Court should conclude at a minimum that the Debtors hold the Additional Collateral in constructive trust for the benefit of Gemini and Earn Users. Although not required for the Court to impose a constructive trust, every factor supporting a constructive trust is present here: GGC and Gemini had a confidential and fiduciary relationship; DCG transferred the GBTC shares to GGC for Gemini's benefit in reliance on GGC's promise to further transfer the shares to Gemini; and the Debtors' pre-petition wrongful conduct caused their unjust enrichment.

The Complaint also alleges facts, which must be accepted as true for purposes of the Motion, against Holdco and GAP, that preclude dismissal of Gemini's claims against them. The Court should reject the Debtors' cynical attempt to use their bankruptcy petitions to excuse blatantly wrongful conduct that the Debtors' engaged in prior to filing for bankruptcy.

The Debtors' Motion makes numerous references to Gemini's foreclosure on the Initial Collateral even though the Motion does not challenge that foreclosure. (*See* Mem. at 1, 2, 9). Those references are therefore irrelevant to the Motion; they appear aimed only at smearing Gemini in an obvious attempt to convince the Court to dismiss the claims actually at issue in the Motion. Gemini is compelled to state that the Debtors' assertion that Gemini seeks "to retain for its own account the massive appreciation in value of the [Initial Collateral] by virtue" of having properly foreclosed on that collateral (Mem. ¶ 1) is completely false. Gemini has made clear—including in the Complaint—that any appreciation in the value of the Initial Collateral will go to the Earn Users. (*See* Compl. ¶¶ 4, 11.) The Debtors' contention to the contrary is a cynical untruth and the latest manifestation of the Debtors' inequitable and unjust behavior, which Gemini details further below.

## FACTUAL BACKGROUND

In February 2021, Gemini began offering a new program, Gemini Earn, through its cryptocurrency platform. (Compl. ¶ 22.) The Gemini Earn Program allowed Earn Users to loan their digital assets to GGC. Certain master loan agreements ("MLAs") governed Earn Users' lending, which, among other things, entitled each Earn User to the return of any loaned digital assets upon request.[3] (Compl. ¶ 22.)

In late spring 2022, following the launch of the Gemini Earn Program, Singapore-based hedge fund Three Arrows Capital Pte. Ltd. ("3AC") collapsed and entered liquidation proceedings. (Compl. ¶ 23.) At the time, GGC had $2.3 billion in outstanding loans to 3AC. (Compl. ¶ 23.) According to the Debtors, GAP also "had substantial loans to 3AC." (Mem. ¶ 10.)

3. Each MLA was executed by three parties: (i) an individual Earn User, (ii) GGC, as borrower, and (iii) Gemini, as custodian and authorized agent on behalf of an Earn User. (Compl. ¶ 22.)

In the wake of 3AC's collapse, DCG and GGC made material misrepresentations to Gemini about GGC's financial condition to convince Gemini to keep the Earn Program in place. (Compl. ¶¶ 24-25.) Specifically, DCG and GGC fraudulently misrepresented that DCG had absorbed the losses on the 3AC loans at the parent level and that GGC was not at risk; in truth, DCG did not absorb those losses and GGC was massively insolvent. (Compl. ¶ 24.) In response to Gemini's inquiries regarding GGC's financial condition, GGC provided Gemini with fictitious financial reports and outright false statements about the financial support that DCG had supposedly provided. (Compl. ¶ 25.)

In August 2022, following Gemini's inquiries to GGC and amidst broad market turmoil, Gemini sought collateral from GGC as security for Earn Users' loans to GGC. (Compl. ¶ 26.) On August 15, 2022, Gemini, as agent on behalf of Earn Users, entered into the Security Agreement with GGC, pursuant to which GGC pledged 30,905,782 GBTC shares to secure GGC's obligations to Earn Users. (Compl. ¶ 27 & Ex. 1, Security Agreement § 1.) Section 1 of the Security Agreement is entitled "Transfer of Collateral" and implicitly refers to the 30,905,782 GBTC shares as collateral that GGC promised to transfer to Gemini. (Compl. Ex. 1, Security Agreement § 1.)

Section 2 of the Security Agreement provides that, as "security for the prompt payment and performance in full when due . . . of all liabilities and obligations of [GGC] under the [MLAs]," GGC "hereby pledges, assigns, and grants to [Gemini], for the benefit of [Gemini] and the [Earn Users], a security interest in all of [GGC's] right, title, and interest in and to all property from time to time transferred by or on behalf of [GGC] to or for the benefit of [Gemini] or the [Earn Users] in connection with this Agreement or any [MLAs]." (Compl. Ex. 1, Security Agreement § 2 (emphasis added).)

Section 4 of the Security Agreement, titled "Security Interest Absolute," provides that Gemini's rights, and "the grant of a security interest in the Collateral shall be absolute and unconditional irrespective of any circumstance." (Compl. Ex. 1, Security Agreement § 4.) And in Section 5(a) of the Security Agreement, GGC represented and warranted that the Security Agreement "creates a legal and valid security interest in the Collateral in favor of [Gemini], for its benefit and the benefit of the [Earn Users], which is enforceable against [GGC], subject to applicable bankruptcy, insolvency, reorganization or other laws affecting creditors' rights generally and subject to general principles of equity." (Compl. Ex. 1, Security Agreement § 5(a).)

On October 13, 2022, Gemini provided GGC 30 days' notice of its intention to terminate the Earn Program. (Compl. ¶ 36.) After receiving the notice, GGC again falsely represented its health and financial stability to convince Gemini to extend the timeline to terminate the program. (Compl. ¶ 37.) Based on GGC's misrepresentations, Gemini elected to delay termination of the Earn Program rather than explore more rapid termination or other relief, which Gemini would have done had it known the truth about GGC's financial condition.[4] (Compl. ¶ 37.)

On November 10, 2022, Gemini entered into the Second Amendment with GGC and DCG. (Compl. ¶ 39 & Ex. 4, Second Amendment.) Under the Second Amendment, the parties amended, among other things, Section 1 of the Security Agreement—which, again, was entitled "Transfer of Collateral"—such that DCG agreed to deliver an additional 31,180,804 GBTC shares—*i.e.*, the Additional Collateral—to GGC for the sole purpose of having GGC, in turn, provide those shares to Gemini to serve as additional collateral for loans that Earn Users had made to GGC. (Compl. ¶ 39 & Ex. 4, Second Amendment.)

4. On November 7, 2022, GGC and Gemini entered into an amendment to the Security Agreement that extended the Security Agreement's term to November 22, 2022, to ensure that termination of the Security Agreement would be coincident with termination of the Gemini Earn Program. (Compl. ¶ 38.)

Among other things, the Second Amendment added the following provision to Section 1 of the Security Agreement regarding transfer of the collateral:

> As promptly as practicable after the execution of this Second Amendment, [DCG] shall assign, sell, convey, transfer, and deliver to [GGC], or a controlled subsidiary of [GGC], all right, title and interest in and to **31,180,804** shares of [GBTC], free and clear of all liens, claims, charges and encumbrances. As promptly as practicable after such assignment, conveyance, transfer, and delivery, [GGC] shall transfer or cause to be transferred such **31,180,804** shares of [GBTC] to the GTC Account[.]

(Compl. Ex. 4, Second Amendment § 1 (emphases in original).) The parties titled Section 1 of the Second Amendment "Amendment to Collateral Amount," making clear that the Additional Collateral constituted "collateral" under the terms of the Security Agreement that GGC had previously entered. (*See* Compl. Ex. 4, Second Amendment § 1 (emphasis added).)

Had GGC not pledged the Additional Collateral to Gemini under the Second Amendment, Gemini would have terminated the Earn Program. (*See* Compl. ¶ 42.)

On November 10, the same day that the parties entered into the Second Amendment, DCG transferred the Additional Collateral to GGC. (*See* Compl. ¶ 47.) Beginning that same day, and for nearly a week, Gemini repeatedly sought confirmation that GGC was fulfilling its unconditional obligation to transfer the Additional Collateral to Gemini. (*See* Compl. ¶¶ 48-53.) But GGC refused to transfer the Additional Collateral, and instead obfuscated and outright ignored Gemini. (Compl. ¶ 48.) GGC first informed Gemini that "shares take quite a long time to transfer" because the "mechanics are complex," and that GGC had been "work[ing] diligently to understand all of the mechanics of a transfer of shares." (Compl. ¶¶ 49, 53.) GGC made these claims despite having previously transferred GBTC shares to Gemini without any issue or delay and despite the fact that DCG was able to transfer the GBTC shares to GGC the same day that the parties executed the Second Amendment. (Compl. ¶ 53; *see also* Compl. ¶¶ 27, 35.) GGC never asserted at the time that the shares were not "collateral," that it had not pledged the shares, that it owned the shares

outright, or that its obligation to transfer the shares was in any way contingent or otherwise excused. But GGC never delivered the Additional Collateral to Gemini. (Compl. ¶ 53.) Rather, GGC informed Gemini that its restructuring counsel had advised GGC, in essence, to ignore its obligations under the Second Amendment and not transfer the Additional Collateral. (Compl. ¶ 53.)[5]

On January 19, 2023, each Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. On October 27, 2023, Gemini commenced the present adversary proceeding. On November 21, 2023, Debtors filed the Motion. Also on November 21, 2023, GGC filed an Answer to Count I and asserted various Counterclaims, including a preferential transfer claim under Section 547 of the Bankruptcy Code.

## LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6), applicable here via Federal Rule of Bankruptcy Procedure 7012(b), permits dismissal of a complaint only where the complaint fails to plead enough facts to state a claim to relief that is plausible on its face. *See In re Roman Cath. Diocese of Rockville Centre*, 652 B.R. 226, 231 (Bankr. S.D.N.Y. 2023) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In determining the plausibility of the allegations, courts must assess the complaint by 'accepting all factual claims in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor.'" *Id.* (quoting *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 403 (2d Cir. 2014)).[6] "Because plausibility is a standard lower than probability, a given

5. The Debtors' Motion discusses Gemini's allegations regarding Gemini's foreclosure on the Initial Collateral. (*See* Mem. ¶¶ 22-24.) However, because GAP and Holdco make only a perfunctory argument concerning Count I, which concerns that foreclosure, and GGC has not moved to dismiss Count I, Gemini does not repeat facts related to that foreclosure here.

6. On a motion to dismiss, courts may consider documents attached to the complaint as exhibits. *See Nat'l Bank of Anguilla (Private Banking Tr.) Ltd.) v. Caribbean Com. Bank (Anguilla) Ltd.* (*In re Nat'l Bank of Anguilla (Private Banking Tr.) Ltd.*), 580 B.R. 64, 71 (Bankr. S.D.N.Y. 2018).

set of actions may well be subject to diverging interpretations, each of which is plausible, and the choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion." *Halperin v. Morgan Stanley Inv. Mgmt., Inc.* (*In re Tops Holding II Corp.*), 646 B.R. 617, 646-47 (Bankr. S.D.N.Y. 2022) (cleaned up). As such, in ruling on a motion to dismiss, a court may not properly dismiss a complaint that states a plausible version of events simply because the court finds a different version "more plausible." *Id.* at 647. In cases involving contracts, if an ambiguity exists in the contract, courts should, at the motion to dismiss stage, resolve the ambiguity in favor of the plaintiff. *See Valentine Props. Assocs., LP v. U.S. Dep't of Hous. & Urban Dev.*, No. 05 Civ.2033(SCR), 2007 WL 3146698, at *14 (S.D.N.Y. Oct. 12, 2017) (citing *Subaru Distribs. Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 122 (2d Cir. 2005)).

## ARGUMENT

### I. GEMINI PLAUSIBLY ASSERTS CLAIMS AGAINST HOLDCO AND GAP

The Court should reject the Debtors' perfunctory argument that Gemini's claims against Holdco and GAP should be dismissed. The Complaint makes numerous factual allegations against Holdco and GAP, all of which must be accepted as true at this stage. If proven true, those facts would establish that Gemini has a right to relief against both entities.

*First*, the Complaint alleges that Holdco and GAP were important players in the events giving rise to Gemini's claims. For example, the Debtors state that GAP provided loans to 3AC via an extension of working capital from GGC. (Mem. ¶ 10.)

*Second*, the Complaint plausibly asserts claims against both Holdco and GAP regarding the Initial Collateral, which is the subject of Count I, as well as the Additional Collateral, which is the subject of Counts II, III, and IV. For example, Gemini alleges that "Genesis"—defined to include Holdco and GAP in addition to GGC—"has consistently asserted in filings and discussions

with counsel that Genesis disputes that Gemini's foreclosure 'satisfied applicable law,'" and has "prevented [Gemini] from distributing the proceeds of the Initial Collateral to Earn Users." (*See* Compl. ¶ 5; *see also* Compl. at 2 (referring to GGC, Holdco, and GAP collectively as "Genesis").)

*Third*, with respect to the Additional Collateral, Gemini alleges that "Genesis"—which, again, is defined to include Holdco and GAP—"pledged an additional 31,180,804 shares of GBTC . . . to Gemini for the benefit of Earn Users." (Compl. ¶ 7.) Although Holdco and GAP were not parties to the Security Agreement or amendments thereto, the Complaint makes clear that "Gemini does not have complete knowledge and information as to the corporate relationship among [the Debtors], including which entity may actually be holding the Additional Collateral, and which entity or entities were responsible for the decision to not transfer the Additional Collateral to Gemini." (Compl. ¶ 17 n.8.) It thus can plausibly be inferred that Holdco and/or GAP had a hand in that decision or were otherwise involved in the improper failure to deliver the Additional Collateral. Debtors also assert that the Additional Collateral was commingled with GGC's other GBTC holdings at Continental Stock Transfer & Trust Company (Mem. ¶ 21), but make no representation regarding any interest that Holdco and GAP may have in the account or assets therein.

Thus, taking Gemini's allegations as true, dismissal of the Complaint as against Holdco and GAP is inappropriate at this stage.[7]

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7. Debtors argue that the Complaint should be dismissed as against GAP for lack of proper service. (Mem. ¶ 26 n.5.) However, the Debtors provide no facts supporting this bare assertion. The argument also is impossible to reconcile with the Debtors' representations to this Court in numerous filings that GAP's service address is 250 Park Avenue South, 5th Floor, New York, NY 10003 (*see, e.g.*, Decl. of Michael Leto in Support of First Day Motions and Applications in Compliance with Local Rule 1007-2, at 1 n.1 (Bankr. Dkt. ECF No. 28), which is the address at which the Complaint was served on GAP. The Court should reject the Debtors' conclusory and frivolous argument. In the event that the Court were to dismiss the claims against GAP on this basis, Gemini would re-serve the Complaint on GAP, requiring GAP to respond again.

## II. GEMINI HAS A SECURED INTEREST IN THE ADDITIONAL COLLATERAL

Count II of the Complaint seeks a declaration that Gemini has a secured interest in the Additional Collateral. Gemini's claim is supported by the plain language of the Second Amendment. GGC's argument that the Additional Collateral never became collateral because GGC wrongfully refused to transfer the Additional Collateral to Gemini rests on a fundamentally flawed and unreasonable interpretation of the Security Agreement. *First*, the fact that GGC failed to transfer the Additional Collateral to Gemini does not mean that GGC never "pledged" that Additional Collateral as security for the Earn Users' loans—to the contrary, GGC "pledged" the Additional Collateral as soon as GGC received the specified GBTC shares from DCG; no transfer to Gemini was required for those shares to become "collateral." *Second*, even if a transfer was required for the pledge to become effective and for the specified GBTC shares to become "collateral," DCG's transfer of the Additional Collateral to Genesis for the benefit of Gemini and Earn Users satisfied that requirement. At worst, the Second Amendment is ambiguous on these points, and that ambiguity must be resolved in Gemini's favor at this stage, precluding dismissal of the claim.

### 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. Notwithstanding entering into an agreement that provided Gemini with an "absolute and unconditional" security interest in the Additional Collateral, GGC now argues that Gemini has no security interest in the Additional Collateral on the theory that GGC never "pledged" the GBTC shares to Gemini because GGC refused to transfer those shares to Gemini. (*See generally* Mem.) The plain terms of the Second Amendment,

however, make clear that GGC pledged the Additional Collateral the moment that GGC received the specified GBTC shares from DCG.

GGC's interpretation of the Security Agreement myopically focuses on a single definition, while largely ignoring the rest of the contract, in contravention of well settled contract interpretation principles. *See Williams Press, Inc. v. State of N.Y.*, 37 N.Y.2d 434, 440 (N.Y. 1975) (courts 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 phases"). 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 reject the interpretation for those reasons as well. *See Norma Reynolds Realty, Inc. v. Edelman*, 29 A.D.3d 969, 969 (N.Y. App. Div. 2006) ("The 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 that rendered most, if not all, of 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 were 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 restriction" (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 after 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." And if the Additional Collateral became "collateral" only after GGC transferred the GBTC shares to Gemini, GGC would not have been the "sole owner" of the shares and it would

not have had any ability to transfer the shares.

The fact that Section 2 of the Security Agreement, regarding "The Pledge," defines "Collateral" by reference to shares transferred by GGC to Gemini, including shares "credited to the GTC Account," does not undercut the parties' clear intention to grant Gemini a secured interest in the specified GBTC shares regardless of whether they were transferred as promised. Rather, by including reference to the GGC transfers, the parties addressed the possibility (under Section 6 of the Security Agreement and Section 3 of the Second Amendment) that Gemini might return a portion of the collateral pursuant to a "Collateral Return Request" or that GGC might provide additional collateral pursuant to a "Collateral Top-Up Request." The occurrence of either event would change the number of GBTC shares that Gemini was holding as collateral. But the fact that the number of shares being held as collateral might have changed in the future does not mean that Gemini never had a secured interest in the initial tranches of GBTC shares specified in the Security Agreement and Second Amendment. The plain language of the agreements shows that the parties intended Gemini's security interest to be effective as soon as GGC received the Additional Collateral, not only after GGC transferred the shares to Gemini. 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").[8]

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8. The Court should reject GGC's conclusory statement that, even if GGC pledged the Additional Collateral to Gemini under the Second Amendment, Gemini's security interest in such shares "would not have been perfected, such unperfected security interest would have been subject to avoidance by Plaintiffs [*sic*] pursuant to Section 544 of the Bankruptcy Code," and "no perfection occurred (nor could it have occurred) because the shares were never transferred and thus were never pledged." (Mem. ¶ 30 n.6.) As the error in the quoted language indicates, if the Debtors believe that providing a security interest in the Additional Collateral to Gemini was an avoidable preference, the Debtors were required to bring a preference action or counterclaim to that effect. *Cf.* 5 Collier on Bankruptcy ¶ 547.13 (16th ed. 2023). A mere argument that they could have done so is not a basis to dismiss Gemini's claim. This is particularly true because, to the extent that the Debtors brought such action or asserted

### B. If a Transfer was Required, DCG's Transfer of the Additional Collateral Resulted in a Pledge of the Additional Collateral.

Even if the Court agrees with GGC's strained interpretation of the Security Agreement and Second Amendment (and it should not), dismissal of Count II is unwarranted because DCG's transfer of the GBTC shares specified in the Second Amendment resulted in a pledge of the Additional Collateral. GGC argues that, because GGC never transferred the Additional Collateral to Gemini, GGC never pledged the GBTC shares as security and the shares never became "collateral." (Mem. ¶ 30.) But even under GGC's view, to become "collateral," the Additional Collateral could be transferred not only by GGC to Gemini, but "on behalf of GGC" "for the benefit of Gemini and the Earn Users." (Mem. ¶ 29 (emphasis added) (alterations accepted).) As alleged in the Complaint, and drawing all reasonable inferences in Gemini's favor, these requirements were satisfied when DCG transferred the Additional Collateral on behalf of GGC for the benefit of Gemini and Earn Users. (*See* Compl. ¶¶ 39, 47.) DCG's transfer was on behalf of GGC and for the benefit of Gemini and Earn Users because the sole purpose of DCG's transfer was for GGC to then provide the specified GBTC shares to Gemini. (Compl. ¶ 39.) Thus, even accepting GGC's reading of the agreement, DCG's transfer constituted a pledge of the Additional Collateral, which gave rise to Gemini's security interest.

### C. Dismissal of Count II is Inappropriate if the Security Agreement and Second Amendment are Ambiguous.

As detailed above, if the Court interprets the Security Agreement and Second Amendment in accordance with the plain language of the agreements and the parties' intent, Gemini has a secured interest in the Additional Collateral and Count II cannot be dismissed. At worst, however, the plain language of the agreements is ambiguous, and the parties' intent cannot be gleaned from

such a counterclaim, Gemini has defenses that would defeat the Debtors' claims, which Gemini need not detail here in light of the Debtors' failure to properly assert any such claim.

that language. At the very least, as made clear by the parties' competing interpretations, there is a reasonable basis for a difference of opinion regarding whether the Security Agreement and Second Amendment required that GGC specifically transfer the additional GBTC shares to Gemini in order for Gemini's security interest to become effective. But that ambiguity would preclude dismissal of Count II. *See Valentine Properties Assocs., L.P.*, 2007 WL 3146698, at *14 (citing *Subaru Distributors Corp.*, 425 F.3d at 122) (courts resolve any ambiguity in favor of the plaintiff at the motion to dismiss stage); *see also Readick v. Avis Budget Grp., Inc.*, No. 12 Civ. 3988 (PGG), 2013 WL 3388225, at *4-5 (S.D.N.Y. July 3, 2013) (denying motion to dismiss breach of contract claim where contract at issue was ambiguous).

## III. THE ADDITIONAL COLLATERAL IS NOT PROPERTY OF ANY DEBTORS' ESTATE

Count III of the Complaint seeks a declaration that the Additional Collateral is not property of any Debtor's estate under Section 541 of the Bankruptcy Code. The Debtors' Motion does not directly address this claim. In fact, the Debtors do not cite Section 541 of the Bankruptcy Code at all and do not cite any cases for principles related to Section 541. Nor do the Debtors even attempt to explain what equitable interest they might have in the Additional Collateral. That is because they have none.

The plain language of the Second Amendment makes clear that GGC's legal interest in the Additional Collateral was limited to receiving the Additional Collateral from DCG for the sole purpose of then transferring it to Gemini for the benefit of Gemini and Earn Users. Thus, the Debtors' Motion is falsely premised on the notion that GGC had full legal title to the Additional Collateral. It never did—GGC's interest in the Additional Collateral was limited to transferring it to Gemini. Furthermore, neither the Second Amendment nor any other authority conveyed to GGC any equitable interest in the Additional Collateral, and no Debtor claims to have any such interest.

Under Section 541 of the Bankruptcy Code, property in which a debtor holds only legal title and not an equitable interest becomes property of the estate "only to the extent of a debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." 11 U.S.C. § 541(d); *see* 11 U.S.C. § 541(a)(1). In other words, the bankruptcy estate does not include "property of others in which the debtor ha[s] some minor interest such as a lien or bare legal title." *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 n.8 (1983). The extent of GGC's legal interest in the Additional Collateral is limited to the right to transfer that collateral to Gemini. And none of the Debtors hold any equitable interest in the Additional Collateral. *See Musso v. N.Y. State Higher Educ. Servs. Corp.* (*In re Royal Bus. Sch., Inc.*), 157 B.R. 932, 939-42 (Bankr. E.D.N.Y. 1993) (concluding that escrow account was not property of estate where debtor possessed "only a contingent interest" in the account based on terms of agreement).

The Second Amendment makes clear that, as "promptly as practicable after" DCG transferred the Additional Collateral to GGC, GGC was required to transfer the Additional Collateral to Gemini. The Second Amendment provided GGC no discretion or flexibility other than as to the precise timing of the transfer (so long as that transfer occurred as "promptly as practicable" after GGC received the GBTC shares from DCG). The Second Amendment certainly did not give GGC a right to refuse to transfer the GBTC shares at all, and then to do with them what it pleased. The transfer from DCG to GGC did not give GGC any equitable interest in the Additional Collateral, which GGC had unconditionally pledged as security for the assets that GGC had borrowed from Earn Users. Instead, the Second Amendment required that GGC serve as a mere conduit for the Additional Collateral. *See Harrah's Atl. City Operating Co., LLC v. Lamonica* (*In re JVJ Pharmacy Inc.*), 630 B.R. 388, 408 (S.D.N.Y. 2021) ("The mere conduit is a

financial intermediary, with actual or constructive possession of the asset, whose sole function is to transfer the property to another entity.") (quotation marks and citation omitted). The Second Amendment thus expressly limited GGC's interest in the Additional Collateral to receiving it for the benefit of, and transferring it to, Gemini. *See Musso*, 157 B.R. at 942. To read the Second Amendment otherwise would render the agreement meaningless, and the Court must therefore reject any such reading. *See C.P. Apparel Mfg. Corp.*, 210 F. Supp. 2d at 275-76. A declaration to this effect is therefore warranted.

## IV. THE DEBTORS HOLD THE ADDITIONAL COLLATERAL IN CONSTRUCTIVE TRUST FOR THE BENEFIT OF GEMINI AND EARN USERS

Even if Gemini does not have a secured interest in the Additional Collateral (and it does), the Debtors hold the Additional Collateral in constructive trust for Gemini and Earn Users.[9] The Debtors' arguments to the contrary should be rejected. *First*, the Debtors argue that the existence of the Second Amendment precludes Gemini from bringing a constructive trust claim. But because the Debtors have challenged the validity of that contract, Gemini is entitled to plead an alternative claim for constructive trust. *Second*, the Court is not required to rigidly require that each of the factors favoring imposition of a constructive claim be met. But even if the Court were to do so, each factor is satisfied here. Dismissal of Gemini's constructive trust claim is therefore inappropriate.

9. The Debtors argue in a footnote that Gemini cannot assert a claim for a constructive trust because a constructive trust is a remedy. (*See* Mem. ¶ 35 n.9.) However, courts frequently permit parties to bring constructive trust claims. *See, e.g.*, *Winklevoss Cap. Fund, LLC v. Shrem*, 351 F. Supp. 3d 710, 721 (S.D.N.Y. 2019) (collecting cases allowing constructive trust claims and noting that the distinction between a constructive trust "claim" and "remedy" was "entirely semantic") (citing *Jaffer v. Hirji*, 887 F.3d 111, 114-15 (2d Cir. 2018) (vacating grant of summary judgment on constructive trust claim without making any suggestion that the claim was not a cause of action)); *CF 135 Flat LLC v. Triadou SPY S.A.*, 15-CV-5345 (AJN), 2016 WL 5945933, at *13 (S.D.N.Y. June 21, 2016) (collecting cases).

### A. The Existence of the Second Amendment Does Not Require Dismissal of Gemini's Constructive Trust Claim.

The Debtors argue that the existence of the Second Amendment bars Gemini's constructive trust claim. (Mem. ¶¶ 16-36.) Although constructive trust claims are equitable in nature and generally not permitted where a valid, written agreement exists, Gemini may plead a constructive trust claim in the alternative because the Debtors have challenged the validity of the Second Amendment. *See, e.g.*, *Moreno-Godoy v. Gallet Dreyer & Berkey, LLP*, 14 Civ. 7082 (PAE) (JCF), 2016 WL 5817063, at *5 (S.D.N.Y. Oct. 4, 2016) ("because the existence of a contract is not undisputed, it cannot yet be determined whether the plaintiff's legal claims will be sufficient or whether an equitable remedy would need to be imposed"); *Colwell & Salmon Commc'ns, Inc. v. ArborMed Corp.*, No. 1:10–CV–01137, 2011 WL 2516926, at *4 (N.D.NY. June 23, 2011) (denying motion to dismiss constructive trust claim where the parties' contentions as to the validity of the agreement were not yet known).

Here, the Debtors challenge the validity and enforceability of the Second Amendment by asserting that "no consideration was provided to GGC in exchange for its accession to the Second Amendment." (Mem. ¶ 20 (citing Compl. Ex. 4, Second Amendment).) Therefore, the Court should reject the Debtors' argument that the existence of the Second Amendment requires dismissal of Gemini's constructive trust claim. *See Moreno-Godoy*, 2016 WL 5817063, at *5 (refusing to dismiss constructive trust claim where existence of contract was disputed and it could not yet be determined whether an equitable remedy would need to be imposed) (citing *Speedfit LLC v. Woodway USA, Inc.*, 53 F. Supp. 3d 561, 580-81 (E.D.N.Y. 2014)).

Furthermore, even if the Second Amendment is valid, the Court should not dismiss Gemini's equitable constructive trust claim if Gemini does not have an adequate remedy at law, such as if an action for breach of the Second Amendment would render Gemini and the Earn Users

materially worse off as general, unsecured creditors of the estate. *Simonds v. Simonds*, 45 N.Y.2d 233, 238, 240-41 (N.Y. 1978) (constructive trust available where decedent breached agreement with wife, but action for breach would be "fruitless" and "worthless" given estate's insolvency).

### B. The Factors Favoring Imposition of a Constructive Trust are Adequately Pled.

The Debtors argue that the factors favoring imposition of a constructive trust are not present, *i.e.*, that (1) the Debtors were not unjustly enriched when GGC refused to transfer the Additional Collateral (*see* Mem. ¶¶ 37-42); (2) GGC and Gemini did not have a fiduciary or confidential relationship (*see* Mem. ¶¶ 43-44); and (3) Gemini made no transfer in reliance on a promise by GGC (*see* Mem. ¶ 45). The Debtors' arguments do not support dismissal of Gemini's constructive trust claim because the factors favoring imposition of a constructive trust are flexible and, in any event, Gemini has adequately pled the existence of each factor.

#### *i. The factors for imposing a constructive trust are flexible*

Although, in *Sharp v. Kosmalski*, the New York Court of Appeals posited four "factors" supporting imposition of a constructive trust—which may be "useful in many cases"—the "constructive trust doctrine is not rigidly limited." *Simonds*, 45 N.Y.2d at 241.[10] Accordingly, New York courts "do not insist that a constructive trust must fit within the framework of these" factors, which are merely "flexible considerations for the court to apply in determining whether a constructive trust should be imposed." *Counihan v. Allstate Ins. Co.*, 194 F.3d 357, 362 (2d Cir. 1999) (internal quotation marks and citation omitted). In fact, New York courts have consistently stressed the need to "apply the [constructive trust] doctrine with sufficient flexibility to prevent

10. The four factors favoring imposition of a constructive trust are: (1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer of the subject *res* made in reliance on that promise; and (4) unjust enrichment. *See Superintendent of Ins. v. Ochs* (*In re First Cent. Fin. Corp.*), 377 F.3d 209, 212 (2d Cir. 2004).

unjust enrichment in a wide range of circumstances." *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc.* (*In re Koreag, Controle et Revision S.A*), 961 F.2d 341, 353-54 (2d Cir. 1992); *see also Reiner v. Reiner*, 100 A.D.2d 872, 874 (N.Y. App. Div. 1984) (constructive trust factors are merely useful guides and are "not talismanic"). Rather than requiring rigid adherence to each factor, New York courts recognize constructive trusts "whenever necessary to satisfy the demands of justice," meaning that their "applicability is limited only by the inventiveness of men who find ways to enrich themselves unjustly by grasping what should not belong to them." *Chem. Bank v. U.S. Lines (S.A.), Inc.* (*In re McLean Indus., Inc.*), 132 B.R. 271, 285-87 (Bankr. S.D.N.Y. 1991) (quotation marks and citation omitted) (constructive trust over insurance proceeds appropriate where debtor, its estate, and unsecured creditors were never the intended beneficiaries).

In line with this flexible approach, courts have imposed constructive trusts in the absence of one or more of the four factors. *See Barnard v. Kumar* (*In re Verma*), No. 06–8102–619, 2007 WL 2713017, at *6 (Bankr. E.D.N.Y. Sept. 14, 2007) (the constructive trust factors "are not conclusive and courts have imposed constructive trusts in the absence of a confidential relationship, unjust enrichment or a promise") (cleaned up). This includes cases where there was no:

(1) confidential or fiduciary relationship between the plaintiff and defendant, *see State Farm Mut. Auto. Ins. Co. v. Cohan*, No. 12–CV–1956 (JS)(GRB), 2013 WL 4500730, at *4-5 (E.D.N.Y. Aug. 30, 2013) (denying motion to dismiss constructive trust claim despite plaintiff's failure to plead a fiduciary relationship); *CF 135 Flat LLC*, 2016 WL 5945933, at *13 (concluding that "the lack of a fiduciary duty between [the parties] standing alone does not require dismissal of" constructive trust claim);

(2) transfer of property, *see Counihan*, 194 F.3d at 362-63 (imposing constructive trust "[e]ven though there was no formal transfer" of the property at issue); and

(3) promise, *see Baker v. Harrison*, 180 A.D.3d 1210, 1212 (N.Y. App. Div. 2020) (noting that, to support constructive trust claim, a "promise need not be express, but may implied based on the circumstances of the relationship and the nature of the transaction").

Gemini's allegations regarding the Debtors' pre-petition conduct, taken as true, support imposition of a constructive trust even if one or more of the factors is not met. In any event, Gemini has adequately pled each of the four factors.

*ii. The Debtors were unjustly enriched pre-petition*

In this Circuit, a constructive trust is appropriate where a debtor's pre-petition conduct results in unjust enrichment. *See In re Fetman*, 567 B.R. 702, 707 (Bankr. E.D.N.Y. 2017) (allegations that debtor acted contrary to agreement at issue at creditors' expense could give rise to constructive trust); *Geltzer v. Balgobin* (*In re Balgobin*), 490 B.R. 13, 23 (Bankr. E.D.N.Y. 2013) (citing several cases in which courts imposed constructive trusts where debtors engaged in pre-petition unjust conduct relating to the property at issue).

The Debtors incorrectly assert that "Gemini fails to plead facts to support any inference that GGC's purported enrichment was unjust." (Mem. ¶ 38.)[11] Tellingly, the Debtors disregard Gemini's myriad allegations of the Debtors' unjust, pre-petition conduct culminating in GGC wrongfully obtaining and retaining the Additional Collateral. Specifically, Gemini alleges that:

- in order to keep the Earn Program in place, GGC falsely represented to Gemini that DCG had absorbed the losses on the 3AC loans at the parent level and that GGC—which was in actuality insolvent—was not at risk (Compl. ¶ 24);
- throughout July and August 2022, Gemini sought information from GGC regarding GGC's financial condition, but GGC responded with fictitious financial reports and false and misleading statements about the financial support that DCG had supposedly provided GGC (*see* Compl. ¶ 25);
- after receiving Gemini's 30 days' notice of its intention to terminate the Earn Program, GGC falsely represented its financial health and stability to Gemini, inducing Gemini to delay termination of the Earn Program (*see* Compl. ¶¶ 36-37);

11. GGC further contends that "the argument that GGC was unjustly enriched here is illogical" given Debtors' purportedly viable preference claim. (*See* Mem. ¶ 39.) As explained below, such argument is inappropriate at this stage of the litigation and should be rejected.

- Gemini entered into the Second Amendment to obtain the Additional Collateral; but rather than transfer the Additional Collateral to Gemini "[a]s promptly as practicable" after the execution of the Second Amendment, the Debtors wrongfully retained the Additional Collateral (*see* Compl. ¶¶ 39-42, 47-53); and

- after entering into the Second Amendment, GGC falsely represented that it was "work[ing] diligently to understand all of the mechanics of a transfer of [the GBTC] shares"; in truth, GGC had no intention of transferring the shares (*see* Compl. ¶¶48-53) (first alteration in original).

Most important of these, of course, was GGC's flagrant breach of the Second Amendment by refusing to transfer the Additional Collateral to Gemini as required. It is well-established under New York law that a party is unjustly enriched when it holds property "under such circumstances that in equity and good conscience [it] ought not to retain." *Simonds*, 45 N.Y.2d at 242 (quotation marks and citation omitted). The foregoing facts more than establish that the Debtors were wrongfully "enriched" by inducing Gemini to enter into the Second Amendment and then keeping the Additional Collateral when they had no right to it (*see* Mem. ¶ 40); the facts, taken together and accepted as true, establish the Debtors' pattern of repeated, unjust, pre-petition conduct aimed at wrongfully retaining the GBTC shares that they promised to use to secure Earn Users' loans. By repeatedly misrepresenting its financial condition and promising under the Second Amendment that it would transfer the Additional Collateral to Gemini, GGC actively sought to frustrate Gemini's interest in the Additional Collateral. Such pre-petition bad faith warrants imposition of a constructive trust over the Additional Collateral. *See First Cent.*, 377 F.3d at 215-17 (highlighting that "bad faith or malfeasance" can give rise to constructive trust); *accord Sanyo Elec., Inc. v. Howard's Appliance Corp.* (*In re Howard's Appliance Corp.*), 874 F.2d 88, 94-95 (2d Cir. 1989) (finding unjust enrichment and imposing constructive trust where debtor did not inform creditor of change of inventory location and thus acted with the expectation that creditor would not perfect its security interest in such inventory).

The cases the Debtors rely on in support of their contention that Gemini failed to plead facts to support an inference that the Debtors' enrichment was unjust (*see* Mem. ¶ 38) are inapposite. In those cases, the plaintiffs failed to allege how the debtors were unjustly enriched at the plaintiffs' unique expense. *See, e.g.*, *Off. Comm. of Unsecured Creditors of Hydrogen, L.L.C. v. Blomen* (*In re Hydrogen, L.L.C.*), 431 B.R. 337, 343-44, 359 (Bankr. S.D.N.Y. 2010) (complaint failed to allege how defendants were unjustly enriched); *Rosen v. Chowaiki & Co. Fine Art Ltd.*, 593 B.R. 699, 720-21 (Bankr. S.D.N.Y. 2018) (plaintiff alleged that individual defendant, not debtor, was unjustly enriched, and plaintiff was similarly situated to other creditors who likewise had been defrauded); *In re Dreier LLP*, 429 B.R. 112, 136-38 (Bankr. S.D.N.Y. 2010) (other claimants were subject to the same unjust conduct as objecting party).

The Debtors' expansive reading of *First Central* and its progeny—in essence that a constructive trust is unavailable in circumstances that "would require [a debtor] to relinquish property, which would otherwise be used to satisfy the claims of all unsecured creditors on a ratable basis, in favor of a single creditor" (Mem. ¶ 42)—would essentially render constructive trusts unavailable in *any* bankruptcy proceeding. This is not the law. The Second Circuit has "rejected the notion that bankruptcy law trumps state constructive" trust law, and has held that courts need only act cautiously in applying constructive trust law to "minimize conflict with the goals of the Bankruptcy Code." *See First Cent.*, 377 F.3d at 217; *see also Ades & Berg Grp. Invs. v. Breeden* (*In re Ades & Grp. Invs.*), 550 F.3d 240, 245 (2d Cir. 2008) (noting that "*First Central* expressly acknowledged that we do not disturb the general rule that constructive trusts must be determined under state law") (quotation marks and citation omitted). Moreover, "[t]he preference that the constructive trust claimant acquires over general creditors of the defendant is usually the object of the remedy, not a reason to disallow it." *See* Restatement (Third) of Restitution and

Unjust Enrichment § 55 comment a (Am. L. Inst. 2011) (emphasis added). Even under a cautious application of constructive trust law, the Debtors were unjustly enriched because they are holding Additional Collateral in which they have no equitable interest and obtained through wrongful conduct.

*iii. There was a fiduciary or confidential relationship between Gemini and GGC*

A fiduciary or confidential relationship exists between parties when "one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" and where "confidence is reposed on one side and there is resulting superiority and influence on the other." *Genger v. Genger* (*In re Genger*), No. 20-01010-jlg, 2021 WL 3574034, at *20 (Bankr. S.D.N.Y. Aug. 12, 2021) (quotation marks omitted) (collecting cases). Such relationship arises "out of a close and intimate association which creates and inspires trust and confidence between the parties." *A. Brod, Inc. v. SK & I Co., L.L.C.*, 998 F. Supp. 314, 327 (S.D.N.Y. 1998) (quotation marks and citation omitted). The existence of a fiduciary or confidential relationship is a question of fact. *See Crown Realty Co. v. Crown Heights Jewish Com. Council*, 175 A.D.2d 151, 151 (N.Y. App. Div. 1991).

Gemini has adequately pled that a fiduciary and confidential relationship existed between Gemini and GGC, which began when Gemini requested information from GGC regarding its financial condition and continued when GGC promised to transfer the Additional Collateral and Gemini relied on that promise.

Amid broad market turmoil, Gemini, on behalf of Earn Users, repeatedly sought information from GGC regarding its financial condition to ensure the soundness of the Earn Program. (*See* Compl. ¶¶ 24-25; *see also* Compl. ¶ 37.) In response, GGC falsely represented its financial health and stability. (*See* Compl. ¶¶ 25, 37.) Relying on these representations—which

Gemini believed to be true—Gemini kept the Earn Program in place. (*See* Compl. ¶¶ 25, 37-38.) Such trust (on Gemini's part) and influence (on GGC's part) gave rise to a fiduciary or confidential relationship. *See LBBW Luxemburg S.A. v. Wells Fargo Sec. LLC*, 10 F. Supp. 3d 504, 525 (S.D.N.Y. 2014) (confidential relationship adequately pled where plaintiff alleged that defendant had "special access to relevant data" and defendants made "representations intended to induce [plaintiff's] reliance").

Gemini then relied on GGC's representation that it would transfer the Additional Collateral as soon as GGC received it from DCG. Gemini could have required that DCG transfer the Additional Collateral directly to Gemini. Instead, in agreeing to the structure of the transfer, Gemini—on behalf of Earn Users—placed trust and confidence in GGC that GGC would transfer the Additional Collateral to Gemini to protect Earn Users.

The Security Agreement and Second Amendment thus were the product of negotiations aimed at protecting Earn Users from broad market turmoil. (*See* Compl. ¶ 26.) Under such circumstances, a fiduciary or confidential relationship existed between Gemini and GGC. *Cf. A. Brod, Inc.*, 998 F. Supp. at 327-28 (finding confidential or fiduciary relationship where assignor placed trust in assignee by assigning copyright to protect its copyright interests).

Gemini also relied on GGC's representations in not taking more immediate action with respect to the Earn Program and trusting GGC's repeated representations that it was in the process of transferring the Additional Collateral. (*See* Compl. ¶¶ 48-53.) This, too, reflects a fiduciary and confidential relationship between the parties.

It is no answer, as the Debtors contend, that the MLAs include a disclaimer of any confidential or fiduciary relationship. The MLAs governed the relationship among Gemini, individual Earn Users, and GGC "*in respect of any Loan*." (Compl. Ex. 2, MLA § V(j) (emphasis

added).) The confidential and fiduciary relationship that supports imposition of a constructive trust here did not arise out of any Earn loan. Rather, that relationship arose out of the negotiation of the Security Agreement and then the Second Amendment, neither of which contained any such disclaimer.[12]

*iv. The Additional Collateral was transferred in reliance on GGC's promise*

The Debtors argue that "[t]here was no transfer of the property at issue in reliance on a promise," and that a constructive trust can only be "imposed with respect to the assets that a plaintiff transferred in reliance on defendant's promise, or with respect to property that the plaintiff's transfer of assets was ultimately used to acquire." (Mem. at 22 & ¶ 45.) This argument is incorrect—there is no requirement that Gemini specifically had to be the party to transfer the Additional Collateral in order for the Court to impose a constructive trust over that collateral. To the contrary, DCG's transfer of the specified GBTC shares to GGC for the benefit of Gemini, in reliance on GGC's promise to further transfer the shares to Gemini, satisfies the "transfer in reliance" factor.

The cases that the Debtors cite support this conclusion. For example, in *Malmsteen v. Berdon, LLP*, the plaintiff alleged that the defendant, who was the plaintiff's financial manager and accountant, opened bank accounts into which the defendant deposited funds on the plaintiff's behalf and then withdrew funds to pay his own expenses and fees. 447 F. Supp. 2d 655, 659-60 (S.D.N.Y. 2007). Although the "plaintiff himself did not transfer funds to [the defendant] in reliance on a promise," the court nonetheless concluded that a constructive trust could be imposed

12. Neither the Security Agreement nor the Second Amendment incorporate by reference the terms of the MLAs. (*See generally* Compl. Ex. 1, Security Agreement; Compl. Ex. 4., Second Amendment.)

over funds that defendant transferred to himself. *Id.* at 669. Thus, *Malmsteen* shows that the plaintiff itself does not need to make the relevant transfer for a constructive trust to be imposed.

Nor do the other cases that the Debtors cite stand for the proposition that Gemini had to transfer the Additional Collateral for the Court impose a constructive trust over that collateral in Gemini's favor. Both *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (N.Y. 1978), and *Fairfield Financial Mortgage Group, Inc. v. Luca*, 584 F. Supp. 2d 479, 485 (E.D.N.Y. 2008), simply note that a transfer of the subject *res* is a factor supporting imposition of a constructive trust. Neither case states that that transfer must be made by the plaintiff.

Furthermore, courts have "extended the transfer element to include instances where funds, time and effort were contributed in reliance on a promise to share in some interest in property, even though no transfer actually occurred." *Baker*, 180 A.D.3d at 1212 (quotation marks and citation omitted).

Here, there was a transfer of the Additional Collateral made in reliance on GGC's promise, and this factor therefore supports imposition of a constructive trust over that collateral.

## V. THE DEBTORS' PREFERENCE ARGUMENT DOES NOT SUPPORT DISMISSAL OF ANY CLAIMS

The Debtors suggest that their preference counterclaim, brought pursuant to Section 547 of the Bankruptcy Code, supports dismissal of Counts II, III, and IV of the Complaint. (*See* Mem. ¶ 30 n.6; Mem. ¶ 39.) However, consideration of the Debtors' allegations, which are outside the four corners of the Complaint, and as to which the Debtors will bear the burden of proof, would plainly be inappropriate in deciding the present motion. *See Securitas Elec. Sec., Inc. v. DeBon*¸ 20-cv-5323 (CM) (KNF), 2021 WL 965382, at *1 (S.D.N.Y. Mar. 15, 2021) (refusing to consider allegations drawn from counterclaim on motion to dismiss, noting that such allegations were outside the four corners of the complaint). The Debtors have "the burden of proving by a

preponderance of the evidence every essential, controverted element resulting in the" alleged preference, 5 Collier on Bankruptcy ¶ 547.13 (16th ed. 2023), which they have not yet done. If the Debtors were to bring such a claim, Gemini has defenses that would defeat it. The Debtors' bare assertion of a preference claim cannot support dismissal of Gemini's claims.

## CONCLUSION

For the reasons set forth above, Gemini respectfully requests that the Court deny Debtors' motion to dismiss in its entirety.

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