UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE:	:	CASE NO. 23-40569-EJC
MASTER LENDING GROUP, LLC,	:	CHAPTER 7
Debtor.	:	
TIFFANY E. CARON, Chapter 7 Trustee for the Bankruptcy Estate of Master Lending Group, LLC	:	
Plaintiff,	:	
vs.	:	Adv. Pro. No. 23-04013-EJC
JUDITH HIRSCH,	:	
Defendant.	:	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff, TIFFANY E. CARON, as Chapter 7 Trustee for the Bankruptcy Estate of Master Lending Group, LLC ("Plaintiff"), hereby files this, Plaintiff's Response in Opposition to Defendant's Motion to Dismiss, respectfully showing this Court as follows:

I. INTRODUCTION

This case arises from the wrongful and tortious conduct of Defendant Judith Hirsch ("Mrs. Hirsch") in her capacity as power of attorney for her husband, Gregory M. Hirsch ("Mr. Hirsch"), during the final months of Mr. Hirsch's life. The debtor corporation in this matter, Master Lending Group, LLC ("Debtor"), was solely owned

and controlled by Mr. Hirsch until his eventual passing from a progressively debilitating terminal illness on August 3, 2023. Shortly before his death, Mrs. Hirsch filed the instant petition for Chapter 7 bankruptcy (the "Petition") on Debtor's behalf, with the knowledge and assistance of Mr. Hirsch, as his power of attorney.

Despite the limitations caused by his disease, Mr. Hirsch communicated to Mrs. Hirsch the assets and liabilities of the Debtor to be included in Debtor's bankruptcy Petition, which Mrs. Hirsch, in turn, communicated to Debtor's bankruptcy counsel. This included, but was not limited to, the entirety of the proceeds of a $5,000,000.00 life insurance policy (the "Policy") issued by the Pruco Life Insurance Company ("Pruco") three years prior in July 2020. Mr. Hirsch was the owner of the Policy, and Mrs. Hirsch is named as the beneficiary.

Mr. Hirsch was clear and unequivocal in his directive to Mrs. Hirsch that, upon his death, the beneficial proceeds of the Policy shall issue to the Debtor. Indeed, Mrs. Hirsch wrote and sent an email to Debtor's counsel on June 26, 2023, stating, "[Greg] has told me, repeatedly, that the $5M policy was directed to MLG..." and that Mr. Hirsch, in response to the following question from Mrs. Hirsch, "Is that $2M policy also intended for MLG use?", he stated, "No. Only the $5M policy [is] for MLG…the other is for you."

During the time that Mr. Hirsch was still living, Mrs. Hirsch filed three different versions of Debtor's Schedule of Assets under oath with the Court. Each of these three versions accurately reflected Debtor's equitable interest in the entirety of the beneficial proceeds of the Policy valued at $5,000,000.00. Then, one day following the death of Mr. Hirsch, Mrs. Hirsch filed a contradictory fourth version, in which she attempted to

change course by removing, albeit unsuccessfully, Debtor's equitable interest in the Policy.

Mrs. Hirsch lacked the requisite legal authority to file the fourth version of Debtor's Schedule of Assets insofar as her power of attorney had expired with Mr. Hirsch's death the preceding day. The fourth version of Debtor's Schedule of Assets was thus a nullity and ineffective as an amendment to the three prior versions of Debtor's Schedule of Assets.

Since the filing of this action, it has come to Plaintiff's attention that, in addition to the fourth version of Debtor's Schedule of Assets, each of the amendments to Debtor's Schedule of Assets were also a nullity in that Debtor's counsel failed to receive wet-ink signatures for such amendments – a fact which even Debtor's counsel himself has conceded is cause for withdrawal of each and every one of the three amendments to Debtor's asset schedules. On October 23, 2023, a separate amendment, filed by an individual purporting to represent Mr. Hirsch's estate, was also improperly filed and is due to be stricken by the Court. In short, the original Schedule of Assets filed on the petition date, in which Mrs. Hirsch swore that the Debtor retained a 100% equitable interest in the beneficial proceeds of the Policy, is the operative version of Debtor's Sworn Schedule of Assets in this case.

Plaintiff has filed a Complaint to Determine Validity, Priority, and Extent of Lien and Ownership Interest (the "Complaint"), which Mrs. Hirsch now seeks to dismiss. The Complaint asserts numerous causes of action against Mrs. Hirsch, including, but not limited to, breach of confidential relationship and the duty of good faith, unjust

enrichment and for turnover pursuant to 11 U.S.C. § 542. What Plaintiff ultimately seeks by the filing of the Complaint is an order declaring that the entirety of the beneficial proceeds of the Policy constitute property of the Bankruptcy Estate, as Mr. Hirsch expressly intended, and that the entirety of said proceeds shall be turned over to the Trustee to be held in her bonded fiduciary account for Debtor's benefit.

Mrs. Hirsch's conduct in attempting to remove Debtor's equitable interest in the Policy from the bankruptcy schedules evidences either malicious or bad faith intent on the part of Mrs. Hirsch and has indisputably placed Debtor's interest at dire risk. For the reasons set forth herein, Defendant's Motion to Dismiss Plaintiff's Complaint should be denied in its entirety.

II. BACKGROUND AND STATEMENT OF FACTS

Debtor filed with this Court its Petition for Chapter 7 Bankruptcy relief on July 6, 2023. (Compl., ¶ 8). Debtor's owner is identified therein as Gregory M. Hirsch ("Mr. Hirsch"). (Compl., ¶ 13). Due to deteriorating health caused by Lou Gehrig's disease, or ALS, Mr. Hirsch executed a power of attorney ("POA") naming Mrs. Hirsch as his agent on November 8, 2022. (Compl., ¶ 14). Mrs. Hirsch signed and filed the Petition and related forms for Mr. Hirsch, with the assistance of bankruptcy counsel, pursuant to the POA. (Compl., ¶ 17). Mr. Hirsch later died resulting from complications related to his disease on August 3, 2023. (Compl., ¶ 18).

Prior to his death, Mr. Hirsch purchased a life insurance policy from Pruco in the amount of $5,000,000.00 on July 15, 2020 (the "Policy"). (Compl., ¶ 19). Named as the beneficiary of the Policy is Mrs. Hirsch. (Compl., ¶ 20). At some point prior to the filing

of Debtor's bankruptcy Petition, however, Mr. Hirsch informed Mrs. Hirsch, as holder of his power of attorney, that he wanted the Policy proceeds to go for the benefit of the Bankruptcy Estate, instead of Mrs. Hirsch, individually. (Compl., ¶ 20). Mr. Hirsch was still able to communicate, despite his ALS diagnosis, before his untimely passing. (Compl., ¶ 22). Mr. Hirsch did not equivocate in his desire to have the entirety of the Policy proceeds inure to the benefit of the Bankruptcy Estate. (Compl., ¶ 23).

Consistent with Mr. Hirsch's directive, Mrs. Hirsch swore under penalty of perjury in the first version of Debtor's Schedule of Assets on July 6, 2023 (the "**First Sworn Schedules**"), that the Debtor had assets totaling $6,070,100.00, comprised, among other things, of a $5,000,000.00 "[u]nvested, equitable interest" in the Policy, together with cash in the amount of $975,000.00, and a Truist Bank checking account valued at $95,100.00 (Compl., ¶ 24). In a subsequent amendment dated July 17, 2023 (the "**Second Sworn Schedules**"), Mrs. Hirsch modified Debtor's Schedule of Assets to reflect only that the true value of the Truist Bank checking account is $92,148.00, not the $95,100.00 she had stated in Debtor's First Sworn Schedules, and to remove as an asset of the Debtor the $975,000.00 cash. (Compl., ¶ 25). Notably, Mrs. Hirsch did not remove from the Second Sworn Schedules the afore-listed equitable interest of the Debtor in the Policy. (Compl., ¶ 26). Rather, for a second time, Mrs. Hirsch swore under penalty of perjury that the proceeds of the Policy belonged to the Debtor's Bankruptcy Estate. (Compl., ¶ 27).

Mrs. Hirsch was still not done. On July 26, 2023, Mrs. Hirsch again amended Debtor's Schedule of Assets (the "**Third Sworn Schedules**") to include Debtor's potential claims against various entities and one individual for breach of a promissory note.

(Compl., ¶ 28). No other amendments were otherwise made to Debtor's Schedule of Assets at that time. (Compl., ¶ 29). Thus, Mrs. Hirsch continued to swear for a third time, under penalty of perjury, that the Debtor maintained the sole equitable interest in the Policy, the proceeds of which, according to Debtor's counsel, and pursuant to Mr. Hirsch's wishes, were to be disbursed to the Trustee upon Mr. Hirsch's death. (Compl., ¶ 30).

On August 4, 2023, one day after Mr. Hirsch's passing, Mrs. Hirsch filed a fourth amendment to Debtor's Schedule of Assets (the "**Fourth Sworn Schedules**"). (Compl., ¶ 31). This time, Mrs. Hirsch removed the Policy as an asset of the Debtor's Bankruptcy Estate. (Compl., ¶ 32). In so doing, Mrs. Hirsch contradicted each of her prior sworn representations to the Court, given on three separate occasions under penalty of perjury, that Debtor held the beneficial interest in the Policy proceeds. *Id*. The Fourth Sworn Schedules were not authorized, however, because Mrs. Hirsch's appointment as Mr. Hirsch's power of attorney had expired upon his death on August 3, 2023. (Compl., ¶ 33). The Fourth Sworn Schedules were therefore a nullity, not binding and ineffective as an amendment to the three prior Sworn Schedules. (Compl., ¶ 34).

Thereafter, a meeting of creditors was held on August 15, 2023, pursuant to 11 U.S.C. § 341(a), at which time Mrs. Hirsch testified under oath that it was Mr. Hirsch's unequivocal directive to her that the Policy proceeds be issued for Debtor's benefit and the Bankruptcy Estate more broadly. (Compl., ¶ 35). The only allowable inference, given the facts and circumstances, is that Mr. Hirsch intended to remove Mrs. Hirsch as beneficiary, and that he specifically intended to substitute Debtor as beneficiary for the

broader benefit of the Bankruptcy Estate. This is independently confirmed by various actions taken by Mrs. Hirsch during the course of this bankruptcy action, including, but not limited to, the following:

(1) scheduling the Policy, under penalty of perjury, as an asset of the Bankruptcy Estate of Debtor on not one, but three separate occasions;

(2) making statements to Debtor's counsel that the Policy proceeds will be disbursed to the Trustee upon Mr. Hirsch's death; and

(3) testifying that Mr. Hirsch instructed her to issue the Policy proceeds to the Debtor. (Compl., ¶ 36).

While Debtor's counsel has since informed Plaintiff that he did not receive or maintain wet-ink signatures for the amendments Mrs. Hirsch filed in this case, he continues to insist, nevertheless, that the amendments were filed at the request and/or direction of Mrs. Hirsch and her legal representatives. Even assuming this to be true, it does not change the fact that the amendments filed by Mrs. Hirsch in this case were improperly filed and require withdrawal.

On October 23, 2023, Thomas J. Ratcliffe, Jr., as personal representative for Mr. Hirsch's estate ("Mr. Ratcliffe"), purported to file the following withdrawals of the amendments filed by Mrs. Hirsch:

(1) Withdrawal of Amended Schedule A/B filed on July 17, 2023, i.e., the "**Second Sworn Schedules**" (Doc No. 31);

(2) Withdrawal of Amended Schedule A/B filed on July 26, 2023, i.e., the "**Third Sworn Schedules**" (Doc No. 46);

(3) Withdrawal of Amended Schedule A/B filed on August 4, 2023, i.e., the "**Fourth Sworn Schedules**" (Doc No. 71);

That same date, Mr. Ratcliffe also purported to re-file the Fourth Sworn Schedules, again removing the $5,000,000.00 Pruco Life Insurance Policy and the $975,000.00 Cash on Hand.

The second version of the Fourth Sworn Schedules, as signed by Mr. Ratcliffe, includes an extensive Disclaimer Regarding Debtor's Amended Schedule of Assets, reflecting that Mr. Ratcliffe has no personal knowledge of the information in the Debtor's schedules and makes no representations of whether the amendments are accurate. The Fourth Sworn Schedules signed by Mr. Ratcliffe also did not include a Corporate Resolution giving him the authority to file documents on behalf of the Debtor in this bankruptcy case, nor did he seek or obtain Court approval to act on behalf of the Debtor. Finally, the Fourth Sworn Schedules signed by Mr. Ratcliffe were not signed by counsel for the Debtor corporation. Plaintiff, accordingly, has moved to strike them.[1]

In short, each of the amendments filed by Mrs. Hirsch and Mr. Ratcliffe were improperly filed and amount to a nullity, such that the only operative sworn schedule of assets in this case are the First Sworn Schedules, filed with the original Petition, on July 6, 2023. The First Sworn Schedules clearly state that the Policy is an asset belonging to the Debtor pursuant to the Debtor's equitable interest in same.

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[1] Indeed, a life insurance policy has nothing to do with the probate estate and is not even administered through probate or by the executor. The issues herein are well beyond the scope of his duties, and the Ratcliffe amendment should be stricken for that reason as well and bears no weight on the issues herein concerning the Policy.

III. ARGUMENT AND CITATION OF AUTHORITY

The unmistakable fact is that the entirety of the Policy proceeds are equitably owned by the Debtor, as previously acknowledged even by Mrs. Hirsch, herself. There is no plausible explanation for Mrs. Hirsch's conduct in removing the Policy as an asset of the Debtor other than a coordinated effort by Mrs. Hirsch to retain the Policy proceeds to benefit herself personally, which is in derogation of Mr. Hirsch's intentions for the proceeds, as well as federal bankruptcy law. *See* 11 U.S.C. § 541(a)(1).

Mrs. Hirsch holds only bare legal title to the Policy proceeds, without any equitable interest, and Mrs. Hirsch's possession of bare legal title to the Policy proceeds is insufficient to establish her interest as an intended beneficiary of the Policy proceeds. Indeed, by virtue of its equitable interest, Debtor is the true intended beneficiary and rightful owner of the entirety of the Policy proceeds - a fact which has been sworn to and conceded by Mrs. Hirsch on more than three separate occasions. Mrs. Hirsch's Motion to Dismiss is thus due to be denied.

A. Legal Standard

A motion to dismiss pursuant to Rule 12(b)(6) challenges the sufficiency of the claims set out in the plaintiff's pleadings; however, Rule 12(b)(6) is not intended to be a difficult hurdle to clear. *See Davita Inc. v. Nephrology Assocs., P.C.*, 253 F. Supp. 2d 1370, 1372 (S.D. Ga. 2003) ("[m]otions to dismiss are disfavored and are therefore seldom granted."). To survive such a motion, a plaintiff must plead only enough facts to "nudge [his] claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A claim is facially plausible

"when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Speaker v. U.S. Dep't of Health & Human Servs.*, 623 F.3d 1371, 1380 (11th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)).

In ruling on a motion to dismiss, the court accepts as true all well-pleaded facts alleged in the complaint and draws all reasonable inferences from those facts in the plaintiff's favor. *Paws Holdings v. Daikin Indus.*, No. CV 116-058, 2017 U.S. Dist. LEXIS 24684, at *9-10 (S.D. Ga. Feb. 22, 2017) (citing *Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009) (citing *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1262 (11th Cir. 2004)). Indeed, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Speaker*, 623 F.3d at 1380 (quoting *Twombly*, 550 U.S. at 570). "The issue [on a motion to dismiss] is not whether the [plaintiff] will ultimately prevail" but whether the plaintiff is entitled to offer evidence to support her claims. *Skinner v. Switzer*, 562 U.S. 521, 529-30, 131 S. Ct. 1289, 1296 (2011); *S. Entm't TV, Inc. v. Comcast Corp.*, 270 F. App'x 747, 748 (11th Cir. 2008) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)). Thus, dismissal is appropriate only if it is clear beyond doubt that the plaintiff "can prove no set of facts in support of the claims in the complaint." *Patel v. Specialized Loan Servicing, LLC*, 904 F.3d 1314, 1316 (11th Cir. 2018).

B. The Complaint States a Claim for Determination of Validity, Priority and Extent of Liens and Interest.

Section 541 of the Bankruptcy Code defines "property of the estate" broadly to

include all of the debtor's interests, legal and equitable. 11 U.S.C. § 541(a)(1).

> "Under the expansive language of § 541, the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed. (citation omitted). The definition of property of the Bankruptcy Estate set forth in § 541 ensures that 'every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative' is placed within the custody of the bankruptcy court."

Meeks v. Nalley (In re Nalley), 507 B.R. 411 (Bankr. S.D. Ga. 2014) (quoting *In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993) (abrogated on other grounds by *Law v. Siegel*, 571 U.S. 415, 134 S. Ct. 1188, 188 L.Ed.2d 146 (2014).

On three separate occasions, in Debtor's First, Second and Third Sworn Schedules, Mrs. Hirsch swore under penalty of perjury that Debtor retained a 100% equitable interest in the Policy proceeds. Mrs. Hirsch did so while Mr. Hirsch was still living and, in so doing, acted within the full scope of her authority as power of attorney for Mr. Hirsch at the time. Following Mr. Hirsch's passing, however, Mrs. Hirsch suddenly changed course by attempting to remove the asset from Debtor's bankruptcy Schedules. This, Mrs. Hirsch simply had no authority to do.

Georgia law provides that a power of attorney expires at the time of the principal's death. O.C.G.A. § 10-6B-10. Mr. Hirsch died on August 3, 2023, and the Fourth Sworn Schedules, in which Mrs. Hirsch attempted to remove the Policy proceeds as an asset of the Bankruptcy Estate, were filed afterwards on August 4, 2023. There is simply no basis upon which Mrs. Hirsch can plausibly argue that the Fourth Sworn Schedules were effective to amend the prior three, in which she swore that the entirety of

the Policy proceeds belonged to the Debtor. The filings signed by Mr. Ratcliffe, including the second version of the Fourth Sworn Schedules, are also ineffective and amount to a nullity as well.

C. The Complaint States a Claim for Turnover.

Having established above that the Policy is property belonging to the Debtor's Bankruptcy Estate, Plaintiff has clearly stated a claim for turnover. Section 542 of the Bankruptcy Code provides the means for obtaining possession of property of the Bankruptcy Estate and requires turnover. 11 U.S.C. § 542. As property of the Bankruptcy Estate, there can be no other argument than that the proceeds of the Policy must be turned over to Plaintiff as required by law. There is simply no basis for Mrs. Hirsch's motion to dismiss Plaintiff's turnover claim.

D. The Complaint States a Claim for Breach of Confidential Relationship and the Duty of Good Faith.

A confidential relationship existed between Mr. and Mrs. Hirsch, obligating Mrs. Hirsch to act in good faith and in accordance with Mr. Hirsch's directives. O.C.G.A. § 23-2-58 provides:

> "Any relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners; principal and agent; guardian or conservator and minor or ward; personal representative or temporary administrator and heir, legatee, devisee, or beneficiary; trustee and beneficiary; and similar fiduciary relationships."

Mrs. Hirsch was fully aware that the proceeds of the Policy were to be awarded to Debtor for the benefit of the Bankruptcy Estate. Nothing about Mr. Hirsch's directive to Mrs. Hirsch regarding the Policy proceeds, as herein described, was ambiguous or unreasonable.

Mrs. Hirsch nonetheless failed to act in good faith or in accordance with Mr. Hirsch's reasonable directive when she removed the Policy from Debtor's Fourth Sworn Schedules as an asset of the Bankruptcy Estate. In fact, the inverse is true. While Mr. Hirsch was still living, Mrs. Hirsch swore three separate times, under penalty of perjury, that the Debtor retained a 100% equitable interest in the Policy proceeds. By removing the Policy out of what can only be interpreted as an attempt to keep the proceeds for herself, Mrs. Hirsch no doubt acted in bad faith and contrary to the intent and reasonable directive of Mr. Hirsch, which were repeatedly communicated to Debtor's bankruptcy counsel and this Court.

The above-stated actions of Mrs. Hirsch directly contravene the duties created by virtue of her confidential relationship with Mr. Hirsch. Mrs. Hirsch's actions in not only removing the Policy proceeds as an asset of the Bankruptcy Estate, but also in doing so after the expiration of her power of attorney, were manifestly disloyal and created a conflict of interest that impaired her ability to act impartially in Mr. Hirsch's best interests. There can be no other conclusion than that Mrs. Hirsch breached the confidential relationship she enjoyed with Mr. Hirsch and her corresponding duty of good faith. Based on these facts, Plaintiff has stated a claim against Mrs. Hirsch for breach of her confidential relationship and duty of good faith.

E. The Complaint States a Claim for Constructive Fraud.

O.C.G.A. § 23-2-51 provides, in relevant part, that "[c]onstructive fraud consists of any act of omission or commission, contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another.

Mrs. Hirsch committed constructive fraud when she falsely represented in Debtor's Fourth Sworn Schedules that Debtor no longer maintained any interest in the Policy, and when she falsely represented herself as Mr. Hirsch's agent with the authority to file them.[2] Mrs. Hirsch knew that her power of attorney for Mr. Hirsch had expired at the time she filed the Fourth Sworn Schedules, and that she had no legal right or authority to amend Debtor's Sworn Schedules or to remove the Policy proceeds as an asset of the Bankruptcy Estate.

The foregoing representations were made by Mrs. Hirsch in furtherance of her plan to misappropriate the Policy proceeds for her personal benefit, despite Mr. Hirsch's plain directive that the Debtor receive the proceeds of the Policy upon his death. As the Bankruptcy Estate unquestionably faces depletion by the actions of Mrs. Hirsch, Plaintiff has stated a claim for and is likely to prevail on her claim against Mrs. Hirsch for constructive fraud. Plaintiff has alleged in her Complaint the requisite specificity to survive Mrs. Hirsch's motion to dismiss on this count.

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[2] Mrs. Hirsch has not disputed Debtor counsel's assertions that her and/or Greg Hirsch's personal attorney directed him to file the Amendments.

F. The Complaint States a Claim for Unjust Enrichment.

Plaintiff has also stated a claim for unjust enrichment. Under Georgia law, a claim of unjust enrichment will lie if there is no legal contract and "the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefited party equitably ought to return or compensate for." *Smith v. McClung*, 215 Ga. App. 786, 789 (3) (452 SE2d 229) (1994). "The word 'benefit,[]' . . . denotes any form of advantage." Restatement of Restitution, § 1, Unjust Enrichment, cmt. b (1937). *Jones v. White*, 311 Ga. App. 822, 827-28, 717 S.E.2d 322, 328 (2011) (emphasis added).

Under these circumstances, it is conspicuously evident that Mrs. Hirsch intends to retain the Policy proceeds for herself and not to comply with Mr. Hirsch's intentions that the Policy proceeds be conveyed to Debtor. Such proceeds clearly constitute an "advantage" to which Mrs. Hirsch is not entitled, and Mrs. Hirsch's attempt to remove them from the Debtor's Bankruptcy Estate to benefit herself personally is both wrongful and would precisely constitute unjust enrichment. At the very least, Mrs. Hirsch "equitably ought to return or compensate for" the proceeds of the Policy. *See Smith*, *supra*, 215 Ga. App. at 789.

G. The Complaint States a Claim for Conversion (In the Alternative).

Under Georgia law,

> "Conversion involves the unauthorized assumption and exercise of the right of ownership over personal property belonging to another, contrary to the owner's rights. Any distinct act of dominion wrongfully asserted over another's property in denial of his right, or inconsistent with it, is a conversion.

Rebel Auction Co. v. Citizens Bank, 805 S.E.2d 913, 917-18 (Ga. App. 2017).

Debtor is the rightful beneficiary of the proceeds of the Policy. In spite of Mr. Hirsch's directive to Mrs. Hirsch that said proceeds be awarded to Debtor to benefit the Bankruptcy Estate, Mrs. Hirsch has asserted dominion over the Policy proceeds, as demonstrated by her wrongful and tortious conduct in attempting to remove the Policy proceeds from Debtor's Schedules for her individual and personal benefit. Mrs. Hirsch had no legal authority to remove the Policy proceeds from Debtor's Schedules. Mrs. Hirsch also has no legal authority or right to retain the Policy proceeds to benefit herself personally.

Debtor has a right to immediate possession of the entirety of the Policy proceeds, but at present, Mrs. Hirsch has or will have actual possession of the Policy proceeds. Debtor has been and continues to be denied full use of the Policy proceeds. By withholding same from Debtor and the Bankruptcy Estate at large, Mrs. Hirsch has converted the lawful Property of Debtor. Plaintiff has thus stated a claim for conversion, in the alternative.

H. The Complaint States a Claim for Imposition of a Constructive Trust.

A constructive trust is a remedy imposed in equity "whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." O.C.G.A. § 53-12-132. "Equity will not allow one with a legal interest in a piece of property a windfall recovery when the beneficial interest should flow to another." *Ansley v. Raczka-Long*, 293 Ga. 138, 744 S.E.2d 55 (2013) (quoting *Weeks*

v. Gay, 243 Ga. 784, 787 (1979). The purpose of a constructive trust is "to prevent unjust enrichment." *Id*.

The evidence is glaring that Mrs. Hirsch's sole objective in attempting to remove the Policy proceeds from the Bankruptcy Estate was to retain them to benefit herself. Mrs. Hirsch's actions were not only dishonest, but also illegal and unjustified, in that her power of attorney over Mr. Hirsch's affairs had extinguished upon his death. Mrs. Hirsch acted without any authority whatsoever on August 4, 2023, when she filed the Fourth Schedules with the Debtor's 100% equitable interest in the Policy proceeds removed. In view of the foregoing, it would be unjust for Mrs. Hirsch to retain the Policy proceeds, and there is ample evidence to support imposing a constructive trust.

Even assuming, *arguendo*, an absence of dishonesty by Mrs. Hirsch, the fact that Mrs. Hirsch would be unjustly enriched by receiving the Policy proceeds against the express directive and wishes of Mr. Hirsch is sufficient in and of itself for the Court to impose a constructive trust in this matter. Without the imposition of a constructive trust, Mrs. Hirsch would receive nothing short of a windfall where the beneficial interest in the proceeds indisputably were intended for and belong to the Debtor for the benefit of the investors in this case. These facts, as set forth in Plaintiff's Complaint, are sufficient to state a claim for Plaintiff's request that constructive trust in this matter be imposed.

IV. CONCLUSION

In view of the foregoing, Plaintiff respectfully requests that this Honorable Court

deny Defendant's Motion to Dismiss in its entirety. Plaintiff also respectfully requests that a constructive trust be imposed to prevent a windfall recovery to Mrs. Hirsch to the detriment of the Debtor and the overall Bankruptcy Estate.

Respectfully submitted,

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