**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF GEORGIA**
**SAVANNAH DIVISION**

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| **IN RE:**<br><br>**MASTER LENDING GROUP, LLC,**<br><br>**Debtor.** | **CHAPTER 7**<br><br>**CASE NO. 23-40569-EJC** |
| **TIFFANY E. CARON, Chapter 7 Trustee for the Bankruptcy Estate of Master Lending Group, LLC**<br><br>**Plaintiff,**<br>**v.**<br><br>**JUDITH HIRSCH,**<br><br>**Defendant.** | **Adversary Proceeding. No. 23-04013-EJC** |

**DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE PLAINTIFF'S FIRST AMENDED COMPLAINT**

COMES NOW Judith Hirsch ("Defendant" or "Mrs. Hirsch"), and files this, Defendant's Response in Opposition to Plaintiff's Motion for Leave to File Plaintiff's First Amended Complaint, respectfully showing this Court as follows:

## I. BACKGROUND

Plaintiff filed her Complaint (Doc. No. 1) (hereinafter, the "Original Complaint") in this Adversary Proceeding on September 5, 2023. In response, Mrs. Hirsch filed her Motion to Dismiss (Doc. No. 7) and Memorandum of Law in Support thereof (Doc. No. 8) (collectively, the "Motion to Dismiss"). A hearing on Mrs. Hirsch's Motion to Dismiss was scheduled for November 30, 2023. On November 3, 2023, Plaintiff filed a Response in Opposition to Defendant's Motion to Dismiss (Doc. No. 15). On November 17, 2023, Mrs. Hirsch filed a Reply to Plaintiff's Response to the Motion to Dismiss (Doc. No. 17). On November 27, 2023, just three days before the hearing

on Mrs. Hirsch's Motion to Dismiss, Plaintiff filed her Motion for Leave to File Plaintiff's First Amended Complaint (Doc. No. 18) (the "Motion"). Attached as Exhibit A to Plaintiff's Motion was the proposed Plaintiff's First Amended Complaint (Doc. No. 18, Exhibit A) (the "Amended Complaint").

## II. LEGAL STANDARDS

### A. Standard for Amending a Pleading

"A party may amend its pleading once as a matter of course no later than… 21 days after service of a motion under Rule 12(b)[.]" Fed. R. Civ. P. 15(a)(1). After the time for amending as a matter of course has passed, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). The rule further instructs that "[t]he court should freely give leave when justice so requires." Id.

"Generally, where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." Bryant v. Dupree, 252 F.3d 1161, 1163, 14 Fla. L. Weekly Fed. C 707 (11th Cir. 2001). The court "need not, however, allow an amendment (1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." Id.

The 11th Circuit Court of Appeals "has found that denial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal." Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1263, 17 Fla. L. Weekly Fed. C 489 (11th Cir. 2004); see also Cockrell v. Sparks, 510 F.3d 1307, 1310, 21 Fla. L. Weekly Fed. C 254 (11th Cir. 2007) ("Leave to amend a complaint is futile when the complaint as amended would still be properly dismissed[.]").

Therefore, before determining whether to grant a motion for leave to amend a complaint, "[t]he Court must first determine whether Plaintiff's proposed amended complaint satisfies the motion to dismiss standard[.]" Turner v. Selective Way Ins. Co., No. 5:18-CV-85, 2019 U.S. Dist. LEXIS 195429, at *7 (S.D. Ga. Apr. 16, 2019). When the claims asserted in a proposed amended complaint are insufficient as a matter of law under the motion to dismiss standard, a motion to amend the complaint is properly denied as futile. Burger King Corp. v. Weaver, 169 F.3d 1310, 1320, 12 Fla. L. Weekly Fed. C 605 (11th Cir. 1999); see also Fortson v. Best Rate Funding, Corp., 602 F. App'x 479, 482 (11th Cir. 2015) ("The district court denied properly [Plaintiff]'s motion to file an amended complaint because [Plaintiff]'s only proposed amendment…would have cured none of the deficiencies identified -- by the earlier-filed motion to dismiss -- in the original complaint.").

**B. Standard for a Motion to Dismiss[1]**

Federal Rule of Civil Procedure 8(a)(2) requires that a plaintiff must provide at a minimum "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint must "state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L.Ed.2d 929, 949 (2007). The plaintiff must nudge "their claims across the line from conceivable to plausible." Twombly, 550 U.S. at 570. The pleading standard "demands more than an unadorned, the defendant-unlawfully-harmed-me accusations." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868, 883 (2009) (citing Twombly, 550 U.S. at 556). "Rule 8(a) requires parties to make their pleadings straightforward so

[1] For a complete discussion of the standards applicable in deciding a motion to dismiss, see Defendant's Motion to Dismiss (Doc. No. 7 and Doc. No. 8) and Reply to Plaintiff's Response to Defendant's Motion to Dismiss (Doc. No. 17).

that judges and adverse parties need not try to fish a gold coin from a bucket of mud." United States v. Lockheed-Martin Corp., 328 F.3d 374, 378 (7th Cir. 2003).

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court should dismiss a complaint if it fails to state a claim upon which relief may be granted. Where no construction of the factual allegations of a complaint will support the cause of action, dismissal is appropriate. Campos v. I.N.S., 32 F. Supp. 2d 1337, 1343 (S.D. Fla. 1998).

When considering a motion to dismiss, the court "must accept petitioner's allegations as true." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L.Ed.2d 59, 65 (1984). However, courts are not required to accept factual claims that are internally inconsistent, facts counter to facts of which the court can take judicial notice, conclusory allegations, unwarranted deductions, or mere legal conclusions. Smedley v. Fulton Cty Sch. Dist., No. 1:09-CV-1715-HTW, 2011 U.S. Dist. LEXIS 164168, *3 (N.D. Ga. June 23, 2011).

## III. ARGUMENT AND CITATION OF AUTHORITY

Plaintiff's Motion to Amend is futile. Even accepting all of the facts alleged in the Amended Complaint as true, the proposed Amended Complaint fails to state a claim upon which relief may be granted. Thus, Plaintiff's Motion to Amend should be denied.

In requesting leave to amend her complaint, Plaintiff asserts that the amendment is not futile because "[t]he revised complaint is sufficient to state a cause of action and raise a right to relief above the speculative level." Plaintiff's Motion does not explain the ways in which the Amended Complaint addresses the deficiencies in her Original Complaint.

As explained in Mrs. Hirsch's Motion to Dismiss, each of the counts in Plaintiff's Original Complaint failed to state a claim. A detailed comparison of the Original Complaint and the proposed Amended Complaint shows that the Amended Complaint fails to state a claim, largely

for the same reasons asserted in Mrs. Hirsch's Motion to Dismiss. The additions to the Amended Complaint are insufficient to rise to the level of stating a claim pursuant to Rule 8.

**A. COUNT I: Determination of Validity, Priority and Extent of Liens and Interest**

Count I of the proposed Amended Complaint, like Count I of the Original Complaint, fails to state a claim because Plaintiff has failed to plead a cause of action. Count I of the Amended Complaint contains two changes from the Original Complaint. First, Plaintiff's Original Complaint stated that the "proceeds of the Policy constitute property of the Bankruptcy Estate based on the Bankruptcy Estate's 100% equitable interest therein." Compl. ¶ 45. The Amended Complaint alleges that the "proceeds of the Policy constitute property of the Bankruptcy Estate based on Mr. Hirsch's explicit statement to Mrs. Hirsch that the entirety of the Policy proceeds belonged to the Debtor for the benefit of the Bankruptcy Estate and also that, on information and belief, Mr. Hirsch took affirmative steps to have the beneficiary designation of the Policy changed to the Debtor. *See* Exhibit 'A.'" Am. Compl. ¶ 54.

In addition to these new factual averments, Plaintiff now states her claim pursuant to 11 U.S.C. § 541(a)(1) and Rule 7001(2) (Am. Compl. ¶ 55), instead of only Rule 7001(2) (Compl. ¶ 46). Neither of these changes are sufficient to remedy the deficiencies in Count I of the Original Complaint. Count I of the Amended Complaint does not state "a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570.

The deficiency in Count I of Plaintiff's Original Complaint, as established in Mrs. Hirsch's Motion to Dismiss, was not insufficient factual allegations to support the claim, but rather insufficient law to support a valid cause of action. Therefore, Plaintiff's additional factual allegations do nothing to cure the deficiencies in the Original Complaint.

As explained in the Motion to Dismiss, Rule 7001(2) does not give rise to a cause of action. Bankruptcy Rule 7001(2) simply states that "a proceeding to determine the validity, priority, or extent of a lien or other interest in property" is an adversary proceeding. "Rule 7001 is a procedural rule and does not provide a substantive basis for relief." Day v. Agricenter Int'l, Inc. (In re Butcher Shop of Cordova, LLC), Nos. 21-22100-L, 22-00080, 2022 Bankr. LEXIS 3086, at *7 n.1 (Bankr. W.D. Tenn. Oct. 26, 2022). A request for the court to determine ownership of certain property pursuant to Bankruptcy Rule 7001 is a request pursuant to "a procedural rule which itself does not provide grounds for a cause of action." See Bailey v. Amaro (In re Amaro), No. 20-96021, 2020 Bankr. LEXIS 2399 (Bankr. N.D. Ill. Sep. 11, 2020 (citing United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 272, 130 S. Ct. 1367, 1378, 176 L.Ed.2d 158, 170 (2010)). The court in In re Amaro held that the plaintiff's claim pursuant to Bankruptcy Rule 7001 "manifestly fail[ed] to describe an actionable claim" and "therefore, must be dismissed." Plaintiff has already conceded that Rule 7001(2) does not create a viable cause of action by failing to respond to Mrs. Hirsch's argument in her Motion to Dismiss. See Reply to Pl.'s Resp. to Def.'s Mot. to Dismiss.

Further, Plaintiff's effort to make the claim pursuant to Rule 7001(2) *and* Bankruptcy Code § 541(a)(1) does not transform Count I into a viable cause of action. Section 541(a) simply states that the bankruptcy estate is comprised of "[a]ll legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The issue in this case is not whether a property interest of Debtor should be considered property of the Bankruptcy Estate. Rather, the issue is whether Debtor ever had a property interest in the proceeds of the Policy in the first place. If Debtor had a property interest in the Policy proceeds, that interest would undoubtably become part of the Bankruptcy Estate. However, Debtor held no such interest. By pleading pursuant to Section 541(a)(1), Plaintiff misunderstands the subtle distinction between "[w]hether a debtor's

interest constitutes 'property of the estate,'" which "is a federal question" governed by Section 541, and whether the debtor has a property interest at all, which is governed by state law. Bell-Tel Fed. Credit Union v. Kalter (In re Kalter), 292 F.3d 1350, 1353, 15 Fla. L. Weekly Fed. C 632 (11th Cir. 2002).

"Property interests are created and defined by state law." Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 918, 59 L.Ed.2d 136, 141-42 (1979). Section 541(a)(1) does not govern whether Debtor had a property interest in the Policy proceeds. Bell v. Instant Car Title Loans (In re Bell), 279 B.R. 890, 895 (Bankr. N.D. Ga. 2002) ("whether a debtor has a 'legal or equitable interest' in property for purposes of § 541(a)(1) is determined by reference to state law."). The ownership of the Policy proceeds is governed by Georgia law. Georgia law is clear. The beneficiary under an insurance policy is the owner of the proceeds exclusive to the rights of all others. The applicable statute provides that "whenever any person residing in the state shall die leaving insurance on his or her life, such insurance shall inure exclusively to the benefit of the person for whose use and benefit such insurance is designated in the policy[.]" O.C.G.A. § 33-25-11(a). Bankruptcy Code Section 541 is wholly irrelevant to the determination of whether the Debtor has a "legal or equitable interest" in the Policy proceeds under Georgia law.

To state a claim to the Policy proceeds, Plaintiff must successfully plead a cause of action under Georgia law which is plausible on its face. Plaintiff's effort to make a state law claim, if any, fails to state a claim as a matter of law. Because Plaintiff has failed to state a claim upon which relief may be granted in Count I of her proposed Amended Complaint, the Court should deny the Motion as futile.

**B. COUNT II: Turnover**

As explained in Mrs. Hirsch's Motion to Dismiss, a turnover claim under Bankruptcy Code § 542 is designed to allow a trustee to recover an asset of the estate held by another. Scarver v. Ellis (In re McKeever), 567 B.R. 652 (Bankr. N.D. Ga. 2017). "[A] turnover action is not the appropriate tool for acquiring the right to use or possess property if the debtor's right to use or possess the property is subject to dispute." Id. "Turnover is not intended as a remedy to determine disputed rights of parties to property." In re Suncoast Towers S. Assocs. v. Menada, INC., Chapter 11, Bankruptcy No. 98-10537-BKC-AJC, Adversary No. 98-1451-BKC-AJC-A, 1999 Bankr. LEXIS 770, at *30 (Bankr. S.D. Fla. June 17, 1999).

Count II of the Amended Complaint states that, "to the extent the Court determines that the Policy proceeds constitute property of the Bankruptcy Estate, the Policy proceeds are subject to turnover by Mrs. Hirsch to Plaintiff,…pursuant to 11 U.S.C. § 542." Count II is intrinsically tied to the state law claims because the request for turnover requires a determination under Georgia law that the policy proceeds are property of the Bankruptcy Estate. Because all of Plaintiff's state law claims fail as a matter of law, Count II must also be dismissed. Plaintiff is unable to plead a claim to the Policy proceeds that is plausible on its face. As a result, Plaintiff's request for the turnover of the of the Policy proceeds must be dismissed.

**C. COUNT III: Breach of Confidential Relationship and The Duty of Good Faith**

Plaintiff lacks standing to bring a claim for breach of a confidential relationship or fiduciary duty against Mrs. Hirsch. Nowhere in the Amended Complaint does Plaintiff address the issue of standing to bring such a claim. As such, the Amended Complaint still fails to state a claim, and this Court should deny Plaintiff's Motion to Amend as futile.

On November 30, 2023, at the hearing on Defendant's Motion to Dismiss, Defendant understood Plaintiff to say that Defendant's arguments to dismiss this claim were misplaced as they were directed against a claim for breach of fiduciary duty. Plaintiff's counsel asserted the Plaintiff's claim was not for breach of fiduciary duty but rather an alleged breach of a confidential relationship. Plaintiff seemed to assert that Count III was brought pursuant to O.C.G.A. § 23-2-58. If this is the case, Plaintiff has brought a claim under a statute that does not create a cause of action. O.C.G.A. § 23-2-58 simply defines a confidential relationship as follows:

> 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.

O.C.G.A. § 23-2-58. This section is located in the Article 3 of Chapter 2 of Title 23, which is entitled "Fraud." The definition is clearly directed at a preceding section in the same chapter, O.C.G.A. 23-2-53, which reads as follows:

> Suppression of a material fact which a party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.

O.C.G.A. 23-2-53. Thus, when the provisions of Article 3 are read in concert with each other, it is clear that O.C.G.A. § 23-2-58 is only meant to define a confidential relationship for the purposes

of determining who owes a duty to disclose in relation to a fraud claim. O.C.G.A. § 23-2-58 does not create an independent tort cause of action for breach of a confidential relationship that is somehow different from a claim for breach of fiduciary duty.

In fact, in King v. King, the Georgia Supreme Court addressed whether a breach of the duty to disclose in a confidential relationship, constituting fraud, would also support a breach-of-fiduciary-duty tort claim under Georgia law. King v. King, 316 Ga. 354, 357, 888 S.E.2d 166, 169 (2023). The court held that "while all fiduciary relationships are confidential in nature, only some confidential relationships are fiduciary relationships." Id. "[I]f the parties in a confidential relationship are also in a fiduciary relationship, a fraudulent breach of the duty to disclose would support a breach-of-fiduciary-duty tort claim under Georgia law. King, 316 Ga. at 359. By answering this question, the Georgia Supreme Court made it clear that there is no independent and distinct tort cause of action for breach of a confidential relationship.

In the interest of reading Plaintiff's claims in the light most likely to state a claim, Defendant assumed that Plaintiff intended to assert a claim for breach of fiduciary duty. If Plaintiff did not intend to state a claim for breach of fiduciary duty, Count III should be dismissed for failure to state a claim because breach of a confidential relationship is not an independent cause of action. If Plaintiff did in fact intend to bring a claim for breach of a fiduciary duty, the claim should be dismissed for lack of standing.

As explained in Mrs. Hirsch's Motion to Dismiss, Plaintiff does not have standing to bring a claim based on the alleged relationship between Mr. and Mrs. Hirsch because Plaintiff was not a party to that relationship. See Ford v. Reynolds, 315 Ga. App. 200, 726 S.E.2d 687 (2012) (holding that a third party to a fiduciary relationship did not have standing to bring a claim for breach of a fiduciary duty). In Ford, the plaintiff claimed that the defendant "breached her

obligations to [the deceased] by using the power of attorney to defeat [the deceased]'s gifts to [the plaintiff]." Id. The court granted summary judgement to the defendant and held that the plaintiff lacked standing to bring a claim against the defendant for any duty the defendant owed to the deceased under the power of attorney. Id.

Similarly, in the case at hand, Plaintiff has no standing to bring a claim against Mrs. Hirsch for any duty she may have owed to Mr. Hirsch. Further, Plaintiff has conceded the standing argument by failing to respond to it in her Response to Defendant's Motion to Dismiss. See Reply to Pl.'s Resp. to Def.'s Mot. to Dismiss. As a result of Plaintiff's lack of standing, Count III of the Amended Complaint fails to state a claim upon which relief can be granted. Thus, this Court should deny Plaintiff's Motion to Amend because it is futile.

**D. COUNT IV: Unjust Enrichment**

Plaintiff's Amended Complaint removes Count IV of the Original Complaint and no longer attempts to state a claim for Constructive Fraud. Count IV of the Amended Complaint now attempts to state a claim for unjust enrichment. Plaintiff's claim for unjust enrichment was Count V of the Original Complaint.

In Count IV the Amended Complaint, Plaintiff fails to state a claim for unjust enrichment. Plaintiff's Count IV of the Amended Complaint is largely the same as Count V of the Original Complaint. As explained in the Motion to Dismiss, Plaintiff "cannot state a claim for unjust enrichment because [the Bankruptcy Estate] did not [itself] confer a benefit upon" Mrs. Hirsch. See Tiller v. State Farm Mut. Auto. Ins. Co., No. 1:12-CV-3432-TWT, 2013 U.S. Dist. LEXIS 15726 (N.D. Ga. Feb. 5, 2013); see also Motion to Dismiss. Plaintiff failed to respond to the argument that the Bankruptcy Estate did not confer a benefit on Mrs. Hirsch. As a result, Plaintiff conceded this argument. See Reply to Pl.'s Resp. to Def.'s Mot. to Dismiss.

Plaintiff asserts one new allegation in her Amended Complaint. Plaintiff alleges that Mrs. Hirsch would be "unjustly enriched by being allowed to retain the benefit of the proceeds of the Policy, given that the Policy was purchased with funds directly from or traceable to Debtor's Bank account(s)." Am. Compl. ¶ 73. Even if this were true, this allegation is insufficient as a matter of law to support a claim for unjust enrichment.

In Speedway Motorsports, Inc. v. Pinnacle Bank, the Georgia Court of Appeals held that "OCGA § 33-25-11 (a) precludes any claims in this case against the proceeds of the life insurance policy." Speedway Motorsports, Inc. v. Pinnacle Bank, 315 Ga. App. 320, 325, 727 S.E.2d 151, 156 (2012), cert. denied, No. S12C1329, 2013 Ga. LEXIS 50 (Ga. Jan. 7, 2013). In Speedway, the plaintiff attempted to assert a "tracing argument" to recover the proceeds of a life insurance policy. Id. The Plaintiff alleged that the insured "used the proceeds of his fraud to purchase" a life insurance policy. Id. at 324. The insured subsequently died. Id. Speedway, the victim of the insured's fraud, asserted that the beneficiaries "were unjustly enriched by their receipt of the life insurance proceeds." Id. Speedway alleged that it was "equitably entitled to the proceeds of the policy, at least up to the amount of the premiums paid with funds that [the insured] acquired by his fraud." Id. The Georgia Court of Appeals rejected Speedway's argument and held that O.C.G.A. § 33-25-11 put the proceeds of the insurance policy out of the reach of Speedway as a matter of law. Id.

In reaching this determination, the Georgia Court of Appeals conducted a detailed analysis of the history of O.C.G.A. § 33-25-11. Id. The court began its analysis with the Code of 1910 which "provided that 'the assured [i.e. insured] may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and upon such direction given, and assented to by the insurer, no other person can defeat the same.'" Speedway, 315 Ga. App. at

326 (quoting Civil Code of 1910, § 2498). The court in Speedway also cited Bennett v. Rosborough, a Georgia Supreme Court case from 1923. In Bennett, the "Supreme Court considered whether an employer might properly recover, by way of a constructive trust, the proceeds of insurance on the life of its employee, where the employee had embezzled funds from the employer and used them to pay the premiums on his life insurance." Speedway, 315 Ga. App. at 326. The Bennet court found that, in Georgia, creditors cannot reach the proceeds of a life insurance policy, "even though premiums might have been paid at a time when the [insured] was insolvent or with money which had been stolen from the creditors." Speedway, 315 Ga. App. at 327 (quoting Bennett v. Rosborough, 155 Ga. 265, 272, 116 S.E. 788, 791 (1923)).

In 1933, ten years after Bennett, the Georgia General Assembly enacted a statute which gave "a 'creditor' the limited right to recover the amount of any premiums paid by the insured with intent to defraud the 'creditor.'" Speedway, 315 Ga. App. at 327 (citing Ga. L. 1933, p. 181, § 1). Nearly thirty years later, in 1960, "the General Assembly enacted a comprehensive insurance code, and in doing so, it repealed the 1933 statute, but it nevertheless carried forward the provisions of the 1933 statute about the limited extent to which a 'creditor' could recover life insurance proceeds." Id. at 328. "The 1960 statute was amended in 1982, Ga. L. 1982, p. 3, § 33, and again in 2006, Ga. L. 2006, p. 885, § 1, at which time the limited right of a creditor to recover the amount of premiums paid to defraud the creditor was abolished." Id. The Court of Appeals concluded that O.C.G.A. § 33-25-11, as written, precluded any claims against the policy proceeds, regardless of how the premiums were paid. Id. at 325.

Speedway argued that "such a construction of the statute effectively gives thieves and fraudsters an incentive to launder the proceeds of their wrongdoing through life insurance." Id. at 328-29. The Court of Appeals acknowledged that "it might do just that," but concluded that the

General Assembly wrote the statute as it did to further important policy interests, "including the policy interest in providing certainty for insurers about the persons to whom proceeds of policies should be paid, as well as the policy interest in ensuring that the beneficiaries of life insurance—for some of whom the life insurance proceeds may represent the only valuable asset that the insured has left for their care—promptly receive the proceeds of the policy." Id. at 329. The court held that "it is for the General Assembly, not appellate judges, to strike the difficult balance between competing policy interests" and affirmed the dismissal of Speedway's claims. Id.

Speedway was decided on March 29, 2012. Id. Just one day prior, on March 28, 2012, a different panel on the Georgia Court of Appeals decided McCrary v. Middle Ga. Mgmt. Servs., 315 Ga. App. 247, 726 S.E.2d 740 (2012). In McCrary, the plaintiff filed suit seeking a constructive trust on the proceeds of a life insurance policy which was obtained with funds allegedly embezzled by the insured. Id. at 247. The Georgia Court of Appeals held that "the claim of a creditor to life insurance proceeds cannot defeat a designated beneficiary." Id. at 251. "Under the plain terms of the statute," creditors are precluded from defeating the interest of a designated beneficiary. Id. The Court of Appeals held that the trial court erred in denying the defendant's motion for summary judgement and that the plaintiff's claim for the imposition of a constructive trust over the life insurance proceeds failed as a matter of law. Id.

Similarly, in the case at hand, Plaintiff now seems to assert some sort of "tracing" claim. Though not thoroughly articulated, Plaintiff assumably asserts that some funds paid as premiums on the instant policy represent "ill-gotten gains." Construing the proposed Amended Complaint in favor of Plaintiff, Plaintiff still has failed to establish a plausible claim for unjust enrichment under Georgia law. Therefore, this Court should deny Plaintiff's Motion to Amend as futile because the Amended Complaint fails to state a claim.

**D. COUNT V**

Plaintiff's Amended Complaint does not contain a Count V.

**E. COUNT VI: Conversion (In the Alternative)**

Plaintiff's Amended Count VI fails to state a claim for Conversion. As explained in the Motion to Dismiss, under Georgia law, conversion is a "distinct act of dominion wrongfully asserted over another's property in denial of his right, or inconsistent with it." Md. Casualty Ins. Co. v. Welchel, 257 Ga. 259, 261, 356 S.E.2d 877, 880 (1987). "In order to establish a claim for conversion, the complaining party must show (1) title to the property or the right of possession, (2) actual possession in the other party, (3) demand for return of the property, and (4) refusal by the other party to return the property." Internal Med. All., LLC v. Budell, 290 Ga. App. 231, 239, 659 S.E.2d 668, 675 (2008).

Plaintiff has no property interest in the Policy proceeds and thus cannot state a claim for conversion. Under O.C.G.A. § 33-25-11, life insurance policies "shall inure exclusively to the benefit of the person for whose use and benefit such insurance is designated in the policy." Mrs. Hirsch's interest in the proceeds of the Policy vested upon Mr. Hirsch's death. See Loyd v. Loyd, 203 Ga. 775, 779 (1948). The court in Gratchev v. Gratchev explained why a purported equitable interest is insufficient to state a claim for conversion:

> The property allegedly converted by [the defendant] was titled in his name; [The plaintiff] cannot establish that he is the "rightful owner" of the property. [The plaintiff] may have an equitable interest in the property and has raised claims in equity of constructive fraud and unjust enrichment. But [the defendant] is the legal owner of the property. [The plaintiff] cannot maintain a claim for conversion of property he does not own.

Igor Ivanovich Gratchev v. Maxime Igorovich Gratchev, No. 20-60022-CIV-SINGHAL, 2021 U.S. Dist. LEXIS 260238, at *11 (S.D. Fla. Jan. 25, 2021). The Bankruptcy Estate does not have a property interest in the Policy proceeds. Therefore, Plaintiff fails to state a claim for conversion.

Further, even if Plaintiff did have a property interest in the Policy proceeds, Plaintiff cannot state a claim for conversion because the proceeds are not and have never been in the *actual possession* of Mrs. Hirsch, as required for a claim of conversion. See Internal Med. All., LLC v. Budell, 290 Ga. App. at 239.

Plaintiff also cannot state a claim for conversion of an intangible interest in the proceeds of the Policy. [A]n action for conversion will lie only for appropriation of discrete physical things. Faircloth v. A. L. Williams & Assocs., 206 Ga. App. 764, 766-67, 426 S.E.2d 601, 604 (1992). Conversion is not available as a cause of action with regard to intangible property interests that have not been merged into a document. Internal Med. All., LLC v. Budell, 290 Ga. App. at 239 (explaining a check or other negotiable instruments can be converted, but a right to payment could not). Hence, conversion is not a viable claim where there is nothing more than a failure by the defendant to pay money owed to the plaintiff. Id.

Plaintiff has no property interest and is owed none of the Policy proceeds. However, even if Plaintiff did have an interest in the Policy proceeds, Mrs. Hirsch has not had actual possession of the policy proceeds. Thus, for all of the reasons laid out above, the Amended Complaint fails to state a claim for conversion and this Court should deny Plaintiff's Motion to Amend as futile.

**F. COUNT VII: Constructive Trust**

Finally, the Amended Complaint fails to state a claim for a constructive trust. As explained in Mrs. Hirsch's Motion to Dismiss, a constructive trust is merely a remedy, not a cause of action. See Lee v. Lee, 260 Ga. 356, 357, 392 S.E.2d 870, 871 (1990) ("a constructive trust is a remedial

device created by a court of equity in order to prevent unjust enrichment."); see also Arcturus Int'l LLC v. Geller-Stoff, No. 1:21-CV-5155-TWT, 2022 U.S. Dist. LEXIS 159538, *30 (N.D. Ga. Sep. 2, 2022) ("As correctly pled…the imposition of a constructive trust is not a separate cause of action but a remedy to prevent unjust enrichment."). Because Plaintiff's unjust enrichment claim (Count IV of the Amended Complaint) fails as a matter of law, Plaintiff holds no valid claim that would support imposition of a constructive trust as a remedy. Count VII must be dismissed.

Count VII of the Amended Complaint is substantively identical to Count VII of the Original Complaint with one addition. The Amended Complaint includes the allegation that it would be "unfair and inequitable to allow Mrs. Hirsch to be unjustly enriched by being allowed to retain the benefit of the proceeds of the Policy, given that the Policy was purchased with funds directly from or traceable to Debtor's bank account(s)." As explained above, this "tracing argument" is insufficient, under Georgia law, to sustain a claim of unjust enrichment or support the imposition of a constructive trust. See McCrary v. Middle Ga. Mgmt. Servs., 315 Ga. App. 247, 247, 726 S.E.2d 740, 741 (2012) (Plaintiff could not prevail on a claim for a constructive trust on the proceeds of a life insurance policy that was allegedly obtained with embezzled funds because, under OCGA § 33-25-11, the claim of a creditor to life insurance proceeds cannot defeat the rights of a designated beneficiary).

As for Plaintiff's allegation that "[i]t would be unfair and inequitable to unjustly deprive the Debtor…the benefit of the Policy proceeds Mr. Hirsch intended for it to have," Mrs. Hirsch has already explained in her original Motion to Dismiss why the alleged intent of Mr. Hirsch is insufficient as a matter of law to support the imposition of a constructive trust. Am. Compl. ¶ 87. "A constructive trust arises not from the intent of the parties, but by equity." Aetna Life Ins. Co.

v. Weekes, 241 Ga. 169, 172, 244 S.E.2d 46, 48 (1978). Intent alone, without unjust enrichment, is an insufficient ground for the imposition of a constructive trust.

In Bennett v. Rosborough,[2] the Supreme Court of Georgia refused to impose a constructive trust where the insured intended the policy proceeds to be used to pay creditors. Bennett, 155 Ga. 265 (1923). In Bennett, the deceased wrote a letter to his wife the day before his death expressing his intent for her to use the proceeds of his life insurance policy to pay his creditors. Id. at 270. Despite the insured's clear expression of his intent for the proceeds of the policy, the Supreme Court of Georgia held that the creditors had no interest, legal or equitable, in the policy proceeds and refused to impose a constructive trust. Id. at 274.

[2] This is the same Bennett v. Rosborough discussed above in "Count IV: Unjust Enrichment." In this case, the Georgia Supreme court rejected the plaintiff's tracing argument and also rejected the argument that creditors were entitled to the policy proceeds because it was the intent of the insured.

## IV. CONCLUSION

Plaintiff's proposed Amended Complaint, like Plaintiff's Original Complaint, fails to state a claim upon which relief may be granted. The 11th Circuit Court of Appeals "has found that denial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal." Hall, 367 F.3d at 1263 (11th Cir. 2004). Because Plaintiff's proposed Amended Complaint is subject to dismissal for failure to state a claim, this Court should deny Plaintiff's Motion to Amend as futile.

WHEREFORE, Defendant prays for the following relief:

(a) That this Court deny Plaintiff's Motion to Amend;

(b) That this Court grant Defendant's Motion to Dismiss; and

(c) For such other and further relief as this Court deems just and proper.

Respectfully submitted this 11th day of December, 2023.

**JONES & WALDEN LLC**

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**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF GEORGIA**
**SAVANNAH DIVISION**

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

**CERTIFICATE OF SERVICE**

I certify that the foregoing *Response in Opposition to Plaintiff's Motion for Leave to File Plaintiff's First Amended Complaint* was electronically filed using the Bankruptcy Court's Electronic Case Filing program which sends a notice of and an accompanying link to the Amendment to the following parties who have appeared in this case under the Bankruptcy Court's Electronic Case Filing program:

- **Natalie Rowland** nrowland@taylorenglish.com

This 11th day of December, 2023.

**JONES & WALDEN LLC**

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