UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEMINI TRUST COMPANY, LLC,

Plaintiff,

v.

DIGITAL CURRENCY GROUP, INC. and BARRY SILBERT,

Defendants.

Case No. 1:23-cv-06864-LJL [rel. 23-2027]

Hon. Lewis J. Liman

ORAL ARGUMENT REQUESTED

DEFENDANTS' NOTICE OF MOTION TO DISMISS THE COMPLAINT

PLEASE TAKE NOTICE that, upon the accompanying memorandum of law, and the Declaration of Caroline Hickey Zalka, dated August 10, 2023, with exhibits attached thereto, Defendants Digital Currency Group, Inc. and Barry Silbert, by and through their undersigned counsel, hereby move this Court before the Honorable Lewis J. Liman, at the United States Courthouse, 500 Pearl Street, New York, New York, 10007, for an Order, pursuant to Federal Rules of Civil Procedure 8, 9(b), and 12(b)(6), dismissing with prejudice the Complaint in this action, and for any further relief that the Court may deem just and proper.

Dated: August 10, 2023
New York, New York

Respectfully submitted,

/s/ Jonathan D. Polkes

Jonathan D. Polkes
Caroline Hickey Zalka
Stefania D. Venezia
Dylan L. Ruffi
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000
Fax: (212) 310-8007

Counsel for Defendants Digital Currency Group, Inc. and Barry Silbert

Joshua M. Wesneski
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW, Suite 600
Washington, DC 20036
Tel: (202) 682-7000
Fax: (202) 857-0940

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEMINI TRUST COMPANY, LLC,

Plaintiff,

v.

DIGITAL CURRENCY GROUP, INC. and BARRY SILBERT,

Defendants.

Case No. 1:23-cv-06864-LJL [rel. 23-2027]

Hon. Lewis J. Liman

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000
Fax: (212) 310-8007

Counsel for Defendants Digital Currency Group, Inc. and Barry Silbert

August 10, 2023

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Defendants Digital Currency Group, Inc. ("DCG") and Barry Silbert ("Silbert," and collectively, "Defendants") respectfully submit this memorandum of law in support of their Motion to Dismiss the Complaint ("Complaint"), under Rules 8, 9(b), and 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Plaintiff Gemini Trust Company, LLC ("Gemini") brings allegations of fraudulent misrepresentations related to the Gemini Earn program, formerly operated by Gemini in coordination with Genesis Global Capital, LLC ("Genesis"). Yet Genesis is not a defendant here. It filed for bankruptcy on January 19, 2023, leaving Gemini—which created and promoted the Gemini Earn program—with irate customers. Gemini and its principals—Cameron and Tyler Winklevoss—thereafter began an effort to deflect blame by contriving a public, Twitter-based character assassination campaign against Defendants DCG (Genesis's indirect parent) and Silbert (DCG's founder)—neither of whom operated or oversaw the Gemini Earn program. These tweets were personal, vicious, and false, accusing Silbert of "foster[ing] and architect[ing] a culture of lies and deceit" and describing a letter by Silbert as "another piece of carefully crafted stupidity."[1] This Complaint is a continuation of that public relations campaign.

Through the Gemini Earn program, Gemini actively encouraged its existing customers to lend their digital assets (including cryptocurrency) to Genesis in exchange for interest, representing to its customers that it was a sophisticated market participant and that it had thoroughly vetted Genesis. Each Gemini customer who wished to participate in the Gemini Earn program executed

[1] @Cameron, TWITTER (July 3, 2023 8:27PM), https://twitter.com/cameron/status/1676024844641550337; *see also* @Cameron, TWITTER (Jan. 2, 2023 9:02AM), https://twitter.com/cameron/status/1609913051427524608 (claiming that Barry Silbert is "hid[ing] in [his] ivory tower" and using his background "as a bankruptcy restructuring associate" to take "the money of schoolteachers").

a Master Loan Agreement ("MLA") among the customer (as the lender), Genesis (as the borrower), and Gemini (as custodian and authorized agent for the customer). Ex. A ("MLA") § XXV.[2]

Notably absent from this arrangement is any participation by Defendants. That is because Defendants had virtually nothing to do with the Gemini Earn program—with its inception, with Gemini's promotion of the program to its customers, or with its ongoing operation. Indeed, the MLA provided that "none of Genesis' parents or affiliates shall have any liability under this Agreement nor do such related entities guarantee any of Genesis' obligations under this Agreement." MLA § XVII. The parties further agreed that "any and all claims and liabilities against Genesis arising in any way out of this Agreement are only the obligation of Genesis, and not any of its parents or affiliates, including but not limited to Digital Currency Group, Inc." *Id.* § XVII.

In its 33 pages and 120 paragraphs of sensational claims, Gemini identifies just *one* representation made by Defendants to Gemini, allegedly at a lunch between Silbert and Cameron Winklevoss. As to that single representation, Gemini does not explain why it supposedly was fraudulent (much less with the particularity demanded by Rule 9(b)). The rest of the Complaint is a hodgepodge of conclusory allegations against non-defendant Genesis, all belied by the fact that Gemini has not filed these spectacular claims in the Genesis bankruptcy, as it surely would have had there been any good-faith basis for them. In either event, these allegations against Genesis have no legal bearing on the claims against the actual Defendants in this case.

Gemini tries in various ways to hold Defendants responsible for alleged misrepresentations by Genesis, but Gemini's efforts to impute them to Defendants fail as a matter of law. It is a settled principle of law that parents are not liable for the conduct of their subsidiaries, and Gemini does

[2] Citations to "Ex. _" refer to exhibits appended to the accompanying Declaration of Caroline Hickey Zalka, dated August 10, 2023.

not even try to allege any theory of alter ego. Instead, it asserts that Defendants are liable for not affirmatively correcting the alleged misstatements of Genesis. That is not the law, and if it were, every parent would be liable for every public representation made by its subsidiary. Defendants owed no duty to Gemini to correct the allegedly false misstatements of another.

This theory of liability suffers from a host of other defects. Gemini fails to offer anything beyond bare, conclusory assertions of knowledge and scienter by Defendants, both of which are independent (and demanding) elements of fraud. It fails to allege that any reliance on Genesis's alleged representations regarding its financial condition was reasonable, and fails to draw any cogent connection between Genesis's representations and the unspecified *third-party* lawsuits that form the sole basis for its claim of injury. Gemini's fallback theory of conspiracy liability is similarly deficient, because Gemini fails to adequately allege the most essential elements of that claim—the existence of an unlawful agreement and actual knowledge of the fraud.

In the alternative, Gemini argues that Defendants aided and abetted Genesis's alleged fraud through various corporate transactions and paperwork. This effort fares no better. There are no well-pled allegations that Defendants had actual knowledge of any alleged fraud, and Gemini does no more than rely on Defendants' corporate relationship with Genesis to argue otherwise. Once again, that effort runs squarely into the settled law prohibiting plaintiffs from equating subsidiaries with their parents. Nor can Gemini allege any substantial assistance by Defendants. Here too, Gemini invents conclusory claims that a promissory note issued by DCG to Genesis was fraudulent, even though it has filed no such claims in the bankruptcy proceeding.

At bottom, this lawsuit is an attempt by Gemini to smear Defendants—who did not operate the Gemini Earn program—with claims it has not even filed in the Genesis bankruptcy proceeding. It fails as a matter of law for the numerous reasons set forth below.

STATEMENT OF FACTS[3]

A. Gemini and Genesis

This action concerns a digital-asset lending arrangement between Gemini and Genesis (not DCG). Prior to its bankruptcy in January 2023, Genesis's business consisted of borrowing digital assets from others and relending those assets to third parties at higher interest rates than the original loan. Compl. ¶ 23. Genesis launched its lending business in 2018 and rose to prominence as one of the largest lending businesses in cryptocurrency, with more than $244.4 billion in cumulative loan originations. *Id.* ¶ 22.

In February 2021, Gemini—a cryptocurrency trust company—entered into a partnership with Genesis whereby it would offer its customers the opportunity to lend their digital assets to Genesis and earn interest. Compl. ¶¶ 2, 12, 24. Gemini marketed this product as the "Gemini Earn" program. *Id.* Each Gemini customer who wished to participate in the Gemini Earn program executed an MLA among the customer (as the lender), Genesis (as the borrower), and Gemini (as custodian and authorized agent for the customer). MLA § XXV. Each MLA provided that "none of Genesis' parents or affiliates shall have any liability under this Agreement," *id.* § XVII, and that "any and all claims and liabilities against Genesis arising in any way out of this Agreement are only the obligation of Genesis, and not any of its parents or affiliates, including but not limited to Digital Currency Group, Inc." *Id.* § XVII. Gemini warranted that it was a sophisticated party, represented by sophisticated counsel. *Id.* §§ V(d), XXIV.

Participants in the Gemini Earn program were not the only parties who lent assets to Genesis: "Genesis provides the full suite of services global investors require for their digital asset

[3] The following facts are drawn from the Complaint, documents incorporated therein, and documents relied on by Gemini in bringing this suit. *Harris v. AmTrust Fin. Servs., Inc.*, 135 F. Supp. 3d 155, 168 (S.D.N.Y. 2015), *aff'd*, 649 F. App'x 7 (2d Cir. 2016). The Court "may consider . . . statements or documents incorporated into the complaint by reference." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

portfolios. It offers digital asset OTC lending, institutional lending, and prime services." Compl. ¶ 18. The Gemini Earn program thus comprised only one part of Genesis's lending portfolio.

B. Three Arrows Capital

Genesis made money by relending digital assets it borrowed. One of the third parties who frequently borrowed from Genesis was Three Arrows Capital Ltd. ("3AC"). As of June 2022, 3AC owed approximately $2.3 billion in loans to Genesis. Compl. ¶ 43. Gemini alleges that part of 3AC's borrowing strategy involved Grayscale Investments, LLC ("Grayscale"), a DCG-owned company that sponsored and managed an investment fund, the Bitcoin Trust. *Id.* ¶¶ 21, 45. Accredited investors could obtain shares in the Bitcoin Trust by contributing digital assets (bitcoin) to the trust, and those shares could be bought and sold on the open market. *Id.* ¶ 45.

According to Gemini, 3AC borrowed digital assets from Genesis in order to contribute bitcoin to the Bitcoin Trust in exchange for shares in the trust. Compl. ¶ 45. After a mandatory six-month holding period, 3AC could sell those shares on the open market and, if the trading price for the shares exceeded the price of the bitcoin 3AC had contributed to the Bitcoin Trust, earn a profit. *Id.* ¶¶ 45–46. This strategy only worked, however, so long as 3AC earned more from selling its shares in the Bitcoin Trust than it had to repay its lenders. Eventually, however, prices for shares in the Bitcoin Trust fell below the prices for bitcoin. *Id.* ¶ 48.

In June 2022, 3AC was called upon by its lenders to post additional collateral for its outstanding debt, but was unable to do so. Compl. ¶¶ 39, 41–42. 3AC thereafter commenced liquidation proceedings in the British Virgin Islands. *Id.* ¶¶ 39, 41. At the time, 3AC owed Genesis $2.36 billion, a sum Genesis had little hope of recovering. *Id.* ¶ 43. After foreclosing on collateral, Genesis was left with an unpaid debt from 3AC of approximately $1.2 billion. *Id.* ¶¶ 5, 43.

C. Genesis's Financial Condition Following 3AC's Demise

On June 17, 2022, Genesis advised its lenders that a "large counterparty" had failed to meet

a margin call and that Genesis would "actively pursue recovery on any potential residual loss through all means available." Compl. ¶ 45.

DCG is the indirect parent of Genesis, Compl. ¶¶ 15, 19, with its own separate executive and management teams. On June 30, 2022, DCG exchanged a $1.1 billion promissory note, with 1% annual interest and a ten-year maturity (the "Note"), for Genesis's approximately $1.2 billion account receivable from 3AC. Ex. B (Note). The Note provided for DGC to pay Genesis any future proceeds received from 3AC. *Id.* § 1.6. On July 6, 2022, a Genesis representative Tweeted: "we worked with [DCG] to find the optimal strategy to further isolate the risk. DCG has assumed certain liabilities of Genesis related to this counterparty to ensure we have the capital to operate and scale our business for the long-term." Compl. ¶ 42 (emphasis omitted).

Following execution of the Note, Genesis communicated directly with Gemini and other lending counterparties regarding its financial condition. Compl. ¶¶ 54, 61–66, 84, 88, 89. Genesis accounted for the Note as a $1.1 billion "[r]eceivable from related part[y]" in the financial records it shared with Gemini and others. *Id.* ¶¶ 73, 78, 89. DCG was excluded from the vast majority of these communications, and was not an active participant in any (just copied on two emails referenced in the Complaint). *See id.* ¶¶ 52–54, 61–66, 71, 80, 87–89.

Gemini alleges only a single relevant interaction between it and Defendants: an October 2022 lunch meeting between DCG's CEO (Defendant Barry Silbert) and Gemini's co-founder (Cameron Winklevoss). Compl. ¶ 96. The purpose of that meeting, Gemini alleges, was for the two to discuss the Gemini Earn program, "ways to take advantage of the crypto winter," and opportunities "to collaborate closely in the future." *Id.* ¶¶ 95, 98. Silbert allegedly told Winklevoss that Genesis "needed sufficient time to effect an orderly unwinding of its 'complex' loan book," and that difficulties in terminating the Gemini Earn program were attributable to "a

mismatch in the timing of Genesis's loan positions." *Id.* ¶ 97. Gemini claims that, following this meeting, it decided to "delay the termination of the Gemini Earn Program." *Id.* ¶ 99.

The only allegation remotely connecting DCG to the Gemini Earn program is that, on November 10, 2022, DCG, Genesis, and Gemini executed an agreement under which DCG agreed to transmit additional collateral to Genesis for the benefit of Gemini Earn lenders (the "Tripartite Agreement"). Compl. ¶ 100. DCG thereafter transferred "31,180,804 shares of GBTC (valued in excess of $626.1 million as of July 6, 2023) to Genesis." *Id.*

D. Genesis's Bankruptcy and Resulting Lawsuits

In November 2022, the cryptocurrency exchange FTX Trading Ltd. ("FTX") unexpectedly unraveled. Compl. ¶ 8. Shortly thereafter, Genesis disclosed its financial exposure to FTX. *Id.* As the cryptocurrency market panicked, Gemini Earn lenders began recalling their loans, putting severe strain on Genesis's short-term liquidity. *Id.* On November 16, 2022, in an effort to preserve assets amidst an unprecedented bank run, Genesis suspended all withdrawals of borrowed cryptocurrency, including assets it had borrowed through Gemini Earn. *Id.* ¶¶ 103–04.

On January 19, 2023, Genesis filed a petition for Chapter 11 bankruptcy relief. Compl. ¶ 105. Additionally, unable to access their cryptocurrency assets held by Genesis, Gemini Earn lenders filed several lawsuits against Gemini, alleging a variety of misconduct arising from the lending relationship memorialized in the MLAs. *See, e.g.*, *Coburn v. Gemini Tr. Co.*, No. 650567/2023 (N.Y. Sup. Ct. Jan. 29, 2023); *Chablaney v. Gemini Tr. Co.*, No. 650076/2023 (N.Y. Sup. Ct. Jan. 5, 2023); *Picha v. Gemini Tr. Co.*, No. 22-cv-10922 (S.D.N.Y. Dec. 27, 2022). The Securities and Exchange Commission also commenced an enforcement action against Gemini. *See SEC v. Gemini Tr. Co.*, No. 23-cv-287 (S.D.N.Y. Jan. 12, 2023).

Months after this salvo of litigation against it, Gemini filed this lawsuit against Defendants. Defendants timely and properly removed to federal court.

LEGAL STANDARD

To avoid dismissal under Rule 12(b)(6), Gemini must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court is not obliged to accept as true legal conclusions, naked assertions, conclusory statements, or implausible inferences. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Nor must the Court accept any allegation contradicted by documents incorporated into the complaint. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011).

Rule 9(b) "sets forth a heightened pleading standard for allegations of fraud," which requires that fraud be pled with "particularity." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006). A complaint alleging a fraud claim must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Id.* (quotation marks omitted).

ARGUMENT

The principal and pervasive problem with Gemini's inflammatory and factually baseless allegations is that they have very little to do with Defendants. Taken down to its actual substance, the Complaint identifies just *one* allegedly false representation by Defendants to Gemini—Silbert's statements at the October 2022 lunch with Winklevoss. And as to those statements, Gemini does not actually allege that anything Silbert said was actionably false. Instead, it just repeats its claim that Genesis was insolvent, pre-supposes that DGG knew and omitted that fact, and avers that it was incumbent upon Defendants to apprise Gemini accordingly. It was not.

The remaining allegations relate to alleged misrepresentations by *Genesis*. But DCG and Genesis are separate companies, and Gemini offers no theory that would allow the alleged misrepresentations by Genesis—that are not even described with particularity—to be imputed to DCG. Instead, Gemini rotely asserts the generalized supposition that DCG "participated" in

various communications and representations. But neither through direct nor aiding-and-abetting liability can Gemini shift responsibility for the alleged torts to Defendants.

I. GEMINI FAILS TO ADEQUATELY AND PARTICULARLY ALLEGE FRAUD BY DEFENDANTS

To withstand dismissal on its fraud claim against Defendants, Gemini must adequately allege "(1) a material misrepresentation or omission of fact; (2) made by a defendant with knowledge of its falsity; (3) intent to defraud; (4) reasonable reliance on the part of the plaintiff; and (5) resulting damage to the plaintiff." *Crigger v. Fahnestock & Co.*, 443 F.3d 230, 234 (2d Cir. 2006). Gemini fails to adequately plead even one element of its claim, much less all of them.

A. Gemini Fails to Plead Any Actionable Misrepresentations by Defendants

1. None of the Statements by Defendants Are Actionable

Stripping out the allegations regarding misrepresentations allegedly made by *Genesis*—which comprise the vast majority of the Complaint—Gemini alleges just *one* misrepresentation by DCG to Gemini. As a matter of well-settled law, this does not remotely suffice to plead fraud.

The Complaint alleges that in his lunch with Winklevoss, Silbert stated that "Genesis simply needed sufficient time to effect an orderly unwinding of its 'complex' loan book, and that any difficulty that the termination of the Gemini Earn Program would cause for Genesis was merely a mismatch in the timing of Genesis's loan positions." Compl. ¶ 97. The problem is that Gemini does not actually allege what about these statements was supposedly false—Gemini does not dispute that Genesis needed sufficient time to unwind its complex loan book or that difficulties arising from the Gemini Earn program were the product of a "mismatch" in timing. *See Zutty v. Rye Select Broad Mkt. Prime Fund, L.P.*, 2011 WL 5962804, at *10 (N.Y. Sup. Ct. Apr. 15, 2011) (fraud claim dismissed where "plaintiffs have alleged no facts sufficient to demonstrate that any of the statements [were] false when made"). That is because these statements are not the kind of

assertions of objective fact capable of verification necessary for a fraud claim. *See In re Refco Inc. Sec. Litig.*, 2010 WL 11500542, at *22 (S.D.N.Y. Oct. 22, 2010) (dismissing claim where alleged misstatements were "vague," "imprecise," and "subject to multiple interpretations").

Gemini nonetheless asserts in conclusory fashion that these statements were false because "Genesis had a gaping hole in its balance sheet" owing to the 3AC losses and because DCG had not provided adequate financial support to Genesis. Compl. ¶ 98. But none of that contradicts the statements Silbert allegedly made. Gemini cannot show falsity simply by reciting its conclusory assertions about Genesis's financial health, nor can Gemini show that the terms of the Note, pursuant to which DCG had exchanged Genesis's uncollectable receivable from 3AC for an enforceable promissory note, in any way undermine the veracity of Silbert's representations.

Gemini also alleges that in July 2022, DCG's Chief Operating Officer had a phone call with "another Genesis depositor" in which he purportedly made false statements. Compl. ¶¶ 83–84. These statements cannot form the basis for liability. Gemini's failure to identify the depositor—who does not appear to have filed suit—is reason enough to dismiss these allegations. *See Yencho v. Chase Home Fin. LLC*, 2015 WL 127721, at *3 (S.D.N.Y. Jan. 8, 2015) ("Factual allegations must reflect the 'who, what, when, where and how of the alleged fraud.'"). Moreover, the statements were not made to Gemini and Gemini does not allege that it relied upon them; New York law does not "extend the reliance element of fraud to include a claim based on the reliance of a third party, rather than the plaintiff." *Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y.3d 817, 829 (2016); *see also Sec. Inv'r Prot. Corp. v. BDO Seidman, LLP*, 222 F.3d 63, 72 (2d Cir. 2000) (rejecting claim because plaintiffs "never received" the alleged misrepresentation); *In re Fyre Festival Litig.*, 399 F. Supp. 3d 203, 217 (S.D.N.Y. 2019) (rejecting claim because plaintiffs

failed to allege that they "saw, read, or otherwise noticed" the alleged misrepresentation).[4]

2. Defendants Are Not Liable for Alleged Misrepresentations by Genesis

Gemini cannot salvage its fraud claim by relying on statements allegedly made by Genesis, and *not* Defendants. These include: (1) Genesis's purported representations concerning risk management and solvency prior to 3AC's collapse (Compl. ¶¶ 29–36); (2) a July 6 email and phone call concerning Genesis's financial position (*id.* ¶¶ 61–66); (3) a July 18 email concerning Genesis's exposure to 3AC (*id.* ¶ 52); (4) a July 27 and 28, 2022 email exchange concerning the contents of financial reports previously provided by Genesis (*id.* ¶¶ 71–74); and (5) other unspecified communications (*see id.* ¶¶ 51, 80). Setting aside that Gemini does not identify anything factually inaccurate about Genesis's statements, Defendants were not the "maker" of any of these statements, and nor does Gemini allege that they "authorized" or "caused" the statements to be made. *Woori Bank v. RBS Secs., Inc.*, 910 F. Supp. 2d 697, 702 (S.D.N.Y. 2012); *see also Kirschner ex rel. Millennium Lender Claim Tr. v. J.P. Morgan Chase Bank, N.A.*, 2020 WL 9815174, at *8 (S.D.N.Y. Dec. 1, 2020) ("[C]onclusory language . . . does not support Plaintiff's theory that [defendants] controlled [the third party's] statements.").

Recognizing this gaping hole in its theory, Gemini baldly asserts that Defendants are liable for failing to *correct* statements made by Genesis regarding "the nature of DCG's support" and Genesis's financial condition. Compl. ¶¶ 40–42, 59, 82, 88–90, 96–97. That contention runs headlong into the "basic tenet of American corporate law" holding that "the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). New York law recognizes this principle. *See Beck v. Consol. Rail Corp.*, 394 F. Supp. 2d 632, 637

[4] Many of the statements allegedly made by Genesis were to unnamed third parties, *see, e.g.*, Compl. ¶¶ 53–54, 83–84, 87–89, and are defective for the same reason. And as set forth below, any such misrepresentations are not imputable to Defendants. *See infra* pp. 11–12.

(S.D.N.Y. 2005); *DeGraziano v. Verizon Commc'ns, Inc.*, 325 F. Supp. 2d 238, 245 (E.D.N.Y. 2004). While there are limited exceptions to this rule, none applies here, and Gemini does not allege otherwise. Nor could it, as Gemini agreed in the MLAs that DCG would have no liability for the conduct of Genesis. *See* MLA § XVII.

Gemini cannot sidestep this law by framing its allegations in terms of a failure to correct. Silence is "not actionable under the common law of fraud and deceit unless there is a duty to speak." *Kirschner*, 2020 WL 9815174, at *10 (quotation marks omitted). Such duty arises only "where the parties stand in a fiduciary . . . relationship, or where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge." *In re Fyre Festival Litig.*, 399 F. Supp. 3d at 217 (quotation marks omitted). Gemini does not allege a fiduciary relationship between it and Defendants, and Gemini offers nothing beyond bare conclusory allegations that Defendants knew that Gemini was "acting on the basis of mistaken knowledge." *See also Brass v. Am. Film Techs., Inc.*, 987 F.2d at 142, 152 (2d Cir. 1993) ("[A] fraudulent concealment claim based on superior knowledge must allege that the defendant 'knew that the plaintiff was acting under a mistaken belief with respect to a material fact'" (citation omitted)).

Moreover, even if Defendants had superior knowledge and knew Gemini was acting on it, "[t]he duty to disclose superior knowledge normally 'arises in the context of business negotiations where parties are entering a contract,'" *In re Fyre Festival*, 399 F. Supp. 3d at 218 (quoting *Lerner*, 459 F.3d at 292), not simply anytime a party allegedly knows something someone else does not. The notion that DCG's officers were required to comb through pages of emails discussing myriad topics and not even addressed to them to search out and correct any hypothetical misrepresentations by a legally distinct subsidiary is beyond the pale.

Gemini makes the unsupported claim that DCG's provision of approximately $600 million worth of collateral to Genesis in the Tripartite Agreement—for the benefit of Gemini Earn users—shortly after Silbert's lunch with Winklevoss somehow gave rise to a legal obligation by Defendants to "correct" representations regarding Genesis's losses. Compl. ¶ 101. But an ordinary commercial relationship does not give rise to a blanket duty to correct all alleged misrepresentations made by others. *Tellez v. OTG Interactive, LLC*, 2016 WL 5376214, at *5 (S.D.N.Y. Sept. 26, 2016) ("A duty to speak cannot arise simply because two parties may have been on opposite sides of a bargaining table when a deal was struck between them." (quotation marks omitted)). Gemini does not even attempt to connect any of Genesis's allegedly false statements to the representations made by Defendants in connection with the Tripartite Agreement.

B. Gemini Fails to Plead Knowledge

Even if Gemini had adequately alleged that Defendants made false statements for which they are responsible (it has not), Gemini comes nowhere close to alleging that Defendants had knowledge of falsity. *See, e.g.*, *In re Fyre Festival*, 399 F. Supp. 3d at 212–13 (fraud requires proof of the defendant's "knowledge of [the statement's] falsity"); *Tradeshift, Inc. v. Smucker Servs. Co.*, 2021 WL 4463109, at *6 (S.D.N.Y. Sept. 29, 2021) (dismissing fraud claim when plaintiff failed to allege defendant "knew that the representations were false when made").

Gemini's sparse allegations of knowledge by Defendants are based on nothing more than its say-so. *See* Compl. ¶¶ 6–7, 98. The only facts Gemini musters are allegations that Defendants knew of the Note's terms. But Gemini does not identify any allegedly false statements by Defendants *about the terms of the Note*—rather, Gemini claims the statements Defendants made were false because they purportedly misrepresented (or omitted information about) Genesis's financial health more generally. *See id.* ¶¶ 83–85, 95, 97. There are no non-conclusory allegations of knowledge by Defendants about *those* facts, *see In re Duane Reade Inc. Sec. Litig.*, 2003 WL

22801416, at *10 (S.D.N.Y. Nov. 25, 2003) ("[M]ere speculation is inadequate to plead knowledge of allegedly omitted facts." (citation omitted)), *aff'd sub nom. Nadoff v. Duane Reade, Inc.*, 107 F. App'x 250 (2d Cir. 2004), or that the statements themselves were even false.

Indeed, any possible inference that Defendants knew of Genesis's insolvency is negated by the fact that, just days before Genesis shuttered its doors, DCG executed the Tripartite Agreement. Compl. ¶ 100. That Defendants pledged $600 million worth of assets as collateral belies any plausible allegation of knowledge regarding Genesis's insolvency.

C. Gemini Fails to Plead a Strong Inference of Scienter

Gemini has also failed to adequately plead any "facts that give rise to a *strong inference* of fraudulent intent." *First Cap. Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 179 (2d Cir. 2004) (quotation marks omitted); *see also Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd.*, 33 F. Supp. 3d 401, 446 (S.D.N.Y. 2014) ("The scienter element for common law fraud 'is essentially the same as that under federal securities laws.'" (quotation marks omitted)). A strong inference of fraudulent intent must be established "'either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.'" *IKB Int'l S.A. v. Bank of Am. Corp.*, 584 F. App'x 26, 27–28 (2d Cir. 2014). Gemini has done neither.

Gemini's efforts to plead motive and opportunity fail, because the Complaint alleges no "concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged." *Harborview Value Masterfund, L.P. v. Freeline Sports, Inc.*, 2012 WL 612358, at *9 (S.D.N.Y. Feb. 23, 2012) (quotation marks omitted). The only possible motive even posited by Gemini is that keeping Genesis afloat allowed Genesis to continue lending digital assets to 3AC, which could in turn purchase shares in the Bitcoin Trust, increasing the management fees earned by Grayscale. Compl. ¶ 3. The threshold problem with this theory is that it once again

conflates DCG with its subsidiaries—Grayscale is a separate entity with its own revenue stream, and "the mere existence of a parent-subsidiary or affiliate relationship is not on its own sufficient to impute the scienter of the subsidiary to the parent or affiliate." *Valentini v. Citigroup, Inc.*, 837 F. Supp. 2d 304, 317 (S.D.N.Y. 2011); *see also Defer LP v. Raymond James Fin., Inc.*, 654 F. Supp. 2d 204, 218 (S.D.N.Y. 2009) ("[T]here is no . . . rule requiring the imputation of a subsidiary's knowledge to its parent . . . . Nor should there be.").

Moreover, a parent's "motive to maintain the appearance of corporate profitability, or of the success of an investment," is not sufficient for scienter. *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996); *see also Cohen v. Stevanovich*, 722 F. Supp. 2d 416, 429 (S.D.N.Y. 2010) (rejecting profit-seeking motive as basis for fraudulent intent (collecting cases)). And, even if DCG could be said to have a motive to keep Genesis running, that does not establish intent *to defraud*—given DCG's $600 million pledge of collateral to Genesis in November 2022, *see* Compl. ¶ 100, the only plausible inference is that DCG's actions were a *genuine* effort to support Genesis. Gemini provides no reason, beyond pure speculation, to conclude otherwise.

Gemini's theory of conscious misbehavior and recklessness fare no better. "Reckless is 'at least, . . . an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" *Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 71 (S.D.N.Y. 2010), *aff'd*, 485 F. App'x 461 (2d Cir. 2012). But despite its broad and unsubstantiated allegations against Defendants, Gemini alleges no actual *facts* demonstrating that Defendants were engaged in "highly unreasonable" conduct. *See Warren v. Coca-Cola Co.*, 2023 WL 3055196, at *9 (S.D.N.Y. Apr. 21, 2023) (rejecting a "lone, conclusory allegation that 'Defendant's fraudulent intent is evinced by its knowledge that the Product was not consistent with its representations'"). Nor does Gemini allege

any particular facts indicating that Defendants knew of but ignored red flags regarding Genesis's representations to investors. *See Saltz*, 782 F. Supp. 2d at 76–77.

Gemini's allegation that the "basic nature" of the Note was fraudulent is premised on no particularized—or even general—allegations of *fact* as to why that would be the case. Compl. ¶ 92. Gemini muses about what kind of response from DCG would have been most "rational" under the circumstances, but Gemini's judgment about what DCG ought to have done as a business matter does nothing to show that DCG was a knowing participant in a fraudulent exchange. Gemini takes issue with how Genesis represented the value of the Note to investors, *see id.*, but there are no well-pled allegations that DCG had any notion of or involvement with how Genesis accounted for the Note on its books, *see, e.g.*, *Kelly v. Beliv LLC*, 2022 WL 16836985, at *10 (S.D.N.Y. Nov. 9, 2022) ("Rule 9(b) requires a plaintiff to 'allege facts that give rise to a strong inference of fraudulent intent.'" (quoting *Lerner*, 459 F.3d at 290)). The Complaint glaringly omits any allegations of communications between Genesis and DCG regarding an alleged plan to misrepresent the Note, or any particularized facts demonstrating that DCG issued the Note to knowingly further such a plan. At bottom, Gemini has alleged only a business transaction with which it disagrees, but that comes nowhere close to establishing fraud on the part of Defendants.

D. Gemini Fails to Plead Reasonable Reliance

Gemini's claims also fail for the absence of plausible allegations regarding reliance. A sophisticated party—as Gemini warranted it was in the MLA, MLA §§ V(d), XXIV—cannot establish that its reliance was reasonable where "the information necessary to unmask the alleged fraud [was] accessible to the sophisticated party through minimal diligence," no "matter whether the requisite material was made available to Plaintiffs by Defendants." *Terra Secs. Asa Konkursbo v. Citigroup, Inc.*, 740 F. Supp. 2d 441, 449 (S.D.N.Y. 2010), *aff'd*, 450 F. App'x 32 (2d Cir. 2011). Courts thus routinely dismiss fraud claims where a party fails to plead that it exercised

minimal diligence. *See, e.g.*, *id.* at *451; *Brock Cap. Grp. LLC v. Siddiqui*, 2022 WL 2047589, at *6 (S.D.N.Y. June 7, 2022); *Afra v. Zamir*, 76 A.D. 3d 56, 62 (N.Y. App. Div. 2010), *aff'd*, 17 N.Y.3d 737 (2011). The same result is warranted here.

Gemini concedes it knew that $1.1 billion of Genesis's assets were attributable to "receivables from related parties." Compl. ¶ 73. It also concedes that it was both Genesis's lending partner and the agent and custodian for Gemini Earn lenders. *Id.* ¶ 25. Yet Gemini nowhere alleges that it probed the terms or details of Genesis's $1.1 billion "receivables from related parties." Instead, the Complaint shows that Gemini could have asked basic questions to reveal the "information necessary to unmask the alleged fraud," but did not. *Terra*, 740 F. Supp. 2d at 449. Gemini does not even allege that it inquired as to which "related part[y]" owed the receivable. Gemini's failure to engage in minimal diligence undermines its claim of fraud.

E. Gemini Fails to Plead Actionable Damages

The Complaint also fails to allege any actionable damages arising from the purported fraud. The only harms asserted by Gemini are attorneys' fees and expenses allegedly incurred while defending against unidentified lawsuits. Compl. ¶¶ 10, 106–08. Gemini's failure to identify a single lawsuit for which fees and costs are sought is itself fatal, but more critically, a plaintiff may recover only "the actual pecuniary loss sustained as the direct result of the wrong." *Starr Found. v. Am. Int'l Grp., Inc.*, 76 A.D.3d 25, 27 (N.Y. App. Div. 2010) (quotation marks omitted). Gemini offers no factual allegations tying Defendants' alleged conduct to the attorneys' fees it has purportedly incurred as a result of lawsuits filed by *third parties*.

Indeed, even a cursory examination of the claims at issue in the now-pending lawsuits against Gemini reveals that they are unrelated to the allegations in this action. For example, many of the cases involve allegations that Gemini unlawfully sold unregistered securities and that it lacked adequate risk management and compliance functions. *See, e.g.*, *Berdugo v. Gemini Tr. Co.*,

No. 23-cv-60057 (S.D. Fla. 2023), Dkt. No. 1 ¶ 8; *Picha v. Gemini Tr. Co.*, No. 22-cv-10922 (S.D.N.Y. 2023), Dkt. No. 45 ¶ 74. Neither of those things has anything to do with Defendants' alleged fraud. And although Gemini claims it has incurred fees in Genesis's bankruptcy case, *see* Compl. ¶ 10, Gemini does not claim that Defendants did anything to *render* Genesis bankrupt.

Gemini's damages theory is also premised on impermissible speculation. Gemini claims that but for the alleged fraud, it "would not have refrained from terminating the Gemini Earn Program—which in turn would have eliminated or reduced the claims asserted against Gemini relating to the Gemini Earn Program." Compl. ¶ 108. "New York law bars claims that require a factfinder to cut through this many 'layers of uncertainty' and speculation." *AHW Inv. P'ship v. Citigroup Inc.*, 980 F. Supp. 2d 510, 527 (S.D.N.Y. 2013), *aff'd*, 661 F. App'x 2 (2d Cir. 2016) (quoting *Starr Found.*, 76 A.D.3d at 30). Gemini asks this Court to infer that had it known of Genesis's alleged insolvency, it would have terminated the Gemini Earn program earlier, Genesis would have had the funds to repay Gemini's investors (notwithstanding that Gemini claims Genesis was insolvent at all relevant times), *and* investors would not have sued Gemini for any of the unrelated claims they have asserted. But "the general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 10 (2010) (quotation marks omitted). Moreover, interposing all of this is the intervening—and unforeseeable—collapse of FTX, an event which cannot possibly be attributed to Defendants and which severs any plausible chain of causation. *See Kush v. City of Buffalo*, 59 N.Y.2d 26, 33 (1983). The law does not support such an attenuated theory of damages.

F. Gemini's Conspiracy Theory Fails

Gemini attempts to bolster its deficient claim by vaguely gesturing toward a theory of conspiracy liability, *see, e.g.*, Compl. ¶ 116, but that effort fails.

First, any theory of conspiracy is impermissibly duplicative of Gemini's aiding-and-abetting claim. A conspiracy claim that is supported by "essentially the same alleged acts that form the basis of the aiding and abetting claim . . . . is duplicative" and should be dismissed. *Briarpatch Ltd., L.P. v. Geisler Roiberdeau, Inc.*, 2007 WL 1040809, at *26 (S.D.N.Y. Apr. 4, 2007), *aff'd sub nom. Briarpatch Ltd. LP v. Phx. Pictures, Inc.*, 312 F. App'x 433 (2d Cir. 2009); *see also In re Platinum-Beechwood Litig.*, 426 F. Supp. 3d 14, 21 (S.D.N.Y. 2019) (similar). Here, Gemini's theory of conspiracy is premised on the same allegations and underlying tort as its aiding-and-abetting claim against Defendants. Accordingly, Gemini's conspiracy claim is duplicative and must be dismissed.

Second, Gemini in any event fails to plead the basic elements of a conspiracy, which requires more than an allegation of direct fraud. To plead conspiracy liability, Gemini must adequately allege the underlying fraud *and* four other elements: "(1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *Ritchie Cap. Mgmt., LLC v. Gen. Elec. Cap. Corp.*, 121 F. Supp. 3d 321, 339 (S.D.N.Y. 2015), *aff'd*, 821 F.3d 249 (2d Cir. 2016); *see also Heinert v. Bank of Am. N.A.*, 835 F. App'x 627, 632 (2d Cir. 2020) (claim for conspiracy "requires the same allegations of actual knowledge" as aiding and abetting).

Gemini fails to plead these elements. It alleges no facts plausibly establishing the existence of an unlawful agreement between Defendants and Genesis, and its "bare assertion" of a conspiracy is insufficient. *Twombly*, 550 U.S. at 556; *LeFebvre v. N.Y. Life Ins. & Annuity Corp.*, 214 A.D.2d 911, 912 (N.Y. App. Div. 1995) (dismissing claim where plaintiff alleged no facts that "support an inference that defendants knowingly agreed to cooperate in a fraudulent scheme, or

shared a perfidious purpose"). Gemini also does not allege an "overt act" in furtherance of the conspiracy—it points to DCG's execution of the Note, but the execution of a lawful business transaction is not sufficient. *See LeFebvre*, 214 A.D.2d at 913 (the "mere fact that a defendant's otherwise lawful activities may have assisted another in pursuit of guileful objectives is not a sufficient basis for a finding that he or she conspired to defraud"). And Gemini does not plead any facts plausibly establishing that Defendants "actually knew the information provided to plaintiff was false or misleading, or to otherwise directly connect [Defendants] to [Genesis's] allegedly fraudulent conduct." *Meisel v. Grunberg*, 651 F. Supp. 2d 98, 121 (S.D.N.Y. 2009).

Accordingly, Gemini's conspiracy allegations fail to breathe life into its fraud claim, which should be dismissed in its entirety.

II. GEMINI FAILS TO PLEAD AIDING AND ABETTING FRAUD WITH PARTICULARITY

Perhaps recognizing it cannot sustain a claim for direct fraud against Defendants, Gemini seeks to do indirectly what it cannot do directly, alleging a claim for aiding and abetting against Defendants. *See* Compl. ¶¶ 118–20. Gemini does not articulate the basis for this theory, except in broad strokes that largely recite the elements of liability. But on whatever factual allegations it is premised, this claim fares no better than the first.

To withstand dismissal, Gemini must plead: "'(1) the existence of a fraud; (2) [the] defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission.'" *Geoffrey A. Orley Revocable Tr. v. Genovese*, 2020 WL 611506, at *12 (S.D.N.Y. Feb. 7, 2020) (alteration in original). "[T]he particularity requirements of Rule 9(b) apply to claims of aiding and abetting fraud no less than to direct fraud claims." *Filler v. Hanvit Bank*, 156 F. App'x 413, 417 (2d Cir. 2005).

A. Gemini Fails to Plead Actual Knowledge of Fraud

The Complaint is devoid of factual allegations necessary to support "a strong inference" of Defendants' actual knowledge of the alleged fraud. To impose liability on Defendants, Gemini must plead actual knowledge of the underlying fraud. *Lerner*, 459 F.3d at 292. "Constructive knowledge is not sufficient, nor is a 'lower standard such as recklessness or willful blindness.'" *Berdeaux v. OneCoin Ltd.*, 561 F. Supp. 3d 379, 412 (S.D.N.Y. 2021). Thus, "'[t]he burden of demonstrating actual knowledge, although not insurmountable, is nevertheless a heavy one.'" *Chemtex, LLC v. St. Anthony Enters., Inc.*, 490 F. Supp. 2d 536, 546 (S.D.N.Y. 2007).

As set forth above, *see supra* pp. 13–14, Gemini's allegations of knowledge are uniformly deficient. Gemini offers a slew of conclusory assertions that Genesis acted "with the knowledge and active involvement of DCG," Compl. ¶ 6; *see also id.* ¶¶ 3, 20, 82–83, 98, but these allegations amount to no more than legal conclusions masquerading as facts, *see Krys v. Pigott*, 749 F.3d 117, 130 (2d Cir. 2014) (conclusory statements of actual knowledge are insufficient to support a claim for aiding and abetting fraud). This high-level approach to pleading is decidedly inadequate for alleging fraud. *See Berdeaux*, 561 F. Supp. 3d at 413 (suspicions or ignorance of obvious warning signs "do not give rise to an inference of actual knowledge"); *Nat'l Westminster Bank USA v. Weksel*, 124 A.D.2d 144, 147 (N.Y. App. Div. 1987) ("bare[] allegation[s]" that the defendants "had or should have had [] knowledge" are "plainly not sufficient").

Gemini's claim that Defendants were "put on notice" of Genesis's alleged fraud by way of emails on which DCG employees were copied (Compl. ¶¶ 87–90) is no substitute for plausible allegations of actual knowledge, *see Ryan v. Hunton & Williams*, 2000 WL 1375265, at *9 (E.D.N.Y. Sept. 20, 2000) ("Allegations that [the defendant] suspected fraudulent activity, however, do not raise an inference of actual knowledge . . . ."). Moreover, most of these "notice" allegations relate to correspondence with unnamed parties other than Gemini. *See, e.g.*, Compl.

¶¶ 87–90. But the relevant knowledge is knowledge of the fraud allegedly *perpetrated on Gemini*. *See Kirschner v. Bennett*, 648 F. Supp. 2d 525, 545 (S.D.N.Y. 2009) (aiding-and-abetting claim dismissed for the plaintiff's failure to "demonstrate that the defendants had actual knowledge of wrongful conduct *that harmed the [] customers* . . . not actual knowledge of different wrongful conduct that might have harmed others, such as [the company's] shareholders"). Any allegations regarding constructive knowledge of alleged misrepresentations to *other* investors are irrelevant.

Finally, Gemini's assertion that DCG and Genesis "agreed to . . . conceal the promissory note's existence and its terms from Genesis's depositors" is nothing beyond unadorned and factually unsupported accusation. Compl. ¶ 94. Defendants had no way of knowing the entire breadth of information Genesis had shared with Gemini regarding the terms and circumstances of the Note, and Gemini does not allege otherwise. And as discussed above, there is no support for Gemini's bare claim that the terms of the Note were inherently fraudulent. *See supra* pp. 16–17.

B. Gemini Fails to Plead Substantial Assistance

Gemini also has not adequately alleged substantial assistance by Defendants. To plead substantial assistance, Gemini must allege "facts from which the Court can infer that (1) the defendant affirmatively assisted, helped conceal, or failed to act when required to enable the fraud to proceed; and (2) 'the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated.'" *Berdeaux*, 561 F. Supp. 3d at 416. Gemini has done neither.

1. Gemini Fails to Allege That Defendants Affirmatively Assisted in Any Fraud

Nowhere in its Complaint does Gemini actually identify what conduct it claims constitutes "substantial assistance" by Defendants, and that alone is reason to dismiss this claim. But to the extent Gemini seeks to repurpose its insufficient allegations of fraud in service of its aiding-and-abetting claim, that attempt fails.

The closest Gemini comes to claiming substantial assistance is its assertion that the execution of the Note "demonstrates that DCG was a willing participant in the scheme to mislead." Compl. ¶ 92. There are no factual allegations to support this claim: Apart from deeming the Note "**tailor-made to allow DCG and Genesis to conspire to deceive Genesis depositors**," (*id.*), the Complaint contains no facts evidencing a fraudulent purpose. There are no facts—circumstantial or otherwise—remotely suggesting that Defendants ever intended to conceal, enable, or assist in wrongdoing. *See supra* Part II.B.

Moreover, as set forth above, *see supra* pp. 16–17, Gemini's claim that the "basic nature" of the Note was fraudulent is entirely conclusory and based on no factual allegations. Compl. ¶ 92. Whatever Gemini believes would have been most "rational" for DCG to do, that is irrelevant to whether the execution of this business transaction constituted substantial assistance to *fraud*. And absent specific allegations describing Defendants' direct participation in the purported fraud, Gemini's aiding and abetting claim fails. *See JP Morgan Chase Bank v. Winnick*, 406 F. Supp. 2d 247, 257 (S.D.N.Y. 2005) (only in circumstances "'where there is an extraordinary motivation to aid the fraud'" will a defendant be held liable for aiding and abetting); *Chemtex*, 490 F. Supp. 2d at 547 (dismissal where no evidence that the defendant "either affirmatively assisted . . . in an effort to defraud [the plaintiff] . . . or in any way helped to conceal any such alleged [fraud]"); *see also Filler*, 156 F. App'x at 417 (aiding and abetting must be pled with particularity).

Nor can Gemini rely on its conclusory allegations that Defendants "collaborated" with Genesis to prepare responses to inquiries from an unidentified depositor. Compl. ¶¶ 87, 93. Gemini does not say what Defendants are alleged to have actually done in connection with the responses, and a generalized claim that Defendants were involved in the responses is not sufficient. *See Morin v. Trupin*, 711 F. Supp. 97, 113 (S.D.N.Y. 1989) ("[T]he substantial assistance must

relate to the preparation or dissemination of the document itself.").

And finally, as with its infirm allegations of direct fraud, aiding-and-abetting liability cannot be premised on Defendants' alleged failure to correct Genesis's alleged misstatements, because Defendants owed no fiduciary duty to Gemini to do so. *See Lerner*, 459 F.3d at 295 ("'[M]ere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff.'"); *SPV OSUS Ltd. v. AIA LLC*, 2016 WL 3039192, at *8 (S.D.N.Y. May 24, 2016) ("Defendants' alleged failure to reveal the fraud cannot support a claim for aiding and abetting where, as here, the [] Defendants owed no fiduciary duty directly to plaintiff . . . ."), *aff'd sub nom. SPV Osus Ltd. v. UBS AG*, 882 F.3d 333 (2d Cir. 2018).

Accordingly, Gemini's allegations regarding Silbert's alleged failure to disclose information about Genesis's solvency in his meeting with Winklevoss, *see* Compl. ¶¶ 7, 95–97, and regarding correspondence on which DCG employees were copied, *see id.* ¶¶ 87, 89–91, are not sufficient to allege affirmative assistance, *see Chemtex*, 490 F. Supp. 2d at 547 ("'[I]naction on the part of the alleged aider and abettor ordinarily should not be treated as substantial assistance . . . except when . . . it was in conscious and reckless violation of a duty to act.'"); *see also supra* pp. 12–13. A defendant's "[m]ere presence, and passive receipt of email, cannot, by definition, constitute affirmative assistance." *Winnick*, 406 F. Supp. 2d at 258.

2. Gemini Fails to Plead That Defendants Proximately Caused Its Injuries

Finally, Gemini's aiding-and-abetting allegations fail for the additional reason that Gemini has failed to adequately allege proximate causation. As set forth above, Gemini has not alleged causation with respect to the alleged fraud generally, *see supra* pp. 18–19, but its allegations of causation arising out of Defendants' alleged aiding and abetting are even weaker.

To plead proximate cause in the context of aiding-and-abetting liability for fraud, Gemini

must adequately allege that Defendants' acts were a "'direct or reasonably foreseeable result of the conduct.'" *UBS AG*, 882 F.3d at 345. "Merely pleading 'but-for' causation is not enough," rather, "'aider and abettor liability re[q]uires the injury to be a direct or reasonably foreseeable result of the conduct.'" *SPV OSUS*, 2016 WL 3039192, at *6; *see also Bayshore Cap. Advisors, LLC, v. Creative Wealth Media Fin. Corp*., 2023 WL 2751049, at *36 (S.D.N.Y. Mar. 31, 2023) (proximate cause requires plaintiff to "demonstrate that the damages are not so remote as not to be directly traceable to the [tort] or the result of other intervening causes" (quotation marks omitted)).

Defendants' conduct is far removed from any injury Gemini has attempted to claim here. By Gemini's own admission, there are a host of other events contributing to its claimed injuries, including (1) numerous alleged misrepresentations by Genesis in which Defendants had no alleged involvement whatsoever, (2) the collapse of FTX, and (3) the decision by third parties to file suit against Gemini. *See, e.g.*, Compl. ¶¶ 8, 10, 29–36, 54, 71–73. In no sense could it be said that litigation against Gemini was the naturally foreseeable consequence of DCG's execution of the Note or Defendants' alleged silence as to Genesis's communications to third parties. *See Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 371 (S.D.N.Y. 2007) (no proximate causation if "the alleged aider and abettor did not assist in the making or dissemination of th[e] statement"). Gemini's invocation of "but-for" causation, *see* Compl. ¶ 108, does nothing to establish a direct link between the meager conduct by Defendants that Gemini alleges and the downstream injury it alleges from third-party lawsuits.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety. Because no additional allegations could cure the substantive defects in the Complaint, dismissal should be with prejudice.

Dated: August 10, 2023
New York, New York

Respectfully submitted,

/s/ Jonathan D. Polkes

Jonathan D. Polkes
Caroline Hickey Zalka
Stefania D. Venezia
Dylan L. Ruffi
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000
Fax: (212) 310-8007

Counsel for Defendants Digital Currency Group, Inc. and Barry Silbert

Joshua M. Wesneski
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW, Suite 600
Washington, DC 20036
Tel: (202) 682-7000
Fax: (202) 857-0940

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEMINI TRUST COMPANY, LLC,

Plaintiff,

v.

DIGITAL CURRENCY GROUP, INC. and BARRY SILBERT,

Defendants.

Case No. 1:23-cv-06864-LJL [rel. 23-2027]

Hon. Lewis J. Liman

ORAL ARGUMENT REQUESTED

DECLARATION OF CAROLINE HICKEY ZALKA IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

I, Caroline Hickey Zalka, declare the following under penalty of perjury:

1. I am an attorney duly admitted to practice before this Court and a member of Weil, Gotshal & Manges LLP, counsel for Defendants Digital Currency Group, Inc. ("DCG") and Barry Silbert (collectively, the "Defendants"). I submit this Declaration in support of Defendants' Motion to Dismiss the Complaint (the "Motion").

2. True and correct copies of the following documents cited in the accompanying Memorandum of Law in Support of the Motion are attached as exhibits A and B:

Exhibit	Description
A	Master Digital Asset Loan Agreement among Genesis Global Capital, LLC, Gemini Trust Company, and each Gemini Earn Lender.
B	June 30, 2022 Promissory Note between DCG, Genesis Global Capital, LLC, and Genesis Asia Pacific Pte. Ltd.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 10, 2023
New York, New York

/s/ Caroline Hickey Zalka

Caroline Hickey Zalka
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000
Fax: (212) 310-8007

Counsel for Defendants Digital Currency Group, Inc. and Barry Silbert

EXHIBIT A

MASTER DIGITAL ASSET LOAN AGREEMENT

This Master Digital Asset Loan Agreement ("Agreement") is made on this [date of Lender onboarding] by and between Genesis Global Capital, LLC ("Genesis" or "Borrower"), a corporation organized and existing under the laws of Delaware with its principal place of business at 111 Town Square Place, Suite 1203, Jersey City, NJ 07310 Gemini Trust Company, LLC ("Gemini" or "Custodian") a trust company organized and existing under the laws of the State of New York with its principal place of business at 315 Park Avenue South, 18th Floor, New York, NY 10010, acting as the authorized agent of a customer of Custodian which accepts the terms of this Agreement and direct Custodian to lend their assets hereunder (the "Lender" and, together with Genesis and Gemini, the "Parties").

RECITALS

WHEREAS, Gemini serves as custodian of Digital Assets for Lender, and Lender have appointed Gemini as its agent to facilitate Loans of its Digital Assets;

WHEREAS, subject to the terms and conditions of this Agreement, Borrower may, from time to time, seek to initiate a transaction pursuant to which Custodian will facilitate the lending of Digital Assets on behalf of Lender to Borrower, and Borrower will pay a Loan Fee and return such Digital Assets to Lender upon the termination of the Loan; and

WHEREAS, Borrower intends to use any Loaned Assets under this Agreement in its Digital Asset lending business;

Now, therefore, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

I. Definitions

"***Airdrop"*** means a distribution of a new token or tokens resulting from the ownership of a preexisting token. For the purposes of Section V, an "***Applicable Airdrop***" is an Airdrop for which the distribution of new tokens can be definitively calculated according to its distribution method, such as a pro rata distribution based on the amount of the relevant Digital Asset held at a specified time. A "***Non-Applicable Airdrop***" is an Airdrop for which the distribution of new tokens cannot be definitively calculated, such as a random distribution, a distribution to every wallet of the relevant Digital Asset, or a distribution that depends on a wallet of the relevant Digital Asset meeting a threshold requirement.

"***Borrower***" means Genesis Global Capital, LLC.

"***Borrower Email***" means lend@genesiscap.co.

"***Business Day***" means a day on which Genesis is open for business, following the New York Stock Exchange calendar of holidays.

"***Call Option***" means Lender has the option to demand immediate payment of a portion or the entirety of the Loan Balance at any time, subject to this Agreement and in particular Section II(c)(ii).

"***Digital Asset***" means Digital Asset that the Borrower includes in any Offered Loan Terms, and that is available for trading on the Gemini Exchange.

"***Digital Asset Address***" means an identifier of alphanumeric characters that represents a digital identity or destination for a transfer of Digital Asset.

"Fixed Term Loan" means a Loan with a pre-determined Maturity Date.

"Gemini Earn Platform" means a service and accompanying user interface offered by Custodian whereby a Lender may authorize Custodian, as custodian of Lender's Digital Assets, to negotiate one or more loan agreements on the Lender's behalf for the purpose of lending certain of Lender's Digital Assets to one or more borrowers at Lender's direction.

"***Hard Fork"*** means a permanent divergence in the blockchain (e.g., when non-upgraded nodes cannot validate blocks created by upgraded nodes that follow newer consensus rules, or an airdrop or any other event which results in the creation of a new token).

"***Loan***" means a loan of Digital Assets made pursuant to and in accordance with this Agreement.

"***Loan Balance***" means the sum of all outstanding amounts of Loaned Assets, including New Tokens, Loan Fees and Late Fees, and for a particular Loan, as defined in Section III.

"***Loaned Assets***" means any Digital Asset amount transferred in a Loan hereunder until such Digital Asset (or identical Digital Asset) is transferred back to Lender hereunder, except that, if any new or different Digital Asset is created or split by a Hard Fork or other alteration in the underlying blockchain and meets the requirements set forth in Section V of this Agreement, such new or different Digital Asset shall be deemed to become Loaned Assets in addition to the former Digital Asset for which such exchange is made. For purposes of return of Loaned Assets by Borrower or purchase or sale of Digital Currencies pursuant to Section X, such term shall include Digital Asset of the same quantity and type as the Digital Asset, as adjusted pursuant to the preceding sentence.

"***Maturity Date***" means the pre-determined future date upon which a Loan becomes due in full, whether by Term or Call Option.

"***Open Term Loan***" means a Loan without a Maturity Date where Borrower has a Prepayment Option and Lender has a Call Option.

"***Term***" means the period from the date Loaned Assets are delivered to Borrower through the date such Loan's Loaned Assets are repaid in full.

II. General Loan Terms.

(a) Offers of Loans to Lender

Custodian will provide to Lender on the Gemini Earn Platform the current terms on which Borrower has offered to enter into Loans (the "Offered Loan Terms"), which shall be delivered by Borrower to Custodian. Offered Loan Terms may include the types of Digital Assets which the Borrower will borrow, the rates and Loan types of such Digital Assets it will borrow, and maximum amounts it will borrow from all lenders on the Gemini Earn Platform. Custodian will promptly update the Gemini Earn Platform to reflect any change in the Offered Loan Terms communicated by Borrower to Custodian. For the avoidance of doubt, no erroneous or contrary information provided by Custodian to Lender, whether on the Gemini Earn Platform or otherwise, shall obligate Borrower to enter into Loans on terms other than those specified in the Offered Loan Terms then in effect.

(b) Loan Procedure

During the Term of this Agreement, on any Business Day Lender may direct Custodian, via the Gemini Earn Platform to notify Borrower on its behalf for each Digital Asset and Loan type listed in the applicable Offered Loan Terms whether it will lend additional Digital Assets at the current Loan Fee or whether it requests a return of Digital Assets (if applicable). For any Digital Assets Lender will lend, it shall deliver such Digital Assets according to the time and manner specified, and to a Digital Asset Address provided by, Custodian. For any Digital Assets Lender requests to be returned, Borrower shall return such Digital Assets within three Business Days to a Digital Asset Address provided by Custodian. Upon receipt of the Loaned Assets, Custodian shall include a record of the Loan, including all the terms of the Loan, in a log of all Lender's Loans accessible to Lender and Borrower.

(c) Loan Repayment Procedure

Loans will be Open Term Loans unless otherwise specified. For Open Term Loans, the Loaned Assets shall be repaid to a Digital Asset Address provided by Custodian within three Business Days after the request by Lender pursuant to Section II(b) above. For Fixed Term Loans, the Loaned Assets shall be repaid to a Digital Asset Address provided by Custodian at the time indicated in the Offered Loan Terms, unless Borrower and Lender agree to extend the Fixed Term Loan for another Fixed Term Loan under the then-current Offered Loan Terms, or an Open Term Loan. If Custodian has not provided to Borrower a Digital Asset Address for receiving the repayment of a Loan by 5:00 p.m. New York time on the day prior to the earlier of the Maturity Date or the Recall Delivery Day (defined below), then such Loan will become an Open Term Loan on said Maturity Date or Recall Delivery Day, whichever applicable, and no additional Loan Fees shall be accrued after the Maturity Date or the Recall Delivery Day.

Custodian shall notify Borrower to the extent Custodian determines in its sole discretion that it shall no longer support custody, trading or ancillary services for a particular Digital Asset. The date of such notice will be deemed the Recall Request Day for any Loan Balance comprised of such Digital Assets.

(d) Termination of Loan

A Loan will terminate upon the earlier of:

(i) the Maturity Date;

(ii) for an Open Term Loan, the repayment of the Loan Balance by Borrower prior to the Maturity Date;

(iii) the occurrence of an Event of Default as defined in Section VIII; however, Lender, or Custodian on behalf of Lender, shall have the right in its sole discretion to suspend the termination of a Loan under this subsection (iii) and reinstitute the Loan. In the event of reinstitution of the Loan pursuant to the preceding sentence, Lender does not waive its right to terminate the Loan hereunder; or

(iv) in the event any or all of the Loaned Assets becomes in Borrower's sole discretion a risk of being: (1) considered a security, swap, derivative, or other similarly-regulated financial instrument or asset by any regulatory authority, whether governmental, industrial, or otherwise, or by any court of law or dispute resolution organization, arbitrator, or mediator; or (2) subject to future regulation materially impacting this Agreement, the Loan, or Borrower's business.

Nothing in the forgoing shall cause, limit, or otherwise affect the Term and termination of this Agreement except as specified in Section XXIV.

In the event of a termination of a Loan, any Loaned Assets
shall be redelivered immediately to a Digital Asset Address provided by Custodian and any fees or owed shall be payable by Borrower immediately to a Digital Asset Address provided by Custodian. In the event of a termination of a Loan pursuant to Section II(d)(iv), Borrower shall pay an additional Loan Fee until (i) the end of the then-current monthly loan period or (ii) the Maturity Date of such Loan (whichever is shorter) at the then-current interest rate on the amount of the Loan terminated.

(e) Redelivery in an Illiquid Market

If Gemini and each of the three other highest-volume Digital Asset exchanges that report prices for the applicable Digital Asset (as measured by the 30-day average daily trading volume of the applicable Digital Asset on the Loan Date) (these such exchanges, the "Liquidity Exchanges") cease or suspend trading as of in the Loaned Assets on the Maturity Date or the Recall Delivery Day, whichever applicable, Borrower and Custodian will engage in good faith negotiations to reach agreement on a substitute form of repayment for the affected loans or to otherwise temporarily suspend the requirement for Borrower to return the Loaned Assets, and such negotiation shall be binding on Lender.

III. Loan Fees and Transaction Fees.

(a) Loan Fee

Unless otherwise agreed, Borrower agrees to pay Lender a financing fee on each Loan (the "Loan Fee"). When a Loan is executed, the Borrower will be responsible to pay the Loan Fee as set forth in the Offered Loan Terms. Except as Borrower and Lender may otherwise agree, Loan Fees shall accrue from and include the date on which the Loaned Assets are transferred to Borrower to the date on which such Loaned Assets are repaid in their entirety to Lender.

Unless otherwise specified in the Offered Loan Terms, (i) Loan Fees shall be based on a monthly interest rate, which may be updated on the first day of each calendar month upon at least five (5) days advance notice by Borrower to Custodian; (ii) no minimum amount of Loaned Assets shall be required for a Loan to accrue a Loan Fee; (iii) Loan Fees shall be calculated using the "daily balance method", meaning the applicable monthly interest rate shall be applied to the principal and interest that has accrued on the Loaned Assets each day; (iv) Loan Fees shall at all times be greater than 0% APY; and (v) Loan Fees shall be paid monthly by Borrower to a Digital Asset Address provided by Custodian as agent for Lender. Upon receipt, Custodian shall be solely responsible for paying Loan Fees to Lenders, and Lender will have no recourse to Borrower for such Loan Fees.

Borrower shall calculate any Loan Fees (which may be aggregated across all outstanding Loans from Lender) owed on a daily basis and provide Custodian with the calculation, and information relied upon to support the calculation, upon request. The Loan Fee will be calculated off all outstanding portions of the Loaned Assets. If Custodian believes any Loan Fee was calculated in error, Custodian shall present its own Loan Fee calculation and the Borrower and Custodian shall cooperate in good faith to decide a mutually agreeable calculation. The calculation of any Loan Fees accepted by Custodian shall be final and binding upon Lender.

(b) Late Fee

For each Calendar Day in excess of the Maturity Date or the Recall Delivery Day (whichever is applicable) in which Borrower has not returned the entirety of the Loaned Assets or failed to timely pay any outstanding Loan Fee in accordance with Section III(c), Borrower shall incur an additional fee (the "Late Fee") of a 1% (annualized, calculated daily) on all outstanding portions of the Loaned Assets.

(c) Payment of Loan Fees and Late Fees

Unless otherwise agreed, any accrued but unpaid Loan Fee or Late Fees payable hereunder shall be paid by Borrower upon the earlier of (i) promptly following the end of the calendar month in which the Loan was outstanding, but in any even no later than three (3) Business Days after the end of such month or (ii) the termination of all Loans hereunder (the "Payment Due Date"). The Loan Fee and Late Fees shall be payable, unless otherwise agreed by the Borrower and Lender in writing, in the same Loaned Assets that were borrowed, on the same blockchain and of the same type that was loaned by the Lender during the Loan.

IV. Hard Fork

(a) No Immediate Termination of Loans Due to Hard Fork

In the event of a Hard Fork in the blockchain for any Loaned Assets or an Airdrop, any outstanding Loans will not be automatically terminated. Borrower and Custodian, in behalf of Lender, may agree, regardless of Loan type, either (i) to terminate a Loan without any penalties on an agreed upon date or (ii) for Custodian to manage the Hard Fork on the behalf of Borrower. Nothing herein shall relieve, waive, or otherwise satisfy Borrower's obligations hereunder, including without limitation, the return of the Loaned Assets at the termination of the Loan and payment of accrued Loan Fees, which includes the per diem amounts for days on which Borrower transfers Digital Asset to Custodian and Custodian transfers said Digital Asset back to Borrower pursuant to this section.

(b) Lender's Right to New Tokens

Lender will receive the benefit and ownership of any incremental tokens generated as a result of a Hard Fork in the Digital Asset protocol or an Applicable Airdrop (such tokens that meet the following conditions, the "New Tokens") if the following two conditions are met:

- *Market Capitalization*: the average market capitalization of the New Token (defined as the total value of all New Tokens) on the 30th day following the occurrence the Hard Fork or Applicable Airdrop (calculated as a 30-day average on such date) is at least 5% of the average market capitalization of the Loaned Assets (defined as the total value of the Loaned Assets) (calculated as a 30-day average on such date).
- *24-Hour Trading Volume*: the average 24-hour trading volume of the New Token on the 30th day following the occurrence the Hard Fork or Applicable Airdrop (calculated as a 30-day average on such date) is at least 1% of the average 24-hour trading volume of the Loaned Assets (calculated as a 30-day average on such date).

For the above calculations, the source for the relevant data on the Digital Asset market capitalization and 24-Hour trading volume will be blockchain.info (or, if blockchain.info does not provide the required information, bitinfocharts.com, and if neither provides the required information, the parties shall discuss in good faith to mutually agree upon another data source).

If the Hard Fork or Applicable Airdrop meets the criteria above, Borrower will have up to 60 days from the Hard Fork or Applicable Airdrop to transfer the New Tokens to Lender. If sending the New Tokens to Lender is burdensome in Borrower's reasonable discretion, Borrower can reimburse Lender for the value of the New Tokens by either (i) a one-time payment in the same Loaned Assets transferred as a part of the Loan reflecting the amount of the New Tokens owed using the spot rate reasonably selected by Borrower at the time of repayment, or (ii) returning the borrowed Digital Asset so that Lender can manage the split of the underlying digital tokens as described in Section IV(b) above. Alternatively, subject to Lender's written agreement, the parties may agree to other methods of making Lender whole for Borrower's failure to transfer New Tokens to Lender. For the avoidance of doubt, if Borrower returns a Loan to Lender prior to the 30th day following a Hard Fork, Borrower's obligations under this

Section V shall continue for any New Tokens that meet the criteria in this subsection (b) for such Loan on the 30th day following the Hard Fork. Lender's rights to New Tokens as set forth in this Section shall survive the termination of the relevant Loan, return of the Loaned Assets, and termination of this Agreement.

V. Representations and Warranties.

The Parties hereby make the following representations and warranties, which shall continue during the term of this Agreement and any Loan hereunder:

(a) Each Party represents and warrants that (i) it has the power to execute and deliver this Agreement, to enter into the Loans contemplated hereby and to perform its obligations hereunder, (ii) it has taken all necessary action to authorize such execution, delivery and performance, and (iii) this Agreement constitutes a legal, valid, and binding obligation enforceable against it in accordance with its terms.

(b) Each Party hereto represents and warrants that it has not relied on the other for any tax or accounting advice concerning this Agreement and that it has made its own determination as to the tax and accounting treatment of any Loan, any Digital Assets or funds received or provided hereunder.

(c) Each Party hereto represents and warrants that it is acting for its own account unless it expressly specifies otherwise in writing and complies with Section VI.

(d) Each Party hereto represents and warrants that it is a sophisticated party and fully familiar with the inherent risks involved in the transaction contemplated in this Agreement, including, without limitation, risk of new financial regulatory requirements, potential loss of Loaned Assets and risks due to volatility of the price of the Loaned Assets, and voluntarily takes full responsibility for any risk to that effect.

(e) Each Party represents and warrants that it is not insolvent and is not subject to any bankruptcy or insolvency proceedings under any applicable laws.

(f) Each Party represents and warrants there are no proceedings pending or, to its knowledge, threatened, which could reasonably be anticipated to have any adverse effect on the transactions contemplated by this Agreement or the accuracy of the representations and warranties hereunder or thereunder.

(g) Each Party represents and warrants that to its knowledge the transactions contemplated in this Agreement are not prohibited by law or other authority in the jurisdiction of its place of incorporation, place of principal office, or residence and that it has necessary licenses and registrations to operate in the manner contemplated in this Agreement.

(h) Each Party represents and warrants that it has all necessary governmental and other consents, approvals and licenses to perform its obligations hereunder.

(i) Each Party represents and warrants that it has made its own independent decisions to enter into any Loan and as to whether the Loan is appropriate or proper for it based upon its own judgement and upon advice from such advisers (other than another Party) as it has deemed necessary. It is not relying on any communication (written or oral) of the other Parties as investment advice or as a recommendation to enter into any Loan, it being understood that information and explanations related to the terms and conditions of a Loan will not be considered investment advice or a recommendation to enter into that Loan.

(j) Each Party represents and warrants that it is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of any Loan. It is also capable of assuming, and assumes, the risks of that Loan. The other Parties are not acting as a fiduciary for or an adviser to it in respect of any Loan.

(k) Lender represents and warrants that it has, or will have at the time of the transfer of any Loaned Assets, the right to transfer such Loaned Assets subject to the terms and conditions hereof, and free and clear of all liens and encumbrances other than those arising under this Agreement.

(l) Lender represents and warrants that the Loaned Assets have not been or will not be obtained, directly or indirectly, from or using the assets of any: (i) "employee benefit plan" as defined in Section 3(3) of the U.S. Employee Retirement Income Security Act of 1974 which is subject to Part 4 of Subtitle B of Title I of such Act; (ii) any "plan" as defined in Section 4975(e)(1) of the U.S. Internal Revenue Code of 1986; or (iii) any entity the assets of which are deemed to be assets of any such "employee benefit plan" or "plan" by reason of the U.S. Department of Labor's plan asset regulation, Title 29 of the Code of Federal Regulations, Section 2510.3-101.

(m) Lender represents and warrants that it is in compliance with applicable laws and regulations, except where Lender's failure to so comply would not have a material effect on Borrower.

(n) Borrower represents and warrants that it has, or will have at the time of return of any Loaned Assets, the right to transfer such Loaned Assets subject to the terms and conditions hereof.

(o) Borrower has furnished to Lender, or will furnish to Lender within seven (7) Business Days after demand by Lender, its most recent statement required to be furnished to customers pursuant to Rule 17a-5(c) under the Securities Exchange Act of 1934.

(p) Custodian represents and warrants that it has been duly authorized by Lender to (i) enter into this Agreement and the Loans contemplated by this Agreement; and (ii) perform the obligations set forth herein on behalf of Lender.

VI. Appointment of Custodian as Agent

a. Borrower and Custodian agree to execute and comply fully with the provisions of Exhibit A (the terms and conditions of which Exhibit are incorporated herein and made a part hereof).

b. Lender represents, which representation shall continue during the term of this Agreement and any Loan hereunder, that it:
   (i) has received and reviewed a copy of this Agreement;
   (ii) has duly appointed Custodian as its agent to act on Lender's behalf for all purposes under this Agreement;
   (iii) has duly authorized Custodian to enter into the Loans contemplated by the Agreement on its behalf and to perform the obligations of Lender under such Loans;
   (iv) is a Principal referred to in Exhibit A and will be liable as principal with respect to Loans entered into by Custodian on its behalf and its related obligations hereunder; and
   (v) has taken all necessary action to authorize such appointment of Custodian and such performance by it.

c. Custodian represents and warrants that it is in compliance with applicable laws and regulations, except where Custodian's failure to so comply would not have a material effect on the other Parties.

d. Lender agrees and acknowledges that Borrower's delivery to Custodian of any Loaned Assets in accordance with the terms of this Agreement and Exhibit A will fully discharge Borrower's obligations with respect to such Loaned Assets and that, thereafter, Custodian will be the only Party to which Lender may have recourse for such Loaned Assets. Subject to the terms of the Gemini Earn Platform and any other applicable agreements between Lender and Custodian, Custodian agrees to promptly deliver to Lender all Loaned Assets so received from Borrower.

VII. Default

It is further understood that any of the following events shall constitute an event of default hereunder against the defaulting Party, and shall be herein referred to as an "Event of Default" or "Events of Default":

(a) the failure of the Borrower to return any and all Loaned Assets upon termination of any Loan however, Borrower shall have two Business Days to cure such default;

(b) the failure of Borrower to pay any and all Loan Fees, Late Fees, or to remit any New Tokens in accordance with Section V, however, Borrower shall have three Business Days to cure such default;

(c) a material default by either Party in the performance of any of the other agreements, conditions, covenants, provisions or stipulations contained in this Agreement, including without limitation a failure by either Party to abide by its obligations in Section IV or V of this Agreement and such Party's failure to cure said material default within ten Business Days;

(d) any bankruptcy, insolvency, reorganization or liquidation proceedings or other proceedings for the relief of debtors or dissolution proceedings that are instituted by or against a Party and are not be dismissed within thirty (30) days of the initiation of said proceedings; or

(e) any representation or warranty made by either Party in this Agreement that proves to be incorrect or untrue in any material respect as of the date of making or deemed making thereof however, a Party shall have ten Business Days to cure such default.

(f) any representation or warranty of Custodian in Exhibit A proves to be incorrect or untrue in any material respect as of the date of making thereof or during the term of any Loan, or Custodian shall fail to perform in any material respect Custodian's covenants in Exhibit A, which shall be deemed an Event of Default by Lender, provided, however, Custodian shall have ten Business Days to cure such default.

VIII. Remedies

(a) Upon the occurrence and during the continuation of any Event of Default on a Loan by Borrower, the Custodian acting on behalf of the Lender may, at its option: (1) declare the entire Loan Balance outstanding for the Loan hereunder immediately due and payable; (2) transfer any Collateral for a Loan from the collateral account to Custodian's operating account to hold on behalf of itself and the Lender, to the extent necessary for the payment of any nonpayment, liability, obligation, or indebtedness created by the Loan; and/or (3) exercise all other rights and remedies available to the Lender hereunder, under applicable law, or in equity. If any Event of Default by Borrower under Sections VII(a) or (b), persist for thirty days or more, or immediately upon an Event of Default by Borrower under Sections VII(c) or (d), the Custodian acting on behalf of the Lender may, at its option, (4) terminate this Agreement and any Loan hereunder upon notice to Borrower.

(b) Upon the occurrence and during the continuation of any Event of Default on a Loan by Lender or Custodian, the Borrower may, at its option exercise all other rights and remedies available to the Borrower hereunder, under applicable law, or in equity. If any Event of Default by Lender under Section VII (e) persist for thirty-days or more, or immediately upon an Event of Default by Lender under Sections VII (c) or (d), the Borrower may, at its option, terminate this Agreement and any Loan hereunder upon notice to Lender.

(c) In addition to its rights hereunder, the non-defaulting Party shall have any rights otherwise available to it under any other agreement or applicable law; however, the non-

defaulting Party shall have an obligation to mitigate its damages in a commercially reasonable manner.

IX. Rights and Remedies Cumulative.

No delay or omission by a Party in exercising any right or remedy hereunder shall operate as a waiver of the future exercise of that right or remedy or of any other rights or remedies hereunder. All rights of each Party stated herein are cumulative and in addition to all other rights provided by law, in equity.

X. Survival of Rights and Remedies

All remedies hereunder and all obligations with respect to any Loan shall survive the termination of the relevant Loan, return of Loaned Assets, and termination of this Agreement.

XI. Governing Law; Dispute Resolution.

This Agreement is governed by, and shall be construed and enforced under, the laws of the State of New York without regard to any choice or conflict of laws rules. If a dispute arises out of or relates to this Agreement, or the breach thereof, and if said dispute cannot be settled through negotiation it shall be finally resolved by arbitration administered in the County of New York, State of New York by the American Arbitration Association under its Commercial Arbitration Rules, or such other applicable arbitration body as required by law or regulation, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction. The parties agree to waive their rights to a jury trial. If any proceeding is brought for the enforcement of this Agreement, then the successful or prevailing party shall be entitled to recover attorneys' fees and other costs incurred in such proceeding in addition to any other relief to which it may be entitled.

XII. Confidentiality.

(a) Each Party to this Agreement shall hold in confidence all information obtained from the other Party in connection with this Agreement and the transactions contemplated hereby, including without limitation any discussions preceding the execution of this Agreement (collectively, "Confidential Information"). Confidential Information shall not include information that the receiving Party demonstrates with competent evidence was, or becomes, (i) available to the public through no violation of this Section XII, (ii) in the possession of the receiving Party on a non-confidential basis prior to disclosure, (iii) available to the receiving Party on a non-confidential basis from a source other than the other Party or its affiliates, subsidiaries, officers, directors, employees, contractors, attorneys, accountants, bankers or consultants (the "Representatives"), or (iv) independently developed by the receiving Party without reference to or use of such Confidential Information.

(b) Each Party shall (i) keep such Confidential Information confidential and shall not, without the prior written consent of the other Party, disclose or allow the disclosure of

such Confidential Information to any third party, except as otherwise herein provided, and (ii) restrict internal access to and reproduction of the Confidential Information to a Party's Representatives only on a need to know basis; provided, however, that such Representatives shall be under an obligation of confidentiality at least as strict as set forth in this Section XII.

(c) Each Party also agrees not to use Confidential Information for any purpose other than in connection with transactions contemplated by this Agreement.

(d) The provisions of this Section XII will not restrict a Party from disclosing the other Party's Confidential Information to the extent required by any law, regulation, or direction by a court of competent jurisdiction or government agency or regulatory authority with jurisdiction over said Party; provided that the Party required to make such a disclosure uses reasonable efforts to give the other Party reasonable advance notice of such required disclosure in order to enable the other Party to prevent or limit such disclosure. Notwithstanding the foregoing, Lender may disclose the other Party's Confidential Information without notice pursuant to a written request by a governmental agency or regulatory authority.

(e) The obligations with respect to Confidential Information shall survive for a period of three (3) years from the date of this Agreement. Notwithstanding anything in this agreement to the contrary, a Party may retain copies of Confidential Information (the "Retained Confidential Information") to the extent necessary (i) to comply with its recordkeeping obligations, (ii) in the routine backup of data storage systems, and (iii) in order to determine the scope of, and compliance with, its obligations under this Section XII; provided, however, that such Party agrees that any Retained Confidential Information shall be accessible only by legal or compliance personnel of such Party and the confidentiality obligations of this Section XII shall survive with respect to the Retained Confidential Information for so long as such information is retained.

XIII. Notices.

Any notices or right exercisable by Lender(s) hereunder may also be exercised by Custodian in its capacity as authorized agent for Lender(s). Unless otherwise provided in this Agreement, all notices or demands relating to this Agreement shall be in writing and shall be personally delivered or sent by Express or certified mail (postage prepaid, return receipt requested), overnight courier, electronic mail (at such email addresses as a Party may designate in accordance herewith), or to the respective address set forth below:

Custodian, as authorized agent for Lender:
Gemini Trust Company, LLC
315 Park Avenue South, 18th Floor
New York, NY 10010
Attn: Gemini Earn
Email: legal@gemini.com

Borrower:
Genesis Global Capital, LLC
111 Town Square Place, Suite 1203
Jersey City, NJ 07310
Attn: General Counsel
Email: legal@genesiscap.co

Either Party may change its address by giving the other Party written notice of its new address as herein provided.

XIV. Modifications.

All modifications or amendments to this Agreement shall be effective only when reduced to writing and signed by both parties hereto.

XV. Single Agreement

The Parties acknowledge that, and have entered into this Agreement in reliance on the fact that, all Loans hereunder constitute a single business and contractual relationship and have been entered into in consideration of each other. Accordingly, the Parties hereby agree that payments, deliveries, and other transfers made by either of them in respect of any Loan shall be deemed to have been made in consideration of payments, deliveries, and other transfers in respect of any other Loan hereunder, and the obligations to make any such payments, deliveries and other transfers may be applied against each other and netted. In addition, the Parties acknowledge that, and have entered into this Agreement in reliance on the fact that, all Loans hereunder have been entered into in consideration of each other.

XVI. Entire Agreement.

This Agreement, each exhibit referenced herein, and all applicable Offered Loan Terms constitute the entire Agreement among the parties with respect to the subject matter hereof and supersedes any prior negotiations, understandings and agreements. Nothing in this Section XVII shall be construed to conflict with or negate Section XV above.

XVII. Successors and Assigns.

This Agreement shall bind and inure to the benefit of the respective successors and assigns of each of the parties; provided, that no Party may assign this Agreement or any rights or duties hereunder without the prior written consent of each of Custodian and Borrower. Notwithstanding the foregoing, in the event of a change of control of Custodian or Borrower, prior written consent shall not be required so long as such Party provides the other Party with written notice prior to the consummation of such change of control. For purposes of the foregoing, a "change of control" shall mean a transaction or series of related transactions in which a person or entity, or a group of affiliated (or otherwise related) persons or entities acquires from stockholders of the Party shares representing more than fifty percent (50%) of the outstanding voting stock of such Party. Neither this Agreement nor any provision hereof, nor any Exhibit hereto or document executed or delivered herewith, shall create any rights in favor of or impose any obligation upon

any person or entity other than the parties hereto and their respective successors and permitted assigns. For the avoidance of doubt, any and all claims and liabilities against Genesis arising in any way out of this Agreement are only the obligation of Genesis, and not any of its parents or affiliates, including but not limited to Digital Currency Group, Inc. and Genesis Global Trading, Inc. The Parties agree that none of Genesis' parents or affiliates shall have any liability under this Agreement nor do such related entities guarantee any of Genesis' obligations under this Agreement.

XVIII. Severability of Provisions.

Each provision of this Agreement shall be severable from every other provision of this Agreement for the purpose of determining the legal enforceability of any specific provision.

XIX. Counterpart Execution.

This Agreement may be executed in any number of counterparts and by different parties on separate counterparts, each of which, when executed and delivered, shall be deemed to be an original, and all of which, when taken together, shall constitute but one and the same Agreement. Delivery of an executed counterpart of this Agreement by email or other electronic method of transmission shall be equally as effective as delivery of an original executed counterpart of this Agreement. Any Party delivering an executed counterpart of this Agreement by email or other electronic method of transmission also shall deliver an original executed counterpart of this Agreement but the failure to deliver an original executed counterpart shall not affect the validity, enforceability, and binding effect of this Agreement.

XX. Relationship of Parties.

Nothing contained in this Agreement shall be deemed or construed by the Parties, or by any third party, to create the relationship of partnership or joint venture between the parties hereto, it being understood and agreed that no provision contained herein shall be deemed to create any relationship between the parties hereto other than the relationships of Borrower, Custodian and Lender.

XXI. No Waiver.

The failure of or delay by either Party to enforce an obligation or exercise a right or remedy under any provision of this Agreement or to exercise any election in this Agreement shall not be construed as a waiver of such provision, and the waiver of a particular obligation in one circumstance will not prevent such Party from subsequently requiring compliance with the obligation or exercising the right or remedy in the future. No waiver or modification by either Party of any provision of this Agreement shall be deemed to have been made unless expressed in writing and signed by both parties.

XXII. Indemnification.

(a) *By Custodian*. Custodian hereby agrees to indemnify, defend and hold harmless Borrower, its affiliates and any of their respective officers, directors, employees, agents,

consultants or other representatives from and against all liabilities, losses, costs, damages, expenses or causes of action, of whatever character, including but not limited to reasonable attorneys' fees (collectively, "Liabilities"), to the extent arising out of or relating to any pending or threatened claim, action, proceeding or suit (each, a "Claim") by any third party based on, arising out of or relating to Custodian breach of any of its representations, warranties or obligations set forth in this Agreement; provided, however, Custodian's obligation to provide such indemnity will not apply to the extent that such Liabilities are incurred as a result of the breach by Borrower in any material respect of its obligations under this Agreement.

(b) *By Borrower*. Borrower hereby agrees to indemnify, defend and hold harmless Lender, Custodian, and their respective affiliates and any of their respective officers, directors, employees, agents, consultants or other representatives from and against all Liabilities, to the extent arising out of or relating to any Claim by any third party based on, arising out of or relating to Borrower's breach of any of its representations, warranties or obligations set forth in this Agreement; provided, however, Borrower's obligation to provide such indemnity will not apply to the extent that such Liabilities are incurred as a result of the breach by Lender or Custodian in any material respect of their obligations under this Agreement.

(c) *By Lender*. Lender hereby agrees to indemnify, defend and hold harmless Borrower, Custodian, and their respective affiliates and any of their respective officers, directors, employees, agents, consultants or other representatives from and against all Liabilities, to the extent arising out of or relating to any Claim by any third party based on, arising out of or relating to Lender's breach of any of its representations, warranties or obligations set forth in this Agreement; provided, however, Lender's obligation to provide such indemnity will not apply to the extent that such Liabilities are incurred as a result of the breach by Borrower or Custodian in any material respect of their obligations under this Agreement.

XXIII. Term and Termination.

This Agreement may be terminated by any Party by providing thirty days' written notice to the other Parties.

In the event of a termination of this Agreement, any Loaned Assets shall be redelivered immediately and any fees owed shall be payable immediately.

XXIV. Miscellaneous.

Whenever used herein, the singular number shall include the plural, the plural the singular, and the use of the masculine, feminine, or neuter gender shall include all genders where necessary and appropriate. This Agreement is solely for the benefit of the parties hereto and their respective successors and assigns, and no other Person shall have any right, benefit, priority or interest under, or because of the existence of, this Agreement. The section headings are for convenience only and shall not affect the interpretation or construction of this Agreement. The Parties acknowledge that the Agreement and any Lending Request are the result of negotiation

between the Parties which are represented by sophisticated counsel and therefore none of the Agreement's provisions will be construed against the drafter.

XXV. Intent.

Each Party agrees that the Loans are intended to be commercial loans of Digital Assets and not securities under the U.S. federal or state securities laws.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed and delivered as of the date first above written.

LENDER:

By: _____
Name:
Title:

CUSTODIAN:

GEMINI TRUST COMPANY, LLC

By: _____
Name: Cameron Winklevoss
Title: President

BORROWER:

GENESIS GLOBAL CAPITAL, LLC

By: _____
Name: Kristopher Johnson
Title: Senior Risk Officer

EXHIBIT A

Gemini Trust Company, LLC Acting as Agent

This Exhibit sets forth the terms and conditions governing all Loans in which Gemini Trust Company, LLC is acting as agent ("Agent") for a third party ("Principal"). Unless otherwise defined, capitalized terms used but not defined in this Exhibit shall have the meanings assigned in the Master Digital Asset Loan Agreement of which it forms a part (such agreement, together with all exhibits thereto, the "Agreement").

1. **Additional Representations, Warranties and Covenants.** In addition to the representations and warranties set forth in the Agreement, Agent hereby makes the following representations, warranties and covenants, which shall continue during the term of any Loan:

   (a) Principal (i) acknowledged electronically or in writing receiving a counterpart of the Agreement, (ii) has duly authorized Agent to deliver Digital Assets comprising any Loaned Assets for the Loans contemplated by the Agreement and to perform the obligations of Lender under such Loans, and (iii) has taken all necessary action to authorize such execution and delivery by Agent and such performance by it;

   (b) Principal has specifically directed Agent, through the Gemini Earn Platform, to deliver Digital Assets comprising any Loaned Assets for each Loan and to request the return of any Loaned Assets, and has not authorized Agent to exercise discretion in the determining the amount, timing or selection of any Loan on Principal's behalf;

   (c) Agent will provide in a timely manner with a written confirmation or other notification of each Loan and, upon a Principal's request, promptly provide Principal with any records of the Loans made on its behalf;

   (d) Agent will provide Principal with a statement, at least quarterly, containing a description of all lending activity on Principal's behalf during the preceding period, including all Loans made on behalf of Principal, all Digital Assets returned and Loan Fees paid to Principal (net fees and expenses charged to Principal), and the amount of Loans outstanding at the beginning and end of the period; and

   (e) Agent will assist Borrower in obtaining from Principal such information regarding Principal as Borrower may reasonably request; provided, however, that Agent shall not have any obligation to provide Borrower with confidential information regarding Principal.

2. **Identification of Principal.** Agent agrees to provide Borrower, prior to any Loan under the Agreement, with the ability to access the name of the specific Principal for which it will act as Agent under the Agreement. If Agent fails to provide access to the identify of such Principal prior to any Loan under the Agreement,, or Borrower shall determine in its reasonable discretion that any Principal identified by Agent is not acceptable to it, Borrower may reject and rescind any Loan with such Principal, return to Agent any Loaned Assets previously transferred to Borrower and refuse any further performance under such Loan;

provided, however, that (A) Borrower shall promptly (and in any event within one Business Day of notice of the specific Principal) notify Agent of its determination to reject and rescind such Loan and (B) to the extent that any performance was rendered by Lender under any Loan rejected by Borrower, Lender shall remain entitled to any fees or other amounts that would have been payable to it with respect to such performance if such Loan had not been rejected.

3. **Netting of Deliveries.** On each Business Day, at such times and in such manner as may be mutually agreed by Agent and Borrower, Agent will sum together the aggregate amount of each Digital Asset to be delivered to Borrower, and subtract therefrom the aggregate amount of such Digital Asset to be delivered by Borrower to Agent, in each case on behalf of Agent's Principals in accordance with the Agreement (the "**Net Settlement Amount**"). If the Net Settlement Amount for a Digital Asset is: (i) positive, Agent will deliver the Net Settlement Amount of such Digital Asset to Borrower or, (ii) negative, Borrower will deliver the Net Settlement Amount to Agent, in each case in accordance with the Agreement. Upon delivery of the Net Settlement Amount, Borrower and each Principal shall be fully discharged from liability for the obligations, if any, corresponding to such Net Settlement Amount and Agent shall be solely responsible and liable for delivering to each Principal the amount of such Digital Asset to which such Principal is entitled to under the Agreement.

4. **Limitation of Agent's Liability.** The Parties expressly acknowledge that if the representations and warranties of Agent under the Agreement, including this Exhibit, are true and correct in all material respects during the term of any Loan and Agent otherwise complies with the provisions of this Exhibit, then:

   (a) Agent's obligations under the Agreement shall not include a guarantee of performance by its Principal;

   (b) Borrower's remedies shall not include a right of setoff against obligations, if any, of Agent arising in other transactions in which Agent is acting as principal; and

   (c) Following an Event of Default by Borrower, the Principal to the Loan(s) subject to such Event of Default may proceed directly as Lender against Borrower and not be obligated to join Agent or any other Principal as a condition precedent to initiating such proceeding.

4. Interpretation of Terms. All references to "Lender" or "Borrower," as the case may be, in the Agreement shall, subject to the provisions of this Exhibit (including, among other provisions, the limitations on Agent's liability in Section 3 of this Exhibit), be construed to reflect that (i) Principal shall have, in connection with any Loan or Loans entered into by Agent on its behalf, the rights, responsibilities, privileges and obligations of a "Lender" directly entering into such Loan or Loans with Borrower under the Agreement, and (ii) Principal has designated Agent as its sole agent for performance of Lender's obligations to Borrower and for receipt of performance by Borrower of its obligations to Lender in connection with any Loan or Loans under the Agreement (including, among other things, as Agent for Principal in connection with transfers of Loaned Assets and as agent for giving and receiving all notices under the Agreement). Both Agent and its Principal shall be deemed "Parties" to the Agreement and all

references to a "Party" or "either Party" in the Agreement shall be deemed revised accordingly (and any Default by Agent under the Agreement shall be deemed a Default by Lender).

EXHIBIT B

PAYMENT OF THIS NOTE AND OF THE OBLIGATIONS HEREUNDER ARE SUBORDINATED TO THE EXTENT AND IN THE MANNER PROVIDED FOR IN THAT CERTAIN INTERCOMPANY SUBORDINATION AGREEMENT (THE "**SUBORDINATION AGREEMENT**") BY AND AMONG THE OBLIGOR (AS HEREINAFTER DEFINED), THE SUBSIDIARIES OF THE OBLIGOR PARTY THERETO FROM TIME TO TIME, AND SB CORPORATE FUNDING LLC, AS ADMINISTRATIVE AGENT. THE SUBORDINATION AGREEMENT IS INCORPORATED HEREIN BY REFERENCE AND MADE A PART HEREOF AS IF SET FORTH HEREIN IN ITS ENTIRETY.

PROMISSORY NOTE

$1,100,000,000.00 June 30, 2022

THIS PROMISSORY NOTE (this "**Note**") is made as of the date first written above by the undersigned, DIGITAL CURRENCY GROUP, INC., a Delaware corporation (the "**Obligor**"), to GENESIS GLOBAL CAPITAL, LLC, a Delaware limited liability company (together with any successors or assigns or any subsequent holder of this Note, the "**Holder**"), and, solely for purposes of the agreements set forth in Section 1.6 of this Note, GENESIS ASIA PACIFIC PTE. LTD., a corporation organized and existing under the laws of Singapore ("**GAP**").

WITNESSETH

WHEREAS, GAP heretofore has made or assumed loans and other financial accommodations (collectively, the "**TAC Loans**") provided from time to time to Three Arrows Capital Ltd., a corporation organized and existing under the laws of the British Virgin Islands ("**TAC**");

WHEREAS, the TAC Loans were funded with working capital provided from time to time by the Holder, evidenced by book-entry intercompany transfers from the Holder to GAP and resulting in non-interest-bearing accounts payable from GAP to the Holder (the "**Intercompany Payables**");

WHEREAS, as of June 30, 2022, the parties agree that the aggregate principal amount of the Intercompany Payables, after giving effect to all repayments and recoveries in respect of the TAC Loans (and taking into account the value of any potential realization on any TAC Collateral (as hereinafter defined)) as of such date, is $1,100,000,000.00 (the "**Assumed Liability**");

WHEREAS, TAC has defaulted on the TAC Loans and, except for expected recoveries from the realization by GAP of collateral provided by TAC to secure certain of the TAC Loans (the "**TAC Collateral**"), GAP has substantial doubts that it will be able to recover any additional amounts from TAC in respect of the TAC Loans;

WHEREAS, notwithstanding the foregoing, the Assumed Liability shall be reduced in accordance with the terms of Section 1.6 of this Note to reflect any repayment or other recoveries (including any further realization on the TAC Collateral) in respect of the TAC Loans after the date hereof;

WHEREAS, contemporaneously with the issuance of this Note, GAP assigned to the Obligor, and the Obligor assumed from GAP, the Assumed Liability pursuant to that certain Assignment and Assumption Agreement, dated as of even date herewith, between GAP and the Obligor (the "**Assignment**"); and

WHEREAS, the Obligor is issuing this Note to the Holder to evidence the Obligor's obligations in respect of the Assumed Liability and to memorialize the terms of the repayment thereof.

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated into the operative provisions of this Note by this reference, and for other good and valuable consideration, the receipt and adequacy of which are hereby conclusively acknowledged, the parties hereto agree as follows:

FOR VALUE RECEIVED, the Obligor promises to pay to the Holder on the Maturity Date (as hereinafter defined), the principal sum of ONE BILLION ONE HUNDRED MILLION AND 00/100 DOLLARS ($1,100,000,000.00), or such lesser amount as shall equal the outstanding principal balance hereunder (as such amount may increase from time to time, if applicable, due solely to the payment of PIK Interest (as hereinafter defined) pursuant to the terms hereof, the "**Principal Amount**"), in lawful money of the United States of America in immediately available funds, and to pay interest from the date of issuance of this Note on the Principal Amount from time to time outstanding at a rate per annum and payable on such dates as determined pursuant to the terms of this Note.

SECTION 1. TERMS OF PAYMENT

1.1 Maturity Date. The unpaid Principal Amount of this Note, together with all accrued and unpaid interest as set forth in this Note, shall be paid in full on or before June 30, 2032 (the "**Maturity Date**"). If any day on which a payment is due pursuant to the terms of this Note is not a day on which banks in the State of New York are generally open (a "**Business Day**"), such payment shall be due on the next Business Day following.

1.2 Interest.

1.2.1 The Principal Amount outstanding from time to time shall bear interest at a rate equal to one percent (1.00%) per annum.

1.2.2 Interest with respect to this Note shall be paid quarterly in arrears on the last Business Day of each March, June, September and December of each calendar year, commencing September 30, 2022 (each, an "**Interest Payment Date**"), either (a) in cash or (b) at the option of the Obligor, or at any time cash payments are not permitted by the terms of the Subordination Agreement, in kind by adding an amount equal to the accrued interest for such quarterly interest period to the then-outstanding Principal Amount (interest so paid under this clause (b), "**PIK Interest**"). Once paid, any PIK Interest shall constitute principal of this Note and shall accrue interest as such.

1.2.3 Under no circumstances shall the rate of interest chargeable under this Note be in excess of the maximum amount permitted by applicable law. If for any reason any such

excess interest is charged and paid, then the excess amount shall be promptly refunded by the Holder.

1.2.4 Interest on this Note shall be computed on the basis of the actual number of days elapsed over a year of 365 days (366 days in a leap year). In computing such interest, the date this Note is issued shall be included and the date of payment of any Principal Amount shall be excluded.

1.3 Optional Prepayments. The Principal Amount, together with any accrued and unpaid interest thereon, may be prepaid, at Obligor's option, at any time prior to the Maturity Date, in whole or in part, without premium or penalty. All payments received by Holder hereunder will be applied first to interest and the balance to the Principal Amount. No amount repaid or prepaid hereunder may be reborrowed.

1.4 Recordation of Payments. The Holder is hereby authorized to record all repayments or prepayments under this Note on the schedule attached hereto, or otherwise in its books and records, such schedule and/or books and records constituting *prima facie* evidence (absent manifest error) of the principal amount of this Note; provided, however, that the failure of the Holder to make such a notation or any error in such notation shall not affect the obligations of the Obligor to the Holder under this Note.

1.5 Form of Payment. Any and all payments hereunder shall be made in lawful money of the United States of America by wire transfer of immediately available federal funds in accordance with such wire transfer or other payment instructions as the Holder may designate from time to time, or if no such designation is made.

1.6 TAC Loans.

1.6.1 Each of the Obligor and GAP hereby agrees to promptly pay or transfer over, and shall cause each of their respective affiliates to pay or transfer over, to the Holder any payment, repayment, distribution, proceeds or other amount received in respect of the TAC Loans or the TAC Collateral after the date hereof, whether in cash, securities or other property (each, a "**TAC Recovery**"), for application to the Principal Amount then remaining unpaid, until paid in full.

1.6.2 The parties hereto agree that the Principal Amount hereof shall be reduced immediately and automatically (on a dollar-for-dollar basis) upon the receipt by the Holder of any TAC Recovery, whether from GAP, the Obligor, TAC or any other person or entity, by set-off or otherwise.

1.6.3 Each of GAP and the Holder agrees that it shall use commercially reasonable efforts, in a manner determined in its reasonable business judgment with the advice of counsel and advisors, to maximize the TAC Recovery.

1.6.4 Each of GAP and the Holder agrees that the Obligor's obligations to repay the Principal Amount, together with interest thereon, in accordance with the terms hereof are subject to performance by GAP and the Holder with its obligations under this Section 1.6.

SECTION 2. MISCELLANEOUS

2.1 Amendments and Waivers; Transfers; Successor and Assigns. No amendment, modification, termination, waiver or consent to departure of any provision of this Note shall in any event be effective without the prior written consent of the Holder and the Obligor. This Note may not be assigned or transferred by the Holder to any person or entity without the consent of the Obligor, and any such assignment or transfer without the Obligor's prior written consent shall be null and void in all respects. The Obligor shall not be permitted to assign or transfer any of its rights, liabilities or obligations hereunder without the prior written consent of the Holder, and any such assignment or transfer without the Holder's prior written consent shall be null and void in all respects. This Note shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

2.2 Applicable Law; Consent to Jurisdiction. This Agreement shall be governed by, and construed in accordance with, the internal laws of the State of New York, without regard to principles of conflicts of law. The Holder and the Obligor hereby submit to the exclusive jurisdiction of the State and Federal courts located in the State of New York. THE UNDERSIGNED ACKNOWLEDGE THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED UNDER CERTAIN CIRCUMSTANCES. TO THE EXTENT PERMITTED BY LAW, EACH PARTY, AFTER CONSULTING (OR HAVING HAD THE OPPORTUNITY TO CONSULT) WITH COUNSEL OF ITS, HIS OR HER CHOICE, KNOWINGLY AND VOLUNTARILY, AND FOR THE MUTUAL BENEFIT OF ALL PARTIES, WAIVES ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF LITIGATION ARISING OUT OF OR RELATED TO THIS AGREEMENT OR ANY OTHER DOCUMENT, INSTRUMENT OR AGREEMENT BETWEEN THE UNDERSIGNED PARTIES.

2.3 Entirety; No Strict Construction; No Third Party Beneficiaries. This Note embodies the entire agreement among the parties and supersedes all prior agreements and understandings, if any, relating to the subject matter hereof. The language used in this Note shall be deemed to be the language chosen by the parties hereto to express their mutual intent, and no rule of strict construction will be applied against any person or entity. The use of the word "including" and "includes" in this Note shall be by way of example rather than by limitation. Nothing herein expressed or implied is intended or shall be construed to confer upon or give to any person or entity, other than the Holder and the Obligor and their respective permitted successors and assigns, any rights or remedies under or by reason of this Note.

2.4 Further Assurances. Each of the parties hereto agrees from time to time, as and when requested by any party hereto, to execute and deliver or cause to be executed and delivered, all such documents, instruments and agreements and to take or cause to be taken such further or other action as such party may reasonably deem necessary or desirable in order to carry out the intent and purposes of this Note and any other documents or agreements executed or otherwise delivered in connection herewith.

2.5 Waivers. The Obligor hereby waives presentment, demand, protest or notice of any kind in connection with this Note.

2.6 Severability. If any provision of this Note is held by a court of competent jurisdiction to be void or unenforceable in whole or in part, the remaining provisions of this Note shall continue in full force and effect.

[*SIGNATURES FOLLOW*]

IN WITNESS WHEREOF, the Obligor has executed and delivered this Note as of the date first above written.

OBLIGOR

DIGITAL CURRENCY GROUP, INC.

DocuSigned by:
By: BARRY SILBERT
Name: Barry E. Silbert
Title: Chief Executive Officer

Acknowledged and Agreed:

HOLDER

GENESIS GLOBAL CAPITAL, LLC

By: Genesis Global Holdco, LLC, its sole member

By: _____
Name:
Title:

[*SIGNATURES CONTINUE ON NEXT PAGE*]

IN WITNESS WHEREOF, the Obligor has executed and delivered this Note as of the date first above written.

OBLIGOR

DIGITAL CURRENCY GROUP, INC.

By: _____
Name:
Title:

Acknowledged and Agreed:

HOLDER

GENESIS GLOBAL CAPITAL, LLC

By: Genesis Global Holdco, LLC, its sole member

By: _____
Name: S. Michael Moro
Title: CEO

[*SIGNATURES CONTINUE ON NEXT PAGE*]

Solely for purposes of Section 1.6 of the Note:

GENESIS ASIA PACIFIC PTE. LTD.

By: _____
Name: S. Michael Moro
Title: Director

SCHEDULE OF REPAYMENTS
TO NOTE OF DIGITAL CURRENCY GROUP, INC.

Date	Principal Amount of Note Before Payment	Repayments of Principal	Unpaid Principal Amount After Payment