

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

THE PEOPLE OF THE STATE OF NEW YORK,
by LETITIA JAMES, Attorney General of the State
of New York,

Plaintiff,

v.

GEMINI TRUST COMPANY, LLC; GENESIS
GLOBAL CAPITAL, LLC; GENESIS ASIA
PACIFIC PTE LTD.; GENESIS GLOBAL
HOLDCO, LLC; DIGITAL CURRENCY GROUP,
INC.; SOICHIRO MORO (a.k.a. MICHAEL
MORO); and BARRY E. SILBERT,

Defendants.

Index No. 452784/2023
Commercial Division

**NOTICE OF MOTION TO
DISMISS**

Oral Argument Requested

PLEASE TAKE NOTICE, that upon the accompanying Memorandum of Law, the Affirmation of Daniel Silver dated March 6, 2024 and the exhibits annexed thereto, Defendant Barry E. Silbert, by his attorneys, will move this Court on July 1, 2024 at 9:30 a.m., in the Motion Submissions Part, Room 130 of the Supreme Court of the State of New York, Commercial Division, 60 Centre Street, New York, New York 10007, or at such other time or place as the Court may direct, for an Order pursuant to CPLR 3211:

- a. Dismissing with prejudice the Amended Complaint against Defendant Barry E. Silbert; and
- b. Awarding Mr. Silbert such other relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to the parties' Stipulation (NYSCEF No. 14), the New York Attorney General's opposition to the motion shall be due on or

before June 4, 2024, and Mr. Silbert's reply motion shall be due on or before June 28, 2024.

Dated: March 6, 2024
New York, New York

Respectfully submitted,

s/ Daniel Silver

Daniel Silver
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Index No. 452784/2023
Hon Melissa A. Crane

IAS Part 60

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT BARRY E. SILBERT'S MOTION TO DISMISS**

Dated: March 6, 2024

Daniel Silver
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Barry E. Silbert*

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Defendant Barry E. Silbert submits this Memorandum of Law in support of his Motion to Dismiss.

PRELIMINARY STATEMENT

In its second attempt at pleading a claim against Mr. Silbert, the New York Attorney General (“OAG”) again fails to allege any viable cause of action. The Amended Complaint quotes selectively and misleadingly from a handful of Mr. Silbert’s contemporaneous communications in an attempt to shore up the exceedingly thin allegations against him. Mr. Silbert is not alleged to have made any misrepresentations to anyone, nor to have had any involvement in how Genesis accounted for (or represented to others) DCG’s financial obligations to Genesis. Rather, the documents underpinning the Amended Complaint reveal that at all times Mr. Silbert was laser-focused on trying to support Genesis during the turmoil impacting the cryptocurrency markets in 2022, consistent with his obligations to DCG and its shareholders. There is nothing fraudulent about Mr. Silbert’s words or actions. On the contrary, the pleadings and documents cited therein reflect appropriate oversight by the CEO of a responsible corporate parent.

This case concerns the events that led to Genesis’s bankruptcy, including the failure of the Gemini Earn product, a cryptocurrency lending program offered by Defendants Gemini and Genesis. The OAG claims that Gemini and Genesis misled the market about the viability of the program and about Genesis’s financial condition more generally. But instead of just suing the parties that conceived, executed and marketed the Earn program and managed Genesis’s other lending relationships, the OAG brought what it calls a “sweeping lawsuit” that drags in Genesis’s parent company, DCG, and DCG’s CEO, Mr. Silbert.

The OAG conjures several claims against Mr. Silbert personally. To allege these claims, the Amended Complaint largely relies on improper group pleading that lumps Mr. Silbert together with other persons and entities. The Amended Complaint also selectively quotes from a smattering

of Mr. Silbert's June 2022 correspondence to suggest that he believed Genesis was insolvent and that this should be hidden from Genesis's counterparties. But when viewed in full, these communications show that the opposite is true—Mr. Silbert continued to believe in Genesis's viability, and his statements and actions were consistent with this good faith belief. Indeed, if Mr. Silbert actually believed Genesis was insolvent in June 2022, it would have made no sense to provide Genesis with a \$1.1 billion promissory note (which Genesis's creditors could enforce against DCG).¹

As set forth below and in DCG's motion to dismiss—which Mr. Silbert joins in full—the claims against DCG and Mr. Silbert are legally defective and should be dismissed. Among other reasons, the only alleged misrepresentations even remotely involving DCG and Mr. Silbert are banal (and true) statements akin to those made by any financial institution seeking to avoid unwarranted panic and are immaterial as a matter of law. The Martin Act claims also lack the requisite connection to securities or commodities.

The claims against Mr. Silbert are especially bereft of substance. Mr. Silbert is several steps removed from the alleged fraud, yet the Amended Complaint seeks to hold him personally liable and permanently bar him from the securities industry. Put simply, Mr. Silbert neither said nor did anything misleading. The Eighth and Ninth Causes of Action—which allege violations of the penal law—are emblematic of the Amended Complaint's kitchen-sink approach. These claims add nothing to the OAG's case except an unwarranted smear of Mr. Silbert's reputation. They require particularized allegations of fraudulent intent and conspiracy, but the OAG comes nowhere

¹ Mr. Silbert would have explained all this during the OAG's pre-suit investigation, but the OAG commenced this case without taking his testimony. Mr. Silbert's testimony had been scheduled for September 2023. Following the cancer diagnosis of his nine-year-old daughter, the testimony was adjourned until November 6, 2023. The OAG nonetheless raced ahead with filing suit on October 19, 2023.

close to satisfying that heightened burden. In addition, because they are based on the same alleged conduct and seek the same relief as the Second, Fifth, and Seventh Causes of Action, they should be dismissed as duplicative.

For the foregoing reasons and those set forth below, all the claims against Mr. Silbert should be dismissed with prejudice.

FACTUAL BACKGROUND²

I. Genesis Capital and the Gemini Earn Program.

Gemini Trust Company, LLC (“Gemini”) is a New York cryptocurrency platform. ([Am. Comp.](#) ¶ 1.) Genesis Global Capital, LLC (“Genesis Capital,” and together with its affiliates, “Genesis”) is a New York cryptocurrency lender. ([Id.](#)) In February 2021, Gemini and Genesis launched a program called Gemini Earn. ([Id.](#)) As part of this program, Gemini customers deposited digital assets, including cryptocurrencies, in Gemini Earn accounts, which Gemini then lent to Genesis. Genesis paid interest in connection with these loans, and then in turn would relend the assets to third parties. ([Id.](#) ¶¶ 43-51.) Genesis also had other lenders (all of whom met a suitability threshold and were primarily investment funds and wealthy individuals) with whom it dealt directly. ([Id.](#) ¶ 190.)

Genesis’s indirect parent company is Digital Currency Group, Inc. (“DCG”). ([Id.](#) ¶¶ 24, 30.) DCG is not alleged to be a party to the Gemini Earn program or to any of Genesis’s other

² The background relevant to this motion is also discussed in DCG’s motion. The Amended Complaint’s allegations are presumed to be true solely for purposes of this motion. The Court may also consider documents referenced in the Amended Complaint. See [Mendoza v. Akerman Senterfitt LLP](#), 128 A.D.3d 480, 482 (1st Dep’t 2015) (“The court properly deemed the above emails that were described and quoted in the complaint itself to be documentary evidence.”); [All. Network, LLC v. Sidley Austin LLP](#), 43 Misc. 3d 848, 852 (N.Y. Sup. Ct. 2014) (“On a motion to dismiss, the Court may consider documents referenced in a complaint, even if the pleading fails to attach them.”). Copies of such documents are included as exhibits to the accompanying Affirmation of Daniel Silver dated March 6, 2024 (“Silver Ex.”).

lending relationships with third parties. Mr. Silbert is DCG's CEO. (*Id.* ¶ 31.)

II. The 3AC Default.

One of Genesis's borrowers was a hedge fund called Three Arrows Capital Ltd. ("3AC"). (*Id.* ¶ 118.) On June 13, 2022, 3AC defaulted on approximately \$1 billion in loans that were owed to a Genesis affiliate (which that affiliate in turn owed to Genesis Capital). (*Id.* ¶¶ 118-19, 122.)

The Amended Complaint alleges that Mr. Silbert participated in discussions with Genesis about "how to communicate with counterparties about Three Arrows, and how to bolster the Genesis Entities' financial condition in the wake of these losses." (*Id.* ¶ 125.) However, primary responsibility for this issue lay with Genesis. For example, in a June 13, 2022 Microsoft Teams chat, Mr. Silbert emphasized to Genesis management that he "want[ed] to make sure *you're* leading this process with support and guidance from DCG." (*Am. Comp.* ¶ 126; Silver Ex. 1 (emphasis added).)

III. Initial Discussions About the 3AC Default.

The Amended Complaint suggests that Mr. Silbert believed Genesis would fail following the 3AC default, but nevertheless sought to give the public "false confidence in Genesis Capital's financial health." (*Am. Comp.* ¶¶ 9, 129-30, 132-33.) But the OAG's allegations on this score improperly conflate Mr. Silbert with other persons and entities, and otherwise are based on selective quotations from his correspondence that omit highly relevant context.

For instance, the Amended Complaint cites Mr. Silbert's June 13, 2022 update to DCG's board, explaining the risks from the 3AC default and the potential for a bank run on Genesis. (*Am. Comp.* ¶ 129; Silver Ex. 2.) However, in the same email, Mr. Silbert also noted encouraging news: "[o]n a slightly brighter note, Genesis continues to shore up their liquidity and they expect to get to \$2 billion tonight." (Silver Ex. 2 (emphasis added).) Mr. Silbert did *not* think a fatal bank run was a foregone conclusion, but rather assured the board that "[a]long those lines, we are

exploring financing options for DCG to further strengthen our balance sheet – both debt or equity.” (*Id.* (emphasis added).)

The next day, Mr. Silbert presented the DCG board with several potential “paths/strategies” going forward. ([Am. Comp.](#) ¶ 131; Silver Ex. 3.) The Amended Complaint only highlights that one of these options was for DCG to “[j]ettison the Genesis Capital business.” (*Id.*) But, missing from the Amended Complaint is the fact that Mr. Silbert expressly described that as the “**worst case scenario.**” (*Id.* (emphasis added).) As he put it, the three options for DCG were to:

- 1) “[s]upport Genesis”—*i.e.*, “while the Genesis team makes every effort to bolster its own balance sheet, DCG looks to secure our own additional liquidity to keep in reserve should we decide later to contribute capital to stabilize the Genesis balance sheet.”
- 2) “[j]ettison the Genesis Capital business,” which Mr. Silbert explained was “the contra of contributing more capital, this would be **the worst case scenario.**”
- 3) undertake a “Shock & Awe” plan for “**reconfiguring Genesis to take maximum advantage of the new environment.**” (*Id.* (emphasis added).) This would include, *e.g.*, Mr. Silbert becoming Genesis’s CEO and DCG contributing significant assets to Genesis (“~1.5 billion at current crypto prices”).

(*Id.* (emphasis added).)

On June 15, 2022, Mr. Silbert was involved in a discussion about market conditions and potential financing options for Genesis. ([Am. Comp.](#) ¶ 134.) The Amended Complaint asserts that Mr. Silbert “directed Genesis Capital personnel to perpetuate the idea that, within the cryptocurrency industry, Genesis Capital was akin to highly stable ‘blue chip’ companies.” (*Id.*) This is a highly misleading description of the correspondence. In reality, Mr. Silbert had asked how to “further install confidence in [G]enesis,” and a Genesis executive responded that “[i]t ultimately comes down to our ops/processing etc, as people see our responsiveness, word spreads fast . . . you can just reaffirm our position etc.” (Silver Ex. 4.) In other words, Genesis’s continued responsiveness and customer service was the best way to assure the market of its continued viability. It was in this context that Mr. Silbert noted he had been **told** that “**the word on the street**

is that [G]enesis is the ‘blue chip’ in this mess” and said that “we need to continue to perpetuate that of course.” (*Id.* (emphasis added).) Thus, Mr. Silbert was simply stating that, in a volatile industry in the midst of turmoil, he had been told that Genesis was seen as relatively stable and the goal should be to remain so. Certainly, any group CEO would seek to ensure that a subsidiary maintain its positive reputation. Mr. Silbert is not alleged to have asked anyone to “perpetuate” that impression by false or fraudulent means (and the actual correspondence does not support such an inference).

IV. DCG Provides Genesis with a Promissory Note.

In the following weeks, Mr. Silbert continued to believe Genesis had good liquidity, but that market conditions required planning for a potential bank run. The Amended Complaint implies that Mr. Silbert wanted to keep Genesis’s financial condition secret because, in a June 21, 2022 exchange, Mr. Silbert asked his colleagues to keep certain aspects of the planning process “between us.” ([Am. Comp.](#) ¶ 147.) This totally ignores the relevant context. Mr. Silbert was discussing onboarding a new DCG team member, and explained:

[W]hat I didn’t say [to the new hire], which we need to keep between us, is that ***even though our liquidity is super strong right now, the hole in Genesis equity due to the Three Arrows exposure is something that we will need to fill by 6/30. It is my sense that DCGI [DCG’s investment arm] will play a role here in addressing the hole,*** hopefully temporarily, through the pledge of assets or if need be, the downstream of certain/all assets until prices recover. ***The challenge is we don’t know what will be the recovery on the Three Arrows claim, or what will be the BTC price on 6/30, so it is difficult to calculate the hole.*** We’re trying to come up with as many options as possible. This is super confidential/sensitive stuff, so please don’t share with anybody, including [the new hire], until he is in the circle of trust.

(Silver Ex. 5 (emphasis added).) In short, Mr. Silbert did not want to include a new team member in sensitive discussions about how to support Genesis. The Amended Complaint misleadingly omits Mr. Silbert’s statements that “our liquidity is super strong right now,” DCG would “play a role in addressing that hole,” and that calculating how much support Genesis needed was difficult.

Ultimately, on June 30, 2022—following extensive consultations with and based on the advice and recommendation of specialist investment bankers and other experienced external advisors—DCG executed a \$1.1 billion promissory note in favor of Genesis Capital (the “Promissory Note”). ([Am. Comp.](#) ¶ 156.) Specifically, DCG assumed the liability arising from the 3AC default that a Genesis affiliate owed to Genesis Capital, and DCG agreed to pay that amount to Genesis Capital in 10 years at an interest rate of 1% (to be offset by any recovery from 3AC). Thus, Genesis Capital received an enforceable promissory note from its solvent parent, in lieu of a loan to a Genesis affiliate that, due to 3AC’s insolvency, could not be repaid.

The Amended Complaint asserts that Genesis mischaracterized the Promissory Note in disclosures to the market or third parties. But there is no allegation that Mr. Silbert said anything about the Promissory Note to anyone, or that he was even aware of how Genesis characterized it. The Amended Complaint only alleges that Mr. Silbert “reviewed” a July 6, 2022 tweet posted by Genesis’s CEO, stating:

Since [3AC’s default], we worked with @DCGco 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.

([Id.](#) ¶¶ 160-161.) But there is no allegation that Mr. Silbert himself drafted or made this statement and, in any event, the statement was accurate.

V. Meeting with Cameron Winkelvoss.

In the months that followed, Gemini and Genesis were involved in discussions about the continuation of the Earn program and Genesis handled communications with its direct lenders. (See [Am. Comp.](#) ¶¶ 165-88, 190-222.) The Amended Complaint does not allege any involvement

by Mr. Silbert in these discussions.³

In September-October 2022, Gemini decided to terminate its relationship with Genesis. (*Id.* ¶¶ 6, 112.) On October 20, 2022, at the request of Genesis’s CEO, Mr. Silbert met with Gemini’s president Cameron Winkelvoss. (*Id.* ¶ 113.) (There is no allegation that Mr. Silbert had been involved in prior discussions with Mr. Winkelvoss or anyone else at Gemini.) Mr. Silbert summarized this meeting in an email sent immediately afterwards. (Silver Ex. 6.) At the meeting, Mr. Silbert suggested a potential Gemini-Genesis-DCG partnership, about which Mr. Winkelvoss was “intrigued.” (*Id.*) Regarding Gemini’s potential termination of the Earn program, Mr. Silbert told Mr. Winkelvoss that this *could* lead to a Genesis bankruptcy, stating:

Genesis has ALWAYS maintained sufficient liquidity for day to day withdrawals, but never planned for a bank run scenario where their largest and most important partner asked for all of the money back immediately.

(*Id.*) The Amended Complaint alleges, in conclusory fashion and without documentary support, that on October 28, 2022, Mr. Silbert “authorized” Genesis to share the Promissory Note with Gemini. (*Am. Comp.* ¶ 189.) (There is no allegation that Mr. Silbert had previously directed Genesis to conceal the Promissory Note, nor that he was aware Genesis had not already shared it with Gemini, nor that he had been involved in discussions about sharing information regarding the Promissory Note with Gemini or anyone else.)

A few weeks later, after the sudden and unexpected bankruptcies of FTX and Alameda Research caused panic in the crypto markets, Genesis announced that it was suspending customer withdrawals. (*Id.* ¶¶ 260.) Genesis filed for bankruptcy in January 2023. (*Id.* ¶ 27.)

³ Mr. Silbert received presentations from Genesis regarding its financial condition during September and October 2022. (*Am. Comp.* ¶¶ 211, 214.) But there is no allegation that he made, or directed others to make, any misleading statements to anyone during this period.

VI. The OAG's Lawsuit.

On October 19, 2023, the OAG commenced this proceeding. In a press release issued the same day, the OAG touted this “sweeping lawsuit” as part of its broader efforts relating to cryptocurrency enforcement.⁴ The OAG seeks not only damages from Mr. Silbert but extraordinary injunctive relief that would, among other things, permanently bar him from the securities business. On February 9, 2024, the OAG filed an Amended Complaint. The Amended Complaint adds only a handful of references to Mr. Silbert, none of which have anything to do with any alleged false or misleading statements. (See [Am. Comp.](#) ¶¶ 29, 128, 151, 211, 214, 258.)⁵

In the Second Cause of Action, the OAG asserts a claim against Mr. Silbert for securities fraud under the Martin Act. ([Am. Comp.](#) ¶¶ 276-83.) In the Fifth and Seventh Causes of Action, the OAG brings claims under Executive Law § 63(12) for “repeated and persistent” fraud and illegality based on the same alleged Martin Act violation. ([Id.](#) ¶¶ 291-292, 297-300.)

The OAG also alleges that Mr. Silbert engaged in “repeated and persistent illegality” by violating penal laws. Specifically, the Eighth Cause of Action asserts that Mr. Silbert violated Penal Law § 190.65(1)(b) by engaging in a scheme to defraud in the first degree. ([Id.](#) ¶¶ 301-306.) The Ninth Cause of Action alleges that he violated Penal Law § 105.05(1) by committing conspiracy in the fifth degree. ([Id.](#) ¶¶ 307-14.) All these claims are meritless and should be dismissed with prejudice.

⁴ See October 19, 2023 Press Release, “Attorney general James Sues Cryptocurrency Companies Gemini, Genesis, and DCG for Defrauding Investors,” available at <https://ag.ny.gov/press-release/2023/attorney-general-james-sues-cryptocurrency-companies-gemini-genesis-and-dcg>.

⁵ For example, the Amended Complaint references a June 17, 2022 tweet in which Mr. Silbert said that the crypto market had hit “max pain” and so “[w]e’re buying BTC [bitcoin].” ([Id.](#) ¶ 151.) There is no allegation that this statement of opinion about the bitcoin market was false, much less actionable as fraud, or that it has anything to do with Genesis.

ARGUMENT

To survive a motion to dismiss under [CPLR § 3211](#), “the complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory.” [MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.](#), 87 A.D.3d 836, 839 (1st Dep’t 2011) (internal quotation marks omitted). Dismissal is warranted if the plaintiff “fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” [Connaughton v. Chipotle Mexican Grill, Inc.](#), 29 N.Y.3d 137, 142 (2017).

In addition, although the complaint’s factual allegations are presumed to be true, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.” [Simkin v. Blank](#), 19 N.Y.3d 46, 52 (2012) (internal quotation marks omitted); [People v. Barclays Capital Inc.](#), 47 Misc.3d 862, 867 (N.Y. Sup. Ct. 2015) (“[F]actual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” (internal quotation marks omitted)).

I. The OAG Cannot Rely on Group Pleading to State a Claim Against Mr. Silbert.

As a threshold matter, the OAG cannot state a claim against Mr. Silbert by lumping him into allegations against other Defendants. Rather, the OAG must plead with particularity facts sufficient to support a claim *against him*. The Amended Complaint utterly fails to do this.

A defendant is “entitled to notice of ‘the material elements of each cause of action.’” [Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.](#), 84 A.D.2d 736, 736 (1st Dep’t 1981) (citing [CPLR § 3013](#)). Therefore, “group pleading”—*i.e.*, failing to distinguish between the conduct of particular defendants—is improper. See [Principia Partners LLC v. Swap Fin. Grp., LLC](#), 194 A.D.3d 584, 584 (1st Dep’t 2021); [Aetna](#), 84 A.D.2d at 736 (dismissing claims where allegations were “against

all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant”).

This is especially so for a fraud claim, which must be alleged with particularity. See [Jonas v. Nat'l Life Ins. Co.](#), 147 A.D.3d 610, 612 (1st Dep't 2017) (rejecting fraud claim that “impermissibly lump[ed] together all defendants”); [Cedar Cap. Mgmt. Grp. Inc. v. Lillie](#), 79 Misc.3d 1238(A), 193 N.Y.S.3d 700 (N.Y. Sup. Ct. 2023) (collecting cases). It is well-settled that particularized pleading is necessary for fraud-based claims under the Martin Act and Executive Law § 63(12). See, e.g., [People v. Wells Fargo Ins. Servs., Inc.](#), 62 A.D.3d 404, 405 (1st Dep't 2009); [Barclays](#), 47 Misc.3d at 869 n.7. Therefore, the Amended Complaint must allege “with specificity who made the representations, when they were made and their substance, and when.” [Orange Orchestra Properties LLC v. Gentry Unlimited, Inc.](#), 191 A.D.3d 609, 609 (1st Dep't 2021); see also [CPLR § 3016\(b\)](#) (for fraud claim, “the circumstances constituting the wrong shall be stated in detail”).

Moreover, corporate officers may not be conflated with their companies for purposes of alleging fraud. They can be liable for alleged corporate wrongdoing only if they “participated in or had knowledge of the fraud.” [Polonetsky v. Better Homes Depot, Inc.](#), 97 N.Y.2d 46, 55 (2001); [N. Shore Architectural Stone, Inc. v. Am. Artisan Const., Inc.](#), [153 A.D.3d 1420](#), 1421 (2d Dep't 2017) (“A director or officer of a corporation does not incur personal liability for its torts merely by reason of his or her official character.” (internal quotation marks and alterations omitted)). And plaintiffs seeking to pierce the corporate veil bear a “heavy burden”; conclusory allegations are insufficient. See [Vitamin Realty Assocs. LLC v. Time Rec. Storage, LLC](#), 193 A.D.3d 491, 491 (1st Dep't 2021) (“[P]laintiff’s allegations that defendant TRS and defendant 225 Long Avenue share offices, officers, and ownership, along with conclusory allegations of ‘domination,’ are

insufficient to allege alter ego liability.”); [501 Fifth Ave. Co. LLC v. Alvona LLC](#), 110 A.D.3d 494, 494 (1st Dep’t 2013) (dismissing claim where “[t]he allegations of corporate domination are wholly conclusory”).

As relevant here, the principal theory of the Amended Complaint is that “the Genesis Entities, Moro [Genesis Capital’s CEO], DCG, and Silbert” engaged in a “months-long campaign of misstatements, omissions, and concealment” to “instill false confidence in Genesis Capital’s financial health.” ([Am. Comp.](#) ¶¶ 2, 9.) But the Amended Complaint repeatedly lumps Mr. Silbert in with other Defendants and seeks to put him on the hook for alleged statements or actions by others. For example, the Amended Complaint alleges:

- “[O]n June 15 and June 17, Genesis Capital, Silbert, Moro, and/or DCG published tweets” ([Id.](#) ¶ 9.)
- The “Genesis entities, DCG, Moro, and Silbert falsely assured counterparties” about Genesis’s financial condition. ([Id.](#) ¶ 11.)

These are classic examples of group pleading. They do not identify what *Mr. Silbert* allegedly said or when or to whom. These and other allegations that do not specify any actions or statements by Mr. Silbert should be disregarded. Similarly, to the extent the Amended Complaint suggests that DCG and/or Genesis are alter egos of Mr. Silbert (*see* [Am. Comp.](#) ¶¶ 25, 31), these conclusory allegations are insufficient to support a veil-piercing theory.

As discussed below, the sparse allegations in the Amended Complaint that do pertain to Mr. Silbert are woefully insufficient to state a claim against him.

II. The Martin Act and Executive Law “Fraud” Claims Against Mr. Silbert Should Be Dismissed.

The Second, Fifth, and Seventh Causes of Action seek to hold Mr. Silbert liable for alleged violations of the Martin Act and/or repeated and persistent fraud under the Executive Law. These claims should be dismissed because the Amended Complaint fails to identify any actionable

statements or omissions by Mr. Silbert. In addition, as set out in DCG's motion to dismiss, the alleged misstatements are not actionable or material, and also cannot give rise to liability under the Communications Decency Act. (See [DCG Br.](#) at pp. 2, 12-14, 16-19.) Moreover, the Martin Act is inapplicable because the underlying Gemini Earn agreements and Genesis's other financing arrangements do not constitute securities or commodities; even if they did, any alleged misstatements by DCG and Mr. Silbert were not in connection with promoting any such securities or commodities. (See [DCG Br.](#) at pp.19-22.)

The claims against Mr. Silbert are doubly deficient given the failure to allege his personal involvement in any fraud. See [People v. Greenberg](#), 95 A.D.3d 474, 483 (1st Dep't 2013) (officers and directors can be liable under the Martin Act and Executive Law § 63(12) "where they either personally participate in the fraud or have actual notice of its existence"); see also [People v. Federated Radio Corp.](#), 244 N.Y. 33, 41 (1926) (noting that the Martin Act is "not aimed" at "[p]erfectly honorable members of the business in question" (internal quotation marks omitted)). Notably, the Amended Complaint alleges only a handful of instances in which Mr. Silbert was supposedly involved in or aware of any allegedly fraudulent acts:

June 15 Re-Tweet. On June 15, 2022, Mr. Silbert re-tweeted the following message that had been posted by Genesis:

Despite continued heightened market volatility, the Genesis balance sheet is strong and our business is operating normally. Our lending business continues to meet client demand. Our trading business remains an essential liquidity provider in the spot and derivatives market.

([Am. Comp.](#) ¶¶ 132-133.) The OAG alleges in conclusory fashion that this statement was false because Genesis's balance sheet was not strong and the business was not operating normally.

([Id.](#) ¶¶ 145, 150.) But this tweet cannot reasonably be viewed either as an actionable statement of fact or as material to Genesis's counterparties. Indeed, the vague and generalized statement that

Genesis had a “strong” balance sheet is insufficient to support a claim. See [Hoffman v. AT & T Inc.](#), 67 Misc. 3d 1212(A), 126 N.Y.S.3d 854 (N.Y. Sup. Ct. 2020) (“Terms like ‘strong’ have routinely been held to be either inactionable corporate puffery, or legitimate statements of optimism.” (collecting cases)). And there is no well-pled allegation that, when this statement was made, Genesis was not conducting business normally and meeting client demands. Moreover, it defies logic to suggest that any reasonable investor would have made an investment decision based on this conclusory three-sentence tweet. See [State v. Rachmani](#), 71 N.Y.2d 718, 726-27 (1988) (alleged fraud is material under the Martin Act only where it would have assumed “actual significance” in the deliberations of a reasonable investor given the “total mix” of available information); [Barclays](#), 47 Misc. 3d 862 at 867, 869 (noting that “materiality is an ‘essential element’ of a Martin Act claim” and that claims may not be premised on statements involving “impermissibly vague descriptions and sheer puffery”).

Promissory Note. On behalf of DCG, Mr. Silbert is also alleged to have executed the Promissory Note in favor of Genesis. But there is nothing fraudulent about assuming an obligation to an affiliate. The Amended Complaint argues that the Promissory Note’s terms should have been more generous to Genesis Capital in order to offset the 3AC losses. ([Am. Comp.](#) ¶ 164). However, DCG was not required to support Genesis at all. The manner in which it did so was a commercial decision wholly within DCG’s discretion. The Amended Complaint also asserts that Genesis failed to disclose sufficient detail about the Promissory Note’s terms. ([Id.](#) ¶ 11.) But there is no allegation that **Mr. Silbert** was responsible for or involved in such disclosure or that he directed anyone to make any false statements regarding the Note.⁶

⁶ As to Genesis’s July 6 tweet that Mr. Silbert supposedly “reviewed” ([id.](#) ¶¶ 160-61), there was nothing false about that statement. Indeed, DCG *did* “assume[] certain liabilities” of Genesis relating to 3AC. (See [DCG Br.](#) at pp. 5-6, 18.)

III. The Executive Law Claims Predicated on Penal Law Violations Against Mr. Silbert Should Be Dismissed.

In the Eighth and Ninth Causes of Action, the OAG purports to bring claims against Mr. Silbert for alleged illegality under Executive Law § 63(12). The purported illegality consists of violating (1) Penal Law § 190.65(1)(b)—*i.e.*, scheme to defraud in the first degree (Eighth Cause of Action); and (2) Penal Law § 105.05(1)—*i.e.*, conspiracy in the fifth degree (Ninth Cause of Action). ([Am. Comp. ¶¶ 301-14.](#)) For these claims, the OAG must satisfy the elements of the underlying statutes. See [People v. Tempur-Pedic Int'l, Inc.](#), 30 Misc. 3d 986, 993, 997 (Sup. Ct. N.Y. Cnty. 2011) (rejecting “illegality” claim where state failed to establish the elements of underlying statute).⁷ These claims have the same defects as the Second, Fifth, and Seventh Causes of Action, and also should be dismissed for the reasons discussed below.

A. The Scheme to Defraud Claim Fails as a Matter of Law.

A scheme to defraud in the first degree requires showing that the defendant engaged in (1) a “scheme constituting a systematic ongoing course of conduct”; (2) “with intent to defraud” or to “obtain property from” persons “by false or fraudulent pretenses, representations or promises”; and (3) where the individual obtains such property from the intended victims. See [Penal Law § 190.65\(1\)\(b\)](#); [People v. Brigham](#), 261 A.D.2d 43, 49 (3d Dep’t 1999). *Scienter* is the “key” and “critical” element. See [People v. White](#), 101 A.D.2d 1037, 1038 (2d Dep’t 1984); [People v. Cohen](#), No. 1474/2000, 2001 WL 1537669, at *6 (N.Y. Sup. Ct. Nov. 1, 2001). There must be a “conscious aim or objective to cheat or deprive another of something of value by means of deception or cheating.” [Cohen](#), 2001 WL 1537669, at *5.

⁷ See also [People v. Credit Suisse Sec. \(USA\) LLC](#), 31 N.Y.3d 622, 633-34 (2018) (“To determine whether such a [Section 63(12)] claim is timely, courts must ‘look through’ Executive Law § 63(12) and apply the statute of limitations applicable to the underlying liability.”)

The Eighth Cause of Action is defective because Mr. Silbert was not involved in any alleged fraud (*see supra*). Moreover, his limited involvement in a handful of discussions is insufficient to show anything like the “systematic ongoing course of conduct” required to violate Penal Law § 190.65(1)(b). Notably, the statute requires showing a “plan and a pattern as opposed to isolated ad hoc acts,” and emphasizes the “planned, organized, or methodical nature of the scheme and its single-minded implementation over a period of time.” *See* [Penal Law § 190.60](#), McKinney’s cmt.; [People v. Reynolds](#), 174 Misc. 2d 812, 830 (N.Y. Sup. Ct. 1997) (“Certainly, on its face, the statute would not apply to episodic or individual acts, unless they are part of a coherent continuing system or plan.”).

Most importantly, the Eighth Cause of Action fails because the allegations of scienter are conclusory, implausible, and contradicted by the documentary evidence. For instance, the notion that Mr. Silbert intended to conceal Genesis’s imminent insolvency is belied by the very documents the OAG cites, which show Mr. Silbert’s continued belief in Genesis’s financial viability. (*See, e.g.*, Silver Ex. 2; *id.* Ex. 5.) Although Genesis ultimately did fail months later following the collapse of FTX, fraud claims may not be based on hindsight. *See* [Shields v. Citytrust Bancorp, Inc.](#), 25 F.3d 1124, 1129 (2d Cir. 1994) (“[M]isguided optimism is not a cause of action, and does not support an inference of fraud.”). In addition, it is wholly implausible that Mr. Silbert would have approved the Promissory Note if he believed Genesis was on the verge of insolvency. Indeed, issuing that note means that DCG is now on the hook to Genesis Capital for \$1.1 billion, which Genesis Capital’s creditors can (and are) pursuing in bankruptcy proceedings. And although others at Genesis allegedly mischaracterized the terms of the Promissory Note, there is no pleaded basis to infer that Mr. Silbert knew anything about that. *See* [Fried v. Lehman Bros. Real Est. Assocs. III, L.P.](#), 156 A.D.3d 464, 465 (1st Dep’t 2017) (“The allegations of scienter here were not

pleaded with the requisite particularity, but are conclusory, and scienter may not reasonably be inferred from the circumstantial evidence relied on by plaintiffs.”); [Giant Grp., Ltd. v. Arthur Andersen, LLP.](#), 2 A.D.3d 189, 190 (1st Dep’t 2003) (same); [Abrahami v. UPC Const. Co.](#), 224 A.D.2d 231, 233–34 (1st Dep’t 1996) (“Since the mere negligent failure to acquire knowledge of the falsehood is not sufficient to demonstrate intent, as corporate officers and directors are personally liable for fraud only where they personally participated in the misrepresentation or had actual knowledge of it, we find the evidence insufficient to establish defendant possessed the requisite intent.”).

Nor is there any basis to infer fraudulent intent based on Mr. Silbert’s understandable desire to avoid a bank run on Genesis. The motive to help a subsidiary’s business—shared by any responsible corporate parent—is not indicative of fraud. See [CeltixConnect Equity Invs. LLC v. Sea Fibre Network Ltd.](#), 52 Misc. 3d 1210(A), 41 N.Y.S.3d 718 (N.Y. Sup. 2016) (“The motive suggested by Celtix—the procurement of Redwood’s \$700,000 fee—cannot be used to infer scienter. The prevalent view in our state courts, and the well-settled rule in the federal courts, is that the motive to earn a fee, without more, cannot be used to infer scienter.”); [Russo v. Bruce](#), 777 F. Supp. 2d 505, 519 (S.D.N.Y. 2011) (rejecting “[t]he theory that defendants engaged in fraud ‘to protect the very survival of the company’” as “‘far too generalized (and generalizable)’” to support an inference of scienter); [In re PXRE Grp., Ltd., Sec. Litig.](#), 600 F. Supp. 2d 510, 533 (S.D.N.Y. 2009) (ruling that allegations of “raising capital as part of an amorphous scheme to stave off a company’s collapse” is too generalized for scienter). Simply put, the Amended Complaint fails to allege that Mr. Silbert acted in anything other than good faith at all times.

B. The Conspiracy Claim Fails as a Matter of Law.

In the Ninth Cause of Action, the OAG alleges that Mr. Silbert conspired with the “Genesis/DCG Defendants” to commit a scheme to defraud and/or violate the Martin Act. ([Am.](#)

[Comp.](#) ¶ 313.) The sole explanation of the alleged conspiracy is that “the Genesis Entities, DCG, Moro, and Silbert conspired to and did in fact falsely represent Genesis Capital’s financial condition to conceal [the 3AC] structural hole.” ([Id.](#) ¶ 9.)

A person is liable for conspiracy in the fifth degree when, “with intent that conduct constituting . . . a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.” Penal Law § 105.05. In other words, the statute requires: “first, the specific intent that a crime be performed; and second, an agreement with another person to engage in or cause that crime to be performed.” [People v. Reyes](#), 31 N.Y.3d 930, 931, (2018) (internal quotation marks omitted). This must be alleged with specificity. See [Kovkov v. L. Firm of Dayrel Sewell, PLLC](#), 182 A.D.3d 418, 419 (1st Dep’t 2020) (“Bare, conclusory allegations of conspiracy are insufficient.”); [Abrahami v. UPC Const. Co.](#), 176 A.D.2d 180, 180 (1st Dep’t 1991) (conspiracy to defraud claim must satisfy the “specificity and particularity requirements of CPLR 3013 and 3016(b)”).

The Ninth Cause of Action should be rejected for several reasons.

First, the Amended Complaint fails to plead that Mr. Silbert intended for anyone to commit fraud, much less fraud constituting a felony. Indeed, as discussed *supra*, the allegations of scienter as to Mr. Silbert are woefully deficient.

Second, the Amended Complaint fails to allege the requisite agreement. The sole reference to the conspiracy ([Am. Comp.](#) ¶ 9) is conclusory—*e.g.*, it does not detail when this supposed agreement was reached or exactly what the agreement was. See [Nocro, Ltd. v. Russell](#), 94 A.D.3d 894, 895 (2d Dep’t 2012) (“The appellants’ contentions regarding conspiracy are vague and conclusory, and fail to offer sufficient factual details regarding an agreement among the respondents/defendants[.]”). And there are no other factual allegations that would permit the

inference that Mr. Silbert entered such an ill-defined agreement. As discussed *supra*, although Mr. Silbert discussed ways to support Genesis's financial condition with DCG and Genesis personnel, there is no allegation of him making a false statement, suggesting that anyone else should do so, or even being aware of false statements by others. See *Schwartz v. Soc'y of New York Hosp.*, [199 A.D.2d 129](#), 130 (1st Dep't 1993) ("In this case, the bare allegation that these two defendants were acting in concert with defendant Savarese without any allegation of independent culpable behavior on their part was clearly insufficient to link them to the allegedly defamatory remarks."); *Abrahami*, 176 A.D.2d at 180 (dismissing conspiracy claim where Complaint lacked "allegations of fact from which it could be inferred that [defendants] had agreed or entered into an understanding with the other defendant (against which particular acts of fraud were alleged) to cooperate in any fraudulent scheme").⁸

Third, even if a conspiracy were sufficiently alleged as factual matter (and it is not), it would be legally defective under the "intra-corporate conspiracy" doctrine. The alleged conspiracy consists of DCG, its CEO, its indirect subsidiary, and that entity's CEO. (Am. Comp. ¶¶ 9, 313.) It is well-established that a company "generally cannot conspire with its employees or agents as all are considered a single entity" for purposes of conspiracy law. *Lilley v. Greene Cent. Sch. Dist.*, [187 A.D.3d 1384](#) (3d Dep't 2020). This is because a corporation can act only through its agents, and so "a claim that the agents collectively agreed to take some unlawful action in the name and on behalf of the corporation is simply another way of saying that the corporation acted unlawfully and therefore does not satisfy the basic requirements of a conspiracy." *Tufano v. One Toms Point Lane Corp.*, 64 F. Supp. 2d 119, 133 (E.D.N.Y. 1999). Because the Ninth Cause of

⁸ Even if Mr. Silbert were aware that others were making false statements—which is not alleged—that would be insufficient because "mere 'knowledge of the existence and goals of a conspiracy'" does not establish an agreement. *Reyes*, 31 N.Y.3d 930 at 931.

Action depends on an intra-corporate conspiracy, it should be dismissed. See [Hatteras Enterprises, Inc. v. Forsythe Cosm. Grp., Ltd.](#), No. 15 Civ. 5887, 2019 WL 9443845, at *9 (E.D.N.Y. Jan. 14, 2019) (rejecting alleged conspiracy that consisted of “Forsythe, the controlling owner and president of Forsythe, an officer of Forsythe, and entities controlled by Forsythe”).

C. The Eighth and Ninth Causes of Action Are Duplicative of Other Claims.

In addition to their above-discussed legal defects, the Eighth and Ninth Causes of Action are duplicative of the Second, Fifth, and Seventh Causes of Action because they are based on the same conduct and seek the same relief. They should be dismissed for that reason alone. See [Eurotech Const. Corp. v. Fischetti & Pesce, LLP](#), 155 A.D.3d 437 (1st Dep’t 2017) (dismissing as duplicative claims that were “premised on the same facts and seek the same relief” as another claim); [People v. Katz](#), 16 Misc. 3d 1104(A), 2007 WL 1814652, at *3 (N.Y. Sup. Ct. 2007) (dismissing illegality claim under Executive Law § 63(12) as duplicative of fraud claim under same statute).

CONCLUSION

For the reasons set forth herein, Mr. Silbert’s motion to dismiss should be granted.

Dated: March 6, 2024
New York, New York

Respectfully submitted,

s/ Daniel Silver

Daniel Silver
John P. Alexander
CLIFFORD CHANCE US LLP
31 West 52nd Street
New York, New York 10019

*Attorneys for Defendant
Barry E. Silbert*

CERTIFICATE OF COMPLIANCE

Pursuant to Commercial Division Rule 17, I certify that this brief complies with the word-count limit. This brief contains 6,553 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Commercial Division Rule 17.

Dated: March 6, 2024

s/ Daniel Silver
Daniel Silver

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

THE PEOPLE OF THE STATE OF NEW YORK,
by LETITIA JAMES, Attorney General of the State
of New York,

Plaintiff,

v.

GEMINI TRUST COMPANY, LLC; GENESIS
GLOBAL CAPITAL, LLC; GENESIS ASIA
PACIFIC PTE LTD.; GENESIS GLOBAL
HOLDCO, LLC; DIGITAL CURRENCY GROUP,
INC.; SOICHIRO MORO (a.k.a. MICHAEL
MORO); and BARRY E. SILBERT,

Defendants.

Index No. 452784/2023
Commercial Division

AFFIRMATION OF DANIEL SILVER

Daniel Silver, an attorney duly admitted to practice in the Courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. Attached as Exhibit 1 is a true and correct copy of a Microsoft Teams chat dated June 13, 2022.
2. Attached as Exhibit 2 is a true and correct copy of an email dated June 13, 2022.
3. Attached as Exhibit 3 is a true and correct copy of an email dated June 14, 2022.
4. Attached as Exhibit 4 is a true and correct copy of excerpts of a Microsoft Teams chat dated June 15, 2022.
5. Attached as Exhibit 5 is a true and correct copy of a Microsoft Teams chat dated June 21, 2022.

6. Attached as Exhibit 6 is a true and correct copy of a true and correct copy of an excerpt of an email dated October 20, 2022.

Dated: March 6, 2024
New York, New York

s/ Daniel Silver
Daniel Silver

CERTIFICATE OF COMPLIANCE

Pursuant to Commercial Division Rule 17, I certify that this affirmation complies with the word-count limit. This affirmation contains 150 words, as determined by the word-count function of Microsoft Word, excluding the parts of the affirmation exempted by Commercial Division Rule 17.

Dated: March 6, 2024
New York, New York

s/ Daniel Silver

Daniel Silver

19:5bb2feaa9d704fc58d3d1d25c4732425@thread.v2

Chat Filters Events History Disclaimers

<input checked="" type="checkbox"/>	Participant	Entity	Login	Email		
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<input checked="" type="checkbox"/>	Michael Kraines <michael@dcg.co>	Dcg	michael@dcg.co	michael@dcg.co	0	0
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<input checked="" type="checkbox"/>	Michael Moro <mmoro@genesistrading.com>	Genesistrading	mmoro@genesistrading.co	mmoro@genesistrading.com	5	0
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Barry Silbert 2022-06-13 06:09:03.187 PM

Michael Moro Derar
 Islim ballensweig doesn't really know what he is doing. you guys guiding the ship here?

Derar Islim 2022-06-13 06:22:37.327 PM

I am working very closely with him. It is a very stressful situation. He wants to ensure the book is in a good liquidity stand at this point

Barry Silbert 2022-06-13 06:23:24.047 PM

of course. i meant the TAC stuff

Barry Silbert 2022-06-13 06:24:35.817 PM

i haven't seen you guys chiming in much, so want to make sure you're leading this process with support and guidance from DCG

Michael Moro 2022-06-13 06:29:06.013 PM

He is nervous and rattled right now and isn't entirely thinking straight. We are all nervous of course, but Derar and I are involved every step of what has been hap pening.

I am speaking to him in a minute. We will manage through this with help from you and DCG.

Michael Moro 2022-06-13 08:34:28.267 PM

Immediate focus areas, just putting them here:

1. Continue to shore up liquidity from everywhere we can. Trying to get to north of \$2 billion by the morning.
2. Now that we've officially declared the default, trying to think through how/if we partner on next steps with a BlockFi or Galaxy
3. Keeping our trading book ready for more downside pain

4.

Monitoring very closely our other counterparties as well as lending platforms for liquidity/credit issues with constant communication

In addition, our Comms team is drafting both internal and external talking points on the TAC situation as needs arise.

I am keeping Matt focused on 1 and 4 as his marching orders.

Barry Silbert

2022-06-13 08:36:33.420 PM

on #1, we're willing to pay up for this borrow, right?

Barry Silbert

2022-06-13 08:36:39.473 PM

even short term stuff is helpful

Michael Moro

2022-06-13 08:37:13.983 PM

Absolutely. Not too much though as we don't want to seem desperate, but we are willing to pay above where we have been.

Barry Silbert

2022-06-13 10:24:56.517 PM

we're scheduling a DCG board update and strategy call for tomorrow late morning. pencilling in 11 am. i'd like for moro, derar, matt and arianna to join. okay?

Michael Moro

2022-06-13 10:26:43.940 PM

Yes

Barry Silbert

2022-06-13 10:26:57.693 PM

please give matt and arianna the heads up

Michael Moro

2022-06-13 10:27:04.193 PM

Will do.

Barry Silbert

2022-06-13 10:27:05.293 PM

my office will reach out to you guys to schedule

Message

From: Barry Silbert [barry@dcg.co]
Sent: 6/13/2022 9:05:01 PM
To: Lawrence Lenihan - Resonance (lawrence@resonance.nyc) [lawrence@resonance.nyc]; Glenn Hutchins - North Island (glenn@northisland.net) [glenn@northisland.net]; Matthew Harris (mharris@baincapital.com) [mharris@baincapital.com]; Matt Turck - Firstmark Capital (matt@firstmarkcap.com) [matt@firstmarkcap.com]
CC: Michael Kraines [michael@dcg.co]; Mark Murphy [mark@dcg.co]
Subject: Re: Fun never ends

Hello there,

Things have continued to deteriorate all around – the stock market, the crypto market and the situation with Three Arrows. They basically went silent today on all the lenders, so everybody assumes this is the beginning of the end. We served them with a default notice and are initiating – I believe the correct term – is arbitration. There are signs of fraud, so we are aggressively going after the personal assets of the two main principals, which seems to include yachts and mansions.

Given the deteriorating bitcoin price, our unsecured exposure has grown in size. I don't have the exact number, but it is uncomfortably big (well over \$500 mm now). Complicating things a bit is the collateral we have includes shares of GBTC and ETHE, which as a DCG affiliate, Genesis is limited to how many shares they can sell quarterly.

On a slightly brighter note, Genesis continues to shore up their liquidity and they expect to get to \$2 billion tonight. But as you can imagine, it feels that everybody in our space is uncomfortable right now – or about to go out of business – so we are prepping for the bank run on Genesis, which we expect will happen when our action against Three Arrows becomes public, if not sooner. Also difficult to determine at this point how many other borrowers we have that are going to face difficulty paying Genesis back.

Along those lines, we are exploring financing options for DCG to further strengthen our balance sheet – both debt or equity. We are also starting to think about bringing in equity partners directly into Genesis Global (the parent co of trading, lending and custody). Everything needs to be on the table.

Redacted

Redacted

There are intercompany

loans from Genesis to DCG and we want to make sure we do every kosher and by the book.

I suggest we have a board update and strategy call tomorrow, maybe late morning? These are really difficult times for me and the team and we could really use your help and support.

Barry Silbert
Founder & CEO, Digital Currency Group
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t: (212) 473-2408 | [@BarrySilbert](https://twitter.com/BarrySilbert)
262 Harbor Drive, 3rd Floor
Stamford, CT 06902

DCG Family of Companies:

[CoinDesk](#)
[Luno](#)
[Grayscale](#)
[Genesis](#)
[Foundry](#)
[TradeBlock](#)
HQ

From: Barry Silbert <barry@dcg.co>
Date: Monday, June 13, 2022 at 12:29 PM
To: Lawrence Lenihan - Resonance (lawrence@resonance.nyc) <lawrence@resonance.nyc>, Glenn Hutchins - North Island (glenn@northisland.net) <glenn@northisland.net>, Matthew Harris (mharris@baincapital.com) <mharris@baincapital.com>, Matt Turck - Firstmark Capital (matt@firstmarkcap.com) <matt@firstmarkcap.com>
Cc: Michael Kraines <michael@dcg.co>, Mark Murphy <mark@dcg.co>
Subject: Re: Fun never ends

Hi all,

No real update on the Three Arrows front. We just sent a threat to put them in default unless they give us the information we're asking for and engage in a dialogue. Deadline is 2 pm

Other than Three Arrows, things seem to be operating smoothly on the lending side. We have one derivatives counterparty that is \$80 mm short on a margin call, but we just confirmed that he has \$2 billion of Blockchain and Kraken stock he can pledge if need be.

Most of the trading flows on the desk today are sales, obviously, but they said things slowed down over the past hour. Which has coincided with the BTC price recovering a bit. So perhaps we're through the forced liquidations for today.

Barry Silbert
Founder & CEO, Digital Currency Group
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e: barry@DCG.co
t: (212) 473-2408 | [@BarrySilbert](https://twitter.com/BarrySilbert)
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[Grayscale](#)
[Genesis](#)
[Foundry](#)
[TradeBlock](#)
HQ

From: Barry Silbert <barry@dcg.co>
Date: Monday, June 13, 2022 at 8:29 AM
To: Lawrence Lenihan - Resonance (lawrence@resonance.nyc) <lawrence@resonance.nyc>, Glenn Hutchins - North Island (glenn@northisland.net) <glenn@northisland.net>, Matthew Harris (mharris@baincapital.com) <mharris@baincapital.com>, Matt Turck - Firstmark Capital (matt@firstmarkcap.com) <matt@firstmarkcap.com>
Cc: Michael Kraines <michael@dcg.co>, Mark Murphy <mark@dcg.co>
Subject: Fun never ends

Hi guys,

So I got the dreaded 2 am call last night re Genesis. Our second largest borrower, Three Arrows, could not meet their margin call last night, nor could they meet the margin calls of their other lenders (Galaxy, BlockFi, Blockchain). We are, unfortunately, their largest lender with upwards of \$500 mm of unsecured exposure at current crypto prices. We are, fortunately, in a very strong liquidity position currently at Genesis with ~\$1.5 billion of USD, BTC and ETH. It seems that Galaxy, BlockFi and Blockchain are all having liquidity issues and we are being asked to bail everybody out.

Three Arrows has until 9 am to post the additional collateral, which they won't be able to do. To give us time to work with them on a plan, we offered them a 48 hour forbearance agreement in exchange for the two founders pledging all of their GP and LP interests in the fund to us, provided they get the same from the other lenders. They agreed, but we have not heard back yet if they got the forbearances. We have asked Three Arrows for a bunch of information about current assets, liabilities, etc. so that we can decide what to do here. Still waiting on that too.

The industry is now facing substantial pain and there is a cascade of forced liquidations happening right now everywhere. We're doing our best to weather the storm, but I'm afraid the worst might be yet to come with the potential for Tether to blow up (we are short Tether about \$400 mm to protect us a bit in that scenario).

Other than locking down liquidity any place we can, we'd of course welcome any additional words of wisdom as to how best to navigate. We're obviously going to see a ton of great distressed opportunities, but as Glenn has always advised, we're going to be patient.

We'll keep you posted

Barry Silbert

Founder & CEO, Digital Currency Group

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HQ

Message

From: Barry Silbert [barry@dcg.co]
Sent: 6/14/2022 1:03:49 PM
To: Lawrence Lenihan - Resonance (lawrence@resonance.nyc) [lawrence@resonance.nyc]; Glenn Hutchins - North Island (glenn@northisland.net) [glenn@northisland.net]; Matthew Harris (mharris@baincapital.com) [mharris@baincapital.com]; Matt Turck [mturck@firstmarkcap.com]
CC: Mark Murphy [mark@dcg.co]; Michael Kraines [michael@dcg.co]
Subject: Agenda for board call today

Hi all,

The plan for the call today is to spend the first portion giving the Genesis team an opportunity to update the board on the Three Arrows situation and to answer any questions. Participants from Genesis will be Mike Moro (CEO), Derar Islam (COO), Arianna Pretto-Sakmann (CLO) and Matt Ballensweig (head of lending).

They will then drop and we will cover the following three paths/strategies, as well as anything else that it would be helpful to cover.

- 1) Support Genesis
 - while the Genesis team makes every effort to bolster its own balance sheet, DCG looks to secure our own additional liquidity to keep in reserve should we decide later to contribute capital to stabilize the Genesis balance sheet
 - at the same time continue to work with counsel to ensure best defenses against veil piercing
- 2) Jettison the Genesis Capital business
 - the contra of contributing more capital, this would be the worst case scenario
- 3) "Shock & Awe" plan

The Shock & Awe Plan

Narrative: in response to the dramatic change in the market landscape, we are reconfiguring Genesis to take maximum advantage of the new environment

- Barry becomes CEO of Genesis immediately; will of course remain CEO of DCG
- DCG contributes DCGI assets (crypto, venture, public equity and funds portfolios) and investing team to Genesis (~\$1.5 billion at current crypto prices, not reflecting discount on Grayscale products)
- Genesis improved with additional merchant banking capability unlocking new solutions for clients and opportunity sets
- Gives lenders, employees, investors, and the public confidence and comfort; gives us time to work through illiquid assets; should be easier/cheaper for Genesis to access debt capital for the loan book
- We immediately share plans internally (and externally?) about our plans to take Genesis public in 2023; more diversified set of assets make for a more successful IPO & post IPO company
- Big opportunity for Genesis to come out of this as THE leader in the space
- As 100% owner of Genesis, DCG shareholders are no worse off, other than DCGI's assets being put under Genesis creditors;
- Provides clear path to liquidity for DCG shareholders via Genesis IPO
- We can also consider raising pre-IPO capital into Genesis immediately to further strengthen the balance sheet, or down the road once things have stabilized; putting DCGI assets into Genesis will give investors the opportunity to participate in the upside of our portfolio alongside the Genesis business

IMPORTANT: we have not discussed either the Jettison or Shock & Awe plans with the Genesis team. As far as they know, we're on path #1 right now, so please do not bring up the alternative paths on the call today with the team.

Barry Silbert

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<input checked="" type="checkbox"/>	Participant	Entity	Login	Email		
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<input checked="" type="checkbox"/>	Michael Kraines <michael@dcg.co>	Dcg	michael@dcg.co	michael@dcg.co	22	0
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Arianna Pretto-Sakmann 2022-06-15 12:25:51.293 AM

Redacted

Michael Paleokrassas 2022-06-15 12:41:12.737 AM

not sure anyone is awake, but starting to see a steady flow of calls starting

Matthew Ballensweig | Genesis Cap 2022-06-15 12:47:49.683 AM

yeah a lot of smaller lenders 20mm and udner

Matthew Ballensweig | Genesis Cap 2022-06-15 12:47:54.033 AM

coming to ask for withdrawals

Arianna Pretto-Sakmann 2022-06-15 12:56:23.733 AM

Redacted

Arianna Pretto-Sakmann 2022-06-15 12:57:17.080 AM

Matthew Ballensweig

Redacted

Matthew Ballensweig | Genesis Cap 2022-06-15 01:08:01.010 AM

Thank you! Appreciate everyone's continue help and all hands effort.

Michael Paleokrassas 2022-06-15 01:44:05.707 AM

going to get some sleep for tomorrow. Matt Ham and the whole singapore office is around

Matthew Ballensweig | Genesis Cap 2022-06-15 01:44:29.403 AM

Mark Murphy 2022-06-15 10:57:12.157 AM

Great

Matthew Ballensweig | Genesis Cap 2022-06-15 10:57:15.190 AM

also starting to see some ex-celsians come over

Arianna Pretto-Sakmann 2022-06-15 10:57:21.843 AM

Arianna Pretto-Sakmann

Redacted

Matthew Ballensweig | Genesis Cap 2022-06-15 10:57:31.937 AM

weve been defening the castle all night and day on phone with depositors, prosepects etc

Barry Silbert 2022-06-15 10:57:58.327 AM

is there anything we/DCG can do to further install confidence in genesis?

Matthew Ballensweig | Genesis Cap 2022-06-15 11:06:02.447 AM

It ultimately comes down to our ops/processing etc, as people see our responsiveness, word spreads fast. We have some portcos that have wanted to hop on call s today - I just spoke to Wyre, we're speaking with Decentraland etc so if they triangulate with you, you can just reaffirm our position etc.

Barry Silbert 2022-06-15 11:06:19.947 AM

great

Barry Silbert 2022-06-15 11:06:39.417 AM

marcus says that the word on the street is that genesis is the "blue chip" in this mess

Matthew Ballensweig | Genesis Cap 2022-06-15 11:06:56.313 AM

I spoke to Bernard from Luno this AM

Barry Silbert 2022-06-15 11:06:58.650 AM

we need to continue to perpetuate that of course

Matthew Ballensweig | Genesis Cap

2022-06-15 11:07:24.700 AM

yes definitely

Matthew Ballensweig | Genesis Cap

2022-06-15 11:07:34.193 AM

So who has the best line into CZ?

Barry Silbert

2022-06-15 11:08:48.837 AM

I dm'd with him for the first time a couple weeks ago about meeting up at consensus. don't think i've ever met or spoke with him

Barry Silbert

2022-06-15 11:08:55.697 AM

i'm happy to ping him

Barry Silbert

2022-06-15 11:09:08.003 AM

but don't want to freak him out

Barry Silbert

2022-06-15 11:09:14.913 AM

so probably should come from lower initially

Leon Marshall

2022-06-15 11:11:28.503 AM

Am reaching out to EMEA contact here

Our original path from our APAC desk would've gone via Arthur Hayes.

MikeP and I not sure he can be discreet here so looking to find other paths


If EMEA path doesn't work happy for you to ping - will find out in next hour or so

Matthew Ballensweig | Genesis Cap

2022-06-15 11:14:10.893 AM

19:b05cabb1cbff436f8f715db228f42197@thread.v2						
Chat Filters: <input checked="" type="checkbox"/> Events <input checked="" type="checkbox"/> History <input checked="" type="checkbox"/> Disclaimers						
<input checked="" type="checkbox"/>	Participant	Entity	Login	Email		
<input checked="" type="checkbox"/>	Mike Katz <mike@dcg.co>	Dcg	mike@dcg.co	mike@dcg.co	0	0
<input checked="" type="checkbox"/>	Rumi Morales <rumi@dcg.co>	Dcg	rumi@dcg.co	rumi@dcg.co	1	0
	Barry Silbert					2022-06-21 12:00:49.487 PM
	Going to need to cancel the bi weekly today					
	Matt Beck					2022-06-21 12:02:24.583 PM
	no problem - we got a line into Joe Parker at Wyre - we can synch up with them during that slot					
	Barry Silbert					2022-06-21 01:35:37.267 PM
	<p>Fyi, I spoke with Daniel to welcome to the team and shared the following:</p> <ul style="list-style-type: none"> - our industry is in the midst of a healthy cleansing and deleveraging, but it is painful and nobody has been spared, even us - across DCG and Genesis we have about ~\$2 billion of liquidity, but that is precious right now and we are in bunker mode and not deploying in order to be able to withstand whatever negative event comes next - we are all focused on making sure that the trust and confidence in Genesis remains high because we can't risk money leaving Genesis and depleting our liquidity - once we get through this, the Genesis access to low priced capital via the institutional investor and retail channel like Gemini is going to give us a major competitive advantage in a market where there is limited liquidity and will help power the next stage of investing - I told him that as an immediate focus, beyond just getting up to speed, is to see if he can help Foundry assess their loan book and address any issues. He is excited to do so and I connected him with Colyer - what I didn't say, which we need to keep between us, is that even though our liquidity is super super strong right now, the hole in Genesis equity due to the Three Arrows exposure is something they we will need to fill by 6/30. It is my sense that DCGI will play a role here in addressing the hole, hopefully temporarily, through the pledge of assets or if need be, the downstream of certain/all assets until prices recover. The challenge is we don't know what will be the recovery on the Three Arrows claim, or what will be the BTC price on 6/30, so it is difficult to calculate the hole. We're trying to come up with as many options as possible. This is super confidential/sensitive stuff, so please don't share with anybody, including Daniel, until he is in the circle of trust 					
	Barry Silbert					2022-06-21 01:35:49.323 PM
	Daniel is not in this group yet					
	Barry Silbert					2022-06-21 01:36:02.613 PM
	But we should add him sooner rather than later					
	Bill Krueger					2022-06-21 01:38:38.233 PM
	We had planned to add him after his honeymoon. If you think sooner, we can do that.					
	Barry Silbert					2022-06-21 01:39:04.077 PM
	After honeymoon makes sense. Minus the history					
	Matt Beck					2022-06-21 01:40:55.277 PM

This all makes sense - we're standing by ready to do what's necessary

 Barry Silbert 2022-06-21 01:41:56.560 PM


Once I get thumbs up from everybody on above I'm going to delete

 Bill Krueger 2022-06-21 01:42:12.020 PM

No need

 Bill Krueger 2022-06-21 01:42:19.767 PM

We can add him without history

 Bill Krueger 2022-06-21 01:42:42.797 PM

There are historic threads about his recruiting process that I don't want us having to pick through.

 Rumi Morales 2022-06-21 01:57:43.460 PM

Thank you for confiding in us, Barry, and having us in the circle of trust. We are always here to help at any time.

From: Barry Silbert/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6a26b17679934131bffc47c28730c0d1-barry_f89a9]

Sent: Thur 10/20/2022 3:27:41 PM (UTC-04:00)

Subject: Re: Follow up on Gemini / DCG

Good lunch with Cameron. Tldr: he is intrigued about the idea of a closer partnership between Genesis/Gemini/DCG, including a potential merger of the companies. I put him on clear notice that the path we're on right now could lead to a Genesis bankruptcy, which would put Gemini's deposits (and therefore, Gemini's business) at significant risk. He took that part surprisingly well and appreciates we need to work together to mitigate that risk. Next steps: he is going to chat with Tyler and come back with thoughts on how best to proceed.

These are the points I made to him:

- Big opportunity to lean in together
 - Could take a lot of different forms, ranging from a commercial partnership to joining forces and merging the companies together
- Genesis and Gemini are super complementary
 - Gemini has retail, exchange, custody
 - Genesis has institutional relationships, prime services and is strong in derivatives
 - Both NY based and both approach regulations and compliance seriously
- Joining forces is most exciting to me
 - Combined Gemini and Genesis would be a juggernaut and would be competitive with Coinbase and FTX (I shared Genesis' 2021 revenue and EBITDA with him, fyi)
 - The combined company would be super exciting to investors. We could go raise \$500-\$1 billion and take the company public in 24 months
 - Opportunity to also acquire and roll up weak competitors
- Benefits of Gemini joining the family of DCG companies
 - Move Grayscale's assets over, thereby making Gemini the largest custody provider in the world
 - Genesis would direct substantial order flow to the Gemini exchange
 - Foundry can direct bitcoin miners to trade and custody via Gemini
 - We could use CoinDesk for customer lead gen
 - Luno could use Gemini for liquidity
 - We could roll out Gemini's stablecoin across DCG and give Circle/USDC and run for their money
- Even without merging, there is a ton more Gemini and Genesis can do together and the two companies should be leaning in together, not pulling apart
- Candidly, ending the Earn partnership introduces potential catastrophic risk to Genesis and thereby Gemini. So at the very least, they need to revisit that decision
- My concerns:
 - Unclear that Genesis can replace the liquidity on the timeframe being discussed
 - Gemini is Genesis' largest and most important partner
 - It took nine months for the Genesis deposits to hit the current amount when the program was launched. And that was at a period in time when rates were basically zero and we were in the midst of a bull market
 - Genesis has ALWAYS maintained sufficient liquidity for day to day withdrawals, but never planned for a bank run scenario where their largest and most important partner asked for all of the money back immediately
 - The thing that scares me is either Genesis falling short on replacing the liquidity or the end of the program triggering a run on Genesis by other lenders
 - This would be very bad and would likely lead to a Genesis bankruptcy, which puts Gemini's deposits at risk
 - Even if Gemini pulled the money today, other Genesis creditors would pursue a preference claim against Gemini for that money. So this puts Gemini's going concern at risk
 - We need to avoid a bank run, no matter what
 - It will be difficult, if not impossible, for Genesis to find replacement liquidity if those new sources of debt and equity know that the Gemini deposits are leaving. And I can't raise money at DCG if there is a Genesis bankruptcy risk. So the ball is in their court to prevent a bad thing from happening

Barry Silbert
Founder & CEO, Digital Currency Group