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,	:	
-against-	:	Index No. 452784/2023 Hon. Melissa A. Crane
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,	:	(Motion Sequence No. ___) ORAL ARGUMENT REQUESTED
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DIGITAL CURRENCY GROUP INC.'S MOTION TO DISMISS THE AMENDED COMPLAINT

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Defendant Digital Currency Group, Inc. ("DCG") respectfully submits this memorandum of law in support of its motion to dismiss with prejudice the Amended Complaint ("AC") of Plaintiff the People of the State of New York by Letitia James, Attorney General of the State of New York ("OAG") pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7).

PRELIMINARY STATEMENT

The allegations against DCG in this case are a thin web of baseless innuendo, blatant mischaracterizations and unsupported conclusory statements. In search of a headline-worthy scapegoat for losses caused by others, the OAG wrongfully seeks to portray DCG's good-faith support of a subsidiary as participating in fraud. If this case proceeds, the facts will show that DCG did nothing wrong, and that it acted properly, with the best of intentions, based on the sound, considered advice of accountants, investment bankers, consultants and other advisors from elite firms with the highest of reputations. The facts will further show that, rather than creating a "liquidity crunch" as the OAG alleges, DCG in fact on a net basis invested hundreds of millions of dollars of additional capital into its subsidiary during the months leading up to its bankruptcy, even though DCG had no obligation to do so. But the case should not proceed. None of what is alleged in the Amended Complaint suffices to plead fraud against DCG, and it should be dismissed in its entirety.

The case primarily concerns Gemini Earn, a product offered by Gemini Trust Company, LLC ("Gemini") to Gemini customers seeking to earn a loan fee on their cryptocurrency deposits with Gemini. Under the terms of tripartite agreements between Gemini, its customers, and Genesis Global Capital, LLC ("Genesis Capital" or "Genesis"), an indirect DCG subsidiary, the Gemini Earn funds were provided to Genesis Capital, which agreed to pay the loan fee to Gemini's customers based on a monthly interest rate. Genesis subsequently loaned out the cryptocurrency deposits to other borrowers. When the cryptocurrency markets

were disrupted by events outside the control of any of the parties here—including by the implosion of FTX—certain of Genesis Capital's counterparties defaulted, forcing Genesis to file for bankruptcy.

The first half of the Amended Complaint alleges fraud against Gemini for misrepresenting to its customers the risks associated with the Earn program. DCG is not alleged to have been involved in any of these events. Rather, the second half of the Amended Complaint alleges a separate purported fraud, focused principally on alleged misrepresentations by Genesis. The crux of OAG's overreaching theory is that DCG participated "in a communications campaign" that conveyed to Earn customers and others who invested directly in Genesis Capital (the "Direct Investors") that Genesis was operating "business as usual." AC ¶ 124.

The allegations as to DCG are plainly deficient. First, two of the statements relied upon by the OAG are simply "retweets" by DCG of messages initially tweeted by others. A federal statute, the Communications Decency Act ("CDA"), prohibits liability for retweeting content posted by others on social media. As for the other allegedly fraudulent statements described in the Amended Complaint, nearly all were made by Genesis, not DCG. Unsupported allegations that DCG employees "reviewed" or "edited" statements by Genesis do not suffice to plead fraud against DCG under CPLR § 3016(b), which requires that fraud be pled with particularity against each defendant.

Second, all of the statements alleged in the Amended Complaint that are purportedly tied to DCG are far too vague to be the basis for a fraud claim. The Amended Complaint relies on statements that Genesis' business was operating "normally," that it had "shed the risk and moved on," and that DCG had "absorbed" or "assumed" certain losses. AC ¶¶ 132, 136, 160, 168-70. Many of these statements concern Genesis' characterization of a

promissory note that DCG provided to backstop its subsidiary (an entirely valid, binding obligation, properly vetted and endorsed by DCG's board of directors, accountants, and other advisors). These statements are not the kind of provably false and concrete assertions of fact that can form the basis for a fraud claim.

Third, New York's Martin Act applies only to fraud "where engaged in to induce or promote" the purchase, sale, or distribution of a security or commodity. The Amended Complaint fails to allege any conduct by DCG undertaken for this purpose. The securities or commodities allegedly providing the basis for the Martin Act claims are (1) the agreements pursuant to which Gemini Earn participants loaned their cryptocurrency deposits to Genesis Capital and (2) "the cryptocurrencies bought, sold, and stored on Gemini's exchange and used as part of Earn." AC ¶¶ 241, 277, 298. The Amended Complaint fails to adequately allege that DCG did anything to promote the agreements or induce Gemini's customers to enter into them, or to induce Gemini's customers otherwise to buy, sell, or store cryptocurrency on Gemini's exchange. Moreover, the loan agreements were clearly not securities, as established by the loan documents themselves.

Accordingly, and for the additional reasons set out in DCG CEO Barry Silbert's motion to dismiss—which DCG incorporates by reference and joins in full—the Amended Complaint should be dismissed with respect to DCG.

STATEMENT OF FACTS[1]

I. The Gemini Earn Program

Genesis Capital is a New York cryptocurrency brokerage that engaged in services related to management of digital assets. AC ¶¶ 1, 39, 40. Genesis Capital and Genesis Asia

[1] The facts summarized below are based on non-conclusory allegations in the Amended Complaint, as well as documents referenced therein. *See Bauhouse Grp. I. v. Kalikow*, No.

Pacific Pte. LTD. ("Genesis Asia Pacific") are owned by Genesis Global Holdco, LLC (together, the "Genesis Entities"). AC ¶ 24. Genesis Global Holdco, LLC is in turn owned by DCG. AC ¶ 30.

In February 2021, Genesis Capital contracted with Gemini in connection with Gemini's Earn program. AC ¶¶ 1, 43. Under the program, Gemini customers could lend to Genesis digital assets they had on deposit with Gemini. AC ¶ 49. To participate, Gemini customers entered into a Master Digital Loan Agreement (the "MDLA," Affirmation of Paul H. Schoeman dated March 6, 2024 ("Schoeman Aff."), Ex. B) between themselves, Gemini, and Genesis Capital. AC ¶¶ 47, 237. DCG was not a party to the MDLA, and in fact the agreement made clear that DCG had no obligations or liabilities arising from the program. *See* MDLA § XVII.

Gemini customers who loaned assets to Genesis received in return a "Loan Fee," which was based on a monthly interest rate. *See* MDLA at Preamble. The Loan Fee was payable monthly to Gemini, which was then responsible for paying it to its customers, after deducting an agent fee. *See* MDLA § III(a); AC ¶ 50. Gemini customers could terminate their loans at any time and receive a return of their assets. *See* MDLA §§ II(c), II(d).

The MDLA provided that nothing in the 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," or to create any relationship other than Borrower, Custodian, and Lender. MDLA § XX. Finally, the MDLA included an agreement "that the Loans are intended to be

158277/2017, 2018 WL 6329461, at *2 n.2 (Sup. Ct. N.Y. Cnty. Dec. 4, 2018), *aff'd*, 190 A.D.3d 401 (1st Dep't 2021).

commercial loans of Digital Assets and not securities under the U.S. federal or state securities laws." MDLA § XXV.

II. The Three Arrows Default

Genesis was in the business of loaning digital assets and fiat currency to counterparties, one of which was a hedge fund called Three Arrows Capital Ltd. ("TAC"). AC ¶¶ 41, 118. The loans to TAC were issued by Genesis Asia Pacific. AC ¶ 118.

On June 13, 2022, TAC defaulted. AC ¶¶ 8, 122. Genesis Capital recovered a portion of its outstanding credit through the foreclosure of certain collateral, but TAC still owed over $1 billion. AC ¶ 122. According to the Amended Complaint, Genesis Capital and its indirect parent, DCG, then had a series of meetings to discuss "how to communicate with counterparties about [TAC], and how to bolster the Genesis Entities' financial condition in the wake of these losses." AC ¶ 125.

III. The Promissory Note

On June 30, 2022, DCG executed a promissory note (the "Note," at Schoeman Aff., Ex. C) with Genesis, under which DCG assumed Genesis Asia Pacific's liability to Genesis Capital arising out of TAC's debt default by providing Genesis with the Note for $1.1 billion. *See* Note at Preamble. The Note was payable in ten years at an interest rate of 1% per year. AC ¶ 156. There is no allegation that DCG received anything of value in return for taking on this obligation, and indeed it did not. The Amended Complaint does not allege that the Note was invalid or otherwise unenforceable.

Contemporaneously with the Note, Genesis Asia Pacific executed an "Assignment and Assumption Agreement" (the "Assignment Agreement," at Schoeman Aff., Ex. D), assigning to DCG its obligation to Genesis Capital. *See* Assignment Agreement at Preamble. Accordingly, DCG took on the responsibility for paying to Genesis Capital $1.1 billion, which

was designated in the Note as the "Assumed Liability." *See* Note at Preamble. The Note required DCG and Genesis Asia Pacific to pay to Genesis Capital any funds they were able to recover from TAC. Note § 1.6. Otherwise, DCG was obligated to pay the $1.1 billion in ten years (with quarterly interest), although DCG could prepay that amount at any time without penalty. Note §§ 1.1, 1.2, 1.3. By virtue of this arrangement, DCG supported Genesis Capital by substituting its own enforceable obligation to make a future payment for an obligation that Genesis Asia Pacific could not meet.

IV. The Alleged Misrepresentations

Although the Amended Complaint alleges that Genesis made misleading statements to Earn users and other investors, those that are alleged to have involved DCG are few and far between. We summarize them here.[2]

1. Retweets

On June 15, 2022, DCG's Twitter account retweeted a tweet by Genesis' account stating that Genesis' balance sheet was "strong" and that business was "operating normally." AC ¶¶ 132, 133. The tweet further stated that Genesis' "lending business continues to meet client demand" and that its "trading business remains an essential liquidity provider in the spot and derivatives markets." AC ¶ 132. The Amended Complaint does not allege that any DCG employee drafted or otherwise directed Genesis' tweet.

On June 17, 2022, DCG's Twitter account retweeted a tweet by Genesis Capital's CEO, Michael Moro, stating that Genesis had "mitigated" losses, that "[n]o client funds are impacted," that Genesis had hedged its "liquid collateral" to "minimize" downside, and that Genesis had "shed the risk and moved on." AC ¶¶ 136, 139. The Amended Complaint alleges

[2] The allegations relating specifically to Mr. Silbert are addressed in his memorandum of law and therefore not repeated here.

that DCG's COO "reviewed and edited" these tweets before Mr. Moro posted them, and that the COO "directed" Mr. Moro to send the tweets from his personal account, rather than the Genesis account. AC ¶ 137. But there are no allegations as to what the COO's edits or comments were, whether those edits added anything false or misleading, or whether the COO had authority over the tweet. AC ¶ 137.

2. July 6, 2022 Moro Tweets

On July 6, 2022, Mr. Moro sent out two tweets, stating, among other things, that "[o]nce [TAC] were unable to meet the[ir] margin call requirements, we immediately sold collateral and hedged our downside. Since then, 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." AC ¶ 160. The Amended Complaint alleges that DCG's COO and Head of Communications "edited" and "helped draft" these tweets, and that Mr. Silbert "reviewed" them. AC ¶ 161. But it does not allege what the edits were, or that they added anything false or misleading. The Amended Complaint also alleges that DCG "approved these tweets before they were published," but does not allege who at DCG purportedly did so or to whom the purported approval was conveyed. AC ¶ 161.

3. Genesis Capital Talking Points

On July 6, 2022, Genesis' Co-Head of Trading and Lending informed Gemini, allegedly using a prepared set of talking points, that the TAC "[l]osses [were] predominantly absorbed by and netted against DCG balance sheet" and that Genesis Capital remained "well-capitalized." AC ¶ 169. The Amended Complaint alleges that DCG's Head of Communications "helped draft" these talking points and that DCG's COO "reviewed" them. AC ¶ 167. It further alleges that Genesis used these talking points again on October 5, 2022 and November 1, 2022 to

respond to questions from investors concerning TAC. AC ¶¶ 213, 218-20. The Amended Complaint does not allege what, if any, specific contribution DCG executives made to the talking points, or whether they directed the inclusion of the portions cited in the Amended Complaint. With no supporting detail, the Amended Complaint refers to the talking points in one instance as "DCG-approved." AC ¶ 213. It makes no allegations regarding who at DCG purportedly did so, to whom the purported approval was conveyed, or when.[3]

4. July 19, 2022 Bitvavo Conversation

The Amended Complaint alleges that, on July 19, 2022, DCG's COO had a telephone conversation with the CEO of Bitvavo—a Direct Investor—in which DCG's COO made "misleading statements." AC ¶ 206. The purportedly "misleading statements" were a reiteration of Mr. Moro's July 6, 2022 tweet and the claim: "'[l]osses predominantly absorbed by and netted against DCG balance sheet, leaving Genesis with adequate capitalization to continue [business as usual].'" AC ¶¶ 205-06. The Amended Complaint also alleges that the COO "did not disclose the terms of the Promissory Note," AC ¶ 206, although it does not allege that he was asked or required to do so.

5. November 11, 2022 Genesis Message

According to the Amended Complaint, on November 11, 2022, Genesis sent Gemini and the Direct Investors the following message by email and other messaging platforms: "Genesis has taken steps to strengthen its balance sheet with an additional equity infusion of $140M from our parent company, Digital Currency Group. This additional capital will bolster

[3] The Amended Complaint also contends that DCG created a "liquidity crunch" by borrowing funds from Genesis. AC § IV.E. This false claim is not linked to any specific fraud allegation and appears designed merely to smear DCG. Moreover, the specific allegation that DCG borrowed Bitcoin from Genesis shortly after the TAC default is patently false. That did not happen.

our position as a global leader in crypto capital markets and allow us to support our clients and the growing demand for our services. Genesis continues to operate with transparency as we always have, and we remain steadfastly committed to our clients throughout all market conditions." AC ¶ 247. The Amended Complaint alleges that "DCG drafted this message and authorized Genesis Capital to send this message to Genesis Capital's investors." AC ¶ 248. The Amended Complaint does not dispute that DCG did exactly what it said it did, but instead wrongly insinuates—by completely ignoring the fact-specific context surrounding these events—that investors would have made a mistaken assumption about which Genesis entity received the infusion.[4]

V. Collapse Of FTX And Genesis Capital's Bankruptcy

In November 2022, the cryptocurrency exchange FTX collapsed. The ensuing market disruption triggered substantial withdrawal requests from Earn participants. AC ¶ 262. Genesis Capital announced that it "faced a liquidity crunch and would not return cryptocurrencies invested under Earn." AC ¶ 17. On January 19, 2023, Genesis Capital filed for bankruptcy. AC ¶ 267.

LEGAL STANDARD

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon documentary evidence . . . or . . . the pleading fails to state a cause of action." CPLR §§ 3211(a)(1), (7). "[C]onclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

[4] The message in question was, in fact, a response to FTX's freezing of assets belonging to the Genesis subsidiary at issue.

"[F]actual assertions that are flatly contradicted by the documentary evidence" are not entitled to be deemed true. *Dragon Head LLC v. Elkman*, 102 A.D.3d 552, 552 (1st Dep't 2013).

All of the causes of action in this case pleaded against DCG are fraud claims. Accordingly, the heightened pleading standard under CPLR § 3016(b) applies. *See People v. Barclays Cap. Inc.*, 47 Misc. 3d 862, 869 n.7 (Sup. Ct. N.Y. Cnty. 2015) (CPLR § 3016(b) applies to Martin Act claims); *People v. Wells Fargo Ins. Servs., Inc.*, 18 Misc.3d 1117(A), at *3 (Sup. Ct. N.Y. Cnty. 2008) (applying CPLR § 3016(b) to fraud-based claim under Executive Law § 63(12)). This standard requires that the "circumstances constituting the wrong shall be stated in detail," CPLR § 3016(b), and requires dismissal of a complaint unless its claims are supported by "specific and detailed allegations of fact in the pleadings." *Callas v. Eisenberg*, 192 A.D.2d 349, 350 (1st Dep't 1993); *see Orange Orchestra Properties LLC v. Gentry Unlimited, Inc.*, 191 A.D.3d 609, 609 (1st Dep't 2021) (to sustain fraud claim, a complaint must allege "with specificity who made the representations, when they were made and their substance, and when").

Where a complaint seeks to extend liability for fraud beyond the principal actors to those who allegedly aided in the commission of a fraud, "it is especially important that the command of CPLR § 3016(b) be strictly adhered to." *Nat'l Westminster Bank USA v. Weksel*, 124 A.D.2d 144, 149 (1st Dep't 1987). A fraud claim against a defendant who is not alleged to be the primary actor in a fraud "is not made out simply by allegations which would be sufficient to state a claim against the principal participants in the fraud." *Id*.

ARGUMENT

The Amended Complaint purports to plead fraud against DCG under the Martin Act (Second Cause of Action) and Executive Law § 63(12) (Fifth, Seventh, Eighth, and Ninth

Causes of Action).[5] First, all of the claims should be dismissed insofar as the Amended Complaint relies on statements that DCG simply retweeted or did not make. Second, the claims must be dismissed because the content of the statements on which the Amended Complaint purports to pin DCG's liability are too subjective and insufficiently concrete to support a fraud claim. Third, the Martin Act claims must be dismissed because the Act's prohibitions only apply to fraud "where engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase . . . of any securities or commodities." GBL § 352-c. The Amended Complaint does not allege that DCG took any action for this purpose. Nor does the Amended Complaint adequately allege that the loan agreements at issue with regard to the Earn Program constituted securities or commodities under the law.

I. All Claims Against DCG Must Be Dismissed Because The Amended Complaint Fails To Allege Actionable Misconduct By DCG

A. The Amended Complaint Does Not Sufficiently Allege Conduct By DCG Constituting Fraud

The fraud theory set forth in the Amended Complaint as against DCG is that DCG concealed Genesis' financial condition from Earn users and other Genesis investors. But DCG had nothing to do with Earn and was merely the indirect corporate parent of the Genesis entity with which Direct Investors had chosen to do business. The Amended Complaint does not plead a theory of alter-ego or vicarious liability with regard to conduct by a subsidiary; nor could it, given that Genesis was a separate entity and there are no allegations sufficient to establish veil-

[5] The Executive Law claims are predicated on various alleged forms of "repeated and persistent" fraud or illegality, including fraud (Fifth Cause of Action); the Martin Act (Seventh Cause of Action); N.Y. Penal Law § 190.65(1)(b) (scheme to defraud) (Eighth Cause of Action); and N.Y. Penal Law § 105.05(1) (conspiracy) (Ninth Cause of Action).

piercing.[6] The OAG is left, therefore, with a handful of highly attenuated, and ultimately insufficient, allegations that it claims make DCG responsible for Genesis' conduct.

1. The Communications Decency Acts Bars All Fraud Claims Based On The June 15, 2022 and June 17, 2022 Retweets

The Amended Complaint alleges DCG published "retweets" of a June 15, 2022 tweet by Genesis and June 17, 2022 tweets by Mr. Moro. Although the retweets are core to the case against DCG, a federal statute, the CDA, precludes using a retweet as the basis for liability.

Congress passed Section 230 of the CDA as part of the Telecommunications Act of 1996 with the goal of, among other things, maintaining "the robust nature of Internet communications." *Shiamili v. the Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 287 (2011) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). To this end, the CDA mandates that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," 47 U.S.C. § 230(c)(1), and, further, that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). The New York Court of Appeals has held that these provisions shield a defendant from state law liability if "(1) [the defendant] is a 'provider or user of an interactive computer service'; (2) the complaint seeks to hold the defendant liable as a 'publisher or speaker'; and (3) the action is based on 'information provided by another information content provider.'" *Shiamili*, 17 N.Y.3d at 286-87 (collecting cases). Courts around the country have held that the

[6] "Those seeking to pierce a corporate veil . . . bear a heavy burden." *TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998). A plaintiff must show that, "(1) the owners exercised *complete domination* of the corporation in respect to the transaction attacked; and (2) [ ] such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Ciavarella v. Zagaglia*, 132 A.D.3d 608, 608-09 (1st Dep't 2015) (internal citation omitted) (emphasis added).

CDA's immunity provisions should be broadly construed. *See, e.g.*, *id.* at 288; *Word of God Fellowship, Inc., v. Vimeo, Inc.*, 205 A.D.3d 23, 26 (1st Dep't 2022) ("Courts have construed section 230 as authorizing broad immunity.").

Here, the CDA shields DCG from liability based on the June 15, 2022 and June 17, 2022 retweets. First, DCG, as a Twitter user, falls squarely into the category of "users of an interactive computer service." *See Brikman v. Twitter, Inc.*, No. 19 Civ. 5143, 2020 WL 5594637, at *2 (E.D.N.Y. Sept. 17, 2020) (Twitter is an "interactive computer service" for purposes of the CDA); *Banaian v. Bascom*, 175 N.H. 151, 158 (2022) (CDA barred tort action against individual users based on their retweets of defamatory statements). Second, by alleging DCG committed fraud in connection with the June 15 and June 17 retweets, the AC seeks to hold DCG liable as the "publisher or speaker" of others' tweets. AC ¶¶ 132-33, 139; *see, e.g.*, *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420-21 (1st Cir. 2007) (barring suit under state securities fraud statute where liability premised on publishing on message board of content created by others); *see also Force v. Facebook, Inc.*, 934 F.3d 53, 64 n.18 (2d Cir. 2019) ("[I]t is well established that Section 230(c)(1) applies not only to defamation claims, where publication is an explicit element, but also to claims where the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker.") (internal quotation marks and emphasis omitted).

Finally, it is clear that DCG's retweets were "information provided by another information content provider" under the statute. As to the retweet of Genesis' June 15 tweet, there is no allegation that DCG contributed to or was otherwise involved in creating or issuing the original tweet. AC ¶ 133; *Shiamili*, 17 N.Y.3d at 290 (for purposes of the CDA, information is "provided by another" if there is "no allegation that defendants actually authored the

statements"); *Force*, 934 F.3d at 68 (recognizing no liability for another's content where defendant did not "directly and 'materially' contribute[] to what made the content itself 'unlawful'"). As to the retweet of Mr. Moro's June 17 tweets, the Amended Complaint alleges that DCG merely "reviewed and edited" the original tweets, not that DCG "actually authored" or "materially contributed" to them. AC ¶ 137.

Accordingly, the CDA bars the OAG's effort to premise its fraud claims against DCG on the June 15, 2022 and June 17, 2022 retweets.

2. The Amended Complaint Fails To Allege That DCG Engaged In Culpable Conduct With Respect To Genesis Capital's Communications

The Amended Complaint alleges that DCG executives "reviewed" and "helped draft" a set of talking points that "were to be used by Genesis Capital personnel" in a call with Gemini on July 6, 2022, and then again on calls with Genesis Capital customers and investors on October 5, 2022 and November 1, 2022. AC ¶¶ 167, 213, 218-20. However, DCG did not speak directly to Gemini or its customers and had no obligation to do so. The Amended Complaint does not allege what input DCG executives provided with regard to the talking points, whether they contributed to any purportedly fraudulent portions of the talking points, or whether they directed the inclusion of those portions in the final draft.

The tenuous connection alleged in the Amended Complaint between DCG and these statements does not suffice to support a fraud claim under the heightened pleading standard of CPLR § 3016(b). *See Nat'l Westminster Bank USA*, 124 A.D.2d at 147 (no liability for fraud when "there [was] no allegation anywhere in the complaint that [defendant] made any representation, fraudulent or otherwise, to plaintiff"); *see also P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V.*, 301 A.D. 2d 373, 376 (1st Dep't 2003) ("To state a legally cognizable claim of fraudulent misrepresentation, the complaint must allege that the defendant made a

material misrepresentation of fact."). Where a defendant who did not himself make representations is alleged to have committed fraud, allegations that he simply contributed in some fashion to those representations are insufficient. *See* *Nat'l Westminster Bank USA*, 124 A.D.2d at 149.

That the Amended Complaint has alleged a fraud claim under the Martin Act does not change this analysis. *See, e.g.*, *Barclays Cap. Inc.*, 47 Misc. 3d at 865 ("Despite the broad scope of the Martin Act . . . it is a statute that only gives rise to liability when misrepresentations are made."). Moreover, in determining the scope of liability under the Martin Act, New York courts often look to decisions construing the federal securities laws. *See, e.g.*, *E. Midtown Plaza Hous. Co. v. Cuomo*, 20 N.Y.3d 161, 170 (2012) ("In our application of the Martin Act we have repeatedly found it appropriate to be guided by the decisions of federal courts interpreting federal blue sky laws"). Under federal law, a defendant must "make" or "ultimately ha[ve] authority over" a statement in order to be liable for violations of Rule 10b-5, the primary provision governing securities fraud, where the alleged fraud is premised on false statements. *See* *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142, 144 (2011) (no liability under Rule 10b-5 where defendant participated in the drafting of a false statement, but did not have "ultimate authority over the statement, including its content and whether and how to communicate it"); *SEC v. Rio Tinto*, 41 F.4th 47, 54 (2d Cir. 2022). That same principle should guide the Court here.

The Court should dismiss the Executive Law claims for the same reason, as the fraud provisions of that statute stretch no further than those of the Martin Act. *See* *People by Schneiderman v. Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622, 633-34 (N.Y. 2018) (Executive Law § 63(12) contains "virtually identical" language to the Martin Act and was drafted "to

equate the meaning of the words 'fraud' and fraudulent' . . . with the provisions of the Martin Act[.]"). In addition, the Eighth and Ninth Causes of Action, which are predicated on alleged violations of the Penal Law, should be dismissed because they fail to allege scienter, which is an element of the relevant sections of the Penal Law. *See* *People v. Mikuszewski*, 73 N.Y.2d 407, 412 (1989); *People v. Gillette*, 178 A.D.3d 1278, 1279-80 (3d Dep't 2019). On this point, we refer the Court to the memorandum of law filed by Mr. Silbert.

3. None Of The Alleged "Misrepresentations" Were Fraudulent

The claims against DCG should be dismissed for an additional reason: the statements at issue are the kinds of statements that, as a matter of law, cannot be deemed "fraudulent." The statements contained precisely the kind of language that New York courts, like the federal courts, have held is too subjective and insufficiently concrete to constitute fraud, as it is immaterial to an investment decision. *See, e.g.*, *Barclays Capital Inc.*, 47 Misc.3d at 869 ("[R]epresentations that are immaterial to an investment decision are not actionable, and thus, cannot give rise to liability under the Martin Act."); *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004) ("[E]xpressions of puffery and corporate optimism" are immaterial and "do not give rise to securities violations.") (internal citation omitted); *Camelot Event Driven Fund v. Morgan Stanley & Co.*, 77 Misc. 3d 1232(A), at *21 (Sup. Ct. N.Y. Cnty. 2023) (same).

For example, the Amended Complaint claims that Genesis' June 15, 2022 tweet was fraudulent because it stated that the company's balance sheet was "strong," its business was operating "normally," its "lending business continues to meet client demand" and that its "trading business remains an essential liquidity provider in the spot and derivative markets." AC ¶ 132. The facts will show all of this was true and DCG believed it to be so. But even at this stage of the case, the Court should reject the OAG's effort to premise allegations of fraud on language of this sort. The Amended Complaint does not allege that Genesis was failing to meet

client demand or was no longer an essential liquidity provider. Nor does the Amended Complaint sufficiently allege that the Genesis was not operating "normally," a subjective term. In the days prior to the tweet, the company was seeking additional financing, considering options and taking precautionary measures—but there are no allegations that Genesis had closed down its operations or otherwise ceased to function. And courts have held that, in the context of messaging to investors, terms like "strong" are not concrete enough to be material under the securities laws—they are "either inactionable corporate puffery, or legitimate statements of optimism." *Hoffman v. AT & T Inc.*, 67 Misc. 3d 1212(A), at *7 (Sup. Ct. N.Y. Cnty. 2020); *see also* *Gissin v. Endres*, 739 F. Supp. 2d 488, 511-12 (S.D.N.Y. 2010) (defendant's assertion that the company "continues to maintain a strong balance sheet" was unactionable puffery); *San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Companies, Inc.*, 75 F.3d 801, 811 (2d Cir. 1996) (defendant's statements concerning optimism about strong financial performance were unactionable puffery); *Steinberg v. PRT Grp., Inc.*, 88 F. Supp. 2d 294, 305 (S.D.N.Y. 2000) (statements expressing defendant's "belief in its 'competitive advantage'" were unactionable puffery).

Similarly, the language used in Moro's tweets is not actionable. The Amended Complaint alleges that on June 17, 2022 Mr. Moro tweeted that Genesis had "carefully and thoughtfully" mitigated losses, that no client funds had been "impacted," that Genesis had hedged its "liquid collateral" to "minimize" downside, and that Genesis had "shed the risk and moved on." AC ¶ 136. Statements like this—communicating that a company is "moving forward well," that "things are going well," or that operations are "successful"—are not actionable unless "the statements address[] [something] concrete and measurable," which they do not here. *Oklahoma Firefighters Pension & Ret. Sys. v. Xerox Corp.*, 300 F. Supp. 3d 551, 570

(S.D.N.Y. 2018) (citations omitted); *see* *In Re Philip Morris Int'l Inc. Sec. Litig.*, 89 F.4th 408, 417(2d Cir. 2023) (statements offering "generally optimistic opinions" are "*precisely* the type of puffery . . . consistently held to be inactionable") (internal quotation omitted); *In re Synchrony Fin. Sec. Litig.*, 988 F.3d 157, 170 (2d Cir. 2021) (statements regarding risk management strategy, asset quality, and business practices were "too general to cause a reasonable investor to rely upon them" and therefore are unactionable puffery); *In re Nokia Corp. Sec. Litig.*, No. 19 Civ. 3509, 2021 WL 1199030, at *17 (S.D.N.Y. Mar. 29, 2021) (words like "complete," "successful," and "went beautifully" are "too general to cause a reasonable investor to rely upon them") (citation omitted); *DH Cattle Holdings Co. v. Smith*, 195 A.D.2d 202, 208 (1st Dep't 1994) (representation that an investment was "safe" not actionable since "such statements are generally considered . . . mere opinion and puffery").

The Amended Complaint also purports to find fault with statements that DCG had "assumed" or "absorbed" liabilities related to the TAC default. AC ¶¶ 160, 167-68, 205-06, 213, 218-20. But that is precisely what DCG did in issuing the $1.1 billion Note to Genesis Capital. As is reflected in the Note itself and the accompanying Assignment Agreement, DCG agreed to "assume" the liability associated with the TAC loss, and to pay $1.1 billion to Genesis—the Note referred to the loss as the "Assumed Liability." *See* Note at Preamble. There was therefore nothing misleading in a statement indicating that DCG had assumed the loss. Nor does the Amended Complaint allege that the Note was unenforceable; it was, and remains today, a binding obligation.

Finally, Genesis' November 11, 2022 message to Gemini and the Direct Investors concerning the $140 million "equity infusion" to "Genesis" from DCG also fails to plead fraud as to DCG. AC ¶ 247. First, while the OAG complains that the message misled investors as to

the recipient of the equity infusion (which the Amended Complaint claims was not Genesis Capital but rather another subsidiary called Genesis Global Capital International, Ltd.), the message referred broadly, but accurately, to "Genesis," and the Amended Complaint concedes that Genesis readily identified the specific entity receiving the equity infusion in response to any investors who asked. AC ¶ 254. Second, the language in this message that the "operation of [its] lending and trading businesses have not been impacted by recent market events," AC ¶ 255, is the kind of general language reflecting legitimate optimism that, as discussed above, is not actionable.

II. The Martin Act Claims Must Be Dismissed Because DCG's Conduct Is Outside The Scope Of The Statute

A. DCG Did Not Do Anything To Induce Or Promote The Purchase, Sale, Or Distribution Of Securities

The Martin Act claims against DCG fail for an additional reason: they do not sufficiently allege that DCG did anything, much less committed fraud, in order "to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase . . . of any securities or commodities," as the statute requires. GBL § 352-c. Where the text of a statute is unambiguous, the text should be given its plain meaning. *See People ex rel. Schneiderman v. Bank of New York Mellon Corp.*, 40 Misc. 3d 1232(A), at *3 (Sup. Ct. N.Y. Cnty. 2013). Here, there is no ambiguity in the words "to induce or promote," and DCG cannot be liable unless it has taken action for that purpose. *See People v. Mashinsky*, 79 Misc. 3d 1237(A), at *10 (Sup Ct. N.Y. Cnty. 2023) ("[T]he Martin Act prohibits fraudulent or misleading practices and representations by any person or entity who is 'engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities or commodities.'" (quoting GBL § 352-c(1))). Yet the Amended Complaint is devoid of any specific allegation that DCG made communications in order to induce or promote the purchase,

sale, or distribution of interests in the Gemini Earn Program, or of any securities or commodities by Earn participants or the Direct Investors in Genesis.

B. The Gemini Earn Loan Agreements Were Not Securities

Finally, the Martin Act claims fail because the agreements Earn participants entered into with Gemini and Genesis were not securities or commodities. They were instead contracts setting forth the framework for commercial loans. Under the terms of the MDLA, participants could loan cryptocurrency to Genesis Capital, and in return receive fixed loan fees tied to a monthly interest rate. *See* MDLA § III(a). If they chose to make those loans, participants were entitled to those fees, regardless of how Genesis performed. Participants could cancel the loans at any time, and were entitled to the return of their assets. *See* MDLA § XXIII. Participants did not believe they were purchasing securities, as their contracts expressly stated. *See* MDLA § XXV. The Court should accordingly reject the effort to label as "securities" what were clearly loan agreements under the law and as per the expectations of the parties.

The Amended Complaint alleges that "Earn is a security under the Martin Act because Earn investors provided their cryptocurrency assets to Genesis Capital with the expectation of receiving promised yields from Genesis Capital's efforts in deploying investors' pooled assets." AC ¶ 241. Thus, the Amended Complaint appears to argue that the Earn loans are "investment contracts," a type of security under federal law that the Court of Appeals, relying on the test in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), has recognized in the context of the Martin Act. *See People v. First Meridian Planning Corp.*, 86 N.Y.2d 608, 618-19 (1995). Under *Howey*, an instrument is an investment contract where there is (1) an investment of money, (2) in a common enterprise, (3) in which the purchaser expects profits solely derived from the efforts of others. 328 U.S. at 298-99.

The Amended Complaint does not adequately allege that Earn participants invested money in a common enterprise, as required by the first two elements of the *Howey* test. In this regard, the Amended Complaint does not plead the "tying of each individual investor's fortune to the fortunes of the other investors by the pooling of assets, usually combined with the pro-rata distribution of profits." *Revak v. SEC Realty Corp.*, 18 F.3d 81, 87 (2d Cir. 1994); *see also Mount Lucas Assocs., Inc. v. MG Refin. & Mktg., Inc.*, 250 A.D.2d 245, 252 (1st Dep't 1998). "Pooling" of assets generally occurs when the funds received from investors are "reinvested by the promoter into the business" and "[i]n turn, such reinvestment increases the value of the instrument offered." *Friel v. Dapper Labs, Inc.*, 657 F. Supp. 3d 422, 436 (S.D.N.Y. 2023). Here, there was no such commonality. There was no pro-rata distribution of profits, no reinvestment of funds into the business to increase the value of the loans, and no way in which one investor's fortunes were tied to those of other investors. Rather, each Earn participant was simply entitled to the payment of a loan fee, fixed monthly, under the terms that he or she had contracted with Genesis and Gemini.[7] *See generally* MDLA; *see, e.g.*, *Heine v. Colton, Hartnick, Yamin & Sheresky*, 786 F. Supp. 360, 370 (S.D.N.Y. 1992) (no common interest "[g]iven the fixed rate of return expected").

The Amended Complaint also fails to allege facts establishing the third element of *Howey*, requiring that a purchaser expect profits derived solely from the efforts of another party. While the Court of Appeals has not construed literally the term "solely," it has looked to whether the other party's efforts are "the undeniably significant ones, those essential managerial efforts,

[7] As addressed further below, *infra* at 22, nor were the fortunes of the Earn participants "inextricably" tied to the efficacy of Genesis Capital, which was obliged to pay the participants the same contractual loan fee whether its own lending operations were a success or failure. *See First Meridian Plan. Corp.*, 86 N.Y.2d at 620.

which affect the failure or success of the enterprise." *First Meridian Plan. Corp.*, 86 N.Y.2d at 620-21 (internal quotations and citation omitted). More recently, federal courts have stressed that "[t]he inquiry is an objective one focusing on the promises and offers made to investors." *SEC v. Ripple Labs, Inc.*, No. 20 Civ. 10832, 2023 WL 4507900, at *9 (S.D.N.Y. July 13, 2023) (quotation marks omitted).

Under this standard, the Earn loan agreements were not securities. Per the MDLA, Genesis was not obliged to share with Earn participants a percentage of its profits from the loaned funds, and the loan fees were not tied to any such profits. Nor did the MDLA provide that participants (who acknowledged that they were making commercial loans, not securities) were to share in any losses by Genesis; indeed, regardless of any such losses, Genesis was contractually required to issue Earn users the loan fee, as well as to return to participants upon request the entirety of the loaned funds. *See* MDLA Preamble, §§ II(b), II(c), III(a), XXV; *see also, e.g.*, *Union Planters Nat'l Bank of Memphis v. Com. Credit Bus. Loans, Inc.*, 651 F.2d 1174, 1185 (6th Cir. 1981) (finding no security where "the return expected by the Bank was simply the repayment of the amounts advanced plus a fixed rate of interest"); *Union Nat'l Bank of Little Rock v. Farmers Bank*, 786 F.2d 881, 884-85 (8th Cir. 1986) (finding no security where the plaintiffs "return was based solely upon [the issuer's] ability to repay the loan").

Accordingly, the Earn agreements are not securities under the Martin Act, and the Second and Seventh Causes of Action must be dismissed.

CONCLUSION

The Court should dismiss the Amended Complaint with prejudice.

Dated: New York, New York
March 6, 2024

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

The foregoing document complies with the word count limit as stated in Rule 17 of the Rules of the Commercial Division of the Supreme Court. The total number of words in this brief, exclusive of the caption, table of contents, table of authorities, and signature block, is 6,994.

Dated: New York, New York
March 6, 2024

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