

People v Gemini Trust Co., LLC

2025 NY Slip Op 31269(U)

April 9, 2025

Supreme Court, New York County

Docket Number: Index No. 452784/2023

Judge: Melissa A. Crane

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

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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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, BARRY E. SILBERT

Defendant.

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INDEX NO. 452784/2023
03/07/2024,
03/06/2024,
MOTION DATE 03/15/2024
MOTION SEQ. NO. 002 003 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 68, 69, 70, 89, 105, 106

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44, 45, 71, 72, 73, 90, 91, 92

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 53, 54, 55, 56, 74, 75, 76, 93, 94, 95

were read on this motion to/for DISMISS.

The New York State Attorney General (OAG) commenced this cryptocurrency fraud action under General Business Law (GBL) Article 23-A [the Martin Act] and Executive Law Section § 63 (12). Former defendant Gemini Trust Company, LLC (Gemini) operated a cryptocurrency trading platform. Gemini’s customers could purchase and trade cryptocurrency on Gemini’s exchange. In addition, Gemini partnered with former defendant Genesis Global Capital, LLC (Genesis) to launch the Gemini Earn program (Earn). OAG alleges that the Earn program was a retail investment program through which Genesis raised money from the public.

Through the Earn program, Gemini’s customers deposited accepted cryptocurrencies with Genesis, and Genesis deployed those assets in its own cryptocurrency lending operations. In June 2022, Three Arrows Capital, Ltd. (Three Arrows)—one of Genesis’s largest borrowers—defaulted on loans that Genesis-affiliate and former defendant Genesis Asia Pacific had issued to it, leaving the Genesis entities with a \$1.1 billion liquidity hole.

OAG’s Martin Act and Executive Law fraud claims against the Genesis and Digital Currency Group defendants (Moro, Silbert, and Digital Currency Group) concern these defendants’ alleged misstatements and omissions following the Three Arrows default. Ultimately, Genesis announced that it was suspending all loan withdrawals in November 2022, and it declared bankruptcy in January 2023.

After this case was commenced, OAG settled its claims against Gemini Trust and the Genesis entity defendants (Genesis Global Capital, LLC, Genesis Asia Pacific PTE. LTD., and Genesis Global Holdco, LLC).

Now, defendants Digital Currency Group Inc. (DCG) [MS 02], Barry E. Silbert, and Soichiro Moro move to dismiss the amended complaint. OAG opposes the motions.

BACKGROUND

The facts are taken from the amended complaint (Doc 17) unless noted otherwise. Former defendant Gemini is a cryptocurrency exchange that offered securities to the public through its alleged investment program, Gemini Earn (*id.*, paras 34-39). As discussed later in this decision, the parties dispute that the Earn program constitutes a “security” within the Martin Act’s meaning (*see* discussion section 1, *infra*). Gemini and former defendant Genesis Global Capital, LLC (Genesis) launched the Earn program in January-February 2021. Defendant DCG

owns and operates cryptocurrency businesses, including Genesis, Genesis Holdco, and Genesis Asia.

Under the Earn program, Gemini’s customers “invested” their cryptocurrency assets into Earn, Gemini acted as the “custodian” for those assets, and Genesis, as borrower, used those assets to fund its own cryptocurrency lending endeavors. Gemini’s clients who elected to join the Earn program as “lenders” had to enter into a Master Digital Asset Loan Agreement (the Earn Agreement). The Earn Agreement set forth the terms regarding the Earn program, including terms for transferring cryptocurrency assets and fee payments. Earn investors’ assets were pooled together on Gemini’s platform, and Genesis would transfer those assets to its external accounts and wallets (*see* Doc 17, paras 43-49). “When Earn investors withdrew their assets, Genesis Capital had five days from the date of the withdrawal request to return the investor’s assets, along with the yield promised to the investor” (*id.*, para 50). Genesis agreed to pay Gemini’s investor customers “a financing fee on each Loan (the ‘Loan Fee’),” as set forth in the Earn Agreement (*see* Doc 33, section III [a] [Earn Agreement]). In addition, Gemini received agent fees for its Earn services. The agent fees were deducted from the Earn investors’ assets and yield (Amended Complaint, Doc 17, paras 50, 52-55).

OAG asserts

“As a large institutional lender in the cryptocurrency industry, Genesis Capital negotiated more favorable loan terms and interest rates with borrowers than Earn investors could negotiate on their own. Genesis Capital paid yield to the Earn investors from the interest it earned on its loans to third parties. Thus, the Earn investors’ fortunes were tied to the effort and expertise of Genesis Capital, and the investors shared in the profits made by Genesis Capital.

....

The yield paid to Earn investors fluctuated. On a monthly basis, Genesis Capital determined the types of cryptocurrencies it was willing to borrow and the yield it was willing to pay for each type of asset. . . .

....

These rates frequently changed. For example, an Earn investor who invested one bitcoin at the start of Earn could have earned 3.05% APY on that investment in February 2021, 2.05% in May 2021, 1.65% APY in August 2021, 1.49% APY in September 2021, and 1.01% in February 2022. . . .

Gemini and Genesis Capital controlled the interest rates and cautioned their investors: ‘rates may increase or decrease in the future’ ”

(*id.*, paras 53-55).

The Alleged Genesis/DCG Scheme

OAG asserts that Genesis “lent cryptocurrency and fiat currency to institutions and high-net-worth clients. Genesis Capital funded these loans by receiving financing from third parties, including the Earn investors” (Amended compl., para 39). Another DCG subsidiary, Genesis Asia, “lent assets to Singapore-based clients, such as cryptocurrency hedge fund Three Arrows, on behalf of Genesis” (*id.*, para 41). Genesis “provided virtually all of Genesis Asia Pacific’s lending capital” (*id.*).

In June 2022, nonparty Three Arrows “defaulted on billions of dollars in loans” that Genesis Asia issued to it (*id.*, para 8). According to plaintiff, “[t]he resulting losses created . . . a ‘structural hole’ at Genesis Capital that impaired [Genesis Capital’s] ability to repay its open-term liabilities—including to Earn investors” (*id.*). In short, OAG contends that DCG, Genesis, DCG’s CEO (Silbert), and Genesis’ CEO (Moro) conspired to misrepresent Genesis’ financial condition “to conceal this structural hole” (*id.*, para 9). For example,

“the Genesis Entities, DCG, Silbert, and Moro engaged in concerted communications with the public and with counterparties to instill false confidence in Genesis Capital’s financial health. For example, on June 15 and June 17, Genesis Capital, Silbert, Moro, and/or DCG published tweets claiming the Genesis Entities’ balance sheet was ‘strong,’ that Genesis Capital was functioning ‘normally,’ and that it had ‘shed the risk and moved on.’ In reality, Three Arrows’ default on June 13, 2022, created an equity deficiency at the Genesis Entities, and Silbert had ordered Genesis Capital to limit its extension of new loans”

(*id.*).

In addition, on June 30, 2022, “Moro and Silbert executed an illiquid promissory note under which DCG agreed to pay Genesis Capital \$1.1 billion in a decade at only a 1% per annum interest rate . . . to purportedly backstop losses from the Three Arrows loans” (*id.*, para 10). Then, in order to solicit additional assets through the Earn program, “the Genesis Entities, DCG, Moro, and Silbert falsely assured counterparties and the public that Genesis Capital was ‘well-capitalized’ and that DCG ‘absorbed the losses’ from the Genesis Entities” (*id.*, para 11 [also alleging that Moro “tweeted that DCG had ‘assumed certain liabilities of Genesis’ associated with Three Arrows, leaving Genesis Capital with ‘adequate capital’ to continue ‘business as usual’ ”]; *see also id.*, para 14 [asserting that Genesis sent a false private balance sheet to Gemini that included the promissory note “as an asset that could be reduced to cash within a year”]). “Meanwhile, from July 2022 to November 2022, DCG further widened Genesis Capital’s structural hole” by forcing Genesis “to extend the maturity date for hundreds of millions of dollars’ worth of loans to DCG” (*id.*, para 14).

Finally, on November 16, 2022, Genesis “announced that it faced a liquidity crunch and would not return cryptocurrencies invested under Earn or obtained directly from other investors, leaving investors unable to redeem more than \$3 billion worth of assets” (*id.*, para 2; *see id.*, para 260). That is, Genesis suspended withdrawals on that date, while “it owed more than \$1 billion in cryptocurrencies and dollar-denominated assets to more than 232,000 Earn investors” (*id.*, para 262). Genesis also “owed dozens of Direct Investors more than \$2 billion in cryptocurrencies, U.S. dollars, and dollar-denominated assets as of November 16, 2022” (*id.*, para 263). Genesis then filed for bankruptcy in January 2023.

The Causes of Action Against the Remaining Genesis and DCG Defendants

As noted above, OAG settled its claims against Gemini and the Genesis entities (*see* Docs 77, 83 [settlement stipulations]). Thus, this decision addresses only OAG's second, fifth, seventh, eighth, and ninth causes of action against Moro, Silbert, and DCG (together, the defendants). OAG's first, third, fourth, sixth, and tenth causes of action were only against Gemini and/or the Genesis entities.

OAG asserts the following Martin Act [GBL Article 23-A] and Executive Law § 63 (12) claims against the three remaining defendants:

1. OAG's second cause of action [Martin Act] for engaging in fraudulent practices under GBL § 352;
2. OAG's fifth cause of action [Executive Law] for engaging in repeated or persistent fraudulent acts under the Executive Law;
3. OAG's seventh cause of action [Executive Law] for engaging in fraudulent or illegal acts [specifically, illegal acts in violation of the Martin Act/ GBL §§ 352, 352-c, and 353];
4. OAG's eighth cause of action [Executive Law] for engaging in illegal acts [specifically, illegal acts in violation of New York Penal Law § 190.65 (1) (b), Scheme to Defraud in the First Degree]; and
5. OAG's ninth cause of action [Executive Law] for engaging in illegal acts [specifically, illegal acts in violation of New York Penal Law § 105.05 (1), Conspiracy in the Fifth Degree].

Defendants now move to dismiss the amended complaint. Moro, Silbert, and DCG all seek dismissal on the basis that the amended complaint fails to state a cause of action against them. Sibert also moves to dismiss based on documentary evidence. OAG opposes the motions.

DISCUSSION

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court accepts the facts as alleged in the complaint as true and accords the non-moving party the benefit of every favorable

inference (*id.*). However, the court need not accept conclusory factual or legal allegations (*e.g.* *Wilson v Tully*, 243 AD2d 229, 234 [1st Dept 1998]).

To prevail on a CPLR 3211 (a) (1) motion, the movant must show “that the relied upon documentary evidence ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim’ ” (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted]). Movant must demonstrate that “the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted]).

1. OAG’s Martin Act Claim [second cause of action]

The Martin Act (General Business Law Article 23–A) prohibits certain deceitful and fraudulent practices in the distribution, sale, exchange, and purchase of securities, including:

“(a) Any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale;

(b) Any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances;

(c) Any representation or statement which is false, where the person who made such representation or statement: (i) knew the truth; or (ii) with reasonable effort could have known the truth; or (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation or statement made;

where engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities or commodities, as defined in section [352] of this article, regardless of whether issuance, distribution, exchange, sale, negotiation or purchase resulted”

(GBL § 352–c [1] [a] – [c]).

a. Plaintiff adequately alleges that Earn is a security under New York law

Defendants assert that the Martin Act claims must be dismissed because the Earn program is not a security. Specifically, they contend that “the Earn loans” are not “investment contracts” (*e.g.* Doc 36 [DCG mem supp] at 20-21). OAG responds that Earn was a security and the Earn investors exchanged commodities.

Under GBL § 352, “commodities” are “any commodity dealt in on any exchange within the United States of America or the delivery of which is contemplated by transfer of negotiable documents of title,” and “any foreign currency, and any other good, article, or material” (GBL §§ 352 [1], 359-e [14]). Thus, courts “have acknowledged that cryptocurrencies are a type of commodity under the definitions set forth the Martin Act and the Commodities Exchange Act” (*People by James v Mashinsky*, 79 Misc 3d 1237(A), *9 [Sup Ct, NY County 2023]).

The Martin Act defines “securities” as “stocks, bonds, notes, evidences of interest or indebtedness or other securities, including oil and mineral deeds or leases and any interest therein” (GBL § 352). Typically, New York State courts have applied the securities law tests set forth in *S.E.C. v W.J. Howey Co.* (328 US 293 [1946]) (*Howey*) and *In re Waldstein* (160 Misc 763 [Sup Ct 1936]) (*Waldstein*) to determine whether an instrument or transaction qualifies as an investment in a security (*see e.g. All Seasons Resorts, Inc. v Abrams*, 68 NY2d 81, 92 [1986]; *but see Mashinsky*, 79 Misc 3d 1237(A) at *7 n7 [noting it is unclear whether the *Waldstein* approach is still accepted]).

In *Sec. and Exch. Commn. v Genesis Glob. Capital, LLC* (2024 WL 1116877, at *1 [SDNY Mar. 13, 2024]), the federal district court recently addressed similar issues concerning the same Gemini Earn program. In that case, the SEC filed an action against Genesis and Gemini “alleging that they offered and sold unregistered securities through the Gemini Earn program” (*id.*). In resolving defendants’ motions to dismiss, the federal court determined that

the Gemini Earn program constitutes a security within the meaning of the Securities Act (*id.* at *5 - *9 [finding that Earn is a security under the *Howey* and *Reves* tests]). While that decision is not controlling, the court finds it persuasive.

Here, defendants contend that OAG's allegations do not establish that the Earn program constitutes a security under the Martin Act. The court disagrees. At this pre-answer stage, OAG's allegations are sufficient to state a Martin Act claim under both the *Howey* test and the *Waldstein* test. The *Waldstein* court "held long ago that 'any form of instrument used for the purpose of financing and promoting enterprises, and which is designed for investment, is a security according to the modern meaning of that term' " (*People v Van Zandt*, 43 Misc 3d 563, 573 [Sup Ct 2014]). The *Howey* test asks, "looking at the economic realities, the transaction 'involve[d] an investment of money in a common enterprise with profits to come solely from the efforts of others (328 U.S., at p 301)' " (*All Seasons Resorts, Inc. v Abrams*, 68 NY2d 81, 92 [1986], quoting *Howey, supra*; see also *SEC v Genesis Glob. Capital, LLC*, 2024 WL 1116877, at *5 ["This definition of investment contract 'embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.'" (citations omitted)]).

OAG's allegations are sufficient because, "looking at the economic realities," at this pre-answer stage, the transactions involved investment contracts. This is because the transactions involved Earn customers' investment of cryptocurrency commodities in a "common enterprise" [Genesis Capital's third-party lending operations]. In addition, the court can plausibly infer that the Earn investors' profits derived, at least in part, from Genesis' third-party lending business. OAG alleges that Genesis would set the interest rate that the Earn customers received based on the performance of Genesis' third-party loaning operations.

OAG credibly alleges that: “[t]o invest in Earn, investors first had to buy or hold cryptocurrency on Gemini’s [] platform”; Gemini issues a list of eligible cryptocurrencies for Earn on its webpage; Genesis was the “sole ‘approved borrower’ [permitted to] receive investors’ assets under Earn”; each Earn investor had to enter into a “Master Digital Asset Loan Agreement” (Earn Agreement) with Gemini and Genesis to participate in Earn; the agreement “set forth terms concerning the transfer and return of cryptocurrencies and the payment of fees”; Gemini pooled Earn investors’ assets together and transferred them to Genesis; and Genesis “in turn transferred these assets” to their own external accounts “where the assets were pooled and commingled” for Genesis’ use “in its lending business” (*id.*, paras 44-49). Upon withdrawal, Genesis was supposed to return the invested assets “along with the yield promised to the investor,” less Gemini’s “agent fee, which was deducted from the Earn investors’ assets and yield” (*id.*, para 50).

OAG explains:

“As a large institutional lender in the cryptocurrency industry, Genesis Capital negotiated more favorable loan terms and interest rates with borrowers than Earn investors could negotiate on their own. Genesis Capital paid yield to the Earn investors from the interest it earned on its loans to third parties. Thus, the Earn investors’ fortunes were tied to the effort and expertise of Genesis Capital, and the investors shared in the profits made by Genesis Capital”

(*id.*, para 51).

The yield rate fluctuated monthly as “Genesis Capital determined the types of cryptocurrencies it was willing to borrow and the yield it was willing to pay for each type of [cryptocurrency] asset” (*id.*, para 53; *see id.* para 55 [“Gemini and Genesis Capital controlled the interest rates and cautioned their investors: ‘rates may increase or decrease in the future.’ ”]). Gemini’s Earn webpage “referred to Earn as a ‘yield-generating cryptocurrency investment’ ” and “claimed that ‘[u]nlike other opportunities to earn interest on your cryptocurrency, [with

Earn] you can redeem your cryptocurrency at any time, with no penalties, and receive it at its current market value—plus the interest you’ve earned!’ ” (*id.*, para 52).

Thus, OAG adequately alleges here that Earn customers invested cryptocurrency assets in a common enterprise because “the returns earned by each investor were dependent on how Genesis pooled and deployed the crypto assets” (*SEC v Genesis Glob. Capital, LLC*, 2024 WL 1116877, at *7 [noting that “the complaint need only allege that ‘the fortunes of each investor depend upon the profitability of the enterprise as a whole’ ” (citation omitted)]; *see also People v First Meridian Planning Corp.*, 201 AD2d 145, 153 [3d Dept 1994], *aff’d* 86 NY2d 608 [1995] [applying the “broad” vertical commonality approach as it “consistent with the liberal interpretation to be given to the Martin Act to give effect to its remedial purpose” and that approach “is an interpretation that New York courts have given the *Howey* test”]; *Mashinsky*, 79 Misc 3d 1237(A) [Sup Ct, NY County 2023] [relying on “broad vertical commonality” test to satisfy common enterprise prong of *Howey* test]). This satisfies the common enterprise prong of the *Howey* test for a Martin Act claim, at least at this pre-answer stage.

In addition, OAG sufficiently alleges that Earn investors’ “expectation of profits was dependent on Genesis’ efforts” as “Genesis had ‘complete discretion’ as to how deploy the crypto assets once it took possession of them” (*SEC v Genesis Glob. Capital, LLC*, 2024 WL 1116877, at *9; *see also SEC v Infinity Grp. Co.*, 212 F3d 180, 189 [3d Cir 2000] [“(T)he definition of security does not turn on whether the investor receives a variable or fixed rate of return.”]; *see generally SEC v Edwards*, 540 US 389, 397 [2004] [“(A)n investment scheme promising a fixed rate of return can be an ‘investment contract’ and thus a ‘security’ ”]). This is sufficient to satisfy the expectation of profits prong of the *Howey* test at this juncture, particularly because OAG alleges that investors’ yields were generated by Genesis’ deployment

of the invested assets, Genesis and Gemini advertised Earn as a “yield-generating cryptocurrency investment,” and Gemini touted Genesis as “a partner due to their experience in managing a large loan portfolio.”

Next, the court rejects defendants’ argument that each Earn agreement constituted a loan, rather than an investment contract, at this time. It is not dispositive that the investors, Genesis, and Gemini agreed that the Earn investments “are intended to be commercial loans of Digital Assets and not securities under the U.S. federal or state securities laws” (Doc 33, section XXV).

Finally, the federal district court’s ruling in *Sec. and Exch. Commn. v Binance Holdings Ltd.* (738 F Supp 3d 20, 62 [DDC 2024]) (*Binance*) does not require a different result. In *Binance*, the district court found that one of the defendant’s programs, called “Simple Earn,” was not an investment contract. With respect to Simple Earn, the court found that

“the allegations concerning Simple Earn do not describe a scheme or transaction in which investors were urged to put their money in Binance’s hands so that they could share in the return that Binance would generate through its managerial or entrepreneurial efforts. The holders of crypto assets simply agreed to loan them to the company for a specified period of time at a specified rate of interest, and the complaint lacks any allegation that they were led to believe that Binance’s efforts would generate the return or make the assets more valuable at the end of the day. Binance could pool the assets or not, and it could deploy them for any purpose, without any connection between the use of the funds and the rewards paid to “investors.” Moreover, the interest rate paid would be set at Binance’s discretion, at a rate that would take market conditions and competitors’ offerings into consideration, and the company explicitly disavowed any relationship between the interest rate to be paid and the company’s profitability”

(*id.* at 62).

Unlike Binance’s “Simple Earn” program, the Gemini Earn agreements specifically state that “[Genesis] intends to use any Loaned Assets under this Agreement in its Digital Asset lending business,” and the defendants advertised the Gemini Earn program as a “yield-generating

cryptocurrency investment.” Thus, the allegations create a plausible inference that the investors’ returns were dependent, to some degree, on the success of Genesis’ overall lending operation.

b. OAG’s Martin Act claim does not otherwise fail to state a claim

Under GBL § 353, OAG is authorized to file Martin Act claims against “any person” or entity “concerned in or in any way participating in . . . fraudulent practices.” “[T]he Martin Act expands upon, rather than codifies, the common law of fraud” (*People by Schneiderman v Credit Suisse Sec. (USA) LLC*, 31 NY3d 622, 632 [2018]). The “broad definition of ‘fraudulent practices[]’ . . . encompasses ‘wrongs’ not cognizable under the common law and dispenses, among other things, with any requirement that the Attorney General prove scienter or justifiable reliance on the part of investors” (*id.*; see also *State of New York v Sonifer Realty Corp.*, 212 AD2d 366, 367 [1st Dept 1995]). The Martin Act “is remedial in nature and should be liberally construed” (*People ex rel. Cuomo v Merkin*, 26 Misc 3d 1237(A) [Sup Ct, New York County 2010], citing *People v Lexington Sixty-First Assocs.*, 38 NY2d 588, 595 [1976]).

“Despite the Martin Act’s exceedingly broad scope and its limited elements,” CPLR 3016 (b)’s heightened pleading requirements apply to Martin Act claims, and “materiality is ‘an essential element’ of a Martin Act claim” (*People ex rel. Schneiderman v Barclays Capital Inc.*, 47 Misc 3d 862, 869 [Sup Ct, NY County 2015] [citations omitted]). That is, “representations that are immaterial to an investment decision are not actionable,” and “the test for materiality is whether defendants’ representations, taken together and in context, would have [misled] a reasonable investor about the nature of the investment” (*id.* [internal citations and quotation marks omitted]). “Officers and directors are liable for a corporation’s fraud where they either personally participate in the fraud or have actual notice of its existence” (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 483 [1st Dept 2012], *affd* 21 NY3d 439 [2013]).

Here, OAG adequately alleges its Martin Act claim against Silbert, Moro, and DCG. OAG asserts that Genesis' second-largest borrower, Three Arrows, defaulted on billions of dollars of loans from Genesis on 6/13/22 (Amended Complaint, paras 117-123). Three Arrows' collateral was insufficient to cover all of the losses, and Genesis was left with about \$1 billion in unsecured exposure, creating an equity hole on Genesis' balance sheet (*id.*, paras 145-146). OAG asserts that DCG, Silbert [DCG's CEO], and Moro [Genesis' CEO] each participated in, and had knowledge of, a concerted effort to conceal Genesis' financial condition following the Three Arrows default.

Specifically, OAG alleges Silbert instructed Moro to lead Genesis' response to the default "with support and guidance from DCG" (Amended complaint, para 126). Moro agreed that Genesis "will manage through this with help from [Silbert] and DCG" (Doc 40 [ex 40 to Silber aff in support of MS 03]). Following the default, DCG allegedly helped Genesis create an "overall plan" to cover up Genesis' true financial condition, including by drafting or reviewing misleading internal and external "talking points." OAG's allegations demonstrate that DCG and Genesis, and their respective CEOs, recognized internally that Genesis' financial condition was quickly deteriorating and even worried that Genesis would face a bank run. Thus, Silbert directed Genesis to restrict its normal lending operations to "aggressively shrink[] the loan book" (*id.*, para 130). That is, Silbert told Genesis to stop lending to new borrowers to preserve Genesis' fragile liquidity (*see id.*; *see also id.* paras 126, 147; *cf. also* Doc 42 [email noting Genesis' liquidity issues], Doc 44).

Externally, defendants painted a rosier picture of Genesis' financial condition. On 6/15/22, Genesis' Twitter account stated "[d]espite continued heightened market volatility the Genesis balance sheet is strong," and its "business is operating normally" (amended complaint, ¶

132). Both DCG and Silbert “re-tweeted” that message. The defendants internally discussed the tweet and its impact on the public. In an internal chat including Genesis and DCG officers, Genesis’ Head of Trading reported that “multiple clients have stated that our tweet helped them get comfortable and keep their loans to us” (*see* Doc 69 [Microsoft Teams chat log between Genesis and DCG staff from 6/15/22]).

On 6/17/22, Moro issued a public tweet from his personal Twitter account that DCG allegedly help to draft:

“Genesis can confirm that we carefully and thoughtfully mitigated our losses with [Three Arrows]. **No client funds are impacted.** We sold and/or hedged all of the liquid collateral on hand to minimize any downside. We will actively pursue recovery on any potential residual loss through all means available, however our potential loss is finite and can be netted against our own balance sheet as an organization. **We have shed the risk and moved on**”

(amended complaint, paras 136, 140-141).

Genesis was still facing negative equity in advance of its 6/30/22 deadline to provide a private balance sheet to select counterparties (including Gemini). On 6/28/22, Moro emailed Silbert and suggested “injecting certain assets to ‘plug the equity hole’ ” **“for liquidity purposes, it could just be for balance sheet support”** to coax “additional unsecured funding” (amended complaint, paras 152-153). Silbert responded that DCG hoped and intended to help Genesis “address the equity hole” and “[t]o that end, the Genesis team should be working 24/7 with DCG . . . to figure out all possible ways to do so” (*id.*, para 155). DCG and Genesis then entered into a \$1.1 billion note whereby DCG agreed to pay Genesis that sum, with 1% interest, in 10 years. The note would “replace” Genesis’ lost receivables from Genesis Asia that the Three Arrows default wiped out (*id.* para 156). Genesis “categorized this \$1.1 billion as an asset on its balance sheet” (*id.*).

On 7/6/22, Moro tweeted that “DCG has assumed certain liabilities of Genesis related to [Three Arrows] to ensure [Genesis has] the capital to operate and scale . . . for the long-term” (*id.*, para 160). These tweets were allegedly drafted together with DCG, and Genesis told its sales representatives to share the tweets with “any clients . . . that have either halted doing business with us or slowed down materially citing concerns over our exposure to [Three Arrows]” (*id.*, para 162). From July – November 2022, Genesis deployed “talking points” (that it shared with DCG for “review and approval”). These talking points mischaracterized the Note, and misrepresented that DCG “absorbed” the Three Arrows losses and that Genesis was “well capitalized” (*id.*, paras 167-168). Genesis and DCG allegedly communicated these talking points to investors, as well as counterparties such as Gemini.

Ultimately, Genesis was forced to suspend withdrawals in November 2022. On 11/16/22, Genesis finally admitted “[t]he default of [Three Arrows] negatively impacted [our] liquidity and duration profiles” (*id.*, para 261). In an emergency loan application on 11/12/22, Genesis and DCG revealed that the “liquidity crunch” was caused by three “illiquid assets on its balance sheet following” the Three Arrows default: the \$1.1 billion Note, certain collateral [shares in Grayscale Bitcoin Trust] that that Silbert instructed Genesis not to sell, and Genesis’ uncollateralized loans to DCG (*id.*, ¶ 257).

These facts, and other allegations in the amended complaint, are sufficient to state a Martin Act claim against Moro, Silbert, and DCG. Further, there is at least an issue of fact as to whether defendants’ misrepresentations and omissions would have materially misled investors, especially when considered together and in the context of the Three Arrows default (*People v Merkin*, 26 Misc 3d 1237(A) [Sup Ct 2010] [“Where the Martin Act claims are based on the defendant's omissions or failure to disclose, the omitted facts must be material—that is, that there

is a substantial likelihood that the omitted fact would have assumed actual significance in the deliberations of a reasonable investor.”], citing *State of New York v Rachmani Corp.*, 71 NY2d 718, 726 [1988] [“[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”]). “Materiality is a mixed question of fact and law” that is often “inappropriate for resolution at the motion to dismiss stage” (*People v Merkin*, 26 Misc 3d 1237(A), *supra*, citing *ECA, Local 134 IBEW Joint Pension Trust of Chicago v JP Morgan Chase Co.*, 553 F3d 187, 197 [2d Cir 2009]; *In re NovaGold Resources Inc. Sec. Litig.*, 629 F Supp 2d 272, 292 [SDNY 2009]).

In addition, individual defendants Silbert and Moro, CEOs of DCG and Genesis, respectively, are not entitled to dismissal at this juncture. “Officers and directors are liable for a corporation’s fraud where they either personally participate in the fraud or have actual notice of its existence” (*People v Greenberg*, 95 AD3d 474, 483 [1st Dept 2012], *affd* 21 NY3d 439 [2013]). OAG’s allegations plainly establish that Silbert and Moro had knowledge of the purported fraud and participated in the overall scheme to cover up Genesis’ liquidity hole to encourage investors to continue doing business with Genesis through the Earn program.

The court disagrees with defendants’ argument that the pleading lacks specificity under CPLR 3016 (b). While CPLR 3016 (b) applies to Martin Act fraud claims, “[t]his requires ‘facts sufficient to permit a reasonable inference of the alleged conduct’ ” (*People v Mashinsky*, 79 Misc 3d 1237(A) [Sup Ct, NY County 2023] [citations omitted]). CPLR 3016 (b) does not require “unassailable proof of fraud” (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). OAG alleges its Martin Act claim with adequate specificity by reciting the facts, detailing the alleged misrepresentations and omissions, and explaining the general audience for

those misstatements and omissions. OAG also provides the surrounding context and explains how the statements and omissions were allegedly false or misleading.

The court also rejects defendants' arguments that the complaint must be dismissed under the Communications Decency Act (47 USC § 230) or the federal "maker doctrine." The CDA does not immunize Silbert and DCG because the allegations in the complaint against these defendants are not limited to only two "re-tweets." As discussed above, the "re-tweets" were part of the alleged overall scheme to cover up Genesis' negative liquidity following the Three Arrows default. Likewise, dismissal under the federal maker doctrine is not warranted at this pre-answer stage. "It is well established that liability for fraud may be premised on knowing participation in a scheme to defraud, even if that participation does not by itself suffice to constitute the fraud" (*Kuo Feng Corp. v Ma*, 248 AD2d 168, 168-169 [1st Dept 1998]).

For these reasons, the court denies defendants' motions to dismiss the second cause of action.

2. OAG's Executive Law Claims

Executive Law § 63 (12) "defines the fraudulent conduct that it prohibits, authorizes the Attorney General to commence an action or proceeding to foreclose that conduct, and specifies the relief, including equitable relief, that the Attorney General may seek" (*People v Trump Entrepreneur Initiative LLC*, 137 AD3d 409, 417 [1st Dept 2016]).

In the context of a § 63 (12) proceeding,

"[t]he word 'fraud' or 'fraudulent' . . . shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term 'persistent fraud' or 'illegality' . . . shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term 'repeated' as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person"

(Exec. Law § 63 [12]).

Thus, fraud claims under § 63 (12) are broader than common law fraud and can be established without proof of scienter or reliance (*see People v Trump Entrepreneur Initiative LLC*, 137 AD3d 409, 417 [1st Dept 2016]; *People v Coventry First LLC*, 52 AD3d 345, 346 [1st Dept 2008]). “The test for fraud under Executive Law § 63 (12) is whether the targeted act has the capacity or tendency to deceive or creates an atmosphere conducive to fraud” (*People v Northern Leasing Sys., Inc.*, 193 AD3d 67, 68 [1st Dept 2021]).

Executive Law § 63 (12) claims have been applied to a wide array of respondents, including persons with knowledge of fraudulent schemes, individuals who perpetrated those schemes, and pass-through entities and knowing recipients of fraudulently obtained proceeds (*see People v Leasing Expenses Co. LLC*, 199 AD3d 521, 523 [1st Dept 2021]; *see also e.g. People v Northern Leasing Sys., Inc.*, 169 AD3d 527, 528 [1st Dept 2019]; *People v One Source Networking, Inc.*, 125 AD3d 1354, 1357 [4th Dept 2015] [“Because Executive Law § 63 (12) allows the Attorney General to seek relief against ‘any person,’ there is no impediment to imposing personal liability against a corporate officer if it is established that he [or she] personally participated in or had actual knowledge of the fraud or illegality.”] [quotations omitted]; *People v Apple Health and Sports Clubs, Ltd., Inc.*, 80 NY2d 803, 808 [1992] [finding that “interlocking corporations” that “acted in concert” can be liable for fraudulent and illegal activities]).

Executive Law § 63 (12) was “meant to protect not only the average consumer, but also the ignorant, the unthinking and the credulous” (*State v Northern Leasing Sys. Inc.*, 193 AD3d at 75). Section 63 (12) actions have also been maintained on behalf of the people of New York (*e.g. People v Sprint Nextel Corp.*, 26 NY3d 98, 109 [2015]), and “to recover overpayments of

reimbursements” paid by New York’s Medicaid program (*e.g. People v Pharmacia Corp.*, 39 AD3d 1117, 1118 [3d Dept 2007]).

a. OAG’s fifth and seventh Executive Law causes of action for repeated or persistent fraud and illegality under the Martin Act

Defendants move to dismiss the fifth and seventh Executive Law causes of action on the basis that they fail to state a claim. However, the court sustained the Martin Act claim above and OAG’s Executive Law causes of action are subject to less restrictive pleading requirements. Thus, the court denies defendants’ motions to dismiss OAG’s fifth and seventh causes of actions for the reasons discussed above in connection with OAG’s Martin Act claim [second cause of action]. That is, these causes of action are sufficiently pleaded as to each defendant.

b. OAG’s eighth and ninth Executive Law causes of action for illegality in violation of the Penal Law

The court grants defendants’ motions to dismiss the eighth and ninth causes of action. In these claims, OAG asserts Executive Law 63 § (12) claims for alleged illegality under the New York Penal Law. The eighth cause of action seeks to hold defendants liable for engaging in illegal acts in violation of New York Penal Law § 190.65 (1) (b), Scheme to Defraud in the First Degree. The ninth cause of action seeks to hold defendants liable for engaging in illegal acts in violation of New York Penal Law § 105.05 (1), Conspiracy in the Fifth Degree.

Pursuant to NY Penal Law § 190.65 (1) (b), a person commits a scheme to defraud in the first degree when they engage “in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person or to obtain property from more than one person by false or fraudulent pretenses, representations or promises, and so obtains property with a value in excess of one thousand dollars from one or more such persons.” Pursuant to NY Penal Law § 105.05 (1), a person commits 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.

These claims are duplicative as they are based on the same acts and omissions as the less restrictive Martin Act and Executive Law claims that the court sustained above.

CONCLUSION

The court has considered the defendants' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that Motion Seq. Nos. 02, 03, and 05 are granted only to the extent that the eighth and ninth causes of action are dismissed from the amended complaint; and it is further

ORDERED that the motions to dismiss are otherwise denied; and it is further

ORDERED that defendants shall answer the amended complaint within 20 days from the date of this decision and order.

4/9/2025
DATE

Melissa A. Crane
MELISSA A. CRANE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	DENIED		