UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

WILLIAM MCGREEVY, ASHWIN GOWDA, TRANSLUNAR CRYPTO, LP, CHRISTOPHER BUTTENHAM, REMO MARIA MORONE, DOMINIC MACRI, LARRY WIENER, DEREK WILSON, DANIEL AMELI, and LEE JACOBSON, individually and on behalf of all others similarly situated, Plaintiffs, v. DIGITAL CURRENCY GROUP, INC., BARRY SILBERT, MICHAEL KRAINES, MARK MURPHY, SOICHIRO "MICHAEL" MORO, and DERAR ISLIM, Defendants.	Case No. 3:23-cv-00082-SRU Hon. Stefan R. Underhill April 2, 2026

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO CERTIFY THE FEBRUARY 24, 2026 ORDER FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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PRELIMINARY STATEMENT

The Court's February 24, 2026 Order on Defendants' Motions to Dismiss raises a discrete, debatable, and dispositive question of law uniquely suitable for interlocutory appeal: whether interest-bearing cryptocurrency accounts qualify as "securities." The DCG Defendants respectfully request that the Court certify that question for immediate review by the Second Circuit.

Each of the requirements for certification under 28 U.S.C. § 1292(b) is satisfied. The question of whether interest-bearing cryptocurrency accounts qualify as "securities" is controlling because Plaintiffs' remaining claims under the Securities Act and Exchange Act cannot go forward if the Genesis Yield program is not a security. The case would be dismissed. Additionally, the issue is both novel and debatable. In holding that such accounts may qualify as securities, this Court recognized "the difficulties of using older legal frameworks to evaluate a modern industry that has evolved unpredictably and rapidly." ECF No. 216 at 10. The Court was required to opine on novel questions about how to apply both *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), and *Reves v. Ernst & Young*, 494 U.S. 56 (1990), to financial instruments in the crypto industry. An immediate appeal would provide certainty to the parties and this Court about the proper resolution of this case-dispositive question. And finally, immediate appellate review would allow for efficient resolution of these issues at the outset of this case. Should the Second Circuit conclude that the accounts at issue here are *not* securities, then the case will terminate completely. Finding that answer now would benefit all parties and this Court, avoiding the time, expense, and strain on judicial resources of many years of litigation.

In sum, these are the precise circumstances for which interlocutory appeal is designed.

ARGUMENT

Under 28 U.S.C. § 1292(b), a district court may certify an otherwise non-appealable order for interlocutory appeal where the court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Each of these factors is satisfied here.

I. Whether interest-bearing crypto accounts qualify as a "security" is a controlling question of law.

The threshold question of whether Plaintiffs have plausibly alleged that the Genesis Yield program is a security is a "controlling question of law." That question is a "purely legal one" because it turns on the application of the statutory standard to allegations in the pleadings and thus is "largely a matter of statutory interpretation, rather than a matter of analyzing a factual record." *SEC v. Coinbase, Inc.*, 761 F. Supp. 3d 702, 715 (S.D.N.Y. 2025). And, as the Second Circuit has explained, "it is clear that a question of law is 'controlling' if reversal of the district court's order would terminate the action." *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990). Because this Court declined to exercise supplemental jurisdiction over Plaintiffs' state-law causes of action, *see* ECF No. 216 at 49–50, the only remaining causes of action in this case arise under the Securities Act and the Exchange Act. And, as this Court has recognized, the "Securities Act and Exchange Act claims necessarily fail" unless Plaintiffs have "adequately allege[d] that the Genesis Yield program is a security." *Id.* at 9. Because a decision holding that the Genesis Yield program is not a security would lead to judgment in favor of the defendants, that question of law is "controlling" for purposes of § 1292(b).

This question is also controlling because "the certified issue has precedential value for a large number of cases." *SEC v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 227 (S.D.N.Y. 2000). A person that sells a non-exempt security for which no registration statement is in effect may be liable under the Securities Act regardless of whether the seller engages in any fraudulent or otherwise culpable activity. *See* 15 U.S.C. § 77e(a). Under Plaintiffs' theory, then, any business that offers to pay interest on cryptocurrency accounts may be subject to liability unless it has filed a registration statement for such accounts. That framework could have significant implications for many businesses, particularly as consumers increasingly turn to cryptocurrency as a substitute for traditional currency. *See* Dalvin Brown, Wall Street Journal, *Crypto Fans Have an Alternative to Savings Accounts. Banks Are Freaking Out* (Mar. 5, 2026) (discussing the rise of accounts that pay yield on stablecoin deposits).

II. There is substantial ground for difference of opinion as to whether interest-bearing crypto accounts qualify as a "security."

As this Court has previously recognized, there is substantial ground for difference of opinion where the issue in question "is one of first impression, or is not substantially guided by previous decisions." *In re Aggrenox Antitrust Litig.*, 2018 WL 834228, at *6 (D. Conn. Feb. 12, 2018) (Underhill, J.) (citations and internal quotation marks omitted). That aptly describes the task of applying the almost-100-year-old securities laws to the cryptocurrency accounts at issue here. Indeed, this Court recognized "the difficulties of using older legal frameworks to evaluate a modern industry that has evolved unpredictably and rapidly." ECF No. 216 at 10. So, too, this Court recognized that "the Genesis Yield program will not 'fit neatly' within" either the *Howey* test for investment contracts or the *Reves* test for notes. *Id.* In fact, for just these reasons, a different district court in the Second Circuit certified an order relating to other types of crypto services for interlocutory appeal only last year, explaining that "the application of *Howey* to

crypto-asset transactions is … a difficult legal issue of first impression for the Second Circuit," and that certification of a pleading-stage decision holding that cryptocurrency tokens qualified as securities was thus warranted. *Coinbase*, 761 F. Supp. 3d at 719.[1]

That "securities" question is even more difficult here because the Genesis accounts at issue resemble interest-bearing deposit accounts in many respects. Lenders received interest at defined rates that were adjusted monthly or weekly depending on supply and demand, just like an ordinary deposit account. *See* TAC ¶ 192. And, just like an ordinary deposit account, lenders were promised that defined interest rate for each month or week regardless of what happened to Genesis's fortunes. Indeed, that is why Plaintiffs are creditors—not equity investors—in the underlying bankruptcy. *See id.* ¶¶ 17–19.

Like traditional lenders, Plaintiffs merely faced counterparty risk—the risk of insolvency that is inherent in virtually any commercial transaction—as well as the market risk of declining interest rates in the markets overall, faced by any depositor in a checking or savings account. In fact, Plaintiffs have repeatedly analogized the Genesis Yield program to an ordinary deposit account, *see id.* ¶¶ 235–36 (stating that Genesis used the "same business model utilized by commercial banks" that pay interest); July 1, 2025 Hearing Tr., ECF No. 210, at 7–8 (stating that "[i]t is hard to distinguish this product from a bank account"), although they disagree as to the implications of that comparison.

This Court's application of *Howey* and *Reves* thus necessarily required the Court to address unsettled questions about the application of those frameworks to offerings that do not resemble traditional investment contracts or notes.

[1] This litigation settled before the Second Circuit acted on the petition for interlocutory review. *See Coinbase, Inc. v. SEC*, No. 25-145 (2d Cir.), ECF No. 56 (Mar. 4, 2025).

A. There is substantial ground for difference of opinion as to whether interest-bearing cryptocurrency accounts may qualify as investment contracts under *Howey*.

The Genesis accounts at issue here do not resemble a normal investment contract. Lenders did not commit capital to a venture with the expectation of open-ended upside based on the promoter's entrepreneurial efforts—or the downside risk of loss should those efforts fall flat. Instead, customers were paid a pre-defined amount of interest on their assets, with rights in bankruptcy should Genesis become insolvent. This Court previously remarked on the difference between these accounts and traditional investments, comparing Genesis to a "bank making a loan." July 3, 2024 Hearing Tr., ECF No. 167, at 52:9–10. Nonetheless, this Court ultimately held that Genesis's account offerings qualified as investment contracts under *Howey*. In coming to this conclusion, the Court addressed two issues that are not controlled by existing law and that are subject to reasonable debate.

First, *Howey* requires that there be a "common enterprise," *see* 328 U.S. at 299, which in turn requires, as a matter of horizontal commonality, the "tying of each individual investor's fortunes 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). There is, at a minimum, substantial ground for debate about how that standard applies here, because there was no distribution of Genesis's profits at all, much less the kind of pro rata distribution that is the hallmark of an investment contract. Instead, lenders were promised a defined interest rate on top of the underlying value of the assets they loaned to Genesis; they were not offered and did not receive any return based on the fortunes of a common enterprise that were generated by the pooling of assets. *See* TAC ¶ 183 ("Class members sought to invest in Genesis Yield securities by loaning crypto or cash in exchange for a fixed rate of return in the form of interest on an unsecured basis and the promise of the return of principal at maturity."). Interest rates, moreover, were fixed over

the course of any given month for the Gemini Earn program and every week for direct lenders. *See id.* ¶ 192. Once the rate was fixed, there was no commonality, because investors' fortunes did not depend on the profits (or losses) of the enterprise or of any other investor. Nor did the method for setting the rates for each period involve commonality. Typical of variable rate loans, rates were set based on market interest rates, *see id.* ¶ 194; ECF No. 180, Ex. G, at 12, not based on the extent of Genesis's profits or losses in the prior period.

This Court reasoned that horizontal and strict vertical commonality were met because, "if Genesis identified higher-yield opportunities to invest the plaintiffs' digital assets, the plaintiffs would then receive higher rates of return" and, thus, "the fortunes of the investors depended on Genesis's continued success." ECF No. 216, at 15–16. But the Second Circuit has cautioned that commonality cannot "be established by the mere showing that the fortunes of investors are tied to the efforts of the promoter"; rather, under strict vertical commonality, as under horizontal commonality, it must be the case "that the fortunes of investors [are] tied to the *fortunes* of the promoter." *Revak*, 18 F.3d at 87–88. One could reasonably disagree whether this requirement is met when lenders simply received yield on the assets they lent that did not depend on whether Genesis actually earned profits (or losses) in any given month or week.

Moreover, the Court's observation that Genesis could offer higher rates of return depending on Genesis's ability to identify higher-yield opportunities is true in a host of debtor-creditor relationships that are not generally considered to be investment contracts. In any lending arrangement where rates are periodically repriced, the borrower may offer higher or lower interest depending on the lending opportunities in the market and the rate it must pay to attract capital. *See* TAC ¶ 194 (alleging that Genesis adjusted interest rates based on "(1) the opportunities to invest digital assets and earn yield Genesis Global Capital saw *in the market*; and (2) the rate of return

Genesis Global Capital determined it needed to offer prospective investors to attract investment capital to take advantage of the investment opportunities" (emphasis added)). In a high-yield savings account, for instance, the bank pays out variable interest rates that turn on market forces, and in turn must identify opportunities to make use of its assets that can sustain competitive interest rates. *See In re Capital One 360 Savings Account Interest Rate Litig.*, 779 F. Supp. 3d 666, 684 (E.D. Va. 2024) ("customers' reasonable expectations for 'high interest' or 'high yield' savings accounts" are that "the rates on their accounts … fluctuat[e] with market conditions"). The same is true in other contexts ranging from credit cards to asset-based loans and repurchase agreements. *See, e.g.*, Fed. Reserve Bank of Richmond, *Instruments of the Money Market*, at 60 (T. Cook & R. Laroche eds., 1993 ed.) ("[R]epo interest rates are influenced by overall money market conditions, the competitive rates paid for comparable funds in related markets, and the availability of eligible collateral."). In all of these cases, the lenders' returns are not primarily generated by the "pooling of assets" that sustain the underlying business; rather, they are determined by the overall supply-and-demand for money or the asset in question. So too here.

Indeed, this Court itself has previously recognized the potential problem, observing that "[p]icking a higher rate than payable elsewhere doesn't create a security" and that there is a difference between profits that are "used to pay the interest" and returns that are "dependent upon" a company's profits. July 3, 2024 Hearing Tr., ECF No. 167, at 52:6–7, 68:10–20. As the Court further observed: "We're going to pay you 13 percent. That's better than you can get at your bank. And … we think we can do that because we're such a successful investment company. That doesn't connect the lender to the success of Genesis, does it?" *Id.* at 57:16–20.

At a minimum, then, there is significant room for disagreement as to whether commonality can be satisfied in the context of interest-bearing accounts where the interest rate is periodically

adjusted to reflect competitive market rates, and not by reference to the institution's profits (or losses). In its order denying dismissal, this Court did not identify any controlling authority—or indeed, any appellate authority—on the question, nor did Plaintiffs in their opposition to dismissal.

And the federal district courts have disagreed on the issue. In *SEC v. Binance Holdings Ltd.*, the court held that cryptocurrency loans under a similar "Simple Earn" program did not qualify as a security because "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." 738 F. Supp. 3d 20, 62 (D.D.C. 2024). This Court distinguished *Binance* on the ground that the Genesis Yield program was marketed as a "program that allows our customers the ability to generate a real return on their crypto holdings." ECF No. 216, at 15. But that is a feature of *any* interest-bearing account, including the Simple Earn program in *Binance*. Thus, *Binance* at least shows that district courts have taken different approaches in this context.

Second, *Howey* requires that investors have "the expectation that they would earn a profit solely through the efforts of the promoter or of some one other than themselves." 328 U.S. at 298. As the Second Circuit has explained, this element turns on whether "the scheme was being promoted primarily as an investment or as a means whereby participants could pool their own activities, their money and the promoter's contribution in a meaningful way." *United States v. Leonard*, 529 F.3d 83, 88 (2d Cir. 2008) (internal quotation marks omitted). Here, however, investors expected to receive profits based "primarily" on the supply-and-demand mechanics for the assets they lent, not based on Genesis's profits or losses. As Gemini's website explained, interest rates "vary based on the supply and demand for each cryptocurrency in crypto lending markets, similar to how interest rates vary for any type of currency." ECF No. 180, Ex. G, at 12.

This Court held otherwise, primarily relying on an out-of-circuit opinion holding that a promoter's activities did not qualify because they were "clerical and routine in nature, not managerial or entrepreneurial, and therefore unimportant to the source of investor expectations." *SEC v. Life Partners, Inc.*, 87 F.3d 536, 545–46 (D.C. Cir. 1996). This Court reasoned that, because Genesis "controlled the pooled crypto assets," it engaged in functions that "are managerial, require specialized knowledge, and could not be completed by the average person." ECF No. 216, at 17–18. But *Life Partners* did not suggest that the application of any managerial efforts is sufficient if returns depend primarily on market conditions. Again, even in an ordinary bank account, the bank will necessarily take managerial steps that require specialized knowledge and could not be completed by the average person, namely, lending and reinvesting the deposits to earn profits. The Court's analysis of this issue—which did not rely on controlling authority—is therefore subject to reasonable disagreement.

B. There is substantial ground for difference of opinion as to whether interest-bearing cryptocurrency accounts may qualify as notes under *Reves*.

The Court's determination that accounts in the Genesis Yield program may qualify as security "notes" is likewise debatable. The Court's Order does not discuss a threshold and dispositive question: whether interest-bearing cryptocurrency accounts are "notes" in the first place, such that they are subject to the *Reves* analysis. *See* ECF No. 216, at 18. That issue, which DCG raised in its motion, *see* ECF No. 177, at 15–16, is readily debatable.

A deposit account is not a note. A note is a "two-party negotiable instrument," *i.e.*, a "written instrument that (1) is signed by the maker or drawer, (2) includes an unconditional promise or order to pay a specified sum of money, (3) is payable on demand or at a definite time, and (4) is payable to order or to bearer." Black's Law Dictionary at 1136, 1162 (9th ed. 2009). When Plaintiffs loaned assets to Genesis, however, they did not receive any written instrument in

exchange that they could trade, redeem, or endorse to third parties. They retained the contractual right to withdraw their assets—the same rights possessed by anyone with a checking account. And lenders were expressly *prohibited* from assigning their interest in the lending arrangements to third parties. *See* ECF No. 180, Ex. A § XVII, Ex. B § XVII. Put simply, there are no "notes" here. The contracts instead prohibit treating the accounts like notes.

Because the accounts at issue are not notes in the first place, there is room for disagreement as to whether the *Reves* test can even apply. After all, *Reves* did not set forth a test for determining whether any contract or financial instrument should be deemed a "note"; it articulated a test for determining whether an instrument that qualifies as a "note" should be treated as a security. *See* 494 U.S. at 60 ("This case requires us to decide whether the note issued by the Co-Op is a 'security' within the meaning of the 1934 Act."); *id.* at 67 ("We conclude … that in determining whether an instrument *denominated a 'note'* is a 'security,' courts are to apply the version of the 'family resemblance' test that we have articulated here." (emphasis added)). There do not appear to be any appellate cases addressing whether interest-bearing cryptocurrency accounts (or any interest-bearing accounts, for that matter) qualify as notes. This question would thus necessarily be one of first impression for the Second Circuit.

Even if *Reves* did apply, moreover, there is ample room for disagreement—and no controlling authority—as to how that test applies in the context of accounts that pay fixed interest on loaned assets that is adjusted periodically based on market rates. For instance, one of the *Reves* factors concerns "the motivations that would prompt a reasonable seller and buyer to enter into" the transaction. *Reves*, 494 U.S. at 66. This Court held this factor satisfied because the TAC alleged that Plaintiffs "were primarily interested in the profit they expected the program to generate" and that Genesis "was focused on obtaining the plaintiffs' crypto assets to run its

investment activities." ECF No. 216, at 20. In the context of Genesis's programs, however, lenders would have been motivated to lend cryptocurrency because they believed that Genesis could pay a competitive yield on top of the underlying value of the asset itself, *see* TAC ¶ 194—not because they wished to "invest in the future success of the buyer" and expected a price that "might vary along with the success, or lack thereof, of the buyer's business." *Intelligent Digit. Sys. LLC v. Visual Mgmt. Sys., Inc.*, 683 F. Supp. 2d 278, 284 (E.D.N.Y. 2010). Especially given the lack of appellate precedent in this area, one could reasonably disagree whether the desire to profit from the market interest generated by an asset qualifies as the sort of investment motivation contemplated by *Reves*.

For this same reason, the "reasonable expectations of the investing public"—another *Reves* factor, *see* 494 U.S. at 66—would have been to receive the defined interest rate on top of the value of the underlying asset, not based on Genesis's profits or losses. For instance, Gemini explained that the rates for the Gemini Earn program were "subject to the same market forces of supply and demand that affect every lending market," and that its interest rates were adjusted "based on market-wide shifts for specific crypto." ECF No. 180, Ex. G, at 12. So, too, Gemini Earn lenders were told that the accounts were "intended to be commercial loans of Digital Assets and not securities." ECF No. 180, Ex. B, § XXV. Indeed, in the SEC's suit against Genesis, the court recognized that there were "'countervailing factors' that might have led a reasonable person to question whether the notes were investments." *SEC v. Genesis Global Capital, LLC*, 2024 WL 1116877, at *13 (S.D.N.Y. Mar. 13, 2024). And the Second Circuit has emphasized that, even if there are "isolated references to 'investors' in the loan documents," where such documents "more consistently refer to the buyers as 'lenders,'" this factor cuts against viewing the note as a security. *Kirschner v. JP Morgan Chase Bank, N.A.*, 79 F.4th 290, 308 (2d Cir. 2023). Here, where Genesis

disclaimed to buyers that the loans served as an investment opportunity and where the economic value of the loans turned simply on the underlying assets, one could reasonably disagree as to whether the "reasonable expectations" factor is met.

Finally, there is substantial ground for disagreement as to whether the "'plan of distribution' of the instrument" suggests that it is "an instrument in which there is common trading for speculation or investment." *Reves*, 494 U.S. at 66 (internal quotation marks omitted). This Court held this factor satisfied because Genesis offered accounts to "a broad segment of the public," even though the accounts could not be assigned and had no secondary market. ECF No. 216, at 20 (quoting *Kirschner*, 79 F.4th at 306). But other courts in the Second Circuit have previously held that the absence of a secondary market is dispositive on this *Reves* factor, even if not dispositive of the *Reves* analysis as a whole. *See Nat'l Bank of Yugoslavia v. Drexel Burnham Lambert, Inc.*, 768 F. Supp. 1010, 1015 (S.D.N.Y. 1991) ("Since there is no allegation that there was a secondary market for the time deposits, the Bank does not show that there was 'common trading for speculation or investment' in the notes."). And the Second Circuit has recognized that "assignment restrictions … weig[h] against concluding that the relevant [instruments] are securities." *Kirschner*, 79 F.4th at 307. In any event, this factor too demonstrates that *Reves* is a misfit for the accounts at issue here, which functioned as a mechanism for lenders to earn returns on the cryptocurrency they already owned rather than as a platform to purchase an instrument that might serve as a vehicle "for speculation or investment." *Reves*, 494 U.S. at 66.

* * *

The subsidiary issues identified above all resolve to the same ultimate question: whether an interest-bearing cryptocurrency account is a "security." Lower courts have answered that question in different ways, and no appellate court has reached it. Particularly considering the

difficulty in applying the traditional *Howey* and *Reves* tests to new financial instruments, there is more than ample ground for reasonable disagreement.

III. An immediate appeal would materially advance the ultimate termination of this litigation.

Finally, an immediate appeal clearly would materially advance this litigation. An interlocutory appeal now, at the pleading stage, would resolve at the earliest possible moment the case-dispositive question of whether Genesis's products may qualify as securities. Should the Second Circuit conclude that they are not securities, the case will terminate completely. That would both serve the interests of judicial economy and save the parties many years of litigation, as well as the expenses associated with discovery, further motions practice, and a potential trial. Such an appeal would thus "minimiz[e] the total burdens of litigation on parties and the judicial system by accelerating or at least simplifying trial court proceedings." 16 E. Cooper, Fed. Prac. & Proc. § 3930 (Sep. 2025 Update). Indeed, the *Coinbase* court recently found that an interlocutory appeal would materially advance ultimate termination of the litigation even though there were claims before the court that did *not* turn on whether the defendant's products were securities. There, "the *possibility* of reversal" that would significantly narrow the case at the pleading stage, before the expenses of further litigation, justified an interlocutory appeal. *See* 761 F. Supp. 3d at 721. Here, where the "securities" question is fundamental to each claim remaining in the case, the case for an interlocutory appeal is even stronger.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court certify its February 24, 2026 order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Dated: April 2, 2026

DEFENDANTS DIGITAL CURRENCY GROUP, INC., BARRY SILBERT, AND MARK MURPHY

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April 2026, a true and correct copy of the foregoing document was served by CM/ECF to the parties registered to the Court's CM/ECF system.

/s/ Carolina Hickey Zalka
Caroline Hickey Zalka

CERTIFICATION OF COMPLIANCE WITH RULE XI (ATTORNEY SIGNATURES)

I, Caroline Hickey Zalka, under Rule XI(D) (Multiple Signatures) of the Electronic Filing Policies and Procedures of the U.S. District Court for the District of Connecticut (Revised Oct. 3, 2025), represent that I have obtained the consent of the other attorneys who have signed the document above. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 2nd day of April 2026.

/s/ Caroline Hickey Zalka
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