No. 22-

IN THE

Supreme Court of the United States

GLENN ARCARO,

Petitioner,

v.

ALBERT PARKS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JULIANNA THOMAS MCCABE
RACHEL A. OOSTENDORP
CARLTON FIELDS, P.A.
Two MiamiCentral
700 NW 1st Ave., Suite 1200
Miami, Florida 33136
(305) 530-0050

CARL E. VOLZ
PONTEM LAW, LLC
65 West Jackson Blvd.,
Suite 119
Chicago, Illinois 60604
(708) 601-0261

MARKHAM R. LEVENTHAL
Counsel of Record
CARLTON FIELDS, P.A.
1025 Thomas Jefferson St.,
NW, Suite 400 West
Washington, DC 20007
(202) 965-8100
mleventhal@carltonfields.com

Counsel for Petitioner

314795

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Section 12(a)(1) of the Securities Act of 1933 provides that anyone who "offers" or "sells" an unregistered security "shall be liable ... to the person purchasing such security *from him*" 15 U.S.C. § 77*l* (emphasis added). This Court, in *Pinter v. Dahl*, 486 U.S. 622 (1988), instructed courts to focus on the plaintiff-purchaser's relationship with a defendant when deciding whether the defendant qualifies as a "statutory seller" under the Securities Act. The *Pinter* decision has defined the contours of statutory seller liability under the Securities Act for over thirty years.

Respondents allege that Petitioner Glenn Arcaro was a YouTube influencer who promoted a cryptocurrency program through social media and internet videos. Respondents claim over thirty other defendants are each liable to them as statutory sellers under the Securities Act based on Respondents' purchase of cryptocurrency tokens sold under the program, and that Mr. Arcaro is their statutory seller solely because they viewed his widely published social media content while researching investments, and later purchased cryptocurrency tokens.

The question presented is:

Whether the Eleventh Circuit's Opinion violates this Court's decision in *Pinter v. Dahl* by creating a new test for statutory seller liability under the Securities Act which extends "seller" liability under Section 12 of the Securities Act beyond the plain language of the statute and congressional intent.

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellee below) is Glenn Arcaro.

Respondents (plaintiffs-appellants below) are Albert Parks, Faramarz Shemirani, Cory Struzan, Maryann Marryshow, Mija Yoo, and Nelson Arias.

Ryan Maasen is a defendant in the proceedings below. YouTube, LLC and Trevon Brown were defendants in the trial court, but were dismissed and that decision was not appealed. BitConnect International PLC, BitConnect Ltd., and BitConnect Trading Ltd. were dismissed in the trial court for lack of service and that decision was not appealed.

RELATED PROCEEDINGS

In re BitConnect Securities Litigation, No. 18-cv-80086, U.S. District Court for the Southern District of Florida. Judgment entered March 31, 2020.

Parks v. BitConnect Ltd., et al., No. 20-11675, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered February 18, 2022, which became final April 22, 2022.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RELATED PROCEEDINGS iii

TABLE OF CONTENTS iv

TABLE OF APPENDICES vii

TABLE OF CITED AUTHORITIES viii

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

A. Several Cryptocurrency Speculators Filed A Putative Class Action Alleging That Over Thirty Defendants Were "Statutory Sellers" Of Unregistered Securities Under The Securities Act 4

Table of Contents

Page

B. The District Court Correctly Applied *Pinter*, And Held That Without Allegations Of A Relationship Between The Purported Seller And Purchaser, There Could Be No Statutory "Seller" Liability Based Solely On Encounters With Arcaro's Online Content 6

C. The Eleventh Circuit Created A "Test" For Statutory "Seller" Liability That Conflicts With This Court's Decision In *Pinter*. 7

REASONS FOR GRANTING THE PETITION. 8

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *PINTER V. DAHL* BECAUSE IT CREATES A NEW TEST FOR STATUTORY SELLER LIABILITY THAT EXTENDS SECTION 12 LIABILTY BEYOND THE STATUTE 8

A. Section 12's "Purchase From" Requirement Limits Liability Only To The Buyer's Immediate Seller, And Focuses On The Defendant's Relationship With A Plaintiff-Purchaser 8

Table of Contents

Page

B. The Eleventh Circuit's Decision Is In Conflict With *Pinter* Because It Holds That Mass Communications Directed At The Public May Alone Form The Basis For A Person's Liability As A "Seller" 10

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH *PINTER* BECAUSE IT ADOPTS AN INTERPRETATION OF SECTION 12 THAT IS BROADER THAN THE "SUBSTANTIAL FACTOR" TEST THAT WAS EXPRESSLY REJECTED BY THIS COURT.....14

III. THE QUESTION PRESENTED IS IMPORTANT IN TODAY'S SOCIAL MEDIA ENVIRONMENT, AND THIS CASE WOULD BE A GOOD VEHICLE TO RESOLVE IT.....15

CONCLUSION 17

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED FEBRUARY 18, 2022. . . . . 1a

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED MARCH 31, 2020 . . . . . 13a

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED NOVEMBER 15, 2019 . . . . . 16a

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED AUGUST 23, 2019 . . . . . 38a

APPENDIX E — ORDER DENYING REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED APRIL 22, 2022. . . . . 73a

APPENDIX F — RELEVANT STATUTORY PROVISIONS 75a

TABLE OF CITED AUTHORITIES

Page

Cases

Craftmatic Sec. Litigation v. Kraftsow,
890 F.2d 628 (3d Cir. 1989) 11

Dolan v. U.S. Postal Service,
546 U.S. 481 (2006). 12

Pinter v. Dahl,
486 U.S. 622 (1988). . . . . *passim*

Raiford v. Buslease, Inc.,
825 F.2d 351 (11th Cir. 1987). 9

Rosenzweig v. Azurix Corp.,
332 F.3d 854 (5th Cir. 2003) 11

Ryder Int'l Corp. v. First Am. Nat'l Bank,
943 F.2d 1521 (11th Cir. 1991) 14

Shaw v. Digital Equip. Corp.,
82 F.3d 1194 (1st Cir. 1996) 11

Statutes and Other Authorities

15 U.S.C. § 77a 2

15 U.S.C. § 77b. 2

15 U.S.C. § 77e 1, 2, 8

Cited Authorities

Page

15 U.S.C. § 77*l* 1, 2, 8, 9

28 U.S.C. § 1254(1). 1

Joseph E. Reece, *Would Someone Please Tell Me The Definition of the Term 'Seller': The Confusion Surrounding Section 12(2) of the Securities Act of 1933*, 14 Del. J. Corp. L. 35 (1989) 12-13

Sam Skolnik, *Crypto Lawsuit Deluge Has Big Firms Scrambling to Keep Up*, Bloomberg Law (May 17, 2022) 16

Glenn Arcaro respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 25 F.4th 1341 and reproduced at App. 1a-12a. The district court's opinion is unreported but is available at 2019 WL 9171208 and is reproduced at App. 16a-37a. The district court's other relevant opinions are reproduced at App. 13a-15a and 38a-72a.

BASIS FOR JURISDICTION

The Eleventh Circuit issued its judgment on February 18, 2022, which became final on April 22, 2022, when the Eleventh Circuit denied the petition for rehearing and rehearing en banc. App. 73a-74a. On June 28, 2022, this Court granted Petitioner's application for a 60-day extension of time, extending the time to file a petition for a writ of certiorari until September 19, 2022. The Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 12(a)(1) of the Securities Act of 1933 provides in relevant part:

> Any person who ... offers or sells a security in violation of section 77e of this title ... shall be liable ... to the person purchasing such security from him[.]

15 U.S.C. § 77*l*. The relevant statutory provisions, 15 U.S.C. §§ 77a, 77b, 77e, and 77*l*, are reproduced in full at App. 75a-90a.

INTRODUCTION

This action implicates the reach of "statutory seller" liability under Section 12(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77*l*, as applied in the context of modern communication through social media, and the purchase of cryptocurrency products by market speculators. The Eleventh Circuit Court of Appeals departed from this Court's long-standing precedent defining the scope of statutory seller liability in *Pinter v. Dahl*, 486 U.S. 622 (1988), when it issued a published opinion in direct conflict with *Pinter*, expanding the definition of a statutory seller under the Act to include *anyone* who uses mass communications to promote the sale of an unregistered security, even where the alleged seller lacks any relationship with the plaintiff-purchaser. This Petition asks the Court to accept certiorari to reverse the Eleventh Circuit's decision.

The plaintiffs below each alleged that they invested in the highly volatile cryptocurrency market and purchased BitConnect Coins as part of a program that originated in the United Kingdom and eventually collapsed. Plaintiffs allege Petitioner Glenn Arcaro was a YouTube influencer who promoted Bitconnect Coins through social media and internet videos. Mr. Arcaro was one of more than a dozen defendants named in the action below, and each defendant, including Arcaro, is alleged to have been the "statutory seller" of unregistered securities to each of the plaintiffs.

The district court dismissed the claims against Mr. Arcaro, applying this Court's decision in *Pinter*, which instructs lower courts to focus on a defendant's "relationship with the plaintiff-purchaser" in deciding who qualifies as a statutory seller of unregistered securities. *Id.* at 651. Liability under Section 12 extends only to the person passing title or a "broker acting as agent of one of the principals to the transaction" when he or she "successfully solicits a purchase." *Id.* at 646. In such cases, the broker "is a person from whom the buyer purchases within the meaning of § 12 and is therefore liable as a statutory seller." *Id.* This Court's decision in *Pinter* has defined the contours of statutory seller liability for more than three decades.

The district court correctly concluded that the mere allegation that the plaintiffs encountered Mr. Arcaro's widely published content while researching investments, and later purchased Bitconnect Coin, was insufficient to state a claim against Arcaro. A panel of the Eleventh Circuit Court of Appeals reversed, departing from this Court's controlling decision in *Pinter*. The Eleventh Circuit's decision focused solely on whether a person can solicit a purchase within the meaning of the Securities Act by promoting a security in a mass communication, rather than the nature of the relationship between the alleged seller and plaintiff-purchaser as mandated by *Pinter*. In doing so, the ruling extends liability under Section 12 to persons "collateral" to the sale of an unregistered security, expanding such liability beyond the language of the statute, and the relationship envisioned by Congress, to anyone who publishes content to the public regarding an unregistered security via social media or other mass communication.

The statutory seller provisions of the Act were intended to extend seller liability somewhat, beyond those who actually hold and transfer title of an unregistered security, to include persons who broker the sale with the plaintiff-purchaser. Under the Eleventh Circuit's analysis, however, any and every person who promotes an unregistered security would be liable to rescind the purchase of a plaintiff who viewed that promoter's social media or other digital content and later bought a related security, regardless of whether the purchaser alleges facts establishing the existence of a relationship with the defendant that resulted in the purchase. Mr. Arcaro now petitions this Court to reverse the Eleventh Circuit's decision, provide clarity regarding the scope of statutory seller liability under the Securities Act, and reaffirm that this Court's relationship-based analysis of the Act in *Pinter* remains applicable and is no less relevant in the modern world of social media, web-based content, and other digital communications relating to securities.

STATEMENT OF THE CASE

A. Several Cryptocurrency Speculators Filed A Putative Class Action Alleging That Over Thirty Defendants Were "Statutory Sellers" Of Unregistered Securities Under The Securities Act

Plaintiffs were speculators in the cryptocurrency market, who each alleged that they purchased a cryptocurrency token called BitConnect Coin ("BCC"), which lost its value after BitConnect's founders closed its trading platform. D.E. 118 ¶ 13. Within days of the BitConnect shutdown, Plaintiffs filed a putative national class action against over thirty defendants, one of whom is Mr. Arcaro, alleging violations of the Securities Act

and a host of state law claims. Several related lawsuits were filed by other BCC purchasers, and the district court consolidated four separate actions. D.E. 46.

Plaintiffs alleged that the BitConnect program was a Ponzi scheme organized in the United Kingdom by several entity defendants, BitConnect International PLC, BitConnect Ltd., and BitConnect Trading Ltd. (collectively, "BitConnect"). They claim that BCC and its related programs were unregistered securities issued and sold as part of a fraudulent scheme whereby BitConnect "enlisted multi-level affiliate marketers" and paid them commissions. D.E. 118 ¶¶ 2, 6, 33-38.

While Plaintiffs sued the supposed masterminds who developed BCC and the alleged Ponzi scheme, they never actively pursued or served those defendants; instead, they focused on Mr. Arcaro and other individuals who were neither the owners, founders, nor developers of BitConnect. The suit identified Mr. Arcaro as one of the "promoter defendants," along with sixteen other named individuals and nine John Doe defendants. Plaintiffs alleged that Arcaro managed a team of marketers in the United States, and that he and others created videos and posted website content promoting "BitConnect Investment Programs." *Id.* ¶¶ 3, 116-17, 138, 190. They further alleged that Mr. Arcaro posted YouTube videos and created multiple, publicly available websites related to crypto-currency investing, including a course entitled "Cryptocurrency 101." *Id.* ¶¶ 148, 158-61, 199.

Plaintiffs alleged that they actively researched, and then invested in, BitConnect. *Id.* ¶¶ 26, 186. They claim that they encountered publicly available content during their efforts to research the BitConnect Investment

Programs, including content published by Mr. Arcaro and many others, and they asserted that any promoter defendant who published such content was liable as a statutory seller to each of them. *Id.* ¶¶ 26, 186-87. Plaintiffs did not allege that they ever met or communicated directly with Mr. Arcaro, or that they purchased BCC from or through him, or because they viewed any of his specific posts. Despite this, Plaintiffs claim that Arcaro was one of more than thirty defendants all of whom were statutory "sellers" of unregistered securities under Section 12(a) of the Securities Act because they "successfully solicited investments" in Bitconnect. *Id.* ¶¶ 26, 187.

B. The District Court Correctly Applied *Pinter*, And Held That Without Allegations Of A Relationship Between The Purported Seller And Purchaser, There Could Be No Statutory "Seller" Liability Based Solely On Encounters With Arcaro's Online Content

The district court dismissed Plaintiffs' sixth pleading with prejudice, concluding, among other things, that the allegations could not establish that any of them had been successfully solicited by Mr. Arcaro to qualify him as a "statutory seller" under the Securities Act. App. 25a-32a. The court correctly observed that the statute does not "impose express liability for *mere participation* in unlawful sales transactions" and that, under this Court's decision in *Pinter v. Dahl*, courts must "focus[] on the defendant's relationship with the plaintiff-purchaser." App. 26a. Plaintiffs had not alleged a relationship between Mr. Arcaro and any of the Plaintiffs, or that Mr. Arcaro "engaged in active efforts to urge or persuade any of the Plaintiffs to invest in BCC." App. 29a. Instead, Plaintiffs had "sought to establish liability on the sole basis that

they encountered publicly available content created by Arcaro ... while researching the BitConnect Investment Programs," which the trial court held was not activity that falls within the statutory definition of "seller." App. 28a. Although the pleading added allegations that one of the Plaintiffs participated in a "training program" available on Mr. Arcaro's website and later purchased BCC, those allegations still failed to establish that any defendant personally solicited an investment from that Plaintiff and that she had purchased the securities as a result. App. 30-31a.

C. The Eleventh Circuit Created A "Test" For Statutory "Seller" Liability That Conflicts With This Court's Decision In *Pinter*

A panel of the United States Court of Appeals for the Eleventh Circuit reversed, reasoning that "when the promoters urged people to buy BitConnect coins in online videos, they still solicited the purchases that followed," and therefore Plaintiffs stated a claim under Section 12. App. 10a. The Eleventh Circuit framed the issue on appeal as solely a question of "whether a person can solicit a purchase, within the meaning of the Securities Act, by promoting a security in a mass communication," and concluded that there is "nothing in the Securities Act [that] makes a distinction between individually targeted sales efforts and broadly disseminated pitches." App. 7a. In reaching this conclusion, the Panel observed that nowhere in the Act "does Congress limit solicitations to 'personal' or individualized ones." App. 8a. The decision referenced this Court's controlling decision in *Pinter* in just two sentences, concluding that this "leading case interpreting Section 12" did not answer the question at hand. App. 9a. The court instead examined 1930s case

law defining "solicitation" in several unrelated contexts to determine that "[b]roadly disseminated communications also can convey a solicitation." App. 8a-9a. Accordingly, a person would be liable to a buyer who purchases securities whether the communication "was made to one known person or to a million unknown ones." App. 12a.

Arcaro petitioned for rehearing en banc. The petition was denied on April 22, 2022. App. 73a-74a. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *PINTER V. DAHL* BECAUSE IT CREATES A NEW TEST FOR STATUTORY SELLER LIABILITY THAT EXTENDS SECTION 12 LIABILTY BEYOND THE STATUTE

A. Section 12's "Purchase From" Requirement Limits Liability Only To The Buyer's Immediate Seller, And Focuses On The Defendant's Relationship With A Plaintiff-Purchaser

Section 5 of the Securities Act prohibits the sale of unregistered securities, and Section 12(a)(1) creates a private right of action for rescission against anyone who "offers or sells" an unregistered security "to the person *purchasing such security from him*." 15 U.S.C. §§ 77e, 77*l* (App. 86a-90a) (emphasis added). In order to state a claim for statutory seller liability under this section, a plaintiff must demonstrate "the sale or offer to sell securities, the absence of a registration statement covering the securities, and the use of the mails or facilities of interstate commerce

in connection with the sale or offer." *Raiford v. Buslease, Inc.*, 825 F.2d 351, 354 (11th Cir. 1987). Liability under Section 12 extends to an owner who passes title or other interest in a security, as well as to a broker or other person who "successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Pinter v. Dahl*, 486 U.S. 622, 642, 647 (1988).

In *Pinter*, this Court examined the statutory language of the Securities Act to determine under what circumstances a defendant may be deemed a "seller" under Section 12. Noting that the Act defined the operative terms of Section 12, including "sale," "sell," "offer to sell," and "offer," the Court considered those terms within context to conclude that a "seller" under the statute includes not only owners who transfer title, but also those who successfully solicit an offer to buy. *Id.* at 641–43. However, the Court observed that the second clause of Section 12(a)(1), which "provides that only a defendant 'from' whom the plaintiff 'purchased' securities may be liable, narrows the field of potential sellers." *Id.* at 643. This "purchase" requirement "clearly confines § 12 liability to those situations in which a sale has taken place." *Id.* at 644. Therefore, "a prospective buyer has no recourse against a person who touts unregistered securities to him if he does not purchase the securities." *Id.* at 644. Importantly, the "purchasing ... from" requirement of Section 12 also limits the imposition of liability to "*only* ... the buyer's immediate seller," and, therefore, "a buyer cannot recover against his seller's seller." *Id.* at 644 n.21 (emphasis added). Liability, for example, extends to a broker or agent of one of the principals to the transaction only when he "successfully solicits a purchase," meaning the broker or other agent must be a person "from" whom the buyer "purchases." *Id.* at 644, 646.

While statutory seller status would necessarily include "at least some persons who urged the buyer to purchase," the *Pinter* Court made clear that liability *does not* extend under the Act to those who merely participated in a sale or whose actions were "collateral to the offer or sale." *Id.* at 642, 644, 649–50. This Court expressly rejected a more expansive "substantial factor" approach applied by the lower court, which focused on the defendant's level of involvement in the entire sales transaction and its surrounding circumstances. *Id.* at 651. Under the "substantial factor" test, which incorporates the tort law doctrine of proximate cause, a seller is defined as one "whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place." *Id.* at 649. In declining to adopt the substantial factor test, this Court observed that the "deficiency of the substantial-factor test is that it divorces the analysis of seller status from any reference to the applicable statutory language and from any examination of § 12 in the context of the total statutory scheme." *Id.* at 651. Instead, the "purchase from" requirement of Section 12 dictates that courts "focus[] on the defendant's relationship with the plaintiff-purchaser" when determining who qualifies as a statutory seller. *Id.*

B. The Eleventh Circuit's Decision Is In Conflict With *Pinter* Because It Holds That Mass Communications Directed At The Public May Alone Form The Basis For A Person's Liability As A "Seller"

The decision below disregarded the road map set out in *Pinter*, as well as the limiting language of the statute, and instead framed the issue simply as "whether a person can solicit a purchase within the meaning of the Securities

Act, by promoting a security in a mass communication." App. 7a. Based on this inaccurate formulation of the issue, the Eleventh Circuit departed from this Court's directive that it "focus[] on the defendant's relationship with the plaintiff-purchaser" and held that "mass communications," such as YouTube videos directed at the public, may alone form the basis for a promoter's liability as a statutory seller to any purchaser of an unregistered security.

In reaching this conclusion, the Eleventh Circuit ignored entirely the focus—mandated by *Pinter*—on the relationship between the alleged seller and purchaser, and the fact that the statute creates liability only in favor of a "person purchasing such security *from* [the alleged seller]." *Pinter*, 486 U.S. at 642-43. Courts across the country have for decades interpreted *Pinter*'s "relationship" requirement to require a showing of some kind of direct communication with the purchaser, or direct and active participation in the solicitation of an immediate sale. *See, e.g.*, *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871 (5th Cir. 2003) ("To count as 'solicitation,' the seller must, at a minimum, directly communicate with the buyer."); *Craftmatic Sec. Litigation v. Kraftsow*, 890 F.2d 628, 636 (3d Cir. 1989) ("The purchaser must demonstrate direct and active participation in the solicitation of the immediate sale to hold the issuer liable as a § 12[(a)](2) seller."); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1214 (1st Cir. 1996), *superseded by statute on other grounds as stated in Silverstrand Invests. v. AMAG Pharms., Inc.*, 707 F.3d 95 (1st Cir. 2015) (observing that a "defendant must be directly involved in the actual solicitation of a securities purchase in order to qualify"; "proof the defendant *caused* a plaintiff's purchase of a security is not enough to establish that the defendant 'solicited' the sale"; and "a person's 'remote' involvement in a sales

transaction or his mere 'participa[tion] in soliciting the purchase' does not subject him to Section 12 liability"). The Eleventh Circuit's ruling is completely untethered to *Pinter* and the over thirty years of precedent delineating statutory seller liability under Section 12.

Rather than apply *Pinter* to the factual allegations of the case, the Eleventh Circuit defined "solicitation" in a vacuum, without reference to this Court's analysis of the persons captured by the Act's phrase "solicitation of an offer to buy." As this Court has made clear, "[i]n determining whether [a defendant] may be deemed a seller for purposes of §12(1), such that he may be held liable for the sale of unregistered securities, we look first at the language of §12(1)." *Pinter*, 486 U.S. at 641. Instead of heeding this instruction, the decision below referenced a 1930s dictionary definition and a series of authorities decided fifty years prior to *Pinter*, none of which interprets the Securities Act. As a result, the Eleventh Circuit concluded that solicitation need not be "personal" to trigger liability, and that "[b]roadly disseminated communications also can convey a solicitation." App. 8a-9a.

Statutory construction demands context, and the definition of words in isolation is not necessarily controlling. *See Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). The Eleventh Circuit's analysis ignores the statutory context in which the word "solicitation" is used, and in particular, the requirement that only a defendant from whom the plaintiff "purchased" securities may be held liable under the Act, which this Court has made clear focuses on the relationship between the purchaser and the seller. *Pinter* at 651; *see also* Joseph E. Reece, *Would Someone Please Tell Me The Definition of the Term 'Seller': The Confusion Surrounding Section 12(2) of the Securities Act*

of 1933, 14 Del. J. Corp. L. 35, 92 (1989) ("The Court noted that the 'purchase from' requirement of section 12 was clearly focused on the relationship between the defendant and the plaintiff-purchaser.").

The Eleventh Circuit invoked the remedial nature of the Securities Act to justify its holding, reasoning that an alternative interpretation would "allow[] easy end-runs around the Act." App. 10a. But this Court rejected this exact reasoning when declining to extend Section 12 liability pursuant to the "substantial factor" test, explaining that although the Court has recognized Congress' remedial goals in enacting securities laws, it has never done so "entirely apart from the statutory language." *Pinter*, 486 U.S. at 653. Had Congress intended to impose a rescission remedy upon a person who has no actual relationship with the purchaser and did not target or pursue an individual purchaser who ultimately purchased the security from someone else, it certainly could have done so, as marketing personalities have touted investments through public channels for years. By myopically interpreting the term "solicitation," the decision below would extend liability under Section 12 well beyond the statutory text and its legislative intent. This a court cannot do: "[T]he Court never has conducted its analysis entirely apart from the statutory language. 'The ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress has enacted into law.'" *Pinter*, 486 U.S. at 653 (citation omitted).

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH *PINTER* BECAUSE IT ADOPTS AN INTERPRETATION OF SECTION 12 THAT IS BROADER THAN THE "SUBSTANTIAL FACTOR" TEST THAT WAS EXPRESSLY REJECTED BY THIS COURT

The decision below is not simply a misapplication of *Pinter* to the facts at hand. Rather, the Eleventh Circuit broadly extends, as a matter of law, statutory liability to anyone who engaged in a "mass communication" that promotes an unregistered security, granting a cause of action for rescission against the producer of such content to any person who alleges they viewed it and at some later point purchased the security. In doing so, the decision creates a novel and unworkable test that is impermissibly broader than the test established by this Court in *Pinter* and even the "substantial factor" test that was explicitly rejected as too expansive in *Pinter*.

Prior to *Pinter*, a majority of circuits applied the liberal "substantial factor" test, which defined a statutory seller as anyone "whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place." *Pinter*, 486 U.S. at 649.[1] This Court rejected the substantial factor test because it cast too wide a net under Section 12 and "introduce[d] an element of uncertainty into an area that demands certainty and predictability."

1. *See Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.2d 1521, 1524–25 (11th Cir. 1991) ("The Second, Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits ... us[ed] either a 'substantial factor' test, a 'proximate cause' test or a variation thereof to define the class of participants who, albeit not owners of the securities, could nevertheless be liable").

Id. at 652. After *Pinter*, it is clear that liability does not extend to those whose actions were "collateral to the offer or sale." *Id.* at 650. The inquiry must instead focus on the "relationship" between the plaintiff-purchaser and the alleged seller, which led to the sale. *Id.* at 651.

If not reversed, the decision below would impermissibly extend statutory liability in the Eleventh Circuit to anyone who engages in a "mass communication" that promotes an unlicensed security, including persons whose activities are "collateral" to the sale. *Id.* at 650. As with the defunct substantial factor test, the Eleventh Circuit's "test" "affords no guidelines for distinguishing between the defendant whose conduct is not sufficiently integral to the sale," nor does it "articulate[] what measure of participation qualifies a person for seller status[.]" *Id.* at 652. The ruling offers no limiting principle to define the category of defendants that could be held strictly liable under the statute, resulting in precisely the type of ad hoc analysis that this Court condemned in *Pinter*. *Id.*

III. THE QUESTION PRESENTED IS IMPORTANT IN TODAY'S SOCIAL MEDIA ENVIRONMENT, AND THIS CASE WOULD BE A GOOD VEHICLE TO RESOLVE IT

This case squarely presents an important question on the scope of statutory seller liability under the Securities Act as applied to the promotion of securities directed to the public through modern methods of digital communication, including social media. Although marketing personalities have touted investments on television and the internet for decades, the advent of social media and cryptocurrency and other financial technology have created nuanced

challenges for courts and litigators across the country as the prevalence of these contemporary claims continues to rise exponentially.[2]

The Eleventh Circuit's decision offers "little predictive value to participants in securities transactions," and unduly expands the reach of Section 12's provisions for a rescission remedy well beyond the statutory intent. *Pinter*, 483 U.S. at 652. Taken to its logical end, any influencers, entertainers, athletes, social media personalities, and others who publish information about investments on television, in videos, and through social media channels with an expectation of remuneration would suddenly become liable to anyone merely observing them. Such persons, under this analysis, could be liable under the Act to rescind the purchase of anyone who saw their content and later bought a security, regardless of whether the purchaser alleges facts establishing the existence of a relationship with the defendant that resulted in the purchase. As this Court recognized over thirty years ago, it is "unlikely that Congress would have ordained *sub silentio* the imposition of strict liability on such an unpredictably defined class." *Id.*

Mr. Arcaro respectfully petitions this Court to reverse that decision and provide further clarity regarding the

2. For example, as of May 2022, industry experts reported that cryptocurrency "has generated more than 200 class action lawsuits and other private litigation," which is up more than 50 percent since the start of 2020, and that class actions and private lawsuits make up half of all cryptocurrency litigation. Sam Skolnik, *Crypto Lawsuit Deluge Has Big Firms Scrambling to Keep Up*, Bloomberg Law (May 17, 2022), available at https://news.bloomberglaw.com/business-and-practice/crypto-lawsuit-explosion-has-big-law-scrambling-to-keep-up.

scope of statutory seller liability under *Pinter* as applied to modern forms of mass communication and social media. This case would be a good vehicle for doing so, as it presents a straight-forward legal issue as applied to undisputed factual allegations.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JULIANNA THOMAS MCCABE
RACHEL A. OOSTENDORP
CARLTON FIELDS, P.A.
Two MiamiCentral
700 NW 1st Ave., Suite 1200
Miami, Florida 33136
(305) 530-0050

MARKHAM R. LEVENTHAL
Counsel of Record
CARLTON FIELDS, P.A.
1025 Thomas Jefferson St., NW, Suite 400 West
Washington, DC 20007
(202) 965-8100
mleventhal@carltonfields.com

CARL E. VOLZ
PONTEM LAW, LLC
65 West Jackson Blvd., Suite 119
Chicago, Illinois 60604
(708) 601-0261

Counsel for Petitioner

September 19, 2022

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED FEBRUARY 18, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-11675

CHARLES WILDES, *et al.*,

Plaintiffs,

ALBERT PARKS, FARAMARZ SHEMIRANI, CORY STRUZAN, MARYANN MARRYSHOW, MIJA YOO, NELSON ARIAS,

Plaintiffs-Appellants,

PAUL LONG, *et al.*,

Consolidated Plaintiffs,

versus

BITCONNECT INTERNATIONAL PLC, A FOREIGN CORPORATION, BITCONNECT LTD., A FOREIGN CORPORATION, BITCONNECT TRADING LTC., A FOREIGN CORPORATION, GLENN ARCARO, AN INDIVIDUAL, TREVON BROWN, AN INDIVIDUAL, A.K.A. TREVON JAMES, *et al.*,

Defendants-Appellees,

NICHOLAS TROVATO, *et al.*,

Consolidated Defendants.

Appendix A

Appeal from the United States District Court
for the Southern District of Florida.
D.C. Docket No. 9:18-cv-80086-DMM

Before BRANCH, GRANT, and ED CARNES, Circuit Judges.

GRANT, Circuit Judge:

An online promotions team posted thousands of videos, all with a single aim: persuading people to buy BitConnect coin, a new cryptocurrency. But BitConnect coin wasn't a sound investment—it was a Ponzi scheme. After that scheme collapsed, BitConnect buyers sought to hold the promoters liable under section 12 of the Securities Act of 1933 for soliciting the purchase of unregistered securities.

The marketers insist that they cannot be held liable because the Securities Act covers sales pitches to particular people, not communications directed to the public at large. Not so—neither the Securities Act nor our precedent imposes that kind of limitation. Solicitation has long occurred through mass communications, and online videos are merely a new way of doing an old thing. Because the Securities Act provides no free pass for online solicitations, we reverse the district court's dismissal of the section 12 claim.

I.

BitConnect and its promoters stoked public enthusiasm for a new form of cryptocurrency, the BitConnect coin. But as the plaintiffs tell it, each round of investors was

simply paid back by the one that followed—with the promoters siphoning off money each time.[1] The story was that investors could buy BitConnect coins and then earn outsized returns without doing anything else. In the "staking" program, for example, investors could earn up to 10 percent interest per month, guaranteed, just for holding their BitConnect coin in a virtual "wallet." And in the lending program, investors lent their coins to BitConnect, which ostensibly traded them for profit. BitConnect promised "lenders" extravagant earnings—not only fixed interest each day (as well as possible daily bonus interest) but also up to 40 percent interest at the end of each month.

Skeptics of this "opportunity" would be proven right. The promised interest did not reflect growth in BitConnect's value, or result from traders' ability to beat the market by unthinkable margins. BitConnect's original investors simply received their so-called returns from the money paid by new investors hoping for the same.

To keep this Ponzi scheme running, each round of investors required still more to follow. That is where BitConnect's "multi-level marketing" structure came in, incentivizing each set of investors to draw in a new round of recruits. "Promoters" encouraged others to sign up for BitConnect, and earned a commission on the investments that followed. Some number of those recruits became promoters themselves, bringing in more investors. A share

1. For purposes of this appeal, we take those allegations as true. *See Statton v. Florida Fed. Jud. Nominating Comm'n*, 959 F.3d 1061, 1062 (11th Cir. 2020).

of each investment would then pass on to the recruit's promoter, her promoter's promoter, and so on and so forth—a classic pyramid scheme.

Glenn Arcaro played a significant role in BitConnect's pyramid-on-Ponzi scheme. He was the national promoter for the United States, which meant that he managed a team of regional promoters. Together, the team created an extensive U.S. marketing scheme for BitConnect, which included multiple websites where Arcaro encouraged viewers to buy BitConnect coins. At glennarcaro.com, for example, he told potential investors that passive income was merely "a click away"—all they needed to do was take "a few minutes" to join BitConnect. At BitFunnel, he instructed investors to fill out a form to access a video about "how to make huge profits with BitConnect." And at Futuremoney.io, Arcaro hosted a course called Cryptocurrency 101, which culminated in lessons on how to create a BitConnect account and how to transfer bitcoin there. Arcaro also shaped his team's recruitment efforts, directing regional promoters to create videos about investing that always ended with a pitch for BitConnect. Together, Arcaro and his team posted thousands of YouTube videos extolling BitConnect, and those videos were viewed millions of times.

Millions of views led to millions of dollars. Just short of a year after the coin's introduction, BitConnect was bringing in around $7 million per week in investments from the United States. And that was not the limit; the next month, BitConnect's weekly haul was more than $10 million.

All that money still could not sustain BitConnect's Ponzi scheme. So as the year ended, BitConnect came up with another plan to reel in millions—and announced that it would offer another cryptocurrency, BitConnectx. State regulators, however, had other ideas. At the start of the new year, Texas issued an emergency cease and desist order, and North Carolina soon followed suit. Within days, the scheme unraveled. BitConnect closed its trading platform, and the value of its cryptocurrency plummeted; within "moments" its value fell by almost 90%. Months later, the coin was worth only 40 cents—a 99.9% drop in value from the start of the year.

Two victims of the BitConnect collapse tried to recoup their losses, suing on behalf of themselves and a putative class of all persons who had lost money in BitConnect investments. They alleged (among other things) that the promoters were liable under section 12 of the Securities Act for selling unregistered securities through their BitConnect videos. 15 U.S.C. § 77*l*(a)(1); *see id.* § 77e(a)(1). Some of the promoters moved to dismiss, arguing that they were liable under the Securities Act only if they had offered or sold the plaintiffs a security.[2] They had not done so, they asserted, because their videos did not "directly communicate" with the plaintiffs.

---

2. The plaintiffs sued Arcaro and five regional promoters he managed: Trevon Brown, Craig Grant, Ryan Hildreth, Ryan Maasen, and Tanner Fox. The district court dismissed Grant from the suit because the plaintiffs failed to timely serve him. The plaintiffs managed to serve the other promoters, but for reasons that are not clear from the record, only Arcaro and Maasen moved to dismiss the case.

The district court agreed. It said that the plaintiffs needed to allege that the promoters had urged or persuaded them—"individually"—to purchase BitConnect coins. Because the plaintiffs based their case on interactions with the promoters' "publicly available content," the district court concluded that their complaint failed to state a section 12 claim. It also dismissed the remaining state-law claims against the promoters because jurisdiction for those claims was premised on a Securities Act violation.

The plaintiffs were given a chance to amend their complaint and did so, adding claimants who—unlike the original plaintiffs—had signed up for BitConnect directly through the promoters' referral links. The district court dismissed the amended complaint (and a similar one that followed) because the new plaintiffs, just like the old ones, had never received a "personal solicitation" from the promoters. This appeal followed.[3]

II.

We review de novo a dismissal for failure to state a claim. *Godelia v. Doe 1*, 881 F.3d 1309, 1316 (11th Cir. 2018). In doing so, we accept the complaint's factual allegations as true and construe them in the light most favorable to the plaintiffs. *Id.*

3. The plaintiffs appeal rulings contained in orders that also dismiss other claims against the promoters and YouTube, as well as unserved defendants. In their briefs, however, the plaintiffs challenge only the dismissal of their section 12 and state-law claims against the promoters. The plaintiffs therefore do not appeal the dismissal of their other claims—including their claim against YouTube and their claim against Arcaro under section 15 of the Securities Act.

III.

The only question here is whether a person can solicit a purchase, within the meaning of the Securities Act, by promoting a security in a mass communication. Arcaro insists that liability follows only when a seller directs a solicitation to a particular prospective buyer.[4] Mass communications, in his view, are never enough. That rule would certainly go a long way toward eliminating liability for the promoters here, and for others who champion dicey investments through modern communication channels. The problem for these promoters is that nothing in the Securities Act makes a distinction between individually targeted sales efforts and broadly disseminated pitches.

The Securities Act prohibits a person from using "any means or instruments of transportation or communication in interstate commerce" to sell an unregistered security. 15 U.S.C. § 77e(a)(1). And to enforce the prohibition, section 12 of the Act authorizes buyers of an unregistered security to sue a person who "offers or sells" it. *Id.* § 77*l*(a)(1).

So what does it mean under the Act to offer or sell a security? In reverse order, a person sells a security when he makes a "contract of sale" for or disposes of a security for value. *Id.* § 77b(a)(3). And a person offers a security "every" time he makes an "offer to dispose of"—or a "solicitation of an offer to buy"—a security for value. *Id.*

---

4. Arcaro was the only promoter to file a brief in this appeal.

Nowhere in those definitions does Congress limit solicitations to "personal" or individualized ones as the district court did here. In fact, the Act suggests the opposite. It makes a person who solicits the purchase of an unregistered security liable for using "*any* means" of "communication in interstate commerce." *Id.* § 77e(a)(1) (emphasis added); *see id.* § 77*l*(a)(1). Among those methods is "any prospectus"—which the Act defines to include communications as impersonal as radio and television advertisements. *Id.* §§ 77e(a)(1), 77b(a)(10).

Nor is the proposed limitation somehow baked into the word "solicitation." When Congress provided in 1933 that an offer included a "solicitation," that word meant something broader than Arcaro now contends. *See* Securities Act of 1933, Pub. L. No. 73-22, § 2(3), 48 Stat. 74, 74. Solicitation unsurprisingly entailed the "pursuit, practice, act, or an instance, of soliciting," and "solicit" meant "to approach with a request or plea, as in selling." *Webster's New International Dictionary of the English Language* 2393-94 (2d ed. 1938). And cases from that era show that a sales "approach" did not need to be personal to amount to a solicitation. Rather, people understood solicitation to include communications made through diffuse, publicly available means—at the time, newspaper and radio advertisements. *See, e.g.*, *Cochran v. United States*, 41 F.2d 193, 196-97 (8th Cir. 1930) ("solicitation" of securities purchases occurred "by means of divers newspaper advertisements"); *Horwitz v. United States*, 63 F.2d 706, 709 (5th Cir. 1933) (Sibley, J., concurring) ("radio communications" were "clearly solicitations"); *People ex rel. Chi. Bar Ass'n v. Goodman*, 366 Ill. 346, 348, 8 N.E.2d

941 (1937) (a "widespread plan of solicitation" included "advertisement in the telephone directory" and "radio announcements"); *In re Tracy*, 197 Minn. 35, 37, 266 N.W. 88 (1936) (attorney "solicited" clients "by advertisements in newspapers"); *Dvorine v. Castelberg Jewelry Corp.*, 170 Md. 661, 666, 185 A. 562 (1936) (defendant "continuously solicited" the public "by extensive advertisements inserted in the daily newspapers published in Baltimore City"). Under the text, then, a solicitation need not be "personal" to trigger liability. Broadly disseminated communications also can convey a solicitation—indeed, they are consistent with the longstanding interpretation of the term.

Moreover, and contrary to Arcaro's suggestion, Securities Act precedents do not restrict solicitations under the Act to targeted ones. The leading case interpreting section 12, *Pinter v. Dahl*, says nothing about what solicitation entails. 486 U.S. 622, 108 S. Ct. 2063, 100 L. Ed. 2d 658 (1988). It instead focuses on the result and intent necessary for section 12 liability: the solicitation must succeed, and it must be motivated by a desire to serve the solicitor's or the security owner's financial interests. *See id.* at 647. Three years later, this Court touched on the meaning of solicitation. But we held only that, for solicitation to occur, a person must "urge or persuade" another to buy a particular security. *Ryder Int'l Corp v. First Am. Nat'l Bank*, 943 F.2d 1521, 1531, 1534 (11th Cir. 1991) (quotation omitted). We never added that those efforts at persuasion must be personal or individualized.

Technology has opened new avenues for both investment and solicitation. Sellers can now reach a global

audience through podcasts, social media posts, or, as here, online videos and web links. But under the district court's cramped reading of the Securities Act, a seller who would be liable for recommending a security in a personal letter could not be held accountable for making the exact same pitch in an internet video—or through other forms of communication listed as exemplars in the Act, like circulars, radio advertisements, and television commercials. *See* 15 U.S.C. §§ 77e(a)(1), 77b(a)(10). That makes little sense. A seller cannot dodge liability through his choice of communications—especially when the Act covers "any means" of "communication." *Id.* § 77e(a)(1). We decline to adopt an interpretation that both contradicts the text and allows easy end-runs around the Act.

A new means of solicitation is not any less of a solicitation. So when the promoters urged people to buy BitConnect coins in online videos, they still solicited the purchases that followed. The plaintiffs therefore have stated a section 12 claim against Arcaro and the other promoters.[5]

5. The district court also gave an alternative reason for dismissing any claims against Brown, Hildreth, and Fox—that the plaintiffs had failed to prosecute those claims. On appeal the plaintiffs have failed to raise, and thus abandoned, any challenge to that ground for dismissal. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014). We therefore affirm the dismissal of the claims against those three defendants.

IV.

Arcaro argues that the plaintiffs should nonetheless lose because they abandoned any challenge to an independent ground for dismissing their claim—namely, they did not allege that they had purchased the coins "as a result of" Arcaro's solicitations. Arcaro divines this alternative holding from a single sentence in the district court's order, which said that "the additional allegations" in the amended complaint "fail to allege that Plaintiffs purchased securities *as a result of* Arcaro's and/or Maasen's *personal* solicitation."

Though we do not see Arcaro's interpretation as the most obvious, that sentence, standing alone, might imply that the district court thought the plaintiffs did not allege that the promoters' videos had convinced them to invest. But the district court did not end there. It continued by explaining that the claim failed because the plaintiffs had not alleged that the promoters "engaged in active efforts to urge or persuade any of the Plaintiffs to invest in BitConnect." And the court focused at length on the plaintiffs' failure to allege that any promoter had "personally solicited" an investment. So the court dismissed the case because the solicitations weren't "personal," not because the solicitations didn't lead to the plaintiffs' purchases. Indeed, the district court recognized that the plaintiffs alleged that they had bought BitConnect coins "because of" the promoters' "recruitment efforts." We see no reason to read the district court's opinion as coming to a conclusion that is in tension with its own characterization of the complaint.

V.

The plaintiffs also ask us to reinstate their state-law claims against the promoters. The district court dismissed those claims for lack of personal jurisdiction; the plaintiffs had premised jurisdiction on the Securities Act but (according to the district court) had not stated a claim under the Act. As explained above, though, the court incorrectly dismissed the section 12 claim. Its reason for holding that it lacked jurisdiction thus cannot stand.

* * *

When a person solicits the purchase of securities to serve his (or the security owner's) financial interests, he is liable to a buyer who purchases those securities—whether that solicitation was made to one known person or to a million unknown ones. Using publicly available videos, the promoters here—with Arcaro in the lead—convinced the plaintiffs to buy BitConnect through their referral programs and earned a commission on those investments. We therefore **REVERSE** the district court's dismissal of the section 12 claim against Arcaro and Maasen; **VACATE** its dismissal of the state-law claims against them; **AFFIRM** its dismissal of any other claims and defendants in the orders appealed; and **REMAND** this case for further proceedings consistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED MARCH 31, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No: 18-cv-80086-MIDDLEBROOKS

IN RE BITCONNECT SECURITIES LITIGATION.

ORDER DISMISSING COMPLAINT AND CLOSING CASE

THIS CAUSE comes before the Court upon Plaintiffs' Response to the Court's Order to Show Cause. (DE 143).

In an order striking Plaintiffs' Second Amended Complaint, I stated:

> [I]n light of my dismissal of Defendant Arcaro and Maasen from the Second Amended Complaint, I hereby strike the remainder of that complaint. (DE 118; DE 133). For clarity of the record, I will require Plaintiffs to file a Third Amended Complaint by December 5, 2019. In drafting this Third Amended Complaint, Plaintiffs shall remove the dismissed defendants and the relevant allegations. Plaintiffs shall also bear in mind the reasons for my dismissal of Defendants Arcaro and Maasen. (*See* DE 133). To the extent Plaintiffs have intended to impose liability upon other Defendants for the

> same reasons as Arcaro and Maasen, Plaintiffs shall remove those Defendants (if any) from the Third Amended Complaint. Failure to do so will result in *sua sponte* dismissal of those Defendants.

(DE 134 at 3). Upon review of the Third Amended Complaint (DE 137), it appeared that Plaintiffs failed to follow this instruction with respect to Defendants Trevor Brown, Ryan Hildreth, and Tanner Fox. As a result, I entered an Order to Show Cause why Defendants Brown, Hildreth, and Fox should not be dismissed. (DE 142). These Defendants are the only three that remain in this action.

Plaintiffs have responded to the Order to Show Cause. (DE 143). In their response, Plaintiffs do not explain how the allegations regarding Defendants Brown, Hildreth, and Fox differ from the ones made in connection with Defendants Arcaro and Maasen. (*See generally id.*). Instead, Plaintiffs attempt to relitigate whether these facts sufficiently state claims under the Securities Act. I have already rejected these arguments twice and will not substantively address them again. My previous orders granting Defendant Arcaro's and Maasen's Motions to Dismiss explain at length the reasoning as to why Plaintiffs' claims against Defendants Brown, Hildreth, and Fox fail to state any actionable securities law violation. (DE 115, Order Granting Motion to Dismiss Amended Complaint); (DE 133, Order Granting Motion to Dismiss Second Amended Complaint). Therefore, for the reasons

stated in my prior orders, Plaintiffs' claims against Defendants Brown, Hildreth, and Fox are dismissed.[1]

Because those Defendants are the only remaining defendants, it is **ORDERED AND ADJUDGED** that:

1. Plaintiff's Third Amended Complaint is **DISMISSED WITH PREJUDICE.**

2. The Clerk of Court shall **CLOSE THIS CASE** and **DENY** any pending motion **AS MOOT.**

SIGNED in Chambers in West Palm Beach, Florida, this 31st day of March, 2020.

/s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

---

1. It is worth adding that this lawsuit was originally filed over two years ago. (DE 1). And Plaintiffs have failed to actively pursue the claims against Defendants Brown, Hildreth, and Fox. For example, in August 2018, Plaintiffs moved for and subsequently obtained a Clerk's Entry of Default as to Defendant Brown. (DE 71; DE 72). To date, however, Plaintiffs have not moved for final default judgment. Accordingly, Plaintiffs' failure to prosecute their claims against the remaining Defendants is another reason why the claims against them should be dismissed. *See Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962) ("The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.").

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED NOVEMBER 15, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No: 18-cv-80086-MIDDLEBROOKS

IN RE BITCONNECT SECURITIES LITIGATION,

ORDER ON MOTIONS TO DISMISS

THIS CAUSE comes before the Court upon the Motions to Dismiss filed by Defendant Glenn Arcaro (DE 122) and Defendant Ryan Maasen (DE 130) on September 27, 2019 and October 29, 2019, respectively. Co-Lead Plaintiffs Albert Parks and Faramarz Shemirani responded in opposition to Defendant Arcaro's Motion on October 18, 2019, and Defendant Arcaro replied on October 29, 2019. (DE 128; DE 129).

Additionally, on November 6, 2019, Plaintiffs represented that they would not separately respond to Defendant Maasen's Motion, *see* DE 132, as Maasen has essentially restated (almost verbatim) the arguments made in Defendant Arcaro's Motion. (*Compare* DE 122, *with* DE 130).

For the following reasons, the Motions are granted.

Appendix C

BACKGROUND

This putative class action is composed of six different lawsuits brought on behalf of investors allegedly defrauded by a cryptocurrency Ponzi scheme. Pursuant to the Private Securities Litigation Reform Act of 1995, I previously consolidated these cases and appointed Albert Parks and Faramarz Shemirani, who together comprise the "BitConnect Investor Group," as Co-Lead Plaintiffs. (DE 46). Plaintiffs filed their Amended Consolidated Class Action Complaint (the "Consolidated Complaint") on October 11, 2018. (DE 78).

I dismissed the Consolidated Complaint as to Defendants Arcaro's, Maasen's, and YouTube's Motions to Dismiss upon their respective motions. (DE 115). While the dismissal of Defendant YouTube was with prejudice, the dismissal of Arcaro and Maasen was without prejudice. In the Order of dismissal, I allowed Plaintiffs to amend their complaint.

On September 13, 2019, Plaintiffs filed a Second Amended Consolidated Class Action Complaint (the "SAC"). (DE 118). Defendants Arcaro and Maasen subsequently filed the present Motions to Dismiss. (DE 122; DE 130). In the present Motions, Arcaro and Maasen ask for the claims against them to be dismissed with prejudice, as they have already been dismissed once.

I. The Consolidated Complaint

I begin by addressing the allegations raised in the dismissed Consolidated Complaint. The Consolidated

Complaint categorized the many Defendants in this matter into three groups. The first, composed of Defendants Bitcoin AMR Limited f/k/a BitConnect Public Limited, BitConnect International PLC, BitConnect Ltd., BitConnect Trading Ltd., is identified as the "BitConnect Corporate Defendants." (Consol. Compl. ¶¶ 28-32). These entities (collectively "BitConnect") are wholly interrelated and are used as interchangeable instrumentalities of the alleged schemes. (*Id.* ¶ 33). Plaintiffs next identify a group of "BitConnect Developer Defendants," composed of eleven of BitConnect's founders, administrators, consultants, and operatives. (*Id.* ¶¶ 34-42). While summons have been issued as to all of the BitConnect Corporate Defendants and BitConnect Developer Defendants (DE 1; DE 3; DE 80; DE 81), the docket does not reflect whether any of them have been served, and none have appeared in this action.

The third group, which included seventeen identified individuals and nine John Does, is labeled as the "BitConnect Director and Promoter Defendants." (*Id.* ¶¶ 43-60). Of this group, four individuals have appeared in this action: Defendants Glenn Arcaro, Trevon Brown, Ryan Hildreth, and Ryan Maasen. The Consolidated Complaint referred to the BitConnect Corporate Defendants, the BitConnect Developer Defendants, and the BitConnect Director and Promoter Defendants collectively as the "BitConnect Defendants." The other Defendant named in the Consolidated Complaint was YouTube, LLC ("YouTube").

The essence of the Consolidated Complaint is that BitConnect operated a pyramid/Ponzi scheme

in the form of the BitConnect Lending Program and the BitConnect Staking Program (the "BitConnect Investment Programs"). (*Id.* ¶ 3). Participation in either of these programs required investors to purchase, using either bitcoin or fiat currency, BitConnect-created cryptocurrency called BitConnect Coins ("BCC") on the BitConnect BCC Exchange. (*Id.* ¶ 3). The BitConnect Lending Program was marketed as an opportunity for investors to "lend" their BCC back to BitConnect, which would then use a trading algorithm to create profit from volatility in the bitcoin market. (*Id.* ¶ 4). The BitConnect Staking Program was presented as a way for investors to "stake" their BCC by holding them in a digital wallet software created by BitConnect. (*Id.* ¶ 5). Both of the BitConnect Investment Programs were alleged to have "guaranteed" lucrative returns on investments. (*Id.* ¶¶ 4-5).

To extend the reach of the BitConnect Investment Programs, BitConnect was alleged to have used a multilevel affiliate marketing system in which affiliates were paid a commission for referrals and would receive a portion of investments made by subsequent investors. The Promoter Defendants were alleged to have been "highly influential affiliate marketers and/or directors" of BitConnect and to have received compensation directly from BitConnect. (*Id.* ¶¶ 6-7). YouTube's role in the allegations stemmed from its partnerships with the Promoter Defendants: The Consolidated Complaint alleged that YouTube was negligent in failing to warn the victims of the harmful BitConnect content for which YouTube compensated its creators and publishers. (*Id.*).

Appendix C

After an enormous amount of investment in BCC and the BitConnect Investment Programs—Plaintiffs alleged that the class suffered damages in excess of $2,000,000,000—BitConnect shut down its trading platforms in early 2018. (*Id.* ¶¶ 189, 192). It shut down the lending program and stopped honoring promises to return the principal invested in the program. (*Id.* ¶ 190). Within moments of BitConnect shutting down its trading and lending platforms, the price of BCC fell nearly 90% in value, and the Complaint stated that BCC are now "effectively useless." (*Id.* ¶ 191).

The Consolidated Complaint alleged a violation of Section 12(a) of the Securities Act of 1933 against the BitConnect Defendants. (Count I). The Consolidated Complaint also alleged violations of Section 15(a) of the Securities Act against most of the BitConnect Developer Defendants and four of the Promoter Defendants: Defendants Satish Kumbhani, Divyesh Darji, Glenn Arcaro and Joshua Jeppesen. (Count II—Count XIII). Plaintiffs alleged a breach of contract against the Corporate Defendants, the Developer Defendants, and Defendants Satish and Darji. (Count XIV). Against the BitConnect Defendants, Plaintiffs also alleged unjust enrichment (Count XV), violation of Florida's Deceptive and Unfair Trade Practices Act (Count XVI), fraudulent inducement (Count XVII), fraudulent misrepresentation (Count XVIII), negligent misrepresentation (Count XIX), conversion (Count XX), and civil conspiracy (Count XXI). Against YouTube, Plaintiffs alleged a single count of negligent failure to warn (Count XXII).

II. The Dismissal of the Consolidated Complaint

Defendants Arcaro, Maasen, and YouTube previously sought dismissal of the Consolidated Complaint for lack of personal jurisdiction and for failure to state a claim. (DE 86; DE 88; DE 94). Defendant YouTube also sought dismissal on the basis that Plaintiffs' claim against it was barred by Section 230 of the Communications Decency Act (the "CDA").

I granted each of the three motions to dismiss. (DE 115). I dismissed Plaintiffs' claim against YouTube with prejudice because it was barred by the CDA. (*Id* at 24-25). I also dismissed Plaintiffs claims against Defendants Arcaro and Maasen, but without prejudice, because the Court lacked personal jurisdiction over those defendants. (*Id.* at 5-6). In so doing, I rejected Plaintiffs' arguments that the Securities Act established personal jurisdiction over Defendants Arcaro and Maasen. It is true that because the Securities Act provides for nationwide service of process, it can become the statutory basis for personal jurisdiction. *See* 15 U.S.C. § 77v(a). However, the mere allegation of a Securities Act violation is not sufficient to confer personal jurisdiction. And because I subsequently found that Plaintiffs securities law claims against Defendants Arcaro and Maasen failed, jurisdiction on the basis of the Securities Act was foreclosed. (*Id.* at 5-6).

The Securities law claims against Defendant Arcaro and Maasen failed because the Consolidated Complaint's allegations did not establish that Arcaro and Maasen qualified as "Statutory Sellers," which is a prerequisite to

stating the Section 12(a) securities law claim. (*Id.* at 18-20). I also dismissed the Section 15(a) claim against Defendant Arcaro because the Consolidated Complaint failed to sufficiently allege "controlling person liability." (*Id.* at 22). Specifically, Plaintiffs failed to include allegations that Arcaro had the power to control the general affairs of the primarily liable entity and that Arcaro had the power to control the specific corporate policy which resulted in the primary liability.

Plaintiffs were permitted to file a Second Amended Consolidated Class Action Complaint by September 13, 2019. (*Id.* at 25). The Order dismissing the Consolidated Complaint described at length the deficiencies in Plaintiffs' claims against Defendants Arcaro and Maasen. Thus, Plaintiffs were directed to cure these deficiencies in the Second Amended Complaint if they intended to pursue the claims against Arcaro and Maasen.

III. The Additional Relevant Allegations in the Second Amended Complaint

On the September 13 deadline, Plaintiffs filed the SAC. (DE 118). In the SAC, Plaintiffs bring the claims against Defendants Arcaro and Maasen that were dismissed without prejudice. The SAC adds four additional plaintiffs and Plaintiffs argue that the allegations related to these additional plaintiffs establish that Defendant Arcaro and Maasen qualify as statutory sellers. One of these plaintiffs claims to have been "personally solicited" by Defendant Arcaro to invest in BitConnect. However, the alleged "personal solicitation" involved the applicable plaintiff

visiting Arcaro's publicly available website, completing a BitConnect training course, and later investing in BitConnect. (SAC ¶ 29). The remaining three additional plaintiffs claim to have been "personally solicited" by Defendants Arcaro and Maasen. This alleged "personal solicitation" involved Plaintiffs viewing publicly available videos (on YouTube) made by Arcaro and/or Maasen about BitConnect. (*Id.* ¶ 30-32). Plaintiffs' investment in BitConnect was allegedly motivated by these videos. (*Id*). As for the Section 15(a) claim against Defendant Arcaro, it appears that almost every relevant allegation from the Consolidated Complaint has been repleaded word for word in the SAC.[1] (*Compare* Consol. Comp. ¶¶ 43, 51, 93-96, 140-145, *with* SAC ¶¶ 48, 56, 98-101, 145-150).

ANALYSIS

Defendants Arcaro and Massen seek dismissal of Plaintiffs' Securities Act claims for lack of personal jurisdiction and failure to state a claim.

I. Failure to State a Claim

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of a complaint. *See* Fed. R. Civ. P. 12(b)(6). To satisfy the pleading standard of Rule 8(a)(2), as articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and *Ashcroft*

1. Plaintiffs have only minimally amended two paragraphs of the Section 15(a) allegations. Because these amendments do not alter the analysis for the Section 15(a) claim against Arcaro, I do not address them in further detail.

v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), a complaint "must . . . contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Am. Dental Ass 'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Twombly*, 550 U.S. at 570). "Dismissal is therefore permitted when on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Glover v. Liggett Grp., Inc.*, 459 F.3d 1304, 1308 (11th Cir. 2006) (internal quotations omitted) (citing *Marshall Cty. Bd. of Educ. v. Marshall Cty. Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993)).

When reviewing a motion to dismiss, a court must construe a plaintiff's complaint in the light most favorable to the plaintiff and take the complaint's factual allegations as true. *See Erickson v. Pardus, 551* U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007); *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997). Pleadings that "are no more than conclusions[] are not entitled to the assumption of truth," however. *Iqbal*, 556 U.S. at 678.

A. Section 12(a) of the Securities Act

Defendant Maasen and Arcaro both move to dismiss Plaintiffs' Section 12(a) claim against them. (DE 122; DE 130). The Securities Act of 1933 protects investors by ensuring that companies issuing securities (known as "issuers") make a full and fair disclosure of information relevant to a public offering. *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175,

135 S. Ct. 1318, 1323, 191 L. Ed. 2d 253 (2015) (citing *Pinter v. Dahl*, 486 U.S. 622, 646, 108 S. Ct. 2063, 100 L. Ed. 2d 658 (1988)). "The linchpin of the Act is its registration requirement." *Id* Section 5 of the Act, 15 U.S.C. § 77e, prohibits the sale of unregistered securities, and Section 12(a)(1) of the Act, 15 U.S.C. § 771, creates a private right of action against any person who "offers or sells" a security in violation of Section 5.

"To establish *a prima facie* case of violation of section 5, a plaintiff need allege only the sale or offer to sell securities, the absence of a registration statement covering the securities, and the use of the mails or facilities of interstate commerce in connection with the sale or offer." *Raiford v. Buslease, Inc.*, 825 F.2d 351, 354 (11th Cir. 1987) (*citing Swenson v. Engelstad*, 626 F.2d 421, 424-25 (5th Cir. 1980)). With respect to the second element of the *prima facie* case, Arcaro and Maasen argue that they did not offer or sell BCC within the scope of the statute.

1. Statutory Sellers' Analysis

Plaintiffs' Section 12(a) claim against Maasen and Arcaro must be dismissed for their failure to satisfactorily allege the second element of their *prima facie* case. In *Pinter v. Dahl*, the Supreme Court articulated two circumstances in which a defendant could be considered to have "sold" unregistered securities. Liability extends to both "the person who transfers title to, or other interest in, that property" and "the person who successfully solicits the purchase, motivated at least in part by a desire to

serve his own financial interests or those of the securities owner." 486 U.S. at 642, 647. Plaintiffs argue that Arcaro and Maasen's solicitation makes them liable under the latter category.

In defining the contours of solicitors' § 12 liability, the *Pinter* Court found that the language of § 12 indicated the need to "focus[] on the defendant's relationship with the plaintiff-purchaser" and noted that the statute does not "impose express liability for *mere participation* in unlawful sales transactions." *Id.* at 651-52 (emphasis added). The *Pinter* decision rejected as too broad the Fifth Circuit's "substantial-factor" test, which imposed liability if the defendant's participation in the buy-sell transaction was "a substantial factor in causing the transaction to take place." *Id* at 649.

Interpreting *Pinter*, the Eleventh Circuit cited a law review article for the proposition that the § 12 liability of "participants who do not own the securities" is governed by a two-part test that first asks whether the participant in the sale "solicited" the purchase and second asks "whether the participant or the owner of the security sold benefited." *Ryder Int'l Corp. v. First Am. Nat. Bank*, 943 F.2d 1521, 1531 (11th Cir. 1991) (citing Joseph E. Reece, *Would Someone Please Tell Me the Definition of the Term 'Seller': The Confusion Surrounding Section 12(2) of the Securities Act of 1933*, 14 Del. J. Corp. L. 35 (1989)). In *Ryder*, the Eleventh Circuit affirmed the trial court's grant of summary judgment for defendants on the basis that the plaintiff-appellant failed to satisfy the first part of the test: "The substance of the communications

between Wallace Case and Mike Casey (the parties to the two transactions at issue), is not in dispute and reveals that Casey (working for [Defendant bank]) only executed [Plaintiff corporation]'s orders. Casey did not actively solicit the orders, *i.e.* 'urge' or 'persuade' Casey (working for [Plaintiff]) to buy [the subject securities]." *Id.* at 1531 (citing *Pinter*, 486 U.S. at 644, 647). Thus "a plaintiff must allege not only that the defendant actively solicited investors, but that the plaintiff purchased securities as a result of that solicitation. Mere conclusory allegations that a defendant solicited the sale of stock and was motivated by financial gain to do so are insufficient to state a claim under Section 12." *In re CNL Hotels & Resorts, Inc.*, No. 04-cv-1231ORL-31KRS, 2005 U.S. Dist. LEXIS 51501, 2005 WL 2291729, at *5 (M.D. Fla. Sept. 20, 2005).

2. Statutory Seller Allegations in the Consolidated Complaint

In dismissing Plaintiffs' claims against Defendants Arcaro and Massen, I found that Plaintiffs failed to allege that they purchased securities *as a result* of Arcaro and Maasen's *personal* solicitations. (DE 115 at 19). Although the Consolidated Complaint contained broad recitations of the elements of Plaintiffs' § 12(a) claims,[2] it was devoid

2. *See, e.g.*, Consol. Compl. ¶ 25 ("[E]ach of the Plaintiffs were personally, and successfully, solicited by the BITCONNECT Defendants in connection with their public representations and active solicitations to purchase BCCs or participate in the BitConnect Investment Programs."); *id.* ¶ 51 ("ARCARO himself was one of the most successful affiliate/recruiters for BITCONNECT, soliciting hundreds if not thousands of BITCONNECT investors in the United

of specific allegations regarding Arcaro and Maasen's efforts to urge or persuade Plaintiffs, individually, to purchase BCC. Plaintiffs sought to establish liability on the sole basis that they encountered publicly available content created by Arcaro and Maasen while researching the BitConnect Investment Programs:

> Such research included reviewing virtual currency online forums, reading BITCONNECT's publications and viewing its promotional videos. Accordingly, each of the solicitations outlined below were successful in soliciting Plaintiffs and the Class to invest with BITCONNECT. . . . With respect to the Promoter Defendants, each actively solicited investments in BCCs and the BitConnect Investment Programs -- largely through YOUTUBE -- for the sole purpose of receiving compensation. Such activity falls squarely under the definition of "seller."

(Consol. Compl. ¶¶ 180, 184). As explored in the prior Order (DE 115) and reiterated above, such activity does not fall under the definition of "seller," and Plaintiffs supplied (and still supply) no caselaw to the contrary. *See also Rensel v. Centra Tech, Inc.*, No. 17-24500-CIV, 2019 U.S. Dist. LEXIS 79855, 2019 WL 2085839, at *2 (S.D.

States and abroad through social media sites such as YOUTUBE and Facebook."); *id.* ¶ 58 ("MAASEN served as an affiliate/recruiter for BITCONNECT, soliciting hundreds if not thousands of BITCONNECT investors in the United States and abroad through social media sites such as YOUTUBE and Facebook.").

Fla. May 13, 2019) (dismissing § 12(a)(1) claim where only solicitation allegations entailed two posts on defendant's Twitter account related to the subject security).

I also recognized that the Consolidated Complaint contained no allegations regarding a relationship between any of the Plaintiffs and Arcaro or Maasen. Nor did it contain allegations that either Defendant engaged in active efforts to urge or persuade any of the Plaintiffs to invest in BCC. As a result, I concluded that Plaintiffs had not satisfied the two-part *Pinter* test articulated by the Eleventh Circuit in *Ryder*. Plaintiffs' claims against Defendants Arcaro and Maasen were dismissed; however, Plaintiffs were given leave to amend the complaint.

3. Statutory Seller Allegations in the Second Amended Complaint

In the SAC, Plaintiffs mostly re-plead the statutory seller related allegations that were made in the Consolidated Complaint. *Compare, e.g.*, Consol. Compl. ¶ 25 ("[E]ach of the Plaintiffs were personally, and successfully, solicited by the BITCONNECT Defendants in connection with their public representations and active solicitations to purchase BCCs or participate in the BitConnect Investment Programs."), *with* SAC ¶ 26 (repeating the allegation made in Paragraph 25 of the Consolidated Complaint verbatim). For the reasons stated in the Order dismissing Plaintiffs' claims against Defendants Arcaro and Maasen (DE 115), and reiterated in this Order, those allegations do not sufficiently establish that Arcaro and Maasen qualify as "Statutory Sellers."

Appendix C

Plaintiffs add allegations that four plaintiffs purchased BCC because of Defendants Arcaro's and Maasen's recruitment efforts. (DE 128 at 14-15) (arguing that the allegations made in Paragraphs 29-32, 160-61, 191-92 of the SAC establish that Arcaro and Maasen qualify as statutory sellers). According to the SAC, three of these additional plaintiffs "were personally and successfully solicited to invest in BitConnect" by Arcaro and one of those plaintiffs was also solicited by Maasen. (SAC ¶¶ 30-32). However, this "personal and successful solicitation" was not so personal after all. The three additional plaintiffs merely viewed Arcaro's and Massen's publicly available videos (on YouTube) about the BitConnect program and allegedly invested in BitConnect because of these videos. (*See, e.g.*, SAC ¶ 30) ("Plaintiff Yoo was personally and successfully solicited to invest in BitConnect by Defendants Arcaro and Maasen. Specifically, Plaintiff Yoo viewed Defendant Arcaro's and Maasen's YouTube videos and signed up for BitConnect through their affiliate programs.").

Plaintiff Marryshow, the fourth additional plaintiff, "completed the 'training program' available on Defendant Arcaro's primary website to 'funnel' investments into BitConnect—futuremoney.io. Following Plaintiff Marryshow's completion of training on futuremoney.io, Plaintiff Marryshow invested approximately 1.52838 bitcoin into the BitConnect Investment Porgrams." (SAC ¶ 29); (*id* ¶ 160) ("Defendant Arcaro's primary 'funnel' site appears to have been futuremoney.io. On that website, 'lessons' eight, nine, and ten in the course named 'Cryptocurrency 101' were entitled, respectively, 'Buying Your First Bitcoin,"Creating Your Bitconnect Account,'

and 'Bitcoin to Bitconnect: Transfer and Start Earning!' Unsurprisingly, the 'graduates' of 'BCC School' were directed to open Bitconnect accounts using Defendant Arcaro's and his team's referral links."); (*id.* ¶ 191) ("Plaintiff Marryshow was personally and successfully solicited to invest in the BitConnect Investment Programs by Defendant Arcaro because she completed the 'training program' on Defendant Arcaro's website (futuremoney.io), after which she invested in BitConnect.").

As was the case with the three other additional plaintiffs, these allegations regarding Plaintiff Marryshow do not allege that any defendant personally solicited an investment from Marryshow. Instead, the SAC only alleges that Plaintiff Marryshow interacted with Defendant Arcaro's training program and later invested in the BitConnect program.

For the same reasons stated in the prior Order (DE 115), the additional allegations fail to allege that Plaintiffs purchased securities *as a result of* Arcaro's and/or Massen's *personal* solicitation. Like the allegations made in the Consolidated Complaint, the SAC fails to allege that either Defendant engaged in active efforts to urge or persuade any of the Plaintiffs to invest in BitConnect. Rather, Plaintiffs attempt to establish liability simply because certain plaintiffs encountered and interacted with publicly available content made by Defendants Arcaro and Maasen while researching BitConnect. And these Plaintiffs claim to have subsequently invested in Bitconnect as a result of viewing/completing Defendants Arcaro's and Maasen's BitConnect related materials. As

a result, I again conclude that Plaintiffs have not satisfied the two-part *Pinter* test, as articulated by the Eleventh Circuit in *Ryder*; therefore, the Section 12 claims against Arcaro and Maasen are dismissed with prejudice.

B. Section 15(a) of the Securities Act

Defendant Arcaro also moves to dismiss Plaintiffs' Section 15(a) claim against Arcaro. (DE 122). Section 15 of the Securities Act of 1933 imposes joint and several liability upon controlling persons for acts, committed by those under their control, that violate §§ 11 and 12. *See* 15 U.S.C. § 77o. To state a claim for control person liability in the Eleventh Circuit, a plaintiff must allege facts that establish, in addition to a primary violation of the securities laws, that the defendant "had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws" *and* that the Defendant "had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability." *Brown v. Enstar Grp., Inc.*, 84 F.3d 393, 396 (11th Cir. 1996) (quotations omitted). "A complaint that merely restates the legal standard for control person liability, without providing facts in support of the allegation, does not adequately plead control person liability." *Bruhl v. Price Waterhousecoopers Int'l*, No. 03-23044-CIV, 2007 U.S. Dist. LEXIS 21885, 2007 WL 983263, at *10-11 (S.D. Fla. Mar. 27, 2007). A defendant is not subject to control person liability simply because he is an officer or director of a corporation. Rather, the "plaintiff must make a showing that the defendant 'had power, directly or indirectly, to

influence the policy and decision-making process of the one who violated the act, such as through ownership of voting stock, by contract or through managerial power.'" *Tippens v. Round Island Plantation L.L.C.*, No. 09-CV-14036, 2009 U.S. Dist. LEXIS 66224, 2009 WL 2365347, at *10 (S.D. Fla. July 31, 2009) (quoting *In re Sahlen & Assocs., Inc. Sec. Litig.*, 773 F. Supp. 342, 362-63 (S.D. Fla. 1991)).

I previously dismissed without prejudice Count XII of the Consolidated Complaint, in which Plaintiffs raised a Section 15(a) claim against Defendant Arcaro. (Consol. Comp. ¶¶ 273-75; DE 115 at 20-22). Plaintiffs re-raise this claim in Count XII of the SAC. Defendant Arcaro contends that Count XII of the SAC is again subject to dismissal because "Plaintiffs make no effort in the SAC to address the Court's dismissal of their control person claim." (DE 122 at 12). Specifically, Arcaro contends that Plaintiff has failed to offer any new factual allegations related to the Section 15(a) claim, "despite being told by the Court precisely what type of allegations' would suffice." (*Id.* at 13).

Plaintiffs argue that the SAC's allegations plausibly state a Section 15(a) claim against Defendant Arcaro.[3] (DE 128 at 18-19). In making this argument, Plaintiffs rely on factual allegations that were raised in the Consolidated Complaint and have been re-raised in the

3. Plaintiffs heavily rely on *In re Tezos Securities Litigation*, No. 17-cv-6779, 2018 U.S. Dist. LEXIS 157247, 2018 WL 4293341 (N.D. Cal. Aug. 7, 2018). Needless to say, I am not bound by *In re Tezos*. And that case is not even minimally persuasive as it is factually dissimilar to the present case.

SAC. I previously found that these same allegations fail to impose "control person liability" on Defendant Arcaro, meaning Plaintiffs' Section 15(a) claim against Defendant Arcaro was subject to dismissal. Again, I reject Plaintiffs' identical argument (that these allegations plausibly state a Section 15(a) claim against Arcaro) for the reasons stated in the prior Order (DE 115). Because I already found these allegations to be inadequate, Plaintiffs' Section 15(a) claim against Defendant Arcaro is dismissed with prejudice.

II. Personal Jurisdiction

Defendants Arcaro and Maasen argue that once the Securities Act claims are dismissed, the Court lacks personal jurisdiction over Arcaro and Maasen. (DE 122 at 12-13; DE 130 at 13). In deciding whether to exercise personal jurisdiction over a particular defendant, federal courts generally conduct a two-part inquiry, first determining whether the defendant can properly be served with process under the applicable statutory authority and then ascertaining whether that service comports with constitutional due process requirements. *See* United *Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009). The plaintiff "has the burden of establishing a *prima facie* case of personal jurisdiction." *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006) (citing *Meier ex rel. Meier v. Sun Int 'l Hotels, Ltd.*, 288 F.3d 1264, 1268-69 (11th Cir. 2002)).

In the prior motion to dismiss briefing, which the Parties adopt in their current briefing, Plaintiffs

specifically identified the Securities Act as the basis for personal jurisdiction.[4] (*See* DE 97 at 19-20) ("Personal jurisdiction in this case is not premised on Florida's long-arm statute, but rather on a specific statutory provision, 15 U.S.C. § 77v(a), which authorizes nationwide service of process for claims brought under the federal securities laws."). The Securities Act gives the district courts of the United States "jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto." 15 U.S.C. 77v(a). That section also provides that

> Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

---

4. In direct contrast with this representation, Plaintiffs add allegations to the SAC stating (in a conclusory manner) that the Court has personal jurisdiction over Defendants Arcaro and Maasen through Florida's long-arm statute. (SAC ¶ 23). However, in response to the present Motions, Plaintiffs have not argued personal jurisdiction in this manner. In addition, Plaintiffs' SAC does not include any specific factual allegations supporting the application of the long-arm statute. Thus, even assuming Plaintiffs have not waived the argument that the Court has personal jurisdiction based upon Florida's long-arm statue, Plaintiffs have not met their burden of establishing personal jurisdiction through application of the long-arm statute. *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006) ("[The plaintiff] has the burden of establishing *a prima facie* case of personal jurisdiction.").

Id. Where, as here, a federal statute provides for nationwide service of process, it becomes the statutory basis for personal jurisdiction. *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 942 (11th Cir. 1997).

However, the mere allegation of a Securities Act violation is not sufficient to confer personal jurisdiction. When a jurisdictional motion to dismiss depends "on the assertion of a right created by a federal statute, the court should dismiss for lack of jurisdiction only if the right claimed is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise devoid of merit as not to involve a federal controversy." *Id.* at 941 (citations and quotations omitted).

Because Plaintiffs' Securities Act claims against Arcaro and Maasen fail, *see* Section I & II, jurisdiction on the basis of the Securities Act is foreclosed.

CONCLUSION

For the reasons set forth above, Plaintiffs' Securities Act claims against Defendants Arcaro and Maasen are dismissed with prejudice. Because Plaintiffs' basis for personal jurisdiction over Arcaro and Maasen is premised upon the Securities Act, the Court lacks personal jurisdiction over those Defendants and dismisses the SAC in its entirety as to Arcaro and Maasen.

Although I have dismissed the federal claims brought against Defendants Arcaro and Maasen with prejudice,

I did not reach any of the state law claims because, without any plausible federal claim, the Court lacks personal jurisdiction over Arcaro and Maasen. Therefore, the dismissal of Arcaro and Madsen with prejudice only dismisses them from this action in this forum.

Accordingly, it is **ORDERED and ADJUDGED** that:

(1) Defendant Glenn Arcaro's Motion to Dismiss (DE 122) is **GRANTED**.

(2) Defendant Ryan Maasen's Motion to Dismiss (DE 130) is **GRANTED**.

(3) Defendants Ryan Maasen and Glenn Arcaro are **DISMISSED WITH PREJUDICE**.

SIGNED in Chambers at West Palm Beach, Florida this 15 day of November, 2019.

/s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED AUGUST 23, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No: 18-cv-80086-MIDDLEBROOKS

IN RE BITCONNECT SECURITIES LITIGATION,

August 23, 2019, Decided;
August 23, 2019, Entered on Docket

ORDER ON MOTIONS TO DISMISS

THIS CAUSE comes before the Court upon the Motions to Dismiss filed by Defendant Ryan Maasen (DE 86), Defendant YouTube, LLC (DE 88), and Defendant Glenn Arcaro (DE 94). Co-Lead Plaintiffs Albert Parks and Faramarz Shemirani filed an omnibus response in opposition to these motions on November 20, 2019. (DE 97). Defendants Maasen, YouTube, and Arcaro each filed a reply in support of their respective motions on December 4, 2018. (DE 101; DE 102; DE 103). THIS CAUSE also comes before the Court on Defendant Arcaro's Request for Judicial Notice, to which Plaintiffs did not respond. (DE 105).

Appendix D

BACKGROUND

This putative class action is composed of six different lawsuits brought on behalf of investors allegedly defrauded by a cryptocurrency Ponzi scheme. Pursuant to the Private Securities Litigation Reform Act of 1995, I previously consolidated these cases and appointed Albert Parks and Faramarz Shemirani, who together comprise the "BitConnect Investor Group," as Co-Lead Plaintiffs. (DE 46). The operative complaint in this matter is the Amended Consolidated Class Action Complaint ("Consolidated Complaint") filed on October 11, 2018 by Parks and Shemirani ("Plaintiffs").

The Consolidated Complaint categorizes the many Defendants in this matter into three groups. The first, composed of Defendants Bitcoin AMR Limited f/k/a BitConnect Public Limited, BitConnect International PLC, BitConnect Ltd., BitConnect Trading Ltd., is identified as the "BitConnect Corporate Defendants." (Consol. Compl. ¶¶ 28-32). The Consolidated Complaint states that these entities (collectively "BitConnect") are wholly interrelated and are used as interchangeable instrumentalities of the alleged schemes. (*Id.* ¶ 33). Plaintiffs next identify a group of "BitConnect Developer Defendants," composed of eleven of BitConnect's founders, administrators, consultants, and operatives. (*Id.* ¶¶ 34-42). While summons have been issued as to all of the BitConnect Corporate Defendants and BitConnect Developer Defendants (DE 1; DE 3; DE 80; DE 81), the docket does not reflect whether any of them have been served, and none have appeared in this action. The third

group, which includes seventeen identified individuals and nine John Does, is labeled as the "BitConnect Director and Promoter Defendants." (*Id.* ¶¶ 43-60). Of this group, four individuals have appeared in this action: Defendants Glenn Arcaro, Trevon Brown, Ryan Hildreth, and Ryan Maasen. The Consolidated Complaint refers to the BitConnect Corporate Defendants, the BitConnect Developer Defendants, and the BitConnect Director and Promoter Defendants collectively as the "BitConnect Defendants." The other Defendant named in this matter is YouTube, LLC ("YouTube").

The essence of the Consolidated Complaint is that BitConnect operated a pyramid/Ponzi scheme in the form of the BitConnect Lending Program and the BitConnect Staking Program (the "BitConnect Investment Programs"). (*Id.* ¶ 3). Participation in either of these programs required investors to purchase, using either Bitcoin[1] or fiat currency, BitConnect-created cryptocurrency called BitConnect Coins ("BCC") on the BitConnect BCC Exchange. (*Id.* ¶ 3). The BitConnect Lending Program was marketed as an opportunity for investors to "lend" their BCC back to BitConnect, which

1. Bitcoin is an electronic form of floating currency that is neither backed by any real asset nor regulated by a central bank or governmental authority—instead, the bitcoin supply is based on an algorithm that structures a decentralized peer-to-peer transaction system. *SEC v. Shavers*, No. 4:13-CV-416, 2013 U.S. Dist. LEXIS 110018, 2013 WL 4028182 (E.D. Tex. Aug. 6, 2013) (citing Derek A. Dion, *I'll Glady Trade You Two Bits on Tuesday for a Byte Today: Bitcoin, Regulating Fraud in the E-Conomy of Hacker-Cash*, 2013 U. Ill. J.L. Tech & Pol'y 165, 167 (2013)). The value of Bitcoin is volatile. *Id.*

would then use a trading algorithm to create profit from volatility in the bitcoin market. (*Id.* ¶ 4). The BitConnect Staking Program was presented as a way for investors to "stake" their BCC by holding them in a digital wallet software created by BitConnect. (*Id.* ¶ 5). Both of the BitConnect Investment Programs are alleged to have "guaranteed" lucrative returns on investments. (*Id.* ¶¶ 4-5).

To extend the reach of the BitConnect Investment Programs, BitConnect is alleged to have used a multilevel affiliate marketing system in which affiliates were paid a commission for referrals and would receive a portion of investments made by subsequent investors. The Promoter Defendants are alleged to have been "highly influential affiliate marketers and/or directors" of BitConnect and to have received compensation directly from BitConnect. (*Id.* ¶ 6). YouTube's role in the allegations stems from its partnerships with the Promoter Defendants: The Consolidated Complaint alleges that YouTube was negligent in failing to warn the victims of the harmful BitConnect content for which YouTube compensated its creators and publishers. (*Id.* ¶ 7).

After an enormous amount of investment in BCC and the BitConnect Investment Programs—Plaintiffs allege that the class has suffered damages in excess of $2,000,000,000—BitConnect shut down its trading platforms in early 2018. (*Id.* ¶¶ 189, 192). It shut down the lending program and stopped honoring promises to return the principal invested in the program. (*Id.* ¶ 190). Within moments of BitConnect shutting down its trading

and lending platforms, the price of BCC fell nearly 90% in value, and the Complaint states that BCC are now "effectively useless." (*Id.* ¶ 191).

The Consolidated Complaint alleges a violation of Section 12(a) of the Securities Act of 1933 against the BitConnect Defendants. (Count I). The Consolidated Complaint also alleges violations of Section 15(a) of the Securities Act against most of the BitConnect Developer Defendants and four of the Promoter Defendants: Defendants Satish Kumbhani, Divyesh Darji, Glenn Arcaro and Joshua Jeppesen. (Count II—Count XIII). Plaintiffs allege a breach of contract against the Corporate Defendants, the Developer Defendants, and Defendants Satish and Darji. (Count XIV). Against the BitConnect Defendants, Plaintiffs also allege unjust enrichment (Count XV), violation of Florida's Deceptive and Unfair Trade Practices Act (Count XVI), fraudulent inducement (Count XVII), fraudulent misrepresentation (Count XVIII), negligent misrepresentation (Count XIX), conversion (Count XX), and civil conspiracy (Count XXI). Against YouTube, Plaintiffs allege a single count of negligent failure to warn (Count XXII).

ANALYSIS

Defendants Arcaro, Maasen, and YouTube seek dismissal for lack of personal jurisdiction and for failure to state a claim. Defendant YouTube also seeks dismissal on the basis that Plaintiffs' claim against it is barred by Section 230 of the Communications Decency Act.

Appendix D

I. Personal Jurisdiction

Defendant Arcaro is alleged to be a resident of California, Defendant Maasen is alleged to be a resident of Oklahoma, and Defendant YouTube is alleged to be a Delaware limited liability company with its principal place of business in California. (Consol. Compl. ¶¶ 51, 58, 61). Each argues that dismissal is warranted under Federal Rule of Civil Procedure 12(b)(2), which allows for dismissal of a claim when the court lacks personal jurisdiction over a defendant.

In deciding whether to exercise personal jurisdiction over a particular defendant, federal courts generally conduct a two-part inquiry, first determining whether the defendant can properly be served with process under the applicable statutory authority and then ascertaining whether that service comports with constitutional due process requirements. *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009). The plaintiff "has the burden of establishing a prima facie case of personal jurisdiction." *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006) (citing *Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1268-69 (11th Cir. 2002)).

A. Defendants Arcaro and Maasen

Arcaro and Maasen argue that dismissal is proper because Florida's long-arm statute does not confer jurisdiction over them. Plaintiffs, however, identify a different statutory basis for personal jurisdiction: the

Securities Act, which gives the district courts of the United States "jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto." 15 U.S.C. 77v(a). That section also provides that

> Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Id. Where, as here, a federal statute provides for nationwide service of process, it becomes the statutory basis for personal jurisdiction. *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 942 (11th Cir. 1997).

The mere *allegation* of a Securities Act violation is not sufficient to confer personal jurisdiction, however. When a jurisdictional motion to dismiss depends "on the assertion of a right created by a federal statute, the court should dismiss for lack of jurisdiction only if the right claimed is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise devoid of merit as not to involve a federal controversy." *Id.* at 941 (citations and quotations omitted). Because Plaintiffs' securities claims against Arcaro and Maasen fail, however, *see infra* Section II, jurisdiction on the basis of the Securities Act is foreclosed.

Plaintiffs' remaining claims against Arcaro and Maasen are all state law causes of action. The only argument Plaintiffs advance with respect to these claims is that personal jurisdiction is proper because the claims arise from the same nucleus of operative fact as Plaintiffs' securities claims.[2] "Pendent personal jurisdiction permits a court to entertain a claim against a defendant over whom it lacks personal jurisdiction, but only if that claim arises from a common nucleus of operative fact with a claim in the same suit for which the court does have personal jurisdiction over the defendant." 13D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3567 (3d ed. 2019). Plaintiffs' securities claims against Arcaro and Maasen are subject to dismissal, however, and in the absence of an anchor claim, pendant jurisdiction does not provide a basis for personal jurisdiction of Plaintiffs' state law claims. *See Siegmund v. Xuelian Bian*, No. 16-62506-CIV, 2017 U.S.

2. Plaintiffs, on this point, appear to conflate supplemental jurisdiction, which pertains to subject matter jurisdiction, with pendant jurisdiction, which pertains to personal jurisdiction. *See* 13D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3567 (3d ed. 2019). While supplemental jurisdiction is expressed in a statute, 28 U.S.C. § 1367, pendant jurisdiction is a matter of common law and has not been adopted by the Eleventh Circuit. I note, however, that "every circuit court of appeals to address the question [has] upheld the application of pendent personal jurisdiction.'" *See Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1176 (9th Cir. 2004) (quoting *United States v. Botefuhr*, 309 F.3d 1263, 1272-75 (10th Cir. 2002)) (adopting doctrine of pendant jurisdiction). Accordingly, for the purposes of this analysis, I will assume as valid the doctrine of pendant jurisdiction.

Dist. LEXIS 217216, 2017 WL 5644599, at *10 (S.D. Fla. Sept. 29, 2017) (declining to exercise pendant personal jurisdiction over state law claims after determining federal securities claim was due to be dismissed).

Plaintiffs do not argue that personal jurisdiction over Arcaro and Grant should be premised on Florida's long arm statute. Accordingly, in the absence of any basis for the Court to exercise personal jurisdiction over Plaintiffs' state law claims against Arcaro and Grant, and these claims are dismissed.

B. Defendant YouTube

I next turn to the question of whether the Court possesses personal jurisdiction over Defendant YouTube. "A defendant can be subject to personal jurisdiction under Florida's long-arm statute in two ways." *Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1204 (11th Cir. 2015). First, section 48.193(1)(a) lists acts that subject a defendant to *specific* personal jurisdiction—that is, jurisdiction over suits that arise out of or relate to a defendant's contacts with Florida. Fla. Stat. § 48.193(1)(a). Second, section 48.193(2) provides that Florida courts may exercise *general* personal jurisdiction—that is, jurisdiction over any claims against a defendant, whether or not they involve the defendant's activities in Florida—if the defendant engages in "substantial and not isolated activity" in Florida. Fla. Stat. § 48.193(2). Plaintiffs do not address general personal jurisdiction, but argue instead that YouTube is subject to specific jurisdiction because Defendant Grant, who is alleged to be a resident

of Miami, Florida, actively promoted BitConnect through videos he posted to YouTube. (Consol. Compl. ¶ 56). The Consolidated Complaint also alleges that in October of 2017, Grant began spending $7,000 per week on marketing with Google and YouTube. (*Id.* ¶ 148).

Florida's long-arm statute extends to, *inter alia*, persons and entities "[o]perating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state." Fla. Stat. § 48.193(1)(a)(1). Even if YouTube's conduct satisfied this provision, I find that the exercise of personal jurisdiction would be improper under the second component of the personal jurisdiction analysis, which requires a determination of whether the exercise of jurisdiction would comport with constitutional due process.

Jurisdiction over a non-resident defendant comports with due process if the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)). Since *International Shoe*, two categories of personal jurisdiction have arisen: general jurisdiction and specific jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 80 L. Ed. 2d 404, nn.8-9 (1984). With respect to specific jurisdiction, at issue here, the Court applies a three-part due process test, examining: (1) whether the plaintiffs claims "arise out of or relate to" at least one of

the defendant's contacts with the forum; (2) whether the nonresident defendant "purposefully availed" himself of the privilege of conducting activities within the forum state, thus invoking the benefit of the forum state's laws; and (3) whether the exercise of personal jurisdiction comports with "traditional notions of fair play and substantial justice." *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1355 (11th Cir. 2013) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73, 474-75, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). The plaintiff bears the burden of establishing the first two prongs, and if the plaintiff does so, "a defendant must make a 'compelling case' that the exercise of jurisdiction would violate traditional notions of fair play and substantial justice." *Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc.*, 593 F.3d 1249, 1267 (11th Cir. 2010). In the instant case, Plaintiffs fail to establish the first prong, and the analysis proceeds no further.

With respect to the first prong, the Court must determine whether Plaintiffs' claim arises out of or relates to one of Defendants' contacts with Florida. *Fraser v. Smith*, 594 F.3d 842, 850 (11th Cir. 2010) (citing *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1222 (11th Cir. 2009)). To do so, I must "look to the 'affiliation between the forum and the underlying controversy,' focusing on any 'activity or . . . occurrence that [took] place in the forum State.'" *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1314 (11th Cir. 2018), *cert. denied sub nom. Waite v. Union Carbide Corp.*, 139 S. Ct. 1384, 203 L. Ed. 2d 611 (2019) (quoting *Bristol-Myers Squibb Co. v. Superior Court*, 137 S.Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017)). In the absence

of such a connection, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.* at 1781. In the Eleventh Circuit, a tort arises out of or relates to the defendant's activity in a state only if the activity is a "but-for" cause of the tort. *Waite*, 901 F.3d at 1314 (citing *Oldfield*, 558 F.3d at 1222-23). In *Fraser*, for example, Fraser and his family were aboard a boat in the Turks and Caicos Islands when it exploded, killing Fraser and injuring his family members. 594 F.3d at 844. When Fraser's estate and family members brought suit against the boat's operators in Florida, the Eleventh Circuit determined that specific personal jurisdiction could not be premised on the defendant's website or advertisements in Florida because, since the plaintiffs had not viewed them, they could not "reasonably be construed as the but-for causes of the accident." *Id.* at 844-45, 850. In this case, the premise of Plaintiffs' failure-to-warn claim is that "YouTube owed a duty to its users not to partner with purveyors of fraud such as the BitConnect Defendants." (Consol. Compl. ¶ 348). Plaintiffs allege that Defendant Grant, one of the BitConnect Defendants, lived in Miami, posted videos to YouTube, paid $7,000 per week to advertise with Google and YouTube, and participated in the "YouTube Partner Program," which "let content creators monetize their content on YouTube while simultaneously monetizing YouTube's business operation itself." (*Id.* ¶¶ 56, 148, 197, 202). Plaintiffs have not alleged, however, that they watched any of Grant's videos or saw any of the advertisements he paid for. There is thus no direct causal relationship "among 'the defendant, the forum, and the litigation,'" *Oldfield*, 558 F.3d at 1222 (quoting *Helicopteros*, 466 U.S. at 414), and YouTube's

contacts with Grant cannot be considered a "but-for" cause of their failure to warn Plaintiffs. Accordingly, personal jurisdiction on the basis of Florida's long-arm statute is foreclosed.

The other argument Plaintiffs advance with respect to Defendant YouTube, pendant personal jurisdiction, also fails. While Plaintiffs' securities claims fail against Arcaro and Maasen, they may yet prevail with respect to other defendants in this action. Even so, the claims could not provide an anchor claim because, as YouTube argues, pendant jurisdiction provides a basis only for the exercise of personal jurisdiction over a plaintiff's related claims *against the same party. See Gill v. Three Dimension Sys., Inc.*, 87 F. Supp. 2d 1278, 1284 (M.D. Fla. 2000) (citing *Morley v. Cohen*, 610 F.Supp. 798 (D. Md. 1985)) (requiring plaintiff to plead sufficient facts to establish basis for personal jurisdiction over pendant parties independent of the nationwide service of process provisions of the Securities Exchange Act of 1934). *See also* 13D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3567 (3d ed. 2019) ("Pendent personal jurisdiction permits a court to entertain *a claim against a defendant* over whom it lacks personal jurisdiction, but only if that claim arises from a common nucleus of operative fact with a claim in the same suit for which the court does have personal jurisdiction *over the defendant.*") (emphasis added). Indeed, the apparent reasoning behind the doctrine's adoption into the common law is that, "[w]hen a defendant must appear in a forum to defend against one claim, it is often reasonable to compel that defendant

to answer other claims in the same suit arising out of a common nucleus of operative facts." *Action Embroidery*, 368 F.3d 1174, 1181 (9th Cir. 2004). Such purpose would not be served by the exercise of pendant jurisdiction here, and accordingly, I decline to exercise pendant jurisdiction over Defendant YouTube. For lack of personal jurisdiction, YouTube's Motion to Dismiss is due to be granted. Leave to amend shall be withheld, as amendment would be futile in light of the Communications Decency Act. *See infra* section II.C.

II. Failure to State a Claim

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of a complaint. *See* Fed. R. Civ. P. 12(b)(6). To satisfy the pleading standard of Rule 8(a)(2), as articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), a complaint "must . . . contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Am. Dental Ass 'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Twombly*, 550 U.S. at 570). "Dismissal is therefore permitted when on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Glover v. Liggett Grp., Inc.*, 459 F.3d 1304, 1308 (11th Cir. 2006) (internal quotations omitted) (citing *Marshall Cty. Bd. of Educ. v. Marshall Cty. Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993)).

When reviewing a motion to dismiss, a court must construe a plaintiff's complaint in the light most favorable

to the plaintiff and take the complaint's factual allegations as true. *See Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007); *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997). Pleadings that "are no more than conclusions[] are not entitled to the assumption of truth," however. *Iqbal*, 556 U.S. at 678.

A. Section 12(a) of the Securities Act

The Securities Act of 1933 protects investors by ensuring that companies issuing securities (known as "issuers") make a full and fair disclosure of information relevant to a public offering. *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 135 S. Ct. 1318, 1323, 191 L. Ed. 2d 253 (2015) (citing *Pinter v. Dahl*, 486 U.S. 622, 646, 108 S. Ct. 2063, 100 L. Ed. 2d 658 (1988)). "The linchpin of the Act is its registration requirement." *Id.* Section 5 of the Act, 15 U.S.C. § 77e, prohibits the sale of unregistered securities, and Section 12(a)(1) of the Act, 15 U.S.C. § 771, creates a private right of action against any person who "offers or sells" a security in violation of Section 5.

"To establish a prima facie case of violation of section 5, a plaintiff need allege only the sale or offer to sell securities, the absence of a registration statement covering the securities, and the use of the mails or facilities of interstate commerce in connection with the sale or offer." *Raiford v. Buslease, Inc.*, 825 F.2d 351, 354 (11th Cir. 1987) (citing *Swenson v. Engelstad*, 626 F.2d 421, 424-25 (5th Cir. 1980)). While neither Arcaro nor Maasen

deny that BCC lacked a registration statement, Arcaro argues that BCC is not a security while Maasen, for the purposes of his motion, assumes that it is. (*See* DE 86 at 12). With respect to the second element of the prima facie case, Arcaro and Maasen argue that they did not offer or sell BCC within the scope of the statute.

1. BCC constitute a "security"

The purpose of the securities laws is to regulate investments, "in whatever form they are made and by whatever name they are called," and to that end, Congress enacted a definition of "security" broad enough "to encompass virtually any instrument that might be sold as an investment." *Reves v. Ernst & Young*, 494 U.S. 56, 61, 110 S. Ct. 945, 108 L. Ed. 2d 47 (1990). The Securities Act of 1933 defines the term "security" to encompass "any note, stock, treasury stock, security future, security-based swap, bond, debenture, . . . investment contract, . . . or, in general, any interest or instrument commonly known as a 'security.'" 15 U.S.C. § 77b(a)(1).

While the term "investment contract" is not defined by the statute, the Supreme Court established a test for whether a particular scheme is an investment contract in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946). The *Howey* test requires courts to determine "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Id.* at 301. This definition "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." *Id.* at 299. In analyzing whether something is a security, "form should be disregarded for substance," *Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S. Ct. 548, 19 L. Ed. 2d 564 (1967), "and the emphasis should be on economic realities underlying a transaction, and not on the name appended thereto." *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 849, 95 S. Ct. 2051, 44 L. Ed. 2d 621 (1975).

The first element of the *Howey* test asks whether the purported investment contract required an "investment of money." *Id.* at 301. "An 'investment of money' refers to an arrangement whereby an investor commits assets to an enterprise or venture in such a manner as to subject himself to financial losses." *S.E.C. v. Friendly Power Co. LLC*, 49 F. Supp. 2d 1363, 1368-69 (S.D. Fla. 1999) (citing *Stowell v. Ted S. Finkel Inv. Servs., Inc.*, 489 F.Supp. 1209, 1224 (S.D. Fla. 1980)). Arcaro argues that the first element of the *Howey* test cannot be met because BCC can only be purchased with bitcoin.[3] Bitcoin is an unregulated cryptocurrency rather than a fiat currency, Arcaro argues, and so purchase of BCC is not an investment of *money*, per se. I find such pedantry unavailing in the face of the broad and adaptable conceptions of investment contracts, as defined by the Supreme Court, and of securities, as contemplated by Congress. "It is well established that cash is not the only form of contribution or investment

3. I also note that the Consolidated Complaint, the allegations of which must be accepted at this stage of the litigation, alleges that BCC *could*, in fact, be purchased with fiat currency as well as bitcoin, undermining Arcaro's argument. (Consol. Compl. ¶ 115).

that will create an investment contract." *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 940 F.2d 564, 574 (10th Cir. 1991) (collecting cases). I thus determine that Plaintiffs' investment of Bitcoin satisfies the first element of the *Howey* test. *See also Sec. & Exch. Comm 'n v. Shavers*, No. 4:13-CV-416, 2013 U.S. Dist. LEXIS 110018, 2013 WL 4028182, at *2 (E.D. Tex. Aug. 6, 2013), *adhered to on reconsideration*, No. 4:13-CV-416, 2014 U.S. Dist. LEXIS 194380, 2014 WL 12622292 (E.D. Tex. Aug. 26, 2014) (determining that an investment of Bitcoin satisfies the first prong of *Howey* on the basis that it can be exchanged for conventional currencies and used as money to purchase goods and services).

With respect to the second element—common enterprise—the Eleventh Circuit has adopted the concept of vertical commonality, which maintains that a common enterprise exists where "the fortunes of the investor are interwoven with and dependent on the efforts and success of those seeking the investment or of third parties." *Villeneuve v. Advanced Business Concepts Corp.*, 698 F.2d 1121, 1124 (11th Cir. 1983), *aff'd en banc*, 730 F.2d 1403 (11th Cir. 1984) (quoting *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 n. 7 (9th Cir. 1973)). "[T]he requisite commonality is evidenced by the fact that the fortunes of all investors are inextricably tied to the efficacy of the [promoter]." *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 479 (5th Cir. 1974).[4] *See also Eberhardt*

4. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

v. Waters, 901 F.2d 1578, 1580-81 (11th Cir. 1990) ("The thrust of the common enterprise test is that the investors have no desire to perform the chores necessary for a return."). Reference to the decision in *Howey* is illustrative here:

> [The respondent companies] are offering an opportunity to contribute money and to share in the profits of a large citrus fruit enterprise managed and partly owned by respondents. They are offering this opportunity to persons who reside in distant localities and who lack the equipment and experience requisite to the cultivation, harvesting and marketing of the citrus products. Such persons have no desire to occupy the land or to develop it themselves; they are attracted solely by the prospects of a return on their investment. Indeed, individual development of the plots of land that are offered and sold would seldom be economically feasible due to their small size. Such tracts gain utility as citrus groves only when cultivated and developed as component parts of a larger area. A common enterprise managed by respondents or third parties with adequate personnel and equipment is therefore essential if the investors are to achieve their paramount aim of a return on their investments.

328 U.S. at 299-300.

Arcaro argues that the BitConnect operation does not satisfy the second *Howey* prong because BCC purchasers

were never led to believe that their BCC purchases "would be used to invest in or develop any future product or common enterprise." (DE 94 at 13). This argument misses the forest for the trees: the BitConnect platform *itself* was the common enterprise. Those who purchased BCC did so in order to make a return on their investment; indeed, BCC appear to have no other purpose.[5] The success of an

5. According to the Consolidated Complaint, investor opportunities were inextricably linked to BitConnect from very early on—BitConnect launched in February 2016 and in June 2016 launched what it purported to be the world's first automated Bitcoin lending platform, even before introducing BCC through the BitConnect ICO in November and December of 2016. (Consol. Compl. ¶¶ 79, 83). BitConnect is alleged to describe itself as "an opensource [sic] all-in-one bitcoin and crypto community platform designed to provide multiple investment opportunities with cryptocurrency education" and to describe BCC as "an open source, peer-to-peer, community driven decentralized cryptocurrency that allow [sic] people to store and invest their wealth in a non-government-controlled currency, and even earn a substantial interest on investment [sic]." (*Id.* ¶¶ 78, 84). Indeed, the Consolidated Complaint includes the following image (*Id.* ¶ 86) from BitConnect's marketing materials, suggesting the central purpose of investing in BCC *is to invest*:

investment in BCC was inextricably linked to the value of the BCC, which in turn was "interwoven with and dependent on the efforts and success" of the BitConnect Defendants, who were to operate the BitConnect Lending Program and the BitConnect Staking Program. The investors had neither the desire nor the capacity to operate these investment programs. Additionally, to the extent that the Promoter Defendants received their commissions in BCC, as Plaintiffs allege, the efforts of the promoters are also a fundamental part of the enterprise.

Arcaro attempts to distinguish *In the Matter of Munchee Inc.*, a Securities and Exchange Commission investigation in which the Commission, after determining that Munchee's sale of digital tokens ("MUN tokens") constituted sale of an unregistered security in violation of the Securities Act of 1933, imposed a cease-and-desist order halting the sale and requiring the return of all proceeds. *In the Matter of Munchee Inc.*, Securities Act of 1933 Release No. 10445 (December 11, 2017), https://www.sec.govilitigation/admin/2017/33-10445.pdf. Munchee, which operated an iPhone application for restaurant reviews, was selling the MUN tokens to raise capital to improve the application and recruit users, with the eventual goal of creating an "ecosystem" in which MUN could be used to buy goods and services, such as advertisements on its platform, for restaurants, and meals and in-application purchases, for users of the Munchee application. The Commission determined that

> MUN token purchasers had a reasonable expectation of profits from their investment

> in the Munchee enterprise. . . . The investors reasonably expected they would profit from any rise in the value of MUN tokens created by the revised Munchee App and by Munchee's ability to create an "ecosystem" . . . . In addition, Munchee highlighted that it would ensure a secondary trading market for MUN tokens would be available shortly after the completion of the offering and prior to the creation of the ecosystem. Like many other instruments, the MUN token did not promise investors any dividend or other periodic payment. Rather, as indicated by Munchee and as would have reasonably been understood by investors, investors could expect to profit from the appreciation of value of MUN tokens resulting from Munchee's efforts.

Id. at 8-9. An "enterprise" need not be so all-encompassing as to constitute an "ecosystem" in order to satisfy the *Howey* test, of course, but the Consolidated Complaint does in fact allege a complex and self-reinforcing common venture built around the Lending Program and its apparently nonexistent bitcoin trading algorithm. "The commonality element is present as long as the fortunes of all of the investors are tied to the expertise and efforts of the promoter." *Eberhardt*, 901 F.2d at 1581 (11th Cir. 1990) (citing *Plunkett v. Francisco*, 430 F.Supp. 235 (N.D. Ga. 1977)). That standard is certainly met here.

The third *Howey* element is satisfied when an investor "is led to expect profits solely from the efforts of the

promoter or a third party." 328 U.S. at 298-299.[6] "Although the [Supreme] Court used the word 'solely' in the *Howey* decision, it should not be interpreted in the most literal sense." *Williamson v. Tucker*, 645 F.2d 404, 418 (5th Cir. 1981). The test is "'whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.'" *Id.* (quoting *SEC v. Glenn W. Turner Enters.*, 474 F.2d 476, 482 (9th Cir. 1973)). "An interest thus does not fall outside the definition of investment contract merely because the purchaser has some nominal involvement with the operation of the business. Rather, 'the focus is on the dependency of the investor on the entrepreneurial or managerial skills of a promoter or other third party.'" *S.E.C. v. Merch. Capital, LLC*, 483 F.3d 747, 755 (11th Cir. 2007) (quoting *Gordon v. Terry*, 684 F.2d 736, 741 (11th Cir. 1982)). "An investor who has the ability to control the profitability of his investment, either by his own efforts or by majority vote in a group venture, is not dependent upon the managerial skill of others." *Gordon*, 684 F.2d at 741.

Arcaro contends that the third element was not satisfied because BCC owners retained control of their

6. The vertical commonality conceptualization of "enterprise" has been observed to overlap somewhat with the third *Howey* element. *See Revak v. SEC Realty Corp.*, 18 F.3d 81, 88 (2d Cir. 1994) ("If a common enterprise can be established by the mere showing that the fortunes of investors are tied to the efforts of the promoter, two separate questions posed by Howey—whether a common enterprise exists and whether the investors' profits are to be derived solely from the efforts of others—are effectively merged into a single inquiry: "whether the fortuity of the investments collectively is essentially dependent upon promoter expertise.")

purchases, but this argument denies the economic reality of the investor-plaintiffs. Arcaro relies on *Alunni v. Dev. Res. Grp., LLC*, 445 F. App'x 288, 298 (11th Cir. 2011) (unpublished), but BCC, unlike the condominiums in *Alunni*, have a limited range of uses. Apparently only three, in fact: BCC could be invested in the BitConnect Lending Program, invested in the BitConnect Staking Program, or exchanged with other currencies. (DE 94 at 14; *supra* n.5). Considering these options—either place your BCC in a BitConnect-operated program, in which case profitability depends on the program's operation, or unload it—it is clear that "the efforts made by those other than the investor are the undeniably significant ones." *Williamson*, 645 F.2d at 418. Especially considering that the valuation of BCC was also largely dependent on the actions of BitConnect, I find that the investors' profits were dependent on the efforts of others such that the third prong of the *Howey* test is satisfied.

Accordingly, I determine that BCC constitute investment contracts under *Howey*, and that they are thus subject to the provisions of the Securities Act of 1933.

2. Arcaro and Maasen were not statutory sellers

Regardless of whether BCC constitute "securities," however, Plaintiffs' Section 12(a) claim against Maasen and Arcaro must be dismissed for their failure to satisfactorily allege the second element their prima facie case. In *Pinter v. Dahl*, the Supreme Court articulated two circumstances in which a defendant could be considered to

have "sold" unregistered securities. Liability extends to both "the person who transfers title to, or other interest in, that property" and "the person who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." 486 U.S. at 642, 647. Plaintiffs argue that Arcaro and Maasen's solicitation makes them liable under the latter category.

In defining the contours of solicitors' § 12 liability, the *Pinter* Court found that the language of § 12 indicated the need to "focus[] on the defendant's relationship with the plaintiff-purchaser" and noted that the statute does not "impose express liability for *mere participation* in unlawful sales transactions." *Id.* at 651-52 (emphasis added). The *Pinter* decision rejected as too broad the Fifth Circuit's "substantial-factor" test, which imposed liability if the defendant's participation in the buy-sell transaction was "a substantial factor in causing the transaction to take place." *Id.* at 649.

Interpreting *Pinter*, the Eleventh Circuit cited a law review article for the proposition that the § 12 liability of "participants who do not own the securities" is governed by a two-part test that first asks whether the participant in the sale "solicited" the purchase and second asks "whether the participant or the owner of the security sold benefited." *Ryder Int'l Corp. v. First Am. Nat. Bank*, 943 F.2d 1521, 1531 (11th Cir. 1991) (citing Joseph E. Reece, *Would Someone Please Tell Me the Definition of the Term 'Seller': The Confusion Surrounding Section 12(2) of the Securities Act of 1933*, 14 Del. J. Corp. L. 35

(1989)). In *Ryder*, the Eleventh Circuit affirmed the trial court's grant of summary judgment for defendants on the basis that the plaintiff-appellant failed to satisfy the first part of the test: "The substance of the communications between Wallace Case and Mike Casey (the parties to the two transactions at issue), is not in dispute and reveals that Casey (working for [Defendant bank]) only executed [Plaintiff corporation]'s orders. Casey did not actively solicit the orders, *i.e.* 'urge' or 'persuade' Casey (working for [Plaintiff]) to buy [the subject securities]." *Id.* at 1531 (citing *Pinter*, 486 U.S. at 644, 647). Thus "a plaintiff must allege not only that the defendant actively solicited investors, but that the plaintiff purchased securities as a result of that solicitation. Mere conclusory allegations that a defendant solicited the sale of stock and was motivated by financial gain to do so are insufficient to state a claim under Section 12." *In re CNL Hotels & Resorts, Inc.*, No. 04-cv-1231ORL-31KRS, 2005 U.S. Dist. LEXIS 51501, 2005 WL 2291729, at *5 (M.D. Fla. Sept. 20, 2005).

Plaintiffs in this matter fail to allege that they purchased securities *as a result of* Arcaro and Maasen's solicitations. The Consolidated Complaint contains broad recitations of the elements of Plaintiffs' § 12(a) claims[7]

7. *See, e.g.*, Consol. Compl. ¶ 25 ("[E]ach of the Plaintiffs were personally, and successfully, solicited by the BITCONNECT Defendants in connection with their public representations and active solicitations to purchase BCCs or participate in the BitConnect Investment Programs."); ¶ 51 ("ARCARO himself was one of the most successful affiliate/recruiters for BITCONNECT, soliciting hundreds if not thousands of BITCONNECT investors in the United States and abroad through social media sites such as

but is devoid of specific allegations regarding Arcaro and Maasen's efforts to urge or persuade Plaintiffs, individually, to purchase BCC. Plaintiffs seek to establish liability on the sole basis that they encountered publicly available content created by Arcaro and Maasen during their efforts to research the BitConnect Investment Programs:

> Such research included reviewing virtual currency online forums, reading BITCONNECT's publications and viewing its promotional videos. Accordingly, each of the solicitations outlined below were successful in soliciting Plaintiffs and the Class to invest with BITCONNECT. . . . With respect to the Promoter Defendants, each actively solicited investments in BCCs and the BitConnect Investment Programs -- largely through YOUTUBE -- for the sole purpose of receiving compensation. Such activity falls squarely under the definition of "seller."

(Consol. Compl. ¶¶ 180, 184). As explored above, however, such activity does not fall under the definition of "seller," and Plaintiffs supply no caselaw to the contrary. *See also Rensel v. Centra Tech, Inc.*, No. 17-24500-CIV, 2019 U.S. Dist. LEXIS 79855, 2019 WL 2085839, at *2 (S.D. Fla. May 13, 2019) (dismissing § 12(a)(1) claim where only

---

YOUTUBE and Facebook."); ¶ 58 ("MAASEN served as an affiliate/recruiter for BITCONNECT, soliciting hundreds if not thousands of BITCONNECT investors in the United States and abroad through social media sites such as YOUTUBE and Facebook.").

solicitation allegations entailed two posts on defendant's Twitter account related to the subject security).

The Consolidated Complaint contains no allegations regarding a relationship between any of the Plaintiffs and Arcaro or Maasen. Nor does it contain allegations that either Defendant engaged in active efforts to urge or persuade any of the Plaintiffs to invest in BCC. In the absence of any such individualized allegations, Plaintiffs have not satisfied the two-part *Pinter* test articulated by the Eleventh Circuit in *Ryder*. Plaintiffs have thus failed to state a § 12(a) claim against Arcaro or Maasen.

B. Section 15(a) of the Securities Act

Section 15 of the Securities Act of 1933 imposes joint and several liability upon controlling persons for acts, committed by those under their control, that violate §§ 11 and 12. *See* 15 U.S.C. § 77o. To state a claim for control person liability in the Eleventh Circuit, a plaintiff must allege facts that establish, in addition to a primary violation of the securities laws, that the defendant "had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws" *and* that the Defendant "had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability." *Brown v. Enstar Grp., Inc.*, 84 F.3d 393, 396 (11th Cir. 1996) (quotations omitted). "A complaint that merely restates the legal standard for control person liability, without providing facts in support of the allegation, does not adequately plead control person liability." *Bruhl v.*

Price Waterhousecoopers Int'l, No. 03-23044-CIV, 2007 U.S. Dist. LEXIS 21885, 2007 WL 983263, at *10-11 (S.D. Fla. Mar. 27, 2007). "A defendant is not subject to control person liability simply because he is an officer or director of a corporation. Rather, the plaintiff must make a showing that the defendant 'had power, directly or indirectly, to influence the policy and decision making process of the one who violated the act, such as through ownership of voting stock, by contract or through managerial power.'" *Tippens v. Round Island Plantation L.L.C.*, No. 09-CV-14036, 2009 U.S. Dist. LEXIS 66224, 2009 WL 2365347, at *10 (S.D. Fla. July 31, 2009) (quoting *In re Sahlen & Assocs., Inc. Secs. Litig.*, 773 F.Supp. 342, 362-63 (S.D. Fla. 1991)).

Count XXII of the Consolidated Complaint alleges that Defendant Arcaro is liable under § 15(a) because he had power to control, and did control, the decision-making related to the BitConnect Investment Programs, including the decision to engage in the sale of unregistered securities thereof. The Consolidated Complaint alleges that, after Arcaro began promoting BitConnect, he was hired as one of BitConnect's "National Promoters," which entailed "managing a team of U.S.-based affiliates/recruiters." (Consol. Compl. ¶ 51). In his capacity as a National Promoter, Arcaro is alleged to have reported directly to Defendant Satish, who is regarded as one of BitConnect's founders. (*Id.* ¶¶ 43, 90). Arcaro was listed as an active director and shareholder of BitConnect International PLC, according to paperwork filed with the corporate registry office in the United Kingdom, but after he notified the Business and Properties Courts of England

and Wales Companies Court (ChD) that the listing was inaccurate, the listing was redacted to the extent he was identified as a member or shareholder of the company. (*Id.* ¶¶ 51, 93-94).[8] Plaintiffs provide a portion of a group chat log in which Defendant Grant purportedly reveals that the Arcaro's application to the foreign court was a farce

> Grant: too many, and i see the new company with all the promoters, pretty slick geln [sic] told me about aLL THAT [sic] he had to send all his documents to bitconnect a couple months ago so they can make a new company with all the promoters.

(*Id.* ¶¶ 95-96). Without more, I cannot conclude this message is sufficient to allege controlling person liability, which requires allegations that a defendant had the power to control the general affairs of the primarily liable entity and that the defendant had the power to control the specific corporate policy which resulted in the primary

8. Defendant Arcaro has filed a Request for Judicial Notice regarding the order of the High Court of Justice. (DE 105). Attached to the request is a copy of the order and a copy of the witness statement Arcaro submitted to that court. Federal Rule of Evidence 201 governs judicial notice of adjudicative facts and Rule 201(b) provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). Rule 201(c)(2) states that a court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2). Accordingly, Arcaro's request for judicial shall be granted.

liability. Nor are Plaintiffs' remaining allegations—that Arcaro knew he was involved in a Ponzi scheme (*id.* ¶ 140), that he created numerous websites to "funnel" investors seeking information regarding cryptocurrencies to BitConnect (*id.* ¶¶ 141-44), that he encouraged investors to attend a BitConnect conference in Thailand (*id.* ¶ 145), and that he was given access to a "development fund" that he used to provide resources to other promoter defendants (*id.* ¶¶ 141-43)--sufficient to meet this standard. While Plaintiffs paint a portrait of Arcaro as a person who knowingly and ruthlessly took advantage of others by working as hard as he could to further a Ponzi scheme, they have not described him as having control over that scheme, and thus their § 15(a) claim against Arcaro must be dismissed.

C. The Communications Decency Act

Even if the exercise of personal jurisdiction over YouTube were proper, I find that Plaintiffs' negligence claim would be preempted by § 230 of the Communications Decency Act ("CDA").

The CDA is generally considered to "establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). "[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw,

postpone or alter content—are barred." *Zeran*, 129 F.3d at 330. The statute explicitly preempts any inconsistent state law causes of action. 47 U.S.C. § 230(e)(3).

YouTube relies on the following provision of the CDA: "No 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." § 230(c)(1). The Parties do not dispute that YouTube is an "interactive computer service," a term defined by the CDA to include "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server[.]" § 230(f)(2). Rather, the Parties dispute whether YouTube acted as an "information content provider" in this instance.

The CDA defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service." § 230(f)(3). Plaintiffs contend that where website operator is in part responsible for the creation or development of content, then it is an information content provider as to that content—and is not immune from claims predicated on it." *Am. Income Life Ins. Co. v. Google, Inc.*, No. 2:11-CV-4126-SLB, 2014 U.S. Dist. LEXIS 124870, 2014 WL 4452679, at *7 (N.D. Ala. Sept. 8, 2014) (citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119. 1123 (9th Cir. 2003)). The Consolidated Complaint, however, does not satisfactorily allege that YouTube acted as an "information content provider."

Appendix D

The Consolidated Complaint details at length the degree to which the BitConnect Defendants used YouTube to solicit investment in BCC. Indeed, YouTube's platform provided the BitConnect Defendants with an extraordinary reach: for example, Defendant Grant alone is alleged to have posted approximately 2,500 videos promoting the BitConnect Investment Programs, and his videos are alleged to have received nearly 33,000,000 independent views. (Consol. Compl. 11202). Several of the BitConnect Defendants are alleged to have been designated as "Partners" through the "YouTube Partner Program" (*id.* ¶¶ 195, 197, 202-06), and Plaintiff argues that this relationship requires YouTube to be considered an "information content provider." While participation in the "YouTube Partner Program" may have helped direct traffic to the BitConnect Defendants' videos, traffic redirection alone is not sufficient to preclude § 230 immunity. *See Dowbenko v. Google Inc.*, 582 F. App'x 801, 805 (11th Cir. 2014) (unpublished) (citing *Zeran*, 129 F.3d at 330) (noting that allegation defendant manipulated its search results to prominently feature the article at issue did not change determination that defamation claim was preempted under § 230(c)(1)). Nothing else nothing about the program, as described in the Consolidated Complaint, indicates that YouTube was "responsible, in whole or in part, for the creation or development," § 230(f)(3), of the BitConnect Defendants' videos. *See Fair Hous. Council of San Fernando Valley v. Roommates.Com*, LLC, 521 F.3d 1157, 1167 (9th Cir. 2008) (interpreting the term "development" as used in § 230(0(3) as "referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In

other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it *contributes materially* to the alleged illegality of the conduct") (emphasis added); *see also Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 413 (6th Cir. 2014) (adopting "material contribution" test described in *Roommates.Com*); *Roca Labs, Inc. v. Consumer Opinion Corp.*, 140 F. Supp. 3d 1311, 1321 (M.D. Fla. 2015) (same).

Defendant YouTube is alleged to have profited significantly from the exposure of its users to videos advertising Defendants' purported Ponzi scheme. (Consol. Compl. ¶¶ 193, 197). While YouTube may have had a moral or ethical responsibility to protect its users from Defendants' allegedly fraudulent schemes, Plaintiffs' claim that it had a *legal* duty to do so is preempted by the CDA. Accordingly, Plaintiffs' claim against YouTube is thoroughly foreclosed and shall be dismissed with prejudice.

CONCLUSION

In light of the foregoing, it is **ORDERED and ADJUDGED** as follows:

(1) Defendant Ryan Maasen's Motion to Dismiss (DE 86) is **GRANTED**.

(2) Defendant YouTube, LLC's Motion to Dismiss (DE 88) is **GRANTED**.

(3) Defendant Glenn Arcaro's Motion to Dismiss (DE 94) is **GRANTED**.

(4) Defendants Ryan Maasen and Glenn Arcaro are **DISMISSED WITHOUT PREJUDICE**.

(5) Defendant YouTube, LLC is **DISMISSED WITH PREJUDICE**.

(6) Plaintiffs are **DIRECTED** to file a Second Amended Consolidated Class Action Complaint on or before September 13, 2019.

(7) Defendant Arcaro's Request for Judicial Notice (DE 105) is **GRANTED**. The Court takes judicial notice of the Order of the Business and Properties Courts of England and Wales Companies Court (ChD) regarding the registrar of companies. (DE 105-1).

SIGNED in Chambers at West Palm Beach, Florida this 23 day of August, 2019.

/s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER DENYING REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED APRIL 22, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-11675-AA

CHARLES WILDES, *et al.*,

Plaintiffs,

ALBERT PARKS, FARAMARZ SHEMIRANI, CORY STRUZAN, MARYANN MARRYSHOW, MIJA YOO, NELSON ARIAS,

Plaintiffs-Appellants,

PAUL LONG, *et al.*,

Consolated Plaintiffs,

versus

BITCONNECT INTERNATIONAL PLC, A FOREIGN CORPORATION, BITCONNECT LTD., A FOREIGN CORPORATION, BITCONNECT TRADING LTC., A FOREIGN CORPORATION, GLENN ARCARO,AN INDIVIDUAL, TREVON BROWN, AN INDIVIDUAL, A,K,A, TREVON JAMES, *et sl.*,

Defendants-Appellees,

Appendix E

NICHOLAS TROVATO, *et al.*,

Consolidated Defendants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: BRANCH, GRANT, and ED CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

APPENDIX F — RELEVANT STATUTORY PROVISIONS

15 U.S.C. § 77a

§ 77a. Short title

This subchapter may be cited as the "Securities Act of 1933".

Appendix F

15 U.S.C. § 77b

§ 77b. Definitions; promotion of efficiency, competition, and capital formation

(a) Definitions

When used in this subchapter, unless the context otherwise requires--

(1) The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or

a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell", "offer for sale", or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. The terms defined in this paragraph and the term "offer to buy" as used in subsection (c) of section 77e of this title shall not include preliminary negotiations or agreements between an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer) and any underwriter or among underwriters who are or are to be in privity of contract with an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer). Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been offered and sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until

some future date, shall not be deemed to be an offer or sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security. Any offer or sale of a security futures product by or on behalf of the issuer of the securities underlying the security futures product, an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for sale, or offer to sell the underlying securities. Any offer or sale of a security-based swap by or on behalf of the issuer of the securities upon which such security-based swap is based or is referenced, an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for sale, or offer to sell such securities. The publication or distribution by a broker or dealer of a research report about an emerging growth company that is the subject of a proposed public offering of the common equity securities of such emerging growth company pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective shall be deemed for purposes of paragraph (10) of this subsection and section 77e(c) of this title not to constitute an offer for sale or offer to sell a security, even if the broker or dealer is participating or will participate in the registered offering of the securities of the issuer. As used in this paragraph, the term "research report" means a written, electronic, or oral communication that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.

(5) The term "Commission" means the Securities and Exchange Commission.

(6) The term "Territory" means Puerto Rico, the Virgin Islands, and the insular possessions of the United States.

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 77f of this title, and includes any amendment thereto and any report, document, or memorandum filed as part of such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security; except that (a) a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 77j of this title) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the

requirements of subsection (a) of section 77j of this title at the time of[1] such communication was sent or given to the person to whom the communication was made, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 77j of this title may be obtained and, in addition, does no more than identify the security, state the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deemed necessary or appropriate in the public interest and for the protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

Appendix F

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

(13) The term "insurance company" means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner, or a similar official or agency, of a State or territory or the District of Columbia; or any receiver or similar official or any liquidating agent for such company, in his capacity as such.

(14) The term "separate account" means an account established and maintained by an insurance company pursuant to the laws of any State or territory of the United States, the District of Columbia, or of Canada or any province thereof, under which income, gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(15) The term "accredited investor" shall mean--

(i) a bank as defined in section 77c(a)(2) of this title whether acting in its individual or fiduciary capacity;

an insurance company as defined in paragraph (13) of this subsection; an investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; a Small Business Investment Company licensed by the Small Business Administration; or an employee benefit plan, including an individual retirement account, which is subject to the provisions of the Employee Retirement Income Security Act of 1974, if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is either a bank, insurance company, or registered investment adviser; or

(ii) any person who, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management qualifies as an accredited investor under rules and regulations which the Commission shall prescribe.

(16) The terms "security future", "narrow-based security index", and "security futures product" have the same meanings as provided in section 78c(a)(55) of this title.

(17) The terms "swap" and "security-based swap" have the same meanings as in section 1a of Title 7.

(18) The terms "purchase" or "sale" of a security-based swap shall be deemed to mean the execution, termination (prior to its scheduled maturity date),

assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.

(19) The term "emerging growth company" means an issuer that had total annual gross revenues of less than $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of--

(A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) or more;

(B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under this subchapter;

(C) the date on which such issuer has, during the previous 3-year period, issued more than $1,000,000,000 in non-convertible debt; or

(D) the date on which such issuer is deemed to be a "large accelerated filer", as defined in section 240.12b-2 of title 17, Code of Federal Regulations, or any successor thereto.

(b) Consideration of promotion of efficiency, competition, and capital formation

Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

Appendix F

15 U.S.C. § 77e

§ 77e. Prohibitions relating to interstate commerce and the mails

(a) Sale or delivery after sale of unregistered securities

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly--

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) Necessity of prospectus meeting requirements of section 77j of this title

It shall be unlawful for any person, directly or indirectly--

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) Necessity of filing registration statement

It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

(d) Limitation

Notwithstanding any other provision of this section, an emerging growth company or any person authorized to act on behalf of an emerging growth company may engage in oral or written communications with potential investors that are qualified institutional buyers or institutions that are accredited investors, as such terms are respectively defined in section 230.144A and section 230.501(a) of title 17, Code of Federal Regulations, or any successor thereto, to determine whether such investors might have an interest in a contemplated securities offering, either prior to or following the date of filing of a registration statement

with respect to such securities with the Commission, subject to the requirement of subsection (b)(2).

(e) Security-based swaps

Notwithstanding the provisions of section 77c or 77d of this title, unless a registration statement meeting the requirements of section 77j(a) of this title is in effect as to a security-based swap, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant as defined in section 1a(18) of Title 7.

Appendix F

15 U.S.C. § 77*l*

§ 77*l*. Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who--

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b), to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received

thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2), if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.