No. 20-11675-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALBERT PARKS, et al,
on behalf of themselves and all others similarly situated,

Plaintiffs/Appellants,

v.

BITCONNECT, LTD., et al.,

Defendants/Appellees.

On Appeal from a Final Judgment of the United States
District Court for the Southern District of Florida

District Court Case No. 9:18-cv-80086-DMM

BRIEF OF PLAINTIFFS/APPELLANTS

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Counsel for Appellants

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure and 11th Circuit Rule 26.1-1, Plaintiffs/Appellants state that the following persons and entities may have an interest in the outcome of this appeal:[1]

Abbott Law Group PA

Abigale Rhodes Green Injury Law PLLC

Alphabet Inc., a publicly held company (NASDAQ: GOOG, GOOGL), has more than 10% ownership of XXVI Holdings, Inc. No publicly held company owns 10% or more of Alphabet Inc.'s stock.

Appel, Ross Adam

Arcaro, Glenn

Arias, Nelson

Atherton, Thomas Allan

Baltazar, Avalos

Bana-ay, Jeson Talingting

Berman, Nathan Michael

Bhat, Kiran Narayan

Bitcoin AMR Limited f/k/a BitConnect Public Limited

[1] Plaintiffs/Appellants are individuals and therefore have no parent corporations to disclose.

BitConnect International PLC

BitConnect Ltd.

BitConnect Trading Ltd.

Brannon, Hon. Dave Lee, U.S.M.J.

Brotman, Kenn

Brown, Trevon

Bushell, Daniel A.

Bushell Law, P.A.

Chaudhari, Mahendra

Davis, Alex C.

Darji, Divyesh

Doria, Francisco

Eggnatz, Joshua Harris

Eggnatz Pascucci, P.A.

Enright, Donald J.

Fox, Tanner

Google LLC, a subsidiary of XXVI Holdings Inc., has more than a 10% ownership of YouTube, LLC

Gorasiya, Suresh

Grant, Craig

Gray & White

Green, Abigale R.

Grubman, Jeffrey

Gurry, James

Harold, Aric

Hildreth, Ryan

Huna, Lena

Huy, Le Thi Thannh

Jeppesen, Joshua

Jones Ward PLC

K&L Gates

Katz, Akiva

Klein, Michael J.

Kline, Andrew

Komlossy, Emily Cornelia

Komlossy Law P.A.

Kotadiya, Nalin

Kumbhani, Satish

Labreche, Jean-Simon

Lathiya, Gautham

Levi & Korsinsky, LLP

Levy, Jacob E.

Lockridge Grindal Nauen PLLP

Long, Paul

Love, Kiandra

Lumpkin, Carol Celeiro

Maasen, Ryan

Mabra, Charles

Marryshow, Maryann

Mavani, Dhaval

Mengesha, Patricia

Meshbesher & Spence

Middlebrooks, Hon. Donald M., U.S.D.J.

Miller, Jason Stuart

Minh, Nay

Moore, Desiree

Morgan & Morgan

Mueller, Nicole Claire

Naik, Raj Sandipobhai

Naik, Sandip Balvantrai

Naik, Smit Sandiphbhai

Nelson, Ronald

Paige, Brian

Parks, Albert

Pascucci, Michael James

Perry, Justin

Peterson, Rebecca A.

Powell, Calen

Praseteya, Yuris

Purohit, Ramdayal

Richlin, Eli B.

Savaliya, Piyush

Saxena, Ranjeet

Shelquist, Robert K.

Shemirani, Faramarz

Showers, Dusty

Silver, David Chad

Silver Miller

Struzan, Cory

Stull Stull & Brody

Stumphauzer Foslid Sloman Ross & Kolaya PLLC

Stumphauzer, Ryan K.

Teppler, Steven William

Trovato, Nicholas

Volz, Carl E.

Ward, Jasper D.

Wardah, Santoso

Wildes, Charles

Willen, Brian M.

Wilson Sonsini Goodrich & Rosati

XXVI Holdings, Inc., a subsidiary of Alphabet Inc., holds more than 10% ownership of Google LLC

Yanchunis, John Allen, Sr.

Yoo, Mija

YouTube, LLC

Zimmerman, Genevieve M.

Zuckerman Spaeder LLP

Zuckerman Spaeder Taylor & Evans

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2020 I electronically filed the foregoing using the Court's CM/ECF system, which will electronically serve a copy on the following counsel of record: Nathan M. Berman; Alex C. Davis; Joshua H. Eggnatz; Michael J. Klein; Emily C. Komlossy; Carol Celeiro Lumpkin; Jason Stuart Miller; Michael

James Pascucci; David Chad Silver; Steven William Teppler; Brian M. Willen; and John A. Yanchunis.

/s/ Daniel A. Bushell
Daniel A. Bushell

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs/Appellants request oral argument. This case involves an issue of first impression in this Court as to the scope of liability under the Securities Act of 1933. More specifically, this case raises questions as to whether a defendant must engage in a one-to-one, real-time conversation to engage in "solicitation" sufficient to trigger liability under Section 12(a) of the Securities Act or whether solicitation also encompasses a dissemination of videos and other materials through the Internet and social media that are targeted at persuading investors to invest in a security. It is also an important issue given the increasing importance of the Internet and social media as means of communication and persuasion. Plaintiffs/Appellants believe that oral argument would assist the Court in resolving these important issues.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 77v (Section 22 of the Securities Act) in that the plaintiffs alleged violations of 15 U.S.C. §§ 77l(a)(1) and 77o(a) (Sections 12(a)(1) and 15(a) of the Securities Act). This Court has jurisdiction over this appeal from the District Court's Order Dismissing Complaint and Closing Case, which dismissed the Third Amended Complaint with prejudice, pursuant to 28 U.S.C. § 1291. The District Court entered its order dismissing with prejudice on March 31, 2020. Plaintiffs/Appellants timely filed their notice of appeal on April 30, 2020.

STATEMENT OF THE ISSUES

1. Did the District Court err in concluding that Plaintiffs/Appellants failed to state a claim against Defendants Arcaro and Maasen under Section 12(a)(1) of the Securities Act?

2. Did the District Court err in *sua sponte* dismissing Plaintiffs/Appellants' claims against the other Promoter Defendants?

3. Did the District Court err in dismissing Plaintiffs/Appellants' state law claims?

STATEMENT OF THE CASE

This appeal presents issues at the crossroads between the federal securities laws, cryptocurrency (also known as digital currency or virtual currency), multilevel marketing, and social media. It stems from a class action brought by investors in the BitConnect digital currency (cryptocurrency) investment scheme, which was abruptly shuttered—taking with it the entirety of Plaintiffs/Appellants' investments—within a year of its formation, when it came under investigation for the sale of unregistered securities. Among others, Plaintiffs/Appellants sued certain individuals as solicitors of their investments, which was accomplished primarily through Internet and social media marketing. In a series of orders, the United States District Court for the Southern District of Florida dismissed with prejudice of all of Plaintiffs/Appellants' claims.

I. Statement of the Facts

On October 11, 2018, Plaintiffs Albert Parks and Faramarz Shemirani, on behalf of themselves and the members of a putative class of similarly situated persons, filed a 105-page Amended Consolidated

Class Action Complaint ("ACC"). ECF Doc. 78.[1] Plaintiffs alleged that Bitconnect, Ltd. "operated fraudulent Ponzi/pyramid schemes" through devices known as the BitConnect Lending Program and BitConnect Staking Program (collectively, the "Investment Programs"). *Id.* at 7.

BitConnect

BitConnect created a cryptocurrency called BitConnect Coins. *Id.* A crytocurrency, also called a digital currency or a virtual currency, is a "digital representation of value that can be traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status . . . in any jurisdiction." *Id.*, n.2. BitConnect Coins could be purchased with bitcoins (a common cryptocurrency) or fiat currency (e.g., U.S. dollars or Euros). *Id.*

The BitConnect Coins were marketed as "an 'investment option' that could be 'used to profit on **price fluctuation**' in that investors could "buy BitConnect coin at a lower price and sell[ ] them at [a] higher price."" *Id.* at 34. Investors were also told they could profit when the prices of

[1] The District Court had previously consolidated four similar class actions under the rubric *In re Bitconnect Securities Litigation*, and appointed co-lead plaintiffs, co-lead counsel, and an executive committee. *See* ECF Doc. 46.

BitConnect Coins decreased if they sold high and repurchased after the price decreased. *Id.*

In the Lending Program, investors were to purchase BitConnect Coins and lend them back to BitConnect. *Id.* at 7. BitConnect was then supposed to use the borrowed funds to invest in bitcoins, purchasing them at low prices and selling them at high prices using a proprietary "trading bot." *Id.* at 8. Investors were to earn interest and their principal investment was to be repaid on a specified date. *Id.* at 10.

The Lending Program was billed as an "investment option [that] involves profiting from [the] Bitconnect trading bot and volatility software," with investors to "receive daily profit based on [their] investment option." *Id.* at 39. At the completion of a fixed term, investors were to receive their "capital back," which they could choose to "reinvest back in lending platform to **continue receiving daily profit**." *Id.* Investors were promised earnings of up to 40% per month. *Id.* at 39-40.

In the Staking Program, BitConnect invited investors to purchase and hold BitConnect Coins in a digital "wallet." *Id.* at 8. Investors were "guaranteed" that they would obtain returns on their investments of "up to 10% per month" merely by holding their BitConnect Coins in their

online wallets. *Id*. After holding the BitConnect Coins in their "wallets" for 15 days, investors were to earn interest rates of 10-60% annually (1.4-10% per month) over specified time periods. *Id*. at 42.

Plaintiffs asserted that BitConnect Coins were "investment contract" securities as that term is defined in the Securities Act but were not registered as such, in violation of the Securities Act. *Id*. at 9. The Investment Programs were also investment contract securities for which the required registration was not obtained. *Id*.

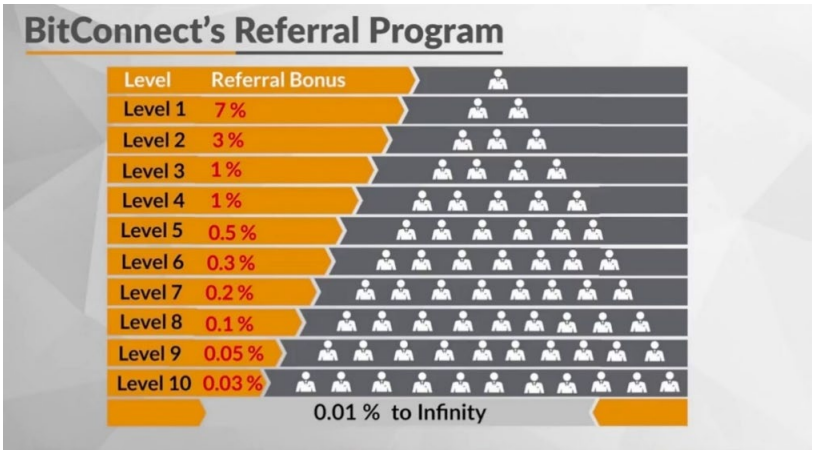
BitConnect was actually a Ponzi scheme. *Id*. at 57. No investment returns were actually generated; BitConnect simply used new investors' money to pay the promised returns on previous investors' investments. *Id*. at 58. Investors' funds were also used to pay salary and commissions to Arcaro, Hildreth, Maasen, and other directors and affiliates. *Id*.

In early January 2018, the Texas State Securities Board and Secretary of State of North Carolina – Securities Division issued cease-and-desist orders based on their conclusions that BitConnect investments were unregistered securities and that BitConnect had engaged in fraud. *Id*. at 63. Within days, BitConnect closed it trading and lending platforms. *Id*. at 63-64. The price of BitConnect Coins lost almost

90% of its value almost instantaneously and are they are now worthless. *Id.* at 65.

BitConnect Coin sales and both Investment Programs were propagated through a multi-level marketing scheme, under which affiliates would recruit investors and receive a percentage of the investments made by their recruits as well as a portion of the investments made by their recruits' recruits, in addition to receiving compensation directly from BitConnect. *Id.* at 8. The promoters named as defendants were highly influential marketers of the Investment Programs, some of whom partnered with YouTube in their promotion of BitConnect and the Investment Programs. *Id.*

BitConnect's pyramid hierarchy involved promoters higher on the pyramid receiving compensation for investors recruited at each level below them:



Id. at 43.

Arcaro

Defendant/Appellee Glenn Arcaro, after departing another multi-level marketing firm that went bankrupt, became a promoter of BitConnect. *Id*. at 21. He later became a "National Promoter," reporting to BitConnect's founders, and a director of BitConnect International PLC. *Id*. Arcaro was "tasked with managing a team of U.S.-based affiliates/recruiters," with the most influential U.S.-based promoters reporting to him. *Id*. He also "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 YOUTUBE and Facebook." *Id*. at 21-22.

Arcaro was responsible for managing a large team of affiliate marketers for BitConnect. *Id*. at 46. He helped affiliates prepare sales presentations and sales pitches to potential investors in the Investment Programs. *Id*. The ACC includes an excerpt from an online chat in which Arcaro shares marketing strategy with Grant, another senior level promoter of BitConnect:

Arcaro: most people eat at mcdonalds
it's small but I think there is new blood all the time coming in
also, we just need to target better

Grant: i am focused on new blood

Arcaro: are you hitting those hyips keywords12 in youtube?[2]
ethrade, coinxl and all those
should add regal coin to the mix

Grant: I am doing great with all i am doing

Arcaro: coo
I'd make a video targeting just regal coin
Start out by saying
"don't invest into regal coin until you watch this video"
Blah blah blah
I'd do that for each of the hyips
And run that ad only against that keyoword [sic]
Maybe we can't do it because we are promoters but
we can get our team to

Grant: sounds like your area of expertice [sic]

Arcaro: I'd say something nice about the program and then say I have something better than xyz program…

[2] "Hyips" are "High-yield investment programs." A high-yield investment program is a Ponzi scheme that offers unsustainably high returns on investment to lure in investors. As typical with a Ponzi scheme, new investor funds are then used to return established investors. Investor.gov explains that the "hallmark of an HYIP scam is the promise of incredible returns at little or no risk to the investor. A HYIP website might promise annual (or even monthly, weekly, or daily!) returns of 30 or 40 percent – or more." BITCONNECT's Investment Programs fall squarely in this definition. *Id*. at 48, n.12.

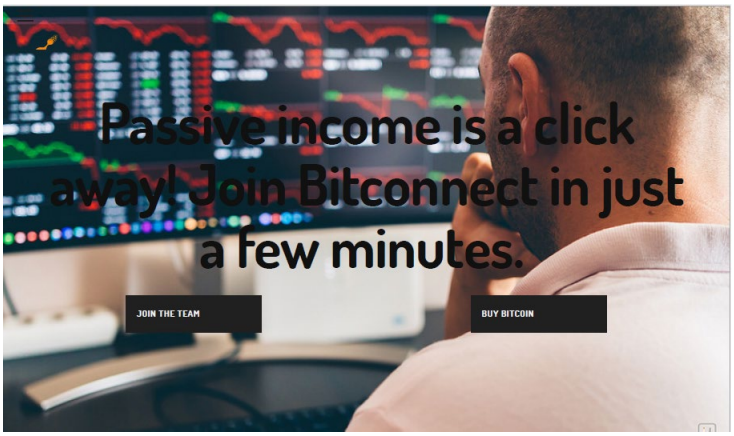
Id. at 48.

Arcaro was wildly successful at recruiting investors to invest in BitConnect, even receiving "a Porsche Carrera 911 S as a reward during a live broadcast of the BitConnect Conference in October 2017." *Id*. at 46. He also received extra compensation "in the form of so-called 'development funds.'" *Id*. at 49. In October 2017, such funds reached approximately $700,000.00 per week. *Id*. at 50. Arcaro apparently had as much as $12 million in bitcoins in his account by November 25, 2017. *Id*. at 52.

Arcaro allocated development funds to building an "online training program to 'teach' the unsuspecting public how to participate in cryptocurrency investment opportunities, including the BitConnect Investment Programs." *Id*. at 49. He also encouraged promoters to persuade potential investors to attend BitConnect conferences, where they could be convinced to invest larger sums with BitConnect. *Id*. at 50-51.

Arcaro published multiple websites to promote BitConnect and funnel investors to invest in BitConnect. *Id*. at 52. For example, he

displayed an image promoting BitConnect investment on the homepage of his website at http://www.glennarcaro.com:



Id. at 52.

Arcaro similarly displayed an image promoting BitConnect investment on his website "BitFunnel":

Id. at 53.

But Arcaro's primary "funneling" website was www.Futuremoney.io, where he offered a purported educational course called "Cryptocurrency 101." *Id.* at 53. "Lessons" eight, nine, and ten of the course named were entitled "Buying Your First Bitcoin," "Creating Your Bitconnect Account," and "Bitcoin to Bitconnect: Transfer and Start Earning!" *Id.* Graduates of the course were urged to open BitConnect accounts using Arcaro and his team's referral links. *Id.*

Maasen and Hildreth

Defendant/Appellee Ryan Hildreth was "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." *Id.* at 22. Hildreth posted more than 250 videos on YouTube promoting BitConnect, which were viewed almost 3,500,000 times. *Id.* at 67. He accumulated more than 100,000 subscribers and recruited more than 5,000 investors to cumulatively invest more than $20 million in BitConnect. *Id.* at 67.

Hildreth also marketed the BitConnect Investment Programs through his website (http://www.ryanhildreth.com), on which he told investors he could teach them "how to make an extra $1,000 - $5,000+

per month" and targeted "ENTREPRENEURS WHO WANT THE FREEDOM TO MAKE MONEY FROM ANYWHERE IN THE WORLD, TRAVEL, AND CHOOSE THE LIFESTYLE [THEY] WANT TO LIVE!" *Id*. at 56. Together with a promoter known as CRYPTONICK, Hildreth promoted BitConnect through another course at "Bitcoinmastery.teachable.com." *Id*. at 56.

Similarly, Defendant/Appellee Ryan 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." *Id*. at 23. Maasen published dozens of YouTube videos promoting the Investment Programs, primarily focusing his efforts on raising investments from high school and college-aged investors. *Id*. at 57. His videos were viewed more than 850,000 times and he accumulated more than 20,000 subscribers to his YouTube channel. *Id*. at 67. In BitConnect's pyramid hierarchy, Maasen and Hildreth were "Regional Promoters" reporting to National Promoter Arcaro. *Id*. at 31-32.

Plaintiffs alleged that they "each actively researched BITCONNECT and the BitConnect Investment Programs prior to

making their purchases of [BitConnect Coins] and throughout the periods in which they invested in BITCONNECT." *Id*. at 13. Their research "included reviewing virtual currency online forums, reading BITCONNECT's publications and viewing its promotional videos." *Id*. at 61. Given Arcaro, Maasen, and Hildreth's extensive promulgation of content promoting BitConnect,

> each 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.

Claims for Relief

In Count I, Plaintiffs alleged violations of Section 12(a) of the Securities Act for the sale of unregistered securities. *Id*. at 77. "Defendants unlawfully made use of means or instruments of transportation or communication in interstate commerce or of the mails for the purposes of offering, selling, or delivering unregistered securities in direct violation of the Securities Act." *Id*. BitConnect Coins and the Investment Programs constituted securities because:

> (a) to receive any [BitConnect Coins] (and invest in the BitConnect Investment Programs), an investment of money, in the form of [bitcoins] and/or other currencies was required; (b) the investment of money was made into the common enterprise that is Defendant BITCONNECT and its ability to provide "guaranteed" returns using its trading algorithm or otherwise; and (c) the success of the investment opportunities and any potential returns thereon were entirely reliant on Defendants' ability to continuously provide such "guaranteed" returns to investors.

Id. at 77.

Arcaro, Maasen, and Hildreth each was a "seller" under the Securities Act. *Id*. Each "personally profited by soliciting investors to use their 'referral' links to participate in the BitConnect Investment Programs." *Id*.

In Count XII, Plaintiffs asserted a claim against Arcaro for violation of section 15(a) of the Securities Act. *Id*. at 84. As a result of his "ownership in and/or control over" BitConnect International PLC, Arcaro "acted as controlling person of BITCONNECT INTERNATIONAL PLC within the meaning of Section 15(a) of the Securities Act." *Id*. "By virtue of his positions as an affiliate manager and/or director and participation in and/or awareness of" BitConnect International PLC's "operations, Defendant ARCARO had the power to influence and control and did

influence and control, directly or indirectly, the decision making relating to the BitConnect Investment Programs, including the decision to engage in the sale of unregistered securities in furtherance thereof." *Id*.

Plaintiffs also asserted state law claims against Arcaro, Hildreth, and Maasen, among others. Those claims included Unjust Enrichment, Fraudulent Inducement, Fraudulent Misrepresentation, Negligent Misrepresentation, Conversion, Civil Conspiracy, and violations of the Florida Deceptive and Unfair Trade Practices Act. *Id*. at 87-96.

II. Procedural History

Arcaro moved to dismiss the ACC for lack of personal jurisdiction and failure to state a claim. ECF Doc. 94. Maasen and YouTube similarly filed motions to dismiss. ECF Docs. 86 & 88. On August 23, 2019, the District Court entered an order granting those motions. ECF Doc. 115.

The District Court concluded that a BitConnect Coin constitutes a "security" within the meaning the Securities Act of 1933. ECF Doc. 115 at 12-17. It concluded, however, that Plaintiffs failed to state a claim for relief under section 12 against Arcaro and Maasen because they were not statutory sellers. *Id*. at 18.

Citing *Pinter v. Dahl*, 486 U.S. 622 (1988), the District Court observed that seller 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."

ECF Doc. 115 at 18 (quoting *Pinter*, 486 U.S. at 647).

But it stressed the *Pinter* Court's statement that mere participation in a transaction is not enough. *Id*. The District Court also noted this Court's decision in *Ryder International Corp. v. First American National Bank*, 943 F.2d 1521 (11th Cir. 1991), affirming summary judgment for the defendant in question, and a decision of the United States District Court for the Middle District of Florida interpreting *Ryder* to require allegations that the plaintiff purchased the security as a result of the specific defendant's solicitation. ECF Doc. 115 at 19 (relying on *In re CNL Hotels & Resorts, Inc.*, No. 04-cv-1231ORL-31KRS, 2005 WL 2291729 (M.D. Fla. Sept. 20, 2005)).

The District Court said the ACC was "devoid of specific allegations regarding Arcaro and Maasen's efforts to urge or persuade Plaintiffs, individually, to purchase" BitConnect Coins. *Id*. Plaintiffs, it said, only

alleged that they "encountered publicly available content created by Arcaro and Maasen during their efforts to research the Bitconnect Investment Programs." *Id*.

It found the ACC deficient because it lacked "allegations regarding a relationship between any of the Plaintiffs and Arcaro or Maasen." *Id*. at 20. To state a claim, Plaintiffs needed "individualized allegations" of Arcaro and Maasen having "engaged in active efforts to urge or persuade" them to invest in BitConnect. *Id*.

The District Court also dismissed Plaintiffs' claim against Arcaro for liability as a control person under section 15 of the Securities Act. *Id*. at 20-22. It noted the ACC's allegations that Arcaro was "was listed as an active director and shareholder of BitConnect International PLC." *Id*. at 21. But it granted Arcaro's Request for Judicial Notice of an order of the High Court of Justice redacting identification of him as a shareholder and his witness statement in support. *Id*., n.8. Although the ACC contained a chat message suggesting the application for that order was a ruse, the District Court said it could not "conclude this message is sufficient to allege controlling person liability" because it did not

establish that Arcaro had the power to control BitConnect and the policy that resulted in liability. *Id.* at 22.

Finally, the District Court dismissed Plaintiffs' claims against YouTube with prejudice, holding that YouTube was shielded from liability under Section 230 of the Communications Decency Act. *Id.* at 22-25. The District Court rejected Plaintiffs' argument that YouTube was an "information content provider" that was in part responsible for the creation or development of the information in the YouTube videos promoting BitConnect. *Id.* at 23. "While participation in the 'YouTube Partner Program' may have helped direct traffic to the Bitconnect Defendants' videos," it said, "traffic redirection alone is not sufficient to preclude § 230 immunity." *Id.* at 24.

Having dismissed the claims against Arcaro and Maasen without prejudice, the District Court directed Plaintiffs to file an amended complaint. *Id.* at 25. On September 13, 2019, Plaintiffs filed their Second Amended Consolidated Class Action Complaint ("SAC"). ECF Doc. 118.

In the SAC, Maryann Marryshow, Mija Yoo, Nelson Arias, and Cory Struzan were joined as additional plaintiffs. ECF Doc. 118 at 5. Tanner Fox was joined as an additional defendant. *Id.* at 7. Fox was "an

affiliate/recruiter for BITCONNECT, soliciting thousands of BITCONNECT investors in the United States and abroad through social media sites." *Id.* at 25. He "published 350+ BITCONNECT promotional videos on YouTube." *Id.* at 64. Those videos were viewed approximately 4,000,000 times. *Id.* Fox successfully recruited almost 1,500 investors to invest a total of $5,200,000.00 in BitConnect, for which Fox received approximately $400,000.00 in compensation. *Id.*

Plaintiffs alleged that Marryshow "completed the 'training program' available on Defendant ARCARO's primary website to "funnel" investments into BitConnect —Futuremoney.io." *Id.* at 14. After completing that "training," Marryshow "invested approximately 1.52838 bitcoin into the BitConnect Investment Programs." *Id.*; *see also id.* at 62.

Yoo was "personally and successfully solicited to invest in BitConnect by" Arcaro and Maasen. *Id.* After watching Arcaro and Maasen's YouTube videos, she "signed up for BitConnect through their affiliate programs." *Id.* at 15. "From December 20, 2017 through December 29, 2017, Defendants ARCARO and MAASEN successfully solicited Plaintiff YOO's investment of 1.59551122 bitcoin into the BitConnect Investment Programs." *Id.*; *see also id.* at 62.

Similarly, Arias watched "Defendant ARCARO's and FOX's YouTube videos and signed up for BitConnect through Defendant FOX's referral affiliate program." *Id.* "In approximately September 2017, Defendants ARCARO and FOX successfully solicited Plaintiff ARIAS' investment of approximately $6,500.00 into the BitConnect Investment Programs." *Id.*

Likewise, Struzen "was personally and successfully solicited to invest in BitConnect by Defendants ARCARO, JAMES and HILDRETH." *Id.* After watching "Defendant ARCARO's, JAMES' and HILDRETH's YouTube videos," Struzen "signed up for BitConnect through their affiliate programs." *Id.* "From November 9, 2017 through December 20, 2017, Defendants ARCARO, JAMES, and HILDRETH successfully solicited Plaintiff STRUZEN's investment of 4.75934893 bitcoin into the BitConnect Investment Programs." *Id.*

Arcaro and Maasen moved to dismiss the SAC. ECF Doc. 122 & 130. On November 15, 2019, the District Court entered an order granting those motions. ECF Doc. 133. It noted and reaffirmed the dismissal of the ACC and its reasoning in reaching that decision. *Id.* at 4-5.

The District Court noted its conclusions in the prior order that Plaintiffs had not alleged "a relationship between any of the Plaintiffs and Arcaro or Maasen" or that "either Defendant engaged in active efforts to urge or persuade any of the Plaintiffs to invest" in BitConnect Coins. *Id*. at 10. Although the District Court recognized the addition of four plaintiffs and the allegations that they were personally solicited by Arcaro and Maasen, in its view, "this 'personal and successful solicitation' was not so personal after all." *Id*. at 11.

Three Plaintiffs "merely viewed Arcaro's and Maasen's publicly available videos (on YouTube) about the BitConnect program and allegedly invested in BitConnect because of these videos." *Id*. The fourth additional Plaintiff, Marryshow, had invested in BitConnect after completing Arcaro's purported training program, in which she was urged to invest in BitConnect. *Id*. at 11-12. In the District Court's view, however, persuading investors to invest through publicly available content is insufficient as a matter of law:

> 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 Maasen'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.

Id. at 12 (emphasis in original).

As a result, the District Court dismissed Plaintiffs' Section 12 claims with prejudice. *Id*. Finding Plaintiffs relied on the same allegations in the SAC as in the ACC regarding Section 15 liability, the District Court dismissed that claim with prejudice as well. *Id*. at 12-14. And having found no claim stated under the Securities Act, the District Court concluded that it lacked personal jurisdiction over Arcaro and Maasen to adjudicate the state law claims against them. *Id*. at 14-16.

On November 20, 2019, the District Court entered a *sua sponte* order. ECF Doc. 134. In that order, the District directed Plaintiffs to file a motion for leave to effectuate alternative service of process on the foreign defendants that they had not been able to serve. *Id*. at 2. It dismissed three domestic defendants that had not been served. *Id*. at 2-

3. Additionally, the District Court struck the remainder of the SAC and directed Plaintiffs to file a third amended complaint with Arcaro and Maasen removed, as well as any other defendant that "Plaintiffs [may] have intended to impose liability upon…for the same reasons as Arcaro and Maasen." *Id*. at 3. The District Court "stress[ed] that allowing Plaintiffs to file a Third Amended Complaint should not be construed as an invitation to expand this litigation in any manner." *Id*.

Plaintiffs filed a Third Amended Complaint ("TAC") and a Motion for Leave to Effect Alternative Service on Unserved Foreign Defendants. ECF Docs. 137 & 138. The District Court denied the motion for leave and directed Plaintiffs to file a renewed motion with additional information. ECF Doc. 140. Plaintiffs did so. ECF Doc. 145. On January 9, 2020, the District Court entered an order denying the renewed motion for leave to effect alternate service and dismissed all remaining defendants except Trevon Brown, Ryan Hildreth, and Tanner Fox. ECF Doc. 146.

After reviewing the TAC, the District Court issued an order to show cause why Trevon Brown, Ryan Hildreth, and Tanner Fox should not be dismissed because liability was sought to be imposed on them on the same basis as Arcaro and Maasen. ECF Doc. 142. Plaintiffs filed a

memorandum in response to the order. ECF Doc. 143. They argued that all these defendants were sellers within the meaning of the Securities Act. *Id*. at 3-9. They also noted that Trevon Brown a/k/a Trevon James had defaulted, and thus admitted the allegations against him. *Id*. at 6.

On March 31, 2020, the District Court entered an Order Dismissing Complaint and Closing Case. ECF Doc. 147. It said that in their response to the order to show cause, Plaintiffs had attempted to reargue the issues decided in addressing Arcaro and Maasen's motions to dismiss and " for the reasons stated in my prior orders, Plaintiffs' claims against Defendants Brown, Hildreth, and Fox are dismissed." *Id*. The District Court dismissed the TAC with prejudice. *Id*. at 2. Plaintiffs timely appealed. ECF Doc. 149.

III. Standard of Review

This Court reviews "the grant of a motion to dismiss under Rule 12(b)(6) for failure to state a claim de novo, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009). In ruling on a motion to dismiss, "[t]he allegations in the complaint must be accepted as true and construed in the light most favorable to the

plaintiff." *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 694 (11th Cir. 2016) (citing *Ironworkers Local Union 68 v. AstraZeneca Pharm., LP,* 634 F.3d 1352, 1359 (11th Cir. 2011)). To survive a Rule 12(b)(6) motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

Although the challenged rulings effectively dismissed Plaintiffs' claims for failure to state a claim, a de novo standard of review also applies when this Court reviews a district court's order on a motion to dismiss for lack of personal jurisdiction. *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 255 (11th Cir. 1996). Similarly, "[t]he district court must accept the facts alleged in the complaint as true, to the extent they are uncontroverted by the defendant's affidavits," and "where the plaintiff's complaint and the defendant's affidavits conflict, the district court must construe all reasonable inferences in favor of the plaintiff." *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990).

SUMMARY OF THE ARGUMENT

The District Court erred in dismissing Plaintiffs' Section 12 claims against Arcaro and Maasen. Although the District Court correctly concluded that BitConnect Coins and the Investment Programs were unregistered securities, it erred in concluding that Arcaro and Maasen were not persons subject to liability under Section 12(a)(1).

The ACC and SAC contain ample allegations that Arcaro and Maasen engaged in active efforts to persuade Plaintiffs and other investors to invest in BitConnect Coins and the Investment Programs. Plaintiffs properly alleged that Arcaro and Maasen did so for their own financial benefit and for the benefit of BitConnect. And Plaintiffs properly alleged that Arcaro and Maasen were successful in soliciting their investments. The District Court erred in concluding that Arcaro and Maasen were not subject to liability based merely on the fact that Plaintiffs alleged they solicited investments through the Internet and social media rather than in one-to-one conversations with investors.

The District Court dismissed Plaintiffs' state law claims against Arcaro and Maasen based on its dismissal of the Section 12 claims and Plaintiffs' claims against Brown, Hildreth, and Fox based on its dismissal

of Plaintiffs' claims against Arcaro and Maasen. Because the District Court erred in dismissing Plaintiffs' Section 12 claims against Arcaro and Maasen was erroneous, its dismissal of Plaintiffs' state law claims against them should be vacated, as should the District Court's dismissal of all of Plaintiffs' claims against Brown, Hildreth, and Fox.

ARGUMENT AND CITATIONS OF AUTHORITY

For the reasons that follow, the District Court erred in dismissing Plaintiffs' claims with prejudice. This Court should reverse.

I. The District Court Erred in Dismissing Plaintiffs' Section 12 Claims Against Arcaro and Maasen

Section 5 of the Securities Act of 1933 prohibits the sale of unregistered securities:

> (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.
>
> * * *
>
> (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.

15 U.S.C. § 77e.

Section 2(1) broadly defines a security:

> 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.

15 U.S.C. § 77b.

In *S.E.C. v. W.J. Howey Co.*, the Supreme Court defined an investment contract as

> a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.

S.E.C. v. W.J. Howey Co., 328 U.S. 293, 298–99 (1946).

The District Court correctly concluded that the ACC and SAC plausibly alleged that BitConnect Coins and Investment Programs were unregistered securities. It erred, however, in concluding that the ACC and SAC failed to plausibly allege that liability could be imposed on Arcaro and Maasen under section 12(a)(1) of the Securities Act.

Section 12(a) of the Securities Act imposes liability on persons that offer or sell unregistered securities:

> 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.

15 U.S.C. § 77l.

In turn, section 2(3) states that "'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." 15 U.S.C. § 77b(3) (emphasis added). Based on this definition, the Supreme Court has explained that "[t]he inclusion of the phrase 'solicitation of an offer to buy' within the definition of 'offer' brings an individual who engages in solicitation . . . within the scope of § 12." *Pinter v. Dahl*, 486 U.S. 622, 643 (1988). "Congress' express definition of 'sells' in the original Securities

Act to include solicitation suggests that the class of those from whom the buyer 'purchases' extended to persons who solicit him." *Id.* at 645.

In fact, the Supreme Court went on to explain, imposing liability on persons that solicit a sale of securities is central to the Securities Act's enforcement scheme:

> The solicitation of a buyer is perhaps the most critical stage of the selling transaction. It is the first stage of a traditional securities sale to involve the buyer, and it is directed at producing the sale. In addition, brokers and other solicitors are well positioned to control the flow of information to a potential purchaser, and, in fact, such persons are the participants in the selling transaction who most often disseminate material information to investors. Thus, solicitation is the stage at which an investor is most likely to be injured, that is, by being persuaded to purchase securities without full and fair information.

Pinter, 486 U.S. at 646–47.

The Supreme Court, however, concluded "that Congress did not intend to impose . . . liability on a person who urges the purchase but whose motivation is solely to benefit the buyer" or was gratuitous. *Id.* at 647. Rather, "liability extends only to 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." *Id.* It also rejected

the "substantial factor" test that some courts had used to determine whether a defendant was a "seller" based on tort law principles, under which a defendant was a seller if he or she was "'a substantial factor in causing the transaction to take place.'" *Id.* at 649 (quoting *Pharo v. Smith,* 621 F.2d 656, 667 (5th Cir. 1980)). The Supreme Court remanded for further fact finding because the record lacked findings "on whether Dahl urged the other purchases in order to further some financial interest of his own or of Pinter." *Id*. at 655.

In *Ryder International Corporation v. First American National Bank*, 943 F.2d 1521 (11th Cir. 1991), this Court examined *Pinter* to determine when a defendant may be liable as a seller under Section 12(2) of the Securities Act. *Ryder*, 943 F.2d at 1524-1529. In that case, Ryder had a banking relationship with First American, which had told Ryder of options for investing in commercial paper and executed an order by Ryder to purchase from an underwriter and exclusive dealer commercial paper issued by a certain publicly traded company. *Id*. at 1522.

This Court, therefore, was called on to address "whether a bank should be deemed a seller under section 12(2) when it acts as an intermediary in the purchase of securities through a registered dealer."

Ryder, 943 F.2d at 1524. This Court noted that although *Pinter* addressed only Section 12(1), the use of identical language in two subsections compelled the conclusion "that a 'solicitor' of a purchase of securities he or she does not own is within the ambit of either section 12(1) or section 12(2)." *Id.* at 1527. The reasoning of *Pinter*, in fact, confirmed the correctness of this Court's jurisprudence holding "that privity is not required under section 12(2)." *Id.*

At the same time, this Court held that the "substantial factor" test it had used in determining liability under section 12(2) did not survive *Pinter*. *Id.* at 1527. That test was overinclusive in extending liability beyond "persons who pass title and who solicit the purchase of unregistered securities," on whom liability is properly imposed, "to participants only remotely related to a sale transaction, such as lawyers and accountants whose involvement is that of merely providing professional services," on whom liability cannot be imposed. *Id.* Elimination of the test, the Court noted, "may not have much effect in this circuit because some form of solicitation has usually been required under the substantial factor test, at least in the more recent cases…" *Id.*

Under *Pinter*, courts must engage in a two-part inquiry: "'First, whether the participant in the sale 'solicited' the purchase; and second whether the participant or the owner of the security sold benefited.'" *Id.* at 1531 (quoting 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)). "[I]n contrast to a buyer's agent," such as the bank in *Ryder*, "it would be uncommon for a seller's agent not to engage in solicitation if he or she is hired to sell a principal's securities." *Ryder*, 943 F.2d at 1531.

This Court concluded that the summary judgment record lacked evidence that the bank, which was the buyer's agent, engaged in solicitation. *Id.* at 1531-1532. Rather, the undisputed facts were that Casey, the bank employee that handled Ryder's account, "only executed Ryder's orders. Casey did not actively solicit the orders, *i.e.* 'urge' or 'persuade' Case (working for Ryder) to buy" the commercial paper at issue. *Id.* at 1531. Liability could not be imposed under Section 12(2) because "Ryder ha[d] not shown that First American persuaded Case to purchase Integrated paper." *Id.* at 1534.

As described above, the SAC included allegations that Arcaro and Maasen engaged in extensive efforts to solicit investments in BitConnect and the Investment Programs. Arcaro published multiple websites and created a purported training course designed to persuade investors to invest in BitConnect Coins and the Investment Programs, in addition to touting investment in BitConnect on social media platforms. Maasen published hundreds of YouTube videos to promote BitConnect and persuade investors to invest in BitConnect Coins and the Investment Programs. It further alleges that Arcaro and Maasen were motivated by their own financial interests, garnering substantial commissions as a result of the investments they solicited, and that Plaintiffs invested in BitConnect Coins and the Investment Programs as a result of being persuaded by Arcaro and Maasen to do so. Under *Pinter* and *Ryder*, such allegations bring Arcaro and Maasen within the ambit of Section 12(a)(1).

The District Court erroneously concluded that Plaintiffs had not plausibly alleged that Arcaro and Maasen were liable under Section 12(a)(1) based on the premise that solicitation requires a "personal relationship" between the solicitor and the investor. It appears that in the District Court's view, a defendant solicits an investment only when

he or she has a personal conversation with the investor, not when he or she promotes investment to many investors by posting a video or advertisement on the Internet for the investor to view.

That premise is inconsistent with the statutory text as well as case law interpreting it. Indeed, numerous precedents establish that a person engages in solicitation, and is subject to liability under Section 12(a)(2) (under which the scope of persons liable is coextensive with Section 12(a)(1)), by promoting an investment through public events and broadly dissemination publications. An Internet video touting an investment is no less a solicitation than is giving a speech in a public forum. Indeed, viewing a video or course is, in fact, a personal experience, even if communication does not take place in real-time.

Most important, the District Court's importation of a personal conversation requirement is inconsistent with the terms of the Securities Act. In *Pinter*, the Supreme Court emphasized the need to interpret the scope of persons liable under Section 12(a) based on the "common parlance" meaning of the statutory text. *Pinter*, 486 U.S. at 641-643. It was based on its inconsistency with the meaning of the text that the Supreme Court rejected the "substantial factor" test. *Id.* at 651 ("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.").

And it was because of the common parlance meaning of the statutory terms that the Supreme Court concluded that a person that solicits investment *is* liable under Section 12(a)(1). *Id.* at 643 ("The inclusion of the phrase 'solicitation of an offer to buy' within the definition of 'offer' brings an individual who engages in solicitation, an activity not inherently confined to the actual owner, within the scope of § 12."). Indeed, this Court in *Ryder* noted the *Pinter* Court's "emphasis on statutory language" as the compelling factor requiring retirement of the "substantial factor" test. *Ryder*, 943 F.2d at 1527.

The Securities Act defines "offer" as including "solicitation of an offer to buy…" It does not define the term "solicitation" and the Supreme Court in *Pinter* did not define the term solicit. "When a statute does not define a term, 'we look to the common usage of words for their meaning.'" *In re Walter Energy, Inc.*, 911 F.3d 1121, 1143 (11th Cir. 2018) (quoting *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir.

2001)). To determine the ordinary meaning of a term, we often look to dictionary definitions for guidance. *Id*.

The dictionary definition of "solicitation" is not limited to individualized communications. For example, the Merriam-Webster dictionary defines the word "solicit" based on the content of the communication, not based on the mode of communication:

> 1 a **:** to make petition to **:** ENTREAT
> b **:** to approach with a request or plea
> // *solicited* Congress for funding
>
> 2 **:** to urge (something, such as one's cause) strongly
>
> 3 a **:** to entice or lure especially into evil
> b **:** to proposition (someone) especially as or in the character of a prostitute
>
> 4 **:** to try to obtain by usually urgent requests or pleas solicited donations

"Solicit." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/solicit (Accessed July 8, 2020).

Similarly, the Supreme Court has explained that the word "'Solicitation,' commonly understood, means '[a]sking' for, or 'enticing' to, something." *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505

U.S. 214, 223 (1992) (citing *Black's Law Dictionary* 1393 (6th ed. 1990) & Webster's Third New International Dictionary 2169 (1981)). In fact, analyzing the meaning of the term solicitation as used in 15 U.S.C. § 381(a), the Supreme Court explained that the term encompasses not only direct requests but "any speech or conduct that implicitly invites an order." *Id*.

The plain meaning of "solicitation" includes "urging" or "enticing" investors through websites, courses, videos, and social media posts that persuade investors to purchase an investment just as it includes persuading investors through phone conversations. Nothing in the statutory text limits the scope of solicitation to "personal solicitation."

In fact, even before *Pinter*, this Court had held that a defendant can engage in solicitation under Section 12 through statements directed to a broader audience just as through individual conversations. And *Pinter* only reinforced the correctness of those holdings. Indeed, in *Ryder*, this Court noted that the adoption of the *Pinter* test would not change the result in cases such as *Junker v. Crory*, 650 F.2d 1349, 1360 (5th Cir. 1981), where the defendant was held to have solicited investments by

promoting a merger in a speech at a shareholder's meeting. *Ryder*, 943 F.2d at 1528.

Similarly, "[a]s many courts have found, the registration statement," when one is filed, "is itself a solicitation document." *In re Charles Schwab Corp. Sec. Litig.*, 257 F.R.D. 534, 549–50 (N.D. Cal. 2009). A registration statement, of course, is a public filing, not an individualized conversation.

And as the United States District Court for the Southern District of New York has recognized, "it has become well settled" in the wake of *Pinter* and its extension to Section 12(a)(2) "that the seller need not have 'personal' contact with the purchaser . . . to be held liable under § 12(a)(2)." *In re Vivendi Universal, S.A.*, 381 F. Supp. 2d 158, 186 (S.D.N.Y. 2003). Thus, the court in *Vivendi* concluded that plaintiffs had plausibly alleged that the defendant engaged in solicitation under Section 12 where they alleged only that he participated in preparing the registration statement "and regularly appeared before investors and financial news agencies to tout the financial vitality of Vivendi and thereby encourage investors to purchase Vivendi's securities." *Id.* at 187; *see also In re OSG Sec. Litig.*, 971 F. Supp. 2d 387, 403 (S.D.N.Y. 2013)

(finding solicitation under Section 12(a)(2) was plausibly alleged where the complaint alleged "that the Individual Defendants 'prepar[ed] the defective and inaccurate Prospectus and participat[ed] in efforts to market the Offering to investors.'"); *Charles Schwab*, 257 F.R.D. at 549-550 (finding solicitation under Section 12(a)(2) was plausibly alleged where the complaint alleged that the defendants signed the registration statement, "'actively solicited the sale of the fund's shares' and that certain defendants were involved in marketing the fund.").

In fact, in a case involving the sale of another cryptocurrency, the Southern District of New York recently held that a complaint alleging individual defendants made only public statements plausibly alleged liability under Section 12(a)(1). *See Balestra v. ATBCOIN LLC*, 380 F. Supp. 3d 340, 358 (S.D.N.Y. 2019). The court found it sufficient that the complaint contained "several references to the personal involvement of Ng and Hoover in publicizing the ATB ICO," including quotes in a press release and three videos in which they touted the cryptocurrency. *Id.* "These promotional statements trumpeting the potential of the ATB Coin and the ongoing opportunity to invest in the ATB ICO . . . clearly reflect both Ng's and Hoover's efforts to solicit the sale of ATB Coins." *Id.*

The same result should have obtained here. The ACC and SAC extensively allege that Arcaro and Maasen engaged in active efforts to persuade investors to invest in BitConnect Coins and the Investment Programs. They similarly allege that Arcaro and Maasen did so for their own benefit as well as for the benefit of BitConnect. And the SAC alleges that Plaintiffs invested in BitConnect Coins and the Investment Programs as a result of Arcaro and Maasen's actions, directly benefiting Arcaro and Maasen by using their links to effectuate the purchases.

That Arcaro and Maasen persuaded Plaintiffs and other investors through recordings of themselves and social media posts broadly disseminated on the Internet makes their actions no less solicitations than if they would have made such statements in an individual conversation. It simply made their solicitations more damaging, extending to hundreds of thousands of investors rather than one.

In addition to contravening the statutory text and case law, the the District Court's approach is also counterintuitive. Under its reasoning, a person who engages in a conversation with one investor to persuade him or her to invest is subject to liability under Section 12. But the mere fact that the same person conveys the same message to millions of persons by

posting it on the Internet immunizes the solicitor. Indeed, the same logic would immunize persons that promulgate press releases, advertisements, and any other broadly disseminated communications from liability under Section 12. There is no indication in the Securities Act that Congress intended that counterintuitive result.

In sum, the District Court erred in holding that solicitation under Section 12 only occurs when the defendant engages in a one-to-one "personal" conversation with the investor as well as in concluding that a communication through a video or course that is individually viewed by an investor is not a personal interaction. Because the SAC properly alleged that Arcaro and Maasen, for their own financial benefit, solicited Plaintiffs to invest in BitConnect Coins and the Investment Programs, the District Court erred in dismissing Plaintiffs' Section 12 claims. This Court should reverse.

II. The District Court Erred in Dismissing PlaintiffsAppellants' Other Claims Against the Promoter Defendants

In its August 23, 2019 order, the District Court correctly concluded that the Securities Act conferred personal jurisdiction over Arcaro and Maasen. ECF Doc. 115 at 5. It concluded, however, that "[b]ecause

Plaintiffs' securities claims against Arcaro and Maasen fail, . . . jurisdiction on the basis of the Securities Act is foreclosed." *Id.* And, it said, "in the absence of an anchor claim, pendant jurisdiction does not provide a basis for personal jurisdiction of Plaintiffs' state law claims."

As explained above, the District Court erred in concluding that the Plaintiffs failed to state a claim for violation of Section 12 of the Securities Act. And as the District Court noted, "'every circuit court of appeals to address the question has upheld the application of pendent personal jurisdiction.'" *Id.* at 6, n.2 (quoting *Action Embroidery Corp. v, Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1176 (9th Cir. 2004). As such, because the District Court's dismissal of Plaintiffs' claims under the Securities Act is due to be reversed, their state law claims should be reinstated as well.

Similarly, based on its conclusion that Plaintiffs failed to state a claim against Arcaro and Maasen, the District Court *sua sponte* dismissed Plaintiffs' claims against Trevon Brown (a/k/a Trevon James), Ryan Hildreth, and Tanner Fox. *See* ECF Docs. 142 & 147. It dismissed Brown/James despite that a clerk's default had been entered against him, such that he had admitted Plaintiffs' allegations.

Similar to Arcaro and Maasen, Plaintiffs alleged that Hildreth, Fox, and Brown/James were liable under Section 12 in that they successfully solicited investments in BitConnect Coins and the Investment Programs through videos and other social media postings promoting such investments, which were made for their financial benefit and the benefit of BitConnect. The District Court dismissed Plaintiffs' claims against Hildreth, Fox, and Brown/James because it found the allegations as to their conduct did not go beyond Plaintiffs' allegations regarding Arcaro and Maasen.

As explained above, the District Court's conclusion that Plaintiffs failed to state a Section 12 claim against Arcaro and Maasen was erroneous. It follows that the District Court's dismissal of Plaintiffs' claims against Hildreth, Fox, and Brown/James was erroneous. As such, this Court should vacate the District Court's dismissal of these defendants as well.

CONCLUSION

For the reasons set forth above, this Court should reverse the District Court's dismissal of Plaintiffs' claims against the Promoter Defendants and remand for further proceedings.

Dated: July 8, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 8,585 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

/s/ Daniel A. Bushell
Daniel A. Bushell

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2020, I electronically filed the foregoing document using the Court's CM/ECF system, which will electronically serve a copy of the foregoing document on all counsel of record.

/s/ Daniel A. Bushell
Daniel A. Bushell