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.

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.*).

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 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (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

[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.

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 (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*, 135 S. Ct. 1318, 1323 (2015) (citing *Pinter v. Dahl*, 486 U.S. 622, 646 (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. § 77l, 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 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 of specific allegations regarding Arcaro and Maasen's efforts to urge or persuade Plaintiffs, individually, to purchase BCC. Plaintiffs

[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 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.").

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 WL 2085839, at *2 (S.D. 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."

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 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. 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 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 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)).

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 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)).

[3]Plaintiffs heavily rely on *In re Tezos Securities Litigation*, No. 17-cv-6779, 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.

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.

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

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[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.").

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 Maasen 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.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

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