

# Beware The Rocket Ship: How SEC Is Scrutinizing Emoji Use

By **Andrew Balthazor, Jessica Magee and Scott Mascianica** (March 29, 2023)

Emojis are now mainstream in society, both in public and private communications, and have transformed the way people communicate.[1][2]

When used effectively, they communicate a clear message succinctly — on their own or as context to a broader message. But they are also susceptible to considerable nuance depending on the user, use, context, audience, and the device or app used to view the emoji.

What could mean "blissfully happy" to the sender could mean "ready to fight" to someone else.[3]

Today, the appearance of emojis in litigation, as evidence of a statement, act or intent, is on the rise.[4]

This reality can have considerable consequences under U.S. securities laws — and especially so in litigation involving digital assets, in which private plaintiffs and regulators are pointing to emojis to allege the existence of a security.

Emojis played a significant role in the recent denial of the defendants' motion to dismiss in *Friel v. Dapper Labs Inc.*,[5] when the U.S. District Court for the Southern District of New York in February decided that the plaintiff adequately alleged that the defendants' non-fungible tokens are investment contract securities under the multipronged test established by the U.S. Supreme Court in *SEC v. W.J. Howey Co.* — an investment of money in a common enterprise with the expectation of profit to be realized from the efforts of others.[6]

Notably, the *Dapper Labs* court determined that the plaintiff sufficiently pled the expectation-of-profit prong based, in part, on allegations about a tweet promoting defendants' NFTs with the rocket ship, increasing chart or moneybag emojis — or 🚀, 📈 and 💰, respectively — which the court concluded "objectively mean one thing: a financial return on investment." [7]

*Dapper Labs* is a private securities action, but it illustrates how emojis may be weaponized to allege the existence of a security in litigation.

For its part, the U.S. Securities and Exchange Commission has filed several enforcement actions in recent years incorporating a defendant's use of emojis to purport the existence of a security under *Howey*, the required predicate for charging any number of securities law violations in connection with an alleged investment contract.

So far, the SEC's cases involving emoji allegations have largely focused on purported touting, insider trading and market manipulation. These agency actions underscore the need to carefully review any use of emojis in the securities context, particularly because their use may convey different meanings to different viewers — creating an uncertain amount of



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regulatory risk for users.

### **How the SEC Uses Emojis to Allege an Expectation of Profits**

The SEC most commonly highlights a defendant's use of emojis, in combination with other allegations, to satisfy the expectation-of-profit prong of the Howey analysis.

Typically, the commission identifies publicly disseminated messages — e.g. tweets — incorporating emojis, and then purports how those emojis, along with other statements and relevant context, would lead a reasonable investor to expect the offered transaction to be profitable.

The rocket ship emoji, , has received particular attention from the SEC.

In SEC v. LBRY Inc. in the U.S. District Court for the District of New Hampshire, the agency alleged in February 2022 that LBRY's LBC token was a security, in part because LBRY predicted on its website that for LBC the "best is yet to come" punctuated by a .[8] The SEC claimed that this signified "to readers that LBC was going to rocket to higher prices." [9]

After considering this and other statements made by LBRY, the court concluded in November that LBC was a security and granted the commission's motion for summary judgment, finding that "[t]hese statements are representative of LBRY's overall messaging about the growth potential for LBC, and thus the SEC is correct that potential investors would understand that LBRY was pitching a speculative value proposition for its digital token." [10]




And in SEC v. Auzins, an action filed in the U.S. District Court for the Eastern District of New York relating to a purportedly fraudulent initial coin offering, the SEC alleged in December 2021 that the defendant "suggested to investors that the price of the [digital asset] would appreciate, with posts on its Twitter feed and Facebook page including emoji symbols of rockets taking off and a chart with an upward trajectory, signifying that purchasers could expect profits." [11]

The rocket ship emoji featured once again in the recently filed action SEC v. Sun, in connection with the BTT and TRX digital assets. [12]

In Sun, the SEC alleged on March 22 in the Southern District of New York that the defendants marketed BTT to investors with an expectation of profit by promoting the asset's performance in secondary markets.

For example, the SEC purported that one defendant's tweet provided BTT pricing statistics and stated that "#BTT to the [sic] Mars," with two rocket ship emojis. [13]

### **How the SEC Uses Emojis to Allege Unlawful Securities Touting**

These rocket ships   were not the only emojis in Sun's orbit .

The SEC is also using statements including emojis — or emojis themselves — as purported promotional statements that it claims other defendants made in violation of securities anti-touting laws.

Section 17(b) of the Securities Act prohibits a person from promoting a security in exchange for consideration from an issuer, underwriter or dealer without fully disclosing the

consideration, and places the duty of disclosing a paid promotional arrangement on the party being paid to perform the promotional activities.

In a series of settlements, the SEC stated that the Sun defendants paid celebrity promoters to share specific content on social media.

Social media personality and boxer Jake Paul simply tweeted "#TRX [TRX emoji] 🚀,"[14] while Michele Mason, an adult entertainer known as Kendra Lust, tweeted, "people should use only \$TRX cause its [sic] fast, cheap and hot 🔥 even PornHub likes it 😊."[15]

It should be noted, however, that these tweets were not relied upon by the SEC to allege the expectation-of-profit prong for TRX. Instead, the commission merely used the promoters' statements as evidence of their own unlawful touting because the promoters made the statements without disclosing that they were paid to do so.

The SEC also included emojis as statements in its action against purported EthereumMax promoter Paul Pierce, a former NBA star.

Pierce tweeted, "Put me in coach coming in hot like ... @ethereum\_max 🚀🚀🚀🚀🚀🚀🚀🚀."[16]

The SEC explained in the EthereumMax action that the "rocket ship image — along with other space images, analogies, and phrases such as 'to the moon' — are widely-used in the crypto asset space to signal expectations that a token will dramatically increase in value."[17] The promoter settled with the SEC relating to the alleged touting.

### **How the SEC Uses Emojis To Allege Insider Trading and Market Manipulation**

The SEC has also included emojis in allegations related to insider trading and market manipulation.[18]

In the insider trading context, the SEC's use of emojis has often been used as evidence of the communications between insider and outsider defendants:

- Alleging that one defendant texted the OK hand emoji, 🙌, to alert the other defendant it was time to sell securities based on material nonpublic information;[19]
- Alleging that an insider defendant texted another defendant the money-mouth emoji, 🗨️, following the insider's company's unexpectedly positive earnings announcement — an announcement the insider had alerted the defendant to by providing material nonpublic information;[20] and
- Alleging that a defendant — alerted by an insider to sell based on an upcoming event — communicated to the insider after the event's announcement with "\$ 🙄."[21]

In the above cases, the SEC does not explain the meaning of the emojis — something it has

done in other emoji-included cases.

This implies that the SEC views the emojis and their meanings as self-evident when viewed in the context of surrounding events and contemporaneous verbal statements, at least for the purposes of showing a communicative relationship between parties.

### **Use of Emojis as Evidence of State of Mind**

Emojis are sometimes used to provide context for a statement — and can be relevant to the state of mind of the person making the statement.

The SEC and defendants have seized on this peculiar feature of emojis — and the ambiguity inherent in some — both to support allegations relating to a state of mind and defend against them.

In *SEC v. Hwang*, a case in the Southern District of New York involving alleged fraud and market manipulation, the SEC in August included a defendant's emoji as part of an allegation that he knew he could manipulate stock prices through his stock purchases.

Specifically, in response to a text message regarding whether a stock price increase was a "sign of strength", the SEC alleged that the defendant responded, "'No. It is a sign of me buying,' followed by a 'tears of joy' or laughing emoji [😂]."[22]

Two of the Hwang defendants have pushed back against the SEC, arguing in motions to dismiss that the 😂 emoji shows that the defendant who used it made the preceding comment in jest and that the emoji's use "undermines the nefarious connotation that the SEC seeks to ascribe to" the entire statement.[23]

The SEC chose to not squarely address this argument in its reply — instead pointing to a number of other allegations that it said are adequate to meet its burden at the pleading stage.[24] A hearing on the defendants' motions to dismiss is set for May.

Hwang is not the first instance of a defendant raising the "emoji defense" — that an emoji rendered a contemporaneous statement trivial or immaterial.

In *SEC v. Fassari*, the SEC alleged in 2021 in the U.S. District Court for the Central District of California that the defendant committed fraud in violation of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act. Specifically, the SEC purported that the defendant encouraged his Twitter followers to purchase a specific stock and falsely stated he was purchasing the stock himself — while he instead was selling his holdings.

The defendant argued that "anyone reviewing Fassari's twitter feed would see that he regularly ends tweets with 'WEEEEEEEE' and/or smiling face emojis, clear indications that Fassari's analyses were not on the same level as [a professional investment adviser]."[25]

The SEC responded that "Fassari's use of emojis, exclamation points and other flip language does not change the substance of what he posted. Fassari's Tweets ... implied that he had nonpublic information from the [stock's] company's CEO and repeatedly misstated facts regarding [the company's] operations and imminent business prospects."

The court agreed with the commission, determining that Fassari's use of emojis did not alter the materiality of the statements' substance.[26]

Unlike Hwang, Fassari offers helpful insight into how the SEC may argue the use of emojis going forward — and how parties might counter those arguments — by teasing out how and why an emoji underscores or contradicts the substance and materiality of a preceding written statement.

### **How the SEC Uses Emojis to Allege Consideration in the Offer of Securities**

Finally, we return to SEC v. Sun and the commission's novel argument about the defendants' use of emojis as a consideration in an offer of securities.

Specifically, the SEC alleged that the defendants offered the TRX token as a potential reward for an "emoji contest," in which the defendants required participants to upload submissions via social media using the Tron emoji — an emoji representing the issuer of TRX — and tag 10 of their friends.[27]

The commission claimed that by "entering the 'emoji contest,' participants provided Sun and the Tron Foundation with valuable consideration — the online promotion of the Tron platform and TRX ecosystem, promotional artwork to feature on the Tron website, and the Twitter and Facebook handles of entrants and their tagged friends — in exchange for an opportunity to receive TRX."

Because the defendants did not take steps to exclude U.S. persons from this offering — which would have made the offering exempt from registration under Regulation S — the emoji contest allegedly constituted an offer of unregistered securities under Sections 5(a) and 5(c) of the Securities Act.

Sun is still pending, and the defendants have not yet to respond to the complaint.

### **Key Takeaways**

Emojis offer the chance to cleverly convey a clear and concise message, but they may also appear and be interpreted differently depending on the viewer's experience, age, cultural exposure, and the hardware and software through which an emoji is viewed.

Given that intended meaning and actual interpretation can differ, this ambiguity creates a heightened regulatory and enforcement risk for those using emojis in connection with securities-related activities.

Significant foundational securities questions persist when it comes to use of emojis.

For example, outside the securities arena, courts have concluded that liking or reacting to an online post is, in itself, a separate statement.[28]

Would "liking" another's singular emoji post increase the specter of promoter liability? How would courts view such action in the context of determining the "maker" of a statement?

Generally, the SEC has not viewed emojis in isolation as part of its enforcement actions, instead seeing them in light of the surrounding context and contemporaneous statements.

And when emojis are put under the microscope, the SEC has either not separately addressed their stand-alone significance — Hwang — or argued that they do not alter the substance and materiality of an attendant written statement — Fassari.

This broader context is necessary to fully evaluate the state of mind, the expectations of the reasonable viewer, or mere opinion and puffery-type defenses.

Although they may have infiltrated public discourse, emojis' use — and meaning — have not yet been heavily litigated in private securities or SEC enforcement actions, and open issues exist on many fronts.

Bear in mind that certain emojis, such as 📈, 💰 and 😊, may be peculiarly susceptible to scrutiny for their perceived risk of creating an expectation of profit, encouraging investment or otherwise impacting the markets or a person's investment decision.

As a result, caution is warranted. Or, if you prefer: 🚀🤖🚩.

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[1] Emojis include emoticons — which are characters employed to resemble a face or other image. See *Ukwuachu v. State*, No. PD-0366-17, 2018 WL 2711167, at \*6 n.12 (Tex. Crim. App. June 6, 2018) (citing Brian Garner, *Garner's Modern English Usage* 476 (4th ed. 2014)).

[2] See *The Future of Creativity: 2022 U.S. Emoji Trend Report*, Adobe (2022) (reporting survey results showing a majority of users employ emojis for personal and business uses), <https://acrobat.adobe.com/link/track?uri=urn:aaid:scds:US:e9a97193-e287-4aac-b8ee-7d1e098ec9a2>

[3] Hannah Miller et al., "Blissfully happy" or "ready to fight": Varying Interpretations of Emoji, *ICWSM'16* (2016), [https://www-users.cse.umn.edu/~bhecht/publications/ICWSM2016\\_emoji.pdf](https://www-users.cse.umn.edu/~bhecht/publications/ICWSM2016_emoji.pdf)

[4] Since 2004, there has been a general trend of an increasing number of cases referencing emojis. See Eric Goldman, *2021 Emoji Law Year-in-Review*, *Tech. & Mktg. Law Blog* (Jan. 9, 2022), <https://blog.ericgoldman.org/archives/2022/01/2021-emoji-law-year-in-review.htm>.

[5] See generally No. 21-Civ-5837 (S.D.N.Y. Feb. 22, 2023).

[6] 328 U.S. 293 (1946).

[7] *Dapper Labs*, No. 21-Civ-5837, at \*46 (S.D.N.Y. Feb. 22, 2023) (citing *SEC v. Edwards*, 540 U.S. 389, 396 (2004)).

- [8] No. 21-CV-260, 2022 WL 356772, at \*2 (D.N.H. Feb. 7, 2022).
- [9] Id.
- [10] No. 21-cv-260, 2022 WL 16744741, at \*5 (D.N.H. Nov. 7, 2022).
- [11] No. 21-cv-06693 ¶ 48 (Dec. 2, 2021, E.D.N.Y.).
- [12] No. 23-cv-02433 (Mar. 22, 2023, S.D.N.Y.).
- [13] Id. ¶ 83.
- [14] Paul, Securities Act Release No. 11171 ¶ 7 (March 22, 2023).
- [15] Mason, Securities Act Release No. 11174 ¶ 7 (March 22, 2023).
- [16] Pierce, Securities Act Release No. 11157 ¶ 19 (Feb. 17, 2023).
- [17] Id.
- [18] See, e.g., SEC v. Wahi, No. 22-cv-01009 ¶ 165 (July 21, 2022, W.D. Wa.) (alleging a digital asset was a security, in part relying on the issuer promoting the asset using a rocket ship emoji).
- [19] SEC v. Stiles, No. 23-cv-01523 ¶ 55 (Feb. 23, 2023).
- [20] SEC v. Sargent, No. 22-cv-168 ¶ 72 (Jan. 11, 2022, N.D. Ill.)
- [21] Wahi, No. 22-cv-01009 ¶ 6.
- [22] No. 22-cv-03402 ¶ 67 (Aug. 26, 2022, S.D.N.Y.).
- [23] Mot. to Dismiss, Hwang, No. 22-cv-03402, at 29 (Oct. 25, 2022), ECF No. 58.
- [24] Opp'n, Hwang, No. 22-cv-03402, at 47, 75 (Dec. 23, 2022), ECF No. 82.
- [25] SEC v. Fassari, No. SACV21403, 2021 WL 2290576, at \*6 (C.D. Cal. May 5, 2021).
- [26] See id.
- [27] SEC v. Sun, No. 23-cv-02433 ¶¶ 51–58 (Mar. 22, 2023, S.D.N.Y.).
- [28] See, e.g., Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1183 (9th Cir. 2022) (holding that reactions to a Facebook post were protected, expressive statements separate from the underlying post).