CONSUMERS CAUGHT IN THE CRYPTOCURRENCY CRISIS: WHY CELEBRITY ENDORSERS SHOULD NOT ESCAPE LIABILITY

Abstract: Described as the "Wild West" by some commentators, the world of cryptocurrency is rapidly expanding faster than regulators can catch up. Because of this asymmetric growth, consumers are at risk of investing in fraudulent and deceptive platforms. Adding endorsements by celebrities, professional athletes, and social media influencers to the equation creates additional pitfalls for consumers. A lack of due diligence on the part of endorsers leads to significant damages and losses for trusting consumers. Regulating cryptocurrency and its advertisements is a relatively new area of the law. Nevertheless, parallels exist between the lack of due diligence in advertising cryptocurrency and in advertising health and medical products without substantiating the claim. Regarding the latter type of endorsement, the Federal Trade Commission (FTC) has cracked down on deceptive advertisements that cause harm to consumers. Current lawsuits allege that celebrity endorsers of cryptocurrency companies engaged in deceptive trade practices, violating state versions of the Federal Trade Commission Act. Historically, the FTC has only found the parent company liable in similar cases, rather than individual endorsers. This Note argues that increased regulation and enforcement actions by the FTC against individual endorsers is the most effective method to curtail deceptive advertising.

INTRODUCTION

In November 2022, the cryptocurrency company FTX and its related entities effectively imploded overnight, losing consumers eleven billion dollars.[1] Plaintiffs filed a class action lawsuit in the Southern District of Florida Miami Division on November 15, 2022, against Sam Bankman-Fried, the former CEO of FTX, as well as an extensive list of celebrity defendants who promoted, as-

[1] Class Action Complaint & Demand for Jury Trial at 2, 4, Garrison v. Bankman-Fried, No. 22-cv-23753 (S.D. Fla. Nov. 15, 2022) [hereinafter *Garrison* Complaint]. The FTX entities consisted of FTX Trading and FTX US, both of which offered and sold yield-bearing accounts which resulted in damages to American residents. *Id.* at 2; *see* Scott D. Hughes, *Cryptocurrency Regulations and Enforcement in the U.S.*, 45 W. ST. U. L. REV. 1, 3–4 (2017) (defining cryptocurrency and analyzing its history in the U.S.). An in-depth analysis of cryptocurrency is beyond the scope of this Note, but its decentralized nature and lack of an oversight body are features that will be highlighted in this Note. Hughes, *supra*, at 3–4.

sisted in, and actively participated as "FTX ambassadors" in FTX Trading and FTX U.S. (FTX Entities).[2]

The FTX Entities collectively maintained the "FTX Platform" where consumers could make investments.[3] Consumers could place trades for cryptocurrencies, a relatively new but overwhelmingly controversial type of technology that can be used to transfer money or make investments.[4] Cryptocurrency exists without the interference of institutional third parties such as banks, making it decentralized in nature.[5] Although many consumers see this as a selling point for cryptocurrency, its incorporeal nature creates a regulation problem.[6] While government agencies vie for regulatory authority, consumers remain vulnerable to

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[2] *Garrison* Complaint, *supra* note 1, at 2, 21. The list of celebrity defendants includes Tom Brady, Gisele Bundchen, Stephen Curry, Kevin O'Leary, David Ortiz, the Golden State Warriors, and more athletes and actors. *Id.* at 2. The defendants were paid to participate in television advertisements and commercials, as well as advertising to fans through their social media platforms. *Id.* at 21–22. Both Brady and Bundchen were equity stakeholders in the company. *Id.*

[3] *Id.* at 8; *see* Kalley Huang, *Why Did FTX Collapse? Here's What to Know*, N.Y. TIMES, https://www.nytimes.com/2022/11/10/technology/ftx-binance-crypto-explained.html [https://perma.cc/W8JT-RHHC] (Nov. 18, 2022) (explaining the history of FTX in light of its collapse). Stated simply, FTX was one of the largest marketplaces for customers to trade digital currencies. Huang, *supra*.

[4] *Garrison* Complaint, *supra* note 1, at 8; *see* Hughes, *supra* note 1, at 1 (explaining that cryptocurrency is a new technological advancement that is mostly unregulated due to its differences from other types of financial products). The lack of any regulatory body overseeing cryptocurrency contributes to the controversy surrounding the financial instrument. *See* Hughes, *supra* note 1, at 2–3 (highlighting the fact that rather than developing laws for cryptocurrency specifically, agencies are attempting to fit cryptocurrency cases into rules meant for traditional finance). Stemming from that is an issue of consumer protection. *Id.* at 3.

[5] *See* Hughes, *supra* note 1, at 3–4 (highlighting Bitcoin, the first successful cryptocurrency, to explain that cryptocurrency exists "without interference by sovereign entities, central banks, or financial intermediaries"). Because it is decentralized and separate from financial institutions, there is no governmental agency or institutional agency ensuring the value of the digital currency. Timothy M. Barry, *#Notfinancialadvice: Empowering the Federal Trade Commission to Regulate Cryptocurrency Social Media Influencers*, 16 OHIO ST. BUS. L.J. 279, 289 (2022). Hughes lists "virtual money, identity authentication, security issuance, voting, and gambling" as some of the applications that utilize cryptocurrencies. Hughes, *supra* note 1, 4. Cryptocurrency is built upon blockchain, a technology that allows digital currencies to "transparently record a ledger of transactions." Jonathan Su, *Redirecting the Herd: Informing Cryptocurrency Regulations Through the Lens of Behavioral Science*, 14 HASTINGS SCI. & TECH. L.J. 123, 127 (2023). This technology cuts out traditional institutions because the decentralized network verifies the transaction. *Id.*

[6] *See* Hughes, *supra* note 1, at 2, 4 (noting that reduced costs and privacy are features some users value). Because cryptocurrencies are virtual, they do not exist in a physical form, adding jurisdictional issues to the overall regulation problem. *Id.* at 4. Those looking to track or prove ownership of a digital asset must use the distributed ledger generated by the cryptocurrency's underlying blockchain. Brandon Ferrick, Note, *Modernizing the Stockholder Shield: How Blockchains and Distributed Ledgers Could Rescue the Appraisal Remedy*, 60 B.C. L. REV. 621, 651 (2019). Any member of a blockchain network can access the distributed ledger generated by that specific blockchain to "track record ownership of electronic assets or provide evidence of ownership of a physical asset." *Id.* at 651–52.

cryptocurrency platforms and schemes that are engaging in fraudulent or deceptive tactics.[7]

In the case of FTX, the class action complaint alleges that at its core, the FTX Platform was a Ponzi scheme that traded investor money back and forth between affiliates to maintain the illusion of liquidity.[8] By engaging celebrities such as Tom Brady, Gisele Bündchen, Stephen Curry, and Larry David in their advertising practices, FTX was able to encourage more Americans to invest in the yield-bearing accounts sold by FTX.[9] Because FTX Entities recently declared emergency bankruptcy, the plaintiffs chose to increase their chances of recovering damages by naming the celebrity defendants listed above, as well as others.[10]

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[7] *See* Su, *supra* note 5, at 125 (describing the current crypto regulatory system as "fractured" due to varying state and federal rules and frameworks). Su credits social media as one of the factors that led to cryptocurrency's exponential increase in popularity, as well as a key factor in consumer loss. *Id.*

[8] *Garrison* Complaint, *supra* note 1, at 4. The Ponzi-like scheme run by Bankman-Fried is exemplified in the interactions between FTX and his trading firm, Alameda Research. *Id.*; *see* Edward Helmore, *Fraud, Cons and Ponzi Schemes: Did Sam Bankman-Fried Use Madoff Tactics?*, THE GUARDIAN (Dec. 17, 2022) https://www.theguardian.com/business/2022/dec/17/sam-bankman-fried-bernie-madoff-fraud-ftx [https://perma.cc/9VR9-6UVQ] (analogizing Bankman-Fried's scheme to Bernie Madoff's financial scam carried out in the early 2000s). At its core, a Ponzi scheme works by paying existing customers' withdrawals with the money coming in from new customers. *Garrison* Complaint, *supra* note 1, at 4. In the FTX scenario, Alameda's balance sheet was full of FTX's FTT tokens, showing its foundation was based on FTX's coin rather than an independent asset. *Id.* at 9. In a series of tweets posted on November 10, 2022, Bankman-Fried attempted to explain what went wrong with FTX, apologizing to customers and promising existing collateral will go towards those who lost their investments. Sam Bankman-Fried (@SBF_FTX), X (Nov. 10, 2022, 9:13 AM), https://twitter.com/SBF_FTX/status/1590709166515310593?cxt=HHwWgsDSsePjqpMsAAAA [https://perma.cc/EH6X-BR7J]. For definitional purposes, it is useful to distinguish between cryptocurrency "coins" and "tokens." Paul Andersen, *Will the FTX Collapse Finally Force the U.S. Policymakers to Wake Up?: Regulatory Solutions for Cryptocurrency Tokens Not Classified as Securities Under the Supreme Court's* Howey *Analysis*, 18 J. BUS. & TECH. L. 251, 258 (2023). The "coin" is a digital asset that is unique to the blockchain that built it; i.e. the FTX coin was created and therefore native to FTX. *Id.* The "token" is a descriptor for all other cryptocurrencies that exist on other blockchains. *Id.*

[9] *Garrison* Complaint, *supra* note 1, at 2, 21. At the time of FTX's bankruptcy petition, customers had invested somewhere between "$10-to-$50 billion . . . ." *Id.* at 8. The yield-bearing accounts offered and sold by the FTX Entities are not registered with the U.S. Securities and Exchange Commission (SEC). *Id.* at 5. Because cryptocurrencies do not fit neatly into the test established by the Supreme Court for defining securities, the SEC cannot always bring enforcement actions to regulate cryptocurrency tokens. *See* Andersen, *supra* note 8, at 261 (explaining the elements necessary for a digital asset to be treated as a security and regulated by the SEC pursuant to the *Howey* test: "any token that is created and issued by founders or a company, that investors purchase with physical or digital currency, that have an expectation of profits from marketing, expected development plans, or future partnerships, and that are derived from the efforts of the founders or a common enterprise can likely be regulated by the SEC as securities"). Despite this regulatory schema, many types of cryptocurrencies, such as non-fungible tokens, fail the *Howey* test and therefore evade SEC regulation. *Id.* at 263–64.

[10] *Garrison* Complaint, *supra* note 1, at 4, 6. The named plaintiff on the class action, Edwin Garrison, purchased an unregistered security after seeing misrepresentations and omissions by the defendants about the FTX Platform. *Id.* at 6. In relying on these deceptions, he suffered damages. *Id.* A *Washington Post* article calls the scope of the case "ambitious" as prosecutors try to hold not only

The cryptocurrency industry lacks the same level of regulatory oversight that traditional financial markets possess, making it less safe for investors and more prone to fraud.[11] The issue of regulating digital assets is beyond the scope of this Note.[12] Instead, this Note will focus on regulation and enforcement action with respect to advertising and endorsing cryptocurrency platforms and companies.[13] In the past five years, actions have been brought against celebrities such as Floyd Mayweather, DJ Khaled, and Kim Kardashian for violating disclosure laws when promoting cryptocurrency.[14] These actions have mostly been brought by the SEC, but they set the context for the current FTX litigation.[15]

Bankman-Fried liable, but the individual celebrity endorsers as well. Steven Zeitchek & Julian Mark, *FTX Investors Sue Sam Bankman-Fried and Celebrity Endorsers*, WASH. POST, https://www.washingtonpost.com/business/2022/11/16/ftx-class-action-lawsuit/ [https://perma.cc/2FB3-58SE] (Nov. 17, 2022). On November 2, 2023, Bankman-Fried was convicted on seven counts consisting of fraud and conspiracy after a monthlong criminal proceeding. Luc Cohen & Jody Godoy, *Sam Bankman-Fried Convicted of Multi-Billion Dollar FTX Fraud*, REUTERS (Nov. 3, 2023), https://www.reuters.com/legal/ftx-founder-sam-bankman-fried-thought-rules-did-not-apply-him-prosecutor-says-2023-11-02/. Prosecutors built a case against Bankman-Fried to show his actions led to eight billion dollars being diverted from users of the FTX Platform. *Id,*

[11] Melissa Davis & Mark Parisi, *Cryptocurrency Investment Schemes: Red Flags and Evaluating Potential Risk*, DAILY BUS. REV., Nov. 29, 2022, BLOOMBERG L., https://www.bloomberglaw.com/document/X9F63T9G000000?jcsearch=gmf45ekfldh#jcite [https://perma.cc/5Y8V-B8DC]. Cryptocurrencies are inherently riskier to investors than traditional securities or currencies because they are not protected by a central institution. *Id.*

[12] Barry, *supra* note 5, at 287. Multiple agencies, including the SEC and the Commodity Futures Trading Commission (CFTC) have been involved in suits regarding cryptocurrency as they try to establish their respective agency as the regulator of cryptocurrency markets. *Id.* at 287–88. This topic will no doubt continue to evolve in the near future. *See id.* at 279 (noting that in one year alone, different types of cryptocurrency coins available to consumers has doubled to 10,000).

[13] *See id.* (positing that the FTC should oversee social media influencer endorsements of digital currencies to protect consumers); *see also* Christopher Terry, Eliezer Joseph Silberberg & Stephen Schmitz, *Throw the Book at Them: Why the FTC Needs to Get Tough with Influencers*, 29 J.L. & POL'Y 406, 407 (2021) (arguing that the FTC needs to tighten regulations toward social media influencers and increase enforcement action). Celebrity endorsement of a product resembles social media influencing as both groups have a high degree of influence over its fanbases and have garnered trust and credibility on its platforms. *See* Michael J. Rivera & Abby Yi, *Social Media Endorsement Activities Can Prompt Securities and Exchange Commission Liability for Celebrities*, ENT. & SPORTS LAW., Winter 2021, at 27, 27 (noting the high degree of influence celebrities have over society).

[14] *Garrison* Complaint, *supra* note 1, at 5. After tweeting or otherwise sharing investment promotions on their social media pages, Floyd Mayweather, DJ Khaled, Kim Kardashian, and Paul Pierce were all accused and prosecuted by the SEC for violating disclosure rules about their payment and involvement with the crypto companies. *Id.* An FTC data spotlight in 2021 reported that between October 2020 and May 2021, consumers lost more than $80 million in cryptocurrency scams. Emma Fletcher, *Cryptocurrency Buzz Drives Record Investment Scam Losses*, FTC (May 17, 2021), https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2021/05/cryptocurrency-buzz-drives-record-investment-scam-losses [https://perma.cc/4F5C-EXL2].

[15] *See* Rivera & Yi, *supra* note 13, at 34 (providing recommendations for avoiding SEC liability, including conducting due diligence and exercising caution before engaging in advertisements for cryptocurrency). Outside of the SEC, the FTC has issued warnings to celebrities that failure to dis-

The FTX complaint alleges similar violations but also brings a claim against the defendants under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), state legislation that mirrors the Federal Trade Commission Act (FTC Act).[16] If the defendants violated the FDUTPA and that conduct led to consumers sustaining damages, the plaintiffs and class members could be entitled to damages and other remedies to make them whole.[17] This holding would establish the possibility of individual liability for endorsers involved in deceptive advertising, allowing plaintiffs to recover damages from the individuals as well as the sponsoring business.[18] Such a win could be a warning message, forcing celebrities and influencers to undertake due diligence before advertising in order to protect themselves from liability in any future litigation,

close their connection to the brand they are advertising can trigger scrutiny and potential charges. *Id.* at 34.

[16] FLA. STAT. § 501.203 (2023); *Garrison* Complaint, *supra* note 1, at 37. Count One of the complaint alleges violations of the Florida Securities and Investor Protection Act, a law similar to SEC action at the federal level. *Garrison* Complaint, *supra* note 1, at 36. Violations with respect to selling or offering securities is outside the scope of this Note, which focuses on Count Two of the complaint, violating the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). *Id.* at 37. Plaintiffs brought the claim under the FDUTPA rather than the Federal Trade Commission Act (FTC Act) because the FTC Act does not allow for a private right of action and therefore, many states have adopted "[l]ittle FTC Act[s]" that provide a private right of action for consumer protection cases. FLA. STAT. § 501.207; D. Matthew Allen, David L. Luck & Leah A. Sevi, *The Federal Character of Florida's Deceptive and Unfair Trade Practices Act*, 65 U. MIA. L. REV. 1083, 1085–86 (2011).

[17] *Garrison* Complaint, *supra* note 1, at 37. Three elements must be proved to support a private claim for damages: (1) an act or practice that is unfair, deceptive, or unconscionable, (2) that this act was the cause of the loss, and (3) actual damages. Allen et al., *supra* note 16, at 1093. The plaintiff must prove that a reasonable consumer under the same circumstances would have been deceived by the deceptive practice. *Id.* at 1096.

[18] *Garrison* Complaint, *supra* note 1, at 37. The complaint seeks actual damages as well as attorneys' fees and costs from the defendants for violating the Florida statute. *Id.* Count Two also seeks declaratory or injunctive relief to compel the defendants to stop engaging in the deceptive acts and practices. *Id.* at 38. It is important to note that the argument for endorser liability does not run contrary to First Amendment considerations. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771–72 (1976) (holding that pharmacists providing promotional materials and the price of prescription drugs were protected under the First Amendment). In *Virginia State Board*, the U.S. Supreme Court held that "commercial speech," despite its differences from political or other types of speech, still necessitated First Amendment protections. *Id.* at 770. Because the pharmacists in that case were not disseminating untruthful or misleading information, the Court held that consumers had a right to receive the flow of information and make decisions based upon it. *Id.* Nonetheless, the Court did not grant wholesale First Amendment protection to commercial speech and noted there are occasions in which commercial speech can be regulated. *Id.* at 773. An unlawful restriction on free speech can be differentiated from endorser liability because endorser liability does not seek to suppress a type of speech totally, but rather seeks to hold the speaker liable after their words have affected a consumer third party. *See* Garrison Complaint, *supra* note 1, at 37 (seeking damages rather than implicating the suppression of speech); *Va. State Bd.*, 425 U.S. at 773 ("What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients.").

an outcome that would increase consumer protection from uncertain products and investments.[19]

Part I of this Note provides background and context about consumer protection regulations, first discussing how FTC enforcement actions against health products provide a blueprint for enforcement actions against crypto companies before focusing on general advertising regulations and the current cryptocurrency enforcement context.[20] Part II then discusses these regulations and their applications to case law in more detail.[21] Finally, Part III suggests that finding the celebrity endorsers in the FTX case liable under a consumer protection framework will set a standard that deters unsophisticated endorsers from advertising financial assets like cryptocurrency and therefore protect consumers from deceptive practices.[22]

I. WEAVING A TANGLED WEB: SOCIAL MEDIA, CELEBRITIES, AND CRYPTOCURRENCY

So how can consumers be protected given the unregulated "Wild West" nature of the cryptocurrency landscape?[23] As the FTC and other regulatory

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[19] *See Garrison* Complaint, *supra* note 1, at 5 (accusing the defendants of not performing due diligence before advertising FTX products to the public); Terry et al., *supra* note 13, at 447 (highlighting the lack of enforcement on the part of the FTC against individual influencers for their role in deceptive advertising practices). Although the FTC has found that celebrities and influencers engage in deceptive practices, there has been no actual enforcement to curb these practices. Terry et al., *supra* note 13, at 454. This enforcement would serve as a standard for compliance with FTC guidelines rather than create an outright ban on endorsements, thus not offending First Amendment principles. *See* Bruce Ledewitz, *Corporate Advertising's Democracy*, 12 B.U. PUB. INT. L.J. 389, 393 (2003) (stating that advertising is commercial speech that serves the "free flow of commercial information" and therefore is afforded First Amendment protections). The government recognizes that consumers can make informed decisions based on the information they receive; advertising, endorsing, and other forms of commercial speech cannot be completely restricted as that would be "paternalistic." *Va. State Bd.*, 425 U.S. at 770. Despite this fact, regulatory bodies such as the FTC are empowered to set standards regarding the dissemination of information that will harm consumers or run afoul of its guidelines. *See* Tamany Vinson Bentz & Carolina Veltri, *The Indirect Regulation of Influencer Advertising*, 75 FOOD & DRUG L.J. 186, 187–88 (2020) (describing enforcement actions taken by the FTC and FDA when guidelines were not followed).

[20] *See infra* notes 23–148 and accompanying text.

[21] *See infra* notes 149–190 and accompanying text.

[22] *See infra* notes 191–215 and accompanying text.

[23] Su, *supra* note 5, at 125. In 2021, SEC Chairman Gary Gensler commented that the cryptocurrency world is like the "Wild West or the old world of 'buyer beware' that existed before the securities laws were enacted." Gary Gensler, *Testimony Before the United States Senate Committee on Banking, Housing, and Urban Affairs*, U.S. SEC. & EXCH. COMM'N (Sep. 14, 2021), https://www.sec.gov/news/testimony/gensler-2021-09-14 [https://perma.cc/2759-EGJW]. Cryptocurrency regulation faces challenges in part because all cryptocurrencies are unique and therefore do not neatly fall under one agency's jurisdiction. Hughes, *supra* note 1, at 4. Digital assets bear similarities to traditional investment mediums such as securities and commodities, but their differences can keep them outside of regulatory reach. Robert Stevens, *Securities vs. Commodities: Why It Matters for Crypto*, COINDESK, https://www.coindesk.com/learn/securities-vs-commodities-why-it-matters-for-crypto/ [https://perma.cc/VJF5-

bodies struggle to keep up with rapid changes in cryptocurrency, as well as advances in the use of social media and celebrity advertising, consumers are at risk of deceptive practices leading to monetary loss.[24] Much of the current scholarship surrounding cryptocurrency focuses on what agency should be in charge of its regulation, mainly by classifying the assets at issue.[25] Although this debate is influential and will have widespread effects in the future, this Note will focus on the more narrow topic of regulating cryptocurrency advertisements, an issue that falls squarely within the FTC's domain.[26]

Section A of this Part provides an overview of the FTC's approach to advertising regulations, and how this breeds asymmetry between companies and individual endorsers.[27] Section B expands on FTC regulation and highlights specific enforcement actions in sectors other than cryptocurrency.[28] Section C gives a brief overview of cryptocurrency before developing how crypto fits into the current consumer protection framework.[29] Finally, Section D concludes with a discussion of the above-mentioned FTX disaster and how it represents the culmination of failure to protect consumers from the dangers of

KK6M?type=image] (May 5, 2023). Securities are instruments like stocks and bonds that represent a fractional ownership interest in the issuer. *Id.* Because cryptocurrency is decentralized by nature, it can avoid violating securities law because there is no central entity inflating the price of the asset. *Id.* Cryptocurrencies also serve a different purpose from traditional securities. *Cryptocurrency vs Stocks*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/cryptocurrency/cryptocurrency-vs-stocks/ [https://perma.cc/6BZ4-AKPD]. Rather than representing ownership interest in the blockchain, a purchaser of cryptocurrency receives a "medium of exchange." *Id.*

[24] Su, *supra* note 5, at 138 (discussing the intersection between cryptocurrency and social media, such as through the use of memes to encourage consumers to invest in meme-based coins); *see* Barry, *supra* note 5, at 281 (describing the "pump and dump" scheme, one type of predatory scheme used by coin creators and content creators to defraud consumers by selling off their portion of the asset after consumers have invested and caused the value to surge). The rise of the internet and online presence created confusion for consumers because of the personal nature of social media endorsements. Barry, *supra* note 5, at 307–08. The FTC had to catch up to the new manner that celebrities and influencers were getting paid by incorporating products into their seemingly earnest posts. *Id.*

[25] *See* Barry, *supra* note 5, at 295–97 (listing various agencies, including the SEC, CFTC, Internal Revenue Service, and Financial Crimes Enforcement Network, that have attempted to bring crypto assets into their regulatory domain). Barry also argues that the FTC is the correct agency to oversee social media influencers who advertise crypto assets because the agency's stated mission includes oversight of "fair business practices." *Id.* at 304–05.

[26] *See* Rivera & Yi, *supra* note 13, at 34 (discussing the FTC's Endorsement Guidelines geared towards celebrities and influencers). One current problem with FTC regulation involves a lack of enforcement action. *Id.* Although the FTC has promulgated guidelines and rules related to social media endorsements, it has only enforced them through sending warning letters to celebrities and influencers rather than taking any other type of legal action. *Id.*; 16 C.F.R. § 255.0 (2023). The FTC promulgated these regulations as a supplement to section 5 of the FTC Act in order to address how section 5 applies to testimonials and endorsements in advertising. 16 C.F.R. § 255.0(a).

[27] *See infra* notes 31–48 and accompanying text.

[28] *See infra* notes 49–82 and accompanying text.

[29] *See infra* notes 83–135 and accompanying text.

cryptocurrency, specifically noting how this culmination necessitates new forms of regulation to protect consumers.[30]

A. The FTC's Cautious Approach to Consumer Protection in an Influencer World

Section 5 of the FTC Act prohibits unfair methods of competition as well as unfair or deceptive acts or practices.[31] The mission of the FTC is to protect consumers from predatory trade or business practices throughout various sectors of the economy.[32] The FTC has the authority to sue companies or individuals under the FTC Act for money damages or an injunction.[33] The FTC Act lacks a private right of action, so individual parties must sue under state laws modeled after the FTC Act.[34] Both methods of redress seek to recover damages for consumers who were harmed by deceptive or unfair trade practices.[35]

Advertisements are part of the FTC's jurisdiction, and in 1980, the FTC released the Guides Concerning the Use of Endorsements and Testimonials in Advertising (the Guides).[36] The Guides are the FTC's interpretation of how section 5 of the FTC Act applies to the use of endorsements and testimonials in

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[30] *See infra* notes 136–148 and accompanying text.

[31] 15 U.S.C. § 45. States have established private rights of action through "[l]ittle FTC Act[s]" modeled after the FTC Act. Allen et al., *supra* note 16, at 1085–86.

[32] The Federal Trade Commission's Mission, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/mission [https://perma.cc/9T5H-6WPN].

[33] *See* Complaint for Permanent Injunction and Other Equitable Relief, Fed. Trade Comm'n v. Teami, LLC, No. 20-cv-518, at 1 (M.D. Fla. Mar. 5, 2020) [hereinafter *Teami* Complaint] (highlighting an example of an FTC enforcement action against a company). The FTC sought to exercise two of its enforcement powers in its action against Teami, seeking money for consumers and enjoining Teami from continuing its deceptive marketing practices. *Id.* at 18–19; *see* 15 U.S.C. § 45(l)–(m) (mandating that the FTC has authority to issue injunctions and other equitable relief or pursue civil actions when an entity has violated an order or rule of the Commission).

[34] Allen et al., *supra* note 16, at 1085–86. If private actors want to sue for violations of advertising practices, they file pursuant to their state's "[l]ittle FTC Act." *See id.* (explaining the history of how and why states adopted their own forms of the FTC Act, most with a private right of action). The FTX class action is suing under Florida's version of the FTC Act, the FDUTPA. *Garrison* Complaint, *supra* note 1, at 37.

[35] *See* Press Release, Fed. Trade Comm'n, FTC Returns More Than $930,000 to Consumers Who Bought Teami's Deceptively Advertised Teas (Feb. 22, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-returns-more-930000-consumers-who-bought-teamis-deceptively-advertised-teas [https://perma.cc/QDN5-Q3RC] (showing the FTC's ability to recover money for consumers subject to deceptive trade practices); Bezdek v. Vibram USA Inc., 79 F. Supp. 3d 324, 330 (D. Mass. 2015) (providing an example of the private right of action leading to damages). In 2015, a class action group brought a case against Vibram, the barefoot running company, alleging misrepresentations in the company's advertisements regarding health benefits for the company's footwear. *Bezdek*, 79 F. Supp. 3d at 330. The court did not answer the question about substantiation of claims because the case was settled for $3.75 million in damages. *Id.*

[36] 16 C.F.R. § 255 (2023). The Guides were released in 1980 but remained unchanged until a 2009 revision. Barry, *supra* note 5, at 306. This change was largely in response to celebrity advertisements on televised talk shows as well as the rise of the internet. *Id.* at 306–07.

advertising.[37] If a practice is inconsistent with the Guides' requirements, the FTC is empowered to take corrective action under the FTC Act.[38] Although the Guides are advisory in nature, administrative interpretation is often given deference by courts due to its specialized and persuasive nature.[39] Noncompliance with the Guides thus represents noncompliance with the FTC Act and can result in proceedings seeking monetary damages or injunctions.[40]

The Guides require that an endorsement not contain a representation that would be deceptive if made directly by the advertiser.[41] Endorsements must also reflect the endorser's subjective and honest opinion or experience with the product.[42] Any statement that distorts the endorser's honest belief constitutes deception under the FTC's standard.[43] This balancing act requires subjective

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[37] *FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N, https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking#ftcactapply [https://perma.cc/Q3CF-PMKK]. The FTC states that the Guides are meant to give insight to endorsers as to what the FTC thinks about marketing activities under section 5 of the FTC Act. *Id.*

[38] 16 C.F.R § 255.0(a). The Commission may conduct an investigation if reason exists to believe that section 5 of the FTC Act has been violated. *Id.* The FTC has authority under section 5 to take corrective action if an investigation yields unlawful practices. *Id.*

[39] *See FTC's Endorsement Guides: What People Are Asking*, *supra* note 37 (acknowledging that the Guides do not have the force of law on their own, but are supported by the FTC Act); Fed. Trade Comm'n v. Garvey, 383 F.3d 891, 903 (9th Cir. 2004) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)) (noting the persuasive nature of administrative pronouncements). The court acknowledged that pronouncements like the Guides are not necessarily entitled to deference, but that they can often provide persuasive authority for the issuing agency's position. *Garvey*, 383 F.3d at 903. The *Chevron* doctrine is not bulletproof, however, as shown in a case regarding fisheries before the U.S. Supreme Court in 2023. Josh Gerstein & Alex Guillén, *Supreme Court Move Could Spell Doom for Power of Federal Regulators*, POLITICO (May 1, 2023), https://www.politico.com/news/2023/05/01/supreme-court-chevron-doctrine-climate-change-00094670 [https://perma.cc/BYV6-TZ92]. Many conservatives have long wished to eliminate *Chevron* deference, and the Court's recent decision could be the end of deference to federal agencies. *Id.*

[40] *See FTC's Endorsement Guides: What People Are Asking*, *supra* note 37 (warning that inconsistent practices could lead to enforcement actions for violations of the FTC Act). The FTC warns that enforcement actions could be orders to give up money earned from the violating practices and to refrain from committing these violations in the future. *Id.*

[41] 16 C.F.R. § 255.1(a); *see* Consuelo Lauda Kertz & Roobina Ohanian, *Recent Trends in the Law of Endorsement Advertising: Infomercials, Celebrity Endorsers and Nontraditional Defendants in Deceptive Advertising Cases*, 19 HOFSTRA L. REV. 603, 609–10 (1991) (listing the requirements of endorsers under the Guides). Endorsers must have a reasonable basis of fact for the claims they make; even if the claim represents an opinion, if the claim is patently false, the subjective belief of the opinion does not matter. *Id.* at 610.

[42] Terry et al., *supra* note 13, at 424. One of the substantive requirements of endorsers is that they cannot lie in their statements about a product. *Id.* Any individuals who attempt to sell a product through their statements must meet this standard to avoid violating the FTC's standard for deception. *Id.* at 425–26.

[43] *Id.* at 425; *see* 16 C.F.R. § 255.0(b) (stating that actions that would reasonably lead consumers to believe they are a reflection of honest "opinions, beliefs, findings, or experiences" are endorsements for purposes of the regulations). The Guides leave this requirement expansive, stating that there may be no deception even if the views of the endorser are identical to the views of the sponsoring company. 16 C.F.R. § 255.0(b).

honest beliefs that also reflect objective truths.[44] It can be difficult to reconcile the endorser's opinion with objective truth when the endorser is advertising a product that needs professional or expert substantiation.[45]

In 2004, in *Federal Trade Commission v. Garvey*, the U.S. Court of Appeals for the Ninth Circuit ruled against the FTC, holding that the celebrity defendant did not provide an endorsement as defined in the Guides and therefore declined to answer whether the Guides can form a basis for individual liability.[46] The decision highlighted the defendant's independent investigation to substantiate his belief about the efficacy of the product as a factor that weighed against his liability.[47] Because the court in *Garvey* did not define the defendant as an endorser, the theory of endorser liability remains murky.[48]

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[44] *See* Terry et al., *supra* note 13, at 425 (explaining the crossroads between influencing and informing the public honestly). In the written language of the FTC Guides, it states that both brands and endorsers can be liable for misrepresentations made in the advertisement to ensure honesty for consumers. *Id.*

[45] *See id.* (stating how the FTC Guides inform influencer posts). The FTC has released a set of guidelines for social media influencers in an attempt to curtail deceptive and fraudulent endorsements of products, specifically for pharmaceuticals or other health related products. *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM'N (2019). In its educational material, the FTC reminds social media influencers that they are not allowed to create claims about products that are not supported by proof. *Id.* For example, a post cannot claim that a product treats a health condition when that statement has not been substantiated by science. *Id.*

[46] 383 F.3d 891, 905 (9th Cir. 2004). *Garvey* was an example of the FTC attempting to enforce the Guides against a former MLB player, Steve Garvey, for his involvement with Enforma Natural Products, Inc. ("Enforma"), a company that produced dietary supplements. *Id.* at 893–94. Enforma entered into a consent agreement with the FTC for $10 million. Natasha T. Brison, Thomas A. Baker III & Kevin K. Byon, *False Advertising Claims: Analysis of Potential Athlete Endorser Liability*, 2 ARIZ. ST. U. SPORTS & ENT. L.J. 163, 172 (2012). Garvey was personally named in a subsequent suit by the FTC. *Id.* The FTC appealed the case to the Ninth Circuit which ultimately affirmed the lower court's ruling that Garvey was merely a spokesperson stating his own opinions and therefore could not be held liable for the claims about the product. *Id.* 172–73. The difference between an "endorser" and a "spokesperson" for purposes of liability under the FTC Guides is whether consumers would reasonably believe the statements reflect the individual's subjective opinion rather than the sponsoring advertiser's views. Aramowicz v. Bridges (*In re* Diamond Mortg. Corp. of Ill.), 118 B.R. 575, 580–81 (Bankr. N.D. Ill. 1989) (asserting defendant's argument that defendant was merely a spokesperson for the principal and his statements reflected the principal's viewpoint rather than his own, making him not liable). If consumers are likely to believe the statements reflect the individual's personal opinion, the individual is considered an endorser. *Id.* In contrast, a spokesperson is one who introduces a product or invites the public to learn more information about the sponsoring advertiser. *Id.*

[47] *Garvey*, 383 F.3d at 896, 901. The court undertook an analysis about the level of substantiation Garvey needed to avoid liability. *Id.* at 901. The court highlighted the fact that Garvey and his wife personally used the weight loss system, losing eight and twenty–seven pounds respectively. *Id.* Garvey also read booklets written by Enforma about the system and spoke with several individuals who had used the system and achieved "positive results." *Id.* The FTC offered evidence in response, citing Garvey's statements in infomercials where he claimed that Enforma's products were "the most amazing system" he had used, that he "truly believe[d]" Enforma to be "the greatest weight loss program in history," and other personal proclamations supporting the product. *Id.* at 904. The court held that, despite these statements supporting Enforma, pursuant to the Guides, the FTC had failed to meet its burden to prove liability. *Id.* Overall, the court held that for someone in his position, Garvey had un-

B. Enforcement Actions in Non-Crypto Sectors

Recent FTC enforcement actions against social media influencers and celebrity endorsers have not extended beyond sending letters to warn and educate about FTC requirements.[49] This Section explores the tension between endorsements and FTC regulation of health products, gambling, and financial investments.[50]

1. Responsibility for False Claims: FTC Focus on Companies Rather Than Influencers

Social media is rife with posts about weight loss products, wellness teas, medical devices, and many other health-related products.[51] Although social media spreads information efficiently and effectively, messages about products that lack scientific proof or fail to disclose potential side effects can create serious risks for consumers.[52]

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dertaken the requisite investigation and substantiation to validate the claims he made about the Enforma system. *Id.* at 902.

[48] *Id.* at 903–04. Because Garvey was not an endorser within the Guides, the court's analysis stopped short of probing into the force of the Guides as a basis for liability. *Id.* The FTC maintains that *Garvey* was wrongly decided, adding to the unclear nature of the requirements for endorsers who wish to avoid liability. *See* Brison et al., *supra* note 46, at 173–74 (reflecting on the status of endorser liability following the *Garvey* decision). Because the guidelines are unclear, endorsers should conduct investigation and research before endorsing products. *Id.*

[49] Bentz & Veltri, *supra* note 19, at 187–88. In past actions, the FTC has only taken significant steps against marketers rather than individual endorsers. *Id.* Enforcement against influencers so far has only reached the level of sending warning letters to remind of "truth-in-advertising laws and standards." *Id.* at 188 (quoting Letter from Fed. Trade Comm'n, to Social Media Influencers, https://www.ftc.gov/system/files/attachments/press-releases/ftc-staff-reminds-influencers-brands-clearly-disclose-relationship/influencer_template.pdf [https://perma.cc/XP2W-XQR3]).

[50] *See infra* notes 51–82 and accompanying text.

[51] *See* Press Release, Fed. Trade Comm'n, *supra* note 35 (summarizing the FTC's case against Teami LLC, a company who paid endorsers to deceptively market its tea as able to help with weight loss, fight cancer, decrease migraines, and other effects without the backing of reliable scientific evidence). This case exemplifies modern FTC regulation regarding deceptive advertising because the legal action was solely against the business, not the influencers who endorsed the product. Terry et al., *supra* note 13, at 445. Many of the influencers involved were well-known celebrities who had access to business teams to perform due diligence on the product before its promotion. *Id.* at 444. These influencers were still only sent educational information rather than being held accountable, through fines or otherwise, for their role in the deception. *Id.*

[52] *See* Sarah Karlin, *Kim Kardashian's Drug Ad Lands Company in FDA Hot Seat*, POLITICO (Aug. 11, 2015), https://www.politico.com/story/2015/08/kim-kardashian-fda-duchesnay-121263 [https://perma.cc/3UBA-GZCY] (detailing the danger associated with advertising a morning sickness drug without disclosing risks and unstudied populations). This situation highlighted the regulatory overlap of the FDA with the FTC. *See id.* (highlighting FDA enforcement action over advertising of a morning sickness drug). Kim Kardashian faced no personal repercussion other than removing the post from her social media. *Id.*

Companies that advertise health benefits without any scientific backing have faced legal action based on unsubstantiated advertising.[53] This theory of liability, brought under state FTC Acts, suggests that some level of due diligence is necessary for endorsers to advertise a product that could have serious risks or consequences to consumers.[54] Whether the claims are made by the business or endorsers, there is a presumption of substantiation and honesty.[55]

In 2020, in *Federal Trade Commission v. Teami, LLC*, the FTC brought a case against Teami, an online tea brand that sold blends of teas, claiming these products resulted in weight loss and detoxification.[56] These health effects were not substantiated, and the company was using paid influencer posts to market its products.[57] The paid posts ranged from relatively unknown influencers to celeb-

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[53] *See* Joshua T. Calo, Comment, *Deceptive Advertising or Evolving Science? How "Barefoot Running" Demonstrates Novel Strategies for Defending False Advertising Lawsuits Under State Deceptive Trade Practices Acts*, 22 JEFFREY S. MOORAD SPORTS L.J. 529, 532 (2015) (using the marketing campaign of a "barefoot running" company to introduce the idea of substantiation). An interesting case study into the unsubstantiated advertising theory of liability revolves around "barefoot running" companies and the health benefits they claimed in their advertising. *Id.* Beginning in 2005, barefoot running became a fitness trend in which runners would wear "minimalist" shoes designed to mimic the experience of running barefoot while still having light protection. *Id.* at 529. Plaintiffs filed suit against one of the most popular barefoot running shoe companies, alleging that the health benefits of the shoes were unsubstantiated by scientific evidence. *Id.* at 532.

[54] *Id.* Regarding whether a fact is unsubstantiated, the "barefoot running" case brought up the issue of scientific dispute or debate. *See* Calo, *supra* note 53, at 533. The manufacturers argued that if the facts were still being disputed, they were not deceptively or falsely advertising the health benefits. *Id.* The multiple lawsuits against the company were settled for $3.75 million dollars, and the question raised about disputed scientific information was not addressed by the court. *Id.* at 533; *see* Fed. Trade Comm'n v. Lunada Biomedical, Inc., No. CV-15-3380, 2016 WL 4698938, at *2 (C.D. Cal. Feb. 23, 2016) (developing the theory of substantiation in marketing). The FTC brought a claim against Lunada Biomedical for unsubstantiated claims that its drug would cause weight loss in menopausal women. *Lunada Biomedical*, 2016 WL 4698938, at *2.

[55] *See* Bentz & Veltri, *supra* note 19, at 187 (concluding that "the regulations make clear that liability for violations rests with the advertiser and the endorser"). The FTC regulations surrounding endorsers apply to the advertiser and the endorser and have been applied to both social media advertisements and traditional advertising. *Id.*; *see* Calo, *supra* note 53, at 561–62 (describing the theory of substantiation as it is posited by the FTC). Section 5 of the FTC Act gives the FTC the authority to request any "test, studies, or other data" to substantiate advertised claims regarding "a product's safety, performance, efficacy, quality, or comparative price." *Id.* (quoting Dorothy Cohen, *The FTC's Advertising Substantiation Program*, J. MKTG., Winter 1980, at 26, 26).

[56] *See* Stipulated Order for Permanent Injunction and Monetary Judgment, Fed. Trade Comm'n v. Teami, LLC, No. 20-cv-518-T-33TGW, at 1. (M.D. Fla. Mar. 17, 2020) [hereinafter *Teami* Order] (granting an injunction and monetary damages against Teami); Terry et al., *supra* note 13, at 442–43 (describing the Teami action and deception). Teami failed to abide by FTC disclosure rules as well as FTC rules against misrepresenting the effects of its product. Terry et al., *supra* note 13, at 442–43.

[57] Terry et al., *supra* note 13, at 443. The FTC ordered an injunction against the brand for "false claims" regarding the health benefits of its products. *Id.*; *see also* Calo, *supra* note 53, at 561–62 (providing background on substantiation and FTC authority over substantiating scientific or health claims). Since 1983, the FTC has required that advertisements be substantiated. *FTC Policy Statement Regarding Advertising Substantiation*, FED. TRADE COMM'N (Nov. 23, 1984), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-regarding-advertising-substantiation [https://perma.cc/MK53-TQJF]. The underlying requirement is a reasonable basis for the claims being advertised. *Id.* Another

rities such as Demi Lovato and Cardi B, artists who each have millions of social media followers.[58] After Teami continued to fall short of FTC regulations, it was fined upwards of fifteen million dollars while the involved endorsers only received warning letters with legal advice regarding how to comply with FTC regulations in the future.[59] Despite these endorsers being pop-culture names who had access to business savvy teams, they did not conduct due diligence about the truthfulness of Teami's claims.[60] Nevertheless, this lack of due diligence only led to a warning letter, with no real enforcement action taken despite the blatant disregard for consumer protections set up by FTC regulations.[61]

2. *CSGOLotto*: A Possible Step Towards Individual Endorser Liability

In 2017, in *CSGOLotto, Inc.*, the FTC pursued not only the company, but individual influencers for violating disclosure, monitoring, and compliance

standard listed by the FTC is prior substantiation; the idea that if an ad states "tests prove," there must really be a test that proves the stated fact. *Id.*

[58] Terry et al., *supra* note 13, at 442–43. Cardi B's post for Teami amassed over 20 million views. *Id.*; *see* Paige Leskin, *Detox Tea Maker Fined $1 Million Over 'Deceptive' Instagram Influencer Ads Claiming Its Tea Could Help You Lose Weight and Fight Cancer*, BUS. INSIDER (Mar. 9, 2020), https://www.businessinsider.com/instagram-influencers-teami-detox-tea-sponsored-posts-ftc-settlement-2020-3 [https://perma.cc/LQQ8-37V7] (including nineteen Instagram posts of Teami influencers). The detox tea market specifically raised so many red flags that in 2019, Senator Richard Blumenthal made a statement urging the FTC to investigate the marketing practices of detox tea companies. *Id.*

[59] Terry et al., *supra* note 13, at 442–43. After the issuance of a monetary judgment of over $15 million, the FTC suspended all but $1 million of the fines. *Id.* Though the FTC's case leaned heavily on including influencer posts and content, the endorsers themselves were not named in the litigation as defendants. Bentz & Veltri, *supra* note 19, at 188. Around this time, the FTC also sent warning letters to influencers advertising e-cigarettes without a nicotine warning, an omission of health and safety risks that amounts to deceptive advertising. *Id.* Despite the apparent danger behind both of these products, the FTC has chosen to pursue aggressive enforcement action solely against the businesses behind them rather than the endorsers. *Id.*

[60] *See* Terry et al., *supra* note 13, at 444 (describing the asymmetry between FTC action taken against companies and action taken against endorsers). Terry, Silberberg, and Schmitz point to the fact that in the enforcement action against Teami, the endorsers were not just "micro-influencers," or regular people with small followings, but rather well-known celebrities who had the resources to investigate the products they were advertising to millions of people. *Id.* While influencers may rely on the money they receive from endorsement deals, the brands employing them are also reliant on influencer culture to make money. *See* Fine F. Leung, Jonathan Z. Zhang, Flora F. Gu, Yiwei Li & Robert W. Palmatier, *Does Influencer Marketing Really Pay Off?*, HARV. BUS. REV. (Nov. 24, 2022), https://hbr.org/2022/11/does-influencer-marketing-really-pay-off [https://perma.cc/SCZ6-TC2D] (highlighting that more than 75% of brands set money aside specifically for influencer marketing). The influencer marketing industry continues to rise in value, reaching $16.4 billion in 2022. *Id.*

[61] Terry et al., *supra* note 13, at 443–44. (emphasizing the use of endorsers' content in the case against Teami despite their absence from the litigation). The FTC's case made it clear that the deceptive social media practices and violation of section 5 of the FTC Act were a result of social media posts, but then declined to hold the social media influencers accountable past a warning letter. *Id.* at 442.

regulations.[62] CSGOLotto was a gambling site that facilitated bets based on an online video game, with an eight percent fee on the bets.[63] The FTC also named Trevor Martin and Thomas Cassell in the complaint, owners of the company who advertised the ability to win large sums of money on CSGOLotto through their YouTube and Twitter accounts.[64] The defendants, as owners of the company, had a stronger connection to the brand than the average influencer.[65] Nevertheless, this case is the only example of the FTC holding individual influencers liable for their role in deceptive advertising.[66]

3. Private Rights of Action: Laying the Groundwork for FTX Ambassadors

Celebrities have always been an efficient avenue for businesses to market their services or products.[67] In 1989, in *Aramowicz v. Bridges*, a mortgage

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[62] CSGOLotto, Inc., 162 F.T.C. 3184, at *5–6 (2017) (complaint); *see* Krystina Dorta, Note, *No Ifs, ands, or Juuls About It: Why Influencers Must Be Held Accountable*, 29 CATH. U. J.L. & TECH. 131, 154 (2021) (drawing similarities between CSGOLotto and the deceptive practices used to advertise e-cigarettes). Dorta argues that the FTC needs to take harsher enforcement actions against influencers who advertise e-cigarette products. Dorta, *supra*, at 154. The FTC has yet to take action against Juul, but Dorta believes it would best serve the agency's regulatory goals to hold the company and its influencers accountable for Juul's advertising practices. *Id.* at 154–55.

[63] *CSGOLotto*, 162 F.T.C. 3184, at *2. The users of the website gambled using "skins" that operated as virtual currency that could be bought, sold, or traded for real money. *Id.*

[64] *Id.* at *2–3. The FTC complaint included excerpts of the social media posts to highlight the deceptive nature of the advertisements that failed to include the posters' connections to the company and simply listed large sums of money that could be won by using the website. *Id.* The complaint also goes on to include endorsements posted by other influencers, none of which disclose the fact that the posts were sponsored, another violation of FTC disclosure rules. *Id.* at *4.

[65] Press Release, Fed. Trade Comm'n, CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers (Sept. 7, 2017), https://www.ftc.gov/news-events/news/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against-individual-social-media-influencers [https://perma.cc/2AAS-K35K]. The FTC emphasized the fact that individual influencers were named in the charges, using this as a warning to other social media influencers that they could face legal action for deceptive advertising. *Id.*

[66] *See* Terry et al., *supra* note 13, at 436–37 (detailing how the owner influencers of CSGOLotto posted videos on their YouTube channels pretending to "discover" the gambling site without disclosing their connection to said site). The FTC Complaint lists three counts of violations of section 5 of the FTC Act against CSGOLotto as a company and the two owners. *CSGOLotto*, 162 F.T.C. 3184, at *5–6.

[67] *See* Rivera & Yi, *supra* note 13, at 27 (describing the significant influence celebrities have over society). Celebrities promote and endorse household goods, clothing, trends, investment opportunities, financial plans, and more, with some of these endorsements governed by federal regulatory authorities. *Id.* When a brand relies on celebrity endorsements to bolster their reputation or increase public goodwill, the brand relies on the "halo effect." Mitchell Grant, *Halo Effect: Overview, History, and Examples*, INVESTOPEDIA, https://www.investopedia.com/terms/h/halo-effect.asp [https://perma.cc/QJB4-58J8] (Dec. 27, 2022). This marketing concept states that when consumers have a positive experience with a brand, they are psychologically disposed to build loyalty with that brand and therefore more likely to continue buying that brand's products in the future. *Id.* Celebrity endorsements capitalize on the halo effect. *Id.* By associating their products or image with said celebrity, consumers will attribute any goodwill related to the celebrity to the brand as well. *Id.*

company engaged in a Ponzi scheme where it used new investors' money to pay off old investors rather than matching investors with a mortgage they would see a return on.[68] In the suit that followed the company's collapse, an actor who was featured in the company's advertisements was implicated for endorsing the investment.[69] Under the FTC Guides, the plaintiffs contended that the actor had an affirmative duty to conduct due diligence on the financial status of the company before endorsing its claims.[70] This due diligence included substantiating the honesty of the message through independent and reliable investigation into the finances of the company.[71] The court denied the actor's motion for summary judgment and held that he did in fact have an affirmative duty to conduct due diligence and an independent inquiry into substantiating the information he was endorsing.[72] Although the court implied that the celebrity endorser could face civil liability under the Guides, the case later settled, leaving the question of duty unanswered.[73]

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[68] Aramowicz v. Bridges (*In re* Diamond Mortg. Corp. of Ill.), 118 B.R. 575, 577 (Bankr. N.D. Ill. 1989). The theory behind the scheme was for investors to become the mortgagee of a mortgagor's note, which carried high interest rates around 15%. *Id.* In reality, the company was running a Ponzi scheme with the investors' money that resulted in bankruptcy when the fraud was exposed. *Id.*

[69] *Id.* Actor Lloyd Bridges was featured in a number of Diamond Mortgage television advertisements and was subsequently sued, along with other defendants, for violating the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA). *Id.* Bridges then brought a motion for summary judgment, which was ultimately denied. *Id.* at 583.

[70] *Id.* at 579–80. Although the complaint was brought under the ICFA, the state statute deferred to interpretations of courts relating to section 5 of the FTC Act. *Id.* at 579. Therefore, as an endorser of the deceptive mortgage practice, the actor was liable under the FTC's Guides Concerning Use of Endorsements and Testimonials in Advertising. *Id.*; *see* Kertz & Ohanian, *supra* note 41, at 633–34 (noting that not knowing the falsity of the claim does not negate liability). The record in the case showed that the principals of Diamond Mortgage had been charged in neighboring states for violating securities laws in similar schemes to the one committed in Illinois. Kertz & Ohanian, *supra* note 41, at 634.

[71] *Aramowicz*, 118 B.R. at 580. The court went on to analyze Bridges' assertion that he was not an endorser, but just a spokesperson. *Id.* The court found the distinction lacking, holding that he was in fact an endorser and therefore his statements would lead reasonable consumers to trust that what he said indicated his "opinions, beliefs, findings, or experience" regarding the investment opportunity. *Id.* (quoting 16 C.F.R. § 255.0(b) (2023)). The court also declined to find merit in Bridges' argument that he was not an expert in investments and therefore could not be held liable for his statements. *Id.* at 581. The Guides do not say that to be held liable the endorser must be an expert and this argument did not exclude him from liability. *Id.*

[72] *Id.* at 583. The court ultimately denied the motion for summary judgment and concluded that as an endorser of the investment opportunity, Bridges had a duty under the FTC Guides to investigate the substance of the endorsements and independently investigate the financial stability of Diamond Mortgage. *Id.*

[73] Bentz & Veltri, *supra* note 19, at 193. Courts have yet to decide a case that holds influencers or endorsers liable to consumers directly, although there have been cases that addressed the issue. *Id.* Another class action attempted to hold Nicole "Snooki" Polizzi liable for misrepresenting a weight loss supplement's effectiveness, but the question was side-stepped as the court granted Polizzi's motion to dismiss. *Id.* The plaintiff had purchased the supplement prior to Polizzi's endorsement, making it impossible for the court to trace an injury in fact to the celebrity endorsement. *Id.*

In 2015, in *Brady v. Basic Research, L.L.C.*, the class action complaint named reality television personality Nicole "Snooki" Polizzi among the defendants accused of violating the Maryland Consumer Protection Act when they fraudulently marketed the product Zantrex as a weight loss supplement.[74] The complaint alleged that the advertisements featuring Polizzi misrepresented the effectiveness of Zantrex and subsequently led to her unjust enrichment, a violation of state consumer protection laws.[75] The claim against Polizzi was dismissed because the plaintiff's purchase of the product predated Polizzi's endorsement, proving that the plaintiff did not rely on the defendant's misrepresentations.[76] Because of this procedural dismissal, the court did not determine Polizzi's individual liability to the consumers who purchased Zantrex, once again side-stepping the question of individual influencer liability.[77]

4. Theories of Liability and Routes to Recourse

FTC recourse against Teami and CSGOLotto are examples actions taken on behalf of consumers for violations of sections 5(a) and 12 of the FTC Act.[78]

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[74] 101 F. Supp. 3d 217, 224–25 (E.D.N.Y. 2015). Polizzi was a paid spokesperson for Zoller Laboratories, the manufacturer of Zantrex, and was featured in almost every Zantrex advertisement. *Id.* at 225. The plaintiffs claimed that the effectiveness of Zantrex was negligently and fraudulently misrepresented. *Id.*

[75] *See* Bentz & Veltri, *supra* note 19, at 193 (summarizing the Zantrex class action complaint and highlighting Polizzi's involvement). Polizzi advertised for Zantrex in *Life & Style Magazine*, stating that Zantrex was a fat burner that was safe and effective for losing fat. *Brady*, 101 F. Supp. 3d at 236.

[76] *Brady*, 101 F. Supp. 3d at 229. Polizzi filed a motion to dismiss for lack of subject matter jurisdiction. *Id.* The court granted her motion based on the fact that the plaintiff relied on advertisements on the product's bottle and not on Polizzi's endorsement. *Id.* The plaintiff could not plausibly trace an "injury-in-fact" to Polizzi's actions and therefore had no standing to bring the claim. *Id.*

[77] Bentz & Veltri, *supra* note 19, at 193. An Eleventh Circuit case involving a football player who participated in radio ads held that the player was not an endorser of the company, but merely acted as a spokesperson who encouraged the audience to investigate the brand for themselves, therefore avoiding the issue of endorser liability. *Id.*; *see also* Luman v. Theismann, 647 F. App'x 804, 807 (9th Cir. 2016) (holding that ex-professional football player Joe Theismann was only a spokesperson and therefore not liable for violating California consumer protection laws). The Ninth Circuit's decision in *Luman* may indicate that courts are more focused on liability for sellers rather than endorsers. *See* 647 F. App'x at 807–08 (determining that as a spokesperson and not a seller, Theismann could not be liable for violations of consumer protection laws).

[78] 15 U.S.C. §§ 45, 52. See notes 51–65 for a discussion of FTC action against Teami and CSGOLotto. The FTC cited section 13(b) of the FTC Act as the authority to seek injunctive relief, restitution, refunds, and other equitable reliefs. *Teami* Complaint, *supra* note 33, at 18. The false claims made by companies like Teami and CSGOLotto have potentially dangerous effects on consumers. *See* Terry et al., *supra* note 13, at 442–43 (describing the false claims and lack of substantiation); Jacob Wolf, *Federal Trade Commission Settles with Owners of CSGO Lotto*, ESPN (Sept. 8, 2017), https://www.espn.com/esports/story/_/id/20635149/federal-trade-commission-settles-owners-csgo-lotto [https://perma.cc/T94E-BWQ8] (exposing the dangerous underside of online gambling sites like CSGOLotto for their lack of regulation and potential for teen gambling). Teami advertised numerous health benefits that lacked substantiation and could have deceived consumers who relied on the false claims of health benefits. *See Teami* Complaint, *supra* note 33, at 16–17 (listing the alleged health benefits Teami advertised). CSGOLotto utilized a "skins gambling site" and was part of a larger skins

These enforcement actions for lack of substantiation and violations of disclosure guidelines resulted in monetary damages and injunctive relief.[79] In contrast, state law offers recourse directly available to consumers.[80] The private suit in *Aramowicz* alleged that the defendant failed to conduct due diligence before endorsing a product, but ended in settlement outside of court.[81] Regulatory enforcement actions empowered by the FTC Act and private causes of action empowered by state consumer protection laws form the legal framework for the possible endorser liability introduced in Count Two of the FTX class action.[82]

C. Defining a New Sector: What is Cryptocurrency and What Are the Limits of Liability for Those Involved?

Cryptocurrency is a new and complex financial sector that has led to an influx of novel litigation.[83] The ongoing FTX litigation mirrors other current

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gambling marketplace valued at $5 billion in 2016. Wolf, *supra*. FTC regulation of CSGOLotto's business practices was especially important because the lack of age restrictions on the website led to many teens participating in skins gambling. *Id.* Investigations showed that the teens using these gambling sites were highly susceptible to developing gambling addictions. *Id.*

[79] *See Teami* Order, *supra* note 56, at 13 (ordering a monetary judgment against Teami as relief to be distributed to consumers); CSGOLotto, Inc., 162 F.T.C. 3184, at *4–5 (2017) (decision and order) (ordering compliance with disclosure requirements as well as monitoring of influencers).

[80] Aramowicz v. Bridges (*In re* Diamond Mortg. Corp. of Ill.), 118 B.R. 575, 578 (Bankr. N.D. Ill. 1989). The decision noted that the Illinois statute was modeled after section 5(a) of the FTC Act. *Id.* at 583; *see* Allen et al., *supra* note 16, at 1085–86 (comparing and contrasting state consumer protection laws to the FTC Act).

[81] *Aramowicz*, 118 B.R. at 583; *see* Bentz & Veltri, *supra* note 19, at 193 (noting that the case settled without the court deciding the core issues regarding endorser liability). The other endorser co-defendant, George Hamilton, also filed a motion for summary judgment in the bankruptcy court that the court addressed in a subsequent decision. Aramowicz v. Bridges (*In re* Diamond Mortg. Corp. of Ill.) (*Aramowicz II*), 118 B.R. 588, 596 (Bankr. N.D. Ill. 1989) (denying Hamilton's motion for summary judgment). The court in Hamilton's case provided additional background on the bankruptcy and subsequent criminal proceedings surrounding Diamond Mortgage. *Id.* at 590. The management of the fraudulent mortgage corporation raised more than $40 million through investors, comprised largely of elderly people. *Id.* In the aftermath of the Ponzi scheme collapsing, several principals in the company's management faced criminal charges and were ultimately convicted for their participation. *Id.* Because of the incarcerations and general mismanagement of money, investors began to search for deeper pockets to recover their losses, which brought about the suits against the celebrity endorsers. *See id.* (noting that the claims brought by consumers targeted solvent individuals and entities).

[82] *Garrison* Complaint, *supra* note 1, at 37; *see Aramowicz*, 118 B.R. at 579–80 (listing the elements required to find endorser liability under the Illinois consumer protection statute); Bentz & Veltri, *supra* note 19, at 193 (establishing the current trends of FTC enforcement actions).

[83] *See* Su, *supra* note 23, at 127 (providing a discussion and overview of the development of cryptocurrency and blockchain technology); Hughes, *supra* note 1, at 4–5 (listing different cryptocurrencies and unique characteristics). Statistics show that as of May 2022, "[c]rypto has generated more than 200 class action lawsuits and other private litigation as of this month, up more than 50% since the start of 2020." Sam Skolnik, *Crypto Lawsuit Deluge Has Big Firms Scrambling to Keep Up*, BLOOMBERG L. (May 17, 2022), https://news.bloomberglaw.com/business-and-practice/crypto-lawsuit-explosion-has-big-law-scrambling-to-keep-up [https://perma.cc/FZT3-2EJH]. Class actions comprise approximately 44% of these suits, with most arising out of securities regulations and consumer protection statutes.

cryptocurrency litigation involving celebrity endorsements of digital assets.[84] As interest and involvement in cryptocurrency surges, more and more celebrities and influencers are finding themselves in hot water over their role in promoting and endorsing deceptive products and platforms.[85] Subsection 1 will begin with a brief overview of cryptocurrency's history and its risks to consumers.[86] Subsections 2, 3, and 4 will detail recent and ongoing crypto litigation involving celebrity defendants.[87]

1. Brief History of Cryptocurrency and Its Dangers to Consumers

During the outbreak of COVID-19, the year 2020 saw a sharp increase in the number of consumers getting involved with cryptocurrency apps and platforms.[88] Many consumers fell prey to scams or frauds because the new market

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Farshad Ghodoosi, *Crypto Litigation: An Empirical View*, 40 YALE J ON REGUL. 87, 95 (2022). Ghodoosi uses the 2008 financial crisis and the number of suits filed against banks and financial institutions as a comparison to show the potential economic impact of crypto litigation. *Id.* at 88. The empirical data analyzed in the essay implies that crypto litigation is pivoting, with fewer cases involving securities claims and more involving private law claims arising from "contracts, business formation, and torts." *Id.* at 90.

[84] *See Garrison* Complaint, *supra* note 1, at 3–4 (outlining litigation against Voyager Digital Holdings that the FTX complaint mirrors and shares many characteristics with). In the months before the FTX Entities declared emergency bankruptcy, FTX U.S. entered into an agreement with the bankrupt Voyager Digital Holdings to purchase substantially all of its assets for over $1.4 billion. *Id.* at 4. This action was meant to provide approximately $111 million to the debtor Voyager's estate, increasing the chance that more Voyager customers would be paid. *Id.* The plan evaporated when the FTX Entities broke down and entered emergency bankruptcy. *Id.*

[85] *See* Paul Guirguis & Susan Ross, *Celebrity Crypto Fines Flag Lessons for Lawyers*, BLOOMBERG L. (Oct. 13, 2022), https://news.bloomberglaw.com/us-law-week/celebrity-crypto-fines-flag-lessons-for-lawyers [https://perma.cc/5BWG-8CC7] (noting SEC enforcement action against Kim Kardashian as an example of increased scrutiny for endorsers). Both the SEC and FTC are ramping up surveillance when it comes to celebrity and influencer endorsements of cryptocurrency. *Id.* Celebrities, specifically professional athletes, helped to publicize cryptocurrency in 2022 as many well-known professionals elected to take their salaries in Bitcoin. Jack Kelly, *Should Sports Stars and Celebrities Endorse or Accept Crypto Pay After Entanglement in FTX Scandal?*, FORBES (Dec. 13, 2022), https://www.forbes.com/sites/jackkelly/2022/12/13/will-sports-stars-and-celebrities-continue-to-endorse-or-accept-pay-in-crypto-after-being-entangled-in-the-ftx-scandal/?sh=11222c9b1b1a [https://perma.cc/W8YH-V3DR]. Although these celebrities are not involved with the crypto platforms to the extent the FTX defendants are involved, the trend of taking compensation in digital assets highlights the popularity of cryptocurrency in the media. *See id.* (opining that athletes and celebrities should wait on taking payments or endorsing cryptocurrencies because the sector is volatile, leaving the rules and regulations in flux).

[86] *See infra* notes 88–99 and accompanying text.

[87] *See infra* notes 100–135 and accompanying text.

[88] *See* Bianca Britton, *Inside the 'Wild West' of Cryptocurrencies and Social Media Influencers*, NBC NEWS (July 21, 2021), https://www.nbcnews.com/tech/tech-news/wild-west-cryptocurrencies-social-media-influencers-rcna1469 [https://perma.cc/2QEC-K7QU] (explaining that many young people invested in cryptocurrency during the pandemic); Barry, *supra* note 5, at 280 (noting an increase in retail trading apps as well as digital assets becoming a more common investment for consumers). Britton reports that younger people are the most susceptible demographic when it comes to falling for crypto scams. Britton, *supra*. Britton explains that "people aged 20 to 49 were five times

lacked regulatory oversight.[89] Cryptocurrency is decentralized in nature, utilizing a peer-to-peer network rather than centralized institutions that verify the transaction.[90] This decentralization and lack of a middleman is a double-edged sword.[91] Although this is often a selling point of cryptocurrency, it can lead to higher rates of scams and frauds.[92]

One common crypto scam are called a "pump and dump schemes."[93] Influencers with large followings are given a percentage of the cryptocurrency

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more likely to lose money in cryptocurrency investment scams than older age groups." *Id.* (citing Fletcher, *supra* note 14). A potential reason for this trend is that the younger investors were driven by emotions and feelings, basing their investment decisions on "competition and novelty" rather than traditional reasons like retirement savings. *Id.*

[89] *See* Barry, *supra* note 5, at 281 (observing that investors lost $80 million due to cryptocurrency scams); Fletcher, *supra* note 14 (highlighting various tactics used to deceive consumers into investing in cryptocurrency). Fraudulent cryptocurrency investments have "skyrocketed" since 2020, resulting in a median loss of $1,900 per consumer. Fletcher, *supra* note 14; *see* John Hyatt, *Decoding Crypto: Are There Regulations in the U.S. for Cryptocurrency?*, NASDAQ (Aug. 19, 2021), https://www.nasdaq.com/articles/decoding-crypto%3A-are-there-regulations-in-the-u.s.-for-cryptocurrency [https://perma.cc/K6PU-TGWU] (explaining that as a new marketplace, cryptocurrency does not fit neatly into financial regulatory frameworks). Part of the short history of cryptocurrency also includes Bitcoin, a type of cryptocurrency, being used as a medium in an online illegal drug bazaar. Hyatt, *supra*.

[90] *See* Su, *supra* note 5, at 127 (providing a condensed history of cryptocurrency and blockchain technology). Blockchain technology is the foundation that allows cryptocurrency to function in a decentralized manner. *Id.* Cryptocurrencies use blockchain to "transparently record a ledger of transactions." *Id.* The decentralized nature is a function of cryptocurrency's peer-to-peer network rather than transactions going through a centralized institution. *Id.* As it has developed, cryptocurrency and social media have become intertwined, causing social media posts and advertisements to greatly affect the cryptocurrency market. *See id.* at 129–134 (detailing the rise of cryptocurrency and the contributions social media have made to cryptocurrency's growth); *Garrison* Complaint *supra* note 1, at 20 (describing how the celebrity defendants' social media posts and online videos contributed to consumers' purchases and subsequent monetary losses).

[91] *See* Su, *supra* note 5, at 127 (explaining that part of the "allure" of cryptocurrency is the lack of traditional middlemen such as banks, cutting down on transaction costs and avoiding corrupt and powerful financial institutions); Fletcher, *supra* note 14 (listing the many types of scams prevalent in cryptocurrency). Although the lack of traditional institutional involvement appeals to consumers, it also poses greater risks than traditional investments. *See* Fletcher, *supra* note 14 (highlighting how cryptocurrency scams impersonate governmental authorities and businesses to lure in investors).

[92] *See* Su, *supra* note 5, at 125 (making note of the high prevalence of cryptocurrency scams); Barry, *supra* note 5, at 281 (warning of the types of cryptocurrency schemes consumers fell prey to through the internet). Many of these schemes are created by or carried out by social media influencers who use their platforms to encourage followers to invest in certain types of cryptocurrencies. Barry, *supra* note 5, at 282.

[93] *See* Su, *supra* note 5, at 136 (analogizing crypto pump and dump schemes to traditional stock market pump and dump schemes, made illegal by the Securities Act of 1933). Although traditional pump and dump schemes seen in the stock market are illegal, the kind carried out through the internet for crypto assets are still unregulated as legislatures struggle to classify the tokens. *Id.* "Save the Kids," a charity cryptocurrency, provides an example of a "pump and dump" scheme in the crypto industry. Britton, *supra* note 88. Members of a popular esports team called the FaZe Clan advertised through social media about the Save the Kids project, causing followers to invest. *Id.* One such follower invested $94, only to have the coin's value crash to around $5 within hours of the coin's launch. *Id.*

token, or coin, that they then advertise and endorse to their followers.[94] After their followers purchase the coins on the advice of the influencers, the value of the coin inflates.[95] Once they have pumped the value to the maximum, the influencers "dump" their coins, causing the value to plummet and harming their followers who were deceived into buying the coin.[96] By taking advantage of their platform and trusting audiences, celebrities and influencers are able to enrich themselves at the expense of consumers.[97] These influencers often do not disclose their connection to the coin, making their endorsement deceptive and omissive of their material connection.[98] To date, there has not been any real regulatory enforcement action against influencers or celebrity endorsers to hold them accountable for engaging in such ploys.[99]

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[94] *See* Barry, *supra* note 5, at 281 (describing how social media influencers carry out pump and dump schemes). This type of scheme, along with others, has resulted in 7,000 consumers losing a combined $80 million from cryptocurrency schemes. *Id.* One report found that in 2022, roughly one quarter of new cryptocurrencies launched showed signs of artificial inflation, pointing to a potential pump and dump scheme. Mary Ellen Cagnassola, *Crypto Fraudsters Made $30 Million Last Year Off 'Pump and Dump' Schemes: Report*, MONEY (Feb. 21, 2023), https://money.com/new-crypto-pump-and-dump-schemes/ [https://perma.cc/7FUJ-UP6M]. Analysis firm Chainalysis reported that 9,000 tokens represented a quarter of existing tokens, all of which dropped in value at least 90% within one week. *Id.*

[95] Barry, *supra* note 5, at 281; *see* Su, *supra* note 5, at 136 (explaining traditional pump-and-dump schemes in the context of the stock market). Pump and dump schemes in traditional security assets violate the Securities Act of 1933 and are governed by the SEC. Su, *supra* note 5, at 136. Because the scope of cryptocurrency regulation is still unclear, crypto pump and dump schemes are not regulated in the same way. *Id.*

[96] Barry, *supra* note 5, at 281. Once the consumers are stuck holding the worthless coin, influencers are free to invest in other currencies that they can sell for a large profit when the value surges. *Id.* at 282. Barry goes on to describe the power celebrities can hold over the value of digital assets, using Elon Musk as an example. *See id.* at 283–84 (observing how Tesla's acceptance of Bitcoin as payment affected the value of the currency). Musk announced that Bitcoin could be used as payment for services provided by Tesla, causing the value to skyrocket; Bitcoin's value plummeted when Musk later announced that Tesla would no longer accept Bitcoin as payment. *Id.*

[97] *Id.* at 286. There have been multiple instances in which public figures capitalized on their goodwill to engage in deceptive advertising that resulted in consumer losses. *See id.* (citing Elon Musk as an example of celebrity influencers enriching themselves by promoting cryptocurrency); Steven Zeitchek & Julian Mark, *Tom Brady Pushed Crypto to His Fans. This Lawyer Wants Him to Pay Up*, WASH. POST (Dec. 14, 2022), https://www.washingtonpost.com/business/2022/12/14/ftx-class-action-lawsuit/ [https://perma.cc/9S35-7D3V] (reporting on individual consumers affected by the FTX scheme). One *Washington Post* article detailed individual stories of consumers who invested in FTX and trusted the brand because of the celebrity endorsements they saw. Zeitchek & Mark, *supra*. One interviewee, a plaintiff in the class action, invested $30,000 in FTX after seeing that Tom Brady endorsed the platform. *Id.*

[98] *See* Barry, *supra* note 5, at 282 (arguing for regulations that require influencers to disclose their incentives to advertise). Conversely, known celebrity involvement with a coin can also result in risky investments for consumers. *See* Su, *supra* note 5, at 137 (observing that celebrity endorsements distorts the value of cryptocurrency). For example, Elon Musk tweeting about a coin can cause a coin's value to instantly spike, without regard for the actual value of the coin and posing a threat to investors. *Id.* at 133.

[99] *See* Barry, *supra* note 5, at 286 (arguing that the mentioned examples exemplify the need for increased oversight to hold endorsers accountable and provide harmed consumers with damages).

2. A Platform Built on False Promises: *Cassidy v. Voyager Digital Ltd.*

In December 2021, plaintiffs brought a class action lawsuit against the now-defunct cryptocurrency trading app, Voyager.[100] The complaint contains many allegations similar to the FTX litigation, describing how the platform targeted unsophisticated and young investors who were unfamiliar with cryptocurrency.[101] Voyager then utilized the support of major stakeholders, like the Dallas Mavericks and their owner Mark Cuban, to garner public attention and trust for the platform.[102] Although Cuban is not a named defendant in the class action complaint, the plaintiffs cite his endorsement of the platform as evidence of Voyager's violation of the New Jersey Consumer Fraud Act and the FDUTPA.[103] The decision not to list Cuban as a defendant reflects the trend of holding the company rather than the influencer liable in FTC actions and their state law counterparts.[104]

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[100] Class Action Complaint & Demand for Jury Trial at 1–2, Cassidy v. Voyager Digit. Ltd., No. 21-cv-24441 (S.D. Fla. Dec. 24, 2021) [hereinafter *Cassidy* Complaint]. Created in 2019, Voyager was a platform used to purchase cryptocurrency, generating millions of dollars in revenue. *Id.* at 1. The complaint alleges that Voyager targeted young and inexperienced investors, especially those who had never been involved in cryptocurrency trading and were likely to use mobile apps instead of sophisticated software. *Id.*

[101] *See id.* (highlighting that Voyager targeted young investors). The complaint states that one of the ways Voyager deceived consumers was by marketing the platform as "100% Commission-Free," when in reality the prices on the platform were always set intentionally high enough to collect "exorbitant hidden commissions" on every trade. *Id.* at 2. Experts for the plaintiffs explained that the defendants used their proprietary system to deceive unsophisticated cryptocurrency investors into thinking that they would reap large profits, when in fact the platform benefitted most from hidden commissions. *Id.*

[102] *Id.* at 2–3. The plaintiffs cited excerpts from a speech given by Cuban about the promise of high returns from cryptocurrency investment. *Id.* at 3. Cuban includes an anecdote in his speech about his twelve-year-old son's involvement in crypto investments, encouraging a younger market to invest in the platform. *Id.* Voyager and the Mavericks had entered into a five year partnership and ran promotions through the team for Voyager. Samantha Delouya, *Lawsuit Claims Mark Cuban and the Dallas Mavericks 'Duped' Customers into Investing with the Now-Bankrupt Crypto Platform Voyager Digital, Resulting in $5 Billion in Losses*, BUS. INSIDER (Aug. 12, 2022), https://www.businessinsider.com/mark-cuban-crypto-trading-bankrupt-voyager-digital-lawsuit-ponzi-report-2022-8 [https://perma.cc/GF5M-F65F].

[103] *Cassidy* Complaint, *supra* note 100, at 25–26. Cuban's speech illustrated Voyager's "false and misleading promises of reaping large profits in the cryptocurrency market." *Id.* at 2. In May 2023, Cuban and his legal team fought back by filing motions that the plaintiffs' attorneys allowed false claims to be included in their complaints and that the amended pleading asserts "'manufactured' allegations." Alison Frankel, *Column: Mark Cuban Rips Plaintiffs Lawyers in Voyager Celebrity Endorsement Case*, REUTERS (May 17, 2023), https://www.reuters.com/legal/government/column-mark-cuban-rips-plaintiffs-lawyers-voyager-celebrity-endorsement-case-2023-05-17/ [https://perma.cc/JKG8-V6XH?type=image]. Cuban's team accused the plaintiffs' counsel of engaging "in bad-faith litigation" by putting forth an amended pleading that contains statements already proven false. *Id.* In addition to this motion, Cuban filed a separate motion for sanctions, arguing that the plaintiffs' firm is "prolonging frivolous litigation" because the Florida class representatives lack viable claims. *Id.*

[104] *See* Barry, *supra* note 5, at 286 (theorizing that influencers and endorsers should face the same liability as the advertising company); Terry et al., *supra* note 13, at 445 (pointing out differing levels of

Plaintiffs in a class action chose to bring a separate suit against Cuban and Voyager's CEO Stephen Ehrlich in August of 2022.[105] Similar to the FTX class action, the complaint alleges that Cuban and Ehrlich violated the FDUTPA.[106] Cuban, as the owner of the Dallas Mavericks, entered a partnership between Voyager and his basketball franchise and described the platform as almost risk free for cryptocurrency investments.[107] Despite these public statements of support, Rich Sanders, the plaintiffs' expert on cryptocurrency investigation, provided exhibits showing the unsustainability and deceptions behind the Voyager platform and how Cuban and Ehrlich misrepresented the platform to the public with knowledge and intent.[108] Sanders also points to a culture of influencers and educators employed by Voyager to appeal to vulnerable segments of the population.[109]

The FTX Complaint references the Voyager bankruptcy as part of the background leading to consumer losses.[110] The class action lawsuits against

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liability for influencers who advertise deceptively and the businesses who employ them). Like many of the products discussed above, suits have a greater likelihood of prevailing against the parent company as endorsers are normally punished with mere warnings. Bentz & Veltri, *supra* note 19, at 188.

[105] Class Action Complaint & Demand for Jury Trial at 2, Robertson v. Cuban, No. 22-cv-22538 (S.D. Fla. Aug. 10, 2022) [hereinafter *Robertson* Complaint]. The timing of the lawsuit may be attributed to Voyager's financial woes. *See id.* at 7 (noting that Voyager filed for bankruptcy). As the class action against Voyager began to enter discovery, Voyager filed Chapter 11 bankruptcy upon the news that hundreds of millions of dollars of crypto assets had been lost. *Id.* Once bankruptcy is filed, an automatic stay goes into place that prohibits ongoing litigation from proceeding, therefore halting the class action against Voyager. *Id.*

[106] *See id.* at 64 (bringing a claim under the FDUTPA). The complaint begins with quotes from Cuban and Ehrlich extoling the cheap, easy, and safe nature of the Voyager platform. *Id.* at 1.

[107] *Id.* at 4, 9. Cuban utilized his platform as owner of the Mavericks to speak positively about Voyager by announcing special deals for downloading the app at Mavericks press conferences and lending credibility to the platform. *Id.* at 42. Class members cited the promotional deal offered by Cuban and the Mavericks as the only reason they signed up for the Voyager platform. *Id.* at 42–43; *see* Su, *supra* note 5, at 132 (reporting that research has shown that who owns certain crypto assets can have a large effect on who buys it in the future). Su uses behavioral science research to conclude that celebrity and social media influencer involvement with digital assets can increase the desirability of said asset, leading to increased prices. Su, *supra* note 5, at 132–33.

[108] *Robertson* Complaint, *supra* note 105, at 32 (quoting plaintiffs' expert Rich Sanders). The plaintiffs' expert, Rich Sanders, is the co-founder and lead investigator of a cybercrime firm that specializes in blockchain forensics and works with law enforcement in regulatory investigations. *Id.* at 26. The plaintiffs cite numerous examples of Ehrlich and Cuban presenting statements to the public that the plaintiffs allege the defendants knew to be false while also creating a culture that allowed influencers for their brand to help them mislead the public. *Id.* at 33 (quoting plaintiffs' expert Rich Sanders).

[109] *Id.* Rather than a direct scam, the representations on behalf of Voyager market a sustainable and low risk investment opportunity, leading naive audiences to invest large sums of money. *Id.* As a recent survey found, crypto owners are more likely to be young than other types of investors, as well as more likely to be inclined to follow social media for financial advice. Charlotte Principato, *Kim Kardashian, Cryptocurrency and Celebrity Clout*, MORNING CONSULT (Sept. 21, 2021), https://morningconsult.com/2021/09/21/kim-kardashian-crypto-celebrity/ [https://perma.cc/W3JL-2DJ4].

[110] *Garrison* Complaint, *supra* note 1, at 2–3. FTX was involved with Voyager's bankruptcy proceedings as an investor attempting to recoup some of their lost funds when FTX's deceptive plat-

FTX and Voyager allege that the companies operated deceptive platforms that enriched the owners and endorsers while causing the loss of billions of dollars for consumers.[111] The advertising practices used by Voyager and FTX painted a picture of an easy path to wealth by using celebrity endorsers to garner public trust and investment.[112] The reference to Mark Cuban's statements promoting Voyager in class action lawsuits implied the importance and significance of celebrity endorsers' advertisements in not only attracting consumers but also furthering deceptive trade practices.[113] It remains to be seen whether the courts will hold the individual endorsers liable to the consumers they helped to deceive, but such a novel decision would deter unscrupulous celebrities from endorsing crypto in the future.[114]

3. Social Media Pump and Dump Scheme: *Huegerich v. Gentile*

Kim Kardashian, Floyd Mayweather Jr., and Paul Pierce endorsed the digital token sold by EthereumMax (EMAX) and were later named as defend-

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form was uncovered. *Id.* at 4. This led to FTX's own emergency bankruptcy and the litigation against the FTX Entities as well as the celebrity defendants. *Id.*

[111] *Id.* at 2–3; *Cassidy* Complaint, *supra* note 100, at 25–26 (alleging a state law claim of consumer fraud against Voyager). The estimated loss from the FTX bankruptcy was over $11 billion and the loss sustained from Voyager was over $5 billion. *Garrison* Complaint, *supra* note 1, at 2–3. One Voyager investor spoke at an August 2022 bankruptcy hearing, telling the court that she had invested over $1 million on the Voyager platform. MacKenzie Sigalos, *Voyager Customer Lost $1 Million Saved Over 24 Years and Is One of Many Now Desperate to Recoup Funds*, CNBC (Aug. 15, 2022), https://www.cnbc.com/2022/08/15/voyager-customers-beg-new-york-judge-for-money-back-after-bankruptcy.html [https://perma.cc/J8QV-9AKS]. The bankruptcy hearing lasted for over five hours, and many Voyager users were able to speak about their experience and losses on the platform. *Id.* In its filings, Voyager stated it has over 100,000 creditors, many of them unsecured creditors who invested money on the now defunct platform. *Id.* As of the time of the hearing in August 2022, the creditor claims totaled $1.8 billion. *Id.*

[112] *See Garrison* Complaint*, supra* note 1, at 21 (alleging that the celebrity endorsers tricked consumers into investing in the cryptocurrency scheme). One celebrity endorser for FTX, Kevin O'Leary, popularly referred to as "Mr. Wonderful," stated and tweeted on multiple occasions how safe the FTX Platform was for investors. *Id.* at 22. Another ad campaign featuring NBA player Stephen Curry emphasized that consumers did not need to be experts to participate in FTX's services as the platform allowed them to "buy, sell, and trade crypto *safely*." *Id.* at 25.

[113] *See Robertson* Complaint, *supra* note 105, at 32 (alleging that new crypto industry users rely on companies like Voyager, as well as their educators and influencers, to provide good-faith advice about investments). Cuban was a stakeholder in the Voyager platform personally and through the Dallas Mavericks, the NBA team he owns. *Id.* at 5. Cuban was being paid for his promotions, but the complaint alleges that the scope, nature, and amount of compensation was never disclosed, violating SEC regulations. *Id.* at 7–8. Voyager created a rewards program that concealed itself as an educational tool geared towards getting consumers to invest as young as possible. *Id.* at 39.

[114] *See* Bentz & Veltri, *supra* note 19, at 193 (highlighting the lack of enforcement against individual endorsers); Aramowicz v. Bridges (*In re* Diamond Mortg. Corp. of Ill.), 118 B.R. 575, 580 (Bankr. N.D. Ill. 1989) (concluding that liability could be a possibility for the celebrity endorser due to his participation in deceptive advertising).

ants in a class action lawsuit.[115] EMAX and the celebrity defendants were accused of participating in a "pump and dump" scheme to inflate token prices before they sold all of their ownership.[116] The presence and power of celebrity endorsement is highlighted in this case as Kim Kardashian has over 251 million Instagram followers, the platform on which she encouraged followers to invest in the EMAX Token.[117] Although Kardashian did not disclose how much she received for endorsing EMAX through sponsored Instagram posts, the complaint alleges that her compensation could be between $300,000 to $1 million per post.[118] This is not the first social media post that has landed Kardashian in regulatory hot water.[119] Kardashian has also breached FDA regulations in the past for a post advertising a morning sickness drug.[120]

On December 7, 2022, a judge in California dismissed the suit against Kardashian, Mayweather, and other defendants due to a lack of evidence that

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[115] Class Action Complaint at 1, Huegerich v. Gentile, No. 22-cv-00163 (C.D. Cal. Jan. 7, 2022) [hereinafter *Huegerich* Complaint]. Celebrity defendants participated in the scheme via posts and appearances on Instagram, Twitter, and live panels. *Id.* at 11–12. Kim Kardashian, Floyd Mayweather, Jr., and Paul Pierce were named as the so-called "Promoter Defendants" in the EMAX complaint. *Id.* at 1. The complaint also lists three "Executive Defendants," or persons who were founders, creators, and developers of EMAX and exercised control over sale of the product. *Id.* at 1, 4.

[116] *Id.* at 15. The celebrity defendants received EMAX tokens as part of their compensation for advertising the product. *Id.* at 6. The complaint alleged that many of the defendants were "sophisticated public figures" who were experienced with endorsements contracts. *Id.*

[117] *Id.* at 11. A staggering number of people were swayed by Kardashian's social media post. *See* Principato, *supra* note 109 (reporting that roughly 19% of individuals who saw Kardashian's endorsement invested because of her promotion). The survey found that 45% of crypto owners were likely to invest in a celebrity-endorsed cryptocurrency and crypto owners were more likely than general investors to use social media tips for their investment decisions. *Id.*

[118] *Huegerich* Complaint, *supra* note 115, at 12. Kardashian herself asserted that she makes more money from promotional posts than from her reality television show. *Id.* The promotion did not conspicuously disclose its sponsored nature as defendant only included "#AD" in the bottom right of the post. *Id.* Regarding disclosure requirements, the FTC and SEC differ. *See* Guirguis & Ross, *supra* note 85 (noting the difference in language between FTC and SEC disclosure requirements). The FTC has warned that appending "ad" to the end of a post may not be sufficient for disclosure as many consumers may not see it or understand its significance. *Id.* The SEC has more stringent disclosure rules in general, with additional requirements if the advertisement is for a crypto asset. *Id.* at 1. In Kardashian's case, she did not meet the disclosure requirements for indicating that her post was an advertisement, and because she did not disclose that she was being paid, which is an SEC disclosure requirement. *Huegerich* Complaint, *supra* note 115, at 12.

[119] *See Huegerich* Complaint, *supra* note 115, at 12 (explaining that Kardashian was previously ordered to remove a post by the FDA). The class action plaintiffs allege that Kardashian's 2015 post is similar to her EMAX promotion, noting that both the morning sickness promotion and the crypto advertisement share similarities. *Id.*; *see* Karlin, *supra* note 52 (summarizing the FDA action taken against Kardashian in 2015 for not disclosing important information about Diclegis, a morning sickness drug).

[120] Karlin, *supra* note 52. Kardashian, as well as her mother Kris Jenner, were ordered to take down the violating posts as the only consequence for this regulatory violation. *Id.* The company had also previously been flagged for improper advertising. *Id.*

consumers invested in EMAX because of the celebrity advertisements.[121] The claims were subsequently amended, and the California judge ruled that the new complaint adequately alleged consumer reliance on the endorser statements, allowing the case to proceed under the unfair competition laws.[122] The judge had previously dismissed the claims brought under the California consumer protection law, concluding that "intangible goods" such as cryptocurrency do not fall under the law's definition of goods and services.[123]

In the separate SEC action, Kardashian was able to settle for $1.2 million.[124] Though this may seem like a deterrent, the class action complaint states that Kardashian is paid up to one million dollars per promotional post, making this amount inconsequential.[125] As this was an action taken by the SEC to enforce its regulations, the settlement amount does not go towards making the harmed plaintiffs whole.[126]

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[121] Jody Godoy, *Kim Kardashian, Other Celebrities Beat EMax Crypto Investors' Lawsuit*, REUTERS (Dec. 7, 2022), https://www.reuters.com/legal/kim-kardashian-other-celebrities-beat-emax-crypto-investors-lawsuit-2022-12-07/ [https://perma.cc/5LEH-U2W8?type=image]. The judge stated it was uncertain whether the plaintiffs actually saw the endorsements. *Id.*

[122] Alison Frankel, *Kim Kardashian, Floyd Mayweather Can't Evade EMax Crypto Investors' Claims, Judge Says*, REUTERS (June 7, 2023), https://www.reuters.com/legal/litigation/kim-kardashian-floyd-mayweather-cant-evade-emax-crypto-investors-claims-judge-2023-06-07/ [https://perma.cc/J6MR-SRKZ]. In the amended complaint, totaling 162 pages, the plaintiffs alleged that the defendants "were profiting off endorsements at their fans' expense by touting an investment opportunity that had no legitimate business plan." *Id.* The judge described the plaintiffs as "already-dedicated followers" and "particularly vulnerable" to the defendants' crypto advertisements, making their reliance on the social media posts reasonable. *Id.*

[123] Godoy*, supra* note 121. The claims under California's consumer protection law are not able to be revised as they were permanently dismissed by the judge. *Id.* The judge reasoned that the California law only applied to tangible goods, and therefore the digital assets were outside its scope, possibly implying future roadblocks for this route in California. *Id.* Applying this decision to the FTX case, the FDUTPA defines "[t]rade or commerce" as actions proffering "any good or service, or any property, whether tangible or intangible." FLA. STAT. § 501.203(8) (2023).

[124] Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security (Oct. 3, 2022), https://www.sec.gov/news/press-release/2022-183 [https://perma.cc/33M8-L23V] [hereinafter "SEC Press Release"]. The SEC brought charges against Kardashian for failing to comply with SEC disclosure laws when she advertised EMAX tokens on her social media. *Id.* To settle the charges, Kardashian paid $1.26 million in penalties, disgorgement, and interest. *Id.*

[125] *See Huegerich* Complaint, *supra* note 115, at 12 (discussing Kardashian's high level of compensation for her EMAX promotions); Rivera & Yi, *supra* note 13, at 27 (theorizing that the SEC may want to land big-name defendants in order to make a statement about their high level of enforcement). Rivera & Yi hypothesize that celebrity endorsers need to be more cautious than lesser-known influencers as the SEC may attempt to make their case an example to dissuade other influencers and endorsers from advertising crypto. *Id.* at 27–28.

[126] *See* SEC Press Release, *supra* note 124 (documenting Kardashian's agreement to pay the SEC $1.26 million to settle her claims with the agency); Rivera & Yi, *supra* note 13, at 28 (listing the SEC's 2017 warning to celebrities that they must comply with SEC standards for advertising investment opportunities). The SEC warnings and actions make clear to celebrities that they will not be above the law and therefore need to take steps and precautions to follow SEC regulations when promoting cryptocurrency. Rivera & Yi, *supra* note 13, at 27.

4. Opaque Endorser Connections: *Real v. Yuga Labs, Inc.*

On December 9, 2022, the plaintiffs filed a class action lawsuit against Yuga Labs, Inc. (Yuga) in California.[127] Paris Hilton, Jimmy Fallon, Justin Bieber, Post Malone, and Serena Williams are among the celebrity defendants who endorsed and advertised for the Bored Ape Yacht Club brand.[128] This brand created non-fungible tokens (NFTs) as well as the token ApeCoin, both forms of digital assets.[129] The celebrity defendants were compensated covertly through MoonPay, another service connected to Yuga, as a way to make the promotion of the NFTs appear organic rather than as a paid promotion.[130] These public promotions generated billions of dollars of sales, causing the price of the NFTs to increase and leading to drastically inflated prices for in-

[127] Class Action Complaint at 1, Real, v. Yuga Labs, Inc., No. 22-cv-08909 (C.D. Cal. Dec. 8, 2022) [hereinafter *Real* Complaint]. The complaint lists thirty-seven defendants, many of whom are well-known actors, professional athletes, and performers. *Id.* at 5–11. This complaint was filed by the same attorneys representing the EMAX plaintiffs, showing that crypto class action lawsuits are not slowing down. *See* Peri Berger et al., *Keeping Up with the Lawsuits: Celebrity Endorsers, Crypto Ads, and the Evolving Liability Landscape*, JD SUPRA (Dec. 16, 2022), https://www.jdsupra.com/legalnews/keeping-up-with-the-lawsuits-celebrity-6850249/ [https://perma.cc/W2ZL-UW89] (summarizing the effects of the dismissal against Huegerich and noting that the same attorneys were involved multiple class action lawsuits against endorsers).

[128] *Real* Complaint, *supra* note 127, at 8–9. The complaint explains the allegedly fraudulent set up of Yuga Labs, Inc. (Yuga) and its NFT collection, the Bored Ape Yacht Club. *Id.* at 3. This NFT collection was promoted heavily and aggressively by the celebrity endorsers to get new investors to "join[] the club" by buying an NFT from the brand. *Id.* at 2. The aggressive and public endorsement is documented in a clip from The Tonight Show hosted by Jimmy Fallon and featuring Paris Hilton, where the two compare the NFTs they purchased from the Bored Ape Yacht Club. The Tonight Show, *Paris Hilton Surprises Tonight Show Audience Members by Giving Them Their Own NFTs*, YOUTUBE (Jan. 24, 2022), https://www.youtube.com/watch?v=5zi12wrh5So [https://perma.cc/68EK-P6UY].

[129] *Real* Complaint, *supra* note 127, at 4. A non-fungible token (NFT) is a type of digital asset that exists on a blockchain, a decentralized public transaction ledger. Amanda Mull, *Celebrities and NFTs Are a Match Made in Hell*, THE ATLANTIC (Feb. 4, 2022) https://www.theatlantic.com/technology/archive/2022/02/nft-jimmy-fallon-paris-hilton-millionaire/621486/ [https://perma.cc/C2ZM-WE4X]. In the case of Hilton and Fallon, their NFTs were tokens that correspond with "what can be generously called artworks." *Id.* In August 2023, the class action lawsuit added the Sotheby's auction house as a defendant. Jon Brodkin, *Buyers of Bored Ape NFTs Sue After Digital Apes Turn Out to Be Bad Investment*, ARS TECHNICA (Aug. 17, 2023), https://arstechnica.com/tech-policy/2023/08/buyers-of-bored-ape-nfts-sue-after-digital-apes-turn-out-to-be-bad-investment/ [https://perma.cc/QC5K-Z27S]. In September 2021, Sotheby's held an auction of the Bored Ape NFTs, selling one lot of 101 NFTs for a total of $24.4 million. *Id.* The plaintiffs argue that this auction gave the Bored Ape brand "an air of legitimacy" that led to increased interest and trust in the brand. *Id.* As an added twist, the previously undisclosed buyer of the 101 NFTs turned out to be FTX. *Id.* Sotheby's had maintained that the anonymous buyer was a "'traditional' collector," which furthered the image that NFTs were now a mainstream investment product. *Id.*

[130] *Real* Complaint, *supra* note 127, at 3. The complaint alleges a scheme between a Hollywood talent agent, Guy Oseary, and the blockchain companies Yuga and MoonPay. *Id.* at 2. MoonPay is described as a "white-glove service" geared toward helping wealthy investors and celebrities buy NFTs hassle-free. *Id.* at 3.

vestors.[131] These inflated prices did not last forever, and the Bored Ape Yacht Club NFTs declined sharply in value, with the NFT trading volume falling 92.9% from its height and the trading volume for the ApeCoin decreasing 99.7% from its height.[132]

The plaintiffs allege similar claims to the lawsuits against FTX and other celebrity endorsers, including violations of the California Consumers Legal Remedies Act and the California Unfair Competition Law.[133] Like the FTX and Voyager litigation, these claims allege consumer harm as a direct result of deceptive and misleading advertising practices.[134] The state consumer protection laws that form the basis for endorser liability are modeled after FTC regulations set forth in the FTC Act.[135]

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[131] *Id.* at 3. Celebrity promotions about the "Otherside metaverse," or a Bored Ape Yacht Club ecosystem, generated billions in sales and increased "the interest in and the price of" the NFTs. *Id.* The creator of MoonPay as well as Defendant Oseary admitted that they needed celebrity endorsements and promotions in order to bring customers to their platform and began their media crusade with an article in *Rolling Stone*. *Id.* at 28; *see* Samantha Hissong, *How Four NFT Novices Created a Billion-Dollar Ecosystem of Cartoon Apes*, ROLLING STONE (Nov. 1, 2021), https://www.rollingstone.com/culture/culture-news/bayc-bored-ape-yacht-club-nft-interview-1250461/ [https://perma.cc/A56Y-ACAR] (detailing Bored Ape Yacht Club's inception and rise to fame and fortune). Subsequently, *Rolling Stone* collaborated with Bored Ape Yacht Club to create a collectible zine and NFTs. *Id.*

[132] *Real* Complaint, *supra* note 127, at 72. The complaint refers to the time period of significant devaluation as "[t]he Dump," indicating that Yuga was engaged in a pump and dump scheme to enrich promoters and owners at the cost of investors. *See id.* (highlighting the drastic decrease in trading and valuation). This period of time began after the Bored Ape Yacht Club metaverse launch failed in April of 2022. *Id.*; *see* Katryna Perera, *Paris Hilton, Fallon Among Celebs Sued Over Crypto Promos*, LAW360 (Dec. 9, 2022), https://www.law360.com/articles/1556728/paris-hilton-fallon-among-celebs-sued-over-crypto-promos [https://perma.cc/JC8P-VMGK]. Investors claim that their purchase of the artificially highly priced NFTs was the result of "calculated and planned celebrity endorsements." Perera, *supra*.

[133] *Real* Complaint, *supra* note 127, at 77–80. The first cause of action is under the California Unfair Competition Law and prohibits "unfair, deceptive, untrue, or misleading advertising." *Id.* at 77 (quoting CAL. BUS. & PROF. CODE § 17200 (West 2023)). The complaint alleges that consumers suffered damages as a direct and proximate result of these deceptive practices. *Id.* at 78. The second cause of action is under the California Consumers Legal Remedies Act that prohibits "unfair or deceptive acts or practices . . . undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer." *Id.* at 79 (quoting CAL. CIV. CODE § 1770(a) (West 2023)). This includes misrepresentations about connection to the endorsement or representing sponsorship or approval that does not exist. *Id.* at 79.

[134] *Id.* at 77–79. The complaint also alleges violations of securities laws. *Id.* at 84–92. For purposes of this Note, these causes of action will not be explored in depth as they relate to securities and SEC regulations rather than consumer protection laws. *Id.*; *see* Rivera & Yi, *supra* note 13, at 27 (listing various SEC regulations that are often violated by celebrity endorsers of cryptocurrency).

[135] *See* Barry, *supra* note 5, at 279 (arguing that the FTC is the best regulatory authority to oversee celebrity endorsements of cryptocurrency). As cryptocurrency and its advertising market continue to expand, new regulations will need to be put in place to protect consumers from scams and predatory practices. *See id.* at 325 (arguing for FTC enforcement action for disclosure violations related to cryptocurrency).

D. The FTX Disaster: Exemplifying the Perfect Storm of Lack of Regulation

The FTX collapse exemplifies how cryptocurrency and celebrity endorsements both pose significant risks to consumers.[136] In the wake of this disaster, questions about regulation and liability are at the forefront of litigation.[137] The fraudulent practices of Voyager, Yuga, EMAX, and FTX demonstrate that celebrity endorsement and involvement in the unregulated crypto market poses significant risks to unsuspecting consumers.[138] As these cases progress, the rulings and decisions will create important precedent for cryptocurrency endorsements and advertisements.[139]

The attorneys representing the class action plaintiffs against FTX are pursuing reimbursement from the FTX Ambassadors rather than the FTX Entities or former CEO Bankman-Fried in the wake of the company's emergency bankruptcy.[140] The FTX Complaint lists pages of examples of how the celebrity defendants advertised the FTX Platform, including televised ads during the World Series and Super Bowl, tweets, and branding on clothes and an NBA

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[136] *See* Su, *supra* note 5, at 127 (explaining the decentralized nature of cryptocurrency and the supporters of this lack of institutional oversight). Although the decentralization of cryptocurrency is considered a positive to some, it is also a risk to consumers. *Id.* at 125; *see* Terry et al., *supra* note 13, at 412 (explaining how further regulation is needed to protect consumers from celebrity and influencer endorsing).

[137] *See* Sarah Jackson, *What the Collapse of FTX Means for the Future of Crypto*, BUS. INSIDER (Nov. 11, 2022), https://www.businessinsider.com/ftx-crypto-exchange-implosion-sam-bankman-fried-what-it-means-2022-11 [https://perma.cc/G85A-ERHA] (speculating about the effects of the FTX breakdown on the cryptocurrency market). Although crypto has traditionally lacked oversight, regulators are considering how to get involved in the current "wild west" of trading crypto. *Id.* (quoting analyst James Royal).

[138] *See Garrison* Complaint, *supra* note 1, at 6 (alleging that celebrity endorsements in FTX resulted in over a billion dollars in damages); Barry, *supra* note 5, at 314 (discussing how the FTC needs to expand its regulatory scope to hold "bad actors" accountable in the cryptocurrency universe).

[139] *See* Wildes v. BitConnect Int'l PLC, 25 F.4th 1341, 1343 (11th Cir. 2022) (alleging that BitConnect coin, marketed as a cryptocurrency investment, was in actuality a Ponzi scheme). *Wildes* is another example of ongoing litigation surrounding crypto scams. *Id.* Although celebrity endorsers are not involved in this case, individual endorsers who promoted BitConnect through online videos were named as defendants to the suit. *Id.* at 1344. The FTX complaint cited *Wildes* as an example of potentially holding individual endorsers liable to consumers rather than just the parent company. *Garrison* Complaint, *supra* note 1, at 5. In February 2022, the Eleventh Circuit Court of Appeals reversed a decision that dismissed charges against the promoters, allowing several of the claims to move forward. *Wildes*, 25 F.4th at 1347; *see also* Zeitchek & Mark, *supra* note 97 (quoting the Plaintiffs' attorney, Alan Moskowitz, in the FTX complaint about their litigation strategy). As there is likely little money for the plaintiffs following FTX's bankruptcy, the plaintiffs take a new approach in attempting to hold the celebrity endorsers liable for the consumers' damages. Zeitchek & Mark, *supra* note 97.

[140] Zeitchek & Mark, *supra* note 97. The attorney for the plaintiffs is quoted stating that the celebrity endorsers held the investment out to the public as an opportunity endorsers verified as safe, which confers responsibility onto them for the resulting losses. *Id.*

court.[141] The complaint cites examples of endorsements that flaunt the safety and rigorous compliance standards of FTX.[142] For example, Kevin O'Leary, popularly known as "Mr. Wonderful," posted multiple tweets that have since been deleted stating that FTX met his own high standard for crypto investment and declaring his confidence in Bankman-Fried.[143] The FTX advertising campaigns emphasized the lack of expertise needed to invest in its products and the accessibility of the platform.[144]

This Note discusses Count Two of the class action complaint against the FTX Ambassadors that attempts to hold them civilly liable for violations of Florida's consumer protection laws.[145] If the court holds the endorsers liable

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[141] *See Garrison* Complaint, *supra* note 1, at 21–31 (listing the celebrity defendants and describing their specific involvement). The celebrity defendants participated in multiple campaigns promoting FTX in an attempt by the FTX Entities to reach broad audiences as a relative newcomer to the crypto scene. *Id.* at 21. By 2021, FTX had established itself in the crypto marketplace and became the first cryptocurrency company to name a sports arena, expanding its name recognition to basketball fans. *Id.* at 20.

[142] *Id.* at 22. One of the ad campaigns FTX created was "the #notanexpert campaign," featuring professional basketball player Stephen Curry. *Id.* at 25. The campaign focused on Curry's lack of knowledge about crypto, emphasizing that although he is not an expert, he trusts FTX to buy, sell and trade crypto "safely." *Id.* Though not named as defendants in the complaint, Sam Bankman-Fried's parents played an interesting role in bolstering the image of FTX as a safe and compliant platform. *See* David Gura, *It's Not Just FTX's Sam Bankman-Fried. His Parents Also Face Legal Trouble*, NPR (Oct. 2, 2023), https://www.npr.org/2023/10/02/1200764160/sam-bankman-fried-sbf-parents-ftx-crypto-collapse-trial-stanford-law-school [https://perma.cc/47V3-GZTH] (detailing FTX's lawsuit against Bankman-Fried's parents). Both of Bankman-Fried's parents are lawyers and were known as well-respected professors at Stanford Law School before the downfall of FTX. *Id.* Both became involved with the management of FTX in some capacity and now face legal recourse from attorneys trying to claw back millions of dollars in cash and gifts. *Id.* Bankman-Fried's father, Joseph Bankman, gave legal advice and strategic analysis starting from the earliest days of FTX because the company had yet to establish a legal team. *Id.* Bankman-Fried's mother, Barbara Fried, lacked an official role with FTX, but was influential in advising her son about political contributions from the FTX Group. *Id.*

[143] *Garrison* Complaint, *supra* note 1, at 22. O'Leary is a businessman and well-known television personality, best known for his appearances on *Shark Tank*. *Id.* at 6. His tweets in support of FTX pointed to Bankman-Fried's knowledge of compliance and the fact that both of his parents are attorneys who do compliance work. *Id.* at 22.

[144] *Id.* at 27. Defendant Shaquille O'Neal's tweets stated that as an FTX partner, he endeavored to help make crypto "accessible" to all audiences. *Id.* (quoting Shaquille O'Neal (@SHAQ), X (June 1, 2022, 6:02 PM), https://twitter.com/SHAQ/status/1532120526788886528 [https://perma.cc/8EE3-V8Y7]). Another ad campaign targeted women, featuring professional tennis player Naomi Osaka in an ad she shared with her 1.1 million followers. *Id.* at 30. Like O'Neal, she declares her and FTX's mission to be making cryptocurrency accessible. *Id.* at 31.

[145] *See id*. at 37 (explaining how the defendants' actions violated the FDUTPA, Florida's adoption of the FTC Act to state law). Amanda Mull of *The Atlantic* describes celebrities advertising crypto products as "the logical extreme of celebrity endorsements." Mull, *supra* note 129. If the celebrity endorsers seek to avoid the public and drawn-out nature of a trial, settling with the plaintiffs may be their out. *See* Ciaran Lyons, *NFL and YouTube Stars Reach Settlement in FTX Class-Action Lawsuit*, COIN TEL. (Sept. 17, 2023), https://cointelegraph.com/news/nrl-youtube-stars-settle-ftx-class-action-lawsuit [https://perma.cc/3FA7-C5DE] (reporting that several defendants in the FTX class action lawsuit reached an undisclosed settlement agreement). NFL player Trevor Lawrence and two YouTubers named as defendants in the FTX class action reached a settlement with investors who were mis-

under this theory, future endorsers of crypto would need to undertake due diligence about the financial stability and truthfulness of the claims of the company before promoting the product to their fanbases.[146] Endorsers of cryptocurrency would also need to observe FTC disclosure regulations and announce that they are being paid for the advertisement and disclose how much they were paid.[147] Disclosure and due diligence are the key elements of Count Two of the FTX Complaint, and both reflect FTC federal regulations.[148]

II. REINING THEM IN: UTILIZING FTC AUTHORITY TO BETTER PROTECT CONSUMERS

As discussed in Part I of this Note, unregulated celebrity and influencer advertising of risky crypto products poses a danger to consumers.[149] The FTC is empowered to protect consumers from deceptive and unfair advertising practices.[150] Part I highlights the breadth of the FTC's regulatory authority, but also the limits and ambiguity that apply to endorser liability.[151] This Part discusses previ-

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led by their endorsements. *Id.* The details and amount of the settlement were not released, but they mark the first defendants to exit the class action. *Id.*

[146] *Garrison* Complaint, *supra* note 1, at 5; *see* Aramowicz v. Bridges (*In re* Diamond Mortg. Corp. of Ill.), 118 B.R. 575, 580 (Bankr. N.D. Ill. 1989) (holding that the defendant should have undertaken his own independent investigation into the financial stability of the company before participating in advertisements). *But see* Zeitchek & Mark, *supra* note 97 (countering the argument for celebrity liability with the dismissal of the EMAX case in California). Although these cases are possibilities for holding celebrity endorsers liable, a judge in California stated that investors should "act reasonably" before spending money, despite who is endorsing the product. *See* Zeitchek & Mark, *supra* note 97 (quoting Order Re: Defendants' Omnibus Motion to Dismiss & the Individual Defendants' Motions to Dismiss at 1, *In re* Ethereummax Inv. Litig., No. CV 22-00163 (C.D. Cal. Dec. 6, 2022)).

[147] *See Garrison* Complaint, *supra* note 1, at 5 (alleging that defendants violated SEC regulations by not disclosing payment for endorsements). The involved celebrity defendants failed to disclose how much they were being paid for their advertisements. *Id.*; *see* Guirguis & Ross, *supra* note 85 (summarizing FTC and SEC disclosure rules as they relate to celebrity and influencer endorsements). Guirguis and Ross believe that celebrities should become more well versed in FTC and SEC regulations, as well as how they differ, in order to avoid regulatory actions taken against them. *See* Guirguis & Ross, *supra* note 85 (highlighting the differences in FTC and SEC disclosure regulations).

[148] *Garrison* Complaint, *supra* note 1, at 5, 37; *see* Guirguis & Ross, *supra* note 85 (listing the FTC disclosure regulations for sponsorships, endorsements, advertisements, and similar acts).

[149] *E.g.*, *Garrison* Complaint, *supra* note 1, at 2. The FTX class action follows on the heels of other crypto litigation where consumers relied on celebrity or influencer endorsements to their own financial detriment. *Id.* at 2–3. *See generally* Barry, *supra* note 5, at 282–86 (providing examples of various cryptocurrency scams from 2020–2021 involving social media or celebrity advertising).

[150] *The Federal Trade Commission's (FTC) Mission*, FED. TRADE COMM'N (2012), https://www.ftc.gov/sites/default/files/documents/reports_annual/one-page-ftc-performance-snapshot/2012snapshotpar.pdf [https://perma.cc/PFS8-DVTX]. *But see* Vanessa Chan, Note, *When #AD Is #BAD: Why the FTC Must Reform Its Enforcement of Disclosure Policy in the Digital Age*, 13 OHIO ST. BUS. L.J. 303, 305–06 (2019) (describing the FTC's mission and pointing out how the vague definitions of unfair practices has led to murky waters regarding enforcement and standards for companies and influencers). Although the FTC has standards and guidelines for social media influencers, Chan argues that there is a lack of clarity, resulting in deceptive sponsored content. *Id.* at 306.

[151] *See* Part I.A, *supra* notes 31–48 and accompanying text.

ous FTC regulatory actions and private civil suits in the context of possible civil liability for celebrity endorsers participating in the cryptocurrency market.[152]

A. Steering Clear of Uncharted Waters: Avoiding Endorser Liability

With the rapid rise of the internet and the expansion of social media, new trade practices forced the FTC to update and expand its rules and regulations.[153] The 2009 update to the Guides reflected the changing landscape of celebrity and social media influencer endorsements.[154]

Although FTC enforcement actions ventured into social media, the actions stopped short of meaningful enforcement against individual celebrity or influencer endorsers.[155] This reticence was clear in enforcement action against Teami, where the FTC sued Teami for violating the FTC Act and obtained a one million dollar judgment to distribute to consumers.[156] Clear asymmetry existed between the enforcement action taken against the advertiser, Teami, and the Teami endorsers that included well-known celebrities like Cardi B and Demi Lovato.[157] The endorsers merely received warning letters educating them

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[152] *See infra* notes 153–190 and accompanying text.

[153] *See* Barry, *supra* note 5, at 307 (describing how social media influencers hold a unique position of power over their followers and why this class of advertisers should be governed by the FTC). Social media influencers are distinct from celebrity endorsers because consumers may be more inclined to believe social media endorsements are the influencers' true opinion rather than an advertisement on the platform. *Id.* at 307–08.

[154] *See id.* at 307 (describing "loopholes" in the disclosure guidelines that the 2009 update tried to fix). Celebrities advertising products on talk shows was one impetus behind the 2009 update to the Guides. *Id.* at 306. When advertisements featured celebrities, it was clear that there was a monetary connection between the celebrity and the advertiser, but the connection was less clear on a talk show. *Id.* at 306–07. The rise of the internet and the prevalence of influencers was another impetus behind the update to the Guides. *Id.* at 307. The FTC's goal has always been to make sure the connection between advertiser and endorser is clear to the audience. *FTC's Endorsement Guides: What People Are Asking*, *supra* note 37. If the relationship between the two is clear, no disclosure is needed. *Id.* Social media, the internet, and some television ads blurred the line in terms of whether an endorser is giving an opinion of their own volition or if they are being paid to share their opinion. *Id.*

[155] *See* Dorta, *supra* note 62, at 157 (arguing that the FTC should file complaints against companies and influencers using the same standard). The current enforcement regime lacks clarity and consistency, and it allows violations of FTC regulations by influencers without clear liability. *Id.*; *FTC's Endorsement Guides: What People Are Asking*, *supra* note 37 (stating that the FTC is generally not monitoring bloggers but will investigate if the agency learns of FTC Act violations). The FTC has stated that although the agency doesn't usually monitor bloggers, action against individual endorsers is possible in some circumstances. *FTC's Endorsement Guides: What People Are Asking*, *supra* note 37.

[156] *See Teami* Complaint, *supra* note 33, at 16–17 (listing the violations of FTC regulations in the counts against Teami for the false health claims used in their advertisements). The FTC lists nine claims about products that Teami made in their advertisements without scientific evidence in violation of the FTC Act, including treating cancer, unclogging arteries, and creating substantial weight loss. *Id.*; *see Teami* Order, *supra* note 56, at 13–14 (ordering Teami to pay one million dollars to the Commission).

[157] *See* Terry et al., *supra* note 13, at 444 (emphasizing the discrepancy between the monetary judgment obtained against Teami and the lack of real action against its influencers). In the aggregate,

about FTC regulations, highlighting the FTC's attitude that advertisers should be the focus of meaningful enforcement action.[158]

Cryptocurrency, like social media, is a marketplace that is widely unregulated and expanding quickly.[159] The wild-west nature of cryptocurrency is compounded when influencers and celebrities are involved as endorsers, often using social media and the internet to bring in consumers.[160] Online scams that harm consumers through false, deceptive, or misleading advertising are historically within the FTC's regulatory scope.[161] The private class actions against cryptocurrency platforms cite violations of advertising practices that mirror Section 5 of the FTC Act.[162] The FTX litigation is ongoing, and it remains to be seen if the consumer protection arguments will succeed in holding the celebrity endorsers liable.[163] If the courts mirror the FTC's approach towards

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the influencers for Teami reached tens of millions of followers through their collective social media posts. *Id.* Despite making claims about the efficacy of the products, the influencers escaped being named in the lawsuit. *See* Bentz & Veltri, *supra* note 19, at 188 (quoting an influencer who claimed to have lost five pounds in a week as a result of Teami's product). A deceptive message violates FTC regulations that are meant to apply equally to advertisers and endorsers, but the FTC has chosen to pursue enforcement against only the advertiser. *Id.*

[158] *See* Terry et al., *supra* note 13, at 444 (describing the letters received by the endorsers as "warnings" that contained legal advice about how to better comply with FTC rules). The final order against Teami stipulates that going forward, the company must establish and implement a system to monitor their endorsers to ensure they are complying with FTC disclosure requirements. *Teami* Order, *supra* note 56, at 12. The onus is thus placed on Teami to monitor the influencers and celebrities posting on its behalf rather than on the FTC. *See id.* at 13 (stipulating that Teami must create reports that show the results of their monitoring system as part of the final order).

[159] *See* Barry, *supra* note 5, at 280–81 (highlighting the rapid growth in popularity of cryptocurrency and how it poses unique risks to consumers). While various federal agencies attempt to establish that cryptocurrency is within its scope, consumers are vulnerable to schemes offered by cryptocurrency platforms. *See id.* at 287–88 (summarizing the agencies that have sued cryptocurrency companies, including the CFTC, the SEC, and the FTC).

[160] *See* Su, *supra* note 5, at 125 (noting the unregulated nature of cryptocurrency and its intersection with social media). The popularity of meme-based coins exemplifies the intertwined nature of cryptocurrency and the internet. *Id.* at 130. These cryptocurrencies, based on memes, capitalize on internet culture or jokes to create interest and community buy-in, leading to the coin gaining value. *Id.* at 132. Celebrity or influencer involvement with coins often leads to surges of popularity and an increased price. *Id.* at 133. For example, Elon Musk raised the price of Bitcoin shares by four thousand dollars in a few hours after changing his Twitter bio to "#bitcoin." *Id.*

[161] *See* Barry, *supra* note 5, at 304 (defining the FTC's mission and commitment to protecting consumers from unfair and deceptive actions in the marketplace); Terry et al., *supra* note 13, at 413 (citing the FTC "[a]s the primary consumer protection administrative agency"). The FTC acknowledged the new risks to consumers created by the internet when it updated the Endorsement Guides in 2009 to help consumers be able to rely on the claims made in social media posts. *Id.* at 422.

[162] *See Garrison* Complaint, *supra* note 1, at 37 (listing the violations of the FDUTPA). The consumers in the FTX action allege that they acted reasonably in relying on the endorsers' false and deceptive advertising practices, and thus were misled and harmed. *Id.*

[163] *Id.* at 4–5; *see* Alison Frankel, *FTX, Voyager Celeb Endorsement Class Actions Spark Fight Over Law Firm Subpoenas*, REUTERS (Feb. 1, 2023), https://www.reuters.com/legal/transactional/ftx-voyager-celeb-endorsement-class-actions-spark-fight-over-law-firm-subpoenas-2023-02-01/ [https://perma.cc/8MKG-Z5LM] (reporting on recent developments in the FTX and Voyager litigation). As

companies like Teami, the result could be the FTX Entities being held liable rather than the individual endorsers.[164]

Outside of administrative actions, the possibility of endorser liability under the FTC Act and interpreted by the FTC Guides is often not reached by the courts, leaving the scope of liability unclear.[165] The court in *Garvey* did not reach the question because it held that the defendant, Garvey, did not meet the Guides' definition of an "endorser."[166] In *Brady*, a private class action suit, the claim against the individual endorser Polizzi was dismissed because it lacked sufficient evidence to prove that the consumer relied on the defendant's representations about the product.[167] These outcomes provide no clarity about the duty endorsers owe to consumers.[168] These cases also do little to create supportive case law for future cases that state a claim against individual endorsers.[169]

The December 2022 decision to dismiss the claims against the celebrity defendants in the *Huegerich* class action suggests that lack of causation resulting in actual injury may preclude courts from determining endorser liability.[170]

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the class action continues to develop, both sides remain embroiled in disputes over issues such as the scope of discovery. Frankel, *supra*.

[164] *See Teami* Complaint, *supra* note 33, at 14–15 (including the deceptive celebrity and influencer endorsements that generated sales for Teami's products). Although the FTC's complaint lists specific social media advertisements by celebrities on their social media, the enforcement action implicates only the brand, not the individual endorsers. *Id.* at 2; *see* Godoy, *supra* note 121 (reporting on the dismissal of claims against Kim Kardashian and other celebrity defendants in the EMAX litigation). The subsequent refiling of the EMAX complaint and the judge's decision to move forward with the case is a positive sign in the trending of ongoing crypto suits. *See* Frankel, *supra* note 122. The judge emphasized that the defendants' enrichment was at the expense of their loyal fanbases. *Id.*

[165] *See* Fed. Trade Comm'n v. Garvey, 383 F.3d 891, 903–04 (9th Cir. 2004) (declining to assess whether spokespersons could be held liable under the Guides); Brady v. Basic Rsch., L.L.C., 101 F. Supp. 3d 217, 224 (E.D.N.Y 2015) (dismissing claims against a spokesperson without addressing the question of endorser liability pursuant to FTC statutory authority); Lyons, *supra* note 145 (reporting on three FTX defendants who chose to settle rather than continue with the class action lawsuit).

[166] *Garvey*, 383 F.3d at 904. The Ninth Circuit Court of Appeals affirmed the district court's ruling that Garvey's statements did not meet the FTC's standard for an endorsement. *Id.* The court further noted that Garvey's claims did not necessitate more in-depth substantiation because they pertained to his own personal weight loss, an undisputed fact. *Id.* at 905.

[167] *Brady*, 101 F. Supp. 3d at 229. The dismissal foreclosed the possibility of holding the individual endorser, Polizzi, liable for her role in the deceptive advertising practices. *Id.*

[168] *See Garvey*, 383 F.3d at 903–04 (declining to answer whether the Guides provide an alternative or independent source of liability for endorsers because Garvey did not meet the definition of an endorser); *Brady*, 101 F. Supp. 3d at 229 (dismissing the case against Polizzi on procedural grounds without addressing any substantive theory of liability).

[169] *See* Bentz & Veltri, *supra* note 19, at 193 (discussing the possibility of holding influencers civilly liable). Case law has not clearly established whether individual endorsers can be held directly liable to consumers for their role in misleading trade practices. *Id.*; Brison et al., *supra* note 46, at 176 (observing that there have been few cases that attempt to hold an individual endorser directly liable to consumers for false advertisements).

[170] *See* Godoy, *supra* note 121 (observing that the class action lawsuit for endorsements of crypto was dismissed because investors could not establish that they relied on the promotions) *Brady*, 101 F. Supp. 3d at 229 (granting Polizzi's motion to dismiss based on lack of causation by her endorsement).

Actions that do not provide sufficient evidence that consumers suffered harm as a result of reliance on endorsements risk dismissal.[171] Causation and injury-in-fact were treated as a threshold determination in *Brady* before the court could directly address the possibility of civil liability for individual endorsers, underscoring the importance of this factor.[172] Count Two of the FTX complaint attempts to establish a clear connection between the celebrity defendants' endorsements and the class members' injuries.[173] This attempt could provide facts that distinguish the scenario from the facts of *Brady.*[174]

As of June 2023, the previously dismissed claims against endorsers like Kim Kardashian and Floyd Mayweather were revived after an amended complaint added facts showing reliance on the social media posts and, therefore, causation. Frankel, *supra* note 122. The judge called the defendants' use of social media to hype the crypto assets "an unscrupulous and thereby unfair business practice" because they lacked any substantive basis to prove the tokens' value. *Id.* (quoting Order Granting in Part & Denying in Part Defendants' Omnibus Motions to Dismiss & the Individual Defendants' Motions to Dismiss & Strike at 72, *In re* Ethereummax Inv. Litig., No. CV 22-00163 (C.D. Cal. June 6, 2023)). The lack of disclosure regarding payment for the crypto endorsements also factors into the plaintiffs' case against the celebrities. *Id.*

[171] *See Brady*, 101 F. Supp. 3d at 229 (holding that further evidence was necessary to prove plaintiff's injury-in-fact resulted from reliance on the celebrity defendant's endorsement). In *Brady*, the court was able to avoid the question of endorser liability by dismissing the claim for reasons that do not implicate endorser liability. *See* Bentz & Veltri, *supra* note 19, at 193 (noting that the court in *Brady* dismissed the claim for lack of causation).

[172] *Brady*, 101 F. Supp. 3d at 227 (defining the concept of "standing" to sue, including injury-in-fact traceable to the actions of the defendant). The plaintiffs in *Brady* could not show an injury traceable to the spokesperson, leading to dismissal of the claim against Polizzi. *Id.* at 229. *Luman* differed from *Brady* because the court dismissed the claims against Theismann, the celebrity defendant, on the grounds that he was a spokesperson rather than a seller, avoiding an analysis regarding injury and harm. *See* Luman v. Theismann, 647 F. App'x 804, 807–08 (9th Cir. 2016) (affirming in part the district court's dismissal of claims).

[173] *See Garrison* Complaint, *supra* note 1, at 37 (establishing plaintiffs' reliance on celebrity endorsements leading to their monetary damages). CNBC interviewed FTX investors who lost money following the collapse. Kate Rooney & Jessi Joseph, *FTX Consumers Who Lost a Fortune on the Bankrupt Exchange Are Doubling Down on Crypto*, CNBC (Oct. 2, 2023), https://www.cnbc.com/2023/10/02/ftx-customers-who-lost-fortune-are-doubling-down-on-crypto-.html [https://perma.cc/93NA-GASG]. One investor relayed that he decided to invest in FTX after seeing Larry David's Super Bowl commercial, feeling that it was a safe investment route because of the famous names attached to the brand. *Id.* The investor lost $174,000. *Id.* The investor decided to sell his bankruptcy claim for pennies on the dollar, receiving just $19,000. *Id.* He reported that he planned to use the payout to invest in more crypto. *Id.*

[174] *See Garrison* Complaint, *supra* note 1, at 6 (introducing plaintiff Edwin Garrison and explaining his reliance on the misrepresentations and omissions of the defendants that led to monetary damages). Count Two describes the harm suffered by the plaintiffs as being "directly and proximately caused by" the actions of the defendants. *Id.* at 37; *see also* Allen et al., *supra* note 16, at 1088 (listing three goals that the FDUTPA attempts to promote regarding consumer protection). When consumers are harmed by unfair or deceptive business practices, lawsuits that seek monetary damages may also deter other businesses from engaging in those practices in the future. *See id.* (noting that the FDUTPA acts as a deterrent to businesses).

B. Charting a New Path to Liability: Potential for Endorser Liability

The FTC enforced its regulations against the online gambling service, CSGOLotto, as well as two of the influencers who endorsed the service through their YouTube channels and social media pages.[175] The FTC framed this action as the first of its kind in finding that the influencers engaged in deceptive trade practices.[176] Although that statement is true, there is a notable caveat to this situation: the two influencers were owners and officers of the company.[177] Following the enforcement action against CSGOLotto, it is unclear if an ownership interest or control of the company is necessary for individuals to be subject to enforcement action.[178] Nonetheless, enforcement against CSGOLotto influencers proves that the FTC is willing and able to enforce against individual endorsers, at least in some capacity.[179]

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[175] CSGOLotto, Inc., 162 F.T.C. 3184, at *2 (2017) (complaint). Trevor Martin and Thomas Cassell were the respondents in the FTC action, along with CSGOLotto. *Id.* at *1. The CSGOLotto action was an administrative proceeding that took place before the FTC rather than a court. *Id.* The FTC's complaint lists multiple examples of the advertisements that allegedly violated the FTC Act, most coming from respondents' YouTube pages. *Id.* at *2. The respondents Martin and Cassell allegedly engaged in deceptive promotion, pretending to discover the CSGOLotto website and lying about communicating with the owners on Twitter. *Id.* Neither respondent disclosed anywhere that they were owners and officers of the company. *Id.* The FTC alleged that there was no disclosure in any of the promotions that the influencers were being paid or had any type of material connection to the company. *Id.* at *2–3.

[176] Press Release, Fed. Trade Comm'n, *supra* note 65. In the press release issued after the enforcement action, the acting FTC Chairman stated that the decision should "send a message" to individual influencers that they must properly disclose material connections when advertising online. *Id.*; *see* Dorta, *supra* note 62, at 154 (explaining the repercussions for CSGOLotto in the FTC action). The requirements issued in the Final Decision and Order apply to CSGOLotto as a company and its owners, the influencers named in the action. Dorta, *supra* note 62, at 154.

[177] *CSGOLotto*, 162 F.T.C. 3184, at *1. CSGOLotto employed many other gaming influencers other than the respondents, all of whom were paid and did not disclose their connection to the company. Terry et al., *supra* note 13, at 438. *Compare Teami* Complaint, *supra* note 33, at 14–15 (including influencer endorsements in the complaint but not including influencers as defendants), *with CSGOLotto*, 162 F.T.C. 3184, at *1 (naming Martin and Cassell as defendants).

[178] *See* Terry et al., *supra* note 13, at 438–39 (contrasting the CSGOLotto with other FTC enforcement actions in which the influencers were not owners and therefore not held liable). In 2013, the FTC issued a Final Decision and Order against Machinima, a video game company that failed to instruct its influencers to disclose their connection to the brand. *Id.* at 430. The Final Decision and Order required Machinima to establish and monitor influencer disclosure requirements internally, placing liability solely on the company rather than the individuals. *Id.* at 430–31. The settlement CSGOLotto entered into was meant to send a message to individual influencers but given the unique nature of the influencers as owners and officers, it is not clear whether the message will hold up in future actions. *See id.* (noting the uncertainty over whether influencers without ownership interest will be targeted by the FTC).

[179] *See* Press Release, Fed. Trade Comm'n, *supra* note 65 (emphasizing the settlement of the "first-ever" complaint against individual endorsers). *But see* Terry et al., *supra* note 13, at 438–39 (arguing that CSGOLotto is not a clear step forward from the lack of FTC enforcement action against individuals).

None of the celebrity influencers in the crypto class actions are officers of the companies they promoted, nor do they own more than very minor equity stakes.[180] If liability for violating FTC guidelines is dependent on the influencer's ownership position in a company, the FTC enforcement action against CSGOLotto may not provide a useful argument for the possibility of liability in the cryptocurrency litigations.[181]

In 1989, *Aramowicz v. Bridges*, the U.S. Bankruptcy Court for the Northern District of Illinois grappled with the question of liability for an individual endorser.[182] The court held that Bridges was an endorser and therefore had a duty pursuant to the FTC Guides to conduct his own research about the company's financial stability and substantiate the claims in his endorsements.[183] Not knowing the falsity of a statement does not necessarily protect an endorser from liability, as endorsers still need to adhere to a duty of reasonable care.[184]

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[180] *See Garrison* Complaint, *supra* note 1, at 6–7 (listing the celebrity defendants and their involvement with the FTX Entities); *Cassidy* Complaint, *supra* note 100, at 2–3 (describing Mark Cuban's massive involvement with Voyager through the partnership between Voyager and Cuban's NBA team, the Dallas Mavericks); *Huegerich* Complaint, *supra* note 115, at 2–3 (naming the parties to the class action and describing their engagement with the EMAX token); *Real* Complaint, *supra* note 127, at 8–9 (highlighting some of the most high profile defendants named in the complaint and their involvement with the allegedly deceptive Yuga Labs). The celebrity defendants in the previously cited complaints were all paid to endorse their respective crypto platforms, some with money, some with equity stakes, and some with various cryptocurrencies. *See* Chase Peterson-Withorn, *Exclusive: These FTX Investors Stand to Lose the Most from the Crypto Exchange's Implosion*, FORBES (Nov. 10, 2022), https://www.forbes.com/sites/chasewithorn/2022/11/10/exclusive-these-investors-stand-to-lose-the-most-from-ftxs-implosion/?sh=543cc82c2670 [https://perma.cc/8WPQ-75WX] (reporting on the status of FTX's biggest investors in the wake of its emergency bankruptcy). Tom Brady and Gisele Bundchen owned 0.15% and 0.09% of FTX respectively as of June 2021, stakes that would have been worth $45 and $25 million before the crypto prices crashed. *Id.*

[181] *See CSGOLotto*, 162 F.T.C. 3184, at *1 (naming the respondents and emphasizing their roles as majority stakeholders and decision-making officers). The two respondents owned 85% of the company collectively and were actively involved in controlling or participating in the acts and practices of the business. *Id.* These facts differ from the facts of the FTX litigation as the celebrity defendants were paid to promote the entity but had less than 1% ownership and no control or authority over the company. *Garrison* Complaint, *supra* note 1, at 6–7, 21; *see* Peterson-Withorn, *supra* note 180 (noting Tom Brady and Gisele Bundchen's respective stake percentages in FTX).

[182] Aramowicz v. Bridges (*In re* Diamond Mortg. Corp. of Ill.), 118 B.R. 575, 580–81 (Bankr. N.D. Ill. 1989). The bankruptcy court denied celebrity endorser Lloyd Bridges' motion for summary judgment, explaining that he could be held liable for violating Illinois state law governing advertising practices. *Id.* at 583.

[183] *Id.* Bridges argued that he was merely a spokesperson for Diamond Mortgage Company and therefore should face no liability for his role in promoting the company's fraudulent Ponzi scheme. *Id.* at 580. The court undertook an analysis to determine whether Bridges was a spokesperson whose claims reflected the sponsor's view or if he was an endorser stating his own personal opinion. *Id.* The court held that he was an endorser, and his lack of expertise in the area did not prevent him from facing liability. *Id.* at 581.

[184] Brison et al., *supra* note 46, at 181. Consumers can bring claims for negligent misrepresentation, a tort theory of liability, when the plaintiff purchases a product in reliance on the defendant's endorsement. *Id.* at 179. The factors a plaintiff must show to prove negligent misrepresentation are: (1) false information supplied by the defendant, (2) a breach of reasonable care or competence by the

The case settled, eliminating the opportunity for the court to answer the question about Bridges' duty to consumers, and whether it had been breached.[185] Nevertheless, the court denied the defendant's motion for summary judgment, holding that the claim against him for violating consumer protection law had merit and could potentially succeed.[186]

The FTX complaint and *Aramowicz* both base endorser liability, at least in part, on a lack of due diligence.[187] Because the case settled before further proceedings, the court in *Aramowicz* did not discuss what duty endorsers owed to their audience.[188] This question still looms in the FTX class action, but *Aramowicz* does not foreclose the possibility that endorsers could be held liable for failing to meet a standard of due diligence and a level of care to consumers.[189] Overall, through FTC enforcement or through private civil litigation,

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defendant while obtaining the information, (3) intent by the defendant to influence the plaintiff and cause reliance upon the misrepresentation, and (4) after reasonable reliance on the information, the plaintiff sustained damages. RESTATEMENT (SECOND) OF TORTS § 552 (Am. Law Inst. 1977). This tort theory of liability is not implicated in the crypto litigation but is nonetheless an avenue pursued by consumers seeking endorser liability. *See* Brison et al., *supra* note 46, at 179 (summarizing a case in which a consumer sued the magazine *Good Housekeeping*, alleging negligent misrepresentation when a pair of shoes with the "*Good Housekeeping* seal" caused her to sustain injuries (citing Hanberry v. Hearst Corp., 81 Cal. Rptr. 519 (Dist. Ct. App. 1969)).

[185] *See* Bentz & Veltri, *supra* note 19, at 193 (describing how attempts by private plaintiffs to hold endorsers liable for misleading advertisements have not clarified the issue). Defendant Bridges originally refused to settle on the grounds that he was not an endorser, but a bankruptcy judge ruled against that conclusion, holding that Bridges had a duty of substantiation. Brison et al., *supra* note 46, at 180. The issue of duty to substantiate is often raised in the context of salespeople making representations on behalf of their principal. *See* Elrod v. Bayer Corp., No. 19 cv 06408, 2020 WL 4284416, at *3–5 (N.D. Ill. July 27, 2020) (analyzing plaintiff's claim for negligent misrepresentation against sales representative for a birth control company). In *Elrod*, the court held that the plaintiff's claim had no chance of success because the case law indicated that sales representatives had no legal duty to consumers and therefore no duty to substantiate the information they disseminated. *Id.* at *5. Comparing this case to *Aramowicz*, courts are undecided on whether a duty exists to substantiate claims. *Compare id.* (holding that no duty to substantiate existed), *with Aramowicz*, 118 B.R. at 582 (holding that an issue of fact existed over whether the endorser satisfied a duty of care to substantiate his endorsements).

[186] Brison et al., *supra* note 46, at 180. The court evaluated Bridges claim that he was merely a spokesperson and rejected this argument. *Aramowicz*, 118 B.R. at 583.

[187] *Garrison* Complaint, *supra* note 1, at 5; *Aramowicz*, 118 B.R. at 579–80. *Aramowicz* bases the allegations against Bridges on the FTC Act and the Guides' provisions about substantiating the truthfulness of the claim being made, arguing a lack of due diligence into the mortgage company's financial past. 118 B.R. at 579–80. Although the FTX Complaint does not reference the Guides, it alleges that the lack of due diligence on the part of the FTX Ambassadors was part of the violation of Florida's consumer protection statute. *Garrison* Complaint, *supra* note 1, at 5, 37.

[188] *See* Bentz & Veltri, *supra* note 19, at 193 (concluding that *Aramowicz* left questions about endorser liability unanswered).

[189] *See id.* (speculating that individual endorsers may be subject to civil liability); *Aramowicz*, 118 B.R. at 582 (holding that a factual question about due diligence into the mortgage company still existed). Because there was a lingering question about whether Bridges or his team undertook efforts to substantiate the claims, the court could not conclude whether his duty under the Guides was met. *Aramowicz*, 118 B.R. at 582.

courts have yet to conclusively answer the question of whether endorsers can be directly liable to consumers.[190]

III. FIXING THE CRYPTO CRISIS: TIME FOR THE COURTS AND FTC TO GET SERIOUS ABOUT CONSUMER PROTECTION

Cryptocurrency and celebrity endorsements both pose consumer protection risks separately, and those risks are magnified when the two are combined.[191] Lawsuits continue to pile up involving celebrity endorsers and deceptive cryptocurrency platforms.[192] The FTX class action plaintiffs collectively lost billions of dollars investing in the fraudulent platform, but given the status of FTX's bankruptcy, it is unlikely there will be any payout from the company to the consumers.[193] Because of this financial reality, plaintiffs' attorneys have broadened their horizons in searching for restitution from the celebrity endorsers of the scheme.[194] Using the statutory authority established by the FTC Act

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[190] *See* Bentz & Veltri, *supra* note 19, at 193 (noting that there is a lack of precedent involving social media influencers due to the newness of the medium, and further noting that the limited precedent does not decide the issue of liability); Terry et al., *supra* note 13, at 448 (reporting that the FTC has not found an individual influencer solely liable for participating in a deceptive advertising scheme). Case law in the area is continuing to develop, but some recent decisions have indicated courts may be unlikely to hold individual social media influencers liable for their misleading posts. *See* Bentz & Veltri, *supra* note 19, at 194 (citing Ohio and California cases in which claims against endorser defendants were dismissed).

[191] *See* Barry, *supra* note 5, at 281 (stating how cryptocurrency schemes resulted in $80 million reported losses by consumers in 2021). Cryptocurrency schemes grew in popularity on social media platforms like Twitter, TikTok, and YouTube, allowing social media influencers to promote digital assets and crypto investment opportunities for their own gain at the cost of consumers. *Id.* at 282; *see also* Chan, *supra* note 150, at 309–10 (describing the unique relationship social media influencers build with their followers). Chan explains that influencers capitalize on "engagement," an "emotional, intuitive experience" that allows the influencer to best utilize their platform for advertising. Chan, *supra* note 150, at 310. Social media allows consumers to feel like a part of a community and foster a sense of relationship with influencers and celebrities, deepening their loyalty and trust to the individual or brand they follow. *Id.* at 314.

[192] *E.g.*, *Garrison* Complaint, *supra* note 1, at 37. Part I.C briefly summarizes four other complaints involving celebrity defendants engaged in cryptocurrency promotion in addition to the FTX class action. *See supra* notes 83–135 and accompanying text. This Note primarily focuses on the FTX class action, but the Voyager, Yuga, and EMAX class actions share many commonalities, including the goal of holding individual endorsers liable to consumers for their role in advertising the crypto companies. *See* cases cited *supra* Part I.C, notes 83–135 and accompanying text.

[193] *Garrison* Complaint, *supra* note 1, at 2; *see* Peterson-Withorn, *supra* note 180 (describing the substantial investments various companies and groups put into FTX before its collapse). *Forbes* reported that investors had invested over $1.8 billion into FTX over the course of three years, all of which was lost when FTX collapsed. Peterson-Withorn, *supra* note 180; *see* Carolina Bolado, *FTX Leader, Sports Stars Hit with Investor Suit Over Collapse*, LAW360 (Nov. 16, 2022), https://www.law360.com/articles/1550002/ftx-leader-sports-stars-hit-with-investor-suit-over-collapse [https://perma.cc/5DGU-CLEK] (reporting on the FTX class action filing and describing how the FTX Entities operated). FTX filed for bankruptcy with at least $10 billion of debt. Bolado, *supra*.

[194] Zeitchek & Mark, *supra* note 97. Because the FTX Entities will not be able to recover all the losses of their consumers, the plaintiffs decided to seek restitution from deeper pockets: the celebrity

and reflected in state law, the courts hearing the various cryptocurrency class actions should consider the positive implications of holding individual endorsers directly liable to consumers.[195] Relying on FTC statutory authority, endorser liability is possible from a legal perspective, and necessary from a policy perspective.[196]

Section 5 of the FTC Act defines unlawful trade practices and section 13 of the FTC Act grants enforcement power to the FTC when individuals engage in these practices.[197] The Guides supplement and clarify the FTC Act, and although they do not have the force of law on their own, when combined with the legal authority of the FTC Act, the combination forms a legal basis for an endorser theory of liability.[198] It seems unlikely that the FTC will bring enforcement action against any individual celebrity, influencer, or endorser for their role in promoting cryptocurrency based on FTC enforcement trends in the age of social media.[199] Nonetheless, the FTC is the regulatory body devoted to

defendants. *Id.* The plaintiffs' attorney Moskowitz's strategy reflects the fact that the celebrity defendants are more financially stable than the FTX Entities or the former CEO, Bankman-Fried. *Id.*; *see also* Declaration of John J. Ray III in Support of Chapter 11 Petitions & First Day Pleadings at 1, *In re* FTX Trading Ltd., No. 22-11068 (Bankr. D. Del. 2022) [hereinafter "Declaration of Ray"] (petitioning for Chapter 11 relief as debtor-in-possession and newly appointed CEO for the FTX Entities). John J. Ray III declared bankruptcy for the FTX Entities after being appointed as the new CEO in Bankman-Fried's absence. Declaration of Ray, *supra*, at 1. Ray had extensive experience restructuring corporate entities facing collapse and criminal activity, including Enron. *Id.* at 2. Ray stated he had never "seen such a complete failure of corporate controls and such a complete absence of trustworthy financial information" in his entire career. *Id.*

[195] *See* Barry, *supra* note 5, at 326 (arguing that the FTC should hold endorsers accountable). Despite the lack of case law surrounding the issue, a development in the EMAX class action in December 2022 may suggest difficulty in holding the celebrity defendants liable in crypto class actions. *See* Zeitchek & Mark, *supra* note 97 (reporting on the EMAX token class action that a California judge dismissed in December 2022). The plaintiffs named celebrities including Kim Kardashian and Floyd Mayweather Jr. in the complaint for promoting the token EMAX, alleging that they violated consumer protection laws. *Huegerich* Complaint, *supra* note 115, at 1. After a dismissal in December 2022, the plaintiffs' attorneys refiled their claims with additional evidence. *See* Godoy, *supra* note 121, at 2. According to reports about the dismissal, Judge Fitzgerald stated that the EMAX investors had partial responsibility for the loss of their money. Zeitchek & Mark, *supra* note 97.

[196] 16 C.F.R. § 255.1(d) (2023). The Guides apply to advertisers and endorsers equally as both can be held liable for violating the FTC Act requirements with the endorsement or advertisement. *Id.*; *see* Terry et al, *supra* note 13, at 407 (stating that the lack of FTC enforcement action against individual endorsers has undermined the FTC's mission of consumer protection).

[197] 15 U.S.C. §§ 45(a)(1), 53(b). Section 5 of the FTC does not define the terms "unfair" or "deceptive," but those types of acts or practices in commerce are disallowed. *Id.* § 45.

[198] *See FTC's Endorsement Guides: What People Are Asking*, *supra* note 37 (explaining that the Guides are meant to clarify how section 5 of the FTC Act applies to testimonials and endorsements).

[199] *See* Terry et al., *supra* note 13, at 459 (concluding that FTC enforcement has historically functioned as a model for other advertisers in the field to follow, but this trend has not extended to social media influencers). Terry, Silberberg, and Schmitz state that the FTC trend of educating rather than enforcing against influencers has led to "a status quo of non-compliance" and allowed influencers to avoid repercussions. *Id.*; *see* Dorta, *supra* note 62, at 158 (arguing that the FTC needs to hold individual influencers liable for violating the Guides to set an example). E-cigarettes are another market, like

consumer protection and could use its statutory authority to target individual endorsers.[200] An administrative enforcement action would function in the same way as a private cause of action, warning celebrity endorsers that they owe a duty of care to consumers.[201]

The FTX class action is ongoing, as are the similar cryptocurrency class actions discussed in this Note, and the outcome could substantially affect the future of not only cryptocurrency advertising, but celebrity and influencer endorsement generally.[202] If the court holds the celebrity defendants individually liable, it would send a message to celebrities and influencers that their endorsement of a product could result in personal accountability.[203] Personal accountability could take the form of restitution captured in a dollar amount, but it could also result in reputational harm due to the public nature of the fall-

cryptocurrency, in which influencers are paid large amounts to advertise products that pose substantial risks to consumers. Dorta, *supra* note 62, at 158.

[200] 16 C.F.R. § 255.0. Although the Guides are not legally binding, they provide the basis for compliance with the law for advertisers and influencers. *Id.* If this basis is not met, the FTC can take corrective action under section 5 of the FTC Act. *Id.* The Guides apply equally to marketers and endorsers, but enforcement action has thus far been targeted towards marketers rather than individual endorsers. *See* Bentz & Veltri, *supra* note 19, at 187–88 (providing background on the enforcement actions against companies compared to the actions against individuals). In 2017, the FTC enforced the Guides against influencers for the first time by sending educational letters about endorser responsibilities under the Guides. *Id.* at 188.

[201] Terry et al., *supra* note 13, at 457. FTC enforcement against even a few high-profile influencers that results in financial sanctions could send a message to the advertising world in general that would lead to better compliance with FTC guidelines. *Id.* Terry et al. argues that this action alone would serve to set precedent that deceptive advertising practices will not go unpunished. *Id.* at 457–58. *But see* Bentz & Veltri, *supra* note 19, at 189 (concluding that it does not seem likely the FTC will refocus or expand enforcement efforts from marketers to influencers). In 2020, the FTC Commissioner released a statement about comments on the Guides, focusing on the companies that employ influencer endorsers without focusing on the influencers themselves. Bentz & Veltri, *supra* note 19, at 189.

[202] *See* Part I.C, *supra* notes 83–135 and accompanying text (discussing the cryptocurrency cases other than the FTX class action); Brian Contreras, *Have Celebs Learned Their Lesson from the FTX Debacle?*, L.A. TIMES (Jan. 18, 2023), https://www.latimes.com/entertainment-arts/business/story/2023-01-18/has-hollywood-learned-its-lesson-from-the-ftx-debacle [https://perma.cc/EK52-69S3] (theorizing that the high-profile nature of the FTX class action could change celebrity involvement with risky endorsements like cryptocurrency in the future). The class action serves as a warning to celebrity endorsers that risky decisions result in consequences, hoping to deter celebrities from using their reputations to promote cryptocurrency investments in the future. Contreras, *supra*.

[203] *See* Contreras, *supra* note 202 (quoting the CEO of the Crypto Council to reflect on how celebrities may be hesitant to promote something they do not understand moving forward from the FTX case). The *L.A. Times* quotes the CEO for the Crypto Council for Innovation as well as an associate dean at Vanderbilt Law who speculate that liability for the A-Listers named in the FTX class action could precipitate a shift in celebrity engagement with the crypto industry. *Id.*; *see also* Brison et al., *supra* note 46, at 192 (concluding that endorsers' claims create confidence in the consumers who view the endorsement). Brison et al. focuses specifically on athlete endorser liability and warns that athletes should be wary of accepting endorsement deals without verifying the claims they will make. Brison et al., *supra* note 46, at 193.

out.[204] The threat of these outcomes may incentivize potential endorsers to conduct more thorough investigation and due diligence before accepting an endorsement deal.[205] The FTX complaint alleges that the celebrity defendants did not engage in due diligence before they promoted the FTX Entities to their fanbases, suggesting that independent investigation prior to endorsement may have provided a defense to the charges.[206]

The Guides' interpretation of the FTC Act institutes an affirmative duty of substantiation for endorsers.[207] The court in *Aramowicz* held that conducting independent investigation into the sponsoring company's financial stability and reputation were examples of due diligence available to celebrity endorsers.[208] Cryptocurrency is infamous for its lack of regulation and its volatility, two fac-

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[204] Brison et al., *supra* note 46, at 190 (explaining how athletes negotiate endorsement agreements to attempt to protect their reputations if a scandal occurs). If a company suffers a scandal, that negative image can attach to the celebrity endorser associated with the company, resulting in reputational harm and the potential loss of future deals. *Id.* Brison et al. adds that athlete endorsers are vulnerable to legal action for restitution, in addition to harm to their reputation, if the company they endorsed is insolvent. *Id.* at 191.

[205] *Id.* at 191. Checking into a company's past for scandals or issues, reviewing financial statements, and conducting general research are all ways for celebrity endorsers to conduct due diligence into a company. *Id.* at 191–92. *But see* Kia Kokalitcheva, *Sequoia Capital Partner Says Firm Was "Misled" by FTX*, AXIOS (Jan. 13, 2023), https://www.axios.com/2023/01/13/sequoia-capital-partner-says-firm-was-misled-by-ftx [https://perma.cc/3KHQ-7EGZ] (summarizing an interview with Sequoia Capital's partner recounting FTX's fraudulent communication with the venture capital firm). Alfred Lin of Sequoia Capital stated in an interview that when the firm looked at FTX's balance sheets and organizational charts, there was no sign that Alameda Research was anything other than an independent subsidiary of FTX, a material misrepresentation of the truth. Kokalitcheva, *supra* (quoting Alfred Lin). Bankman-Fried engaged in fraud to secure investments, deceiving venture capital firms who undertook rigorous due diligence before becoming involved with the entities. *Id.*

[206] *Garrison* Complaint, *supra* note 1, at 5. The complaint states that when Binance, the potential buyer of FTX, conducted its due diligence, the information it uncovered caused it to withdraw from the deal, implying that there were signs that the FTX Entities were not a sound platform. *Id.* at 9; *see* Aramowicz v. Bridges (*In re* Diamond Mortg. Corp. of Ill.), 118 B.R. 575, 583 (Bankr. N.D. Ill. 1989) (holding that the celebrity endorser had a duty pursuant to the FTC Guides to substantiate the truthfulness of his claims); *see also* Pete Syme, *Taylor Swift Didn't Sign $100 Million FTX Sponsorship Because She Was the Only One to Ask About Unregistered Securities, Lawyer Says*, BUS. INSIDER (Apr. 19, 2023), https://www.businessinsider.com/taylor-swift-avoided-100-million-ftx-deal-with-securities-question-2023-4 [https://perma.cc/VLD4-EZVU] (reporting on Taylor Swift's decision to turn down an FTX endorsement because FTX could not answer if the assets were securities governed by the SEC).

[207] C.F.R. § 255.2(a)–(b) (2023). If the endorser cannot get substantiation from the advertiser as to the veracity of its claim, the endorser must clearly disclose that results may vary, and no outcome is promised. *Id.* The Guides further caution that even a disclosure stating that results may vary may not be strong enough to overcome consumers' presumptions about the efficacy of the product. *Id.*

[208] *Aramowicz*, 118 B.R. at 580. The fraudulent mortgage company was in bankruptcy and the proceeding against Bridges, the celebrity defendant, took place in bankruptcy court. *See* Brison et al., *supra* note 46, at 180 (describing how the parent companies in the scheme were facing more than $40 million in claims due to its fraud, leading it to declare bankruptcy). Another actor, George Hamilton, was also named in a proceeding during the bankruptcy proceedings for advertising the mortgage scheme, but Hamilton ultimately settled after the court denied his motion for summary judgment. *Id.*

tors that suggest increased necessity for due diligence and investigation before involvement.[209] The court should find that a lack of due diligence on the part of the FTX Ambassadors violates their affirmative duty to substantiate the truthfulness of their claims under the requirements for endorsers imposed by the Guides.[210] Because cryptocurrency is rampant with fraudulent and deceptive schemes disguised as platforms, it may be difficult for potential endorsers to substantiate the truthfulness of their claims, a factor that could deter their involvement.[211] This deterrent effect would force celebrities to proceed with caution when accepting crypto endorsements and therefore strengthen consumer protection.[212] Endorser liability in the FTX case would not only affect celebrity endorsement of cryptocurrency, but it would send a message to celebrities interested in any type of endorsement that direct liability to consumers is possible.[213] Although cryptocurrency is a relevant example of the lack of liability for individual endorsers, this is a systemic problem in today's expansive

[209] *See* Su, *supra* note 5, at 125 (expanding on the lack of regulation associated with cryptocurrency and the frequency of fraud in the market). Su argues that the federal government should engage a third-party group to conduct research and produce analytics on cryptocurrency opportunities to effectively "herd" consumers towards investments that are supported by veritable data rather than tweets or memes. *Id.* at 148. The availability of trustworthy data would promote due diligence before investing, or possibly before endorsing in the context of celebrities and influencers. *Id.*

[210] *See* 16 C.F.R. § 255.0 (addressing how section 5 of the FTC Act applies to endorsements and testimonials in advertising). The Guides stipulate that advertisers can be held liable for false or unsubstantiated claims in their endorsements, and further notes that this liability extends to endorsers. § 255.1(d). The FTX complaint alleges that the celebrity defendants' claims were false and misleading to consumers in violation of Florida consumer protection law. *Garrison* Complaint, *supra* note 1, at 37.

[211] Fletcher, *supra* note 14. The FTC reported "record numbers" of investment scams from October 2020 to May 2021. *Id.* The FTC warned consumers to be wary of online financial tips about crypto investments due to the nature of cryptocurrency. *Id.*; *see* Rivera & Yi, *supra* note 13, at 34–35 (recommending that celebrity endorsers perform due diligence on the company and its owners to prevent endorsing a product or platform that is fraudulent); Contreras, *supra* note 202 (quoting a law professor's prediction that big name celebrities will no longer participate in crypto advertising in the wake of the FTX scandal). Professor Yadav of Vanderbilt Law School predicted to the *L.A. Times* that the crypto industry may become less dependent on celebrity endorsements for validation and seek "legitimation through regulation" instead. Contreras, *supra* note 202.

[212] *See* Barry, *supra* note 5, at 326 (positing that increased FTC regulation of cryptocurrency influencers would deter influencers from accepting digital currency endorsements); Zeitchek & Mark, *supra* note 97 (quoting advertising attorney Jeff Greenbaum about the possibility of celebrity endorsers being held liable in false-advertising claims). The FTC has typically enforced claims for false-advertising instead of allowing private parties to bring suit, and the likelihood of success for the FTX plaintiffs depends on the standards the court will apply. Zeitchek & Mark, *supra* note 97 (quoting Jeff Greenbaum).

[213] *See* Contreras, *supra* note 202 (hypothesizing that reputational damage may be more effective at deterring celebrity endorsers than any amount of monetary damages); Dorta, *supra* note 62, at 157–58 (arguing that the FTC should file cases against individual social media influencers). The e-cigarette advertising world, for example, is an area where the lack of effective regulation for endorsers can have disastrous consequences, specifically to people's health. Dorta, *supra* note 62, at 132. Dorta argues that FTC enforcement action against individual social media influencers generally would deter influencers from advertising these products. *Id.* at 158.

world of social media.[214] A decision to hold endorsers liable would empower consumers across sectors to seek restitution from unscrupulous and deceptive endorsers.[215]

CONCLUSION

Increased consumer protection through judicial decisions and FTC enforcement is necessary as the under-regulated cryptocurrency market continues to grow and take advantage of consumers. Using deceptive advertising practices, cryptocurrency companies and the celebrity endorsers they employ can unjustly enrich themselves while their fanbases are left with nothing. Deceptive advertising practices are squarely within the jurisdiction of the FTC, and the agency has cracked down on similar practices in other sectors in the past. Still, holding parent companies solely liable for the deception without enforcing liability against the individual endorsers is not enough to make the defrauded consumers whole. As the current crypto litigation has shown, the companies behind the scams are bankrupt, leaving nothing to pay the damages owed to consumers. Holding the wealthy celebrity endorsers individually accountable for their role in deceiving consumers gives these consumers an opportunity to receive the damages they are owed.

Finding individual endorsers liable pursuant to FTC deceptive trade practices would not only benefit the current victims of these schemes, but would also create a deterrent effect for celebrity endorsers going forward. Having to undertake due diligence to research endorsement opportunities or be held liable for deceptive advertising would enhance consumer protection in the crypto marketplace. Creating a chilling effect on rampant celebrity and social media influencer advertisements of dangerous crypto products would support and strengthen the FTC's mission of protecting consumers.

MADELINE SIMPSON

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[214] *See* Barry, *supra* note 5, at 325–26 (asserting that new methods of technology and business can be used to exploit consumers' excitement and lack of knowledge). Although cryptocurrency is an example of this phenomenon, it is a general concept that poses a danger to consumers. *Id.*; *see also* Dorta, *supra* note 62, at 137 (explaining how the FTC became involved in the battle for regulation regarding e-cigarettes due to misleading advertising and endorsements of the products).

[215] *See* Barry, *supra* note 5, at 326 (noting that if endorsers are held individually liable, the FTC could seek redress for consumers); Terry et al., *supra* note 13, at 459 (concluding that a lack of FTC enforcement action against individual endorsers has led to a culture of flaunting the law for influencers and celebrities).