Is the Stoken (STKN) Cryptocurrency a "Security" Under the Howey Case

Stokens, Inc.
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FORWARD:

This memorandum is based entirely on the opinion of the author, and **this document does not constitute legal nor financial advice.** Through interactions with the top coin founders, attorneys and experts in the security and cryptocurrency space I believe I've found a compliant way to create security tokens (stokens) and commodity tokens (crypto or cryptocurrency), which are both types of "coins."

I. EXECUTIVE SUMMARY

Stokens Inc. intends to fund operations from revenue or traditional funding. In this memorandum I will analyze whether the commodity cryptocurrency, STKN, in its current and future status, is a security as defined under the U.S. Securities Act of 1933 (the "1933 Act").

In performing this analysis, I relied on the facts regarding the manner in which I helped create Stokens and the current laws as I understand them regarding securities, commodities, exchanges, broker/dealers, venture capital, business types, contracts regarding investment and more. If laws and/or facts change from those summarized in this paper or any of the foregoing, the analysis contained in this memorandum may be affected and invalidated. I must also rely upon further

review and analysis of relevant statutes and case law and review of future commentary by regulators and subject matter experts.

A. Background

Stokens, a digital or cryptocurrency ("STKN" or "Coins") was created by Stokens, Inc. of Delaware, (the "Company"), a C Corp of Delaware, created by John Wright Gotts of Idaho ("Founder"). The Company undertakes business activity directed at the emergence of distributed ledger technology applications for global use. Unlike other cryptocurrencies, there have been no pre-sales of any cryptocurrency to raise capital nor have there occurred subsequent capital fundraising.

B. Summary of Legal Analysis

Historically, the courts and the Securities and Exchange Commission (SEC) have taken an extremely broad view that almost any kind of instrument for investment is a security. The current regulatory environment reflects extreme caution on the part of regulators like the SEC. Its Chairman Jay Clayton has repeatedly warned that cryptocurrency tokens in many cases look like securities and were susceptible to fraud and chicanery by insiders. Similarly, the U.S. Commodity Futures Trading Commission (CFTC) is coordinating carefully with the SEC and is moving rapidly to declare its jurisdiction and intention to enforce cryptocurrency regulations.

Significantly, attorneys with whom I've confirmed have found no court decisions or regulatory guidance for the particular circumstances pertaining to STKN – where coins in an early stage, such as STKN, were created without an accompanying pre-sale or a subsequent early offering using coin or tokens to raise capital for operations. It is my belief that STKN is akin to a digital orange that is provided to volunteers for donating time and expertise to the Stokens project. STKN cryptocurrency is provided purely as a reward for volunteer efforts, or given as a grant for projects that add value and help the Community reach goals. The Company has never sold or traded any form of coin to pay for operations and has only provided coins as a reward to Volunteers for work.

I note that the regulatory treatment of Bitcoin, which is widely viewed as a commodity and not a security[1], has many analogous facts. For example, the creator of Bitcoin (an unknown individual, using the pen name of Satoshi Nakamoto) never conducted a presale or an Initial Coin Offering (ICO). Like Bitcoin, STKN will not have a centralized controlling company committed or responsible for providing managerial oversight or maintenance of any underlying blockchain. At some point Satoshi and other individuals relinquished control of what they built. This is underway now at Stokens, with the Founder playing a management role at the request of the

1 [BU article and other cites]

Community, as a Volunteer and can be replaced by Community vote. The STKN Community now manages the STKN network, and Volunteers help with all aspects of growth in return for STKN coins.

Many of the facts and surrounding circumstances of the STKN cryptocurrency are substantially different from the pattern of facts that have led courts to find certain instruments to be securities. Analysis under the so-called Howey test (see Section III below) indicates that STKN does not possess the necessary elements for a finding that STKN is a security. Consequently, I conclude that there is a substantial possibility that a court or trier of fact may find that, given the distinguishable facts and characteristics, STKN is not a security.

Examples of the distinguishing facts and circumstances that support STKN not being a security under Howey include, but are not limited to the following:

1. there has never been a presale or offering by an issuer to raise capital or value for operating and establishing the blockchain network for STKN;
2. the Company receives capital from its corporate parent and hopes to eventually generate non-trivial revenue through operations unrelated to the blockchain network;
3. no company or particular individuals, such as the founder, has the responsibility or obligation to complete or maintain any Stokens-initiated blockchain development or to support a community of volunteers.
4. After creation by the Founder, the underlying STKN blockchain and cryptocurrency may or may not be supported by a community of volunteers and may or may not continue to be operational depending upon the support of such volunteers.
5. the community of volunteers in their judgment determines who will receive coins as a reward for perceived valuable service for the development of the STKN blockchain or other work the Communtiy finds valuable;
6. commercial activities by the Founder or Company will be conducted in a traditional manner through the Company and its subsidiaries, separate and apart from the STKN blockchain and Community;
7. the Company and its subsidiaries will raise capital as necessary to support commercial endeavors that are separate and apart from the STKN blockchain and cryptocurrency by conducting traditional private placement offerings in accordance with securities laws and regulations under, for example, Reg D and Reg A+.

II. BACKGROUND FACTS

Starting in 2018, Volunteers may begin selling their earned coins, but the Foundation has never and has no intention of ever selling STKN coins for operations.

The Founder, key advisers and unrelated volunteers received or were allocated a percentage of the coins (35%) and those coins will be distributed over four years, or what is left of that time from when they began earning coins.

STKN is a cryptocurrency for value storage and exchange, that can evolve as a Native Language platform for developers and entrepreneurs to easily build applications and services attractive to businesses and consumers (the "STKN Purpose"). The Founder established the Company and future subsidiaries to launch business products, provide business consulting, and services addressing opportunities in the digital asset sector generally (the "Company Purpose"). The White Paper states that the Company will not issue STKN cryptocurrency to raise capital for the Company. The Founder, founding team members and volunteers received their allocation of coins for the services provided in establishing the blockchain and initially facilitating the efforts of volunteers. The STKN White Paper provides that the Company will not retain STKN Coins in connection with the mining of the STKN once established on the EOS blockchain. The Company did not and will not receive any consideration for the Beta Coins currently outstanding.

STKN will be mined by delegates and individual miners, who are both voted into this trusted position by the Community, and will receive STKN based on the number of transactions they confirm on the blockchain. Further, STKN will be earned by volunteers and elected managers, who receive STKN for performing services such as the following: logos and other artwork, web design, website creation and maintenance, marketing, advertising, management of people, and many other daily tasks covered by volunteers, who may take on the STKN mission.

STKN is also expected to be available for purchase on a peer-to-peer basis at the Stokens.com website and other compliant exchanges, which are expected to register as money transmitters under FINCEN rules. All proceeds of sales, prior to Volunteers receiving Coins directly into a chosen exchange wallet, will be sold by the Volunteers in what will be referred to as a Volunteer Coin Conversion or "VCC."

The STKN White Paper acknowledges the success and evolution of STKN will depend both on the growth of the Stokens Community and the work they complete each month, the development of a decentralized external community of Volunteers and users interested in an altcoin dedicated to maintaining the STKN-initiated blockchains, on the number of organizations that depend on those blockchains, and also development of practical applications that essentially "sit on top" of that decentralized computer network. Crypto represents the currently held value of a specific community, its mission, and perhaps its blockchain, finished good, service or coupons for finished goods or services.

B. Disclosure of Risks in White Papers, Website & Educational Material

White Papers, website and educational material express warnings and will continually teach and train buyers of Volunteer coins and Volunteers that there exists significant risk that such a community will not develop and that STKN will not become a viable and useful blockchain cryptocurrency. Apart from the initial genesis block mining and software development for the framework for the STKN, the Company will not control or manage STKN or do ongoing maintenance of the blockchains.

The STKN White Paper concludes with three pages of disclosure about what holders should expect as to the commercial value and regulatory status of the Coins. Some of the statements there distance the fate of STKN from the fate and the efforts of the Company, such as:

["The STKN cryptocurrency. . . represents only the value of volunteers and eventually the underlying STKN blockchain, based on its presumed prospects and work accomplished, size of the network, total number of coin holders, the number and nature of the dApps and services being built on the STKN protocol and the daily work of volunteers earning the Coin."

"The STKN cryptocurrency, and the plans expressed for it in this white paper, is [sic] not meant to generate profits for any shareholders or private owners, nor does ownership of the STKN cryptocurrency provide a dividend, revenue sharing model."

"As the Stokens network matures we hope to see useful applications and services emerge for consumers, businesses, universities and governments, which could increase the perceived value of the network represent [sic] by the STKN cryptocurrency. Likewise, if Stokens fails to materialize or there is not interest from the community the value of the BTCL cryptocurrency will likely fall substantially in perceived value."

"Purchasers of the STKN cryptocurrency should not expect a profit from the ownership or resale of the cryptocurrency and should understand that its value is entirely speculative by nature as it trades on peer-to-peer exchanges."]

III. IS STKN A"SECURITY"

A. Definition of "Security" and the Howey Test

The definition of "security" under Section 2(a)(1) of the Securities Act of 1933 (and the nearly identical definition under Section 3(a)(10) of the Exchange Act of 1934) includes not only a number of specific types of financial instruments, such as notes, bonds, debentures and stock, but also broad categories of financial instruments, such as evidences of indebtedness and investment contracts.

Among these statutory definitions are the words "investment contract," a vague catch-all term, the contours of which were later defined by the U.S. Supreme Court in a case called SEC v. Howey, 328 U.S. 293 (1946). The four part test prescribed in that case remains the law today, and the SEC asserted its applicability to cryptocurrency or token sales in a Report of Investigation, dated July 25, 2017, finding that the public issuance of blockchain units called DAO Tokens should have been registered under the 1933 Act (the "DAO Report"). The underlying facts in the DAO Report pertain to an offering by an issuer, which is not the factual situation found with STKN.

The Howey test dictates that an investment contract exists if there is (1) an investment of money, (2) in a common enterprise, (3) with an expectation of profits, (4) solely from the efforts of others, without regard to the specific form of the instrument. All four factors must be present to find that the offered asset is a security.

In a December 2017 public statement, SEC chairman Jay Clayton underscored the importance for promoters of a cryptocurrency either to be able to demonstrate that the altcoins are not securities or to comply with applicable registration or exemption requirements of the federal securities laws before launching the altcoins. He also asserted his view that "tokens and offerings that incorporate features and marketing efforts that emphasize the potential for profits based on the entrepreneurial or managerial efforts of others continue to contain the hallmarks of a security under U.S. law." While features of a marketing effort are not determinative under Howey, these statements do signal factors that will draw the SEC's attention to an altcoin issuance and possibly attract an investigation or enforcement referral.

1. An investment of money.

Courts have repeatedly confirmed since Howey that "money" in this prong of the test includes all sorts of consideration, not only fiat currency. Goods, services, or a promissory note are sufficient [cites—Teamsters et al.], as is payment by cryptocurrency. [cite DAO Report and Shavers]. The STKN coins that have been issued have been ostensibly for services rendered by volunteers and the Founder. It is not clear to me that these types of services – translations, programming, et al would constitute "an investment of money." Furthermore, the Monopoly Game at McDonald's is not considered gambling when you purchase food to get game tokens for monetary prizes because you can write a self-addressed, stamped envelope to the Game company and they will send you free game pieces. Therefore, I would argue that you cannot count someone's time as money or the Monopoly game at McDonald's and other participating merchants would constitute gambling, in my opinion. Someone who studies for and successfully completes a test or teaches another who successfully passes a test cannot be a financial investment if they then earn coins for learning. Someone is not buying a security if they earn a coin for plugging their computer into a global computer network or to do work creating a new logo for a Community. I would argue that work performed by an individual to earn a reward

does not constitute monetary or any other form of purchase, or the Monopoly game at McDonald's would be illegal and considered gambling. Investment of volunteer time cannot constitute money invested or Bitcoin miners would also be considered purchasers, which doesn't appear to be the case, based on regulating bodies suggesting Bitcoin is a commodity.

Significantly, unlike Howey there was no initial offering for sale of STKN by the Company. There was no process that involved the sale of coins for cash or other cryptocurrency. Further, with STKN, no original owner paid consideration in cash, cryptocurrency or any other tangible or intangible asset. Consequently, with STKN, there was no express "investment of money" as required under Howey. Therefore, unless "services" provided for Coins, are deemed to be "investment of money," STKN does not meet the first prong of Howey and consequently would not be a security.

2. Common Enterprise

In determining whether or not a scheme satisfies the common enterprise requirements of the Howey test, federal courts have applied one or more if the following criteria: (i) horizontal commonality; (ii) broad vertical commonality; and (iii) strict vertical commonality.

Horizontal Commonality

The horizontal commonality approach to evaluating the existence of a common enterprise provides that a common enterprise exists if there is a "pooling of assets from multiple investors so that all share in the profits and risks of the enterprise. The Courts of Appeals taking this approach place great weight on whether the scheme involves a "pooling" of assets. For the common enterprise prong to be satisfied, horizontal commonality requires that an investor's assets be joined with another investor's assets into a joint enterprise in which investors share the risk of profit and loss according to his or her individual investment.

Given the circumstances with STKN, there is certainly no pooling of assets or a "joining" by multiple investors. At most, volunteers who received coins for services may have sold their STKN cryptocurrency secondarily for their own use, not for a pooling as required.

Several federal courts have held that when a seller has no ongoing obligation to act for the benefit of a common group of purchasers, the instrument sold does not satisfy the horizontal commonality test. For example, purchasers of plots of land in a common development have attempted to assert that these purchases constitute an investment contract because the value of their interests was tied to the common development of the land and community in which the plots were located. However, courts evaluating such assertions "have held that the developer must make a commitment to manage, develop or otherwise service the plaintiff's property in a common enterprise." This case is instructive for the STKN situation. The STKN Founders

never agreed to manage, develop or otherwise service the blockchain and STKN cryptocurrency. In fact, the Founders expressly stated in the STKN White Paper that they would not do so and any such development would fall to the volunteer community, and that the Company is a consulting and investment firm and not focused on development at all. Furthermore, the Company and the Community are utilizing the Block.One open-source EOS software for the STKN blockchain, and this will be maintained by Block.One.

In the absence of such an ongoing commitment, the venture to which the purchasers pay the purchase price is not a venture in which the purchasers share with each other a common risk of profit and loss. Rather they are paying a seller that is engaged in its own distinct venture and that will not directly generate profits and losses for the group of purchasers. Again, this is precisely the situation of STKN and its Founder in that he made it clear he and his associates will be operating a separate and distinct business of consulting and finding funding for software entrepreneurs. Thus, there is no "horizontal commonality" under the STKN facts and STKN would consequently not be a security under Howey.

b. Broad Vertical Commonality

The broad vertical commonality approach to evaluating the existence of a common enterprise focuses on the expertise of the promoter of the alleged security. Broad vertical commonality requires that the well-being of all investors be dependent upon the promoter's expertise.

In the case of STKN, the only potential "promoter," the Founder, expressly stated in the STKN White Paper that the Company would not apply expertise to the maintenance and completion of the STKN EOS-based blockchain. Moreover, given that volunteers will be "sellers" of STKN for their own benefit and purpose in secondary trading, there will be no common seller of STKN, since the creation and transfer of STKN on exchanges is decentralized. Additionally, the future value of STKN is not dependent on the expertise of the decentralized sellers (including the Founder) of STKN. Since no such sellers (Founder or volunteers), entered into any commitment to use their expertise to improve and create future value, STKN is not a security under the "broad vertical commonality" criteria for "common enterprise."

Courts have repeatedly adopted similar logic in instances where a developer sells plots of land based on representations that the developer will finish a land development, but will not continue to manage it after the initial development is complete, resulting in a finding of no common enterprise. Such cases support the situation for STKN in that the Founder, like the developer selling plots of land, stated clearly and made no commitment and entered no agreement that they would continue to manage the blockchain after the initial development was complete.

c. Strict Vertical Commonality

The strict vertical commonality approach to evaluating the existence of a common enterprise requires that the investors' fortunes be "interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties." In the STKN situation, the current holders of STKN coins, were and are not seeking to "interweave" their fortunes with the Founder, who never sought their investment but instead is expected to proceed with traditional forms of funding operations apart from the STKN cryptocurrency. Instead the holders of cryptocurrency sought the opportunity to earn coins by providing services to the STKN blockchain. Again, the Founder stated in the STKN White Paper and at other times that he would not maintain or complete the development of the STKN blockchain. In the White Papers, Stokens.org website and Volunteer Handbooks, it was stated that the success or failure of the STKN blockchain and cryptocurrency would depend solely upon the efforts of the volunteer community. Moreover, given the separate commercial business of the Company, the Founder's interests were and are separate from the volunteers, whose STKN coins have a value that is clearly dependent on the successful efforts of the community or Block.One to increase its use and function.

4. Expectation of Profits Solely From Efforts of the Promoter

The final prong of the Howey test requires that a person "is led to expect profits solely from the efforts of the promoter or a third party." In Forman, the Supreme Court explained that "[t]he touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of other." The corresponding "touchstone" of STKN is that there is no entrepreneurial or managerial efforts from the Founder or the Company or any other centralized entity. To the contrary, the STKN blockchain was established to be developed and built, if at all, by unrelated volunteers who might cooperate or not with each other, and might or might not be successful in creating a useful community and/or corresponding blockchain.

V. Conclusion

As stated earlier, given the current cautious and evolving regulatory environment, I cannot predict how a court with jurisdiction would rule as to whether STKN is a security. Moreover, in spite of clear distinctions, one must acknowledge that the SEC and courts might conclude that the circumstances surrounding STKN make it an investment contract under the Howey test.

However, as discussed, STKN can be substantially distinguished from the underlying circumstances in which courts have found other non-traditional instruments as securities. The essence of the analysis is whether the actions of the Founder to create a blockchain-focused movement, community and blockchain represented by STKN, as well as establish a framework for volunteers to operate a decentralized blockchain on which STKN resides, establishes a common enterprise under the Howey test. I see significant distinctions to those circumstances in

which a security was found to exist. The analogy of the activities of the Founder to those of a real estate developer that does not commit to complete the project seem strong. Therefore, there may be a substantial possibility that a court could find that STKN is not to be a security.

Without clear guidance from the regulating bodies I have spent more than four years exchanging knowledge with top attorneys in the United States, many of whom have completed the biggest ICOs or literally pioneered the space, those who wrote much of the JOBS Act and gave me their own interpretation of what they meant while writing Reg A+, for instance. I've met many of the pioneering founders who've created almost all of the current market value in this space. I believe I'm advised by the actual Satoshi, though I would never ask and I'm certain he would never tell if I did ask. I studied the AngelList model from one of the attorneys who wrote the opinion letter to the SEC, stating why Angel.co is not a broker/dealer, and I worked with the AngelList corporate council. I've debated why the SAFT is a frankenstein failure that is somehow trying to be a commodity for accredited investors and that it fails Howey because they use proceeds for operations.

In this time I've debated these topics with top partners at Pillsbury, Perkins, K&L Gates, Cooley, Paul Hastings, HHR... and in some cases with their entire crypto staff. I am represented by a firm with a deep bench of retired US, DOJ and SEC attorneys, including SEC folks who worked in enforcement, and even a retired SEC Commissioner. I have not come upon a single attorney yet who can tell me that I am wrong.

Having taken all good-faith efforts to-date and feeling confident in my logic, we will proceed with the pioneering sale of Volunteer coins in what will be the first ever Volunteer Coin Conversion (VCC). Volunteers can sell earned coins and buyers may support those efforts. Ultimately, STKN coins may then trade on compliant peer-to-peer exchanges, similar to what is allowed for digital securities under the JOBS Act.

At the end of the day I will use a stoken to fund operations following traditional funding methods but allowing the coins to trade on compliant exchanges between accredited investors for Reg D and amongst public coin buyers/sellers if a Reg A+ is successful.

And finally we now have what I believe is a compliant commodity cryptocurrency that is earned by volunteers, who like a Bitcoin miner volunteer might put up hardware, electricity, software, internet access, time, expertise and intent to earn coins.

1 See John Reed Stark, Ten Crypto-Financing Caveats, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Apr. 18, 2018), https://corpgov.law.harvard.edu/2018/04/18/ten- crypto-financing-caveats.

2 Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Statement on Cryptocurrencies and Initial Coin Offerings (Dec. 11, 2017), https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11 (hereinafter Clayton Cryptocurrencies and ICO Statement).

3 According to the SEC, "The DAO was created . . . with the objective of operating as a for-profit entity that would create and hold a corpus of assets though the sale of DAO Tokens to investors, which assets would then be used to fund 'projects'." Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, SEC Release No. 81207, at 1 (July 25, 2017), https://www.sec.gov/litigation/investreport/34- 81207.pdf (hereinafter "DAO Report"). Additionally, "[t]he holders of DAO Tokens stood to share in the anticipated earnings from these projects as a return on their investment in DAO Tokens," and they "could monetize their investments in DAO Tokens by re-selling DAO Tokens on a number of web-based platforms . . . that supported secondary trading in the DAO Tokens." Id.

4 See id. at 10, 17-18. In the DAO Report, the SEC analyzed a token sale by the DAO. The SEC's analysis focused principally on whether investors in the DAO Tokens relied on "others" to manage and affect the failure or success of the enterprise. The SEC concluded that the "curators" of the DAO played this managerial role, by, for example, holding themselves out as experts in blockchain protocol and deciding which projects DAO Token holders would vote on. Id. at 12-15.

5 The U.S. Commodity Futures Trading Commission ("CFTC") has asserted since 2015 that cryptocurrencies are properly defined as commodities. See CFTC, A CFTC Primer on Virtual Currencies, at 11 (Oct. 17, 2017), https://www.cftc.gov/sites/default/files/idc/groups/public/documents/file/labcftc_primercurrencies100417.pdf (noting "CFTC first found that Bitcoin and [] virtual currencies are properly defined as commodities in 2015"); see also CFTC v. Coinflip, Inc., d/b/a Derivabit, CFTC Release No. 7231-15 (Sept. 17, 2015).

6 We similarly believe the circumstances here can be distinguished from the recent administrative proceeding before the SEC involving Munchee, Inc. See In re Munchee Inc., Securities Act of 1933 Release No. 10445, Administrative Proceeding File No. 3-18304 (Dec. 11, 2017), https://www.sec.gov/litigation/admin/2017/33- 10445.pdf. Munchee, a business that created an iPhone app for people to review restaurants, offered and then sold digital tokens to be issued on a blockchain or distributed ledger. Id. at 1. Specifically, Munchee conducted the offering of its tokens to raise $15 million in capital, so that the company could improve its app and recruit users to buy advertisements and write reviews on the app. Id. In its offering, Munchee explained why it believed the tokens would increase in value as a result of the Company's efforts. Id. at 1-2. In finding that these tokens were securities under the Howey test, the SEC relied on (among other things) the facts that (1) Munchee offered and sold the tokens in a general solicitation that included potential investors, and investors paid either Bitcoin or

Ether in return for the tokens, (2) the proceeds of the offering were intended to be used by the company to "build an 'ecosystem' that would create demand for [the] tokens and make [the] tokens more valuable," (3) "[i]nvestors' profits were to be derived from the significant entrepreneurial and managerial efforts of others – significantly Munchee and its agents," and (4) "token purchasers had a reasonable expectation of profits from their investment in the Munchee enterprise." Id. at 8-9. As we explain below, in the case of STKN, there was no initial offering by the Company and its Founder, and neither the Company nor the Founder agreed to manage, develop, or otherwise service the blockchain and STKN cryptocurrency. Additionally, the White Papers that the Company has published expressly warn that there is a significant risk that STKN will be an unprofitable venture. As with the DAO case, however, it is not possible to assure you that these differences between STKN and the Munchee case will be of consequence to either the SEC or a court.

7 The SEC has not yet formally determined whether Bitcoin itself is, or is not, a security. In recent testimony before the House Appropriations Committee, SEC Chairman Clayton stated, "Bitcoin, as a replacement for currency, has been determined by most people to not be a security." He also said that "tokens, which are used to finance projects" are securities, and "to the extent that something is a security, we should regulate it as a security." Coin Center, Rep. Stewart asks SEC's Clayton about cryptocurrencies, YOUTUBE (Apr. 27, 2018), https://www.youtube.com/watch?v=7P6q6AjUKCc.

8 White Paper I included several statements distancing the fate of the Coins from the fate and the efforts of the Company. For example, White Paper I stated: (a) "The STKN cryptocurrency. . . . represents only the value of the underlying STKN blockchain, based on it presumed prospects and work accomplished, size of the network, total number of holders, the number and nature of the Apps and services being built on the STKN protocol and the daily work of volunteers earning the Coin"; (b) "The STKN cryptocurrency, and the plans expressed for it in this white paper, is [sic] not meant to generate profits for any shareholders or private owners, nor does ownership of the STKN cryptocurrency provide a dividend, revenue sharing model"; (c) "As the Stokens network matures we will see useful applications and services emerge for consumers, businesses, universities and governments, which could increase the perceived value of the network represent [sic] by the STKN cryptocurrency. Likewise, if Stokens fails to materialize or there is not interest from the community the value of the STKN cryptocurrency will likely fall in perceived value"; and (d) "Purchasers of the STKN cryptocurrency should not expect a profit from the ownership or resale of the cryptocurrency and should understand that its value is entirely speculative by nature as it trades on peer-to-peer exchanges."

9 We note, however, Company's role in (a) providing the Treasury wallet until volunteers/community vote for replacement utility; (b) making third party community governance apps available to STKN community until volunteers/community vote for replacement

utility; and (c) maintaining a (non-exclusive) website identified with the Stokens name. Founder represents that neither he nor Company will control community voting, directly or indirectly.

10 As described in more detail below, our understanding is that the Founder intends to operate a separate and distinct business of consulting software entrepreneurs.

11 SEC v. Howey, 328 U.S. 293, 297 (1946).

12 Id.

13 See supra note 3 and accompanying text; see also Munchee, supra note 6, at 8-9 (SEC determines that MUN tokens are investment contracts).

*14 See also SEC v. Shavers, No.4:13-CV-416, 2013 US. Dist. LEXIS 110018, at *4-6 (E.D. Tex. Aug. 6, 2013) (finding that shares of digital hedge fund Bitcoin Savings and Trust were "investment contracts" and therefore securities). The court in Shavers limited its holding to whether shares of the hedge fund were investment contracts; it did not decide whether Bitcoin itself constitutes an investment contract. Id. at *6.*

15 328 U.S. 293 (1946). 16 Id. at 298-99.

17 Clayton Cryptocurrencies and ICO Statement, supra note 2. "By and large, the structures of initial coin offerings that I have seen promoted involve the offer and sale of securities and directly implicate the securities registration requirements and other investor protection provisions of our federal securities laws." Id. See also DAO Report, supra note 3.

18 Int'l Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am. v. Daniel, 439 U.S. 551, 559 (1979). 84169499_5

19 In one recent case involving Bitcoin, a court looked to whether the cryptocurrency was a "currency or form of money," such that it could "be used to purchase goods or services" or "be exchanged for conventional currencies, such as the U.S. dollar, Euro, Yen, and Yuan."20 Applying this test, the court found that when the investors used Bitcoin, they "provided an investment of money."21

In the case of STKN, there was no initial offering by the Company and its Founder.22 There was no process that involved the sale of Coins for cash or other cryptocurrency. And with STKN, no original owner will have paid consideration in cash, cryptocurrency, or any other tangible or intangible asset. Given these facts, the SEC's or a court's analysis of this first factor of the

Howey test may turn on whether Volunteers or others obtaining Coin in return for services to the STKN ecosystem (i.e., services that add value to that ecosystem, as explained above) would constitute "an investment of money" under the relevant case law. Given that we have not yet found a case that is directly on point, and that courts generally apply this factor of Howey liberally, there is a risk that a court would find that the services Volunteers offer in return for STKN (which we understand to be one of the hallmarks of the STKN ecosystem) are an "investment of money" for purposes of the Howey analysis.23

*19 Id. at 560, n. 12.20 Shavers, supra note 14, at *5.21 Id.22 Compare In re Munchee Inc., supra note 6, at 8-9.*

23 We note that STKN appears to be distinguishable from some of the cases we have reviewed analyzing whether the performance of services satisfies the first factor of the Howey test. We believe, for example, that the circumstances of STKN are distinguishable from the case in which a court held that an agreement by non- salaried workers to perform services in return for a share of the profits made from their employer's mining operations was an investment contract, because Volunteers are not entitled to a share of any profits of the company or otherwise simply by performing services for STKN. See SEC v. Int'l Heritage Inc., 4 Supp. 2d 1378, 1382-83 (N.D. Ga. 1998) (discussing SEC v. Addison, 194 F. Supp. 709 (N.D. Tex. 1961)).

24 SEC v. SG Ltd., 265 F.3d 42, 49 (1st Cir. 2001) ("Courts are in some disarray as to the legal rules associated with the ascertainment of a common enterprise .... Many courts require a showing of horizontal commonality .... Other courts have modeled the concept of a common enterprise around fact patterns in which an investor's fortunes are tied to the promoter's success rather than to the fortunes of his or her fellow investors. This doctrine, known as vertical commonality, has two variants[:] . . . [b]road vertical commonality ... [and] ... narrow vertical commonality.") (internal citations omitted).

25 Id. (citations omitted). See also Wals v. Fox Hills Dev. Corp., 24 F.3d 1016, 1019 (7th Cir. 1994) (noting that a "pooling of profits" is "essential to horizontal commonality.").

26 DAO Report, supra note 3, at 12.27 White Paper envisions that students and other entrepreneurs will seek coins for effort or endeavors.

may be inspired by the existence of STKN to invent applications, products, and services that STKN may be used 84169499_5

28 See Jeffrey E. Alberts & Bertrand Fry, Is Bitcoin a Security?, 21 B.U. J. SCI. & TECH. L. 1, 17-18 (2015) (discussing cases); see also Rolo v. City Investing Co. Liquidating Trust, 845 F.

Supp. 182, 236 (D.N.J. 1993). Although the Rolo case provides a good window into how a court or agency might consider circumstances similar to those presented by STKN, we would caution against any reliance on this case in a court proceeding or before the SEC, because the Third Circuit vacated the district court's decision without any explanation. The Third Circuit did not specifically rule that the district court's analysis related to the definition of a security was invalid.

29 Rolo, 845 F. Supp. at 236. The court in Rolo discussed a number of other federal cases that support this proposition. See Rodriguez v. Banco Cent. Corp., 990 F.2d 7, 10 (1st Cir. 1993) ("[O]ne who buys raw land or even a building, hoping to profit from rents or the natural increase in the value of property, is not under normal circumstances treated as purchasing a 'security', and "[c]onventional incidentals, such as the seller's promise to install a road or electricity, is similarly not enough to elevate an ordinary real estate transaction to the status of a security.") (citation omitted); Aldrich v. McCulloch Properties, Inc. 627 F.2d 1036, 1040 (10th Cir. 1980) ("[I]f the benefit to the purchasers of the amenities promised by defendants was largely in their own use and enjoyment, the necessary expectation of profit is missing. . . . [T]he obligation to perform minimal managerial functions or to provide basic improvements does not transform a real estate sale into a securities transaction."); Woodward v. Terracor, 574 F.2d 1023, 1025 (10th Cir. 1978) ("Unlike Howey, [the developer] was not under any collateral management contract with the purchasers of its land. In short, the record in the instant case simply shows the purchase by the plaintiffs of lots in a real estate development."); Davis v. Rio Rancho Estates, Inc., 401 F. Supp. 1045, 1050 (S.D.N.Y. 1975) (The developers "did not promise to run the development and distribute profits to the plaintiff, as did the operators of the orange groves in Howey. There was no management contract between plaintiff and defendants, nor were defendants obligated by the Purchase agreement to perform any such services. . . . [T]he expectation of a profit on resale is insufficient to transform what is essentially a sale of real property into the sale of an investment contract[.]")

30 Alberts & Fry, supra note 28, at 18 (citing Rolo, 845 F. Supp. at 236).

31 Id. (citing Brodt v. Bache & Co., Inc., 595 F.2d 459, 462 (9th Cir. 1978)).

32 As discussed, we understand that the Founder intends to operate a separate and distinct business of consulting software entrepreneurs.

33 SG Ltd., 265 F.3d at 49 (noting "[b]road vertical commonality requires that the well-being of all investors be dependent upon the promoter's expertise.").

*34 See Alberts & Fry, supra note 28, at 18. Compare Shavers, supra note 14, at *5 ("[T]he investors here were dependent on Shavers' expertise in Bitcoin markets and his local connections," and "Shavers allegedly promised a substantial return on their investments as a result of his trading and exchanging Bitcoin.").*

35 Cases involving developers who sell real estate in unfinished common developments are also instructive in the context of applying the broad vertical commonality test to the circumstances of STKN. See, e.g., Rodriguez, 990 F.2d at 11-12 (buyers of undeveloped real estate were not part of common venture with developer, because "apart from the promise of an existing lodge or a new country club, the evidence did not show that the promoter or any other obligated person or entity was promising the buyers to build or provide anything"); Woodward, 574 F.2d at 1025 (buyer of real estate from a developer did not form a "common venture or common enterprise" with the developer because the developer "was under no contractual obligation to the plaintiffs other than deliver title once the purchase terms were met" and had no "collateral management contract with the purchasers"); see also Alberts & Fry, supra note 28, at 18-19 ("Courts have repeatedly adopted similar logic in instances where a developer sells plots of land based on representations that the developer will finish a land development, but will not continue to manage it after initial development is complete."). Here, the Founder of STKN, like the developer selling plots of land, stated clearly (and made no commitment and entered no agreement) that the Company would continue to manage the blockchain after the initial development was complete.

36 SG Ltd., 265 F.3d at 49 (quoting SEC v. Glenn W. Turner Enters., 474 F.2d 476, 482 n.7 (9th Cir. 1973)). 37 SEC v. Eurobond Exch. Ltd., 13 F.3d 1334, 1339 (9th Cir. 1994).38 Id.

39 To the extent a court were to adopt the "strict vertical commonality" approach, there is some risk that it could focus on the fact that the Founder has allocated himself Coin and will therefore retain a significant interest in STKN's development and success. The Company and Founder may plausibly argue that their interest as holders of STKN are no different (or are pari passu) to any other holder. The argument is bolstered if these parties factually refrain from managing the STKN blockchain, and pursue their business without regard to changes in value in STKN.

40 Howey, 328 U.S. at 299.41 United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 852 (1975). 42 See, e.g., Glenn W. Turner Enters., 474 F.2d at 482.