

May 3<sup>rd</sup>, 2023

Att: Web3in Tech-lab Pty Ltd

Ref. Opinion on the \$NICHOToken

Web3in Tech-lab Pty Ltd, (Hereinafter the “Company”) has requested an opinion regarding the legal nature of the **\$NICHOToken** (Hereinafter the “Tokens”). To these aims, we hereby provide our opinion on the qualification of the Tokens.

## TABLE OF CONTENT

I.	SCOPE OF OUR WORK .....	1
II.	EXECUTIVE SUMMARY .....	2
III.	DESCRIPTION OF THE PROJECT AND THE TOKENS .....	2
IV.	RELEVANT LEGAL PROVISIONS .....	4
V.	HOWEY TEST ANALYSIS .....	4
	(i) investment of money .....	5
	(ii) common enterprise .....	6
	(iii) expectation of profits (iv) solely from the managerial efforts of others .....	6
	A. Summary and conclusion .....	7
VI.	DISCLAIMERS .....	7

### **I. SCOPE OF OUR WORK**

The content of this legal opinion is based on the whitepaper available [at https://nichonft.gitbook.io/nicho-nft-whitepaper/ecosystem/tokenomic](https://nichonft.gitbook.io/nicho-nft-whitepaper/ecosystem/tokenomic) as of May 3<sup>rd</sup>, 2023, (hereinafter the “Whitepaper”); and information provided by the Company. We have not reviewed any other documents.

The analysis, comments, and conclusions set forth in this legal opinion are based solely on our review of such information and research of the pertinent legislation, regulations, and case law in force as of the date hereof. The analysis herein draws upon Argentinean law and incorporates comparative law examples from other jurisdictions to examine the potential outcome of Bill N° 261/22, currently under consideration by Congress.

For purposes of this legal opinion, we have not conducted any investigation as to factual circumstances. This opinion is merely informative and does not address matters of fact. It should be taken into account that the legal analysis herein may be updated in the future as new laws, regulations, resolutions, guidance, or case law arise. Likewise, judicial and/or administrative authorities may reach a different conclusion from the one set forth below. No guarantees or assurances are given herein regarding the legal qualification of the Tokens.

This opinion has not considered whether it is necessary to obtain licenses, registrations, exemptions, filings, or any other sort of compliance with the applicable law and/or administrative authorities of Argentina or any jurisdiction including with no limitation the Securities Act of 1933 and 1934, the Commodity Exchange Act & Regulations, Federal Civil False Claims Act, the Anti-Kickback Statute, the Physician Self-Referral Law, the Exclusion Authorities, and the Civil Monetary Penalties Law, and the Bank Secrecy Act. The scope is limited to the doctrinal classification of the Tokens as "utility" or "security" based on the most widely adopted criteria. The project, the platform, the idea, the invention, the business proposal, and anything beyond the classification of the Tokens as security or utility tokens is outside the scope of this opinion and was not analyzed or considered in this document.

## **II. EXECUTIVE SUMMARY**

We have considered whether the Tokens shall be classified as Security Tokens or Utility Tokens under Argentina law. After the analysis of the information we received, it is our view that, provided that such information is accurate and complete, the Tokens are likely to be considered Utility Tokens. We base our conclusion on the fact that, according to the document reviewed, the Tokens do not cumulatively meet all the prongs of the Howey Test, which might be used as the standard to make the classification in the future.

## **III. DESCRIPTION OF THE PROJECT AND THE TOKENS**

In order to facilitate the analysis and conclusions that follow, the key aspects of the project and the Tokens, relevant to the purpose of this legal opinion, will be summarized in this section.

According to the Whitepaper *"The purpose of issuing \$NICO governance token is to give the community the opportunity to become a future driving force in building the Dapp. The ultimate goal of Nicho NFT is to develop into a fully decentralised autonomous organisation (DAO), this will provide platform users with complete governance. The DAO will aim to resolve all issues. Users' needs will be addressed. Opinions will be heard. Content will be monitored. And funding will be fair. In a DAO, your voice will be heard."*

Moreover, *"Nicho NFT has its unique reward system. Transactions and creations that are made within a certain timeframe will be rewarded to each address. These rewards come from the reward treasury of Nicho NFT tokens. The design of these token systems was originally made to improve the platform's liquidity. This incentive system allows external and internal smart-contract users to continue trading and creating. And both types of smart-contract users receive quality rewards."*

*"Nicho NFT offers endless opportunities for users to accumulate their earnings. Earn \$NICH0 by minting or trading on the Nicho NFT Marketplace. And make more \$NICH0 by staking \$NICH0!!! To motivate user activity we offer \$NICH0 rewards to the most active artists and collectors, this reward system occurs monthly. 26% of \$NICH0's total supply will be reserved for Nicho NFT Marketplace sellers and buyers. They will earn \$NICH0 by buying and selling NFTs monthly. Our mission is to distribute 260,000,000 NICH0s within 4 years. Contributions to the platform made by the users are actively appreciated."*

*"During the Beta version stage, we will conduct a \$NICH0 airdrop event. 1.2% of the total supply of \$NICH0 will be airdropped. The reciprocates of these airdrops will be the users who participate in the trading, minting and creating of NFT collections in NICH0 NFT.."*

The Whitepaper explains that *"In Nicho NFT, all user transactions will be recorded by the blockchain distributed ledger. The company will reward each transaction with NICH0 tokens in correspondence to the block. Although, the first round of airdrops that are rewarded will be a fixed rate."*

As for the rights granted to token holders *"Holders of NICH0 can submit and vote on the following proposals:*

- *Black/White List*
- *Select the monthly TOP3 artist*
- *New features to be developed or implemented by the development team*
- *Using NICH0 further to decentralize the governance and development of Nicho NFT.*
- *Nicho Park ticket"*

The Tokens serve users to *"Users can use \$NICH0 tokens to pay for some functions, such as the AI generator, or purchase prompts from other users listed."* Also, *"Nicho Prediction is an easy-to-use and enjoyable decentralized prediction playground. By predicting the rise or fall of the daily average price of NFT blue-chip projects, you can win! Use NICH0 to win NICH0!"* And *"users need to convert \$NICH0 to play the games and win other users' \$NICH0 through that."*

Finally, *“The goal of introducing NICH0 is to provide a convenient and secure mode of payment and settlement (such as transaction fees) between participants interacting within the ecosystem on the Nicho NFT Marketplace, without the need for any intermediaries, such as centralized third-party entities /institution/credit.”* And *“The goal of introducing NICH0 is to provide a convenient and secure mode of payment and settlement (such as transaction fees) between participants interacting within the ecosystem on the Nicho NFT Marketplace, without the need for any intermediaries, such as centralized third-party entities /institution/credit.”*

#### IV. RELEVANT LEGAL PROVISIONS

In Argentina, a security is defined as *“(…) credit securities or securities representing credit rights, shares, mutual fund shares, debt securities or certificates of participation of financial trusts or other collective investment vehicles and, in general, any security or investment contract or homogeneous and fungible credit rights, issued or grouped in series and negotiable in the same form and with similar effects as securities; which, due to their configuration and transmission regime, are susceptible to generalized and impersonal traffic in the financial markets (...)”*<sup>1</sup> In short, a security is a right or a collection of rights relating to a company.

Argentina has not yet elaborated on the definition of “security tokens” in the crypto sphere, but certain tokens might be encompassed within an “investment contract” in certain situations and therefore qualify as securities. Due to the ambiguity surrounding the definition of an “investment contract,” it is possible that authorities may adopt an approach similar to that used in the United States, where the Howey Test has been frequently employed to determine whether a token qualifies as a security or utility token. Given this possibility, we will now examine the Howey Test and its application in comparative law to illustrate how it may aid in determining whether a token is classified as a Security Token or a Utility Token in Argentina.

#### V. HOWEY TEST ANALYSIS

A doctrinal analysis of comparative law shows that Section 2(a)(1) of the United States of America (hereinafter “US” or “USA”) Federal Securities Act of 1933 (hereinafter the “Securities Act” or “Security Law”) defines a security as:

Pursuant Section 2(a)(1) of the United States of America (hereinafter “US” or “USA”) Federal Securities Act of 1933 (hereinafter the “Securities Act” or “Security Law”) a security is:

*“Any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any*

---

<sup>1</sup> Law 26.831 Capital Markets Law (2012)

*profit-sharing agreement (...) investment contract (...) or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of."*

The Securities Act tend to control issuing of securities and to testify particular interests attached to them. However, the Securities Act prioritizes substance over form. Therefore, if the SEC believes that any kind of cooperation is promising future profits arising from the mere signing of a contract, it may investigate the case and declare such contract a security. In that scenario, parties to such contract shall disclose particular information to the SEC.

In the SEC v. Howey, 328 U.S. 293 (1946) case, the US Supreme Court came up with the "investment contract" standard to determine whether an instrument meets the definition of a security, as follows:

*"a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."*

According to the Court, such a definition of investment contracts "*embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.*"

Consequently, the standard for determining the existence of an Investment Contract has the following prongs that must be cumulatively fulfilled: (i) investment of money; (ii) common enterprise; (iii) expectation of profits; (iv) solely from the efforts of others.

In the following, we will analyze whether the Tokens meet these criteria and should, therefore, could be categorized as an "investment contract".

#### **(i) investment of money**

With regard to the first prong, the US Supreme Court has held that the only requirement is "*tangible and definable consideration in return for an interest that had substantially the characteristics of a security.*"

Moreover, it has been held that "*If the motivation is focused more on investment, speculation, and creating a secondary market for token sales, rather than functional token use or "utility," it is likely that the token will be considered a security and subject to regulation. If the functional token sale is intended to build a market for the product and develop network participation, or in other words, to get people to use the tokens and thereby grow the network and demand for the digital products, it is less likely to be considered a security.*"

In the case at bar, the main motivation buyers seek when purchasing the Tokens is to engage in the ecosystem. Purchasers need to acquire Tokens to pay for functions such as *“the AI generator, or purchase prompts from other users listed,”* the Nicho Prediction playground, and play in-platform games. Thus, it seems to not be an expectation of a financial gain from the Tokens, as they appear to have a utility only inside of the ecosystem and are intended to serve as an in-platform means of exchange.

#### **(ii) common enterprise**

The Supreme Court has not specified a definition of a common enterprise. The standard to analyze the existence of an underlying contractual relationship of the parties has been developed by US Federal Circuits as follows: “horizontal commonality” and “vertical commonality”.

Horizontal commonality is found when (i) investors contributions are pooled together; and (ii) the fortune of each investor depends on the success of the overall enterprise, usually combined with the pro-rata distribution of profits. On the other hand, vertical commonality is found when the investors fortune depends on the expertise of the promoter or third parties.

However, it must be noted that there is no uniform understanding over the term “common enterprise”. Regarding cryptocurrencies, there is a unanimous understanding in US circuits that horizontal commonality satisfies the second prong of the Howey test, but they are divided as to whether vertical commonality suffices.<sup>2</sup> Moreover, the Securities Exchange Commission (SEC) does not require vertical or horizontal commonality per se, nor does it view this element of the Howey Test as a distinct element of an investment contract.<sup>1</sup>

In the case at bar, according to the Whitepaper, Token holders’ funds are not pooled together and their fortune does not depend on the success of the Company.

#### **(iii) expectation of profits (iv) solely from the managerial efforts of others**

There is an *“expectation of profit derived from the entrepreneurial or managerial efforts of others”* when potential investors: (i) expect to receive profits from their own efforts; or (ii) from the efforts of the Company.

It has been said that *“It is an investment where one part with his money in the hope of receiving the profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use”*.

---

<sup>2</sup> *Ltd*, 265 F.3d at 49–50

The US Supreme Court stated, “*The 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 others.*”<sup>3</sup>

In addition, the SEC staff noted that “*the main issue in analysing a digital asset under the Howey test is whether a purchaser has a reasonable expectation of profits (or other financial returns) derived from the efforts of others. A purchaser may expect to realize a return through participating in distributions or through other methods of realizing appreciation on the asset, such as selling at a gain in a secondary market.*”<sup>4</sup>

The Whitepaper suggests that users will acquire Tokens to engage with the platform’s services and functionalities. There seems to not be an inherent expectation of financial gain derived from such activity as the Tokens are intended to be a means of exchange within the platform.

Moreover, Token holders do not rely on the efforts of others as the community has “*the opportunity to become a future driving force in building the Dapp*” and “*provide platform users with complete governance.*”

#### A. Summary and conclusion

The Tokens do not seem to cumulatively satisfy the four prongs of the Howey Test. As a consequence, in our opinion, the Tokens seem to be likely qualified as Utility Tokens. In the interest of clarity, it should be noted that the analysis set forth herein reflects only our opinion and assessment to the best of our ability. Judicial and/or administrative authorities may reach a different conclusion. Moreover, the result of the analysis elaborated herein can substantially change after a ruling on the matter or further regulations are issued. There is no assurance and no representation or warranty is provided as to the qualification of the Tokens.

## VI. DISCLAIMERS

We have done our best efforts in conducting the analysis to produce this document. The content of this document reflects the opinion of the undersigned and therefore, nothing contained in this legal opinion should be relied upon as absolutely certain beyond doubt and neither the Company nor any third party may make any claim against the undersigned based on what it is expressed in this document, what it is not included herein, or how we have prepared it. There is no assurance and no representation or warranty is provided as to the accuracy or completeness of the information contained herein nor as to the qualification of the Tokens in any jurisdiction.

---

<sup>3</sup>421 U.S. 837, 852 (1975)

<sup>4</sup>*Barkate*, 57 S.E.C. 488, 496 n.13 (Apr. 8, 2004); Commission’s Supplemental Brief at 14 in *SEC v. Edwards*, 540 U.S. 389 (2004) (on remand to the 11th Circuit).



This opinion is not an approval or endorsement of the Company's activities and we have not analyzed whether they are making any fundraising or investment offerings without complying with applicable regulations. The contents of this document should be understood as a personal opinion of scholarly content and cannot be considered legal advice on US law or the rendering of professional services. This opinion is grounded in Argentinean law, and any references to foreign jurisdictions are solely intended as comparative examples to enhance clarity and facilitate understanding of the underlying concepts. No recourse or action can be taken against the undersigned on the basis of the information contained or not contained in this document.

The undersigned shall not be liable for any damages, losses (including interest thereon, if any), and/or costs suffered or incurred by the Company or any third party in connection with this document and its content, including breach of contract, breach of statutory duty, tort (including negligence), fault or other act or omission. This document is addressed to the Company on the basis that neither the Company nor any other party will bring any claim including a claim for damages resulting from or related to this document against the undersigned. This paragraph shall survive any termination of your engagement with the undersigned. The Company is advised that the NCV, SEC, a court, or an administrative authority of competent jurisdiction may reach an alternative conclusion to that stated in this document. The contents of this opinion are for informational and scholarly purposes only and should not be relied upon as a basis for making any decision nor considered investment, legal or other kinds of advice.

This opinion is issued by the undersigned as Law Prism Consultancy is not a registered company. The undersigned is a third-party in no way affiliated with the Company. This opinion is furnished solely for the benefit of the Company and may not be used or relied upon for any other purpose or by any other person. This document may not be shared with third parties not related to the Company and not posted on the internet without prior written consent.

Yours truly,

A handwritten signature in black ink, appearing to read 'F. Matto', is enclosed within a thin black rectangular border.

Florencia Matto