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MEMORANDUM

Date: May 3, 2018
To: [redacted] (Viacoin)
From: Tim Bukher, Michael Feldber
Re: *Howey* Analysis of VIA

Dear [redacted]

You have requested that our firm provide you with a memorandum analysis of Viacoin's VIA token, to determine whether VIA would constitute a security under current United States federal securities laws and regulations. This memorandum evaluates whether or not VIA could have been considered a security under United States federal law at the time of its initial sale (the "**Sale**"). Throughout this memorandum, we refer to cryptographic blockchain tokens, generally, as "**BCTs**" and to the Viacoin token, particularly, as "**VIA**".

Facts Relevant to the Analysis

The following facts have been assumed from our discussions with you as well as from the documentation preceding the Sale (including Viacoin's White Paper, web-content, and other promotional materials) (the "**Documentation**") and other documentation pertaining to the Sale, as provided to our firm by you:

1. VIA is an open source cryptocurrency derived from the Bitcoin protocol.

2. VIA was developed in response to an update to the Bitcoin protocol which reduced the capacity of the OP_RETURN script from 80 bytes to 40 bytes. The reduction, according to Viacoin, proved catastrophic to businesses and entities that had designed services to function on the Bitcoin blockchain and utilize the 80 byte capacity of OP_RETURN.

3. VIA was developed with an 80 byte OP_RETURN capacity, in order to address concerns created by the Bitcoin update and provide an alternative blockchain for services that needed to utilize the additional capacity.

4. Initial development of VIA was completed in July 2014.

5. Upon completion of initial development, 10,000,000 VIA were pre-mined and offered for sale in a forum thread published on bitcointalk.org. The presale was designed to create a liquid market for VIA by distributing coins to initial purchasers, as well as to set VIA's base-price.

6. The presale began on July 8, 2014 and concluded on July 16, 2014, in which time Viacoin collected 610 BTC (worth approximately $381,000 at the time). VIA did not have a predetermined price at the time of the Sale. Its price was determined by dividing the total amount of BTC received, by the total number of VIA available. Sale participants received a percentage of the pre-mine, proportionate to their contribution to the overall amount raised. The approximate value of BTC, at the time of the Sale, was $625 per BTC. This resulted in a post-Sale, base-price of approximately $0.0381 per VIA.

7. VIA did not solicit any form of investment from external sources. The coin's development was independently funded by the lead developer and did not rely on external investment.

8. VIA continues to be maintained by Viacoin, an unincorporated entity (the "**Entity**").

9. VIA is a proof of work coin that relies on miners to validate and add VIA to the blockchain. Miners are rewarded for their efforts via a reward structure governed by the Scrypt algorithm.

10. All VIA created after the Sale have been the product of individual mining efforts. The entity did not create any additional VIA or conduct any subsequent sale of VIA following the Sale. Miners are independent parties with no relation to the Entity.

11. Miners are not granted any form of return by mere virtue of VIA ownership. Conversely, they are required to utilize their own resources, in the form of processing power and its associated costs to earn rewards.

12. At the time of launch, 13 million VIA remained to be mined.

13. VIA are not awarded to miners by the Entity. Rather, VIA are created by the efforts of each individual miner's computer system. Each "proof of work" problem solved by a given computer running the Viacoin software would result in the reward of a newly generated VIA in that individual miner's designated VIA wallet.

14. VIA does not grant holders (the "**Holders**") any equity interest in the Entity, nor any voting or control rights in the Entity. Holders are not entitled to any dividends or other distributions of the Entity or any other entity connected with the Entity's operations.

Analysis

Introduction

This memorandum addresses whether VIA would be considered a "security" under Section 2(a)(1) of the Securities Act of 1933 (the "**Securities Act**") or Section 3(a)(10) of the Securities Exchange Act of 1934 (the "**Exchange Act**").

The broad definition provided in Section 2(a)(1) of the Securities Act defines a security as "any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any 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, or warrant or right to subscribe to or purchase, any of the foregoing."

Based on the above definition, our analysis of relevant case law and the White Paper, and our examination of the Entity's marketing efforts, we have determined that VIA is highly unlikely to meet the legal definition of "security" and be subject to of federal securities laws.

The *Howey* Test

The Supreme Court defined the criteria used to determine whether an instrument should be considered a security in *SEC. v Howey*, 328 U.S. 293 (1946); see also *SEC v. Edwards*, 540, U.S. 398 (2004). *Howey* specifically addressed "investment contracts," a type of security, as the term was widely used to identify instruments of a "more variable character" that did not readily fit within more strictly defined classifications of securities. The *Howey* court noted that investment contracts may be considered a form of "contract, transaction, or scheme whereby an investor lays out money in a way intended to secure income or profit from its employment." *Howey*, 328 U.S. at 298; *see also Golden v Garafolo*, 678 F.2d 1139, 1144 (2d. Cir. 1982) (stating that "investment contract" has been used to identify instruments that do not fit other categories of securities); *see also* Black's Law Dictionary (10th ed. 2014).

Howey identified three[1] elements that *must* be met for an instrument to rise to the level of "investment contract." An investment contract exists where there has been: (1) an *investment of money*; (2) in a *common enterprise*; (3) with an *expectation of profits primarily from the efforts of others*. We examined these elements and their interpretation by the federal courts below.

1. Investment of Money.

An investment of money is not limited to the exchange or provision of capital, but includes goods, services, and debt instruments. *Int'l Bhd. Of Teamsters v. Daniel*, 439 U.S. 551, 560 n.12 (1979); *Hector v. Wiens*, 533 F.2d 429, 432-33 (9th Cir. 1976) ("'investment of money' means only that the investor must commit his assets to the enterprise in such a manner as to subject himself to financial loss"). Because "investment of money" is so broadly defined, nearly any acquisition of cryptocurrency in exchange for another instrument will qualify. In the case of VIA, purchasers who obtained coins during the Sale paid for them in BTC interests, thereby satisfying this factor.

2. Common Enterprise.

The Supreme Court has yet to rule on precisely what constitutes a common enterprise. Whether or not a given token issuance satisfies the second prong of *Howey* will therefore depend on the Federal Circuit Court performing the analysis. The three approaches used to determine whether a common enterprise exists are as follows: (a) horizontal commonality; (b) narrow vertical

[1] Some contemporary *Howey* analyses have split the third element into two and proceeded to analyze four elements, however we follow the three-element approach taken by the majority of courts as well as the SEC.

commonality; and (c) broad vertical commonality. For the reasons stated below, we believe that VIA is not likely to satisfy any of the Circuit tests.

The Circuit Tests

a. First Circuit.

The First Circuit requires a showing of horizontal commonality to satisfy the second prong of *Howey*, though it has not expressly rejected either vertical approaches:

> Thus far, neither the Supreme Court nor this court has authoritatively determined what type of commonality must be present to satisfy the common enterprise element. We came close in *Rodriguez*, in which we hinted at a preference for horizontal commonality. There, promoters selling parcels of land made "strong and repeated suggestions that the surrounding area would develop into a thriving residential community." 990 F.2d at 11. Although we held that the financial arrangement did not constitute a security, we implied that an actual commitment by the promoters to develop the community themselves, coupled with the buyers' joint financing of the enterprise, could constitute a common enterprise.
>
> The case at bar requires us to take a position on the common enterprise component of the *Howey* test. We hold that a showing of horizontal commonality -- the pooling of assets from multiple investors in such a manner that all share in the profits and risks of the enterprise -- satisfies the test.

SEC v. Sg Ltd., 265 F.3d 42, 50 (1st Cir. 2001).

b. Second Circuit.

The Second Circuit has adopted the horizontal commonality test, while rejecting broad vertical commonality as sufficient to create a common enterprise.

> A common enterprise within the meaning of *Howey* can be established by a showing of "horizontal commonality": the tying of each individual investor's fortunes to the fortunes of the other investors by the pooling of assets, usually combined with the pro-rata distribution of profits. In a common enterprise marked by horizontal commonality, the fortunes of each investor depend upon the profitability of the enterprise as a whole:

Revak v. Realty Corp., 18 F.3d 81, 87 (2d Cir., 1994).

> This Court has not previously considered whether vertical commonality (strict or otherwise) satisfies the common enterprise requirement of the *Howey* test. There is

> nothing in the record to indicate that the fortunes of the Lake Park purchasers were interwoven with the promoter's fortunes so as to support a finding of strict vertical commonality. Accordingly, we need not address the question of whether strict vertical commonality gives rise to a common enterprise. We do consider whether broad vertical commonality satisfies *Howey*'s second requirement, and we hold that it does not.

Id. at 88.

Although the Second Circuit has explicitly rejected the board vertical commonality approach, it has not yet ruled on the validity of narrow vertical commonality, which has been successfully applied by the district courts:

> The Court notes that, in *Revak*, the Second Circuit declined to reach the issue of whether the existence of strict vertical commonality alone "gives rise to a common enterprise." However, a number of district courts in this Circuit, as well as the Ninth Circuit Court of Appeals, have found a showing of strict vertical commonality to be sufficient to establish a common enterprise. *See In re J.P. Jeanneret Assocs., Inc*., 769 F. Supp. 2d 340, 360 (S.D.N.Y. 2011) (collecting cases); *accord Brodt v. Bache & Co*., 595 F.2d 459, 461 (9th Cir. 1978). In any event, the Court agrees with the above-cited courts that have reached the issue and concludes that a showing of strict vertical commonality would satisfy the common enterprise prong of the *Howey* test.

Marini v. Adamo, 812 F. Supp. 2d 243, 256 n.9 (E.D.N.Y. 2011).

> To support a finding of strict vertical commonality, a plaintiff must establish that the fortunes of plaintiff and defendants are linked so that they rise and fall together.

Id at 256 (internal quotations omitted).

c. <u>Third Circuit</u>.

The Third Circuit has held that horizontal commonality is sufficient to satisfy the second prong of *Howey* and has yet to rule on the applicability of either vertical commonality approach.

> We have held that the common enterprise requirement is satisfied by ‘horizontal commonality.’ Horizontal commonality is characterized by ‘a pooling of investors' contributions and distribution of profits and losses on a pro-rata basis among investors.’

SEC v. Infinity Grp. Co., 212 F.3d 180, 187-88 (3d Cir. 2000) (quoting *Steinhardt Group Inc. v. Citicorp*, 126 F.3d 144, 152 (3d Cir. 1997))

> In *Steinhardt*, we declined to decide if we should adopt a vertical commonality analysis when conducting an inquiry under the commonality prong of *Howey*. Inasmuch as we conclude that horizontal commonality exists here, we need not now decide if we should also adopt a vertical commonality analysis.

Id at 187 n.8 (internal citations omitted).

d. Fourth Circuit.

The Fourth Circuit has likewise held that horizontal commonality is sufficient to satisfy the second prong of *Howey* without opining on either vertical approach. *Teague v. Bakker*, 35 F.3d 978, 986 n.8 (4th Cir. 1994) ("because we find that 'profits' … are distributed pro rata to lifetime partners, there is horizontal commonality… . This means that we need not decide here whether some form of vertical commonality might satisfy the *Howey* test.").

e. Fifth Circuit.

The Fifth Circuit has adopted the broad vertical commonality approach, finding that the second prong of *Howey* will be satisfied if the investors' economic outcomes are reliant on the expertise of the promoter, finding that horizontal commonality is insufficient to establish a common enterprise. *See Long v. Shultz Cattle Co*., 881 F.2d 129, 137 (5th Cir. 1989) ("In *Koscot*, we noted, with respect to the second prong of *Howey*, that 'the fact that an investor's return is independent of that of other investors is not decisive.'"). The Court explained its position further:

> The courts of appeal are in disagreement regarding the proof necessary to establish the second prong of the *Howey* test. The Third, Sixth, and Seventh Circuits hold that a showing of horizontal commonality-- a pooling of investors -- is necessary to meet the common enterprise requirement. … This court, together with the Ninth and Eleventh Circuits, has explicitly rejected the view that horizontal commonality is a prerequisite to establishing a common enterprise within the meaning of *Howey* and has focused instead on the vertical commonality between the investors and the promoter. … As we stated in *Koscot*, 'the critical factor is not the similitude or coincidence of investor input, but rather the uniformity of impact of the promoter's decisions.'

Id at 140 (5th Cir. 1989) (internal citations omitted).

f. Sixth Circuit.

The Sixth Circuit has held that horizontal commonality is "a prerequisite to constitute a "security" under the Sixth Circuit's interpretation of federal law." *Deckebach v. La Vida Charters, Inc.*, 867 F.2d 278, 279 (6th Cir. 1989). *See also Curran v. Merrill Lynch*, 622 F.2d 216 (6th Cir. 1980) (Holding that a pooling of investors' interests is essential to a finding of common enterprise and explicitly rejecting the broad vertical commonality approach.).

g. Seventh Circuit.

The Seventh Circuit has similarly rejected both broad and narrow vertical commonality, holding that "for an interest to be classified as an investment contract there must be what is called horizontal commonality, which means simply that each investor's interest is pooled with that of the other investors, so that each has an undivided share in a pool of assets rather than an individual asset." *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995). *See also Wals v. Fox Hills Development Corp*. 24 F.3d 1016, 1017 (7th Cir. 1994) ("those circuits that believe that only 'vertical commonality' is required to create an investment contract would deem the combination of sale and rental agreement [to constitute] an investment contract").

h. Eighth Circuit.

The Eighth Circuit has adopted the Ninth Circuit's approach to the second prong of the *Howey* test, finding that a showing of either vertical or horizontal commonality can establish a common enterprise. Miller v. Cent. Chinchilla Grp., Inc., 494 F.2d 414, 417 (8th Cir. 1974) ("We are convinced that the definition of investment contract in *[Securities & Exchange Com'n v. Glenn W. Turner Ent., Inc.*, 474 F.2d 476 (9th Cir.)] is consistent with congressional intent and that it does not represent an impermissible departure from the Supreme Court's holding in *Howey*.")

i. Ninth Circuit.

As noted above, the Ninth Circuit will find the second prong of *Howey* satisfied upon a showing of either horizontal or narrow vertical commonality. *See Hocking v. Dubois*, 885 F.2d 1449, 1459 (9th Cir. 1989) ("on *Howey's* common enterprise requirement, the Ninth Circuit accepts either traditional horizontal commonality or, when no pooling among investors is present, a strict version of vertical commonality.") *See also SEC v. Eurobond Exchange Ltd.*, 13 F.3d 1334 (9th Cir. 1994) (Finding that a common enterprise exists where "the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment.").

j. Tenth Circuit.

The Tenth Circuit has not constrained itself to either horizontal or vertical commonality requirements, instead adopting the Supreme Court's "economic reality" standard:

> The rigid horizontal commonality requirement that the district court imposed has never been a part of the law of this circuit. Instead, when this court has applied the *Howey* test to determine whether a common enterprise and a security exist in a particular case, it has followed the Supreme Court's direction, found in *Tcherepnin v. Knight*, 389 U.S. 332, 336, 19 L. Ed. 2d 564, 88 S. Ct. 548 (1967), that it determine the "economic reality" of the transactions that occurred. … If the law of the Tenth Circuit comes into play and a transaction is purely commercial in nature (for example, a commercial loan or a sale of assets), then it does not give rise to a common enterprise or a security. If, on the other hand, a transaction is in reality an investment (that is, a transaction of a type in which stock is often given), then it creates a common enterprise and gives rise to a security falling within the ambit of the 1933 and 1934 Securities Acts.
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> *McGill v. Am. Land & Expl. Co.*, 776 F.2d 923, 925 (10th Cir. 1985)

k. Eleventh Circuit.

The Eleventh Circuit "adhere[s] to the broad vertical commonality test for determining whether investors operated under a common enterprise." *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 732 (11th Cir. 2005). "Broad vertical commonality, the easiest to satisfy of the alternative tests, only requires a movant to show that the investors are dependent upon the expertise or efforts of the investment promoter for their returns." *Id*.

l. D.C. Circuit.

The D.C. Circuit applies horizontal commonality to the second prong of *Howey*: "So-called horizontal commonality--defined by the pooling of investment funds, shared profits, and shared losses--is ordinarily sufficient to satisfy the common enterprise requirement." *SEC v. Life Partners, Inc*., 318 U.S. App. D.C. 302, 87 F.3d 536, 543 (1996). The D.C. Circuit has yet to apply the vertical commonality approach to the *Howey* test.

Applying the Circuit Tests

Horizontal Commonality. We believe that there is a strong argument against a finding of horizontal commonality from the Sale of VIA. Horizontal commonality requires (1) a pooling of purchaser funds; and (2) purchasers' pro-rata sharing in profits and losses. Although Viacoin pooled the funds it received from VIA purchasers (the Entity collected, held, and directed the use Sale proceeds), the purchasers were not linked in any manner that bound their financial outcomes such that all Holders would have either benefitted or suffered, financially, from their purchase of VIA. Indeed, nearly four years after VIA's sale, no such communal fate has been observed.

The most significant factor in our analysis is purchasers' ability to use their VIA to execute transactions on the blockchain, mine additional VIA, and develop services utilizing the VIA blockchain immediately following purchase (the latter function having been VIA's *raison d'etre*). Holders were not resigned to simply waiting with the hope that the Entity's promise of a functional cryptocurrency with an expanded OP_RETURN would one day materialize in the form of a protocol update and give value to their VIA holdings. On the contrary, VIA came "prepackaged" with all advertised features, and each Holder was immediately able to utilize his coins as he saw fit. Accordingly, there was no mechanism or dynamic in place to support a pro-rata sharing of profits and losses. Once the Sale was complete, VIA had a base fair market value, granted Holders use of a unique blockchain with functionality not shared by the traditional bitcoin protocol, and enabled the continued creation of VIA through mining efforts. The ready-state of Viacoin's protocol militates strongly against a finding of horizontal commonality because each Holder's financial fate was his own. VIA could be used simply as a medium of exchange (like its predecessor, Bitcoin) or could be used to facilitate innovation and utility (by building technology that took advantage of the expanded OP_RETURN script). There was no central endeavor, to be carried out by the Entity, the success or failure of which would determine Holders' fortunes.

Furthermore, neither the initial purchasers VIA, nor its miners, nor subsequent purchasers on the secondary markets received any share in the underlying value of the Entity, nor in any profits or losses of the Entity, by virtue of VIA ownership. The only risk assumed by the Holders was the possibility that the Entity would cease maintaining and developing VIA. However, this typical continuation of business activities, without promise of radical new developments, is not the sort of risk contemplated by *Howey* or subsequent decisions. Accordingly, pursuant to the standards established by the various Circuit Courts applying the horizontal commonality approach, no reasonable argument could be made in which VIA's premine sale could be said to create a common enterprise.

<u>Vertical Commonality</u>. It is equally unlikely that a common enterprise would be found to exist under either of the vertical approaches. The Fifth and Eleventh Circuits hold that commonality is determined by gauging a purchaser's dependence on the seller's expertise. *See Long*, 881 F.2d at 140 ("the critical inquiry is confined to whether the fortuity of the investments is essentially dependent upon promoter expertise."); *see also ETS Payphones*, 408 F.3d at 732

("Broad vertical commonality only requires a movant to show that the investors are dependent upon the expertise or efforts of the investment promoter for their returns."). The Ninth Circuit's narrow vertical test requires that an individual purchaser's outcomes be "interwoven with and dependent upon the efforts and success of those seeking the investment." *Eurobond*, 13 F.3d at 1339.

We believe that VIA would fail to satisfy this inquiry because, as noted above, at the time of the Sale, VIA was already a fully functional cryptocurrency that provided Holders with multiple potential applications. It therefore follows that each individual Holder's financial outcome would be determined entirely how, when, and to what end he used his VIA, rather than on continued efforts of the Entity.

VIA is similarly unlikely to satisfy the Ninth Circuit's narrow vertical test, which requires that an individual purchaser's outcomes be "interwoven with and dependent upon the efforts and success of those seeking the investment." *Eurobond*, 13 F.3d at 1339. No aspect of any individual purchaser's purchase of VIA or miner's mining of VIA creates a dependency on the continued efforts of the Entity (or anyone employed by or affiliated with the Entity). Nor will any individual Holder's outcome be linked to that of the Entity.

Furthermore, miners who chose to acquire VIA without purchasing it from the Sale, did so by devoting their time, effort, and computing power to its acquisition. Miners were neither dependent on the expertise of anyone affiliated with the Entity (because the protocol was already fully developed), nor were the miners' "fortunes interwoven" with those of the Entity (because the protocol would continue to function on miners' computers even in the total absence of the Entity).

For the foregoing reasons, be do not believe that the sale of VIA would create a common enterprise under *Howey*, under either the Horizontal, Narrow Vertical, or Broad Vertical approaches.

3. Expectation of Profits Primarily from the Efforts of Others.

The key consideration of the third *Howey* element is whether VIA purchasers have an expectation of some form of return on their initial purchase, which expectations are determined by examining the seller's representations to potential purchasers.

Under *Howey*, "an investment contract … means a contract, transaction or scheme whereby a person invests his money … and *is led to expect profits expect profits solely from the efforts of the promoter or a third party*." *Howey*, 328 U.S. at 298-299 (emphasis added). Profits are defined as "income or return, to include, for example, dividends, other periodic payments, or the increased value of the investment." *Edwards*, 540, U.S. at 394. *See also Forman*, 421 U.S. at 852:

> By profits, the Court has meant either capital appreciation resulting from the development of the initial investment … or a participation in earnings resulting from the use of investors' funds … By contrast, when a purchaser is motivated by a desire to use or consume the item purchased – 'to occupy the land or to develop it themselves,' as the *Howey* Court put it – the securities laws do not apply.").

In the Matter of Munchie, Inc. ("**MUN**"), the SEC's recent adverse action on and settlement with the issuer of the MUN token, the "expectation of profits" factor contributed primarily to the SEC's argument that MUN constituted a security. In its analysis of the MUN marketing materials, the SEC expressly note:

> On the Munchee Website, in the MUN White Paper and elsewhere, Munchee described the "ecosystem" that it would create, stating that it would pay users in MUN tokens for writing food reviews and would sell both advertising to restaurants and "in-app" purchases to app users in exchange for MUN tokens. Munchee also said it would work with restaurant owners so diners could buy food with MUN tokens and so that restaurant owners could reward app users – perhaps those who

> visited the restaurant or reviewed their meal – in MUN tokens. As a result, MUN tokens would increase in value.
>
> …
>
> In the MUN White Paper, on the Munchee Website and elsewhere, Munchee and its agents further emphasized that the company would run its business in ways that would cause MUN tokens to rise in value.
>
> *In the Matter of Munchie, Inc.*, at p. 4.[2]

Viacoin's Documentation does not appear to create such an expectation in the reader, instead focusing on the potential advantages of a blockchain utilizing an expanded OP_RETURN script, VIA's use of Scrypt mining algorithm, and answering various questions posed by the community. Consequently, we do not believe that a purchaser of VIA could reasonably claim to have been led to expect "profit" from such purchase.

The "development of the initial investment" discussed in *Forman* referred to a fact pattern wherein a sale of land interest (which would not, ordinarily, constitute a security) was considered a security due to the seller's promise that it would engage in exploratory oil drilling on the land:

> Undisputed facts seem to us, however, to establish the conclusion that defendants were not, as a practical matter, offering naked leasehold rights. Had the offer mailed by defendants omitted the economic inducements of the proposed and promised exploration well, it would have been a quite different proposition. *Purchasers then would have been left to their own devices for realizing upon their rights*. They would have anticipated waiting an indefinite time, paying delayed drilling rental meanwhile until some chance exploration proved or disproved the productivity of their acres. Their alternative would have been to test their own leases at a cost of $ 5,000 or more per well.
>
> …
>
> *Without the drilling of the well, no one's leases had any value []. The well was necessary[] to fulfill the hopes of purchasers [].*

[2] Available at: https://www.sec.gov/litigation/admin/2017/33-10445.pdf

SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344, 348-349 (1943) (emphasis added). These facts do not apply to the Sale of VIA. As discussed above, VIA's development was independently funded, and VIA was a fully functional cryptocurrency, which could be mined and transferred freely, at the time of the Sale. Viacoin was not seeking to raise capital to support project development and potentially turn an idea into a tangible product. Accordingly, purchasers were not acting on any reliance that their VIA would appreciate in value from the "development of [their] initial investment." The Entity has, since the Sale, continued to develop VIA, but none of that development was advertised or promised to potential purchasers in an effort to induce their participation in the Sale. All subsequent work on VIA has taken place in response to evolving markets, technologies, and community needs.

The *Forman* decision should not be read as an exhaustive list of what manner of purchaser/seller relationship may constitute "profit" under *Howey*. Indeed, as the *Howey* court noted: "[The term investment contract] 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." *Howey*, 328 U.S. at 299. However, as the Entity conceived, developed, and launched VIA prior to any Sale and without the need for or use of any purchaser funds, we believe it highly unlikely that VIA purchasers could realize "profit" as defined by *Foreman* or *Howey*.

In analyzing the "efforts of others" component, courts have asked "whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." *SEC v. Glenn W. Turner Enters*., 474 F.2d 476, 482-83 (9th Cir. 1973); *see also*, *Forman*, 421 U.S. 837 (1975) ("It is only when [an individual] *relies on third parties to produce the profits for him* that the question of investment contract analysis arises."). The criteria set forth in *Turner* and *Forman* do not apply to VIA for several reasons:

a. VIA Fully Developed at Time of Sale.

As noted numerous times throughout this memorandum, the VIA cryptocurrency was sold in the exact form that it was advertised. Purchasers were promised a Bitcoin forked cryptocurrency with a 80b OP_RETURN script and they received exactly that. If the Entity ceased any and all function immediately after the Sale and did not continue to further maintain and develop VIA, the coin would remain functional to this day. The crucial entrepreneurial and managerial decisions that constitute "efforts of others" that would have determined whether or not VIA was worthy of purchase and ownership had, therefore, already been made prior to the Sale.

We contrast this to the MUN token which was argued by the SEC to constitute a security with respect to the third *Howey* factor because:

> The proceeds of the MUN token offering were intended to be used by Munchee to build an "ecosystem" that would create demand for MUN tokens and make MUN tokens more valuable. Munchee was to revise the Munchee App so that people could buy and sell services using MUN tokens and was to recruit "partners" such as restaurants willing to sell meals for MUN tokens. The investors reasonably expected they would profit from any rise in the value of MUN tokens created by the revised Munchee App and by Munchee's ability to create an "ecosystem" – for example, the system described in the offering where restaurants would want to use MUN tokens to buy advertising from Munchee or to pay rewards to app users.

In the Matter of Munchee Inc., at p. 8. Munchee essentially lured investors with the promise of future development, all of which would be managed by Munchee and, if successful, would yield a return on investment.

b. VIA Value Determined by Market Forces.

VIA is a currency, the value of which cannot be separated from broader market forces. *See Noa v. Key Futures, Inc.* 638 F.2d 77 (9th Cir. 1980) ("Once the purchase [. . .] was made, the profits to the investor depended upon the fluctuations of the [. . .] market, not the managerial efforts of [the seller]"); *see also Sinva v. Merrill Lynch*, 253 F. Supp. 359, 367 (S.D.N.Y. 1966) ("Moreover, the purchase of commodities futures involves no reliance upon the efforts of promoters, managers, employees or any third party. The mere presence of a speculative motive on the part of the purchaser or seller does not evidence the existence of an "investment contract" within the meaning of the securities acts."). *See also E. F. Hutton & Co. v. Lewis*, 410 F. Supp. 416, 418 (E.D. Mich. 1976) (internal citations omitted):

> Although there are several other decisions which have found transactions involving commodities futures to come within the federal securities laws … these cases were suits in which fraud was alleged in the inducement of plaintiffs to open commodity future trading accounts that would be managed by defendants.

VIA serves as both a medium of exchange and as a technological foundation upon which blockchain dependent services may be built. Accordingly, its value derives from people's willingness to use it in both of those functions, and its price has and will continue to fluctuate in response to market forces rather than the actions of the Entity.

For the foregoing reasons, we believe that VIA is highly unlikely to satisfy the third element of the *Howey* test.

Conclusion

Based on the analysis provided herein, it is our belief that VIA would not constitute an investment interest or "security" in accordance with the *Howey* test. To summarize: (1) VIA was fully developed prior to its sale; (2) subsequent to the Sale, additional VIA were created by independent miners with no connection to the Entity; (3) VIA was never marketed as an instrument that would yield any return; and (4) any fluctuation in the value of VIA is dependent on market factors outside of the Entity's control. Notwithstanding the foregoing conclusion, our firm at this time can make no assurances that the Securities Exchange Commission will not challenge the foregoing analysis in light of its, as of yet, lack of formal rulemaking on the applicability of *Howey* to developments in the cryptocurrency and blockchain technology.

Disclaimer

The foregoing analysis is meant to approximate the most likely conclusions to be reached by courts in connection with the facts and caselaw cited herein; we cannot guarantee that the courts would reach the same conclusions or that the relevant regulatory authorities would not take a contrary position regardless of the conclusion reached by a court. Additionally, the foregoing analysis has been made based on facts provided to our firm by the Entity. We are not responsible for any contrary analysis arising out of any potential misstated facts. The analysis and conclusions provided herein are based on existing federal securities laws, regulations, and relevant caselaw. Cryptographic blockchain tokens are relatively new instruments and the rules and regulations governing their sale and distribution are subject to change and/or contrary analysis by the Securities Exchange Commission. We cannot guarantee that evolution in either of these areas will not one day militate against the conclusions stated herein. Furthermore, this analysis does not seek to address state specific regulations which may or may not coincide with the federal law addressed herein.