

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10445 / December 11, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-18304

<p>In the Matter of</p> <p style="text-align:center">MUNCHEE INC.,</p> <p>Respondent.</p>
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ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) against Munchee Inc. (“Munchee” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant To Section 8A of the Securities Act, Making Findings, And Imposing A Cease-And-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds that:

Summary

Munchee is a California business that created an iPhone application (“app”) for people to review restaurant meals. In October and November 2017, Munchee offered and then sold digital tokens (“MUN” or “MUN token”) to be issued on a blockchain or a distributed ledger. Munchee conducted the offering of MUN tokens to raise about \$15 million in capital so that it could improve its existing app and recruit users to eventually buy advertisements, write reviews, sell food and conduct other transactions using MUN. In connection with the offering, Munchee described the

way in which MUN tokens would increase in value as a result of Munchee's efforts and stated that MUN tokens would be traded on secondary markets.

Based on the facts and circumstances set forth below, MUN tokens were securities pursuant to Section 2(a)(1) of the Securities Act. MUN tokens are "investment contracts" under *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946), and its progeny, including the cases discussed by the Commission in its *Report of Investigation Pursuant To Section 21(a) Of The Securities Exchange Act of 1934: The DAO* (Exchange Act Rel. No. 81207) (July 25, 2017) (the "DAO Report"). Among other characteristics of an "investment contract," a purchaser of MUN tokens would have had a reasonable expectation of obtaining a future profit based upon Munchee's efforts, including Munchee revising its app and creating the MUN "ecosystem" using the proceeds from the sale of MUN tokens. Munchee violated Sections 5(a) and 5(c) of the Securities Act by offering and selling these securities without having a registration statement filed or in effect with the Commission or qualifying for exemption from registration with the Commission. On the second day of sales of MUN tokens, the company was contacted by Commission staff. The company determined within hours to shut down its offering, did not deliver any tokens to purchasers, and returned to purchasers the proceeds that it had received.

Respondent

Munchee is a privately-owned Delaware corporation based in San Francisco.

Facts

1. Munchee is a California business that created an app (the "Munchee App") for use with iPhones. The company began developing the app in late 2015 and launched the app in the second quarter of 2017.
2. The Munchee App allows users to post photographs and reviews of meals that they eat in restaurants. The Munchee App is available only in the United States.
3. Munchee and its agents control the content on multiple web pages, including but not limited to its website (the "Munchee Website"), an additional site where it posted Munchee's "white paper" (the "MUN White Paper"), a Twitter account, a Facebook page, and posts on various message boards (collectively, the "Munchee Web Pages").

Munchee Offers To Sell MUN To The General Public

4. By Fall 2017, Munchee had developed a plan to improve the Munchee App during 2018 and 2019 that included raising capital through the creation of the MUN token and incorporating the token into the Munchee App. The MUN is a token issued on the Ethereum blockchain. Munchee created 500 million MUN tokens and stated that no additional tokens could be created.

5. On or about October 1, 2017, Munchee announced it would be launching an “initial coin offering” or “ICO”¹ to offer MUN tokens to the general public. Munchee posted the MUN White Paper that described MUN tokens, the offering process, how Munchee would use the offering proceeds to develop its business, the way in which MUN tokens would increase in value, and the ability for MUN token holders to trade MUN tokens on secondary markets. Munchee posted information about the offering and the MUN White Paper through posts on the Munchee Web Pages, including on a blog, Facebook, Twitter, BitcoinTalk, and the Munchee Website.

6. MUN tokens were to be available for purchase by individuals in the United States and worldwide through websites and social media pages including, but not limited to, the Munchee Web Pages.

7. Pursuant to the MUN White Paper, Munchee sought to raise about \$15 million in Ether by selling 225 million MUN tokens out of the 500 million total MUN tokens created by the company. Purchasers of MUN tokens in the earlier stages of the offering were offered discounts of 15% and 10% on the offering price. Munchee said it would keep the remaining 275 million MUN tokens and use those MUN tokens to support its business, including by paying rewards in the Munchee App with MUN tokens, paying its employees and advisors with MUN tokens, and “facilitating advertising transactions in the future.” In the MUN White Paper and elsewhere, Munchee said that it would spend 75% of the offering proceeds to hire people for its development team and to market and promote the Munchee App, use 15% “for maintenance and to ensure the smooth operation of the MUN token ecosystem” and use 10% for “legals to make sure Munchee is compliant in all countries.” Munchee described a timeline that provided for various development milestones in 2018 and 2019, including the development of a smart contract on the Ethereum blockchain to integrate “in-app” use of the MUN token and setting up in-app wallets for end-users.

8. The MUN White Paper referenced the DAO Report and stated that Munchee had done a “Howey analysis” and that “as currently designed, the sale of MUN utility tokens does not

¹ An “initial coin offering” or “ICO” is a recently developed form of fundraising event in which an entity offers participants a unique digital “coin” or “token” in exchange for consideration (most commonly Bitcoin, Ether, or fiat currency). The tokens are issued and distributed on a “blockchain” or cryptographically-secured ledger. Tokens often are also listed and traded on online platforms, typically called virtual currency exchanges, and they usually trade for other digital assets or fiat currencies. Often, tokens are listed and tradeable immediately after they are issued.

Issuers often release a “white paper” describing the particular project they seek to fund and the terms of the ICO. Issuers often pay others to promote the offering, including through social media channels such as message boards, online videos, blogs, Twitter, and Facebook. There are websites and social media feeds dedicated to discussions about ICOs and the offer, sale and trading of coins and tokens.

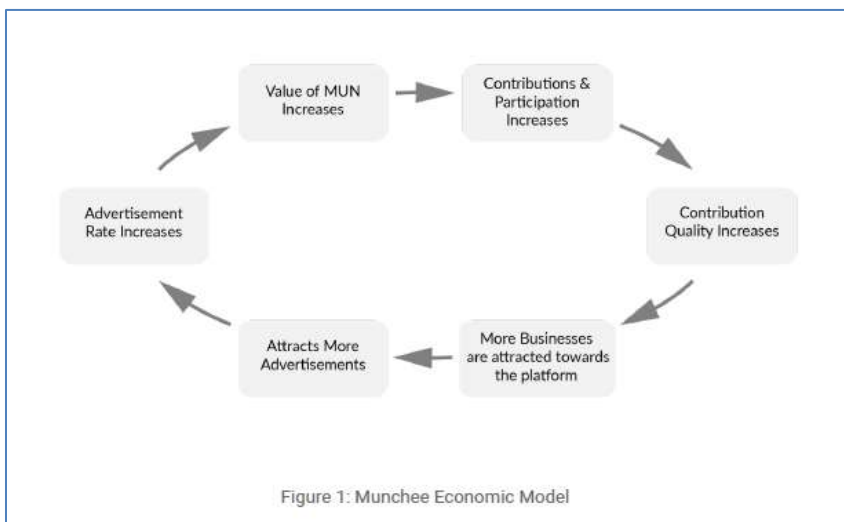
pose a significant risk of implicating federal securities laws.” The MUN White Paper, however, did not set forth any such analysis.

Munchee’s Plan To Create An “Ecosystem” And Take Other Steps To Increase The Value Of MUN

9. Munchee offered MUN tokens in order to raise capital to build a profitable enterprise. Munchee said that it would use the offering proceeds to run its business, including hiring people to develop its product, promoting the Munchee App, and ensuring “the smooth operation of the MUN token ecosystem.”

10. While Munchee told potential purchasers that they would be able to use MUN tokens to buy goods or services in the future after Munchee created an “ecosystem,” no one was able to buy any good or service with MUN throughout the relevant period.

11. 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. Below is an image of “Figure 1” from the MUN White Paper in which Munchee described how increased participation in the “ecosystem” would purportedly lead to increased value of MUN tokens:



12. 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. First, Munchee described a “tier” plan in which the amount it would pay for a Munchee App review would depend on the amount of the author’s holdings of MUN tokens. For example, a “Diamond Level” holder having at least 300 MUN tokens would be paid more for a

review than a “Gold Level” holder having only 200 MUN tokens. Also, Munchee said it could or would “burn” MUN tokens in the future when restaurants pay for advertising with MUN tokens, thereby taking MUN tokens out of circulation. Munchee emphasized to potential purchasers how they could profit from those efforts:

Munchee could potentially choose to to [sic] burn (take out of circulation) a small fraction of MUN tokens everytime [sic] a restaurant pays Munchee as [sic] advertising fee. This, along with our tiered membership plan could potentially increase the appreciation of the remaining MUN tokens as the total supply in circulation reduces and as users would prefer holding their MUN tokens.

13. Munchee intended for MUN tokens to trade on a secondary market. In the MUN White Paper, Munchee stated that it would work to ensure that MUN holders would be able to sell their MUN tokens on secondary markets, saying that “Munchee will ensure that MUN token is available on a number of exchanges in varying jurisdictions to ensure that this is an option for all token-holders.” Munchee represented that MUN tokens would be available for trading on at least one U.S.-based exchange within 30 days of the conclusion of the offering. It also stated that Munchee would buy or sell MUN tokens using its retained holdings in order to ensure there was a liquid secondary market in MUN tokens.

Munchee Promoted MUN Tokens And Purchasers Had A Reasonable Expectation Of Obtaining A Future Profit

14. Purchasers reasonably would have viewed the MUN token offering as an opportunity to profit. Purchasers had a reasonable expectation that they would obtain a future profit from buying MUN tokens if Munchee were successful in its entrepreneurial and managerial efforts to develop its business. Purchasers would reasonably believe they could profit by holding or trading MUN tokens, whether or not they ever used the Munchee App or otherwise participated in the MUN “ecosystem,” based on Munchee’s statements in its MUN White Paper and other materials. Munchee primed purchasers’ reasonable expectations of profit through statements on blogs, podcasts, and Facebook that talked about profits.

15. For example, Munchee published a blog post on October 30, 2017 that was titled “7 Reasons You Need To Join The Munchee Token Generation Event.” Reason 4 listed on the post was “As more users get on the platform, the more valuable your MUN tokens will become” and then went on to describe how MUN purchasers could “watch[] their value increase over time” and could count on the “burning” of MUN tokens to raise the value of remaining MUN tokens.

16. Similarly, on or about October 23, 2017, one of Munchee’s founders described the opportunity on a podcast about the MUN offering:

So they [users] will create more quality content to attract more restaurants onto the platform. So the more restaurants we have, the more quality content Munchee has, the value of the MUN token will go up – it’s like an underlying incentive for users to actually contribute and actually build the community.

17. In addition, Munchee made public statements or endorsed other people's public statements that touted the opportunity to profit. For example, on or about October 25, 2017, Munchee created a public posting on Facebook, linked to a third-party YouTube video, and wrote "199% GAINS on MUN token at ICO price! Sign up for PRE-SALE NOW!" The linked video featured a person who said "Today we are going to talk about Munchee. Munchee is a crazy ICO. If you don't know what an ICO is, it is called an initial coin offering. Pretty much, if you get into it early enough, you'll probably most likely get a return on it." This person went on to use his "ICO investing sheet" to compare the MUN token offering to what he called the "Top 15 ICOs of all time" and "speculate[d]" that a \$1,000 investment could create a \$94,000 return.

18. Munchee and its agents targeted the marketing of the MUN tokens offering to people with an interest in tokens or other digital assets that have in recent years created profits for early investors in ICOs. This marketing did not use the Munchee App or otherwise specifically target current users of the Munchee App to promote how purchasing MUN tokens might let them qualify for higher tiers and bigger payments on future reviews. Nor did Munchee advertise the offering of MUN tokens in restaurant industry media to reach restaurant owners and promote how MUN tokens might let them advertise in the future. Instead, Munchee and its agents promoted the MUN token offering in forums aimed at people interested in investing in Bitcoin and other digital assets, including on BitcoinTalk.org, a message board where people discuss investing in digital assets. These forums are available and attract viewers worldwide, even though the Munchee App was only available in the United States.

19. For example, one of Munchee's founders chose to appear and promote the MUN token offering on the podcast discussed above where the host talks with guests about blockchains and digital assets, emphasizing the financial value of "cryptocurrency." On that podcast, the Munchee founder talked about making money purchasing digital assets, including her own profits investing in Ether and other digital assets.

20. Similarly, Munchee offered to provide MUN tokens to people who published promotional videos, articles or blog posts in forums such as BitcoinTalk.org or otherwise helped Munchee promote the MUN token offering. More than 300 people promoted the MUN token offering through social media and by translating MUN token offering documents into multiple languages so that Munchee could reach potential investors in South Korea, Russia, and other countries where the Munchee App was unavailable.

**MUN Token Purchasers Reasonably Expected They Would Profit From The Efforts
Of Munchee And Its Agents**

21. Purchasers would reasonably have had the expectation that Munchee and its agents would expend significant efforts to develop an application and "ecosystem" that would increase the value of their MUN tokens.

22. Munchee highlighted the credentials, abilities and management skills of its agents and employees. For example, in the MUN White Paper and elsewhere, Munchee highlighted that

its founders had worked at prominent technology companies and highlighted their skills running businesses and creating software.

23. As discussed above, Munchee said in the MUN White Paper that the value of MUN tokens would depend on the company's ability to change the Munchee App and create a valuable "ecosystem" that would inspire users to create new reviews, inspire restaurants to obtain MUN tokens to reward diners and pay Munchee for advertising, and inspire users to obtain MUN tokens to buy meals and to attain higher status within the Munchee App. Munchee said that it and its agents would undertake that work during 2018 and 2019.

24. Potential purchasers would have had a reasonable understanding that their future profit depended on Munchee creating a MUN "ecosystem." For example, on or about October 25, 2017, a person posted a video on YouTube to describe the MUN token offering. The person's YouTube channel has approximately 15,000 followers and was created by a self-proclaimed "[c]ryptocurrency enthusiast" who believed "[t]he early investor catches the bitcoin." In the video review, the person discussed that MUN token purchasers would profit only after Munchee did years of work:

If you are investing in [MUN tokens] now, you do need to keep in mind that it will be awhile before the [Munchee] platform becomes active. So if you are looking at it as a speculative – I want to get it and flip it straight away – you really need to hold on to this one at least until it hits the app in 2018. Obviously, if you can hold this a bit longer until 2019, that is when I think the real value of Munchee is going to be delivered on once it, sort of, gets a lot of users on it.

Munchee Starts To Sell MUN On October 31, 2017

25. On or about October 31, 2017, Munchee started selling MUN tokens. Purchasers could pay one (1) Ether or one-twentieth (1/20) of a Bitcoin to buy 4,500 MUN. On or about November 1, 2017, Ether was trading on virtual currency exchanges for about \$300 USD and Bitcoin was trading for about \$6,500 USD.

Munchee Stopped Selling MUN When It Was Contacted By Commission Staff

26. On November 1, 2017, Munchee stopped selling MUN tokens hours after being contacted by Commission staff. Munchee had not delivered any tokens to purchasers, and the company promptly returned to purchasers the proceeds that it had received.²

² Munchee and the investors entered into a contract of sale for MUN in which investors were irrevocably bound. On November 1, 2017, Munchee unilaterally terminated the contracts of sale, returning the money to investors. Any offer by Munchee to buy the investors' securities would have required registration of the transaction or an exemption from registration.

27. About 40 people purchased MUN tokens from Munchee. In aggregate, they paid about 200 Ether (or about \$60,000 in USD at the time of the offering).

Legal Analysis

28. Under Section 2(a)(1) of the Securities Act, a security includes “an investment contract.” *See* 15 U.S.C. § 77b. An investment contract is an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. *See SEC v. Edwards*, 540 U.S. 389, 393 (2004); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946); *see also United Housing Found., Inc. v. Forman*, 421 U.S. 837, 852-53 (1975) (The “touchstone” of an investment contract “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.”). This definition 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 (emphasis added). The test “permits the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance of ‘the many types of instruments that in our commercial world fall within the ordinary concept of a security.’” *Id.* In analyzing whether something is a security, “form should be disregarded for substance,” *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967), “and the emphasis should be on economic realities underlying a transaction, and not on the name appended thereto.” *Forman*, 421 U.S. at 849.

29. As the Commission discussed in the DAO Report, tokens, coins or other digital assets issued on a blockchain may be securities under the federal securities laws, and, if they are securities, issuers and others who offer or sell them in the United States must register the offering and sale with the Commission or qualify for an exemption from registration.

A. The MUN Tokens Were Securities

30. As described above, the MUN tokens were securities as defined by Section 2(a)(1) of the Securities Act because they were investment contracts.

31. Munchee offered and sold MUN tokens in a general solicitation that included potential investors in the United States. Investors paid Ether or Bitcoin to purchase their MUN tokens. Such investment is the type of contribution of value that can create an investment contract.

32. MUN token purchasers had a reasonable expectation of profits from their investment in the Munchee enterprise. 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, and where app

users would want to use MUN tokens to pay for restaurant meals and would want to write reviews to obtain MUN tokens. In addition, Munchee highlighted that it would ensure a secondary trading market for MUN tokens would be available shortly after the completion of the offering and prior to the creation of the ecosystem. Like many other instruments, the MUN token did not promise investors any dividend or other periodic payment. Rather, as indicated by Munchee and as would have reasonably been understood by investors, investors could expect to profit from the appreciation of value of MUN tokens resulting from Munchee's efforts.

33. Investors' profits were to be derived from the significant entrepreneurial and managerial efforts of others – specifically Munchee and its agents – who were to revise the Munchee App, create the “ecosystem” that would increase the value of MUN (through both an increased demand for MUN tokens by users and Munchee's specific efforts to cause appreciation in value, such as by burning MUN tokens), and support secondary markets. Investors had little choice but to rely on Munchee and its expertise. At the time of the offering and sale of MUN tokens, no other person could make changes to the Munchee App or was working to create an “ecosystem” to create demand for MUN tokens.

34. Investors' expectations were primed by Munchee's marketing of the MUN token offering. To market the MUN token offering, Munchee and its agents created the Munchee Website and the MUN White Paper and then posted on message boards, social media and other outlets. They described how Munchee would revise the Munchee App and how the new “ecosystem” would create demand for MUN tokens. They likened MUN to prior ICOs and digital assets that had created profits for investors, and they specifically marketed to people interested in those assets – and those profits – rather than to people who, for example, might have wanted MUN tokens to buy advertising or increase their “tier” as a reviewer on the Munchee App. Because of the conduct and marketing materials of Munchee and its agents, investors would have had a reasonable belief that Munchee and its agents could be relied on to provide the significant entrepreneurial and managerial efforts required to make MUN tokens a success.

35. Even if MUN tokens had a practical use at the time of the offering, it would not preclude the token from being a security. Determining whether a transaction involves a security does not turn on labelling – such as characterizing an ICO as involving a “utility token” – but instead requires an assessment of “the economic realities underlying a transaction.” *Forman*, 421 U.S. at 849. All of the relevant facts and circumstances are considered in making that determination. *See Forman*, 421 U.S. at 849 (purchases of “stock” solely for purpose of obtaining housing not purchase of “investment contract”); *see also SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 352-53 (1943) (indicating the “test . . . is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect”).

B. Munchee Offered And Sold MUN Tokens In Violation Of The Securities Act

36. As described above, Munchee offered and sold securities to the general public, including potential investors in the United States, and actually sold securities to about 40 investors.

No registration statements were filed or in effect for the MUN token offers and sales and no exemptions from registration were available.

37. As a result of the conduct described above, Munchee violated Section 5(a) of the Securities Act, which states that unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

38. Also as a result of the conduct described above, Munchee violated Section 5(c) of the Securities Act, which states that it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security.

Munchee's Remedial Actions

39. In determining to accept the Offer, and to not impose a civil penalty, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED that:

- A. Pursuant to Section 8A of the Securities Act, Respondent Munchee cease and desist from committing or causing any violations and any future violations of Sections 5(a) and (c) of the Securities Act.

By the Commission.

Brent J. Fields
Secretary