UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	)	
v.	)	Civil Action No. 21-cv-00260
LBRY, INC., Defendant.	)	

ASSENTED-TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF NAOMI BROCKWELL

Naomi Brockwell, on behalf of herself, and similarly situated LBC token holders, respectfully requests that the Court grant her leave to file the proposed Amicus Brief attached hereto. Counsel for LBRY and Counsel for the SEC have no objection and consent to the filing of the proposed Amicus Brief, if allowed by the Court. In providing its consent, the SEC has requested seven days to respond to Mrs. Brockwell's Amicus Brief, and Mrs. Brockwell agreed to such request.

Dated: December 15, 2022

Respectfully submitted,
NAOMI BROCKWELL
By her Attorney,
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CERTIFICATE OF SERVICE

I hereby certify that, on December 15, 2022, I caused true and correct copies of the foregoing to be served on counsel of record for all parties that have appeared to date through the Court's CM/ECF system.

/s/ William S. Gannon

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	)	
v.	)	Civil Action No. 21-cv-00260
LBRY, INC., Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF ASSENTED-TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF NAOMI BROCKWELL

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Attorney for Amicus Curiae
NAOMI BROCKWELL

Naomi Brockwell respectfully submits this memorandum of law in support of her motion for leave to file a brief as amicus curiae in the above-captioned matter, as it relates to LBRY's Motion to Limit the Commission's Remedies (Doc. No. 89). A copy of Naomi Brockwell's proposed Amicus Brief is attached as **Exhibit A.** The parties have no objection to Naomi Brockwell's motion. The SEC has requested seven days to respond. Subject to the approval of this court, Mrs. Brockwell has agreed to that request.

ARGUMENT

"District courts have broad discretion in deciding whether to accept amicus briefs." *Jamaica Hosp. Med. Ctr., Inc. v. United Health Grp., Inc*., 584 F. Supp. 2d 489, 497 (E.D.N.Y. 2008) (citation omitted); *Auto. Club of N.Y., Inc. v. Port Auth*., No. 11 Civ. 6746 (RJH), 2011 U.S. Dist. LEXIS 135391, at *5 (S.D.N.Y. Nov. 23, 2011); *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008); *see also Stuart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013) (noting that non-parties have the option to file amicus briefs in district court proceedings and that such amicus "often make useful contributions to litigation"). In district courts, as opposed to the circuit courts of appeal, "[t]here is no governing standard, rule or statute 'prescrib[ing] the procedure for obtaining leave to file an amicus brief[.]" *In re Terrorist Attacks on Sept. 11, 2001*, No. 03 Civ. 9848, 2022 WL 2829691, at *1 (S.D.N.Y. Apr. 27, 2022) (quoting *Onandaga Indian Nation v. State of New York*, No. 97 Civ. 445, 1997 WL 369389, at *2 (N.D.N.Y. June 25, 1997)) (internal citations omitted). Courts will freely permit the filing of amicus briefs when they would be helpful to the court's decision-making. "The primary role of the amicus is to assist the Court in reaching the right decision in a case affected **with the interest of the general public**." *Russell v. Bd. of Plumbing Examiners,* 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999) (emphasis added); *see also Andersen v. Leavitt*, No. 3-cv-6115-DRH-ARL, 2007 U.S. Dist. LEXIS 59108,

*7 (E.D.N.Y. Aug. 13, 2007) ("The court is most likely to grant leave to appear as an amicus curiae in cases involving matters of the public interest."). An amicus brief should normally be allowed if the amicus has a unique perspective that can help the court. *See Automobile Club N.Y. Inc. v. Port Authority of N.Y. & N.J.*, No. 11- cv-6746-RJH, 2011 U.S. Distr. LEXIS 135391 *2 (S.D.N.Y. Nov. 22, 2011) (internal quotations omitted). Finally, "[a]lthough the court should consider the partiality of a would-be amicus, there is no rule that amici must be totally disinterested." *Auto. Club of N.Y.*, 2011 U.S. Dist. LEXIS 135391, at *6-7 (citations and quotation marks omitted).

No Federal Rule of Civil Procedure applies to motions for leave to appear as amicus curiae filed in district courts, so district courts often look for guidance from Fed. R. App. P. 29, which applies to amicus briefs in federal appellate cases. *See, e.g., Am. Humanist Ass'n v. Maryland Nat'l Capital Park & Planning Comm'n*, 147 F. Supp. 3d 373, 389 (D. Md. 2015). Rule 29 provides that prospective amici must file along with the proposed brief, a motion that states "the movant's interest" and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3).

I. INTERESTS OF *AMICUS CURIAE*

Naomi Brockwell ("Brockwell") is a journalist, film and television producer and creator of *NBTV*, a channel that produces video content available on Odysee and YouTube. *NBTV* is focused on blockchain and cryptocurrency, digital privacy, technology and scientific innovation. In addition to publishing video content, *NBTV* produces a monthly newsletter concerning the latest news in cryptocurrency, called *CryptoBeat*. Brockwell is not a crypto trader and does not make videos about crypto trading. She uses her platform to educate people on blockchain technology and help her viewers become more self-sovereign individuals.

As the Court is aware, Brockwell supplied a Declaration, dated April 28, 2022, which was offered in support of LBRY's Motion for Summary Judgment. *See* Doc. No. 61-1. In fact, Brockwell's business and overall interests in this case were highlighted, on the record, during oral argument, at the July 20, 2022 hearing. *See Hr.'g Tr.* 30:8-16 (Jul. 20, 2022). In her April 28, 2022 Declaration, Brockwell affirmed that she had earned over 261,500 LBC. She earned the LBC through user tips, purchases by viewers, and user rewards. As stated in her April 28, 2022 Declaration, she has never cashed out any of her LBC because it is far more valuable to her to keep the LBC attached to her channel because "staking" helps her videos get viewed by a larger number of people. To this day, ***Brockwell has never purchased or sold a single LBC***. *See Supplemental Declaration of Naomi Brockwell,* dated December 14, 2022, attached hereto as **Exhibit B**.

Naomi Brockwell uses the LBRY platform every day. **Exhibit B**, *Supplemental Declaration of Naomi Brockwell*. As a content creator, it is a great place for her to build an audience and feel comfortable that her channel is not going to be taken away from her. *Id.* During the last five years, Brockwell has accumulated all of the LBC tokens that she owns through her channel. *Id.* It is important to note, Brockwell was not even aware that the LBC tokens she had been accumulating, through the use and application of her channel, had a monetary value associated with them, until a few years ago. *Id*. Also significant, *Brockwell has never sold or bought any LBC tokens*. *Id*. She uses the tokens on a daily basis in the ordinary course of her business to post content, to give her content more visibility, and to access certain videos. *Id.*

On November 7, 2022, this Honorable Court entered a Memorandum and Order (Doc. No. 86) granting the SEC's Motion for Summary Judgment (Doc. No. 55) and denying LBRY's

Motion for Summary Judgment (Doc. No. 61). This Honorable Court's Memorandum and Order (Doc. No. 86) does not reference, in any manner, secondary market purchases or acquisitions of LBC. Nor does the Court's Order address LBC token holders, such as Brockwell, who acquired LBC for non-investment reasons. This Court has already determined that it is indisputable that individuals, like Naomi Brockwell, acquired LBC for consumptive use only. *See Hr.'g Tr.* 30:18-20 (Jul. 20, 2022) ("I think this record does contain evidence that there are consumptive uses for LBC. I think that's undeniable.") (Barbadoro, J.).

On November 21, 2022, this Court held a status conference between the parties. *See* Doc. No. 89-1 at 2. LBRY has offered to divest itself of its remaining pre-mined tokens thus, "secondary token holders will no longer have any reasonable expectation of profit based on the entrepreneurial or managerial efforts of LBRY." *Id.* Any LBC tokens within the secondary market that holders, like Naomi Brockwell, are using for the type of consumptive purposes articulated by Brockwell - would not constitute a security. The SEC, however, either disagrees or prefers regulatory uncertainty regarding secondary market transactions. According to LBRY's recent motion, at the November 21, 2022 status conference, this Honorable Court recognized this very issue and "urged the Commission to work with LBRY to resolve this litigation, **including by providing clarity to secondary LBC holders** (noting LBRY's offer to divest itself of its remaining LBC)." Doc. No. 89-1 at 3-4 (emphasis added). According to LBRY, it "provided the Commission with a settlement proposal consistent with the framework laid out by the Court." *Id*. at 4. After the parties were unable to reach a resolution consistent with this Court's direction (including clarity regarding secondary market sales), LBRY filed a Motion to Limit the Commission's Remedies. Doc. No. 89-1.

Clearly, Naomi Brockwell, as well as hundreds of thousands of other users, have significant interests as secondary market token holders – people who have not transacted with, or acquired LBC from LBRY or its executives for investment purposes and do not view LBC as an investment. Today, LBC holders, like Brockwell, arguably, have a greater interest moving forward than even LBRY itself. Unfortunately, LBRY has indicated that it will be dissolving the corporate entity because its liabilities far exceed its assets. *See* Doc. No. 89-1 at 6. This Court has recognized that LBRY "could go out of business today and the LBRY blockchain would continue in perpetuity just like the Bitcoin blockchain." *Hr.'g Tr.* 40:9-11 (Jul. 20, 2022) (Barbadoro, J.).

II. THE MATTERS ASSERTED IN THE *AMICUS* BRIEF ARE USEFUL AND RELEVANT TO THE COURT'S REVIEW

At the November 21, 2022 status conference, this Court expressed a definitive interest in facilitating a resolution of the remaining issues in this case (civil remedies) and where the SEC would issue clarity regarding secondary sales. Doc. No. 89-1 at 3-4. Specifically, this Honorable Court expressed a desire for a resolution that would allow LBC holders, like Naomi Brockwell, who believe in the LBRY Blockchain for something other than investment, to continue freely operating within the ecosystem. Simply stated, there are many holders of LBC that want to use LBC on the LBRY blockchain and should be able to do so without confusion over whether those secondary sales are restricted. Despite this Court's recommendation, it appears that the SEC is unwilling or unable to provide clarity regarding secondary market transactions. Therefore, this Court will benefit from amicus curiae "to assist the Court in reaching the right decision in a case affected with the interest of the general public." *Russell v. Bd. of Plumbing Examiners,* 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999). recommendation

Naomi Brockwell never purchased an LBC token, nor has she ever sold one. *See* **Exhibit B***, Supplemental Declaration of Naomi Brockwell.* The fact that the Court decided that LBRY offered and sold unregistered securities in the form of LBC tokens, does not mean that Naomi Brockwell is holding unregistered securities. Since Brockwell did not purchase LBC tokens and was completely unaware that the tokens carried a monetary value until a couple of years ago, even the SEC must concede that the first prong of the *Howey* test is not satisfied. Any suggestion otherwise would make Brockwell's lawfully and hard-earned tokens potentially worthless and unusable. The SEC made its point by bringing this enforcement action against LBRY and securing a win at summary judgment. That ruling being stretched to reach secondary market sales by acquirers with no investment intent would mean that people, like Naomi Brockwell, who acquired a non-financial asset would be deemed to have entered into a common enterprise with an entity (LBRY) that they may not be aware exists.

Naomi Brockwell respectfully requests the Court to grant leave to file an amicus curiae brief in this case. Brockwell represents a unique perspective not represented by the parties in this case. Therefore, Brockwell believes her amicus curiae brief can be of assistance to the Court. Finally, it is not hyperbole to suggest that an attempt to apply this Court decision regarding LBRY's offer and sale of securities to sales in the secondary market, independent of LBRY, could have an extremely adverse effect not only on LBC token holders but the entire blockchain industry.

CONCLUSION

For the foregoing reasons, Naomi Brockwell respectfully requests that this Court grant its assented-to motion for leave to file the amicus brief attached as **Exhibit A.**

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	)	
v.	)	Civil Action No. 21-cv-00260
LBRY, INC., Defendant.	)	

AMICUS BRIEF FOR AMICUS CURIAE NAOMI BROCKWELL IN SUPPORT OF DEFENDANTS' MOTION TO LIMIT THE COMMISSION'S REMEDIES

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December 15, 2022

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INTERESTS OF *AMICUS CURIAE*

Naomi Brockwell ("Brockwell") is well-known to this Court. She supplied a Declaration, dated April 28, 2022, which was offered in support of LBRY's Motion for Summary Judgment. Doc. No. 61-1. In fact, Brockwell's interests in this litigation were highlighted during oral argument. *See Hr.'g Tr.* 30:8-16 (Jul. 20, 2022). Through user tips, purchases by viewers, and user rewards, Brockwell has accumulated over 261,500 LBC. Doc. No. 61-1. She has never cashed out any of her LBC because it is far more valuable for her to keep the LBC attached to her channel because "staking" helps her videos get viewed by a larger number of people. *Id.* To this day, ***Brockwell has never purchased or sold a single LBC***. *See Supp. Decl. of Naomi Brockwell,* attached as Exhibit A. Brockwell uses the LBRY blockchain every day. *Id.* During the last five years, Brockwell accumulated LBC tokens through her channel but was originally unaware that the tokens had monetary value. *Id*.

On November 7, 2022, this Court entered an Order granting the SEC's Motion for Summary Judgment. Doc. No. 86. The Court's Order does not reference secondary market acquisitions of LBC. *Id*. Nor does it address LBC token holders, like Brockwell, who acquired LBC for non-investment purposes. *Id.* This Court concluded, however, that many individuals, like Brockwell, acquired LBC for consumptive use only. *See Hr.'g Tr.* 30:18-20 (Jul. 20, 2022) ("I think this record does contain evidence that there are consumptive uses for LBC. I think that's undeniable.") (Barbadoro, J.). However, the Court's Order failed to "distinguish among the sales that were made to purchasers that had a *bona fide* consumptive intent and those who were offered, and who purchased, LBC tokens with a reasonable expectation of profit from the efforts of LBRY, Inc." Lewis Cohen *et al*., *The Ineluctable Modality of Securities Law: Why Fungible Crypto Assets Are Not Securities*, Nov. 10, 2022, attached as Exhibit B at p. 84.

On November 21, 2022, the Court held a status conference to discuss appropriate remedies sought by the Commission. *See* Doc. No. 89-1 at 2. LBRY has offered to divest itself of its remaining pre-mined tokens thus, "secondary token holders will no longer have any reasonable expectation of profit based on the entrepreneurial or managerial efforts of LBRY." *Id.* At the November 21, 2022 status conference, this Court recognized the need for clarity and "urged the Commission to work with LBRY to resolve this litigation, **including by providing clarity to secondary LBC holders**." Doc. No. 89-1 at 3-4 (emphasis added). According to LBRY, it "provided the Commission with a settlement proposal consistent with the framework **laid out by the Court**." *Id*. at 4 (emphasis added). After the parties were unable to reach a resolution consistent with this Court's suggestion, including clarity regarding secondary market sales, LBRY filed a Motion to Limit the Commission's Remedies. Doc. No. 89-1. Clearly, Brockwell, as well as hundreds of thousands of other users, have significant interests as secondary market token holders – people who have not transacted with, or acquired LBC from LBRY or its executives, and who do not view LBC as an investment. Today, LBC holders, like Brockwell, arguably have a greater interest moving forward than LBRY. This Court recognized that LBRY "could go out of business today and the LBRY blockchain would continue in perpetuity just like the Bitcoin blockchain." *Hr.'g Tr.* 40:9-11 (Jul. 20, 2022) (Barbadoro, J.). LBRY has indicated that it will be dissolving the corporate entity. Doc. No. 89-1 at 6. Thus, there are many holders, like Brockwell, who want to use LBC on the LBRY blockchain and should be able to do so without confusion over whether secondary sales are restricted.

ARGUMENT

I. THE TOKEN ITSELF IS NEVER THE SECURITY

There is no case law from the Supreme Court or any appellate court that analyzes whether an underlying asset of an investment contract is itself a security. The reason there is no

precedent is because the underlying asset *utilized in an investment contract transaction* is ***never*** the security. *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946) ("If that test be satisfied, it is immaterial… whether there is a sale of property with or without intrinsic value."); *SEC v. Telegram Grp., Inc.*, 448 F. Supp. 3d 352, 379 (S.D.N.Y. 2020) ("the security…is not simply the Gram, which is little more than alphanumeric cryptographic sequence."). For example, claiming the LBC token itself is a security would be akin to calling the oranges in *Howey* securities. In *Telegram*, the Court clarified its original decision, making clear that the underlying asset (whether oranges or digital tokens) are not themselves investment contracts. *See SEC v. Telegram Grp. Inc.,* No. 19-cv-9439 (PKC), 2020 WL 1547383 at *1 (S.D.N.Y. Apr. 1, 2020) (clarifying that the central point of the Court's holding was that "the 'security' was neither the Gram Purchase Agreement *nor the Gram*."). Likewise, a former SEC Director unequivocally stated: "the token – or coin or whatever the digital information packet is called – **all by itself** is not a security, just as the orange groves in *Howey* were not." William Hinman, Dir., Div. of Corp. Fin., SEC, *Digital Asset Transactions: When Howey Met Gary (Plastic)* (June 14, 2018) (emphasis added).[1] Director Hinman noted that "the digital asset itself is simply code." *Id*. Director Hinman emphasized, "that the analysis of whether something is a security is not static and does not strictly inhere to the instrument." *Id.* Just like any other commodity, "investment contracts can be made out of virtually any asset (including virtual assets)." *Id*. Former SEC Chairman Clayton also agreed. *See Mar. 7, 2019 Ltr. from Chairman J. Clayton to Congressman Ted Budd* ("I agree that the analysis of whether a digital asset is offered or sold as a security is not static and **does not strictly inhere to the instrument**.") (emphasis added).[2] These SEC statements make sense considering any asset or commodity can be offered as a security, whether

[1] Available at https://www.sec.gov./news/speech/speech-hinman-061418.
[2] Available at https://www.coincenter.org/app/uploads/2020/05/clayton-token-response.pdf.

that asset be orange groves,[3] whiskey,[4] chinchillas,[5] condos,[6] beavers,[7] or Bitcoin.[8] When an asset is offered and sold as an investment contract, therefore a security, it does not transform the underlying asset itself into a security. Oranges remain oranges and LBC remains LBC – digital code. Recently, an extensive and comprehensive study was published reviewing every single relevant federal appellate case that has applied *Howey*. The study confirmed that no federal appellate court has ever held the underlying asset subject to an investment contract transaction, is itself an investment contract. *See* Exhibit B.

II. THE *HOWEY* ANALYSIS APPLIES TO SPECIFIC TRANSACTIONS AT THE TIME THE TRANSACTIONS WERE MADE

The SEC has argued that what matters in this case is "the economic reality of a transaction." Doc. No. 70 at 15. Each transaction "must be examined as of the time that the transaction took place." *SEC v. Aqua-Sonic Products Corp.*, 524 F. 866, 876 (S.D.N.Y. 1981); *Telegram Grp.,* 448 F. Supp. 3d 352, 368 ("*Howey* requires the Court to examine the series of understandings, transactions, and undertakings **at the time they were made**.") (emphasis added). Thus, each *Howey* factor must be satisfied for each transaction and each transaction must be examined at the time that it was made. Any potential injunction issued by this Court should expressly permit secondary market sales of LBC by persons unaffiliated with LBRY. Likewise, any potential injunctive relief should expressly permit the continued consumptive use of LBC.

III. NAOMI BROCKWELL'S LBC TOKENS ARE NOT SECURITIES UNDER THE "CHARACTER IN COMMERCE" TEST

[3] *Howey*, 328 U.S. 293 (1946).
[4] *Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1034 (2d Cir. 1974).
[5] *Miller v. Cent. Chinchilla Grp., Inc*., 494 F.2d 414 (8th Cir. 1974).
[6] SEC Rel. No. 33-5347 (Jan. 4, 1973).
[7] *Kemmerer et al. v. Weaver et al*., 445 F.2d 76 (7th Cir. 1971).
[8] *SEC v. Shavers*, 4:13-cv-00416, 2013 WL 4028182 (E.D. Tex. Aug. 6, 2013).

Considering the inherent characteristics of the underlying asset is critical *before* conducting a *Howey* analysis. *Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1034 (2d Cir. 1974). "The test rather 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." *SEC v. C.M. Joiner Leasing Corp.,* 320 U.S. 344, 352-53 (1943). The bottom line is that "[w]hen a purchaser is motivated by a desire to use or consume the item purchased…**the securities laws do not apply**." *United Hous. Found, Inc. v. Forman*, 421 U.S. 837, 852 (1975) (emphasis added). In part, this was a case of first impression and the parties and Court struggled to find the appropriate test to apply. *See Hr.'g Tr.* 51:1-7 (Jul. 20, 2022) (Barbadoro, J.) ("But then you still have to ask in a mixed motive case if some acquirers are acquiring for purely consumptive and others are acquiring purely for investment, what is the test by which a judge evaluates that kind of a case which I don't think any of the cases I've seen have really evaluated in detail those kinds of -- that kind of problem, and that's what we seem to have here."). In responding to this Court's inquiry, the SEC's replied: "Your Honor, I agree it is a tricky problem not fully addressed by the law." *Id*. at 51:18-19 (SEC Attorney Jones). Yet, it is indisputable, that the securities laws do not apply to the LBC acquired by Brockwell in the secondary market, completely independent of LBRY.

IV. THE LBC OWNED BY BROCKWELL DOES NOT SATISFY *HOWEY*

Not only did Brockwell not acquire LBC from LBRY, or its executives, she has ***never sold or purchased a single LBC token*.** Exhibit A. Furthermore, she has never cashed out any of her LBC because it is far more valuable for her to keep the LBC attached to her channel. *See* Doc. No. 61-1. Considering that Brockwell acquired LBC through her channel and was unaware that the tokens had monetary value, the SEC must concede that the first prong of *Howey* could never be satisfied. Furthermore, under these uncontested facts, it cannot be argued that

Brockwell entered into a common enterprise with LBRY or any other LBC token holders. LBRY will soon cease to exist, making it factually impossible for a common enterprise to exist. LBRY may have conceded the common enterprise factor for purposes of summary judgment, but token holders, like Brockwell, have not. Additionally, considering that Brockwell was unaware of any monetary value associated with LBC, she could not have had a reasonable expectation of profits. Finally, any tipping or benefit that she did receive was solely due to her own efforts. The SEC is unable to satisfy even a single factor of the *Howey* test.

V. SECTION 4 EXEMPTIONS DO NOT PROTECT BROCKWELL'S INTERESTS

The SEC may attempt to argue that Section 4 exemptions protect secondary market acquirers. Any such argument is a red herring and not true. Section 4 exemptions *only* apply to a security subject to registration under Section 5. *SEC v. C.M. Joiner Leasing Corp.,* 320 U.S. 344 (1943) at n.3 ("They had to be securities to be exempt securities under the Act." (citing 15 U.S.C. Sec.77c)). Thus, if the SEC attempts to argue Section 4 exemptions offer protections to holders like Brockwell, the SEC is admitting it views LBC tokens as securities. If LBCs are securities "the burden shifts to [Brockwell and others] to show that the securities [are] exempt from the registration requirement." *S.E.C. v. Cavanagh*, 155 F.3d 129, 133 (2d Cir. 1998). Section 4(a)(1) exempts "transactions by any person other than an issuer, underwriter, or dealer," while 4(a)(2) exempts "transactions by an issuer not involving a public offering." 15 U.S.C. § 77d(a)(1)-(2). Section 2(a)(11) defines "underwriter" as "any person who has purchased from an issuer with a view to . . . the distribution of any security." *Id.* Exchanges, like Coinbase, by definition, constitute an issuer, underwriter, or dealer so they would be unable to sell LBC tokens. Moreover, any holder with an intent to sell or transfer (e.g., tipping with LBC) could be deemed an issuer or underwriter. *Id.* Therefore, Section 4 exemptions offer the secondary user no protection or clarity.

VI. ONCE A SECURITY NOT ALWAYS A SECURITY

If the Court issues injunctive relief, it is critical that the Court distinguish secondary market transactions. Even if LBC was offered and sold by LBRY as an unregistered security, the next subsequent transfer or sale of that LBC does not equal the same. This distinction between offer and sale transactions and the underlying crypto assets is critical because facts and circumstances change. *Howey* is illustrative. The original sale of the orange groves constituted an investment contract because it was placed in context with the investor also hiring the W.J. Howey Co. to provide all maintenance and services associated with the orange groves. If the original purchaser sold the land thereafter, unrelated to the W.J. Howey Co., those same plots of land and orange trees would no longer constitute investment contracts. Former SEC Chairman Clayton addressed this issue in his Mar. 7, 2019 letter: "A digital asset may be offered and sold initially as a security…but that designation may change over time if the digital asset later is offered and sold in such a way that it will no longer meet that definition." *See supra*, note 2. Just as no federal appellate court has ever held that the underlying asset subject to an investment contract transaction is itself an investment contract, there is no federal case finding a subsequent transfer of that asset to be a securities transaction. *See* Exhibit B.

CONCLUSION

At the November 21, 2022 status conference, this Court expressed an intent to facilitate a resolution of the remaining issues in this case and a desire for the SEC to issue clarity regarding secondary sales. Doc. No. 89-1 at 3-4. Specifically, this Court expressed a desire for a resolution that would allow LBC holders, like Brockwell, to continue to use LBC on the LBRY blockchain, without any confusion over whether those secondary sales are restricted. *Id*. Despite this Court's recommendation, coupled with the undeniable truth that many holders did not acquire LBC for investment, the SEC is unwilling or unable to provide clarity regarding secondary market

transactions. The Court ruled that LBRY offered and sold unregistered securities in the form of LBC tokens, but that does not mean that Brockwell and others are holding and using unregistered securities. Brockwell, and thousands of others, could be directly and negatively impacted if the Court were to issue the extraordinary remedy of a permanent injunction without clarifying that the LBC token itself and secondary market transactions are still permitted and do not constitute securities.[9] It is not hyperbole to suggest that an attempt to apply the Court's decision regarding LBRY's offer and sale of securities to sales in the secondary market could have an extremely adverse effect not only on LBC token holders but the entire blockchain industry. The SEC made its point by bringing this enforcement action against LBRY and securing a win at summary judgment. This Court's ruling being stretched to reach secondary market sales by acquirers with no investment intent would mean that people, like Brockwell, who acquired a non-financial asset, would be deemed to have entered into a common enterprise with an entity (LBRY) that no longer exists. Since *Howey*, every case in which an investment contract was found, privity between the buyer and the promoter always existed. *See* Exhibit B. That is not the case here nor is it the case in most secondary market transactions. Despite this Court's strong recommendation to provide clarity, the SEC either disagrees or prefers regulatory uncertainty regarding secondary market transactions. Therefore, any potential injunction issued by this Court, should expressly permit secondary market sales of LBC by persons unaffiliated with LBRY. Likewise, any potential injunctive relief should expressly allow the continued consumptive use of LBC.

[9] In considering the briefing on the effect of the Court's ruling on, inter alia, the nature of the token itself and secondary sales, the Court is empowered to, in essence, construe LBRY's Motion to Limit the Commission's Remedies as a Motion for Clarification of the Court's Summary Judgment Memorandum and Order (Doc. No. 86). Since the SEC refuses to clarify secondary market LBC transactions, a clarification of the Court's order is appropriate. This Court's ruling has been interpreted to "characterize LBC itself as a security, ruling that the offer and sale of LBC tokens (apparently all offers and sales, regardless of the specific circumstances of the transaction) violated Section 5 of the Securities Act…" Exhibit B at p. 83.

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. LBRY, INC., Defendant.	Civil Action No. 1:21-cv-00260-PB

SUPPLEMENTAL DECLARATION OF NAOMI BROCKWELL

I, Naomi Brockwell, declare as follows:

1. I am a journalist, film and television producer and creator of "NBTV," a channel that produces video content available on Odysee.com ("Odysee") and YouTube. NBTV is focused on blockchain and cryptocurrency, digital privacy, technology, and scientific innovation. In addition to publishing video content, NBTV produces a monthly newsletter concerning the latest news in cryptocurrency, called CryptoBeat.

2. I am not a crypto trader and I do not make videos about trading. I use my platform to educate people on blockchain technology and help my viewers become more self-sovereign individuals.

3. In addition to my role at NBTV, I frequently appear on national television to discuss blockchain technology and current events. I regularly host some of the largest blockchain and economics conferences around the world, including Consensus, Bitcoin 2019, and Litecoin Summit.

4. I previously submitted a sworn declaration in this case on April 28, 2022, which I understand was submitted as part of LBRY, Inc.'s Motion for Summary Judgment (Doc. No. 61). My previous declaration is attached hereto as **Exhibit A**.

5. I use the LBRY platform every day, because as a content creator, it is a great place for me to build an audience and feel comfortable that my channel isn't going to be taken away from me. Over the past 5 years, my channel has accumulated LBC tokens. I didn't even understand that these tokens had any kind of monetary value until a couple of years ago. I have never sold or bought any LBC tokens, but I use them everyday to post content, to give my content more visibility, and to access certain videos.

6. I did not acquire LBC for investment purposes. I have never sold a single LBC. In order to use the LBRY protocol and post content, LBC is required, and so I use it on a practical level everyday.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 14th day of December, 2022.

Naomi Brockwell

Naomi Brockwell

Exhibit A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
-against-	:	Civil Action No. 1:21-cv-00260-PB
LBRY, INC.,	:	
Defendant.	:	

DECLARATION OF NAOMI BROCKWELL

I, Naomi Brockwell, declare as follows:

1. I am a journalist, film and television producer and creator of "NBTV," a channel that produces video content available on Odysee.com ("Odysee") and YouTube. NBTV is focused on blockchain and cryptocurrency, digital privacy, technology and scientific innovation. In addition to publishing video content, NBTV produces a monthly newsletter concerning the latest news in cryptocurrency, called *CryptoBeat*.

2. In addition to my role at NBTV, I also frequently appear on national television to discuss blockchain technology and current events. I regularly host some of the largest blockchain and economics conferences around the world, including Consensus, Bitcoin 2019, and Litecoin Summit.

3. Since 2022, I have worked as a producer for several feature documentary films, including: (i) *Bitcoin: The End of Money as We Know It* (winner of the Best International Documentary Award at the Anthem Film Festival and the Special Jury Prize at the Amsterdam Film Festival); (ii) *Audition* (winner of the Best Documentary Award at the Lion Star Film

Festival); and (iii) *The Housing Bubble* (winner of the Audience Choice Award at the Anthem Film Festival). In addition, since 2015, I have worked as a producer for 19-time-Emmy-Award-Winning journalist, John Stossel.

4. From 2013 to 2015, I was a Policy Associate at the New York Bitcoin Center. I am also the co-founder of The Soho Forum, a monthly debate series featuring topics of interest to libertarians that aims to enhance social and professional ties within the New York City libertarian community. In addition, I am on the Advisory Council at the Mannkal Economic Education Foundation, which provides scholarships to Western Australia university students to attend conferences, participate in study tours and connect with industry participants both domestically and internationally. The mission of Mannkal Economic Education Foundation is to develop future free market leaders and to promote free enterprise, limited government and individual initiative.

5. In 2016, I published a children's book called *Billy's Bitcoin*, which seeks to educate children on Bitcoin and its various uses in a simple and understandable way.

I. Introduction to LBRY and Creation of LBRY Channel

1. Since 2014, I have been publishing video content produced by NBTV on YouTube, where I have over 120,000 subscribers.

2. I was introduced to the LBRY network in 2017 when we did a show on LBRY for John Stossel's channel. After the show, I wanted to learn more about LBRY, so I created an account. Given the potential to reach a wider audience and to earn extra income, on or around August 9, 2018, I synced my YouTube channel to the LBRY network. This allowed my videos to be played on new and budding applications running on the LBRY blockchain that relies on a cryptocurrency—LBRY Credits ("LBC")—to reward, tip and pay for content.

3. I joined the LBRY network as a means of growing the audience for my channel, as

well as further monetizing my video content. YouTube takes a significant portion of content creator's fees, which has caused creators to grow increasingly frustrated with the application. The LBRY network, on the other hand, allows creators to keep 100% of their earnings. In addition, because it is a centralized application, YouTube is able to—and often does—"demonetize" certain content, which means that YouTube can unilaterally remove the option for creators to monetize certain videos that it believes, in its sole discretion, are unsuitable for advertisers. Demonetization has become an increasing problem for YouTube content creators, particularly for creators like me, who regularly produce content concerning blockchain technology and cryptocurrency—a subject matter that YouTube has been censoring and/or demonetizing over the past several years.

II. Growth on LBRY

4. The NBTV channel became available on the LBRY network on or around August 10, 2018.

5. In the nearly four years since joining the LBRY network, I have published over 600 videos to my LBRY channel. These videos have been viewed approximately 430,000 times and have received a total of over 22,000 reactions and 8,000 comments from viewers.

6. The number of users following and engaging with my channel has increased steadily since publishing my content to the LBRY network in 2018. As of January 1, 2019, I had approximately 160 followers and 3,000 views of my content. That number grew to approximately 2,200 followers and 24,000 views as of January 1, 2020, and approximately 32,000 followers and 98,000 views as of January 1, 2021. As of today, I have approximately 61,000 followers and 430,000 views—a growth from 2019 of approximately 3,8000% and 14,200% in followers and views, respectively.

7. Since joining the LBRY network, I have earned a total of approximately 261,500

LBC. I have earned this LBC in various ways, including through user tips, purchases by viewers, and user rewards.

8. I have never cashed out any of my LBC. It is far more valuable for me to keep my LBC attached to my channel because staking it helps my videos get seen by a larger number of people. I am not a crypto trader and do not make videos about trading — I make videos about useful tools based on blockchain technology that I think can help my viewers become more self-sovereign individuals.

9. I have been thrilled with both the growth of viewership of my channel on the LBRY network, as well as the monetization of my videos—particularly as compared with the monetization of certain of my videos on YouTube. For example, as of April 22, 2020, I had reached approximately 10,000 followers on my LBRY channel, as compared to 35,000 subscribers on YouTube, where I had begun my channel approximately 6 years prior. On that same date, a video posted to my channels on both the LBRY network and YouTube got more views on LBRY than it did on YouTube. Moreover, that same video earned almost $300 worth of LBC, whereas it had been demonetized on YouTube.

10. I have been so impressed with the LBRY network that I have actively sought to recruit other content creators to sync their content. In fact, at my suggestion, in October 2019, John Stossel synced his YouTube channel, called "Stossel TV," to the Odysee application, where he has since amassed approximately 35,000 followers, uploaded 510 videos, and earned over 150,000 in LBC.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 28th day of April, 2022.

Naomi Brockwell

Naomi Brockwell