

2011-45 869

**LAW OFFICES OF M. ANDREW ANDRADE**

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January 31, 2011

Hon. Gerald R. Rome  
Deputy Commissioner  
Colorado Division of Securities  
1650 Broadway, Suite 900  
Denver, Colorado 80202

RE: Request for an exemption confirmation and/or a no action opinion letter for  
Extremebidders.com, LLC doing business as Extremebidders.com

Dear Mr. Roan:

I am writing on behalf of our client, Extremebidders.com, LLC doing business as Extreme Bidders.com ("Extremebidders.com"), to request either an exemption confirmation and/or a no action opinion letter concerning whether certain of the activities of our client fall outside the definition of securities thereby not requiring a registration or if a security then an exemption from registration from the Division of Securities for the State of Colorado. In connection with this request I am tendering a check in the amount of \$100.00 for your processing fee.

**Background Information**

Extremebidders.com is a Nevada Limited Liability Company authorized to do business in the state of Colorado. It expects to operate as an internet auction house for the sale of real property. Extremebidders.com will auction real property situated both within the state of Colorado and outside the state of Colorado.

The inventory of auctioned property will be supplied initially by a sister company of Extremebidders.com. The sister company will hold title to the real property which is being auctioned before the auction has commenced.

It is anticipated that all auctions will be "reserve" auctions. However there also may be "non reserve" auctions as well from time to time. Generally, at the conclusion of the auction, the bidder who has made the last bid and where the reserve price of the auction has been met will purchase the property for the reserve price.

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In order to bid on any inventory on the Extremebid.com web site, a person will be required to purchase rights to bid from Extremebid.com. These rights will be sold for a fixed price per bid. A person using the site is essentially paying for the right to place a bid. For example, if a person wished to bid ten times he or she would purchase ten bids at a price of \$1.00 per bid for a total of \$10.00. That bidder would be free to use all of his or her bids on one auction or several auctions. Each time that a bidder places a bid, the number of bids left in that person's account will decrease by one. If the bidder is outbid, the bid that is considered "used" and cannot be reused by the bidder's account.

All terms and conditions of the bidding process and the purchase conditions will be included in the terms and condition of using the web site.

Here is an example as to how the auction will work. Each time that a bid is placed the price of a property to be auctioned would increase by \$0.01. Extremebid.com would determine that the reserve amount of the property will be \$4,500.00 not including the amounts bid. A timer is used on each auction. Each time that a bid is placed while the timer is between 30 seconds and 0, the timer will reset to 30 seconds and continue counting down to zero. This allows other users a chance to place a bid. The auction ends when nobody else wants to bid and the timer reaches zero. This highest bidder at this point is the winner and is responsible for paying the bid price assuming the reserve has been met.

Here is an example as to how the system works:

Let's say you purchased 100 bids and the price of the house is at \$8.26. If you choose to place a bid when the timer is at 10 seconds, the price will increase to \$8.27 and the timer will reset to 30 seconds and continue counting down. The amount of bids that you will have left to place will be 99. If somebody else places a bid after you, the price will increase to \$8.28 and the timer will again reset to 30 seconds and continue counting down. Since you are no longer the highest bidder, you are not responsible for the \$8.27 that you bid. If you bid again, the price will increase to \$8.29, reset to 30 seconds and continue counting down, and the amount of bids that you have left to place will be 98. The auction will continue like this until the timer reaches zero and the highest bidder at that time will be declared the winner.

Extremebid.com tracks the bidding by this potential purchaser in its computer database. If the bidder was the last bidder and the reserve amount for the auction was met then the bidder would be required to pay the reserve price and execute a Contract to Buy and Sell Real Property in the form approved by the Colorado Real Estate Commission or if the property was situated in another state using the approved forms for that state. Closing would occur through a Title Company in the state where the property was situated.

Extremebid.com derives revenue from the sale of bids and from certain auction fees assessed against the seller of the real property which in this case its subsidiary.

It is anticipated that for every bid that \$.10 would be applied to the reserve price of the auction. For example, if there were 10,000 bids the reserve price would increase by \$1,000.00 on the auction.

Bidders will not own or control Extremebid.com nor will they have the ability to control who wins the auction, except by being the last bidder after the reserve has been met.

### **Our Request:**

My client is requesting an opinion letter or a no action letter on the issue of whether the selling of bids to unrelated third parties by general solicitation constitutes the sale of a security as that term is defined by the Colorado Division of Securities. Moreover, if the selling of bids is a security then my client requests an opinion as to whether an exemption from registration is available for this activity.

### **Legal Discussion:**

Whether a particular transaction involves a security depends not on the name or the form of the instrument, but on the substantive economic realities underlying the transaction. See Griffin v. Jackson, 759 P.2d 839 (Colo. App. 1988). The statutory definition of "security" under the Act states, in pertinent part: "'Security' means any . . . certificate of interest or participation in any profit-sharing agreement; . . . transferable share; investment contract; . . . or, in general, any interest or instrument commonly known as a 'security' . . ." Section 11-51-201(17), C.R.S. 2001 (emphasis added). Under Colorado law, a "security" includes an "investment contract" covered under the Securities Act of 1933. Feigin v. Digital Interactive Associates, Inc., 987 P.2d 876 (Colo. App. 1999).

An investment contract under the Securities Act of 1933 means a contract, transaction, or scheme by which a person (1) invests his or her money (2) in a common enterprise (3) with the expectation of profits from the efforts of others. See Securities & Exchange Commission v. W.J. Howey Co., 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946); Feigin v. Digital Interactive Associates, Inc., *supra* (applying Howey test). These third-party efforts must be significant, that is, essential managerial efforts that affect the success or failure of the enterprise. See Securities & Exchange Commission v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir. 1973).

Here there will be no reliance on the "efforts of others" namely Extreme Bidder.com by the bidder. Each bidder will control the number of bids and whether he or she chooses to bid on any particular item for auction. The court in Life Partners concluded that there was no, or not

sufficient, reliance on the efforts of others and, therefore, the investment vehicle in that case was not an investment contract subject to securities regulation. We believe that the same scenario applies here.

### **Conclusion**

Based upon the foregoing we respectfully request: (1) either a confirmation that the above described activities do not fall within the definition of "securities" as that term is defined by the Division of Securities or (2) that the activities fall within an exemption from registration of securities.

If for any reason you do not believe that you can provide the no action opinion or the relief requested, we respectfully request an opportunity to confer with you prior to any written response.

Yours very truly,



M. Andrew Andrade

MA/pw  
cc: client