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### **LETTER OR OPINION RE: LEGALITY OF DUBLI ONLINE REVERSE-AUCTIONS UNDER U.S. GAMING LAW**

#### **Overview**

Dubli.com offers reverse auctions online for such items as cameras, Xbox 360 game stations, and iPods. Each item begins with a pre-set price. There are three auction programs, called Xpress, Zero and Unique Bid.

Common to Xpress and Zero is the purchase and use of the Dubli "credits", sold online for \$.80 USD each or in various-sized packets. Dubli credits are not used as a substitute for currency. A member must buy credits in order to participate in an auction, and uses up one credit each time he/she checks the price (in the Xpress and Zero Bid versions) or makes a bid (in the Unique Bid version). The act of checking also drives the item's current price down by \$0.25 - for every participant in the auction, and successively- each time someone checks. Dubli credits are non-refundable once expended in the bidding/checking process. They are not transferable, hold no monetary value and cannot be used on any other site or in any other auction enterprise.

In the Xpress version, participants keep checking until the price reaches a level that one of them finds agreeable. At that point the participant is allowed to formally purchase the item in question by clicking a "buy now" button on the screen (first come first served). The item is then paid for separately. Credits cannot be used for this payment.

In the Zero version, participants successively use their credits to check/lower the item price until one final participant lowers it to zero. That participant is the purchaser and the item is his. Although any of the participants can see when the price is approaching zero, none of them can precisely predict when the price will reach zero, because no participant can know how many other participants there are, come or what any of them will do.

In the Unique Bid version, participants use Dubli credits to place bids during a set time window, again charged one credit per bid. In order to be valid however, a given bid must also be a unique bid. That is, there must be no other bid placed by anyone else for the same amount. If someone else does place with an identical bid, both bids are invalidated. Participants are informed by e-mail when such invalidation occurs. At the conclusion of the set time period, the lowest unique bid is the winner. If there is no such bid, the auction is invalidated and Dubli retains the item. Multiple bids may be placed except during the last five minutes, when each participant is restricted to one bid only.

Dubli wishes to confirm that its auction programs do not amount to gambling or lotteries under US state or federal law. But if it turns out that any of them are in doubtful territory, Dubli needs to know what to do about that.

## QUESTIONS PRESENTED

I. **Can any of the three Dubli online auctions be considered a gambling enterprise? Do any of them violate U.S. state or federal laws against lotteries, raffles, or similar forms of gambling? What can be done to minimize any such liability?**

A. Gambling generally. In order for a given transaction to be identified as gambling, three distinct elements must be present together: consideration, chance, and prize.

1. Consideration: in contract law generally, the term "consideration" may mean practically anything of value, including giving up the right to some future act or obligation. In American gambling law, however, consideration means money. This money must be risked- that is, the player gets nothing else for his money but the opportunity to win a prize, determined by chance. Just as importantly he stands to lose that money permanently for no

gain, goods, or service in return.

- a. Standard auction model: in a traditional auction, “consideration” in the gambling sense does not exist. The highest bidder gains the right to buy the item(s) on offer. So long as he can actually pay, the matter is resolved. The same is obviously true of the “ordinary” reverse auction
  - b. Dubli models: on the one hand, a participant expends one credit merely for the chance to check the price. From this point of view it may be said that he is not actually purchasing any chances to buy. On the other hand, each time the price of the item on offer is checked in the “Xpress” and “Zero” models, the act of checking forces the price down \$.25. In the “Unique Bid”, a participant must also expend one credit to make his bid. In that sense, and because credits once utilized to make a bid or price check are not refunded, it is clear that participants purchase the means to affect, or least enter, the contest. Therefore I conclude that the element of consideration is present in all versions of the Dubli online reverse actions.
2. Chance: there is some element of chance in everything humans do. For the purposes of U.S. gambling law, however, “chance” means that a given event is resolved, in regard to all participants at the time, by a common random occurrence which is not under the control of any participant. To give an example, if John and Joe play chess against each other, the element of chance is minimized if not eliminated. All things being equal, the game will be won by the player with the most knowledge of the game and the best moves. Chess is a skill game. But if, on the other hand, they both purchase a lottery ticket, skill has nothing to do with the outcome. Either a given number is picked or it isn’t. This is pure chance.
- a. Additionally it makes a large difference whether the bettor is a participant. To take the chess example above, it is not gambling if John and Joe agree that the loser of the chess game must pay the winner \$10. The conduct of game is under the control of the two participants. However, if two onlookers, Sarah and Sue, bet on which man will win the chess game, that is gambling, because the outcome of the

game is not under the control of either woman.

- b. In the case of Dubli, the element of chance does not rise to the level required to categorize the activity as “gambling”.
  - (1) in the “Xpress” and “Zero” models, the resolution of the event is not dependent upon some random occurrence, but only on the conduct of the participants. The price of a given item on offer is decreased only by the actions of the participants. If, for some reason, none of the participants decided to check/decrease the price of the item, that price would remain static unless and until one or more of the participants chose to act. In fact, if no one chooses to bid on a given item, nothing happens at all.
  - (2) “Unique Bid” is very much in the same vein. That is, a participant’s success in placing a “unique bid” does not depend on anything outside the efforts of the respective participants. Two or more participants may offer bids at the same price, but this is not caused by any random agency. This coincidence (once again, barring collusion) would be the result of the respective participants’ independent decisions, just as various runners’ independent decisions to run a little faster or hold back in a race may lead to different- but not random- results.
  - (3) For this reason I conclude that the element of chance, as understood in American gambling law, is minimal to nonexistent. While the outcome of any given reverse auction is not solely under the control of any one participant, the actions of the respective participants are the only inputs to the final result. There is no random dispositive influence acting outside participatory control.
3. Prize: the definition of “prize” is essentially anything of value. Since obtaining valuable items such as iPods at a reduced price is the whole point of participating in Dubli’s reverse auctions, the element of prize is obviously present.

4. I conclude that since the element of chance, as understood in gambling law, is not present in the Dubli auctions, these auctions cannot be considered either games of chance or lotteries.

B. U.S. State Laws :

1. Gambling : Once we have established that Dubli is not a lottery, the gambling laws of most states are not longer a worry. But not all states: even playing games of skill online may be illegal in Illinois and Iowa (720 ILCS 5-28-1(a) 12 and ISC 725.5, respectively). In addition, eight states outlaw Internet gambling ( except , of course, what they themselves choose to license). They would have to stretch a point to call Dubli an Internet game of chance: further, there is no indication of any particular benefit in doing so. [Note: the text of each State law cited in this discussion is provided in APPENDIX A.] Most importantly, since the reverse auction is neither a sporting contest, a lottery, nor a game of chance, I conclude that Dubli has nothing to fear from state gambling laws
2. Need for an identified auctioneer ? At least twenty-eight states, however, require a license for an auction to be conducted.[ See TABLE II. Some require it at state level, some at county or city level: others differentiate by what is being sold ( real estate, autos, livestock). Some require large bonds to be posted and personal background checks to be conducted as well. While the purpose behind these laws is clear enough, the prevention of fraud, in many states this has become a means to restrict competition and protect the “home market” from other auctions and auctioneers.
3. Is it conceivable that Dubli might be subject to an injunction or lawsuit for conducting auctions without a license issued by the state or municipality where a certain bidder lives? This brings us to the question of jurisdiction and the Internet. Does the transaction take place where the bidder is, and therefore, under the jurisdiction of the bidder’s home state? Or does it take place at the server of the Internet establishment? There is no American law, as far as gambling, which states this, and the case precedent is sparse and unsatisfactory.

4. Outside of gambling, the rule of civil jurisdiction essentially centers on how interactive a given web site is. If a site is merely passive, the equivalent of a billboard, a state could not assert jurisdiction over that site simply because someone in that state had viewed it. If, on the other hand, the site interacts with the customer- inviting and allowing him to look through inventory and product lists, and place orders, etc., it is not passive. The more business that is transacted through that site, the more probable it is that the site will be held to have purposefully directed its activities at that state ( Zippo Manufacturing Co. v. Zippo.com Inc., 952 F. Supp 1119 ( W.D. Pa 1997); Intercon Inc v Bell Atlantic Internet Solutions, 205 F.3d 1244 ( 10<sup>th</sup> Cir 2000)). And this means that it is possible for that state to assert jurisdiction.
  - a. In the case of Dubli, since it will be actively soliciting customers selling credits, taking and recording bids, and then communicating which bids were “knocked out” by identical bids making them non-unique, it is clear that the Dubli web site will be very interactive. It would therefore be technically possible for a given state to claim jurisdiction, if Dubli bidders or participants reside there.
  - b. At the same time it would require an impossible expenditure of time and money to check with every city and county in the United States, find out if a license was required, and then apply for one. As the saying is, life’s too short.
  - c. But the difficulty cuts both ways: since Dubli’s reverse auctions are not readily identifiable as games of chance or gambling, they will not attract the automatic hostile attention that attaches to the traditional gambling enterprises such as sports betting. In other words, their content neutrality makes them a poor target in the heavily politicized arena of gambling law. Dubli need not worry about becoming a “trophy head” anytime soon.
5. So if Dubli remains licensed and located only within the UK, it would be much more difficult for state authorities to interfere further than a cease-and-desist letter.

6. And Dubli, located abroad, might consider handling its marketing and distribution programs through an independent contractor in the USA- and any other countries where this difficulty might arise.
7. At the same time the prestige and reassurance of a licensed auctioneer might be very useful for de-fusing potential resentments in advance. There is National Auctioneers association that also has branches in Canada and South Africa, and they already conduct auctions online. Perhaps it would save time and effort to consult them about using their services, or at least displaying their logo.

C. Federal law

1. Gambling laws : generally speaking, U.S. Federal anti-gambling laws are activated when state gambling laws are broken. Since we have established that state gambling violations are not on the cards, Dubli therefore need not be concerned about violating U.S. Federal gambling law.
2. Auctions: Auctions, as a form of sale, are governed by at the state level by commerce laws. Those auctions which allow bids across state lines come under the Federal Trade Commission, which is mainly concerned that the advertising for such auctions is truthful, and that the items sold correspond to their descriptions. Those conditions being satisfied, there is little further cause for concern. There is no such thing as a national auction license.

II. **Conclusion and Recommendations**

- A. Dubli's reverse auctions are obviously not gambling games, and do not constitute a game of chance nor a lottery as far as the terms are defined in American state and Federal law.
- B. The only potential legal problems ( outside of tax issues) I can foresee would be centered on the issue of local auction licensing. Clearly it is not realistic to attempt to obtain licenses in every state, town, county or

city in the USA that might require them.

- C. The best strategy would be to limit possible exposure to jurisdiction claims by
  - 1. working through third parties and contractors as much as practicable;
  - 2. ensuring that the terms and conditions specify
    - a. the participant's sole responsibility for complying with local laws, and
    - b. UK jurisdiction or arbitration in the event of dispute
- D. It might also be possible to use, or gain the approval of, professional auctioneers societies in the USA.
- E. Finally, there is the matter of "image": since gambling is supposed to be a social harm, associating with socially desirable goals is very good preventive medicine. Dubli's charity-only auction is a very good example of this, and this should be a continuing standard practice, expanded where practicable.

This letter of opinion is based upon my best understanding of applicable law and on information supplied by Mr. Kusche.

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