Velton · Zegelman PC
Attorneys at Law
www.vzfirm.com
795 Folsom Street, Suite 100
San Francisco, CA 94107
(408) 891-7991

Attorney-Client Confidential Communication

Attorney Work Product

December 23, 2017

Native Video Box
Attention: Alexander Shishow
Via Email at ash@nvb.digital

Re: Analysis of the NVB Tokens Under the Howey Test

To whom it may concern,

Based on that definition and our reading of relevant case law, as well as on our understanding of the facts and our review of the materials you provided on the structure of the Tokens, we conclude that the Tokens would not be deemed to meet the definition of security and, accordingly, that the federal securities laws do not apply to the initial distribution and subsequent trading of such Tokens in the United States.[1]
Please accept this letter as the legal opinion, further described herein, regarding the NVB ("Token") sold by the entity doing business as Native Video Box ("Client").

1. Introduction and Scope of Advice.

1.1. The Client is the developer of the NVB Platform ("Platform"), which is designed as a distribution platform for video advertising.

1.2. The Client is seeking to raise funds, via Token Sale.

[1] Our analysis is based on our discussions with you, the materials you provided and the law as it exists as of the date hereof. We have not considered any state or non-US law analysis, including that of federal preemption related to state blue sky laws, and this outline relates solely to the definition of security under the federal securities laws. We do not express any view on any other body of law or legal construct, including without limitation the franchise laws of any state. As of this date, to our knowledge there are no court cases, no SEC rules, and only a few SEC releases that directly address the question discussed in this memorandum as to whether certain blockchain tokens should be characterized as securities for purposes of Section 2(a)(1) of the Securities Act. As such, the SEC or a court could reach an alternative conclusion different from the one provided in this memorandum.

1.3. This memorandum analyses the token structure as it would operate on a fully developed platform and assumes that tokens sold prior to the launch of the Platform will comply with applicable securities laws.

1.4. Velton Zegelman PC has been asked to analyze as to whether the Token, with certain features described in the Token Sale Documents (as defined below), would be considered a "security" for purposes of Section 2(a)(1) of the Securities Act of 1933 ("Securities Act") and Section 3(a)(10) of the Securities Exchange Act of 1934 ("Exchange Act").

1.5. We provide our opinion based on the following: (1) White Paper enclosed as Exhibit A; and (2) our conversations with the Client (collectively, the "Token Sale Documents").

1.6. Please note that we have neither undertaken a legal analysis of any tax implications which may arise in connection with the token sale, nor have we undertaken a legal analysis of any legal framework not mentioned herein.

2. Background Information

2.1. The Platform

The Platform can be generally described as a distribution network that marries content creators with video advertisement sellers. To clarify, there are three primary players on the Platform: publishers; content creators; and programmatic partners. The content creators upload their content (i.e., DIY videos, vlogs, etc.) to the Platform. Programmatic advertising partners will contract with the Client and be matched with the content uploaded by the content creators. The publishers host the content of the content creators (i.e., the content created by the content creators will be played on the publishers' website).

The revenue generated from the programmatic advertisements will be split as follows: 60% to the publisher; 15% to the content creator; and 25% to NVB.

2.2. Token Use and Functionality

The Token will serve as the internal settlement currency for the Platform. Thus, all persons transacting thereon will be paid in NVB tokens.

3. Legal Analysis

The broad definition of "security" is contained in Section 2(a)(1) of the Securities Act: "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".[2]

The applicable Supreme Court case for determining whether an instrument meets the definition of security is SEC v. Howey, 328 U.S. 293 (1946). The Supreme Court has reaffirmed the Howey analysis ("Howey Test") as recently as 2004 in SEC v. Edwards, 540 U.S. 398 (2004). Moreover, the SEC confirmed the applicability of the Howey Test to public token sales in the Report of Investigation, dated July 25, 2017, related to DAO Tokens. Thus, the applicable standard for analysis remains the Howey Test.

Howey focuses specifically on the term "investment contract" within the definition of security, noting that it has been used to classify those instruments that are of a "more variable character" that 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; Golden v. Garafolo, 678 F.2d 1139, 1144 (2d. Cir. 1982) (stating "investment contract" has been used to classify instruments that do not fit other categories); *see also* Black's Law Dictionary (10th ed. 2014).

Some of the investment interests listed above are more properly characterized as traditional types of securities, so their combination with a non-security blockchain token increases the likelihood a blockchain token will be deemed a security under US laws.

The Supreme Court in Howey developed a four-part test to determine whether an agreement constitutes an investment contract and therefore a security. Pursuant thereto, a contract constitutes an investment contract, considered a security, if there is: (i) an investment of money; (ii) in a common enterprise; (iii) with an expectation of profits; (iv) solely from the efforts of others (e.g., a promoter or third party), "regardless of whether the shares in the enterprise are evidenced by formal certificates or by nominal interest in the physical assets used by the enterprise." Howey, 328 U.S. at 298-99. ***To be considered a security, all four factors must be met***. *See* Edwards, 540 U.S. at 390.

We provide our analysis of the Token below, based on each Howey factor:

3.1. **Investment of Money.**

Under Howey, and case law following it, an investment of money may include not only the provision of capital, assets, and cash, but also goods, services, or a promissory note. *See, e.g.,* 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); Sandusky Land, Ltd. V. Uniplan Groups, Inc., 400 F. Supp. 440, 445 (N.D. Ohio 1975).

The courts and the SEC have repeatedly stated that the term "money" includes not only fiat currency but any commonly accepted indication of value. Specifically, in its Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, No. 81207, dated July 25, 2017, the SEC reconfirmed that ETH and other cryptocurrencies are equivalent to fiat currency for the purposes of Howey test, since both represent a "contribution of value". The same principle was previously upheld by US courts in SEC v. Shavers, No. 4:13-CV-416, 2014 WL 4652121, at *1 (E.D. Tex. Sept. 18, 2014) (holding that an investment of Bitcoin, a virtual currency, meets the first prong of Howey).

Whereas it is unclear what currency will be accepted for the Tokens, page 27 of the White Paper illustrates that the Tokens will be sold "at a price of $1." Thus, there is no doubt that there will be

[2] US Supreme Court stated that the definitions of "security" under the Securities Act and the Exchange Act are treated as being the same, despite some technical differences. SEC v. Edwards, 540 U.S. 398 (2004) (*citing* Reves v. Ernst & Young, 494 U.S. 56, 61 n.1 (1990)).

an investment of money in exchange for the Token. In sum, the first prong of Howey Test is satisfied.

It may be argued that some persons (i.e., content creators and publishers) are not purchasing Tokens and just getting paid in them. However, this is irrelevant considering that the Tokens will still be purchased by the programmatic advertisers, which is described further below.

3.2. **Common Enterprise**.

Different judicial circuits in the US use different tests to analyze whether a common enterprise exists. Three approaches predominate: (i) Horizontal Commonality; (ii) Narrow Vertical Commonality; and (iii) Broad Vertical Commonality. Please see below a definition of each test and its application to Tokens.

3.2.1. *Horizontal Commonality*.

Under the Horizontal approach, a common enterprise is deemed to exist where multiple investors pool funds into an investment and the profits of each investor correlate with those of the other investors. *See e.g.*, Curran v. Merrill Lynch, 622 F.2d 216 (6th Cir. 1980). In other words, there is a proportional distribution of profits according to percentage ownership of the investor pool. Whether funds are pooled appears to be the key question, and in cases where there is no sharing of profits or pooling of funds, a common enterprise may not be deemed to exist. *See, e.g.*, Hirk v. Agri-Research Council, Inc., 561 F.2d 96, 101 (finding discretionary future trading account was not investment contract because there was no pooling of funds); Wals v. Fox Hills Dev. Corp., 24 F.3d 1016 (7th Cir. 1994) (promoter of condominium timeshare did not pool profits and thus no common enterprise existed).

In this instance, Horizontal Commonality is satisfied, because the funds raised during the Token Sale will be pooled and used to develop and maintain the Platform. Moreover, the Token holders' profits correlate to one another in the attenuated sense that the Token may subsequently be traded for other crypto currency and/or fiat. The value of the Token during secondary trading correlates each Token holders' profits.

Whereas, it may be argued that the profits are also effected by the amount of activity on the platform, it nonetheless is correlated in one regard. Moreover, the focus on Horizontal Commonality is the pooling of funds. In sum, Horizontal Commonality is likely satisfied.

3.2.2. *Narrow Vertical Commonality*.

The Narrow Vertical approach looks to whether the profits of an investor are tied to a promoter. *See* SEC v. Eurobond Exchange Ltd., 13 F.3d 1334 (9th Cir. 1994) (imposition of profit limitations on investors through requiring promoter to receive excess return rate tied promoter's fortunes to investors).

The Narrow Vertical approach is likely satisfied, because the profits of the Token holders are tied to that of the promoter in the sense that the profits are shared among the three parties described above. When the Token holder makes money (i.e., publisher and/or content creator receive share of profits), the Client receives 25%. Thus, there is a direct correlation between the profits of some Token holders and that of the Client.

It may be argued that the only purchasers of the tokens will be programmatic advertisers, because they will be paying the publishers and content creators via tokens. The advertisers do not receive a share of the profits and are in fact the ones paying. However, the advertisers realize profits via impressions made (i.e., ads watched), and the ultimate payout from the programmatic partners will be determined by the number of impressions.

In summation, all Token holders' profits are correlated to the profits of the Client, and the Narrow Vertical approach is likely satisfied.

3.2.3. *Broad Vertical Commonality*.

The Broad Vertical Approach considers whether the success of the investor depends on the promoter's expertise. If there is such reliance, then a common enterprise will be deemed to exist. See e.g., SEC v. Continental Commodities Corp., 497 F.2d 516 (5th Cir. 1974) (promoter's recommendations regarding certain futures contracts demonstrated investor reliance on promoter's expertise).

The Broad Vertical approach is likely satisfied, because the success of the Token holder largely depends on the expertise of the Client to implement its business plan and to develop a platform that operates as intended. Specifically, the Client is responsible for marrying the appropriate programmatic partners with the appropriate content creators and publishers. This requires a certain level of expertise that the success of all parties involved depends on. Accordingly, the Broad Vertical approach is likely satisfied.

3.3. **Expectation of Profits**.

Under this third prong of the Howey Test, profit refers to the type of return or income an investor seeks on their investment (rather than the profits that the system or issuer might earn).[3] Thus, for purposes of the Token, this could refer to any type of return or income earned by holding the Tokens, which would be narrowed to the extent it is derived passively (e.g., from the efforts of others).

In summation, just because there is a return or profit, does not mean that the investment contract is a security. It is the passive nature of the return, as determined by the "efforts of others" analysis, that results in an "investment contract" and security as opposed to a simple contract instrument.

Since courts consider this factor through the lens of the "efforts of others" factor, we analyze this prong along with the fourth factor below.

3.4. **Solely from the Efforts of Others**.

In the past, courts have been flexible with the word "solely," such that, in addition to the literal meaning, it will also include significant or essential managerial or other efforts necessary to the success of the investment. *See e.g.*, SEC v. Glenn W. Turner Enters., 474 F.2d 476, 482-83 (9th Cir. 1973); SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974) (holding that where promoters retain immediate control over the essential managerial conduct of an enterprise, rather than remote control similar to a franchise arrangement, this element is met); *but see* Hirsch v. Dupont, 396 F. Supp. 1214, 1218-20 (S.D.N.Y. 1975), aff'd, 553 F.2d 750 (2d Cir. 1977) (indicating that solely should have literal application). Overall, the purpose of this fourth prong of the Howey Test is to determine whether generated profits require active involvement by the investor. If the answer is yes, then this fourth prong is likely not met.

3.4.1. Only Programmatic Advertisers are Investors.

It is our opinion that the programmatic advertisers are the only investors, because they are the only persons incentivized to purchase the Tokens. To clarify, all other parties (i.e., publishers and content creators) only get paid in Tokens. The Token's sole use is to pay the publishers and content creators. Unless the publishers and content creators also have programmatic advertising

[3] More specifically, profits may include all manner of returns, such as dividends, other periodic payments or the increased value of the investment whether it is a variable or fixed return. *See e.g.*, Edwards, 540 U.S. at 390.

platforms they wish to use on the Platform, there is no use in holding onto the Tokens. Thus, they will likely trade the token for other crypto currency and/or fiat.

Accordingly, the only investment of money comes from the programmatic advertisers.

3.4.2. The Focus is on Business Revenue and not Appreciation of the Token.

The focus of the Token is not to be held as an investment that will appreciate in value. Instead, it is meant to be used as currency for programmatic advertisers to pay the related parties. Thus, the purpose is to purchase the Token so a programmatic advertiser may use the platform as a venue to spread their ads. The way the Token is designed, the incentive is merely to purchase the token with the intent of using it to pay instead of holding it for appreciation purposes.

3.4.3. Active Participation.

Whereas there is a passive nature to the way the transactions occur (i.e., programmatic advertising), there is active participation in the sense that all parties involve are engaged in backend processes that make the Platform tick. To clarify, if content creators are not creating content and/or programmatic advertisers are not developing advertisements, then the Platform would be meaningless and void of any reason. Accordingly, it is clear that there is active participation in the sense that the expected profits are derived from each parties' own efforts and not solely and/or substantially from the efforts of the Client.

3.4.4. Secondary Trading of the Token.

The Client intends to list the Token on a secondary exchange to permit interested parties a method of obtaining tokens outside of the initial Token Sale. It is unclear how soon following the Token sale the Client intends to list the Token on an exchange. However, the mere listing of the token does not necessarily implicate US securities laws.

Instead, the fact remains to be seen what will occur when the Token is listed on a secondary exchange, and we cannot definitively state one way or another. However, it is our opinion that listing tokens on an exchange immediately following a token sale will likely cause the token to be treated and traded like traditional securities.

Thus, if the Client lists the token on an exchange too soon following the initial Token Sale, it is likely that the Token will become a security by virtue of the economic realities of the Token being traded like a security.

3.4.5. Potential Appreciation of the Token.

The potential appreciation in the value of the Token, due to secondary trading, does not change our view that it is not an investment contract. As described above, the incentive to hold the Token is not as an asset that will appreciate in value itself, but to create value through the independent use and application of the Token (i.e., generate ad revenue).

3.5. Conclusion.

Based on the above analysis, we believe that the Token Sale Documents describe a digital token that is not likely to be deemed a security under applicable US laws.

4. Disclaimers

NO GUARANTEES: CLIENT UNDERSTANDS THE RISKS INHERENT IN THE UNCERTAIN LEGAL STATUS OF THE BLOCKCHAIN AND CRYPTOCURRENCY INDUSTRY IN THE UNITED STATES. YOU UNDERSTAND THAT LEGAL ADVICE PROVIDED HEREIN DOES NOT GUARANTEE SUCCESS OR IMMUNITY FROM CIVIL AND/OR CRIMINAL PROSECUTION DUE IN PART TO THE EVOLVING NATURE OF THE BLOCKCHAIN AND CRYPTOCURRENCY INDUSTRY IN THE UNITED STATES.

CLIENT ADVISED TO CONSULT WITH ATTORNEY: WE ADVISE CLIENT TO CONSULT WITH AN ATTORNEY AS OFTEN AS PRACTICABLE, BECAUSE THE LEGAL LANDSCAP IS ALWAYS CHANGING. WE FURTHER ADVISE CLIENT TO REMAIN AWARE OF THE SHIFTING LEGAL ISSUES REGARDING THE BLOCKCHAIN INDUSTRY.

TOKEN DESIGN VS TOKEN SALE: CLIENT UNDERSTANDS THAT EVEN IF THE TOKENS, AS DESCRIBED HEREIN, MAY NOT BE CONSIDERED A SECURITY BY DESIGN, THEY MAY BE CONSIDERED A SECURITY IN THE MANNER OF HOW AND WHEN THEY WERE SOLD AND/OR HOW THEY ARE TREATED. CLIENT UNDERSTANDS THAT IF THE TOKEN IS EVENTUALLY SOLD AND HELD BY PURCHASERS FOR INVESTMENT PURPOSES, THEN IT IS INCREASINGLY LIKELY THAT IT WILL BE CONSIDERED A SECURITY.

PRE-SALE: CLIENT UNDERSTANDS THAT THE VERY NATURE OF A PRE-SALE WILL LIKELY IMPLICATE US SECURITIES LAWS AND THAT SUCH SALE IS CONDUCTED IN COMPLIANCE WITH SUCH APPLICABLE LAWS.

Please do not hesitate to contact us if you have any questions.

Sincerely,

By: Julian Zegelman Velton
Zegelman PC