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PERSONAL & CONFIDENTIAL – NOT FOR FILING

VIA FEDERAL EXPRESS

Hon. D. Lowell Jensen
United States District Court, Northern District
1301 Clay Street, Suite 400 C
Oakland, CA 94612-5212

Re: *Beigel v. Dwan – Blueberry Software*
U.S. District Court Case No. C02 3116 DLJ
Our File No. 9512-001

Dear Judge Jensen:

Introduction

I wanted to share my thinking regarding the question whether there should be an audit of the Arbortext royalties, in light of several new developments. Plainly, this issue presents the classic – “is a bird in the hand worth two in the bush” conundrum. Arbortext’s indication of a lack of support, Arbortext’s payment of lessening royalties, Arbortext’s indication that it may be planning to use alternate software, together with Arbortext’s continuing desire to pursue a buyout, indicates to me that the buyout alternative continues to have great merit. Also recognizing, however, the legitimate need to know whether royalties have been properly paid, I suggest a more conservative and threshold process, pursuant to which all parties engage in an analysis of Steven Beigel’s assertion that royalties have been underpaid, so as to substantiate, or negate, one way or another, whether there is a legitimate question whether royalties have indeed been underpaid.

Attachments

Attached to this letter as **Exhibit A** is my March 26, 2004 letter to the Court, in which I examine the reasons to do a buyout, the reasons not to do a buyout, and provide a present value analysis of the Arbortext \$100,000.00 buyout.

Attached as **Exhibit B** is a copy of Dave Peralta’s voice mail to me dated May 19, 2004 in which he indicates that Arbortext may be pursuing alternative software, and with it implies that the contract may be cancelled.

Attached as **Exhibit C** is a copy of the most recent royalty statement from Arbortext to Blueberry, in the sum of \$4,652.46 for the first quarter of 2004.

Attached as **Exhibit D** is an Arbortext printout entitled "Invoice Blueberry Register for 1/1/1999 to 3/31/2004" which appears to indicate Arbortext royalties paid to Blueberry for the stated time frame.

New Developments

Since the Court's discussion of this issue earlier this Spring, I perceive several new developments.

First, Peralta's voice mail (See Exhibit B) indicates that Arbortext has "a viable alternative solution now that I think would be a quite a bit less expensive for us." Whether this is bluff, or not, his statement is consistent with earlier statements that he made regarding Arbortext's perception of a need to find an alternative software to the Blueberry Software given the alleged lack of support.

Second, in my March 26 letter, I assumed quarterly royalties in an amount somewhat in excess of \$7,000 per quarter, for a \$28,000 annual payment and a \$56,000 two year payment under the two year cancellation option (should Arbortext chose to cancel the contract but agreed to pay two year's royalties). What is new is that the last royalty check, for the first quarter of 2004, is in the sum of \$4,652. Should this royalty amount remain relatively constant, this would translate to an \$18,608 annual royalty payment, and a \$37,216 royalty payment should Arbortext elect to cancel the contract but pay two year's worth of royalties. This two year payment is substantially less than the amount which I assumed for purposes of comparing that alternative with the buyout alternative. In simple terms, this makes the buyout even more attractive.

While not new, Arbortext continues to make the assertion (which it has made often) that Blueberry does not provide support for the software. This is something I cannot address first hand; it should be the subject of direct discussion with Steven Beigel.

In short summary, Arbortext's indication that it has found alternative software and its assertion that it does not receive support from Blueberry would seem to justify a buyout, given the increasing difference between the proposed buyout amount (\$100,000) and the reduced amount of minimum royalties which Arbortext would pay if it cancelled the contract under the two year notice provision (an amount of roughly \$36,000 based on first quarter of 2004 royalties of \$4,652.00.)

Reason to do an audit

Obviously there is one reason to do an audit. If there was a reasonable basis to believe that the audit would discover past unpaid royalties in an amount which would generate a net benefit to Blueberry in excess of the buyout net benefit amount, then an audit may be justified. The risk is that if Blueberry pursues an audit without having a reasonable basis to do so, Arbortext may come to the conclusion that it does not want to pursue a buyout, that it has grounds to terminate the contract without payment of two year's royalties, and that it will resort

to litigation to assert its rights. In this case, and unless the audit generated very substantial past unpaid amounts, Blueberry could end up receiving nothing and having to bear substantial attorney's fees which it does not have the financial ability to pay.

I therefore respectfully suggest that the Court require a detailed showing of why an audit is justified and a further showing as to what unpaid royalties are reasonably believed to be provable by an audit so that such dollar amount could be compared to the net benefit to Blueberry of the buyout strategy.

I am told that the subject of Arbortext royalty underpayments was addressed in the litigation; I am in no position to evaluate or judge this issue and would leave it to the litigants to address. I do know that there is a very detailed response from Arbortext's counsel regarding the issue of unpaid royalties and I have not seen any rebuttal to that letter.

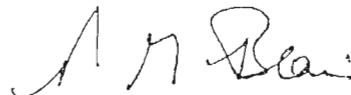
Summary

Everybody wants to accomplish the same goal here, which is to maximize the benefit to be obtained from the Arbortext agreement. From what I have seen, I continue to believe that the buyout strategy will generate the greatest net benefit, and also represents the most conservative path. I recognize, however, that each party has a legitimate right to know that royalties have been properly paid. The threshold approach which I suggest above would provide both parties and the Court with the most information to then judge whether an audit was truly justified or was an unduly risky and unjustified search for the "two birds in the bush".

Finally, attached is a letter I received from Michael Kessler, the auditor retained by Mary Tarantino. I have sent him a copy of the Order appointing me Receiver. He requests to participate in the telephone conference. I will leave it to the Court to determine whether he should participate in this conference, or whether this conference should be limited to the parties, the Receiver and the Court, with him to participate in a later conference if and when the Court deems such necessary or appropriate.

Respectfully submitted,

MORGAN MILLER BLAIR



RICHARD G. BLAIR

RGB:cab
Enclosures

cc: Lawrence Bernheim (via email)
Steven Beigel (via email)
Kevin Dwan (via email)