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Thursday, September 17, 2009

Neil Gillespie
8092 SW 115th Loop
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RE: Economic Analysis Spreadsheet

Dear Neil,

In this letter, I will explain my thoughts and assumptions relative to the economic analysis of your case, as represented by the spreadsheet which you should have received contemporaneously with this letter.

The spreadsheet concludes that the case's return on investment is *negative*.

There are four columns. The "Item" column represents either a potential recovery, which *increases* the net value of the case, or a projected cost, which *decreases* the net value of the case. Costs can be either "hard" costs such as attorneys fees and court costs, or "soft" costs such as the cost of litigation-related illnesses and emotional harms. The "Amount" column represents the best estimate of the actual recovery or cost for the category. The "Prob%" column represents the probability of achieving the recovery or incurring the cost. The "Eco Value" column represents the economic value of the item, i.e. the projected amount times the probability the amount will actually be recovered or incurred.

Next I will discuss each individual item.

Actual Damages.¹ I calculated actual damages as follows. The award of \$56,000 was reduced by 45%, the amount a jury would likely allow the Defendants for their contingent fee. This figure is based on the unexecuted contract attached to the Complaint. Furthermore, the Bar allows that attorneys may pay actual costs *before* application of the contingent fee. Accepting the costs as recited in the Complaint, the award is reduced by \$6,125.46. Next, the amount is

¹ The Complaint calculates actual damages a little differently. I went with my figures because they are more favorable (and I believe, correct).

divided by three to obtain the amount that should have been paid to the Plaintiff, and further reduced by the \$2,000 that was already paid to Plaintiff. I.e.:

Actual Award	\$56,000	\$56,000
-Costs	-\$6,125.46	\$49,874
- 45% Contingent Fee	-\$22,443	\$27,431
- 2/3 due to the 2 other clients	-\$18,286	\$9,143
- \$2,000 already paid	-\$2,000	\$7,143
	=====	
Total Actual Damages	\$7,143.00 ²	

Thus, as you can see, the maximum recoverable actual damages in this case are likely to be \$7,143. Next, the spreadsheet adjusts the maximum actual damage figure by the probability of prevailing, which I calculated as 51%, or just more likely than not. Of course, these estimates are largely subjective. I would have calculated the chance of prevailing on the merits as 75% at the outset of the case, but given the case's history and the events which have transpired since inception, I am forced to reduce the probability of succeeding on the merits to 51%. Thus, the economic value of the actual damages in this case is \$3,643.00.

Punitive Damages. As you know, punitive damages are more difficult to obtain. There are both legal and factual barriers to pleading and proving punitive damages.³ The Defendants may convince the court that punitive damages were not plead properly or are not available in this case, in which event the jury is not permitted to consider punitive damages. Also, punitive damages are granted *up to* three times actual damages, and there is no guarantee that a jury would award the full treble damage amount. Still, I used treble damages, which is a maximum recoverable amount of \$21,431. Furthermore, any punitive damages award can be overruled by the judge, and appealed separately. Therefore, the probability of succeeding with punitive damages is accounted for as half of the probability of succeeding with actual damages, or 25%. Therefore, the economic value of the punitive damages at this point in the case is only \$5,357.00.

² As you can see, I did an independent calculation of damages, which amount was very close to your own figures.

³ In fact, on January 13, 2006, the court ordered the demands for punitive damages to be stricken from the Complaint, so, actually, no current demand for punitive damages exists (presumably it might be re-plead in an amended complaint). Also, to the extent that the suit succeeds on a breach of contract and not tort claim, punitive damages are excluded. Farnsworth, *Contracts*, § 12.3, at 157 (3d ed. 1999) ("Punitive damages should not be awarded for breach of contract because they will encourage performance when breach would be socially more desirable.").

Award of Attorney's Fees. Under the American Rule, each party must pay its own attorneys fees and costs. Unless an exception is granted by agreement between the parties or by statute, there is no provision for the prevailing party to recover its fees and costs. The un-executed representation contract attached to the Complaint contains no provision for attorneys fees. I am aware of no other such agreement or statute that would apply in this case, beyond a bare equitable appeal to the court. The spreadsheet therefore allows for no recovery from the Defendants of fees and costs.

Subtotal, Forecast Recovery. Thus, the maximum recovery at 100%, i.e. full certainty of succeeding in the litigation as to both actual and punitive damages, is \$28,574. However, adjusted for the probability of succeeding on the merits *at this point in the case*, the maximum economic recovery is only \$9,001.

Bauer's Outstanding Fees. Mr. Bauer has a claim to his fees of \$12,517.41, at least as of the most current invoice that I was provided. On the one hand, he may have difficulty proving his entitlement to the fees, due to some evidence that an attempt was made to renegotiate the contract to a contingency basis. However, since that evidence is not conclusive and represents a triable issue of fact, the probability of incurring additional costs to litigate the fees issues offsets the reduction in probability that Mr. Bauer can recover them. Furthermore, generally speaking, most ethical attorneys would require the Plaintiff to resolve the fees issue with predecessor counsel before agreeing to take the case (as I would). Thus, there will be pressure to pay the fees or come to an amicable settlement. Accepting Bauer's figures, the economic cost of the outstanding fees to Mr. Bauer at this point in the case is \$12,517.41.

New Attorney's Fees. A new attorney would be required to litigate the case through trial. Given the extensive history of the case, some non-trivial cost would be incurred in reviewing and understanding the almost four-year history of this litigation (8 hrs). Then, amendment of the complaint (4 hrs), response to various outstanding motions and issues including the garnishment and counter-claims (26 hrs), preparation for trial on the substantive issues and defenses (30 hrs), and the trial itself (30 hrs) will require substantial attorney time. At an estimated \$250 per hour, for 98 estimated attorney hours (loosely including paralegal time, costs etc as part of the hours estimate), the fee for completing the case would be \$24,500. Note that any new attorney would have to consider the highly aggressive and acrimonious nature of this particular litigation. This cost to complete the case is certain to be incurred, accounted therefore at 100% probability. The economic value of this cost is \$24,500.⁴

⁴ It is unlikely a new attorney will offer a discounted, flat-rate, or contingency fee to take this case. The Defendants have shown there is NO likelihood of a positive-cash settlement. Thus, there is no possible reward offsetting the risks posed by this case. The only conceivable basis for a new attorney to proceed would be on a strict time and materials basis with a substantial up-front retainer.

Cost to Litigate Appeal. Based on their litigious behavior to date, the Defendants in this case are almost certain to appeal any favorable ruling. Thus the spreadsheet reflects a probability of 99% that any favorable verdict would be appealed. An average state-court appeal is typically valued at \$25,000, making the economic cost of this item \$24,750.

Unpaid Judgment to Rodeems. Defendants are entitled to collect on their judgment for sanctions in the amount of \$11,550. As I understand the present status, some \$400-\$600 were garnished by the bank and are awaiting an order of the court for release. If Plaintiff prevails at trial, it is likely any award will be setoff by this amount if it is not already paid. Thus, 100% probability the entire cost will be incurred, economic value \$11,550.

Subtotal, Projected Costs. The total projected costs, which will likely be incurred whether or not Plaintiff prevails, are \$73,317.41. *This amount should be considered the direct costs avoided by ceasing litigation at this point.* I note that the smallest cost in this category, the Unpaid Judgment, eliminates almost entirely the projected recovery.

Non-Pecuniary Cost of Litigation. Plaintiff is likely suffering from physical and emotional ill effects resulting from the litigation, as described in Legal Abuse Syndrome, the book provided to me by Plaintiff. It is always difficult to put a dollar figure on the non-pecuniary costs of any case, and this case is no different. In attempting to evaluate the physical and emotional costs of going forward with the litigation, I considered both short and long-term effects, and the opportunity cost caused not just by direct time invested in the case but also by loss of energy related to physical and emotional side-effects. My estimate was \$100,000, but this figure is subjective and the Plaintiff may wish to adjust this figure upwards or downwards. There is 100% probability these costs will be incurred regardless of the outcome of the litigation.

Net Value of Case. The net value of the case is calculated on the spreadsheet by netting all the projected costs of litigation from the projected economic recovery. In this case, the spreadsheet calculates that the net value of the case is *negative* \$164,316.

In summary, even if the figures are manipulated in the most favorable way, such as by raising the probability of succeeding with actual and punitive damages to 100%, erasing Mr. Bauer's attorney's fees, forecasting that no appeal would be filed, and waiving the emotional and physical costs to Plaintiff, the case still would still be in the red by over \$7,000 ((7,143+21,431)-24,500-11,550). The assumptions that the costs would be limited in this way are, obviously, unrealistically optimistic.

The issue to my mind, therefore, is how to exit the case with the lowest possible cost. Please see my letter regarding a recommended course of action for my suggestions in this regard.

Respectfully,

Jeff Childers