



The Franchise Valuations Reporter



Our Expertise

Within the franchise, distribution and dealership context, we are experts in:

- Damages, Valuations & Expert Testimony
- Finance, Accounting and Tax
- Cyber Security

Bruce S. Schaeffer, Editor
Bruce@FranchiseValuations.com
 212.689.0400

Have a Question About Succession Planning for Franchise Owners?

Call us for a free, confidential consultation. And we're always interested in your comments about the newsletter.

Bruce S. Schaeffer, Editor
Bruce@FranchiseValuations.com
 212.689.0400

We Write the Book

Franchise Regulation and Damages, the only treatise that covers damages in franchise disputes and valuations of franchises, is updated 3 times a year.

For more details, to see a Table of Contents or to place an order, go to the Wolters Kluwer Law & Business web page [here](#).



Franchisor Nexus for Income and Sales Tax

Michigan is Pursuing Out-of-State Franchisors

Special thanks to **Chuck Modell of Larkin Hoffman** for alerting us to the fact that the State of Michigan is sending out nexus questionnaires to franchise companies. [Here is a link to the form](#). In the opinion of this newsletter, franchisors should accept the nexus findings and make the best deal they can to go back as few years as possible and avoid penalties. The rules are as follows:

Sales Tax Nexus (6% tax)

Michigan requires that every person engaged in the business of selling tangible personal property at retail to obtain a sales tax license before engaging in business. (Sec. 205.53(1), M.C.L.). An out-of-state seller is subject to Michigan's use tax collection responsibility when it engages in any of the following activities (RAB 1999-1, Department of Treasury, 319-283): (6) Its agents, representatives, independent contractors, brokers or others acting on behalf of the out-of-state seller, are regularly and systematically present in Michigan conducting activities to establish or maintain the market for the out-of-state seller whether or not these individuals or organizations reside in Michigan. Activities that establish or maintain the market for the out-of-state seller include, but are not limited to, the following: (j) *Soliciting, negotiating, or entering into franchising, licensing, or similar agreements.*

Income Tax Nexus (6% tax)

Regular and systematic business activity. For purposes of establishing nexus through regular and systematic in-state business activity, the following provisions apply: (9) **Soliciting, negotiating, or entering into franchising, licensing, or similar agreements.** Mich. Comp. Laws § 208.1200(1) (repealed by Act 39 of 2011, omitting the physical presence standard from Michigan law)

Expert Testimony

California Hearsay Rule: Two Cases Limiting Experts' Reliance on Hearsay

DISCLAIMER

The information provided in this newsletter is for informational purposes only and should not be construed as legal or expert advice which can only be obtained from appropriate professionals. Franchise Valuations, Ltd. and Franchise Technology Risk Management provide such expert advice on the topics addressed herein.

Please visit our websites at www.FranchiseValuations.com and www.ftm.biz

Two California criminal cases have established a new set of rules for experts who rely on evidence which might be considered hearsay. They appear to apply to financial experts as well. *People v Sanchez*[1] and *People v Stamps*[2] may make it harder for experts to testify in reliance on standard evidentiary items such as balance sheets, profit and loss statements and interviews with clients. More work may be necessary such as prodding attorneys to get that type of financial information submitted as business records or as admissions (if received from the opposing party) before the expert's testimony relying on such information will be received by the forum.

Expert Witness Testimony: Net Profits vs Gross Profits

In claims for Lost Profits damages, as a general rule "Net Profits only are recoverable, not gross profits without deduction for expenses." [3] However, an issue arises as to whether the deduction for expenses includes overhead. For example, in *Del Monte Fresh Produce Co v. Net Results Inc.* [4] judgment for lost gross profits without evidence of costs was reversed and remanded for a new trial on damages, including an allocation of overhead.

In other cases it has been held that only specific overhead should be deducted. A recent example of that position came down from the United States District Court in South Dakota. [5] In that lawsuit by a truck and trailer distributor against a manufacturer alleging wrongful termination of a distributorship agreement, the testimony of the distributor's expert witness was held admissible because the expert used what the Court considered a proper measure of damages. The expert relied on the distributor's estimation of costs and earnings potential, and properly offset only overhead directly related to the distributorship agreement.

Missouri Embraces Daubert Standard

About a month after Florida rejected *Daubert*, Missouri governor Eric Greitens signed a house bill that adopted the *Daubert* standard as applicable to expert witnesses. Until this development, the admissibility of expert witness testimony in Missouri was guided by statute. [6] Missouri was one of several states that followed neither the *Frye* standard nor the *Daubert* standard. North Dakota, Nevada, and Virginia are others.

[1] 63 Cal. 4th 665 (2016) (California Supreme Court)

[2] 3 Cal. App. 5th (2016) (California Court of Appeal, Division 4)

[3] Robert L. Dunn, "Recovery of Damages" Section 6.1

[4] 77 So. 3d 667 (Fla. App. 2011)

[5] *Black Hills Truck & Trailer, Inc. v. MAC Trailer Manufacturing, Inc.*, (Case No. 13-cv-4113 July 10, 2017, Schreier, K.) See also cases cited by Dunn op cit Sections 6.5 and 6.6.

[6] The Missouri Code of State Regulations §490.065.3 required that the facts or data upon which an expert based an opinion "must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable."

Joint Employer Update

Suit Fails To Show Jani-King Franchisees Were Employees Protected By Fair Labor Standards Act

In an action against a commercial cleaning service franchisor for allegedly misclassifying its franchisees as independent contractors in its franchise agreements, it was held that the U.S. Department of Labor failed to allege

sufficient facts to show that each franchisee qualified as an "employee" under the Fair Labor Standards Act according to the federal district court in Oklahoma City. Thus, the franchisor's motion to dismiss was granted.[1]

Joint Employer Allegations Allow FLSA, ADEA Claims To Proceed Against Pizza Franchisor, Owners

FLSA and ADEA retaliation claims brought by a general manager of a pizza restaurant were allowed to proceed against the franchisor of the restaurant that the employee was fired from, a federal district court in Maryland ruled, finding that the manager adequately pleaded a joint employer relationship. The franchisor's corporate employee specifically, and the franchisor generally, had at least some power to control and supervise workers and to hire and fire at the franchised restaurant. Thus, the franchisor's motion to dismiss those claims was denied. Although the manager's defamation claim also survived a motion to dismiss filed by the franchisor, franchisee, and the franchisee's owners (together, all defendants), the court dismissed his abusive discharge claim against all defendants[2]

[1] *Acosta v. Jani-King of Oklahoma, Inc.*, (Case No. CIV-16-1133W, June 9, 2017, West, L.).

[2] *Lora v. Ledo Pizza System, Inc.*, July 27, 2017, Chasanow, D.

Little FTC Act

Would-be Franchisee Barred From Suing Franchisor Under Kentucky Consumer Protection Act

A would-be purchaser of an indoor-cycle fitness studio franchise could not sue the franchisor under the Kentucky Consumer Protection Act, according to the US Sixth Circuit Court of Appeals[1]. The appellate court held that state law only provides a private cause of action to purchasers of goods or services that were made for personal, family, or household purpose.

[1] *859 Boutique Fitness, LLC v. CycleBar Franchising, LLC*, (Case No. 16-6427, June 26, 2017, Donald, B.). on an appeal from the District Court for the Eastern District of Kentucky.

Succession Planning for Franchisees

Article Published by the ABA Franchise Law Journal

Ten thousand people a day in the US are turning 65 and contemplating retirement. Many of them are franchisees. Eli Akhavan and I recently wrote an article entitled "Succession Planning for Franchisees" which was just published in the most recent issue of the Franchise Law Journal. If anyone wishes to read it we have provided a [link here](#).

A Quote on a Coming Apocalypse

*The old world in its sunset was fair to see.
But there was a strange temper in the air. Unsatisfied by material prosperity
the nations turned restlessly toward strife internal or external. National
passions, unduly exalted in the decline of religion, burned beneath the
surface of nearly every land with fierce, if shrouded fires. Almost one might
think the world wished to suffer.*

Winston Churchill (*The World Crisis 1911-1918*)