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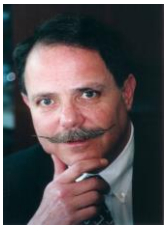
The Franchise Valuations Reporter

Our Expertise



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

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

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Valuations

Michael Jackson Case: Still a Thriller

We've written about the dispute over the value of Mr. Jackson's property for estate tax purposes before. Opposing valuations can be incredibly disparate. After his death in 2009, the Estate filed a tax return indicating a very slim value for his celebrity goodwill, name and likeness, to wit: $2,105. The IRS disagreed, placing a value of almost $1 billion on those intangibles. The trial in the case ended in February 2017[1] and the opposing sides are in the process of preparing closing briefs and motions. An interesting article discussing some of the valuation issues was recently published in *The Value Examiner*[2]. It is anticipated that a decision may come late in the summer of 2018 - nine years after his death.

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[1]*Estate of Michael Jackson v Commissioner*, Tax Court Docket 017152-13

[2]Robert M. Weinstock, "Name and Likeness vs. Celebrity Goodwill: The Estate of Michael Jackson", *The Value Examiner*, July/August 2017

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.

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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.

Expert Testimony

Move To Strike Lying Expert's Testimony Denied

Another interesting aspect of the Michael Jackson case was the estate's motion to exclude the testimony of Weston Anson, an internationally recognized expert on the value of musical libraries retained by the IRS, based in part on his admitted lying during cross-examination. The Commissioner acknowledged that Anson "did not tell the truth when he testified that he did not work on or write a valuation report for the IRS Examination Division in [another] third-party taxpayer audit." Anson had lied about working on similar issues for the IRS in a case brought by the Whitney Houston Estate and then admitted to the lie when confronted by further questions and documentary evidence. Jackson's Estate moved for an order to strike all of Anson's testimony, including all of his expert reports, as tainted by perjury pursuant to Tax Court Rule 143(g) and the T*ucker v. Commissioner, T.C. Memo, 2017-183* decision. The motion was denied.

There was another ground for the motion to strike: Tax Court Rule 143(g) which governs expert witness reports. It requires, among other things, that an expert's report contain "the witness's qualifications, including a list of all publications authored in the previous 10 years" and "a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition." **In a part of the Rule that has no counterpart in the Federal Rules of Civil Procedure, there is a mandatory provision for violations that holds that testimony will be excluded altogether "unless the failure is shown to be due to good cause and unless the failure does not unduly prejudice the opposing party." Tax Court Rule 143(g)(2).**

This came into play because Anson was also found to have omitted two

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items from the curriculum vitae (CV) attached to his expert reports -- one case where he provided expert witness testimony at a deposition and one publication he wrote. Anson claimed that their omission was a mere clerical error. The Tax Court noted that it "believe[d] him" and noted too that Anson's CV disclosed 100 cases where he acted as an expert witness in some capacity and more than 100 publications he has written, "so the inadvertent exclusion of two is understandable and, we find, in good faith. The Jackson Estate makes no assertion that it was unduly prejudiced by their omission."

Another claim in support of the motion to strike was that Anson's testimony should be excluded because his lies reflected his bias in favor of the Commissioner. But the Court held that bias generally goes to the weight of testimony, not its admissibility. Only when an expert report becomes absurd or "so far beyond the realm of usefulness" does bias make an expert report inadmissible held the court.[1]

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[1]Citing *Boltar, LLC v. Commissioner*, 136 T.C. 326, 335-36 (2011).

Tax Nexus: Sales Tax

Connecticut to Implement "App" and "Cookie" Nexus

Commissioner Kevin B. Sullivan stated that the Connecticut Department of Revenue Services will issue sales and use tax nexus guidance that will include software physical presence indicia, the same as implemented by Massachusetts (see below). Massachusetts treats certain software apps and browser "cookies" as contacts with the state.

Massachusetts "Cookie" Nexus Model

Generally, in Massachusetts, a vendor with a principal place of business located outside the state is not subject to sales tax. However, Massachusetts does require an Internet vendor to collect Massachusetts sales or use tax if the vendor meets two conditions.

The first condition occurs if, during the previous year, the vendor had:

more than $500,000 in Massachusetts sales from transactions completed over the Internet; and

made sales resulting in a delivery into Massachusetts in 100 or more transactions. The second condition occurs if the vendor had property interests in and/or the ability to use software (e.g., "apps") and ancillary data (e.g., "cookies") stored on devices of Massachusetts customers. A vendor will meet this condition when the software or data enables the vendor to use customers' devices.

An Internet vendor with this type of contact with Massachusetts is considered to have in-state physical presence sufficient to create nexus and impose registration, reporting, and remitting obligations on the vendor.

Sellers Who Exploit Mississippi Market Must Collect Use Tax

A rule has been adopted requiring sellers who lack a physical presence in Mississippi but who "purposefully or systematically exploit the Mississippi market" to collect use tax if their sales into the state exceed $250,000 for the prior 12 months.[1] The rule applies to all transactions occurring on or after December 1, 2017. Purposefully or systematically exploiting the

Mississippi market includes the following:

- Television or radio advertising on a Mississippi station;
- Telemarketing to Mississippi customers;
- Advertising on billboards, wallscapes, bus benches, interiors and exteriors of buses, or other signage located in Mississippi;
- Advertising in Mississippi newspapers, magazines, or other print media;
- Emails, texts, tweets and any form of messaging directed to a Mississippi customer;
- Online banner, text, or pop up advertising directed toward Mississippi customers;
- Advertising to Mississippi customers through applications ("apps") or other electronic means on customer's phones or other devices; or
- Direct mail marketing to Mississippi customers.

South Dakota Law Ignoring "physical presence" test for Sales Tax Struck Down

South Dakota enacted legislation in 2016 requiring remote sellers with no physical location in the state to remit sales tax, claiming an "economic nexus" was sufficient. It was an iffy proposition in light of SCOTUS's *Quill* decision and the law itself provided for an automatic injunction if it was challenged in court. Naturally, a challenge invoking the injunction was immediately filed on April 28, 2016. Thus, the law has never been in effect. And now it has been overturned; struck down by the South Dakota Supreme Court because it directly conflicted with *Quill*. However, South Dakota promptly filed a petition for writ of certiorari asking the U.S. Supreme Court to revisit the matter.

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[1] Rule 35.IV.3.09, Mississippi Department of Revenue, effective December 1, 2017

Joint Employer and Vicarious Liability

Recent Activity

A recent article in the Fall 2017 issue of *The Franchise Lawyer* by Marlén Cortez Morris, of Cheng Cohen, discussing "the latest joint employment test" as laid down by two Fourth Circuit cases[1] from January 2017 is noteworthy,[2] casting doubt on the proposition that liability will be the "death of franchising". Discussing the Court's finding of joint employer status it includes the quote:

"[i]f everyone abides by the law, treating a firm ... as a joint employer will not increase its costs. Put differently, when - as here - a general contractor contracts work out to a subcontractor that directly employs workers, the general contractor will face no FLSA liability so long as it either (1) disassociates itself from the subcontractor with regard to key terms and conditions of the workers employment or (2) ensures that the contractor cover[s] workers legal entitlements under the FLSA." *Salinas* 848 F3d at 149

No Vicarious Liability: In *Ruiz v Wintzell's Huntsville, LLC*[3] the franchisor was granted summary judgment dismissing a claim of vicarious liability brought by a plaintiff who developed a severe infection after eating raw oysters at a franchisee's restaurant. In order to prevail, the plaintiff had to show the franchisor had a franchise agreement, that it reserved the right of control over the franchisee's performance, and some evidence of the

exercise of that control. Plaintiff's claims were rejected because they failed to show the franchisor had anything to do with the selection of the oysters.

No Vicarious Liability: In *Peterson v. Aaron's Inc*[4] a franchisor of computer stores was held not liable for the alleged privacy violations committed by a franchisee that placed spyware on a leased computer. The court granted the franchisor's motion for summary judgment, but rejected the franchisee's claim that the plaintiff did not have an expectation of privacy in the computer . The plaintiff, an attorney, entered into a lease agreement to rent laptop computers from one of Aaron's franchisees, Aspen Way, on behalf of his law firm. The attorney alleged that Aspen Way remotely accessed the computers and captured private information through a spyware software program named PC Rental Agent ("PCRA"), which Aspen Way installed on their computers without their consent. While the primary function of PRCA was to locate and shut down a computer in the event of theft or missed payment, it also had an optional function called "Detective Mode" that could collect screen shots, keystrokes, and webcam images from the computer. Aspen Way installed and activated Detective Mode on the rented computer on October 21, 2010, and used it until February 7, 2011. Aaron's claimed it had no knowledge of this until May 2011. Aaron's moved for, and was granted, summary judgment on the plaintiff's single claim against it for aiding and abetting Aspen Way's alleged intrusion.

No Vicarious Liability: A franchisor was held not vicariously liable when its franchisee committed fraud because the franchisor did not have complete or substantial control of the instrumentality of harm. The federal district court in Los Angeles granted a tax preparation franchisor's motion to dismiss a claim by a franchisee's customer (after its franchisee was accused of filing fraudulent tax returns and charging undisclosed fees) for failure to establish that the franchisor was complicit in the actions of the franchisee.[5]

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[1] *Salinas v J.I. General Contractors*, 848 F3d 125 (4th Cir. 2017) and *Hall v Direct TV, LLC*, 846 F3d 757 (4th Cir. 2017)

[2]"Associated but Completely Disassociated? What the Latest Joint Employment Test Means for Franchising"

[3]2017 WL 4305004 (ND AL Sep. 28, 2017)

[4] (USDC ND GA October 3, 2017, Thrash, T.) FILE NO. 1:14-CV-1919-TWT

[5] *Lomeli v. Jackson Hewitt, Inc.*, (USDC CD CA Case No. 2:17-CV-02899-ODW (KSx) Oct. 19, 2017, Wright, O.).

Quotes from Samuel Johnson

"I hate mankind, for I think myself one of the best of them, and I know how bad I am."

"I never desire to converse with a man who has written more than he has read."

"Even God would not presume to judge a man before he dies."