



# 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 and E-discovery of Electronically Stored Information

We offer a free initial consultation. If any readers have questions, you are welcome to email or phone us and we will provide our best answer as quickly as possible.

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## Franchise Technology Risk Management



Our franchise law and computer forensics experts provide consulting and implementation of all aspects of cyber security, ESI management and e-discovery for franchise systems - from preparation of cyber security and ESI-related policies and procedures manuals through collection, preservation, processing, production and presentation.

To inquire about our services,

## 'Liquidity Events' Require Current Valuations

*Some Say It's Time to Consider Sale of Stock or Assets*

According to a recent Trinity Capital Restaurant Industry Commentary:

We believe business owners and investors should carefully consider a meaningful 'liquidity event' in 2012. A confluence of factors has created an advantageous time to pursue a sale of all or a portion of company stock or assets, or, for certain owners, a dividend re-cap. These factors include a high likelihood of rising capital gains and dividend tax rates, a much improved company sale valuation environment and the prospects for future economic and market challenges. Together, they have combined to form a compelling argument for business owners to actively evaluate transaction alternatives in the immediate term."

We are the premier source for franchise company valuations. If you are considering a "liquidity event," give us a call.

### **Facebook: Not a Normal Valuation Multiple**

According to Bloomberg News, Facebook Inc. (FB) is betting its growth prospects will persuade investors to pay 99 times earnings for its initial public offering, a higher multiple than 99 percent of the companies in the Standard & Poor's 500 Index. It is reported that FB will seek a market value of as much as \$96 billion, offering shares in a range from \$28 to \$35; the offering will be priced on May 17.

The average franchise company should not expect a similar multiple!

## The Care and Feeding of Expert Witnesses: Part 2

*Using Experts in Drafting Discovery Requests, Preparing for Depositions and More*

In an [issue published earlier this year](#) we noted that the work of an expert witness could be divided into three stages: the report, discovery and trial. We pointed out how the litigator needs to provide the expert with sufficient documentation to withstand a *Daubert* challenge for cherry-picking the evidence relied on in forming the expert's opinion.

In this issue we address some of the issues involved in the use of an expert in the discovery phase which should not be overlooked. The expert's role may include advising the trial attorney as to potential lines of inquiry to be explored in discovery; evaluating responses to interrogatories and documents received through production requests; and reviewing, analyzing, and commenting, in writing, on any reports, opinions, and rationales of opposing parties, identifying both the strengths and weaknesses of each party's case.

There is no all-inclusive check-list of tasks appropriate for every expert. But here are some categories where input from a knowledgeable expert

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## Links to Recent Articles on Cyber Crime



[Tax fraud by identity theft a growing problem with no easy fix](#)

[US and China engage in cyber war games](#)

[Cyberattacks: Computer Warfare Looms As the Next Big Conflict in International Law](#)

## WORTH READING

The current issue of *The Tax Lawyer* (Vol. 64 No. 4), the ABA Taxation Section's excellent journal, has several articles on the topic of nexus. Some for practitioners to consider if they run into esoteric problems - or represent athletes - are:

- H. Beau Baez III, "Taxing Internet Sales: Trying to Make a Two-Thousand-Year-Old Jurisdiction Test Work in the Dot-Com Economy"
- William Joel Kolarik II, "Untangling Substantial Nexus"
- Steven Pahunkin, "Heads Up! Recent Federal and State Attempts to Address Nonresident Income Taxation Perpetuate Selective Enforcement and Unfairness of the 'Jock Tax'"

## 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

should be considered:

- Discovery & document requests
- Interrogatories
- Questions for depositions
- 30(b)6 depositions
- Questions about ESI
- Rebuttal/challenges of opponent's expert reports
- Preparing and responding to Daubert challenges
- Preparation and taking of the expert's own deposition as well as that of opposing experts

Below are some examples of the ways our team's knowledge of finance, tax law, franchise law and document preservation has been a factor in making the trial team more effective.

- In a valuation dispute where data on comparable sales proved elusive, we noticed a Section 754 election in partnership income tax returns and so suggested seeking estate tax returns which turned out to include valuations of the relevant businesses by the plaintiffs themselves.
- When opposing experts turned in a report claiming a more than 50% discount in the value of a franchisor based on the allegedly onerous lack of termination rights under the Wisconsin Fair Dealership Law, we rebutted the claim.
- In preparation for 30(b)6 depositions of financial witnesses, we provided trial counsel with key questions to ask.

Generally, the expert's professional qualifications and the level of rapport with the trial attorney will influence the level of participation; the better the trial lawyer is at exploiting the expert's knowledge, the more they and their client will benefit.

## When to Retain Experts and When to Make Daubert Challenges

### *Chief Judge Urges Earlier Discovery of - and Daubert Challenges to - Damages Evidence*

In recent remarks to the ABA Section of IP Law, Federal Circuit Chief Judge Randall Rader expressed particular concern that the current justice system overlooks damages and valuation issues in the early stages of litigation. Since plaintiffs want to postpone damages until they can prove liability - and defendants want to avoid any discussion that hints of liability - that leaves it to "my fellow judges," Rader says, to "intervene ourselves to get a realistic valuation of the case much earlier." He recommends:

that trial judges use their authority, including *Daubert* inquiries, to ascertain early in the case the approximate dollar value of the case. With some searching inquiry into the parties' damages model, the trial judge can get a good idea of the worth of the [case]. The parties also benefit from early damages discussions and disclosures because it can provide a realistic evaluation of both [the] defendant's exposure and [the] plaintiff's damages calculation and further promote early and effective mediation.

Further, by understanding a case's "true worth," Rader says, the trial

appropriate professionals. Franchise Valuations, Ltd. and Franchise Technology Risk Management provide such expert advice on the topics addressed herein.

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judge would be in a better position to tailor cases to fit their size and significance. "In colloquial terms, the court may adjust timing and procedures of the case to make sure a billion-dollar case gets a 'billion dollars' worth' of process, and a thousand-dollar case gets ... well, less."

We agree completely!

## **Tax Nexus: Case Law and Legislation Update**

### ***Sales Tax Nexus: Click Through Nexus in Georgia***

According to CCH, effective October 1, 2012, it is rebuttably presumed that a "dealer" is subject to sales and use tax if a "related member" that has substantial nexus in Georgia (1) sells a similar line of products as the person and does so under the same or a similar business name; or (2) uses trademarks, service marks, or trade names in Georgia that are the same or substantially similar to those used by the person. The presumption is rebuttable by showing that the person does not have a physical presence in Georgia and that any in-state activities conducted on its behalf are not significantly associated with the person's ability to establish and maintain a market in Georgia.

### ***Sales Tax Nexus: Virginia***

Virginia has enacted legislation that requires certain remote sellers that utilize in-state facilities to collect Virginia sales tax. The law establishes a presumption that a dealer has nexus with the state if any commonly controlled person maintains a distribution center, warehouse, fulfillment center, office, or similar location in Virginia that facilitates the delivery of tangible personal property sold by the dealer to its customers.

### ***Sales Tax Nexus: Licensing of Trademarks Resulted in Nexus in New Mexico***

An online book retailer had substantial nexus with New Mexico for purposes of the gross receipts tax because the in-state use of the retailer's trademarks was sufficient to meet the physical presence requirement under the Commerce Clause of the U.S. Constitution, according to the New Mexico Court of Appeals.

*In the Matter of Barnesandnoble.com LLC*, New Mexico Court of Appeals, No. 31,231, April 18, 2012, CCH ¶401-414

### ***Sales Tax Nexus: Amazon Gives In Again and Again***

Nevada Gov. Brian Sandoval announced that the state reached an agreement with Amazon to begin collecting Nevada sales tax on purchases in the same manner as traditional brick-and-mortar retailers. Additionally, the state and Amazon have agreed to work together to get federal legislation enacted that would create a simplified framework for sales tax collection. Press Release, Nevada Governor Brian Sandoval, April 23, 2012.

In Texas, Amazon reached an agreement to begin collecting sales taxes starting in July 2012 and is backing away from its long-held opposition to tax nexus founded on its warehouses and other facilities. With the deal, Amazon has agreements to collect sales taxes in 12 states, which make up about 40% of the U.S. population, by 2016 while now the company collects taxes in only five states. Since 2011, it has reached agreements with seven other states to begin tax collection over the next four years.

***Income Tax Nexus: Authorized Representative in California Creates Nexus***

A Massachusetts corporation had substantial nexus with California for corporate income tax purposes when the corporation engaged, through its authorized California-based representative, in transactions for a corporate business purpose. By operating through its employee in California, the corporation was afforded substantial and enduring benefits and protections of the state that enabled it to generate business for its recruiting services. Thus, the corporation had a regular, systematic, and substantial connection with, and physical presence within, California establishing substantial nexus.

Appeal of *Warwick McKinley Inc.*, *California State Board of Equalization*, No. 489090, January 11, 2012 (released May 2012)