



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

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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Have a Damages or Valuation Question?

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



Expert Testimony

Expert's Credentials Given Appropriate Respect

In a copyright infringement suit involving the alleged exploitation of a country and western hit, a federal district court denied the defendant's motion in limine to exclude the testimony of three of the plaintiffs' expert witnesses.[1] According to the court, each of the experts was qualified to give their expert opinion on the customs and practices of the music industry, or on the calculation of lost profits and actual damages. In addition, none of the experts' opinions exceeded the scope of their expertise and each of their opinions would assist the jury on the issue of damages.

Of particular note was the attack on Dr. Michael Einhorn, an economist with a Ph.D. from Yale University, a former professor of economics and law at Rutgers University and the author of "Media, Technology and Copyright: Integrating Law and Economics". The Court noted that he also wrote and/or published over 70 professional and academic articles, including 38 articles in the area of copyright and intellectual property, and delivered 36 professional lectures or Continuing Legal Education seminars on those topics. Einhorn had previously testified as an economist in court cases involving the valuation of intellectual property owned by musicians, songwriters, music publishers, record labels, artists, photographers, actors, cartoonists, television producers, cable companies, and radio stations. Einhorn's expert economic analysis had never been disqualified or limited by any court. The court concluded that Einhorn's qualifications were sufficient to offer an expert opinion on the calculation of actual damages and the "infringer's profits." According to the court, Dr. Einhorn's background showed that a trier of fact would be helped by his analyses and opinions on actual damages, the defendants' gross revenues, and the propriety of the defendants' deductions. [See also [our similar discussion](#) when the credentials of our old friend, John Gordon, were attacked in federal court.]

My Expert Credentials in Parallel

My credentials are similar. I am an attorney with an LL.M. (in Taxation) from the New York University Graduate School of Law. Although I have never been a professor, I am the author of two current books covering franchise damages and valuations: 1) for the past twenty years the BNA/Bloomberg Tax Management Portfolio "Finance, Accounting and Tax Aspects of Franchising" and 2) for the past ten years the CCH treatise "Franchise Regulation and Damages", which is updated three times a year, as well as earlier books on similar subjects published by Little Brown and others. I have also written more than 40 professional and academic articles, including many articles on franchise damages and valuation issues; have published over the past eight years approximately 100 issues of this monthly Franchise Valuations Reporter (which has been cited as authoritative by papers presented to the American Bar Association Forum on Franchising); and have delivered many professional lectures or Continuing Legal Education seminars on those topics. I have testified as an expert witness in depositions, arbitrations and court cases involving damages and valuations in the franchise context. I have been retained as an expert with respect to approximately 50 different franchise systems. My expert analysis has never been disqualified or limited by any court.

the Wolters Kluwer Law & Business web page [here](#).

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

[1] *Montana Connection, Inc. v. Moore*, (US DC MD TN December 4, 2015), No. 3:12-cv-0824 Haynes, W.

Valuations

The Planet Fitness Case Valuation Result is Ridiculous

In the Planet Fitness case [1], cash basis EBITDA (which was used by their lender, GE Capital Franchise Finance, to calculate "gross availability" for continuing loans) was \$21,113,533 for the trailing twelve months from June 2014 (the effective date for the valuation was May 14, 2014). Cash basis EBITDA was \$19,339,056 for the trailing twelve months from May 2014. Thus a fair EBITDA estimate would be approximately \$20 million a year.[2]

In a 2016 publication from Business Valuation Resources entitled "Franchise Value: Valuation Methods and Benchmarking Data" under the heading **Pricing Tips by Observers**, there is the following quote:

"When I started[3], and you talked about the value of a franchisee, people talked about 4.5 to 5.5 times EBITDA," said Bill Kraus, senior managing director of GE Capital, Franchise Finance. "That might still be true. But for consolidators that have a lot of scale, prices are in the 7s now."

The judge in the Planet Fitness case determined the value for the entire area development enterprise of thirty-five units with the right and obligation to build and open more than 75 more, at less than \$60 million (including debt) - that was less than a 3X multiple of EBITDA. You can't be serious.

[1] *LaVerghetta v. Lawlor* where I testified for the Plaintiff.

[2] GAAP basis EBITDA (which is an oxymoron for purposes of analyzing cash flow) was just over \$11 million.

[3] A time at which there was no such thing as GAAP EBITDA so he obviously means cash basis EBITDA, the only concern to any lender.

Damages

Seventh Circuit Reinstates Data Breach Suit Against P.F. Chang's

The Seventh Circuit Court of Appeals has reversed the dismissal of a data breach suit against P.F. Chang's. The Court held that the risk of future fraudulent charges and identity theft created by a data breach constituted a "certainly impending" future injury to establish standing for the plaintiffs.

Cybersecurity

Can Franchise Lawyers Afford to Ignore It Anymore?

News reports have confirmed that earlier this year a Russian hacker targeted 48 US law firms, many in the top 100. The hacker went by the name, Oleras and was trying to get confidential insider information regarding mergers and acquisitions. The Department of Justice is investigating whether any confidential information was stolen, and for what purpose. Separately, a plaintiffs' law firm has announced its intent to bring a class action legal

malpractice lawsuit against firms for failing to properly protect client information from hackers. Here we go.

Wisdom from Warriors

From General George S. Patton:

"NOW I WANT YOU TO REMEMBER THAT NO BASTARD EVER WON A WAR BY DYING FOR HIS COUNTRY. HE WON IT BY MAKING THE OTHER POOR DUMB BASTARD DIE FOR HIS COUNTRY."

From General Thomas J. "Stonewall" Jackson:

"IF I THOUGHT MY COAT KNEW MY PLANS I WOULD TAKE IT OFF AND BURN IT."