



The Franchise Valuations Reporter

Our Expertise

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

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



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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 valuations and damages in franchise disputes, 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](#).

DISCLAIMER

Joint Employer

ABC Test Given Retroactive Application in Franchisee Suit Against Jan-Pro Franchising

The ABC test adopted by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court* for determining whether workers are independent contractors or employees under California wage orders was applicable to a class claim filed by workers for a "three-tier franchising" model. Jan-Pro Franchising argued for claim preclusion and against retroactive application of the California Supreme Court ruling but its claims were denied and the case allowed to proceed.

Damages

Antitrust Claims Allowable Against Apple

The US Supreme Court decided on May 13, in an opinion authored by newly-appointed Justice Kavanaugh, joining with the Court's four liberal justices that a class action could proceed against Apple alleging treble antitrust damages for over-pricing in the operation of their App store. iPhone owners are direct purchasers of iPhone applications sold in the Apple iStore and have standing to sue Apple for alleged monopolization of the iPhone app market, the high Court held. Apple charges as much as a 30% royalty on many of the software packages available on its App store. The majority stated that the conclusion was based on the text of the Sherman Act and precedent. The Court agreed with the Ninth Circuit that *Illinois Brick* did not bar the suit, noting that the absence of an intermediary between Apple and the app purchasers was dispositive.

No Right to Jury Trial for Accounting and Disgorgement of Profits

The U.S. Court of Appeals in Atlanta has held that the cosmetics company Hard Candy, LLC in a trademark infringement case seeking the remedy of an accounting and disgorgement of profits over use of its mark HARD CANDY was not entitled to a jury trial because the remedy was equitable in nature. The appeals court also concluded that the federal district court in Miami, following a bench trial, properly found no likelihood of confusion and a fair use defense when a competing cosmetics company used the term "hard candy" (*Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*, April 23, 2019, Marcus, S.).

BBQ Restaurant Franchisor Dickey's Could Be Liable for Nationwide Infringement Damages

The disgorgement of profits remedy for trademark infringement in the Lanham Act is governed by principles of unjust enrichment and is not limited to areas where the infringement actually competed with the trademark owner, the federal district court in Boise has decided. Therefore, in a case in which the owner of the stylized trademark BBQ 4 LIFE sued BBQ restaurant franchisor Dickey's Barbecue Restaurants for infringement, all of the profits attributable to the alleged infringement of Dickey's would be considered for disgorgement, not merely the profits limited to areas where the parties' directly competed. Thus, the trademark owner's motion for partial summary

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judgment on the remedies issue was granted and Dickey's cross-motion was denied (*BBQ 4 Life, LLC v. Dickey's Barbecue Restaurants, Inc.*, April 23, 2019, Winmill, B.).

The Lanham Act does not specify the scope of profits to be considered in a disgorgement remedy, the court noted. However, it does provide some guidance by stating that the disgorgement will be "subject to principles of equity." The particular principle of equity that should guide the court was identified by the Ninth Circuit as "the principle of unjust enrichment traditionally applicable where property is used for profit without the owner's permission." *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117, 123 (9th Cir. 1968).

Money Laundering

Watch Out for These Red Flags

The forensic accounting firm, Marcum LLP, has established a program to assist financial institutions in meeting their Anti-Money Laundering responsibilities. In a recent posting they pointed out some red flags that may indicate a potential problem related to fraud, corruption or money laundering and result in a reputational risk, as well as expose a franchise company or a financial institution to civil and criminal charges. These include:

- Commissions and/or fees greater than the industry norm, especially outside of the U.S.
- Unnecessary or unusual middlemen.
- "Special" invoices or invoices with no discernible service being provided.
- Contributions received from or given to individuals or organizations with suspect background or credentials.
- Excessive travel and entertainment expenses.
- Unusual donations and/or expenses, especially related to sources outside of the U.S.
- Fee payments or monies transmitted and subsequent request of refunds for the same.
- Excessive wires and/or money transactions with countries identified for heightened risk for bribery such as Russia, China, Brazil, Mexico, and India.
- Lack of review of any transactions from embargoed entities, countries, or jurisdictions.
- Willful blindness, which generally results in a potential liability.

Valuations

Private Company Selling Price/EBITDA Median is 4.4x, Per DealStats

The median selling price/EBITDA multiple across all industry sectors is 4.4x, according to the 2Q 2019 DealStats Value Index. EBITDA multiples are highest for the information sector (11.1x) and the mining, quarrying, and oil and gas extraction sector (8.4x). The lowest EBITDA multiples are in the accommodation and food services (2.6x) and the other services sectors (3.0x).

"Tax Affecting"

In an issue that has been discussed frequently in this newsletter, in the District Court case of *Kress v. United States*[1] the taxpayers filed suit for a

refund after paying taxes on gifts of minority positions in a family-owned company. The two experts whose opinions most influenced the Court both "tax affected" by assuming C corporation taxes applied to the cash flow even though the entity was an S corporation. The court concluded that fair market value was as filed with the exception of a very modest decrease in the original appraiser's discounts for lack of marketability (DLOMs). We will have further discussions on this case in subsequent newsletters.

[1]Case No. 16-C-795, U.S. District Court, E.D. Wisconsin, March 25, 2019.

Tax Nexus

North Carolina Department of Revenue to Require Franchisee Information from Franchisors

The North Carolina state legislature introduced legislation that would require franchisors to provide franchisee information to the state Department of Revenue. This is very similar to legislation already in effect for several years in New York. In particular, the NC Department of Revenue is interested in collecting the following data from franchisors with franchisee operations in the states:

- Legal name of franchisee
- Address of each franchise location
- Individual store/unit information (store or unit number)
- FEIN
- Gross sales data

Quotations

A hero is no braver than an ordinary man, but he is brave five minutes longer - Ralph Waldo Emerson