



The Franchise Valuations Reporter



See You In New Orleans

International Franchise Association Annual Convention

On February 24, 2014, Michael Seid, Managing Director, MSA Worldwide, and I will be speaking on the topic of **"Exit, Succession and Estate Planning for Baby Boomer Franchise Owners"**. The session will be moderated by Carlton Curtis, VP of Industry Affairs, The Coca Cola Company.

For more information on the program and to register, go to the [IFA website](#).

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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We Write the Book

Franchise Regulation and



Are Document Preservation Letters Tortious Interference?

Ruling Says OK If Pertinent and Material

After filing a lawsuit in federal court, the plaintiffs sent document preservation letters to the defendants' business associates advising them to maintain documents relating to the ongoing federal court action. The defendants reacted by filing a new lawsuit against the plaintiffs in state court alleging defamation and tortious interference with business relations on the basis of the document preservation letters. But the state court ruled that the letters were judicially privileged and the dismissal of the complaint was affirmed because the letters were sent in the regular course of judicial proceedings and were pertinent and material to the underlying federal court litigation.[1]

[1] *International Portfolio, Inc. v. Purplefish, LLC*, No. 401 EDA 2013 (Superior Ct. Pa. Dec. 24, 2013)

Cybersecurity: The Cost of Failure

One Employee's Carelessness + Employer's Delay = Multimillions

Editor's Comment. *Even though the case described below did not involve a franchise system, the situation and the dire consequences are relevant in any business sector - from retail to hospitality to healthcare to education to services - where franchises operate. Reports of data breaches like this are becoming more and more common and pointedly emphasize the need for businesses - especially franchise businesses - to develop, implement, and maintain appropriate data breach response plans that provide for prompt notice of such incidents.*

In December 2010, an employee of a commercial blood bank, Kaiser Foundation Health Plan, left his office with four backup tapes to drive them to the company's corporate headquarters. During the 13 mile ride, he stopped for awhile, parked his car and locked its doors, leaving the tapes inside. When he got back to his car, the window was broken and the backup tapes, a company laptop, and an external hard drive were gone. Data that was unencrypted, containing customer names, contact information, Social Security numbers, credit card numbers, and checking account numbers were on the stolen laptop and external hard drive, along with unencrypted passwords. The employee immediately filed a police report.

But the story does not end there: soon the company was being investigated by the Federal Trade Commission (FTC), which alleged that it had violated federal law when it "failed to use reasonable and appropriate procedures for handling customers' personal information." Eventually it entered into a settlement with the FTC under which the company is obligated to establish and maintain a comprehensive information security program and to submit to security audits by an independent auditor every other year **for 20 years!**[1]

Subsequently a class action filed on behalf of almost 300,000 customers whose information was on the backup tapes was settled by paying the customers with a two-year subscription to a credit monitoring service (worth approximately \$112 million, if fully utilized), and \$600,000 in attorneys' fees

Damages, the only treatise that covers 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 [CCH web page here](#).

Bruce Schaeffer Named Legal Eagle

List To Appear in April 2014 Issue of Franchise Times

Congratulations to all our readers who were named to this prestigious list of franchise attorneys and a big Thank You to those who nominated me.

Bruce S. Schaeffer
Editor

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, please e-mail Henry@FTRM.biz or call (646) 536-7378

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.

and costs with further provisions for cash reimbursements for actual identity theft losses, and enhanced security measures.[2]

And now, in a classic example of piling on, the California Attorney General has also sued Kaiser for not responding quickly enough because like many other state breach-notification statutes, California's (California Civil Code section 1798.82) provides that a business must disclose a data breach "in the most expedient time possible and without unreasonable delay." Kaiser's failure was that it regained possession of a hard drive containing employee information in December 2011 and conducted a forensic analysis to determine the types of data it contained. At that time, the state alleges, Kaiser could have and should have notified the affected individuals but they did not begin to do so until March 2012, and the state claim is that this three-month delay was unwarranted and violated California law. [3]

[1]See *In re Cbr Systems, Inc.*, FTC File No. 112 3120 (2013).

[2]*Johansson-Dohrmann v. Cbr Systems, Inc.*, No. 12-cv-1115-MMA (BGS), 2013 WL 3864341 (S.D. Cal. July 24, 2013)

[3] California Civil Code section 1798.85 also prohibits an entity from publicly posting or displaying an individual's Social Security number and the AG's complaint alleges that 20,539 Social Security numbers of California residents were on the unencrypted hard drive and seeks \$2,500 for each violation - a total of \$51,347,500.

Cybersecurity is Breaking Bad

Better Call Henry (Not Saul) To Review Your Options

In case you haven't noticed, hacking of private customer files is out of control. Some reports say **over 100 million files have been affected in the last month alone**. The cost to the breached systems per file and the possible imposition of monitors will be astronomical. The cost of preventive measures, on the other hand, can be quite reasonable.

Henry Chan, Principal of Franchise Technology Risk Management, based in New York City, is our first choice for franchise network security matters. For a no obligation initial consultation, we invite you to contact him at Henry@FTRM.biz or (646) 536-7378.

Meanwhile, here are a few more reports than usual on some recent incidents.

[Neiman Marcus Breach Appears Smaller Than Target's](#)

[What the target data security breaches mean for hoteliers](#)

[Credit card details on 20 million South Koreans stolen](#)

[Millions of passwords and email details stolen in Germany](#)

[Exclusive: FBI Warns Retailers to Expect More Credit Card Breaches](#)

[FBI warns retailers to prepare for more cyber-attacks in wake of Target breach](#)

[Crafts Retailer Michaels Warns of Data Attack](#)

[Hackers break into Israeli defence computers, says security company](#)

[Target Hackers Used Stolen Vendor Credentials](#)

[Newest Hacker Target: Ads](#)

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

[Yahoo e-mail customers' names, passwords stolen](#)

[Target Breach Began With Contractor's Electronic Billing Link](#)

[Credit card data breach targets Marriott, Sheraton, other hotels](#)

[Barclays and Regulators Look at Possible Theft of Customer Data](#)

[Retail Hackers Exploited Holes in Network-Management Software](#)

Attorneys Fees

Ninth Circuit Affirms Award of Attorneys Fees To Innocent Defendant

In a case that focused on whether or not the distinctive shape of a hookah water container was copyrightable, it was found that because the container did not incorporate sculptural features that were distinct from its utilitarian aspects it was not copyrightable.[1] Of interest to this newsletter, the court affirmed the district court's award of attorney fees to the defendant.

Exercising its discretion under 17 U.S.C. § 505, the district court awarded \$111,993 in attorneys' fees and in doing so considered the five, non-exclusive factors listed in *Jackson v. Axton*[2]: "(1) the degree of success obtained; (2) frivolousness; (3) motivation; (4) objective unreasonableness (both in the factual and legal arguments in the case); and ([5) the need in particular circumstances to advance considerations of compensation and deterrence."

In ruling that the factors favored an award to the defendant Starbuzz, the district court relied on, among other things, Starbuzz's "total success on the merits" and the need for deterrence of "similarly frivolous claims against innocent Defendants." The Court of Appeals found that the District Court did not abuse its discretion because "the reasons given by the district court in this case are wellfounded in the record and are in keeping with the purposes of the Copyright Act."

Manufacturer Denied Attorney's Fees in Successfully Defending Against a Trade Dress Infringement Claim

Grease pump manufacturer Lubecore International was denied an award of attorney's fees incurred in successfully defending against a trade dress infringement claim brought by its competitor, Groeneveld Transport Efficiency[3], by the federal district court in Cleveland. Although Lubecore ultimately prevailed before the U.S. Court of Appeals in Cincinnati in the dispute, Groeneveld's claim that Lubecore unlawfully copied the design of Groeneveld's "EPO" automatic grease pump was "colorable," in the court's view, and the case was not "exceptional," for purposes of the fee-shifting provision of 15 U.S.C. §1117(a).

Lubecore argued that Groeneveld's case lacked merit from the beginning and that Groeneveld filed it "with a predatory, anti-competitive purpose and to oppress and harass Lubecore." However, the court noted, while Lubecore prevailed on appeal in a 2-1 decision, Groeneveld had survived summary judgment and prevailed at trial, where a jury unanimously found willful infringement on the part of Lubecore. In an April 4, 2012, decision, the district court ruled that the jury's verdict was supported by evidence.

AARP Awarded Attorney's Fees in Trademark Dispute

The federal district court in Washington, D.C., awarded retirees advocate AARP a monetary judgment of \$600,940 to remedy the trademark infringement and counterfeiting damages that AARP had incurred as the result of an insurance broker's fraudulent offers to sell "AARP Life Insurance" [4] consisting of \$583,200 in statutory damages, \$17,150 in attorney fees,

and \$590 in costs. Because AARP proffered evidence to show that its rates were reasonable for the services that were rendered, the court awarded the fees and costs that AARP requested.[5]

[1]*Inhale Inc. v. Starbuzz Tobacco* (CA9, January 9, 2014)

[2]25 F.3d 884, 890 (9th Cir. 1994)

[3]*Groeneveld Transport Efficiency, Inc. v. Lubecore International, Inc.*, January 21, 2014, Nugent, D.

[4]*AARP v. Sycle*, January 17, 2014.

[5]AARP's counsel spent 59.5 hours of attorney time on AARP's case and did so at a rate of \$560 to \$630 per hour for a partner's work and \$414 to \$460 per hour for an associate's work.