



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



Bruce S. Schaeffer, Editor
Bruce@FranchiseValuations.com
 212.689.0400

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.

Bruce S. Schaeffer, Editor
Bruce@FranchiseValuations.com
 212.689.0400

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

Valuations

Private Company EBITDA Multiples Down Sharply in 2Q18

In the second quarter of 2018, EBITDA multiples (median selling price/EBITDA) for private companies plummeted to 2.8x, the largest decline reported in recent years, according to BVR's DealStats Value Index (DVI). It had been fairly steady from the third quarter of 2014 through the first half of 2017; but from the third quarter of 2017 to the present, EBITDA multiples have trended down. EBITDA multiples across all industries were highest in the third quarter of 2017, at 4.7x.

Global Intangible Value Soars; Most Undisclosed Asset

According to the latest "[Brand Finance Global Intangible Finance Tracker](#)" report, the value of intangible assets worldwide has surpassed \$50 trillion for the first time, reaching \$57.3 trillion at the beginning of the current financial year. This constitutes 52% of the overall enterprise value of all publicly traded companies worldwide, which now amounts to an equally record-breaking \$109.3 trillion, exceeding the US\$100 trillion mark also for the first time. 76% of the world's intangible value (\$43.7 trillion) remains unaccounted for as the rules do not allow self-created intangibles to appear on balance sheets. Undisclosed intangible value has grown by 25% year on year. This rate is five times faster than the value of disclosed intangible assets (up 5%), and faster than overall global enterprise value growth (up 18%).

Discounts in Partnership Disputes

In a Nebraska law partnership breakup,[1] the facts showed that Assam withdrew from Fredericks Peebles & Assam (FPM), a limited liability partnership which specialized in handling legal issues impacting Native American tribes. FPM filed a declaratory judgment action to determine the value of Assam's interest and Assam filed an answer and counterclaim for an accounting and fair valuation of his interest in FPM, based on the Partnership Agreement. Assam sought a money judgment and attorney fees. It was a battle of the experts and the court found the Firm's expert who had enormous experience valuing law firms, to be more credible than Assam's several experts (including himself). But especially noteworthy was the fact that the appellate court affirmed the trial court's finding of a **60% discount** for lack of marketability and lack of control to be appropriate holding:

The [trial] court found that the testimony of Brennan [FPM's expert] was credible; Brennan's 60-percent lack-of-control and marketability discount was credible; Brennan's discounts were appropriate as part of a "fair market value" analysis, because they helped replicate a public marketplace for a private entity; Brennan's discount analysis was consistent with the fair market value standard of a hypothetical buyer's ability to convert the ownership interest to cash and control the investment; and Brennan was the only expert to weigh risk factors which were credible and relevant to determining the fair market value test of a fully informed hypothetical willing buyer's desire to maximize his economic interest.[2]

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. provides such expert advice on the topics addressed herein.

Please visit our website at www.FranchiseValuations.com

[1] *Fredericks Peebles & Morgan, LLP v. Assam* 300 Neb, 670 (August 3, 2018)

[2] *Ibid* at p 681

New Tax Law

Opportunity Zone Investing

The Tax Cuts and Jobs Act (actually a hilarious name; it should be called the Trillion Dollar Deficit Law[1]) enacted last December added Sections 1400Z-1 and 1400Z-2 to the Internal Revenue Code which provide the best tax shelter for capital gains since before the 1986 Tax Reform Act. Almost all investment in Qualified Opportunity Funds which invest in Opportunity Zone projects and businesses defer and sometimes eliminate all capital gains that are so invested.

This is a great opportunity for franchised businesses. But for some reason a franchise like Massage Envy does not qualify because "massage parlors" (along with golf courses) are not eligible Opportunity Zone investments. Call us to discuss how to take advantage of this feature of the new tax law.

[1] From [The New York Times](https://www.nytimes.com/2018/11/13/us/politics/budget-gap.html), 11/13/18: "The growing budget gap means the Treasury must borrow more to keep the government running. The Treasury expects to borrow a total of \$1.338 trillion from global investors this calendar year. That would be 145 percent higher than the \$546 billion the federal government borrowed last year. That would be the highest level of borrowing since 2010, when the American economy was struggling to recover from the great recession."

Accounting for Up Front Franchise Fees

FASB Issues Clarification and Examples of Proper Accounting for Franchisee Payments

Special kudos to **Aaron Chaitovsky** of Citrin Cooperman and **Lee Plave** of Plave Koch for their long work on convincing the FASB that not all up front franchise fees should face the problematic restriction of only being recognized ratably over the life of the franchise agreement rather than all at once when the Unit opens. The issue of current recognition of all or portions of the upfront franchise fee turns on two basic issues: Is the fee to provide more than one goods or services which are *distinct*? and **Can a transaction price be allocated to such distinct** elements of the upfront services provided? The new rules have no impact on the timing or recognition of royalty revenue. Readers should be advised that Franchise Valuations are experts in the valuation and enumeration of the elements of upfront franchise fees. Call us if we can be of any assistance. Perhaps now, franchisors will be required to keep three sets of books: for taxes, for general financial, and for specific franchise fee revenue. A link to the FASB's staff paper can be [downloaded here](#).

Expert Testimony

Florida Adopts Daubert Then Reverts to Frye

The question has been open in Florida: will it be *Daubert* or will it be *Frye*? Three years ago the issue seemed to be settled when the legislature

approved *Daubert* as the standard, as the federal courts did in 1993. But the Florida Supreme Court entertained argument that the state's Constitution gives the courts jurisdiction over procedure, while the legislature has say over substance. In 2013, the Florida legislature amended the Florida code, section 90.702, dealing with expert testimony, to incorporate the *Daubert* standard in the state's rules of evidence. But in the recent case of *DeLisle v. Crane Co.*, 2018 Fla. LEXIS 1883 (Oct. 15, 2018) the state's Supreme Court found the legislature had overstepped its authority, declared the amendment unconstitutional, and reinstated the *Frye* standard

Joint Employer and Vicarious Liability

Victim of Embezzling Remax Employee Is Allowed to Maintain Vicarious Liability Claims Against Franchisee and Franchisor

In *Patel v. Sunvest Realty Corp.*,^[1] the bulk of the claims against a real estate franchisee and its franchisor, based on a broker's embezzlement of investment funds, were allowed to go forward. In the case the broker allegedly convinced individuals to invest in real estate in return for monthly interest payments. When he began missing payments and declared bankruptcy, the noteholders learned their money had never been invested in real estate, and sued the franchisee that employed him and its franchisor. The vicarious liability fraud claims against the franchisee were allowed to go forward because the noteholders sufficiently alleged that the broker committed fraud and that he was an employee. Vicarious liability fraud claims against the franchisor were also allowed to go forward because the noteholders alleged apparent agency in that they relied on the franchisor's name and brand quality. A negligent retention claim against the franchisee also was allowed because the franchisee had been named as a co-defendant in several real estate-related breach of contract actions against the broker, which put it on notice of his alleged fraudulent activities. Breach of contract claims were allowed to go forward because the broker had actual agency to act for the franchisee and apparent agency to act for the franchisor. Common law fraud claims failed though because there were no allegations that either entity committed fraud through any conduct other than the broker's.

[1] SUPERIOR COURT OF THE STATE OF DELAWARE, (C.A. NO.: N18C-01-185 AML Decided: October 15, 2018 LeGrow, A.)

A Lament from "The Big Sleep"

Screenplay By William Faulkner et al., Based on the Novel by Raymond Chandler

Sternwood (sitting in wheel chair talking to private detective Marlowe played by Humphrey Bogart):

You are looking, sir, at a very dull survival of a very gaudy life - crippled, paralyzed in both legs, very little I can eat, and my sleep is so near waking that it's hardly worth the name. I seem to exist largely on heat, like a newborn spider. The orchids are an excuse for the heat. Do you like orchids?

Marlowe:

Not particularly.

Sternwood:

Nasty things! Their flesh is too much like the flesh of men, and their perfume has the rotten sweetness of corruption.
