The Franchise Valuations Reporter

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Our Expertise

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

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

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,

Valuation

Many Ways to Increase and Enhance the Value of a Business

Edward Mendlowitz has written a general but useful list of 64 factors that can impact business valuation for prospective sellers They are not necessarily profound or novel but it is a good menu. For example, number 1 is: *Increase profits. Always good*. And numbers 63 and 64 are: *63. Anticipating and mitigating risk should be ingraine, d in your modus operandi. That shows a buyer you have been vigilant and "skeletons in the closet" are less likely. 64. Being in an industry that is part of a roll up can add value, especially if you are an important cog in that wheel.*

In another similar article by *Steven M. Egna,* "Improving the Business and Positioning it for Sale" there are another five pearls of wisdom of which I quote the headlines:

1. Do as I say not as I do.
2. Know what you do not know.
3. Knowledge is power.
4. Lack of commitment.
5. Communication, communication, communication.

Onto the Balance Sheet: The Most Valuable Brand Acquisitions Since 2000

Christof Binder, managing partner of Trademark Comparables AG, has reviewed and listed the 50 most expensive brands and brand portfolios acquired over the past two decades. As most practitioner know, only acquired brands make it onto the balance sheet – self-created intangibles do not get listed on the balance sheet.

go to the Wolters Kluwer Law & Business web page here.

Damages

$2.88M Verdict for Lanham Act Claim Set Aside in Absence of Actual Consumer Deception

A district court in Delaware granted the defendant Next Caller's post-trial motion for judgment as a matter of law, thus negating a $2.88 million jury verdict against Next Caller for violations of the Lanham Act's false advertising provisions, because "the record contains essentially no evidence—direct or circumstantial—that customers were *actually deceived*" by the false statement that Next Caller's spam protection product would increase the containment rate by 10%. The court also noted that the $1.44 million part of the verdict attributed to punitive damages, which was negated for lack of actual deception, was also negated because the Lanham Act does not permit punitive damages.[1]

Travelodge Franchise Agreement Breach Case Moves Forward

Travelodge's motion for partial summary judgment in its case against a franchisee for breach of the franchise agreement was denied, because the franchisee raised an issue of material fact regarding Travelodge's delay in implementing its reservation system. In addition, the franchisee's principals' motion to dismiss the claims against them personally in connection with a guaranty agreement they entered into with the franchisor was denied.[2]

Distributor's Claims of Wrongful Termination By Industrial Burner Manufacturer Fail at Summary Judgment

A Minnesota-based distributor of industrial burners and other manufactured parts failed to show that burner manufacturer Industrial Combustion, Inc. (IC) violated the law or committed any wrongful action in terminating the distributorship. The plaintiff distributor could not pursue its charge that IC's action constituted a violation of the Minnesota Franchise Act because it was not a franchisee of IC. Neither IC nor its predecessor in interest Cleaver-Brooks, Inc., which was also named as a defendant, lacked the right to terminate plaintiff's distributorship or was unjustly enriched through the termination, and IC did not tortiously interfere with plaintiff's prospective for economic advantage, in the court's view resulting in the granting of the defendants' motion for summary judgment.[3]

Exclusive Distributorship Agreement Enforceable

Both an equipment manufacturer and a distributor were liable for breaching separate contracts with one another, held the federal district court in New York City. The manufacturer breached a 2012 exclusive distributorship agreement made by the company's former president when it sold equipment directly to third parties in the country's northeastern region. The manufacturer disputed the enforceability of this agreement. The distributor breached its contracts with the manufacturer when it refused to furnish payment due under a rental agreement and several purchase orders, maintaining that it was offsetting the damages it was owed due to the manufacturer's breach. The court held that the exclusive distributorship agreement was enforceable, and that the distributor was not justified in withholding the payments it owed to the manufacturer.[4]

Lost Future Royalties - Franchise Abandonment

Golden Corral Franchising Systems, Inc. (GC) sufficiently pleaded consequential damages against the operators of a Golden Corral franchise to survive a motion for judgment on the pleadings, according to a federal district court.. GC alleged that the franchisees prematurely abandoned a restaurant the parties' franchise agreement (FA) required them to operate for a period of fifteen years. The FA would have assessed the royalties and marketing fees against gross sales had the defendants continued to operate the restaurant for the agreed fifteen-year period. The defendants offered five arguments in support of their motion that the court should grant judgment in their favor on the pleadings but none were found to be persuasive, at least at this stage of the litigation. The court reasoned that the defendants' various arguments appeared to conflate who was responsible for breach of the FA, and therefore, who would have proximately caused the loss of GC's expected royalties and marketing fees under the FA – hence there were questions of fact.[5]

Use of DCF Method for Calculating Damages Survives Challenge

In a lawsuit in Nevada, the expert for a company that alleges it was forced to close due to anticompetitive practices used the discounted cash flow (DCF) method to calculate damages. At first, the court granted a motion to strike the expert's testimony on the grounds that the DCF was too speculative but then upon reconsideration, the court reversed itself and held that using the DCF was allowable. [6]

[1] *TRUSTID, Inc. v. Next Caller Inc.*, January 5, 2022, Noreika, M..
[2] *Travelodge Hotels, Inc. V. Huber Hotels, LLC*, January 5, 2022, Martinotti, B..
[3] *Louis DeGidio, Inc. et al v. Industrial Combustion, LLC*, December 28, 2021, Tunheim, J.
[4] *Alessi Equipment, Inc. v. American Piledriving Equipment, Inc.*, January 6, 2022, McCarthy, J..
[5] *Golden Corral Franchising Systems, Inc. v. Scism*, D.N.J., ¶16,978
[6] *V5 Techs., LLC v. Switch, Ltd.*, 2021 U.S. Dist. LEXIS 216426; 2021 WL 5237228

Joint Employer/Independent Contractor

Product Distributor's Claims Go Forward

In *Goro v. Flowers Foods, Inc.*,[1] a bakery product distributor/franchisee who sued a bakery and its affiliates for misclassifying him as an independent contractor (rather than an employee) succeeded in dismissing two of the bakery's affirmative defenses as applied to him. The bakery was unable to show that the distributor's work was outside the usual course of the bakery product producer's business; and the court found that 1) the ABC Test applied to the distributor's claims, and 2) that the test was not preempted by the Federal Aviation Administration Authorization Act, the FTC Franchise Rule, or the Lanham Act.

IFA's Request for Pre-Enforcement Review Denied for California's Independent Contractor Statute

A district court in San Diego refused to provide a pre-enforcement review of California's statute setting standards to classify workers as employees or independent contractors. The action, brought by the International Franchise Association, alleged that California Labor Code Sec. 2775(b)(1) violates the Commerce Clause, constitutes taking without just compensation, and is preempted by federal law. In granting the defendant State of California's Rule 12(b)(1) motion to dismiss, the court held that it lacked subject matter jurisdiction on two grounds. First, the challenge to the provision did not establish constitutional ripeness under Article III because the plaintiffs had not shown a threatened

enforcement of the statute that was sufficiently imminent. Second, the challenge failed the prudential component of the ripeness doctrine because its Commerce Clause and regulatory taking claims did not offer facts sufficient for the court to determine which of the defendants would face injury from the statute or the extent of their property that would be taken (*International Franchise Association v. State of California*, January 12, 2022, Bashant, C.).

Franchisor Wyndham Not Liable in Connection With Alleged Sexual Assault

Plaintiff, an employee of a hotel franchisee, failed to state a valid cause of action for negligent misrepresentation under Oklahoma law against hotel franchisors Wyndham Hotels and Resorts and Days Inn Worldwide (collectively Wyndham) in connection with a statement by the franchisor's representative regarding alleged sexual harassment by the franchisee's owner. The franchisor-franchisee relationship between Wyndham and the franchisee simply did not place a duty on Wyndham to protect an employee of the franchisee by providing, when called upon to do so, the employee with accurate legal advice or correct factual information on how to resolve the franchisee's alleged wrongdoing. The decision of a district court was affirmed by the U.S. Court of Appeals in Denver.[2]

[1] S.D. Cal., CCH Business Franchise Guide ¶16,967
[2] *Sullivan v. Wyndham Hotels & Resorts, Inc.*, December 8, 2021, Baldock, B.

Attorneys' Fees

Victorious Parties in Commodity Trading Dispute Awarded All Costs They Sought

The Board of Trade and the Mercantile Exchange, as victorious parties both on summary judgment and on appeal, were entitled to costs of $307,033.40, plus interest of $29,483.62, according to a federal district court in Chicago. All five of the cost categories that the losing parties contested—electronic document processing, court reporter exhibit copies, deposition video recordings, costs without an invoice or receipt but supported by an affidavit, and the costs of real time fees and rough draft of deposition transcripts—were deemed to be the types of costs that could be recovered.[1]

Franchisor Wins Jurisdictional Battle in Legal Malpractice Suit

The federal district court in Michigan may exercise personal jurisdiction over a New York lawyer in connection with a Michigan franchisor's legal malpractice claim. The franchisor contended the lawyer included Evergreen Royalty language (in the franchise industry, royalties which continue to be owed to an area representative based on continuing revenue from restaurants opened during the term of an area representative agreement (ARA), after that ARA is terminated, are commonly known as Evergreen Royalties) in area representation agreements against the franchisor's wishes, thereby committing it to pay royalties even after termination of the agreements. The lawyer's entrance into a long-term, seven-year agreement with the franchisor, Sizzling Black Rock Steak House Franchising, Inc. (Black Rock), a Michigan corporation bearing a substantial connection with Michigan, was sufficient to establish jurisdiction. But jurisdiction did not exist for another firm that had merged with the lawyer's firm.[2]

Daycare Franchisor Wins Fees For Enforcing Arbitration Victory

A Court in Maine awarded costs and attorney fees to a daycare center franchisor based on its franchise agreement's fee agreement with its franchisee who was found by an arbitrator to have violated the franchise agreement. Because the fees were authorized by contract, the franchisor was permitted to seek an order for payment at the trial court for work done in defending an appeal before the First Circuit Court of Appeals.[3]

[1] (*U.S. Futures Exchange, LLC v. Board of Trade of the City of Chicago*, January 6, 2022, Durkin, T.).
[2] *Sizzling Black Rock Steak House Franchising, Inc. v. Kestenbaum*, December 17, 2021, Borman, P.
[3] *Toddle Inn Franchising, LLC v. KPJ Associates, LLC*, December 8, 2021, Levy, J.

Quotations

Wisdom from David J. Kaufmann

Just remember – 70 is the new 50, and 9 PM is the new midnight!

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