



# 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 [here](#).

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## 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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## Nexus: SCOTUS Declines Amazon Appeal

### **New York's "Amazon Law" Finds Sales Tax Nexus Without Physical Presence**

On December 2, the US Supreme Court declined to review a New York law which forces Web retailers such as Amazon.com to collect sales tax from customers even though Amazon has no "physical presence" in New York. All but five states impose sales taxes and the issue has been whether retailers without a "physical presence" had sufficient nexus to incur the burden of having to collect and pay over the sales tax.

## Valuations

### **Are All Experts Whores?**

The main complaints against the use of experts in the U.S. legal system focus on bias and knowledge: (1) Is their testimony simply bought and paid for (as opposed to their honest opinion)? and (2) Do they know what the hell they are talking about?[1] The problem has been put thus:

Experts in other fields see lawyers as unprincipled manipulators of their disciplines, and lawyers and experts alike see expert witnesses - those members of other learned professions who will consort with lawyers - as whores.[2]

A quintessential dispute among experts is evident in the estate tax case relating to the performer, Michael Jackson, where the estate valued the intangible asset of his right to his name and likeness at the time of his death at \$2,105 while the IRS claims its fair market value was \$434 million - quite a difference of opinion!

### **Yet Another Set of Credentials**

According to BV Wire, the publication of Business Valuations Reports, The International Association of Consultants, Valuators and Analysts and the NEBB Institute, comprised of Certified Machinery & Equipment Appraisers (CMEAs), have formed a new strategic alliance. Because business valuations often incorporate M&E valuations, this alliance is designed to strengthen the worldwide ties between these two groups of valuation experts. So now there will be a new set of credentials (to be defined and explained), in addition to the nine already used in the US. Take a look at this ["Financial Forensics Credentials Comparison Chart"](#) also from BV.

And in Canada there's a whole other set of credentials used by testifying expert witnesses as recently enumerated by Tingley, J.S.C. in the Dunkin' Donuts case:

1. BAS (Bachelor of Administrative Studies),
2. MSc (Master of Science),
3. FCMC (Fellow Certified Management Consultant),
4. CFE (Certified Foodservice Executive),
5. FCSI (Foodservice Consultants Society International),
6. CA (Comptable Agréé),
7. CA-EJC (Comptable Agréé - Excellence in JurComptabilité de L'Institut canadien des Comptables Agréés du Quebec),
8. EEE (Institut canadien des Experts en Evaluation d'Entreprises),
9. CFE (Certified Fraud Examiner),

## We Write the Book

**Franchise Regulation and 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](#).

## 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.

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## 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](http://www.FranchiseValuations.com) and [www.ftm.biz](http://www.ftm.biz)

10. CBV (Chartered Business Valuator),
11. CMA (Certified Management Accountant),
12. CA (Chartered Accountant)

Despite all of these credentials, the judge seemed to show his greatest deference to the opinion of one of the Franchisees' experts, described simply as Mr. Francois Desrosiers, MBA.

### 10 Current Issues in Bankruptcy Valuations

Robert Reilly of Willamette Management Associates pointed to the following current issues in bankruptcy valuations during his session at the recent AICPA Forensic & Valuation Services Conference 2013 in Las Vegas:

1. There is no bankruptcy code definition (or standard) of the term "value";
2. The use of hindsight in the valuation is discouraged;
3. The valuation analyst's reliance on management-prepared financial projections is often questioned;
4. The analyst's selection of valuation variables is often questioned;
5. Current interest rates may be considered low;
6. The reasonableness of the analyst's due diligence is often questioned;
7. Consider all of the income tax effects on the debtor value;
8. Use of industry valuation rules of thumb is often questioned;
9. Performing the cash flow test within a solvency analysis; and
10. Use of the market approach in an inactive market is often questioned.

[1]Jennifer L. Mnookin, Vice Dean and Professor of Law at the UCLA School of Law, *Expert Evidence, Partisanship and Epistemic Competence*, Vol. 73:3 Brooklyn Law Review 1009 (2008).

[2]Samuel R. Gross, *Expert Evidence*, 1991 Wis. L. Rev. 1113, 1115 (1991) quoted by Mnookin *ibid*.

## Damages: Attorneys' Fees

### Recent Cases

In the past few months there have been many cases involving attorneys' fees claims and the award of experts' fees.[1]

In *Curves Int'l, Inc. v. Nash*,[2] attorneys' fees were awarded on a Lanham Act claim because the defendant/franchisee's behavior was deemed "exceptional" when, having inquired as to whether offering personal training services would constitute a breach of the franchise agreement, and having been informed that indeed it would, the terminated franchisee proceeded to do it anyhow, ignoring demands to comply with the terms of the agreement, including a cease-and-desist letter.

In *Scentsy, Inc. v. Harmony Brands*[3], there was a claim asserted against Harmony accusing them of misappropriating the "trade dress" of the Plaintiff under both the Lanham Act and the Copyright Law. Both claims were dismissed on summary judgment after which Harmony moved for an award of attorneys' fees which was granted and the Court compared the legal basis for the two claims for attorneys' fees:

The Lanham Act provides that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a). "A case may be considered exceptional when a plaintiff's case is groundless, unreasonable, vexatious, or pursued in bad faith." The decision to award fees under the Latham Act lies within the discretion

of the court. In general, attorney's fees are awarded to the prevailing party under the Lanham Act if (1) the prevailing party can show bad faith on the part of the opposing party or (2) there was an absence of "debatable issues of law and fact" in support of the opposing party's claims.

Section 505 of the Copyright Act gives courts discretion to "allow the recovery of full costs" and "reasonable attorney's fee to the prevailing party." 17 U.S.C. § 505. The Ninth Circuit stated that a court should exercise its discretion in light of several nonexclusive considerations, including (1) the degree of success obtained; (2) frivolousness; (3) objective unreasonableness "both in the factual and legal arguments in the case"; (4) motivation; and (5) the need "to advance considerations of compensation and deterrence."<sup>[4]</sup>

In *Coral Group, Inc. v. Shell Oil Corp.*,<sup>[5]</sup> the court found that when a plaintiff's claims have been dismissed with prejudice as a discovery sanction, the defendant was the prevailing party for purposes of awarding attorney fees and expenses and granted Shell Oil Co. an award of \$3.1 million in attorneys' fees and costs which was deemed reasonable in light of the more than eight year duration of the litigation.

However, in *MB Light House, Inc. v. QFA Royalties LLC*<sup>[6]</sup>, a claim for attorneys' fees spent contesting the removal of a Colorado action to federal court was denied. The franchisees claimed that the request for removal was unreasonable as evidenced by *sua sponte* remands of nine other, similar cases. But the Court held that although the franchisor's attempt to remove the lawsuit to federal court was ultimately unsuccessful, it could not be said that the attempt was unreasonable ruling that even if a similar case was *sua sponte* remanded, this indicated only that removal was not valid, not that it was also unreasonable.

And in *Mayo Clinic v. Peter L. Elkin*<sup>[7]</sup>, the Eighth Circuit reviewed an award of \$1.9 million in attorneys' fees under the "abuse of discretion" standard and remanded the case to the District Court for a more appropriate allocation of the fees for the only successful claim finding:

We are, however, concerned by the district court's award of \$1,900,139.90 in attorneys' fees and costs to Mayo. Of the ten claims brought by Mayo against Elkin, only the statutory trade secret claim supports an award of attorneys' fees. See Minn. Stat. § 325C.04 (permitting a court to award reasonable attorneys' fees to the prevailing party on a claim for willful and malicious trade secret misappropriation). Yet, of \$2,447,058.36 in total attorneys' fees incurred in this litigation, Mayo claims \$1,900,139.30 are attributable to its trade secret claim. We find this figure suspect.

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[1] *Sims v. Nissan North America*, 2013 Ohio App. LEXIS 2642 (Ohio Ct. App. June 25, 2013)

[2] DC N.Y. July 25, 2013, CCH Business Franchise Guide ¶15,102. See also *Mr. Electric Corp. v. Khalil*, Oct 16, 2013)

[3] (DC Idaho August 26, 2013)

[4] See *Overseas Direct Import Co., Ltd. v. Family Dollar Stores Inc.*, 10 Civ. 4919, November 12, 2013, Koeltl, J.), where retail store operator Family Dollar Stores was not entitled to an award of attorney's fees incurred in defending against copyright infringement claims brought by textile design and sales company Overseas Direct Import which were dismissed. The federal district court in New York City ruled that there was no indication that plaintiff pursued its copyright claim in bad faith or for any purpose other than to vindicate its alleged right to its copyrighted graphic design.

[5] CCH Business Franchise Guide ¶15,106. U.S. District Court, (W.D. Mo August 12, 2013).

[6] (DC Col., July 9, 2013). CCH Business Franchise Guide ¶15,116)

[7] August 27, 2013

