



# 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](mailto: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.

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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

## New Tax Law

### *Tax Revenues Fall, Deficit Widens in Wake of New Tax Law*

Federal tax revenue declined 0.4% in 2018, the first full calendar year under the new tax law, despite robust economic growth and the lowest unemployment rate in nearly five decades. The Treasury Department said federal revenue totaled \$3.33 trillion last year, while federal spending totaled \$4.2 trillion, a 4.4% increase from the previous year. That pushed the U.S. budget gap up to \$873 billion for the 12 months that ended in December, compared with \$680.8 billion during the same period a year earlier—a 28.2% increase. Treasury has attributed the weaker revenue collection to the sweeping changes to U.S. tax code that took effect in January 2018, including lower corporate and individual income-tax rates. For more details, see the *Wall Street Journal* report [here](#).

## Joint Employer

### *Domino's Settles Franchisee Wage Dispute with Pizza Delivery Drivers*

To settle claims that franchisees paid drivers less than minimum wage Domino's Pizza agreed to pay drivers over \$1 million. The federal district court in Ohio [1] approved an agreement involving Domino's Pizza, Inc., 20 of its franchise restaurants, and delivery drivers to settle allegations that the company under-reimbursed drivers for their expenses related to using their own vehicles to deliver pizzas. Although Domino's maintains that as franchisor it did not employ the drivers, the company agreed to settle the class action along with its franchised restaurants by paying the drivers an additional 51 cents per mile driven.

In approving the settlement, the court determined that the proposed mileage reimbursement and separate award of attorney fees and costs was fair, reasonable, and adequate. Counsel representing the class requested a fee of 24.47 percent of all settlement payments to be made under the agreement and it was approved. The court noted that Counsel litigated the class action on a wholly contingent basis and obtained a significant benefit to participating class members.

### *Employees of Merry Maids Franchisee Can Sue for Wages Against Franchisor on Ostensible Agency Theory, But Not on Joint Employer Theory*

A franchise agreement and operation manual were just not enough to establish that Merry Maids exercised control over a franchisee sufficient to create joint employer liability. The court ruled against joint employer status finding that there must be a showing that the franchisor had direct authority to control employees' wages, hours, or working conditions to yield joint employer liability. However, the case was not dismissed as triable issues existed: whether the companies could be liable under ostensible agency theory under the claim that the franchisee's employees reasonably believed they worked for the larger organization due to "the uniform system of branding, trademark, and promotion".[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.

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The Supreme Court ruling in the case of *Martinez v Combs* that to "employ" means (1) "to exercise control over the wages, hours or working conditions," (2) "to suffer or permit to work," or (3) "to engage, thereby creating a common law employment relationship" was followed as modified by *Patterson v Domino's Pizza, LLC*, where the court found, in the franchise context, that "the imposition and enforcement of a uniform marketing and operational plan cannot automatically saddle the franchisor with responsibility."

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[1] *Mullins v. Southern Ohio Pizza, Inc.*, January 18, 2019, Dlott, S.

[2] *Cruz v. MM879, Inc.*, DC ED CA, No. 1:15-cv-01563-TLN-EPG, January 16, 2019)

## Nexus for Jurisdiction

### ***A Corporation's Registration With the Department of State Is No Longer Deemed Consent to Be Sued in New York***

The Appellate Division for the Second Department in New York determined that a products liability case (stemming from a traffic accident in Virginia), could not be brought in New York. The plaintiffs alleged general jurisdiction over the defendants based upon business done generally in New York and registration with the NY Department of State. The plaintiffs did not allege long-arm jurisdiction. Neither the vehicle nor the tire was manufactured or purchased from the defendants in New York. The plaintiff had purchased the vehicle from a New York nonparty and had used the vehicle in New York.[1]

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[1] *Aybar v. Aybar*, 2019 N.Y. Slip Op. 00412, Second Dept 1-23-1

## Valuations and Expert Testimony

### ***Two Lessons: A Minority Interest in an LLC is Entitled to a Discount for Lack of Marketability; and A Litigant Should Pay Their Expert If They want Her Testimony***

The Tax Court case of *Estate of Tannenblatt v Commissioner*[1] is informative and instructive. It is informative as precedent for the assertion that a DLOM is available for a minority interest in an LLC which owns only one piece of real estate. But it is also instructive in terms of Tax Court practice with respect to expert testimony.

Rule 143(g)(1) of the Tax Court rules provides that for expert testimony to be admitted the expert witness must prepare a written report, which is marked as an exhibit and, after having been identified by the witness and adopted by him, received into evidence as his direct testimony. In this case the expert was not paid, therefore, she would not testify and, therefore, her report was excluded. The result was that Petitioner was left with no expert testimony at all to offer and the IRS's expert's report was received without dispute and adopted by the Court.

### ***Valuation Experts Should Not Practice Law***

As we have complained repeatedly in this newsletter, valuation experts should not practice law without a license. This is the wisdom to be put forth at the National Divorce Conference in Las Vegas May 8-10 for valuation professionals. According to Business Valuation Resources, they are to be advised that their valuation reports should not be citing court cases,

statutory authority, or other legal precedent unless they have been given specific legal instructions to do so. Cross examination should be used to attack such over-reaching by non-attorney witnesses.

[1]U.S. Tax Court, CCH Dec. 59,694(M), T.C. Memo. 2013-263, 106 T.C.M. 579, (Nov. 18, 2013)

## Damages

### ***Data Security Breach Class Action Against CareFirst Mostly Dismissed for Lack of "Actual Damages"***

A data breach class action by millions of consumers against CareFirst, a health insurer, was almost entirely dismissed in the absence of any evidence of actual identity theft, other than two claims by a single Maryland couple because they were victimized by a tax-refund fraud. Almost all of the tort and contract claims brought by millions of consumers against CareFirst, a health insurer, were dismissed because the increased risk of future identity theft did not constitute "actual damages" in the absence of actual identity theft (*Attias v. CareFirst, Inc.*, January 30, 2019, Cooper, C.).

### ***Walmart Liable for \$95.5M for Willful Infringement***

In the damages phase of a lawsuit brought by Variety Stores against Walmart, the jury found that Walmart's infringement was willful and awarded over \$45 million in royalties and \$50 million in profits. Under the Lanham Act a wronged party can sue for both their lost profits and the infringer's unjust enrichment. A 2018 award of \$32.5 million had been vacated on appeal. The issue was over the mark BACKYARD GRILL plus design which infringed Variety Stores' common law marks.

The jury determined that Variety proved by a preponderance of the evidence that consumer confusion between the marks was likely, and Walmart's infringement was willful. Variety was awarded a reasonable royalty in the amount of \$45,536,846.71 and Walmart's profits in the amount of \$50 million, with post-judgment interest at the rate of 2.56% per annum. The district court issued a final judgment which was nearly three times the amount awarded after an earlier bench trial; that award was vacated on appeal, and the case was remanded for retrial.

## Wisdom from John Wooden

***Talent is God given. Be humble. ...***

***If you're not making mistakes, then you're not doing anything. ...***

***Whatever you do in life, surround yourself with smart people who'll argue with you.***