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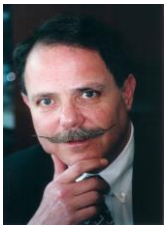
The Franchise Valuations Reporter

Our Expertise



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

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

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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

Joint Employer, Independent Contractor, Vicarious Liability

New York vs Dominos -"Control Factors"

A motion for summary judgment sought by New York State that Domino's was the joint employer of its franchisees' employees which was filed May 23, 2016, was decided on May 27, 2020, against the State finding there were many issues of fact which precluded summary judgment. The issue of joint employer status was considered (citations omitted) by analyzing the

> "economic realities" test, in which "the 'overarching concern' is whether alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented bythe facts [T]he 'economic reality' test encompasses the totalityof circumstances, no one of which is exclusive". When examining the "totality of circumstances," courts have identified ***four*** "formal control" factors, and ***six*** "functional control" factors.
>
> The ***four*** formal control factors ask whether the putative employer: (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. Accordingly, to be deemed a joint employer under the FLSA or the NYLL, the putative joint employer must have actually hired, fired, disciplined, paid, controlled the working conditions of, and/or maintained the employment records of the putative employees.

Additionally, the Court noted the

> ***six*** "functional control" factors: (1) whether the putative joint employer's premises and equipment were used forthe employees' work; (2) whether the front-line employer had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which employees performed a discrete line-job that was integral to the putative joint employer's process of production; (4) whether responsibility under the contracts between the direct and putative joint employer could pass from one entity to another without material changes; (5) the degree to which the putative joint employer or its agents supervised employees' work; and (6) whether employees worked exclusively or predominantly for the putative joint employer.

Bakery Distributors Must Arbitrate Claim They Were Misclassified As Independent Contractors

In *Bissonette v. Lepage Bakeries Park St., LLC,* (May 14, 2020, Dooley, K.) bakery delivery drivers were held not to be transportation workers under the Federal Arbitration Act (FAA), and so were required to arbitrate their claims that an employer unlawfully misclassified them as independent contractors in violation of the FLSA and Connecticut law. As franchisees, the drivers signed a distribution agreement which contained an arbitration provision with CK Sales, a wholly-owned subsidiary of the employer. Because the court was persuaded that the drivers were "more akin to sales workers or managers who are generally responsible for all aspects of a bakery distribution business" than to "traditional transportation workers," it concluded that they were not transportation workers under the FAA. Consequently, the employer was granted its motion to compel arbitration.

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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States Can Pursue Challenge To DOL Joint Employer Rule
In *State of New York v. Scalia,* (June 1, 2020, Woods, G.), a lawsuit brought by 18 states challenging the Department of Labor's final rule narrowing the definition of a joint employer survived the agency's motion to dismiss. The states plausibly alleged that the final rule will reduce their tax revenue and increase their administrative and enforcement costs for state analogues of the FLSA. Thus, the states had "staked out an entirely plausible theory of injury with the requisite specificity, a federal district court in New York ruled. On June 11th, a coalition of groups including the IFA representing hundreds of thousands of employers filed a motion to intervene in the case.

Valuations

No Discounts on Mandatory Buyout in Buy-Sell Agreement

In *Hartman v Big Inch*[1] an Indiana appellate court ruled that a company can not use discounts to reduce the value of a shareholder's interest pursuant to a buy-sell agreement and analogized the situation to "fair value" oppressed shareholder situations. The Court of Appeals observed, citing a prior statutory fair value case:

> "[i]t would be incongruous to discount the shares of the minority shareholder for lack of liquidity when valuation is being done in connection with a proceeding that creates liquidity." When there is a "ready-made market" for shares through a mandatory purchase agreement, "[a]llowing a minority or non-marketability discount to be deducted from their value would indeed amount to a windfall to the [buyer] and its majority shareholders, which is precisely what the Wenzel court sought to avoid."

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[1]2020 Ind. App. LEXIS 183 (May 5, 2020)

Damages

Court Modifies Jury's Damages Award In Pet Medication Applicator Dispute

In *Nite Glow Industries, Inc. v. Central Garden & Pet Co.*, (June 1, 2020, Hayden, K.) a $12.6 million award to an inventor of flea and tick applicator, who accused a product manufacturer of stealing her idea, was reduced by the federal district court in New Jersey after the court vacated the jury's patent infringement verdict and determined that breach of contract damages were duplicative. However, the court upheld the jury's award of over $11 million for misappropriation, finding that there was ample evidence for the jury to conclude that the product manufacturer began to develop the applicator using the inventor's ideas before her applicator idea was published in a patent application.

Franchisee Can Seek Punitive Damages Against Franchise Broker
In *JTKB, LLC v. FranChoice, Inc.*, 2020 WL 2192337 (D. Minn. May 6, 2020) a federal court granted a franchisee's motion to add a claim for punitive damages, holding that the Federal Rules of Civil Procedure supersede state rules with respect to a franchisee amending its complaint to assert a claim for punitive damages.. JTKB became a franchisee of ILKB kickboxing studios after engaging the services of franchise broker FranChoice. JTKB filed suit against FranChoice, alleging claims of fraud and misrepresentations regarding the ILKB franchise system. JTKB later moved to amend its complaint to seek punitive damages under Minnesota's Rules of Civil Procedure.

Audi of America Did Not Tortiously Interfere By Blocking Fanchisee's

Relocation, Dealership Sale

In *Audi of America v. Bronsberg & Hughes Pontiac, Inc.,* (June 4, 2020, Matey, P.) Audi of America, was held not to have engaged in tortious interference by blocking a Pennsylvania franchisee's agreement with a multi-state dealership group to relocate and sell the dealership. The dealership group failed to establish that Audi acted without cause, a requisite element of a tortious interference claim, as Audi offered ample justifications for invoking its contractual rights.

Attorneys' Fees

Photographer Denied Attorney Fees In Suit Involving Willie Nelson Concert Photo

In *Philpot v. LM Communications II of South Carolina, Inc.,* (May 15, 2020, Boom, C.) a photographer plaintiff's practice of making money by filing or threatening to file copyright infringement lawsuits was ruled to preclude an attorneys' fee award. After the Sixth Circuit remanded the copyright infringement case upon concluding that the trial court erred in determining that the photographer was not the prevailing party entitled to attorney fees, the Lexington, Kentucky, trial court, acknowledging that the photographer was the prevailing party, nevertheless rejected his request for attorney fees under the Copyright Act because his motivations for pursuing the suit were suspect. He was deemed to be in the business of litigation rather than licensing the photograph to third parties. Other courts had labelled the photographer as a "copyright troll."

Over $100k In Attorney Fees and $10k In Sanctions Awarded For Bad Faith Litigation

In *Rock v. Enfants Riches Deprimes, LLC*, (May 29, 2020, Carter, A), a copyright infringement suit brought by a professional photographer against defendants that created and sold high-end sweaters and coats bearing copies of a photograph of musician Lou Reed, the federal district court in Manhattan has awarded over $100,000 in attorney fees and $10,000 in sanctions. After the court dismissed the copyright infringement claim for failing to register the work before filing suit, the court denied a motion to reconsider an award of $100,000 in attorney fees to the defendants as prevailing parties and $10,000 in sanctions for bad faith. The court concluded that a summary judgment order for failure to meet copyright registration requirements materially altered the legal relationship between the parties entitling the defendants to recovery attorney fees as a prevailing party.

6th Cir.: Damages Award In Home Design Infringement Case Was Reversed As 'Plainly Absurd'

In Singletary Construction, LLC v. Reda Home Builders, Inc., (June 1, 2020, Moore, K.), a copyright infringement case involving a stolen house design, a jury awarded the copyright holder $296,208.75 in damages against a builder and $14,440.50 against a real estate agent. The Sixth Circuit Court of Appeals reversed and remanded the damages award against the builder but not the real estate agent, because giving the copyright holder the full cost of the house without deducting any building expenses "shocks the conscience." One judge, who wrote a separate opinion, concurring in part and dissenting in part, would have affirmed the full amount on both defendants, on the theory that the award was made in compliance with the Copyright Act's burden-shifting damages analysis, under which the builder should be forced to accept his failure to convince the jury of the legitimacy of his expenses.

Spanish Broadcasting System Awarded $845K In Attorney Fees For Successful Defense

In *Latin American Music Co., Inc. v. Spanish Broadcasting System, Inc.*, (June 1, 2020, Sullivan, R.) Spanish Broadcasting System (SBS) was awarded over $845,000 in attorney fees and costs after music publisher Latin America Music Company and a music performance licensor failed to

show that SBS had infringed copyrights in six songs,. The infringement claims-as well as the plaintiffs' appeal of their dismissal-were objectively unreasonable and frivolous because the plaintiffs did not own the rights to the allegedly infringed songs. The plaintiffs also engaged in litigation misconduct during discovery by failing to produce certain evidence until just before trial. The court, however, reduced the fee award from the amount sought by SBS, finding that counsels' hourly rates were too high, and declined to award time spent by SBS a third party on indemnity issues.

Producer Denied Attorney Fees and Sanctions Against Director and His Attorney

In *16 Casa Duse, LLC v. Merkin,* (June 1, 2020, Sullivan, R.) on remand from the Second Circuit, the federal district court in New York City has denied film producer 16 Casa Duse, LLC's renewed motion for attorney fees and costs under Section 505 of the Copyright Act and sanctions under 28 U.S.C. § 1927 in its long-running dispute with a film director Alex Merkin over rights in a short film they worked on together. An award of attorney fees and costs under the Copyright Act were unwarranted because Merkin's copyright counterclaims were not objectively unreasonable or advanced in bad faith, nor did they sufficiently violate principles of compensation and deterrence. Sanctions against Merkin's attorney were also not appropriate due to reasons related to his untimely death.

Quotations: Two Different Strategies

In discussing politics: "When they go low we go high." Michelle Obama

As the Nazis were advancing on Stalingrad:"If you cannot kill a German with a bullet, then kill him with your bayonet. ... If you have already killed a German, then kill another one - there is nothing more amusing to us than a heap of German corpses. Don't count the days, don't count the kilometers. Count only one thing: the number of Germans you have killed. Kill the Germans! ... Kill the Germans! Kill!" Ilya Ehrenburg, Russian Journalist