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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.

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Damages

Franchisee Ordered To Pay Liquidated Damages

In *Sweetwaters Group, LLC v. Rawah Coffeeshop, LLC*,^[1] a federal district court granted a franchisor's motion for default judgment against a coffeeshop franchisee, finding the franchisee "abandoned" the parties' legally binding agreements and ordered that the franchisee comply with the post-termination obligations of the franchise agreements, pay liquidated damages under the franchise agreements, and pay attorney fees as required under the franchise agreements. The Court ruled that liquidated damages in the amount of \$67,967.28, were reasonable and not a penalty under Iowa law.

Mitigation

In another "abandonment" case^[2] a federal district court in New Jersey granted in part and denied in part franchisor's motion for default judgment in a flooring installation franchise case. The Court found that the franchisor was entitled to damages for unpaid royalty contributions and resolved warranty claims but was not entitled to recover lost future royalties of approximately \$170,000 because of a general duty on plaintiffs to mitigate their damages which the franchisor did not meet. The franchisor was entitled to recover \$18,088.96 in actual damages and \$6,841.84 in attorney fees and costs.

Florida Federal Court Grants Franchisor's Motion to Dismiss Breach of Implied Covenant of Good Faith and Fair Dealing Claims

In *Pinnacle Foods of Cal. v. Popeyes La. Kitchen*,^[3] a court in Florida granted a franchisor's motion to dismiss a franchisee's claim for breach of the implied covenant of good faith and fair dealing, but allowed a claim for breach of contract to proceed. The court rejected Popeyes'

argument that Pinnacle failed to allege actual damages on its breach of contract claim, but the court did dismiss the breach of the implied covenant of good faith and fair dealing claim as duplicative of the breach of contract claim. The court granted Popeyes' motion to dismiss a second good faith and fair dealing claim, finding that Popeyes' reasons for terminating Pinnacle's exclusivity were not pretextual, but rather supported by the terms of the development agreement. Finally, the court granted Popeye's motion to dismiss Pinnacle's Florida deceptive trade practices claim as there was no injury to a "consumer."

Franchisor Planet Fitness Unable To Shake Off Franchisee's Counterclaims For Breach of Implied Covenant

In *Planet Fitness International Franchise v. JEG-United, LLC*,^[4] a federal district court allowed several counterclaims that were brought against fitness center franchisor Planet Fitness by its franchisee and area developer for the territory of Mexico JEG-United, to move forward. JEG-United's counterclaims for breach of contract and breach of the implied covenant of good faith survived Planet Fitness's motion for summary judgment. Also surviving for determination at trial was JEG's counterclaim alleging Planet Fitness violated the New Hampshire Consumer Protection Act. However, holding that evidence was lacking to prove that Planet Fitness tortiously interfered with JEG United's prospective business opportunities with several third-party companies, the court granted summary judgment against this counterclaim.

[1] E.D. Mich., CCH Business Franchise Guide ¶17,203

[2] *FloorCoverings International Ltd. v. Needham*, D.N.J., CCH Business Franchise Guide ¶17,217

[3] 2022 WL 17736190 (S.D. Fla. Dec. 16, 2022)

[4] D.N.H., CCH Business Franchise Guide ¶17,200

Valuations: Donald Trump Beware!

IRS Hits Taxpayer With Gross Valuation Misstatement Penalty

Brooks v. Comm'r, T.C. Memo 2022-122; 2022 Tax Ct. Memo LEXIS 122, a case recently before the Tax Court, involved the valuation of a conservation easement donation for a charitable deduction. This is the same issue that is being litigated with respect to Trump and his Seven Springs property in Westchester County, New York. The deduction is figured by determining the fair market value of the property before the donation and subtracting the FMV after the donation. In this case, as in Trump's, the donation involved an easement primarily on undeveloped real estate. The opposing valuation experts agreed that the highest and best use

for the property was as a residential subdivision and development. But the donors' valuation expert came up with a value that was "incredible as a practical matter," as the court put it. He mischaracterized the zoning and valued the property as fully developed. He also did not consider a prior transaction involving the property. The IRS expert concluded that the valuation should be based on the property being undeveloped. The two valuations were miles apart. The court took the IRS' expert's opinion finding that the donors' valuation was 200% or more of the correct valuation. Accordingly, the taxpayers were subject to a 40% gross valuation misstatement penalty and the court disallowed the deduction entirely because the donors failed to get proper substantiation of the donation—the easement deed alone was not sufficient.

Expert Testimony

Wife Who Foregoes Expert Can't Complain About the Outcome

In *In re Trapp*,^[1] a court held that a party not offering a competing valuation and then appealing the outcome would be dismissed. The husband's business valuation expert appraised an entity that held two real estate properties. The wife did not engage an expert to appraise the properties. The trial court accepted the valuation done by the husband's expert and the wife appealed. But the appellate court upheld the trial court's decision, noting that there was "sufficient foundation" for the expert's determination of value. Plus, the court pointed out (citing a prior case), "where a party does not offer evidence of an asset's value, the party cannot complain as to the disposition of that asset by the court."

Parties' Motions to Exclude Each Other's Experts Are Granted in Part and Denied in Part

In *Redcell Corp. v. A.J. Trucco, Inc.*,^[2] an action under the Defend Trade Secrets Act (DTSA) and for breach of contract both parties' moved to exclude each other's experts and both parties' motions were granted in part and denied in part. The case offers extensive reasons and reasoning to accept and/or reject experts' very technical reports.

[1] 2022 IL App (3d) 210291-U; 2022 Ill. App. Unpub. LEXIS 1914A

[2] 2022 U.S. Dist. LEXIS 154217; 2022 WL 3700148 (Aug. 26, 2022)

Attorney's Fees

Sanctions For Bad Faith

In *NPF Franchising, LLC v. Sy Dawgs, LLC*,^[1] a federal district court in Cleveland, Ohio found Buchalter Law Firm and its individual attorneys representing the franchisor jointly and severally liable for sanctions due to discovery violations. The district court decided the issue on remand from the U.S. Court of Appeals for the Sixth Circuit, which remanded the case to the district court after holding that the lower court did not abuse its discretion in imposing sanctions on the individual attorneys pursuant to Federal Rule of Civil Procedure 37(d). The issue on remand was limited to whether the law firm should be sanctioned under the court's inherent authority, or in the interests of justice, for the well-documented discovery abuses in the case.

Massachusetts Federal Court Denies Franchisor's Attorneys' Fees Request

In *Patel v. 7-Eleven*,^[2] the court denied a franchisor's summary judgment motion which sought attorneys' fees related to its defense of previously dismissed claims. Four 7-Eleven franchisees brought a putative class action against 7-Eleven alleging that it wrongfully classified them as independent contractors instead of 7-Eleven employees, in violation of the Massachusetts Independent Contractor Law and the Massachusetts Wage Act. The district court granted 7-Eleven summary judgment on the employment claims against it concluding that the franchisees are properly classified as independent contractors under Massachusetts law. 7-Eleven then moved for summary judgment on its remaining claims and sought attorneys' fees. The court denied the motion as to 7-Eleven's attorneys' fees, holding that the franchise agreements at issue do not permit a fee award.

[1] N.D. Ohio, CCH Business Franchise Guide ¶17,204

[2] 2023 WL 35357 (D. Mass Jan. 4, 2023)

Joint Employer/Independent Contractor Trafficking Tort Claims For Actions At Franchised Motel Can Go Forward Against Franchisor

In *D.B. v. IE Hotel Group, LLC*,^[1] a federal district court in Oregon granted in part and denied in part a motion to dismiss brought by G6 Hospitality, LLC, G6 Hospitality Franchising, and G6 Hospitality Real Estate (G6) in a suit concerning sex trafficking at a Portland motel. The court held that: (1) despite the absence of a special relationship between D.B. and G6, the trafficking was sufficiently alleged to be foreseeable as to persons such as D.B. due to online reviews, criminal statistics, and G6's own increased commitment to fight sex trafficking; (2) vicariously liability was sufficiently alleged because of the existence of an agency relationship between defendant IE Hotel Group, LLC (IE) and a special relationship between D.B. and IE; (3) under O.R.S. § 30.867, D.B. did not allege facts that G6 had direct participation in a sex trafficking venture; however, it found potential vicarious liability under the facts alleged.

Ninth Circuit Affirms Decision that Franchisees Are Not Employees of Franchisor

In *Haitayan v. 7-Eleven, Inc.*,^[2] the Ninth Circuit Court of Appeals affirmed a decision that a group of franchisees are not employees of their franchisor. The court found findings sufficient to show that the three parts of the ABC test were met even though the trial court had not used that analysis.

Louisiana Appeals Court Affirms Dismissal of Vicarious Liability Claim

In *Flynn v. Anytime Fitness*,^[3] a Louisiana appellate court in Louisiana affirmed summary judgment in favor of a franchisor, dismissing negligence and premises liability claims asserted by a customer who was injured on unauthorized exercise equipment. The trial court granted Anytime's motion for summary judgment, holding that Anytime could not be liable for negligence or vicarious liability where it did not have control over day-to-day operations or otherwise exercise custody or control over the franchisee or its facilities. The appellate court affirmed finding that Louisiana law prevented finding that Anytime had custody of the inversion

table unless it exerted day-to-day control over the franchisee's management procedures which Anytime explicitly disclaimed in the franchise agreement.

[1] Case No. 3:22-cv-00432-IM.(February 1, 2022, Immergut, K.)

[2] 2022 WL17547805 (9th Cir. Dec. 9, 2022)

[3] 2022 WL 17982922 (La. App. Dec. 29, 2022)

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