

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,

Valuations

Deal Stats Value Index Reports on Trends in EBITDA Multiples and Margins

The median EBITDA multiple across all industries was highest in the third quarter of 2022, at 5.6x, and there has since been a downward trend through the fourth quarter of 2022 and the first quarter of 2023.

EBITDA multiples fell during the first quarter of 2022 but have trended positively through the remainder of the year and are positive in the first quarter of 2023. EBITDA, as a percentage of revenue, hit 25% in the first quarter of 2023 (the highest recorded figure over the periods analyzed). The previous range was between 11% and 12%, from the first quarter of 2019 through the fourth quarter of 2022. The lowest EBITDA margin since the first quarter of 2017 was 11%, which was reached in the second quarter of 2019.

EBITDA multiples for transactions with all types of buyers and sellers have been generally trending downward since 2020. EBITDA multiples for public-buyer transactions involving a private seller have shown the most drastic recent decline among all other types, with a multiple of 15.9x in 2022 compared to 21.8x in 2021.

Discount Rate: Kroll Lowers Recommended ERP to 5.5%

Kroll has decreased its recommended U.S. equity risk premium (ERP) from 6.0% to 5.5% when developing USD-denominated discount rates as of June 8, 2023. This is matched with the higher of a normalized risk-free rate of 3.5% or the spot 20-year U.S. Treasury yield as of the valuation date, says the firm in a recent update. In the same update, Kroll says the current recommended ERP in the eurozone (from a German investor perspective)

go to the [Wolters Kluwer Law & Business web page here](#).

remains in the range of 5.5% to 6.0%. The lower the Discount Rate, the higher the valuation of the business.

“Calculation” Reports Are the Most Popular in Canada

At the recent Canadian Business Valuation (CBV) Connect conference, one session discussed the three levels of valuation reports used in Canada: comprehensive, estimate, and calculation. The calculation report is the lowest level and is based on minimal review and analysis and little or no corroboration of information given by management. According to practice inspection declarations for 2022, in Canada more calculation reports were issued from 2018 to 2021 than any other: there were 633 calculation reports issued and 547 estimate valuation reports (the midlevel report)—while only 158 comprehensive valuation reports were issued in that time frame.

Damages - Lanham Act

Security Software Firm’s Use of ‘Malicious’ and ‘Threat’ to Describe Competitor’s Products Actionable Under Lanham Act

On appeal of a district court’s dismissal of its unfair competition claims against competitor Malwarebytes, Inc. (Malwarebytes), a divided panel of the United States Court of Appeals for the Ninth Circuit has concluded that when a computer security business describes a competitor’s software as “malicious” and a “threat” to a customer’s computer, the statement is not protected opinion, but an assertion of objective fact, actionable as false advertising under the Lanham Act. (*Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, June 2, 2023, Clifton, R.)

The district court’s dismissal of Enigma’s false advertising claim was reversed. The Ninth Circuit also found that Malwarebytes was subject to personal jurisdiction in New York, making New York choice of law applicable. Claims for tortious interference with business relations and violation of New York General Business Law (NYGBL) § 349 were revived, while dismissal of Enigma’s tortious interference with contractual relations claim was affirmed for failure to identify a specific contract.

Circuit Judge Bumatay filed a dissenting opinion to express his view that Malwarebyte’s statements constituted subjective opinion not subject to a claim for false advertising. He warned that the majority opinion will have a chilling effect on cybersecurity companies if they perceive civil liability may attach if a court disagrees with a classification of a program as “malware.”

Expert Testimony

Daubert Challenge Over Expert in ESOP Employment Agreements

In *Gamache v. Hogue*, 2023 U.S. Dist. LEXIS 54492; 2023 WL 2658033, an employee benefits lawyer was offered as an expert and prepared a report and was deposed regarding the process by which employment agreements were negotiated as part of a transaction involving an ESOP. The lawyer's opinion was that the process at issue "was not consistent with the standards expected of a fiduciary in conducting such process." The defendants filed a motion to exclude the lawyer's testimony and report, arguing that he had no formal ESOP training, had given tax advice, and had not written any publications on executive compensation or valuation. But the court denied the motion, finding that the expert was qualified enough as an expert; the court noted that a proffered expert need not be the most qualified authority on a subject – just qualified - to be admitted.

Expert Survives Daubert—Allowed to Testify as to Lost Business Value

In *White Buffalo Env't, Inc. v. Hungry Horse, LLC*, 2023 U.S. Dist. LEXIS 48355 (March 22, 2023). the case dealt with two motions to exclude the testimony of Jeremy Jennings, CPA/ABV. Jennings was proposing to testify as to the loss in value of White Buffalo Environmental Inc. Though various defendants filed two motions, "[t]he primary issue is whether Plaintiff White Buffalo Environmental, Inc.'s valuation expert Jeremy C. Jennings, a certified public accountant and business valuation specialist, may testify at trial about White Buffalo's lost business value sustained as a result of the Defendants' alleged actions." The court ultimately concluded that Jennings could testify because his report was based on sufficient facts and data, applying reliable principles to this case.

Attorneys' Fees

Excessive \$1.7 Million Fee Award to Class Counsel Reversed Where Musicians Recovered Only \$50,000 in Settlement With Streaming Service

The Facts: plaintiffs' counsel submitted a request for attorney fees seeking more than \$6 million in fees. A magistrate calculated the attorneys' lodestar (the number of hours worked multiplied by a reasonable hourly rate) to be \$1.7 million, and applied a negative 0.5 multiplier, given the limited benefit to the class from the settlement. The district court accepted that lodestar, but removed the multiplier, and awarded counsel \$1.7 million. The district court cited the fact that the settlement could have provided as much as \$20 million to the class.

But on remand, to the district court, to determine an appropriate fee award related to the actual benefit the settlement provided to a class in a class action, (*Lowery v. Rhapsody International, Inc.*, June 7, 2023, Lee, K.) a district court must evaluate the actual benefit provided to the class and base reasonable attorney fees on that benefit. Holding that an award of attorney fees to class action counsel under the Copyright Act must bear a reasonable relation to the actual monetary benefit recovered by the plaintiff class, the U.S. Court of Appeals for the Ninth Circuit Court reversed a \$1.7 million award to counsel for a class of musicians who received approximately \$50,000 in compensation from Rhapsody International, Inc. (now rebranded as Napster), in settlement of copyright infringement claims. The appellate court remanded the matter.

Joint Employer/Independent Contractor

Franchisor Not Held Vicariously Liable for Franchisee's Negligence When a Wheel Fell off Plaintiff's Car After It Was Serviced at Franchisee

The Second Department, reversing the trial Court, determined the complaint against the franchisor, Toyota, for the negligence of the franchisee car dealership, Plaza Toyota, should have been dismissed with respect to a claim that after the plaintiff's car was worked on at the franchisee, a front wheel fell off. [Caceres v. Toyota Motor N. Am., Inc., 2023 N.Y. Slip Op. 02492, Second Dept 5-10-23]. The appellate court found that the Supreme Court erred in denying the Toyota defendants' cross-motion for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them. "In determining whether a defendant, as a franchisor, may be held vicariously liable for the acts of its franchisee, the most significant factor is the degree of control that the franchisor maintains over the daily operations of the franchisee or, more specifically, the manner of performing the very work in the course of which the accident occurred" (Khanimov v McDonald's Corp., 121 AD3d 1050, 1051; see Smith-Hoy v AMC Prop. Evaluations, Inc., 52 AD3d 809, 811).

Quotations From George Washington

If the freedom of speech is taken away then dumb and silent, we may be led, like sheep to the slaughter.

It is far better to be alone, than to be in bad company.

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