

# The Franchise Valuations Reporter



May 2023 | Vol. 15 - Issue 5

## 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

### *Damodaran Posts 2023 Edition of Equity Risk Premium Paper for Discount Rate Calculations*

The “dean of valuation,” Professor Aswath Damodaran (New York University Stern School of Business), has posted [“Equity Risk Premiums \(ERP\): Determinants, Estimation and Implications—The 2023 Edition.”](#) The 143-page paper is the 14th update of this work, which provides a detailed picture of ERPs as well as a great deal of data, which are all free. In general, there are two approaches to estimating ERP: the ex post approach (using historical information) and the ex ante approach, which is forward-looking. Damodaran is a strong proponent of the use of the ex ante approach, or “implied” ERPs, which are forward-looking estimates that are extracted by examining stock prices today and expected cash flows in the future.

### *“Laughable” Purchase Offer Ignored*

The case of *Nix v. Nix*, 2023 Ind. App. Unpub. LEXIS 183; 2023 WL 2148720, showed that in some cases an offer to purchase a business can be evidence of value, or sometimes evidence of chicanery. The wife was the sole owner of a warehousing and logistics firm. The opposing valuation experts appraised the business at \$470,000 (the wife’s expert) and \$992,100 (the husband’s expert). The Nix’s daughter testified that she offered to buy the business for \$4.25 million, and her mother “laughed at her.” But, the trial court accepted the testimony and valued the business at \$4.25 million “due to the offer to purchase at or near the date of filing.” The wife appealed. The appellate court reversed the decision and remanded the case back to the trial court agreeing that the offer was laughable and that the daughter “did not sign the purchase agreement and, thus, could not be bound by it.”

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

### ***Selected Updates of Highlighted Cases From Bogdanski, “Federal Tax Valuation”***

*Walraven v United States*, 542 F. Supp. 3d 533, where valuation discounts with respect to the formation of an S Corp were disallowed because the transaction was not at arm’s-length and lacked economic substance.

*Clark Raymond & Co v Commissioner*, T.C. Memo 2022-105, in which the Tax Court valued property distributed by a partnership according to the method prescribed in the partnership agreement rather than fair market value (FMV).

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## **Damages - Lost Profits**

### ***Dr. Needham Provides a Series of Articles on Lost Profits***

In the NACVA publication Quick Read, a well-respected expert has published a series of five articles on the Basics of Lost Profits. They are very useful and extensive. Here is one of the cites: [A Review of the Basics for Lost Profits \(Part III\)](#)

### ***Dunn on Recovery of Damages for Lost Profits – Selected Cases Highlighted***

*Michaels v. Greenberg Traurig, LLP*, 62 Cal. App. 5th 512, 277 Cal. Rptr. 3d 1 (2021), holding the trial court erred in excluding plaintiff expert's testimony calculating lost profits at \$7,375,279 using actual data from sales of branded product.

*Mentis Sciences, Inc. v. Pittsburgh Networks, LLC*, 173 N.H. 584, 243 A.3d 1223 (2020), denying engineering firm lost profits damages for costs necessary to re-create data lost after Internet service provider failed to properly maintain data.

*Primarque Products Co., Inc. v. Williams West & Witts Products Co.*, 988 F.3d 26 (1st Cir. 2021) (Massachusetts law), affirming a jury award of lost profits damages to a distributor of soup base products who brought a tortious interference claim after its supplier terminated their long-term relationship.

*General Growth Properties, Inc. v. Property Tax Management, Inc.*, 614 S.W.3d 386 (Tex. App. 2020), holding a tax consulting service could recover lost profits from a shopping mall owner on breach of contract claim, but remitting damages award based on unreliable expert testimony

*Reid Hospital & Health Care Services, Inc. v. Conifer Revenue Cycle Solutions, LLC*, 8 F.4th 642 (7th Cir. 2021) (Indiana law), holding a claim for lost revenue was not barred by a limitations of liability clause excluding consequential damages where the contract was for revenue collection services.

*Jacobson Warehouse Co. v. Schnuck Markets, Inc.*, 13 F.4th 659 (8th Cir. 2021) (Missouri law), holding amounts spent to recover from lost grocery sales and mitigate damages to inventory were consequential damages rather than direct damages.

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## **Expert Testimony**

### ***Educating Courts***

For a well-written and extensively researched article on the use of experts as witnesses in franchise litigation we recommend the following with a long-winded title, Plattner, Harford and O'Connell, "Educating Courts: Using Franchise Lawyers and Consultants as Expert Witnesses in Franchise Cases and Avoiding Exclusion of Testimony as 'Legal Opinion'" *Franchise Law Journal* Vol 42, Number 2 (Fall 2022). It discusses extensively the red line between "expert" opinion and "legal" opinion. For similar subject matter from the same publication see [McKnew, Pearce & Schaeffer, "Focused Expertise—Daubert in Franchise Litigation"](#) *Franchise Law Journal* Vol. 41, No. 1 (Summer 2021).

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## **Attorneys' Fees**

### ***Game Developer Awarded Attorney Fees in Copyright Suit Which Was Voluntarily Dismissed By Competitor***

In *Good Job Games v. SayGames, LLC*, May 4, 2023, Chen, E., a California district court awarded \$112,000 in attorney fees and costs to Say Games, LLC, the creator of mobile video game Cannon Shot!, after determining that it was a prevailing party in a copyright suit brought by Good Job Games, the maker of mobile video game Crazy Jump 3D. Although the case was voluntarily dismissed by Good Job Games, the court determined that Say Games was the prevailing party and found that issue preclusion and claim preclusion would prevent a refiling of the copyright infringement suit.

### ***Denial of Attorney Fees Affirmed in Cannabis Patent Suit Which Was Dismissed by Stipulation***

In *United Cannabis Corp. v. Pure Hemp Collective Inc.*, May 8, 2023, Stark, L. on appeal the U.S. Court of Appeals for the Federal Circuit held that an Oregon federal district court did not abuse its discretion in finding that a company accused of infringing a patent directed to extraction of cannabis compounds was not entitled to attorney fees under the Patent Act's fee shifting provision after the case was voluntarily dismissed with prejudice,. The parties had resolved the case by stipulation and the trial court acted within its discretion in finding that the case was not exceptional, despite the defendant's assertion of unresolved counterclaims alleging inequitable conduct.

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## **Joint Employer/Independent Contractor**

### ***Tennessee Federal Court Grants Franchisor's Motion to Dismiss Claims for Negligent Hiring of Franchisee***

In *Fernald v. JFE Franchising, Inc.*, 2023 WL 2938312 (W.D. Tenn. April 13, 2023) a franchisor's motion to dismiss was granted by a federal court in Tennessee. The claim was that a franchisor was liable for a workplace mass shooting by a franchisee. The plaintiff alleged that the franchisor was responsible for his injuries because it knew or should have known of the shooter's propensities, and failed to use reasonable care in recruiting the franchisee, and failed to provide adequate warning to plaintiff. The case was dismissed by the Court citing Tennessee Code Section 50-1-208, "neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose" which was deemed dispositive.

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## Quotations From Theodore Roosevelt

About striving valiently and daring greatly: **"It is not the critic who counts: not the man who points out how the strong man stumbles or where the doer of deeds could have done better."**

About courage: **"Courage is not having the strength to go on; it is going on when you don't have the strength."**

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