

# The Franchise Valuations Reporter



September 2023 | Vol. 15 - Issue 9

## Our Expertise



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

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

## IRS

### *The Tax Agency Freezes Pandemic-Era Tax Credit*

The IRS is ramping up audits and criminal investigations into unscrupulous promoters of the Employee Retention Tax Credit. The office said that it was freezing a [pandemic-era employer tax benefit](#) that has been a magnet for fraud and has cost the federal government billions of dollars as the agency looks for ways to stop the program from being abused. The tax collector also said it had referred thousands of claims for the so-called Employee Retention Credit for audits and had initiated over 250 criminal investigations involving nearly \$3 billion in potentially fraudulent claims. This office alone has been contacted at least a hundred times by promoters of the \$26,000 per employee free money possibilities.

## 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](#).

## Valuations

### *Tremendous Disagreement Between Valuation Experts*

In *Tennebaum v. Deshpande*, 2023 Minn. App. Unpub. LEXIS 630, a Minnesota divorce case, the wife's expert valued the husband's interest in an asset management company at \$5,067,804, while the husband's expert came up with \$138,418. The district court gave the husband's expert's opinion "little evidentiary weight" and an appellate court affirmed the decision. It is another example of why some courts consider experts to be "whores" or hired guns.

### **Financial Information Witnesses 30 (b)(6)**

*In MD Auto Group, LLC d/b/a I-90 Nissan v. Nissan North America, Inc.*, CCH Business Franchise Guide ¶17,302. U.S. District Court, N.D. Ohio, Eastern Division. Case No. 1:21-CV-01584-CEF. Dated May 4, 2023, a dispute between a dealer and Nissan North America, Inc. (NNA) over the franchisor's discontinuation of a line of vehicles, the federal district court for the Northern District of Ohio denied the dealer's motion to compel an additional 30(b)(6) witness, finding that an inability to answer every question on a particular topic did not mean the corporation failed to comply with its obligation under the rule. However, the court did grant a motion to compel providing annual revenues, profits, and losses for the lifecycle of the vehicle at issue as the court found that information could have influenced the manufacturer's decision to discontinue the vehicle line.

### **Private-Company EBITDA Multiples Up in 2Q2023**

After a downward slide in the fourth quarter of 2022 and the first quarter of 2023, the median selling price-to-EBITDA multiple has jumped to 4.0x in the second quarter of 2023, according to the latest issue of the *DealStats Value Index (DVI)*. In the period analyzed, EBITDA multiples across all industries were highest in the third quarter of 2018, at 5.0x, but then decreased until they bottomed out in the first half of 2022. Since then, EBITDA multiples have generally been trending upward.

### **OMG Check the Buy-Out Prices in Your Buy-Sell Agreement**

Shoemaker's children with holes in their shoes. Firm members with buy-sell agreements, particularly lawyers, should look at the case of *Laurillard v. McNamee Lochner, P.C.*, 2023 N.Y. Misc. LEXIS 3296; 2023 NY Slip Op 50671(U). In that case in New York, a law firm shut down after merging into another law firm. Several partners terminated instead of joining the new firm and were asked to surrender their shares in the old firm in return for a check in the amount of \$100 for each partner, which was the book value of their shares – the buy-out price. The partners sued, alleging breaches of their employment agreement and fiduciary duty. The court dismissed their claims. The employment agreements allowed for termination (by either party), so they were at-will employees, meaning there was no breach. The shareholder agreement included a mandatory redemption provision with a buyback price set at \$100 per share. This was done to avoid future arguments over fair value, and the departing shareholders were bound by that agreement.

---

## **Damages**

### **Pizza Hut's \$6.6 Million Judgment Against Franchisee Affirmed on Appeal**

In our March, 2023 issue, we devoted almost the entire newsletter to Deb Coldwell's overwhelming victory against a Pizza Hut franchisee. Just recently, in (*Pizza Hut L.L.C. v. Pandya*, August 22, 2023, Willett, D.) the Fifth Circuit Court of Appeals affirmed the judgment of over \$6.6 million entered in favor of Pizza Hut. The sole issue on appeal was whether the district court erred in striking Defendant's request for a jury trial. While the Seventh Amendment of the US Constitution guarantees a right to a jury trial, this right can be waived. The court affirmed the lower court's holding that the franchisee voluntarily and knowingly waived his right to a jury trial by entering into a post-termination Transfer Agreement containing an enforceable

jury waiver provision with the franchisor that enabled the franchisee's restaurants to continue operations while the parties negotiated a sale to an approved buyer.

### ***Little Caesars Franchisees Owe Liquidated Damages and Attorney Fees***

In ([\*Little Caesar Enterprises, Inc. v. S&S Pizza Enterprises, Inc.\*](#), August 24, 2023, Parker, L.) the Court found that although the Michigan franchise statute did not define "good cause" for termination, the circumstances in this case amounted to good cause. There was no doubt that a franchisee entity and its two keyperson obligors breached their franchise agreements with plaintiff franchisor Little Caesar Pizza Enterprises, Inc. (LCE) in multiple ways. LCE satisfactorily established a liquidated damages provision in the two franchise agreements and reasonable calculations of liquidated damages, by way of affidavit, consistent with the parties' intent. Michigan law also made attorney fee and litigation cost provisions enforceable where the franchisees triggered judicial action by contesting the franchise terminations which apparently happened in this case.

---

## **Wrongful Termination**

### ***Mitsubishi Dealership That Defrauded Customers Had No Ground To Contest Franchise Termination***

In ([\*Kings Autoshop, Inc. v. Mitsubishi Motors of North America, Inc.\*](#), August 14, 2023, Wicks, J.), less than a year after entering into a franchise agreement, the dealer pleaded guilty to a New York City (City) Department of Consumer and Worker Protection (DCWP) 13-count petition and agreed to pay over \$500,000 in civil penalties and over \$300,000 in restitution. The City also suspended Kings' used car sales license for six days. The City violations involved the sale of used cars, but Kings conducted all vehicle sales under the "banner" of Mitsubishi, the company name under which it pleaded guilty. The court held the Mitsubishi car dealership was properly terminated for cause. As to an opportunity to cure, the court concluded it was too late to do that, and Mitsubishi NA should not be required to continue doing business with an entity that admitted to defrauding its customers. The court granted summary judgment to Mitsubishi NA accordingly.

---

## **Attorneys' Fees**

### ***District Court Improperly Applied Copyright Act's Fee Shifting Provision***

In ([\*Live Face on Web, LLC v. Cremation Society of Illinois, Inc.\*](#), August 11, 2023, Kirsch, T.) the Seventh Circuit held the lower court erred in denying the defendants in a copyright infringement suit fees and costs under the Copyright Act. The appellate tribunal found the district court misapplied the very strong presumption in favor of awarding a prevailing copyright defendant his fees and costs. The Seventh Circuit instructed that if, on remand, the district court determines that the defendants should recover their fees, any such award must include the fees incurred in bringing the appeal. The fee shifting provision encourages innovation by allowing a copyright holder to enforce its rights and allowing others to protect the right to use what is in the public domain.

---

## Joint Employer/Independent Contractor

### *Labor, Business Reach Deal to Raise Fast-Food Wages and End California Ballot Fight*

[Fast-food companies agreed to pull a California referendum](#) off next year's ballot that sought to reverse a landmark worker protection law, forgoing a costly political fight with labor unions over employee pay.[1] The deal between labor and fast-food companies will result in an increase in the minimum wage for fast-food workers to \$20 an hour in April and form a new council of representatives for workers and companies to consider pay bumps in the future, according to sources involved in the negotiations. It marks a rare compromise that allows business groups and labor to avoid a ballot fight over [repealing a law boosting fast-food wages](#) that could have topped \$100 million in campaign spending.

### *Sinema Pushes Back on Labor Board's Planned Joint Employer Rule*

[According to Bloomberg news](#), Sen. Kyrsten Sinema (I-Ariz.) teased a potential vote to overturn the National Labor Relations Board's planned move to alter the joint-employer standard under federal labor law.[2] Sinema said earlier this month that the rule proposed by the NLRB is "concerning," and suggested she would vote to overturn the rule through a Congressional Review Act resolution. Under the CRA, Congress can reverse an agency's rulemaking with a simple majority in both chambers. "What we have seen in the proposal is very, very concerning," Sinema said at an event sponsored by the International Franchise Association, which is lobbying Congress to overturn the NLRB rule once it's finalized.

Sinema's opposition shows that the NLRB's proposal to change the joint employer standard faces a tough environment in Congress, where many lawmakers are concerned about what the rule could mean to franchises such as McDonald's Corp. A bipartisan group composed of Sens. Joe Manchin (D-W.Va), Angus King (I-Maine), Susan Collins (R-Maine), James Lankford (R-Okla), and Mike Braun (R-Ind.) has been talking about the issue in the Senate, Sinema added. The NLRB's [joint-employment](#) framework determines when companies share liability for unfair labor practices and legal obligations to bargain with certified unions. In a break with its usual practice of setting standards via decisions in individual cases, the Trump board minted the current legal test with a [regulation](#) issued in 2020. The board plans to complete its joint employer regulation by Oct. 12, according to an August court [filing](#).

---

## Factoids

The United States has given Egypt \$70 Billion in aid to make peace with Israel but spent \$3.5 trillion to wage war in Afghanistan and Iraq.

September 17, 1862 (161 years ago) was the Battle of Sharpsburg (Confederate) or Antietam (Union), the bloodiest day in American history, after which Lincoln issued the Emancipation Proclamation.

---

[FranchiseValuations.com](http://FranchiseValuations.com)

Franchise Valuations Ltd | 529 Mountain Road, Bloomingburg, NY 12721

[Unsubscribe {recipient's email}](#)

[Update Profile](#) | [Constant Contact Data Notice](#)

Sent by [bruce.schaeffer@franchisevaluations.com](mailto:bruce.schaeffer@franchisevaluations.com) powered by

