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

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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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Expert Testimony - Cryptocurrency

New Rule 702 Crackdown Already Impacting Expert Witnesses

Although they don't officially go into effect until December 1, expert witnesses are already feeling the effects of the changes designed to strengthen Federal Rule of Civil Procedure 702, the federal rule regarding testifying experts. Last year, the well-informed BV Wire noted that the changes would result in more experts being excluded from testifying, and that is just what is happening—but earlier than thought.

Appraisers Have Highest Exclusion Rate Under Daubert, Per PwC Study

Under *Daubert,* appraisers were excluded more often in 2021 than any other type of financial expert witness, according to the PwC survey, "*Daubert* Challenges to Financial Experts (2000-2021)." Of the three most common financial experts (economists, accountants, and appraisers), appraisers had a 38% exclusion rate in 2021, followed by accountants (32%) and economists (27%). Over the 22 years of the study, appraisers have the highest exclusion rate (44%) of the three. The exclusion rate includes full and partial exclusions. For the full report, click here.

Bankman-Fried – All Defendant's Proposed Experts Rejected

In an Order dated September 21, 2023, Judge Lewis A. Kaplan of the Southern District of New York, presiding over the FTX crypto-catastrophe trial GRANTED the Government's request to exclude the testimony of the defendant's proposed experts Thomas E. Bishop and Brian Kim because the expert notices they submitted, "completely fail to satisfy the requirements of Fed. R. Crim. P. 16(b)(1)(C) because neither disclosure contains

a ‘statement of all opinions that the defendant will elicit from the witness in the defendant’s case-in-chief” nor does it contain ‘the bases and reasons for them’”.

The defense claimed they were to be primarily rebuttal witnesses and that their testimony would depend on what the government presented which they were to rebut. The defense was allowed to later re-propose such witnesses and present the necessary Fed. R. Crim. P. 16(b)(1)(C) disclosure after government witnesses have testified.

The government's motion to exclude testimony from Mr. Bradley A. Smith was GRANTED. The Judge wrote, “Mr. Smith's proposed testimony, to the rather limited extent that its substance can be determined from the defendant's disclosure statement, is inadmissible on several bases. First , defendant's expert notice for Mr. Smith, under the heading "Scope and Summary of Opinions," actually contains no opinions. Rather it states that he "may testify to the following topics."

All of the proposed topics are introduced with the phrase "General Background on" various subjects. Thus, while it is clear that Mr. Smith proposes to discourse on various topics, the substance of what he proposes to say is not at all clear. Nor has he articulated the bases and reasons for whatever that might be. Second, Mr. Smith' s testimony is improper because he seeks to instruct the jury on issues of law.

Finally, the majority of Mr. Smith's proposed testimony would be irrelevant to the issues at trial and, to the limited extent it would be relevant, its probative value would be substantially outweighed by the risk of confusing the issues or mis leading the jury.

The government's motion to exclude testimony from Mr. Lawrence Akka was GRANTED. The witness intended to testify regarding the meaning of FTX's terms of service and FTX's obligations thereunder. The Court found such testimony to be plainly inadmissible under Rule 702 as it invades the province of the Court to instruct the jury on the law and the province of the jury to apply the facts to that law. The Court held that it makes no difference that Mr. Akka is an English barrister and that the FTX Terms of Service that he proposes to construe has an English governing law clause.

The Defendant's other proposed experts, a Dr. Pimbley, a Dr. Peter U. Vinella and a Mr. Wu were similarly excluded.

Trader Joe's Says 'Trader Joe' Cryptocurrency Platform Infringes Its Trademark

Trader Joe's, the supermarket chain, has filed a lawsuit against the operators of a cryptocurrency trading platform called "Trader Joe" in California federal court, alleging trademark infringement. The supermarket alleges the crypto platform deliberately copied its name, then "committed fraud to obscure that origin story and prevail" in a World Intellectual Property Organization (WIPO) proceeding, where the supermarket unsuccessfully challenged its registration of the domain name traderjoexyz.com (*Trader Joe's Company v. Joemart Ltd.*, filed October 5, 2023, No. 2:23-cv-08395.).

The complaint alleges trademark infringement and dilution under federal law, violation of the federal Anticybersquatting Consumer Protection Act, unfair competition under California law, common law trademark infringement and unfair competition, and common law conversion in regard to the challenged domain name. The supermarket is asking the court to bar the crypto platform from using its Trader Joe domain names, as well as similar social media handles and mobile app names. It also asks that the platform be barred from offering goods and services or operating a platform under the name "Trader Joe" or similar names, that the court declare the platform's name infringes on the supermarket's trademark, and that the exchange's domain names be transferred to the supermarket. The supermarket company is also seeking damages, costs, and attorney fees.

Trade Secrets

Customer List Can Qualify As a Trade Secret Even Though Its Owner Did Not Enter Into Confidentiality Agreements

In *ArborCraft LLC v. Arizona Urban Arborist, LLC*, October 3, 2023, Gass, D. No. 1 CA-CV 23-0384, a landscaping company was entitled to a preliminary injunction barring a competitor from using its stolen customer list even though it did not enter into written agreements with its independent contractors to prohibit them from using the list, according to the Arizona Court of Appeals. The court, in affirming a trial court's decision to grant the injunction, emphasized that the company was entitled to trade secret protection because it kept the list in a password-protected database to which only the company's owners and

office manager had full access. The lawsuit was brought by ArborCraft, a Phoenix company that specializes in tree removal, pruning, and storm damage response.

The company alleged that two of its independent contractors left to form Arizona Urban Arborist, a Scottsdale-region company that provides similar tree services and the Scottsdale competitor had allegedly stolen its customer list and was using it to solicit customers. In its decision the court of appeals found that the case would not be governed by the law of noncompete agreements. “Put simply, noncompete agreements are not injunctions,” the court held. Rather, covenants not to compete are “creatures of contract, primarily intended to prevent competitive use, for a time, of information or relationships which pertain peculiarly to the employer and which the employee acquired in the course of the employment.” An injunction against misuse of a trade secret, by contrast, “is court-imposed, usually involuntarily, and aimed at undoing or preventing harm likely to result from misappropriation of a trade secret while a lawsuit is pending.” The law of non-competes was therefore not at issue here. Thus, the court also found that the trial court did not abuse its discretion when it found that the client list in the case was a trade secret. Under the AUTSA, a trade secret is information that (a) “derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use” and (b) “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

Independent Contractor’s Failure To Protect Valuation Model (Trade Secret) Dooms Misappropriation Claim

In *Pauwels v. Deloitte LLP*, October 6, 2023, Robinson, B., it was held that Andre Pauwels failed to take steps sufficient to protect his valuation “model” as a trade secret, which was fatal to his claim that the Bank of New York Mellon (“BNYM”) and Deloitte LLP misappropriated the model, according to the Second Circuit Court of Appeals in New York City. The court affirmed the dismissal of Pauwels’ trade secrets misappropriation claim, which arose out of his contention that as part of his independent contractor work for BNYM he provided the model to it, only to have BNYM replace him with Deloitte and provide Deloitte with the model to perform the work he previously had performed.

Valuations

Limited Evidence and a Steakhouse Valuation

The case of *Herremans v. Fedo (In re Herremans)*, 2023 Bankr. LEXIS 1800; 2023 WL 4611429 shows that a court can only decide on a valuation with the evidence it has to work with. In the case, two 50% owners of a Ponderosa steakhouse were locked in a battle over the Old West-themed eatery, with both owners engaging in oppressive conduct. They left it up to the court to decide their fate, and it ordered one owner to buy out the other at fair value. In Michigan, “fair value” can mean anything the court deems appropriate “under the totality of the circumstances.” A business valuation was done, but the expert’s report was not entered into evidence nor did the expert testify. The owner being bought out said Ponderosa was a “dying breed” and the real value was in the real estate. An appraisal of the real estate was presented, and the expert testified that she did not include the value of the going concern nor the furniture, fixtures, or equipment. No competing evidence to her appraisal was offered. With this scant evidence, the court concluded that the restaurant had a “fading popularity” and believed an asset approach was the most appropriate valuation method. It

accepted the real estate valuation and made some adjustments, such as for equipment and both parties' oppressive behavior.

Attorneys' Fees

Attorney Fees Fixed for Manufacturer's Counsel in Hand Sanitizer Non-Payment Case

In *Brands International Corp. v. Reach Companies, LLC*, October 2, 2023, Tunheim, J., No. 0:21-cv-01026-JRT-DLM, the federal district court in Minneapolis fixed the attorney fees for law firms that represented a Canadian manufacturer that had drop-shipped hand sanitizer to the customer of a Minnesota distributor. Following non-payment for the goods shipped, the manufacturer brought suit against the distributor. The manufacturer prevailed on summary judgment, and moved for awards of attorney fees, costs, and interest, which the court calculated and awarded pre-judgment interest in the amount of $16,426.08, applying the Minnesota statutory rate of six percent [Minn. Stat. § 334.01].

Attorney fees-proportionality. In addressing the attorney fee component of the request, the court declined to reduce Brands's request solely because it was nearly three times the amount of the basic summary judgment award because the court found that the United Nations Convention on Contracts for the International Sale of Goods (CISG) applied to the case which specifically provides for attorney fees to the prevailing party (the "English Rule).

Attorney fees-reasonableness. In addition to the foreseeability factor, the court applied the 12 *Hensley* factors in determining a reasonable attorney fee [*Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983)]. Beginning with the so-called "lodestar method" of multiplying hours expended by the applicable attorney billing rates, the court then applied the other factors to adjust the lodestar amount.

Reach, the Defendant, failed to show that any of the time expended by Brands's counsel was excessive. The engagement by Brands of counsel in Philadelphia, where the customary attorney billing rates exceed those of the Minneapolis-St. Paul market, was found to be appropriate because the Philadelphia counsel's work was limited to taking a non-party deposition in Philadelphia. The hourly billing rates charged by one of the Twin Cities law firms engaged by Brands were found to be mostly appropriate; the hourly rates charged by the other Twin Cities law firm were uncontested.

After making a minor downward adjustment to the lodestar figure from *Hensley*, the court reduced the revised lodestar amount by 30 percent on the complexity factor because the entire litigation revolved around the simple issue of whether receipt of an invoice from Brands was a condition precedent to Reach's obligation to pay cash on delivery for the drop-shipped goods. Applying all of the factors, the court awarded Brands $185,000 in attorney fees.

Congress - The Clown Show

"I have learned the difference between a cactus and a caucus. On a cactus, the pricks are on the outside." – Representative Mo Udall (AZ) on being informed he had lost a party vote for Speaker of the House

A Response To a Beheading

In 1219 Genghis Khan sent a mission to the Shah of Khwarezem (Transoxiana) proposing commercial engagement. The Shah quite arrogantly sent the Mongols' emissaries beheaded skulls back to the Mongol Leader. Genghis then advised the Muslim ruler:

"Thou hast chosen war. That will happen which will happen, and what is to be, we know not. God alone knows."

Khwarezem has not existed since 1231. The Mongols were so incensed that they destroyed everything for thousands of miles around and ultimately sacked Baghdad.

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