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NO. 96304-5

SUPREME COURT OF THE STATE OF WASHINGTON

MONEY MAILER, LLC,

Appellant,

v.

WADE G. BREWER,

Respondent.

WADE G. BREWER,

Counterclaim Appellant,

v.

MONEY MAILER, LLC, *et al.*,

Counterclaim Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON STATE
DEPARTMENT OF FINANCIAL INSTITUTIONS

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I. INTRODUCTION

This Court has previously held that a franchisor violated the Franchise Investment Protection Act (FIPA) when it charged a twenty percent markup on products sold to a franchisee. *Nelson v. Nat'l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 392, 842 P.2d 473 (1992). In light of its holding in *Nelson*, and in view of the plain language and the franchisee-protective purpose of the Act, this Court should hold that a markup of 100 percent violates RCW 19.100.180(2)(d). A franchisor's 100 percent markup on products or services obtained from a third party clearly violates RCW 19.100.180(2)(d) on its face. This Court should answer "yes" to the certified questions submitted by the District Court in this matter:

(1) For purposes of FIPA's prohibition on selling "to a franchisee any product or service for more than a fair and reasonable price" (RCW 19.100.180(2)(d)), may the franchisee rely on the price at which the franchisor is able to obtain the product or service in the absence of evidence indicating that the price was not a true market price?

(2) Does a franchisor violate RCW 19.100.180(2)(d) as a matter of law when it charges the franchisee twice what it pays for a product or service?

Order Certifying Questions to the State Supreme Court at 4-5, Sept. 7, 2018.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Department of Financial Institutions (Department) administers the Franchise Investment Protection Act on behalf of the state and the people of Washington. The Department reviews registration applications, promulgates rules for the industry, publishes interpretive opinions and policy statements, and initiates enforcement actions. *See, e.g.*, RCW 19.100.040—.070, .090, .242—.250. Hence, the Department has substantial familiarity with the purposes and provisions of the Act.

Problems with franchises, including sales abuses and unfair practices, were the impetus for the passage of the Act and the inclusion of a “franchisee bill of rights” in the Act. *Donald S. Chisum, State Regulation of Franchising: The Washington Experience*, 48 Wash. L. Rev. 291, 298 (1973); *see also Morris v. Int’l Yogurt Co.*, 107 Wn.2d 314, 317-18, 729 P.2d 33 (1986). Before the Act, many of the problems with franchising centered around two aspects of franchising: (1) the sale of the franchise, and (2) the ongoing relationship between the franchisor and the franchisee. *Chisum*, 48 Wash. L. Rev. at 297. In addition to instances of outright fraud, franchise offerees were not receiving full and accurate disclosures in connection with the sales of the franchises. *Id.* The Act thus protects against abuses in the sales process by requiring franchisors to register franchise offers with the Department and to disclose material information to

prospective franchisees. *See, e.g.*, RCW 19.100.020, .040, .170; *see also Chisum*, 48 Wash. L. Rev. at 352-369.

Additionally, because “[t]he franchisor normally occupies an overwhelmingly stronger bargaining position and drafts the franchise agreement so as to maximize his power to control the franchisee,” the franchisor maintains power over the continuing relationship with the franchisee. *Chisum*, 48 Wash. L. Rev. at 297. Historically, franchisors have used this powerful position “to terminate franchises arbitrarily, to coerce franchisees under the threat of termination, and to force franchisees to purchase supplies from the franchisor or approved suppliers at unreasonable prices[.]” *Id.* at 297-98. The Act sets forth a “franchisee bill of rights” to address these abuses and to resolve problems that arise in the ongoing relationship between a franchisor and a franchisee. *Coast to Coast Stores (Cent. Org.), Inc. v. Gruschus*, 100 Wn.2d 147, 150, 667 P.2d 619 (1983); *Chisum*, 48 Wash. L. Rev. at 370-380. The “bill of rights” provision at issue here is a prohibition on charging franchisees more than a “fair and reasonable price” for products or services, and it has been present in the Act since its original enactment. *See Franchise Investment Protection Act*, Laws of 1971, 1st Ex. Sess., ch. 251, §18.

Although the Act became effective in 1972, problems arising from the imbalances of information and power between the franchisor and

franchisee continue to this day. The Department continues to see, and object to, unfair and unreasonable terms in franchise agreements. The Department also receives and investigates complaints from franchisees who allege that the franchisor made false and misleading claims in connection with the sale of the franchise, as well as complaints about franchisors that impose unreasonable requirements in the ongoing franchise relationship. Thus, the Department has a keen interest in ensuring that the Court continues to interpret the Act in a manner consistent with the Act's purpose: to protect franchisees. *See Dep't of Labor & Indus. v. Lyons Enters. Inc.*, 185 Wn.2d 721, 733, 374 P.3d 1097 (2016) (“the legislature enacted FIPA with the purpose of protecting franchisees, and it is through that lens we continue to view its provisions.”).

III. STATEMENT OF THE CASE

The Department relies on the U.S. District Court's findings of fact contained in the Order Granting In Part Brewer's Motion for Summary Judgment, dated June 28, 2018.

IV. DISCUSSION

This Court's holding in *Nelson*, the plain language of the Act, and the protective purposes of the Act all dictate the answers to the certified questions: A 100 percent markup of products sold to a franchisee through a

requirements contract violates the Act, even if fully disclosed.¹ Because charging twice that of the price charged to it by a third party vendor cannot be fair or reasonable, a franchisor facially violates RCW 19.100.180(2)(d) by doing so. Accordingly, the Department asserts that both certified questions should be answered, “Yes.”

A. *Nelson Confirms That a 100 Percent Markup on Goods or Services Sold to a Franchisee Violates RCW 19.100.180(2)(d)*

Addressing the Court’s second certified question first, a 100 percent markup in sales of goods or services to a franchisee, as occurred here, cannot be “fair” or “reasonable” under the Act. While there may be situations where a small markup, fully disclosed and intended to cover corresponding costs or expenses that are not already accounted for, might indeed be seen as fair and reasonable, that is not the case here, and it is not the question before this Court. The 100 percent markup charged here,

¹ In making this assertion, the Department notes that it has no objection to franchisors earning compensation in the franchise relationship. Indeed, franchisors are properly compensated for use of their intellectual property, operating standards, and support services through a variety of one-time or ongoing fees. These fees must be disclosed upfront to prospective franchisees and can include initial fees to enter into the franchise system, royalties based on sales, and technology and support fees. However, the thrust of the Act is to prevent franchisors from charging ancillary fees as a means to earn hidden profits and to hide or distort their true compensation – as asserted in this case.

regardless of the extent of disclosures, is a per se violation of RCW 19.100.180(2)(d), which states:

(2) For the purposes of this chapter and without limiting its general application, it shall be an unfair or deceptive act or practice or an unfair method of competition and therefore unlawful and a violation of this chapter for any person to:

...

(d) Sell, rent, or offer to sell to a franchisee any product or service for more than a fair and reasonable price.

RCW 19.100.180(2)(d).

To answer whether a 100 percent markup violates the Act, the Department asserts that this Court need only look to its holding in *Nelson*. In *Nelson*, the franchisor entered into an agreement with the franchisee to operate a business organizing “pizza make” fundraisers. *Nelson*, 120 Wn.2d at 385. The terms of the agreement required the franchisees to obtain their pizza supplies through the franchisor. *Id.* The franchisees also agreed to pay an unspecified “standard” markup on all supplies received through the franchisor. The franchisee ordered pizza supplies from the supplier, who sent its bill to the franchisor. The franchisor added a 20 percent markup to the bill, and then billed the franchisee. *Id.* at 389. After receiving the first bill, the franchisee was able to determine that the markup was 20 percent. This Court affirmed the holding of the trial court that the 20 percent markup violated RCW 19.100.180(2)(d). *Id.* at 392.

The facts here indicate that the percentage markup imposed in this case not only meets, but far exceeds, the percentage markup imposed by the franchisor in *Nelson*. Order Granting Summary Judgment at 4 (“Money Mailer does not deny that it charges franchisees twice what it costs to print the advertisements.”). Following the same logic as *Nelson*, the 100 percent markup here also violates the Act and provides an affirmative answer to the District Court’s question.

B. Disclosure of the Printing Price Cannot Excuse a Violation

Money Mailer asserts that RCW 19.100.180(2) does not apply in this situation due to the disclosure of the printing price at the time the franchise was initiated. First, while the cost of the printing services was fully disclosed, neither the extent nor even presence of the markup were. *Id.* at 3-4. Second, that argument is not relevant to the question posed by the District Court. The court asked whether a 100 percent mark-up violated RCW 19.100.180(2), not whether that statute was applicable in this situation. Finally, Money Mailer’s assertion that disclosure of the printing price excuses its egregious markup is legally unsound.

This Court need not look beyond the text of the Act to determine that disclosure of the printing markup would not have avoided a violation of RCW 19.100.180(2)(d). Unlike other provisions of the Act that clearly

apply only to the offer, sale, or purchase of any franchise in this state,² the plain language of RCW 19.100.180(2) applies to *any* person, and is not limited to the initial sale (*i.e.*, if the franchisor disclosed the markups upfront).

In addition, there is no relief in the statute for a franchisor that would otherwise violate RCW 19.100.180(2)(d) if it makes the relevant disclosures upfront. Conversely, the statute does contain such disclosure exceptions elsewhere. Specifically, RCW 19.100.180(2)(e) prohibits any person from “[o]btain[ing] money, goods, services, anything of value, or any other benefit from any other person with whom the franchisee does business on account of such business *unless such benefit is disclosed to the franchisee.*” RCW 19.100.180(2)(e) (emphasis added). If the legislature intended to also limit RCW 19.100.180(2)(d) to circumstances under which the franchisor failed to disclose a markup, then it could have done so.

Further, other provisions of the Act make clear that the legislature did not intend for franchisors to disclose or otherwise bargain away a violation of RCW 19.100.180(2)(d). RCW 19.100.220 limits a franchisor’s ability to avoid compliance with the Act’s provisions through oppressive use of bargaining power. *See* RCW 19.100.220(2) (prohibiting agreements

² *See* RCW 19.100.170 (“It is unlawful for any person in connection with the offer, sale, or purchase of any franchise or subfranchise in this state . . .”).

that “purport to bind any person to waive compliance with any provision of this chapter or any rule or order hereunder . . .”); *see also Rutter v. BX of Tri-Cities, Inc.*, 60 Wn. App. 743, 747, 806 P.2d 1266, 1268 (1991) (RCW 19.100.220 reflects legislature’s intent to restrain franchisors from circumventing the Act’s provisions “through oppressive use of superior bargaining power”). If a franchisor cannot require a franchisee to bargain away compliance with the Act, it would be anomalous to permit a franchisor to “disclose away” a violation.

Moreover, this Court has already rejected the argument that disclosures of any unreasonable price would satisfy the Act. In *Nelson*, the franchisor relied on RCW 19.100.180(2)(e) to argue that its markup was permissible under the Act. This Court resolved the “apparent conflict” between the two provisions in favor of the prohibition on unfair and unreasonable prices, noting:

If the franchisor sells the goods, it can charge only a reasonable price under RCW 19.100.180(2)(d). On the other hand, if the franchisee is forced to buy from approved sources, the supplier may charge an unreasonably higher price and split the profits with the franchisor as long as the arrangement is disclosed under RCW 19.100.180(2)(e). . . . We follow the prohibitory theory in this case because it better comports with the general purpose of the Act, to protect franchisees, and because to do otherwise would vitiate the provision of the act forbidding franchisors from imposing unfair and unreasonable prices on the costs of goods and services.

And in response to the franchisor's argument that it is anomalous to invalidate the markup when it could have generated the same profit using some other method, this Court stated that "construing the disclosure provisions broadly would effectively nullify the prohibition in RCW 19.100.180(2)(d) against charging more than a fair and reasonable price for goods and services." *See Nelson*, 120 Wn.2d at 392.

Thus, it is clear from the text and the purpose of the Act that RCW 19.100.180(2)(d) is violated by charging an unfair and unreasonable price to a franchisee, regardless of any upfront disclosure. Put simply, *Nelson* leads to the conclusion that imposing a 100 percent markup cannot result in a fair and reasonable price. Even in the absence of a per se rule, this Court should hold that charging a franchisee twice what was paid for the product nonetheless violates RCW 19.100.180(2)(d) as a matter of law. Such a holding ensures that the essential purpose of the Act—protecting franchisees from abuse by the franchisor—is preserved. As summed up by the district court, "[t]o hold otherwise would allow undisclosed profit centers and vitiate [the Act's] essential purpose to protect franchisees 'from oppressive practices historically associated with the sale of franchises.' "

Order Granting Summary Judgment at 5 (citation omitted).

C. The Price Paid by the Franchisor for Goods and Services Should be Considered in Determining Whether Charges to a Franchisee are “Fair and Reasonable”

When this Court determined that the 20 percent markup in *Nelson* violated the Act, it looked at the franchisor’s cost to obtain the product. *See Nelson*, 120 Wn.2d at 390-91. Here, Money Mailer argues that the Court should instead look at terms found in unrelated provisions of the Act, or to what other franchisors may charge. Appellant’s Brief (App. Br.) at 19-22. As implicitly recognized by this Court in *Nelson*, the actual costs incurred by the franchisor are highly relevant to the “fair and reasonable price” analysis. *Nelson*, 120 Wn.2d at 389 (rejecting the proposition that FIPA permits a supplier to “charge an unreasonably higher price and split the profits with a franchisor as long as the arrangement is disclosed”). The plain language and purpose of the Act support this straightforward conclusion.

1. A “Fair and Reasonable Price” Should Not Be Conflated With Terms That Determine Whether a Franchise Exists in the First Place

The phrase “fair and reasonable price” in RCW 19.100.180(2)(d) is not the same as “bona fide wholesale price” in RCW 19.100.010(8). The structure and language of the Act support not conflating the two distinct terms, both of which are found in two different statutes and serve entirely separate purposes.

RCW 19.100.180(2) sets specific limits on the franchise relationship once it is determined that a franchise agreement is present. One of those limits is that a person may not sell, rent or offer to sell to a franchisee any product or service for more than a “fair and reasonable price.” RCW 19.100.180(2)(d). In contrast, RCW 19.100.010(8) defines the term “franchise fee,” and sets forth a number of exclusions therefrom. One such exclusion is “[t]he purchase or agreement to purchase goods at a bona fide wholesale price.” RCW 19.100.010 is used to determine whether a franchise agreement *is present*, and whether the Act applies to the relationship in the first place. If the legislature intended that “fair and reasonable price” be interpreted to mean “bona fide wholesale price,” then it could have used the same term in both statutes. Instead, the legislature used two separate terms, and we must assume that in doing so they meant two separate concepts. *See Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007).

Nevertheless, Money Mailer argues at length that “fair and reasonable price is equated to bona fide wholesale price based on fair market price.” App. Br. at 17-19. Money Mailer further asserts that this Court should look at “comparative level of distribution” from the vantage point of the franchisee to determine “bona fide wholesale price.” *Id.* at 22-25. In support of this contention, Money Mailer cites to a number

of cases that address RCW 19.100.010 (the “definitions” section of the Act).

Id.

First, the cases Money Mailer cites in support of its “bona fide wholesale price” and “comparable level of distribution” analysis³ relate to whether a “franchise fee” is present for purposes of applying the Act in the first place. Such analysis is certainly appropriate in cases where this Court is determining whether, for purposes of applying the Act, a “franchise fee” exists, and helpful in cases where the goods are purchased and sold by a manufacturer or wholesaler to a wholesaler or dealer for sales of goods to consumers. However, this analysis is not applicable here. Whether a franchise relationship exists between Money Mailer and Mr. Brewer is not at issue.

Second, this Court has already stated that the concept of “bona fide wholesale price” applies only in determining whether a franchise exists, and not to determining whether the franchisor has charged a “fair and reasonable price.” In *Nelson*, the franchisor urged this Court to think of the “price” charged to the franchise fee as two separate components: the actual food price, and the markup. *Nelson*, 120 Wn.2d at 387. In response, this Court

³ *Bryant Corp. v. Outboard Marine Corp.*, No. C93-1365R, 1994 WL 745159 (W.D. Wash. Sep. 29, 1994); *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir. 1983); *BP W. Coast Prods, LLC v. Shalabi*, No. C11-1341MJP, 2012 WL 441155 (W.D. Wash. Feb. 10, 2012).

noted that the Act excepts from the definition of “franchise fee” any “purchase or agreement to purchase goods at bona fide wholesale price,” and stated:

A statement in *Corp v. ARCO*, 45 Wn. App. 563, 567, 726 P.2d 66, *review denied*, 108 Wn.2d 1014, 1987, read out of context, might create a misimpression about the propriety of imposing fees on goods and services under the statute. There, the court stated: “The statutory definition suggests that a franchise fee ‘includes “fees hidden in the franchisor’s charges for goods or services.” ’ ” (Citations omitted.) *ARCO* is not relevant to the case at bar because (1) it concerned a different provision of the Act (the purchase or lease of real property under former RCW 19.100.010(11)(f)); and (2) the issue in *ARCO* was whether imposition of a fee in a business arrangement indicated the existence of a franchise, not whether the fee was permissibly imposed under the Act. In other words, the question whether a charge is a “fee” for the purpose of determining whether the Franchise Act applies (the question in *ARCO*) is distinct from the question whether the fee is proper or improper under the Act (the question here).

Nelson, 120 Wn.2d at 388 n.3. This Court also determined that to include surcharges on wholesale prices in the definition of “franchise fee” would permit franchisors to circumvent RCW 19.100.180(2)(d). *Id.* at 392. That same reasoning applies here. The requirement to purchase goods marked up by the franchisor is sufficient for purposes of the definition of “franchise fee” to determine whether a franchise exists. It is an entirely separate analysis as to whether a franchisor has charged more than a fair and reasonable price in violation of the Act.

2. **A “Fair and Reasonable Price” Is Not the Equivalent of What Other Franchisors in the Industry Charge**

Money Mailer further argues that “fair and reasonable price” means “the bona fide wholesale price (or fair market price) of the goods available to those similarly situated to Mr. Brewer as established by the envelope-based direct marketing industry, which is the relevant market.” App. Br. at 14. Money Mailer draws attention to its most direct competition, “*i.e.*, franchisor of envelope-based marketing . . .” and states that the prices it charges its franchisees are directly in line with its competitor’s comparable printing services. *Id.* at 9.

One means of analyzing the fairness of a wholesale price is to look to other arms-length transaction prices within a specific market, but this comparison cannot be dispositive. The Act is not intended to provide industry-wide protection to franchisors that charge similarly unfair and unreasonable prices to its franchisees. Rather, the Act has consistently been interpreted to prevent franchisors from exploiting their “overwhelmingly stronger bargaining position” to “force franchisees to purchase supplies from the franchisor or approved suppliers at unreasonable prices[.]” *Chisum*, 48 Wash. L. Rev. at 297-98. If the “franchisee bill of rights” were interpreted to be controlled by industry prices, franchisors would merely ensure that they charge no more or less than the unfair and unreasonable

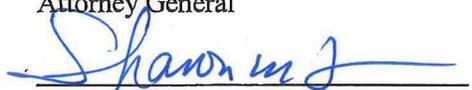
prices charged by their competitors, rendering a “fair and reasonable” analysis of little use.

V. CONCLUSION

In the Department’s view, a franchisor’s markup of a product as a means to create a profit center, hidden or otherwise, violates RCW 19.100.180(2)(d). The Department respectfully requests that this Court hold that the proper focus in determining whether a price is “fair and reasonable” within the meaning of RCW 19.100.180(2)(d) includes consideration of the cost to the franchisor and that a 100 percent markup of products sold to a franchisee through a requirements contract violates the Act. Thus, both certified questions should be answered, “Yes.”

RESPECTFULLY SUBMITTED this 31st day of January, 2019.

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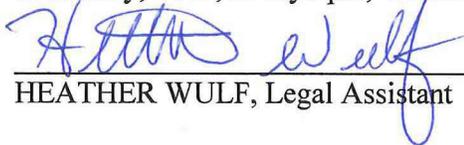
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I certify that I served a true and correct copy of this document on all parties or their counsel of record on the date below as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 31st day of January, 2019, at Olympia, Washington.


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