Received
Washington State Supreme Court

DEC 0 3 2015

Ronald R. Carpenter
Clerk

No. 91610-1

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent,

v.

LYON ENTERPRISES, INC., d/b/a JAN-PRO CLEANING SYSTEMS,

Appellant.

BRIEF BY AMICUS CURIAE INTERNATIONAL FRANCHISE ASSOCIATION

FILED
DEC 15 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Douglas C. Berry, WSBA No. 12291
Daniel J. Oates, WSBA No. 39334
MILLER NASH GRAHAM & DUNN LLP
Pier 70
2801 Alaskan Way, Suite 300
Seattle, Washington 98121
(206) 624-8300
Attorneys for Amicus Curiae
International Franchise Association®

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

While the Industrial Insurance Act (**"IIA"**) and the cases relied on by the Court of Appeals predate the explosive growth of franchising after 1950 (and enactment of the Washington Franchise Investment Protection Act (**"FIPA"**) in 1971), it has always been understood that the unique franchisor/franchisee relationship was outside the IIA. Before this case, the Department of Labor and Industries (**"L&I"**) never sought to treat a franchisee as its franchisor's covered worker. Indeed, as recently as 2005, L&I audited Petitioner Lyons Enterprises, Inc.'s (**"Lyons"**) operations and concluded its franchisees – the same ones involved in this case – were not covered workers.

L&I's change of position was not the result of any change in the IIA, but it does reflect a disregard for franchising and the unique franchisor/franchisee relationship. In adopting L&I's new position, the Court of Appeals recognized that the case "is highly complex, involving the intersection of detailed statutes with somewhat confused common law." *Department of Labor and Industries v. Lyons Enterprises, Inc.*, 186 Wn. App. 518, 542, 347 P.3d 464, 476 (2015). Yet, the Court did not consider or cite to FIPA, and exhibited a lack of understanding of franchising, even referring to Lyons not as a franchisor, but as a "distributor of Jan-Pro cleaning franchises."[1] *Id.* at 523.

---

[1] Under FIPA, Lyons is actually a subfranchisor and under its agreement with Jan-Pro is authorized to grant Jan-Pro® franchises within a defined territory. RCW 19.100.010(9) and (10). As such, in its relationship with Jan-Pro, Lyons is a franchisee, but it is a franchisor in its relationship with its unit franchisees. It should be noted that FIPA makes no distinction between franchisors and subfranchisors in relation to their respective registration and disclosure obligations, or with their relationships with their franchisees. *See* Sec. Div.

"As a general rule, where a statute has been left unchanged by the legislature for a significant period of time, the more appropriate method to change the interpretation or application of a statute is by amendment or revision of the statute, rather than a new agency interpretation."[2] *Dot Foods, Inc. v. Washington Dep't of Revenue,* 166 Wn.2d 912, 921, 215 P.3d 185 (2009). That admonition is particularly apt here, as franchise agreements are generally long-term agreements that cannot be unilaterally altered, and they certainly are not structured to account for industrial insurance premiums. Using Lyons' specific case as an example, the cost of complying with this newly imposed burden will significantly exceed the company's entire annual profit, effectively putting it out of business. *Compare* CP 2135 (noting that the company has annual profits of approximately $125,000) *with* CP 196 (noting that Lyons' annual IIA premiums would be approximately $150,000). Other franchisors will face a similar fate, threatening the very existence of thousands of franchised businesses that depend on the support and assistance of their franchisor.

II. BACKGROUND

A. An Overview of the Franchise Business Model.

L&I sees only the traditional model of the economy; *i.e.*, a black and white division between workers, on the one hand, and their employers on the other. The only shade of gray in this model is that an employer

---

Wash. Dep't of Fin. Inst., Franchise Act Interpretive Statement FIS-01 (Jan.1, 1991).

[2] It goes without saying that were the legislature to change the law to include franchisees as covered workers, such a change would have to apply prospectively only (not retroactively as L&I is attempting to do here by a changed interpretation) to avoid violating the Contracts Clause of the Washington Constitution. WASH. CONST. Art. I, § 23; *see, Silverstreak, Inc. v. Washington State Dep't of Labor & Indus.*, 159 Wn.2d 868, 890, 154 P.3d 891 (2007).

may on occasion subcontract a portion of its work to an independent contractor, such as the subcontractor Mr. Steiner retained to "yard out and cold deck" his sawmill in *White v. Dep't of Labor & Indus.*, 48 Wn.2d 470, 290 P.2d 650 (1956). While the traditional model is still very common, it has become far less common than it was in the 1950s when *White* was decided. It is a model very different from the franchising model.

L&I's attempt to fit franchising into the traditional model is at least understandable; franchising is not well understood. It is a subject not often taught at law schools or business schools. Indeed, most people have little understanding of franchising beyond it is something McDonald's does. But franchising is a lot more than McDonald's. It has become a substantial presence in the U.S. economy, and increasingly in the global economy. Franchising companies and their franchisees account for a reported 40 percent of all retail sales in this country.[3] These businesses operate not just in the quick service restaurant sector, but in numerous other industries providing services to millions of consumers and businesses, including, but certainly not limited to, the following:

- auto maintenance and repair services (*e.g.*, windshields, brakes, transmissions, oil change, tune-ups, and auto body repair)
- real estate brokerage services
- hotels and resorts from budget to luxury
- accounting and tax preparation services

---

[3] PriceWaterhouseCoopers, *The Economic Impact of Franchised Businesses: Volume III, Results for 2007* at I-14 (Feb. 7, 2011) [hereinafter the "**PWC Report**"]. The PWC Report is based on the 2007 special Census Bureau study, the first ever completed by the agency on franchising. U.S. Census Bureau & U.S. Dep't of Commerce, 2007 Economic Census Franchise Report.

- landscaping, yard care, and pest control services
- physical fitness (training, gyms, health clubs, and sports instruction) services
- home improvement, repair, renovation, restoration, and appraisal services
- home nursing and senior support services
- educational instruction (*e.g.*, math and language tutoring)
- small business support and advisory services (*e.g.*, shipping, packaging, printing, photocopying, and business coaching and planning)

While each franchise system differs somewhat, all share certain characteristics which serve to define the franchise business model. Specifically, franchising is a means of establishing a network of independently owned businesses all operating under a common brand. Each member of the network (each franchisee) pays a fee (generally, an initial fee, as well as ongoing royalties and other payments) to the franchisor and commits to following the franchisor's brand standards. In return, each franchisee is licensed to operate a business under the franchisor's brand name. Franchisees also receive training and assistance from the franchisor, which generally includes marketing assistance. *See* RCW 19.100.010(4) (defining "franchise" under FIPA). The relationship between franchisor and franchisee is contractual, and many franchise agreements are long-term agreements of between 10 to 20 years, or even longer.

As a form of business expansion, it offers significant benefits to franchisees, to franchisors, and to consumers. For consumers, it allows them to confidently make purchase decisions knowing they will receive consistent product quality or service irrespective of where they may be located, while the franchise model also drives efficiency, resulting in lower prices and better value to consumers. For franchisees, it makes it possible for thousands of entrepreneurs to own and operate their own businesses, something that otherwise would not be feasible or even possible without the franchisor's training, support, systems, or the power of the franchisor's brand. *See* Donald S. Chisum, *State Regulation of Franchising: the Washington Experience*, 48 WASH. L. REV. 291, 296 (1973); P.J. Kaufmann, *Franchising and the Choice of Self-Employment,* 14 J. BUS. VENTURING 345 (1999). For franchisors, it allows for the growth of the system brand nationally and internationally, something that would otherwise require a staggering amount of both capital and time. David J. Kaufmann, *et al.*, *A Franchisor is Not the Employer of its Franchisees or Their Employees*, 34 FRANCHISE L.J. 439, 453 (Spring 2015). So staggering is that cost that only a few businesses have created national or international platforms using only company-owned units. *Id.* at 454. This, of course, is possible, because growth relies on the franchisee's capital, while the franchisor also reaps the benefit of the entrepreneurial effort of independent business owners. *See Kerl v. Dennis Rasmussen, Inc.*, 273 Wis.2d 106, 123, 682 N.W.2d 328 (2004) ("A franchise relationship is a marriage of convenience. It enables franchisors to spread the capital cost of enlarging the market for their goods and services by transferring most of those costs to local franchisees. The franchise arrangement enables the franchisor to reach new, far-flung markets without having to directly manage a vast network of individual outlets.").

B. The Franchise Model is Relatively New, Post-Dating the IIA.

The history of franchising is recent, post-dating the IIA. Indeed the history of modern franchising really begins with the federal enactment of the Lanham Act after World War II. 15 U.S.C. § 1051, *et seq.* In 1950, just after the adoption of the Lanham Act, there were fewer than 100 franchised systems in the United States.[4] By 2007, there were more than 825,000 franchised businesses in the U.S., and these independently owned and operated franchised businesses produced an economic output (total sales) of $802.2 billion.[5] Today, franchising is "one of the dominant forms of organization of our times." JEFFREY L. BRADACH, FRANCHISE ORGANIZATIONS 3 (1998).

Before adoption of the Lanham Act, trademarked goods were viewed as identifying the source of products, so that consumers would know which company had actually placed them into commerce. Licensing a third party, a franchisee for instance, to distribute trademarked products was considered a deceptive practice because consumers would be misled as to the source of the products. *See, e.g., Macmahan Pharmacal Co. v. Denver Chem. Mfg. Co.*, 113 F. 468, 474-75 (8th Cir. 1901); *see also, Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 367 (2d Cir. 1959) (Noting that "prior to the passage of the Lanham Act many courts took the position that the licensing of a trademark separately from the business in connection with which it had been used worked an abandonment.").

The Lanham Act, however, changed the game and for the first time

---

[4] FTC Statement of Basis and Purpose, 43 Fed. Reg. 59623 (1978), Bus. Franchise Guide (CCH) ¶ 6302.
[5] PWC Report at I-14.

allowed a trademark owner to license the use of its mark. 15 U.S.C. § 1055. That right comes with an important limitation, however. Under the Lanham Act, a licensor *must* exercise control over its licensees' use of the mark. 15 U.S.C. § 1127. A "registrant's mark may be canceled if the registrant fails to control its licensees' use of the licensed mark." *In re Mini Maid Services Co. v. Maid Brigade Systems, Inc.*, 967 F.2d 1516, 1519 (11th Cir. 1992); *Dawn Donut*, 267 F.2d at 366. ("The Lanham Act places an affirmative duty upon a licensor of a registered trademark to take reasonable measures to detect and prevent misleading uses of his mark by his licensees or suffer cancellation of his federal registration."). Where a licensor fails to "exercise adequate quality control over a licensee . . . a court may find that the trademark owner has abandoned the trademark." *Moore Bus. Forms, Inc. v. Ryu*, 960 F.2d 486, 489 (5th Cir. 1992). Quality control must be sufficient to ensure that "all licensed outlets will be consistent and predictable." *Barcamerca, Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 598 (9th Cir. 2002); Donald S. Chisum, *State Regulation of Franchising: the Washington Experience*, 48 WASH. L. REV. at 295 ("[C]ontrol is essential to the validity of the franchisor's trademark since trademarks function in part to guarantee the consistent quality of the product identified by the trademark.").

While "controls" are universally recognized as the hallmarks of a franchise relationship, they do not exist so that the franchisor can dictate the franchisee's day-to-day business operations. They exist only to protect the franchisor's trademark rights, or its other contractual rights under the franchise (*e.g.*, its right to collect royalties). FIPA itself was drafted with the understanding that franchise investments include "elements of product conformity and quality standards which must necessarily be met and which will result in a sacrifice of at least some measure of the franchisee's independence." James Fletcher, *Franchise Investment Protection Act* 13 (June 1971) (unpublished thesis, University of Washington) (on file with University of Washington Law School Library).[6]

At the same time, franchisees are independent business operators. They pay the capital necessary to operate, they are responsible for all business operating expenses, they prepare their own books, they file their own tax returns, they are responsible for their own insurance, they select and provide all necessary business supplies, and they assume the risk of business failure as well as the rights to profits from operations. Unless constrained by the franchisor's brand standards, it the franchisee who is solely responsible for operating the business and making all decisions related to business operations. This is universally true regarding all decisions related to staffing. Franchisees determine when to hire, whether to hire, who to hire, who to fire, what wages to pay their employees, what benefits to offer their employees, how many hours an employee works, and how to staff any particular job or shift. Indeed, the law generally deters franchisors from any involvement into a franchisee's employment or staffing decisions; as such involvement would or could subject the franchisor to liability for a franchisee's employment practices. *See, e.g.,*

[6] "Mr. Fletcher was a draftsman of [FIPA] while working as a legal intern for the Washington Attorney General's Office. His thesis contains the successive drafts of the various bills proposed with comments thereon." Donald S. Chisum, *State Regulation of Franchising: the Washington Experience,* 48 WASH. L. REV. at 334, n.211.

Patterson v. Domino's Pizza, LLC, 60 Cal.4th 474, 333 P.3d 723 (2014); *Folsom v. Burger King*, 135 Wn.2d 658, 673, 958 P.2d 301 (1998).

As independent business operators, franchisees provide services and goods to customers, whether that service is providing lodging, preparing a meal, or cleaning a customer's offices. They do not work for or provide labor to their franchisor. Indeed, unless the franchisor itself operates its own outlets, the franchisor's business is very different from the business in which the franchisee is engaged (and the very different nature of the franchisor's business is often a very big shock to operators who decide they want to franchise their business model). A franchisor is in the business of recruiting prospective franchisees and selling franchises, providing training and support services to its franchisees (the nature of which varies from brand to brand), promoting and marketing the brand, and enforcing franchisee compliance with the franchise agreement, which includes compliance with the applicable brand standards. HAROLD KESTENBAUM & ADINA GLENN, SO YOU WANT TO FRANCHISE YOUR BUSINESS 5 (1998). Franchisors are not in the business of making hamburgers or cleaning offices.

C. Franchising's Growth Prompts Special Franchise Regulation.

Given the growth of franchising, it probably was to be expected that franchising itself would become the focus of its own extensive regulation, both at the federal level under the Federal Trade Commission's Franchise Rule, 16 C.F.R. Parts 436 and 437, and in Washington State under FIPA. FIPA, in particular provides a comprehensive, cradle-to-grave, regulatory framework which exists solely to protect franchisees and prospective franchisees. FIPA thus regulates pre-sale disclosure, pre-sale registration of franchise offerings with the Securities Division of the Department of Financial Institutions, pre-sale registration of advertising materials, as well as franchisee protections (often referred to as the "Franchisee Bill of Rights") regulating the post-sale franchisor/franchisee relationship. *See generally,* Chisum, *supra* note 5; Douglas C. Berry, David M. Byers, & Daniel J. Oates, *State Regulation of Franchising: The Washington Experience Revisited,* 32 SEATTLE U. L. REV. 811 (2009).

FIPA (and the Securities Division) strictly regulates what must be disclosed to a franchise prospect, the manner in which it must be disclosed, and the timing of disclosure. *Id.* In addition to its onerous pre-sale registration and disclosure requirements, FIPA's "Bill of Rights" provisions regulate the post-sale franchisor/franchisee relationship. RCW 19.100.180. Unlike laws governing employment relationships, FIPA's Franchisee Bill of Rights imposes strict limitations on a franchisor's ability to terminate or nonrenew a franchise agreement, and further restricts a franchisor from imposing or enforcing any standard of conduct unless it is reasonable and necessary. RCW 19.100.180(2)(h), (i), and (j).

Compliance with FIPA and other franchise laws is costly, and significantly constrains franchisor decision-making.[7] Noncompliance can

[7] For instance, an employer of a contractor or a worker can effectively say "it's my way or the highway." A franchisor has no such power. Unlike an employer, a franchisor has no ability to adjust wages or demote, suspend, or reassign a franchisee. A franchisor's only enforcement tool is termination of a franchise, but a franchisor's ability to actually use this tool is severely constrained by FIPA, which generally bars termination unless the franchisee has breached a "material" provision of the franchise, and then only after the franchisee has been provided written notice of its defaults and afforded an opportunity to cure any breach. RCW 19.100.180(2)(j). One court has even

subject a franchisor to significant, even severe, administrative, civil, and criminal remedies. RCW 19.100.190; RCW 19.100.210. In short, franchising is more than a label that someone attaches to a relationship, and no one becomes a franchisor to avoid paying industrial insurance premiums.

III. THE COURT OF APPEALS' DECISION SHOULD BE REVERSED

A. The IIA Does Not Apply to Franchise Relationships.

The IIA does not apply unless Lyons' franchisees meet the statutory definition of "workers." The IIA defines a "worker" as including any person "who is working under an independent contract, *the essence of which is his or her personal labor for an employer*." RCW 51.08.180(1). This provision, adopted long before enactment of the Lanham Act and the growth of franchising, was never intended to encompass franchisor/franchisee relationships. L&I nonetheless attempts to hammer franchising into this definition by largely ignoring that a franchisee does not perform labor "for an employer [franchisor]," the work or labor that a franchisee does perform is not "personal labor," and to the extent that a franchisee performs labor, his or her labor is not performed "under an independent contract" "the essence" of which is for personal labor.

L&I argues that a Lyons' franchisee performs labor for Lyons because Lyons is involved in marketing and attracting business on a

---

gone so far as to hold that under FIPA a franchisor cannot terminate a franchisee that has engaged in fraud and theft without first providing notice and granting the franchisee an opportunity to cure its default by tendering back money that was stolen. *Malek v. Southland Corp.*, Bus. Franchise Guide (CCH) ¶ 11,386 (W.D. Wash. 1998).

franchisee's behalf. It is an argument that attaches significance to form, and goes only skin deep. Lyons, like most franchisors, performs certain services for its franchisees, and one of these services is to provide marketing and sales assistance, helping them procure the business for their operations. That is just one of the bundle of benefits provided under the franchise, albeit a feature that likely makes the franchise attractive to a start-up business operator. It is the franchisee, however, that pays Lyons for this service (and not the other way around, as an employer would do for its employee, or company would do for an independent contractor that had been subcontracted work).

Lyons may well be more actively engaged in arranging and soliciting business for its franchisees than some franchisors are, but what Lyons does is not fundamentally different from what most franchisors do to promote their brands and their franchisees. Whether it is the franchisor's advertising intended to drive traffic to a franchisee's brick and mortar outlet, the franchisor that accepts a guest's reservation for lodging over its reservation system for a room at one of its franchisee's hotels, the franchisor that takes a customer order on a franchisee's behalf for services or goods over its website or through its call center, or even the franchisor that accepts a customer's order for services (a pizza, for instance) made over the franchisor's Facebook page, its Twitter address, or through its iPhone® or Android™ mobile app.[8]

[8] *See e.g., Domino's to roll out tweet-a-pizza*, USA TODAY (May 14, 2015); https://www.dominos.com/en/pages/content/content.jsp?page=apps&so=hp (description of Domino's mobile app); https://www.dominos.com/en/pages/order/?route=1#/locations/search/ (online ordering). And Domino's is hardly unique in this regard.

The customer that orders a Domino's pizza over Domino's mobile device application certainly is not expecting the work to be performed by Domino's at its headquarters somewhere in Michigan. And the franchisee that performs work to make and deliver that pizza does not believe that it is making the pizza for Domino's. Because it is not working for Domino's; it is working for the customer. The same is true in Lyons' case. Indeed, the work that a franchisee performs to satisfy the customer's order is performed directly and wholly for the benefit of the customer and the franchisee, since it is, after all, the franchisee that receives the lion's share of the customer's payment. While the franchisor may indirectly benefit through a royalty payment, the work the franchisee performs is not performed *"for [the franchisor] employer."*[9]

The service a franchisee performs for a customer is not "personal labor." "'Personal labor' means labor personal to the independent subcontractor." *Silliman v. Argus Services, Inc.*, 105 Wn. App. 232, 238, 19 P.3d 428 (2001). Independent contractors "who of necessity *or choice* [employ] others to do all or part of the work" do not perform "personal labor." *White v. Dep't of Labor & Indus.*, 48 Wn.2d at 474 (emphasis added).

Here, of course, some of Lyon's franchisees chose to engage others to perform work for them or to assist them, and some may have elected not to do so. In either case, the nature of what the franchisee did was the same, and the decision whether to hire an employee was entirely up to the

[9] There are, of course, good business reasons why Lyons would want to facilitate the customer's payment for the franchisee's services. Lyons, after all, has an interest in making sure the franchisee accurately reports and pays royalties.

franchisee. Nothing in the franchise agreement granted Lyons any power to prevent a franchise owner from retaining others to help work in the business, whether on a permanent or part-time basis. In this regard, Lyons' franchise is no different from any other franchise. While some franchised businesses cannot be operated without employees, franchise agreements generally grant the franchisee unfettered discretion regarding staffing decisions. Where a franchisee owner has the unilateral power to decide how his or her business will be operated, the work that is performed by the franchisee who elects not to retain or hire an employee is certainly not "personal labor." Were it otherwise, it would vest with the franchisee – and not the franchisor – the absolute power to determine whether she or he is a covered worker, since he or she alone makes the decision whether to retain another's assistance in the operation of his or her business.

Finally, even if a franchisee may perform "personal labor," the performance of such labor is not the essence of the franchisee/franchisor relationship because franchisees do not provide personal labor "under the franchise agreement" or on the franchisor's behalf. As this Court has recognized, a franchise is a special kind of contract in which a franchisee is licensed to use the franchisor's trademark in connection with the business the franchisee operates, and the actual business that the franchisee conducts (*i.e.*, the personal labor that he or she performs) is wholly separate and "conceptually distinct," from the franchise itself. *Coast to Coast Stores, Inc. v. Gruschus*, 100 Wn.2d 147, 152, 667 P.2d 619 (1983). Indeed, the franchise consists only of the "agreement between the franchisor and the franchisee, whereby the franchisee is granted a license to use a trade name, service mark, or the like." *Id.* Therefore, the work performed by franchisees in the course of their business is not "under the franchise agreement" because the franchise is merely a license to do business that, as this Court has noted, "might exist quite independently of the franchisee's business, as for example where the franchise agreement is concluded before any business operations commence." *Id.*

By focusing only on work franchisees do in connection with the operation of their businesses, L&I has failed to understand that the franchise contract is "the agreement between the parties, *and not the business operated by the franchisee.*" *Id.* (emphasis added); *see also Corp. v. Atl. Richfield Co.,* 122 Wn.2d 574, 582, 860 P.2d 1015 (1993). Instead, the franchise is merely a license to operate a business, which is legally and conceptually distinct from the franchisee's business, and by extension, the services franchisees provide to customers in the ordinary course of their business. As the franchisee's business operations are not the equivalent of the franchise, any personal labor a franchisee may perform is not performed "under the contract" the "essence" of which is for the franchisee's personal labor.

B. Franchisors Cannot Comply with the IIA.

Perhaps the best illustration of why the IIA should not be read to apply to the franchisor/franchisee relationship is the fact that if it does apply, it is impossible for franchisors to comply. The IIA requires each employer of covered workers keep "original records" for a three year period and to file with L&I quarterly reports relating to, *inter alia*, each worker's actual hours worked, each worker's gross wages, each worker's risk classification and the hours worked within that classification, and the net pay earned by each worker. *See* RCW 51.48.020 and .030; WAC 296-17-35201. Failure to report or keep appropriate records would subject them to penalty. RCW 51.48.030. Yet, and here is the catch, franchisors universally do not have access to a franchisee's business records relating to the details of its franchisee's staffing decisions. They simply have no way of knowing, other than perhaps by anecdotal evidence, (1) whether a franchisee did not engage an employee or worker, and is therefore (under the Court of Appeals' decision) a covered worker, (2) how many hours were actually worked by the franchisee; (3) the exact nature of the work performed and the applicable risk classifications appropriate for that work, or (4) the franchisee's net pay. Franchise agreements do not require a franchisee to report this information; they do not give franchisors a right to this information; and franchise companies lack the infrastructure to monitor and record this information even if it were available to them. That is true for the Lyons franchise agreements, and it is true of all other franchise agreements.

It is axiomatic that Courts should avoid construction of a statute that leads to an absurd result. *Estate of Bunch v. McGraw Res. Ctr.*, 174 Wn.2d 425, 433, 275 P.3d 1119 (2012). Construing the IIA to include franchisees as covered workers would be such a construction. It would be absurd that franchisees alone should have the unilateral power to decide whether they are or are not covered workers by their decision whether or not to retain help or workers in their businesses. And it would be absurd to hold a franchisor accountable as an employer under the IIA where it is impossible for franchisors to comply with the IIA's record keeping and reporting requirements.

C. The Traditional Elements of a Franchise Should Preclude Application of the Exemption in RCW 51.08.195.

The Court of Appeals' decision effectively forecloses any franchisor from taking advantage of the exemption from coverage provided in RCW 51.08.195. This provision provides a six-part exception from IIA coverage which includes situations where a putative covered worker was "customarily engaged in an independently established . . . business" and where the putative worker is "free from control" over the performance of his work by the putative employer RCW 51.08.195(1) & (3). These provisions, which plainly were not drafted with franchising in mind, simply should not be read in a way that would preclude application to all franchise systems.

Lyons' franchisees, like all franchisees, operate independent businesses. They pay the capital necessary to operate, they are responsible for all operating expenses, they prepare their own books, they file their own tax returns, they buy their own insurance, they provide all necessary business supplies, they make all staffing decisions, and they assume the risk of business failure and enjoy the right to operating profits. Yet the Court of Appeals (and the Board) determined that the Lyons' franchisees were not "customarily engaged in an independently established . . . business," and hence not exempt under RCW 51.08.195(3), because they had not been engaged in the janitorial business before they became franchisees, and were prohibited from competing with other Lyons franchisees under noncompete provisions of their franchise agreements. *Lyons,* 186 Wn. App at 473-75, n. 11. This determination cuts to franchising's heart.

A fundamental premise of franchising is that it allows inexperienced entrepreneurs to become business owners. Though there are certainly exceptions, franchisees in most systems have no previous experience operating a business in the same field as the franchised business. The power of franchising is that it often allows someone without any experience in an industry to start-up and to operate a business, whether it is a janitorial business or any of hundreds of other types of businesses. A business should not cease to be considered an "independently established . . . business" simply because it was started by a franchisee who was trained by a franchisor.

Moreover, franchise agreements in virtually all franchised systems contain noncompete clauses. Peter J. Klarfeld & Mark S. VanderBroek, *Law on Covenants Against Competition Shifts Toward Greater Enforceability by Franchisors*, 31 FRANCHISE L.J. 76 (Fall 2011). It only makes sense for a franchisor to protect its brand and its rights to continuing royalties by preventing a franchisee from accepting the franchisor's training, trade secrets, and know-how, and then using them to operate an independent business in competition with other franchisees, and without paying royalties to the franchisor. As the court recognized in *Armstrong v. Taco Time Int'l, Inc.*, 30 Wn. App. 538, 635 P.2d 1114 (1981), a noncompete is necessary to the protection of a franchisor's intellectual property, as well as "its ability to sell new franchise rights, and the protection of existing franchisees from competition by a fellow franchisee." *Id.* at 546. The existence of a non-compete in a franchise should not negate satisfaction of RCW 51.08.195(3).

The IAJ that initially heard the case concluded Lyons' franchisees were "free from [franchisor] control" despite the fact the franchisor had brand standards, and provided training and other support services. The Board concluded otherwise, and while the Court of Appeals did not directly address the issue, its decision can be read as hinting agreement with the Board. In any event, it is certainly L&I's position that franchisor branding controls and assistance common to all franchise systems necessarily means that all franchisees are not free from their franchisor's control. CP 2360 ("[It] is exactly the extreme element of direction and control required by the nature of a franchise operation so that every franchisee provides the same type of service or product to every customer that causes the failure under RCW 51.08.195."); L&I Brief at 18.

As previously mentioned, "controls" are universally recognized as a hallmark of a franchise relationship. By definition, a franchise does not exist under FIPA without such controls, and under the Lanham Act, such controls are necessary to the preservation of the franchisor's trademark and to avoid customer deception. But such controls do not exist so that the franchisor can dictate the franchisee's day-to-day <u>business operations</u>. They exist to protect the franchisor's trademark rights and to insure a reliable and consistent customer experience. A franchisor should not be disqualified from the exemption provided by RCW 51.08.195(1) simply because it expects its franchisees to comply with brand standards, or otherwise provides franchisees with start-up training, advertising and marketing support, or other general assistance. Instead, the standard ought to be whether the franchisor in fact exercises "control [of] the methods and details" of work a franchisee performs for its customers. *Western Ports Transp., Inc. v. Employ. Sec. Dep't*, 110 Wn. App. 440, 452, 41 P.3d 510 (2002); *cf*, *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998); *Patterson v. Domino's Pizza, LLC,* 60 Cal.4th 474, 333 P.3d 723 (2014).

IV. CONCLUSION

The issues raised in this case affect thousands of franchised businesses in this State. They are also new, as never before has L&I attempted to pound the square peg of franchising into the round hole of the IIA. Given franchisors widespread reliance on the proposition that the IIA does not apply to the franchisor/franchisee relationship, the change of policy L&I seeks to effectuate in this case is best left to the legislature. Though clearly the IIA was drafted without franchising in mind, the fact is that as drafted the IIA does not apply to franchisor/franchisee relationships. The Court of Appeals decision should be reversed.

DATED this 31st day of December, 2015.

MILLER NASH GRAHAM & DUNN LLP

Douglas C. Berry
WSBA No. 12291
Daniel J. Oates
WSBA No. 39334
Attorneys for Amicus Curiae
International Franchise Association

DECLARATION OF SERVICE

I, Jennifer L. Schnarr, declare and state as follows:

On the 3rd day of December, 2015, I caused the foregoing Brief of Amicus Curiae International Franchise Association to be filed with the Supreme Court via electronic filing to *Supreme@courts.wa.gov* and sent via U.S. Mail, First Class, postage prepaid, a true and correct copy of the same directed to:

Ryan P. McBride
Robin Dale
Lane Powell
1420 Fifth Avenue, Suite 4200
Seattle, WA 98111

Steve Vinyard
Assistant Attorney General
Attorney General of Washington
7141 Cleanwater Drive SW
PO Box 40121
Olympia, WA 98504-0121

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

SIGNED this 3rd day of December, 2015, at Seattle, Washington.

Jennifer L. Schnarr, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Schnarr, Jennifer
Cc: mcbrider@lanepowell.com; steve.vinyard@atg.wa.gov; Berry, Doug C.
Subject: RE: Washington Dept. of Labor & Industries v. Lyon Enterprises, Inc. (Case No. 91610-1)

Received 12/3/15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Schnarr, Jennifer [mailto:Jennifer.Schnarr@MillerNash.com]
Sent: Thursday, December 03, 2015 1:54 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: mcbrider@lanepowell.com; steve.vinyard@atg.wa.gov; Berry, Doug C. <Doug.Berry@millernash.com>
Subject: Washington Dept. of Labor & Industries v. Lyon Enterprises, Inc. (Case No. 91610-1)

Dear Clerk -

Please find attached for filing in the above-referenced matter, International Franchise Association's Motion to File Amicus Brief and attached Brief of [Proposed] Amicus Curiae. Counsel for [Proposed] Amicus Curiae is Douglas C. Berry (WSBA No. 12291) and Daniel J. Oates (WSBA No. 39334).

Should you have any trouble opening or viewing the attachment, please notify me immediately. Thank you.

Sincerely,

Jennifer L. Schnarr

Jennifer Schnarr
Assistant to Doug Berry, Mike Fandel, Dan Oates, and Vanessa Wheeler

Miller Nash Graham & Dunn LLP
Pier 70 | 2801 Alaskan Way - Suite 300 | Seattle, Washington 98121
Direct: 206.777.7423 | *Office*: 206.624.8300 | *Fax*: 206.340.9599
E-Mail | Web | Social | Blogs