

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
3/5/2019 4:52 PM  
BY SUSAN L. CARLSON  
CLERK

No. 96304-5

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

---

MONEY MAILER, LLC,  
Plaintiff,

v.

WADE G. BREWER,  
Defendant

---

WADE G. BREWER,  
Counterclaim Plaintiff,

v.

MONEY MAILER, LLC, *et al.*,  
Counterclaim Defendants

---

**APPELLANTS' RESPONSE TO WASHINGTON STATE  
DEPARTMENT OF FINANCIAL INSTITUTION'S BRIEF OF  
AMICUS CURIAE**

---

NATHAN T. ALEXANDER (WSBA #37040)  
BRIAN J. JANURA (WSBA #50213)

DORSEY & WHITNEY LLP  
701 Fifth Avenue, Suite 6100  
Seattle, Washington 98104  
Telephone: (206) 903-8800  
Facsimile: (206) 903-8820  
E: alexander.nathan@dorsey.com  
E: janura.brian@dorsey.com

Appellants Money Mailer, LLC and Money Mailer Franchise Corp.

**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. ARGUMENT .....3

A. Money Mailer Agrees That FIPA’s Purpose is to Protect Franchisees, and Its Approach to RCW 19.100.180(2)(d) Serves that Purpose.....3

1. The Department’s Proposed Approach Expands Well Beyond the Protective Purposes of FIPA. ....6

2. FIPA’s Bill of Rights Protects Franchisees from Abuses Resulting from the Franchisor’s “Force” or “Coercion.” .....7

3. Disclosure Has Nothing to Do with RCW 19.100.180(2)(d). ....10

4. Money Mailer’s Approach Serves the Purposes of FIPA and it is Directly In Line With Other Reasonable Interpretations of RCW 19.100.180(2)(d). ....11

B. The Department Misconstrues *Nelson*. ....13

1. *Nelson* Does Not State That a Franchisor’s Costs Should be Used to Determine a Fair and Reasonable Price. ....14

2. *Nelson* Equates a Fair and Reasonable Price to a Bone Fide Wholesale Price. ....16

3. The Department’s “Plain Language” Argumentation is Inconsistent with *Nelson* and FIPA’s Language. ....17

C. The Department’s New Standard Causes Unnecessary Disruption to the Franchise Industry without Providing any Judicially Manageable

	Standard for Determining Whether a Price is Fair and Reasonable. ....	18
III.	CONCLUSION.....	20

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>BP W. Coast Prods., LLC v. Shalabi</i> , No. C11-1341MJP, 2012 U.S. Dist. LEXIS 82879 (W.D. Wash. June 14, 2012).....	16
<i>Carkonen v. Williams</i> , 76 Wn.2d 617, 458 P.2d 280 (1969).....	4
<i>Kwik-Lok Corp. v. Pulse</i> , 41 Wn. App. 142, 702 P.2d 1226 (1985) .....	4
<i>Lobdell v. Sugar ' N Spice, Inc.</i> , 33 Wn. App. 881, 658 P.2d 1267 (1983).....	16
<i>Nelson v. Nat'l Fund Raising Consultants, Inc.</i> , 120 Wn.2d 382, 842 P.2d 473 (1992).....	<i>passim</i>
<i>United States v. Davis</i> , 803 F. Supp. 830 (S.D.N.Y. 1992) .....	18
<i>Wash. Beef, Inc. v. Yakima Cty.</i> , 143 Wn. App. 165, 177 P.3d 162 (2008).....	5
<i>Young v. Young</i> , 164 Wn.2d 477, 191 P.3d 1258 (2008).....	4
<b>Statutes</b>	
Franchise Investment Protection Act.....	<i>passim</i>
RCW 19.100.040(1)(a) .....	19
RCW 19.100.180(2).....	10
RCW 19.100.180(2)(d).....	<i>passim</i>
RCW 19.100.180(2)(e) .....	16

**Other Authorities**

16 C.F.R. § 436 (2019) .....19

48 C.F.R. § 15.404-1 (2019).....4

48 C.F.R. §15.404-1(b)(1) (2019).....4

*An Act Relating to Franchise Investment Protection:  
Hearing on SB 5256-S Before the H. Comm. on  
Commerce & Labor, 1991 Leg., 52nd Sess. (Wash.  
1991) .....13*

Donald Chisum, *State Regulation of Franchising: The  
Washington Experience*, 48 Wash. L. Rev. 291 (1973).....2, 9, 17

Douglas C. Berry et al., *State Regulation of Franchising:  
The Washington Experience Revisited*, 32 Seattle U. L.  
Rev. 881 (2009) .....9, 11, 12, 17

James Fletcher, *Franchise Investment Protection Act  
(1971)*.....1, 9

WAC 460-80-125.....19

WAC 460-80-300.....19

## I. INTRODUCTION

The Attorney General’s Office, through its Department of Financial Institutions (“Department”), files an amicus brief that represents a clear “about-face” from the position it took when it helped draft and enact the Franchise Investment Protection Act (“FIPA” or “Act”) – a position that has remained undisturbed for decades. The AG’s then-stated intent in drafting RCW 19.100.180(2)(d) was:

...[to allow] the industry to determine through the supply and demand mechanisms a reasonable price and then prohibiting the sale of products or services for more than that price by the franchisor to the franchisee rather than to prescribe a price at which the franchisor can sell products or services to the franchisee.

James Fletcher, *Franchise Investment Protection Act 37* (1971) (unpublished thesis, University of Washington) (on file with the Gallagher Law Library, University of Washington); Appellant’s Opening Brief at 19-20. The Department now argues for the abandonment of the market standard in favor of a prescribed *per se* pricing rule (although without any clear standards of application): “fair and reasonable price” should mean the actual cost to a franchisor, plus “a small markup, fully disclosed and intended to cover corresponding costs or expenses that are not already accounted for.” Brief of Amicus Curie Washington State Department of Financial Institutions (“Amicus”) at 5.

The Department's proposed approach to answering the certified questions is not only a departure from FIPA's language, purpose, and decades of shared understanding of its application of the term "fair and reasonable price," but also reveals the impracticality of ignoring market or industry practices.

In contrast to the Department's approach, determining whether the price for goods or services sold to franchisees is fair and reasonable in a manner consistent with FIPA's body of case law, language, purpose, and legislative history can be accomplished with a straightforward and practical approach:

A franchisor who charges a franchisee a price for goods or services that exceeds the price the franchisee would pay at market for the same goods or services violates FIPA.

See Appellant Money Mailer's Opening Brief on Certifies Questions ("Opening Brief") at 14-15.

Professor Donald Chisum's seminal article on FIPA – which is cited to and relied on by virtually every court opining on FIPA's purpose and meaning – concisely states the rule that, "[i]f the franchisor sells supplies directly [to a franchisee], only a 'reasonable price' no higher than market price can be extracted." Chisum, *State Regulation of Franchising: The Washington Experience*, 48 Wash. L. Rev. 291, 373 (1973). It is well understood that the "market price" is not the cost at which the franchisor

purchased the supplies, as even the Department admits,<sup>1</sup> but rather the price of goods available to the franchisee at market. Opening Brief, § VI.A.4. The Court should reject the Department's position.

## II. ARGUMENT

### A. Money Mailer Agrees That FIPA's Purpose is to Protect Franchisees, and Its Approach to RCW 19.100.180(2)(d) Serves that Purpose.

All parties agree that FIPA's purpose is to protect franchisees. Appellant's Opening Brief, § VI.A.4.c. But the Department stops short of acknowledging that the specific purpose of FIPA was to ensure that franchisees are not punished, abused, or disadvantaged simply because they are in a franchise relationship with unequal bargaining power. *Id.* FIPA protects franchisees from being forced to pay more for goods or services than they would otherwise have to pay on the open market. *Id.*

The Department does not appear to dispute that Money Mailer's approach to determining a fair and reasonable price does, in fact, protect franchisees as envisioned by FIPA. It even admits that, "[o]ne means of analyzing the fairness of a wholesale price is to look to other arms-length transaction prices within a specific market..." Amicus at 15. The Department's admission vindicates the practical and common-sense appeal of using the market price to determine a fair or reasonable price, a method

---

<sup>1</sup> See Amicus at 15.

routinely used by Washington courts in myriad circumstances. *Young v. Young*, 164 Wn.2d 477, 491, 191 P.3d 1258, 1266 (2008) (upholding court of appeals holding unjust enrichment damages as the “reasonable value” of the benefit in terms of the market price of a substitute); *Kwik-Lok Corp. v. Pulse*, 41 Wn. App. 142, 149, 702 P.2d 1226, 1230 (1985) (“Market value is defined as ‘that reasonable sum of money which the property would bring on a fair sale’” by a seller not obliged to sell, to a buyer not obliged to buy); *Carkonen v. Williams*, 76 Wn.2d 617, 636, 458 P.2d 280, 291 (1969) (same). Even federal regulations recognize the importance of the market in establishing “fair and reasonable price[s]” by requiring analysis of “prices at which the same or similar items have previously been sold.”<sup>2</sup> *See* 48 C.F.R. § 15.404-1 (2019).

But, the Department then attempts to create a carve-out of the market-based approach, claiming that “this comparison cannot be dispositive” because FIPA “is not intended to provide industry-wide protection to franchisors that charge similarly unfair and unreasonable prices to its franchisees.” The Department’s attempt to limit the application of the market based approach in general, or to the facts of this case in particular, does not follow logically, and is not supported by any facts.

---

<sup>2</sup> Analysis of fair and reasonable pricing in government contracts “is the process of examining and evaluating a proposed price *without evaluating its separate cost elements and proposed profit.*” 48 C.F.R. § 15.404-1(b)(1) (2019) (emphasis added).

First, by starting with “*arms-length transaction prices* within a specific market,” the Department emphasizes the main way in which parties freely and independently come to an agreement without force or exploitation of bargaining position. “Market value, as the name implies, is based on the sales of other similar properties” and the idea that “informed buyers would not pay more for this property than what they could pay for other similar properties on the open market.” *Wash. Beef, Inc. v. Yakima Cty.*, 143 Wn. App. 165, 174, 177 P.3d 162, 167 (2008). “The use of market value assumes an arm’s length transaction.” *Id.*

Second, the Department fails to show why the “*arms-length transaction prices*” would not be dispositive. The Department alleges that if FIPA’s Bill of Rights were controlled by industry practices, “franchisors would merely ensure that they charge no more or less than the unfair and unreasonable prices charged by their competitors.” Amicus at 15. Notably, the Department fails to provide any facts, allegations, or evidence of any kind that the industry as a whole (much less Money Mailer’s competitors) charges unfair and unreasonable prices to franchisees on an endemic scale.

Further, even if the Court were to accept the Department’s entirely speculative concerns that freely negotiated prices across entire industries could somehow be uniformly unfair and unreasonable, there are no facts, evidence, or allegations that printing prices in the direct mail printing

industry are in fact unfair or unreasonable. Additionally, the record in this case not only established that the franchisee could not find lower printing prices from other direct mail franchising companies, such as Valpak, but also that the franchisee could not find lower printing prices from independent print shops having nothing to do with franchising.<sup>3</sup> Opening Brief at 34-35.

Nevertheless, the Department wants to create an exception for using an arms-length, market-based approach to determining fair and reasonable prices – an exception that is based on pure speculation, deeply flawed logic, and assumption of facts that do not even match the record before this Court. As a result, the Department has no valid reason to dispute that evidence of arms-length transaction prices presented in this case conclusively establish the fair and reasonable price of goods and services.

**1. The Department’s Proposed Approach Expands Well Beyond the Protective Purposes of FIPA.**

The Department is not merely advocating for a rule that would protect franchisees, it wants to grant franchisees privileges and advantages not mentioned in FIPA or contemplated by the legislature. By using the franchisor’s purchasing position as the benchmark for determining a fair

---

<sup>3</sup> Neither Brewer, the District Court, nor the Department argue that market prices for comparable printing services at the franchisee’s level of distribution are not readily available, they all just choose to ignore them.

and reasonable price, and prohibiting anything but an undefined “small markup” on the franchisor’s costs, the Department is attempting to create a rule<sup>4</sup> that gives franchisees purchasing powers and benefits they would not have in the open market - benefits ordinarily reserved for wholesale buyers, who take on the risk of large scale purchases, or franchisors, who take on the risks of creating large scale operations that benefit the franchisees. FIPA never intended to give franchisees special benefits or competitive advantages over other independent small business owners in Washington State.

**2. FIPA’s Bill of Rights Protects Franchisees from Abuses Resulting from the Franchisor’s “Force” or “Coercion.”**

The Department is also expanding the protections of FIPA’s Bill of Rights - which is intended to protect franchisees from ongoing abuses once the franchise relationship has begun - to the sale of the franchise, an area to which the Bill of Rights was never intended to apply. *See Amicus* at 2-3.

The Department recites a history, albeit incomplete,<sup>5</sup> of FIPA’s Bill of Right’s intended application. *See Amicus* at 2-4. In sum, the prohibition

---

<sup>4</sup> The Department and the District Court are at odds concerning proposed pricing rules. The District Court suggested that a mark-up of any kind may violate RCW 19.100.180(2)(d). Dkt. 177 at 5. The Department, on the other hand, suggests that a “small markup” intended to “cover the corresponding costs or expenses that are not already accounted for” is permissible under the Act.

<sup>5</sup> The Department fails to acknowledge that the specific abuses articulated by its own office, and intended to be remedied by RCW 19.100.180(2)(d), all dealt with protecting the franchisee from paying more than the fair market price available to her or him at their level of distribution for comparable goods or services. Opening Brief, Section VI.A.4.c.

on charging more than a fair and reasonable price is found in FIPA's Bill of Rights. *Id.* Franchisors had a history of drafting franchise agreements to maximize power "over the continuing relationship with the franchisees." *Id.* at 3. Once in the relationship, franchisors could use this power to "coerce" or "force franchisees to purchase supplies from the franchisors ... at unreasonable prices." *Id.* FIPA's Bill of Rights was enacted to address these abuses that arise in the ongoing franchise relationship. *Id.*

There is not, nor has there ever been, any allegation or implication that Money Mailer "forced" or "coerced" Brewer into purchasing its printing goods or services.<sup>6</sup> Money Mailer did not unilaterally set the effective price for printing goods and services and then force it on Brewer. Instead, the parties agreed on a price for printing goods and services *before* Brewer signed any franchise agreement. It is undisputed that Money Mailer has never charged more than that agreed upon price for printing.

The Department claims that this arms-length agreement on price is irrelevant because Money Mailer's disclosure of the printing price cannot "excuse its egregious markup." Amicus at 7. The Department misses the point entirely.

Money Mailer has never taken the position that disclosure somehow

---

<sup>6</sup> Money Mailer's nearly 40-year history as a franchisor is not built upon force or coercion, but rather on aligning its interests with those of its franchisees. Opening Brief at 30.

absolves a franchisor of liability for charging unfair or unreasonable prices. Instead, Money Mailer points out the fact that the price for printing was agreed to by independent, sophisticated parties as the basis of beginning their franchise relationship, and that these arms-length agreements setting prices are completely distinct from open price purchase requirements that are common in most franchise agreements. Fletcher at 37; Chisum, 48 Wash. L. Rev. at 371-372; Douglas C. Berry et al., *State Regulation of Franchising: The Washington Experience Revisited*, 32 Seattle U. L. Rev. 881, 882-883 (2009). As a result, prices agreed to by these independent parties are not “forced” upon the franchisee and not intended to be covered by FIPA’s Bill of Rights. This is especially true when, as here, the franchisee, who is a sophisticated party represented by counsel and partnered with an existing franchisee with extensive experience and detailed knowledge of the franchisor’s operations, independently reviews, investigates, and agrees to a posted price at the outset of the relationship. Opening Brief at 40; compare *Nelson v. Nat’l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 389-90, 842 P.2d 473, 476-77 (1992) (franchisees could not have agreed to price of goods because “there was no statement in the contract of the price of [NFRCI’s products and equipment].”)

Even the Department admits that the Bill of Rights was enacted to prevent franchisors from using the “powerful positions” given to them by

the franchise agreement to “*force* franchise[s] to purchase supplies from the franchisor...at unreasonable prices” and to “resolve problems that arise in the *ongoing relationship* between a franchisor and franchisee.” Amicus at 3 (emphasis added). It further admits that “RCW 19.100.180(2) sets specific limits on the franchise relationship *once it is determined that a franchise agreement is present.*” *Id.* at 12 (emphasis added). In short, the price for printing was not the result of disparate power, coercion, force, or abuses inherent in the ongoing relationship and therefore RCW 19.100.180(2)(d) does not apply.

Using FIPA’s Bill of Rights to scrutinize an agreed price by parties prior to the franchise relationship even taking form was never intended by the legislature, nor does it protect franchisees from being forced into purchasing goods pursuant to open price requirement for unreasonable prices.

### **3. Disclosure Has Nothing to Do with RCW 19.100.180(2)(d).**

This Court has previously stated that RCW 19.100.180(2)(d) follows the prohibitory theory instead of the disclosure theory, because to follow the latter “would vitiate the provision of the Act forbidding franchisors from *imposing* unfair or unreasonable prices on the costs of goods and services.” *Nelson*, 120 Wn.2d at 389 (emphasis added). The

Department seems confused by FIPA's disclosure requirements and *Nelson's* clear endorsement of the prohibitory theory because it states that there may be situations where a small markup (presumably over and above a bona fide wholesale price) might pass muster as fair and reasonable if "*fully disclosed*" and intended to cover some costs and expenses. Amicus at 5.

**4. Money Mailer's Approach Serves the Purposes of FIPA and it is Directly In Line With Other Reasonable Interpretations of RCW 19.100.180(2)(d).**

In his comprehensive and well researched article, Berry relies on legislative history and legal precedent relating to requirements contracts with open price terms to show that a fair and reasonable price for goods or services is not to be determined by any "abstract assessment of the 'fairness' of a price" but rather on "observance of commercially reasonable standards." Berry, 32 Seattle U. L. Rev. at 882-883. Berry proposes a practical test for determining reasonableness of prices:

If the parties intended that the price charged by the franchisor would be the posted price [available to all franchisees], then the franchisee has the burden of showing that the price is commercially unreasonable. If the franchisee cannot make that showing, the franchisee can still show a lack of good faith on the part of the franchisor, but the burden of proof is significantly higher: clear and convincing proof that the franchisor has a malevolent intent to drive the franchisee out of business. If the franchisee satisfies either burden, then the price set by the franchisor is unreasonable and is a violation of the Franchisee Bill of

Rights.

*Id.*

Berry explained that a franchisee could establish commercial unreasonableness by showing that the franchisor discriminated in its prices, or that “the price charged is not within the range of prices charged by the seller’s competitors in the same market.” *Id.* at n.442. He noted that without this showing, and a demonstration that the franchisor’s prices were set without regard to commercially reasonable standards, “a fact-finder has no standard of comparison to determine whether the franchisor had a legitimate, lawful reason for charging different effective prices.” *Id.*

Berry’s proposed approach serves the purposes of FIPA by protecting franchisees from prices out of line with commercial standards. While he arrived at that approach by looking to the legislative history, the UCC, longstanding legal principles and case law curtailing abuses of open price contracts, his result is substantially similar to the straightforward approach Money Mailer put forth in which fair and reasonable price means the fair market price available at a comparative level of distribution. Opening Brief, Section VI.B.

In contrast, the Department’s approach to determining a fair and reasonable price lacks support among commentators or case law. It is truly an outlier, isolated from FIPA’s legislative history, its purpose, and sound

legal principles. This was never the legislature's intent.<sup>7</sup>

**B. The Department Misconstrues *Nelson*.**

The Department provides a brief overview of *Nelson*'s facts and then concludes that since *Nelson* affirmed that a 20 percent markup violated RCW 19.100.180(2)(d), "the 100 percent markup here also violates the Act and provides an affirmative answer to the District Court's question." Amicus at 7. However, the Department is comparing apples to oranges, as the 20 percent markup in *Nelson* was on top of the bona fide wholesale price available to the franchisee in an open price contract, while the alleged 100 percent margin here was applied to the franchisor's costs of goods and services (goods and services that the franchisee could not possibly achieve in the open market). Opening Brief at 13.

*Nelson*'s 20 percent markup is also vastly different from Money Mailer's 100 percent margin because *Nelson*'s markup was added to a third-party invoice without any evidence that the franchisor incurred any costs or expenses in supplying the franchisee with the pizza ingredients. *Nelson* at 390. There is no evidence the franchisor in *Nelson* had to manage ordering, production, storage, logistics, training, or technical development of the

---

<sup>7</sup> It should also be noted that the legislature's clear intent throughout the past 28 years was not to make Washington an outlier, but to bring it closer to national franchising standards. See *An Act Relating to Franchise Investment Protection: Hearing on SB 5256-S Before the H. Comm. on Commerce & Labor*, 1991 Leg., 52nd Sess. (Wash. 1991) (statement of C. Kent Carlson, chairman of the WSBA Committee).

pizza ingredients. *Id.* As a result the franchisor's 20 percent markup was equated to a 20 percent *profit*. *Id.* at 391. On the other hand, Money Mailer had significant costs and expenses associated with its print-to-insert workflow. Opening Brief at 10. As a result of its considerable costs and expenses associated with the printing goods and services provided, Money Mailer's would-be profit margin on the printing charged to Brewer (which he failed to pay) would have been far less than 20% and as low as 3%. Dkt. 125 at ¶¶ 20, 23.

The Department's disparate comparison of 20 percent to 100 percent is not only misleading, it does nothing to help answer the District Court's first question which asks whether a franchisor's costs can even be used to determine the reasonableness of the price of goods or services to franchisees.<sup>8</sup>

**1. *Nelson* Does Not State That a Franchisor's Costs Should be Used to Determine a Fair and Reasonable Price.**

The Department claims that *Nelson* looked at the franchisor's costs to obtain the product in determining reasonableness of the price to the franchisee. Amicus at 11. This is incorrect. To start, *Nelson* never once indicates or mentions that the franchisor ever "obtained" any of the pizza

---

<sup>8</sup> In addition to the Department's failure to recognize the inherent differences in pricing between distinct business models in distinct industries, it provides no analysis of why any particular operating margin or percentage profit would be unfair or unreasonable in a particular situation.

ingredients the franchisee purchased. *See generally Nelson*. There are no facts, discussion, or evidence of the franchisor ordering, receiving, storing, paying for, or shipping to the franchisee pizza ingredients. *Id.* The Department has added facts that are not present in the case.

The Department further claims that Nelson “implicitly recognized” that the actual costs “incurred by the franchisor are highly relevant to the ‘fair and reasonable price’ analysis.” Not so. First, there are no facts, discussion, or evidence that the franchisor ever “incurred” any costs related to the pizza ingredients. *See generally Nelson*. To the contrary, it was the franchisee that ordered the ingredients directly from the supplier, the franchisee received shipment of the ingredients, and the franchisee paid the invoice. *Id.* at 390. The franchisor merely tacked a 20 percent surcharge on top of supplier’s invoice before sending it on to the franchisee. *Id.*

Second, and more importantly, as support for the “implication” that a franchisor’s costs are relevant in determining reasonableness of the price to the franchisee, the Department claims that *Nelson* “rejected 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.’” Amicus at 11. *Nelson* nowhere rejects this proposition. To the contrary, FIPA explicitly permits a franchisor to require a franchisee to make purchases from a supplier and allows that franchisor to share in the

supplier's profits, so long as the benefit is disclosed. RCW 19.100.180(2)(e); *BP W. Coast Prods., LLC v. Shalabi*, No. C11-1341MJP, 2012 U.S. Dist. LEXIS 82879, at \*29 (W.D. Wash. June 14, 2012) (“RCW 19.100.180(2)(e) ...prohibits a franchisor from benefiting from an individual that does business with the franchisee unless that relationship is disclosed.”) (citing *Nelson*). *Nelson* only refused to apply RCW 19.100.180(2)(e) to the case at hand because the benefit was not disclosed as required by FIPA. *Nelson* at 389-391. Neither RCW 19.100.180(2)(e) nor disclosure requirements are applicable here.

**2. *Nelson* Equates a Fair and Reasonable Price to a Bone Fide Wholesale Price.**

In contrast to the Department's incorrect reading of *Nelson* (unsupported by any further legal authority), Money Mailer's reading of *Nelson* gives it an internally consistent meaning that harmonizes with Washington case law going back decades: fair and reasonable price means the same thing as bona fide wholesale price.

Professor Chisum, a source this Court cites to numerous times in *Nelson* and in other FIPA cases,<sup>9</sup> takes the position that “[f]air and reasonable price is a vague term but should be interpreted to mean ‘bona fide wholesale price.’” Chisum, n.421. Berry similarly states, “the *Nelson*

---

<sup>9</sup> See e.g. *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 888, 658 P.2d 1267, review denied, 99 Wn.2d 1016 (1983).

Court seemed to assume that a ‘fair and reasonable price’ means a ‘bona fide wholesale price.’ Berry at 881. The Department never addresses these important sources of FIPA interpretation, but proposes a reading that upends decades of understanding of the relationship between a reasonable price and the bona fide wholesale price.

**3. The Department’s “Plain Language” Argumentation is Inconsistent with *Nelson* and FIPA’s Language.**

The Department claims that FIPA’s “plain language” dictates that the answers to both certified questions should be “yes.” Amicus at 4. However, the Department fails to identify any such plain language of the Act, let alone describe how it would aid the Court in answering the certified questions. Indeed, as Chisum notes, “fair and reasonable price” is an ambiguous term. Chisum, n.421; see also Berry at 881 (describing RCW 19.100.180(2)(d) as “inexcusably vague.”).

The Department’s proposed definition of “fair and reasonable price” only creates more ambiguity: the price the franchisor paid, plus “a small markup, fully disclosed and intended to cover corresponding costs or expenses that are not already accounted for.” Amicus at 5. The Department’s definition of “fair and reasonable price” adds several undefined elements not found in FIPA or *Nelson*. See also Chisum, n. 421 (describing fair and reasonable as a vague term, but one that should be

interpreted to mean bona fide wholesale price). The Department's new definition of "fair and reasonable price" is neither helpful nor necessary.

While the term "fair and reasonable price" is patently vague, its *meaning*, as derived from *Nelson* and understood by leading commentators, is the same as the meaning given to bona fide wholesale price. Opening Brief, § VI.A.<sup>10</sup>

**C. The Department's New Standard Causes Unnecessary Disruption to the Franchise Industry without Providing any Judicially Manageable Standard for Determining Whether a Price is Fair and Reasonable.**

The Department is advocating for subjective *per se* rules of precisely the type that it discouraged when it helped draft and implement FIPA. Opening Brief at 19-20. The Department offers no objective method for courts to determine whether any percentage markup on costs is permissible under the Act. Instead, the Department's approach requires courts to arbitrarily prescribe prices that they deem reasonable without any reference to measurable or consistent standards. *See United States v. Davis*, 803 F. Supp. 830, 861 (S.D.N.Y. 1992) (holding that the words "fair" and "reasonable" require an objective standard when determining whether the price is acceptable, "since to do otherwise would relegate each inquiry under the statute to a web of subjectivity and destroy the continuity and

---

<sup>10</sup> The fact that the legislature did not use exact terms to denote concepts with similar meaning is not conclusive evidence that those concepts are distinct.

predictability of administration and enforcement.”).

The impact on the industry would be wide-ranging and unnecessarily disruptive. Franchises in the State of Washington are regulated by both FIPA and the Federal Trade Commission’s Franchise Rule (16 C.F.R. § 436 (2019)). RCW 19.100.040(1)(a); *see also* WAC 460-80-125; WAC 460-80-300. Franchisors are not restricted in how they set the business plan for their business, but they are required to disclose how the franchisee will be charged for the system in the Franchise Disclosure Document (“FDD”). There are significant differences between franchise systems, and franchisors have many different economic models to generate revenue and ensure sustainability. Franchisors do this through a mix of fees, royalties, prices on goods and services, etc. Regardless of how the franchisor strikes the balance through fees and costs (including fees and costs for the franchisor’s intellectual property), the franchisor and franchisee memorialize these fees and costs through a contract called the Franchise Agreement. That agreement creates predictability for the franchisor and franchisee going forward, not only in Washington State, but across the United States. What the Department proposes (without appropriate legislative or rule-making process) could impact hundreds and thousands of franchise agreements that do not technically meet the Department’s subjective *per se* rule, regardless of whether the franchisor is

charging a fair and reasonable price for goods and services and makes a small profit overall. Contracts for Washington franchisees might be impacted whereas franchisees outside of Washington in that same franchise system would not, leading to potential disparities in treatment between franchisees, which could further disrupt certain franchise systems, or lead franchisors to cease Washington operations, and thereby depriving Washington businesses of franchise opportunities.

The Department's ill-defined standard for "fair and reasonable" would place courts in the untenable position of having to determine, on a case-by-case basis, whether the franchisor's model has a small enough profit margin, and whether the franchisor has properly valued its time, energy and costs in creating and maintaining a franchise system.

The Department long ago recognized such a subjectively based system would inhibit economic growth without furthering the purpose of FIPA in protecting franchisees. The Department was right then to choose the market standard, which objectively sets pricing and achieves the purposes the Act. The Department's current about-face should be rejected.

### **III. CONCLUSION**

For the reasons described above, Money Mailer respectfully requests that this Court reject the Department's proposals and answer both Certified Questions in the negative.

**RESPECTFULLY SUBMITTED** this 5th day of March, 2018.

**DORSEY & WHITNEY LLP**

/s/ Nathan T. Alexander

/s/ Brian J. Janura

Nathan T. Alexander WSBA #37040

Brian J. Janura WSBA #50213

701 Fifth Avenue, Suite 6100

Seattle, WA 98104-7043

T: (206) 903-2384

E: alexander.nathan@dorsey.com

E: janura.brian@dorsey.com

*Counsel for Appellants Money Mailer,  
LLC and Money Mailer Franchise Corp.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5<sup>th</sup> day of March, 2019, I caused the foregoing document to be filed via ECF. A true and correct copy of the foregoing has been served on the following as noted below:

Daniel J. Velloth  
Daniel A. Brown  
WILLIAMS, KASTNER & GIBBS  
601 Union Street, Suite 4100  
Seattle, WA 98101-2380  
E: [dvelloth@williamskastner.com](mailto:dvelloth@williamskastner.com)  
[dbrown@williamskastner.com](mailto:dbrown@williamskastner.com)  
[rvansteen@williamskastner.com](mailto:rvansteen@williamskastner.com)  
[dbulis@williamskastner.com](mailto:dbulis@williamskastner.com)  
*Attorneys for Defendant Wade G. Brewer*

- Via Messenger
- Via Facsimile
- Via U.S. Mail
- Via Electronic Mail
- Via ECF Notification

Leslie Schwaebe Akins  
LESLIE SCHWAEBE AKINS  
A Law Corporation  
5927 Balfour Court, Suite 114  
Carlsbad, CA 92008  
E: [lsa@stockmarketlaw.com](mailto:lsa@stockmarketlaw.com)

- Via Messenger
- Via Facsimile
- Via U.S. Mail
- Via Electronic Mail
- Via ECF Notification

ROBERT W. FERGUSON, Attorney General  
SHARON M. JAMES  
IAN S. McDONALD  
Office of the Attorney General  
1125 Washington Street SE  
Olympia, WA 98504-0100  
E: [judyg@atg.wa.gov](mailto:judyg@atg.wa.gov)  
[sharon.james@atg.wa.gov](mailto:sharon.james@atg.wa.gov)  
[IanM@atg.wa.gov](mailto:IanM@atg.wa.gov)  
*Attorneys for Washington State Department  
of Finance Institutions*

- Via Messenger
- Via Facsimile
- Via U.S. Mail
- Via Electronic Mail
- Via ECF Notification

*/s/ Jackie Slavik*  
\_\_\_\_\_  
Jackie Slavik

# DORSEY & WHITNEY LLP

March 05, 2019 - 4:52 PM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96304-5  
**Appellate Court Case Title:** Money Mailer, LLC v. Wade G. Brewer

### The following documents have been uploaded:

- 963045\_Briefs\_20190305165033SC236476\_5621.pdf  
This File Contains:  
Briefs - Answer to Amicus Curiae  
*The Original File Name was 20190305 SC Reply Brief of Amicus Curiae Final.pdf*

### A copy of the uploaded files will be sent to:

- lmacphee@polsinelli.com
- IanM@atg.wa.gov
- arosenberg@williamskastner.com
- bob.mahler@polsinelli.com
- dbrown@williamskastner.com
- dvelloth@williamskastner.com
- heather.wulf@atg.wa.gov
- janura.brian@dorsey.com
- jbonanno@polsinelli.com
- jhager@williamskastner.com
- jmazero@polsinelli.com
- judyg@atg.wa.gov
- julie.feser@atg.wa.gov
- lsa@stockmarketlaw.com
- sharon.james@atg.wa.gov

### Comments:

---

Sender Name: Molly Price - Email: price.molly@dorsey.com

**Filing on Behalf of:** Nathan T Alexander - Email: alexander.nathan@dorsey.com (Alternate Email: )

Address:  
Columbia Center  
701 Fifth Avenue Suite 6100  
Seattle, WA, 98104  
Phone: (206) 903-8713

**Note: The Filing Id is 20190305165033SC236476**