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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' REPLY BRIEF
ON CERTIFIED QUESTIONS**

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Appellant Money Mailer, LLC and Money Mailer Franchise Corp.

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I. INTRODUCTION

Respondent Wade G. Brewer urges this Court to rewrite Washington franchise law by arguing that any price for goods and services charged to franchisees in excess of the third-party production cost to the franchisor is an unfair and unreasonable price prohibited by the Washington Franchise Investment Protection Act (“FIPA”). *See* Respondent Wade Brewer Opening Brief (“Response”), p. 1. Specifically, Brewer claims that recouping “general overhead and profit margin into the cost of basic goods franchisees are required to buy is...the worst kind of overreaching” by franchisors. *Id.*, p. 4. In postulating his new rule (or rules),¹ Brewer relies on a single case, *Nelson v. Nat’l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 842 P.2d 473 (1992). And while Brewer places all of his eggs in the *Nelson* basket,² *Nelson* does not support Brewer’s position – it supports Money Mailer’s position. *Nelson* applies long-settled law in Washington that only prohibits a franchisor from charging a franchisee more than a bona fide wholesale price for goods and services – that is, a franchisor cannot charge a franchisee more for goods and services than the price at which the

¹ Brewer repeatedly uses the term “undisclosed mark-up” to suggest that Money Mailer should have disclosed its margins on printing, but later, he argues, inconsistently, that margins, are prohibited by FIPA, whether disclosed or not. Response, p. 14.

² Brewer cites to, or mentions, *Nelson* on pages 1, 2, 3, 11, 12, 13, 14, 15, 16, 19, 20, 21, 24, and 25 of his opposition brief – no less than 25 times in total – but cites to no other controlling authority.

franchisee could purchase those goods and services in the open market.

Money Mailer's position embraces the language of FIPA itself, long-settled case law (including *Nelson*), and other legal authorities in showing that a bona fide wholesale price and a "fair and reasonable price" are the same thing. Opening Brief, § VI.A. It further shows that "fair and reasonable" pricing can only be determined by comparing the price the franchisor charged the franchisee versus the price a franchisee is able to obtain those goods or services in the marketplace – *i.e.*, comparing the same levels of distribution. This methodology shows that Money Mailer charged a fair a reasonable price because there was zero mark-up on the bona fide wholesale price for printing. This approach also carries out the purposes of FIPA in protecting franchisees, without imposing unworkable standards or unnecessary and onerous *per se* rules on Washington's franchising industry.

What is apparent from Brewer's response is that he has no coherent methodology to determine fair and reasonable pricing. Rather, Brewer seeks a *per se* rule that prohibits price increases over production costs, including margins, regardless if the resulting price is still at or below a bona fide wholesale price. Applying the appropriate methodology under Washington law requires this Court to answer both of the District Court's certified questions with a resounding "no."

II. ARGUMENT

A. Money Mailer's Analysis of RCW 19.100.180(2)(d) is in Full Accord with Washington Law, Including *Nelson*.

Nelson is the only case Brewer relies upon to argue that margins of any kind are prohibited by FIPA. Response, pp. 1-3, 11-16, 19-21, 24-25. Brewer argues that because *Nelson* held that a 20% “mark-up” on the bona fide wholesale price of goods and services was an unfair and unreasonable price in violation of FIPA, any “mark-up” on any costs similarly violates FIPA. Brewer misrepresents the holding of *Nelson*. Nowhere does *Nelson* set forth a rule that any margin applied to costs is unfair and unreasonable, or that a 20% “mark-up” is *per se* unfair and unreasonable. Rather, *Nelson*'s holding, which is quite narrow, is that the franchisor, who undisputedly (if not admittedly) charged the franchisee more than a bona fide wholesale price for pizza ingredients, could not avoid FIPA's prohibition under .180(2)(d) by claiming that its unfair and unreasonable prices were really just franchise fees. *Nelson*, 120 Wn.2d at 387-388. In reaching its holding, *Nelson* endorses three important legal principles that are relevant to the certified questions: 1) a fair and reasonable price is the same as a bona fide wholesale price; 2) a mark-up is impermissible only when added on top of a bona fide wholesale price; and 3) Washington follows the prohibitory theory of pricing, not the disclosure theory. *Id.* at 389-391.

1. Nelson Equates Fair and Reasonable Pricing with Bona Fide Wholesale Price.

In *Nelson*, “Food supplies were ordered locally by the Nelsons [the franchisee]. The supplier then sent the bill to NFRCI [the franchisor] in Colorado, which added its markup to the bill, and sent it to the Nelsons.” *Nelson*, 120 Wn.2d at 386. It was undisputed that the franchisor charged the Nelsons more than a bona fide wholesale price by adding a 20% “boost” to the price of food that the Nelsons ordered directly from the supplier. *Id.* at 386, 390. The franchisor argued that what he was charging was really a “franchise fee” because, by charging more than a bona fide wholesale price for pizza ingredients, the franchisor’s charges were a franchise fee by operation of the FIPA definition of franchise fee. *Id.*; *see also* RCW 19.100.010(8). The Court rejected the franchisor’s argument. *Id.*

There was one price point that formed the basis of *Nelson*’s holding: the market price of the ingredients available to the franchisee. *Id.* *Nelson* treated the market price of the ingredients (what the franchisee could purchase directly from the supplier) as the “wholesale price”, the “bona fide wholesale price”, and the “fair and reasonable price.” *Id.* at 390-393. By defining “fair and reasonable price” to mean the same thing as “bona fide wholesale price,” this Court adopted the approach suggested by Chisum. *Id.*; Chisum, *State Regulation of Franchising: The Washington Experience*,

48 Wash. L. Rev. 291, 372, n.421 (1973).

Nelson affirmed that the franchisor's 20% mark-up on top of the market price of the ingredients available to the franchisee was an unfair and unreasonable price under .180(2)(d) because it exceeded the bona fide wholesale price/wholesale price/fair and reasonable price. *Nelson*, at 390-393. The holding of *Nelson* is not that a 20% mark-up is a *per se* violation of FIPA, but that a franchisor cannot charge more than a bona fide wholesale price available to the franchisee, regardless of what the franchisor calls the price increase.

2. FIPA Only Prohibits Prices Charged Above the Bona Fide Wholesale Price.

Brewer claims that the “straightforward” issue before this Court is whether a franchisor can charge “undisclosed mark-ups.”³ Response, p. 1. Brewer thereafter asserts that “any markup of goods or services under RCW 19.100.180(2)(d)-whether disclosed or not-violates FIPA.” Response, p. 14 (emphasis omitted). Brewer cites to the District Court’s summary judgment order, which stated that “it is likely that the courts of Washington would

³ Brewer’s verbatim description of the issue before the Court is “Can a franchisor tout low franchise fees, while secretly making its money through undisclosed markups on goods that it requires franchisees to purchase from it?” Response, p. 1. However, Brewer’s description of the issues has little resemblance to either of the two certified questions, and Brewer includes baseless allegations that were not in the certified record, such as “tout[ing] low franchise fees.” *Id.* Brewer’s failure to address the substance of the certified questions and his proclivity to make allegations without any support in the record (or outside the certified record) are addressed in more detail below. See §§ II.B and III.A, *infra*.

find that any percentage markup on costs of materials is a violation of FIPA.” Dkt. 177, p. 5.⁴ Brewer and the District Court are simply incorrect.

FIPA does not state that any or all margins above the franchisor’s production costs are prohibited, or that their mere presence constitutes a violation of FIPA. *See generally* RCW 19.100.⁵ Nor does *Nelson* endorse this extreme view. *See* 120 Wn.2d at 382. The only “mark-ups” prohibited by Washington law are mark-ups applied *on top of the bona fide wholesale price of goods and services*. *Id.* at 390-392.

It is important to note that the *Nelson* Court did not engage in an analysis to determine the bona fide wholesale price for the pizza ingredients. The franchisor admittedly applied a 20% mark-up on top of the bona fide wholesale price. *Id.* at 387. Therefore, the Nelsons were paying 20% *more* for the pizza ingredients than they would have paid in the open market (*i.e.*, to the local supplier) solely as a result of the contractual relationship with the franchisor. That was deemed to be an unfair and unreasonable price, and precisely the type of conduct FIPA was designed to stop. *Id.* at 392.

While *Nelson* endorsed the FIPA analysis taken by the lower courts to arrive at the bona fide wholesale price/fair and reasonable price, other

⁴ The District Court further found that “as a matter of law, selling a franchisee printing services for twice what they cost is not a ‘fair and reasonable price.’” Dkt. 177 p. 5.

⁵ Despite his near constant use of the term “mark-up” in his brief, Brewer never explains what this term means or how it is applied to FIPA.

Washington cases have engaged in their own determination of the bona fide wholesale price.⁶ Opening Brief, § VI.A.4. Those cases consistently look to the price of goods available to the franchisee in the open market to determine the bona fide wholesale price and hold that charging more than this price is prohibited by FIPA. *Id.* The cases go to the heart of the purpose and legislative intent in enacting FIPA: to curb franchisor abuses in charging captive franchisees more for goods and services than the price at which those goods and services are available in the market⁷ while “giv[ing] the franchisors flexibility for necessary price fluctuations but deny[ing] to them the [traditional] power of unilateral price change.” James Fletcher, *Franchise Investment Protection Act (1971)* (unpublished thesis, on file with University of Washington Gallagher Law Library), app. I, p. 7.

Just as it did in *Nelson*, this Court should look to the market price at a comparable level of distribution to find the bona fide wholesale price, which would be the price for comparable integrated printing services that

⁶ In establishing a bona fide wholesale price, other Washington cases further show that the cost of the product to the franchisor is irrelevant to the determination. Otherwise, courts would be forced to compare different levels of distribution: comparing one level (the costs to the producer/franchisor for making the goods) with a completely different level of distribution (the market price of those goods available to the retailer/franchisee). Opening Brief, § VI.A.4.a.

⁷ The specific abuses FIPA meant to curtail were instances of franchisors selling goods to franchisees for costs above what those franchisees could pay on the open market. *See* Fletcher, app. C (describing supply costs abuses where franchisor charged franchisee 50 cents a pound for baked beans when franchisee could purchase same for 32 to 35 cents a pound, and franchisor charged franchisee 60 cents a pound for peanuts when franchisee “on the open market could have purchased for 46 to 49 cents a pound”).

would be available to Brewer or those similarly situated to him. This Court should not look to Money Mailer's production costs in place of the market price available to Brewer because that would be a comparison of different levels of distribution.⁸ Also, as it did in *Nelson*, this Court should only measure mark-ups as the boost on top of the bona fide wholesale price.⁹

Here, Brewer utterly failed to show that he paid an amount above the bona fide wholesale price for printing. He completely ignores that he was charged printing prices in line with what he would have paid Valpak, and less than he would have paid independent printers to replace Money Mailer. Dkt. 125, ¶¶ 6 and 25; Dkt. 124, ¶ 9; Dkt. 180, pp. 11-12. Brewer was even charged far *less* (*i.e.*, less than \$92/per spot) for printing that what he agreed to pay for per spot (*i.e.*, \$115/per spot in the FDD) (although Brewer was *charged* this amount for printing, he failed to *pay* this amount for printing, instead running up a deficit for unpaid printing). Dkt. 193, p. 3 and n.3. Thus, Money Mailer added zero mark-up on the bona fide wholesale price for printing.

Brewer's extreme position that Money Mailer allegedly "secretly

⁸ Starting the analysis with Money Mailer's costs would also require the Court to implant itself for the market or create a *per se* rule before coming to any final determination of what a fair and reasonable price is. Opening Brief, § VI.B.

⁹ Brewer's failure to provide any legal guidance for determining fair and reasonable price is telling. Brewer admitted in its summary judgment briefing that it did not, and need not, establish the market for printing prices. Dkt. 180, p. 6 n.6. But under the proper FIPA analysis, that failure is fatal to Brewer's claim of unfair and unreasonable pricing.

smuggling general overhead and profit margins into the cost of basic goods franchisees are required to buy is...the worst kind of overreaching” is preposterous and finds no basis in FIPA or in the realities of simple economics. Response, p. 4. Accepting Brewer’s position would make Washington an extreme outlier.

Fortunately, in Washington as well as in other jurisdictions, franchisors are not prohibited from recouping overhead and other expenses, fees, or investments on the goods and services they sell franchisees, as well as the value of their intellectual property, goodwill, and franchise system by adding a margin to those goods and services so long as the final price does not exceed the bona fide wholesale price. Opening Brief, § VI.A.4.

3. Mandated Disclosures of Mark-ups is Not the Law, and Not an Issue before the Court.

Again Brewer improperly frames the issue before this Court as whether a franchisor can charge “undisclosed mark-ups.” Response, p. 1. Brewer mentions the issue of disclosure in some form on nearly every page of his brief. However, disclosure is not an issue before this Court.

Brewer previously tried to tie disclosure of mark-ups to a violation of .180(2)(d) in his motion for summary judgment. *See* Dkt. 177, p. 5, n.3. However, the District Court held that the provision dealing with disclosure,

.180(2)(e),¹⁰ was never established. *Id.* The District Court’s ruling on that issue is not being challenged here, and it is not at all incorporated into or related to either of the certified questions before this Court. *See* Dkt. 223, pp. 4-5.¹¹ In fact, .180(2)(d) has nothing to do with disclosure of mark-ups.

Neither the plain language nor the legislative history of .180(2)(d) references or mentions a requirement to disclose mark-ups or margins. *See* RCW 19.100.180(2)(d); Fletcher. In fact, this Court explicitly chose not to apply a disclosure theory to .180(2)(d). *Nelson*, 120 Wn.2d at 389 (“Chisum concludes that two sections [.180(2)(d) and .180(2)(e)], should ideally follow consistently either the disclosure theory or the prohibitory theory.... We follow the prohibitory theory....”) (emphasis added).¹²

FIPA, not Brewer, mandates which disclosures are required, and those disclosures *do not* include mark-ups or margins on the franchisor’s costs of goods and services. RCW 19.100.080(1) specifically requires franchisors to provide franchisees with a disclosure document, often

¹⁰ Even .180(2)(e) does not deal with disclosure of *mark-ups* as Brewer keeps alluding to. Section .180(2)(e) states that a franchisor may not “Obtain 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).

¹¹ Brewer again quotes the District Court’s order’s term of “undisclosed profit centers.” Response, p. 12 (quoting Dkt. 177, p. 5). Neither Brewer nor the District Court elucidate what such an “undisclosed profit center” is, or how it would violate FIPA. Franchisors are not non-profit enterprises, nor does Washington law treat them as such.

¹² Brewer himself quotes this passage, but nevertheless continues to espouse that the issues here revolve around disclosing mark-ups. Response, p. 12.

referred to as a Franchise Disclosure Document (“FDD”). FIPA mandates that the FDD’s contents are determined by the director, who prepares rules and requirements for disclosure “guided ... by the federal trade commission or the North American Securities Administrators Association, Inc., or its successor, as such guidelines ...” *Id.*, RCW 19.100.040(1)(a); *see also* WAC 460-90-125; WAC 460-80-300. Nowhere do the FTC rules or the NASAA rules require disclosure of a franchisor’s margins applied to goods and services. NASAA, *2008 Franchise Registration and Disclosure Guidelines*, pp. 40-42; FTC, *Franchise Rule 16 C.F.R. Part 436 Compliance Guide*, May 2008, pp. 51-56. Nor has Brewer ever established or even alleged that Money Mailer’s FDD lacked any information required by the director or the 2008 NASAA guidelines. The rules and guidelines requiring disclosures of prices franchisees will be charged provide detailed, line-by-line specifications describing exactly what should be disclosed, which Money Mailer undisputedly followed. *Id.*; Dkt. 122, p. 10.¹³

Further, Money Mailer is arguably *prohibited* from cluttering the FDD with detailed information on the margins applied to each and every good or service sold or offered for sale to a franchisee:

¹³ Brewer ignores what Money Mailer *did* disclose to him *prior* to Brewer becoming a franchisee. Money Mailer undisputedly provided the FDD to Brewer, and disclosed that Brewer could expect to be charged \$115/spot for costs, including printing (which turned out to be much less - \$92/spot). Dkt. 125, ¶¶ 6 and 25; Dkt. 193, p. 3 and n.3. Brewer thereafter became a franchisee.

The FDD shall have “no extraneous content beyond what is required or permitted by law and by the *2008 Franchise Registration and Disclosure Guidelines* promulgated by NASAA, but which may include customary devices for manipulating electronic documents in machine readable form and tools, or access to tools, that may be necessary or convenient to enable the recipient to receive and view the Franchise Disclosure Document.”

WAC 460-80-300(2)(a)(ii).¹⁴ Without this rule, franchisors could include so much information in their FDDs that material information – as properly determined by NASAA – would be buried in heaps of immaterial information, and the potential to confuse franchisees with figures, numbers, and calculations would increase.¹⁵

Simply put, Brewer’s repeated insistence that Money Mailer was somehow required to disclose the margin applied to its printing costs is another example of him creating new rules with absolutely no basis in law or practicality. Instead, Money Mailer clearly and conspicuously disclosed the prices for goods and services, including printing prices, as directed by FIPA, the WAC, FTC Rules, and the NASAA guidelines, prior to Brewer becoming a franchisee. Dkt. 122, p. 6.

¹⁴ These long-established rules provide the proper amount of transparency between the franchisor and the franchisee consistent with the purposes of FIPA. Brewer’s assertion of apparently limitless “transparency” is not the law. Response, p. 4.

¹⁵ Further, if every franchisor was required to publicly disclose their costs of goods, it would put them at disadvantages to non-franchisors competing in the same industry. The inevitable result would be an erosion of “one of our economy’s most important sectors” and even fewer franchising options for Washington franchisees. Fletcher, p. 1.

B. Brewer Utterly Fails to Provide Any Workable Standard for Determining a Fair and Reasonable Price.

As noted above, Brewer relies entirely on an inaccurate interpretation of *Nelson* for his claim that all mark-ups violate FIPA, and he provides virtually no analysis of the District Court’s certified questions (which do not ask whether all mark-ups violate FIPA). *See supra*, § II.A; Response, p. 18.¹⁶ Furthermore, rather than provide this Court with his own statutory provisions, cases, or other authority to establish how a bona fide wholesale price can or should be determined, Brewer attempts to dismiss or discredit the authorities that Money Mailer relies upon. *Id.*

First, Brewer provides no analysis of the language of .180(2)(d) or other provisions of FIPA. He simply concludes that “fair and reasonable price” means zero increase over production costs for any purpose whatsoever. Response, p. 14. Brewer also proposes that the Court ignore rules of statutory interpretation, and make up its own meaning to terms in the statute – a position that clearly ignores legislative intent. *Id.*, p. 17, n.11.

Second, Brewer ignores the legislative history, even going so far as to demean the principal draftsman of the Act as a mere “intern.” Response, p. 27. This “intern” was the actual drafter of FIPA, and his thesis has been

¹⁶ *See also* Response, p. 13 (“the Court need only determine what a ‘fair and reasonable price’ is not”); *id.*, p. 16. Clearly this is not a workable standard that allows franchisors or franchisees to determine fair and reasonable pricing.

used by notable commentators and courts alike to shed light on the legislative history of FIPA. See, e.g., Chisum, *State Regulation of Franchising: the Washington Experience*, 48 Wash. L. Rev. at 334 n.211. (“For a detailed description of the legislative history of the Act, see J. Fletcher, *Franchise Investment Protection Act...*”); *Lobdell v. Sugar ‘N Spice*, 33 Wn. App. 881, 893, 658 P.2d 1267 (1983).

Third, Brewer chooses to dismiss all the cases Money Mailer cited showing how courts go about determining a bona fide wholesale price. Response, p. 16. Brewer claims that Money Mailer’s analyses of *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir. 1983), *BP W. Coast Prods. LLC v. Shalabi*, No. 11-1341 2012 U.S. Dist. LEXIS 17027 (W.D. Wash. 2012), *Corp. v. Atl.-Richfield Co.*, 45 Wn. App. 563, 567, 726 P.2d 66 (1986), and *Bryant Corp. v. Outboard Marine Corp.*, No. C93-1365R, 1994 U.S. Dist. LEXIS 18371 (W.D. Wash. Sept. 29, 1994) are misplaced because each case considers what constitutes a franchise fee, not whether a price is unreasonable. *Id.* Brewer misses the point entirely. As Money Mailer explained, a fair and reasonable price means the same thing as a bona fide wholesale price. Opening Brief, § VI.A.2-4. Each of these cases established a bona fide wholesale price for goods or services, so each is instructive to courts determining a fair and reasonable price. In every case, the court looked to the fair market value at a comparable level of distribution

to find the bona fide wholesale price. *Id.* at § VI.A.4.a.

Brewer ignores the approaches taken by these courts and retreats to the District Court's opinion, which failed to establish the bona fide wholesale price because it looked to different levels of distribution (*i.e.*, the District Court incorrectly looked to the price for the printing services available to the franchisor, instead of the market price for integrated printing services available to the franchisee). Dkt. 223, p. 2. Brewer repeatedly conflates the different levels of distribution and the different prices available at each level.¹⁷ For example, Brewer ignores that a level of distribution closer to the manufacturer, such as a franchisor, can obtain goods at cheaper prices than a level of distribution closer to the retail customer, such as a franchisee. *See, e.g., Bryant*, 1994 U.S. Dist. LEXIS 18371, at *7 (“Bryant paid wholesale prices for the products it purchased from [the manufacturer], which Bryant in turn sold to its dealers at higher, but still wholesale prices”). Brewer also fails to grasp that the bona fide wholesale price distinguishes between levels of distribution because the value of the end-product franchisors, such as Money Mailer, provided to

¹⁷ Brewer also dismissed the fact that it is difficult to ascertain the market value for printing at one level of distribution (sales of printing services from vendors to Money Mailer when Money Mailer provides myriad services of intangible value), but that the market value at the appropriate level of distribution (*i.e.*, the price charged by Money Mailer versus the price that a franchisee could obtain the same services in the market) is readily determinable from the prices that franchisees expect and agree to pay to Money Mailer or to other direct marketing companies such as Valpak. Response, pp. 22-23.

franchisees is more than the mere aggregation of raw material costs.

Fifth, Brewer similarly dismisses authority from Illinois and Michigan providing more detailed guidance on how to establish a bona fide wholesale price. Opening Brief, § VI.A.4.b. The Attorneys General of both these states, in efforts to clarify their respective franchise protection acts, made it explicit that the bona fide wholesale price is determined by looking to the market price at a comparable level of distribution. *Id.* Brewer hasn't provided any authority from any jurisdiction which endorses his, or any other, approach to establishing the bona fide wholesale price.

Sixth, Brewer claims that looking to antitrust law to give meaning to .180(2)(d) is "incorrect" because antitrust law is only referenced in .180(2)(b). Response, p. 22. But, Brewer ignores the fact that .180(2)(d)'s prohibition on unreasonable prices deals directly with "control of supply" abuses, which are based on antitrust laws. Chisum, pp. 315, 372. He also ignores the fact that antitrust law underpins nearly all of .180's rights and prohibitions. *See generally id.*; Fletcher, app. I, p. 7; Douglas Berry, et al., *State Regulation of Franchising: The Washington Experience Revisited*, 32 Seattle U. L. Rev. 811, 879 (2009). As a result, antitrust law is appropriate to guide interpretation and application of FIPA, and it clearly disfavors the creation of any *per se* rules on setting prices. Opening Brief, § VI.C.2.

Finally, as an aside, Brewer dismisses, and even discredits,

commentators on FIPA, particularly Douglas Berry and his analysis of .180(2)(d), because he is supposedly biased against franchisees. Response Brief, p. 11, n.7 (claiming Mr. Berry represents franchisors and therefore has “skin in the game”). However, Brewer himself trusted Mr. Berry because he hired the commentator as his attorney to assist him in becoming a Money Mailer franchisee, and never once complained about bias in his representation. Dkt. 195-1, p. 12. Mr. Berry reviewed Money Mailer’s franchise agreement and FDD with Brewer, and he cautioned Brewer of the inherent risks of starting his own business as a franchisee. *Id.*

With no analytical framework for determining “fair and reasonable” pricing, Brewer leaves this Court with nothing but his *per se* rule: FIPA prohibits mark-ups of any kind regardless of whether the resulting price is a bona fide wholesale price. That is not Washington law.

III. REQUEST TO STRIKE/RESPONSE TO SANCTIONS

A. Brewer’s Statement of the Case Relies on Statements Unsupported by the Certified Record, which should be Stricken.

RAP 10.3(a)(5) requires each factual statement contained in the statement of the case to be accompanied by a citation to the record. The court may, among other remedies, strike from the record any statements unsupported by reference to the record or by citation of authority. *See, e.g., Nelson v. McGoldrick*, 127 Wn.2d 124, 141, 896 P.2d 1258 (1995).

Brewer's Statement of the Case repeatedly asserts facts which are unsupported by the certified record or without any citation whatsoever.

For example, in subsection C of Brewer's Statement of the Case, the entire second paragraph is comprised of a series of factual assertions, all of which are completely unaccompanied by *any* citation. Response, p. 9. The final paragraph of the same section asserts that "[i]t is undisputed that, had Mr. Brewer known about that he was paying prices inflated beyond wholesale, he would not have become a franchisee." *Id.*, p. 10. Brewer cites, without reference to a specific page or paragraph, to Dkt. 105, which does not in any way support Brewer's assertion that this was undisputed. *Id.* Money Mailer has actually disputed this contention at length. Dkt. 200, pp. 17-18. Each of Brewer's unsupported assertions violates RAP 10.3(a)(5) and should be stricken.

B. Brewer's Request for Sanctions is Without Merit and Should be Denied.

Brewer's request for sanctions under RAP 18.9 is without basis in law or fact, and should be denied. RAP 18.9 states that using the appellate procedure for the purpose of delay, filing a frivolous appeal, or failure to comply with the rules of appellate procedure may result in sanctions. RAP 18.9(a); *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 340, 798 P.2d 1155 (1990) ("A frivolous action is one that cannot be supported by any rational

argument on the law or facts”).

Brewer’s entire complaint is that Money Mailer cites to a source entitled “Wash. Franchise Investment Protection Act Legislative History, 1970-1971” for its arguments relating to the legislative history of FIPA. Response, p. 27. The source in question is a paper by James Fletcher, who—as Brewer admits in a footnote—was a *draftsman* of FIPA, and the thesis “contains the successive drafts of the various bills proposed with comments thereon.” *Id.*, n.16 (quoting Chisum, *State Regulation of Franchising*, 48 Wash. L. Rev. at 334 n.211).

Despite being an unpublished thesis, Fletcher’s paper is widely cited by academic authors, legal briefs, and even Washington courts themselves, and is frequently referred to as the legislative history in these contexts. *See, e.g.*, Berry, 32 Seattle U. L. Rev. at 814 (citing to Fletcher for discussion of legislative history and intent); Daniel Oates, et al., *A State’s Reach Cannot Exceed its Grasp: Territorial Limitations on State Franchise Statutes*, 37 Fran. L. J. 2, 185, 195 n.7 (2017) (citing to Fletcher’s paper for FIPA legislative history); *Lobdell*, 33 Wn. App. at 893. In fact, in his attempt to discredit Fletcher with a Chisum quote, Brewer omits a key sentence: “For a detailed description of the legislative history of the Act, *see* J. Fletcher, Franchise Investment Protection Act, June 1971...” *Compare* Chisum at 334 n.211 with Response p. 27, n.16.

Money Mailer's supposed misrepresentation of Fletcher's position is also without merit. Money Mailer's brief *directly quotes* Fletcher's paper, not misquotes it as Brewer alleges. Opening Brief, p. 20 (quoting Fletcher, p. 49). Brewer claims that Money Mailer omitted a portion of Fletcher's discussion on the preceding page, but the preceding page is consistent with Money Mailer's assertions. *Compare* Response, p. 28 *with* Opening Brief, p. 20. There is nothing in this section, or anywhere else in Fletcher's thesis, to substantiate Brewer's allegation that Money Mailer was somehow misleading in its reference to Fletcher.

Brewer has no good faith basis for his sanctions request, and Money Mailer therefore respectfully requests that the Court deny it.

IV. CONCLUSION

For the reasons described above, Money Mailer respectfully requests that this Court answer both certified questions in the negative.

RESPECTFULLY SUBMITTED this 3rd day of December, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of December, 2018, 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:

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