

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
11/6/2018 4:03 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

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MONEY MAILER, LLC,  
Plaintiff,

v.

WADE G. BREWER,  
Defendant

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WADE G. BREWER,  
Counterclaim Plaintiff,

v.

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

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APPELLANTS' OPENING BRIEF  
ON CERTIFIED QUESTIONS

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Appellant Money Mailer, LLC and Money Mailer Franchise Corp.

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## I. INTRODUCTION

This case is about establishing the meaning of “*a fair and reasonable price*” under Washington’s Franchise Investment Protection Act (“FIPA”). Appellants Money Mailer, LLC and Money Mailer Franchise Corp. (collectively, “Appellant” or “Money Mailer”), consistent with Washington law, charged reasonable prices for printing based on costs that a franchisee would be required to pay on the open market for comparable printing services. Washington law recognizes that it is this market price available to the franchisee, rather than a price available to a franchisor or a price prescribed by a court, that determines whether goods and services are fairly and reasonably priced. This method protects franchisees from paying more for goods and services sold under their franchising agreements than they would be able to purchase on the open market.

The United States District Court for the Western District of Washington (“District Court”) presents two certified questions concerning the proper basis for determining whether a price for goods or services a franchisee purchases from a franchisor is fair and reasonable pursuant to FIPA’s reasonable price provision, RCW 19.100.180(2)(d). The District Court’s certification order (Dkt. 223) articulated a novel approach to determining the meaning of fair and reasonable pricing, an approach that clearly runs contrary to Washington law:

Underlying all of Money Mailer's arguments is its contention that its charges for printing services were fair and reasonable because they approximate what other franchisors in the industry charge and/or what Brewer would have had to pay if he had individually contracted for the services from a third-party vendor. Money Mailer misses the point. In the circumstances presented here, ***the relevant inquiry is not what other franchisors are charging for similar services (other franchisors may similarly be overcharging franchisees) or even what an individual franchisee could negotiate on the open market...the fair and reasonable costs of the services were established by what Money Mailer was actually paying for the printing services.***

Dkt. 223, p. 2 (emphasis added). Washington law dictates just the opposite: the law *does* require an examination of the market price at a comparable level of distribution to the franchisee, *not* to the franchisor; the market price at a comparable level of distribution is *precisely* what establishes a “fair and reasonable price” under FIPA, including RCW 19.100.180(2)(d).

The terms of the statute, the legislative history for the statute, and cases interpreting the terms of the statute all uniformly look to the market price at a comparable level of distribution in order to determine the “bona fide wholesale price” or the “fair market price” – *i.e.*, the fair and reasonable price – for those goods. Nothing in the statute, its legislative history, or the case law instructs a comparison of the price the franchisor charged the franchisee versus the cost at which the franchisor obtained the goods or services. Looking to the market price at a comparative level of distribution is not only consistent with every previous decision regarding fair prices

under FIPA and related laws, it also accomplishes FIPA’s goal of protecting franchisees from paying more for goods and services under their franchise agreement than they pay for such goods and services on the open market.

Applying the proper definition of “a fair and reasonable price,” the record before this Court demonstrates that Money Mailer did not violate FIPA in charging the costs of printing advertisements to its former franchisee, Respondent Wade G. Brewer (“Brewer” or “Respondent”). The record establishes that Money Mailer charged Brewer the market rates – in fact, less than market rates – for the printing at issue. To affirm the District Court’s legal analysis would amount to rewriting FIPA in a manner contrary to the legislature’s intent. The market, not the courts, is to establish fair and reasonable pricing.

## **II. CERTIFIED QUESTIONS**

The District Court certified the following two questions for review:

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

Under Washington law the answer to the first question must be “no.”

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

Under Washington law the answer to the second question must be “no.”

### **III. STANDARD OF REVIEW**

Certified questions from a federal court are questions of law that the Court reviews de novo. *In re F5 Networks, Inc.*, 166 Wn.2d 229, 236, 207 P.3d 433 (2009). The legal issues are not considered in the abstract but instead on the certified record that the federal court provides. RCW 2.60.030(2); *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 126, 196 P.3d 664 (2008). The Court may also reformulate the certified question. *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 580, 397 P.3d 120, 122 (2017); *Allen v. Dameron*, 187 Wn.2d 692, 701, 389 P.3d 487 (2017).

### **IV. STATEMENT OF THE CASE**

#### **Factual Summary**

#### **Money Mailer’s Direct Marketing Franchise System**

Money Mailer is a 39-year-old envelope-based direct marketing company that provides local businesses (e.g., pizza shop, dry cleaner,

contractor, insurance agent) the ability to obtain targeted advertising in their own local market or in a larger area (*e.g.*, city-wide, county-wide, state-wide, region-wide, or country-wide). Money Mailer reaches these local business through its nationwide Money Mailer franchise system, in which franchisees sell these local businesses advertisements that are placed in the Money Mailer “shared” direct mail envelope product. Dkt. 125, ¶ 2. The “shared” direct mail envelope contains advertisements from multiple businesses in a single envelope. *Id.* Shared direct mail offers a cost advantage to the advertiser in that the cost of postage, freight, envelopes, inserting, and addressing are shared by between the businesses purchasing ads. *Id.* The success of both the franchisees and Money Mailer depends on a shared mail production system that can timely produce the highest quality shared mail product at the lowest possible cost. *Id.* As a pioneer in the direct mail industry for more than 39 years, Money Mailer has created such a system. *Id.*, ¶ 4.

Money Mailer currently has a franchise network of over 160 franchisees operating in approximately 35 different states. *Id.* Franchisees operate franchises ranging in size from four to over 180 “zones.” A zone is comprised of 10,000 households within specified geographic boundaries. *Id.* ¶ 5. The objective is to identify 10,000-household zones with optimal

demographics (home ownership, household income, etc.) to increase the response potential for the advertisers. *Id.*

Franchisees typically send out mailings 12 times per year (monthly) to their zones. *Id.* ¶ 6. Each zone that is mailed contains a unique set of advertisements from businesses likely to be relevant to the applicable households in that zone. *Id.* ¶ 9. A franchisee consults with local business advertisers to help them target where their best customers likely reside, and to sell advertisements into those zones (Money Mailer has developed and offers franchisees a proprietary software tool called SmartZones® to do this). *Id.* Depending on the size and type of advertiser and the customers it wishes to reach, an advertiser may choose to advertise in only one zone, all zones, or even in zones that are operated by another franchisee. Money Mailer's zones cover most of the metropolitan areas in the United States, allowing advertisers more options to reach their target consumers. *Id.*

In 2016, Money Mailer mailed to approximately 18,100 zones (of 10,000 households per zone) or approximately 1,500 zones per month. *Id.*, ¶ 12. Each envelope contained an average of 36 unique ads. Accordingly, Money Mailer produced more than 6.5 billion ads mailed to 180 million mailboxes throughout the year. *Id.*

Franchisees generate revenues by selling spots to their local customers. *Id.* A “spot” is an ad per zone.<sup>1</sup> These revenues serve to cover both the “fixed” and “variable” costs of the mailing, along with profit for the franchisee. *Id.*, ¶ 8. Fixed costs include postage, freight (to ship mailings to USPS for delivery), envelopes, mailing lists, addressing of envelopes, and inserting the advertisements into the envelopes. *Id.* These costs are “fixed” because they are a set amount per zone, regardless of the number of spots that are included in the mailing. *Id.* Variable costs include the cost of printing services. *Id.* They are “variable” because the costs are determined by the number of “spots” the franchisee sells. *Id.* The lower the fixed costs, the fewer spots a franchisee must sell to pay for the costs of each mailing and begin generating gross profit. *Id.* The economics of shared mailing can be likened to operating an airplane – fixed costs are the same whether there are 2 ads (passengers) or 20 ads in the envelope. The key drivers of gross profit – the number of spots sold and retail spot price – are in the franchisee’s sole control. *Id.*, ¶ 8.

Money Mailer franchisees are also able to generate profit by cross-selling ads into other franchisees territories, and from local and national ads sold by Money Mailer and other franchisees into their zones. *Id.*

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<sup>1</sup> So, for example, if the local pizza shop buys an ad and places it in three zones, the pizza shop is buying three “spots” for distribution of an ad into 30,000 households.

Money Mailer's primary gross profit generator mirrors that of the franchisee – spot sales. Therefore, Money Mailer and the franchisees' interests are aligned – the more spots a franchisee sells, the more revenue they generate for themselves, and the more Money Mailer also makes in variable costs of printing. Dkt. 125, ¶¶ 3, 8. Money Mailer is highly sensitive to the market prices for its variable per-spot charges, and sets those charges to allow both parties in the distribution chain – the franchisee and Money Mailer – to earn a fair and reasonable profit for their respective investments and efforts for each mailing. *Id.*

The success of Money Mailer's system requires that all of the ads from local businesses across the country are processed, printed, and organized so that each zone has the correct number and type of ad that the local businesses ordered. *Id.*, ¶ 13. Money Mailer has developed its own proprietary system – in fact its own production algorithm – to stage ads for printing, print and “finish” them for efficient inserting, and insert the ads specifically to the correct zones – a print-to-insert workflow process. *Id.*; Dkt. 124, ¶¶ 3-8. Money Mailer created the workflow and is responsible for managing the complex logistics required to ensure that all advertisements go into the correct zone for each mailing (including the franchisee's own local ads, the cross-sale out ads, the cross-sale in ads, and national ads). Dkt. 124, ¶¶ 5-8; Dkt. 125, ¶ 12-13. As a result of its

proprietary system, Money Mailer achieves nearly perfect accuracy in the inserting of billions of ads into all of its zones. *Id.*

The print-to-insert process developed by Money Mailer is not a standalone process, but requires a complex interaction between Money Mailer franchisees all using Money Mailer's proprietary software; trained and technically capable vendors; special printing and inserting equipment; and specifically dedicated personnel and resources from Money Mailer. *Id.*, ¶¶ 4-8. Because this production process is integral to the Money Mailer franchise opportunity, Money Mailer requires that all mailings be handled by Money Mailer. *Id.* ¶ 3. Only Money Mailer franchisees are permitted to use the proprietary process. *Id.*

Money Mailer clearly discloses the pricing it charges for fixed and variable costs for the mailings in its Franchise Disclosure Document ("FDD"), which franchisees receive and agree to *prior* to signing the Franchise Agreement with Money Mailer. Dkt. 122, p. 6. Importantly, franchisees would not be able to obtain printing services to integrate with their respective Money Mailer franchises for cheaper prices in the open market. *Id.* at ¶¶ 9-11. Money Mailer's most direct competitor (*i.e.*, franchisor of envelope-based direct marketing) is Valpak. Dkt. 122, p. 15; Dkt. 125, ¶ 25. Valpak's comparable printing services are directly in line with the prices Money Mailer charges its franchisees. *Id.*

In short, Money Mailer’s print-to-insert workflow is far more than the single line-item ink-to-paper printing cost that the District Court pointed to as being “2X” of what it costs Money Mailer. The District Court disregarded the totality of the print-to-insert workflow, including accurate cross-sales in and out, national spots, and local spots, and the resources and investments that Money Mailer dedicated to the print-to-insert workflow, that form the very essence of the Money Mailer franchise system.

*Brewer’s Franchise*

Brewer became a Money Mailer franchisee in 2011 after signing the Franchise Agreement and other related agreements (Franchise Agreement). Dkt. 12, ¶ 10. Brewer certified that he received and reviewed the FDD weeks prior to signing the Franchise Agreement with Money Mailer. Dkt. 122, p. 6. Prior to becoming a franchisee, Brewer emphasized his extensive small business and marketing experience. *Id.* Brewer also consulted with Money Mailer’s largest franchisees, including his good friend and California franchisee, Charles Gourley, who shared with him extensive information about the workings of a Money Mailer franchise. Dkt. 125, ¶ 7. Prior to becoming a franchisee, Brewer was clearly notified of the prices he would pay for Money Mailer’s shared mailings, including the price of printing. Detailed cost invoices Brewer received from Gourley, and the FDD, which Brewer certified as having read before becoming a franchisee,

both clearly stated that the print production and services costs would be approximately \$115/per spot per mailing. Dkt. 122, p. 6.

Money Mailer had challenges with Brewer as a franchisee, but attempted throughout the four years that he was a franchisee to work collaboratively with Brewer to make his franchise profitable. *Id.*, p. 6. Brewer sold too few ads to his customers. *Id.* As a result, Brewer made far less in profit than comparably sized franchises. *Id.* In addition to Brewer's troubles selling ads and generating revenue, his business was failing because he was constantly extracting cash from his franchise for his own personal use. Dkt. 193, p. 3.

Brewer operated his franchise for about four years, and during that time he collected revenue from selling ads to his local customers – ads that Money Mailer processed, organized, and delivered on Brewer's behalf. *Id.*, pp. 2-3. However, Brewer largely did not pay the fixed and variable costs or fees for these mailings, including envelopes, insertion, addressing, and particularly, printing. *Id.*; Dkt. 125, ¶ 16.

Money Mailer's franchise-wide profit margins was a modest 2% to 5% during the time Brewer was a franchisee. Dkt. 122, p. 6. In fact, Brewer was a drain on the business. Even if Money Mailer is able to collect the amounts that Brewer continues to owe the company, Money Mailer will still lose nearly \$760,000 from Brewer's franchise. *Id.*; Dkt. 125, ¶ 16.

On May 29, 2015, Money Mailer delivered a letter to Brewer giving him notice of default under the Franchise Agreement and providing thirty days to pay a cure amount of \$800,000, a fraction of Brewer's combined total outstanding debts of \$1,671,637.90 to Money Mailer. *Id.* Money Mailer extended this deadline to pursue negotiations with Brewer's counsel. *Id.* These efforts proved unsuccessful, and on July 31, 2015 Money Mailer filed its complaint in the District Court for breach of contract and money due and owing. *Id.* Brewer remained a franchisee until Money Mailer terminated his franchise on August 4, 2015. *Id.*

#### **Summary Judgment**

On October 26, 2017, Brewer filed a motion for partial summary judgement ("Motion"). Dkt. 105. On November 13, 2017, Money Mailer filed its opposition, Dkt. 122 ("Opposition"), with supporting declarations from Dale Martin, Money Mailer, LLC's Director of Plant Operations (Dkt. 124) and Ryan Carr, Money Mailer's Chief Financial Officer (Dkt. 125). The Opposition and supporting declarations showed that Money Mailer worked closely with its third-party vendor to provide the printing services, which required a vast array of logistics, support, expertise, and proprietary ordering, organizing, and finishing services that extended well beyond merely putting ink on paper. *Id.*

Money Mailer further showed that the printing charges to Brewer for these services were directly in line with market rates for wholesale coupon printing, and that Brewer would not have been able to obtain the same services for his Money Mailer franchise for less money from another vendor. *See, e.g.*, Dkt. 124, ¶¶ 9-11. Oral arguments took place on June 6, 2018, and the Court issued the Order on June 28, 2016. Dkt. 177. The Order held that Brewer established that Money Mailer marked up the cost of the printing services sold to Brewer two-fold in violation of RCW 19.100.180(2)(d). *Id.*, pp. 5-6.

Money Mailer moved for certification of the Order for immediate appeal (or, in the alternative, reconsideration). Dkt. 180. Money Mailer argued in its motion that the Order failed to account for, let alone view in a light most favorable to Money Mailer, evidence that: (1) the market for comparable printing services is consistent with the prices charged by Money Mailer; (2) the printing prices were fair and reasonable (and agreed to by Brewer before he became a franchisee); and (3) Brewer could not obtain comparable printing services at a lower cost from any other entity or individual on the open market. Money Mailer further pointed out that the District Court acknowledged that an undisputed cost for printing services had not even been established. Dkt. 177, n.2. The District Court thereafter certified two questions to this Court. Dkt. 223.

## V. SUMMARY OF ARGUMENT

RCW 19.100.180(2)(d) states:

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

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

Under this provision, the reasonableness of prices of goods and services sold to franchisees must be determined by looking to the market rate for the goods and services, and not by creating a *per se* limitation on what the franchisor charged. The market price that needs to be analyzed is the bona fide wholesale price at the comparable level of distribution – that is, the market rate at which a *franchisee* can obtain the same or similar goods or services, not the cost at which the franchisor can access similar goods or services. The bona fide wholesale price at the comparable level of distribution approach is consistent with the language of the statute and with its legislative history. It is also the approach taken in every single Washington case examining bona fide wholesale pricing under FIPA.

Applied to this case, “fair and reasonable price” under the statute means the bona fide wholesale price (or fair market price) of the goods available to those similarly situated to Brewer as established by the envelope-based direct marketing industry, which is the relevant market.

Because the certified questions both rely on either an improper point of comparison (*i.e.*, the cost to the franchisor, instead of the market price available to the franchisee) or on an improper *per se* limit on profit margin, the answer to both of the questions must be “no.” Furthermore, the definition of “fair and reasonable price” requires an intensive factual inquiry into the bona fide wholesale price at a comparable level of distribution that precludes summary judgment in Brewer’s favor.

## VI. ARGUMENT

### A. “Fair and Reasonable Price” Means “Bona Fide Wholesale Price” at a Comparable Level of Distribution.

The District Court’s two certified questions to this Court are based upon RCW 19.100.180(2)(d)’s prohibition on charging a franchisee more than a fair and reasonable price for goods or services. Both certified questions require a clear legal definition of “fair and reasonable price” within the meaning of FIPA. Only then can the Court address the specific questions certified by the District Court.

The District Court held that Money Mailer violated RCW 19.100.180(2)(d) by charging Brewer “twice” the amount for printing that Money Mailer was charged for printing services. Dkt. 223, p. 2-3. The District Court held that examining the price at which Brewer could obtain the same printing services was irrelevant. *Id.* Setting aside the factual

disputes as to the amount Money Mailer actually paid for the full, integrated print-to-insert process, which it then charged to Brewer, the District Court's order rejected Washington law's methodology for determining fair and reasonable prices (bona fide wholesale prices at the comparable level of distribution) in favor of an imputed *per se* rule for prices (the price charged to franchisees should be the same price the franchisor paid for those services as a matter of law). *Id.*; *see also* Dkt. 177 p. 5. Washington law holds to the contrary.

#### **1. Legal Standard for Statutory Interpretation.**

The meaning of a statute is a question of law reviewed *de novo*. *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001). The Court's "fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4, 9 (2002). The statute's plain meaning should be derived from what the legislature has said in its enactments, including "all that the legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* However, if the statute in question remains subject to more than one reasonable meaning after this analysis, the statute is ambiguous and it is appropriate to resort to aids of construction, including

legislative history and relevant case law to assist in interpreting it. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001); *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66, 70 (2002).

RCW 19.100.180(2)(d) does not define the term “price,” much less “fair and reasonable price.” *See* RCW 19.100.180(2)(d); RCW 19.100.010 (FIPA Definitions). Nor are there dictionary definitions for “fair and reasonable price.” *See generally* Webster’s Third New International Dictionary 1804 (3d ed. 1993); Black’s Law Dictionary, 10th ed. (2014). The leading commentator on FIPA notes that “fair and reasonable price” is a “vague term.” Chisum, *State Regulation of Franchising: The Washington Experience*, 48 Wash. L. Rev. 291, 372, n.421. (1973).

## **2. “Fair and Reasonable Price” Means “Bona Fide Wholesale Price.”**

Other provisions of FIPA help define “fair and reasonable price.” For example, the definitions section, while not defining “fair and reasonable price” as one of the terms, does provide guidance that the phrase should be read as synonymous with “bona fide wholesale price.” RCW 19.100.010(8) defines “Franchise Fee” under FIPA. The definition includes a list of exceptions, *i.e.*, certain payments that, while required by the franchisor as part of operating a franchise, are not considered franchise fees. The first exception reads as follows: “the following shall not be considered payment

of a franchise fee: (a) The purchase or agreement to purchase goods at a bona fide wholesale price...” *Id.*<sup>2</sup> Therefore, RCW 19.100.010(8) recognizes that when prices for goods and services are set appropriately (*i.e.*, at a bona fide wholesale price), those prices are not considered a franchise fee. *Id.*

This Court noted this same parallel of “bona fide wholesale price” under Section .010(8)<sup>3</sup> and “fair and reasonable price” under Section .180(2)(d)<sup>4</sup> in *Nelson v. Nat'l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 842 P.2d 473 (1992). The appellant in *Nelson* argued that, because he had admittedly charged the franchisee more than a bona fide wholesale price for pizza ingredients, his charges should be considered a franchise fee because the prices did not meet the exception for franchise fee under Section .010(8). *Id.* 120 Wn.2d at 388.

The Court rejected the franchisor’s reasoning, finding that “fair and reasonable” under Section .180(2)(d) should be read in harmony with

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<sup>2</sup> Washington’s “Franchise Fee” definition is quite similar to how “Franchise Fee” is typically defined by other states. *See e.g.* Cal. Corp. Code § 31011, Cal. Bus. & Prof. Code § 20007, 14 Ill. Admin. Code tit. 14, § 200.106(a), Minn. Stat. § 80C.01 (Subd. 9).

<sup>3</sup> RCW 19.100.010(8) (Franchise Fees) was numbered RCW 19.100.010(11) prior to the 1991 amendment; it was then changed to (12) before being numbered (8).

<sup>4</sup> *Nelson* did not find that the marked-up pizza ingredients were sold at unfair and unreasonable prices. It only concluded that an arbitrary mark-up on goods or services sold to a franchisee is not permitted under FIPA as an undisclosed franchise fee. 120 Wn. 2d 391-392. Indeed, the franchisor, by relying on the exception to Franchise Fees under Section .010(8) effectively conceded that he was charging for pizza ingredients at a price higher than the bona fide wholesale price. *Id.* at 388.

.010(8) in view of the statute’s overall purpose. *Id.* at 392; *see also* Berry, *State Regulation of Franchising: The Washington Experience Revisited*, 32 Seattle U. L. Rev. 811, 881 (2009) (noting that the *Nelson* Court “seemed to assume that a ‘fair and reasonable price’ means a ‘bona fide wholesale price’”). Looking at FIPA as a whole, “fair and reasonable price” means “bona fide wholesale price.”

However, FIPA does not define “bona fide wholesale price.” *See* RCW 19.100.010(8). Nor does FIPA describe how to determine whether a franchisor has exceeded a bona fide wholesale price. *Id.*<sup>5</sup> It is appropriate, therefore, to examine the legislative history to define “bona fide wholesale price” and “fair and reasonable price.” *Campbell & Gwinn*, 146 Wn.2d at 12, 43 P.3d at 10 (2002).

### **3. “Bona Fide Wholesale Price” Means the Fair Market Price As Determined by the Relevant Industry.**

While the legislative history on FIPA’s fair and reasonable price provision is not detailed or in-depth, the legislature’s intent is clear that a *fair market price* should be used to determine what a fair and reasonable price or bona fide wholesale price should be. First, the legislature equated “bona fide wholesale price” to “fair market price” in describing the

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<sup>5</sup> *Nelson* does not provide a definition of, or explicit guidance on how to determine, a bona fide wholesale price either. *Nelson*, 120 Wn.2d. at 392.

definition of “franchise fee” under what is now RCW 19.100.010(8). The legislature stated the definition of “Franchise Fee”:

... prohibits the franchisor from charging more than a bona fide wholesale price *or a fair market price* for the respective goods or services mentioned therein ...

FIPA, legislative history, 1970-1971, p. 49 (emphasis added).

The legislative history also explains how the legislature thought to establish reasonable price. The legislature stated that the section prohibiting unfair and unreasonable prices (now contained in Section .180(2)(d)) was being amended in a third draft of the bill to “more clearly reflect [its] intent” of allowing:

...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.

FIPA, legislative history, 1970-1971, p. 37. Therefore, the legislature clearly stated that an industry’s own standards and mechanisms of supply and demand demonstrate what a fair and reasonable price should be based on the relevant market. This is recognized as well by franchise commentator Prof. David Chisum when he notes, “If the franchisor sells supplies directly [to a franchisee], only a ‘reasonable price’ no higher than market price can be extracted.” Chisum, 48 Wash. L. Rev. at 373.

The legislative history also reveals the clear intent of the legislature to establish fair pricing by examining the relevant market “rather than to prescribe a price at which the franchisor can sell products or services to the franchisee.” FIPA, legislative history, 1970-1971, p. 37; *see also id.*, p. 49 (noting that the legislature was seeking to avoid “unilaterally set[ting] prohibitive pricing”). Therefore, the legislature specifically rejected setting a *per se* rule for determining an unreasonable or unfair price.

The legislative history shows that the market will establish the fair and reasonable price/bona fide wholesale price of goods and services sold by franchisors to franchisees. Here, Money Mailer provided evidence of the market printing price in the direct-mail industry available to those like Brewer. Money Mailer showed that its main competitor, Valpak, charged printing prices to those similarly situated to Brewer that were directly in line with the amount Money Mailer charged. Dkt. 122, p. 15; Dkt. 125, ¶ 25. Further, Money Mailer presented unrebutted evidence that its franchisees – hundreds from across the country – established the fair market value by agreeing to pay Money Mailer’s printing prices after receiving full information as to the prices that would be required.<sup>6</sup> Dkt. 122, p. 6; Dkt. 125, ¶ 3-4; Dkt. 180, p. 7.

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<sup>6</sup> Fair market value is defined as “The price that a seller is willing to accept and buyer is willing to pay on the open market and in an arm’s-length transaction; the point at which supply and demand intersect.” Black’s Law Dictionary, 10th ed. (2014).

**4. “Bona Fide Wholesale Price” Means the Market Price at a Comparable Level of Distribution.**

The statutory language, legislative history, and leading commentator all suggest that fair and reasonable price is equated to bona fide wholesale price based on the fair market price. However, there can be multiple wholesale prices for the same goods with higher or lower values depending on the levels of distribution. *See, e.g., Bryant Corp. v. Outboard Marine Corp.*, No. C93-1365R, 1994 U.S. Dist. LEXIS 18371, at \*7 (W.D. Wash. Sep. 29, 1994) (“Bryant paid wholesale prices for the products it purchased from OMC, which Bryant in turn sold to its dealers at higher, but still wholesale prices” who sold at retail to consumers). Which wholesale price is properly examined? Washington Courts and other states’ franchise laws examine wholesale price from a comparable level of distribution.

**(a) Washington Courts Look to the Market Price at the Comparable Level of Distribution to Determine the “Bona Fide Wholesale Price” and “Fair and Reasonable Price.”**

While FIPA and the legislative history do not provide explicit guidance or direction as to which level of distribution should be considered in determining the bona fide wholesale price (*i.e.*, the franchisor-to-franchisee level rather than the vendor-to-franchisor level), every case Appellants have found in Washington analyzing the appropriateness of prices to a franchisee or would-be franchisee under FIPA has looked to the

fair market price at the comparable level of distribution, not the price available to the franchisor. In fact, the District Court's order is the only case to set market price based on a comparison of the price charged to a franchisee versus the price at which the franchisor obtained the goods or services (*i.e.*, comparing the price at which Money Mailer purportedly obtained printing versus the price at which Brewer could obtain). Dkt. 223.

A comparable level of distribution compares prices from the wholesale vantage point of the franchisee – procuring the goods from the franchisor on the one hand, or procuring those same goods from the open market on the other. *Nelson* looked to the comparable level of distribution to determine whether the franchisee was purchasing goods for more than a bona fide wholesale price. In *Nelson*, the franchisee was required to buy pizza ingredients from local food distributors. *Nelson*, 120 Wn.2d at 390. The franchisee determined what pizza ingredients it needed and then placed the wholesale order directly with the local distributor for those ingredients. *Id.* The franchisor would then step in to “mark up or ‘boost’ the wholesale price of the product by twenty percent (20%) and require that the [franchisee] pay this higher amount.” *Id.* This Court affirmed the trial court, not on the analysis of what is fair and reasonable, but on the analysis that the mark-up could not be called a “franchise fee” as a way of getting around the limitations of RCW 19.100.180(2)(d). *Id.*

It is nevertheless clear from *Nelson* what the comparable level of distribution for determining the bona fide wholesale price was: the wholesale price of goods at which the *franchisee* was able to obtain them. The franchisee could have obtained the pizza ingredients from the local distributor at wholesale cost. But because of the Total Requirement Agreement between the franchisor and franchisee, the franchisee was required to pay a 20% mark-up on the prices it was able to obtain in the market. The 20% mark-up, therefore, was by definition a price higher than the bona fide wholesale price, which the franchisor effectively admitted to by arguing that the cost should be considered a franchise fee. *Id.* at 388.

Other cases in Washington provide additional examples of courts examining the comparable level of distribution for purposes of determining whether the bona fide wholesale price was exceeded. For example, in *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1211 (9th Cir. 1983), the plaintiffs/putative franchisees alleged that they were in a franchise agreement with Mobil, in part, because they purchased motor oil above a bona fide wholesale price, and the excess price constituted a franchise fee. *Id.* at 1211. The court agreed. *Id.* at 1220. Unrebutted testimony showed that Mobil was selling its motor oil to the franchisees at a price “substantially above” the bona fide wholesale price available to those franchisees from independent distributors. *Id.* at 1211. The court in *Blanton*

was not at all concerned with the price Mobil paid for the motor oil; instead, it looked to the fair market price at a comparable level of distribution – what price did Mobil charge the plaintiffs versus what price plaintiffs could pay to purchase the same goods in the open market. *Id.* at 1211, 1220.

In *BP W. Coast Prods., LLC v. Shalabi*, No. C11-1341MJP, 2012 U.S. Dist. LEXIS 17027, at \*16 (W.D. Wash. Feb. 10, 2012) the court denied BP’s motion to dismiss because Shalabi pled facts that he was sold gas for more than a bona fide wholesale price. Once again, the court determined the bona fide wholesale price by looking at the market price at the comparable level of distribution as Shalabi. In that case, the court noted that “the fair market value is gauged as to similarly situated retailers” as Shalabi. *Id.* The court focused exclusively on the price available to comparable level of distributors, or as the court put it “similarly situated retailers,” and not the price at which BP acquired the goods. *Id.*; *see also Corp. v. Atl.-Richfield Co.*, 45 Wn. App. 563, 569, 726 P.2d 66, 69 (1986) (determined fair value of lease by looking to lease terms available to other similarly situated lessees, not the costs to lessors).

**(b) Other States’ Franchise Laws Explicitly Look to Comparable Level of Distribution to Determine the Bona Fide Wholesale Price.**

Most states have enacted some form of a franchise protection act, and have enacted provisions that prohibit unfair prices. Two such states,

Illinois and Michigan, can shed insight on the proper definition of fair and reasonable price.

The Illinois Franchise Disclosure Act (“IFDA”) 815 Ill. Comp. Stat. Ann. § 705/3 shares a similar definition of “franchise fee” as Washington. Illinois defines a franchise fee as “any fee or charge that a franchisee is required to pay directly or indirectly for the right to enter into a business or sell, resell, or distribute goods, services or franchises under an agreement” except for “the purchase or agreement to purchase goods for which there is an established market at a bona fide wholesale price.” 815 Ill. Comp. Stat. Ann. § 705/3(14)(c) and (f).

Like FIPA, Illinois’ IFDA did not define bona fide wholesale price or provide guidance on how to apply the term. As a result, the Illinois Attorney General promulgated a rule to help clarify what IFDA meant by the term “bona fide wholesale price.” 14 Ill. Admin. Code § 200.106. The Attorney General’s rule explicitly endorsed looking to the comparable level of distribution, the same approach taken in *Nelson*, *Shalabi*, and *Blanton*:

The Bona Fide Wholesale and Retail Price exceptions to franchise fee described in Section 3(14)(c) and (f) of the Act apply if the price charged constitutes a fair payment for goods purchased at a *comparable level of distribution*. No part of the price may be for the right to enter into the franchise business.

Ill. Admin. Code tit. 14, § 200.106 (emphasis added).

Michigan’s Franchise Investment Act also has a definition for franchise fee similar to FIPA and the IFDA, including an exemption from the franchise fee definition for the purchase of goods “at a bona fide wholesale price.” *Id.* 445.1503. Michigan similarly includes a definition of “bona fide wholesale price” as:

...a price which constitutes a fair payment for goods purchased *at a comparable level of distribution*.... Goods sold at a bona fide wholesale price may include, but are not limited to, goods sold to the franchisee for resale, as well as fixtures, equipment, raw materials, supplies, and other goods used by the franchisee in the conduct of the franchise business. The price charged for a trademarked product does not exceed its bona fide wholesale price merely because the price exceeds the wholesale price of nontrademarked products of comparable quality and specifications. If the trademarked product commands a premium price by virtue of the trademark it carries, the premium does not necessarily constitute the payment of a franchise fee. A payment made directly or indirectly by the franchisee to or for the benefit of the franchisor in excess of the bona fide wholesale price constitutes a franchise fee.... In a determination as to whether the price of goods arising from a marketing plan or system of a manufacturer, licensor, or a franchisor is a bona fide wholesale price, relevant cost, marketing, pricing, or payment information, among other factors, may be considered.

Mich. Admin. Code r. 445.101(6) (emphasis added).<sup>7</sup> Michigan’s definition expressly contemplates that the bona fide wholesale price for

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<sup>7</sup> Michigan and Illinois also share a recognition that a franchisor may even benefit from selling certain goods above a bona fide wholesale price if the premium is attributed to its goodwill and recognition. “The price charged for a trademarked product does not exceed its bona fide wholesale price merely because that price exceeds the wholesale price of non-trademarked products of comparable quality and specifications. If the trademarked product

goods shall be determined by looking to the comparable level of distribution, *i.e.* the price that the franchisee can obtain the goods at market. Michigan's case law further shows that a seller or franchisor is permitted to place a profit margin on goods so long as the marked-up price to the buyer or franchisee is the same or lower than the price available to similarly situated buyers.<sup>8</sup>

**(c) Public Policy Supports the Comparable Level of Distribution Approach.**

FIPA was designed to protect franchisees from abusive practices of franchisors. *See Dep't of Labor & Indus. v. Lyons Enters., Inc.*, 185 Wn.2d 721, 732, 374 P.3d 1097, 1102 (2016) ("When the legislature enacted FIPA, it created a comprehensive scheme for regulating franchising in Washington, and did so with the aim of protecting franchisees"). A franchisee should not be subjected to unfair treatment or abuse solely because of its position in a franchise relationship. Therefore, fairness is

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commands a premium price by virtue of the trademark it carries, such premium does not constitute the payment of a franchise fee." 14 Ill. Admin. Code tit. 14, § 200.106(b).

<sup>8</sup> Michigan recognizes that a franchisor can mark-up goods and still sell them at a bona fide wholesale price. *See Hamade v. Sunoco, Inc.*, 271 Mich. App. 145, 158, 721 N.W.2d 233, 243 (2006) (defendant's uncontroverted evidence that its goods were sold to plaintiff dealer at the same price that other dealers could obtain the goods established that its goods were sold at bona fide wholesale prices regardless of the fact that the goods were marked up); *Kenaya Wireless v. Ssmj*, No. 281649, 2009 Mich. App. LEXIS 692, at \*4 (Ct. App. Mar. 24, 2009) (defendant's affidavit showing its phones were sold to plaintiff at or below competitor's prices established that the phones were sold at a bona fide wholesale price, and "the fact that the phones were marked up does not prove that plaintiffs purchased the phones in excess of the bona fide wholesale price"). Appellants did not find cases in Washington where such an analysis was performed. Rather, the Washington cases did not examine the vendor-franchisor level of distribution.

measured from the franchisee's point of view. *Id.* The law is meant to even the playing field.

By applying a rule that looks to fair market pricing, FIPA carries out the intention of the legislature in protecting franchisees. Franchisees pay no more for goods and services than they would if they were to obtain those same goods and services from the open market. Conversely, applying a *per se* rule that limits a franchisor's ability to charge anything above the price they pay for goods and services would drive franchisors out of the Washington franchise market and provide fewer franchising opportunities for franchisees. First, a rule that looks to the franchisor's unit costs, rather than the franchisee's options in the open market, would subject franchisors in this State to costly litigation and invasive discovery, even if those goods and services are sold to franchisees at or below market.<sup>9</sup> Second, such a rule would discourage franchisors from investing in improvements and efficiencies of their franchise systems that are not captured in third-party cost metrics. More efficient and higher quality franchise systems benefit the franchisees, the franchisors and the public in general.

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<sup>9</sup> This is assuming that franchisors are even able to confidently calculate the exact costs of goods when they take part in the production of those goods and provide valuable experience, training, trade secrets, or other value that is difficult to calculate with exactness, like Money Mailer does here.

Additionally, Money Mailer's margin on printing, which is decidedly fair and reasonable, is far from an abuse of franchisees. Instead, it highlights the favorable public policy goal of aligning the interests between franchisors and their franchisees. Here, Money Mailer uses a franchise model that aligns its interests with the franchisees. Dkt. 122, p. 6; Dkt. 125, ¶¶ 3, 8. Money Mailer only succeeds when its franchisees succeed at increasing the variable – the number of spots sold. Dkt. 125, ¶¶ 3, 8. While the fixed costs that franchisees are required to pay remain the same with every mailing regardless of the number of spots sold, both the franchisees and Money Mailer begin to see profit when the franchisees start selling more spots. *Id.*

FIPA provides flexibility within franchising so that the franchisees and franchisors can create pricing and business models that make the most sense for their particular franchise systems. Berry, *State Regulation of Franchising: The Washington Experience Revisited*, 32 Seattle U. L. Rev. at n. 435. The flexibility granted by FIPA is also held in check by the statute's prohibition on franchisors selling goods or services to franchisees at prices higher than those available in the comparable market. The comparable level of distribution approach preserves market-based flexibility while protecting franchisees from paying more for goods and services than they are worth on the open market.

**B. The Answer to the First Certified Question is *No*: A Franchisee Should Not be Permitted to Look to the Franchisor's Costs to Determine the Reasonableness of Prices for Goods or Services.**

The first certified question asks:

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

Parsing through the complex wording and double negatives in the question reveals what is really at issue: can courts determine the reasonableness of prices charged to franchisees by ignoring the market price for comparable goods in favor of looking solely to the franchisor's costs for those goods. The answer is "no."

A fair and reasonable price/bona fide wholesale price/fair market price must be determined by comparing what the franchisor is charging for goods versus the price at which the franchisee could obtain comparable goods in the open market. Nowhere does RCW 19.100.180(2)(d), the rest of FIPA, or the legislative history instruct courts to look to a franchisor's costs of goods or services, or mark-up on goods or services, as a factor in establishing the fairness or reasonableness of the prices of goods and services sold to franchisees. Furthermore, the record in this case is replete with evidence of the relevant market price for the printing services at issue,

and there was no reason to ignore this evidence in determining a reasonable price. *See, e.g.*, Dkt. 124, ¶¶ 9-11, Dkt. 180.

**1. Brewer Failed to Provide Evidence of Market Price Based on a Comparable Level of Distribution.**

To establish that Money Mailer charged Brewer an unfair or unreasonable price for printing as part of its envelope-based direct marketing franchise, Brewer must produce uncontroverted evidence that Money Mailer charged Brewer more for its print-to-insert printing than Brewer could obtain those equivalent printing services in the envelope-based direct marketing market. Brewer did not meet this burden. Instead, Brewer claimed that the market rate for printing was irrelevant and pointed to only a single internal document to argue that Money Mailer was charging more than twice for printing what it was being charged by its print vendor. *See* Dkt. 186, p. 4. Therefore, Brewer, who had the burden of proof on his summary judgment motion, failed to establish the bona fide wholesale price or fair market price for the printing services in question. *Davis v. United States*, 854 F.3d 594, 598 (9th Cir. 2017).

Not only did Brewer fail to meet this evidentiary burden, but Brewer failed to rebut Money Mailer's evidence that it was charging the most competitive pricing possible for its franchisees, consistent with pricing charged by the other national, envelope-based direct marketing franchisor.

Dkt. 131, Dkt. 223. Instead, Brewer claimed Money Mailer's evidence that it charged a market rate was irrelevant. Dkt. 129, p. 11.

**2. Determining Fair Market Price with Dissimilar Levels of Distribution Requires Courts to Supplant the Market and Effectively Prescribe a *Per Se* Rule on Price.**

Comparing the prices for goods and services available to a uniquely positioned buyer with those prices available to wholesalers or franchisees at large is an apples to oranges comparison, and courts cannot bridge that gap without supplanting the mechanisms of supply and demand with judicially prescribed prices. Replacing the objective standard of the market with a court's subjective prescription directly contradicts the Washington legislature's stated intent.

The record demonstrates that Money Mailer is in a unique position to source printing as a part of its total print-to-insert workflow for its franchisees. Dkt. 124. Not only did Money Mailer leverage its decades of direct mail printing experience to create a unique and streamlined printing process with its printer, it also expended large resources to train and supply that printer so that it could perform the printing jobs in a manner to ensure speedy and accurate production of millions of varied mailings each month. *Id.* Money Mailer also works closely with its printer to ensure that orders (including cross-sales between franchisees and also Money Mailer's national ads sales team) are processed in a seamless, accurate and highly

efficient manner. *Id.* The only way Money Mailer's printer was even able to produce the printed goods and services was because Money Mailer trained, financed, and supervised the printer in its production of the final printed product. *Id.*

As a result of its investments and ongoing unique role in the printing process, Money Mailer is in a unique position to obtain the printing goods and services at a price that is simply not available to any other wholesalers or franchisees. *Id.* at ¶¶ 9-11; *see also* Dkt. 124, ¶ 4.<sup>10</sup> Money Mailer is then producing an end product – a highly integrated, accurate, high quality envelope of hyperlocal advertisements bearing Money Mailer's trademark. Money Mailer provided evidence that hundreds of franchisees across the country agreed to pay Money Mailer's prices, including printing prices, to obtain and sell the Money Market envelope of ads. Dkt. 125, ¶ 3-4; Dkt. 180, p. 7. Money Mailer also provided undisputed evidence showing that the price of comparable printing services sold by Money Mailer's main competitor, Valpak, are directly in line with the prices Money Mailer charges its franchisees. Dkt. 122, p. 15; Dkt. 125, ¶ 25.

Brewer presented no evidence that he could in fact obtain these prices on his own from any printer. Brewer instead claimed that the market

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<sup>10</sup> The sworn evidence supplied by Mr. Martin, Money Mailer's Director of Plant Operations was uncontroverted.

price for printing was immaterial by stating, “Brewer does not need wholesale or market prices to show that the 110% to 151% markups he was charged were unreasonable.” Dkt. 129, p. 11. The only testimony that Brewer provided on costs of printing services was rebutted by Brewer’s sole source of evidence, Wade Leitch. Mr. Leitch, who was deposed following Brewer’s motion for summary judgment, admitted that the printing services he quoted were not for comparable printing and could not be used as a replacement to Money Mailer’s printing without significant additional costs. Dkt. 180, pp. 11-12.

The District Court ignored Money Mailer’s evidence showing its prices to Brewer were in line with bona fide wholesale prices (prices available at a comparable level of distribution as Brewer), and it accepted Brewer’s argument that evidence of the bona fide wholesale price was irrelevant. Dkt. 223, p. 2. The District Court’s summary judgment and certification orders seek to create a new legal analysis that runs contrary to FIPA’s language, the legislative history, and prior court decisions.

The District Court’s certification order specifically rejects the comparisons normally performed by Washington courts by holding that “the relevant market is not what other franchisors are charging for similar

services (other franchisors may similarly be overcharging franchisees)<sup>11</sup> or even what an individual franchisee could negotiate on the open market.” Dkt. 223, p. 2. By failing to compare the relevant market, the District Court could not establish a bona fide wholesale price. *Id.*; compare *Coyne’s & Co. v. Enesco, LLC*, 553 F.3d 1128, 1132 (8th Cir. 2009) (determining whether a mark-up is a bona fide wholesale price or an indirect franchise fee under Minnesota’s franchise act “is a fact-specific inquiry”). The District Court resorted instead to comparing what Money Mailer paid its print vendor, and called that dissimilar level of distribution the “market” for printing services to Brewer. Dkt. 223. That was contrary to Washington law.

Neither Brewer nor the District Court pointed to any other case law in Washington or elsewhere that allowed a franchisee to substitute its burden of establishing a bona fide wholesale price at a comparable level of distribution with simply pointing to the franchisor’s costs versus the costs charged to franchisees. Washington law would require the District Court to examine the Money Mailer evidence of the relevant market, and, at a minimum, deny Brewer’s motion for summary judgment.<sup>12</sup>

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<sup>11</sup> The District Court provided no evidence or analysis to support its claims that others in the market “may be similarly overcharging franchisees.” Dkt. 223, p. 2.

<sup>12</sup> At the summary judgment stage, Money Mailer’s evidence of market price must be viewed in the light most favorable to Money Mailer. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 553 (1986). If

**C. The Answer to the Second Certified Question is *No*: The Price of Goods and Services Available to a Franchisor Is Not a Proper Basis to Determine the Reasonableness of Prices Available to a Franchisee, and there is a Strong Preference against Setting *Per Se* Rules.**

The District Court’s second certified question asks, “Does a franchisor violate RCW 19.100.180(2)(d) as a matter of law when it charges the franchisee twice what it pays for a product or service?” Dkt. 223 at 4-5. Because prescribing a price “as a matter of law” would create a *per se* rule for setting a price (apart from a bona fide market price), Washington law requires the answer to the second question be “no.”

**1. The Analysis Must Start with the Market Price at a Comparable Level of Distribution.**

The second certified question necessitates the improper starting point of the analysis – examining what the franchisor paid for the products and services, instead of examining the price at which the franchisee is able to secure the products and services in the relevant market. Again, determining a reasonable, market, or bona fide wholesale price requires an analysis of the comparable level of distribution. *See, supra*, § VI.A.

**2. It is Not Appropriate to Resort to a *Per Se* Rule.**

Not only are the franchisor’s costs an improper basis for determining the fair and reasonable price, but creating *per se* rules is disfavored and

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Brewer continues to fail to establish a relevant market to compare the prices he was charged, he cannot succeed on his FIPA claims against Money Mailer.

thoroughly inappropriate here. First, there are disputed questions of fact regarding the costs to Money Mailer in providing its direct mail services. Money Mailer provided evidence that showed the actual costs of printing services were much higher than those cited to in the Order. Dkt. 180, pp. 7-10. Instead, the District Court relied almost exclusively on one page of a Money Mailer internal presentation examining limited metrics out from the entire mailing process, while not acknowledging the facts Money Mailer presented on the additional costs associated with the printing services. Dkt. 124; Dkt. 125. The Court then reached a conclusion that “Money Mailer is adequately compensated through its disclosed fees and charges for the component parts.” Dkt. 177, p. 6. That ruling was contrary to law.

Second, *per se* rules are disfavored in these situations. Federal antitrust law is incorporated by reference into RCW 19.100.180 and the statute explicitly directs courts to be “guided by” decisions under federal antitrust laws. RCW 19.100.180(2)(b); Chisum, pp. 326, 372. Federal antitrust law, including guidance from the U.S. Supreme Court, makes it clear that *per se* rules on the reasonableness of prices are inappropriate. The U.S. Supreme Court has repeatedly held that resorting to *per se* rules in antitrust law is confined to restraints “that would always or almost always tend to restrict competition and decrease output.” *Leegin Creative Leather*

*Prods. v. PSKS, Inc.*, 551 U.S. 877, 881, 127 S. Ct. 2705, 2710, 168 L.Ed.2d 623, 628 (2007) (internal quotations omitted).

Thus, a *per se* rule is appropriate only after courts have weighed all of the circumstances and amassed considerable experience with the type of restraint at issue. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979). Furthermore, a *per se* rule is only appropriate if the court can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason. *See Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982).

A “yes” answer to the second certified question would not be based on any history or experience, but instead on an arbitrary assumption that a wholesale price for goods or services that is twice the third-party costs of those goods or services is inherently unreasonable in this, and every franchise context. This replaces factual and reasoned inquiry with simplistic formulas in contravention of federal antitrust laws. *Coyne's*, 553 F.3d at 1132 (determining whether a mark-up is a bona fide wholesale price “is a fact-specific inquiry”); *Leegin*, 551 U.S. at 887 (a “departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing”) *citing Continental T. V., Inc.*

*v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).

Furthermore, the legislative history for FIPA makes it abundantly clear that the legislature rejected the *per se* rule approach with respect to fair and reasonable prices or bona fide wholesale prices. *See, supra*, § VI.B.2. By creating a *per se* rule, courts would be legislating prices in the franchise context in a way directly contrary to legislative intent.

**D. RCW 19.100.180(2)(d) Is Not Applicable Here Because It Protects Franchisees From Unfair Practices *After* They Sign the Franchise Agreement, Not *Before*.**

RCW 19.100.180(2)(d) protects franchisees from abuses that arise *during* the franchise relationship. The fair and reasonable price provision in Section .180(2)(d) isn't even applicable to the facts here because Brewer was given clear notice of the printing prices Money Mailer would charge him well in advance of Brewer becoming a franchisee. Dkt. 122, p. 6. He reviewed that price with his attorney and with his friend who was an experienced Money Mailer franchisee. Dkt. 125, ¶ 7. He explicitly agreed to pay that printing price in an arms-length transaction *before* becoming a franchisee. Dkt. 122, p. 6. This is simply not a scenario that Section .180(2)(d) applies to.

FIPA addresses two primary “problem centers.” Chisum, p. 297. The first is to curb abuses in the sale of franchises. *Id.* Of primary concern

was the protection of persons “with little or no business experience and no access to expert advice” who were making substantial investments in franchisees. *Id.* FIPA requires robust disclosures of information to give these inexperienced and unrepresented persons the benefit of full and accurately disclosed material information prior to becoming franchisees. *Id.*<sup>13</sup>

The second problem center, which is at issue here, is the abuses made *after* the franchise agreements were signed and *during the course of the franchise relationship*. *Craig D. Corp v. Atl.-Richfield Co.*, 122 Wn.2d 574, 580, 860 P.2d 1015, 1018 (1993) (the first part of FIPA regulates the sale of franchises, the second part, including the fair practices and bill of rights sections, regulates the franchise relationship once it is formed because only after the contracts are signed does the franchisor normally occupy a stronger bargaining position). These abuses include franchisors taking advantage of their superior bargaining power that come with contracts granting franchisors disproportionate power over franchisees. *Id.* The legislature enacted FIPA to curtail these gross abuses of power after the franchise agreements were signed, including franchisors coercing

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<sup>13</sup> While the first problem center is not directly implicated in the certified questions, it is noteworthy that the franchisee in this case, a sophisticated party benefiting from the advice of counsel and advisors intimately familiar with Money Mailer’s business operations, is not within the scope of the intended protected beneficiaries of FIPA.

franchisees “under threat of termination... to purchase supplies from the franchisor or approved suppliers at unreasonable prices.” *Lyons Enters., Inc.*, 185 Wn.2d at 733; *see also Nelson*, 120 Wn.2d at 391 (franchisee’s lack of bargaining power recognized by FIPA only present *after* purchasing franchise).

The cases examining whether a bona fide whole sale price was charged or exceeded, did so from the perspective of a franchisee or putative franchisee learning of the prices the franchisor was requiring of them *after* they entered into an agreement with the franchisor. *See id.; supra*, § VI.A.4.a. In *Nelson*, for example, the Court emphasized that the franchisees did not know the applicable pricing before they entered into the Total Requirements Contract, but discovered it upon receiving their first invoice – after they had entered into the agreement. *Nelson*, 120 Wn.2d at 391. Conversely, Brewer knew through his study of the FDD and other documents what he would expect to pay for fixed and variable costs associated with his mailings, including the printing. Dkt. 122, p. 6.

Indeed, Money Mailer conspicuously posts its printing prices in its FDDs, which are given to potential franchisees to review and study before signing the franchise agreement. *Id.* Brewer reviewed and agreed to these prices before becoming a franchisee, and what he was charged turned out to be lower than what he was told to expect. *Id.* The printing prices are not

the product of unfair bargaining positions that occur after Brewer signed the agreements, and Brewer was obviously not coerced into purchasing goods for unreasonable prices by any threat of termination. Rather, the printing prices at issue are the product of an arms-length transaction agreed to by a party suffering no lack of bargaining power. Therefore, RCW 19.100.180(2)(d) is not concerned with, or applicable to, this type of transaction.

## VII. CONCLUSION

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

**RESPECTFULLY SUBMITTED** this 6th day of November, 2018.

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**CERTIFICATE OF SERVICE**

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