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NO. 96304-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MONEY MAILER, LLC,
Appellant,

v.

WADE G. BREWER,
Respondent

WADE G. BREWER,
Counterclaim Plaintiff,

v.

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

RESPONDENT WADE BREWER'S OPENING BRIEF

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I. INTRODUCTION

Money Mailer not only misrepresents the basic factual background of this case, it also skews the legal issue and attempts to turn this statutory scheme into something it was never intended to be.

As a threshold matter, what is *not* before the Court is whether there are “issues of fact.” While it is clear that Money Mailer disagrees with certain rulings and conclusions by the federal court, it is not entitled to create jurisdiction in this Court to “go beyond the legal questions certified.” *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000). Money Mailer’s disagreements are objectively wrong, to be sure, but this Court need not expend its resources addressing issues that *Money Mailer* elected to resolve in the federal forum.

What *is* before the Court is straightforward: Can a franchisor tout low franchise fees, while secretly making its money through undisclosed markups on goods that it requires its franchisees to purchase from it? Since at least 1992 the answer has simply been **no**. *Nelson v. Nat’l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 842 P.2d 473 (1992) (undisclosed 20% markup violated Washington’s Franchise Investment Protection Act); Berry et al., OPEN PRICE AGREEMENTS: GOOD FAITH PRICING IN THE FRANCHISE RELATIONSHIP, 27 Franchise L.J. 45, 47 n.32 (2007) (identifying Washington as one of the states “prohibit[ing]

franchisors from receiving any benefit from vendors without disclosing or transmitting the benefit to the franchisee”). In other words, franchisors can make as much money as the market will bear through royalties and franchise fees. But they cannot maintain secret profit centers, as here, in the form of hidden mark-ups on goods and services they require their franchisees to buy from them. This settled law should stand—for many reasons.

Legally, this Court’s 1992 interpretation of RCW 19.100.180(2), prohibiting such secret profit centers, is effectively built into the statute at this point. When, as here, the legislature declines to revisit a statutory interpretation after this long, *stare decisis* principles are at their zenith. *See, e.g., Baker v. Leonard*, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993) (“Legislative silence regarding... creates a presumption of acquiescence in that construction.”); *State v. Coe*, 109 Wn.2d 832, 846, 750 P.2d 208 (1988) (legislature is “deemed to acquiesce” if no change is made for a substantial time after the decision).

Money Mailer’s proposed interpretation—besides being predicated almost exclusively on the wrong part of the statute¹—is also antithetical to

¹ Oddly, almost every case and argument cited by Money Mailer is based upon RCW 19.100.010(8), which defines “franchise fee.” The issue in cases like *Blanton v. Mobil Oil Corp*, 721 F.2d 1207 (9th Cir. 1983) and *BP W. Coast Prods. LLC v. Shalabi*, 2012 U.S. Dist. LEXIS 17027 (W.D. Wash. 2012), was whether a charge constituted a

(footnote continued on the following page)

the very purpose of FIPA—which is to “maximize disclosure and thus minimize franchisor overreaching,” *Nelson*, 120 Wn.2d at 391, in a context where franchisees often “suffer a lack of material information before purchasing their franchise and of bargaining power after purchasing,” *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 888, 658 P.2d 1267 (1983) (quoting Chisum, STATE REGULATION OF FRANCHISING: THE WASHINGTON EXPERIENCE, 48 Wash. L. Rev. 291, 297 (1973)). It is difficult to see how disclosure is “maximized” by permitting Money Mailer to buy printing from a third-party vendor for \$36.50 and resell it to its franchisees for \$98.60:²

“franchise fee” – and thus, whether FIPA even applied in the first place. The issue in those cases was not, as here or in *Nelson*, whether the franchisor could charge an undisclosed mark-up on goods it was requiring the franchisee to purchase from it.

² Dkts. #109 and 112 (Declaration of Wade Brewer, at Ex. A, p. 32). This document—a PowerPoint slide in which Money Mailer touted its profitability, at franchisees’ expense, to investors—was found years into the litigation and only after every effort by Money Mailer to resist its discovery failed.



Key Financial Metrics

	2011A	2012A	2013A	2014B	2014F
Revenue	\$89,179	\$90,840	\$89,165	\$95,050	\$95,092
Gross Profit	\$27,187	\$28,635	\$28,606	\$33,502	\$32,478
% of Revenue	31.2%	32.9%	32.7%	35.2%	34.2%
SG&A	\$15,287	\$16,583	\$16,217	\$15,453	\$15,152
% of Revenue	16.4%	17.8%	17.3%	16.3%	15.9%
EBITDA	\$13,224	\$14,639	\$15,601	\$18,581	\$18,060
% of Revenue	14.8%	15.1%	15.4%	19.5%	19.0%
Operating Cash Flow	\$11,483	\$8,326	\$16,187	\$13,947	\$13,000
Avg Revenue per Printed Spot	\$97.13	\$96.69	\$95.90	\$98.60	\$98.60
Avg Discount per Printed Spot	\$14.70	\$10.70	\$9.76	\$10.24	\$11.51
Avg Cost per Printed Spot	\$44.53	\$43.51	\$36.67	\$37.22	\$36.50

Indeed, secretly smuggling general overhead and profit margin into the cost of basic goods franchisees are required to buy is the opposite of transparency and the worst kind of overreaching—perhaps explaining why no Washington court has ever endorsed the practice.

And finally, if Money Mailer is serious in its concerns about the free market, it is on the wrong side of this issue. Information-asymmetry leads to market failures. Yet Money Mailer is asking the Court to endorse a reality where it is permitted to publicize low franchise fees, while collecting upwards of \$38,000 per month in *unseen* franchise fees—in undisclosed printing markups—from franchisees like Mr. Brewer.³ To the

³ See e.g., Dkt. #109 at Ex. G, part 2, p.9 (MM 000452) reflecting a total printing print charge of \$76,230.50 for a random month of printing costs. Over half of that amount – in excess of \$38,000 – is now known to be simply a secret markup each month. This is in addition to the touted low royalty/franchise fee of \$3,500 a month.

extent that Money Mailer is genuinely adding that degree of value to its franchisees' operations, Money Mailer should have no trouble identifying the actual cost of the service (printing) and the cost of the relationship with Money Mailer. Then the would-be franchisee could make a rational decision about whether a relationship with Money Mailer justifies a \$38,000 per month payment. That is how the free market works, and tellingly, it is precisely the opposite of what Money Mailer seeks.

Lastly, pursuant to RAP 18.9(a), Mr. Brewer respectfully requests a sanction in light of Money Mailer's particularly egregious misrepresentation of FIPA's "legislative history." Though cited officially as "Wash. Franchise Investment Protection Act Legislative History, 1970-1971" in its opening brief, Money Mailer is actually referring to an unpublished research paper authored by a legal intern in the Attorney General's office—and *misquoting* the intern at that. The Court should enter a sanction impressing upon Money Mailer the importance of honest dealings in Washington's courts.

For the reasons that follow, both certified questions should be answered in the affirmative, just as Judge Lasnik did in the federal court.

II. STANDARD OF REVIEW

Certified questions from a federal court are questions of law that are reviewed *de novo*. *Allen v. Dameron*, 187 Wn. 2d 692, 701, 389 P.3d

487 (2017) (citing *Carlsen v. Glob. Client Sols., LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011)). The Court considers these issues based upon the certified record provided by the federal court. *Id.* at 701. And although this Court has discretion to reformulate certified questions, this only occurs practically when necessary to avoid factual inquiries. *See e.g. Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn. 2d 200, 205, 193 P.3d 128 130 (2008); *Travelers Cas. & Sur. Co. v. Washington Tr. Bank*, 186 Wn. 2d 921, 931, 383 P.3d 512 (2016).

Here, the federal court’s certified questions present no factual issues—and Money Mailer’s attempt to reformulate them to *create* one is unavailing. The factual findings and summary judgment rulings by the federal court are properly treated as verities.

III. QUESTIONS PRESENTED

Money Mailer required its franchisees to purchase hundreds of thousands of dollars of printing through Money Mailer. But it never disclosed that it was securing those print services from a third-party—for what the district court found *was* the market price—and then re-selling to franchisees for more than double the amount Money Mailer had paid. In fact, Money Mailer’s business model is largely not based upon published franchise fees at all, but instead, the profit center it hides in its printing charges foisted upon its franchisees. The questions presented by the

federal court are as follows:

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

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

IV. STATEMENT OF THE CASE

A. Money Mailer Mandates that Franchisees Purchase Various Goods and Services from Money Mailer

Money Mailer Franchise Corporate, a California franchisor, contracts with franchisees across the country to operate direct mail advertising businesses within a franchised territory. Dkt. #177 at 2. As the federal court found, Money Mailer mandates franchisees (such as Mr. Brewer) to purchase from its alter-ego entity, Money Mailer, LLC,⁴ various goods and services at prices set by Money Mailer, “including printing and inserting advertisements into shared mail envelopes, list procurement, and freight procurement for delivery to the United States

⁴ The federal court found that the two companies—which are operated by the same executives, for the same purpose—are one company for the purposes of FIPA. Dkt. #177 at 3. MMFC and MMLLC are therefore referred to collectively as “Money Mailer.” *Id.*

Post Office.” *Id.* The other goods and services, including envelopes, the creation of mailing lists, postage, freight, and the like, were separately billed to Mr. Brewer apart from the printing costs. Dkt. #177 at 3 (citing Dkt. #109-2 at 3).

B. Money Mailer Failed To Disclose Any Markup to Mr. Brewer
“Money Mailer does not deny [and has never denied] that it charges franchisees twice what it costs to print the advertisements.” Dkt. #177 at 4. Nor is disputed that, while Mr. Brewer was operating his Washington franchise, Money Mailer never disclosed to him any markup at all. Dkt. #177.

The nondisclosure was particularly surprising, as Money Mailer admits that these printing services (and markups) are “central and essential” to the franchise relationship. Dkt. #22-1 at 12; Dkt. #177 at 2. Indeed, according to its CEO, Money Mailer could not even survive as a company if it charged franchisees what it *actually cost* for printing:

- Q. Well, how significant would it have been if you made the decision to have the LLC sell printing to the franchisees at cost?
- A. I understand the question. It would have been a fundamental change, and not allowed us to stay in business.

Dkt. #188, Ex. A (36:22-37:9). It turned out that Money Mailer’s business model was largely comprised of hidden mark-ups forced upon its

franchisees. *See e.g.* Dkt. #202 (Money Mailer pays \$187.50 for envelopes per zone, and charged Brewer between \$252 and \$260 for them – no disclosure of these markups either).

C. No Amount of Due Diligence Would Have Uncovered Money Mailer's Hidden 100%+ Markups

Nobody outside of Money Mailer's top management and key investors knew about the hidden mark-ups on required services. Dkt. 188 (Mulloy Dep. (31:16-22)). This is undisputed. So Money Mailer attempts to deflect blame onto Mr. Brewer, suggesting that he was smart and should have known. A couple observations are in order.

First, this is somewhat hypocritical given how aggressively Money Mailer fought to *hide* its markup. It took nearly two years of hard-scrabble litigation and discovery skirmishing to unearth the truth. In the interim, Money Mailer consistently resisted disclosure, filed a slew of motions, repeatedly sought summary judgment, moved for a protective order, tried to move the case into arbitration, and then sought a stay. It even (improperly) attempted to take an interlocutory appeal to the Ninth Circuit. It was not until every last gambit failed that the truth sprouted, and Mr. Brewer finally obtained substantive discovery establishing Money Mailer's business practices. The suggestion, now, that Mr. Brewer should have been aware of the conduct prior to even entering into the franchise agreement rings hollow.

Second, and to be clear, Mr. Brewer does not deny that he investigated the franchise opportunity. But this hardly makes Money Mailer’s argument better. On the contrary, if a “sophisticated party” (Br. at 41, fn. 13)⁵ like Mr. Brewer—aided by other franchisees⁶—was *still* misled into buying printing for inflated prices (which were available to non-franchisees), it is difficult to understand what chance a typical franchisee would have.

It is undisputed that, had Mr. Brewer known about that he was paying prices inflated beyond wholesale, he would not have become a franchisee. *See e.g.*, Dkt. #105 (citing Dkt #26 at ¶¶14-15).

V. ARGUMENT

A. FIPA Was Enacted to Protect Franchisees, Not Franchisors

Although Money Mailer gives lip service to this Court’s prior statements regarding FIPA’s interpretation, it promptly disregards it in service to its arguments. Notwithstanding that fact, the “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.” *State, Dep’t of*

⁵ An assessment which is, incidentally, contradicted by the federal court’s findings. *See* Dkt. #47 at 4-5.

⁶ Brewer spoke to his long-time friend and franchisee Chuck Gourley. He also spoke to Chris Nelson (another Washington franchisee whose franchise later failed). Dkt. #202 ¶ 9 (Decl. of W. Brewer ¶ 5).

Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Statutory provisions are construed in light of one another and in view of the statute's overall purpose. *See, e.g., Prince v. Savage*, 29 Wn. App. 201, 627 P.2d 996 (1981).

There is little dispute about FIPA's purpose or policy. It was enacted in 1972 "to protect franchisees." *Nelson v. Nat'l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 389, 842 P.2d 473, 476 (1992). The statute is aimed to "maximize disclosure and thus minimize franchisor overreaching" (*id.* at 391), in a context where franchisees often "suffer a lack of material information before purchasing their franchise and of bargaining power after purchasing," *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 888, 658 P.2d 1267 (1983) (quoting Chisum, STATE REGULATION OF FRANCHISING: THE WASHINGTON EXPERIENCE, 48 Wash. L. Rev. 291, 297 (1973)). *Lobdell* went on to emphasize that "[t]he State legislature enacted the FIPA in 1972 in order to correct this maldistribution of information and power" and to stop the "sales abuses by requiring registration of offers and **full disclosure of facts material to the transaction.**" *Id.* at 888 (emphasis added).⁷

⁷ Chism's oft-relied upon treatise sets forth the purpose of FIPA. But Money Mailer, relies heavily upon other sources—particularly, an article penned in 2009 by private practice attorneys. With due respect, they have skin in the game. Douglas Berry's biography provides, "[f]or over twenty five years, Doug has served as a trial lawyer representing franchisors and suppliers in connection with disputes with their franchisees

As recently as 2016, this Court confirmed these very purposes in *Dep't of Labor & Indus. of State v. Lyons Enterprises Inc.*, 185 Wn.2d 721, 374 P.3d 1097 (2016), acknowledging that “[w]hen the legislature enacted FIPA, it created a comprehensive scheme for regulating franchising in Washington, and did so with the aim of protecting franchisees.” *Id.* at 732. This was, and remains, the policy of this state.

And it is precisely what Judge Lasnik relied on when concluding that “selling franchisee printing services for twice what they cost is not a ‘fair and reasonable price.’ To hold otherwise would allow undisclosed profit centers and vitiate FIPA’s essential purpose to protect franchisees...” Dkt. #177; *Nelson*, 120 Wn.2d at 389 (“We follow the prohibitory theory in this case because it better comports with the general purpose of the Act, to protect franchisees, and because to do otherwise would vitiate the provision of the act forbidding franchisors from imposing unfair or unreasonable prices on the costs of goods and services. See RCW 19.100.180(2)(d).”).⁸

and distributors.” (<http://www.millernash.com/douglas-c-berry/> (last visited November 21, 2018)). Mr. David Byers previously worked with Mr. Berry in that practice group, before himself joining a large Seattle based franchisor (<https://www.linkedin.com/in/david-byers-25b57184/> (last visited November 21, 2018)).

⁸ Given this, it is not surprising that Money Mailer retreats to “legislative history” rather than the statute itself or its decisional law. It is addressed in Section H, *infra*.

B. The Court Should Uphold and Affirm Settled Law

Money Mailer asserts that both certified questions require a clear legal definition of “fair and reasonable price” within the meaning of FIPA. The Court’s task is far simpler. To answer both questions, the Court need only determine what a “fair and reasonable price” is *not*. And it already did so in *Nelson* 25 years ago.

In *Nelson*, the franchisor disclosed—prior to entering into the agreement—that there was a “standard markup” on the pizza supplies the franchisor required the franchisee to purchase, though it did not disclose the actual amount of the markup. *Id.* at 385.⁹ After receiving its first bill from the franchisor, the franchisee was able to calculate the markup charged was 20%. *Id.* at 390. The trial court found that the 20% markup violated RCW 19.100.180(2)(d), as it constituted the sale of goods to franchisee for more than “a fair and reasonable price.” Injunctive relief was granted. *Id.* at 386. On appeal, both the Court of Appeals and this Court affirmed on this issue. *See id.* (“whether the percentage markup on

⁹ Money Mailer claims that “[i]n *Nelson*...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 contract” Br. at 42. In reality, it was the opposite: “Nothing in the Total Requirements Agreement, dated October 1, 1985, indicated that the price of the goods would include a markup. The Nelsons appear to have learned the precise percentage the markup represented, when they received their first bill.” *Nelson*, 120 Wn.2d at 391. Furthermore, for disclosure “to be meaningful, [it] must occur before contract formation, not after the parties have become contractually bound.” *Id.* (citing Restatement (Second) of Contracts, vol. 1, ch. 3 (1981)). Money Mailer is worse on both fronts, failing to disclose before *and* during the franchise relationship.

the cost of materials violated the Franchise Investment Protection Act.”).

Then this Court ultimately adopted a “prohibitory theory” in this context:

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

Id (emphasis added). In other words, any markup of goods or services under RCW 19.100.180(2)(d)—***whether disclosed or not***—violates FIPA.¹⁰

This case is *Nelson redux*. The franchisor in *Nelson* did precisely what Money Mailer did here. It never disclosed any markup in the pricing for the services that franchisees were mandated to purchase from it, and that markup was in excess of 100% (sometimes “two or three times” the cost that Money Mailer paid for those pricing services). *See* Dkt. #177 at 5.

¹⁰ This is certainly how the federal court understood the decision. “*While it is likely that the courts of Washington would find that any percentage markup of the costs of materials is a violation of FIPA. . . the Court need not resolve that issue to find 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 at 5. (internal citations omitted) (emphasis added).

This 1992 interpretation is effectively part of FIPA. As recently as 2011, the legislature revisited the original nomenclature of RCW 19.100.180, but decided to make no substantive changes, despite its presumptive awareness of *Nelson*. See S.B. 5045, 2011 62nd Leg., Reg. Sess. (Wash. 2011); *Baker*, 120 Wn.2d at 545.

The legislature of course remains free to revisit the statute, but the Courts generally do not “change their mind” about a longstanding interpretation. In *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004), the construction of the Washington Law Against Discrimination was challenged. Refusing to re-interpret a previously interpreted statute, this Court explained:

The Legislature is presumed to be aware of judicial interpretation of its enactments, and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.

Id. (citing *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992)). Courts do not “change their mind” as to what a statute means. *Id.* at 147; see also *Baker v. Leonard*, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993) (“Legislative silence regarding the construed portion of the statute in a subsequent amendment creates a presumption of acquiescence in that construction.”).

As here, the Court found an undisclosed 20% markup on goods to violate FIPA. The federal court's ruling lines up with the statute and case law, perforce. To find otherwise would effectively eviscerate FIPA and its longstanding interpretations, on which individuals across the state rely.

C. Even Under a “Bona-Fide Wholesale Price,” Money Mailer’s “Price” Would Constitute an Improper Franchise Fee

Money Mailer spends several pages arguing that “fair and reasonable price” should mean a “bona fide wholesale price.” Br. at 17. Although Mr. Brewer does not believe that the Court needs to specifically define this term in order to answer the certified question—but merely determine what a “fair and reasonable price” is *not*—a closer look at Money Mailer’s authority confirms only that its premise would continue to violate FIPA.

To begin, most of the cases Money Mailer cites in support of its “bona-fide wholesale price” and “comparable level of distribution” arguments address RCW 19.100.010, which relates to the definition of a “franchise fee.” That is, the issue in cases like *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir. 1983), *BP W. Coast Prods. LLC v. Shalabi*, 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 WL 745159, at *3 (W.D. Wash. Sept. 29, 1994), were each whether a charge constituted a “franchise fee”

at all – and thus, whether FIPA applied in the first place.¹¹ The issue was *not*, as here, whether the franchisor could charge an undisclosed markup on goods or services it was requiring the franchisee to purchase.

But even adopting the reasoning in many of these cases, there was no allegation that the price charged was even above the wholesale price. *See Blanton*, F.2d at 1219; *Bryant* 1994 WL 745159, at *3. That is not the case, here—as the federal court already found. Money Mailer charged Brewer *double* (and up to triple) the “bona-fide wholesale price” it received for those same printing services: “[i]t cost Money Mailer approximately \$45 per spot to do it in-house, and it was able to obtain the same printing services from a third party for approximately \$38 per spot. It is both unreasonable and unfair to [then] charge the franchisees *two or three times that much.*” Dkt. #177 at 5 (emphasis added).

The first certified question is, in this regard, narrowly framed:

“[I]n the absence of evidence indicating that the price was not a true market price,” may a franchisee “rely on the price at which the franchisor

¹¹ Money Mailer cites The Illinois Franchise Disclosure Act (“IFDA”) and Michigan’s Franchise Investment Act for the same argument. Br. at 25-27. Similar to the cases Money Mailer cites, these statutes are equally unhelpful. The statutes define “franchise fee” and give guidance for when a franchisor/franchisee relationship exists at all. The Court need not thrust the definition of a “franchise fee” onto other undefined words in a statute. This is not the role of the judiciary. *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S. Ct. 597, 601, 67 L. Ed. 1078 (1923) (“To the legislative department has been committed the duty of making laws, to the executive the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts.”).

is able to obtain the product or service” for purposes of FIPA’s prohibition on selling to a franchisee a product or service for more than a fair and reasonable price? Dkt. #223 at 4 (order of question changed). In other words, can a franchisee look to the price a franchisor pays for a product or service—*when no other evidence exists to the contrary*—for purposes of determining whether the franchisee is being charged an unfair and unreasonable price for that same product or service? The answer to this question is obviously **yes**, as Judge Lasnik concluded. After all, central to FIPA is the presumption of reliance. *Morris*, 107 Wn.2d at 329-30; *Lobdell* 33 Wn. App. at 881.

Furthermore, since the franchisor purchases from those in the market of providing those services, it is at least a reasonable starting point. Dkt. #223 at 3 (“Money Mailer is both the purchaser and seller of the services. It paid a certain amount for a set of services it designated as ‘printing services’ and charged Brewer two times as much for what were described as ‘printing services.’”) At the outset and during the franchise relationship—especially given Washington’s longstanding prohibitions against marking up goods and services—it was hardly unreasonable for Mr. Brewer to rely upon Money Mailer to follow the law vis-à-vis what it was selling to him.

The answer to the federal court’s second certified question only requires reference to the reasoning underpinning the holding of *Nelson*. The policy espoused by the legislature, and examined by Chisum, has not changed: to protect against “a hidden [franchise] fee in the form of overcharges for property [or services] sold to the franchisee.” Chisum, at 343. Here the undisputed facts led the federal court to conclude:

Absent some evidence of a special discount or other indication that the price Money Market paid was not a market price, the fair and reasonable costs of the services were established by what Money Mailer was actually paying for the printing services. The undisputed evidence showed that Money Mailer was paying X for “printing services” and was charging approximately 2X to Brewer for “printing services.

Dkt. #223 at 2. The service purchased by Money Mailer (printing services) cost it at least half of what it turned around and charged its franchisees. Under RCW 19.100.180(d)(2):

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

[...]

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

The federal court specifically does not seek the answer to what amount is the minimum amount of permissible markup, if any, especially without disclosure. Dkt. #223 at 1 (Money Mailer “had marked up the

charges it assessed against its franchisee, Wade G. Brewer, for printing services by over 100% without adequately disclosing the mark up.”). And this Court need not pinpoint that number, either, because this is not the marginal or borderline case. It is a massive overreach by a franchisor, which makes the FIPA violation in *Nelson* look relatively modest. This Court need only apply settled law, as the federal court did. *See* Dkt. #223 at 2-3. (“The Court declines to reconsider... its legal conclusion that selling a specified service to a franchisee at more than twice what those services cost the franchisor violates 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)).

At bottom, Money Mailer held itself out as a obtaining the best prices for the required services (including printing services) due to its self-proclaimed enormous market share and buying power. Br. at 34. Its Franchise Disclosure Document emphasizes that a material benefit provided by the franchise agreement is the mandated services to be purchased, including printing, provided by it. It was, in other words, (a) actively concealing its enormous markups, while (b) representing to Brewer that it obtained the best prices for such services and materials due

to its enormous market share and buying power.¹² This is in no way consistent with FIPA, as this Court should hold.

D. Money Mailer *Is* the Relevant “Market”

Money Mailer also takes issue with the concept of a “*per se* rule,” which it believes would limit franchisors’ ability to mark up their goods or services, and ultimately drive them out of Washington. Br. at 29. The problem with this is that it is addressing an argument that neither the federal court nor Mr. Brewer made. Nobody is advocating a “*per se* rule” here.

Judge Lasnik simply resolved the issue as a matter of law on the evidence (or lack thereof) before him – something courts do all the time. Given that a 20% markup violated FIPA in *Nelson*, Judge Lasnik’s analysis of a 100%-200% markup of ink-on-paper was hardly remarkable, especially when it was not disclosed by the franchisor to the unknowing franchisee. This comported with *Nelson* and FIPA in every way. To answer “yes” to each of the certified questions, this Court need not resort to antitrust laws, nor create *per se* rules. This case is driven by its own facts and circumstances, which simply do not present any close calls.

¹² While out of one side of its mouth Money Mailer claims Brewer engaged in extensive investigation (though not disputing that it never disclosed, even to Brewer’s so-called “advisors,” the true nature of the printing charges). Out of the other side of its mouth it repeats its argument of nearly a year ago that Brewer had some duty to investigate more and ultimately discover Money Mailer’s concealed wrongdoing. That has been rejected by the district court and cannot be reargued before this Court. Dkt. #177 at 6.

As an aside, however, Money Mailer is incorrect about the law. Though RCW 19.100.180(2)(b) incorporates antitrust laws by reference, Mr. Brewer is not seeking relief under that portion of the statute. Dkt. #177 at 5. He seeks relief under 19.100.180(2)(d), which has *not* incorporated antitrust laws. If the legislature intended to incorporate antitrust laws into every section of RCW 19.100.180, it would have done so. *Whatcom Cty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303, 1308 (1996) (internal citations omitted) (“The court must give effect to legislative intent determined ‘within the context of the entire statute.’”).¹³

As for Money Mailer’s arguments regarding the available relevant market, Mr. Brewer is left somewhat befuddled. On one hand, Money Mailer asserts that the relevant inquiry for determining what a “fair and reasonable price means” is the bona-fide wholesale price in the relevant industry and at a comparable level of distribution. Br. at 19-23. Then, Money Mailer turns around and emphasizes that it cannot “confidently calculate” the exact costs of goods because, built into Money Mailer’s price for printing, are additional items such as “training, trade secrets, and

¹³ Accordingly, Money Mailer’s antitrust authority is misplaced. See Br. at 39 (citing *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 4, 99 S. Ct. 1551, 1554, 60 L. Ed. 2d 1 (1979); *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 335, 102 S. Ct. 2466, 2468, 73 L. Ed. 2d 48 (1982); *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881, 127 S. Ct. 2705, 2710, 168 L. Ed. 2d 623 (2007)).

other value that is difficult to calculate with exactness.” Br. at 29, n. 9.¹⁴ It then further states that “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 franchises.*” Br. at 34 (*emphasis added*).

Money Mailer cannot have it both ways. It cannot urge the Court to look at the “relevant market” while simultaneously proclaiming that *it is the market.*

Not surprisingly, the cases cited by Money Mailer for this this contention live in the distributor/reseller realm. *See Blanton*, F.2d at 1219 (franchisees were required to purchase oil, tires, and other goods from the franchisor for resale); *BP W. Coast Prod.*, 2012 WL 441155, at *1 (franchisee was required to purchase gasoline from the franchisor for resale). Unlike those cases, Money Mailer franchisees are *not* printing

¹⁴ Judge Lasnik rejected this argument repeatedly. *See e.g.* Dkt. #177 at 5 (“Money Mailer argues that it provides such overwhelming benefits to its franchisees in the form of its integrated printing-insertion-mailing methodology that the prices it charges for printing are eminently reasonable. This argument fails, both on the law *and on the facts*. As a matter of law, huge markups in the price of a product or service that a franchisee is required to purchase from the franchisor are simply not permitted. The market has established a fair and reasonable cost for the type of printing services provided to the franchisees.”); Dkt. #223 at 3 (“To the extent Money Mailer’s motion is based on its insistence that the phrase “printing services” when included on an invoice to the franchisee includes “many value-added services offered by [Money Mailer] beyond merely printing ink on paper” (Dkt. #180 at 9), the Court again rejects that argument as unreasonable. Money Mailer is both the purchaser and seller of the services. It paid a certain amount for a set of services it designated as “printing services” and charged Brewer two times as much for what were described as “printing services.” Its argument is either that it used the same term for two different things or that it failed to disclose the services Brewer was required to purchase from the franchisor by subsuming them under the label “printing services.” The first argument is not supported or reasonable, and the second would likely also violate FIPA.”)

resellers. They are *not* envelope resellers. They sell advertising and use the printing services they are required to buy from Money Mailer to support that endeavor. They stand in the same role as the pizza franchisee in *Nelson*, selling pizzas made with the dough, sauce, and toppings bought from the franchisor, ignorant of the 20% markup they were being charged.

Mr. Brewer does not suggest Money Mailer be prohibited from making a profit—far from it. Money Mailer should simply be required to be transparent, as FIPA contemplates. If Money Mailer brings so much to the table to make a franchisee’s business that successful, the market will bear its \$38,000-per-month-franchise-fee, and it can charge that after disclosure. What Money Mailer cannot do, however, is conceal it as a “printing cost.” This is self-evident as the purpose of FIPA is to protect franchisees, and if anything, also consistent with antitrust law inasmuch as transparency—permitting rational decision-making by would be franchisees—will “foster competition.” *See e.g., State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997). Secret markups, as advocated by Money Mailer, are consistent with no body of law, nor with sound public policy. The Court should, again, disallow such practices.

E. Brewer Assumed Money Mailer Would Follow the Law

There is no indication that Brewer knew or should have known that Money Mailer was overcharging for printing services before discovery in this case disclosed how little it was actually paying for those services. Huge markups are

forbidden by FIPA, and Brewer cannot be faulted for assuming that Money Mailer would follow the law.

Dkt. #177 at 6. California company or not, Money Mailer must follow the law—and franchisees should be permitted to expect as much. Whether one calls it a secret markup or a hidden and undisclosed franchise fee, the law in Washington has been clear for over 25 years that such conduct, in this case an undisclosed markup of 100% or more, is a violation of FIPA.

Yet Money Mailer proclaims that its interests are seamlessly aligned with its franchisees. Br. at 30. That is, if its franchisees make a profit, so does Money Mailer: “Money Mailer only succeeds when its franchisees succeed at increasing the variable – the number of spots sold.” *Id.* This is demonstrably false.

In fact, Money Mailer’s pricing scheme permits it to profit regardless of whether its franchisees ever make money—so long as they print a lot. This is actually what happened, here. Mr. Brewer increased his sales and charged prices comparable to what Money Mailer charged when it operated his very territory as a corporate franchise. Yet Mr. Brewer made little, if anything, before going deeply into debt. At the same time, Money Mailer made upwards of a \$38,000-per-month-franchise-fee on printing alone (in addition to other royalties and markups on other line items like envelopes, etc.). It benefits until the franchisee

either does turn a profit or goes out of business. This *disparity* in interest is exactly why the legislature found a need to enact laws specifically designed to protect franchisees.

F. This Is a Legal Question, Not a Factual Issue

Although Money Mailer undoubtedly disagrees with the federal court's summary judgment rulings, it is not entitled to create jurisdiction here to "go beyond the legal questions certified." *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn. 2d 670, 676 (2000). "The federal court retains jurisdiction over all matters except the local question certified." *Id.* at 676 (internal citations omitted); *Louisiana-Pacific Corp. v. Asarco Inc.*, 131 Wn.2d 587, 604, 934 P.2d 685 (1997) ("We do not have jurisdiction to go beyond the specific question presented by the Certification Order.").

This is not an opportunity for Money Mailer to make factual arguments to this Court.¹⁵ The federal court appropriately found, based upon "undisputed evidence," that "Money Mailer was paying X for 'printing services' and was charging approximately 2X to Brewer for 'printing services.'" *Id.* No matter how badly Money Mailer wishes to dispute this holding, it is not before this Court. Money Mailer can seek to do so another day in a different forum.

¹⁵ Money Mailer initiated these proceedings in federal court. To the extent it has a remedy related to summary judgment error, it is in the Ninth Circuit at the end of the case.

G. Mr. Brewer Respectfully Seeks a Sanction Under RAP 18.9 Based Upon Money Mailer’s Lack of Candor

Finally, Money Mailer relies heavily on what it cites as “legislative history,” or “Wash. Franchise Investment Protection Act Legislative History, 1970-1971.” This is problematic on a number of levels—beyond the usual concern about how “[j]udicial investigation of legislative history has a tendency to become... an exercise in ‘looking over a crowd and picking out your friends.’” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568, (2005) (internal citations omitted).

In this instance, Money Mailer’s “legislative history” is not actually legislative or official in any defensible sense. The statements did not even come from the legislature, but sprout from the AG’s office—and not even from an attorney or public official, but a *legal intern*. “Wash. Franchise Investment Protection Act Legislative History, 1970-1971” is an *unpublished* research paper by Mr. J. Fletcher, who was interning nearby at the time.¹⁶

¹⁶ In other words, this is even worse than Justice Kennedy’s concern about giving “unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.” *Exxon*, 545 U.S. at 568. Money Mailer is attempting to turn the unpublished, un-codified statements of a legal intern—who had a limited scrivener’s role—into law, under the guise of “legislative history.” See Mr. Fletcher was a draftsman of the Act while working as a legal intern for the Washington Attorney General’s Office. His thesis contains the successive drafts of the various bills proposed with comments thereon. Chisum, *State Regulation of Franchising: the Washington Experience*, 48 Wash. L. Rev. at 334 n. 211.

But worse yet, Money Mailer is not even quoting the legal intern *accurately*. Money Mailer misleadingly states that “the legislature equated ‘bona fide wholesale price’ to ‘fair market price’ in describing the definition of ‘franchise fee.’” Br. at 20 (citing Fletcher at 49). That is flat wrong. In its rush to equate two different statements (and mis-attribute them to the legislature), Money Mailer omits the part, on the preceding page, where Mr. Fletcher explains that he is making the exact opposite point. He was not conflating “bona fide wholesale price” and “fair market price,”¹⁷—but rather, citing *two different protections* against the same franchisor overreach:

it is felt that with this definition the franchisor will not be able to circumvent the provisions of the act by not charging a franchise fee in the traditional sense, e.g., an initial capital investment fee, and in place of this charging or increasing royalty fees, fees for goods or services, etc.

Fletcher, at p. 48.¹⁸ Stated differently, it was contemplated that franchisors would *not* do exactly what Money Mailer did: supplant

¹⁷ Money Mailer’s use of its invented equivalency of fair market price and “bona fide wholesale price” is belied by the definition of the word “bona fide,” meaning “neither specious nor counterfeit: genuine” according to Merriam Webster (<https://www.merriam-webster.com/dictionary/bona%20fide>). Smuggling an undisclosed markup into a “wholesale” is counterfeit, not “genuine.”

¹⁸ See Fletcher, Appendix J “Washington Franchise Investment Protection Act”, at Section 1(10): “the following shall not be considered payment of a franchise fee (a) the purchase or agreement to purchase goods at a **bonafide wholesale price**” compared to (e) “the purchase or agreement to purchase supplies or fixtures necessary to enter into the business or to continue the business under the franchise agreement at their **fair market value.**” (emphasis added).

traditional, transparent franchise fees with hidden “fees for goods or services.” *See id.* This is, in turn, consistent with *Nelson*, which held that the sale of services or goods at the “bona fide wholesale price” does not constitute a franchise fee. But the sale of goods for more than the genuine wholesale price absolutely is a franchise fee by any other name. *See e.g.* RCW 19.100.010(8) (“‘Franchise fee’ means ...any payment for the mandatory purchase of goods or services or any payment for goods or services available only from the franchisor...”).

Fundamentally, Money Mailer wants this Court to believe—through a corrupt reading of a false “legislative history”—that Washington has always permitted hidden markups. *See Br.* at 21-22. Even if the “legislative history” did support it (and it does not), the cases cited by *Money Mailer* confirm that it should not be treated as law. *See BP W. Coast Prod., LLC v. Shalabi*, No. C11-1341MJP, 2012 WL 441155, at *6 (W.D. Wash. Feb. 10, 2012) (“Whatever the legislature may have had in its ‘mind,’ it did not put it into law. The Court does not find it proper to re-write FIPA and add in an exclusion based on the legislative history. The Court rejects this invitation.”).

“RAP 18.9 reflects a balance between the basic theme of the rules that appellate cases should be heard on their merits, and a recognition that unstructured appeals would be of great inconvenience to the courts, make the determination of the merits more difficult, and could result in overreaching and abuse on the part of counsel.” Tegland, 3 WASHINGTON PRACTICE, RAP 18.9 (8th ed. 2018). Failure to comply with the rules, including misquoting authority and the record, are grounds for sanctions. *Id.*; *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 342, 798 P.2d 1155 (1990) (“Sanctions may include, as compensatory damages, an award of attorney’s fees to the opposing party.”).

Mr. Brewer would defer to the Court with respect to a sanction. But the Court has authority to require payment to the judiciary, payment to Mr. Brewer for the cost of responding to the frivolous argument, payment to a charity, or simply a firm admonishment. Mr. Brewer believes any of these outcomes, if imposed to a sufficient degree, would impress upon Money Mailer—which saw fit to misrepresent authorities in a litigation about its lack of honesty and transparency—the importance of candor in Washington courts.

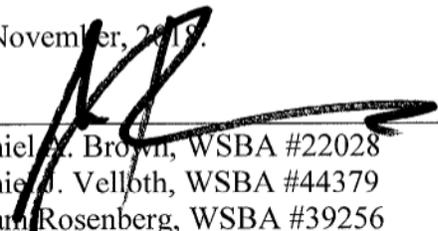
VI. CONCLUSION

With its hidden markups here and there, all of which were unbeknownst to the hapless franchisee, Money Mailer seems eerily reminiscent of a certain colorful innkeeper:

*Charge 'em for the lice, extra for the mice
Two percent for looking in the mirror twice
Here a little slice, there a little cut
Three percent for sleeping with the window shut
When it comes to fixing prices
There are a lot of tricks I knows
How it all increases, all them bits and pieces
Jesus! It's amazing how it grows!*

Master of the House, *Les Miserables* (originally performed 1980). This is not how franchises in Washington should function. Mr. Brewer respectfully submits that the Court should answer the certified questions, “Yes” and “Yes.”

DATED this 21st day of November, 2019.



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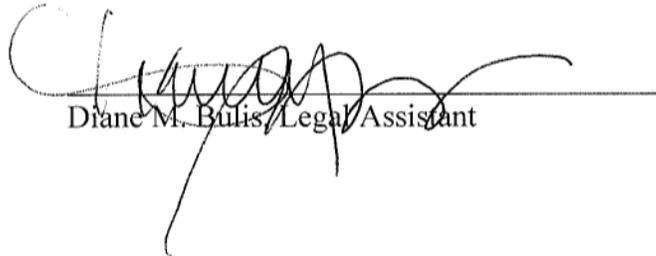
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 21st of November, 2018, I caused a true and correct copy of the foregoing document, to be delivered via the court efilng system to:

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