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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 RESPONSE TO AMICUS
CURIAE BRIEF BY WASHINGTON STATE DEPARTMENT OF
FINANCIAL INSTITUTIONS

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I. INTRODUCTION

The Department of Financial Institutions (“the Department”) is the agency charged with oversight of Washington franchise regulations, including investigation and enforcement of the Franchise Investment Protection Act (“FIPA” or the “Act”).¹ Accordingly, its analysis is entitled deference. Brewer concurs to its reasoning, and respectfully urges the Court to do so as well in addressing the two certified issues in this appeal.

II. ARGUMENT

A. The Department’s Interpretation Is Entitled Deference

The Department fulfils the historical purpose of an *amicus curiae*; namely, “to provide impartial information on matters of law about which there was doubt, especially in matters of public interest.” *United States v. State of Mich.*, 940 F.2d 143, 164 (6th Cir. 1991) (citing *Miller–Wohl Co. v. Commissioner of Labor & Indus., State of Montana*, 694 F.2d 203, 204 (9th Cir.1982); 4 Am.Jur.2d, Am.Cur. §§ 1, 2 at 109–10). *United States v. State of Mich.*, 940 F.2d 143, 164–65 (6th Cir. 1991) (citing *Miller-Wohl Co.*, 694 F.2d 203, 204 (per curiam) (“The orthodox view of *amicus curiae* was, and is, that of an impartial friend of the court—not an adversary party in interest in the litigation.”)).

¹ Amicus Br. at 1. The Department “reviews registration applications, promulgates rules for the industry, publishes interpretive opinions and policy statements, and initiates enforcement actions. See e.g., RCW 19.100.040-.070, .242-.250.”

The Department is the state agency tasked with administering FIPA, which includes rulemaking, interpretive opinions, and enforcement actions. As this Court has repeatedly emphasized, deference to such agency interpretations is appropriate:

[w]here an administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's construction of statutory words and phrases and legislative intent *should be accorded substantial weight* when undergoing judicial review....

Overton v. Washington State Econ. Assistance Auth., 96 Wn.2d 552, 555, 637 P.2d 652 (1981) (emphasis added); *see also City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091, 1094 (1998).²

B. The Department Confirms the District Court's Second Question Was Settled More Than 25 Years Ago. A Markup of 20% or More – Disclosed or Not – Violates FIPA

The Department's interpretation of the state of Washington law parallels Brewer's and federal district court judge. Since 1992, *Nelson* has been the law of the land, and a 20% markup has violated

² Of course this Court has the ultimate authority to interpret the statute. But "deference is accorded an agency's interpretation" when "(1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency's special expertise." *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846, 854 (2007) (citing *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004)). There is no question that the first and third factors are satisfied: the Department is tasked with administration and enforcement and FIPA falls squarely within the Department's expertise (*see Br. at 4*). While Brewer does not believe the statute is ambiguous, the questions posed by the District Court, and the debate among the parties, militate in favor of the second factor as well.

RCW 9.100.180(2)(d). Here, this is, admittedly, *at least* a 100% markup and, “following the same logic as *Nelson*, the 100 percent markup here also violates the Act...” Br. at 7.

C. Disclosure of the *Total Price* Does Not Absolve Money Mailer

The only disclosure Money Mailer can cite is the “total price” for the printing. But as the Department correctly points out, Money Mailer’s disclosure argument is untethered to the applicable law because, even if they had fully disclosed the 100% plus markup, there is no disclosing one’s way out of a violation of RCW 9.100.180(2)(d). The statute simply does not provide for it. Br. at 7-10.

Here, “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. Simply put, consistent with the Department’s enforcement practices and *Nelson*, charges with a 100% or more markup violate RCW 9.100.180(2)(d) as selling a franchisee a “product or service for more than a fair and reasonable price.”

This reasoning comports with broader principles, which do not permit franchisors to quietly withhold material information. In *Morris v. Int’l Yogurt Co.*, 107 Wn.2d 314, 729 P.2d 33 (1986), franchisees were

being sold “proprietary yogurt mix.” But the franchisor never mentioned that it was freely available to other customers. The nondisclosure was material, because it was ““a fact to which a reasonable man would attach importance in determining his choice of action in the transaction in question.”” *Id.*, at 323 (citing *Clausing v. DeHart*, 83 Wn.2d 70, 73, 515 P.2d 982 (1973) (quoting *Shermer v. Baker*, 2 Wn. App. 845, 855, 472 P.2d 589 (1970))).

The onus is on the franchisor to disclose anything to which a reasonable person would “attach importance” (including a 100% markup on the actual price of the most crucial supply in the franchise); it is no excuse to suggest to a franchisee that “we told you what you need to know.”

D. The Department Correctly Points Out that the Focus of FIPA Is the Franchisee, Not to Provide Safe Harbor to an Industry as Long as Pricing Amongst Competitors Is Consistent

The Department urges this Court to answer in the affirmative to the first question of the District Court. In doing so, it rejects the contention that the price charged for printing by Money Mailer’s competitors is somehow dispositive of the “fair and reasonable price” analysis. This again squares with both the statutory text as well as the broader principles of FIPA to guard franchisees against the franchisors who frequently hold overwhelming bargaining power and information.

Indeed, the very arguments by Money Mailer in this action recognize that it has enormous market power—which was one of the selling points to Brewer. It does not follow that just because a competitor has similar pricing means it is necessarily “fair and reasonable.” Indeed, the Department cautions against such an analysis,³ and advocates examination of the specific circumstance in front of the Court. In this, the Department is in agreement with the district court:

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.

DFI—like the district court—is correct that Money Mailer violated the Act’s requirement that a franchisor charge a franchisee a fair and reasonable price for the goods and services the franchisee purchases from the franchisor.

³ “If the ‘franchisee bill of rights’ were interpreted to be controlled by industry prices, franchisors would merely ensure that they charge no more or less than the unfair and unreasonable prices charged by their competitors, rendering a ‘fair and reasonable’ analysis of little use.” Department’s Amicus, at pp. 15-16.

III. CONCLUSION

Brewer respectfully requests this Court afford deference to the reasoning and conclusions of the Department in its *amicus* brief, and ultimately answer the District Court's questions as "yes" and "yes".

RESPECTFULLY SUBMITTED this 5th day of March, 2019.



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