No. 08-372

In The Supreme Court of the United States

SHELL OIL PRODUCTS COMPANY LLC;
MOTIVA ENTERPRISES LLC;
SHELL OIL COMPANY, INC.,

Petitioners,

v.

MAC'S SHELL SERVICE, INC.; CYNTHIA KAROL;
JOHN A. SULLIVAN; AKMAL, INC.; SID PRASHAD;
RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.;
STEPHEN PISARCZYK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

GARY R. GREENBERG
JOHN F. FARRAHER, JR.
(Counsel of Record)
GREENBERG TRAURIG, LLP
One International Place
Boston, MA 02110
(617) 310-6000

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition where the decision of the First Circuit to affirm respondents' constructive termination claim under the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806, is not contrary to the decisions of other courts of appeals.

CORPORATE DISCLOSURE STATEMENT

Respondents MAC's Shell Service, Inc. ("MAC"), Akmal, Inc. ("Akmal"), RAM Corporation, Inc. ("RAM"), or J&M Avramidis, Inc. ("J&M") have no parent corporation, nor are there any publicly traded companies that owns more than ten percent of the stock of MAC, Akmal, RAM or J&M.

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INTRODUCTION

The crux of the Petition proffered by Shell and Motiva is that the courts of appeals are fundamentally divided with respect to the availability of a constructive termination claim under the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806 ("PMPA" or the "Act"). In petitioners' view, in contrast to the positions of the First and Fourth Circuits, the Ninth and Sixth Circuits require actual severance of the franchise relationship for a constructive termination claim. The alleged circuit split is perceived, not real. The Sixth Circuit – like the First Circuit – recognizes constructive termination claims under the PMPA where (following an assignment of the franchise), one of the three statutory components of the franchise (the contract to use the refiner's trademark, the contract for the supply of motor fuel, and the lease of the premises) is breached or where the assignment is in violation of state law. Indeed, the First Circuit has adopted the Sixth Circuit's test for constructive terminations. The different outcomes between the circuit cases have nothing to do with differences in the elements of a constructive termination claim or the need for a complete severance of the franchise relationship. The outcomes were based on evidence (or the lack thereof) of a breach of one of the statutory components of the franchise. Nothing in the holdings of the Sixth Circuit cases mandates actual severance of the franchise relationship for constructive termination.

Nor do the decisions of the First and Fourth Circuits somehow disturb the goal of uniform standards for terminations under the Act or federalize mere breach of contract claims. It is evident from the structure, language and purpose of the Act that the goal of uniformity in standards for terminations is not meant to be inflexible. Certainly, as the cases confirm, the Act recognizes that assignments which increase the risks and burdens of the dealers' duties and obligations in violation of state law are violative of the Act and result in the termination of the franchise. This demonstrates not only that Congress did not intend to foster a single, uniform and inflexible standard in construing terminations under the Act, but also puts the lie to petitioners' contention that actual severance is required for constructive termination. Obviously, material changes in the risks and burdens imposed on a franchisee as a result of an assignment do not require abandonment to be unlawful under state law or violative of the Act, as the First Circuit recognized. Moreover, the First Circuit's decision makes it abundantly clear that the standard for constructive termination of a franchise is not lightly met and requires the effective termination of one of the agreements comprising the franchise. In this case the evidence established that as part of a strategy to force the conversion of franchisee-operated stations to stations run by Shell's joint venture, respondents' leases with Shell, which for two decades provided for rent subsidies, were effectively terminated when, after they were assigned to Motiva, the rent subsidies were eliminated, causing material

changes in the manner in which the Respondents operated their businesses and sold gasoline. Recognizing the intent of the Act to protect the expectations of dealers in their investments made as franchisees, the First Circuit found that the case presented a strong argument for the doctrine of constructive termination.

STATEMENT OF THE CASE

A. Factual Background

From the petitioners' description of the case and recitation of facts, one is hard pressed to recognize the actual case detailed at length in the First Circuit's decision. Understandably, the petitioners are silent on the substantial evidence presented, that for nearly two decades, commencing in 1982 and continuing until shortly after petitioner Motiva was formed by Shell and others, the respondents' leases with Shell included a permanent rent subsidy to offset their monthly rents. The evidence was, as the First Circuit noted, that "[v]arious representations were made to the Dealers to the effect that the Subsidy or something like it would always exist, the contract rent was to be disregarded, and the cancellation provision was only intended to be invoked in a situation like war or an oil embargo." Pet.App. at 3a. *See*

also Pet.App. at 14a.[1] Moreover, "internal Shell documentation indicat[ed] that the Subsidy was intended to be permanent, that franchisees should plan their business around the continued availability of the Subsidy, and that franchisees would understand the loss of the Subsidy to be a breach of a promise made by Shell." Pet.App. at 15a.

The petitioners also conspicuously avoid the evidence that with the creation of Motiva they embarked on a plan to transform Shell's existing gasoline distribution network to company-operated facilities which would allow them to capture profits then being earned by the independent dealers. The plan to convert the network was part of the "Strategic Marketing Initiative" ("SMI"). Initial plans called for the conversion of hundreds of independent stations to company-operated stations at a cost of several hundred million dollars. Motiva's goal for Massachusetts was to increase the number of company-operated stations and decrease the number of independent stations in certain markets by more than 70%. If forced to purchase the goodwill in each franchisees' business, however, the petitioners anticipated having to pay each dealer $200,000 or more per station. By early 2000, they had targeted the stations to be

[1] "There was evidence that the defendants said that the Subsidy was intended to be permanent, that the 30-day notice provision was only in place for cases of war or embargo, and that the Dealers could rely on the continuation of the Subsidy or something like it." Pet.App. at 14a.

converted, including the stations operated by the respondents and remaining plaintiffs.

Beyond the substantial costs involved to buy out the targeted dealers, another major impediment to the conversion of the dealerships was the restrictions imposed by the PMPA, which limited Motiva's right to terminate the franchises. For petitioners, converting dealers to company-operated stations would be beneficial because company-operated stations would not be subject to PMPA restrictions. Petitioners' documents acknowledged the need to devise "methods to overcome these restrictions."

Ultimately, petitioners instituted a plan to squeeze the dealers out of business, thus appropriating stations without incurring the huge cost of buyouts and effectively avoiding the limitations imposed by the PMPA. To this end, the subsidy was eliminated, which the petitioners understood would cause dramatic increases in rent and result in the closure of some franchisee-operated stations. In addition, new Motiva leases were drafted to replace expiring Shell leases. These leases were presented to the dealers on a "take-it-or-leave-it" basis. The respondents were told that if they refused to sign the new Motiva leases, their franchises would be terminated. While the Motiva leases differed in several ways from the Shell leases, the most significant change was the manner in which rent was calculated, the net effect of which was that rents increased even further. The evidence showed that the petitioners knew that the new leases would cause a decrease in the number of

independent dealers. With the implementation of the SMI, the number of independent stations in Massachusetts decreased from 177 (in January 1998) to 96 (in January 2003); during the same time period, the number of company-operated stations increased from 3 to 40.

B. First Circuit Decision

These are the factual predicates which presented, the First Circuit noted, "a strong argument for the doctrine of constructive termination." Pet.App. at 19a. There is no indication in the First Circuit's decision that the court perceived a split in the circuits on the issue of constructive termination or indeed, more remarkably, that the court felt it was, by its decision, somehow creating a fundamental rift with the Sixth and Ninth Circuits on the elements of such claims, as the petitioners contend. In fact, the First Circuit notes that in its prior case of *Chestnut Hill Gulf v. Cumberland Farms Inc.*, 940 F.2d 744 (1st Cir. 1991) it had adopted the test for constructive termination established by the Sixth Circuit.

> [T]o sustain a claim, under the PMPA, that a franchisor assigned and thereby constructively terminated a franchise agreement, the franchisee must prove either: (1) that by making the assignment, the franchisor breached one of the three statutory components of the franchise agreement, (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the

> lease of the premises), and thus, violated the PMPA; or (2) that the franchisor made the assignment in violation of state law and thus, the PMPA was invoked.

Pet.App. at 16a *citing Chestnut Hill Gulf*, 940 F.2d at 750-51 (*quoting May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989)). It is also noteworthy that the above quote from *May-Som Gulf* cites for support, among other cases, the Fourth Circuit's decision in *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986), which figures prominently in many cases and, according to the petitioners, is at odds with the Sixth Circuit's view.[2] Again, there is no indication that the Sixth Circuit in *May-Som Gulf*

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[2] In *Barnes*, the franchisee (Barnes) alleged that her franchise was constructively terminated when the franchisor (Gulf) assigned its interest in the franchise to Anderson Oil. *Barnes*, 795 F.2d at 360. As a result of the assignment, Barnes claimed that she was compelled to pay more money for gasoline (as much as $1,000 per month) which forced her to raise her prices and decreased her sales and net income. *Id.* at 361. The trial court held that the assignment did not terminate the franchise because Barnes was still in business. *Id.* at 360. The "primary issue" addressed on appeal was whether an assignment of a franchise that increased the retailer's cost of gasoline over a stipulated price gave rise to a claim for constructive termination under the PMPA. *Id.* at 359. The Fourth Circuit answered in the affirmative and reversed the grant of summary judgment stating that "[a] franchisor cannot circumvent the protections the [PMPA] affords a franchisee by the simple expedient of assigning the franchisor's obligation to an assignee *who increases the franchisee's burden* by charging more for gasoline than the stipulated franchise price." *Id.* at 362 (emphasis added).

considered *Barnes* an abnormality on this issue, and the First Circuit noted in this case that what set *Barnes* apart from *May-Som Gulf* and *Chestnut Hill Gulf* was that *Barnes* concerned an actual breach of one of the statutory elements of the franchise. Pet.App. at 16a. In other words, the difference in the cases was not in the articulation of the elements of a constructive termination claim, but whether the plaintiffs had sufficient facts to make out a claim that one of the statutory elements of the franchise had been breached. *See May-Som Gulf*, 869 F.2d at 923 ("Thus, on the facts presented here, we conclude that plaintiffs cannot secure relief on the ground that Chevron or Cumberland breached one of the three components of their Gulf franchise agreements.").

In any event, as to the substantive constructive termination claim (i.e. breach of one of the three statutory components of the franchise), the First Circuit ruled that Shell was not insulated from liability by virtue of its assignment to Motiva. An action for constructive termination lies against the assignor of a franchise when the assignee breaches the franchise. Pet.App. at 17a. The PMPA did not relegate the franchisee to seeking damages against the assignee which might not have the resources to satisfy a judgment. *Ibid.* The First Circuit also rejected petitioners' contention that the breach had to be contemporaneous with the assignment. A delay between the assignment and the breach was not relevant and this was especially true where, as here, the assignee is a joint venture in which the franchisor

is a party. *Ibid. See also Fresher v. Shell Oil Co.*, 846 F.2d 45, 46-47 (9th Cir. 1988); *Riverdale Enters., Inc. v. Shell Oil Co.*, 41 F. Supp. 2d 56, 64 (D. Mass. 1999).

Further, the court ruled that the breach of the statutory element of the franchise did not have to be a total breach. Pet.App. at 18a. The court rejected the petitioners' analogy to constructive termination in employment law or constructive eviction. Unlike those doctrines, which require actual severance of the relationship, constructive termination of the franchise did not require the actual abandonment of years of work and investment and the severance of the franchise relationship. *Ibid.* The court noted, however, that constructive termination could only be found where the breach of the lease, as the district court charged, was such a material change that it effectively ended the lease. *Ibid.*

To require an actual abandonment of years of work and investment before a right under the PMPA is recognized was unreasonable and would frustrate the congressional plan by requiring a franchisee to go out of business before invoking the protections of the PMPA. *Ibid.* Thus, "[w]here the franchisor has breached its obligations to the franchisee such that the franchisee faces the effective end of the franchise, the PMPA must treat that as a termination of the franchise." Pet.App. at 20a-21a. The underlying reason, as the court goes on to explain, is the Act's protection of the franchisee's expectations, which can be undermined or eviscerated when, as here, the franchisor had engaged in a plan to squeeze out the

franchisees and convert their stations to direct operation. Pet.App. at 19a-20a. Without the Act's express restriction on the franchisor's ability to convert dealer franchises to its own use, "the franchisor could extract any increase in value by the franchisee's investment without sharing that increase with the franchisee. This would dampen the incentive for a franchisee to develop the business." Pet.App. at 20a. The court noted that nothing prevented the petitioners from buying the dealers out. "What the PMPA does forbid is franchisors using their power to dictate impossible franchise terms in order to force the franchisees to walk away from their investments or to set them at artificially low prices. This is exactly what the Dealers claimed was happening here." Pet.App. at 20a n. 13. Finally, the court concluded that there was ample evidence for the jury to conclude that the financial hardship resulting from the loss of the subsidy meant the end of the relationship with Shell and that it would not step into the jury box to provide a second opinion. As the verdict was not against the weight of the evidence and did not result in a blatant miscarriage of justice, the district court did not abuse its discretion in its denial of the motion for a new trial. *Id.* at 21a.

REASONS FOR DENYING THE PETITION

A. The Circuit Court Decisions Uniformly Recognize A Claim For Constructive Termination Where There Has Been A Breach Of The Franchise

Contrary to petitioners' contention, the courts of appeals are not fundamentally divided with respect to the availability of a constructive termination claim under the PMPA. Petitioners argue that the Sixth and Ninth Circuits require actual severance of the franchise relationship for a constructive termination claim.[3] Petition at 17 *citing Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of California*, 153 F.3d 938 (9th Cir. 1998); *Little Oil Co. v. Atl. Richfield Co.*, 852 F.2d 441 (9th Cir. 1988); *Clark v. BP Oil Co.*, 137 F.3d 386 (6th Cir. 1998).[4] Such is not the case. As

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[3] Petitioners failed to raise this argument in the district court. By failing to object to the district court's charge that constructive termination was available where there was a material change that effectively ended the lease, even though the plaintiffs continued to operate the business, they waived the argument that constructive termination requires severance of the franchise relationship.

[4] The Petitioners assert that the Fifth and Eleventh Circuits have signaled their agreement with the Sixth and Ninth Circuits. Petition at 18 *citing McGinnis v. Star Enterprise*, No. 93-1234, 1993 WL 455587 (5th Cir. Oct. 21, 1993); *Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 486-488 (5th Cir. 2003); *Shukla v. BP Exploration & Oil, Inc.*, 115 F.3d 849 (11th Cir. 1997). Except for *McGinnis*, an unpublished decision, the remaining cases are unexceptional in that they recognize that a claim for constructive termination requires a breach of one of the statutory components of the franchise. In *McGinnis*, the

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noted, the Sixth Circuit like the First Circuit (and in fact the other circuits that have decided the issue) recognizes that a claim for constructive termination under the PMPA is available where, as here, following an assignment of the franchise, one of the three statutory components of the franchise (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises) is breached and/or where the assignment is in violation of state law. *See Chestnut Hill Gulf v. Cumberland Farms Inc.*, 940 F.2d 744 (1st Cir. 1991); *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989); *see also Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 486-488 (5th Cir. 2003); *Shukla v. BP Exploration & Oil, Inc.*, 115 F.3d 849, 852-853 (11th Cir. 1997); *Beachler v. Amoco Oil Co.*, 112 F.3d 902, 906-07 (7th Cir. 1997). Petitioners fail to acknowledge that the First Circuit in *Chestnut Hill Gulf* adopted the test for constructive termination articulated by the Sixth Circuit in *May-Som Gulf* and deftly attempt to relegate *May-Som Gulf* to a footnote, standing for the proposition that constructive termination claims have been allowed where a franchisor assigns a franchise in violation of state law, which petitioners argue is not a theory at issue in this case. Petition at

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entire discussion of the PMPA claim is contained in two short paragraphs, with the court pronouncing without analysis that "[t]he plain meaning of the statute does not provide for 'constructive termination.'" This pronouncement is at odds with the recognition in *Abrams Shell, supra,* that the Act provides for constructive termination.

16 n. 9. This myopic view ignores the fact that under the Act "franchise" is defined to include the unexpired portion of any franchise that is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of state law which permits such transfer or assignment without regard to any provision of the franchise. § 2801(1)(B). As the Fourth Circuit noted in *Barnes*, an assignment that is unauthorized by state law is prohibited under the Act and the unexpired portion of the franchise is no longer a franchise as defined by the Act. 795 F.2d at 363. It follows that "[a]n assignment that is invalid under state law because it increases the franchisee's burdens is tantamount to a constructive termination of the franchise." *Ibid.* Nothing in *May-Som Gulf* takes issue with the Fourth Circuit's analysis in *Barnes*, and the First Circuit's analysis in this case makes clear that Motiva's termination of the rent subsidies effectively increased the dealers' burdens under the Shell leases and effectively terminated those leases.

Petitioners' reliance on *Clark* does not advance their argument. *Clark*, which relies on and extensively cites *May-Som Gulf*, does not stand for the proposition that severance is required for a constructive termination. The *Clark* court made clear that

> In *May-Som*, this court interpreted the minimum standards provided by the PMPA to permit a claim of constructive termination of a franchise resulting from an assignment only where there is a breach of one of the

> statutory components of the franchise – the contract to use the refiner's trademark, the contract for the supply of motor fuel, and the lease of the premises – or when the assignment violates applicable state law.

137 F.3d at 392. The problem for Clark was that the franchise supply agreement provided for an open price term which could be freely changed by BP. *Ibid.* In other words, the assignee did nothing to Clark that BP could not have done. *Ibid.* This was in contrast to the situation in *Barnes*, as the *Clark* court noted, where the dealer did not agree to an open price term and was allowed to reach the jury on whether the increased price paid for gasoline materially increased his burden under the agreements. *Id.* at 393. Moreover, in *Clark*, unlike here, the price supports and other arrangements with BP were determined to be informal arrangements not required and enforceable under the franchise. *Id.* at 394. Thus, even though the court in *Clark* recognized that a material change in the franchise gives rise to a violation under the Act, *id.* at 393 discussing *Barnes*, *supra*, because the price supports were gratuitous, Clark could not establish a material change in the BP franchise. *Id.* at 393-394.

The Ninth Circuit cases do not support the petitioners as the Ninth Circuit has not yet decided whether a constructive termination claim is viable under the PMPA. *Portland 76*, 153 F.3d at 948 ("We assume for purposes of discussion, but do no decide, that constructive termination may give rise to a claim

under the Act."); *DuFresne's Auto Service, Inc. v. Shell Oil Co.*, 992 F.2d 920 (9th Cir. 1993). However, in *Little Oil Co., Inc. v. Atlantic Richfield Co.*, 852 F.2d 441 (9th Cir. 1988), the court, while acknowledging that it had not yet decided whether the PMPA applied to constructive terminations, approved of the district court's instructions that the plaintiff had to prove that the franchisor's changes were "unduly burdensome and overbearing." 852 F.2d at 445. "If the changes were not 'unduly burdensome and overbearing,' no 'constructive' termination could have occurred." *Ibid.* The court noted that the challenged instruction defined the contour of the plaintiffs' initial burden under the PMPA of proving that a constructive termination has occurred." *Ibid.* In short, there is no suggestion in *Little* that complete severance of the franchise relationship is required.

In sum, the main predicate for the Petition is more the product of creative and selective lawyering than of actual disagreement by the courts of appeals on the reasoning and contours of constructive termination under the Act. As there is no circuit split to address, the Petition should be denied.[5]

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[5] Petitioners cite a number of district court decisions to support the argument that, as with the circuit courts, there are divergent results in the district court decisions. Petition at 22-24. But the misreading of circuit court decisions by district courts certainly is not a compelling reason to grant the Petition where the circuit court decisions themselves have consistently recognized constructive termination under the circumstances in this case. *See May-Som Gulf*, 869 F.2d at 922 n. 3 (distinguishing

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B. The First Circuit Decision Does Not Eviscerate The Standard For Terminations Under The Act Or Federalize Mere Breach Of Contract Claims.

The petitioners argue that the First and Fourth Circuit law expands the Act's coverage and federalizes a large category of disputes formerly governed by state contract law. Like the perceived circuit split on constructive terminations, the supposed policy reasons advanced by the petitioners for accepting the Petition are part creativity and part studied ignorance. The petitioners argue that the standard articulated by the First Circuit was unintelligible and that the court failed to explain how a breach could effectively end a franchise when the plaintiff continued to operate. Petition at 25. The answer is not all that difficult to appreciate. The Act speaks of the termination of a franchise (that is, the termination of one of the agreements included in the franchise, here, Shell's lease agreements) and the nonrenewal of the franchise relationship. Simply stated, the evidence was clear (and the jury so found under the court's instructions) that the subsidy was of such material importance to the dealers that with Motiva's cancellation of the decades-old rent subsidies, the original Shell leases were effectively terminated.[6] Thereafter,

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the district court decision in *Florham Park I*, Bus. Franchise Guide (CCH) ¶9011 because it did not correctly apply *Barnes*).

[6] The failure to appreciate the difference with franchise and franchise relationship is also evident in the petitioners' failure to

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the parties effectively were left going forward with what in reality were Motiva leases sans the rent subsidies. There is nothing incoherent about this so-called standard and it certainly does not allow dealers to allege PMPA violations in virtually any contract dispute. Pet. at 25. To require termination to include the end of the franchise relationship would equate termination with nonrenewal under the Act, notwithstanding the clear differences between the two concepts.

The First Circuit decision also does not disturb the goal of uniform standards for terminations under the Act. The Act recognizes that assignments which increase the risks and burdens of the dealers' duties and obligations in violation of state law are violative of the Act and result in the termination of the franchise. *Barnes*, 795 F.2d at 363. As the *Barnes* court

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distinguish constructive termination under the Act and constructive eviction or constructive discharge. Petition at 19-20. In the first instance, constructive eviction and constructive discharge liability claims are not part and parcel of a Federal statutory scheme enacted in large measure to protect franchisees from overreaching and oppressive tactics by franchisors. Unlike constructive termination of a franchise, where a material breach of one of the statutory agreements making up the franchise is possible without cessation of the franchise relationship, one cannot conceive of a constructive discharge or constructive eviction without a complete break in the employment or landlord relationship. Indeed, it may well be that the terms of the actual agreements have little or nothing to do with the living or employment conditions that form the basis for the construction eviction or discharge claims. The First Circuit was correct in noting that petitioners' analogy failed.

noted, a claim for "constructive termination" is rooted in the legislative history of the Act and the equitable powers vested with the judiciary. *Id.* at 362. The drafters of the legislation recognized that

> there is an area in which Federal termination provisions under this legislation and State-granted rights of assignability of a franchise may conflict. It is intended that the harmonizing of these competing interests be left to judicial balancing of competing equities on a case-by-case basis. No hard and fast statutory rule would accomplish the desired goal of harmonizing the competing statutory objectives as equitably as application of general principles of equity to specific fact situations.
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> * * *
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> Therefore, the legislation leaves to the courts the task of resorting to traditional principles of equity to maximize attainment of competing statutory objectives consistently with the supremacy clause of the Constitution and the purpose of the Federal legislation.

Ibid, quoting S.Rep. No. 731, 95th Cong., 2d Sess. at 43.[7]

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[7] As noted, this demonstrates that Congress did not intend to foster an inflexible standard in construing terminations under the Act, and undermines petitioners' contention that actual severance is required for constructive termination. Material changes in the risks and burdens imposed on a franchisee as a result of an assignment do no require abandonment to be

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Thus, the court concluded that assignments authorized by state law may have to give way to the Acts termination provisions. *Id.* at 362. "One of Congress' purposes in adopting the [PMPA] was to protect franchisees from overbearing, burdensome conduct by the franchisor during the term of the franchise." *Id.* at 363.

Moreover, in this case, as the First Circuit recognized, the driving issue struck one of the central tenets of protection that the Act provides to franchisees. The Act prohibits termination and nonrenewal where the purpose of the termination or nonrenewal is to convert the leased premises to operation by employees or agents of the franchisor for the franchisor's own account. Thus, under § 2802(b)(3) an appropriate ground for nonrenewal of the franchise relationship occurs when the franchisor and franchisee fail to agree on terms proposed by the franchisor in good faith and the ordinary course of business so long as the purpose is not to convert stations to the franchisor's control or otherwise to prevent the renewal of the ongoing relationship:

> (A) The failure of the franchisor and franchisee to agree to changes or additions to provisions of the franchise, if –
>
> (i) such changes or additions are the result of determinations made by

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unlawful under state law or violative of the Act, as the First Circuit recognized.

> the franchisor in good faith and in the normal course of business; and
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> (ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for the benefit of the franchisor or otherwise preventing the renewal of the franchise relationship.

Here the First Circuit recognized:

> At trial the Dealers argued that Shell assigned the franchise agreements to Motiva, even *created* Motiva, in order to squeeze them out of their franchises. If the jury accepted as the reason for the changes that Shell wanted to squeeze them out of their franchises, "the case falls within the scope of the PMPA, which is designed not to freeze the franchise agreements exactly where they were, but to prevent franchisors from improperly terminating franchises and thereby to ensure that franchisees benefit from successful investment in their franchises."

Pet.App. at 19a. The import of this prohibition was understood by the First Circuit, which noted that without the Act's express restriction on the franchisor's ability to convert dealer franchises to its own use, "the franchisor could extract any increase in value by the franchisee's investment without sharing that increase with the franchisee. This would dampen

the incentive for a franchisee to develop the business." Pet.App. at 20a. The court noted that this same protection for franchisee expectations underlies the PMPA's requirement that a franchisor make a bona fide offer or grant a right of first refusal to the franchisee when the franchisor contemplates withdrawing from the market. Pet.App. at 19a.

In sum, the First Circuit's decision is firmly grounded in the Act and is in accord with the other courts of appeals that have addressed the issue of constructive termination under the PMPA. The decision is hardly one that federalized mere breach of contract claims or in any way increases the limited preemption of state authority provided under the Act.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore respondents respectfully request that the Petition be denied.

Respectfully submitted,

GARY R. GREENBERG
JOHN F. FARRAHER, JR.
Counsel of Record
GREENBERG TRAURIG, LLP
One International Place
Boston, MA 02110
(617) 310-6000

Counsel for Respondents