No.

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 a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806, regulates the circumstances in which an oil refiner or distributor can "terminate" a service station franchise. In this case, the First Circuit, in conflict with the decisions of other courts of appeals, allowed service station operators to sue for "constructive termination" even though they continued to operate their stations (indeed, many were still operating their stations at the time of trial, almost five years after they claim to have been "constructively terminated"). The question presented is:

Whether a service station operator that continues to operate its franchise—using the same trademark, selling the same fuel, and occupying the same premises—can bring an action claiming that it was "constructively terminated" in violation of the Act.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company, Inc., were defendants in the district court and appellants in the court of appeals.

Respondents Mac's Shell Service, Inc., Cynthia Karol, John A. Sullivan, Akmal, Inc., Sid Prashad, RAM Corporation, Inc., J&M Avramidis, Inc., and Stephen Pisarczyk were plaintiffs in the district court and appellees in the court of appeals. Three K's, Inc., was a plaintiff in the district court and an appellee in the court of appeals.

Francis Marcoux, Abraham Abraham, Jordan Avramidis, Chriss Azazian, Richard Baima, Ed Baker, Steve Black, James Coggeshall, Michael Corbett, Patricia Dasilva, Alex Dasilva, Steve Falcone, George Fontaine, Bill Fontaine, Camille Francis, Matty Gaeta, Donald Gagnon, John Generoso, Kal Hamze, Abraham Hamze, Tibor Hangyal, Adam Hipp, Abdul Kafal, George Kantarges, Jim Kantarowski, William Kaufman, Joe Kelleher, Hussein Kobessi, Mike Lamarche, Richard Melanson, Akmal Moawed, Constantin Peides, Harvey Rudnick, Roger Thibault, Dimitrious Tsanikilides, Stephen Shea, J. Enterprise, Inc., Nikolas Manousaridis, Paul Sroczynski, JES Service, Inc., Ronnie Aboud, Mahendrs Amin, Massoud Atalish, Mike Atalish, Douglas Chapman, Steve Frangias, John Golden, Kal Hamze, Patrick Hines, Muhammad Imatiaz, Jay Jon, Kay Jon, Jaque Kanaan, Hussein Kobessi, James Moraidis, Sunny Patel, Russell Picard, Paul Richards, Fred Saad, Aziz Saba, Walid Samrout, Earl Stickney, Thomas Sullivan, Toufic Atallah, Dror Dusdushman, Earl McLaughlin, Wilson Tiburtino, Lasco Enterprises, Inc., and Larry Rubensein were plaintiffs in the district court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company, Inc., state as follows:

1. Shell Oil Company is a Delaware corporation and a wholly owned subsidiary of Shell Petroleum, Inc. Shell Petroleum, Inc. is a Delaware corporation, the shares of which are owned directly or indirectly by Shell Petroleum N.V. Shell Petroleum N.V. was founded under the laws of the Netherlands. The shares of Shell Petroleum N.V. are owned 100% by Royal Dutch Shell plc, a publicly traded company. Royal Dutch Shell plc is the ultimate parent company of the companies which comprise the Shell Group.

2. Motiva Enterprises LLC is a Delaware limited liability company in which Shell Oil Company and Saudi Refining Inc. respectively own directly or indirectly 50% of the ownership interests. The ultimate parent company of Saudi Refining Inc. is the Saudi Arabian Oil Company ("Saudi Aramco"). Saudi Refining Inc. and Saudi Aramco are not publicly traded companies.

3. Shell Oil Products Company was formed as a Delaware corporation wholly owned by Shell Oil Company. On April 1, 2001, Shell Oil Products Company converted to a Delaware limited liability company now known as Shell Oil Products Company LLC. Shell Oil Products Company LLC is wholly owned by Shell Oil Company.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is published at 524 F.3d 33 (1st Cir. 2008). The orders and judgment of the district court (App., *infra*, 34a-63a) are unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 18, 2008. The court of appeals denied a petition for rehearing and rehearing en banc on May 23, 2008 (App., *infra*, 64a-66a). On August 14, 2008, Justice Souter extended the time to file a petition for a writ of certiorari to and including September 20, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title I of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806, is set forth in the Appendix (App., *infra*, 67a-91a).

STATEMENT

This petition presents an important issue that has squarely divided the courts of appeals. The Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806, regulates the circumstances in which an oil refiner can "terminate" or "fail to renew" a service station franchise. The First and Fourth Circuits have construed the term "terminate" expansively. Under their decisions, a franchisee can sue for "constructive termination" even if it continues to operate its franchise. In this case, for example, the First Circuit allowed service station operators to sue for "constructive termination" even if they were still operating their stations at the time of trial—almost five years after they claim to have been "constructively terminated." By contrast, the Sixth and Ninth Circuits require an actual end to the franchise as a prerequisite to any constructive termination claim. This case provides the Court with an opportunity to resolve that longstanding conflict.[1]

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[1] Respondents have filed their own petition for a writ of certiorari from the same judgment (No. 08-240), asking this Court to resolve a closely related issue: whether a dealer can claim it was "construc-

I. STATUTORY FRAMEWORK

A. Oil refiners provide motor fuel to the public through service stations that are often operated by independent dealers pursuant to petroleum franchise agreements. Those agreements typically authorize the dealer to use the refiner's trademark, provide for the supply of fuel, and may also include a lease of the physical premises. See S. Rep. No. 95-731, at 17, 29 (1978).[2] Franchise agreements ordinarily have a specified term (*e.g.*, three years) after which they automatically expire. See, *e.g.*, C.A. App. 1412. The parties can "renew" the franchise relationship at the end of the stated term by executing a new agreement. See S. Rep. No. 95-731, at 18.

In the 1970s, Congress received "numerous complaints by franchisees of unfair terminations or non-renewals of their franchises." S. Rep. No. 95-731, at 17. In 1978, it responded by enacting the Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322 (codified in part as amended at 15 U.S.C. §§ 2801-2806). Rather than regulate all aspects of the franchise relationship, Congress focused on two specific events—"termination and non-renewal." S. Rep. No. 95-731, at 19. Its goal was to "define the rights and obligations of the parties to the franchise relationship in the crucial area of termination of a franchise or non-renewal of the franchise relationship." *Ibid.* Moreover, concerned about the "uneven patchwork of rules governing franchise relationships which differ

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tively non-renewed" in violation of the PMPA if it in fact renews its franchise relationship and continues to operate its franchise.

[2] Often, different aspects of the franchise relationship are set forth in separate contracts. For example, the parties may sign one contract addressing fuel supply and trademark rights and a separate contract for the lease of the premises. See, *e.g.*, C.A. App. 1334-1346, 1395-1410. Those contracts are often referred to collectively as the "franchise agreement," and we follow that convention here.

from State to State," Congress also sought to impose a "single, uniform set of rules governing the grounds for termination and non-renewal." *Ibid.*

To those ends, the PMPA contains a series of interlocking provisions that "prohibit[] a franchisor from *terminating* a franchise during the term of the franchise agreement and from *failing to renew* the relationship at the expiration of the franchise term, unless the termination or nonrenewal is based upon a ground specified or described in the legislation and is executed in accordance with the notice requirements of the legislation." S. Rep. No. 95-731, at 15 (emphasis added). To provide "certainty and uniformity in franchise relationships which permeate a nationwide motor fuel distribution and marketing network," the Act also "preempts state law in the subject areas in which the federal legislation deals, i.e., termination and non-renewal of franchise relationships." *Id.* at 16. In establishing those uniform rules for termination and non-renewal, Congress "recognize[d] the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.* at 19. The Act thus strikes a careful balance between protecting franchisees and affording franchisors necessary flexibility.

B. Section 101 of the PMPA identifies the franchise agreements subject to the Act's restrictions. It defines the term "franchise" as a contract under which a refiner authorizes a retailer to use its trademark in selling motor fuel (as well as similar arrangements between refiners and wholesale distributors or between distributors and retailers). 15 U.S.C. § 2801(1)(A). The Act defines the "franchise" to include not only the agreement authorizing use of the trademark but also any agreement providing the retailer with a "supply of motor fuel" or authorizing the retailer to "occupy leased marketing premises." *Id.*

§ 2801(1)(B); S. Rep. No. 95-731, at 29. Those three elements—the right to use a trademark, to occupy premises, and to receive motor fuel—are often referred to as the "statutory elements" of a franchise. App., *infra*, 2a n.1.

Section 102 sets forth the Act's principal substantive restrictions. It states that, except as permitted by the Act, no franchisor may "(1) terminate any franchise * * * prior to the conclusion of the term, or the expiration date, stated in the franchise," or "(2) fail to renew any franchise relationship." 15 U.S.C. § 2802(a). Subsection (b)(2) sets forth permissible grounds for termination of a franchise agreement during its stated term, or for non-renewal upon expiration of that term. *Id.* § 2802(b)(2). For example, a franchisor may terminate a franchisee who fails "to exert good faith efforts to carry out the provisions of the franchise" despite appropriate warnings. *Id.* § 2802(b)(2)(B). Subsection (b)(3) lists additional grounds for non-renewal. *Id.* § 2802(b)(3). For example, a franchisor may refuse to renew a franchisee who fails "to agree to changes or additions to the provisions of the franchise" proposed by the franchisor, provided the changes were proposed "in good faith and in the normal course of business" and not "for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor." *Id.* § 2802(b)(3)(A).

Section 104 sets forth notification procedures a franchisor must follow before terminating or declining to renew a franchisee. 15 U.S.C. § 2804. Normally, the franchisor must provide written notice of its intent to terminate or not to renew a franchise "not less than 90 days prior to the date on which such termination or nonrenewal takes effect." *Id.* § 2804(a). Where 90 days' notice is impractical, the franchisor must provide notice on the earliest date on which notice is "reasonably practicable." *Id.* § 2804(b)(1). In all cases, the notice must state the franchisor's "intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor." *Id.* § 2804(c).

Section 105 establishes a private cause of action for violations of the Act, subject to a one-year statute of limitations. 15 U.S.C. § 2805(a). It authorizes courts to grant "such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with [the Act], including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief." *Id.* § 2805(b)(1). Courts are *required* to grant a preliminary injunction if (1) a franchisee has been terminated or non-renewed; (2) there are "sufficiently serious questions going to the merits to make such questions a fair ground for litigation"; and (3) the balance of hardships favors relief. *Id.* § 2805(b)(2). The franchisor has the burden of justifying any termination or non-renewal. *Id.* § 2805(c).

Section 105 also provides for monetary relief. Plaintiffs are entitled to recover actual damages and, in any case involving "willful disregard" of the Act's requirements, punitive damages. 15 U.S.C. § 2805(d)(1)(A)-(B). Plaintiffs are entitled to recover attorney's fees and expert witness fees whenever they recover more than nominal damages. *Id.* § 2805(d)(1)(C).

Finally, Section 106 addresses the PMPA's relationship to state law. To the extent the PMPA applies, "no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation * * * with respect to termination * * * of any such franchise or to the nonrenewal * * * of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision" of the PMPA. 15 U.S.C. § 2806(a)(1). Section 106 also clarifies that nothing in the Act "authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise" authorized by the contract or by state law. *Id.* § 2806(b)(1).

II. PROCEEDINGS BELOW

A. Background

This case arises out of franchise agreements between petitioner Shell Oil Company ("Shell") and various Shell service station operators in Massachusetts. Those franchise agreements specified a monthly "contract rent" for lease of the station premises. App., *infra*, 2a-3a. For many years, however, Shell also offered a rent reduction program (referred to by the court of appeals as a "subsidy") that reduced the amount of rent a dealer had to pay depending on the volume of gasoline sold. *Ibid.* The written program terms "explicitly provided for cancellation [of that program] with thirty days' notice." *Id.* at 3a; see, *e.g.*, C.A. App. 3533 ("Shell may, at its option, upon at least 30 days' prior notice to you, * * * discontinue the Program at the end of any month * * * ."). The franchise agreements also contained integration clauses requiring that any modification be in writing. App., *infra*, 13a.

In 1998, Shell assigned its rights and obligations under the franchise agreements to petitioner Motiva Enterprises LLC ("Motiva"), a joint venture formed by Shell, Texaco, and Saudi Refining to conduct gasoline marketing operations. See App., *infra*, 2a; C.A. App. 2476. Unlike Shell, the other joint venture partners did not offer a volume-based rent subsidy; the joint venture thus "had to evolve a uniform rent structure." App., *infra*, 57a. At the time, moreover, the "entire industry was changing the manner of computing rent." *Ibid.* Rather than basing rent on gasoline sales, the industry was "switch[ing] to a formulation based on the value of the station's real estate." *Ibid.* That shift reflected "a change in the use of gas stations from simply selling gasoline and oil to including also convenience stores and other amenities." *Ibid.*

At least in part for those reasons, the rent subsidy for the Shell dealers was gradually phased out. See App., *infra*, 57a. After substituting a transitional program for 16 months, Motiva ended the subsidy entirely on January 1, 2000. *Id.* at 2a-3a; C.A. App. 2912. In addition, consistent with the industry trend, Motiva decided to start computing rent based on the value of the station's real estate. See App., *infra*, 57a. As each dealer's franchise agreement expired by its terms over the months and years following January 1, 2000, Motiva offered a new franchise agreement that calculated rent on that revised basis. See *id.* at 21a.

B. Proceedings in the District Court

1. On June 30, 2000, six months after Motiva ended the rent subsidy, six Shell dealers and an unincorporated association named the "Shell Dealers Defense Group" filed a lawsuit against Shell and Motiva (the "*Tsaniklides*" action). App., *infra*, 3a; C.A. App. 3793, 3798-3804. None of the respondents here was a named plaintiff in that action. C.A. App. 3798. After the district court held that the Shell Dealers Defense Group lacked standing—and more than a year after Motiva ended the rent subsidy—plaintiffs moved to add respondents and approximately 70 other dealers (all of whom claimed to be members of the Shell Dealers Defense Group) as plaintiffs in the *Tsaniklides* suit. *Id.* at 3864-3875. The court denied that motion on June 12, 2001. *Id.* at 3906.

On July 27, 2001, about 18 months after Motiva ended the rent subsidy, 63 of those dealers (including respondents) filed this suit against Shell and Motiva. App., *infra*, 4a; C.A. App. 52-64.[3] The complaint acknowledged that the written program terms authorized Shell to discontinue the rent subsidy on 30 days' notice. C.A. App.

[3] The suit alleged jurisdiction under 15 U.S.C. § 2805 and 28 U.S.C. §§ 1331 and 1367. C.A. App. 59-60.

70. But the complaint alleged that Shell sales representatives had orally promised the dealers—contrary to the express written program terms and the express prohibition on oral modification—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 a war or an oil embargo." App., *infra*, 3a. The suit thus claimed that Motiva's discontinuation of the rent subsidy was a breach of contract under state law. *Id.* at 4a.

The complaint also included two federal PMPA claims. Although the dealers were never actually terminated and continued to operate their Shell stations after Motiva ended the rent subsidy, they claimed that discontinuation of the rent subsidy constituted a "constructive termination" of their franchise agreements in violation of the PMPA. App., *infra*, 4a. Similarly, although the dealers in fact renewed their franchise relationships by signing new franchise agreements with Motiva when their existing agreements expired, they claimed that those new agreements constituted "constructive non-renewals" of their franchise relationships because Motiva changed the way it computed rent. *Ibid.*[4]

Shell and Motiva moved to dismiss and later moved for summary judgment, arguing (among other things) that a mere rent increase, unaccompanied by any termination of the franchise, was not actionable under the PMPA. Pltfs. C.A. Supp. App. 11-15; Def. C.A. Supp. App. 1-6. The court denied both motions, holding that the dealers had a valid claim for "constructive termination" under the PMPA. App., *infra*, 62a; C.A. App. 488-489.

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[4] Plaintiffs later added claims for bad-faith pricing under U.C.C. § 2-305, alleging that Shell and Motiva charged too much for fuel under the open price terms of their supply agreements. App., *infra*, 3a-4a; C.A. App. 319-320.

2. The district court selected eight of the 63 dealer-plaintiffs—respondents here—to proceed to trial first. C.A. App. 297.[5] A 15-day jury trial began on November 15, 2004. At trial, the dealers testified about their operations following the January 1, 2000, cancellation of the rent subsidy. Four of the eight dealers testified that they were still operating their Shell-branded service stations at the time of trial, 58 months after their alleged "constructive termination." *Id.* at 846, 897, 942, 996.

Three of the four remaining dealers testified that they continued operating their stations until after the allegedly terminated agreements expired according to their terms and the dealers signed renewal agreements with Motiva. One of those three dealers signed a new Motiva agreement and then operated the station until April 30, 2004, 52 months after the subsidy ended. C.A. App. 1009, 1372-1373. Another signed a new Motiva agreement and then operated the station until September 2001, when he sold it to a third party, 21 months after the subsidy ended. *Id.* at 992, 1390-1391. The last of the three signed a new Motiva agreement effective June 2000 and then operated the station until September 2000, when he sold it to Motiva, nine months after the subsidy ended. *Id.* at 882, 1393-1394.

The eighth dealer operated his Shell station for seven months after the rent subsidy ended. C.A. App. 2866. His son then purchased the property from Motiva so it could be converted to a garden center. *Id.* at 1077-1078. That dealer did not claim his decision to leave the service-station business had anything to do with cancellation of the rent subsidy; he had been planning to convert the station before the subsidy ended. *Id.* at 1070-1078.

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[5] The court initially selected ten dealers, C.A. App. 297, but one lost on summary judgment and another settled on the eve of trial, *id.* at 490, 805, 809-810.

Some stations were quite profitable after their alleged constructive termination. One dealer averaged more than $200,000 in net income and compensation each year from his two Shell stations (and a related towing service he operated using station employees and facilities). C.A. App. 968-971, 3556. Another station's net income doubled to $57,000 the year after the subsidy ended; in the words of its owner, it "looked pretty good profit-wise." *Id.* at 992-996, 3557. A third station earned more in 2001, two years after the subsidy ended, than in any other year since 1994. *Id.* at 856.

3. The jury found Shell and Motiva liable on all counts to all plaintiffs, awarding damages of $3.3 million ($4.3 million after prejudgment interest). C.A. App. 548-558; App., *infra*, 53a. That award included $1.3 million for constructive termination and $1.2 million for constructive non-renewal. C.A. App. 548-555.[6]

Before and after the verdict, Shell and Motiva moved for judgment as a matter of law, arguing again that the evidence failed to show constructive termination or nonrenewal. Pltfs. C.A. Supp. App. 118-122, 156-179. "[O]nly the act of termination or nonrenewal * * * gives rise to a PMPA claim," they argued, and thus "'[t]he plain language of the statute contemplates an actual ending of the franchise relationship.'" *Id.* at 156. That limitation precluded the PMPA claims, they urged, because respondents "remained in operation." *Id.* at 158. The district court denied the motion. App., *infra*, 58a-59a.[7]

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[6] The other $0.8 million related to the state-law claims for bad-faith pricing. C.A. App. 556-557. The jury also awarded $1.3 million for breach of contract, but those damages were not separate from the damages for constructive termination. See *id.* at 548-553; App., *infra*, 29a n.16; see also p. 28 n.10, *infra*.

[7] The district court also rejected Shell and Motiva's argument that the PMPA claims were untimely, holding that the suit "relate[d]

The district court then awarded plaintiffs "attorneys' fees and expert witness fees pursuant to the Petroleum Marketing Practices Act." Def. C.A. Br. Add'm 27. Noting that "[t]he PMPA provides that a franchisee who prevails in an action under the statute is entitled to 'reasonable attorney and expert witness fees,'" the court awarded $1.16 million in attorney's fees and $209,000 in expert witness fees. *Id.* at 28-29, 42. The court entered a final judgment on respondents' claims under Federal Rule of Civil Procedure 54(b). App., *infra*, 34a-35a.

C. Proceedings in the Court of Appeals

1. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-33a. Addressing respondents' "constructive termination" claims, the court held that there was sufficient evidence that cancellation of the rent subsidy amounted to a constructive termination of the dealers' franchise agreements. *Id.* at 15a-21a. To establish "constructive termination," the court ruled, a franchisee must prove that "the franchisor breached one of the three statutory components of the franchise agreement"—namely, "the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises." *Id.* at 16a. The court found that test met because "the Dealers have proven to the jury's satisfaction that Motiva breached the lease component of the franchise agreements" by discontinuing the subsidy, thereby "allow[ing] the jury to find that Shell constructively terminated the Dealers' franchises." *Id.* at 17a.

The court rejected the argument that a breach of contract cannot amount to a termination under the PMPA where, as here, the plaintiff continues to operate its fran-

back" to the earlier *Tsaniklides* suit. App., *infra*, 58a-62a; Pltfs. C.A. Supp. App. 186-187. The court also rejected challenges to the state-law claims and the damages awards. See App., *infra*, 58a-59a; Pltfs. C.A. Supp. App. 144-156, 179-184, 187-189.

chise using the defendant's trademark, fuel, and premises. App., *infra*, 17a. Relying on *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986), the court held that the breach of the franchise agreement "does not have to be a total breach" and "need not result in complete deprivation of a statutory element of the franchise to support a constructive termination" claim. App., *infra*, 18a-19a. Although the court did not hold that "any material breach of the lease would necessarily be sufficient," it stated that the district court had set an "appropriate threshold" by instructing the jury that "it could find constructive termination only if the breach of the lease 'was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business.'" *Id.* at 18a.

The court acknowledged that its ruling was inconsistent with the concept of "constructive" termination in other areas of the law. App., *infra*, 18a. In other contexts, the court recognized, plaintiffs claiming "constructive" termination must still show an "actual severance of the relationship." *Ibid.* For example, an employee claiming constructive discharge "must leave the workplace," and a tenant claiming constructive eviction "must move out." *Ibid.* But the court held that service station franchisees are different because "sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible." *Ibid.* "To require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable." *Ibid.*

2. Turning to the constructive non-renewal claims, the court of appeals reached the opposite conclusion. App., *infra*, 21a-25a. The court noted that most circuits do not allow a dealer to claim non-renewal (constructive or otherwise) under the PMPA where the dealer actually

renews its franchise. *Id.* at 22a-23a. As those courts have explained, the PMPA includes elaborate provisions that require 90 days' advance notice for non-renewal and authorize courts to grant preliminary injunctive relief. *Ibid.* A dealer confronting objectionable contract terms can thus refuse to sign the new agreement, triggering a notice of non-renewal. *Id.* at 23a. The dealer can then bring suit during the 90-day notice period and seek a preliminary injunction to preserve the status quo while the court determines the legality of the franchisor's proposed renewal terms. *Ibid.* That framework affords franchisees and franchisors a measure of certainty in short order. By contrast, "[a]llowing a franchisee to sign 'under protest' and then later challenge the renewal would extend the period of uncertainty through the entire first year of a contract." *Id.* at 24a.

Accordingly—despite having ruled that dealers can claim constructive *termination* even where they continue to operate the franchise—the court held that a dealer cannot claim constructive *non-renewal* "where the franchisee has signed and operates under the renewal agreement complained of." App., *infra*, 25a. "[J]ust as the PMPA requires a clear indication from franchisors that they seek nonrenewal of a franchise relationship, it likewise requires that franchisees faced with objectionable contract terms refrain from ratifying those terms by executing the contracts (even 'under protest') and operating under them." *Id.* at 24a. The court of appeals thus reversed the judgment on the constructive non-renewal claims. *Id.* at 25a. In addition, because "[t]he award of attorneys' fees [wa]s mandated by the PMPA" and the court was "uphold[ing] only one of the two [PMPA] claims," the court remanded for recalculation of the fee award. *Id.* at 32a-33a.[8]

3. The court of appeals denied rehearing and rehearing en banc on May 23, 2008. App., *infra*, 64a-66a. On August 14, 2008, Justice Souter extended the time to file a petition for a writ of certiorari to and including September 20, 2008.

REASONS FOR GRANTING THE PETITION

The decision in this case exacerbates a division of circuit authority on an issue of critical importance to petroleum refiners and their service-station franchisees alike. The Petroleum Marketing Practices Act provides that a refiner may not "terminate" a franchise except on particular grounds following specified procedures. 15 U.S.C. § 2802(a)(1). In the decision below, the First Circuit held that the PMPA permits claims for "constructive termination" even where the franchisee continues to operate its franchise—occupying the same premises, receiving the same gasoline, and using the same trademark. Although that ruling is consistent with the Fourth Circuit's construction of the Act, it squarely conflicts with decisions of

[8] The court of appeals rejected all of Shell and Motiva's remaining arguments. With respect to the statute of limitations, the court acknowledged that the suit was filed after the one-year limitations period had expired. App., *infra*, 8a. It also conceded that "the letter of Rule 15," which governs when one filing "relates back" to a prior filing, was "not met here." *Id.* at 10a. Nonetheless, the court of appeals held that the district court had discretion to allow the suit to relate back to the earlier *Tsaniklides* suit filed by other plaintiffs in June 2000. *Id.* at 10a-12a. The court also rejected the argument that the amount of damages was unsupported by the evidence. *Id.* at 29a-33a. It admitted that "the expert's figures were probably too high," but found that defect irrelevant, opining: "A clock that is five minutes fast is, strictly speaking, wrong. But it still may give a general sense of the time and thereby serve its purpose." *Id.* at 29a-30a. Finally, the court affirmed the judgment on the state-law breach-of-contract and bad-faith pricing claims. *Id.* at 13a-15a, 25a-28a.

the Sixth and Ninth Circuits, which hold that a dealer cannot claim it was "constructively terminated" under the PMPA if it continues to operate its franchise.

The First and Fourth Circuits' decisions cannot be reconciled with the statutory text, which addresses "termination" of franchises, not mere breaches of ongoing franchise agreements. Those decisions improperly federalize a vast swath of disputes traditionally governed by state contract law. And the circuit conflict defeats one of Congress's primary goals in enacting the PMPA: to establish a "single, uniform set of rules governing * * * termination and non-renewal." S. Rep. No. 95-731, at 19 (1978). The conflict thus does not merely undermine the general principle that federal rights and obligations ought not vary with the happenstance of where a suit is filed. It defeats Congress's intent by imposing precisely the patchwork of inconsistent regional standards that Congress sought to eliminate.

I. THE CIRCUITS ARE DIVIDED OVER WHETHER A PLAINTIFF THAT CONTINUES TO OPERATE ITS FRANCHISE CAN CLAIM "CONSTRUCTIVE TERMINATION" UNDER THE PMPA

The PMPA defines a petroleum franchise in terms of three elements—use of a trademark, supply of motor fuel, and occupancy of the premises. 15 U.S.C. § 2801(1). Consistent with that definition, courts of appeals generally agree that a franchisor's conduct cannot amount to "constructive termination" unless "the franchisor breached one of th[ose] three statutory components." *May-Som Gulf, Inc.* v. *Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989).[9] The courts of appeals, however,

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[9] Courts have also allowed constructive termination claims where a franchisor assigns a franchise in violation of state law. See *May-Som*, 869 F.2d at 922. The theory is that the "unexpired portion of a franchise that has been invalidly assigned is no longer a franchise as

disagree sharply over whether a plaintiff can claim it was "constructively terminated" if it continues to operate as a franchisee—using the defendant's trademark, fuel, and premises—despite the alleged breach.

A. The Courts of Appeals Are Squarely Divided

1. At least two courts of appeals have held that "constructive termination" requires severance of the franchise relationship—*i.e.*, that there can be no constructive termination if the dealer continues to operate, occupying the same premises, receiving the same fuel, and using the same trademark. In *Portland 76 Auto/Truck Plaza, Inc.* v. *Union Oil Co. of California*, 153 F.3d 938 (9th Cir. 1998), for example, the dealer (Portland 76) claimed that Unocal had constructively terminated its franchise by assigning the agreement to another entity that "charged more for fuel." *Id.* at 948. The Ninth Circuit rejected that claim. "For the assignment to have amounted to a constructive termination," the court held, "it would have had to *force Portland 76 out of its business* * * * ." *Ibid.* (emphasis added). That was fatal to Portland 76's claim because the dealer had "stayed in business until the time came for renewal." *Ibid.*; see also *Little Oil Co.* v. *Atl. Richfield Co.*, 852 F.2d 441, 444-445 (9th Cir. 1988).

The Sixth Circuit reached the same result in *Clark* v. *BP Oil Co.*, 137 F.3d 386 (6th Cir. 1998). The dealer there claimed that the franchisor had breached the franchise agreement by charging more for fuel than the contract allowed. *Id.* at 391-392. Observing that "[t]he PMPA does not exist to redress every breach of an agreement between a gasoline station franchisee and franchisor," the court refused to equate the breach of a

defined by the Act." *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358, 363 (4th Cir. 1986). That theory is not at issue here: The court of appeals did not suggest that Shell's assignment of the franchises to Motiva was invalid under state law.

contractual duty to provide fuel *at a particular price* with constructive termination. *Ibid.* Because the dealer "d[id] not claim that [the refiner] *refuses* to supply him with gasoline," the court explained, the alleged breach did not implicate the PMPA. *Id.* at 391 (emphasis added). The dealer was still a franchisee, receiving the three statutory elements of his franchise: "[E]ven if Clark can establish a breach of the price term, it does not trigger the protections of the PMPA since he still retains use of BP's trademark, use of the Emerald-Mart premises, and continues to receive BP-branded motor fuel." *Id.* at 392.

The Fifth and Eleventh Circuits have signaled their agreement with that interpretation. In *McGinnis* v. *Star Enterprise*, No. 93-1234, 1993 WL 455587 (5th Cir. Oct. 21, 1993) (unpublished opinion), the Fifth Circuit stated in dicta that "[t]he plain meaning of the statute does not provide for 'constructive termination,'" and refused to allow a claim where the plaintiff "continued as a franchisee" at all relevant times. *Id.* at *4; see also *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482, 486-488 (5th Cir. 2003) (noting that issue has not been conclusively resolved); *April Mktg. & Distrib. Corp.* v. *Diamond Shamrock Ref. & Mktg. Co.*, 103 F.3d 28, 29-31 & n.2 (5th Cir. 1997) (same). And in *Shukla* v. *BP Exploration & Oil, Inc.*, 115 F.3d 849 (11th Cir. 1997), the Eleventh Circuit "question[ed]" whether a franchisor could violate the PMPA by charging more for fuel than the contract allowed, observing that the dealer had "not alleged that [the assignee] *refused* to supply him with gasoline," only that it supplied gasoline "at [an] increased price." *Id.* at 853-854 (emphasis added).

Those decisions make sense. The PMPA by its terms provides only that a refiner may not "*terminate* any franchise" except on particular grounds following specified procedures. 15 U.S.C. § 2802(a)(1) (emphasis added). Aside from clarifying that "[t]he term 'termination' includes cancellation," the Act does not define "terminate." *Id.* § 2801(17). "When terms used in a statute are undefined, [courts] give them their ordinary meaning." *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995). The ordinary meaning of "terminate" is to "put an end" to something. *Black's Law Dictionary* 1511 (8th ed. 2004); see also *Webster's New International Dictionary of the English Language* 2605 (2d ed. 1954) (same); *id.* at 389 (cancel: "[t]o annul or destroy"). Thus, as a matter of plain text, a plaintiff who continues to do business as a franchisee of the defendant—occupying the same premises, receiving the same fuel, and using the same trademark—has not been "terminated."

The same would be true even if one construed the Act to reach "constructive" terminations. Nothing in the Act expressly extends its coverage that far. But even if Congress meant to incorporate that concept, a "constructive" termination still requires an end to the relationship. An *actual* termination takes place when the terminating party expressly ends a relationship. A *constructive* termination occurs where one party imposes conditions so onerous that its counterparty has no choice but to end the relationship. In both cases, however, the relationship actually ends.

In the employment context, for example, there can be no "constructive" termination absent an end to the relationship: "An employee claiming constructive discharge must actually leave employment." 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 1449 (4th ed. 2007); see also *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 141-143, 148 (2004); 2 *EEOC Compliance Manual* § 612.9(a) (2002); 1 M. Rothstein *et al.*, *Employment Law* § 2.10, at 218-219 (3d ed. 2004). Similarly, a tenant claiming "constructive eviction" must actually "abandon the premises." 49 Am. Jur. 2d *Landlord and Tenant* § 518, at 524 (2006); see also 52A C.J.S. *Landlord*

& Tenant § 968, at 363 (2003). Thus, a termination can be "constructive" in those contexts in the sense that the employee quits or the tenant moves out because of unbearable conditions, rather than being expressly ordered out by the employer or landlord. But, as the court below acknowledged, there still must be an "actual severance of the relationship": "The employee must leave the workplace; the tenant must move out." App., *infra*, 18a.

Consequently, even assuming that a claim for "constructive" termination exists, "[t]he accurate analogy in the PMPA context * * * would be to a franchisee who shut down its station because the franchisor caused conditions so onerous that the franchisee could not continue in business." *Abrams Shell* v. *Shell Oil Co.*, 216 F. Supp. 2d 634, 641 (S.D. Tex. 2002), aff'd on other grounds, 343 F.3d 482. A plaintiff who continues to operate his franchise—using the same trademark, receiving the same fuel, and occupying the same premises—has not been "constructively terminated" in any sense of the term.

2. Nonetheless, two courts of appeals, including the First Circuit below, have held that a breach of the franchise agreement can amount to a constructive termination even if the dealer continues to operate its franchise. The Fourth Circuit adopted that view in *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986). The plaintiff there claimed that Gulf had "constructively terminated" her franchise by assigning it to an entity that "increase[d] [her] cost of gasoline over the franchise's stipulated price." *Id.* at 359. Like the Ninth Circuit in *Portland 76*, the district court rejected the suit, holding that Gulf "did not terminate the franchise because Barnes was still in business as a Gulf retailer." *Id.* at 360. But the Fourth Circuit reversed. Without disputing that Barnes was still a franchisee, the Fourth Circuit held that a plaintiff "can obtain relief under the Act if [it] can no longer obtain gasoline at the stipulated franchise price."

Id. at 362. "One of Congress's purposes in adopting the Act," the court declared, "was to protect franchisees from overbearing, burdensome conduct by the franchisor during the term of the franchise." *Ibid.*

Relying on *Barnes*, the First Circuit in this case similarly held that a dealer can claim "constructive termination" even if it continues to operate its franchise. The court expressly rejected the argument that "actual severance of the relationship" is required. App., *infra*, 18a. Instead, the court held that the breach of the franchise agreement "does not have to be a total breach" and "need not result in complete deprivation of a statutory element of the franchise to support a constructive termination" claim. *Id.* at 18a-19a. Such claims are viable, the court stated, "'even though the plaintiffs continued to operate the business.'" *Id.* at 18a. Indeed, the court sustained the verdict in this case even as to the four plaintiffs who were still operating their Shell stations at the time of trial, nearly five years after their purported constructive termination. See pp. 10-11, *supra*. "To require an actual abandonment of years of work and investment," the court opined, would be "unreasonable." App., *infra*, 18a.

The First and Fourth Circuits' holdings are irreconcilable with those of the Sixth and Ninth Circuits. Under the Ninth Circuit's *Portland 76* decision, the constructive termination claims here and in *Barnes* would have failed because "[t]he assignment did not force [plaintiffs] out of business"—rather, plaintiffs "stayed in business" despite the alleged breach of the franchise agreement. *Portland 76*, 153 F.3d at 948. The Sixth Circuit would have rejected these claims, too, because the alleged breach of a contractual duty to lease premises *at a particular price* did not deprive plaintiffs of their use of the premises: "[E]ven if [plaintiffs] can establish a breach of the price term, * * * [they] still retain[] use of [Shell's] trademark, use of the [station] premises, and continue[] to receive

[Shell]-branded motor fuel." *Clark*, 137 F.3d at 392. This Court should grant the petition to resolve that conflict.

B. The Circuit Conflict Reflects Broader Disarray

That square circuit conflict, moreover, reflects broader disagreement. Like the courts of appeals, district courts across the country routinely address this issue with divergent results. Some reject constructive termination claims where the plaintiff continues to operate its franchise. See *Jet, Inc.* v. *Shell Oil Co.*, No. 02 C 2289, 2002 WL 31641627, at *3-5 (N.D. Ill. Nov. 22, 2002) ("The plain language of the statute contemplates an actual ending of the franchise relationship * * * ."), aff'd on other grounds, 381 F.3d 627 (7th Cir. 2004); *Deamor, Inc.* v. *Mobil Oil Corp.*, No. 90-2227, 1990 WL 124927, at *1 (E.D. Pa. Aug. 23, 1990) ("[T]here can be no constructive termination where, as here, plaintiff still operates his Mobil franchise."); see also *Meghani* v. *Shell Oil Co.*, 115 F. Supp. 2d 747, 755-760 (S.D. Tex. 2000) (questioning constructive termination theory and refusing to extend it), aff'd mem., No. 00-20868, 2001 WL 1066697 (5th Cir. Aug. 13, 2001); *Abrams Shell*, 216 F. Supp. 2d at 637-642 (same). Other courts follow the First and Fourth Circuits' approach, allowing constructive termination claims even where a franchisee continues to operate. See, *e.g.*, *Charleston West 76 Auto/Truckstop, Inc.* v. *Nat'l Auto/Truckstops, Inc.*, No. 3:97-cv-25, 1997 WL 528491, at *2-7 & n.8 (N.D. W. Va. May 21, 1997).

That same confusion also pervades cases arising under the PMPA's parallel provisions governing non-renewal. As explained above, the Act regulates both "termination" (ending a franchise agreement during its stated term) and "non-renewal" (refusing to renew the relationship by offering a new contract when the old one expires). See pp. 3-5, *supra*. Just as courts are divided on whether a dealer can claim "constructive termination" if he continues to operate his franchise, so too courts are divided on whether a dealer can claim "constructive non-renewal" if he continues the franchise relationship by signing a renewal agreement. The Ninth Circuit allows such claims. See *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.2d 1394, 1398-1400 (9th Cir. 1986). But the Seventh and Fifth Circuits do not. See *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846, 858-867 (7th Cir. 2002); *Abrams Shell*, 343 F.3d at 488-489 & n.16. And in this case, the First Circuit adopted the majority rule. App., *infra*, 21a-25a.

Those outcomes are not merely inconsistent. They are incoherent. For example, a plaintiff in the *First Circuit* who continues to operate his franchise and signs renewal papers can claim constructive termination to challenge a breach of his old agreement, but not constructive non-renewal to challenge his new one. Compare App., *infra*, 15a-21a with *id.* at 21a-25a. By contrast, a plaintiff in the *Ninth Circuit* who continues to operate his franchise and signs renewal papers *cannot* claim constructive termination to challenge a breach of his old agreement, but *can* claim constructive non-renewal to challenge his new one. Compare *Portland 76*, 153 F.3d at 948, with *Pro Sales*, 792 F.2d at 1398-1400. And plaintiffs in the Northern District of Illinois can claim neither. See *Jet*, 2002 WL 31641627, at *3-5; *Dersch*, 314 F.3d at 858-867.

The decision below reflects that utter disarray. In holding that constructive *non-renewal* is not actionable where the plaintiff renews its relationship, the First Circuit relied on cases that expressly rejected the Ninth Circuit's holding in *Pro Sales* that such claims are viable. App., *infra*, 22a-23a. But when it addressed the issue of constructive *termination*, the First Circuit relied on *Pro Sales* as authority for allowing such claims even where the dealer continues to operate. See *id.* at 18a. It did so even though *Pro Sales* addressed only constructive non-renewal, and even though the Ninth Circuit decision that addressed constructive termination—*Portland 76*—rejected such claims. That makes no sense whatsoever. This Court should grant the petition to bring uniformity and rationality to this area of the law.

II. THE QUESTION PRESENTED IS A MATTER OF NATIONAL IMPORTANCE

The need for resolution of the circuit conflict here is especially compelling. The issue is recurring. It has a profound impact on myriad franchisors and tens of thousands of franchisees during a critical period of industry restructuring. And the conflict undermines one of Congress's central goals in enacting the PMPA—to establish uniform rules governing termination and non-renewal for this nationwide industry.

A. The Circuit Conflict Undercuts One of Congress's Core Goals in Enacting the PMPA

One of Congress's primary goals in enacting the PMPA was to provide "certainty and uniformity" in the "nationwide motor fuel distribution and marketing network" by replacing an "uneven patchwork" of state laws with a "single, uniform set of rules governing the grounds for termination and non-renewal." S. Rep. No. 95-731, at 16, 19. The circuit conflict utterly destroys that goal: Certainty and uniformity are a mirage where the scope of federal law varies from one circuit to the next. In the ordinary case, a conflict warrants review because parties should not receive different treatment under federal law based on the happenstance of where they reside. Here, the conflict also defies Congress's express intent to create a "single, uniform" national standard for termination and non-renewal.

That conflict, moreover, concerns an issue at the heart of the PMPA. Congress enacted the statute to "protect[] * * * franchisees from arbitrary or discriminatory *termination or non-renewal* of their franchises," following "complaints by franchisees of unfair *terminations or non-renewals*." S. Rep. No. 95-731, at 15, 17 (emphasis added). The Act is directed narrowly to that issue: It restricts a franchisor's right to "terminate" or "fail to renew" a franchise, but does not otherwise regulate the franchise relationship. 15 U.S.C. § 2802(a). Precisely what constitutes "termination" is thus a fundamental issue—indeed, *the* fundamental issue—under the Act.

B. The Decision Below Profoundly Affects the Federal-State Balance

By expanding the Act's coverage, the First and Fourth Circuits' decisions also federalize a large category of disputes formerly governed by state contract law. "[T]he regulation of petroleum franchise relationships has traditionally been a matter of local concern in which the parties frame their relationships with reference to State law." *Dersch*, 314 F.3d at 861. The PMPA limits federal intrusion by preempting inconsistent state laws *only* when they regulate "termination" or "nonrenewal." 15 U.S.C. § 2806(a). "State laws dealing with [other] aspects of the relationship are not preempted." S. Rep. No. 95-731, at 42. By expanding what constitutes a "termination," the decision below expands the PMPA's preemptive scope as well, displacing traditional state authority.

The court of appeals purported not to convert every breach of contract into a constructive termination. App., *infra*, 18a. But the standard it articulated was unintelligible: It held that the breach must be "'such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business.'" *Ibid.* Nowhere did the court explain how a breach could "effectively end[]" a franchise when the plaintiff "continue[s] to operate" it. That incoherent standard allows dealers to allege PMPA claims in virtually any contract dispute. Indeed, if the record supports a finding of "constructive termination" here—where dealers were still operating their Shell stations at the time of trial five years later and earning up to $200,000 a year doing so—it is hard to imagine a case where it would not.

The First and Fourth Circuits' approach not only aggrandizes federal authority at the expense of the States, but also distorts the resolution of franchise contract disputes. The PMPA provides remedies for wrongful termination and non-renewal that are not normally available under state contract law, including punitive damages, attorney's fees, and expert witness fees. 15 U.S.C. § 2805(d)(1)(B)-(C). Those additional remedies create incentives for plaintiffs to recharacterize ordinary contract disputes as federal PMPA cases. Here, for example, plaintiffs recovered $1.3 million on their state-law contract claims, but received an additional $1.16 million in attorney's fees and $209,000 in expert witness fees by recharacterizing their rent grievances as federal PMPA claims. See pp. 11-12 & n.6, *supra*. "[T]he PMPA was not designed to provide franchisees with a federal forum for the resolution of run-of-the-mill contract disputes * * * ." *Dersch*, 314 F.3d at 862. But the First and Fourth Circuits' approach steers precisely such disputes into federal court.

This case illustrates the impact. It involves several dozen dealers suing Shell and Motiva in federal court for what amounts, in substance, to a contract dispute over whether Shell and Motiva breached alleged oral modifications to their franchise agreements. This logjam of lawsuits may have been a plausible candidate for state court—indeed, plaintiffs prevailed on a number of state-law claims. See p. 11 n.6, *supra*. But nothing in the PMPA suggests that a grievance that never caused the plaintiff's franchise agreement to end amounts to a "termination" claim that should be litigated in federal court.

C. The Issue Is Important to Refiners and Franchisees Across the Country

Finally, the impact on refiners and franchisees alike is difficult to overstate. There are nearly 165,000 service stations in the United States, see Nat'l Petroleum News, *MarketFacts 2007*, at 92 (2007), approximately 70,000 of which are run by independent dealers under franchise agreements governed by the PMPA, see 2 PriceWaterhouseCoopers, *The Economic Impact of Franchised Businesses* 134 (2008). Moreover, because the Act also applies to relationships between refiners and wholesale distributors, see 15 U.S.C. § 2801(1)(A), that figure greatly understates the number of relationships covered.

Because of the circuit split, the rights of tens of thousands of franchisees now vary from jurisdiction to jurisdiction. Refiners operating nationwide, meanwhile, face a regime in which decisions that do not even implicate the PMPA in one circuit can lead to hundreds of federal lawsuits in another. This case alone involves several dozen plaintiffs whose claims remain to be tried. See pp. 8-10, *supra*. Similar multi-plaintiff cases are pending in which New Hampshire and Rhode Island dealers allege the same PMPA claims based on cancellation of the rent subsidy. See App., *infra*, 4a. And Shell and other refiners have faced a variety of other "constructive termination" claims across the country. See pp. 16-24, *supra*.

That threat of litigation comes at a critical time. Refiners have undertaken restructurings at a "remarkable rate" in response to changing market conditions. See Energy Info. Admin., *Restructuring: The Changing Face of Motor Gasoline Marketing* 1-10, 18-19 (2001). As the cases cited above make clear, those restructurings (and the franchise assignments they often entail) are fertile grounds for contract disputes. The First and Fourth Circuits' decisions threaten to transform all of those disputes into federal PMPA cases.

III. THIS CASE IS AN IDEAL VEHICLE FOR REVIEW

This case squarely presents whether a franchisee can claim it was "terminated" within the meaning of the PMPA even though it continues operating its franchise. The court of appeals thoroughly addressed the issue in a published opinion following a full trial on the merits. That decision finally resolved all eight respondents' claims.[10] And the issue could not be presented more starkly: Seven of the eight respondents continued operating their Shell stations at all relevant times following the alleged constructive termination of their franchise agreements.[11] And the one who ended his franchise

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[10] Although the First Circuit remanded for a recalculation of attorney's fees, see pp. 14-15, *supra*, no fees at all would be payable if the Court were to grant review and reverse the judgment; the PMPA constructive termination claims are the sole remaining basis for any fee award. See pp. 12, 14-15, *supra*. Nor does the remand for fee proceedings affect the finality of the judgment below. See *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988). The fee proceedings, moreover, would not illuminate the issues before the Court, and review at this time is appropriate because the Court's judgment could "serve to hasten or finally resolve the litigation" by rendering the fee proceedings unnecessary. E. Gressman *et al.*, *Supreme Court Practice* 282 (9th ed. 2007). This Court often grants review to decide whether attorney's fees are recoverable despite remands to determine the appropriate amount. See, *e.g.*, *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 241, 246 (1975); *N.C. Dep't of Transp.* v. *Crest Street Cmty. Council, Inc.*, 479 U.S. 6, 11 (1986).

[11] Four respondents were still operating their Shell stations at the time of trial. See p. 10, *supra*. Three additional respondents continued operating their Shell stations until after the agreements that were alleged to have been constructively terminated ran their course, expiring at the end of their stated terms. See *ibid.* Although those three franchisees renewed their relationships by executing new agreements and brought constructive *non-renewal* claims based on those new agreements, they made clear that their constructive *termination* claims related solely to the franchise agreements in effect when the rent subsidy ended. Pltfs. C.A. Br. 40 n.29. This

agreement early never claimed his decision had anything to do with the cancellation of the rent subsidy that allegedly constituted a constructive termination. See p. 10, *supra*. The case thus presents an ideal fact pattern.

Finally, as explained above, see pp. 22-23, *supra*, the courts of appeals are also divided over whether a dealer can claim it was "constructively non-renewed" if it signs a new franchise agreement. Respondents have filed a petition for a writ of certiorari from the judgment below, asking the Court to review that issue (No. 08-240). To the extent that petition warrants review, this petition certainly does as well, and granting both petitions would allow the Court to address circuit splits on constructive termination and constructive non-renewal together in one case. The issues are closely related, and it would plainly be more efficient for the Court to address both at once. This case presents an opportunity to do so.

IV. THE FIRST CIRCUIT'S DECISION IS INCORRECT

Finally, the First Circuit's decision is simply wrong. As explained above, nothing in the PMPA's text covers "constructive" terminations. See pp. 18-19, *supra*. And even if Congress meant to encompass that concept, the Act would still require an actual end to the franchise before a plaintiff could bring such a claim. As the First Circuit conceded, constructive discharge and constructive eviction both require an end to the relationship—the employee must quit; the tenant must move out. See pp. 19-20, *supra*. There is no basis for a different result for constructive termination under the PMPA.

The First Circuit defended its atextual construction on the ground that "sunk costs, optimism, and the habit of

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Court, of course, would not be required to decide whether any particular dealer was constructively terminated. That issue could be addressed under the proper standard articulated by this Court by the First Circuit or district court following any remand.

years might lead franchisees to try to make the new arrangements work," and thus "[t]o require an actual abandonment of years of work and investment * * * would be unreasonable." App., *infra*, 18a. But "sunk costs, optimism, and the habit of years" surely lead many longtime employees or tenants to "try to make the new arrangements work" as well. The First Circuit never explained why the law should require a poor immigrant to become homeless before claiming constructive eviction, but not require the owner of a chain of service stations to end his franchise before claiming constructive termination. Service station operators, moreover, have a panoply of remedies under state contract law to protect them from breaches short of termination—indeed, plaintiffs successfully invoked those remedies here. See p. 11 n.6, *supra*. In any event, the First Circuit did not explain how policy concerns about "sunk costs, optimism, and the habit of years" could transform a statute that was expressly and intentionally limited to "termination" and "non-renewal" into one that covers breaches not amounting to either.

The First Circuit's expansive view is particularly inappropriate because it displaces traditional state authority. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). The "regulation of petroleum franchise relationships" is an area of "traditionally * * * local concern." *Dersch*, 314 F.3d at 861. Congress carefully confined federal intrusion into that area by targeting the PMPA to "termination" and "nonrenewal." 15 U.S.C. § 2806(a)(1). By construing the Act loosely to cover a range of ordinary contract breaches that do not end the franchise, the First Circuit expands federal preemption, significantly altering the traditional federal-state balance in this area. That is yet another reason to reject its construction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2008

APPENDIX A
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 05-2771

FRANCIS MARCOUX, ET AL.,
Plaintiffs,

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

v.

SHELL OIL PRODUCTS COMPANY LLC; MOTIVA
ENTERPRISES LLC; SHELL OIL COMPANY, INC.,
Defendants-Appellants.

United States Court of Appeals,
First Circuit.

Heard Sept. 14, 2007
Decided April 18, 2008

Before TORRUELLA, HOWARD, Circuit Judges, and DELGADO-COLÓN,* District Judge.

HOWARD, Circuit Judge.

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* Of the District of Puerto Rico, sitting by designation.

Defendants-appellants Shell Oil Company, Shell Oil Products Company (collectively, "Shell"), and Motiva Enterprises appeal jury verdicts against them on several claims relating to their treatment of plaintiffs-appellees (the "Dealers"), franchisees and operators of Shell-branded service stations. Shell and Motiva (together, "the defendants") challenge the legal basis for verdicts against them under a federal statute designed to protect franchisees, as well as the verdicts under Massachusetts state law. Additionally, they appeal the jury's damages determinations as without sufficient basis in the evidence. We affirm in part and reverse in part.

Facts

We recite the facts in the light most favorable to the jury's verdict. *See Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 56 (1st Cir. 2005).

Shell maintained a network of franchisees in Massachusetts. Plaintiffs were eight of these franchisees. In 1998, Shell, Texaco, and Star Enterprises formed defendant Motiva, and Shell transferred the franchise relationships to that entity, assigning its rights and duties under the relevant contracts to Motiva.[1] Shortly thereafter, Motiva replaced the Variable Rent Program ("VRP") with the Special Temporary Incentive Program ("STIP"). Each of these programs (collectively, the "Subsidy") provided for reduction of the contract rent through sales of gasoline; once the specified threshold gallonage was sold in a given month, the contract rent for the next month

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[1] The Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806 (the "PMPA"), defines "franchise" as the collection of agreements relating to three elements: the lease of the premises, the license to use the franchisor's trademark, and the agreement governing the supply of branded motor fuel. *Id.* § 2801(1). These three elements are sometimes referred to as the "statutory elements of the franchise."

would be discounted by a certain amount for every gallon sold in excess of that threshold. The threshold amount and the discount amount changed from time to time. The Subsidy had been in effect since 1982; it was renewed in an annual notice to franchisees, although its terms explicitly provided for cancellation with thirty days' notice. Various 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 a war or an oil embargo. Nevertheless, having given the required notice, Motiva ended the STIP on January 1, 2000, terminating the Subsidy. Without the Subsidy, the Dealers paid much more rent.

Motiva also offered new leases as the old leases expired. The new leases calculated rent differently than the old leases, resulting in a further increase in rent.

In accordance with their fuel supply contracts, the Dealers were charged a wholesale price for gasoline known as the Dealer Tank Wagon price (the "DTW price"). The fuel supply contracts were open price term contracts: the contracts were silent as to price, and one party set the price unilaterally. This price was set by the defendants, who calculated it by assessing the street prices of other competing gasoline stations in the area, and reducing those prices by the taxes levied on gasoline and an Estimated Industry Margin to approximate the wholesale price of the defendants' competitors.

Proceedings Below

Several franchisees, along with an unincorporated association called the Shell Dealers Defense Group (the "Defense Group"), filed for injunctive and declaratory relief as well as damages on June 6, 2000. Compl., *Tsaniklides v. Shell Oil Products Co.*, 00-CV-11295. When the Defense Group was found to lack standing, a motion was made to add its members as individual plaintiffs. In denying that motion the district court indicated in a margin order, "[P]laintiffs may file a new case which may be deemed to be related." The individual franchisees filed a new suit on July 27, 2001, and the original suit was voluntarily dismissed on August 10. The new suit was assigned to the same district judge. The cases of New Hampshire and Rhode Island plaintiffs in the new action were transferred to those districts. From the sixty-four Massachusetts plaintiffs in the new suit, ten plaintiffs were chosen to go forward. One of those settled on the eve of trial and another lost at summary judgment. One plaintiff of the remaining eight, Mac's Shell Service, Inc., operated two stations that were sometimes treated as separate plaintiffs. Therefore, eight plaintiffs representing nine stations proceeded to trial.

The Dealers sued under a variety of theories. First, they contended that the Subsidy had been incorporated into the property leases, although the written leases purported to be integrated contracts under Massachusetts law. They claimed the amended contracts were then breached when Motiva eliminated the Subsidy. Under the Dealers' theory, this breach gave rise to two distinct claims: a state cause of action for breach of contract and a claim under the PMPA that Shell had improperly terminated the franchises when Shell assigned the franchise agreements to Motiva and Motiva terminated the Subsidy. Because no actual termination occurred, the Dealers proceeded under a theory of "constructive termination." Similarly, they claimed Motiva had "constructively nonrenewed" the franchise relationships in violation of the PMPA (even though the franchises were in fact renewed) because the new contracts changed the rent-calculation method and increased the rent, along with other objectionable changes. Finally, the Dealers argued that Motiva failed to set prices for gasoline in good faith, as required for open price term contracts under Massachusetts law.

The defendants unsuccessfully moved for dismissal on all constructive termination claims and the constructive nonrenewal claims of two plaintiffs on the ground that they were time-barred. They also moved for a judgment as a matter of law on all claims. Following a jury verdict against them on all claims, they properly renewed this motion. They moved as well for a new trial and to set aside the jury's damages awards. The defendants now appeal the denial of all of these motions.

The PMPA

Congress enacted Title I of the PMPA to "remedy the disparity in bargaining power between franchisors and franchisees." S. Rep. No. 95-731, 95th Cong., 2d Sess. 18; *see also Four Corners Serv. Station v. Mobil Oil Corp.*, 51 F.3d 306, 310 (1st Cir. 1995). Because franchisees claimed that this unequal power was often wielded through arbitrary or discriminatory termination or nonrenewal, or *threats* of termination or nonrenewal, the PMPA aimed to remove this potent weapon from the franchisors' arsenal. S. Rep. No. 95-731, at 17 ("Numerous allegations have been made before Congressional committees investigating petroleum marketing problems that terminations and non-renewals, or threats of termination or non-renewal, have been used by franchisors to compel franchisees to comply with marketing policies of the franchisor."); *id.* at 18 ("[T]ermination of franchise agreements during the term as a remedy for contract violations has been repeatedly utilized."). The "PMPA attempts to level the playing field by restricting the grounds upon which a franchisor can assert a unilateral termination or nonrenewal of a franchise." *Id.*[2]

[2] The PMPA is concerned not only with termination of a franchise agreement, but also with a franchisor's failure to renew such an

The PMPA makes a distinction between a "franchise" and the "franchise relationship." The franchise is a set of definite agreements for 1) lease of the premises, 2) the right to purchase gasoline for resale, and 3) the right to use the franchisor's trademark. 15 U.S.C. § 2801(1). "Franchise relationship" refers to the respective obligations of the franchisor and franchisee created by a franchise. *Id.* § 2801(2). The legislative history of the PMPA makes clear that "franchise" and "franchise relationship" were distinguished to drive home the fact that the franchise relationship survives the expiration of the agreements underlying the franchise. *See* S. Rep. No. 95-731, 95th Cong., 2d Sess. 30 ("The term 'franchise relationship' is utilized to avoid any contention that because the 'franchise' does not exist there is nothing to renew."). The structure and history of the PMPA emphasize Congress's view that the franchisees have a reasonable expectation that the franchises would be renewed and that the relationships would continue.

Accordingly, the PMPA forbids termination of a franchise or nonrenewal of a franchise relationship except under enumerated circumstances and with proper notice. *See* 15 U.S.C § 2802(a) (nonrenewals and terminations generally prohibited); *id.* §§ 2802(b)(2)-(3) (grounds for termination and non-renewal); *id.* § 2804 (notice requirements). The PMPA provides a cause of action to franchisees who suffer termination or nonrenewal in violation of the relevant sections. *Id.* § 2805(a). As long as the action is brought within one year of the termination or

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agreement when it expires. Although the constellation of agreements (real property leases, fuel supply agreements, licenses to use franchisor's trademark) that make up the franchise are definite in term, the "[r]easonable expectations of the parties to a motor fuel franchise are that the relationship will be a continuing one." *Id.* This, of course, encourages franchisees to invest in their franchises and to build up goodwill that benefits both parties.

nonrenewal complained of, *id.* § 2805(a)(1), the franchisee may seek preliminary injunctive relief, *id.* § 2805(b)(2), damages, *id.* § 2805(d), and "such equitable relief as the court determines is necessary," *id.* § 2805(b)(1). The PMPA mandates that preliminary relief "shall" be granted if the plaintiff shows 1) termination or nonrenewal and 2) "sufficiently serious questions going to the merits" that are "a fair ground for litigation," and the court determines 3) that the balance of hardships tips in favor of granting the injunction. *Id.* § 2805(b)(2). In all private civil actions for termination or nonrenewal, it is the franchisee's burden to show termination or lack of renewal. *Id.* § 2805(c).

Standard of Review

We review the denial of judgment as a matter of law de novo as to issues of law. *See Rodriguez-Torres*, 399 F.3d at 57. As to matters of fact, we view the evidence in the light most favorable to the verdict, asking only whether a rational jury could on the basis of that evidence find as the jury has. *See id.* We review a denial of a motion for a new trial for "a manifest abuse of discretion." *United States v. George*, 448 F.3d 96, 101 (1st Cir. 2006). We "will order a new trial only if the verdict is against the demonstrable weight of the credible evidence or results in a blatant miscarriage of justice." *Whitfield v. Meléndez-Rivera*, 431 F.3d 1, 9 (1st Cir. 2005) (internal quotation omitted). We will uphold a jury award if it is a result of "any rational appraisal or estimate of the damages that could be based on the evidence before the jury." *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1172 (1st Cir. 1994) (quoting *Anthony v. G.M.D. Airline Servs.*, 17 F.3d 490, 493 (1st Cir. 1994)). Because it is complex and requires some procedural background, we discuss the applicable standard of review for the statute of limitations claim within the discussion of that issue.

Statute of Limitations

The PMPA contains a one-year statute of limitations.[3] The district court found, and the defendants here do not contest, that the cause of action for constructive termination arose on January 1, 2000, when Motiva terminated the Subsidy. The defendants claim that all of the constructive termination claims are time-barred because this action was not filed until almost nineteen months later, on July 27, 2001.[4] The Dealers point out that in dismissing their motion to be added as plaintiffs to the old action, the district court gave them leave to file a new action "which may be deemed to be related" to the original complaint, and that the first action was not dismissed until after the second was filed.

The defendants filed a motion to dismiss for failure to state a claim on which relief might be granted, citing the lapse of time and the PMPA's statute of limitations. This motion was denied.[5]

Our review of the record indicates that the district court denied the motion to add the individual plaintiffs only because it granted the plaintiffs a right to file a new action that related back. We further conclude that had

[3] "[N]o such action shall be maintained unless commenced within 1 year after the later of—(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or (2) the date the franchisor fails to comply with the requirements of section 102 or 103." 15 U.S.C. § 2805(a).

[4] In the light of our disposition of the constructive nonrenewal claims as a whole, it is unnecessary to complicate this analysis with the defendants' further claim that two of the lease renewals are also time-barred on the same theory.

[5] The Dealers assert, as they have since their opposition to the motion to dismiss, that this resolution of the motion to amend was the result of a compromise regarding discovery vis-à-vis the new parties. At oral argument, the defendants denied ever agreeing to such a solution.

the district court allowed the motion to amend, the amended pleading would have related back under Federal Rule of Civil Procedure 15. In the light of this, two powerful reasons lead us to uphold the district court's resolution of this issue: first, all the purposes of Rule 15(c) are satisfied, if not its letter; and second, the district court was in a better position when it placed the case in this posture than we are now to assess whether the interests of justice are served by permitting this relation back.[6]

Federal Rule of Civil Procedure 15(c) provides that an amended pleading may be deemed to "relate back" for

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[6] We note that this issue was disposed of below in the district court's denial of a motion to dismiss. The parties skirmish about whether such a denial may even be appealed after a jury trial. Where a denial of a motion for summary judgment is predicated on a genuine dispute over issues of material fact, such a denial is not normally reviewable in this circuit after a "full-dress trial." *Lama v. Borras*, 16 F.3d 473, 476 n.5 (1st Cir. 1994). The Dealers argue, with reason, that this would apply *a fortiori* to a denial of a 12(b)(6) motion. *See Bennett v. Pippin*, 74 F.3d 578, 585 (5th Cir. 1996) ("When the plaintiff has prevailed after a full trial on the merits, a district court's denial of a Rule 12(b)(6) motion becomes moot."). But here the question is one of law—whether relation back can be applied outside of the strict confines of Rule 15(c). We think it likely that this changes the analysis, but because we ultimately hold that relation back was appropriate, it makes no difference: even assuming that the issue was properly preserved, the statute of limitations argument fails. We express no view as to whether in the general case a denial of a 12(b)(6) motion may be appealed after a jury trial; we move on to discuss the relation-back issue only because we think it important to consider whether the district court acted properly in acting outside the letter of the Federal Rules of Civil Procedure. In conducting this analysis, we apply de novo review to the pure legal question. Finding, as we do, that as a matter of law such relation back is within the power of the district court, we then review the decision to grant relation back for abuse of discretion. The finding of facts necessary to that conclusion we review for clear error.

statute of limitations purposes to the date of the pleading if certain conditions are met. The defendants rightly point out that Rule 15 concerns amended pleadings, not new pleadings in separate actions. "Rule 15(c) simply does not apply where, as here, the party bringing suit did not seek to 'amend' or 'supplement' his original pleading, but, rather, opted to file an entirely new [action] at a subsequent date." *Neverson v. Bissonnette*, 261 F.3d 120, 126 (1st Cir. 2001) (noting that a dismissal without prejudice leaves the plaintiff "in the same situation as if [the] first suit had never been filed" for purposes of Rule 15(c)). We note that this case differs from *Neverson* in that here the dismissal of the previous action did not occur until *after* the new pleading was filed, and we note further that the district court expressly suggested a new action be filed at the very moment it denied leave to amend the complaint in the first action.

Acknowledging that the letter of Rule 15 is not met here, we conclude that the rule nonetheless does provide some guidance. Rule 15(c) is "intimately connected with the policy of the statute of limitations." Fed. R. Civ. P. 15(c), advisory committee note. The purpose of statutes of limitations is to avoid the difficulties inherent in litigating matters long past, and to provide repose to potential defendants regarding such matters. *See Nelson v. County of Allegheny*, 60 F.3d 1010, 1014 (3d Cir. 1995) ("Statutes of limitations ensure that defendants are protected against the prejudice of having to defend against stale claims, as well as the notion that, at some point, claims should be laid to rest so that security and stability can be restored to human affairs.") (internal quotation omitted). The defendants at no time could have expected or enjoyed repose regarding these matters. The denial of the motion to add the specific Dealers to the original litigation was accompanied in the same breath by notice that a new complaint might be filed under the same facts. This occurred in a timely fashion. And the first litigation was not dismissed until after the second one was filed. No evidence of sandbagging was brought forward, nor do we infer any prejudice to the defendants on this record.[7]

Here, the Dealers had sought to vindicate their rights as the Defense Group, but lacked standing in that guise. In denying a motion to add the plaintiffs to the original litigation, the district court indicated it would allow a new filing to relate back to the date of the old one. It seems clear that the district court could instead have allowed the pleadings to be amended to name the plaintiffs individually. While we cannot say with certainty why one course of action was to be preferred over another, we are confident that the district court did not abuse its discretion.

Rule 15(c) does not specifically contemplate the substitution of plaintiffs. *See* Fed. R. Civ. P. 15(c), advisory committee note ("The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c), since the problem is generally easier."). But this is not a bar to relation back here either; assuming that the general principles of Rule 15 are to govern this admittedly unusual situation, we find that substituting plaintiffs here wreaks no injustice.

> [W]e have laid down three separate requirements applicable to plaintiffs who seek succor under Rule 15(c)(3): The amended complaint must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; there must be a sufficient identity of interest between the new plaintiff, the old plaintiff, and their respective claims so that the defendants can be said

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[7] We note also that the record is replete with delays by the defendants, and to that extent their equitable claim to the benefits of a speedy process is attenuated.

> to have been given fair notice of the latecomer's claim against them; and undue prejudice must be absent.

Young v. Lepone, 305 F.3d 1, 14 (1st Cir. 2002) (quoting *Allied Int'l v. International Longshoremen's Ass'n*, 814 F.2d 32, 35-36 (1st Cir. 1987)). Accepting, as the district court did, that the Dealers were members of the Defense Group,[8] these factors are met here. The district court's factual conclusion does not represent an abuse of discretion, and so we adopt it.

The original complaint states the same causes of action, arising from the same events, as the new complaint. The Dealers have always claimed that they were all members of the Defense Group. That organization was established only to assert its members' rights and protect their interests, and so we find sufficient identity of interest to put the defendants on notice of the claims against them. And there is no undue prejudice where the Dealers are simply asserting themselves a claim they had made through a proxy well within the statute of limitations. Had the motion to amend been granted, and the individual plaintiffs named, relation back would have been within the district court's discretion. The district court, then, properly allowed the relation back of the new case to the previous one, and therefore did not err when it denied the motion to dismiss.[9]

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[8] The Dealers presented testimony on this issue at trial. While that testimony was of course not available to the district court when it decided the motion to amend in *Tsaniklides* and the motion to dismiss in this case, it does help to corroborate the district court's determination.

[9] The Dealers provide two alternate theories on which to uphold the denial of the motion to dismiss: equitable estoppel and equitable tolling of the statute of limitations. Because the district court denied the motion to dismiss on the basis of relation back, we have found it most convenient to follow that analysis here. We note only that all of

State Contract Claim

The defendants appeal the jury's determination that the leases were orally amended to include the Subsidy, and therefore when the Subsidy was ended, the leases were breached. First, the defendants contend that the leases were completely integrated, meaning oral representations before or during the execution of the contract must be excluded by the parol evidence rule. Second, they claim that even if the leases were not integrated, the jury had insufficient evidence to conclude that the leases were amended to include a promise to continue the Subsidy.

The defendants argue as an initial matter that the leases were completely integrated agreements. The leases indisputably represented that they were integrated agreements and that any subsequent modification had to be in writing. The defendants claim the integration clause operated to insulate the leases from oral representations made prior to or contemporaneous with execution. But a document is not integrated merely because it says so. *See* Restatement (Second) of Contracts § 209 cmt. b (1981) ("Written contracts, signed by both parties, may include an explicit declaration that there are no other agreements between the parties, but such a declaration may not be conclusive.").

In Massachusetts, "the question of integration is one of fact reserved for the trial judge, whose resolution of that issue will not be reversed unless clearly erroneous." *Cambridgeport Sav. Bank v. Boersner*, 413 Mass. 432, 436 n.7, 597 N.E.2d 1017 (1992); *Antonellis v. Northgate Constr. Corp.*, 362 Mass. 847, 850-51, 291 N.E.2d 626 (1973) (even absent specific evaluation of evidence by trial judge, finding of non-integration upheld as not clearly

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these approaches address the fundamental issue of whether defendants suffer undue prejudice as a result of delay or lack of notice.

erroneous); *Alexander v. Snell*, 12 Mass. App. Ct. 323, 424 N.E.2d 262, 264 (1981); *accord Brennan v. Carvel Corp.*, 929 F.2d 801, 807 (1st Cir. 1991) ("[U]nder Massachusetts law, the determination of whether a contract is completely or partially integrated, or whether a second contract is collateral to an integrated agreement, is a question of fact to be decided in the first instance by the trial judge.").[10]

Here, the district court did not make a specific finding about integration, but the charge to the jury on amendments compels the inference that the agreements were not integrated. The jury was instructed to consider what the parties said and did concerning the lease; because the instruction did not exclude actions prior to or contemporaneous with the execution of the written lease, the district court must have concluded that the lease was not an integrated agreement.

After review of the record, we cannot say that this determination was clear error. The Subsidy was explained to each plaintiff in documents accompanying the lease, and many plaintiffs testified they regarded the Subsidy as essential to their businesses. 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. The district court therefore had ample evi-

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[10] We are not governed by state practice as to the division of labor between judge and jury, even in diversity cases, *see Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 538 (1958), but in all events federal practice likewise lets judges determine whether an agreement is integrated, *Merk v. Jewel Food Stores Div. of Jewel Cos.*, 945 F.2d 889, 893 (7th Cir. 1991) (applying federal common law of contracts and holding that '[w]hether a writing is fully integrated is generally a question of law to be resolved by a court").

dence before it to determine that the lease was not an integrated agreement.

Because the leases were not integrated, they could be varied by mutual agreement. "Mutual agreement on modification of the requirement of a writing may . . . be inferred from the conduct of the parties and from the attendant circumstances." *First Pa. Mortg. Trust v. Dorchester Sav. Bank*, 395 Mass. 614, 625, 481 N.E.2d 1132 (1985) (internal quotation omitted). The defendants assert that the evidence was insufficient to allow the jury to decide, as it did, that a promise to continue the Subsidy was incorporated into the leases. The district court instructed the jury: "[Y]ou may consider what each one said, one to the other, how they behave[d], what each did, what each knew and what the circumstances were . . . then you may infer . . . from their statements and their conduct . . . whether both Shell and each plaintiff agreed to amend the leases." Evidence adduced at trial included not only representations made directly to the Dealers that the Subsidy or something like it would always be available, but also internal Shell documentation indicating that the Subsidy was intended to be permanent, that franchisees should plan their businesses around the continued availability of the Subsidy, and that franchisees would understand the loss of the Subsidy to be a breach of a promise by Shell. A rational jury viewing this evidence might come to the conclusion that the leases were amended to include the Subsidy.

Constructive Termination

The Dealers claimed that when Motiva breached their leases by eliminating the Subsidy, that breach perfected a constructive termination by Shell. The PMPA allows assignment of duties in franchise agreements in accordance with state law. *See* 15 U.S.C. § 2806(b). But an assignment that is violative of state law, or one that results in a breach of one of the statutory components of a franchise, gives rise to a claim under the PMPA against the original franchisor/assignor. In the words of the Fourth Circuit, "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 . . . ." *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 362 (4th Cir. 1986) (reversing summary judgment and holding that where assignee breaches franchise agreement, action will lie against franchisor/assignor). In *Chestnut Hill Gulf v. Cumberland Farms, Inc.*, 940 F.2d 744 (1st Cir. 1991), we adopted the test for constructive termination articulated by the Sixth Circuit.

> To 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.

Id. at 750-51 (quoting *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989)).

What set *Barnes* apart from both *Chestnut Hill Gulf* and *May-Som Gulf* was that in *Barnes* the assignment of the contract had resulted in gasoline prices above the price specified in the contract; in other words, *Barnes* concerned a breach of one of the statutory elements of the franchise, the agreement for the supply of branded motor fuel. The Fourth Circuit vacated summary judgment for the defendant, holding that the breach of the contract for the supply of gasoline created a constructive termination of the franchise. In *Chestnut Hill Gulf* we held the PMPA was not implicated because there was no evidence that any of the statutory components of a franchise had been breached. "[A]ll thirteen dealers continued to occupy the same service stations under the same leases; they continued to purchase Gulf brand gasoline under the same supply agreements; and they continued to do business under the same Gulf trademark." *Chestnut Hill Gulf*, 940 F.2d at 752. In *May-Som Gulf*, the defendants were entitled to summary judgment because the plaintiffs had merely complained of *potential* breaches to the franchise agreement. In the case before us, the Dealers have proven to the jury's satisfaction that Motiva breached the lease component of the franchise agreements. That breach allowed the jury to find that Shell constructively terminated the Dealers' franchises when it assigned the franchises to Motiva.

The defendants argue that in order to show a constructive termination, the breach must be contemporaneous with the assignment and the breach must amount to a total deprivation of one of the three elements of the franchise. Both contentions misunderstand constructive termination.

First, we agree with the Fourth Circuit that an action for constructive termination lies against the assignor of a franchise when the assignee breaches the franchise. *Barnes*, 795 F.2d at 362. This prevents the assignor/franchisor from shielding itself against liability through the use of another corporation. "The [PMPA] does not contemplate that a franchisee should be relegated to seeking damages from an assignee that might not have the resources to satisfy a judgment." *Id.* A delay between the assignment and the breach changes nothing. The reasons for this are even stronger where the assignee is a subsidiary of the franchisor, or a joint venture in which the franchisor is a party.

Second, the breach of the statutory element of the franchise does not have to be a total breach. In *Barnes* the plaintiff was "forced to raise her prices, and her sales and net income . . . declined." *Id.* at 361. She did not suffer a complete loss of the benefits of the motor fuel supply contract. The defendants' attempted analogy to constructive termination in employment law or constructive eviction in landlord-tenant law is misleading. Those doctrines require an actual severance of the relationship: The employee must leave the workplace; the tenant must move out. But here, as the Dealers testified, sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible. Indeed, some plaintiffs testified they had gone into personal debt, driven themselves into bankruptcy, or enlisted the aid of family members working without pay to make ends meet. To require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable. The "congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA." *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394, 1399 (9th Cir. 1986).

We do not here say that any material breach of the lease would necessarily be sufficient to sustain the constructive termination claim. In this case, the district court instructed the jury that it could find constructive termination only if the breach of the lease "was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business . . . . It's not simply was the lease breached, but did that breach amount to . . . effectively the end of the franchise relationship." In this instruction the district court set an appropriate threshold.

We agree with the district court that an assignor may be liable for even a subsequent breach of the franchise agreement by an assignee, and that a breach of the franchise agreement need not result in complete deprivation of a statutory element of the franchise to support a constructive termination.

Indeed, this case presents a strong argument for the doctrine of constructive termination. 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. They presented evidence that this was the reason for the change in the rent formulation, the elimination of the Subsidy, and the dramatic increase in rents they paid. If the jury accepted this as the reason, the case falls within the scope of the PMPA, which is designed not to freeze the franchise agreements exactly where they were,[11] but to prevent franchisors from improperly terminating franchises and thereby to ensure that franchisees benefit from successful investment in their franchises.

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 relevant market, selling the underlying real property, or dedicating the property to another use. 15 U.S.C. § 2802(b)(2)(E) & (b)(3)(D). This is also why parts of the PMPA place more restrictions on franchisors when the purpose of termination or nonrenewal is to convert

[11] *See May-Som Gulf*, 869 F.2d at 921-22 (noting that the PMPA does not mandate "a permanent status quo" and that the act was not meant to stymie "major national acquisition and large scale divestiture") (quoting *Russo v. Texaco, Inc.*, 630 F. Supp. 682, 683 (E.D.N.Y. 1986)).

the station to direct operation by the franchisor.[12] Were it otherwise, the franchisor could extract any increase in value created by the franchisee's investment, without sharing that increase with the franchisee. This would dampen the incentive for a franchisee to develop the business. In this case, the Dealers presented evidence that the defendants wanted to convert their stations to direct operation.[13] Where a franchisor has breached its obligations to the franchisee such that the franchisee faces the

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[12] For example, subsection 2802(b)(2)(E) requires that a termination made pursuant to a franchisor's withdrawal from "the marketing of motor fuel through retail outlets in the relevant geographic market area" be "not for the purpose of converting the premises . . . to operation by employees or agents of the franchisor for such franchisor's own account." For another example, nonrenewals are normally allowed if they are based on determinations "to materially alter, add to, or replace such premises," or determinations that the franchise "is likely to be uneconomical despite any reasonable changes . . . which may be acceptable to the franchisee." But subsection 2802(b)(3)(D)(ii) explicitly prohibits nonrenewal under those same circumstances when that determination is "made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor." This language forbids termination or nonrenewal under these circumstances even if the right of first refusal is given or the bona fide offer is made. (This restriction does not apply to sales of the premises, perhaps because the drafters of the legislation did not imagine that the sale of the underlying premises could be for the purpose of converting the station to the franchisor's control. *But cf. Patel v. Sun Co.*, 141 F.3d 447 (3d Cir. 1998) (when franchisor sells underlying property with leaseback provision to operate service station, PMPA implicated in neither the sale of the property nor the termination of the franchise on expiration of the franchisor's lease).

[13] Nothing in the PMPA would prevent the defendants 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 sell them at artificially low prices. That is exactly what the Dealers claimed was happening here.

effective end of the franchise, the PMPA must treat that as a termination of the franchise.

Neither will we contradict the jury's verdict. When we are satisfied that the law has been faithfully interpreted, we will overturn a jury's verdict only when no reasonable jury could have come to that verdict on the facts presented. *See Rodriguez-Torres*, 399 F.3d at 57. The jury heard ample evidence to conclude that the financial hardship resulting from the loss of the Subsidy meant the end of the relationship. The defendants had opportunity to attack the credibility of that evidence and to put on their own. We will not step into the jury box to provide a second opinion. Nor was the verdict against the demonstrable weight of the evidence or likely to result in a blatant miscarriage of justice. Consequently, there was no manifest abuse of discretion in the district court's denial of the motion for a new trial.

Constructive Nonrenewal

As each Dealer's lease expired, Motiva presented a new lease. The new leases changed the way rent was calculated, which had the effect of increasing the rents charged. The Dealers argued that this change and others were not made in good faith, as required by the PMPA, but rather were part of the plan to drive the franchisees out of business. They claimed that inclusion of these terms amounted to a nonrenewal of their agreements, even though each Dealer signed a new agreement (albeit "under protest"). We conclude that the PMPA does not support a claim for nonrenewal under these circumstances. We therefore vacate this portion of the district court's judgment and remand with instructions to issue judgment on this claim for the defendants.

It is the plaintiffs' burden to prove that a nonrenewal or a termination has taken place. 15 U.S.C. § 2805(c). A notice of nonrenewal issued pursuant to 15 U.S.C. § 2804, while not strictly speaking a nonrenewal, presumably satisfies this burden. *See Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 864 (7th Cir. 2002) ("[A] franchisor's issuance of a notice of nonrenewal is the precise equivalent of a nonrenewal."); *Lippo v. Mobil Oil Corp.*, 776 F.2d 706, 720 (7th Cir. 1985) ("In an action brought under section 2805(a) the franchisee has the burden of proving termination of the franchise. (This must really mean attempted termination if the injunctive relief is to be of any use.)"). *But see Seckler v. Star Enter.*, 124 F.3d 1399, 1403 (11th Cir. 1997) (no claim under PMPA when notice of nonrenewal rescinded before action commenced); *Akky v. BP Am.*, 73 F.3d 974, 974 (9th Cir. 1996) (same).

The threshold question is whether to recognize such a "constructive nonrenewal" and thereby bring Motiva's actions within the reach of the PMPA. The Ninth Circuit is the only circuit so far to recognize a claim for constructive nonrenewal. *Pro Sales*, 792 F.2d 1394. In *Pro Sales*, the plaintiff signed a renewal agreement "under protest" and immediately brought suit under the PMPA. *Id.* at 1398. The court relied on legislative history to conclude that these facts gave rise to a claim for constructive nonrenewal under PMPA. *Id.* at 1399.

Pro Sales has been rejected by the other circuits to consider the issue. The PMPA, after all, requires a franchisor to provide a notice of nonrenewal, 15 U.S.C. § 2805(c), and then provides a framework for the franchisee to seek preliminary relief on receipt of that notice, *id.* § 2805(b)(2). Two circuits have held that this notice-and-preliminary-relief structure is evidence that Congress intended to limit the reach of the PMPA to cases where either a notice is given or an actual nonrenewal has taken place. *See Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 489 n. 16 (5th Cir. 2003) ("[T]he Seventh Circuit rejected the *Pro Sales* approach based on a 'franchisee's ability to obtain an injunction under the PMPA' in cases of nonrenewal. We reject the *Pro Sales* approach on the same basis." (quoting *Dersch Energies*, 314 F.3d at 865)). Thus, in *Dersch Energies*, the Seventh Circuit held that a franchisee who had signed a renewal "under protest" did not have a claim for constructive nonrenewal because the franchise had in fact been renewed. "Had Dersch allowed the defendants to issue a formal notice of nonrenewal, its dispute with the defendants would have been transformed from a mere contract dispute into a nonrenewal (within 90 days) of its franchise relationship—thus allowing it to . . . maintain suit" under the PMPA. *Id.* at 866; *accord Abrams Shell v. Shell Oil*, 343 F.3d 482, 489 (5th Cir. 2003) ("We find the Seventh Circuit's reasoning in *Dersch Energies* to be especially persuasive, thus we apply the same logic to this case. Plaintiffs have not provided any evidence that Defendants failed to renew the relevant agreements; therefore, Plaintiffs have not shown a breach in the franchise relationship.").

The plaintiffs' constructive nonrenewal argument requires the following reasoning. Had the Dealers refused to agree to the new contract terms, Motiva would have issued notices of nonrenewal alleging as a permissible basis for nonrenewal the "failure of [the parties] to agree on changes or additions to the provisions of the franchise . . . ." 15 U.S.C. § 2802(b)(3)(A). The Dealers would have asserted that the nonrenewal was improper because the changes were not offered in good faith, *id.* § 2802(b)(3)(A)(i), or else were offered in order to convert the premises to the franchisor's own control, *id.* § 2802(b)(3)(A)(ii). On those grounds the Dealers could have sought preliminary relief and damages under the PMPA. *Id.* § 2805(a) & (b).

The stumbling block that trips up the plaintiffs is that, rather than insist on receiving notices of nonrenewal, the Dealers signed the new agreements "under protest" and continued in operation under the new agreements. We conclude that just as the PMPA requires a clear indication from franchisors that they seek nonrenewal of a franchise relationship, it likewise requires that franchisees faced with objectionable contract terms refrain from ratifying those terms by executing the contracts (even "under protest") and operating under them. Allowing a franchisee to sign "under protest" and then later challenge the renewal would extend the period of uncertainty through the entire first year of a contract that in this case was only three years. Recognizing constructive nonrenewal also would enable a franchisee to sign the contract and simultaneously challenge it. If its claims were rejected by the courts, the franchisee would have lost nothing and could continue to operate the franchise under the agreement with the PMPA-enforced reasonable expectation of continuation and renewal. Absent a claim for constructive nonrenewal, a franchisee must wait for a notice of termination to bring suit under the PMPA. The franchisee therefore risks the end of the franchise if the claim fails and so must carefully weigh the decision to sign or sue.[14] This is the balance Congress has struck,

[14] In *Pro Sales* the suit was filed immediately and the plaintiff obtained preliminary relief so that it never operated under the new contract. This is different from *Dersch Energies*, where the plaintiff operated under the new contract "for just under a year" before filing suit. 314 F.3d at 865. The *Dersch* court noted the distinction, but found it irrelevant. *Id.* We do not address the question whether a preliminary injunction enabling the franchisee to avoid operating under the new agreement combined with an immediate suit, as in *Pro Sales*, would satisfy the requirements for bringing suit under the PMPA. Such a case would avoid several of the problems we have identified, but would still allow a franchisee to challenge an agreement as a nonrenewal while retaining the right to take advantage of that agreement should the challenge fail. We hold only that under the facts before us today we cannot recognize a claim for constructive nonrenewal.

and should we prefer another, we would not be free to impose it. Consequently, we reject application of constructive nonrenewal to these facts.

We note with some concern the limited scope of the PMPA. Two unexpected consequences of the legislation seem to loom as potential problems. The first is that franchisors will conform their behavior to the letter of the law but still use their position of power to impose their will on franchisees. The statute is of course not a panacea and cannot be faulted for what it fails to do. But some statutory protection is worse than none when it serves as protective cover for the very misdeeds it purports to eliminate. The second unintended consequence is that, to the extent Congress succeeds in leveling the playing field, it makes the franchise arrangement less appealing to franchisors. It is not difficult to imagine protections for franchisees so strong that franchisors abandon the model entirely. Evidence introduced at trial spoke to both of these hazards. However, these are issues for Congress to weigh and remedy, not for the courts.

Because we do not recognize a claim for nonrenewal under the PMPA where the franchisee has signed and operates under the renewal agreement complained of, we vacate this portion of the district court's judgment and remand with instruction to enter judgment on this count for the defendants.

Unreasonable Gasoline Prices

The Uniform Commercial Code, as adopted in Massachusetts, contemplates the enforcement of contracts in which one party sets the price of goods over time. Mass. Gen. Laws ch. 106, § 2-305(2). But the price must be set in good faith. *Id.* The jury found that the defendants had failed to set reasonable prices in good faith. The defendants appeal on two grounds. First, they claim that the "good faith" requirement means only that such a price may not discriminate among similarly situated buyers.[15] And second, the defendants assert that the Dealers' evidence of unreasonable pricing is inadequate as a matter of law, because 1) it was based only on retail pricing charged by competitors to the Dealers, rather than DTW prices charged to those competitors; and 2) the Dealers' expert presented pricing analysis of only one competitor, thereby failing to establish a "range" of prices outside of which the defendants' wholesale prices fell. We find neither contention persuasive.

Section 2-305(2) "rejects the uncommercial idea that . . . the seller . . . may fix any price he may wish by the express qualification that the price so fixed must be in good faith. Good faith includes observance of reasonable commercial standards of fair dealing . . . ." *Id.* § 2-305(2) cmt. 3; U.C.C. § 2-305(2) cmt. 3. "[I]n the normal case a 'posted price' or a future seller's or buyer's 'given price,' 'price in effect,' 'market price,' or the like satisfies the good faith requirement." *Id.* The defendants and amici urge us to read this comment as providing an absolute safe harbor for nondiscriminatory posted prices in open price term contracts. This we will not do.

For one thing, the very comment on which the defendants and amici rely expressly invokes the general notion of "reasonable commercial standards of fair dealing." If the comment meant that only discriminatory pricing would be disallowed it certainly could have said that. For another, it is clear to us that a situation in which one merchant is raising its prices in order to force a customer out of business is hardly the "normal case." The Eleventh Circuit allowed this question to go to a jury in a class action involving another oil company's pricing policies.

[15] In this assertion they are supported by amici, whose brief is gratefully acknowledged.

Allapattah Servs. v. Exxon Corp., 333 F.3d 1248, 1262 n.16 (11th Cir. 2003) (conceding that in a "normal case" nondiscriminatory pricing is protected, but holding that where the allegation was that an oil company was trying to drive service stations out of business, "whether this case constituted a normal case was a factual issue necessary to determine whether Exxon acted in good faith" and therefore rightly submitted to the jury). More recently, the Fifth Circuit upheld the denial of a motion for judgment as a matter of law on the basis that setting gasoline prices in bad faith to drive franchisees out of business violated the UCC. *Mathis v. Exxon Corp.*, 302 F.3d 448, 457-59 (5th Cir. 2002) ("[T]he jury's finding that Exxon breached its duty of good faith in setting the DTW price it charged the plaintiffs is not without foundation in the law or the evidence."); *see also Bob's Shell, Inc. v. O'Connell Oil Assocs.*, 2005 U.S. Dist. LEXIS 21318 (D. Mass. Aug. 31, 2005); *Wayman v. Amoco Oil Co.*, 923 F. Supp. 1322, 1349 (D. Kan. 1996) (finding that the case before it was a "normal case" but noting that "[i]f there was evidence that Amoco had, for example, engaged in discriminatory pricing or tried to run plaintiffs out of business, then the court's decision might be different"). *But see Shell Oil v. HRN, Inc.*, 144 S.W.3d 429, 435-38 (Tex. 2004) (holding absence of price discrimination created presumption of good faith notwithstanding allegations that that oil company set prices in bad faith as part of a plan to drive franchisees out of business).

Commerce is predicated on the idea that a transaction is good for both buyer and seller. The comment recognizes that allowing one party complete control over the price would be "uncommercial." We do not think the only reason for this is the risk of price discrimination. The drafters of the UCC and amici here are rightly concerned about a flood of litigation second-guessing every price set in an open price term contract. Mere allegations of bad faith will never be enough to survive summary judgment. But this case comes to us after a jury verdict finding bad faith and commercial unreasonableness.

Nor do the defendants' objections to the sufficiency of the evidence require us to set the jury verdict aside. While perhaps more specific and more comprehensive evidence would be preferable, the jury had enough evidence of the defendants' motives and practices, as well as enough information about competitors' pricing, to come to the conclusion that the DTW prices were commercially unreasonable. Specifically, the use of competing gas stations' retail prices to draw conclusions about what those stations might be paying for gasoline is not ideal, but is adequate to the task at hand. In fact, it is the same benchmark that the defendants used in their "street-back" pricing model in setting the DTW price in the first place. In the light of this, the defendants cannot be heard to complain that such prices are not a good measure of what other distributors of gasoline are charging. And although the Dealers' expert failed to present a "range" of such prices, the expert testimony was not the only testimony available. One Dealer testified that the *retail* prices he observed were equal to or lower than the *wholesale* prices he paid. Additionally, at least one Dealer had firsthand knowledge of the DTW prices charged in the same area by another franchisor. On appeal, the defendants put forward once again the contentions of their own experts regarding the range of prices set by competitors. But it was up to the jury to choose between these competing characterizations, and the jury did so.

Damages[16]

The defendants argue that the damages awarded for the PMPA constructive termination claim are not supported by sufficient evidence. The district court instructed the jury to calculate two kinds of damages: damages in the amounts of rents paid that were in excess of the rents under the Subsidy, and damages for reduction in the values of the Dealers' businesses. We agree with the district court that there was ample evidence in the record for the jury to make a damages award, and we uphold that award as reasonable.

The defendants claim that the damages are not supported by sufficient evidence for two reasons. First, the plaintiffs' expert used the VRP when calculating damages for excess rent, rather than the STIP, as would have been correct. Because the STIP was less generous, the expert's figures were probably too high. And second, the expert presented damages figures for lost business value, but those figures were based on excess rent paid under the new leases, not on the elimination of the Subsidy. Because this testimony applied properly only to damages under the constructive *nonrenewal* claim, the defendants say that a correspondence between the expert's figures and the actual awards for lost business value awarded under the constructive *termination* theory must be error. We address each of these in turn.

The judge instructed the jury to find damages for excess rent paid due to the elimination of the Subsidy and

[16] Damages for the state contract claim duplicate those for constructive termination under the PMPA. We discuss these damages only once, under the PMPA. Also, because we vacate the jury's verdict on the constructive nonrenewal claim, we do not consider the damages awarded under that claim. For the same reason, we do not address the defendants' argument on appeal that the awards for constructive termination and constructive nonrenewal were duplicative.

for the loss of value to the Dealers' businesses due to the increased rent and the higher gasoline prices.

Calculation of excess rent requires several predictions: of the Subsidy threshold amount, of the discount rate, and of how much gasoline the Dealers could have sold under the scheme. Aside from those assumptions it is a relatively certain calculation, on which expert testimony was received.[17] The Dealers' damages expert concededly used the VRP instead of the STIP to calculate damages, thereby potentially inflating the damages. But even if we could state with certainty that the damages were therefore inaccurate, that would not necessitate our remanding for a new damages calculation or our settling the matter ourselves. A clock that is five minutes fast is, strictly speaking, wrong. But it still may give a general sense of the time and thereby serve its purpose. And the damage figures provided by the expert are, after all, only guideposts for the jury.

Calculating the loss of business value, on the other hand, relies on many more intangible factors and requires many more assumptions. In this respect it is similar to calculating future lost profits, which we have previously held is a more speculative inquiry than normal economic damages calculations. *See, e.g.*, *Camar Corp. v. Preston Trucking Co.*, 221 F.3d 271, 279 (1st Cir. 2000) ("[M]athematical precision is not required in calculating lost profits" but "a damages award must have a rational

[17] Even this normally simple calculation is complicated somewhat in these circumstances. Higher rents may have forced the Dealers to maintain higher gasoline prices, which in turn might have lowered sales volume. The Subsidy reduced rents based on gasoline volume, so a change in that volume would render more uncertain even the damages on this element. (At least one of the Dealers testified that he would sometimes lower his gasoline prices because he could recoup the lost margin based on increased volume and the lowered rent provided by the Subsidy based on that volume.)

basis in the evidence." (internal quotation omitted)); *E. Mountain Platform Tennis v. Sherwin-Williams Co.*, 40 F.3d 492 (1st Cir. 1994) (upholding as not erroneous a jury's award of future lost profits where the company was only "at a break-even point" and operations were not yet profitable). We reject the defendants' comparison of this case to *Kolb v. Goldring*, 694 F.2d 869, 873 (1st Cir. 1982). That case dealt with lost wages, in a statutory setting that limited recovery to "accounts owing" on a similar footing as a "common law suit for back wages for breach of contract." *Id.* at 871-82. Here, the plaintiffs are entitled to the loss of the value of their business as a result of the defendants' actions.

Because that calculation is necessarily complex and uncertain, we require from the jury less rigor in making the award. Here, along with expert testimony, the Dealers presented testimony that the defendants themselves had valued these stations more highly before the elimination of the Subsidy, and that some of the franchises had lost substantial value. We recognize the wide latitude afforded the jury in this situation—asked to make an uncertain calculation on little hard evidence—and we are mindful that we review to see only if no rational jury could have made this award. "[T]he assessment of damages cannot be disturbed unless the award exceeded any rational appraisal or estimate of the damages that could be based upon the evidence or was grossly excessive, inordinate, shocking to the [conscience] of the court, or so high that it would be a denial of justice to permit it to stand." *Consolo v. George*, 58 F.3d 791, 795 (1st Cir. 1995) (quotation marks and citations omitted). We decline to go so far.

The jury's awards largely correlate with the figures put forward by the Dealers' damages expert. We believe, as did the district court, that once the weaknesses in the expert's figures were pointed out in closing arguments and jury instructions, the jury nonetheless was free to use them as markers of probable damages. That the jury adhered closely to these numbers does not change the fact that the jury was aware of their inadequacies. The jury may have decided that they were close enough, or that no other method of calculation would be better. While a jury is not free "to pull figures out of a hat," *Kolb*, 694 F.2d at 873, we believe that the expert's testimony, the availability of the expert's background data, and the cautionary instruction issued by the district court gave enough guidance to the jury.

And the jury did not simply parrot the expert's figures in any event. In fact, where the jury *did* depart from the experts' figures, the defendants attack those departures as aberrations deserving of reversal. Three Dealers received awards in excess of the damage expert's calculations. The defendants characterize these as mystery "bonus" amounts unsupported by any view of the evidence. But each of these three Dealers testified to particular hardships that the jury might have thought indicated special reductions in business value. The jury may well have been performing its function in calculating losses in business value stemming from those hardships.

Similarly, we find that the jury had ample evidence to make a damages award for the claim under the open price term of the gasoline supply contract. That it differed in some particulars from the numbers put forward by the expert is immaterial, particularly where, as here, different forms of evidence showed different pieces of this picture.

The award of attorneys' fees is mandated by the PMPA. Because we uphold only one of the two statutory claims, however, we must remand for a determination whether the failed constructive nonrenewal claim was a "severable" claim for the purpose of awarding attorney's fees. Such fees are normally not recoverable. *See Figue-*

roa-Torres v. Toledo-Dávila, 232 F.3d 270, 278 (1st Cir. 2000) (fees for unsuccessful severable claims normally not recoverable); *Coutin v. Young & Rubicam*, P.R., 124 F.3d 331, 339 (1st Cir. 1997) (discussing framework for determining whether to reduce fees); *see also Hensley v. Eckerhart*, 461 U.S. 424, 434-37, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). We are mindful both of the district court's discretion in this matter, and of the Supreme Court's admonition that determination of attorney's fees should not result in a second major litigation. *Hensley*, 461 U.S. at 437, 103 S. Ct. 1933. But we have no basis here on which to make a judgment, and so we must remand.

Conclusion

The judgment of the district court on the state contract claims, the unreasonable gasoline pricing claims, and the constructive termination claims is **affirmed**. The judgment on the constructive nonrenewal claims is **reversed**. The jury awards as to the surviving claims are **affirmed** as rational awards supported by sufficient evidence. The award of attorney's fees and costs is **vacated** and **remanded** for reconsideration in the light of our mixed disposition of the claims under the PMPA. Costs on appeal are awarded to the appellees.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

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

Plaintiffs,

v.

SHELL OIL COMPANY, INC., SHELL OIL PRODUCTS COMPANY, LLC (F/K/A SHELL OIL PRODUCTS COMPANY), AND MOTIVA ENTERPRISES, LLC

Defendants.

JUDGMENT

October 27, 2006

Based upon (i) the Jury's Special Verdict dated December 8, 2004, (ii) the September 19, 2005 Order on Trial and Post-Trial Motions, (iii) the Joint Motion for Entry of Separate Judgment Pursuant to Fed. R. Civ. P. 54(b) dated January 24, 2006, and (iv) the August 31, 2006 Memorandum of Decision, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:**

1. With respect to the claims asserted by Plaintiffs, John A. Sullivan, RAM Corporation, Inc., Stephen Pisarczyk, Cynthia Karol, Mac's Shell Service, Inc., J&M

Avramidis, Inc., Sid Prashad, Three K's, Inc. and Akmal, Inc., and for the reasons set forth in the parties' Joint Motion for Entry of Separate Judgment Pursuant to Fed. R. Civ. P. 54(b), it is this Court's determination that there is "no just reason for delay" in entering judgment. Accordingly, judgment shall enter as set forth below.

2. Judgment in favor of Plaintiff **John A. Sullivan** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $23,271.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts averaged $4,654.20 a month, began on January 1, 2000 and ended on June 1, 2000 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at the annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $100,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.[1]

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[1] The interest rates applied to damages for loss of the STIP subsidy (3.08%), excess rent (2.85%), lost business value (2.75%), and the additional unspecified damage awards (2.75%) are those identified in Defendants' Memorandum of Law Regarding Rate of Prejudgment Interest on PMPA Claims dated January 24, 2006. Defendants calculated what the damages and prejudgment interest amounts were as of January 1, 2006 for the Constructive Termination, Constructive Non-Renewal and Breach of Lease claims, respectively, and set those calculations forth in Exhibit B to the Joint Motion For Entry

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $5,460.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments were $1,365 a month, began on June 1, 2000, and ended September 30, 2000 when plaintiff sold his station; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) additional damages in the amount of $100,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $23,271.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts averaged $4,654.20 a month, began on January 1, 2000 and ended on June 1, 2000 when plaintiff entered a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $100,000.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $25,000.00, with prejudgment interest at an annual

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of Separate Judgment Pursuant to Fed. R. Civ. P 54(b) filed by the parties on January 24, 2006.

rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

3. Judgment in favor of Plaintiff **<u>RAM Corporation, Inc.</u>** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $66,011.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,103.75 a month during that year, averaged $5,753.20 from January, 2001 through May 31, 2001, and ended on June 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $40,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $13,644.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on June 1, 2001, were $3,411.00 a month from that date through September 30, 2001 when plaintiff sold his station; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) additional damages in the amount of $40,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $66,011.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,103.75 a month during that year, averaged $5,753.20 from January, 2001 through May 31, 2001, and ended on June 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $40,000.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to County VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $135,940.00 with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

4. Judgment in favor of Plaintiff **Stephen Pisarczyk** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $19,557.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,793.00 a month, and ended on August 1, 2000; prejudgment interest is awarded on the amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; (3) damages at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment; and (4) additional damages in the amount of $50,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for lost business value in the amount of $46,991.00 and additional damages in the amount of $50,000; and

(2) prejudgment interest on the $96,991.00 shall be at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $19,557.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,793.00 a month, and ended on August 1, 2000; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; (3) damages for lost business value in the amount of $46,991.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment; and (4) additional damages in the amount of $50,000.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to County VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $62,142.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claim under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

5. Judgment in favor of Plaintiff **Cynthia Karol** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $41,257.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,380.42 a month during that year, were $692.00 in January, 2001, and ended on February 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $78,290.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $86,557.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on February 1, 2001, were $2,249.00 a month from that date through January 31, 2002, were $2,479.00 a month from February 1, 2002 th[r]ough January 31, 2003, and were $2,711 a month from February 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and

(3) damages for lost business value in the amount of $78,290.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $41,257.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,380.42 a month during that year, were $692.00 in January, 2001, and ended on February 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $78,290.00, with interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $117,578.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

6. Judgment in favor of Plaintiff **<u>Mac's Shell Service, Inc., Southbridge Shell</u>**, against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $58,602.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,919.25 a month during that year, averaged $2,357.10 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $99,962.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $80,220.00; (2) based on the evidence present by plaintiffs' expert, the excess rent payments began on November 1, 2001, were $2,950.00 a month from that date through October 31, 2002, were $3,170.00 a month from November 1, 2002 th[r]ough October 31, 2003, and were $3,389.00 a month from November 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $99,962.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $58,602.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,919.25 a month during that year, averaged $2,357.10 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $99,962.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $181,355.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damages award.

7. Judgment in favor of Plaintiff **Mac's Shell Service, Inc., Webster Shell**, against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $89,335.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,885.50 a month during that year, averaged $4,270.90 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $97,247.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $68,186.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on November 1, 2001, were $2,425.00 a month from that date through October 31, 2002, were $2,746.00 a month from November 1, 2002 th[r]ough October 31, 2003, and were $3,067.00 a month from November 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $97,247.00 with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $89,335.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,885.50 a month during that year, averaged $4,270.90 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $97,247.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $106,609.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

8. Judgment in favor of Plaintiff **J&M Avramidis, Inc.** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $50,388.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $1,866.22 a month through March 31, 2002, and ended on April 1, 2002 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $105,318.00, with prejudgment of interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $63,192.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on April 1, 2002, were $2,992.00 a month from that date through March 31, 2003, and were $3,032.00 a month from April 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $105,318.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $50,388.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $1,866.22 a month through March 31, 2002, and ended on April 1, 2002 when plaintiff entered into a Motiva lease; prejudgment interest shall be awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $105,318.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $98,824.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

9. Judgment in favor of Plaintiff **Sid Prashad** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $17,008.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,429.71 a month through July 31, 2000, and ended on August 1, 2000 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $85,830.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $100,922.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on August 1, 2000, were $2,159.00 a month from that date through July 31, 2001, were $2,429.00 a month from August 1, 2001 th[r]ough July 31, 2002, and were $2,698.00 a month from August 1, 2002 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of the overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $85,830.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $17,008.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,429.71 a month through July 31, 2000, and ended on August 1, 2000 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $85,830.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $69,270.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

10. Judgment in favor of Plaintiff **Akmal, Inc.** against Defendants, Shell Oil Company, Shell Oil Products Com-

pany, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $173,198.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,626.91 a month during that year, averaged $3,552.25 a month during 2001, and averaged $3,627.00 a month during 2002 and 2003; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date the payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $44,573.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for lost business value in the amount of $44,573.00; and (2) prejudgment interest on the $44,573.00 shall be at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $173,198.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,626.91 a month during that year, averaged $3,552.25 a month during 2001, and averaged $3,627.00 a month during 2002 and 2003; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date the payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $44,573.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $42,264.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

11. In summary, the damages amounts for each of the preceding plaintiffs are as follows[2]:

[2] A chart showing the breakdown of the damages calculations for each of the counts for each plaintiff is attached as Exhibit A to this Order. In particular, the damages awarded for Count II (Constructive Termination) are duplicative of the damages awarded for Count V (Breach of Lease), so only one of these damages amounts can be awarded.

Plaintiff	Principal and Interest through 9/30/06	Daily Interest from 9/30/06
Sullivan	$326,11.71	$78.31
RAM	$413,550.96	$121.11
Pisarczyk	$355,450.15	$90.40
Karol	$520,780.93	$125.52
Mac's Shell (Southbridge)	$680,347.51	$174.05
Mac's Shell (Webster)	$612,817.85	$155.95
J&M Avrimidis	$546,392.93	$133.38
Prashad	$447,122.28	$95,04
Akmal, Inc.	$445,459.83	$134.29

12. Judgment in favor of Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC against Plaintiffs, **John A. Sullivan**, **RAM Corporation, Inc.**, **Stephen Pisarczyk**, **Cynthia Karol**, **Mac's Shell Service, Inc. (Southbridge and Webster)**, **J&M Avramidis, Inc.**, **Sid Prashad**, and **Akmal, Inc.** as to Counts I (Request for injunctive relief), III (Violation of M.G.L. Chapter 93A), IV (Violation of M.G.L. Chapter 93E), VII (Breach of Implied Warranty of Good Faith and Fair Dealing), VIII (Promissory Estoppel), and IX (Declaratory Judgment).

13. Judgment in favor of Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, against Plaintiff **Three K's, Inc.** as to all claims (Counts I-IX).

14. The Judgment (compensatory damages plus accrued prejudgment interest) will bear post judgment in-

terest at the judgment rate specified by 28 U.S.C. sec. 1961 until fully satisfied.

15. All relief not expressly granted is denied.

16. This Court shall retain jurisdiction of this matter for purposes of the enforcement of the provisions of this Judgment.

SO ORDERED: /s/ Rya W. Zobel

Hon. Rya W. Zobel
United States District Judge

DATED: [October 27, 2006]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., INC.
AND MOTIVA ENTERPRISES, LLC

ORDER ON TRIAL AND POST-TRIAL MOTIONS

September 19, 2005

ZOBEL, D.J.

Sixty Shell Oil dealers brought this action for breach of contract and violations of the Petroleum Marketing Practices Act ("PMPA"). Because the individual claims are, for the most part, unique, the case is not amenable to class action treatment. The Court did, however, order an initial trial of the claims of ten plaintiffs which was held from November 15 to December 8, 2004 and resulted in a verdict for those plaintiffs.[1]

Plaintiff's motion for limited reconsideration of the entry of summary [judgment] against plaintiff Stephen Pisarczyk (#296 on the docket)

[1] Sixty plaintiffs filed suit. Eighteen voluntarily dismissed their claims in 2002. From the remainder, the Court randomly selected ten for the first trial. One settled on the eve of trial, and the other nine tried to verdict.

The motion was denied.

Defendants' motion for reconsideration of the decision on their motion for summary judgment (#297 on the docket)

The motion was denied.

Defendants' motion in limine regarding damages evidence (#298 on the docket)

The motion is denied as moot.

Defendants' motion in limine to exclude the proposed expert testimony of Brian Gorin (#299 on the docket)

The motion was denied.

Defendants' motion in limine regarding evidence relating to defendants' pricing to non-lessee dealers (#302 on the docket)

The motion is denied as moot.

Plaintiffs' motion for special verdict (#314 on the docket)

The motion was allowed.

Defendants' motion for judgment as a matter of law (#322 on the docket)

The Court reserved on the motion and will revisit it in connection with its renewal #352.

Defendants' supplemental motion for special verdict (#329 on the docket)

The motion was denied as to the form of defendants' proposal, although the Court submitted special questions to the jury.

Defendants' motion for special verdict (#350 on the docket)

The motion was allowed.

Defendants' motion for jury instructions (#351 on the docket)

The motion was allowed in part and denied in part.

Both parties also filed a number of post-trial motions and proposed findings and rulings addressed below.

Plaintiffs' motion for a permanent injunction (#341 on the docket)

The motion is denied. Neither the PMPA nor the record in this case support the requested recalculation of rent.

Plaintiffs' motion for an award of punitive damages for willfulness under the PMPA (#342 on the docket)

The motion is denied. Although the jury found constructive termination and constructive non-renewal of certain lease agreements, I am not convinced that defendants acted in willful disregard of the PMPA and that punitive damages are appropriate. The evidence showed at least two reasons for defendants' conduct that mitigate against the imposition of exemplary damages.

First, the entire industry was changing the manner of computing rent. Whereas Shell and some others had based the amount of rent on the amount of gas purchased, the industry and defendants switched to a formulation based on the value of the station's real estate. That decision followed a change in the use of gas stations from simply selling gasoline and oil to including also convenience stores and other amenities. It also reflected a reasonable business decision to improve defendants' return on their investment in the real estate.

Second, during the period in question, Shell had merged with Texaco, and the combined company had to evolve a uniform rent structure. These business realities were, at least, partially responsible for the rent program of which plaintiff complained, and they compel denial of any award of punitive damages.

Plaintiffs' proposed findings of fact and rulings of law on Count III (#343 on the docket)

In order to establish a violation of Mass. Gen. Laws ch. 93A, § 11, plaintiffs "must show that the defendant[s'] actions fell 'within at least the penumbra of some common-law, statutory, or other established concept of unfairness,' or were 'immoral, unethical, oppressive or unscrupulous' . . ." *Damon v. Sun Co., Inc.*, 87 F.3d 1467, 1484 (1st Cir. 1996). For the same reasons that defendants are not liable for willful disregard and punitive damages under the PMPA, I find the defendants not liable on Count III.

Defendants' motion for judgment as a matter of law, or, in the alternative, for a new trial (#352 on the docket)

Defendants again raise a number of legal issues concerning the viability of plaintiffs' claims. I have previously addressed them in the context of a motion for summary judgment, rulings on evidence and defendants' motions during trial under Rule 50. I adhere to those rulings.

Defendants' arguments that the verdict is not supported by the evidence ignores the jury's right to draw conclusions from the evidence different from the conclusions the parties might reach. The jury is not required to accept calculations by the parties' experts. It may make its own calculations based on the evidence even if they lead to a result different from that reached by the expert. The evidence in this case permitted the jury's findings both as to liability and damages.

Defendants' complain that they were not allowed sufficient time to present their case. First, the Court explained to all counsel before the case began the strictures on time, namely, that there would be fourteen trial days. Second, while it is true that plaintiffs used more time than allotted, a not insignificant part of the excess was attributable to lengthy cross-examination by defendants.

Defendants' motion for judgment as a matter of law is denied as is the alternative, their motion for a new trial.

Defendant's motion for leave to file memorandum in excess of 20 pages (#353 on the docket)

The motion is allowed.

Plaintiffs' motion for leave to file reply (#354 on the docket)

The motion is allowed.

Plaintiffs' motion to file brief in excess of twenty pages (#361 on the docket)

The motion is allowed.

Defendants' motion for leave to file a reply (#365 on the docket)

The motion is allowed.

[Sept. 19, 2005]	/s/ Rya W. Zobel
DATE	RYA W. ZOBEL UNITED STATES DISTRICT JUDGE

APPENDIX D
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., INC.
AND MOTIVA ENTERPRISES LLC

MEMORANDUM OF DECISION

October 7, 2002

ZOBEL, D.J.

On June 30, 2000, lessee-dealers of Shell brand automobile gasoline, acting through the Shell Dealers Defense Group ("Group"), and other individual franchisees, filed an action against Shell Oil Products Company and Motiva Enterprises ("defendants") for numerous causes of action centered on the defendants' termination of its Variable Rent Program ("VRP"). *See Demetrios Tsaniklides, Jr., et al. v. Shell Oil Products Co., Inc. and Motiva Enterprises, LLC*, Civil Action No. 00-11295. After the Court determined that the Group did not have standing, the lessee-dealers sought to amend the complaint to add themselves in their individual capacities. On June 12, 2001, the Court denied the motion, but stated that plaintiffs "may file a new case which may be deemed to be related." On the same day, the Court ordered that the cases involving the Rhode Island plaintiffs and New Hampshire plaintiffs be transferred to their respective states. The remaining parties subsequently stipulated to a dismissal of the action without prejudice. The present action seeking the same relief was then filed on July 27, 2001. Defendants have filed a Motion to Dismiss and a Motion for Judgment on the Pleadings.

Defendants contend that Counts One and Two of plaintiffs' Amended Complaint concerning constructive termination are barred by the one-year statute of limitations under the Petroleum Marketing Practices Act, 15 U.S.C. § 2805 ("PMPA"). Defendants assert that the statute of limitations began to run when Shell terminated the VRP on August 1, 1998, while plaintiffs allege that it began on January 1, 2000, when the VRP substitute was eliminated. Count One of the Amended Complaint states that plaintiffs seek injunctive relief on the grounds that the "dealers' franchises have been constructively terminated by Shell's termination of the Variable Rent Program or a similar alternative. . . ." (Paragraph 49, Subparagraph 1.) Count Two incorporates the same statement by reference. Paragraph 42 of the Amended Complaint states that Shell/Motiva abandoned the last substitution of the VRP on January 1, 2000 and began to charge "Contract Rent" or the new "Program Rent."

Viewing the facts as stated in the Amended Complaint in a light most favorable to the plaintiffs, the statute of limitations for the PMPA claims began to run on January 1, 2000. Plaintiffs then filed suit on June 30, 2000, well within the one-year statute of limitations. Since the present suit is deemed to relate back to the date of the original complaint in accordance with the Court's order dated June 12, 2001, plaintiffs' PMPA claims are not time barred. In fact, none of plaintiffs' claims, including the state law claims, is barred by the PMPA's statute of limitations. Similarly, plaintiffs' claims under M.G.L. ch. 93E are timely.

Defendants also contend that the Rhode Island plaintiffs (except for Paul Sroczynski and his corporation, J. Enterprises) and the New Hampshire plaintiffs (except for Charles Lagasse, Kach Corporation and Ali Jaber), who did not file suit individually in the first action, are time barred. However, both sets of plaintiffs were parties to the first action as members of the Group. The Court ordered that the cases involving those out-of-state plaintiffs be transferred to their respective states pursuant to 28 U.S.C. § 1406(a). Because those actions relate back to the date of the first action, they, too, are timely.

Defendants' motion to dismiss plaintiffs' claim for fraud and misrepresentation is allowed. "In the First Circuit, Rule 9(b) requires a party pleading fraud to specify the time, place, and content of the alleged false representation." *Mead Corp. v. Stevens Cabinets, Inc.*, 938 F. Supp. 87, 90 (D. Mass. 1996). Paragraph 31 of the plaintiffs' amended complaint states that "[f]or over 18 years, the dealers received assurances from the highest levels of the marketing department on down to the field sales representatives, that the VRP would always be there for them. . . ." Plaintiffs have not specified either the time or place of defendants' misrepresentations regarding the VRP as required.

Finally, defendants' assertion that allegations of constructive termination of the franchise are not covered by the PMPA is simply wrong. *See Riverdale Enterprises Inc. v. Shell Oil Co.*, 41 F. Supp. 2d 56, 62 (D. Mass. 1999) (stating that "[a]bsent a claim of per se unlawful termination, a PMPA franchisee must show that a constructive termination has occurred.").

Accordingly, the defendants' Motion to Dismiss and Motion for Judgment on the Pleadings as to the plaintiffs' fraud and misrepresentation claim is allowed. As to all other claims, the motions are denied.

[October 7, 2002]	/s/ Rya W. Zobel
DATE	RYA W. ZOBEL UNITED STATES DISTRICT JUDGE

APPENDIX E
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

NO. 05-2771

FRANCIS MARCOUX; ABRAHAM ABRAHAM; JORDAN AVRAMIDIS; CHRISS AZZIAN; RICHARD BAIMA; ED BAKER; STEVE BLACK; JAMES COGGESHALL; MICHAEL CORBETT; PATRICIA DASILVA; ALEX DASILVA; STEVE FALCONE; GEORGE FONTAINE; BILL FONTAINE; CAMILLE FRANCIS; MATTY GAETA; DONALD GAGNON; JOHN GENEROSO; KAL HAMZE; ABRAHAM HAMZE; TIBOR HANGYAL; ADAM HIPP; ABDUL KAFAL; GEORGE KANTARGES; JIM KANTAROWSKI; WILLIAM KAUFMAN; JOE KELLEHER; HUSSEIN KOBESSI; MIKE LAMARCHE; RICHARD MELANSON; AKMAL MOAWED; CONSTANTIN PIEDES; STEPHAN PISARCYK; HARVEY RUDNICK; ROGER THIBAULT; DIMITRIOUS TSANIKILIDES; STEPHEN SHEA; JOHN A. SULLIVAN; J. ENTERPRISE, INC.; NIKOLAS MANOUSARIDIS; PAUL SROCZYNSKI, PRESIDENT OF J. ENTERPRISES, INC.; JES SERVICE, INC.; RONNIE ABOUD; MAHENDRS AMIN; MASSOUD ATALISH; MIKE ATALISH; DOUGLAS CHAPMAN; STEVE FRANGIAS; JOE GOLDEN; KAL HAMZE; PATRICK HINES; MUHAMMAD IMTIAZ; JAY JON; KAY JON; JACQUE KAAN; HUSSEIN KOBESSI; JAMES MORAIDIS; SUNNY PATEL; RUSSELL PICARD; PAUL RICHARDS; FRED SAAD; AZIZ SABA; WALIF SAMROUT; EARL STICKNEY; THOMAS SULLIVAN; TOUFIC ATALLAH; DROR DUSDUSHMAN; EARL MCLAUGHLIN; WILSON TIBURTINO; LASCOENTERPRISES, INC.; LARRY RUBENSEIN, PRESIDENT OF LASCO ENTERPRISES,

Plaintiffs,

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

Before
Boudin, Chief Judge,
Torruella, Lynch,
Lipez and Howard,
Circuit Judges,
Delgado-Colon,* District Judge.

ORDER OF COURT

Entered: **May 23, 2008**

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc have been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

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* Of the U.S. District Court for the District of Puerto Rico, sitting by designation.

By the Court:

/s/ Richard Cushing Donovan, Clerk

APPENDIX F
RELEVANT STATUTORY PROVISIONS

Title I of the Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322, 322 (1978) (codified as amended at 15 U.S.C. §§ 2801-2806) provides as follows:

§ 2801. Definitions

As used in this subchapter:

(1)(A) The term "franchise" means any contract—

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes—

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed—

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which 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.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who—

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include—

(A) any failure which is only technical or unimportant to the franchise relationship;

(B) any failure for a cause beyond the reasonable control of the franchisee; or

(C) any failure based on a provision of the franchise which is illegal or unenforceable under the law of any State (or subdivision thereof).

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship—

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after June 19, 1978) of the relevant franchise which was entered into prior to June 19, 1978, and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce—

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of

Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

§ 2802. Franchise relationship

(a) General prohibition against termination or nonrenewal

Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may—

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) Precondition and grounds for termination or nonrenewal

(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if—

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if—

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if—

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 2804(d) of this title; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if—

(i) such determination—

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises—

(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if—

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(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.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if—

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if—

(i) such determination is—

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either—

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

(c) Definition

As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as—

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if—

(A) the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise—

(i) of the duration of the underlying lease; and

(ii) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(B) during the 90-day period after notification was given pursuant to section 2804 of this title, the franchisor offers to assign to the franchisee any option to extend the underlying lease or option to purchase the marketing premises that is held by the franchisor, except that the franchisor may condition the assignment upon receipt by the franchisor of—

(i) an unconditional release executed by both the landowner and the franchisee releasing the franchisor from any and all liability accruing after the date of the assignment for—

(I) financial obligations under the option (or the resulting extended lease or purchase agreement);

(II) environmental contamination to (or originating from) the marketing premises; or

(III) the operation or condition of the marketing premises; and

(ii) an instrument executed by both the landowner and the franchisee that ensures the franchisor and the contractors of the franchisor reasonable access to the marketing premises for the purpose of testing for and remediating any environmental contamination that may be present at the premises; and

(C) in a situation in which the franchisee acquires possession of the leased marketing premises effective immediately after the loss of the right of the franchisor to grant possession (through an assignment pursuant to subparagraph (B) or by obtaining a new lease or purchasing the marketing premises from the landowner), the franchisor (if requested in writing by the franchisee not later than 30 days after notification was given pursuant to section 2804 of this title), during the 90-day period after notification was given pursuant to section 2804 of this title—

(i) made a bona fide offer to sell, transfer, or assign to the franchisee the interest of the franchisor in any improvements or equipment located on the premises; or

(ii) if applicable, offered the franchisee a right of first refusal (for at least 45 days) of an offer, made by another person, to purchase the interest of the franchisor in the improvements and equipment.

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for—

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

(d) Compensation, etc., for franchisee upon condemnation or destruction of marketing premises

In the case of any termination of a franchise (entered into or renewed on or after June 19, 1978), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed)—

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) of this section and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

§ 2803. Trial and interim franchises

(a) Nonapplicability of statutory nonrenewal provisions

The provisions of section 2802 of this title shall not apply to the nonrenewal of any franchise relationship—

(1) under a trial franchise; or

(2) under an interim franchise.

(b) Definitions

For purposes of this section—

(1) The term "trial franchise" means any franchise—

(A) which is entered into on or after June 19, 1978;

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 2804 of this title, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 2802 of this title, limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise—

(A) which is entered into on or after June 19, 1978;

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal—

(i) was based upon a determination described in section 2802(b)(2)(E) of this title, and

(ii) the requirements of section 2802(b)(2)(E) of this title were satisfied; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

(c) Nonrenewal upon meeting statutory notification requirements

If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship—

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if—

(A) such nonrenewal is based upon a determination described in section 2802(b)(2)(E) of this title; and

(B) the requirements of section 2802(b)(2)(E) (ii) and (iii) of this title are satisfied.

§ 2804. Notification of termination or nonrenewal of franchise relationship

(a) General requirements applicable to franchisor

Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship—

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

(b) Additional requirements applicable to franchisor

(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section—

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor—

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins—

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall—

(A) furnish notification to the franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) Manner and form of notification

Notification under this section—

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain—

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

(d) Preparation, publication, etc., of statutory summaries

(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(2) In the case of summaries required to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

§ 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of—

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if—

(A) the franchisee shows—

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel

continuation or renewal of the franchise relationship if such action was commenced—

(A) more than 90 days after the date on which notification pursuant to section 2804(a) of this title was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 2804(b)(2) of this title was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 2804(b)(1) of this title.

(c) Burden of proof; burden of going forward with evidence

In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled—

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e) Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that—

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business—

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

(f) Release or waiver of rights

(1) No franchisor shall require, as a condition of entering into or renewing the franchise relationship, a franchisee to release or waive—

(A) any right that the franchisee has under this subchapter or other Federal law; or

(B) any right that the franchisee may have under any valid and applicable State law.

(2) No provision of any franchise shall be valid or enforceable if the provision specifies that the interpretation or enforcement of the franchise shall be governed by the law of any State other than the State in which the fran-

chisee has the principal place of business of the franchisee.

§ 2806. Relationship of statutory provisions to State and local laws

(a) Termination or nonrenewal of franchise

(1) To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(2) No State or political subdivision of a State may adopt, enforce, or continue in effect any provision of law (including a regulation) that requires a payment for the goodwill of a franchisee on the termination of a franchise or nonrenewal of a franchise relationship authorized by this subchapter.

(b) Transfer or assignment of franchise

(1) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise 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.

(2) Nothing in this subchapter shall prohibit any State from specifying the terms and conditions under

which any franchise or franchise relationship may be transferred to the designated successor of a franchisee upon the death of the franchisee.