No. 13-15439

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRANSBAY AUTO SERVICE, INC.,
Plaintiff—Appellee,

v.

CHEVRON U.S.A. INC.,
Defendant—Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
SUSAN Y. ILLSTON, DISTRICT JUDGE • CASE NO. 3:09-CV-04932-SI

APPELLANT'S OPENING BRIEF

HORVITZ & LEVY LLP
MITCHELL C. TILNER
DAVID S. ETTINGER
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800

GLYNN & FINLEY, LLP
ROBERT C. PHELPS
ONE WALNUT CREEK CENTER
100 PRINGLE AVENUE, SUITE 500
WALNUT CREEK, CALIFORNIA 94596-7328
(925) 210-2800

ATTORNEYS FOR APPELLANT
CHEVRON U.S.A. INC.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of appellant Chevron U.S.A. Inc. is Chevron U.S.A. Holdings Inc.

The parent corporation of Chevron U.S.A. Holdings Inc. is Texaco Inc.

The parent corporation of Texaco Inc. is Chevron Investments Inc.

The parent corporation of Chevron Investments Inc. is Chevron Corporation, a publicly traded corporation.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under the Petroleum Marketing Practices Act, 15 U.S.C. § 2805(a) (2012).

The district court entered a document entitled "Judgment" on November 14, 2012. (1 ER 5.) On February 7, 2013, the court entered an order denying defendant Chevron U.S.A. Inc.'s motions for new trial and for judgment as a matter of law. (1 ER 6.) On March 6, 2013, the court entered an order awarding attorney fees and prejudgment interest to

plaintiff Transbay Auto Service, Inc. (1 ER 17.) Chevron appealed from the judgment and both orders on March 8, 2013. (2 ER 61-62.)

The "Judgment" recites that "[t]he issues [were] tried before the Court and [a] special verdict [was] rendered on September 11, 2012," and then states, "IT IS ORDERED AND ADJUDGED that pursuant to the findings, judgment shall be entered in favor of plaintiff and against defendant. [¶] IT IS SO ORDERED." (1 ER 5.)

The "Judgment" does not state the amount owed to plaintiff, which might mean that it is not a final and appealable judgment. *See United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 233 (1958) ("it is obvious that a final judgment for money must, at least, determine, or specify the means for determining, the amount"), *citing United States v. Cooke*, 215 F.2d 528, 530 (9th Cir. 1954) ("the bare statements of the names of the successful litigants without stating the amounts of their respective recoveries do not constitute a showing of the 'substance' of the judgments."); *see also Rush Univ. Med. Ctr. v. Leavitt*, 535 F.3d 735, 737 (7th Cir. 2008) ("Unless the plaintiff loses outright, a judgment must provide the relief to which the winner is entitled."); *Mullane v. Chambers*, 333 F.3d 322, 336 (1st Cir. 2003) ("In general, the judgment should be

self-sufficient, complete, and describe the parties and the relief to which the party is entitled."); *United States v. Menendez*, 48 F.3d 1401, 1408-09 (5th Cir. 1995) ("a final judgment for money must at least specify the amount awarded so that it may be properly enforced"; judgment that "did not specify the amount of the damages" did "not constitute a final judgment.").

On the other hand, the "Judgment" could be considered final because its reference to the jury's verdict could be sufficient to "specify the means for determining" the judgment amount. *F. & M. Schaefer Brewing Co.*, 356 U.S. at 233; *see Rush,* 535 F.3d at 737 ("Sometimes it is easy to infer the disposition, and then the appeal may proceed despite technical shortcomings."); *Matter of W. Tex. Mktg. Corp.*, 12 F.3d 497, 501 (5th Cir. 1994); Fed. R. App. P. 4(a)(7)(B) ("A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order."). Thus, a remand to the district court and then a second appeal are unnecessary. "[S]uch paper shuffling serves 'no practical purpose,'" and this Court can "take[ ] jurisdiction directly and dispense[ ] with the detour

to the district court." *Outlaw v. Airtech Air Conditioning and Heating, Inc.*, 412 F.3d 156, 163 (D.C. Cir. 2005).

If the judgment is final and appealable, then this Court has jurisdiction under 28 U.S.C. § 1291 (2006), and the appeal is timely because it was filed within 30 days from entry of the order denying Chevron's motions for judgment and for a new trial. Fed. R. App. P. 4(a)(4)(A); *see* 28 U.S.C. § 2107 (2006).

STATEMENT OF ISSUES PRESENTED

1. Whether plaintiff Transbay Auto Service, Inc., failed to prove its case for damages under the Petroleum Marketing Practices Act because it decided not to produce evidence of the fair market value of the service station it purchased from defendant Chevron U.S.A. Inc.

2. Whether a new trial is required because the district court refused to admit into evidence — as an adoptive statement — a property appraisal that Transbay itself had used to obtain a loan to finance the purchase of the property.

ADDENDUM TO BRIEF

At the end of this brief is an addendum containing verbatim copies of (1) the relevant sections of the Petroleum Marketing Practices Act and (2) Rule 801 of the Federal Rules of Evidence.

STATEMENT OF THE CASE

Chevron and Transbay had a service station franchise relationship, under which Transbay leased property from Chevron for the purpose of conducting a service station business. Chevron opted not to renew the relationship and offered to sell the property to Transbay. Transbay accepted Chevron's offer. Transbay later sued Chevron for damages under the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. §§ 2801-2841 (2012). (1 ER 33.) Transbay claimed that the sales price was too high and that Chevron had thus not made a "bona fide offer," as required under the PMPA, 15 U.S.C. § 2802(b)(3)(D)(iii)(I) (2012).

A jury returned a verdict awarding Transbay $495,000. (2 ER 59-60, 293-94.) The court filed a document entitled "Judgment" stating that "judgment shall be entered in favor of plaintiff and against defendant." (1 ER 5.) The court denied Chevron's motion for judgment as a matter of law, its renewed motion for judgment, and its motion for a new trial.

(1 ER 6; 2 ER 277-85.) Later, the court entered an order awarding Transbay $243,206.75 in attorney fees, expert fees, and costs. (1 ER 29.)

Chevron appealed. (2 ER 61-62.)

STATEMENT OF FACTS

A. In 2001, Transbay leases a service station from Chevron with notice that Chevron planned to sell the station in the near future.

Beginning in the late 1930s, Chevron owned a parcel of property in San Francisco's West Portal neighborhood, which it leased to a series of independent dealers for purposes of operating a service station business. (2 ER 64-65.)

In 2001, Transbay, which is solely owned by Mike Tsachres (2 ER 65, 222), became a Chevron dealer and leased the West Portal property. (2 ER 65, 223-24; 3 ER 330.) At the outset of their relationship, and thereafter, Chevron told Mr. Tsachres the service station was one of several Bay Area locations that Chevron planned to sell in the near future. (2 ER 65-66, 80-85, 269-71; 3 ER 309, 331.)

B. In 2008, after deciding not to renew the franchise relationship with Transbay, Chevron offers to sell the property to Transbay for $2,375,700, an amount slightly below the value placed on the property by an appraisal requested by Chevron.

In May 2008, Chevron notified Transbay that it would not renew Transbay's dealership agreement when the agreement expired in three months (the agreement was later extended by two months (2 ER 67; 3 ER 313, 329)) because Chevron had decided to sell the service station property. (2 ER 66, 85-87, 227; 3 ER 311.) Under these circumstances, the PMPA required Chevron to give Transbay a right of first refusal or to make a "bona fide offer" to sell the property to Transbay. 15 U.S.C. § 2802(b)(3)(D)(iii). Accordingly, Chevron's notification letter informed Transbay that Chevron would either give Transbay a right of first refusal on a third-party offer to buy the property or make a sales offer directly to Transbay. (3 ER 311.)

A few months earlier, Chevron had solicited bids for the property, making known to potential bidders that Transbay would have a right of first refusal. (2 ER 109-11; 3 ER 302.) Despite the right of first refusal, Transbay submitted a bid, for $1,450,000. (2 ER 112, 225-26; 3 ER 304.)

Transbay's owner Mr. Tsachres intended — and still intends — to use the property only to operate his service station. (2 ER 113, 278-79.)

Chevron received two other bids, one for less than Transbay's bid and one for considerably more — $2,500,000 — from Highland Development Company, which planned to develop the property into a mixed retail-residential site. (2 ER 112-13; 3 ER 304.)

A letter of intent outlining the potential sale of the property to Highland stated that Chevron would be responsible for obtaining from the City of San Francisco a permit, required by a City ordinance, to close the gas station. (2 ER 115-16; 3 ER 308; *see* 3 ER 348.) The sale to Highland ultimately was not completed. (2 ER 66-67.)

After the unsuccessful sale to Highland, Chevron asked Deloitte Financial Advisory Services to appraise the property. (2 ER 122, 126-27; *see* 2 ER 106-07, 123-24, 128-29 [Chevron regularly used Deloitte for appraisals].) In July 2008, Deloitte appraised the property at $2,386,000. (2 ER 137-38; 3 ER 345.)

The $2,386,000 Deloitte valuation was based on putting the property to its highest and best use, i.e., the use that would produce the highest value for the property (2 ER 201, 214), which the appraisal considered to

be commercial/retail use. (2 ER 130-32, 201; 3 ER 345.) The appraisal also reported that, if the property instead continued to be used just as a service station, the value would be $1,500,000. (2 ER 130; 3 ER 345.)[1]

Chevron typically uses the fair market value stated in an appraisal to set a property's sales price (2 ER 107), and it followed that practice in setting the price it offered to Transbay. In September 2008, Chevron offered to sell the service station property to Transbay for $2,375,700, about $10,000 less than the appraised value. (2 ER 67, 229; 3 ER 317.) Chevron also extended an alternative offer — at exactly the appraised value — that included Transbay continuing to be a Chevron retailer, which would have required Transbay to expand the service station's convenience store and, in so doing, remove one or two of its three service bays. (2 ER 89-96, 100-02, 107-08, 3 ER 313-14, 316.)

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[1] Another Deloitte appraisal, completed four months earlier to help Chevron determine a fair rent for the property, considered the property's value to be $3,240,000 at its highest and best use and $1,600,000 as a service station. (2 ER 118-21, 124-25, 138, 141-42; 3 ER 299.) The later appraisal was lower because, among other things, it took into account a 26-foot development height limit that the City reportedly imposed at the behest of a neighborhood group, rather than the 45-foot height limit provided by the area's zoning designation. (2 ER 138-40, 164-66; 3 ER 346.)

C. Claiming the sales price is too high, Transbay accepts Chevron's offer under protest. Yet to obtain financing for the purchase, Transbay submits to its lender an appraisal — excluded from evidence at trial — that values the property at almost $150,000 *more* than the sales price.

Mr. Tsachres told Chevron he thought the offer price was too high. (2 ER 98-99, 102, 231.) He nonetheless accepted Chevron's offer to sell the property for $2,375,700, albeit under protest. (2 ER 67, 97-98, 232-33; 3 ER 318.) Mr. Tsachres had already retained counsel with whom he consulted before accepting the offer. (2 ER 272-73.) In fact, he said that everything was handled by his lawyers. (2 ER 273.)

To obtain financing for the purchase, Mr. Tsachres applied unsuccessfully to numerous lenders before getting an initial positive response from American California Bank. (2 ER 234-35, 237-38.) Ultimately, American California declined to make the loan. (2 ER 238-39.) However, after it declined Mr. Tsachres's application, American California gave him a packet of materials, including an appraisal. (2 ER 239, 257-58.) The appraisal, which had been prepared for American California by The Property Sciences Group Inc. (PSG), valued the property at $2,520,000. (3 ER 325.)

Mr. Tsachres later applied to California Pacific Bank. As part of the loan application, he gave that bank the packet he had received from American California, including the PSG appraisal. (2 ER 240-42, 258.) California Pacific agreed to give Mr. Tsachres a loan. (2 ER 236-37; 3 ER 352.)

Mr. Tsachres knew American California had the property appraised, because the appraiser visited the property, interviewed him, and got financial information from him. (2 ER 256-57.) Also, he knew that the packet of materials he received from American California contained paperwork related to his loan application, and he testified that he wanted California Pacific to use the paperwork to approve his loan. (2 ER 258, 260.) Nonetheless, Mr. Tsachres testified he never opened the packet before giving it to California Pacific and he denied having looked at the PSG appraisal. (2 ER 239, 259, 264-65.) At deposition, however, Mr. Tsachres testified he saw the appraisal before he "'closed on the deal.'" (2 ER 260; cf. 2 ER 261-62 [during voir dire at trial, Mr. Tsachres denies having seen the appraisal valuation number before closing the deal].)

D. At trial, Transbay criticizes Chevron's appraisal, but the only appraisal Transbay offers expressly "ignor[es]" and "disregards" the property's highest and best use.

At trial, Transbay contended that the value in the appraisal conducted for Chevron by Deloitte was too high and that Chevron's sales offer based on that appraisal was thus not "bona fide," as required by the PMPA. According to Transbay, the Deloitte appraisal was inaccurate because, among other things (*see* 2 ER 143-63), it did not take into account the time and expense of converting the property from a service station to a retail development. Specifically, Transbay pointed to the San Francisco ordinance requiring City permission to close and convert gas stations. (2 ER 169-71; 3 ER 348.)

A land use attorney testifying for Transbay stated that obtaining permission for a conversion can take from two to three years and cost $500,000. (2 ER 171-82.) The attorney also made clear, however, that the specific gas-station-conversion ordinance was not itself an obstacle. He explained that the City is not so much concerned with keeping a service station in business, but with evaluating the project that will replace the service station, a process applicable generally to new developments on all types of properties. (2 ER 170-71, 190-91; 3 ER 335; *see* 2 ER 181, 192

[attorney does not believe the City has ever denied a gas station conversion request].) The attorney said it was his "belief" and "understanding" that a buyer would reduce the amount it was willing to pay because of the time and expense of converting the property, but — apparently because he is not an appraiser and does not read many appraisals — he made no attempt to quantify the effect of the conversion process on the fair market value of the property that Transbay bought. (2 ER 183-84, 186-90, 194-96.)

The Deloitte appraiser used a comparable-sales approach in valuing the property, looking at the sales of other San Francisco properties (2 ER 133-36, 200), which were all subject to the same City development constraints. Accordingly, he testified that the City ordinance's effect on the property's value was inherent in the appraisal process. (2 ER 148.) He also agreed, however, that his valuation could be impacted if converting the service station to retail use would take two to three years and cost $500,000. (2 ER 150-51.)

Although critical of Chevron's appraisal, Transbay did not provide the jury with any other appraisal that valued the property at its highest and best use. On the contrary, Transbay blocked the introduction into

evidence of the PSG appraisal it had submitted to its lender to finance its purchase of the property, the appraisal which valued the property *higher* than Chevron's appraisal and offer. (2 ER 267-68.)

Additionally, the appraisal that Transbay did present to the jury — by its appraisal expert, Andrew Plaine — specifically disavowed a highest-and-best-use evaluation. Plaine stated at the outset of his report that the appraisal — finding a value of $1,800,000 — was "based upon the ***hypothetical condition that the subject property is valued as a service station and not according to its highest and best use potential.***" (3 ER 337, original emphasis; *see also* 3 ER 342 [appraisal "is predicated on the hypothetical condition and extraordinary assumption that the subject is valued as a service station ignoring its highest and best use"].) This "extraordinary" limitation was imposed on Plaine by Transbay's counsel, a limitation Plaine found to be highly significant. (3 ER 342-43.) As he also wrote to counsel:

> ***As per your instructions, this appraisal is based upon the hypothetical condition that the highest and best use of the subject property is disregarded and the subject property is valued as a service station facility.*** The appraisal disregards any alternate use potential and disregards the highest and best use potential. In effect, this condition of appraisal is equivalent to assuming that the subject property is deed restricted to service station use only

> for the foreseeable future, and that no other use would be permitted. ***This is a major hypothetical condition that is value-influencing; this appraisal does not reflect the "as-is" value of the subject property based upon its highest and best use.***
>
> (3 ER 337, original emphases; *see* also 3 ER 341-43.)

The Plaine appraisal not only "ignor[ed]" and "disregarded" the property's highest and best use, it also reported that the "highest and best use potential . . . is quite probably something other than a service station." (3 ER 343.) Plaine's testimony was consistent with his report. (2 ER 204, 207-17.) Moreover, he stated it was "[n]ot at all" inconceivable that a San Francisco service station property would sell for more than $2,000,000. (2 ER 218-19.)

E. After the district court excludes from evidence the appraisal Transbay submitted to its lender, the jury renders a verdict for Transbay.

By stipulation, the parties authenticated the $2,520,000 PSG appraisal that Transbay had submitted to its lender, but Transbay argued it should be excluded from evidence as hearsay. (2 ER 69-71, 262-63.) Chevron contended that, under Fed. R. Evid. 801(d)(2)(B), the appraisal was not hearsay, but an adopted statement. (2 ER 71-72, 260, 267.)

Before trial, when it was considering Chevron's summary judgment motion, the district court ruled the PSG appraisal was admissible. The court found sufficient evidence, "albeit disputed," "for a jury reasonably to conclude that the plaintiff adopted the statement." (2 ER 52.) Similarly, the court later overruled Transbay's objection and allowed Chevron's counsel to discuss the PSG appraisal in his opening statements. (2 ER 72.)

However, during trial, the court reversed course and excluded the appraisal from evidence. (2 ER 263, 267-68.) The court issued its ruling after hearing Mr. Tsachres's voir dire testimony out of the jury's presence, discussed above, about his use and knowledge of the appraisal, testimony which was essentially the same as a declaration he submitted in objecting to the appraisal during the summary judgment proceeding (2 ER 47).

Transbay claimed damages — including increased loan interest costs — based on the difference between the $2,375,700 it paid Chevron for the property and either the $1,450,000 bid it had made to buy the property or the $1,800,000 Plaine appraisal it presented at trial. (2 ER 244-52, 291-92.) The jury awarded $495,000. (2 ER 60, 296-97.)

SUMMARY OF THE ARGUMENT

Transbay failed to prove its case for damages under the PMPA because it decided not to produce evidence of the fair market value of the service station it purchased from Chevron. The only evidence of the property's fair market value was the Deloitte appraisal, which exceeded Chevron's asking price. This Court should reverse the judgment and the order awarding attorney fees and expert witness costs, and order entry of a judgment for zero or nominal damages.

Alternatively, this Court should reverse the judgment and order a new trial because the district court prejudicially erred in refusing to admit into evidence — as an adoptive statement — a property appraisal that Transbay itself had used to obtain a loan to finance the purchase of the property.

ARGUMENT

I. TRANSBAY FAILED TO PROVE ANY DAMAGES UNDER THE PMPA.

A. Summary of the PMPA.

The PMPA "limits the circumstances in which petroleum franchisors may 'terminate' a franchise or 'fail to renew' a franchise relationship." *Mac's Shell Serv., Inc. v. Shell Oil Prods. Co. LLC*, 559 U.S. 175, 177 (2010); *see BP W. Coast Prods. LLC v. May*, 447 F.3d 658, 662 (9th Cir. 2006) ("the PMPA 'establish[es] "minimum Federal standards governing the termination and non-renewal of franchise relationships for the sale of motor fuel by the franchisor or supplier."'").

The PMPA "was a response to widespread concern over increasing numbers of allegedly unfair franchise terminations and nonrenewals in the petroleum industry." *Mac's Shell*, 559 U.S. at 178. "But," as this Court has recognized, "that was not the only concern." *Unocal Corp. v. Kaabipour*, 177 F.3d 755, 762 (9th Cir. 1999). The legislation also "'recognize[s] 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.*; *see Keener v. Exxon Co., USA*, 32 F.3d 127, 130 (4th Cir. 1994) ("The PMPA

preserves the flexibility of petroleum delivery markets by ensuring that sound business judgment does not become a casualty of constant judicial oversight."). Indeed, Congress "affirmatively declined to give franchisees more elaborate protections because of concern that this might unduly interfere with the franchisors' property rights, possibly amounting to an unconstitutional taking." *Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1391 (9th Cir. 1986); *accord Keener*, 32 F.3d at 130; *see Beachler v. Amoco Oil Co.*, 112 F.3d 902, 904 (7th Cir. 1997) ("[B]ecause the PMPA also serves to diminish the property rights of franchisors, it 'should not be interpreted to reach beyond its original language and purpose.'").

In the PMPA, "Congress was seeking to strike a balance," *Beachler*, 112 F.3d at 904, between "competing interests," *Kaabipour*, 177 F.3d at 762; *see Hilo v. Exxon Corp.*, 997 F.2d 641, 645 (9th Cir. 1993) (there is "no doubt . . . that the statute was a 'product of compromise.'"). Thus, although the "'overriding purpose of Title I of the PMPA is to protect the franchisee's reasonable expectation of continuing the franchise relationship,'" *Ellis v. Mobil Oil*, 969 F.2d 784, 788 (9th Cir. 1992), and the law generally "'"must be given a liberal construction consistent with its goal of protecting franchisees,"'" *Mustang Mktg., Inc. v. Chevron Prods.*

Co., 406 F.3d 600, 606-07 (9th Cir. 2005), "arguments which depend on the notion that the PMPA is a one-way statute, which should single-mindedly be construed to favor franchisee positions, are rooted in sterile ground," *Kaabipour*, 177 F.3d at 762-63.

As relevant here, the PMPA "regulates and limits those circumstances under which a franchisor may . . . fail to renew a franchise." *Pro Sales, Inc. v. Texaco, U.S.A., Div. of Texaco, Inc.*, 792 F.2d 1394, 1399 (9th Cir. 1986). It is simply regulation, however, not prohibition; "[u]nder the statutory scheme, nonrenewal is neither prohibited nor punished." *Sandlin v. Texaco Ref. and Mktg. Inc.*, 900 F.2d 1479, 1480 (10th Cir. 1990).

A franchisor may lawfully decline to renew a franchise relationship for certain specified reasons, 15 U.S.C. § 2802(a)(2) (2012), including "a determination made by the franchisor in good faith and in the normal course of business . . . to sell [the leased] premises," 15 U.S.C. § 2802(b)(3)(D)(i)(III), provided the franchisor "made *a bona fide offer* to sell, transfer, or assign to the franchisee such franchisor's interests in such premises," 15 U.S.C. § 2802(b)(3)(D)(iii)(I) (emphasis added).

Most courts, including this circuit, use an objective test to determine whether an offer is bona fide. "It is settled law that a bona fide offer under the PMPA is measured by an objective market standard. To be objectively reasonable, an offer must 'approach[ ] fair market value.'" *Ellis*, 969 F.2d at 787; *see Forty-Niner Truck Plaza, Inc. v. Union Oil Co.*, 68 Cal. Rptr. 2d 532, 543 (Cal. Ct. App. 1997) (identifying "[t]he prevalent federal view").[2] The fair market value that must be approached is "by definition, . . . the highest price a willing buyer would pay." *Slatky*, 830 F.2d at 484; *accord LCA Corp. v. Shell Oil Co.*, 916 F.2d 434, 438 (8th Cir.1990); *Sandlin*, 900 F.2d at 1483.

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[2] It is logical that a bona fide offer need only "*approach*" the fair market value and not be *at* fair market value. "Congress's decision not actually to use the term 'fair market value' but instead the term bona fide, . . . suggests some degree of deference. That choice indicates, we believe, a recognition that 'the word "value" almost always involves a conjecture, a guess, a prediction, a prophecy.' [Citation.] '[T]here is no universally infallible index of fair market value.' [Citation.] There may be a range of prices with reasonable claims to being fair market value. Were we to mandate that courts determine whether the distributor's offer actually was at fair market value, distributors could rarely rest comfortably that their offer would eventually be determined by the court to be fair market value." *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 485 (3d Cir. 1987); *accord Rhodes v. Amoco Oil Co.*, 143 F.3d 1369, 1372 (10th Cir. 1998).

For violations of the PMPA, a prevailing franchisee can recover actual damages, reasonable attorney and expert witness fees, and, if appropriate, punitive damages. 15 U.S.C. § 2805(d)(1) (2012).

B. Under the PMPA, Transbay had the burden of proving damages from Chevron's alleged failure to make a "bona fide offer."

"It is a basic concept of damages that they must be proved by the party seeking them." *Servicios-Expoarma, C.A. v. Indus. Mar. Carriers, Inc.*, 135 F.3d 984, 995 (5th Cir. 1998). Therefore, it is "the plaintiff's burden to put on proof from which the jury [can] ascertain damages with reasonable certainty." *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.*, 153 F.3d 938, 947 (9th Cir. 1998).

Nothing in the PMPA relieves the plaintiff of the burden of proving damages. On the contrary, the PMPA provides that "actual damages" must be determined "consistent with the Federal Rules of Civil Procedure," 15 U.S.C. § 2805(d)(1)(A) (2012), which means the burden of proof that generally applies to claims for damages in civil cases also applies in PMPA cases. *See Taliferro v. Augle*, 757 F.2d 157, 161-62 (7th Cir. 1985) ("federal tort statutes such as 42 U.S.C. § 1983 . . . are enacted against a background of common law tort principles governing causation and

damages"). And, as the jury was instructed, that general rule placed the burden of proof squarely on Transbay (2 ER 289 ("The plaintiff has the burden of proving damages by a preponderance of the evidence.")).

C. Transbay presented no evidence of the property's fair market value and thus did not satisfy its burden of proving damages.

At trial, Transbay never questioned that Chevron's decision to sell the service station property was lawful under the PMPA because Chevron made its decision "in good faith and in the normal course of business," 15 U.S.C. § 2802(b)(3)(D). Transbay's only contention was that Chevron's sales offer to Transbay was not a "bona fide offer."

But, as we explain, Transbay presented no evidence from which the jurors could calculate its damages. The jurors could only speculate because Transbay made a tactical decision not to present evidence of the property's fair market value. Without such evidence, the jury had no baseline against which to measure Transbay's claimed damages. Transbay did not "put on proof from which the jury could ascertain damages with reasonable certainty." *Portland 76 Auto*, 153 F.3d at 947.

This fundamental and fatal failure of proof is reviewed for substantial evidence. *See United States v. CB & I Constructors, Inc.*, 685 F.3d 827, 833 (9th Cir. 2012).

In this case, if Chevron's offer was not bona fide — i.e., if it did not approach fair market value — Transbay's claimed damages were the amount Transbay allegedly overpaid Chevron for the property, and costs related to that overpayment, such as additional loan interest costs. (2 ER 244-52, 291-92.) To determine damages, therefore, the jury needed to calculate how much Transbay overpaid. But the jury couldn't make that calculation without evidence of the property's fair market value, the benchmark for determining what Transbay *should* have paid.

Transbay presented no such evidence — and its omission was part of its litigation strategy. The Deloitte appraisal on which Chevron's offer was based evaluated the highest price a willing buyer would pay for the service station property. Transbay criticized that valuation, but opted to not provide the jury with any alternate opinion of the property's fair market value. At the express direction of Transbay's lawyer, Transbay's appraiser, Plaine, "ignor[ed]" and "disregarded" what the property could sell for at its highest and best use. (2 ER 204, 207-17; 3 ER 337, 342-43.)

Transbay also introduced evidence of — and sought damages based on — what it had bid for the property several months before Chevron's offer, but there was no evidence that the bid — which was *lower* than Transbay's own appraiser's valuation — represented the highest price that a willing buyer would pay. (2 ER 112, 225-26.)

Transbay's failure of proof is similar to a failure of proof the Supreme Court discussed in a patent case many years ago. The plaintiffs there were entitled to "actual damages" for having their patent infringed, but their damages evidence was insufficient. The Court's holding is relevant here:

> Where a plaintiff is allowed to recover only "actual damages," he is bound to furnish evidence by which the jury may assess them. If he rest his case, after merely proving an infringement of his patent, he may be entitled to nominal damages, but no more. He cannot call on a jury to guess out his case without evidence. Actual damages must be calculated, not imagined, and an arithmetical calculation cannot be made without *certain* data on which to make it.
>
> *New York v. Ransom*, 64 U.S. 487, 488 (1859).

Here, too, if Chevron's offer was not bona fide, Transbay was entitled to seek "actual damages." 15 U.S.C. § 2805(d)(1)(A). But it had to prove them. Proof that Chevron's offer was not bona fide, without more, afforded the jury no basis for awarding more than nominal damages. As the

Ransom Court said, "'actual damages should be actually proved, and cannot be assumed as a legal inference from facts' which afford no data by which they can be calculated." *Ransom*, 64 U.S. at 490; *see id.* at 491 ("if [the plaintiff] fails to furnish any evidence of the proper data for a calculation of his damage, he should not expect that a jury should work out a result for him"); *Taliferro*, 757 F.2d at 162 ("A plaintiff is not permitted to throw himself on the generosity of the jury. If he wants damages, he must prove them.").

In the *Ransom* case, the Supreme Court remanded for a new trial. However, given Transbay's tactical decision not to provide the jury with evidence of the property's fair market value, this Court should simply direct that judgment be entered for zero or nominal damages.

The Court confronted a similar issue in *Slottow v. Am. Cas. Co.*, 10 F.3d 1355 (9th Cir. 1993), an insurance bad faith case. There, the plaintiff sought attorney fees as tort damages, but the Court rejected the claim because only some of the fees incurred were recoverable yet the plaintiff had failed to segregate its recoverable from nonrecoverable fees. Significantly, the Court also refused the plaintiff's request to remand the matter "so it may prove up its damages" and perform the necessary

segregation of fees. *Id.* at 1362. Because the segregation rule was "not new," the Court concluded that the plaintiff had "no excuse for failing to comply with it the first time around." *Id.*

Likewise here, the rule that Transbay bore the burden of proving its actual damages, i.e., the amount it overpaid for the property, was "not new." Given that Transbay made a tactical decision not to provide the jury with the evidence it needed to determine that amount, Transbay should not be heard to argue that it is entitled to a second chance to prove its case for damages.

II. TO OBTAIN A LOAN TO BUY THE PROPERTY, PLAINTIFF USED AN APPRAISAL SHOWING A *HIGHER* MARKET VALUE THAN CHEVRON'S SALES OFFER, BUT THE DISTRICT COURT ERRONEOUSLY EXCLUDED THE APPRAISAL FROM EVIDENCE.

If this Court disagrees that Transbay failed to prove actual damages (*see* Part I, *supra*), the Court should still reverse the judgment because of an evidentiary error that tainted the jury's liability finding. The jury was prevented from seeing important evidence that would have shown that Chevron's offer was indeed "bona fide."

Transbay claimed Chevron's $2,375,700 sales price was too high. But when it sought and obtained a loan to buy the property, Transbay

itself submitted to its lender the PSG appraisal that valued the property at $2,520,000, almost $150,000 *above* Chevron's supposedly inflated offer. (3 ER 325.) Nonetheless, the jury did not know this because the district court excluded the PSG appraisal from evidence as hearsay. (2 ER 263, 267-68.) That critical ruling left the jury with a seriously incomplete view of the story, to Chevron's prejudice.

"'Whether the district court correctly construed the hearsay rule is a question of law reviewed de novo.'" *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 776 (9th Cir. 2010). A decision to admit or exclude evidence as hearsay is reviewed for abuse of discretion. *Calmat Co. v. U.S. Dep't of Labor*, 364 F.3d 1117, 1122 (9th Cir. 2004).

Significantly, the district court initially decided the PSG appraisal was admissible. Chevron relied on that appraisal when it moved for summary judgment. At that time, the district court overruled Transbay's objection to the appraisal's admissibility as an adoptive statement. The court concluded that it "need only decide whether there is enough evidence for a jury reasonably to conclude that the plaintiff adopted the statement. On this record, there is enough such evidence, albeit disputed." (2 ER 52.)

The court was correct then and was thus wrong to exclude the appraisal at trial.

Rule 801(d)(2)(B) of the Federal Rules of Evidence provides that a statement is not hearsay if it "is offered against an opposing party and . . . is one the party manifested that it adopted or believed to be true." The Advisory Committee Notes on the rule counsel in favor of the "generous treatment of this avenue to admissibility." Fed. R. Evid. 801(d)(2) advisory committee's note. The Advisory Committee Notes also state that adoption of a statement "may be manifested in any appropriate manner." Fed. R. Evid. 801(d)(2)(B) advisory committee's note.

Regarding documents, this circuit applies a "possession plus" standard to determine whether a party has manifested adoption of a statement. *United States v. Pulido-Jacobo*, 377 F.3d 1124, 1132 (10th Cir. 2004) ("although possession alone cannot satisfy Rule 801(d)(2)(B) [citation], we do adopt the 'possession plus' standard articulated by the First and Ninth Circuits"); *see United States v. Paulino*, 13 F.3d 20, 24 (1st Cir. 1994). Under this standard, evidence is admitted "where 'the surrounding circumstances tie the possessor and the document together in some meaningful way.'" *Pulido-Jacobo*, 377 F.3d at 1132; *see United*

States v. Carrillo, 16 F.3d 1046, 1049 (9th Cir. 1994) (piece of paper properly admitted because "there was evidence of adoption that went beyond mere possession"; "There is a sufficient link between the writing and [the party's] actions to permit the district court to find an adoption"); *United States v. Ospina*, 739 F.2d 448, 451 (9th Cir. 1984).

Moreover, the district court does not decide whether the party actually adopted the statement, only whether there is sufficient evidence for a *jury* to conclude there was an adoption. As noted, when the district court in this case initially overruled Transbay's objection to the court's consideration of the PSG appraisal, it based its decision on there being "enough evidence for a jury reasonably to conclude that the plaintiff adopted the statement," though the court acknowledged the evidence was disputed. (2 ER 52.) That was the correct standard to apply. *See United States v. Gil*, 58 F.3d 1414, 1420 (9th Cir. 1995) (approvingly quoting a district court's comments that "'it's not a question of the court weighing the evidence . . . and deciding whether the showing is strong or weak. . . . The court merely needs to decide that there is a substantial enough showing to present the issue to the jury for them to perform that weighing function.'") (citing *United States v. Monks*, 774 F.2d 945, 950 (9th Cir.

1985)); *see also United States v. Sears*, 663 F.2d 896, 904 (9th Cir. 1981) ("The court's judgment . . . is only a preliminary or threshold determination").

"'A party may adopt a written statement if the party uses the statement or takes action in compliance [with] the statement.'" *Sea-Land Serv., Inc. v. Lozen Intern., LLC*, 285 F.3d 808, 821 (9th Cir. 2002), quoting treatise; *see also Lear Auto. Dearborn, Inc. v. Johnson Controls, Inc.*, 789 F. Supp. 2d 777, 781 (E.D. Mich. 2011) (adoption can occur "where a party incorporates the third party's statement into its own affirmative effort to achieve a desired result or support its position"); *White Indus., Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1062-63 (W.D. Mo. 1985) ("There is no doubt that where a party's use of a document supplied by another in fact represents the party's intended assertion of the truth of the information therein, an adoptive admission can be found. [Citations.] Situations of this sort are most commonly encountered where the party forwards the document to another in response to some request (or perceived need) for information of the sort contained in the document."); *Courtney v. Courtney*, 542 P.2d 164, 166 (Alaska 1975) (Boochever, J.)

(financial statement prepared by another and used by the party to obtain a loan admissible as an adopted statement).

A good example of adoption-by-use appears in *Grundberg v. Upjohn Co.*, 137 F.R.D. 365, 366 (D. Utah 1991). There, the defendant pharmaceutical company seeking government approval for a drug submitted reports prepared by others about a clinical study of the drug. The court ruled that the reports were admissible as adoptive admissions, concluding "[i]t would be illogical to allow [defendant] to benefit by the submission of the protocol reports for drug approval and then deny the same declarations as [defendant's] if they are against [defendant's] current position." *Id.* at 370; *see id.* ("[Defendant] cannot use the reports to support a new drug application and then deny it accepts the research.").

Grundberg's can't-have-it-both-ways rule is directly applicable here. To obtain a bank loan enabling it to purchase the property, Transbay provided the bank with the PSG appraisal, which showed that the property's fair market value was *higher* than the purchase price. Then, after it sued Chevron and needed to prove that the fair market value was *lower* than the purchase price, Transbay sought to disavow the PSG appraisal and to keep it from the jury. The district court accommodated

Transbay, effectively allowing Transbay to use the appraisal only when it suited Transbay's purposes. Transbay thus reaped the benefits of the appraisal without having to bear its burdens. Under *Grundberg*, the district court's ruling was "illogical."

During a voir dire hearing outside the jury's presence, Transbay's owner, Mr. Tsachres, denied knowledge of the PSG appraisal and its contents. The district court apparently credited Mr. Tsachres's testimony, but the court should have allowed the jury to decide whether he was telling the truth.

There was ample evidence to support a finding that Transbay adopted the PSG appraisal. First, as in *Grundberg*, Transbay used the appraisal for its own benefit. Second, Mr. Tsachres — an experienced businessman with an engineering degree from the University of California Berkeley and an MBA (2 ER 65, 274-76) — knew the appraisal was being done, and he testified that he submitted the packet of materials containing the appraisal with the intention that the bank use the materials to approve his loan. (2 ER 256-60.) Third, he admitted at his deposition that he saw the appraisal before he "'closed on the deal.'" (2 ER 260.) Mr. Tsachres's later denial that he read the appraisal is — as the district

court itself said when admitting the appraisal during the summary judgment proceeding — "relevant to the factual determination of how much weight to give evidence that Tsachres used the . . . [a]ppraisal to obtain a loan." (2 ER 54.) The jury should have been allowed to weigh the evidence.

Explaining its exclusion ruling, the district court relied on the principle "that an individual [must] 'actually hear, understand and accede to the statement' for it to constitute an adoptive admission." (1 ER 15, quoting *United States v. Orellana-Blanco*, 294 F.3d 1143, 1148, n.10 (9th Cir. 2002), which in turn was quoting *Monks*, 774 F.2d at 950).) However, that principle applies where the question is whether a party adopted an *oral* statement, not where, as here, a party both possesses and uses a *document.*

An erroneous evidentiary ruling requires reversal if "it is more probable than not that [the] error . . . tainted the outcome." *GCB Commc'ns, Inc. v. U.S. South Commc'ns, Inc.*, 650 F.3d 1257, 1262 (9th Cir. 2011). The improper exclusion of an adopted statement can require reversal. *Sea-Land*, 285 F.3d at 821-22. Such is the case here.

The PSG appraisal, which had been commissioned by American Bank, would have been the only appraisal before the jury not commissioned by a party and thus would have been highly relevant to the question whether Chevron's offer price approached the property's fair market value, the central issue of the case. It was also important for the jury to know that an appraisal Transbay affirmatively used for its own benefit contradicted its claim that Chevron's sales price was inflated. Further, Chevron was prejudiced when, after the district court allowed Chevron's counsel to tell the jury during opening statements that it would "hear a lot about" a "very important" appraisal (2 ER 76; *see* 2 ER 72 [court ruling]), the court then excluded the PSG appraisal from evidence. Chevron's inability to fulfill its promise to produce the appraisal — a failure Transbay's lawyer seemed to mention during closing argument (2 ER 292-93) — undoubtedly damaged Chevron's credibility with the jury.

The jurors should have been allowed to consider the appraisal that Transbay itself submitted to its lender. The district court's decision to withhold this crucial evidence from the jury prejudiced Chevron and requires reversal.

III. TRANSBAY'S ATTORNEY FEE AND COSTS AWARD SHOULD BE REVERSED ALONG WITH THE JUDGMENT.

The district court awarded Transbay attorney fees and expert witness costs because Transbay prevailed on its PMPA claim. *See* 15 U.S.C. § 2805(d)(1)(C) (2012). If this court reverses the PMPA judgment, the attorney fees and costs awards should also be reversed because Transbay will no longer be a prevailing franchisee. *See Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 374 (9th Cir. 1996).

CONCLUSION

For the reasons stated, this court should reverse the judgment and the order awarding attorney fees and expert witness costs, and either order entry of a judgment for zero or nominal damages or remand the matter for a new trial.

August 21, 2013

HORVITZ & LEVY LLP
MITCHELL C. TILNER
DAVID S. ETTINGER
GLYNN & FINLEY, LLP
ROBERT C. PHELPS

By: s/David S. Ettinger

Attorneys for Appellant
CHEVRON U.S.A. INC.

STATEMENT OF RELATED CASES

Appellant is not aware of any related case pending in this Court.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FED R. APP. P. 32(a)(7)(C)]

☒ 1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

- ☒ this brief contains 7,113 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or
- ☐ this brief uses monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Date: 08/21/2013 s/David S. Ettinger

ADDENDUM

REFERENCES IN TEXT

The Clean Air Act, referred to in subsec. (b), is act July 14, 1955, ch. 360, 69 Stat. 322, as amended, which is classified generally to chapter 85 (§ 7401 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of Title 42 and Tables.

The Noise Control Act of 1972 (42 U.S.C. 4901 et seq.), referred to in subsec. (b), is Pub. L. 92-574, Oct. 27, 1972, 86 Stat. 1234, as amended, which is classified principally to chapter 65 (§ 4901 et seq.) of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 4901 of Title 42 and Tables.

§ 2707. Patents and inventions; statutory provisions applicable; contracts or grants covered

Section 5908 of title 42 shall apply to any contract (including any assignment, substitution of parties, or subcontract thereunder) or grant, entered into, made, or issued by the Secretary of Energy under this chapter.

(Pub. L. 95-238, title III, § 308, Feb. 25, 1978, 92 Stat. 82.)

§ 2708. Comptroller General audit and examination of books, etc.; statutory provisions applicable; contracts or grants covered

Section 5876 of title 42 shall apply with respect to the authority of the Comptroller General to have access to and rights of examination of books, documents, papers, and records of recipients of financial assistance under this chapter; except that for the purposes of this chapter, the term "contract" (as used in section 2206 of title 42, insofar as it relates to such section 5876 of title 42) means "contract or grant".

(Pub. L. 95-238, title III, § 309, Feb. 25, 1978, 92 Stat. 82.)

§ 2709. Reports to Congress by Secretary of Energy

(a) Comprehensive program, etc.

As a separate part of the annual report submitted under section 5914(a)[1] of title 42 with respect to the comprehensive plan and program then in effect under section 5905(a) and (b) of title 42, the Secretary of Energy shall submit to Congress an annual report of activities under this chapter. Such report shall include—

(1) a current comprehensive program definition for implementing this chapter;

(2) an evaluation of the state of automobile propulsion system research and development in the United States;

(3) the number and amount of contracts and grants made under this chapter;

(4) an analysis of the progress made in developing advanced automobile propulsion system technology; and

(5) suggestions for improvements in advanced automobile propulsion system research and development, including recommendations for legislation.

(b) Study on financial obligation guarantees

The Secretary of Energy shall conduct a survey of developers, lending institutions, and other appropriate persons or institutions and shall otherwise make a study for the purpose of determining whether, and under what conditions, research, development, demonstration, and commercial availability of advanced automobile propulsion system technology may be aided by the guarantee of financial obligations by the Federal Government. The Secretary of Energy shall report the results of such survey and study to the Congress within 1 year after February 25, 1978. Such report shall include an examination of those stages of advanced automobile propulsion system technology research, development, demonstration, and commercialization for which financial obligation guarantees may be useful or appropriate and shall contain such legislative recommendations as may be necessary.

(Pub. L. 95-238, title III, § 310, Feb. 25, 1978, 92 Stat. 83.)

REFERENCES IN TEXT

Section 5914 of title 42, referred to in subsec. (a), was omitted from the Code.

§ 2710. Authorization of appropriations

There is authorized to be appropriated to carry out the purposes of this chapter, in addition to any amounts made available for such purposes pursuant to title I of this Act, the sum of $12,500,000 for the fiscal year ending September 30, 1978.

(Pub. L. 95-238, title III, § 312, Feb. 25, 1978, 92 Stat. 83.)

REFERENCES IN TEXT

Title I of this Act, referred to in text, is title I (§§ 101-107) of Pub. L. 95-238, Feb. 25, 1978, 92 Stat. 47. For complete classification of this title to the Code, see Tables.

CHAPTER 55—PETROLEUM MARKETING PRACTICES

SUBCHAPTER I—FRANCHISE PROTECTION

SUBCHAPTER II—OCTANE DISCLOSURE

SUBCHAPTER III—SUBSIDIZATION OF MOTOR FUEL MARKETING

SUBCHAPTER I—FRANCHISE PROTECTION

§ 2801. Definitions

As used in this subchapter:

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

(i) between a refiner and a distributor,

[1] See References in Text note below.

(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.

(Pub. L. 95–297, title I, §101, June 19, 1978, 92 Stat. 322; Pub. L. 103–371, §6, Oct. 19, 1994, 108 Stat. 3486.)

AMENDMENTS

1994—Par. (13)(C). Pub. L. 103–371 added subpar. (C).

SHORT TITLE OF 1994 AMENDMENT

Section 1 of Pub. L. 103–371 provided that: "This Act [amending this section and sections 2802, 2805, and 2806 of this title] may be cited as the 'Petroleum Marketing Practices Act Amendments of 1994'."

SHORT TITLE

Section 1 of Pub. L. 95–297 provided: "That this Act [enacting this chapter and provisions set out as a note under section 2822 of this title] may be cited as the 'Petroleum Marketing Practices Act'."

§ 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 un-

derlying 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.

(Pub. L. 95-297, title I, §102, June 19, 1978, 92 Stat. 324; Pub. L. 103-371, §§2, 3, Oct. 19, 1994, 108 Stat. 3484.)

AMENDMENTS

1994—Subsec. (b)(3)(A)(ii). Pub. L. 103-371, §2, inserted "converting the leased marketing premises to operation by employees or agents of the franchisor for the benefit of the franchisor or otherwise" after "purpose of".

Subsec. (c)(4). Pub. L. 103-371, §3, redesignated portion of introductory language of par. (4) as subpar. (A), redesignated former subpars. (A) and (B) as cls. (i) and (ii), respectively, of subpar. (A), and added subpars. (B) and (C).

§ 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.

(Pub. L. 95-297, title I, §103, June 19, 1978, 92 Stat. 328.)

§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.

(Pub. L. 95–297, title I, § 104, June 19, 1978, 92 Stat. 329.)

§ 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 franchisee has the principal place of business of the franchisee.

(Pub. L. 95–297, title I, §105, June 19, 1978, 92 Stat. 331; Pub. L. 103–371, §4, Oct. 19, 1994, 108 Stat. 3485.)

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (d)(1), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

1994—Subsec. (f). Pub. L. 103–371 added subsec. (f).

§ 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.

(Pub. L. 95–297, title I, §106, June 19, 1978, 92 Stat. 332; Pub. L. 103–371, §5, Oct. 19, 1994, 108 Stat. 3485.)

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–371, §5(1), redesignated existing provisions as par. (1) and added par. (2).

Subsec. (b). Pub. L. 103–371, §5(2), redesignated existing provisions as par. (1) and added par. (2).

crime charged or of a defense. Those matters are for the trier of fact alone.

(As amended Pub. L. 98–473, title II, §406, Oct. 12, 1984, 98 Stat. 2067; Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 706. Court-Appointed Expert Witnesses

(a) APPOINTMENT PROCESS. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) EXPERT'S ROLE. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) COMPENSATION. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs.

(d) DISCLOSING THE APPOINTMENT TO THE JURY. The court may authorize disclosure to the jury that the court appointed the expert.

(e) PARTIES' CHOICE OF THEIR OWN EXPERTS. This rule does not limit a party in calling its own experts.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.)

ARTICLE VIII. HEARSAY

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) STATEMENT. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) DECLARANT. "Declarant" means the person who made the statement.

(c) HEARSAY. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) STATEMENTS THAT ARE NOT HEARSAY. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

(As amended Pub. L. 94–113, §1, Oct. 16, 1975, 89 Stat. 576, eff. Oct. 31, 1975; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

(As amended Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2013, I electronically filed the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Signature: s/ Victoria Beebe

CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 13-15439

I, Victoria Beebe , certify that this brief is identical to the version submitted electronically on [date] August 21, 2013 .

Date August 23, 2013

Signature s/Victoria Beebe

(either manual signature or "s/" plus typed name is acceptable)