NO. 17-55813

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY BEVERAGES, LLC, d/b/a OLYMPIC EAGLE DISTRIBUTING

Appellant,

v.

MONSTER ENERGY COMPANY, f/k/a HANSEN BEVERAGE COMPANY,

Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL CALIFORNIA AT RIVERSIDE

D.C. No. 5:17-cv-00295-RGK-KK
Hon. Judge R. Gary Klausner
United States District Court Judge

BRIEF OF THE NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT CITY BEVERAGES, LLC OPENING BRIEF SEEKING REVERSAL OF THE DISTRICT COURT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The National Beer Wholesalers Association ("NBWA") is a Virginia non-profit corporation. It does not have any parent corporation and there is not any publicly held corporation that owns 10% or more of its stock.

RULE 29(C)(5) STATEMENT OF COMPLIANCE

This brief is submitted pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure with accompanying motion for leave to file. No party or party's counsel authored this brief in whole or in part or contributed money intended to fund its preparation or submittal. No person other than *Amicus* or its members contributed money to fund its preparation or submittal.

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INTERESTS OF *AMICUS CURIAE*

Since 1938, the NBWA has served as the national membership organization of the beer distributing industry representing over 3,000 family-owned independent licensed beverage distribution entities, including beverage distributors in Washington and California. Its members reside in all fifty states and employ over 130,000 individuals.

This case implicates the interests of NBWA and its members. The typical NBWA member markets, promotes, sells and distributes both malt beverages and nonalcoholic beverages. The typical member represents several suppliers and enters into franchise agreements with those beverage franchisors. Each of those franchisors has decided to forego self-distribution within the distributor's territory and instead induces the franchisees to invest in the necessary infrastructure to sell and distribute the products on their behalf. This investment ordinarily entails hundreds of thousands, if not millions, of dollars for the construction or acquisition of refrigerated warehouses, the acquisition or lease of a fleet of trucks or other vehicles, the acquisition of racking systems, the acquisition of a sophisticated computer software system and hardware, employing a sales force, employing a delivery force, and paying for the promotion, advertising, and marketing of the products.

Most states have enacted franchise laws serve two purposes.[1] First, they ensure that franchisors, after inducing this very substantial investment, cannot inequitably usurp that value by terminating the agreement without notice, an opportunity to cure an alleged deficiency and good cause. Second, in recognition of past abuses and a disparity in bargaining power, they ensure a modicum of fairness in business dealings between the franchisor and franchisee. These franchise laws embody nonwaiver provisions which make the franchise law paramount in the event of a conflict between the proposed franchise agreement and the franchise law.

When franchisees and their counsel review proposed agreements, they do so against the backdrop of these franchise laws and with the expectation that if a specific contractual provision conflicts with these laws, the laws prevail. The franchisees sign these agreements based upon that assumption. In other words, these franchise laws largely determine the expectation of the parties regarding their relationship and their respective duties and obligations.

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[1] Although not at issue in this case, beer franchise laws serve additional purposes. *See, e.g.*, *Crowley Beverage Company, Inc. v. Miller Brewing Company,* 862 F.2d 688, 691 (8th Cir. 1988) (Minnesota beer franchise law served legitimate purpose of limiting the involvement of brewers in retail sales and aggressive marketing and sales competition); *Arneson Distributing Co., Inc. v. Miller Brewing Company*, 117 F.Supp.2d 905, 909 (D. Minn. 2000) (Minnesota beer franchise law prohibited brewers from fixing prices, coercing distributors, discriminating against distributors, etc.).

Increasingly, franchisors have been insisting on mandatory arbitration provisions before the franchisor's preferred provider in the city of the franchisor's headquarters. Where, as here, an arbitrator manifestly ignores franchise or other laws, it frustrates the legitimate expectations of the parties, enables a franchisor to inequitably usurp the substantial investment that the franchisor induced the franchisee to make on its behalf, and ill-serves the judicial system's goals of uniform application and predictability.

This case directly implicates the substantial interests of NBWA members and raises significant policy concerns. For the reasons set forth below, NBWA supports Appellant and urges the Court to reverse the District Court and vacate the arbitration award.

BACKGROUND

This case arises out of an arbitration proceeding initiated by Monster Energy Company ("Monster") seeking a declaration that the Washington Franchise Investment Protection Act ("FIPA"), RCW 19.100.010 et seq., had no application to the agreement and relationship existing between Monster and City Beverages LLC, d/b/a Olympic Eagle Distributing ("Olympic Eagle"), that the franchise agreement between Monster and Olympic Eagle was valid and enforceable, that Monster had the right to terminate that agreement without cause, and that Monster was entitled to

recover its attorneys' fees and costs in excess of Three Million Dollars ($3,000,000.00).

The events leading up to the arbitration were as follows. In or about 2006, Monster decided to effectuate distribution primarily through franchisees who also distributed Anheuser-Busch InBev ("ABI") products (the franchisee's primary supplier). Appellant's Excerpts of Record ("ER") 348. Toward that end, Monster sought to maximize its leverage over these prospective franchisees by entering into a "Coordination Agreement" with ABI. ER 374-375. The prospective franchisees were not parties to the Coordination Agreement nor did they consent to its terms. ER 379-380, 551-552. Pursuant to the Coordination Agreement, ABI agreed to "encourage" the prospective franchisees to sign the Monster Distribution Agreement, ER 551, to manage and coordinate the "promotional, marketing, sales, merchandising, and distribution activities" of the franchisees, and to allow Monster to utilize it sales and ordering software. In return, among other things, Monster agreed to pay ABI a percentage of all subsequent sales. ER 380-381, 552.

Thereafter, Monster presented the prospective franchisees with a non-negotiable franchise agreement. ER 379-380, 551-552. The franchisees were required to pay a very substantial, upfront franchise fee in order to acquire the rights to the product. ER 552. They were further required to pay Monster as an ongoing franchise fee an amount equal to 4% of every Monster sale as well as a $.50 per case

marketing fee for every case sold. ER 552. They were required to submit an annual marketing plan embodying very specific sales, merchandising, marketing and distribution goals which were required to be approved by Monster and met by the franchisees. ER 464-465. They were required to purchase certain equipment. *E.g.,* ER 392-393. They were required to participate in annual interdependent cooperative advertising and marketing efforts to promote Monster products. *E.g.,* ER 469-471. They were required to accede to direct buying terms with chain retail accounts. ER 466-470. They were prohibited from carrying competing energy drink products. ER 589,610. In return, the franchisees were provided with the exclusive right to sell Monster products in a specified territory and utilize Monster trademarks, services marks, tradename, advertising, and other trade dress. ER 552, 582; *see also* ER 399-401.

During the period that these franchisees sold Monster products, sales grew dramatically. ER 515. To capture part of that appreciated value, Monster entered into an agreement to sell about 16% of its stock to Coca-Cola ("Coke") and to transition franchise rights to Coke bottlers where legally able to do so for approximately $2.15 Billion Dollars ($2,150,000,000.00). ER 552.

As a result, Monster sent Olympic Eagle a notice of termination on February 9, 2015. ER 553. Olympic Eagle contended that FIPA superseded the applicable franchise agreement and prohibited termination without notice, an opportunity to

cure and good cause. ER 349. Monster initiated an arbitration proceeding before its preferred provider (JAMS, a for profit organization) in Orange County, California (the situs of its headquarters). ER 350. After a limited disclosure of interest, JAMS appointed the Hon. John W. Kennedy (Ret.) as the Arbitrator.[2] ER 233. After the issuance of the award, Olympic Eagle learned that the Arbitrator was one of the owners of JAMS, that as an owner he was the recipient of profit distributions at the end of each year, and that Monster was a large client of the JAMS Orange County Office in the preceding five years, having commenced over 97 arbitrations in that time frame. ER 154, 219, 345-346.

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[2] The JAMS disclosure document failed to reveal that the Arbitrators was an owner of JAMS. This information is not publicly available but certainly is material to an attorney assessing whether a disclosed interest might impact an arbitrator's ability to be fair and impartial. The integrity of the arbitration process depends upon the complete and truthful disclosure of any and all pertinent economic or other interests or relationships of possible arbitrators vis-à-vis the parties or the dispute. This principle and the corresponding canon of judicial ethics rests on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. Certainly, it was not the intent of Congress to authorize litigants to submit their cases and controversies to an arbitrator that might reasonably be thought biased against one litigant and favorable to another. *See Commonwealth Coatings Corp. v. Continental Cas. Co.,* 393 U.S. 145 (1968). While it is beyond the purview of this Amicus Brief, it appears that the Arbitrator's ownership interest, wittingly or unwittingly, may have had an impact on the outcome of the proceeding, particularly in light of the arbitrator's manifest disregard of the law, the award of over Three Million Dollars ($3,000,000.00) in attorneys' fees and costs to Monster, and other unusual aspects of the proceeding and the award.

The Arbitrator issued an award on November 14, 2016. ER 551-560. The Arbitrator held that the FIPA did not apply to the relationship between Monster and Olympic Eagle, that Monster was entitled to terminate under the applicable agreement, and that Monster was entitled to recover over Three Million Dollars ($3,000,000.00) in attorneys' fees and costs. ER 555-558, 564. The Arbitrator's conclusion that FIPA did not apply was based upon a finding that Olympic Eagle's "distribution of Monster products was not 'substantially associated" with Monster's trademarks. ER 555. This finding, in turn, was based upon a "percentage test" that was not embodied within FIPA and which the Arbitrator acknowledged had not been adopted by the Washington Supreme Court. ER 556; *see* pages 18 – 20 *infra*.

ARGUMENT

1. Introduction.

NBWA submits this Amicus Brief in support of Appellant's Opening Brief, which urges this Court to reverse the opinion of the District Court for the Central District of California and vacate the arbitration award. To avoid the repetition of arguments made persuasively by Appellant, NBWA will focus its Amicus Brief on the policies that underlie franchise laws generally and FIPA specifically, the applicability of franchise laws generally and FIPA specifically to relationships like that between Monster and Olympic Eagle, the reasons why a manifest disregard of the law is anathema to the uniform administration of justice and the stability and

predictability of the Law, and finally the reasons why the arbitration award must be set aside and vacated under the Federal Arbitration Act.

2. Policies Underlying the Washington Franchise Investment Protection Act.

The fundamental policies underlying FIPA are two-fold. First, as reflected by the title of the Act, to protect Washington franchisees from the inequitable usurpation of the substantial investment that franchisees are induced to make on a franchisor's behalf.[3] This is accomplished through a provision prohibiting termination of franchise rights without notice, an opportunity to cure, and good cause. RCW 19.100.180 (2) (j). Second, in recognition of past abuses and a disparity in bargaining power, to ensure a modicum of fairness in business dealings between the franchisor and franchisee. This is accomplished through other provisions of the Act which regulate the relationship between franchisor and franchisee. RCW 19.100.180.

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[3] Washington courts have routinely found that legislative intent can be discerned through the title of a legislative act. *See State v. Weaver,* 161 Wash. App. 58, 64, 248 P.3d 1116, 1119 (2011); *State v. T.A.W.,* 144 Wash. App. 22, 26, 186 P.3d 1076, 1077 (2008); *Shoop v. Kittitas Cty.,* 108 Wash. App. 388, 392, 30 P.3d 529, 531 (2001), *aff'd on other grounds,* 149 Wash. 2d 29, 65 P.3d 1194 (2003). There is a distinction made between captions generated by the code reviser or a title that is codified within the statutory scheme itself, with the latter being utilized to discern legislative intent. *Shoop,* 108 Wash. App. at 392, 30 P.3d at 531. Here, the title of the Franchise Investment Protection Act has been codified in RCW 19.100.940 and, as such, the title of the Act provides insight into the intent of the legislature and provides further support for the inherent purpose of the Act, which is to protect a franchisee's investment in a franchise.

As recently expressed by the Washington Supreme Court:

> [w]hen the legislature enacted FIPA, it created a comprehensive scheme for regulating franchising in Washington, and it did so with the aim of protecting franchisees.

Dep't of Labor & Indus. of State v. Lyons Enterprises, 185 Wash. 2d 721, 732, 374 P.3d 1097, 1102 (2016), *as amended* (July 13, 2016), reconsideration denied (July 14, 2016) (citations omitted). S*ee also East Wind Exp., Inc. vs. Airborne Freight Corp*., 95 Wash. App. 98, 102, 974 P.2d 369, 372 (1999); *Morris v. Int'l Yogurt Co.*, 107 Wash. 2d 314, 317–18, 729 P.2d 33, 35 (1986), (citing Donald S. Chisum, *State Regulation of Franchising: The Washington Experience*, 48 Wash. L. Rev. 291, 334–90 (1973)); *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wash. App. 881, 888, 658 P.2d 1267, 1271 (1983), *rev. denied*, 99 Wash. 2d 1016 (1983) ("The State legislature enacted the [FIPA] in 1972 in order to correct [a] maldistribution of information and power") (citations omitted).

This Court has acknowledged that FIPA is one of "the most comprehensive franchise statutes of its kind." *Blanton v. Mobil Oil Corp*., 721 F.2d 1207, 1218 (9th Cir. 1983) (citing 67 A.L.R. 3d 1299, 1302-03) (1975); *see 1-800-Got-Junk? LLC v. Sup. Ctl,* 189 Cal. App. 4th 500, 518, 116 Cal. Rptr. 3d 923, 936 (2010), *as modified* (Nov. 19, 2010) (finding that Washington's FIPA "affords a franchisee far greater protection from summary termination of a franchise" than the California franchise law).

As set forth below, the provisions of FIPA pertinent to this case are clear, unambiguous and essential to the policies outlined above. To the extent that any ambiguity exists, however, FIPA is remedial legislation which must be interpreted in light of its underlying remedial purposes. *See* RCW 19.100.220(3)(describing FIPA as a "fundamental policy of the state of Washington"); *Rutter v. BX of Tri-Cities, Inc.,* 60 Wash. App. 743, 748, 806 P.2d 1266, 1268 (1991) (finding FIPA to be a "fundamental policy of [Washington] to protect its citizens from oppressive practices historically associated with the sale of franchises"); *see, State v. Douty,* 92 Wash. 2d 930, 936, 603 P.2d 373, 376 (1979) (recognizing that remedial legislation is construed liberally in order to accomplish the purpose for which it is enacted) (citation omitted)[4].

As noted by the Washington Supreme Court, "[w]hen interpreting statutory language, the goal of the court is to carry out the intent of the Legislature." *Ellerman v. Centerpoint Prepress, Inc.,* 143 Wash. 2d 514, 519, 22 P.3d 795 (2001) (citing *Seven Gables Corp. v. MGM/UA Entm't Co.,* 106 Wash. 2d 1, 6, 721 P.2d 1 (1986)). "In ascertaining this intent, the language at issue must be evaluated in the

[4] This aligns with other states that treat their franchise laws as remedial in nature. *See Clapp v. Peterson*, 327 N.W.2d 585, 586 (Minn. 1982) (observing that the Minnesota Franchise Act "was adopted in 1973 as remedial legislation designed to protect potential franchisees within Minnesota from unfair contracts and other prevalent and previously unregulated abuses in a growing national franchise industry"); *Martin Investors, Inc. v. Vander Bie*, 269 N.W.2d 868, 872 (Minn. 1978).

context of the entire statute." *Id.* (citations omitted). The liberal construction given should seek to "suppress the evil and advance the remedy" which is the focus of the statute. *Kittilson v. Ford,* 23 Wash. App. 402, 407, 595 P.2d 944, 946-47 (1979), *affirmed,* 93 Wash. 2d 223, 608 P. 2d 264 (1980).

3. <u>The Language of the FIPA is Clear and Unambiguous</u>

FIPA defines a "Franchise" as follows:

> (a) An agreement, express or implied, oral or written, by which:
>
> (i) A person is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan prescribed or suggested in substantial part by the grantor or its affiliate;
>
> (ii) The operation of the business is substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol designating, owned by, or licensed by the grantor or its affiliate; and
>
> (iii) The person pays, agrees to pay, or is required to pay, directly or indirectly, a franchise fee.

RCW 19.100.010 (6).

The definition above embodies five components: (1) there must be an agreement between the parties; (2) the franchisee must be granted the right to sell the franchisor's goods or services; (3) those sales must be effectuated under a marketing plan suggested by the franchisor; (4) the business of selling the franchisor's goods or services must be substantially associated with the franchisor's trademarks and related trade dress; and (5) the franchisee must pay a franchise fee.

For reasons that follow, Olympic Eagle's relationship with Monster was clearly a "franchise" within the meaning of the Act. In fact, the written agreement between Olympic Eagle and Monster itself indisputably evidences the satisfaction of those requirements. The parties entered into written agreements regarding Olympic Eagle's exclusive right to distribute Monster products within a specified territory. *See* Hansen Beverage Company Monster Beverages Off-Premise Distribution Agreement and Hansen Beverage Company Monster Beverages On-Premise Agreement (collectively referred to as the "Franchise Agreement").[5]

Pursuant to Section 2 of the Franchise Agreement, Olympic Eagle was provided with the exclusive right to sell Monster products to retail accounts within its territory. ER 582. Pursuant to Section 2 (d), Olympic Eagle was required to pay an upfront franchise fee of $1,058,210.00, referred to as a "Buy Out Contribution." ER 552. Pursuant to Section 6 (b) and Exhibit F, Olympic Eagle was required to pay an ongoing franchise fee equal to 4% of every sale. ER 552, 584, 599. In addition, Olympic Eagle was required to pay a marketing fee of $.50 per case sold. ER 552. Accordingly, there can be no doubt that the "franchise fee" requirement embodied in Section (6)(a)(iii) of FIPA was satisfied.

[5] Subsequent citations are to the Off-Premise Agreement and, for purposes of this brief, the On-Premise and Off-Premise Agreements are identical).

Pursuant to Section 3(g) of the Franchise Agreement, Olympic Eagle's extensive duties under the Franchise Agreement were delineated, including the obligation to submit a proposed "Annual Marketing Plan," which was to be reviewed and approved by Monster. ER 583. Section 13(a) of the Franchise Agreement dictated the specific items that the proposed Annual Marketing Plan must address including without limitation the:

> "specific account placement performance objectives, merchandising goals, specific account and channel objectives for specified distribution channels, distribution goals, a sales and marketing spending plan and a strategy for maximizing sales and growth of market share."

ER 587. There can be no doubt that the conferral of franchise rights conditioned upon meeting these requirements satisfied the component embodied in (6)(a)(i) regarding "a marketing plan prescribed or *suggested* in substantial part" by the franchisor. *See* RCW 19.100.010 (11) (emphasis added).

That leaves the requirement embodied in (6)(a)(ii) that the "operation of the business is substantially associated with a trademark" of the franchisor. The term "business" is not specifically defined by FIPA but it is first referred to in Section (6)(a)(i) ("A person is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan"). The term "business" clearly refers to the **specific** business of selling the **franchisor's** goods or services. In other words, the business of selling Monster products. In the context of the entire Act, this is the plain and unambiguous meaning of the term "business."

Understood in this context, the appropriate inquiry is whether Olympic Eagle's operation of the business of selling Monster products is substantially associated with Monster trademarks. Again, the Franchise Agreement is illustrative. Pursuant to Section 9, Olympic Eagle was granted the right to use Monster trademarks in its territory in the promotion and growth of the Monster brand. ER 584-585. Pursuant to Section 21 of the Franchise Agreement, it was prohibited from carrying any competing product. ER 589. In other words, Olympic Eagle was not a convenience store, grocery or other ordinary retail outlet selling Monster products as well as competing products to the public. Such a retail venue has no right or obligation to promote the Monster brand, has no right to use the Monster trademarks, and clearly does not satisfy the requirement embodied in (6)(a)(ii). In contrast, Olympic Eagle was specifically granted the right to use the trademarks in its Monster territory. In fact, it was contractually required to do so in the promotion of Monster products and to the exclusion of any competing products in the rapidly growing, multi-billion dollar energy drink market. Its marketing, sales, and advertising programs utilized these trademarks extensively. Olympic Eagle was contractually prohibited from doing any "acts or things contesting or in any way impairing or tending to impair" the trademarks. ER 584-585. Accordingly, there can be no doubt that its business of selling Monster products was "substantially associated" with

those trademarks. The agreement itself and the underlying undisputed facts demonstrate that Olympic Eagle satisfied this requirement.

Even assuming arguendo that the phrase "operation of the business is substantially associated with a trademark" is ambiguous, it must be liberally construed with reference to FIPA's remedial purposes. Under this applicable rule of construction, there can be no doubt that the interpretation outlined above applies. The Washington Legislature specifically titled the Act the "Washington Franchise *Investment* Protection Act." *See* RCW 19.100.940 (emphasis added). As evidenced by this title, their goal was to identify and protect franchisees who were induced to make distribution and sale infrastructure investments on a franchisor's behalf and to prohibit that franchisor from inequitably usurping that investment. Accordingly, the Legislature mandated that a franchise could not be terminated without notice, without providing the opportunity to cure an alleged deficiency and without good cause. *See* RCW 19.100.180. The Legislature further prohibited the waiver of these protections by agreement or otherwise. *See* RCW 19.100.184.

FIPA's definition of "franchise" does not embody any requirement that the franchisee be unsophisticated or that over 50% of the franchisee's sales or profits be derived from the franchisor's products. The nonwaiver provision does not exempt "sophisticated" franchisees or those franchisees whose sales of the franchisor's products were below a certain percentage of their total sales. The Legislature did

not define or use the phrase "operation of the business is substantially associated with a trademark" in connection with a franchisee's total business but rather only in connection with the sale of the franchisor's products.

The requirement that the "operation of the business" be "substantially associated" with the franchisor's trademark is designed to distinguish franchisees from other alternative business relationships. Specifically, the requirement is designed to distinguish franchisees who are required to make a substantial investment in distribution and sales infrastructure on the franchisor's behalf from ordinary retailers or other vendors of the franchisor's products or services who are merely acquiring the products for resale to consumers. Franchisees are expressly granted permission to utilize the franchisor's trademarks and are required to make investments to enhance the value of the brand and grow sales. Ordinary retailers and similar vendors, in contrast, are prohibited from using the marks, labor under no requirement to invest in the brand, and are free to sell the franchisor's products or competing products as they wish.

Even assuming arguendo that the term "business" and the phrase "substantially associated with a trademark" is to be understood in a different context, the undisputed facts still lead inexorably to the conclusion that FIPA applies. If "business" refers to like products (i.e. energy drinks), Olympic Eagle was prohibited from carrying such products so its sole business in this regard was substantially

associated with the Monster trademarks. If "business" refers to Olympic Eagle's non-alcohol beverage business, Monster sales were far in excess of 50% of its total non-alcohol beverage sales. If "business" refers to Olympic Eagle's total business (beverage alcohol and non-beverage alcohol), Monster was part of the ABI portfolio of brands by virtue of the Coordination Agreement and Olympic Eagle's "association" must be viewed through this "co-branded" prism. Accordingly, no matter what interpretation is given to the phrase "business", Olympic Eagle satisfies the requirement and the FIPA's definition of franchise. *See* RCW 19.100.010 (6).

4. An Arbitration Award Must Be Vacated Where an Arbitrator exceeds his Authority by Acting in "Manifest Disregard of Law."

Section 10 of the Federal Arbitration Act sets forth the four grounds upon which a court may vacate an arbitration award:

> **(1)** where the award was procured by corruption, fraud, or undue means;
>
> **(2)** where there was evident partiality or corruption in the arbitrators, or either of them;
>
> **(3)** where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> **(4)** where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C § 10 (a).

With reference to the fourth ground, numerous courts, including the Ninth

Circuit Court of Appeals, have held that an arbitrator exceeds his powers when he demonstrates "a manifest disregard for law." *Johnson v. Wells Fargo Home Mortg., Inc.,* 635 F.3d 401, 413 (9th Cir. 2011); *Comedy Club, Inc. v. Improv West Associates,* 553 F.3d 1277, 1288 (9th Cir. 2009). *See also Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 481-82 (4th Cir. 2012)[6].

A manifest disregard of the law is more than just an error in the law or a failure on the part of the arbitrator to understand or apply the law. *Thompson v. Tega–Rand Int'l,* 740 F.2d 762, 763 (9th Cir. 1984) (per curiam). To meet this standard "[i]t must be clear from the record that the arbitrator recognized the applicable law and then ignored it." *Comedy Club, Inc.,* 553 F.3d at 1290 (quoting *Mich. Mut. Ins. Co. vs. Unigard Sec. Ins. Co.,* 44 F.3d 826, 832 (9th Cir. 1995). For reasons that follow, that standard is clearly met in this case.

5. The Award Must be Vacated Because the Arbitrator Acknowledged and Understood That FIPA Did Not Embody a "Percentage Test" but Nonetheless Applied Such a Test in Concluding that the FIPA Did Not Apply.

In his interim Arbitration Award, the Arbitrator expressly recognized that the central issue in the case was whether Olympic Eagle was a "franchisee" pursuant to FIPA and, in that regard, whether Olympic Eagle satisfied the requirements

[6] While the phrase "manifest disregard for law" does not explicitly appear in the FAA, it has "come to serve as judicial gloss on the standard for vacatur set forth in FAA § 10(a)(4)." *Johnson,* 635 F.3d at 413.

embodied in RCW 19.100.010 (6). ER 554. The Arbitrator also expressly recognized that FIPA was "franchise investment protection legislation," that the phrase "substantially associated with a trademark" referred to Olympic Eagle's Monster business (not its entire business),[7] that no "percentage test" was embodied in FIPA, and that Washington courts have not imposed such a test. *See* ER 554-556. Accordingly, there can be no doubt that the Arbitrator "recognized the applicable law." *Comedy Club, Inc.,* 553 F.3d at 1290 (citation omitted).

Indeed, just several months before the Award issued, the Washington Supreme Court reaffirmed the "fundamental policy" of Washington to protect its citizens from oppressive practices historically associated with the sales of franchises." *Department of Labor & Indus. v. Lyons*, 185 Wash. 2d 721, 732-33, 374 P.3d 1097, 1102 (2016). It noted that "it was in response to these concerns that the legislature included in FPIA a franchisee 'bill of rights.'" *Id.* (citing *Corp v. Atl.-Richfield Co*., 122 Wash. 2d 574, 580, 860 P.2d 1015, 1018 (1993)). Finally, the Washington Supreme Court stated that "[a]lthough subsequent commentary has questioned the validity of these fears, especially in light of the sophisticated

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[7] In his Interim Award, the Arbitrator found "that *OE's distribution of Monster products* was not substantially associated with a trademark . . . owned by or licensed by Monster." ER 555 (emphasis added). Accordingly, this language illustrates that the Arbitrator understood that the appropriate inquiry was whether Olympic Eagle's operation of the business of selling Monster products is substantially associated with Monster trademarks. Nonetheless, he later concluded that it was not because Olympic Eagle's sales did not meet the specified threshold. *Id.*

franchisees operating today, *see* Berry, *supra*, at 873, the legislature enacted FIPA with the purpose of protecting franchisees, and it is through that lens that we continue to view its provisions." *Id.*[8] This latter point was an express rejection of the contention by Douglas C. Berry that FIPA should be construed to only protect unsophisticated, economically vulnerable franchisees. See Douglas C Berry, et al., *State Regulation of Franchising: The Washington Experience Revisited*, 32 Seattle U. L. Rev. 811, 840-41 (2009).[9]

Under the heading "The 'Substantial Association' Requirement," the Arbitrator engaged in a lengthy analysis of a Second Circuit Court of Appeals case construing a Connecticut statute. In manifest derogation of the applicable

[8] Douglas C. Berry, the author of the law review article referred to in the quote above, submitted an amicus brief on behalf of the International Franchise Association, a franchisor trade association, in the *Lyons* case. *See* Brief for International Franchise Association as Amicus Curiae Supporting Appellant, *Department of Labor & Indus. v. Lyons*, 185 Wash. 2d 721, 374 P.3d 1097 (2016). The central issue in *Lyons* was whether a janitorial franchisor was required to pay workers' compensation premiums for those of its franchisees who did not actually employ subordinates. *Lyons*, 185 Wash. 2d at 725-26, 374 P.3d at 1099.

[9] In his law review article, Berry essentially argued that FIPA was ill-conceived legislation based upon faulty assumptions, in particular, the assumption "that franchisors have superior bargaining power." Berry, 32 Seattle U. L. Rev. at 872-73. As evidenced by the *Lyons* decision and the quote above, the Washington Supreme Court rejected this contention and the implication that FIPA's protections only be extended to unsophisticated, economically vulnerable franchisees. *Lyons* at 185 Wash. 2d at 725-26, 374 P.3d at 1099 (2016). Leveraging the franchisees' relationship with ABI, Monster's refusal to negotiate any of the terms of the onerous, one-sided franchise agreement in this case belies Mr. Berry's argument and strongly supports the *Lyons* decision. ER 379-380, 551-552.

Washington law, the Arbitrator adopted a percentage test noting that the "courts of *some* states have imposed a percentage test to resolve the "substantial association requirement" and, as to those courts, the "percentage has *normally* been 50% . . ." *See* ER 557-558 (emphasis added). Because Olympic Eagle failed this test, the Arbitrator issued the Award in favor of Monster. ER 557-558. Rather than relying upon the express language of FIPA and the decisions of the Washington Supreme Court construing its provisions, the Arbitrator based his decision upon a Second Circuit decision construing a Connecticut statute that had no application to this case. *See* ER 555-556 (relying on *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672 (2d Cir. 1985)). He expressly ignored the absence of a percentage sales requirement in FIPA, the absence of an exemption for large or sophisticated franchisees from the waiver prohibition embodied in RCW 19.100.184, and the acknowledged fact that "the courts in Washington have not imposed a percentage requirement." *See* ER 556.

As such, the Arbitrator clearly recognized applicable law, chose to ignore that law, and instead unilaterally substituted his own judgment for that of the Washington Legislature and Washington courts. In this way, he clearly exceeded his authority and his decision must be vacated under 9 U.S.C § 10 (a)(4). *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Johnson,* 635 F.3d at 413; *Comedy Club, Inc.,* 553 F.3d at 1288.

CONCLUSION

For the foregoing reasons, Amicus urges the Court to reverse the District Court and vacate the Arbitration Award.

Respectfully submitted,

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STATEMENT OF RELATED CASES

So far as is known to *Amicus Curiae* National Beer Wholesalers Association, there are no related cases pending in the Ninth Circuit Court of Appeals.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(B), this brief contains 5,239 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2013, in 14 points, Times New Roman, including footnotes.

Date: March 2, 2018 *I/s/Michael D. Madigan*
Michael D. Madigan

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2018, I electronically filed the foregoing *Amicus Curiae* brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit – as an exhibit to the accompanying motion for leave to file - 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.

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