Nos. 08-240 and 08-372

In The
Supreme Court of the United States

MAC'S SHELL SERVICE, INC., ET AL.,

Petitioners,

v.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,

Respondents.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,

Petitioners,

v.

MAC'S SHELL SERVICE, INC., ET AL.,

Respondents.

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

SUPPLEMENTAL BRIEF FOR MAC'S SHELL SERVICE, INC., ET AL.

MARK E. SOLOMONS
LAURA METCOFF KLAUS
GREENBERG TRAURIG, LLP
2101 L Street, N.W.
Washington, DC 20037
(202) 331-3100

JOHN F. FARRAHER, JR.
Counsel of Record
GARY R. GREENBERG
PETER ALLEY
LOUIS J. SCERRA
JUSTIN F. KEITH
GREENBERG TRAURIG, LLP
One International Place
Boston, MA 02110
(617) 310-6000

Counsel for Mac's Shell Service, Inc., et al.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

INTRODUCTION

This case presents a dispute over whether the Petroleum Marketing Practices Act ("PMPA" or "Act") protects franchisees when a franchisor acts to force them out of business. Shell and Motiva assert that the Act requires the franchisor to end the franchise before it is "terminated" within the meaning of the statute. Imposing intolerable conditions designed to force a dealer to abandon his station is not enough, they argue, to invoke the protection of the PMPA. Likewise, so long as a dealer is offered and signs a renewal lease, Shell and Motiva believe that it does not matter that the lease contains terms intended to force the dealer out of business or that the dealer is bullied into signing under threat of losing his livelihood. The record confirms that Shell and Motiva understood that achieving their goal of converting franchise-operated stations to direct operations depended upon their ability to "overcome [the] restrictions" imposed by the PMPA. C.A. App. 1530, 1533. One way of doing this, an executive quipped, was to "run [the dealers] over with a truck." C.A. App. 3606. The economic burdens imposed by higher rents had the same effect. The arguments advanced by Shell and Motiva to "overcome" the restrictions of the Act do not comport with the plain language, design or purpose of the statute. Congress surely understood the might of multi-national oil companies when it enacted the PMPA and did not permit them to avoid the Act by cunning and intimidation. If Shell and Motiva's arguments are accepted, the PMPA's protections will be lost.

I. CONDUCT DESIGNED TO FORCE FRANCHISEES OUT OF BUSINESS VIOLATES THE PMPA

In their merits brief, Shell and Motiva concede that a franchisor may "terminate" a franchise "even absent an express statement of termination."[1] Brief for Shell Oil Products, *et al.* at 34. They now contend that there is no "termination" where "intolerable franchisor conduct" forces a franchisee to abandon his franchise. Reply Brief for Shell Oil Products, *et al.* ("Reply Brief") at 5. "[I]t is not enough that the franchise *was terminated*," they argue, "[i]t must have been the *franchisor* that terminated it." *Id.* A franchisor's refusal to sell gasoline to a franchisee is a "termination," according to Shell and Motiva, but charging a franchisee $100 per gallon with the expectation that the franchisee will be unable to compete in the marketplace and eventually will abandon his station, is not. Thus, Shell and Motiva urge the Court to hold that the PMPA permits franchisors to circumvent the prescribed grounds and methods for terminating franchises by creating such intolerable

[1] The Solicitor agrees with this position. Brief for the United States at 21.

conditions that the franchisee has no choice but to abandon his station.

The Solicitor takes a different view, acknowledging that "[i]n an appropriate case, a franchisee . . . can make out a claim of constructive or informal termination without abandoning any of the basic components of its operation." Brief of the United States at 16. According to the Solicitor, the franchisee must seek injunctive relief to prevent the franchisor from engaging in conduct that would leave the franchisee "no reasonable alternative but to abandon . . . its operations." *Id.* at 21. The Solicitor agrees that it would make little sense for Congress to provide expressly for injunctive relief but require that the injury actually occur before such relief can be granted. *Id.* at 16. In different circumstances, Shell and Motiva acknowledge that a plaintiff seeking injunctive relief does not "have [to go] *out of business* before bringing suit."[2] Reply Brief at 19-20.

The Solicitor's recognition of a franchisee's rights under the Act where the franchisor acts to terminate a franchise on grounds or in a manner inconsistent with the statute is appropriate, but nothing in the

---

[2] Indeed, those dealers who were able to remain in business through trial, *see, e.g.,* n.3 *infra*, helped minimize the damages caused by the violation of the Act. *Cf. Faragher v. Boca Raton*, 524 U.S. 775, 806 (1998) (a victim has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damage" that results from the violation of the statute) (citations omitted).

statutory scheme predicates these rights upon a franchisee seeking injunctive relief. The claim arises and is actionable because the franchisor acts to terminate the franchise in contravention of the Act. An injunction, if granted, preserves the *status quo* while the parties resolve their claims. If a franchisee's request for injunctive relief is denied, it would make little sense to require the franchisee to dismiss his case, wait until the business fails, and then re-file an action for damages. The statutory mechanism Congress created contemplates that alleged violations of the statute may be enjoined, allowing the franchisee to stay in business, litigate the merits of the claim, and recoup any damages. Should a franchisee who is subject to the same misconduct, but who is unable to obtain an injunction, be foreclosed from pursuing a claim under the statute merely because he is able, through whatever means,[3] to remain in business? We

[3] Shell and Motiva's frequent references to certain dealers' earnings and the fact that some stations remained open through the trial distorts the record and are ultimately beside the point. *See, e.g.,* Reply Brief at 2. Although Shell and Motiva claim that Mac's Shell, for example, earned as much as $200,000 a year, they ignore that Mac's Shell also operated a towing business and owned investment property. Those businesses contributed to the company's profitability, but were not part of the facilities Shell and Motiva leased to the franchisee. C.A. App. 942, 950, 966, 968. Despite the rent increases and commercially unreasonable prices charged by the franchisor for gasoline, J.A. 384-85, revenue from the towing operations and investment property helped Mac's Shell remain in business. Likewise, Cynthia Karol contemplated bankruptcy, but kept her station open by borrowing $100,000 and cashing-in a $40,000 retirement account. C.A.

(Continued on following page)

think not. The Act does not differentiate between a franchisee who obtains an injunction, remains in business, and pursues a claim and a franchisee who manages to stay in business without an injunction, but is nevertheless injured by the franchisor's conduct. In both instances, the franchisee is entitled to pursue a claim for damages. 15 U.S.C. § 2805(d)(1).

1. Citing *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), Shell and Motiva argue that this Court has recognized constructive claims in Title VII cases only because Congress supposedly enacted Title VII "against a backdrop of settled precedent that Congress was presumed to have incorporated." Reply Brief at 6. Reliance on this incorporation theory in *Suders* or in any of the other Title VII cases is not apparent. Rather, in its Title VII cases, the Court recognized that "although [Title VII] mentions specific employment decisions with immediate consequences, the scope of its prohibition is 'not limited to economic or tangible discrimination' . . . and that it covers more than 'terms' and 'conditions' in the narrow contractual sense." *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115-16 (2002) (citations omitted). Thus, the Court has repeatedly stated that Title VII's statutory language "evinces a congressional intent to strike at the entire spectrum of disparate treatment." *Suders*, 542 U.S. at 143;

App. 847, 851. Sid Prashad borrowed money and remained in business with the assistance of his mother, who worked 40-60 hours a week without pay. C.A. App. 1000-01.

Morgan, 536 U.S. at 116; *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).[4] Here, the same may be said of the Act. *See Patel v. Sun Co., Inc.*, 141 F.3d 447, 459 (3d Cir. 1998) (noting that Congress "outlawed all franchisee terminations and nonrenewals generally but then created certain exceptions"). There can be no doubt that Congress intended the Act to cover all forms or attempts at termination and nonrenewal, and in drafting its provisions, Congress recognized the potential for franchisors to attempt to circumvent the Act. What the Court said with respect to Title VII is applicable here. "Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Harris,* 510 U.S. at 22. Here, the Act's protections must be given effect before a dealer loses his livelihood.

Shell and Motiva also argue that "there was no 'longstanding recognition' of constructive termination claims in the 'soil' of the contexts Congress considered relevant when it enacted the PMPA."[5] Reply Brief at 7. Whatever else may be said about the status of

---

[4] Similarly, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), does not suggest that constructive discharge claims in the labor law context were accepted based on the inference that Congress intended to incorporate such claims when it enacted the National Labor Relations Act.

[5] Contrary to Shell and Motiva's assertion (Reply Brief at 7), there is no evidence in the legislative history (and Shell and Motiva cite none) that Congress intended to invoke or incorporate into the PMPA anything from the UCC.

constructive claims in other contexts, by 1994, when Congress amended the PMPA, courts confronting the issue recognized constructive terminations and non-renewals. *See*, *e.g., Chestnut Hill Gulf v. Cumberland Farms, Inc*., 940 F.2d 744, 750-51 (1st Cir. 1991); *May-Som Gulf, Inc. v. Chevron U.S.A.*, 869 F.2d 917, 922 (6th Cir. 1989); *Barnes v. Gulf Oil Corp*., 795 F.2d 358, 363-64 (4th Cir. 1986); *Pro Sales, Inc. v. Texaco, U.S.A*., 792 F.2d 1394, 1399 (9th Cir. 1986); *Meyer v. Amerada Hess Corp*., 541 F. Supp. 321, 329 (D.N.J. 1982); *Siecko v. Amerada Hess Corp*., 569 F. Supp. 768, 771 n.2 (E.D. Pa. 1983); *Sun Franchise Assoc. v. Sun Refining and Marketing Co*., 1992 WL 97359 (E.D. Pa. 1992); *Dean v. Kerr-McGee Refining Corp*., 714 F. Supp. 1155, 1158 (W.D. Okla. 1988); *Cedar Brook Serv. Station v. Chevron U.S.A*., 746 F. Supp. 268, 272-73 (E.D.N.Y. 1989); *Ackley v. Gulf Oil Corp.*, 726 F. Supp. 353, 360 (D. Conn. 1989), *aff'd*, 889 F.2d 1280 (2d Cir. 1989). *But see*, *McGinnis v. Star Enters.*, No. 93-1234, 1993 WL 455587 (5th Cir. 1993); *Deamor, Inc. v. Mobil Oil Corp*., 1990 WL 124927 (E.D. Pa. 1990). Congress enacted the 1994 Amendments to "affirm and clarify" certain provisions of the Act by adding additional protections for franchisees. Congress noted that "[d]uring the 16 years since the PMPA was enacted, the provisions of Title I have been the subject of many judicial interpretations. The Committee now believes that further legislation is desirable in order to assure that the PMPA is consistently and clearly understood and interpreted." H.R.

Rep. No. 737, 1994 WL 530965, 1994 U.S.C.C.A.N. 2779. *See also* S. Rep. No. 387, 1994 WL 5347750 (same); *Darling v. Mobil Oil Corp*., 864 F.2d 981, 991 n.1 (2d Cir. 1989) (citing comments of Representative Dingell, principal sponsor of the PMPA in 1978, noting judicial interpretations of the Act that were inconsistent with the Act's language and purpose). While the 1994 Amendments affirmed and clarified the Act's provisions and overruled cases like *O'Shea v. Amoco Oil Co*., 886 F.2d 584 (3d Cir. 1989) and *Bellmore v. Mobil Oil Co*., 783 F.2d 300 (2d Cir. 1986),[6] Congress left undisturbed the rulings upholding constructive terminations and nonrenewals.[7] *See Faragher*, 524 U.S. at 791-92 (noting Congress's

[6] In *O'Shea*, the Third Circuit rejected the franchisee's claim that a termination based on an unenforceable provision of the contract under state law violated the PMPA. In *Bellmore*, the Second Circuit ruled that the Act did not preempt payments of goodwill required by Connecticut law. The 1994 Amendments barred illegal or unenforceable terminations under state law and prohibited mandatory goodwill payments. 15 U.S.C. §§ 2801(13), 2806(a)(2). Congress also reconfirmed the limited scope of preemption under the Act, H.R. Rep. No. 103-387, 103d Cong., 2d Sess. 1994) at 4, thus resolving the conflict regarding the scope of preemption. *See Arabian v. BP Am.*, 898 F. Supp. 703 (N.D. Cal. 1995) (discussing the contrary court of appeals preemption decisions).

[7] Nor did the 1994 Amendments otherwise limit the protections accorded franchisees under the Act. Rather, the 1994 Amendments broadened the protections by, among other things, proscribing terminations of franchises based on provisions void or unenforceable under state law. 15 U.S.C. § 2801(13).

amendment to the liability provisions of Title VII since the *Meritor* decision without any modification of the holding).[8]

That the Act does not expressly acknowledge constructive claims is irrelevant. The dealers are unaware of any statute which contains language framing the cause of action to expressly include "constructive" claims. As this Court's cases establish, Title VII does not expressly include that language, yet there is no doubt Title VII covers constructive claims. The observation by Shell and Motiva that Congress knew how to cover not only doing an act but causing another to do it is likewise inapposite. Reply Brief at 5. The nature of a constructive claim does not involve the question of causing another to do an act.

Shell and Motiva argue that the First Circuit's standard is incoherent, likening it to asking a jury to decide whether a defendant is "effectively guilty" even though he is innocent, or "effectively negligent" even though he exercised due care. Reply Brief at 10-11. There is nothing "effectively guilty even though . . . innocent" about Shell and Motiva's conduct: the jury determined that Shell and Motiva intended to

[8] Comments of a trade group representative during the PMPA hearings regarding economic terminations (Reply Brief at 5) provide no insight into the meaning of the Act and are not evidence of Congress's intent. *See, e.g., Bryan v. United States*, 524 U.S. 184, 196 (1998); *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964).

squeeze out the dealers. Nor is there any question but that such a scheme expressly contravenes the Act. Moreover, Shell and Motiva's only rejoinder to the dealers' analogy to the materiality standard in securities-fraud cases is that such materiality determinations may leave room for judgment. But, as the Title VII cases demonstrate, standards used to measure a defendant's conduct and liability are not necessarily the stuff of scientific dissection. *Harris*, 510 U.S. at 22 (standard of abusive work environment requiring sufficiently severe or pervasive conduct "is not, and by its nature cannot be, a mathematically precise test"). There is nothing incoherent about a standard for constructive termination which requires the jury to conclude that the elimination of the subsidy had to be "such a material change that it effectively ended the lease, even though the [dealers] continue[d] to operate [their] business." J.A. 373, 379-80, 449-50.

II. NEW LEASE TERMS WERE INTENDED TO CONVERT DEALER STATIONS TO DIRECT OPERATIONS

Shell and Motiva claim that the dealers "distort the record" and suggest that the Motiva leases were not intended to force the dealers out of business. Reply Brief at 23. The verdict refutes any notion that the new leases were adopted for any other purpose. "The question for you," the district court charged the jury, "is were the rent increases and other new provisions in the Motiva leases designed to discourage the plaintiffs from renewing and to enable Motiva to convert the stations – to convert the stations to company-owned ones?" J.A. 375. The jury answered affirmatively and found that the Motiva leases amounted to a constructive nonrenewal of the dealers' leases. J.A. 382.[9]

Nevertheless, Shell and Motiva argue that the dealers have no claim under the Act because they signed the renewal agreements. The Solicitor acknowledges that a franchise relationship may be "constructively" non-renewed where the franchisor "insists on changes that a franchisee would be forced to

---

[9] Shell and Motiva's efforts to recast the facts of this case are equally unavailing. Despite the First Circuit's contrary finding, they claim that it is "implausible" to suggest that "Shell *formed Motiva* to drive [the dealers] out of business. . . ." Reply Brief at 23, J.A. 447-48. The "Strategic Marketing Initiative" was developed by Motiva to "convert" franchise operated stations to stations operated directly by Motiva at an anticipated cost of several hundred million dollars. *See, e.g.*, C.A. App. 1530, 1533, 2675, 2700, 3603-06, 3638-48. The jury concluded that the new leases offered by Motiva were designed to unlawfully convert the franchise stations to direct operations, J.A. 374-75, 382, and that Motiva planned to decrease the number of franchise operated stations in certain markets in Massachusetts by more than 70%. *See, e.g.*, C.A. App. 1723, 1728, 1750. By early 2000, Motiva had targeted the stations to be converted, including the dealers' stations. C.A. App. 923-31, 1620-1728, 1729-73, 1835-38. On this record, it was certainly plausible to conclude that Motiva was formed as part of the effort to convert the stations.

reject because continued operation under such terms would not be reasonably possible," but nevertheless agrees that no claim may be brought where the franchisee signs a renewal lease. Brief for the United States at 23. The dealers' signatures on the Motiva leases were no more an acceptance of the leases than a person who signs a contract under duress. *Cf. International Underwater Contractors, Inc. v. New England Tele. and Tele. Co.*, 8 Mass. App. Ct. 340, 342, 393 N.E. 2d 968, 970 (1979) (contract signed under duress is not binding). The dealers protested the new terms, reserved their rights to challenge the legality of the renewal leases, brought suit, and then signed the leases under protest. J.A. 129-31, 450. On this record, it cannot be said that the dealers accepted the terms of the renewal leases.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed on the termination claim (No. 08-373) and reversed on the nonrenewal claim (No. 08-240).

Respectfully submitted,

JOHN F. FARRAHER, JR.
Counsel of Record
GARY R. GREENBERG
PETER ALLEY
LOUIS J. SCERRA
JUSTIN F. KEITH
GREENBERG TRAURIG, LLP
One International Place
Boston, MA 02110
(617) 310-6000

MARK SOLOMONS
LAURA METCOFF KLAUS
GREENBERG TRAURIG, LLP
2101 L Street, N.W.
Washington, D.C. 20037
(202) 331-3100

Counsel for Mac's Shell Service, Inc., Cynthia Karol, John A. Sullivan, Akmal, Inc., Sid Parshad, Ram Corporation, Inc., J&M Avaramidis, Inc. and Stephen Pisarczyk

DECEMBER 2009