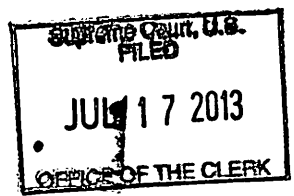


13-88  
No.



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In the  
**Supreme Court of the United States**

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LEHIGH GAS CORPORATION,

*Petitioner,*

vs.

JIMICO ENTERPRISES, INCORPORATED,  
BROWNSON ENTERPRISES, INCORPORATED  
and PETER BROWNSON,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

The Petroleum Marketing Practices Act, 15 U.S.C. §§2801-2806, ("PMPA") governs the circumstances in which a petroleum franchisor may terminate a franchisee. In order to terminate a franchisee, a franchisor must have a substantive reason to do so pursuant to 15 U.S.C. §2803 and must satisfy the notice requirements set out of 15 U.S.C. §2804. In this case, it was found that, while there were no grounds to challenge the actual terminations of the Plaintiffs, the petroleum franchisor had not satisfied the notice requirements of §2804. The Plaintiffs did not appeal that determination.

However, in conflict with this Court's prior decision in *Mac's Shell Service, Inc. v. Shell Oil Prods. Co.*, 559 U.S. 175 (2010), as well as the statutory scheme and intent of the PMPA and, specifically, 15 U.S.C. §2805 which only provides for a private right of action for violations of 15 U.S.C. §§2802, 2803 and 2807, the District Court did not dismiss Plaintiffs' claims and, instead, awarded monetary damages to the Plaintiffs including costs, fees and disbursements.

The question presented is whether a franchisee may maintain a civil action and/or recover monetary damages for a violation of 15 U.S.C. §2804 when the franchisor was not found to have violated any other provision of the PMPA.

**LIST OF PARTIES**

Petitioner Lehigh Gas Corporation was a Defendant and Counterclaim Plaintiff in the District Court and the Appellant in the Court of Appeals.

Respondent Jimico Enterprises, Incorporated was a Plaintiff in the District Court and an Appellee in the Court of Appeals.

Respondent Brownson Enterprises, Incorporated was a Plaintiff and Counterclaim Defendant in the District Court and an Appellee in the Court of Appeals.

Respondent Peter Brownson was a Counterclaim Defendant in the District Court and Appellee in the Court of Appeals.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States and to enable the Court to evaluate possible disqualification or recusal, the undersigned counsel of record for a private (non-governmental) corporate party, Lehigh Gas Corporation, certifies that Lehigh Gas Corporation is a privately owned corporation. Accordingly, there are no parent corporations or any publicly held corporations that own 10% or more of its stock.

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Petitioner Lehigh Gas Corporation ("Lehigh") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

### OPINION BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at *Jimico Enterprises Inc. v. Lehigh Gas Corp.*, 708 F.3d 106 (2d Cir. 2013). *See also* Appendix A. The Second Circuit affirmed the July 10, 2010 Memorandum Decision and Order, October 14, 2010 Memorandum Decision and Order and October 14, 2011 Amended Memorandum Decision and Order of the United States District Court for the Northern District of New York available at the following, respectively: *Jimico Enterprises Inc. v. Lehigh Gas Corp.*, 1:07-CV-0578 (GTS/DRH), 2010 U.S. Dist. LEXIS 75763 (U.S.D.C. N.D.N.Y. July 27, 2010); *Jimico Enterprises Inc. v. Lehigh Gas Corp.*, 1:07-CV-0578 (GTS/DRH), 2010 U.S. Dist. LEXIS 109394 (U.S.D.C. N.D.N.Y. Oct. 14, 2010); and *Jimico Enterprises Inc. v. Lehigh Gas Corp.*, 1:07-CV-0578 (GTS/DRH), 2011 U.S. Dist. LEXIS 112514 (U.S.D.C. N.D.N.Y. Sep. 30, 2011). *See also* Appendix B, C and D.

## **STATEMENT OF JURISDICTION**

The Second Circuit's Opinion was rendered on February 20, 2013. *See* Appendix A. The same day, it issued a Judgment relating thereto. *See* Appendix F. Lehigh timely filed a Petition for panel rehearing or, in the alternative, for rehearing en banc, which was denied in April 19, 2013. *See* Appendix H. The Mandate issued on April 26, 2013. *See* Appendix I. Lehigh moved for a recall of the Mandate and for a stay of the Mandate pending resolution of its Petition for Writ of Certiorari, which was denied on May 14, 2013 without prejudice to pursue the matter before the Circuit Court. *See* Appendix J. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title I of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§2801 to 2806, is set forth in the Appendix. *See* Appendix K to O.

### STATEMENT OF THE CASE

As explained by this Honorable Court and reiterated by the Second Circuit:

"[P]etroleum refiners and distributors supply motor fuel to the public through service stations that often are operated by independent franchisees. In the typical franchise arrangement, the franchisor leases the service-station premises to the franchisee, grants the franchisee the right to use the franchisor's trademark, and agrees to sell motor fuel to the franchisee for resale." *See* Appendix A-3 *quoting Mac's Shell Serv., Inc. v. Shell Oil Prods. Co.*, 559 U.S. 175, 178 (2010).

On June 1, 2006, the Plaintiffs Jimico Enterprises, Inc. ("Jimico Enterprises") and Brownson Enterprises, Inc. ("Brownson Enterprises"), as franchisees, entered into trial franchise agreements ("TFAs"), within the meaning of the PMPA, 15 U.S.C. §2801, with Lehigh to operate five (5) gasoline service stations "along the Governor Thomas E. Dewey Thruway ("Thruway"), more commonly known as the New York State Thruway, which extends from New York City, through Albany, Syracuse, and Buffalo, to the Pennsylvania state line." *See* Appendix A-4 to A-5. "Jimico [Enterprises] operated three stations – one on each side of the Thruway in Angola, and one in Seneca." *See* Appendix A-4.

“Brownson [Enterprises] operated two stations – one on each side of the Thruway in New Baltimore.” See Appendix A-4.

Lehigh terminated the TFAs between July 28, 2006 and April 1, 2007 and, on May 31, 2007, Jimico Enterprises and Brownson Enterprises initiated an action in the United States District Court for the Northern District of New York against Lehigh based upon allegations that the terminations violated the PMPA. See Appendix A-5 to A-6.

The District Court had jurisdiction over this matter pursuant to the PMPA, 15 U.S.C. §2805, which vests federal courts with subject matter jurisdiction over claims under the PMPA, and under the provisions establishing general federal question jurisdiction, 28 U.S.C. §1331, and jurisdiction over claims arising under federal law regulating commerce, 28 U.S.C. §1337.

The District Court had jurisdiction over the pendent and/or ancillary state law claims asserted by the Plaintiffs and the Counterclaims asserted by Lehigh pursuant to 28 U.S.C. §1367 and, in the alternative, pursuant to the federal diversity statute, 28 U.S.C. §1332. There was complete diversity jurisdiction between all of the Plaintiffs and Defendant in this matter because Lehigh was a Delaware corporation with a principal place of business in Pennsylvania and the Plaintiffs were citizens of New York. The amount of controversy exceeded \$75,000.00.

After all parties moved for summary judgment, the District Court, the Honorable Glenn T. Suddaby presiding, agreed with Lehigh and found that the agreements it entered into with Plaintiffs were valid

TFA's that permitted Lehigh to terminate the trial franchise relationships at will. *See* Appendix B-15. Accordingly, the District Court dismissed the Plaintiffs' claims that: (1) they were non-trial franchisees; and (2) that were unlawfully terminated under the PMPA. *See* Appendix B-22. In other words, the District Court found that Plaintiff's substantive rights had not been violated. The Plaintiffs did not appeal that determination.

Notwithstanding its finding that the Plaintiff's substantive PMPA rights had not been violated, the District Court found that Lehigh had violated the notice provisions of the PMPA, 15 U.S.C. §2804, because: (1) Lehigh failed to provide its reasons for termination; and (2) with regard to the New Baltimore and Seneca stations, it failed to provide timely notices of termination and Lehigh was precluded from arguing that less than ninety (90) days' notice was reasonable because it established a new franchise relationship at each station less than thirty (30) days after the respective terminations. *See* Appendix B-22 to B-27.

Simply, the District Court granted summary judgment in favor of the Plaintiffs based solely upon the limited finding that Lehigh did not give adequate notice of the terminations under the PMPA. *See* Appendix A-6. It should be noted, however, that the District Court rejected the "Plaintiffs' argument that, as a result of Defendant providing inadequate notice, Plaintiffs [were] entitled to the termination-related rights of full PMPA franchises." *See* Appendix B-27. The Plaintiffs also did not appeal that determination.

After holding an evidentiary hearing on damages, the District Court awarded the Plaintiffs compensatory and punitive damages as well as attorneys' fees, expert witness fees, paralegal fees, costs and pre- and post-judgment interest. Judgment was then entered. *See* Appendix A-6. The damages award was based upon Plaintiffs' arguments that they suffered a loss as a result of not being permitted to operate their businesses during the ninety (90) day period notice period and had nothing to do with any alleged inability to pursue their rights under the PMPA. *See* Appendix C-6 to C-20. Indeed, since the District Court found that the Plaintiffs did not have any substantive rights under the PMPA, they could not have suffered any damages relating thereto.

It should be noted that, prior to the hearing, Lehigh moved to preclude the Plaintiffs from offering any evidence whatsoever with regard to any alleged damages arguing that doing so was improper because: (1) the District Court had already: (a) dismissed the Plaintiffs' claims that their franchises were non-trial franchises; (b) dismissed Plaintiffs' claims that the franchises were unlawfully terminated under the PMPA; (c) found that the Plaintiffs were not entitled to the termination-related rights of full PMPA franchises; and (2) 15 U.S.C. §2805 only entitled franchisees to recover damages for violations of 15 U.S.C. §§2802, 2803 and 2807 and the District Court did not find a violation of any of those provisions. The District Court denied Lehigh's Motion. *See* Appendix C-5.

Lehigh appealed the District Court's award of damages to the United States Court of Appeals for the Second Circuit. The Court of Appeals had jurisdiction over that appeal pursuant to 28 U.S.C.

§1291 as the appeal was from a final Judgment issued in this matter initially on September 30, 2011, which was amended on October 14, 2011, that disposed of all of the parties' claims. The Notice of Appeal was filed on October 25, 2011. Accordingly, the appeal was timely.

The appeal was heard by a panel of Circuit Judges for the United States Court of Appeals for the Second Circuit comprised of Honorable John M. Walker, Jr., Honorable José A. Cabranes and Honorable Richard C. Wesley with the Opinion written by Honorable Cabranes issued on February 20, 2013. *See* Appendix A. The same day, the Second Circuit issued a Judgment affirming the Amended Judgment of the District Court for the Northern District of New York and remanding the matter for an adjudication of appellate attorneys' fees. *See* Appendix F.

Lehigh then filed a Petition for rehearing or, in the alternative, for rehearing *en banc*, which was denied on April 19, 2013 (*see* Appendix H) and a Mandate issued on April 26, 2013. *See* Appendix I. Lehigh moved for a recall of the Mandate and for a stay of the Mandate pending resolution of its Petition for Writ of Certiorari, which was denied on May 14, 2013 without prejudice to pursue the matter before the Circuit Court. *See* Appendix J.

Lehigh now petitions this Honorable Court for a writ of certiorari.

## REASONS FOR ALLOWANCE OF THE WRIT

The central issue presented for review in this case is whether it was proper for the District Court to award damages, including compensatory and punitive damages, for a violation of the notice requirements of the PMPA (15 U.S.C. §2804) pursuant to the enforcement provisions of 15 U.S.C. §2805 when: (1) the District Court dismissed Plaintiffs' claim that their franchises were non-trial franchises; (2) the District Court dismissed Plaintiffs' claim that they were unlawfully terminated under the PMPA; and (3) 15 U.S.C. §2805 specifically states that such damages are only recoverable for violations of 15 U.S.C. §§2802, 2803 and 2807.

In other words, the issue is whether a franchisee may recover monetary damages pursuant to the PMPA when the franchisor violates the technical, notice requirements of the PMPA but does not violate the substantive rights of the franchisee because there were grounds for termination.

In its Opinion, the Second Circuit found that Lehigh's argument was "contradicted by the plain reading of the statute and by controlling precedent." See Appendix A-12. More specifically, the Second Circuit found that:

"Indeed, although § 2805 does not specifically identify § 2804 in the list of sections giving rise to a right of action, it does provide a private right of action to enforce § 2802, *which explicitly incorporates § 2804's notice requirements* by providing that a franchisor may only terminate a franchise if 'the notification requirements of section 2804 of this title are met.' *Id.* § 2802(b)(1)(A). Hence, the PMPA provides a right

of action when a franchisor fails to comply with the notification requirements prior to terminating a franchise because such a failure amounts to a violation of § 2802.” February 20, 2013 Opinion, pp. 8-9 (emphasis in original) (footnote omitted).

The Second Circuit continued:

“We previously have said as much in *Ceraso v. Motiva Enterprises, LLC*, 326 F.3d 303, 314 (2d Cir. 2003) (‘In order to effect a valid termination, the franchisor must give the franchisee written notice of termination....’), as has the Supreme Court, in the nonrenewal context, *Mac’s Shell Serv.*, 130 S. Ct. at 1263 n. 12 (noting that if a franchisor ‘fail[s] to renew a franchise relationship *without* providing the statutorily required notice....a franchisee would...have a surefire claim for unlawful nonrenewal’ (emphasis in original))...” See Appendix A-12 to A-13.

However, that the notice requirements of §2804 are elements of Sections 2802 and 2803, does not, in and of itself resolve the issue of whether damages are permitted for such a violation. Indeed, in reaching the conclusion that it did, it is respectfully submitted that the Second Circuit misconstrued *Mac’s Shell Service, Inc.*, 559 U.S. 175 (2010), and misapprehended and overlooked: (1) the fact that Congress specifically separated the technical notice requirements of Section 2804 from the substantive requirements of Sections 2802 and 2803; and (2) the fact that, under the PMPA, specifically excluded from the term “failure” is “any failure which is only technical or unimportant to the franchise relationship.” 15 U.S.C. §2801(13).

Indeed, the Second Circuit's Opinion in this case has significantly broadened the scope of the PMPA and has and will continue to lead to unintended and incongruous results with respect to an issue of critical importance to petroleum refiners and distributors which could dissuade refiners and distributors from entering into franchise relationships and, ultimately, undermine the purpose of the PMPA, to ensure the availability of motor fuels to motorists throughout the nation.

Pursuant to Rule 10(c) of the Rules of the Supreme Court of the United States, "A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:"

"[A] state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

As discussed in detail below, it is respectfully submitted that this Honorable Court should grant Lehigh's Petition for writ of certiorari review.

## I. The Second Circuit Misconstrued this Court's Decision in *Mac's Shell Service, Inc.*

In rendering its February 20, 2013 Opinion, it is respectfully submitted that the Second Circuit misconstrued this Court's holding in *Mac's Shell Service, Inc.* As described above, in *Mac's Shell Service, Inc.*, this Court noted in a footnote that, "It is possible, of course, that a franchisor could fail to renew a franchise relationship without providing the statutorily required notice. But in that circumstance, a franchisee would not only have a surefire claim for unlawful nonrenewal..." 559 U.S. at 192, n.12.

However, the Second Circuit's citation to that one sentence in *Mac's Shell Service, Inc.* ignored the entire preceding paragraph which stated, in pertinent part, that, "A franchisee presented with 'unlawful and coercive' terms can simply reject those terms and, if the franchisor pursues nonrenewal, seek a preliminary injunction under the Act once the franchisee receives notice of nonrenewal." *Id.* In other words, this Court's statement that a hypothetical franchisee would have a claim for unlawful nonrenewal if it was not provided with proper notice was premised on the underlying assumption that there was a valid *substantive* reason to challenge the nonrenewal.

Indeed, while this Court stated that the claim for nonrenewal would be pursuant to 15 U.S.C. §2802(b)(1)(A), it also stated that the franchisee could seek a preliminary injunction for the duration of the litigation. *Mac's Shell Service, Inc.*, 559 U.S. at 192, n.12. This Court did not specifically address the question of whether the franchisee would be able to prevail on a claim for improper notice if it was later

determined that there was only a violation of 15 U.S.C. §2804 and not §2803. *Id.*

In actuality, this Court's ruling in *Mac's Shell Service, Inc.* supports the argument that Congress did not intend for there to be a private right of action for a notice violation when there are no substantive grounds to challenge the nonrenewal or termination and, accordingly, the lack of notice in and of itself does not prejudice the franchisee's ultimate rights.

Indeed, as explained by this Court in *Mac's Shell Service, Inc.*, "When given its ordinary meaning, the text of the PMPA prohibits only that franchisor conduct that has the effect of ending a franchise" and "allowing franchisees to obtain PMPA relief for conduct that does not force an end to a franchise would extend the reach of the Act much further than its text and structure suggest." 559 U.S. at 182, 185. Even if one were to assume that the notice given Plaintiffs was insufficient, that lack of notice certainly did not have the effect of ending their franchises as required by this Court in *Mac's Shell Service, Inc.*

As this Court explained:

"Adopting such a broad reading of the PMPA also would have serious implications for run of the mill franchise disputes. The Act *requires* courts to award attorney's fees and expert witness fees in any case in which a plaintiff recovers more than nominal damages. The Act also permits punitive damages, a remedy ordinarily not available in breach of contract actions. Accepting dealers' reading of the statute, therefore, would turn everyday contract disputes

into high-stakes affairs.” *Id.* at 186, n.7 (internal citations omitted).

Based upon the foregoing, it is respectfully submitted that the Second Circuit’s February 20, 2013 Opinion is inconsistent with the Supreme Court’s holding in *Mac’s Shell Service, Inc.*, in that it places form over substance and would permit dealers to recover inordinate sums for litigation-related expenses even where there had been no violation of their substantive rights under the PMPA.

Indeed, for example, in this case, it was determined that Brownson Enterprises actually owed Lehigh \$33,458.34 yet it was awarded a total of \$333,689.40 (before adding in post-judgment interest) jointly with its co-Plaintiff in attorneys’ fees, expert witness fees, paralegal fees and costs. Such a result was clearly not intended by Congress.

Such an interpretation and application of the PMPA is consistent with the express statutory language as well as the intended statutory scheme of the PMPA, to wit: a franchisee may maintain a civil action and recover damages where the franchisor’s conduct improperly extinguishes a franchise relationship.

## II. The Court Overlooked and Misapprehended the Statutory Scheme and Intent of the PMPA.

15 U.S.C. §2802(b)(1) provides that, “Any franchisor may terminate any franchise...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).”

Section 2803 was drafted to parallel Section 2802 but governs non-renewals of trial franchise relationships. It provides that, “If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship...under any trial franchise, at the conclusion of the initial term of such trial franchise...” 15 U.S.C. §2803(c)(1).

Thus, instead of specifically including any notice requirements in Sections 2802 and 2803, Congress specifically elected to separate those notice requirements and provide for them in Section 2804.

In doing so, it is respectfully submitted that Congress made the determination that the technical notice requirements should be treated differently than the substantive requirements. Indeed, this Congressional determination is supported by the definition of the term “failure” which “does not include...any failure which is only technical or unimportant to the franchise relationship.” §2801(13). In other words, “failure” means something substantive and important to the franchise relationship, i.e., a franchisor’s termination or

non-renewal of a franchise without a Congressionally sanctioned basis.

Indeed, 15 U.S.C. §2805(d) only allows for the recovery of damages if a franchisee prevails in an action under Section 2805(a). However, when Congress gave franchisee's the right to maintain a civil action under 15 U.S.C. §2805(a), it made the rational determination that such a civil action may only be maintained where there has been a "failure" by the franchisor to comply with the substantive provisions of Sections 2802, 2803 and 2807. *See* 15 U.S.C. 2805(a) (providing that, "If a franchisor *fails* to comply with the requirements of section 2802, 2803 or 2807 of this title, the franchisee may maintain a civil action against such franchisor.") (emphasis added). 15 U.S.C. §2805 is clear. Specifically excluded from subsection (a) of Section 2805 is a violation of 15 U.S.C. §2804.<sup>1</sup>

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<sup>1</sup> It must be noted that, when the PMPA was first enacted in 1978, Congress drafted it so that 15 U.S.C. §§2805(a) and (d) (identified as Section 105 at that time) only permitted a private right of action and damages for violations of 15 U.S.C. §§2802 and 2803 (identified as Sections 102 and 103 at that time). *See* Petroleum Marketing Practices Act of 1978, H.R. 130, 95th Cong. (1978) (enacted). It did not include 15 U.S.C. §2804 (identified as Section 104 at that time). *Id.* Congress has amended the PMPA twice since it was originally enacted, once in 1994 and again in 2007. *See* Petroleum Marketing Practices Act Amendments of 1994, H.R. 1520, 103rd Cong. (1994) (enacted); Energy Independence and Security Act of 2007, H.R. 6, 110th Cong., 121 Stat. 1492, 1540 (2007) (enacted). At neither time did Congress choose to amend 15 U.S.C. §2805(a) to include a violation of 15 U.S.C. §2804 even though, in 2007, Congress specifically amended 15 U.S.C. §2805 to add a private right of action and to make damages available for a violation of §2807. Energy Independence and Security Act of 2007, H.R. 6, 110th Cong., 121 Stat. 1492, 1540 (2007) (enacted).

As this Honorable Court held in *Barnhart v. Sigmon Coal Co.*, it is a general principle of statutory construction that when “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” 534 U.S. 438, 452 (2002) (internal citations omitted).

Accordingly, it is respectfully submitted that Congress’ definition of the term “failure” coupled with the Congressional determination to separate the technical notice provisions from the substantive provisions together with Congress’ specific exclusion of Section 2804 from the list of grounds for maintaining a civil action in Section 2805(1) evidences Congress’ determination that the mere violation of the technical notice requirements in Section 2804 without a violation of the substantive provisions of either Sections 2802 or 2803 does not have the effect of “ending a franchise,” as stated by this Court in *Mac’s Shell Service, Inc.* and would not constitute the basis for a civil action or resulting damages.<sup>2</sup> See *Walters v. Industrial and Commercial*

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<sup>2</sup> Indeed, this Court has held that, “In all statutory construction cases, the court begins with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.” *Barnhart*, 534 U.S. at 450. Indeed, as this Court has explained:

“[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute

*Bank of China, Ltd.*, 651 F.3d 280, 294 (2d Cir. 2011) (reiterating the familiar canon of construction of “expressio unius est exclusio alterius” which is, “The mention of one thing implies the exclusion of the other.”). *See also Jane Doe v. Bin Laden*, 2011 U.S. App. LEXIS 22516, \*17 (2d Cir. Nov. 7, 2011).

Simply put, if Congress had intended a franchisee to have the right to maintain a civil action solely based upon a technical violation of the notice provisions, it could have, and would have, added the notice provisions in Section 2804 to both Sections 2802 and 2803 or it could have added Section 2804 to the list in Section 2805. That it chose not to was within its legislative authority and it is not the province of the District Court or the Second Circuit to second guess Congress.

Such a strict reading of the language of the PMPA is consistent with its intent, purpose and structure. Indeed, it has been held that, “The purpose of the Act’s franchise termination notice requirements is to allow franchisee to determine his rights under Act.” *Midwest Petroleum Co. v. Am. Petrofina, Inc.*, 603 F. Supp. 1099, 1123 (E.D. Mo. 1985).

As the Second Circuit noted in its February 20, 2013 Opinion, Lehigh terminated its franchises with Jimico Enterprises and Brownson Enterprises between July 28, 2006 and April 1, 2007. *See* Appendix A-5 to A-6. On May 31, 2007, the Plaintiffs filed this suit claiming that Lehigh had violated the

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are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’ *Connecticut National Bank v. Germain*, 503 U.S. 249, 254-55 (1992) (internal citations omitted).

PMPA when it terminated their franchises. See Appendix A-6.

However, as is described in detail above, the District Court found that Plaintiffs substantive rights had not been violated but, nevertheless, granted summary judgment in favor of the Plaintiffs based solely upon the limited finding that Lehigh did not give adequate notice of the terminations under the PMPA. See Appendix A-6. In so finding, the District Court found that the only prejudice the Plaintiffs sustained due to the inadequate notice was as a result of their inability to operate their stations during the ninety (90) day period notice period and not as a result of their inability to enforce their PMPA rights. See Appendix C-6 to C-20.

As this Court has held, “when given its ordinary meaning, the Act is violated only if an agreement for the use of a trademark, purchase of motor fuel, or lease of a premises is ‘put [to] an end’ or ‘annul[ed] or destroy[ed].’ Conduct that does not force an end to the franchise, in contrast, is not prohibited by the Act’s plain terms.” *Mac’s Shell Service, Inc.*, 559 U.S. at 183. Once again, it is clear that receiving less than ninety (90) days’ notice of the terminations did not, in and of itself, “annul or destroy” the Plaintiffs’ franchises.

In addition, as stated above, the limited monetary damages the District Court found the Plaintiffs had suffered relating to their inability to operate their stations during the ninety (90) day notice period is not the type of prejudice that the notice provisions of the PMPA were meant to prevent. Rather, once again, “The purpose of the Act’s franchise termination notice requirements is to allow

franchisee to determine his rights under the Act." *Midwest Petroleum Co.*, 603 F. Supp. at 1123. As described in detail above, in this case, it was determined that the Plaintiffs did not have any substantive rights under the PMPA. Indeed, the District Court specifically dismissed the "Plaintiffs' claim that their franchises were non-trial franchises that were unlawfully terminated under the PMPA..." See Appendix B-27.

It is respectfully submitted that, in a case like this, where the franchisees had no substantive rights to enforce, a violation of the notice requirements of Section 2804 could not be deemed anything other than technical in nature. Since §2805 provides for a private right of action only where a franchisor "fails" to comply with §§2802, 2803 or 2807 and the term "failure" does not include technical failures, the Plaintiffs herein were not entitled to maintain a civil action in this case and were not entitled to recover damages.

### **III. The Issue of Retail Petroleum Marketing is One of Exceptional, National Consumer Importance.**

As discussed in detail above, the Second Circuit's Opinion in this case has significantly broadened the scope of the PMPA and has and will continue to lead to unintended and incongruous results with respect to an issue of critical importance to petroleum refiners and distributors which could dissuade refiners and distributors from entering into franchise relationships and, ultimately, undermine the purpose of the PMPA, to ensure the availability of motor fuels to motorists throughout the nation.

As noted in the report of the Committee on Energy and Natural Resources for the United States Senate at the time the PMPA was enacted, "In recent years the friction between franchisors and franchisees on marketing of motor fuels has become so great that it has threatened adverse impacts upon the nation's motor fuel distribution and marketing system. Numerous states have initiated various legislative actions to address these petroleum product franchising problems...." S. REP. No. 95-731, at 877 (1978).<sup>3</sup>

Indeed, in Senate Report 731, it was noted that prior to the Oil Embargo of 1973, there was a "glut of gasoline [that] insured a ready supply of low-cost product and a proliferation of retail establishments designed to move fuel to the consumer quickly. Growth in income and automobile ownership insured that demand for the product would keep pace with the ability to supply it." S. REP. No. 95-731, at 880. However, starting even before 1973, there was a fundamental "change in the system" caused by "the disappearance of surplus, low-cost domestic petroleum." S. REP. No. 95-731, at 879.

Accordingly, while significant "refining profits [had] compensated for low profitability in [retail] marketing" in the past, it was anticipated that there would be "increasing competition among refiners, distributors and retailers for the revenue available from the sale of the gasoline and diesel fuel product in domestic refineries or imported from abroad" and "increase[d] pressure to make petroleum marketing in general, and motor fuel marketing in particular,

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<sup>3</sup> Senate Report 731 was reported entirely in capitals. For purposes of this Petition, capitals are not used.

yield far more competitive returns that they [had] in the past." S. REP. No. 95-731, at 880.

"In the struggle among refiners, distributors and retailers for profits from the distribution of motor fuel," there was a concern that there would be an unequal bargaining power between the "almost 200,000 independent retail motor fuel dealers" and the refiners and large distributors that were thought to be "larger, more diversified and more sophisticated economic units" that "possessed by far the most power to influence the outcome..." S. REP. No. 95-731, at 880. Indeed, it was noted in Senate Report 731 that "major refiner/marketers increased their share of the market from 4.5 percent in 1972 to 5 percent in 1974 and to 8.5 percent in 1976" which showed "an accelerated trend toward penetration of the retail market by major refiner/marketers; up 70 percent since 1974 while the increase was only minimal from 1972 to 1974." S. REP. No. 95-731, at 882.

Accordingly, at that time, "There [was] a need for federal legislation to insure that a retail sector at least as strong as" it was then would continue "in existence after the coming evolution in the structure of the market [took] place." S. REP. No. 95-731, at 884. The PMPA was, thus, enacted for the protection of the independent franchisees to preserve the "vigorous, diverse and independent retail motor fuel marketing...which, if achieved," was intended to "result in a long-run, continuing benefits [sic] to the consumer" (S. REP. No. 95-731, at 883-84) and "to prevent deterioration of competition in gasoline marketing." S. REP. No. 95-731, at 910.

However, inconsistent with the intended outcome of the PMPA, the major oil refiners have been exiting the domestic retail gasoline market. In 2008, Exxon Mobil Corporation (“ExxonMobil”) announced that it was “getting out of the domestic retail gasoline business.” Russell Gold, *Out of Gas: Exxon to Exit Low-Profit Retail Pumps*, THE WALL STREET JOURNAL, June 13, 2008. “Exxon...[was] following other oil companies that ha[d] been unloading low-profit retail gasoline businesses in recent years.” *Id.* At that time, BP also intended to sell off “its company-owned gasoline stations” and ConocoPhillips had also been “shedding its stations.” *Id.*

Indeed, “Retail gasoline marketing profits have been dropping since 1999, and the sale by Exxon, BP and other suggests that some companies believe there won’t be a rebound anytime soon.” *Id.* While “gas prices [had] rocketed,” “refiners and retailers [had] been unable to pass on the full increase in oil prices to customers, in part because gasoline demand [wa]s weakening as drivers cut back on driving to save money.” *Id.* While readily available supplies of gasoline are crucial to the way of life and success of commerce in rural parts of the nation,” rural states and rural areas are the most vulnerable to market withdrawal by major refinery suppliers...” S. REP. No. 95-731, at 886.

Simply stated, not only is the Second Circuit’s Opinion inconsistent with this Court’s prior Opinion in *Mac’s Shell Service, Inc.* as well as the purpose and intent of the PMPA, the Opinion will likely have the effect of hindering the intent of the PMPA. Indeed, once again, it should be noted that, while the intent of the PMPA was to protect franchisees, the

purpose of doing was to promote competition in order to ensure that consumers would have access to motor fuels.

An overbroad application of the PMPA resulting in, perhaps, too much competition amongst the dealers and a case where a franchisor could potentially be required to pay close to half a million dollars in fees, costs and disbursements<sup>4</sup> in a case where, not only were there grounds to terminate the dealers, but one of them actually owed the franchisor a significant sum of money, will not foster competition and growth within the supply-side of the industry but, rather, will only encourage distributors, just like refiners, to exit from the retail sale business which could hinder the supply of motor fuel to consumers and commerce as well.

Indeed, it should be noted that Senate Report 731 specifically stated that:

“Legislation in this subject area requires recognition of the legitimate needs of a franchisor to be able to terminate a franchise or not renew a franchise relationship based upon certain actions of the franchisee.... Particularly important is that legislation dealing with this subject recognize the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and

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<sup>4</sup> Lehigh has already paid a total of \$333,689.40 (before adding in post-judgment interest) in attorneys' fees, expert witness fees, paralegal fees and costs in this matter and the Plaintiffs seek an additional \$194,347.60 for appellate and post-judgment fees, costs and disbursements.

consumer preferences.” S. REP. No. 95-731, at 877.

Based upon all of the foregoing, it is respectfully submitting that the issue raised in this Petition is one of exceptional importance to consumers and the commerce of this nation.

#### **IV. This Case Is An Ideal Vehicle For Review.**

This case squarely presents the issue of whether a franchisee may maintain a civil action and/or recover monetary damages for a violation of 15 U.S.C. §2804, setting out the notice requirements, when the franchisor was not found to have violated any other provision of the PMPA. Indeed, the issue could not be simpler and the case presents an ideal fact pattern since the franchisees did not appeal the District Court’s determination that their substantive PMPA rights had not been violated.

### CONCLUSION

Simply stated, the Second Circuit's interpretation of the PMPA is one that is inconsistent with this Court's prior precedent as well as the statutory language, intent and purpose of the PMPA and may negatively impact the ability of consumers to access gasoline which is an issue of exceptional, national importance. Accordingly, it is respectfully submitted that Lehigh's Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit and overturn that Opinion should be granted and this Honorable Court should overturn that Opinion.

Dated: Armonk, New York  
July 16, 2013

Respectfully submitted,

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