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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COSTCO WHOLESALE CORPORATION, a
Washington corporation,

Plaintiff,

v.

ROGER HOEN, et al.,

Defendants, and

WASHINGTON BEER AND WINE
WHOLESALE ASSOCIATION,

Intervenor Defendant.

Case No. C04-360 MJP

CORRECTED ORDER ON
PLAINTIFF'S MOTION FOR
ATTORNEYS' FEES

This matter comes before the Court on a motion for attorneys' fees brought by Plaintiff Costco Wholesale Corporation. (Dkt. No. 245.) Having reviewed the motion, Defendants' responses, (Dkt. Nos. 247 & 249), Plaintiff's reply, (Dkt. No. 251), all documents attached in support, and the balance of the record, and having determined that oral argument from the parties is not necessary to assist the Court in its decision, the Court hereby GRANTS the motion in part and DENIES the motion in part. The Court's reasoning is set forth below.

Background

The state of Washington imposed a system of regulations on the sale and distribution of beer and wine. Costco, a national chain of warehouse-style membership wholesalers, challenged nine of these regulations in this Court. The challenged regulations included a uniform pricing rule, a price posting requirement, a “hold” requirement (requiring beer and wine manufacturers and distributors to hold their posted prices for at least thirty days), a minimum mark-up provision, a ban on volume discounts, a ban on selling beer or wine on credit, a “delivered price” requirement (requiring beer and wine distributors to charge the same price regardless of whether they or the retailers handle delivery costs), a ban on central warehousing, and a ban on retailers selling beer and wine to other retailers. Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 883–84 (9th Cir. 2008). Costco also “challenged Washington’s policy of allowing only in-state beer and wine producers to sell their products directly to retailers.” Id. at 882 n.5.

Costco brought suit against Washington’s Liquor Control Board and several other state officials. The Washington Beer and Wine Wholesalers Association (“WBWWA”) intervened as a defendant shortly after the filing of Costco’s complaint. (See Dkt. No. 17.) Count I of the complaint asserted that the challenged regulations violated the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. (Dkt. No. 1 at ¶¶ 18–19.) Count II asserted that Washington’s policy of preferential treatment of in-state breweries and wineries violated the Commerce Clause of the United States Constitution. (Id. at ¶¶ 20–21.) Count III asserted that the statutory provisions challenged in Counts I and II gave rise to a claim under 42 U.S.C. § 1983. (Id. at ¶¶ 22–23.) Count IV asserted that those same provisions violated the Washington Constitution. (Id. at ¶¶ 24–25.) Costco sought declaratory and injunctive relief. (Id. at 7.)

This Court ruled largely in favor of Costco. (Dkt. No. 162.) The Court granted summary judgment in favor of Costco on Count II and the related § 1983 claim under Count III. (Dkt. No. 113); see Costco Wholesale Corp. v. Hoen, 538 F.3d 1128, 1131 (9th Cir. 2008). The Court stayed the entry of judgment to permit the Washington Legislature to correct the problem

1 through legislation. (Dkt. No. 113 at 2.) After a bench trial, the Court ruled in favor of Costco
2 regarding eight of the nine regulations challenged in Count I, holding that these eight were
3 invalid under the Sherman Act. (Dkt. No. 162 at ¶ 1.) The Court ruled in Defendants' favor on
4 Count IV, the state constitutional claim, without prejudice to Costco's refiling in state court. (Id.
5 at 3.)

6 Defendants appealed the Court's rulings on Count I holding eight of the challenged
7 regulations invalid. The Ninth Circuit held that seven of the nine challenged regulations were
8 valid and that the Sherman Act preempted only two of the regulations – the “post” and “hold”
9 requirements. See Costco v. Maleng, 522 F.3d 874 (9th Cir. 2008).

10 While the appeal was pending, this Court adjudicated the issue of attorney fees and costs.
11 The parties stipulated as to amount, subject to certain provisions, but disagreed as to whether
12 WBWWA should be held jointly and severally liable for fees and costs along with the other
13 Defendants. (Dkt. No. 223 at 1.) This Court found that WBWWA was not jointly and severally
14 liable for fees and costs, and Costco appealed that decision. (Id. at 2.) The Ninth Circuit upheld
15 this Court's determination that WBWWA was not jointly and severally liable for fees sought
16 under 42 U.S.C. § 1988, but remanded to this Court the question of joint and several liability for
17 fees sought under 15 U.S.C. § 26. See Costco v. Hoen, 538 F.3d 1128 (9th Cir. 2008).

18 Returning to this Court, Costco seeks the unpaid balance of the previously stipulated fee
19 amount in full, with additional fees for subsequent litigation. (Dkt. No. 245 at 7.) This amount
20 totals \$1,732,911.00 in fees and \$56,923.20 in costs. (Id.) Defendants argue that Costco is not
21 entitled to fees. (Dkt. No. 249 at 4.) Alternatively, Defendants contend that Costco is entitled to
22 far less than the amount it seeks because the previously-stipulated amount reflected Costco's
23 success in this Court on rulings later reversed by the Ninth Circuit. (Id.)

24 Discussion

25 I. Fees for Antitrust Claims

26 15 U.S.C. § 26 enables injunctive relief for a violation of the antitrust laws. It further
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1 provides that, “[i]n any action under this section in which the plaintiff substantially prevails, the
2 court shall award the cost of suit, including a reasonable attorney’s fee, to such plaintiff.” Id.
3 Because Costco “substantially prevailed” on its antitrust action claims, it is eligible for fees
4 under 15 U.S.C. § 26.¹

5 Defendants argue that Costco did not prevail substantially in this action because the
6 Ninth Circuit affirmed the legality of seven of the nine trade restraints that Costco challenged.
7 Defendants further assert that the two restraints Costco challenged successfully were ancillary to
8 Costco’s purpose in bringing suit. However, under the “prevailing party” analysis, “[a] litigant
9 need not prevail on every issue, or even on the ‘central issue’ in the case, to be considered the
10 prevailing party.” Stivers v. Pierce, 71 F.3d 732, 751 (9th Cir. 1995). The Supreme Court has
11 established that, to be a prevailing party, a litigant need only “succeed on any significant issue in
12 litigation which achieves some of the benefit the parties sought in bringing suit.” Hensley v.
13 Eckerhart, 461 U.S. 424, 433 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278–279 (1st
14 Cir. 1978)). A “significant issue” is one that is not “purely technical or *de minimis*[. . . .”
15 Texas State Teachers Ass’n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989). Beyond that
16 determination, whether a given issue is “central” or “ancillary” to a party’s case is irrelevant to
17 the party’s eligibility for fees. Id. at 791–92.

18 Costco successfully challenged Washington’s “post” and “hold” regulations, ultimately
19 bringing about a change in state law. (Dkt. No. 253.) Costco has “modif[ied] the defendant’s
20 behavior in a way that directly benefits the plaintiff.” Farrar v. Hobby, 506 U.S. 103, 111–12
21 (1992). Although Costco did not obtain the full benefit it sought, it “succeed[ed] on [a]
22 significant issue[,]” Hensley, 461 U.S. at 433, and this success was neither “purely technical”
23 nor “*de minimis*,” Texas State Teachers Ass’n, 489 U.S. at 792. Costco is therefore eligible for
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25 ¹Because the Ninth Circuit has “cho[sen] to apply the standard for determining a ‘prevailing
26 party’ developed under section 1988 to awards under [15 U.S.C. § 26],” Southwest Marine, Inc. v.
27 Campbell Indus., 732 F.2d 744, 746–47 (9th Cir. 1984), the Court’s discussion of prevailing party
status employs the analysis applicable to fee awards under 42 U.S.C. § 1988.

1 attorney fees under 15 U.S.C. § 26.

2 Having determined that Costco is a prevailing party entitled to fees, the Court must now
3 apply the lodestar method for determining the appropriate amount of the fee award. McCown v.
4 City of Fontana, No. 07-55896, 2009 WL 1098893, at *3–6 (9th Cir. Apr. 24, 2009).

5 Because Costco sought injunctive relief, the Court must keep in mind the extent to which
6 Costco’s lawsuit benefitted the public. Id. at *6 (counseling consideration of “whether the
7 plaintiff has affected a change in policy”). This consideration should work to encourage actions
8 by “private attorneys general,” without encouraging the accrual of excessive attorney fees that
9 parties justify with a thin sliver of public benefit. See Morales v. City of San Rafael, 96 F.3d
10 359, 367 (9th Cir. 1996) (“[T]he public benefit is not infinite, and what the lawyers do for their
11 actual client is an important measure of extent of success.” (internal quotation marks omitted)
12 (alterations omitted)).

13 Costco asserts that its various antitrust claims are interrelated and involve cross-cutting
14 issues, precluding easy assignment of attorney hours to each claim. (Dkt. No. 246 at ¶¶ 17–20.)
15 Where this is the case, a court should focus on the relative degree of the plaintiff’s success, as
16 measured against the full benefit plaintiffs sought. McCown, 2009 WL 1098893 at *4–5; see
17 also Hensley, 461 U.S. at 436 (finding that an award of fees for all hours spent on the litigation
18 in the face of only partial success may result in an award that is excessive). Although a strict
19 rule of proportionality, comparing successful claims to total claims, is not appropriate, the Court
20 will consider Costco’s partial success on its antitrust claims and reduce the fee as necessary to
21 reach a reasonable award. See McCown, 2009 WL 1098893 at *4–5.

22 Acknowledging the public benefit of Costco’s litigation and the interrelatedness of the
23 nine challenges comprising Costco’s antitrust claim, the Court grants Costco’s fees and costs but
24 applies a marginal time reduction in light of Costco’s partial success. The Court accepts
25 Costco’s representation, supported by evidence in the record, that 85% of the work done on
26 appeal and 93% of the work done in district court was necessary to litigate Costco’s challenge to
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1 the “post” and “hold” restraints. (Dkt. No. 245 at 16 (citing Burman Decl. ¶¶ 20-22).)
2 Therefore, the Court finds appropriate Costco’s proposed adjustment of a 15% marginal time
3 reduction for appellate merits and stay fees and a 7% marginal time reduction for District Court
4 merits and stay fees. (See *id.*) No reduction shall be applicable to the fees and costs relevant to
5 Costco’s fee request.

6 II. Issue of WBWWA’s Joint and Several Liability

7 This Court previously imposed attorneys’ fees pursuant to 15 U.S.C. § 26 and 42 U.S.C.
8 § 1988 on the State, but not on WBWWA. Costco appealed to the Ninth Circuit, seeking joint
9 and several liability for fees against WBWWA. The Ninth Circuit denied joint and several
10 liability for § 1988 fees and remanded the question of joint and several liability for § 26 fees to
11 this Court. On remand, Costco further argues that its litigation of the joint and several liability
12 fee dispute entitles it to additional fees. See *Bernardi v. Yeutter*, 951 F.2d 971, 976 (9th Cir.
13 1991) (“Fees may be awarded for work performed in successfully defending or challenging a
14 district court’s fee award.”).

15 As a preliminary matter, Costco is not entitled to its fees on appeal of the dispute over
16 § 1988 fees because it did not successfully challenge this Court’s § 1988 fee award. See *id.* The
17 Ninth Circuit rejected Costco’s arguments on WBWWA’s joint and several liability under §
18 1988 and affirmed this Court’s refusal to impose fees on WBWWA. *Costco v. Hoen*, 538 F.3d at
19 1136 (“[T]he district court appropriately declined to hold WBWWA liable under § 1988(b).”)

20 The Ninth Circuit did not resolve whether Costco had successfully challenged this
21 Court’s refusal to impose § 26 fees on WBWWA, finding that WBWWA’s joint and several
22 liability for § 26 fees turned on whether Costco had “substantially prevailed” on its antitrust
23 claims, and remanding that question to this Court. *Id.* As discussed above, Costco did
24 substantially prevail on its antitrust claims, therefore Costco is entitled to § 26 fees from
25 WBWWA for its antitrust claims – the fees Costco sought on appeal – as well as additional § 26
26 fees for its success in obtaining *those* fees.

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1 WBWWA argues that Costco had no need to seek fees from WBWWA because the State
2 had stipulated to full payment of awarded fees and suggests that Costco sought fees from
3 WBWWA to intimidate potential intervenors in future actions that might arise. (Dkt. No. 247 at
4 5–6.) Because Costco’s appeal of this Court’s refusal to impose § 26 fee liability on WBWWA
5 is clearly a “challeng[e to] a district court’s fee award” on which Costco ultimately prevailed, the
6 Court need not make guesses about Costco’s tactical purpose in seeking joint and several
7 liability. Bernardi, 951 F.2d at 976. Thus, the Court implements the practice of drawing “no
8 distinction, in calculating fees, between attorney hours spent on the merits and on the issue of
9 counsel fees.” Stanford Daily v. Zurcher, 64 F.R.D. 680, 683 (N.D. Cal. 1974).

10 III. Fees for Commerce Clause Appeal

11 Costco seeks around \$8,000 in fees for preparing an opposition to WBWWA’s
12 Commerce Clause appeal, which WBWWA withdrew early in the appellate process. (Dkt. No.
13 245 at 17.) Costco is correct in asserting that the issue of these fees was not decided by the
14 Ninth Circuit. (Dkt. No. 251 at 18.) Instead, applying the standard set forth in Independent
15 Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989), the Ninth Circuit simply upheld
16 this Court’s decision not to impose fees on WBWWA for its opposition to Costco’s Commerce
17 Clause claim in this Court. Costco v. Hoen, 538 F.3d at 1136 (“Because it was not an abuse of
18 discretion to find that WBWWA’s arguments were not frivolous, the district court appropriately
19 declined to hold WBWWA liable under § 1988(b).”).

20 The Zipes standard also applies to whether WBWWA is liable for Costco’s fees in
21 defending against WBWWA’s appeal of this Court’s decision on the Commerce Clause claim.
22 Under Zipes, fees should be imposed against an innocent intervenor only where the intervenor’s
23 action was “frivolous, unreasonable, or without foundation.” 491 U.S. at 761. The Court now
24 finds that WBWWA’s efforts to appeal this Court’s decision on Costco’s Commerce Clause
25 claim were not frivolous for the same reasons that the WBWWA’s defense of that claim in this
26 Court was not frivolous. As noted by the Ninth Circuit on appeal, the case law governing this
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1 Court's decision on the Commerce Clause claim, Granholm v. Heald, 544 U.S. 460 (2005),
2 included factual distinctions from this action, and was new authority on an issue that had not yet
3 been addressed by the Ninth Circuit. See Costco v. Hoen, 538 F.3d at 1136 ("We are
4 particularly reluctant to find a colorable argument frivolous when it has been advanced on a
5 novel issue.") Because WBWWA's efforts to appeal this Court's decision on Costco's
6 Commerce Clause claim were not frivolous, Costco is not entitled to attorneys' fees in defending
7 against those efforts.

8 IV. Post-Judgment Interest

9 Despite this Court's reduction of Costco's final fee award in light of the Ninth Circuit's
10 decision on appeal, Costco is entitled to post-judgment interest pursuant to 28 U.S.C. § 1961(a).
11 See In re Exxon Valdez, No. 04-35182, 2009 U.S. App. LEXIS 12713 (9th Cir. June 15, 2009)
12 (holding that a plaintiff receives post-judgment interest from the date of original entry of
13 judgment when the plaintiff's right to relief was "meaningfully ascertained" on that date).
14 Although the exact amount of Costco's fee award was not fixed at the time judgment was
15 entered, Costco's success on its challenges to the "post" and "hold" restraints secured its
16 entitlement to fees upon entry of judgment and interest runs from that date. See Friend v.
17 Kolodziejczak, 72 F.3d 1386, 1392 (9th Cir. 1995) (finding that interest runs from the date
18 judgment is entered even when the amount of fees is not fixed until a later date).

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Conclusion

As a substantially prevailing party, Costco is eligible for attorneys' fees on its antitrust claims and the Court awards fees with a marginal time reduction of 15% for appellate merits and stay fees and 7% for district court merits and stay fees, with no reduction applicable to fees related to the fee application. The Court also finds that WBWWA is jointly and severally liable for attorneys' fees pursuant to 15 U.S.C. § 26, and Costco is entitled to fees spent litigating the joint and several liability issue as to § 26 only. Finally, Costco is not entitled to fees spent in preparing to litigate its Commerce Clause arguments on appeal, but is entitled to post-judgment interest on its fee award. Costco is directed to submit a second revised proposed final judgment in accordance with these rulings within ten days of the date of this order.

The clerk is directed to send a copy of this order to all counsel of record.

Dated: June 23, 2009



Marsha J. Pechman
U.S. District Judge