

THE HONORABLE MARSHA PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COSTCO WHOLESALE CORPORATION, a
Washington corporation,

NO. CVO4-0360P

Plaintiff,

NOTICE OF CIVIL APPEAL

vs.

ROGER HOEN, VERA ING, AND MERRITT
LONG, in their official capacities as members
of the Washington State Liquor Control Board;

Defendants, and

WASHINGTON BEER AND WINE
WHOLESALE ASSOCIATION, a Washington
non-profit corporation,

Intervenor Defendant.

TO: CLERK OF THE ABOVE TITLED COURT;
AND TO: ALL PARTIES OF RECORD

Notice is hereby given that Washington Beer & Wine Wholesaler's Association,
Intervenor Defendant in the above entitled case, appeals the Order on Intervenor
Defendant's Motion to Amend Judgment (Dkt #266) filed on August 3, 2009, and any
Amended Final Judgment entered pursuant thereto, which Order amends the Final
Judgment (Dkt. #259) filed July 7, 2009, which incorporates the District Court's Corrected

NOTICE OF CIVIL APPEAL - 1 of 4
(CVO4-0360P)
[1448442 v3.doc]

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

1 Order on Plaintiff's Motion for Attorneys' Fees (Dkt. #257) filed June 23, 2009.
2 Intervenor Defendant's Representation Statement is attached to this Notice, as required
3 by Ninth Circuit Rule 3-2(b). The Civil Appeals Docketing Statement, required by Ninth
4 Circuit Rule 3-4, also accompanies this Notice of Appeal.

5 Dated this 18th day of August, 2009.
6

7 GORDON THOMAS HONEYWELL LLP

8
9 By 

10 John C. Guadnola, WSBA No. 08636
11 jguadnola@gth-law.com
12 Attorneys for WBWWA
13 1201 Pacific Avenue, Suite 2100
14 P.O. Box 1157
15 Tacoma, WA 98401
16 (253) 620-6500 phone
17 (253) 620-6565 facsimile
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REPRESENTATION STATEMENT

Pursuant to Ninth circuit Rule 3-2(b), Intervenor Defendant Washington Beer & Wine Wholesalers Association, identify the following parties to this action, and their counsel of record:

1. Appellant Washington Beer Wine Wholesalers Association:

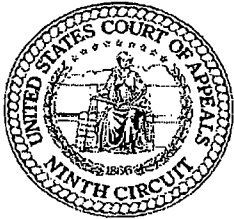
John C. Guadnola, WSBA 08636
jguadnola@gth-law.com
Gordon Thomas Honeywell LLP
1201 Pacific Avenue, Suite 2100
P.O. Box 1157
Tacoma, WA 98401
Telephone: (253) 620-6500
Facsimile: (253) 620-6565

2. Appellant/Appellee Roger Hoen, Vera Ing, Merritt Long, and WA State Liquor Control Board:

Jay D. Geck, WSBA No. 17916
JayG@atg.wa.gov
David M. Hankins, WSBA No. 19194
David.Hankins@atg.wa.gov
Attorney General of Washington
1125 Washington Street SE
P.O. box 40100
Olympia, WA 98504-0110
Telephone: (360) 586-2697
Facsimile: (360) 664-2963

3. Appellee Costco Wholesale Corporation:

David Burman, WSBA No. 10611
DBurman@perkinscoie.com
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000



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| USCA DOCKET # (IF KNOWN) |
| |

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CIVIL APPEALS DOCKETING STATEMENT**

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

| | | |
|--|---|---|
| TITLE IN FULL: COSTCO WHOLESALE CORPORATION, a Washington corporation, Plaintiff, vs ROGER HOEN, VERA ING and MERRITT LONG, in their official capacities as members of the WA State Liquor Control board, defendants and WASHINGTON BEER AND WINE WHOLESALERS ASSOCIATION | DISTRICT: Western | JUDGE: Marsha Pechman |
| | DISTRICT COURT NUMBER: CV04-360MJP | |
| | DATE NOTICE OF APPEAL FILED: <i>Aug. 18, 2009</i> | IS THIS A CROSS APPEAL? <input type="checkbox"/> YES |
| | IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY): 06-35538; 06-35542; 06-35543; 522 F.3d 874 & 538 F.3d 1128 (2008) | |
| BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW: See attached sheet | | |
| PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL: See attached sheet. | | |
| PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POST-JUDGMENT MOTIONS): Costco Wholesale Corp. v. Maleng, 522 F.3d 874 (9th Cir. 2008) | | |
| DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING: <input checked="" type="checkbox"/> Possibility of Settlement <input type="checkbox"/> Likelihood that intervening precedent will control outcome of appeal <input type="checkbox"/> Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify) <input type="checkbox"/> Any other information relevant to the inclusion of this case in the Mediation Program <input type="checkbox"/> Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges | | |

| LOWER COURT INFORMATION | | | |
|---|--|--|--|
| JURISDICTION | | DISTRICT COURT DISPOSITION | |
| FEDERAL | APPELLATE | TYPE OF JUDGMENT/ORDER APPEALED | RELIEF |
| <input checked="" type="checkbox"/> FEDERAL QUESTION <input type="checkbox"/> DIVERSITY <input type="checkbox"/> OTHER (SPECIFY): <div style="border: 1px solid black; height: 100px; width: 100%;"></div> | <input checked="" type="checkbox"/> FINAL DECISION OF DISTRICT COURT <input type="checkbox"/> INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT <input type="checkbox"/> INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY): <div style="border: 1px solid black; height: 30px; width: 100%;"></div> <input type="checkbox"/> OTHER (SPECIFY): <div style="border: 1px solid black; height: 30px; width: 100%;"></div> | <input type="checkbox"/> DEFAULT JUDGMENT <input type="checkbox"/> DISMISSAL/JURISDICTION <input type="checkbox"/> DISMISSAL/MERITS <input type="checkbox"/> SUMMARY JUDGMENT <input checked="" type="checkbox"/> JUDGMENT/COURT DECISION <input type="checkbox"/> JUDGMENT/JURY VERDICT <input type="checkbox"/> DECLARATORY JUDGMENT <input type="checkbox"/> JUDGMENT AS A MATTER OF LAW <input type="checkbox"/> OTHER (SPECIFY): <div style="border: 1px solid black; height: 30px; width: 100%;"></div> | <input type="checkbox"/> DAMAGES: SOUGHT \$ <input style="width: 50px;" type="text"/> AWARDED \$ <input style="width: 50px;" type="text"/> <input checked="" type="checkbox"/> INJUNCTIONS: <input type="checkbox"/> PRELIMINARY <input checked="" type="checkbox"/> PERMANENT <input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED <input checked="" type="checkbox"/> ATTORNEY FEES: SOUGHT \$ <input style="width: 50px;" type="text"/> 1,849,786.5 AWARDED \$ <input style="width: 50px;" type="text"/> 1,768,296 <input type="checkbox"/> PENDING <input checked="" type="checkbox"/> COSTS: \$ <input style="width: 50px;" type="text"/> 56,923 |

CERTIFICATION OF COUNSEL

I CERTIFY THAT:

1. COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED.
2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2).
3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.
4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.

/s/ John C. Guadnola

Signature

8/18/09

Date

COUNSEL WHO COMPLETED THIS FORM

| | | | |
|---------|-------------------------------|----------|----------------|
| NAME | John C. Guadnola, WSBA #08636 | | |
| FIRM | GORDON THOMAS HONEYWELL | | |
| ADDRESS | P.O. Box 1157 | | |
| CITY | Tacoma | STATE | WA |
| | | ZIP CODE | 98401 |
| E-MAIL | jguadnola@gth-law.com | | TELEPHONE |
| | | | (253) 620-6500 |
| FAX | (253) 620-6565 | | |

****THIS DOCUMENT SHOULD BE FILED IN DISTRICT COURT WITH THE NOTICE OF APPEAL. ****
****IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS.****

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

Costco sued state Liquor Control Board members regarding laws regulating distribution and sale of wine and beer. District court found 8 of 9 challenged restraints violated the Sherman Act. This court reversed in substantial part, upholding 7 of the 9 challenged restraints. On remand, the district court entered judgment against the Liquor Control Board members and intervenor-defendant Washington Beer & Wine Wholesalers Association ("WBWBA") for Costco's attorneys fees from trial (\$1,188,230); Costco's attorney fees from appeal (\$392,957); fees incurred by Costco in seeking fees (\$78,223 plus interest); and statutory costs. The District Court also entered judgment against WBWBA alone for Costco's fees on establishing joint and several liability at the trial court (\$9,304) and on appeal (\$99,751.50).

PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL:

Did the district court err in awarding Costco nearly all the attorneys' fees it incurred during trial and on appeal even though Costco failed on the great majority of its claims? Should the fee award have been reduced to reflect Costco's limited success?

Did the district court err in awarding Costco all of the fees it incurred litigating WBWBA's joint and several liability even though Costco was successful on only part of that litigation? Should the fee award against WBWBA have been reduced to reflect the district court's earlier rulings and Costco's limited success?

REPRESENTATION STATEMENT

Pursuant to Ninth circuit Rule 3-2(b), Intervenor Defendant Washington Beer & Wine Wholesalers Association, identify the following parties to this action, and their counsel of record:

1. Appellant Washington Beer Wine Wholesalers Association:
John C. Guadnola, WSBA 08636
jguadnola@gth-law.com
Gordon Thomas Honeywell LLP
1201 Pacific Avenue, Suite 2100
P.O. Box 1157
Tacoma, WA 98401
Telephone: (253) 620-6500
Facsimile: (253) 620-6565

2. Appellant/Appellee Roger Hoen, Vera Ing, Merritt Long, and WA State Liquor Control Board:
Jay D. Geck, WSBA No. 17916
JayG@atg.wa.gov
David M. Hankins, WSBA No. 19194
David.Hankins@atg.wa.gov
Attorney General of Washington
1125 Washington Street SE
P.O. box 40100
Olympia, WA 98504-0110
Telephone: (360) 586-2697
Facsimile: (360) 664-2963

3. Appellee Costco Wholesale Corporation:
David Burman, WSBA No. 10611
DBurman@perkinscoie.com
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000

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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

ORDER ON INTERVENOR
DEFENDANT'S MOTION TO
AMEND JUDGMENT

On July 8, 2009, Intervenor Defendant Washington Beer and Wine Wholesalers Association ("WBWWA") submitted objections to the final judgment in this action, which the Court construed as a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e). (Dkt. Nos. 260 & 261.) Having reviewed the motion, Plaintiff's response (Dkt. No. 262), WBWWA's reply (Dkt. No. 265), the reply filed by Defendant Washington State Liquor Control Board ("LCB") (Dkt. No. 264), and the balance of the record, the Court hereby GRANTS the motion in part and DENIES the motion in part. The final judgment entered on July 7, 2009 (Dkt. No. 259)

1 is hereby amended in accordance with the rulings below, and all parties shall bear their own fees
2 and costs on this motion.

3 **1. Injunctive Relief**

4 WBWWA first objects that the injunctive relief granted by this Court in the final
5 judgment dated July 7, 2009 is overly broad. In the final judgment, the Court granted injunctive
6 relief on Costco's commerce clause claim, stating "LCB defendants, their officers, agents,
7 servants, employees, and attorneys, and other persons who are in active concert or participation
8 with them, are enjoined from discriminating in favor of in-state producers of wine and beer over
9 out-of-state producers." (Dkt. No. 259 at 2.) To conform with this Court's findings of fact and
10 conclusions of law, the Court hereby amends the final judgment such that the above-quoted
11 clause relates to the sale of wine and beer to retailers. (See Dkt. No. 162.) The amended final
12 judgment shall read as follows:

13 2. Judgment is also entered in Costco's favor on Costco's Second Claim
14 (Commerce Clause) and the related portion of Costco's Third Claim. LCB
15 defendants, their officers, agents, servants, employees, and attorneys, and other
16 persons who are in active concert or participation with them, are enjoined from
discriminating in favor of in-state producers of wine and beer over out-of-state
producers in selling to retailers.

17 WBWWA's motion to amend this portion of the final judgment is GRANTED.

18 **2. Attorneys' Fee Award**

19 WBWWA also objects to the fee award contained in the final judgment, arguing that
20 Plaintiff must not be awarded any fees incurred litigating WBWWA's joint and several liability
21 on the commerce clause claim. (Dkt. No. 265 at 3.) In its order on Plaintiff's motion for
22 attorneys' fees, this Court found that Costco was "not entitled to its fees on appeal of the dispute
23 over [commerce clause claim] fees" and that "Costco is entitled to fees spent litigating the joint
24 and several liability issues as to [the antitrust claim] only." (Dkt. No. 257 at 6, 9.) The final
25 judgment accords with these rulings in stating that "Costco is entitled to fees and recoverable
26 costs from WBWWA that Costco reasonably expended in the district and appellate court
27 establishing WBWWA's joint and several fee liability." (Dkt. No. 259 at 2.) It follows that

1 Costco is not entitled to fees and costs expended in the litigation that did not result in
2 establishing WBWWA's joint and several liability, namely fees incurred pursuing WBWWA's
3 joint and several liability on the commerce clause claim. Because the language in the final
4 judgment sufficiently reflects the Court's rulings on Costco's motion for fees, WBWWA's
5 motion on this issue is DENIED.

6 **Conclusion**

7 The Court grants WBWWA's motion in part and hereby amends the final judgment such
8 that the injunctive relief granted on Costco's commerce clause claim relates to discriminatory
9 activity involving the sale of wine or beer to retailers. The Court denies WBWWA's motion to
10 amend final judgment on Costco's fee award as the language of the judgment is in accord with
11 this Court's ruling on Costco's fee motion. All parties shall bear their own fees and costs on this
12 motion.

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

14 Dated: August 3, 2009

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16 Marsha J. Pechman

17 U.S. District Judge
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THE HONORABLE MARSHA J. PECHMAN

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.

No. C04-360P

FINAL JUDGMENT

Based upon the Findings of Fact and Conclusions of Law entered in this matter, the decisions of the Ninth Circuit, and the records and files herein, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. Judgment is entered in favor of plaintiff Costco Wholesale Corporation on Costco's First Claim (antitrust preemption) pursuant to Fed. R. Civ. P. 65(d) and 15 U.S.C. § 26. Defendants Washington State Liquor Control Board ("LCB defendants"), their officers, agents, servants, employees, and attorneys, and other persons who are in active concert or participation with them,

FINAL JUDGMENT (NO. CV04-0360P) – 1

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1 are enjoined from enforcing "Post and Hold" policies, statutes, regulations or schemes that require
2 manufacturers and distributors of beer and wine to post the prices of their products with the
3 Washington State Liquor Control Board and to "hold" those prices.
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7 2. Judgment is also entered in Costco's favor on Costco's Second Claim (Commerce
8 Clause) and the related portion of Costco's Third Claim. LCB defendants, their officers, agents,
9 servants, employees, and attorneys, and other persons who are in active concert or participation with
10 them, are enjoined from discriminating in favor of in-state producers of wine and beer over out-of-
11 state producers.
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17 3. Judgment is entered in defendants' favor on Costco's Fourth Claim, without prejudice
18 to Costco pursuing such claims in state court.
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21 4. As the Court ruled in the Corrected Order on Plaintiff's Motion for Attorney's Fees
22 dated June 23, 2009, Costco has substantially prevailed. (Dkt. 257 at 4-5, 9.) Costco is entitled to
23 fees and recoverable costs that Costco reasonably expended to obtain and preserve on appeal the
24 relief in paragraph 1 above, as well as fees and recoverable costs reasonably necessary to pursue fee
25 and cost recovery, jointly and severally, from LCB defendants and Intervenor-Defendant Washington
26 Beer and Wine Wholesaler's Association ("WBWWA"). The parties have resolved Costco's district
27 court fees and costs with respect to the relief in paragraph 2 above. Costco is not entitled to fees and
28 recoverable costs from WBWWA that Costco reasonably expended in responding to WBWWA's
29 appeal of the Judgment in paragraph 2 prior to WBWWA's voluntary dismissal of that appeal.
30 Costco is entitled to fees and recoverable costs from WBWWA that Costco reasonably expended in
31 the district and appellate court establishing WBWWA's joint and several fee liability.
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43 5. LCB defendants and WBWWA are jointly and severally liable to Costco for: a)
44 reasonable attorney's fees and non-statutory costs in the amount of \$1,188,230.31 and statutory costs
45 in the amount of \$56,923.20, plus interest at a rate of 5.07% from the date of the November 3, 2006,
46 Judgment until paid as provided by 28 U.S.C. § 1961; b) reasonable attorney's fees and non-statutory
47 costs in the amount of \$392,957.40, plus interest at a rate of 2.31% from January 29, 2008, until paid
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FINAL JUDGMENT (NO. CV04-0360P) - 2

1 as provided by 28 U.S.C. § 1961; and c) reasonable attorney's fees in the amount of \$78,233.00, plus
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3 interest at a rate of 0.51% from June 23, 2009, until paid as provided by 28 U.S.C. § 1961, for the
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5 effort on remand.

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7 6. WBWWA is solely liable to Costco for: a) reasonable attorney's fees in the amount of
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9 \$9,304.00, plus interest at a rate of 5.07% from November 3, 2006, until paid as provided by 28
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11 U.S.C. § 1961; and b) reasonable attorney's fees in the amount of \$99,571.50, plus interest at a rate of
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13 2.23% from August 15, 2008, until paid as provided by 28 U.S.C. § 1961.
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17 DATED: July 7, 2009
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20 /s/ Marsha J. Pechman
21 Marsha J. Pechman
22 United States District Judge
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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.

1 **Background**

2 The state of Washington imposed a system of regulations on the sale and distribution of
3 beer and wine. Costco, a national chain of warehouse-style membership wholesalers, challenged
4 nine of these regulations in this Court. The challenged regulations included a uniform pricing
5 rule, a price posting requirement, a “hold” requirement (requiring beer and wine manufacturers
6 and distributors to hold their posted prices for at least thirty days), a minimum mark-up
7 provision, a ban on volume discounts, a ban on selling beer or wine on credit, a “delivered price”
8 requirement (requiring beer and wine distributors to charge the same price regardless of whether
9 they or the retailers handle delivery costs), a ban on central warehousing, and a ban on retailers
10 selling beer and wine to other retailers. Costco Wholesale Corp. v. Maleng, 522 F.3d 874,
11 883–84 (9th Cir. 2008). Costco also “challenged Washington’s policy of allowing only in-state
12 beer and wine producers to sell their products directly to retailers.” Id. at 882 n.5.

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

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

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

1 Court's decision on the Commerce Clause claim, Granholt 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

Mitchell, Gina A.

From: ECF@wawd.uscourts.gov
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U.S. District Court

United States District Court for the Western District of Washington

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Case Number: 2:04-cv-360
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David J. Burman dburman@perkinscoie.com, docketsea@perkinscoie.com,
jmccluskey@perkinscoie.com

David Mark Hankins david.hankins@atg.wa.gov, revolyef@atg.wa.gov

Jay Douglas Geck JayG@atg.wa.gov, sgoolyef@atg.wa.gov

John C Guadnola jguadnola@gth-law.com, gmitchell@gth-law.com

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Mark Allen Maghie mmaghie@comcast.net

Martha P Lantz (Terminated) MarthaL1@atg.wa.gov, DianneE1@atg.wa.gov,
kathrynr1@atg.wa.gov, LaLOlyEF@atg.wa.gov

Michael D Sandler mike@sandlaw.com

Oma L LaMothe oma.lamothe@kingcounty.gov, jenny.chen@kingcounty.gov

Paul R Romain promain@teleport.com

Shylah Renee Alfonso salfonso@perkinscoie.com, docketsea@perkinscoie.com,
RKelly@perkinscoie.com

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