IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

FAMILY WINEMAKERS OF CALIFORNIA; STEPHEN J. POOR III, MD, an individual; and GERALD C. LEADER, an individual,

Plaintiffs,

v.

EDDIE J. JENKINS, in his official capacity as Chairman of the Massachusetts Alcoholic Beverages Control Commission; SUZANNE IANNELLA, in her official capacity as Associate Commissioner of the Massachusetts Alcoholic Beverages Control Commission; and ROBERT H. CRONIN, in his official capacity as Associate Commissioner of the Massachusetts Alcohol Beverages Control Commission,

Defendants.

CIVIL ACTION NO. 1:06-CV-11682-RWZ

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR ATTORNEY'S FEES

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INTRODUCTION

Pursuant to this Court's December 18, 2008 order, Plaintiffs Family Winemakers of California *et al.* ("Family Winemakers") respectfully move for an award of attorney's fees and expenses in the amount of $2,062,343. This amount represents the reasonable attorney's fees and expenses incurred in establishing that Massachusetts' wine distribution law —"§ 19F"— violated Family Winemakers' constitutional rights. As the prevailing party in a § 1983 case, Plaintiffs are entitled to this award under 42 U.S.C. § 1988.

BACKGROUND

In late 2006, Family Winemakers of California, Dr. Stephen Poor, and Mr. Gerald Leader, as Plaintiffs, filed suit, alleging that Massachusetts General Laws Chapter 138 § 19F was unconstitutional and deprived them of rights under color of state law, in violation of 42 U.S.C. § 1983. Docket No. 1. Plaintiffs sought injunctive relief, costs, expenses and attorney's fees. *See id.* This Court entered judgment in favor of Plaintiffs. This Court's ruling was affirmed on appeal.

Family Winemakers is a not-for-profit California-based trade association representing the interests of its member wineries. In this case, Family Winemakers asserted the rights of its members to access Massachusetts consumers and retailers on the same terms as in-state entities and free from protectionist burdens. This case is Family Winemakers' single largest investment in litigation to date. *See* Genesen Decl. ¶ 9.[1] While participating significantly in *Granholm v. Heald*, 544 U.S. 460 (2005), this is Family Winemakers' first complaint-to-final-appeal

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[1] The Genesen, Gleason, Caruso and Osgood declaration or affidavit citations all refer to the May 25, 2010 declarations or affidavits by those individuals filed in support of Plaintiffs' Motion for Attorney's Fees.

challenge to laws that unconstitutionally restrict interstate commerce in wine. Genesen Decl. ¶¶ 7 & 9. Recovering its fees and expenses is vital to Family Winemakers' financial health. *Id.*

Two individuals also comprise Plaintiffs. Dr. Stephen Poor and Mr. Gerald Leader are retirees and Massachusetts oenophiles who sought vindication of their rights to purchase out-of-state wines. § 19F violated their rights by discriminating against out-of-state wines in favor of in-state wines and burdening the flow of interstate wine into the Commonwealth without a legitimate, non-protectionist justification. *See* Plaintiffs' Compl., Docket No. 1, ¶ 3.

This case arose in a changing and uncertain legal landscape. In invalidating facially-discriminatory laws, *Granholm* did not address the 21st Amendment's effect on facially-neutral laws like § 19F. Nor did *Granholm* address whether the 21st Amendment prohibited invalidation under second-tier Dormant Commerce Clause analysis (the "*Pike*" test). Critically, for fact-finding strategy purposes, no court decision established either the quanta or kind of evidence sufficient to strike down a facially-neutral regulatory regime. *See* Genesen Decl. ¶ 19. Family Winemakers knew that a challenge to a facially-neutral statute under the Commerce Clause required "a sensitive, case-by-case analysis of purposes and effects," *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994), and that many challenges to facially-neutral laws had previously resulted in failure. Simply put, there was no successful legal or factual blueprint for Family Winemakers to follow.

Finally, during the run up to and in the course of this litigation, two district courts released decisions concerning statutes similar to § 19F, in Kentucky (late 2006) and Arizona (early 2008). In those cases, the plaintiffs' counsel pursued a limited legal theory and chose to

present scant evidence of discriminatory purpose and effect.[2] Similarly, the First Circuit rejected a challenge to Maine's (different) direct shipping statute under the Commerce Clause. *Cherry Hill Vineyard LLC v. Baldacci*, 505 F.3d 28, 35-37 (1st Cir. 2007). All of these plaintiffs lost, which added further support to Family Winemakers' view that a broad-based legal challenge, supported by an extensive evidentiary record, was absolutely necessary. *See* Genesen Decl. ¶ 19.

Turning to the work performed, Family Winemakers' requested award includes the recoverable fees and costs that they incurred in the district court and on appeal. Family Winemakers has litigated this case since 2006, including successfully opposing a motion to dismiss, opposing the intervention of Massachusetts' wholesalers (which would have increased Plaintiffs' expenditures on discovery, attorney's fees and other expenses), and opposing the Commonwealth's summary judgment motion. *See* Docket No. 110 and Docket Entries 12/18/2006 Order Denying Motion to Intervene and 5/16/2008 Order Denying Motion to Dismiss. Most importantly, Family Winemakers presented an extensive evidentiary record that supported its claims that § 19F discriminated in purpose and effect. *See* Docket Nos. 86 - 99. This record was the result of significant investigative efforts and extensive third-party discovery.

Family Winemakers developed this record through a variety of means. *See* Plaintiffs' Statement of Facts, Docket Nos. 87-93; Genesen Decl. ¶¶ 19-22. Family Winemakers interviewed, subpoenaed, and deposed Massachusetts vintners and wine wholesalers. Family Winemakers obtained critical local and national wine industry details, such as gallonage production statistics, tax and licensing information, fruit wine production information, and inside information on wholesalers' practices and motivations. Family Winemakers obtained documents

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[2] Indeed, the Ninth Circuit Court of Appeals, in affirming the Arizona district court, specifically remarked upon the differences in the records here and in that case. *See Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1233 (9th Cir. 2010).

from and interviewed lobbyists, legislators and their staff, concerning the critical aspect of discriminatory intent. Legal and practical realities, including the fact that Massachusetts does not publish legislative history, increased the difficulty of this process. Genesen Decl. ¶ 20. Importantly, this included sensitivity to legislators' reticence to being deposed. *Id.* Family Winemakers also made extensive efforts to locate and interview appropriate and willing winery declarants, which was difficult. *Id.* ¶ 22. To prove practical discrimination, it was important to demonstrate how specific aspects of § 19F harmed wineries of varying sizes, business models, and experiences in the Massachusetts market. Since many wineries were reluctant to participate in litigation due to the risk of commercial reprisal, Family Winemakers expended great effort to gather this critical evidence. *Id.* Family Winemakers also commissioned an expert report by the noted economist, Dr. Robert Hahn. *See* Docket No. 86.

Ultimately, Family Winemakers' record in support of its summary judgment motion was thorough. Family Winemakers submitted a 36-page statement of 197 undisputed facts detailing critical contextual details of the often-arcane wine industry, § 19F's genesis and legislative history, and § 19F's practical effects on wineries and consumers. *See* Docket Nos. 87 - 93. To prove these facts, Family Winemakers adduced 76 exhibits, including 13 declarations, and an expert report. The factual record was extensive. Yet, the Defendants made virtually no substantive challenges to these carefully-developed facts, which this Court noted. *See* 11/19/2008 Memorandum of Decision and Order at 3. Docket No. 110. Nor can there be any doubt as to the importance of Family Winemakers' record in establishing the necessary factual context surrounding direct shipping of wine. *See Family Winemakers of Cal. v. Jenkins*, 592 F. 3d 1, 5-9 (1st Cir. 2010) (devoting four pages to describing the wine industry's features and those features' interaction with § 19F).

In addition to the extensive factual work, this case required extensive legal analysis and briefing. As discussed above, the course in this Circuit for challenging a facially-neutral liquor law was uncharted. Nor was the application of the *Pike* test clear. As to the briefing, at the district court level, both Plaintiffs and Defendants filed motions for summary judgment, oppositions, and reply briefs. *See* Docket Nos. 78-108. Plaintiffs were also required to respond to an *amicus* brief, authored by prominent Supreme Court litigator Carter Phillips. *See* Amicus Br. of Wine & Spirit Wholesalers of Massachusetts, Docket No. 77. Plaintiffs and Defendants also briefed the critical issue of "leveling up" or "leveling down" were § 19F to be found unconstitutional. *See* Defendants' Summary Judgment Br., Docket No. 79, at 22-28; Plaintiffs' Opposition Br., Docket No. 104, at 27-30.

After three rounds of summary judgment briefing, preparations for oral argument began. Given the breadth of evidence, the complexities of § 19F and the wine industry, and the diversity of relevant Dormant Commerce Clause case law, extensive preparations were required. Genesen Decl. ¶ 25. On July 29, 2008, this Court held an extensive oral hearing. On November 19, 2008, this Court declared that § 19F was unconstitutional. Docket No. 110. A brief round of litigation over the form of judgment ensued. *See* Docket Nos. 111 & 112. Plaintiffs opposed the defendants' suggested form and again succeeded. This court entered its judgment on December 18, 2008. Docket No. 113. The State Defendants appealed.

Appellate briefing began in mid-2009. As appellees, Plaintiffs filed an opposition brief, prepared a surreply (ultimately not needed when the Commonwealth agreed to amend their reply brief), and prepared a "28(j) letter" brief in response to a 28(j) letter brief filed by the Commonwealth concerning a recent Second Circuit decision. Genesen Decl. ¶ 24. This letter brief was vital given that *Baldacci*, 505 F.3d 28, was the only First Circuit case addressing the

Dormant Commerce Clause and 21st Amendment issues. Plaintiffs then undertook thorough preparations for the November 2, 2009 oral argument, including three moot courts. *Id.* ¶ 25. Given the novelty of the legal issues and complexities of the wine market, Plaintiffs prepared for vigorous questioning by the panel. *Id.* The argument exceeded the initial allotted time by virtue of the extensive questioning by the Court of Appeals. The Chief Judge concluded the argument by describing this as a "very interesting case." On January 14, 2010, a unanimous panel affirmed this Court's decision and found that Plaintiffs had proven § 19F discriminated in purpose and effect. *See Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010).

Family Winemakers employed two law firms. The majority of the work was performed by Kirkland & Ellis LLP, which is a large international law firm, with offices in New York, Chicago, Washington D.C., San Francisco, and Los Angeles. Kirkland & Ellis is similar in size, structure, and reputation to prominent Boston firms. Caruso Decl. ¶ 20. Kirkland & Ellis, however, is the only firm that specializes in litigating the intersection of wine shipping, the Dormant Commerce Clause, and the 21st Amendment, as shown by Kirkland & Ellis's drafting of the Respondents' Supreme Court brief in *Granholm*. *See* Genesen Decl. ¶ 7. Kirkland & Ellis's primary wine-law expert is partner Tracy Genesen. *Id.* Pursuant to Local Rule 83.5.3, Family Winemakers employed Rubin & Rudman LLP as Massachusetts counsel. Caruso Decl. ¶¶ 13-14. Partner Gerald Caruso, a specialist in Massachusetts alcohol law, performed the majority of the work for Rubin & Rudman. *Id.* ¶¶ 12-14.

Throughout this litigation, Family Winemakers' attorneys staffed this case in an efficient manner while still taking advantage of the intellectual resources available. Genesen Decl. ¶ 12. Although certain attorneys would make important contributions at critical points, the majority of the work was performed by one partner and the two junior associates assigned to the case. *See*

id. ¶ 12 & Ex. A. From 2006 through 2010, which includes all discovery, multiple dispositive motions at the district court, the appeal, and preparation of this fee motion, Family Winemakers' counsel has devoted 5172 hours to this case. *Id.* ¶ 18. The primary partner was Tracy Genesen. Two junior associates worked on the case, whose identities changed because of normal personnel turnover. *Id.* ¶ 12. For large periods, there was only one associate. *Id.* Family Winemaker's local counsel, Jerry Caruso, also contributed significantly. Caruso Decl. ¶ 18. These four "roles" — primary partner, Massachusetts counsel, and two associates — collectively billed over 71% of the hours on this case. *See* Osgood Decl. Ex. A at 50. Paraprofessionals (with lower billing rates) were used prudently; their hours constituted almost 13% of the requested hours. *Id.*

Other attorneys became involved in limited capacities to leverage specialties in discovery, constitutional law, appellate brief writing, or oral argument preparation. Genesen Decl. ¶¶ 10-11 & Ex. A. One contributor whose impact was significant was Kenneth Starr — former Solicitor General of the United States and United States Court of Appeals Judge, and the incoming President of Baylor University — who consulted on the case and provided expert advice and review during all phases of briefing and oral argument preparation. *Id.* ¶ 10. While his impact was large, Mr. Starr billed less than 4% of the hours on this case. *Id.* Ex. A. No other attorney than those described above billed more than 3% of the hours on this case. *See id.*

ARGUMENT

Plaintiffs are entitled to an award of attorney's fees and expenses in amount of $2,062,343 pursuant to 42 U.S.C. § 1988. As the prevailing parties in a § 1983 suit, Plaintiffs are entitled to their costs, expenses, and an award of attorney's fees (see Part I). The amount of such costs, expenses, and fees sought by Plaintiffs is reasonable (see Part II).

I. § 1988 ENTITLES PLAINTIFFS TO COSTS, EXPENSES, AND FEES

Family Winemakers are entitled to recover their costs, expenses and their reasonable attorney's fees from this litigation because A) 42 U.S.C. § 1988 entitles prevailing plaintiffs to costs and attorney's fees in § 1983 cases and B) Dormant Commerce Clause challenges to state laws are proper § 1983 cases.

A. Family Winemakers are entitled to their costs and fees because they are "prevailing plaintiffs" in a § 1983 case.

Federal law awards "prevailing" plaintiffs filing claims under § 1983 (and other statues) their costs and expenses, including "a reasonable attorney's fee." 42 U.S.C. § 1988(b); *See also De Jesus Nazario v. Morris Rodriguez*, 554 F.3d 196, 207 (1st Cir. 2009). While § 1988 speaks of a court's discretion, the Supreme Court has clarified that "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (internal marks omitted). In this Circuit, "the sorts of 'special circumstances' that would permit the outright denial of a fee award . . . are few and far between." *De Jesus Nazario*, 554 F.3d at 200.

There is no dispute that Plaintiffs are prevailing parties under § 1988. "A plaintiff who receives a favorable judgment on the merits of a claim is the classic example of a 'prevailing party.'" *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 453 (1st Cir. 2009) (*citing Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992) and *De Jesus Nazario*, 554 F.3d at 199-200). Here, Plaintiffs have prevailed on the merits and successfully enjoined the statute that directly caused them (or their members) injury; this makes them "prevailing parties." *Id.* at 454 (holding plaintiffs were "prevailing parties" for obtaining "the injunctive relief they sought" and "the desired practical outcome of their suit").

B. Plaintiffs, deprived of constitutional rights, properly brought suit under § 1983.

Plaintiffs have a valid § 1983 claim because § 19F deprived them of rights and privileges protected by the U.S. Constitution. § 1983 establishes a cause of action whenever a person "under color of any statute" deprives another person "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Under the U.S. Constitution, the Commerce Clause "confers a right to engage in interstate trade free from restrictive state regulation." *Dennis v. Higgins*, 498 U.S. 439, 448 (1991) (internal marks omitted). § 19F's restrictive regulation burdened those trade rights, giving rise to a § 1983 claim. *See id.*; *see also Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 142 (1st Cir. 2001). The First Circuit has stuck down state laws under the Dormant Commerce Clause that were brought under § 1983 and so an award of fees is appropriate. *See Family Winemakers*, 592 F.3d at 9; *Walgreen Co. v. Rullan*, 405 F.3d 50, 52 (1st Cir. 2005); *see also Boston and Maine Corp. v. Town of Ayer*, 330 F.3d 12, 19 (1st Cir. 2003) (rejecting award of attorney's fees for claim based on agency orders, "not under the Commerce Clause"). Because fee awards are *de rigeur* for prevailing plaintiffs in § 1983 cases, and Family Winemakers has prevailed in its challenge to § 19F, Family Winemakers are entitled to reasonable costs, expenses, and attorney's fees.

II. FAMILY WINEMAKERS ATTORNEY'S FEES, COSTS, AND EXPENSES ARE REASONABLE AND SHOULD BE AWARDED

Under applicable law, Family Winemakers' requested costs, expenses, and attorney's fees are reasonable. Under § 1988, Family Winemakers requests an attorney's fee award of $1,940,238 and costs and expenses of $122,105. Theses fees and costs are reasonable in view of the length of the litigation, the highly complex and uncertain nature of this case, and Plaintiffs' need to retain counsel experienced in ground-breaking litigation involving the intersection of the Commerce Clause, 21st Amendment, and state liquor regulation.

A. Family Winemakers' requested attorney's fees are the product of a reasonable number of hours at reasonable hourly rates.

To determine the amount of recoverable attorney's fees under § 1988, courts in this circuit use the "lodestar method." *See United States v. One Star Class Sloop Sailboat*, 546 F. 3d 26, 37-38 (1st Cir. 2008); *Torres-Rivera v. O'Neil-Cancel*, 524 F. 3d 331, 337 (1st Cir. 2008); This method is accomplished by "multiplying the number of hours productively spent by a reasonable hourly rate" to calculate a "base figure." *See One Star Class Sloop Sailboat*, 546 F. 3d at 37-38; *Torres-Rivera*, 524 F. 3d at 336. While styled as "attorney's fees," the "work of paid law clerks and paralegals" is included. *Guckenberger v. Boston University*, 8 F. Supp. 2d 91, 107 (D. Mass. 1998); *see also Real Estate Bar Ass'n of Ma. v. Nat'l Real Estate Info. Srvcs.*, 642 F. Supp. 2d 58, 67-68 (D. Mass. 2009). Adjustments to the base figure can be made downward or upward to reflect the "results obtained" by Plaintiffs. *Torres-Rivera*, 524 F.3d at 336. A plaintiff that achieves greater success may be entitled to an enhancement, while one that achieves limited success may be subject to a reduction. *See id.* "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

Family Winemakers' base figure for attorney's fees is $1,940,238. This base figure was calculated using 2010 rates. This figure also includes reductions for billing judgment and uses reduced rates for non-core work. Even using 2010 rates, this represents a reduction in the amount billed to Family Winemakers.[3] This base figure includes just over 5172 hours of work. *See* Osgood Decl. ¶ 10 & Ex. A at 50. Family Winemakers also voluntarily excluded from this figure hundreds of hours spent by twenty attorneys or paraprofessionals. Genesen Decl. ¶ 17.

[3] From 2006 to 2010, Family Winemakers' attorneys billed Family Winemakers $2.1 million for attorney's and paraprofessional fees.

Dividing the base figure by the hours expended yields an effective hourly rate of approximately $375 per hour. Osgood Decl. ¶ 10 & Ex. A at 50. Both the hours expended and the hourly rates are reasonable. Genesen Decl. ¶¶ 18 & 26; Caruso Decl. ¶¶ 18-20; Gleason Aff. ¶ 20-22.

1. Given the nature of the case, the hours expended during 3 1/2 years of litigation were reasonable.

Upon an examination of the history and context of this litigation, the expenditure of 5172 hours by Family Winemakers' attorneys and paraprofessionals on this litigation is reasonable for multiple reasons. ***First,*** this case involved a challenge to a ***facially-neutral*** state liquor law. Supreme Court case law does not provide a roadmap regarding the character and quantity of evidence necessary to invalidate these laws. Without further elaboration, the First Circuit has said that a successful challenge to such laws requires "substantial" evidence. *Baldacci*, 505 F. 3d. at 36. In fact, Defendants described Family Winemakers' challenge to a facially neutral law as "more difficult" and "an uphill battle." App. Br. at 14-15. Accordingly, Family Winemakers' prudently felt compelled to expend significant time on discovery and evidence gathering or risk a failure of proof as happened in other challenges to facially-neutral laws. *See Baldacci*, 505 F. 3d at 36; *Black Star Farms, LLC v. Oliver*, 544 F. Supp. 2d 913, 928 (D. Ariz. 2008) (upholding similar facially neutral law because plaintiffs failed to offer "substantial evidence").

Importantly, the evidence Family Winemakers sought to collect was often not readily accessible. The wine industry is a highly decentralized, dispersed group of small businesses, which makes evidence collection more difficult. Genesen Decl. ¶ 21. For example, ascertaining fruit wine production within Massachusetts required contacting each winery. *Id.* Determining every winery that has a Massachusetts wholesaler is virtually impossible. *Id.* Consumer data is scant. Data on direct shipping and wholesaler sales—confidential business information—was generally not available. *Id.* Significant time was spent reviewing government records, scouring

the Internet and library resources, and speaking to industry insiders. *Id.* ¶¶ 20-21. In addition, Wineries were reluctant to become involved in this litigation, even when informed their identities would be protected. *Id.* ¶ 22. Because Massachusetts does not create a formal legislative history record, collecting evidence of § 19F's history and animating purpose required significant sleuthing, not unlike detective work. *Id.* ¶ 20. Family Winemakers interviewed state legislators and legislative aids (including repeated entreaties to cooperate) to unearth the legislative history of § 19F, including local industry and regulatory body participation. *Id.* Family Winemakers ultimately visited the State House to view debate videotapes. *Id.*

Despite these difficulties, Plaintiffs assembled 36 pages of 197 material facts in support of summary judgment, based on 63 exhibits and 13 declarations. Indeed, in distinguishing a prior challenge to Maine's direct shipping ban, this Court described "the record in this case, unlike that in *Baldacci*, [as] replete with evidence of discriminatory effect." Docket No. 110 at 24. This Court's opinion also extensively relied upon Plaintiffs' evidence of discriminatory purpose. *See id.* at 8-14 (detailing § 19F's statutory and legislative history). In fact, Plaintiffs' evidentiary record was recently highlighted by the Ninth Circuit: to the following effect: "[T]he plaintiffs in [the Family Winemakers] case, unlike the plaintiffs here, had evidence to prove their contentions." *Black Star Farms LLC,* 600 F.3d at 1233. In sum, collecting this vital evidence required extensive efforts that were well-managed. Gleason Decl. ¶¶ 25-26.

Second, the motion practice in this case required a significant expenditure of time. A Massachusetts wholesaler trade organization sought to intervene, which Family Winemakers opposed. At that time, the wholesalers were using Carter Philips, a noted Washington, D.C. lawyer, who worked on the *Granholm* litigation. The wholesalers were ultimately allowed to participate as *amici*, requiring Family Winemakers to research and address their arguments.

Nevertheless, limiting the wholesalers to an appropriate *amici* role reduced the fees that would otherwise have been incurred in this case. The Commonwealth moved to dismiss this case for lack of standing, which necessitated Plaintiffs collecting evidence akin to that required to oppose summary judgment. Family Winemakers, over the Commonwealth's opposition, had to move to protect the identities of certain wineries that feared commercial retaliation. Finally, Family Winemakers moved for summary judgment and opposed the Commonwealth's motion.

Third, unlike other civil rights cases, the novelty and particularity of this case — the "sensitive case-by-case analysis of purpose and effects" to use Justice Stevens's phrase — required an extensive review of Dormant Commerce Clause law. Unquestionably, this is a challenging case on the law. The First Circuit has described Dormant Commerce Clause principles as "easy to recite," but "their application to a particular factual setting is often difficult." *Walgreen Co. v. Rullan*, 405 F.3d 50, 55 (1st Cir. 2005). Successful challenges to facially neutral laws are few. Additionally, unique features of this case made this research all the more necessary. Those features included the effect of the 21st Amendment and federal laws on a facially neutral state law and the *Pike* test, the fact that more "small" wineries existed outside of Massachusetts than inside, and the peculiar features of § 19F. Family Winemakers determined that an extensive review of caselaw was required. Genesen Decl. ¶ 18. Family Winemakers also had to research, brief and argue the issues raised by the Massachusetts wholesaler *amici*.

Fourth, the hours expended also include the appeal brought by the Commonwealth. In addition to preparing its brief, Family Winemakers expended a significant amount of time in preparing for oral argument. Chief Justice Roberts, then writing as an experienced appellate attorney, described the "overriding key to presenting an effective oral argument" as "relentless preparation" and advised that appellate oral arguments should be preceded by at least three moot

courts. John G. Roberts, Jr., Thoughts on Presenting an Effective Oral Argument, School of Law in Review 1997, at 7-2 & 7-6. Family Winemakers dutifully prepared answers to potential questions, conducted several moot courts, and Ms. Genesen (who presented oral argument) extensively studied the expansive factual record and applicable case law. Genesen Decl. ¶ 25. Family Winemakers was also required to analyze the Second Circuit's decision in *Arnold's Wines, Inc. v. Boyle*, No. 07-4781, 2009 WL 1873655 (2d Cir. July 1, 2009), and respond to the Commonwealth's 28(j) letter. Genesen Decl. ¶ 24. Family Winemakers also had to react to the Commonwealth's misstatements in its reply brief. *Id.*

Finally, the hours expended are a reasonable, real-world measurement of work actually and judiciously performed.[4] Family Winemakers' attorneys kept detailed records of every task performed, which were submitted to the client for payment. *See* Genesen Decl. Ex. B; Caruso Decl. Ex. A. Daniel Gleason, a highly respected Boston attorney, has opined that Family Winemakers "accomplished a great deal basically through targeted staffing and good coordination," and employed "a streamlined and cost-effective process resulting in a compelling victory for the clients." Gleason Aff. ¶¶ 19 & 28. Mr. Gleason further opines that it is his "strongly held view" that this case was run and managed well, including through Ms. Genesen's and Mr. Caruso's coordinated efforts. *Id.* ¶ 28. In short, "it would be difficult to overstate the successes accomplished by this litigation tandem in managing [this case] . . . with the end result a decision that is precedent-setting on a national scale." *Id.* ¶ 31.

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[4] The fact that "more than one lawyer toils on the same general task does not necessarily constitute excessive staffing. Effective preparation and presentation of a case often involve the kind of collaboration that only occurs when several attorneys are working on a single issue." *Gay Officers Action League v. Comm. of Puerto Rico*, 247 F.3d 288, 297 (1st Cir. 2001) (citing *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 860 (1998)).

Given the duration, necessary legal and factual research, and litigation history, Family Winemakers' "streamlined and cost-effective" expenditure of 5172 hours was reasonable.

2. Family Winemakers' Base Figure Is Based Upon Reasonable Hourly Rates.

The hourly rates Family Winemakers seeks to recover are also reasonable. Generally, the "prevailing [hourly] rates in the community for comparably qualified attorneys" are reasonable. *Lipsett v. Blanco*, 975 F.2d 934, 937 (1st Cir. 1992). In this Circuit, however, higher rates are also reasonable if the plaintiff employs specialized, out-of-town counsel. *See United States v. One Star Class Sloop*, 546 F. 3d 26, 40 (1st Cir. 2008). In determining the reasonable hourly rate for the particular case at hand, courts should consider "the nature of the work, the locality in which it was performed, the qualifications of the lawyers, and other criteria." *One Star Class Sloop*, 546 F. 3d at 38. Other criteria include "the quality of a prevailing party's counsel's representation," which "normally are reflected in the reasonable hourly rate." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566 (U.S. 1986).

Cases of a "commercial nature," involving "novel questions of state and federal law," justify a "fee award based on the [higher] rates of commercial litigators." *Real Estate Bar Ass'n of Mass.,* 642 F. Supp. 2d at 71 (approving fee award based on higher hourly rates). The "strongest and most persuasive authority" is that a "plaintiff in a civil rights action should get whatever his or her [attorney's] normal hourly rate is" as long as that rate is "reasonable." *Rosie D. ex rel John D. v. Patrick*, 593 F. Supp. 2d 325 (D. Mass. 2009). This is because the purpose of the lodestar calculation is to produce "an award that *roughly* approximates the fee the prevailing attorney would have received if he or she had been representing a paying client." *Perdue v. Kenny A. ex rel Winn*, 130 S.C. 1662 (2010). Therefore, the best evidence of the

reasonable rates in a complex and novel case such is this is the rates ***actually charged*** to Family Winemakers for winning this case.

Nevertheless, the hourly rates upon which Family Winemakers calculated its base figure are ***less than Kirkland & Ellis standard 2010 rates*** and comparable to rates charged by Boston attorneys. Family Winemakers made reductions to its rates in this application for "non-core" work. Family Winemakers analyzed each task performed and reduced the hourly rate by 1/3 for non-core tasks.[5] Each hour billed by a paraprofessional to the client at a full rate was reduced in this application to a 2/3 rate to account for the non-core nature of that work. Family Winemakers also calculated its base figure using each associate's historical seniority.[6] These adjustments have a significant effect on hourly rates. The following chart, excerpted from the Exhibit A to the Genesen Declaration, shows the average hourly rate ***used in this application*** compared to the current hourly rate for the most active billers:

Name & Position	Hours Billed	Current 2010 Rate	Application Hourly Rate
Tracy Genesen, Kirkland & Ellis Partner	773	$680	$560
Jerry Caruso, Rubin & Rudman Partner	432	$325	$276
Megan Rodkin, Kirkland & Ellis Associate	532	$545	$385
Micah Osgood, Kirkland & Ellis Associate	1547	$455	$339
Melea Weber, Kirkland & Ellis Project Assistant	349	$150	$109

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[5] Core work includes legal research, drafting legal memoranda, briefs and other legal documents, court appearances, negotiating with opposing counsel and similar tasks; non-core work includes letter writing, phone conversations, and clerical tasks. *See*, *e.g.*, *Brewster v. Dukakis*, 3 F.3d 488, 492 n. 4 (1st Cir. 1993). When core and non-core tasks are billed as one, the hours have been proportionately divided between the tasks.

[6] For example, work performed by a second year associate in 2007 was calculated at the 2010 rate for a second year associate, not that associate's current billing rate.

As this chart shows, Family Winemakers calculated their base figure using a conservative approach that yields a lower result than simply billing each professional's total hours multiplied by their current rate. Across all billers, the weighted average hourly rate is $375. Osgood Decl. ¶ 10 & Ex. A at 50. Accordingly, the hourly rates in this application are reasonable.

The reasonableness of these rates is supported by evidence of what other attorneys charge in Boston for similar results. Mr. Gleason opines that Kirkland & Ellis's rates "are reasonable for high-end litigation as it is practiced in this jurisdiction." Gleason Decl. ¶¶ 19-20. He also finds that "given the complexity of issues," the "effective rate" at which Kirkland & Ellis accomplished this work represented "substantial value." *Id.* ¶ 22. Other courts in this District have approved, on a weighted-average basis, similar rates. *See Hutchinson v. Patrick*, No. 07-33084, __ F. Supp. 2d. __, 2010 WL 450914, at *6 (D. Mass. Feb. 8, 2010) ($312 weighted-average hourly rate awarded); *Rosie D. v. Patrick*, 593 F. Supp. 2d 325 (D. Mass. 2009) ($288 weighted-average hourly rate awarded equals).

Numerous federal courts have approved Kirkland & Ellis's ***full*** rates — without any reduction. *E.g. In re Hawaiian Telecom Communications Inc.*, Case No. 08-02005, Docket No. 1675 (Bankr. D. Hawaii March 4, 2010); *In re Charter Communications Inc.*, Case No. 09-11435, Docket No. 1121 (Bankr. S.D.N.Y. Jan. 21, 2010); *In re Calpine Corporation*, Case No. 05-60200, Docket No. 7748 (Bankr. S.D.N.Y. March 27, 2008). Federal courts in this and other districts have approved similar rates for Boston-based attorneys. *See In re Graphics Properties Holdings, Inc.*, Case No. 09-11701, Docket Nos. 919 & 891 (Bankr. S.D.N.Y. Mar. 22, 2010) (approving rates of $925 for a senior partner and $525 for a 5th year associate); *In re The Education Resources Institute*, Case No. 08-12540, Docket Nos. 989 & 949 (Bankr. D. Mass. Feb. 8, 2010) (approving rates of $800 for a senior partner and $470 for a 4th year associate).

To the extent that Kirkland & Ellis rates (even when reduced here) exceed Boston rates, higher out-of-town rates are justified when specialized litigation requires use of specialized counsel. *One Star Class Sloop Sailboat*, 546 F. 3d at 40; *Maceira* v. Pagan, 698 F. 2d 38, 40 (1st Cir. 1983); *see also National Wildlife Fed'n v. Hanson*, 859 F. 2d 313 (4th Cir. 1988) (allowing Washington D.C. rates in environmental litigation in Raleigh, North Carolina). In *Maceira*, the court held that where it is reasonable to hire an out-of-town specialist, the lower courts are justified in using that lawyer's usual and customary rates. 698 F.2d at 40. In other words, "when a party recruits counsel from outside the vicinage of the forum court, that court may deem the 'relevant community' to be the community in which the lawyer has his or her principal office." *One Star Class Sloop Sailboat*, 546 F.3d at 40. In that circumstance, "the Court may look to the outside lawyer's actual billing practices to determine the relevant rate." *Id.*

This Court applied the same rationale when it allowed a plaintiff to recover for the fees of an out-of-state lead counsel, even though it "increased the cost of [the] proceeding." *Whallon v. Lynn*, No. 00-11009, 2003 WL 1906174, at *3 (D. Mass. April 18, 2003), *aff'd by* 356 F. 3d 138 (1st Cir. 2004). Similarly, in *Sarsfield v. City of Marlborough*, No. 03-10319, 2007 WL 210389 (D. Mass. Jan. 26, 2007), the Court permitted New York counsel to recover at their usual and customary rates. The Court noted that "although Boston boasts a significant number of excellent civil rights lawyers, at the time this case began, the choice of Mr. Scheck and his partner was fully justified and eminently reasonable." *Id*. at 1.

Likewise, here it was reasonable for Family Winemakers to use Kirkland & Ellis to represent them in this case. Tracy Genesen and Kirkland & Ellis have represented Family Winemakers in this and other test cases around the country for a decade. Genesen Decl. ¶¶ 7 & 9. Ms. Genesen and Kirkland & Ellis were involved in litigating these issues before the Supreme

Court in the seminal case of *Granholm*, undoubtedly the most important case in the intersection of the Dormant Commerce Clause and the 21st Amendment. *Id.* ¶ 10 & 11. While there can be no doubt that Boston abounds with excellent attorneys, only Kirkland & Ellis has the specific expertise in and history of successfully litigating the intersection of the Dormant Commerce Clause and the 21st Amendment. Tellingly, the wholesaler *amici* — frequently heard to be warning of lost Massachusetts jobs (see Docket No. 87 at 32-33) — looked outside the Commonwealth and hired attorneys from a Washington D.C. law firm to write their briefs in support of the motion to intervene and *amicus* in the District Court, see Docket No. 77.

B. Family Winemakers' requested costs are reasonable.

Costs are recoverable if they are reasonable out-of-pocket expenses incurred by attorneys and of the type normally billed to clients. *Brown v. Gray*, 227 F. 3d 1278, 1297 (10th Cir. 2000); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983) (*per curiam*). These costs and expenses include costs that would normally be recoverable by parties under Federal Rule of Civil Procedure 54(d). Family Winemakers requests costs and expenses equal to $122,105. Osgood Decl. Ex. A at 3. This amount represents out-of-pocket expenses incurred by Kirkland & Ellis or Rubin & Rudman and actually billed to Family Winemakers of California. Genesen Decl. ¶ 17; Caruso Decl. ¶ 17.

The expenses and costs that Family Winemakers submits in this application are reasonable. Expenses incurred in connection with attorney travel are awardable. *See Palmigiano*, 707 F.2d at 637 (holding travel expenses awardable under 42 U.S.C. § 1988 when specialized out-of-town counsel are used); *Alfonso v. Aufiero*, 66 F. Supp. 2d 183, 201 (D. Mass. 1999) (awarding travel costs). Costs for in-house printing or copying are also awardable. *See Rosie D.*, 593 F. Supp. 2d at 334.

III. THE PLAINTIFFS ARE ENTITLED TO COMPENSATION FOR DELAY IN PAYMENT

Almost four years have elapsed since Plaintiffs first incurred fees in this litigation, and an appropriate adjustment for delay in payment is warranted. Calculating the base figure using current hourly rates, rather than historical rates, is an appropriate method to adjust the award for a delay in payment. *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 283-84 (1989). Courts in this district have followed this approach. *See Dixon v. Int'l Brotherhood of Police Officers*, 434 F. Supp. 2d 73, 85 (D. Mass. 2006). Family Winemakers has calculated its attorney's fee base figure using 2010 hourly rates. Although as discussed previously, Family Winemakers has applied the applicable 2010 hourly rate corresponding to each associate's historical seniority rather than simply multiply each associate's hours by his or her 2010 billing rate.

Lastly, Family Winemakers is entitled to post-judgment interest on its attorney's fee award. When "an attorneys' fee award" is granted in a final judgment, "interest will thereafter accrue on the amount of the award." *Foley v. City of Lowell, Mass.*, 948 F.2d 10, 21 (1st Cir. 1991). This is because "the only way in which a fee award will retain its stated worth is by adding interest in order to compensate for delay in payment from that point forward." *Id.* at 22.

CONCLUSION

As a § 1983 prevailing plaintiff, Family Winemakers are entitled to their reasonable costs and fees, equaling $2,062,343. This includes an attorney's fees award for the 5172 hours that were reasonably expended in this lawsuit over the course of 3 1/2 years. The hourly rates Family Winemakers seek, averaging out to $375, are reasonable given the commercial nature of this case, complexity and uncertainty of the legal issues, quality of representation, and success achieved. Family Winemakers is also entitled to post-judgment interest.

DATED: May 25, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on May 25, 2010:

1. Plaintiffs' Memorandum in Support of Their Motion for Attorney's fees.

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