Superior Court of the State of Washington
For Thurston County

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LETTER OPINION

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Re: ***STATE V. GROCERY MANUFACTURERS ASSOCIATION*, TCSC NO. 13-2-02156-8**
***GROCERY MANUFACTURERS ASSOCIATION V. BOB FERGUSON, AG*, TCSC No. 14-2-00027-5**
Cross Motions for Attorney Fees

Counsel:

In over three years of very active litigation, involving numerous dispositive motions and a trial, the Grocery Manufacturers Association (GMA) has prevailed on one limited issue of law. As the prevailing party, the State asks for attorney fees of $1,067,781.30, plus $25,427.32 in costs of litigation, and $1,820.05 for investigative costs. For the one issue on which it prevailed, GMA asks for over $390,374.50 in attorney fees and $11,788.12 in costs. The parties bring cross motions for attorney fees, each challenging whether the other's fees are reasonable or appropriate. The court considered all of the briefing and declarations on this issue, and heard oral argument on February 9, 2017. The court now holds that the State's requested fees are reasonable and appropriate, except for $3,386 that it concedes was erroneous. The court also holds that the fees requested by GMA are not reasonable, and should be reduced in the manner urged by the State. The court disagrees with the State, however, to the extent that this court holds that out-of-market attorney fees are appropriate under the circumstances presented in

this case. There is a third motion for the court to decide, a motion to "conform" brought by GMA. The court denies that motion.

GMA'S MOTION TO CONFORM

First, GMA presents a "motion to conform the penalty amount to the excessive fines limitation of the Eighth Amendment and the Washington Constitution." The motion is denied as untimely.

In its trial brief, the State asked the court to assess a base penalty of $14,622,820 and treble damages to $43,868,460 if the court found intentional concealment of contributions. (Plaintiff's Trial Brief, at 7. Filed 4/7/16.) The court held a four-day penalty phase trial in this case in August 2016. The court issued a letter ruling and findings of fact and conclusions of law on November 2, 2016. The court ordered GMA to pay a base penalty of $6,000,000 and that the penalty be trebled to $18,000,000. (Court's Decision.) A judgment was entered December 2, 2016. Ten days later, GMO appealed the case to the Court of Appeals.

The present motion was filed on January 27, 2017. It asks the court to reduce the judgment under the constitutional prohibition on cruel and unusual punishment. This is essentially a motion for reconsideration of the court's ruling, and it is far too late to be considered. CR 59(b). GMO claims surprise by the judgment, but it was far less than the over $43 million requested by the State in its trial brief. Thus, this court holds that the motion is also untimely under CR 60 because it has not been made within a reasonable time. The motion is denied on procedural grounds.

GMA'S ATTORNEY FEES AND COSTS

GMA correctly asserts that it is entitled to attorney fees and costs for litigating the issue on which it prevailed. The fees and costs that it requests, however, contain numerous flaws and shall be reduced as explained in this opinion. After careful deliberation, this court agrees with the each of the arguments presented by the State except as provided here.

First, GMA asks for fees and costs for litigating issues for which it did not prevail. In February 2014, before another judge, GMA filed a motion for judgment on the pleadings. It raised three issues: (1) whether the definition of "political committee" and related regulations violate the First Amendment and the Fourteenth Amendment's Equal Protection Clauses; (2) whether the disclosure laws are unconstitutional based on fact of GMA's commingled fund in which it held its

contributions to the No On 522 campaign; and (3) whether the "$10 – 10" rule, RCW 42.17A.442, is unconstitutional.

The court granted GMA's motion of only one of those arguments. (Order. Filed 7/25/14.) It held that the $10-10 rule is unconstitutional. The court dismissed the State's claims that GMA violated that rule, but otherwise denied GMA's motion.

GMA argues that it should be awarded attorney fees for the entire motion, even though it won on only one of the three issues. It cites case law, which this court has reviewed, regarding whether issues are sufficiently related to allow an award of attorney fees on an issue in which the moving party did not prevail. *See, e.g., Webb v. Sloan*, 330 F.3d 1158 (2003); *Dice v. City of Montesano*, 131 Wn. App. 675 (2006). In this case, the court finds that the law and facts of the $10-10 rule were distinct from the two other issues raised. GMO did not segregate or otherwise identify the work that was performed on each issue for the judgment on the pleadings. Accordingly, the award of fees for work performed on that motion for judgment on the pleadings shall be reduced by two-thirds.

Second, GMA asks for an award of fees and costs for discovery. This court holds that no discovery was related to the $10-10 rule. That was a purely legal ruling brought in the context of a motion for judgment on the pleadings. Discovery costs are not allowed.

Third, there is a dispute about whether the attorney fee rates are reasonable, specifically whether the higher cost of a Washington D.C. firm should be awarded, rather than the prevailing rate for Seattle attorneys. GMA presents compelling evidence that it tried to retain several Seattle firms that litigate campaign finance law, but each had conflicts of interest. (See Reply in Support of GMA's Motion for Attorney Fees and Costs, at 1-2, and cited declarations. Filed 12/12/16.) GMA therefore retained K&L Gates from Seattle as local counsel, and also retained Wiley Rein from Washington D.C. as an expert on campaign finance law and in particular the constitutional aspects of it. This was the very area of expertise needed for the motion for judgment on the pleadings. GMA faced landmark multimillion dollar penalties, and was entitled to hire counsel that is competent in the specialized area of law at issue in this case. The court therefore allows out-of-market attorney fees. *See Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014); *Mathur v. Bd. of Trustees of S. Illinois Univ.*, 317 F.3d 738, 743-44 (7th Cir. 2003).

The fourth issue presented here concerns allowable costs. GMA explains that it charges its clients costs such as Westlaw research and postage, and therefore those costs should be awarded to it

as a prevailing party. As succinctly argued by the State, the concept of "costs" that may be awarded under Washington law does not encompass such items and they will not be allowed.

Finally, the State makes numerous line-item objections to GMA's fees and cost bill. Some of those objections are based on reasons already discussed in this opinion, some are for other reasons such as lack of explanation of the work that was performed or that the billing is duplicative. The court has reviewed these objections and GMA's responses and provided documentation and agrees with the State. The court specifically adopts the approach to calculating fees presented in the Declaration of Lisa Boggess.

In summary, the State's objections to GMA's motion for fees and costs are granted, except that the court holds that Wiley Rein's Washington D.C. attorney fees are reasonable under the lodestar method. The State is directed to present findings and conclusions of law, as well as a judgment, on this matter.

THE STATE'S ATTORNEY FEES AND COSTS

The State asks for over a million dollars in fees and costs. GMA presents three challenges to the State's cost bill. The court rejects those challenges and awards the fees and costs as requested.

The major dispute in the proper rate of attorney fees for the State's counsel. Three methods have been offered to determine hourly rates. First, GMA asks the court to award fees based on the actual expenses incurred by the State. As public service employees, the State's attorneys are paid a salary that is well below market rate for their experience and expertise. Additionally, some amount of overhead costs could be formulated. However, the lodestar method does not determine attorney fees based on what was actually paid, but instead based on "the market value of the attorney's services." *Collins v. Clark County Fire District No. 5*, 155 Wn. App. 48, 99 (2010). The court must determine a "reasonable hourly rate," not the actual hourly rate. *Id.* This suggested method is inappropriate under a lodestar analysis.

Second, GMA asserts that the hourly rate should be based on a Washington State inter-agency agreement that provides a rate for reimbursement of attorney fees in certain circumstances. That method of determining a "reasonable hourly rate" may be appropriate in some circumstances, but the court finds it inappropriate here. The inter-agency agreement provides reimbursement of $250 per hour for an attorney with the experience of Linda Dalton, a Senior

Assistant Attorney General, with 31 years of experience and significant expertise in complex litigation.

The $250 rate would be likely be the same or lower for attorneys working on this case with less experience. This includes Noah Purcell, who graduated from law school less than 10 years ago, but who is Solicitor General of this state, has briefed cases before the U.S. Supreme Court, and recently successfully argued a notable case in the Ninth Circuit Court of Appeals regarding a Presidential executive order. In this court's experience, a new, junior associate at a private Washington law firm would likely bill her clients around $250 per hour. This court does not find that $250 an hour or less is a reasonable hourly rate for the State's attorneys in this case, based on the market value of these attorney's services.

The court notes that Linda Dalton declared in July 2016 that, "[t]he hourly billable rate set by the Attorney General's office for an attorney with 31 years of experience is $250.00." GMA argues that this declaration now bars the State from asking for a different rate. This argument is not well taken. Dalton accurately explained her *billable* rate, but this court has discretion to find her billable rate reasonable, or some other market rate reasonable. This court does not find the inter-agency billable rate to be a reasonable rate under the lodestar method.

Third, the State suggests an hourly rate that is based on a formula of the attorney's education, skills, experience, and location and applies the U.S. Department of Justice's index for attorney billing rates. The State bears the burden to show that its proposed billing rate is reasonable, and it has done so. The court notes that the highest rate requested, for Dalton and Purcell, is $408 per hour for non-litigation work and $449 for litigation. Less senior attorneys billed at $358 per hour for non-litigation work, and $394 for litigation. This court finds that these rates are reasonable.

The next argument by GMA is that the State's hours are excessive because they include hours related to defending the $10-10 rule, and include work on unrelated matters. The State concedes that 4.5 hours were improperly billed because they related to the $10-10 rule motion that they lost. The court accepts the State's concession. GMA further speculates that other billed work was related to that issue, but the court finds credible the State's assertion that it was unrelated, and that other billings related to that issue were omitted from its original cost bill. GMA also challenges 28.9 hours on a motion to consolidate and PRA matters that it believes is unrelated to this case. This court finds that disputed work was related to and integral to this litigation, and is appropriately reimbursed to the State.

Last, GMA states that "[t]he State's requested hours should be reduced by no less than one-third." The court rejects that argument because it is unsupported by law or argument.

In conclusion, this court awards attorney fees to the State as requested, with the exception of reducing 4.5 hours that should have been deducted because it relates to defense of the $10-10 rule.

Regarding GMA's fees and costs, the court agrees with each of the objections raised by the State, except it finds that the Washington D.C. attorneys' out-of-market rates are reasonable under the circumstances. The court additionally denies GMA's "motion to conform" the judgment as untimely.

Finally, the Court is aware that that GMA has filed a motion to Strike or Defer Consideration of the State's Statement of Supplemental Authorities and noted it for hearing on Friday, March 3, 2017. The Court has not reviewed any pleadings or declarations filed after the court heard argument on February 7th and will not being doing so; however, based on the Court's ruling as contained in this letter opinion, the Court is striking the March 3rd hearing.

The court is entering this letter opinion to detail the basis of this ruling. The parties shall present findings of fact and conclusions of law, along with judgment summaries, that reflect this ruling. The proposed orders may be presented ex parte if agreed on by the parties as to form, or otherwise may be set for a presentation hearing.

Very truly yours,

Anne Hirsch, Judge
Thurston County Superior Court

ALH:ymp
cc: Court File