

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COSTCO WHOLESALE CORPORATION,

Plaintiff,

v.

ROGER HOEN, et al.,

Defendants, and

WASHINGTON BEER AND WINE
WHOLESALE ASSOCIATION,

Intervenor-Defendant

No. C04-360P

ORDER ON PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT ON SECOND CLAIM
AND RELATED PORTION OF THIRD
CLAIM

This matter comes before the Court on Plaintiff Costco Wholesale Corporation's motion for partial summary judgment on its second claim and the related portion of its third claim. (Dkt. No. 69).

Defendants and the Intervenor-Defendant have filed a joint brief in opposition to Plaintiff's motion.

Having heard oral argument on this motion and having reviewed the papers and pleadings submitted by the parties, as well as an amicus brief filed by the Washington Wine Institute, the Court hereby

ORDERS as follows:

- (1) Plaintiff's motion for summary judgment is GRANTED in part. The Court finds that Washington statutes that permit in-state beer and wine producers to distribute their products directly to retailers, while withholding such privileges from out-of-state beer

1 and wine producers, discriminate against out-of-state producers in violation of the
2 Commerce Clause of the United States Constitution.

3 (2) The Court DENIES Plaintiff's request that the Court remedy the unconstitutionality of
4 Washington's policies by extending the self-distribution privilege currently granted to
5 in-state wineries and breweries to out-of-state wineries and breweries. The remedy
6 proposed by Plaintiff would be more disruptive to Washington's existing statutory
7 scheme than withdrawing the self-distribution privilege from in-state wineries and
8 breweries.

9 (3) The Court STAYS the entry of judgment on these claims until April 14, 2006. Under
10 the circumstances of this case, such a stay of judgment is warranted to provide a
11 sufficient period of time for the Washington State Legislature to determine whether to
12 extend the self-distribution privilege to out-of-state beer and wine producers, rather
13 than withdrawing the privilege from in-state entities.

14 **Background**

15 Plaintiff Costco Wholesale Corporation ("Costco") is challenging a number of Washington
16 state laws and regulations governing the sale and distribution of beer and wine. Defendants are
17 members of the state Liquor Control Board (LCB). In addition, the Washington Beer and Wine
18 Wholesalers Association (WBWWA) has been granted leave to appear as an Intervenor-Defendant.¹
19 Costco raises both antitrust and constitutional claims in this litigation. This motion solely concerns
20 Costco's constitutional claims.

21 Like many states, Washington has established a "three-tier" system to regulate the sale and
22 distribution of alcoholic beverages. The "three tiers" refer to: (1) the producer; (2) the distributor or
23 wholesaler; and (3) the retailer. For the most part, state law prohibits wine and beer producers from

24
25 ¹ For ease of reference, the Court will refer to the Defendants and the Intervenor-Defendant collectively as "Defendants."

1 selling their products directly to retailers. Instead, the products generally must pass through a separate
2 distributor or wholesaler before reaching the retailer.

3 RCW 66.24.170 and 66.24.240 create an exception to this rule for wineries and breweries that
4 manufacture products in Washington state. The two statutes concern the licensing of “domestic”
5 wineries and breweries.² RCW 66.24.170(3) provides that “[a]ny domestic winery licensed under this
6 section may also act as a distributor and/or retailer of wine of its own production.” Similarly, RCW
7 66.24.240(2) provides that “[a]ny domestic brewery, except for a brand owner of malt beverages
8 under RCW 66.04.010(5), licensed under this section may also act as a distributor and/or retailer for
9 beer of its own production.” Both statutes provide that a domestic winery or brewery operating as a
10 distributor and/or retailer “shall comply with the applicable laws and rules relating to distributors
11 and/or retailers.” RCW 66.24.170(3) and 66.24.240(2).

12 In effect, these statutes allow domestic wineries and breweries to “self-distribute” their
13 products directly to retailers. By contrast, out-of-state beer and wine producers must sell their
14 products to a distributor, who in turn sells the products to retailers. See, e.g., RCW 66.28.070(1).

15 In the second claim set forth in its complaint, Costco challenges the constitutionality of RCW
16 66.24.170 and 66.24.240 as follows:

17 RCW 66.24.170 and 66.24.240 permit only Washington-based wineries and brewers to
18 distribute directly to retailers. These statutes unlawfully discriminate against out-of-state
19 wineries and brewers and against those seeking to deal with such businesses in violation of the
Commerce Clause.

20 Complaint ¶ 21. In its third claim, Costco alleges that it has been deprived of its constitutional rights
21 in violation of 42 U.S.C. § 1983. Id. ¶ 23.

22
23
24 ² A “domestic winery” is defined as “a place where wines are manufactured or produced
25 within the state of Washington,” while a domestic brewery is defined as “a place where beer and malt
liquor are manufactured or produced by a brewer within the state.” RCW 66.04.010(11)-(12).

Analysis

1. Granholm v. Heald

Costco's motion for summary judgment relies significantly on the Supreme Court's recent decision in Granholm v. Heald, 125 S. Ct. 1885 (2005). In Granholm, the Court considered the constitutionality of laws in Michigan and New York that allowed in-state wineries to ship their products directly to consumers, while prohibiting (or sharply restricting) the ability of out-of-state wineries to do so. The Court found that such laws discriminated against interstate commerce in violation of the Commerce Clause of the Constitution, Art. I, § 8, cl. 3.

The Granholm Court began its analysis by noting that "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" Id. at 1895 (internal citation omitted). The Court further noted that "[s]tate laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" Id. at 1897 (internal citation omitted).

Michigan and New York attempted to justify their discrimination against out-of-state wineries by invoking § 2 of the Twenty-first Amendment, which provides the states with broad authority to regulate alcohol. The Court rejected the states' argument, finding that "state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment" and that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." Id. at 1903-04. After analyzing Supreme Court precedent before and after prohibition, the Court held that state policies regulating the distribution of alcohol "are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." Id. at 1905.

Although the Michigan and New York policies discriminated against out-of-state wineries, the Court noted that the policies could be upheld if they advanced "a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Id. (internal citation omitted).

The states offered two primary rationales: keeping alcohol out of the hands of minors and facilitating

1 tax collection. The Court rejected both arguments, finding that these purposes could be achieved
2 through other nondiscriminatory alternatives. The Court held that the states must demonstrate that
3 discrimination is “demonstrably justified” and that state regulations that discriminate against interstate
4 commerce will be upheld “only after finding, based on concrete record evidence, that a State’s
5 nondiscriminatory alternatives will prove unworkable.” *Id.* at 1907 (internal citations and quotations
6 omitted).

7 The Court concluded its holding as follows:

8 States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This
9 power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-
10 state wine while simultaneously authorizing direct shipment by in-state producers. If a State
11 chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without
demonstrating the need for discrimination, New York and Michigan have enacted regulations
that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence,
these regulations cannot stand.

12 *Id.* at 1907.

13 2. Applicability of *Granholm* to Plaintiff’s Claims

14 Costco argues that *Granholm* is directly applicable to this case and requires a finding that
15 Washington’s policies are unconstitutional. Although the WBWWA had argued earlier in this
16 litigation that the issues presented in *Granholm* were “in principle the same” as the issues in this case,
17 Defendants now attempt to distinguish *Granholm*.

18 a. Ability of States to Grant Distributor Privileges Only to In-State Producers

19 Defendants argue that the challenged statutes merely allow in-state wineries and breweries to
20 serve as distributors for their own products. They suggest that this practice is constitutionally
21 permissible, arguing that “Washington treats all beer and wine sold to retailers the same, wherever it is
22 produced: retailers can only buy from entities licensed as distributors by the State.” (Opp. Brief at 3).

23 Defendants’ argument is not persuasive. Like the Michigan policy at issue in *Granholm*, the
24 “discriminatory character” of the Washington system is “obvious.” *Granholm*, 125 S. Ct. at 1896.
25 Domestic beer and wine producers are allowed to distribute their products directly to retailers, while

1 out-of-state producers may not. This privilege provides clear advantages to in-state wineries and
2 breweries that out-of-state producers do not enjoy. The Washington Wine Institute has submitted
3 declarations from Washington winery owners who indicate that the cost of selling their products
4 through wholesalers is quite high and cuts sharply into their profitability. Several winery owners also
5 note that it can be very difficult to find a distributor willing to take their products, particularly in cases
6 involving small wineries. Similar issues were noted by the Court in Granholm. See id. (noting that
7 Michigan law requiring out-of-state wines to pass through an in-state wholesaler increases costs of
8 out-of-state wines and that the inability to secure a wholesaler for small shipments can effectively bar
9 small wineries from the Michigan market).

10 As Costco notes, Washington's policies create a situation where "only in-state wineries can
11 avoid the bottleneck of obtaining a distributor." Costco also asserts that "only in-state wineries do not
12 have to impose two tiers' worth of minimum mark-ups (producer and distributor)." (Reply Brief at 3).
13 Costco is referring to Washington laws that require two levels of "minimum mark-ups" when beer and
14 wine is sold in the state. First, when a producer sells beer or wine to a wholesaler, the products must
15 be sold for at least 10 percent more than the cost of production. RCW 66.28.180(3)(b). The second
16 mark-up occurs when a wholesaler sells beer or wine to a retailer; the product must be sold for at least
17 10 percent more than the wholesaler's acquisition cost. RCW 66.28.180(2)(d).

18 On the record before the Court, it is readily apparent that Washington law discriminates
19 against out-of-state beer and wine producers and prevents them from competing on equal terms with
20 in-state producers. Washington law subjects out-of-state wineries and breweries, but not in-state
21 producers, to the added costs and burdens of selling their products through a separate wholesaler
22 under the three-tier system. Under Granholm, such discrimination against out-of-state producers is
23 not consistent with the Commerce Clause.

1 b. Applicability of *Granholm* to Direct Shipments to Retailers, Rather than to Consumers

2 The Granholm Court struck down state laws that prohibited out-of-state producers from
3 selling their products directly to consumers. Seizing on this distinction, Defendants argue that
4 Granholm is limited to cases involving direct sales from producers to consumers, rather than cases
5 involving direct sales from producers to retailers. Defendants suggest that “it is clear that the
6 Granholm majority believes there is a constitutionally significant difference between sales of alcoholic
7 beverages to individuals for personal use and sales of such products to retailers for resale.” (Opp.
8 Brief at 7).

9 Costco argues that nothing in Granholm’s holding or language suggests that prohibiting only
10 out-of-state producers from selling directly to retailers is any less constitutionally offensive than
11 prohibiting them from selling directly to consumers. The Court agrees. The central question in both
12 Granholm and in this case is whether a state can discriminate against out-of-state producers. Allowing
13 in-state producers to sell beer and wine directly to retailers, while withholding that privilege from out-
14 of-state producers, presents the same type of discrimination against interstate commerce that the Court
15 in Granholm held to be unconstitutional. Granholm does not suggest that it may be constitutionally
16 permissible for states to discriminate against out-of-state producers in sales to retailers, but not in sales
17 to consumers.

18 3. Legitimate Local Purposes for Discrimination Against Interstate Commerce

19 Defendants argue that even if RCW 66.24.170 and 66.24.240 discriminate against interstate
20 commerce, the statutes are nonetheless valid because they advance legitimate local purposes that
21 cannot be adequately served by any reasonable nondiscriminatory alternatives. If the State can make
22 such a showing, the statutes may be upheld despite their discrimination against interstate commerce.
23 See Granholm, 125 S. Ct. at 1905. However, the Granholm Court made it clear that a state seeking to
24 justify discrimination against interstate commerce faces a considerable burden. The Court noted:

1 Our Commerce Clause cases demand more than mere speculation to support discrimination
2 against out-of-state goods. The “burden is on the State to show that ‘the *discrimination* is
3 demonstrably justified.’” The Court has upheld state regulations that discriminate against
interstate commerce only after finding, based on concrete record evidence, that a State’s
nondiscriminatory alternatives will prove unworkable.

4 Granholm, 125 S. Ct. at 1907 (internal citations omitted) (emphasis in original).

5 Here, Defendants offer two local purposes for denying out-of-state producers the right to sell
6 their products directly to retailers: (1) ensuring the orderly distribution of beer and wine; and (2)
7 facilitating tax collection.

8 a. Orderly Distribution

9 Defendants argue that the state would not be able to assert sufficient control over the
10 distribution of beer and wine if out-of-state retailers were permitted to sell directly to retailers.

11 Defendants note that Washington has multiple laws governing the sale and distribution of beer and
12 wine. They argue that the State needs to conduct audits and annual inspections of distributors in order
13 to ensure compliance with these laws and that they do not have the resources to perform audits or
14 inspections for all out-of-state beer and wine producers who may seek to sell products directly to
15 retailers. They suggest that if out-of-state producers are allowed to sell directly to retailers, the State
16 will “lose all practical ability to control the distribution of alcohol.” (Opp. Brief at 12).

17 Defendants’ arguments are based on a declaration from Lorraine Lee, the Liquor Control
18 Board’s director of licensing and regulation. Ms. Lee asserts that the State “could not properly
19 enforce its mandated responsibilities in enforcing the statutes and regulations by having to inspect out-
20 of-state suppliers acting in the capacity as a distributor.” (Lee Decl., ¶ 4). She also states that there
21 “are not enough liquor enforcement officers to inspect the numerous suppliers outside the State of
22 Washington.” Id.

23 In response, Costco notes that similar arguments were raised in Granholm. See Granholm, 125
24 S. Ct. at 1907 (noting that “Michigan and New York offer a handful of other rationales, such as
25

1 facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory
2 accountability.”) The Granholm Court rejected those arguments, holding:

3 These objectives can . . . be achieved through the alternative of an evenhanded licensing
4 requirement. Finally, it should be noted that improvements in technology have eased the
5 burden of monitoring out-of-state wineries. Background checks can be done electronically.
6 Financial records and sales data can be mailed, faxed, or submitted via e-mail.

7 Id.

8 Costco also argues that the Defendants have not indicated what purposes are accomplished by
9 annual inspections of distributors, nor has the State provided any evidence regarding the potential cost
10 of auditing out-of-state producers acting as distributors. In addition, Costco notes that Defendants
11 have not established that the state is financially unable to hire more enforcement agents or that the cost
12 of doing so could not be defrayed through licensing fees. Costco also suggests that physical visits to
13 distributors could be done cooperatively by other state liquor control boards.

14 The Court finds that Defendants have not produced sufficient evidence to create a genuine
15 issue of material fact on whether discrimination against out-of-state producers is demonstrably
16 justified to ensure orderly distribution of beer and wine. Defendants’ arguments are largely
17 speculative and conclusory. Much like in Granholm, Defendants provide “little concrete evidence for
18 the sweeping assertion that they cannot police direct shipments by out-of-state” producers. Granholm,
19 125 S. Ct. at 1907. The state must provide “more than mere speculation to support discrimination
20 against out-of-state goods.” Id. Under these standards, Defendants have not made a sufficient
21 showing to avoid summary judgment.

22 b. Tax Collection

23 Defendants also argue that distributor privileges must be restricted to in-state entities in order
24 to facilitate tax collection. In Washington, the “liter tax” on beer and wine is paid and collected at the
25 distributor level, rather than at the retailer level. Defendants argue that the State “is better able to

1 enforce the collection of such taxes than would be the case if the tax-collecting entity was out-of-
2 state.” (Opp. Brief at 12).

3 Costco responds by noting that similar arguments were raised in Granholm. Like Defendants,
4 New York state argued that tax collection was a legitimate local purpose for prohibiting out-of-state
5 wineries from shipping directly to consumers. The Court rejected this argument, finding that “New
6 York could protect itself against lost tax revenue by requiring a permit as a condition of direct
7 shipping” and that “[l]icensees could be required to submit regular sales reports and to remit taxes.”
8 Granholm, 125 S. Ct. at 1906. Costco argues that there is no reason why Washington could not do
9 the same, noting that the state already requires out-of-state producers to obtain “certificates of
10 approval” in order to sell their products to Washington wholesalers.

11 Costco also notes that until relatively recently the state relied on retailers, rather than
12 wholesalers, to collect the liter tax on beer and wine. Costco states that this duty was shifted to
13 wholesalers in 1973 for wine and in 2000 for beer. Costco argues that the state offers no reason why
14 the liter tax could not again be collected at the retailer level, rather than at the distributor level.

15 The Court finds that Defendants have not presented evidence that is sufficient to create a
16 genuine issue of material fact on whether discrimination against out-of-state beer and wine producers
17 is demonstrably justified to facilitate tax collection. As before, Defendants’ arguments are speculative
18 and conclusory at best.

19 c. Other Non-Discriminatory Alternative

20 Finally, it should be noted that Washington has at least one non-discriminatory alternative to
21 the current regulatory scheme that would address Defendants’ professed concerns about ensuring
22 orderly distribution of beer and wine and facilitating tax collection: The state could revoke the self-
23 distribution privileges granted to in-state beer and wine producers. As the Fourth Circuit noted in a
24 recent case where a 1981 North Carolina law allowed in-state wineries, but not out-of-state wineries,
25 to sell their products directly to consumers:

1 At least one reasonable nondiscriminatory alternative is available to North Carolina and it
2 would require North Carolina simply to return to the pre-1981 structure and require in-state
wines to pass through the same three-tiered scheme that all other wines must pass through.

3 Beskind v. Easley, 325 F.3d 506, 515 (4th Cir. 2003). Similarly, Washington state could avoid
4 discrimination against out-of-state producers by requiring both in-state and out-of-state producers to
5 sell their products through the same three-tiered structure.

6 4. Remedy

7 The constitutional infirmities of Washington's system may be remedied by two different
8 approaches: (1) allowing out-of-state producers of beer and wine to distribute directly to retailers; or
9 (2) prohibiting in-state producers of beer and wine from distributing directly to retailers. Costco and
10 the Washington Wine Institute support the first alternative, while the LCB defendants and the
11 Washington Beer and Wine Wholesalers Association argue for the second option. The Wine Institute
12 also suggests that the Court should stay enforcement of any order on this matter until the State
13 Legislature has had sufficient time to revise the challenged statutes.

14 Both sides cite Heckler v. Matthews, 465 U.S. 728 (1984), to support their positions. In
15 Heckler, the Court stated that when a district court is faced with a "constitutionally underinclusive"
16 statute, it has "two remedial alternatives: [it] may either declare [the statute] a nullity and order that its
17 benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage
18 of the statute to include those who are aggrieved by the exclusion." Id. at 738 (internal citations and
19 quotations omitted). In a footnote, the Court elaborated on this point:

20 Although the choice between "extension" and "nullification" is within the "constitutional
21 competence of a federal district court," and ordinarily "extension, rather than nullification, is
22 the proper course," the court should not, of course, "use its remedial powers to circumvent the
23 intent of the legislature," and should therefore "measure the intensity of commitment to the
24 residual policy and consider the degree of potential disruption of the statutory scheme that
25 would occur by extension as opposed to abrogation."

Id. at 739 n.5 (internal citations omitted).

1 Costco points to language from Heckler stating that “extension, rather than nullification” is
2 ordinarily the proper way to remedy an underinclusive statute. Costco also notes that since Granholm,
3 several district courts have held that state laws allowing only in-state wine producers to sell directly to
4 consumers should be remedied by extending the direct shipment privilege to out-of-state producers.

5 Defendants argue that Washington has a long history of enforcing a three-tier system and that
6 the remedy proposed by Costco “would require the court to invade the province of the state legislature
7 and amend a number of provisions regarding the three-tier system.” Defendants note that the
8 Washington Legislature has adopted severability clauses for the state’s beer and wine distribution
9 laws, which generally provide that if any provisions of the statutes are held invalid, the remainder of
10 the statutes should not be affected. RCW 66.98.080, 090. Defendants also point to Beskind v.
11 Easley, 325 F.3d 506 (4th Cir. 2003), a case involving a North Carolina law that allowed in-state wine
12 producers to sell directly to consumers, while requiring out-of-state producers to sell through
13 wholesalers. The Beskind court remedied the unconstitutionality of the statute by striking down the
14 preference for in-state wineries. In explaining its reasoning, the court noted:

15 [W]e can accept a presumption that North Carolina would want to uphold and preserve all of
16 its [Alcoholic Beverage Control] laws against constitutional challenges. Accordingly, when
17 presented with the need to strike down one or more of those laws as unconstitutional, we can
18 assume that North Carolina would wish us to take the course that least destroys the regulatory
19 scheme that it has put into place pursuant to its powers under the Twenty-first Amendment.
20 And as a matter of comity and harmony, we are duly bound to give effect to such a policy,
21 disturbing only as much of the State regulatory scheme as is necessary to enforce the U.S.
22 Constitution. When applying this “minimum-damage” approach, we have little difficulty in
23 concluding that it causes less disruption to North Carolina’s . . . laws to strike the single
24 provision – added in 1981 and creating the local preference – as unconstitutional and thereby
25 leave in place the three-tiered regulatory scheme that North Carolina has employed since 1937
and has given every indication that it wants to continue to employ.

21 Id. at 519.

22 In this case, the remedy proposed by Defendants would appear to create the “minimum
23 damage” to the existing statutory and regulatory scheme in Washington. Defendants remedy would
24 require portions of only two statutory provisions (RCW 66.24.170(3) and RCW 66.24.240(2)) to be
25

1 invalidated. By contrast, a proposed order submitted by Costco would require six statutory provisions
2 to be amended in order to extend the self-distribution privilege to out-of-state producers. (RCW
3 66.12.030(2), 66.28.070(1), 66.24.170(3), 66.24.206; 66.24.240(2), and 66.24.270). Defendant's
4 proposed remedy would remove a limited exception to Washington's long-standing three-tier system,
5 while Plaintiff's proposed remedy would significantly expand this exception. Extending the self-
6 distribution privilege to out-of-state producers would also require more significant changes in the
7 State's licensing, enforcement, and tax collection efforts for beer and wine than withdrawing the
8 privilege from in-state producers.

9 Therefore, the more appropriate remedy from a judicial perspective would be to withdraw the
10 self-distribution from in-state producers, rather than extending the privilege to out-of-state producers.
11 It should be emphasized that the Court is not empowered to decide which alternative represents better
12 public policy. Although the Court recognizes that withdrawing the self-distribution privilege would
13 impose financial hardships on Washington wineries, this remedy would appear to be more consistent
14 with the intent of the Washington Legislature because it would impose less significant changes on the
15 existing statutory and regulatory structure for beer and wine in the state.

16 The Washington Wine Institute argues that the Court should "stay the enforcement of its order
17 for a period sufficient to permit the Washington legislature to act on the matter." (Dkt. No. 109 at 2).
18 The Court agrees. The constitutional defects in the current Washington system present a policy choice
19 between two alternatives, a decision that is within the discretion of the State Legislature. Regardless
20 of the remedy chosen by the Court, the State Legislature could simply choose to adopt the other
21 remedy during the upcoming legislative session, which starts in early January 2006. Therefore, the
22 Court will stay the entry of judgment on this claim until April 14, 2006 to provide the Washington
23 State Legislature with a sufficient period of time to act on this matter. See, e.g., Population Servs.
24 Int'l v. Wilson, 398 F. Supp. 321, 340-41 (S.D.N.Y. 1975) (staying enforcement of injunction for a
25 period of time to permit state legislature the opportunity to amend unconstitutional statutes).

1 **Conclusion**

2 In light of the Supreme Court’s decision in Granholm, Washington may not permit in-state
3 beer and wine producers to distribute their products directly to retailers while withholding that
4 privilege from out-of-state producers. Without demonstrating the need for such discrimination,
5 Washington’s system prevents out-of-state beer and wine producers from competing on equal terms
6 with in-state producers. Under the Commerce Clause of the United States Constitution, Washington’s
7 policies cannot stand. Therefore, the Court GRANTS in part Costco’s motion for summary judgment
8 on its second claim and the related portion of its third claim.

9 The Court DENIES Costco’s request to remedy the unconstitutionality of Washington’s
10 system by extending the self-distribution privilege to out-of-state producers. This remedy would be
11 more disruptive to the existing statutory and regulatory scheme than withdrawing the self-distribution
12 privilege from in-state producers. The Court recognizes, however, that the Washington State
13 Legislature ultimately has the authority to decide whether to correct the constitutional infirmities of
14 the Washington system by either extending the self-distribution privilege to out-of-state producers or
15 withdrawing the privilege from in-state producers. Because the State Legislature will be convening in
16 early January 2006, the Court will stay the entry of judgment on these claims until April 14, 2006 in
17 order to provide the State Legislature with sufficient time to act on this matter.

18 The clerk is directed to provide copies of this order to all counsel of record.

19 Dated: December 21, 2005

20 s/Marsha J. Pechman
21 Marsha J. Pechman
22 United States District Judge
23
24
25