IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TONY KORAB; TOJIO CLANTON; KEBEN ENOCH; CASMIRA AGUSTIN; ANTONIO IBANA; AGAPITA MATEO; and RENATO MATEO, each individually and on behalf of those persons similarly situated, Plaintiffs, vs. RACHEL WONG, in her official capacity as Director of the State of Hawaii, Department of Human Services; LESLIE TAWATA in her official capacity as State of Hawaii, Department of Human Services, Med-QUEST Division Administrator, Defendants.	CIVIL NO. 10-00483 JMS-KSC FINDINGS AND RECOMMENDATION TO DENY PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

FINDINGS AND RECOMMENDATION TO DENY PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

Before the Court is Plaintiffs' Motion for Attorneys' Fees ("Motion"), filed May 11, 2015. On May 21, 2015, Plaintiffs filed a Statement of Consultation. Defendants filed their Opposition on June 4, 2015.

Plaintiffs filed their Reply on June 18, 2015.

After careful consideration of the parties' submissions, and the applicable law, the Court FINDS AND RECOMMENDS that this Motion be DENIED for the reasons set forth below.

BACKGROUND

Insofar as the Court and the parties are familiar with the extensive history of this case, the Court includes only those facts relevant to the disposition of this Motion.

On August 23, 2010, Plaintiffs initiated this action to prevent Defendants from implementing Basic Health Hawaii ("BHH"), a medical benefits program created in 2010 for Plaintiffs, who are 1) COFA Residents - non-pregnant citizens or immigrants, age nineteen or older, of countries with a Compact of Free Association with the United States who are lawfully residing in Hawaii and 2) New Residents - non-pregnant immigrants, age nineteen or older, who have been United States residents for less than five years.

On December 13, 2010, U.S. District Judge J. Michael Seabright issued an Order Granting Plaintiffs' Motion for Preliminary Injunction ("Injunction Order"), wherein he ordered as follows:

> 1. For COFA Residents who presently are enrolled in BHH, Defendants shall reinstate the benefits that the COFA Resident was receiving through the Old Programs as of June 1, 2010, prior to being deemed into BHH effective July 1, 2010 pursuant to Hawaii Administrative Rule §17-1722.3-33, as amended.
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> 2. Defendants shall give priority to processing the reinstatement of benefits for those COFA Residents who are enrolled in BHH and who were receiving benefits through the QExA or SHOTT programs. These COFA Residents presently enrolled in BHH will be entitled to benefits effective December 15, 2010 and Defendants shall reimburse providers for any benefits provided on or after that date, regardless of when Defendants complete processing the re-enrollment documentation. COFA Residents having QExA benefits reinstated will receive these benefits through the same health plan through which they previously received them.
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> 3. No later than January 1, 2011, Defendants shall complete the reinstatement of benefits for COFA Residents presently enrolled in BHH who were receiving QUEST benefits before being deemed into BHH. COFA Residents having QUEST benefits reinstated will receive

these benefits through the same health plan through which they previously received them.

4. No later than February 1, 2011, Defendants shall reinstate benefits for COFA Residents who were enrolled in BHH and were receiving benefits through the QUEST-ACE or QUEST-Net programs. COFA Residents having QUEST-ACE or QUEST-Net benefits reinstated will receive these benefits through the same health plan through which they previously received them.

5. No later than January 15, 2011, Defendants shall complete the reinstatement of benefits for COFA Residents deemed into BHH who were disenrolled upon conclusion of the transition period for failing to meet BHH eligibility criteria. However, COFA Residents in this group who received benefits through the QExA or SHOTT programs on June 1, 2010 will have these benefits reinstated effective December 15, 2010 as provided in paragraph 2, above.

6. Effective December 15, 2010, Defendants shall accept and timely process applications for medical benefits from COFA Residents who are not presently enrolled in BHH. Defendants shall not deny any application for medical assistance from a COFA Resident with an application date on or after December 15, 2010 based on citizenship. Upon meeting all medical assistance eligibility requirements that are applicable to United States citizens, other than citizenship, COFA Residents shall receive the benefits of the Old

Program for which he/she is eligible. However, for applications dated from December 15, 2010 through December 31, 2010, if the COFA Resident applicant is determined eligible to receive QUEST benefits, then the applicant will receive BHH benefits from the date of eligibility through December 31, 2010 and will receive QUEST benefits beginning January 1, 2011.

7. Defendants shall publish notice in the Honolulu Star-Advertiser, The Maui News, Hawaii Tribune Herald, West Hawaii Today, and The Garden Island, announcing that the Defendants are accepting applications for medical benefits from COFA Residents as provided in paragraph 6, above. Defendants shall consult with Lawyers for Equal Justice, to the extent practicable given the time constraints of this Order, on the wording of the public notice.

8. Defendants shall make every effort to identify COFA Residents who were disenrolled from the Old Programs because of a change in pregnancy status or who turned 19 years old after July 1, 2010, but were not enrolled into BHH because of the cap on BHH enrollment. Once identified, Defendants shall separately notify these individuals of their right to apply for medical assistance benefits.

9. Defendants shall take steps to assure that medical providers in the State of Hawai‘I are aware that COFA Residents are entitled to benefits under the Old Programs so that they receive the benefits to which they are entitled, even if Defendants have not completed processing

> the re-enrollment documentation.
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> No bond shall be required pursuant to Fed. R. Civ. P. 65(c). This Preliminary Injunction Order shall be binding as provided in Fed. R. Civ. P. 65(d) and shall remain in effect for the duration of this litigation, until further order of the court.

Injunction Order at 14-18.

On January 10, 2011, Defendants appealed the Injunction Order.

On January 1, 2014, new federal rules, known as the "individual mandate", were enacted pursuant to the Affordable Care Act ("ACA").

On April 1, 2014, the Ninth Circuit issued an Opinion vacating the preliminary injunction, holding that rational basis was the proper standard of review for the State's actions. Doc. No. 87 at 24-25. The Ninth Circuit remanded the case to this Court for further proceedings.

On March 3, 2015, Judge Seabright issued an Order (1) Granting in Part and Denying in Part Plaintiffs' Motion to Dismiss Action Without Prejudice, Doc. No. 108; and (2) Denying Defendants' Counter-

Motion for Summary Judgment, Doc. No. 116. Doc. No. 122.

On April 28, 2015, the Court entered a Stipulation to Dismiss Count I Without Prejudice and Order. Judgment entered the same day.

The present Motion followed.

DISCUSSION

I. Entitlement to Attorneys' Fees

Plaintiffs submit that they are entitled to attorneys' fees under 42 U.S.C. § 1988(b) because they are the "prevailing party" in this 42 U.S.C. § 1983 action. Plaintiffs assert that 1) they obtained a preliminary injunction requiring Defendants to continue providing comparable benefits to COFA Residents and 2) the preliminary injunction, which remained in place for approximately three and a half years, afforded substantial relief to the class. According to Plaintiffs, the Ninth Circuit's ruling vacating the injunction did not strip them of their prevailing party status because this action became moot prior to a final decision on the merits.

Defendants counter that Plaintiffs are not the "prevailing party" because the Ninth circuit vacated the preliminary injunction, i.e., Plaintiffs were not entitled to the remedy; 2) Plaintiffs obtained no enduring favorable judicial result; and 3) Plaintiffs achieved no judicially sanctioned change in the legal relationship between the parties.

Section 1988 provides, in pertinent part: "In any action or proceeding to enforce a provision of section[] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). To be considered a "prevailing party," a party must "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Farrar v. Hobby, 506 U.S. 103, 109 (1992) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)); LSO, Ltd. v. Stroh, 205 F.3d 1146, 1160 (9th Cir. 2000). In other words, a plaintiff "'prevails' when actual relief on the merits of his claim materially alters the

legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Farrar, 506 U.S. at 111-12; UFO Chuting of Haw., Inc. v. Smith, 508 F.3d 1189, 1197 (9th Cir. 2007). "Relief 'on the merits' occurs when the material alteration of the parties' legal relationship is accompanied by '*judicial imprimatur* on the change.'" Higher Taste, Inc. v. City of Tacoma, 717 F.3d 712, 715 (9th Cir. 2013) (quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Heath & Human Res., 532 U.S. 598, 605 (2001)).

Although the Supreme Court has held that "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant," Farrar, 506 U.S. at 113,[1] the Ninth Circuit has made clear that in certain circumstances, "prevailing party" status may be

[1] Farrar v. Hobby did not involve "prevailing party" status in the context of injunctive relief, but rather, whether a party who is awarded nominal damages following trial is a "prevailing party." 506 U.S. 103.

accorded to those who obtain injunctive relief. See UFO, 508 F.3d at 1197 (defining prevailing party as one who "achieves the objective of its suit by means of an injunction issued by the district court"); Williams v. Alioto, 625 F.2d 845, 847 (9th Cir. 1980) (per curiam) (holding that a plaintiff who obtains a preliminary injunction prevails on at least some of the merits of its claims); Harris v. McCarthy, 790 F.2d 753, 757 (9th Cir. 1986) (issuance of preliminary injunction, without more, warranted an award of attorneys' fees because the plaintiffs succeeded on a significant issue in the litigation and achieved some of the benefit they sought in bringing suit). "A preliminary injunction issued by a judge carries all the 'judicial imprimatur' necessary to satisfy *Buckhannon*." Watson v. Cnty. of Riverside, 300 F.3d 1092, 1096 (9th Cir. 2002).

Here, although Plaintiffs obtained a preliminary injunction in district court, they cannot be deemed the "prevailing party" given that the Ninth Circuit vacated the preliminary injunction. Plaintiffs argue that they are the prevailing party because they

obtained a preliminary injunction and the case was rendered moot before final judgment. Plaintiffs appear to believe that the reversal of the preliminary injunction has no effect upon their prevailing party status. Mem. in Supp. of Mot. at 9 ("Moreover, even though the Ninth Circuit ultimately vacated the Court's ruling, the case was effectively mooted when the coverage requirements of the ACA took effect on January 1, 2014."). The cases relied upon most heavily by Plaintiffs - Watson and Higher Taste - are distinguishable and they do not compel the result proffered by Plaintiffs. Significantly, neither Watson nor Higher Taste involved the vacation of the preliminary injunctions relied upon by the plaintiffs in those cases to satisfy the judicial imprimatur requirement.

In Watson, the court explained that "there will be occasions when the plaintiff scores an early victory by securing a preliminary injunction, then loses on the merits as the case plays out and judgment is entered against him–-a case of winning a battle but losing the

war." Watson, 300 F.3d at 1096. It then distinguished the facts before it, noting that

> this case is different because Watson's claim for permanent injunctive relief was not decided on the merits. The preliminary injunction was not dissolved for lack of entitlement. Rather, Watson's claim for permanent injunction was rendered moot when his employment termination hearing was over, after the preliminary injunction had done its job.

Id. (emphasis added).

Higher Taste recognized that "[p]recisely because the relief afforded by a preliminary injunction may be undone at the conclusion of the case, some inquiry into events postdating the injunction's issuance will generally be necessary." Higher Taste, 717 F.3d at 717. If a party obtains a preliminary injunction but loses on the merits after a case is litigated to final judgment, that party is not a prevailing party. Id. By contrast, "when a plaintiff wins a preliminary injunction and the case is rendered moot before final judgment, either by the passage of time or other circumstances beyond the parties' control, the plaintiff is a prevailing party eligible

for a fee award." Id. (citing Watson, 300 F.3d at 1096). The reasoning for this is that the plaintiff "received relief that was as enduring as a permanent injunction would have been and, by virtue of the case's mootness, that relief was no longer subject to being 'reversed, dissolved, or otherwise undone by the final decision in the same case." Id. (citations omitted) (emphasis added).

Applying these legal principles to the instant case, Plaintiffs cannot be deemed a prevailing party. As much as Plaintiffs attempt to disregard or downplay the vacation of the preliminary injunction, the Court is unable to ignore the reversal's substantial effect upon the disposition of this action. Essentially, Plaintiffs should never have obtained the preliminary injunction in the first place, and in view of this fact, any relief they enjoyed is a nullity. Unlike in Higher Taste and Watson, any purported mootness here did not prevent the vacation of the preliminary

injunction.[2] Had the preliminary injunction never issued, Plaintiffs might have enjoyed no relief until Defendants repealed BHH, much less any judicially sanctioned relief. It would be an absurd result to confer prevailing party status on Plaintiffs when the very success upon which they rely as entitling them to prevailing party status was improperly granted.

The Eighth Circuit has articulated this rationale.[3] In Pottgen v. Missouri State High School Activities Association, the plaintiff brought an action

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[2] That the ACA coverage requirements took effect on January 1, 2014, three months before the Ninth Circuit vacated the preliminary injunction, is of no consequence. Indeed, Plaintiffs themselves did not move to dismiss the action on mootness grounds until January 13, 2015, asserting that there was no live case or controversy given Defendants' December 5, 2014 announcement to repeal BHH. Had the case truly been moot, it is doubtful that the Ninth Circuit would have issued its decision and remanded the case for further proceedings.

[3] While a factually analogous Ninth Circuit opinion would have been preferable, the Ninth Circuit has adopted the rationale of other circuits, including the Eight Circuit, with respect to the prevailing party analysis for § 1988(b) fee awards. See, e.g., Higher Taste, 717 F.3d at 717 (citing and relying upon Second, Third, Sixth, Seventh, Eight Circuit, and Eleventh Circuit cases).

against the defendant because it refused to allow him to participate in interscholastic athletics during the 1993-94 school year, citing By-Law 232, which prohibited students 19 years of age or older from participating in interscholastic sports. 103 F.3d 720, 722 (8th Cir. 1997). The plaintiff obtained a preliminary injunction on the merits, which allowed him to play baseball for his high school baseball team. Id.

By the time the defendant's appeal of the decision was heard, the baseball season had ended. Id. The Eight Circuit nevertheless addressed the appeal because a live controversy existed regarding a portion of the injunction. Id. It reversed the preliminary injunction and remanded the case to the district court for further proceedings consistent with its holding. Id.

Notwithstanding the reversal, its issuance of an order rescinding all injunctive relief, and its dismissal of the complaint with prejudice, the district court determined that the plaintiff was a prevailing

party and awarded him attorneys' fees and expenses. Id. The Eighth Circuit reversed the order awarding fees and costs, holding that "the only judgment upon which Pottgen can base a claim of prevailing party status has been reversed, and hence nullified. That judgment therefore does not constitute success on the merits for the purposes of awarding attorney's fees, and Pottgen is consequently not a prevailing party." Id. at 724. The Pottgen court further explained that

> While we recognize that Pottgen was able to play baseball, this opportunity was the result of an incorrect ruling by the district court. Had it not been for the passage of time between the district court's grant of injunctive relief and this Court's reversal of that relief, MSHSAA could have enforced its By-Law 232 as written against Pottgen. In addition, MSHSAA has in no way been barred from future enforcement of By-Law 232 against any other student. Thus, Pottgen cannot be considered to be prevailing party in any meaningful sense. He got the chance to play baseball only because the district court erred in granting a TRO and preliminary injunctive relief. A victory of this sort--one due to an incorrect ruling by the district court--is not sufficient to support a finding of prevailing party status.

Id. at 724 n.14 (emphasis added).

Plaintiffs' attempt to distinguish Pottgen is unavailing. Much like the plaintiff in Pottgen, any success enjoyed by Plaintiffs in this action was due solely to the improperly issued preliminary injunction. Accordingly, the Court finds that Plaintiffs are not a prevailing party and they are not entitled to an award of fees.

CONCLUSION

Based on the foregoing, the Court HEREBY FINDS AND RECOMMENDS that Plaintiffs' Motion for Attorneys' Fees be DENIED.

IT IS SO FOUND AND RECOMMENDED.

DATED: Honolulu, Hawaii, July 15, 2015.

Kevin S.C. Chang
United States Magistrate Judge