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17 UNITED STATES DISTRICT COURT  
18 NORTHERN DISTRICT OF CALIFORNIA

19  
20 SHIRLEY "RAE" ELLIS, et al.,  
21 Plaintiffs,  
22 v.  
23 COSTCO WHOLESALE CORPORATION,  
24 Defendant.

Case No. C04-3341 EMC

Assigned to Hon. Edward M. Chen

**SUPPLEMENTAL APPLICATION FOR  
SERVICE AWARDS TO CLASS  
REPRESENTATIVES**

Hearing Date: February 6, 2014  
Hearing Time: 1:30 p.m.  
Courtroom: 5 (17th Floor)

1                                   **SUPPLEMENTAL APPLICATION FOR SERVICE AWARDS**

2           In connection with their motion for preliminary settlement approval, Plaintiffs explained  
3 that they would request Court approval of modest named Plaintiff service awards in connection  
4 with the proposed settlement. (*See* ECF No. 755 at 23-25.) Plaintiffs anticipated that a motion  
5 for service payments would be filed prior to the hearing on final approval, at a time to be  
6 determined by the Court. (*Id.*) In its Order of January 22, 2014, the Court indicated that, in  
7 advance of preliminary approval, Plaintiffs should provide additional discussion as to the nature  
8 and scope of the named Plaintiffs' involvement to aid the Court's determination of whether they  
9 are entitled to incentive payments. (ECF No. 767 at 3.) Accordingly, Plaintiffs file this  
10 supplemental application for service awards in advance of the hearing on preliminary approval.  
11 The application is based on the following Memorandum of Points and Authorities, as well as the  
12 Declarations of Shirley "Rae" Ellis, Leah Horstman, and Elaine Sasaki, filed herewith.

13                                   **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I.       INTRODUCTION**

15           Plaintiffs request Court-approval of a service award<sup>1</sup> of \$10,000 for each Class  
16 Representative—Shirley "Rae" Ellis, Elaine Sasaki, and Leah Horstman, to be paid from the  
17 Gross Settlement Fund. (*See* Am. Settlement Agreement §§ 3.3, 10.4.) These service awards will  
18 compensate the named Plaintiffs for the extensive services they performed for the class, the time  
19 they spent on this case, and the risks they assumed in connection with this litigation.

20 **II.     FACTUAL BACKGROUND**

21           In 2002, and again in 2004, Shirley "Rae" Ellis filed a charge of discrimination with the  
22 EEOC. (ECF No. 1 ¶¶ 33, 34.) In August 2004, Ellis filed the original Complaint, and Horstman  
23 joined later that year in an Amended Complaint. (ECF Nos. 1, 63.) Sasaki joined as a named  
24 Plaintiff in 2005. (ECF Nos. 83, 96.) The named Plaintiffs now represent a class of  
25 approximately 1,300 female employees who were subject to Costco's system of promotions to  
26 Assistant General Manager and/or General Manager. (*See* ECF No. 693.)

27 \_\_\_\_\_  
28 <sup>1</sup> These service awards are in addition to the amount the Class Representatives will be entitled to  
seek as class members and for their individual claims. (*See* Am. Settlement Agreement § 10.)

1 Over nearly ten years of litigation, the named Plaintiffs each expended great and  
2 consistent effort on behalf of this class action. As further detailed in the declarations filed  
3 herewith, each of the named Plaintiffs spent many hours conferring with Class Counsel about the  
4 underlying facts of the case. (*See* Sasaki Decl. ¶ 14; Ellis Decl. ¶ 9; Horstman Decl. ¶ 9.) Sasaki  
5 was deposed three times. (Sasaki Decl. ¶ 14(b).) Ellis was deposed twice over the course of  
6 three days. (Ellis Decl. ¶ 9(c).) Horstman was deposed twice, and her deposition was noticed a  
7 third time. (Horstman Decl. ¶¶ 9(b)-(e).) All three Plaintiffs met with Counsel at length to  
8 prepare for their depositions and to review documents. (Sasaki Decl. ¶ 14(b); Ellis Decl. ¶ 9(c);  
9 Horstman Decl. ¶¶ 9(b)-(e).) The depositions required both Ellis and Sasaki to travel to the Bay  
10 Area three times from their homes in Colorado and Fresno, respectively. (Ellis Decl. ¶ 9(c)(iii);  
11 Sasaki Decl. ¶ 14(b)(iv).) All three named Plaintiffs were instrumental in responding to several  
12 sets of written discovery, not only searching their own records for responsive materials, but  
13 consulting with Class Counsel in drafting responses, and then carefully reviewing draft responses.  
14 (Sasaki Decl. ¶ 14(d); Ellis Decl. ¶ 9(e); Horstman Decl. ¶ 9(g).)

15 In addition, all three named Plaintiffs traveled to San Francisco to represent the class at  
16 the hearing on class certification in 2006. (Sasaki Decl. ¶ 14(e); Ellis Decl. ¶ 9(f); Horstman  
17 Decl. ¶ 9(h).) And all three consulted at length with Class Counsel about potential settlement,  
18 and participated in discussions preparing for trial. (Sasaki Decl. ¶ 14(f); Ellis Decl. ¶ 9(g);  
19 Horstman Decl. ¶ 9(i).) Sasaki attended two full days of mediation, and all three named Plaintiffs  
20 remained available throughout all of the several mediation sessions. (Sasaki Decl. ¶ 14(f); Ellis  
21 Decl. ¶ 9(g); Horstman Decl. ¶ 9(i).)

22 Each of the three named Plaintiffs took on certain risks in stepping forward as Class  
23 Representatives. Sasaki was, and remains, a current employee at Costco. (Sasaki Decl. ¶¶ 4-6.)  
24 She understandably was very concerned about potential negative reactions from her employer if  
25 she joined the lawsuit as a named Plaintiff, fearing that she would be seen as disloyal or  
26 disruptive. (*Id.* ¶¶ 9, 16.) She was also concerned that she would be shunned by co-workers who  
27 might fear being seen as her ally. (*Id.* ¶ 10.) Ellis and Horstman both had justifiable concerns  
28 about the reaction future employers and potential employers might have upon discovering, as is

1 so easily done electronically, that they had brought a class action against a former employer.  
2 (Ellis Decl. ¶ 14; Horstman Decl. ¶¶ 12, 13.) Both Ellis and Horstman also feared, and realized,  
3 that their personal lives would be grist for the litigation mill, and that private facts would be open  
4 for review. (Ellis Decl. ¶ 12; Horstman Decl. ¶¶ 9(c)-(e), 14.) They lost both personal and  
5 professional relationships with friends and mentors, as Costco employees limited their  
6 communications with them. (Ellis Decl. ¶ 13; Decl. Horstman ¶ 6.)

7 Throughout the nearly 10 years of litigation, all three of the named Plaintiffs demonstrated  
8 constant loyalty to the class. They never sought to elevate their own claims above those of the  
9 class, and even now, if the class settlement is approved, they have no assurance of personally  
10 recovering damages. (Sasaki Decl. ¶¶ 11-13; Ellis Decl. ¶¶ 6, 7, 8, 16; Horstman Decl. ¶¶ 7, 15,  
11 16.) They never wavered in their commitment that this action, brought for all similarly situated  
12 women, should be resolved for all similarly situated women. (Sasaki Decl. ¶ 19; Ellis Decl. ¶¶  
13 10, 15; Horstman Decl. ¶¶ 15-16.) Ellis, Horstman, and Sasaki all remained firm throughout the  
14 years in their determination that changes needed to be made, and that this case was not just about  
15 their individual concerns. (Sasaki Decl. ¶¶ 11-13; Ellis Decl. ¶¶ 10, 16; Horstman Decl. ¶¶ 7, 16.)

16 These services performed by these three Plaintiffs were critical to the litigation and  
17 settlement of this case, and resulted in substantial benefits to the class. The requested service  
18 awards of \$10,000 are relatively modest and very reasonable in light of the considerable efforts of  
19 the named Plaintiffs and their active involvement in all aspects of the litigation and settlement  
20 expended over 10 years.

### 21 **III. ARGUMENT**

#### 22 **A. Class Representative Service Awards Are Standard In Class Actions.**

23 It is well-established in this circuit that named plaintiffs in a class action are eligible for  
24 reasonable incentive payments, also known as service awards. *See Staton v. Boeing Co.*, 327 F.3d  
25 938, 976-77 (9th Cir. 2003) (discussing approval of incentive awards). The Ninth Circuit recently  
26 noted that incentive payments to named plaintiffs have become “fairly typical” in class actions.  
27 *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (citing 4 William B.  
28 Rubenstein *et al.*, *Newberg on Class Actions* § 11:38 (4th ed. 2008); Theodore Eisenberg &

1 Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 U.C.L.A.  
2 L.Rev. 1303 (2006)).

3 Class representative incentive or service awards are intended to compensate the named  
4 plaintiffs for work done on behalf of the class, to make up for financial or reputational risks  
5 undertaken in bringing the action and, sometimes, to recognize their willingness to act as private  
6 attorneys general. *Id.* at 958-59.

7 **B. The Proposed Service Awards Are Reasonable.**

8 In evaluating the reasonableness of a requested service award, courts may consider factors  
9 such as: (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree to  
10 which the class has benefitted from those actions; (3) the duration of the litigation and the amount  
11 of time and effort the plaintiff expended in pursuing it; and (4) the risks to the plaintiff in  
12 commencing the litigation, including reasonable fears of workplace retaliation, personal  
13 difficulties, and financial risks. *See Staton*, 327 F.3d at 977 (citing *Cook v. Niedert*, 142 F.3d  
14 1004, 1016 (7th Cir. 1998)); *see also Wren v. RGIS Inventory Specialists*, C-06-05778, 2011 WL  
15 1230826, at \*31-32 (N.D. Cal. Apr. 1, 2011); *In re Walmart Stores, Inc. Wage & Hour Litig.*, No.  
16 C 06-2069, 2011 WL 31266, at \*3 (N.D. Cal. Jan. 5, 2011) (applying *Staton* factors); *see also*  
17 *Singer v. Becton Dickinson & Co.*, No. 08-CV-821-IEG, 2009 WL 4809646, at \*9 (S.D. Cal.  
18 Dec. 9, 2009) (same).<sup>2</sup>

19 In light of these factors, the requested \$10,000 service awards are clearly reasonable.  
20 The named Plaintiffs assumed the risk associated with representing a proposed class of current  
21 and former employees. Sasaki was and remains an employee of Costco. Her willingness to bring

22 <sup>2</sup> In assessing the reasonableness of a service award, district courts in the Ninth Circuit have also  
23 applied the five-factor test set forth in *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294,  
24 299 (N.D. Cal. 1995), which analyzes: (1) the risk to the class representative in commencing a  
25 class action, both financial and otherwise; (2) the notoriety and personal difficulties encountered  
26 by the class representative; (3) the amount of time and effort spent by the class representative; (4)  
27 the duration of the litigation; and (5) the personal benefit, or lack thereof, enjoyed by the class  
28 representative as a result of the litigation. *See, e. g., Fulford v. Logitech, Inc.*, No. C 08-2041  
MMC, 2010 WL 807448, at \*2 (N.D. Cal. Mar. 5, 2010); *Smith v. CRST Van Expedited, Inc.*, No.  
10-CV-1116-IEG WMC, 2013 WL 163293, at \*6 (S.D. Cal. Jan. 14, 2013); *Singer*, 2010 WL  
2196104, at \*9.

1 suit on behalf of her co-workers exposed her to potential risks of negative consequences. She had  
2 a reasonable fear of retaliation, and possible job loss, as a result of suing her employer, and feared  
3 being shunned by her co-workers. Risk to reputation, and impact upon subsequent employment  
4 opportunities, were reasonable concerns for all three Plaintiffs. *See Glass v. UBS Fin. Servs.,*  
5 *Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at \*16-17 (N.D. Cal. Jan. 26, 2007)  
6 (acknowledging professional and legal risks posed to employees participating as class  
7 representatives in employment class actions); *Franco v. Ruiz Food Prods., Inc.*, No. 1:10-CV-  
8 02354-SKO, 2012 WL 5941801, at \*23 (E.D. Cal. Nov. 27, 2012) (recognizing that plaintiffs  
9 bore significant personal risk that by serving as named plaintiffs, other employers may be  
10 reluctant to hire them).

11 Notwithstanding these risks, Ellis, Sasaki and Horstman devoted substantial time and  
12 effort to the litigation. As described above and in their declarations filed herewith, each named  
13 Plaintiff provided Class Counsel with critical information and evidence throughout the litigation,  
14 prepared for and attended two depositions (three depositions in the case of Sasaki), aided in  
15 extensive discovery, attended the hearing on class certification, and assisted with the mediation  
16 sessions. They provided these services to the class throughout nearly ten years of litigation and  
17 settlement negotiations. The efforts of Ellis, Sasaki, and Horstman as Class Representatives were  
18 critical both in investigating and litigating the merits of the case and in reaching a fair settlement.  
19 This record of active involvement despite the risks posed supports approval of incentive awards.  
20 *Van Vranken*, 901 F. Supp. at 300.

21 The requested service awards do not create any conflict with the interests of the class  
22 members. As confirmed in their declarations, Ellis, Sasaki, and Horstman each provided their  
23 service to the class without any promise of any service award. Their support of the proposed  
24 settlement was not influenced by and is not contingent upon approval of the request for the  
25 service awards.

26 Further, there is also no conflict with the class due to the relatively small amount  
27 requested. The requested service awards are modest in comparison with the total settlement fund.  
28 The \$10,000 requested is .125% of the \$8,000,000 settlement fund, and the total of the three

1 requested service awards is still far less than 1% of the total fund (.375%). *Cf. Staton*, 327 F.3d at  
2 977 (disapproving proposed service awards totaling \$890,000, or 12% of the total monetary  
3 recovery).

4 Finally, the requested amounts are within the acceptable range awarded in other cases.  
5 *See Bolton v. U.S. Nursing Corp.*, NO. C 12-4466 LB, 2013 WL 5700403, at \*6 (N.D. Cal. Oct.  
6 18, 2013) (\$10,000 incentive award to named plaintiff from a \$1.7 million dollar settlement);  
7 *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG WMC, 2013 WL 163293, at \*6 (S.D.  
8 Cal. Jan. 14, 2013) (approving \$15,000 service payments in employment class action and noting  
9 that the amount “is well within the range awarded in similar cases”); *Garcia v. Gordon Trucking,*  
10 *Inc.*, No. 1:10-CV-0324 AWI SKO, 2012 WL 5364575, at \*11 (E.D. Cal. Oct. 31, 2012) (\$15,000  
11 to each of the four named plaintiffs in an employment case); *Thieriot v. Celtic Ins. Co.*, No. C 10-  
12 04462 LB, 2011 WL 1522385, at \*7-8 (N.D. Cal. 2011) (“Therefore, although on the high end of  
13 an acceptable incentive award, the court awards Thieriot an incentive award of \$25,000.”);  
14 *Martin v. AmeriPride Servs., Inc.*, No. 08cv440–MMA (JMA), 2011 WL 2313604, at \*9 (S.D.  
15 Cal. 2011) (“The \$18,500 incentive award is also well within the acceptable range awarded in  
16 similar cases.”); *Chu v. Wells Fargo Invs., LLC*, No. C 05–4526 MHP, 2011 WL 672645, at \*5  
17 (N.D. Cal. Feb. 16, 2011) (“\$10,000 seems reasonable” for the two plaintiffs who participated in  
18 the litigation for five and six years, but not for the more recently added plaintiffs who had only  
19 been involved in the litigation for two years, and who were awarded \$4,000 each); *Hopson v.*  
20 *Hanesbrands, Inc.*, No. No. CV–08–0844 EDL, 2009 WL 928133, at \*10 (N.D. Cal. Apr. 3,  
21 2009) (approving \$5,000 award to one member of 217 member class from \$408,420 settlement  
22 amount); *Glass*, No. C-06-4068 MMC, 2007 WL 221862, at \*16-17 (awarding \$25,000  
23 enhancement payments to named plaintiffs in employment class action), *aff’d*, 331 F. App’x 452  
24 (9th Cir. 2009); *Van Vranken*, 901 F. Supp. at 299 (approving \$50,000 award in \$76,723,213.26  
25 settlement amount); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000)  
26 (approving \$5,000 to two plaintiff representatives of 5,400 potential class members in \$1.75  
27 million settlement).

28

1 **IV. CONCLUSION**

2 In light of the critical efforts of the three named Plaintiffs over nearly ten years of  
3 litigation, the risks they undertook, and the substantial benefit to the class from the settlement, a  
4 service award of \$10,000 to each is reasonable. Plaintiffs respectfully request that the Court  
5 approve Plaintiffs' application for service awards.

6 Dated: January 30, 2014

7 Respectfully submitted,

8 DAVIS, COWELL & BOWE, LLP

9 By: /s/Elizabeth A. Lawrence

10 Elizabeth A. Lawrence

11 Attorneys for Plaintiffs and Certified Classes

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