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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

**NOTICE OF MOTION AND MOTION
FOR (1) PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT;
(2) APPROVAL OF CLASS NOTICE AND
NOTICE PLAN; AND (3) SETTING OF
SCHEDULE FOR FINAL APPROVAL**

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

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1 **NOTICE OF MOTION AND MOTION; RELIEF SOUGHT**

2 Please take notice that, on February 6, 2014 at 1:30 p.m. before the Honorable Judge
3 Edward M. Chen, United States District Court, 450 Golden Gate Ave., San Francisco, CA,
4 Plaintiffs will seek an order granting preliminary class action settlement approval.

5 Pursuant to Fed. R. Civ. P. 23(e), Plaintiffs request that the Court: (1) grant preliminary
6 settlement approval; (2) approve a proposed notice and notice plan; and (3) set a schedule for
7 final settlement approval. (*See Proposed Order.*)

8 **INTRODUCTION**

9 This action, filed in August 2004, alleges that Costco Wholesale Corporation
10 discriminates against female employees by using a uniform, corporate-directed system that fails
11 to promote equally or better qualified women into the positions of Assistant General Manager and
12 General Manager. Over nearly ten years of litigation, the Named Plaintiffs and their counsel have
13 worked diligently to prosecute the claims of the class members. Likewise, Costco has
14 consistently denied the allegations, and has aggressively asserted its defenses.

15 The parties have now reached a proposed agreement to resolve this dispute. The proposed
16 class action settlement agreement is the product of over five months of good-faith negotiations,
17 aided by an experienced and well-respected mediator. It was reached by experienced counsel,
18 and informed through extensive discovery, motion practice, and expert analysis. If approved, the
19 settlement will provide class-wide programmatic relief addressing the alleged practices at issue in
20 this litigation, and will also create a formal, expedited claims procedure through which the
21 individual claims of the class members may be finally resolved. In exchange, Costco will receive
22 a release from the settlement class members of all claims for individual and class-wide
23 declaratory, injunctive, and monetary relief.

24 The proposed settlement is fair, adequate, and reasonable. It was reached through serious,
25 informed, non-collusive negotiations, falls within the range of possible approval, and contains no
26 obvious defects. Accordingly, Plaintiffs respectfully request that the Court: (1) grant preliminary
27 settlement approval; (2) approve the proposed notice and notice plan; and (3) set a schedule for
28 final settlement approval.

BACKGROUND

I. RELEVANT FACTUAL AND PROCEDURAL HISTORY

A. The Complaint

Plaintiff Shirley “Rae” Ellis filed a class charge of discrimination with the EEOC on October 30, 2002. (ECF No. 1 at 18-22.) She filed this lawsuit on August 17, 2004. (*Id.*) In the Fourth Amended Complaint, Ms. Ellis, along with Named Plaintiffs Leah Horstman and Elaine Sasaki, bring claims against Defendant Costco Wholesale Corporation on behalf of themselves and all others similarly situated, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C §§ 2000(e) *et seq.* (ECF No. 718.) Plaintiffs allege that Costco discriminates against female employees by using a uniform, corporate-directed system that fails to promote equally or better qualified women into Assistant General Manager (“AGM”) and General Manager (“GM”) positions. (*Id.* ¶¶ 115-130.) In addition to the class claims, the Named Plaintiffs bring individual discrimination claims under the California Fair Employment & Housing Act, Government Code §§ 12940 *et seq.* (*Id.* ¶¶ 131-135.) Ms. Ellis and Ms. Sasaki also allege individual Title VII retaliation claims. (*Id.* ¶¶ 136-147.)

B. Plaintiffs Have Explored their Claims and Positions through Extensive Discovery

The Named Plaintiffs vigorously pursued their claims and the claims of the classes through extensive discovery spanning over nine years of litigation.

During the period leading up to Plaintiffs’ first class certification motion (2004 through 2006), Class Counsel served six sets of document requests containing 143 separate requests for production, and also served 19 interrogatories. (Larkin Decl. ¶ 5.) Class Counsel took the depositions of twelve fact witness, as well as three depositions of Costco pursuant to Fed. R. Civ. P. 30(b)(6). (*Id.*) Counsel also assisted the Named Plaintiffs in responding to Costco’s requests for production, interrogatories, and requests for admissions. (*Id.*) Class Counsel defended the depositions of the three Named Plaintiffs (twice each) and five class members. (*Id.*)

Plaintiffs also obtained more than 39,000 pages of documents, as well as electronic personnel and payroll data regarding Costco warehouse employees. (ECF No. 134 ¶ 4; Larkin

1 Decl. ¶ 6.) Plaintiffs spent many hours reviewing this information and data in preparation for the
2 2006 class certification motion. (Larkin Decl. ¶ 6.) Plaintiffs retained three expert witnesses—a
3 statistician, a sociologist, and a labor economist—each of whom provided extensive analysis of
4 the employment practices at issue. (*Id.*) Costco deposed each of Plaintiffs’ expert witnesses, and
5 Class Counsel also deposed three of Costco’s four experts. (*Id.*)

6 Following the Ninth Circuit’s remand of the initial class certification decision and this
7 Court’s September 2012 certification order, the parties resumed discovery in preparation for
8 dispositive motions and trial. (*See* ECF No. 704.) Plaintiffs served four additional sets of
9 document requests containing 45 requests for production, and served nine interrogatories.
10 (Larkin Decl. ¶ 7.) Class Counsel also assisted the Named Plaintiffs in responding to Costco’s
11 additional document requests, interrogatories, and requests for admissions. (*Id.*) Plaintiffs
12 obtained several hundred thousand additional pages of documents from Costco, including
13 personnel files and electronically stored information. (*See* ECF No. 720; Larkin Decl. ¶ 7.) In
14 addition, Costco produced supplemental personnel and payroll data (updated through mid-2013),
15 which the parties and their statistical experts used to reevaluate their respective positions in
16 preparation for dispositive motions, trial, and settlement negotiations. (Larkin Decl. ¶ 7.)

17 Under the most recent pretrial order, the cut-off for non-expert discovery was set for
18 October 31, 2013, the deadline for dispositive motions was January 30, 2014, and trial was set to
19 begin on March 17, 2014.¹ (ECF No. 746.)

20 **C. Both Parties Asserted their Positions through Extensive Motion Practice**

21 The parties also engaged in extensive motion practice. These efforts included a contested
22 motion for class certification that was fully briefed and decided, appealed to the Ninth Circuit
23 under Fed. R. Civ. P. 23(f), and subsequently re-briefed in this Court following the Supreme
24 Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). When the proposed
25 settlement was reached, both parties were preparing to file summary judgment and *Daubert*
26 motions, and Costco was planning to file a motion for decertification.

27 _____
28 ¹ The parties requested and received two extensions of the pretrial deadlines in order to focus
their efforts on mediation. (ECF Nos. 731, 745.)

1 **1. Costco’s Motion to Transfer Venue**

2 Shortly after the filing of the Complaint, Costco filed a motion to transfer venue on
3 October 15, 2004, arguing that the litigation should be moved to the District of Colorado, the
4 Western District of Washington, or the Southern District of California. (See ECF Nos. 6, 65, 66,
5 70, 74.) The Court denied the motion without prejudice, subject to renewal by Costco after
6 discovery on the scope and geographic distribution of the proposed class. (ECF No. 77.) The
7 parties subsequently conducted discovery and submitted additional briefing. (See ECF No. 81.)
8 On May 31, 2005, the Court denied the motion to transfer. (ECF No. 98.)

9 **2. Plaintiffs’ Motion for Class Certification**

10 On August 28, 2006, Plaintiffs filed their motion for class certification. (ECF No. 127.)
11 Not surprisingly, the motion was vigorously contested. Costco opposed the motion, and also filed
12 motions to strike the declarations of each of Plaintiffs’ three expert witnesses.² (ECF Nos. 433,
13 435, 436, 447.) On January 11, 2007, the Court granted Plaintiffs’ motion and certified a class
14 under Fed. R. Civ. P. 23(b)(2) of “all current and former female Costco employees nationwide
15 who have been denied promotion to GM and AGM or denied promotion to Senior Staff positions
16 since January 3, 2002.” (ECF No. 494.) The parties later stipulated to a slightly narrower class
17 definition. (ECF No. 509 ¶ 1.)

18 **3. Costco’s Appeal to the Ninth Circuit Court of Appeals**

19 Costco sought permission to appeal the class certification order under Fed. R. Civ. P.
20 23(f), and the Ninth Circuit granted the petition on May 11, 2007.³ (Case No. 07-15838, ECF No.
21 1.) Briefing was completed in late 2007, and oral argument was held on April 14, 2008. (Case
22 No. 07-15838, ECF No. 47.) However, the Ninth Circuit’s decision was delayed by the appellate
23 proceedings in *Dukes v. Wal-Mart Stores, Inc.*, No. C01-02252 (N.D. Cal.).

24 On February 13, 2009, the Ninth Circuit granted Wal-Mart’s petition for rehearing en
25 banc in *Dukes*, and the en banc opinion was issued on April 26, 2010. On July 8, 2010, the Ninth

26 _____
27 ² In addition, a dispute arose regarding approximately 200 declarations from current and former
28 female Costco employees submitted by Costco in support of its opposition. (See ECF No. 482.)

³ The parties agreed to stay discovery during the pendency of the appeal. (ECF No. 509 ¶ 11.)

1 Circuit ordered the parties in this case to submit supplemental briefs addressing what effect, if
2 any, the *Dukes* decision had on the *Ellis v. Costco* appeal. (Case No. 07-15838, ECF No. 65.) On
3 December 6, 2010, the United States Supreme Court granted *certiorari* in the *Dukes* litigation.
4 Accordingly, on December 8, 2010, the Ninth Circuit deferred submission of *Ellis v. Costco*
5 pending the outcome in *Dukes*. (Case No. 07-15838, ECF No. 75.)

6 The Supreme Court issued its decision in *Dukes* on June 20, 2011. *See Wal-Mart Stores,*
7 *Inc. v. Dukes*, 131 S.Ct. 2541 (2011). Three days later, the Ninth Circuit ordered the parties in
8 this case to file simultaneous briefs setting forth their respective positions on the application of
9 the Supreme Court's decision. (Case No. 07-15838, ECF No. 76.)

10 The Ninth Circuit issued its decision in *Ellis v. Costco* on September 16, 2011. *See Ellis*
11 *v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011). In light of *Dukes*, the Ninth Circuit
12 affirmed in part, vacated in part, and remanded. *See id.* at 974-75. Specifically, the Ninth Circuit
13 vacated and remanded with respect to the initial class certification rulings on commonality,
14 typicality, adequacy (as to Ms. Ellis and Ms. Horstman), and the certification of claims for
15 monetary relief under Fed. R. Civ. P. 23(b)(2). *See id.*

16 **4. Plaintiffs' Second Motion for Class Certification**

17 On remand, the parties agreed that Plaintiffs would file a Third Amended Complaint to
18 reflect the intervening change in the law. (ECF No. 535 at 5.) Costco filed a motion for an order
19 eliminating class claims challenging Plaintiffs' certification theory on May 4, 2012. (ECF No.
20 543.) Plaintiffs responded, and also filed an affirmative motion for class certification. (ECF No.
21 664.) On September 25, 2012, the Court granted Plaintiffs' motion and, in a lengthy opinion
22 analyzing the impact of *Dukes* and the Ninth Circuit's opinion in this case, certified an Injunctive
23 Relief Class defined as:

24 All women who are currently employed or who will be employed at any Costco
25 warehouse in the U.S. who have been or will be subject to Costco's system for
promotion to Assistant General Manager and/or General Manager positions.

26 (ECF No. 693 at 85.) The Court also certified a Monetary Relief Class (back pay, compensatory,
27 and punitive damages) defined as:

28 All women who have been employed at any Costco warehouse store in the U.S.

1 since January 3, 2002 who have been subject to Costco's system for promotion to
2 Assistant General Manager and/or General Manager positions.

3 (*Id.*)

4 The Court set a tentative two-stage trial plan. (*Id.* at 86.) In part one of the first stage, a
5 jury would decide whether Costco engaged in a pattern or practice of discrimination (liability for
6 disparate treatment), whether Costco's conduct met the standard for punitive damages, and
7 Costco's liability to the three Named Plaintiffs. (*Id.*) The Court would decide whether the
8 employment practices alleged had an adverse impact on the class. (*Id.*) In part two of the first
9 stage, the Court would decide whether Costco's employment practices were justified by business
10 necessity and, if so, whether there was a less discriminatory alternative. (*Id.*) The Court would
11 then issue appropriate injunctive relief. (*Id.*) In the second stage, individual hearings would be
12 held to determine instatement, back pay, and damages, and also to adjudicate individual defenses.
13 (*Id.*) If necessary, the aggregate amount of punitive damages would also be decided in stage two.
14 (*Id.*)

15 Costco again sought permission from the Ninth Circuit to appeal under Fed. R. Civ. P.
16 23(f). The petition was denied on January 16, 2013. (Case No. 12-80188, ECF No. 5.) Court-
17 approved notice was issued in December 2012. (*See* ECF. No. 717.) Approximately 100 of the
18 original class members opted out of the litigation. (Larkin Decl. ¶ 18.) The parties estimate that
19 there are approximately 1,300 current class members; 1,125 current Costco employees, and 175
20 former employees. (*Id.*)

21 As already explained in detail above, after class certification the parties engaged in
22 extensive additional discovery in preparation for dispositive motions and trial. At the time the
23 proposed settlement was reached, both parties were preparing to file multiple summary judgment
24 and *Daubert* motions, and Costco was preparing a motion to decertify the classes. (*See, e.g.*, ECF
25 Nos. 697, 747.)

26 **II. SETTLEMENT NEGOTIATIONS**

27 The parties devoted substantial time and effort to reaching a proposed settlement. At all
28 times, the negotiations were conducted at arms' length and on a bifurcated basis: the parties

1 negotiated class programmatic and monetary relief first, and only when substantial agreement was
2 reached on these issues did the parties discuss relief for the Named Plaintiffs and attorneys' fees.
3 (Larkin Decl. ¶ 20.)

4 In 2004, Class Counsel attempted to resolve this matter prior to filing a lawsuit, but the
5 parties were unable to reach a settlement. (*See* ECF No. 136 ¶ 12.) In 2005, after the venue
6 motion was resolved, the parties held two mediations sessions (September 21st and November
7 10th) with Mark Rudy, a respected and experienced mediator. (ECF No. 99.) These early
8 mediations were also unsuccessful. (Larkin Decl. ¶ 22.)

9 In 2013, the parties scheduled another formal mediation session with Mr. Rudy. (ECF
10 No. 733.) In advance of that session, two members of Class Counsel's litigation team flew to
11 Costco's headquarters in Issaquah, Washington to discuss the prospect of settlement with high-
12 level Costco executives, in-house counsel, and litigation counsel. (Larkin Decl. ¶ 23.)
13 Thereafter, the parties prepared extensive mediation briefs and the mediation took place on
14 July 11, 2013. (*Id.* ¶ 24.) Although no settlement was reached, progress was made, and the
15 parties scheduled a second session. (*Id.*) The parties also prepared and exchanged draft language
16 for certain aspects of a possible agreement. (*Id.*)

17 The parties met again on August 5, 2013. (*Id.* ¶ 25.) After this follow-up session,
18 Mr. Rudy circulated a mediator's proposal regarding two important aspects of a potential
19 settlement. (ECF No. 737.) As a result of the proposal, the parties made significant progress in
20 resolving several major settlement issues. (ECF No. 744.) Over the course of the next two
21 months, the parties continued their negotiations directly through a series of regular conference
22 calls and email correspondence. (Larkin Decl. ¶ 26.) Mr. Rudy also made himself available as
23 needed to resolve disputes as they arose. (*Id.*)

24 After making substantial further progress through informal efforts, the parties scheduled a
25 final mediation. (*Id.* ¶ 27.) In advance of the session, counsel for both parties attended two days
26 of in-person negotiations in Los Angeles, California. (*Id.*)

27 The final mediation took place on Saturday, October 5, 2013. (*Id.* ¶ 28.) On October 11,
28 2013, the parties reached an agreement on the principal terms of a class-wide settlement, which

1 was submitted to the Court *in camera*. (See ECF No. 749.) A final settlement agreement was
 2 signed on December 17, 2013. (See Larkin Decl. ¶ 28.)

3 **III. THE TERMS OF THE PROPOSED SETTLEMENT**

4 The terms of the proposed settlement are summarized below. The settlement provides
 5 class-wide programmatic relief tailored to the Title VII violations alleged, and also creates a
 6 formal claims procedure through which the discrimination claims of the class members may be
 7 finally resolved. In exchange, Costco will receive a release from the settlement class of all claims
 8 for individual and class-wide declaratory, injunctive, and monetary relief. The proposed
 9 settlement has the full support of each of the three Named Plaintiffs. (See Ellis Decl. ¶¶ 6-8;
 10 Horstman Decl. ¶ 5; Sasaki Decl. ¶¶ 6-7.)

11 **A. Programmatic Relief**

12 The proposed programmatic relief is designed to address the specific gender promotion
 13 issues alleged in this litigation. (Larkin Decl., Ex. A (“Agreement”).) This relief includes:
 14 (1) use of an industrial organizational psychologist to conduct job analyses, evaluate promotion
 15 processes, and develop selection criteria and tools for AGM and GM promotions; (2) a posting
 16 process for AGM promotions; (3) a registration of interest system for GM promotions; (4) a
 17 merchandising training class for Senior Staff managers; (5) a promotion process for AGM
 18 positions, including comprehensive records maintenance; and (6) internal training and
 19 communication concerning the implemented programs. The agreement also contains compliance
 20 procedures, including annual reporting by Costco. (See *id.*)

21 **1. Job Analysis and Selection Criteria**

22 Costco will use an independent industrial organizational psychologist (“Independent
 23 Consultant”) to conduct job analyses, evaluate promotion processes, and develop selection criteria
 24 and assessment tools for AGM and GM promotions.⁴ (*Id.* § 4.1.) Class Counsel may
 25 communicate with the Independent Consultant concerning this work without restriction. (*Id.*)

26
 27 ⁴ All fees and expenses of the Independent Consultant will be paid by Costco, except that up to
 28 \$100,000 of any funds not awarded to class members through the monetary claims process may
 also be used to pay the Independent Consultant. (*Id.* § 4.1.4.)

1 **Job Analyses:** The Independent Consultant will work with Costco’s subject matter
2 experts to prepare job analyses for the positions of AGM and GM. (*Id.* § 4.2.1.) The agreement
3 expressly provides that:

- 4 ● The Job Analyses will identify the knowledge, skills, abilities, experiences,
5 and competencies associated with AGMs and GMs whom Costco deems
6 successful in those positions. The Parties anticipate that preparation of Job
7 Analyses will entail structured interviews of Costco’s subject-matter
8 experts, review of relevant Costco personnel practices, and observations of
9 a sample of AGMs and GMs at work. (*Id.*)
- 10 ● The Independent Consultant will provide the completed Job Analyses to
11 the Parties. Absent a good-faith concern, Costco will accept the Job
12 Analyses. If Class Counsel dispute Costco’s good faith in raising a
13 concern, then the Parties and the Independent Consultant will confer in an
14 effort to resolve the issues that prompted Costco’s stated concerns. (*Id.*
15 § 4.2.2.)
- 16 ● Costco will make available to its U.S. warehouse management staff revised
17 job descriptions reflecting any accepted Job Analyses. (*Id.* § 4.2.3.)

18 **Selection Criteria:** The Independent Consultant will use the job analyses that Costco has
19 accepted to develop proposed selection criteria and assessment tools, which may include
20 modifications to the AGM selection process if necessary. (*Id.* § 4.2.4.) The selection criteria and
21 assessment tools may also contain proposed changes to the GM selection process. (*Id.*) The
22 agreement provides:

- 23 ● The proposed Selection Criteria will be developed based on the
24 Independent Consultant’s professional judgment. To the extent that Costco
25 adopts Selection Criteria, they will be in writing, non-discriminatory, and
26 job-related. (*Id.* § 4.2.5.)
- 27 ● To the extent that the proposed Selection Criteria take into account
28 performance evaluations, “Ready Now” ratings, or other similar evaluative
tools, then these tools will also incorporate non-discriminatory, job-related
selection criteria. (*Id.* § 4.2.6.)
- If the proposed Selection Criteria take into account an employee’s
merchandising experience, then women will have the same opportunity for
merchandising training and experience that are available to similarly
situated male employees. (*Id.* § 4.2.7.)
- If the proposed Selection Criteria take into account an employee’s
willingness to relocate, then Costco will apply any relocation criteria in a
non-discriminatory, job-related manner. (*Id.* § 4.2.8.)

1 **Promotion Process:** Costco will, absent a good-faith concern, implement any selection
 2 criteria and assessment tools that the Independent Consultant proposes for promotions into AGM
 3 positions. (*Id.* § 4.2.9.) Costco will incorporate implemented proposals, where and as
 4 appropriate, into the job descriptions, performance evaluations, and promotion process for AGM.
 5 (*Id.*) Costco will, in good faith, also consider for implementation any proposed selection criteria
 6 and assessment tools for GM promotions, but retains discretion not to adopt those
 7 recommendations. (*Id.* § 4.2.10.)

8 2. Posting and Registration of Interest

9 **Posting of AGM Positions:** Costco will post each AGM opening it intends to fill with a
 10 promotion no fewer than ten (10) days before filling it, absent compelling business reasons for
 11 using a shorter posting period. (*Id.* § 4.3.1.1.) Under the agreement:

- 12 ● Each job posting will contain the location of the opening, job description,
 13 selection criteria, and the designated minimum qualifications for the
 14 opening. (*Id.*)
- 15 ● An open AGM position that Costco intends to fill with a promotion will be
 16 posted within a district or other objectively defined area, to be broad
 17 enough to encompass at least 10 warehouses or a 50-mile radius. The
 18 posting will be available to be viewed by all U.S. warehouse Senior Staff
 19 managers (i.e., each Front End Manager, Administration Manager,
 20 Receiving Manager, and Merchandise Manager) within that area, whether
 21 or not they meet the minimum qualifications for the position. (*Id.*
 22 § 4.3.1.2.)
- 23 ● Costco will provide a mechanism for an employee who meets the posted
 24 minimum qualifications to apply for the posted AGM position. Costco will
 25 audit U.S. warehouses for compliance with the job posting policy,
 26 including the retention of documents recording the names of qualified
 27 candidates who apply for each AGM opening. (*Id.* § 4.3.1.3.)
- 28 ● Each qualified employee who exercised the right to apply for a posted
 AGM opening in a particular warehouse will be informed of the identity of
 any individual who is selected for that opening. (*Id.* § 4.3.1.4.)

24 **Registration of Interest for GM Positions:** Costco will implement a system that allows
 25 AGMs to directly register interest in GM positions that may become available at any U.S.
 26 warehouse location. (*Id.* § 4.3.2.1.) More specifically, under the agreement:

- 27 ● An AGM can register this interest twice per year: (1) in connection with
 28 each annual performance review, and (2) six months thereafter.
 Registration will be accomplished by the AGM providing his or her
 personal email address in that connection. Each registration of interest will

1 expire after one year unless renewed. Costco will act in good faith to put
2 the registration system into electronic form by the Implementation Date.
(*Id.*)

- 3 • Costco, in filling a GM position by promoting an AGM, will review the list
4 of AGMs deemed qualified for promotion who have registered interest in
5 that position. Costco will notify registered AGMs of the identity of
6 individuals selected for those positions. Notice of these identities will not
7 be required if Costco already is publicizing those individuals to all current
8 AGMs through other means. (*Id.* § 4.3.2.2.)

9 **3. Merchandising Class**

10 Costco will offer a merchandising training class for its Senior Staff managers who have
11 not obtained merchandising experience in their current or prior positions. (*Id.* § 4.3.3.)

12 **4. Promotion Process**

13 Costco will use any selection criteria and assessment tools adopted under the proposed
14 settlement agreement. (*Id.* § 4.4.1.) Costco ordinarily will conduct personal or telephonic
15 interviews with all applicants who meet the posted minimum qualifications for an open AGM
16 position. (*Id.* § 4.4.2.) Costco may limit the number of interviews to five based upon non-
17 discriminatory criteria. (*Id.* § 4.4.3.) The criteria used to limit the interview pool will be
18 communicated to eligible applicants who were not interviewed. (*Id.*)

19 In addition, Costco will maintain records of every AGM promotion, including the
20 identities of qualified applicants (those who met posted minimum qualifications), the identities of
21 the applicants interviewed, the identities of decision-makers, the identities of candidates who
22 received offers, the identity of the candidate who received the position, and the reason for the
23 selection. (*Id.* § 4.4.4.) Costco will also maintain information about selection criteria and
24 assessment tools on its intranet, accessible to warehouse management employees. (*Id.* § 4.4.5.)

25 **5. Training and Communication**

26 Costco will train managers responsible for AGM and GM selections regarding the AGM
27 job posting system, the GM registration of interest system, and any selection criteria and
28 assessment tools that are adopted. (*Id.* § 4.5.) Costco will also inform U.S. Senior Staff
warehouse management and AGMs about the AGM job posting system, the GM registration of
interest system, and any selection criteria and assessment tools that are adopted. (*Id.* § 4.6.)

1 **6. Recordkeeping and Compliance**

2 Costco will maintain records necessary to monitor its compliance with the terms of the
3 proposed settlement agreement. (*Id.* § 4.7.) The parties will also follow a compliance procedure,
4 which includes: (1) a Court-appointed Compliance Special Master to oversee the implementation
5 of the terms of the proposed agreement, with all fees and costs of the Special Master to be paid by
6 Costco, (*id.* §§ 13.1, 13.8); (2) submission by Costco, on each anniversary, of a report to Class
7 Counsel including status information on the work of the Independent Consultant, as well as
8 statistical information, by gender, of applicants for AGM positions, candidates interviewed for
9 AGM positions, and employees selected for AGM and GM positions, (*id.* § 13.2); and
10 (3) submission by Costco of information that it prepares in the normal course of business on
11 attrition by gender from the AGM and GM positions, (*id.*). The agreement also contains
12 procedures to ensure that Costco is at all times acting in good faith with respect to its obligations,
13 including review by the Compliance Special Mater and, if necessary, the Court. (*See id.* § 13.)

14 **7. Term**

15 The terms of the programmatic relief will remain in effect for two years after the date that
16 Costco first implements any selection criteria and assessment tools, initiates the AGM posting
17 program, or activates the registration of interest program, *whichever is later.* (*Id.* § 4.10.)

18 **B. Monetary Relief**

19 The proposed settlement agreement also provides extensive monetary relief to the
20 members of the class. This includes a claims process to distribute an \$8 million settlement fund,
21 with the bulk of any remaining amounts going to educational programs addressing the
22 advancement of women to leadership roles in retail management.

23 **1. \$8 Million Settlement Fund**

24 Costco will pay a gross settlement of \$8 million on a non-reversionary basis. (*Id.* § 3.1.)
25 The fund will be used to pay out claims made by class members who prevail under the claims
26 process, and will also cover settlement administration costs and any service payments awarded by
27 the Court to the Named Plaintiffs. (*Id.* §§ 3.3, 3.4.) The \$8 million will not be used to pay
28 attorneys' fees and costs, fees and costs of the claims arbitrators, or the claims of the Named

1 Plaintiffs, unless they choose to participate in the claims process. (*Id.* § 3.6.)

2 Any funds not awarded to claimants who prevail in the claims process will be used as
3 follows: (1) the first \$100,000, or fraction thereof, will be used to pay the Independent Consultant
4 to the extent that those fees exceed \$100,000; (2) any remainder will be donated to an educational
5 program or programs addressing the advancement of women to leadership roles in retail
6 management. (*Id.* § 3.5.)

7 **2. The Claims Process**

8 Under the claims process, each claimant may challenge up to three promotions, depending
9 on their length of tenure. (*See id.* § 5.3.) The claimant has the burden to prove by a
10 preponderance of the evidence that she was interested in and qualified for each promotion that she
11 challenges. (*Id.* § 5.7.) If the claimant meets her burden, then Costco will have the burden to
12 prove by a preponderance of the evidence that gender was not a motivating factor in her non-
13 selection for the promotion in question. (*Id.*) Claimants who prevail in the claims process will be
14 entitled to economic damages, including salary, bonus, and stock-grant value, plus interest. (*Id.*
15 § 5.5.2.) Evidence of damages will be resolved through stipulations by counsel, without requiring
16 expert foundation. (*Id.* § 5.5.6.)

17 **3. Context Briefs**

18 At the outset of the claims process, the parties will submit simultaneous 30-page briefs to
19 the arbitrator(s) to describe the relevant policies and practices and any claimed context of the
20 decision-making that either side wishes to advance. (*Id.* § 5.9.1.) Each side will have an
21 opportunity to respond in an additional 15-page brief. (*Id.*)

22 **4. Claim Formats**

23 Claimants may submit claims in one of two formats: (1) a claim by written submission; or
24 (2) a claim by formal arbitration. (*Id.* §§ 5.10, 5.11.) Claims will be decided by neutral
25 arbitrators, jointly selected by the parties, who are experienced in litigating employment
26 discrimination disputes. (*See id.* § 5.1.) Costco will pay all arbitrator fees and costs. (*Id.*
27 § 5.1.7.) Claimants will receive legal consultation without charge concerning the claims process
28 from Class Counsel and may also elect to be represented by Class Counsel in making a claim at

1 *no cost* to themselves. (*Id.* § 5.6.) A Claimant may also hire her own lawyer. (*Id.*)

2 **a. Claims by Written Submission**

3 If a claimant chooses to make a claim by written submission, the claimant will submit a
4 twenty-five page position statement and supporting materials to the arbitrator. (*Id.* § 5.10.3.)
5 Costco will then submit a twenty-five page opposition and supporting materials. (*Id.*) The
6 claimant may submit a fifteen page reply, and Costco may submit a fifteen page sur-reply. (*Id.*)
7 Documentary evidence will be limited to the claimant's personnel file, the contested male's
8 personnel file, and other documents that the arbitrator finds relevant to the claimant's or the
9 selectee's promotability to the contested position. (*Id.* § 5.10.2.)

10 Under the written claim procedure, a claimant prevailing on an AGM promotion claim
11 may receive an award of up to \$150,000, and a claimant prevailing on a GM promotion may
12 receive an award of up to \$300,000. (*Id.* § 5.10.4.) Current Costco employees will also have the
13 option of pursuing their written claims through a confidential process, under which their current
14 managers will not be aware that they are making a claim. (*Id.* § 5.10.5.) Under this option, a
15 claimant prevailing on an AGM promotion claim may receive up to \$25,000, and a claimant
16 prevailing on a GM promotion may receive up to \$50,000. (*Id.* §§ 5.10.5.5, 5.10.5.6.)

17 Claimants who prevail on written claims are entitled to seek attorneys' fees not to exceed
18 \$10,000 per claimant and costs not to exceed \$1,000 per claimant. (*Id.* § 5.10.6.) The total
19 attorneys' fee award on written claims will not exceed \$750,000. (*Id.*)

20 **b. Claims by Formal Arbitration**

21 If a claimant chooses to make a claim by formal arbitration, the claim will be decided
22 through a two-day arbitration at a location near the site of the promotion being challenged. (*Id.*
23 §§ 5.11.1, 5.11.4.) The parties are allowed to file pre-arbitration briefs, and will also exchange
24 witness lists. (*Id.* § 5.11.2.) Each side may take one deposition not to exceed four hours. (*Id.*
25 § 5.11.3.) Documentary evidence will be limited to the claimant's personnel file, the contested
26 male's personnel file, and other documents that the arbitrator finds relevant to the claimant's or
27 the selectee's promotability to the contested position. (*Id.* § 5.11.2.) The Federal Rules of
28 Evidence will govern, except the arbitrator has the discretion to admit reliable hearsay and waive

1 foundational requirements. (*Id.* § 5.11.6.)

2 Under the arbitration claim procedure, a claimant prevailing on an AGM promotion claim
3 may receive an award of up to a cap of \$250,000, and a claimant prevailing on a GM promotion
4 may receive an award of up to a cap of \$600,000. (*Id.* §§ 5.11.10, 5.11.11.) Claimants who
5 prevail on arbitration claims will also be entitled to seek reasonable attorneys' fees and costs. (*Id.*
6 § 5.11.12.)

7 **5. Adjustment of Awards and Confidentiality**

8 If the awards obtained by successful claimants in the aggregate do not reach the amount of
9 the net settlement fund, then the individual awards will be increased, subject to a second set of
10 caps. (*Id.* § 5.13.2.) With adjustments, awards for AGM promotion claims can reach up to
11 \$425,000, and awards for GM promotion claims can reach up to \$900,000. (*Id.* § 5.13.2.) To the
12 extent that the total awards or settlements⁵ exceed the amount of the net settlement fund, they will
13 be reduced pro rata. (*Id.* § 5.12.)

14 All outcomes in the claims process will be confidential. (*Id.* § 5.14.1.) The proposed
15 settlement agreement contains detailed procedures through which either party may seek relief for
16 a breach of confidentiality. (*Id.* § 5.14.3.)

17 **C. Scope of the Release**

18 The proposed settlement agreement gives Costco a release of claims limited to the claims
19 asserted in the Fourth Amended Complaint. In exchange for the relief provided, members of the
20 settlement class will release all claims for systemic injunctive relief for the claims alleged in the
21 case on behalf of the Injunctive Relief Class. (*Id.* § 6.) In addition, class members who submit
22 claims through the monetary claims process shall, upon the date of her claim, release any claim
23 for failure to promote to AGM or GM not pursued through that process. (*Id.*) Each member of
24 the Monetary Relief Class who does not opt out and who does not submit a timely claim will also
25 release any claim that Costco, on the basis of her gender, denied her promotion to AGM or GM at
26 any time since January 3, 2002. (*Id.*)

27 _____
28 ⁵ Under the proposed settlement agreement, Costco and the claimant may agree to settle her
claim. (Agreement § 5.13.1.)

1 **D. Resolution of the Named Plaintiffs’ Claims**

2 Under the proposed settlement agreement, a Named Plaintiff may choose to resolve all of
3 her claims against Costco by trial in this Court. (*Id.* § 10.) Any damages awarded will not be
4 taken from the gross settlement fund. (*Id.*) In the alternative, a Named Plaintiff may choose to
5 submit only her promotion claims through the monetary claims process. (*Id.*) Under this
6 scenario, any damages awarded will be taken out of the gross settlement fund. (*Id.*) The Named
7 Plaintiffs may seek Court-approved service payments of up to \$10,000 each, to be paid from the
8 gross settlement fund. (*Id.*)

9 **E. Attorneys’ Fees and Costs**

10 Under the agreement, Plaintiffs may apply for an award of reasonable attorneys’ fees and
11 costs for the litigation up to the date of final approval of the proposed settlement. (*Id.* § 11.)
12 Plaintiffs may also seek an award of reasonable fees and costs for their anticipated services in
13 monitoring the programmatic relief and administrating the monetary claims settlement. (*Id.*)

14 **ARGUMENT**

15 **I. PRELIMINARY APPROVAL SHOULD BE GRANTED**

16 **A. The Legal Standards for Preliminary Settlement Approval**

17 Strong judicial policy favors settlements, “particularly where complex class action
18 litigation is concerned.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).
19 Under Rule 23(e) of the Federal Rules of Civil Procedure, “[t]he claims, issues, or defenses of a
20 certified class may be settled . . . only with the court’s approval.” Review of a class settlement
21 proceeds in two steps. First, “counsel submit the proposed terms of settlement and the judge
22 makes a preliminary fairness evaluation.” Manual for Complex Litigation (Fourth) § 21.632.
23 Second, after notice is given to the class, the court holds a final fairness hearing. *Id.* § 21.634.

24 Any proposed settlement must be “fundamentally fair, adequate, and reasonable.” *Hanlon*
25 *v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). The decision to approve or reject a
26 settlement is committed to the sound discretion of the district court, which has been “exposed to
27 the litigants, and their strategies, positions and proof.” *Id.* (quoting *Officers for Justice v. Civil*
28 *Serv. Comm’n of San Francisco*, 688 F.2d 615, 626 (9th Cir. 1982)). In assessing a proposed

1 settlement, the district court balances various factors, including: (1) the strength of the plaintiffs'
2 case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of
3 maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the
4 extent of discovery completed and the stage of the proceedings; (6) the experience and views of
5 counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members
6 to the proposed settlement.⁶ *Id.* at 1026.

7 “Closer scrutiny [of a class action settlement] is reserved for the final approval hearing.”
8 *Harris v. Vector Marketing Co.*, 2011 WL 1627973, at *7 (N.D. Cal. Apr. 29, 2011). Preliminary
9 settlement approval should be granted if the proposed settlement was the product of serious,
10 informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant
11 preferential treatment to class representatives or segments of the class, and falls within the range
12 of possible approval. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079-80 (N.D. Cal.
13 2007) (quoting Manual for Complex Litigation (Second) § 30.44 (1985)); *see also Harris*, 2011
14 WL 1627973, at *7.

15 **B. The Proposed Settlement Falls Within the Range of Possible Approval and**
16 **There are No Obvious Deficiencies**

17 “To determine whether a settlement falls within the range of possible approval a court
18 must focus on substantive fairness and adequacy, and consider plaintiffs’ expected recovery
19 balanced against the value of the settlement offer.” *In re Tableware Antitrust Litig.*, 484 F. Supp.
20 2d at 1080 (internal quotation marks omitted). Here, the proposed settlement consists of three
21 primary components: (1) programmatic relief; (2) an expedited monetary claims process; and (3)
22 a limited release of class claims. These elements of the settlement are fair, adequate, and
23 reasonable. (Larkin Decl. ¶ 29.)

24 First, the programmatic relief provides significant benefits to the Injunctive Relief Class,
25 and will materially advance the goal of equal promotion opportunities for female Costco
26 warehouse employees. The relief is comprehensive, and addresses the specific employment

27 ⁶ “It is the settlement taken as a whole, rather than the individual component parts, that must be
28 examined for overall fairness.” *Hanlon*, 150 F.3d at 1026 (citing *Officers for Justice*, 688 F.2d at
628).

1 practices challenged by the Named Plaintiffs, including the use of subjective decision-making and
 2 unwritten, unvalidated criteria, (ECF No. 718 ¶¶ 34-41, 49-54, 60-65), use of “ready now”
 3 ratings, “promotable lists,” and the “Green Room,” (*id.* ¶¶ 36-40), failure to provide females with
 4 opportunities to gain merchandising experience, (ECF No. 693 at 33, 38), undue emphasis on
 5 willingness to relocate, (*id.* at 33), and lack of a job posting and interview process, (ECF No. 718
 6 ¶¶ 46-48, 57-59). For instance:

- 7 • Subjective Decision-Making and Reliance on Unvalidated/Unwritten Criteria: An
 8 industrial organizational psychologist will conduct job analyses, evaluate promotion
 9 processes, and develop selection criteria and assessment tools for promotion of AGMs and
 10 GMs. (Agreement §§ 4.1, 4.2.)
- 11 • Use of Ready Now Ratings, Promotable Lists, and the Green Room: To the extent that
 12 selection criteria take into account performance evaluations, “Ready Now” ratings, or
 13 other similar evaluative tools, they will incorporate non-discriminatory, job-related
 14 selection criteria. (*Id.* § 4.2.6.)
- 15 • Merchandising Experience: If proposed selection criteria take into account merchandising
 16 experience, women will have the same opportunity for merchandising training and
 17 experience that are available to similarly situated male employees. (*Id.* § 4.2.7.) Costco
 18 will also offer a merchandising class for Senior Staff managers. (*Id.* § 4.3.3.)
- 19 • Willingness to Relocate: If proposed selection criteria take into account willingness to
 20 relocate, any relocation criteria in a non-discriminatory, job-related manner. (*Id.* § 4.2.8.)
- 21 • Lack of Job Posting and Interview Process: Costco will post each AGM opening, and
 22 postings will contain the location of the opening, job description, selection criteria, and
 23 the designated minimum qualifications for that opening. (*Id.* § 4.3.1.) Costco will conduct
 24 interviews for AGM promotions, and will maintain records of these promotion decisions.
 25 (*Id.* § 4.4.) Costco will implement a registration of interest system for GM promotions.
 26 (*Id.* § 4.3.2.)

27 Although the proposed agreement gives Costco more latitude with regard to implementation of
 28 GM selection criteria and assessment tools, this is reasonable in light of differences in the

1 strength of the AGM and GM claims. As the Court noted at class certification, in contrast to
2 promotions to AGM, experts for both sides agreed that there was no statistically significant
3 disparity in the rate of promotion from AGM to GM. (ECF No. 693 at 50.) Although Class
4 Counsel believes their expert's explanation for the lack of disparity is persuasive (an artificially
5 low GM feeder pool), Plaintiffs faced greater risks associated with GM claims.

6 Second, the monetary relief component is fair, adequate, and reasonable. The claims
7 process provides members of the Monetary Relief Class with a forum to pursue their claims
8 similar to proceedings that what would take place in the second stage of a pattern-or-practice trial.
9 As the Supreme Court held in *Wal-Mart Stores, Inc. v. Dukes*, employers can insist that each class
10 member's eligibility for back pay be determined through individual hearings as described in
11 *Teamsters v. United States*, 431 U.S. 324, 361 (1977). See 131 S. Ct. 2541, 2560-61 (2011). Just
12 as in a *Teamsters* hearing, the proposed settlement agreement shifts the burden of proof to Costco
13 to prove by a preponderance of the evidence that gender was not a motivating factor in the
14 employment decision in question. (See Agreement § 5.7.2.) The claimant need only show that
15 she was interested in and qualified for the promotion. (*Id.* § 5.7.1.)

16 In addition, the claims process will be less expensive and more convenient. Rather than
17 appearing for individual Stage II hearings in the Northern District of California, class members
18 will have the choice of either filing their claim through an expedited written claim procedure, or
19 opting for a full two-day arbitration in a venue where the decision at issue took place. (*Id.*
20 §§ 5.10, 5.11.) A *confidential* option is available for current employees, which Class Counsel
21 believe will further encourage participation in the claims process. (*Id.* § 5.10.5; Larkin Decl.
22 ¶ 30.)

23 And the remedies available through the monetary process are substantial. Class Counsel
24 have obtained an \$8 million fund to be dispersed through the claims process. Prevailing
25 claimants in the written process can obtain awards up to \$150,000 for AGM promotions, and up
26 to \$300,000 for GM promotions. (Agreement § 5.10.4.) Awards in arbitration can be up to
27 \$250,000 for AGM claims, and up to \$600,000 for GM claims. (*Id.* § 5.11.10, 5.11.11.) With
28 upward adjustments, awards for AGM promotion claims can reach up to \$425,000, and awards

1 for GM promotion claims can reach up to \$900,000. (*See id.* § 5.13.2.)

2 Notably, the \$8 million fund is non-reversionary. The bulk of any funds not awarded to
3 claimants will be donated to an educational program or programs addressing the advancement of
4 women to leadership roles in retail management, to be agreed upon by the parties.⁷ (*See id.*
5 § 3.5.) This use of *cy pres* is reasonable. The mission of the recipient organizations will be
6 directly tied to the objectives of this lawsuit, and will account for the geographic distribution of
7 the class. *See, e.g., Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011) (distribution
8 must be guided by the objectives of the underlying statute and the interests of the class members,
9 and must not benefit a group too remote from the class). (Larkin Decl. ¶ 31.)

10 Finally, the release is limited to the claims asserted in the litigation, and applies solely to
11 the members of the classes as certified by the Court's September 2012 order. (Agreement § 6.)

12 **C. The Proposed Settlement was the Product of Serious, Informed,**
13 **Non-Collusive Negotiations by Experienced Counsel**

14 The process through which the proposed settlement was reached also favors approval.
15 “An initial presumption of fairness is usually involved if the settlement is recommended by class
16 counsel after arm’s-length bargaining.” *Harris*, 2011 WL 1627973, at *8 (quoting *Riker v.*
17 *Gibbons*, 2010 WL 4366012, at *2 (D. Nev. Oct. 28, 2010)). Moreover, “[t]he assistance of an
18 experienced mediator in the settlement process confirms that the settlement is non-collusive.”
19 *Carter v. Anderson Merchandisers, LP*, 2010 WL 1946784, at *7 (N.D. Cal. May 11, 2010)
20 (quoting *Satchell v. Fed. Express Corp.*, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007)).

21 Here, the parties reached the proposed settlement after five formal mediation sessions with
22 Mark Rudy, a well-respected neutral with extensive experience mediating complex class actions.
23 *See, e.g., Nielson v. The Sports Authority*, 2013 WL 3957764, at *5 (N.D. Cal. July 29, 2013)
24 (approving the use of Mark Rudy as “a respected employment attorney and mediator”). Between
25 mediations, the parties continued their negotiations through regular conference calls, email
26 correspondence, and in-person meetings. To avoid any actual or perceived conflict of interest, the

27 ⁷ As of the date of this motion, the parties have not yet agreed on a specific *cy pres* recipient. The
28 parties will come to an agreement before the preliminary approval hearing, and Plaintiffs will
supplement their filings accordingly. (Larkin Decl. ¶ 31.)

1 parties negotiated class relief before discussing the resolution of the Named Plaintiffs' claims or
2 attorneys' fees and costs.

3 Both sides were represented by experienced and well-informed counsel. Class Counsel
4 are experts in complex employment litigation. (See ECF No. 494 at 21-22 (“Together counsel
5 have decades of class action and employment discrimination experience[.]”)) Their settlement
6 positions were informed by extensive information gathered through discovery and challenged in
7 motion practice. In the course of discovery, Counsel obtained and reviewed hundreds of
8 thousands of pages of Costco’s documents, took the depositions of fifteen witnesses, including
9 three 30(b)(6) witnesses, and defended multiple depositions of each Named Plaintiff. Class
10 Counsel also retained three expert witnesses, including a statistician, a sociologist, and a labor
11 economist. Critically, in the course of merits discovery, Costco produced supplemental personnel
12 and payroll data (updated through mid-2013), allowing the parties to reevaluate their respective
13 positions in preparation for settlement talks.

14 Costco was represented by Seyfarth Shaw, a prominent national law firm with an
15 expertise in employment law. Attorneys from three of Seyfarth Shaw’s offices participated in the
16 negotiations, as did in-house attorneys from Costco. (Larkin Decl. ¶ 24.) Counsel for Costco’s
17 insurance carriers also attended some of the mediation sessions. (*Id.*)

18 The fact that the proposed settlement was reached by experienced counsel—informed by
19 discovery and aided by an experienced neutral—favors preliminary approval. *See, e.g., Bond v.*
20 *Ferguson Enters., Inc.*, 2011 WL 284962, at *6 (E.D. Cal. Jan. 25, 2011) (granting preliminary
21 approval where an agreement was reached through mediation after “extensive investigation and
22 discovery allowing [both parties] to assess the strengths and weaknesses of the case.”); *Vasquez v.*
23 *Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009) (granting preliminary
24 approval where the parties “conducted extensive investigation and discovery allowing them to
25 assess the strengths and weaknesses of the case.”).

26 **D. The Proposed Settlement is Reasonable in Light of the Risks, Expense, and**
27 **Delay Inherent in Continued Litigation**

28 A finding that the proposed settlement is reasonable is also warranted in light of the risks,
expense, and delay associated with continued litigation and trial.

1 Costco denies that it has discriminated against female warehouse employees through the
2 promotion policies and practices at issue. (*See, e.g.*, ECF No. 721.) Indeed, the case was heavily
3 litigated from the start. Costco immediately filed a motion to transfer venue in response to
4 Plaintiffs' Complaint, and aggressively opposed class certification. Costco filed approximately
5 200 declarations from current and former employees in opposition to class certification
6 purporting to disclaim any gender discrimination in Costco's warehouses. Costco also hired four
7 expert witnesses to rebut Plaintiffs' allegations and the opinions of their experts. Prior to
8 settlement, Costco indicated that it was planning to file multiple dispositive motions and a motion
9 for decertification, and was prepared to proceed to trial. (ECF No. 747.)

10 Class Counsel believe their case is strong. However, "[e]ven if Plaintiffs were to prevail,
11 they would be required to expend considerable additional time and resources potentially
12 outweighing any additional recovery obtained through successful litigation." *Bond. v. Ferguson*
13 *Enters., Inc.*, 2011 WL 284962, at*7 (E.D. Cal. Jan. 25, 2011). Continued litigation would
14 increase the amount of attorneys' fees incurred, without necessarily improving the likelihood of a
15 favorable resolution and monetary recovery for the class members. The parties have been
16 litigating this case for almost ten years, including a nearly five-year delay at the appellate level.
17 The presentation of evidence spanning a ten-year period, including changes in Costco's practices,
18 would be daunting for both counsel and the jury. The passage of time would also undoubtedly
19 affect the quality of percipient witness testimony on both sides. Moreover, if Plaintiffs prevailed
20 in a stage one trial and obtained an injunction under the Court's current trial plan, (ECF No. 693
21 at 86), there would still have to be countless individual *Teamsters* hearings to determine
22 instatement, back pay, and damages, and to allow Costco to present its individual defenses. *See*
23 *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2561 (2011). Further appeals would be
24 inevitable.

25 In sum, any additional recovery that could be obtained through continued litigation is far
26 outweighed by the risk, delay, and expense associated with a stage one pattern-or-practice trial.
27 The proposed settlement allows for immediate implementation of meaningful programmatic relief
28 to address the employment practices at issue in this lawsuit, and allows the class members to

1 pursue their individual claims through an expedited process.

2 **E. The Resolution of the Named Plaintiffs' Claims is Reasonable**

3 Under the proposed settlement, the three Named Plaintiffs may choose to adjudicate their
4 claims asserted against Costco in this litigation by trial in this Court. (Agreement § 10.) Any
5 damages awarded will *not* be taken out of the class settlement fund. (*Id.*) In the alternative, a
6 Named Plaintiff may choose to submit only her promotion claims through the monetary claims
7 process. (*Id.*) In this scenario, damages will be taken out of the settlement fund. (*Id.*)

8 The parties' resolution of the Named Plaintiffs' claims is reasonable. In addition to the
9 certified class claims, each of the Named Plaintiffs has an individual discrimination claim under
10 the California Fair Employment & Housing Act, Government Code §§ 12940 *et seq.* (ECF No.
11 718 ¶¶ 131-135.) Ms. Ellis and Ms. Sasaki also allege individual Title VII retaliation claims. (*Id.*
12 ¶¶ 136-147.) In light of their non-class claims, affording the Named Plaintiffs the opportunity to
13 proceed in the district court, instead of the claims procedure, is reasonable. *See Duling v.*
14 *Gristede's Operating Corp.*, 2013 WL 3146772, at *6-7 (S.D.N.Y. June 19, 2013) (additional
15 payments of \$50,000 and \$20,000 to named plaintiffs, in addition to service payments, to resolve
16 individual claims); *Jaffe v. Morgan Stanley*, No. 06 Civ. 39303, slip. op. at 7-9 (N.D. Cal. Feb. 7,
17 2008) (\$25,000 service award to named plaintiff, plus additional \$125,000 for non-class claims)
18 (attached as Exhibit B); *E.E.O.C. v. Morgan Stanley & Co.*, 256 F.R.D. 124, 125 (S.D.N.Y. 2004)
19 (\$12 million to resolve individual claims of named plaintiff); *Lo Re v. Chase Manhattan Corp.*,
20 1979 WL 236, at *3, *6 (S.D.N.Y. May 25, 1979) (approving \$229,000 paid to named plaintiffs
21 in settlement of their individual claims).

22 **F. The Proposed Awards of Attorneys' Fees, Costs, and Plaintiff Service**
23 **Payments are Reasonable**

24 The proposed settlement's provision for reasonable attorneys' fees and costs and modest
25 Named Plaintiff service payments should also be approved. Fees and costs and service payments
26 are addressed in separate motions and therefore are not addressed here. The class settlement is
27 not conditioned on either an award of attorneys' fees or the service payments.
28

1 **II. THE PROPOSED NOTICE AND NOTICE PLAN SHOULD BE APPROVED**

2 The Court should also approve the proposed notice and notice plan. Under Rule 23(e)(1)
 3 of the Federal Rules of Civil procedure, the Court must “direct notice in a reasonable manner to
 4 all class members who would be bound by the proposal.” Notice is satisfactory if it “generally
 5 describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to
 6 investigate and come forward and be heard.” *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566,
 7 575 (9th Cir. 2004). Notice must also comply with Fed. R. Civ. P. 23(c)(2). *See, e.g., Evans v.*
 8 *Linden Research, Inc.*, 2013 WL 5781284, at *5 (N.D. Cal. Oct. 25, 2013).

9 The proposed notice and notice plan are satisfactory. Under the proposed settlement
 10 agreement, a respected claims administrator will mail a notice packet to class members by First
 11 Class U.S. Mail. (Agreement § 7.6.) The administrator will take reasonable steps to determine
 12 the most recent address of each class member. (*Id.*)

13 The notice packet will contain a Notice of Class Action Settlement and an Opt-Out Form.
 14 (*Id.*) The proposed Notice describes: (1) the nature of the action; (2) the identities of class
 15 counsel; (3) the terms and provisions of the proposed settlement; (4) the relief to which the
 16 members of each class will be entitled, including detailed summaries of the programmatic relief
 17 and claims process; (5) the process by which class members may make a claim for monetary
 18 relief if the settlement is approved; (6) how administrative costs, attorneys’ fees, and potential
 19 service payments will be handled; (7) the procedures and deadlines for submitting objections,
 20 and/or requests for exclusion; and (8) the date, time, and place of the final approval hearing. (*See*
 21 *Agreement, Ex. 1.*) Under the proposed notice plan, class members will have 60 days to opt out
 22 or submit objections. (*Id.* ¶ 7.6.6.)

23 **III. THE COURT SHOULD SET A FINAL APPROVAL SCHEDULE**

24 Finally, the Court should set a final approval schedule. The parties propose:

25 February 20, 2014	Notice packet distributed to class members by claims administrator (14 days after preliminary approval)
26 February 20, 2014	Deadline for filing motions for service awards (14 days after preliminary approval)
27 April 21, 2014	Last date to postmark objections or exclusions (60 days from notice)

1 2 3 4	April 17, 2014	Deadline for filing motion for final settlement approval (35 days prior to final approval hearing)
5	May 15, 2014	Due date for briefs responding to objections
6	May 22, 2014	Final approval hearing (first hearing date 100 days after preliminary approval)

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CONCLUSION

For all of the reasons explained above, Plaintiffs respectfully request that their motion for preliminary settlement approval be granted.

Dated: December 17, 2013

Respectfully submitted,

IMPACT FUND

By: /s/Jocelyn D. Larkin
 Jocelyn D. Larkin
 Attorneys for Plaintiffs and Certified Classes