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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18

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

Case No. C04-3341 EMC
Assigned to Hon. Edward M. Chen
**JOINT SUPPLEMENTAL BRIEF IN
RESPONSE TO JANUARY 22, 2014
ORDER AND REGARDING
CONTINGENT DISTRIBUTION OF
EXCESS FUNDS**

Hearing Date: February 6, 2014
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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

RESPONSE TO JANUARY 22, 2014 ORDER RE MOTION FOR PRELIMINARY APPROVAL..... 1

 A. Programmatic Terms 1

 1. Differential Obligation Regarding AGM and GM Positions 1

 2. Length of Programmatic Relief Term 2

 B. Monetary Claim Process..... 3

 1. Availability of Promotion Data 3

 2. Relative Value of Confidential and Non-Confidential Claims..... 4

 3. Availability of Promotion Data and Discovery for Outside Counsel..... 4

 4. Reasonableness of Settlement Fund 5

 C. Other Provisions 12

 1. Support for Service Awards 12

 2. Time Period for Objections 12

 D. Class Notice..... 12

 1. Number of Challenges 12

 2. Restrictions in Arbitration Process 12

 3. Fees Available for Claimant’s Retained Counsel..... 13

 4. No Charge for Class Counsel to Prosecute Claim..... 13

 5. Impact of Failure to Act 13

 6. Description of Release..... 13

SUPPLEMENTAL STATEMENT RE CONTINGENT DISTRIBUTION OF EXCESS FUNDS..... 13

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Cases

Easterling v. Conn. Dep’t of Corr.,
No. 3:08-cv-00826-JCH, slip. op. (D. Conn. June 27, 2012)..... 6

Kyriazi v. Western Elec. Co.,
465 F. Supp. 1141 (D.N.J. 1979)..... 12

Kraszewski v. State Farm Gen. Ins. Co.,
No. C-70-1261 TEH, 1986 WL 11746 (N.D. Cal. July 17, 1986) 6

Nachshin v. AOL, LLC,
663 F.3d 1034 (9th Cir. 2011) 14

United States and The Vulcan Soc’y, Inc. v. City of New York,
681 F. Supp. 2d 274 (E.D.N.Y. Jan. 21, 2010)..... 5

United States and The Vulcan Soc’y, Inc. v. City of New York,
276 F.R.D. 22 (E.D.N.Y. July 8, 2011) 5

United States and The Vulcan Soc’y, Inc. v. City of New York,
847 F. Supp. 2d 395 (E.D.N.Y. Mar. 8, 2012) 5

United States and The Vulcan Soc’y, Inc. v. City of New York,
No. 07-cv-2067, 2012 WL 2374204 (E.D.N.Y. Apr. 10, 2012)..... 5

Wal-Mart Stores v. Dukes,
__U.S. __, 131 S. Ct. 2541 (2011)..... 5

RESPONSE TO JANUARY 22, 2014 ORDER
RE MOTION FOR PRELIMINARY APPROVAL

Pursuant to the Court's Order (ECF No. 767), the parties submit this supplemental brief to address the Court's questions regarding preliminary approval of the proposed class action settlement. The briefing tracks the numbering format of the Court's Order. The parties are concurrently submitting an Amended Class Action Settlement Agreement, which includes as an exhibit a revised Class Notice. For the convenience of the Court, we submit a *clean* version of these documents (Exhibit A) and a *redlined* version (Exhibit B) attached to the Declaration of Jocelyn D. Larkin in support of this Joint Supplemental Brief.

The parties also concur that the Court may contact the mediator, Mark S. Rudy, to provide additional information to aid the Court's assessment of the proposed settlement, as needed.

A. Programmatic Terms

(1) Differential Obligation Regarding AGM and GM Positions – As the Court notes, the Agreement provides Costco additional latitude with regard to the implementation of GM selection criteria and assessment tools (i.e., “consider for implementation any” vs. “implement any”). The difference is reasonable for at least two reasons. The first is the parties' differing assessments of Plaintiffs' claim for GM promotion. As the Court noted in its Order granting class certification, in contrast to promotions to AGM, there was no statistically significant disparity in the rate of promotion to GM. (ECF No. 693 at 50.) Although Plaintiffs believe that their expert's explanation for this lack of disparity is meritorious (an artificially low GM feeder pool) (*see id.*), Costco argues that there has never been even a superficial gender disparity in promotions to GM from those AGMs available to fill GM positions, and would press this position at both the summary judgment and trial phases and in moving to decertify this portion of the class. As a result, Plaintiffs face greater risk for the GM claim than they do for the AGM claim.

The second reason is the singular importance that Costco assigns to the GM position in its business. Each GM operates a warehouse that is roughly equivalent to a \$100 million-plus business. (ECF No. 543 at 4.) GMs hire, evaluate, and promote more than 200 warehouse employees, and maintain a daily \$10 million inventory. (*Id.*) Only approximately 33 of over 900

1 AGMs are promoted to GM annually. (*Id.* at 6.) Given the importance of the position and the
2 small number of openings annually, high-level executives are involved in the selection of GMs,
3 as the Court recognized. (ECF No. 693 at 28 – 33.) The parties negotiated a somewhat more
4 lenient standard for the implementation of GM selection criteria and assessment tools to ensure
5 the company a measured approach to changing its longstanding practices for what it deems a
6 particularly critical job.

7 With regard to the dispute resolution procedure provided for in Section 13.9 of the
8 settlement agreement, this procedure will be used to resolve any issues that may arise concerning
9 the implementation of both the AGM position proposals and the GM position proposals. (*See*
10 *Am. Agreement* §§ 4.2.14, 4.2.15.)

11 (2) Length of the Programmatic Relief Term – Under the proposed settlement
12 agreement, the terms of the programmatic relief will remain in effect for two years after the
13 Implementation Date, which is defined as “the date on which Costco, under Section 4,
14 implements any selection criteria and assessment tools, initiates its AGM posting program, or
15 activates its Registration of Interest program, whichever is later.” (*Id.* §§ 2.23, 4.10 (emphasis
16 added).) In other words, the two-year clock will not begin to run until after the Independent
17 Consultant has prepared, and Costco has implemented, the job analysis and selection criteria
18 required under the agreement, as well as the AGM posting program and the GM Registration of
19 Interest program. (*Id.*) The parties expect that the implementation process could take 12 to 18
20 months to complete. Accordingly, the total term of the programmatic relief could be as long as
21 3½ years.

22 Based on the parties’ research of similar settlements containing programmatic relief, this
23 term is within the range of reasonableness. *See, e.g., EEOC v. Regions Fin. Corp.*, No. 2:12-CV-
24 02855 (W.D. Tenn. Dec. 19, 2013) (two years from entry of decree); *Cogdell v. The Wet Seal,*
25 *Inc.*, No. 8:12-cv-01138-AG-AN (C.D. Cal. Dec. 9, 2013) (three years from the date of
26 preliminary approval); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 1:05-CV-
27 06583 (N.D. Ill. Dec. 6, 2013) (three years from effective date); *EEOC v. Baby O’s Rest.*, No.
28 3:12-CV-00681 (S.D. Miss. June 28, 2013) (two years from the approval and entry of decree);

1 *EEOC v. Dillard's, Inc.*, No. 3:08-CV-01780 (S.D. Cal. Dec. 18, 2012) (three years from
 2 effective date); *Waters v. Cook's Pest Control, Inc.*, No. 2:07-CV-00394-LSC (N.D. Ala. July 17,
 3 2012) (three years from the entry of the decree; may be extended to a maximum of four years to
 4 the extent necessary to resolve any issues still pending with monitor after three years); *Holloway*
 5 *v. Best Buy Co.*, No. 4:05-05056-PJH (N.D. Cal. Nov. 9, 2011) (four years from effective date,
 6 including implementation period of up to twelve months); *Velez v. Novartis Pharm. Corp.*, No.
 7 1:04-CV-09194-CM (S.D.N.Y. Nov. 30, 2010) (three years from effective date or until the court
 8 determines defendant is in compliance); *Wade v. Kroger Co.*, No. 3:01-CV-00699 (W.D. Ky.
 9 Nov. 20, 2008) (three years from effective date; extended to four years if, after the first year,
 10 defendant found to have violated a material term of the decree); *Wiginton v. Ellis, Inc.*, No. 1:02-
 11 CV-06832 (N.D. Ill. Jan. 9, 2008) (two years from the effective date).¹

12 Finally, the nature of the changes contemplated here—which would result from the
 13 professional recommendations of a jointly selected industrial-organizational psychologist that
 14 Costco would accept absent a good-faith basis not to do so—are more likely to endure within the
 15 organization than would any change imposed through an adversarial litigation process.

16 B. Monetary Claims Process

17 (1) Availability of Promotion Data – In the course of discovery, Plaintiffs obtained a
 18 spreadsheet from Costco that identifies each male who was promoted to AGM or GM at any time
 19 from January 1, 1999 to the present. For each promotion, the spreadsheet identifies (a) the name
 20 of the individual who was promoted, (b) the date of the promotion, (c) the name and number of
 21 the warehouse in which the promotion was available, and (d) whether the promotion was to AGM
 22 or GM. The parties intend to review that spreadsheet for completeness prior to the
 23 commencement of the Claims Process. Accordingly, Class Counsel will have the information
 24 required to assist Class Members in determining which promotions to challenge. That
 25 information is provided to the class members in the Class Notice. (*See* Am. Agreement, Ex. 1
 26 (Am. Notice) § 13.)

27
 28 ¹ The parties will submit copies of these agreements at the Court's request.

1 (2) Relative Value of Confidential and Non-Confidential Claims – The availability of
2 a confidential option for pursuing a claim was a key term that Plaintiffs achieved to ensure that
3 current employees, who might be reluctant to step forward and risk alienating important working
4 relationships with their managers, could feel comfortable submitting a written claim while
5 maintaining positive relationships with their superiors. Notably, were the case to instead go to a
6 liability trial and then to Stage II *Teamsters* proceedings, those hearings would be public and
7 class members would not have the option of seeking relief in a confidential manner. Thus, some
8 class members, who would ordinarily never file a claim and who thus would receive zero from
9 the settlement, now would have an important additional option that removes a significant barrier
10 to their participation.

11 Use of this confidential option, however, would complicate Costco’s ability to defend a
12 claim. As noted, if a Class Member were to proceed confidentially, then her current managers
13 could not be made aware of her participation in the process. (Am. Agreement §§ 5.10.5.1,
14 5.10.5.2.) Costco believes that, in many cases, this restriction could limit the company from
15 procuring the witnesses and evidence necessary to effectively defend claims. The difference in
16 monetary relief available to Class Members who choose to pursue their claims through the
17 confidential Written Submission procedure is reasonable in light of the heightened risk that
18 Costco may face in connection with these claims. With regard to the specific amounts available
19 for recovery under the confidential process (\$25,000 for AGM claims and \$50,000 for GM
20 claims), these amounts were the subject of negotiation by the parties, and were eventually fixed
21 through the use of a mediator’s proposal addressing the terms of the Claims Process.

22 (3) Availability of Promotion Data and Discovery for Outside Counsel – In
23 negotiating the proposed settlement agreement, the parties contemplated that any outside counsel
24 representing Class Members in the monetary claims procedure would have access to the same
25 information and documents obtained by Class Counsel through the discovery process in this
26 action. The parties have modified the agreement to make this explicit. (*See* Am. Agreement §
27 5.6.3.)
28

1 (4) Reasonableness of Settlement Fund – The proposed \$8 million settlement fund is
 2 reasonable when compared with a possible outcome through litigation, and in light of the relative
 3 strengths and weaknesses of the parties’ positions.

4 *Value of the Settlement Fund Compared with a Litigated Outcome* – The Court’s order
 5 asked for “an estimate of a Class Member’s potential jury verdict recovery (for denial of
 6 promotions to AGM and GM positions).” (ECF No. 767 at 2.) After the Supreme Court’s
 7 decision in *Wal-Mart Stores v. Dukes*, which mandates individual hearings to determine damages
 8 arising from a pattern or practice or disparate impact liability finding, the answer to that question
 9 is necessarily complex and contingent on a number of factors. *See Wal-Mart Stores, Inc. v.*
 10 *Dukes*, 131 S. Ct. 2541, 2560-61 (2011). In other words, there would be no single Stage I jury
 11 verdict on damages—only a series of Stage II hearings that would be tailored to the specific
 12 liability findings as well as this Court’s determination of various legal issues.² Those issues
 13 include:

- 14 • **What damages are available?** If Plaintiffs prevail on their pattern and practice
 15 claims, Class Members would be eligible to seek wage loss and interest
 16 (determined by the Court) and compensatory and punitive damages up to the
 17 statutory cap (determined by individual juries) in Stage II. If Plaintiffs prevail
 18 only on their disparate impact claims, then, under the Court’s tentative trial plan,
 19 their monetary recovery would be limited to lost wages and interest. (*See* ECF No.
 20 693 at 86.)
- 21 • **For what time period could Costco be found liable?** This case has an unusually
 22 long liability period as a result of the interlocutory appeal of the first certification
 23 order. The extent of the statistical shortfall varies across that period and Costco’s

24 ² To illustrate the complexity of these Stage II proceedings post-*Dukes*, the parties refer the Court
 25 to the series of orders issued by Judge Garaufis in *United States and The Vulcan Soc’y, Inc. v.*
 26 *City of New York*, No. 07-cv-2067 (E.D.N.Y.) (“*Vulcan Soc’y*”). *See, e.g. Vulcan Soc’y*, 681 F.
 27 Supp. 2d 274, 282-94 (E.D.N.Y. Jan. 21, 2010) (discussing framework for awarding individual
 28 relief); *Vulcan Soc’y*, 276 F.R.D. 22, 44-51 (E.D.N.Y. July 8, 2011) (further discussion of
 individual relief framework); *Vulcan Soc’y*, 847 F. Supp. 2d 395, 429-35 (E.D.N.Y. Mar. 8, 2012)
 (eligibility criteria for damages and use of special masters); *Vulcan Soc’y*, No. 07-cv-2067, 2012
 WL 2374204, at *1-6 (E.D.N.Y. Apr. 10, 2012) (recommendation of special masters regarding
 claims process).

1 liability might be limited to a certain time period.

2 • **For which positions could Class Members seek relief?** The Court would also
3 need to decide whether class members could challenge *any* promotion that went to
4 a man or only promotions to men in regions where there was an actual annual
5 shortfall within a particular year and where the class member worked or was
6 willing to move.

7 • **Would the back pay pool be calculated based on the shortfall of promotions?**

8 Some courts have held that the back pay pool is limited to the value of the “lost”
9 promotions (i.e., the shortfall). *Compare Easterling v. Conn. Dep’t of Corr.*, No.
10 3:08-cv-00826-JCH, at 4-8 (D. Conn. June 27, 2012) (limiting back pay to the
11 shortfall in positions denied to women as a result of discrimination, with
12 individual hearings to determine which class members would be entitled to a pro
13 rata share of the aggregate damages award) (Larkin Decl. Ex. C) *with Kraszewski*
14 *v. State Farm Gen. Ins. Co.*, No. C-70-1261 TEH, 1986 WL 11746, at *4-5 (N.D.
15 Cal. July 17, 1986) (class members allowed to challenge any of the vacancies
16 filled by men and obtain full wage loss if successful). According to Costco’s
17 updated statistics, the total shortfall, from April 1999 to April 2013, has remained
18 at less than zero for GM promotions and has totaled 29.3 for AGM promotions.
19 The 29.3 number is artificially high, Costco contends, because that result reflects
20 an analysis that (i) includes more than two and one-half years of pre-limitation
21 statistics (when Costco’s rate of female promotions was relatively lower), and (ii)
22 controls only for membership in the promotion feeder pool and does not account
23 for Merchandise Manager experience (more likely to be held by men than by
24 women). If pre-limitation data were excluded and if Merchandise Manager
25 experience were considered, then, according to Costco’s statistics, there would be
26 no shortfall at all for AGM promotions.

27 • **Would class members compete against each other to prove their entitlement**
28 **to a particular promotion?** Stage II proceedings are intended to “recreate” what

1 would have happened in the absence of discrimination. It is conceivable that more
2 than one class member would argue that she should have received a particular
3 promotion. The Court would then have to determine whether the hearings would
4 be “winner take all” or involve a pro rata distribution among successful claimants.

- 5 • **Would back pay be cut off for women who left their employment at Costco**
6 **during the liability period and would back pay be subject to a mitigation**
7 **defense?** This determination would affect the extent of recoverable wage loss.

8 The parties anticipate relatively few arbitration claims as to GM promotions, the higher
9 value claim, for several reasons. First, the vast majority of challenged promotions within the
10 liability period have been from Senior Staff to AGM, not from AGM to GM. Second, Costco’s
11 statistics indicate that Costco’s GM promotions have been in proportion to female representation
12 among AGMs. Third, women who have a particularly strong claim have the option to opt out and
13 bring a separate lawsuit, enabling them to seek unlimited back pay and front pay as well as
14 emotional distress and punitive damages.

15 As to claims challenging AGM promotions, the parties can estimate the average difference
16 in compensation (salary, bonus, and grants of restricted stock units) between Staff Managers and
17 AGMs. That difference has ranged from about \$10,000 annually at the beginning of the class
18 period to about \$30,000 annually at the end of the class period.

19 *Parties’ Strengths and Weaknesses*³ – The amount of the fund is reasonable in light of the
20 strengths and weakness of Plaintiffs’ claims and Costco’s defenses. Plaintiffs believe their case is
21 strong. In their motion for class certification, Plaintiffs set forth extensive evidence that they
22 contend supports their claim that Costco used a uniform, corporate-directed selection system that
23 fails to promote equally or better qualified women into the AGM and GM positions. Plaintiffs

24 ³ Obviously, nothing in this Joint Brief is intended by either party as an adoption or affirmation of
25 any of the opposing party’s facts, arguments, or positions. In addition, the parties have
26 endeavored to be candid with the Court about the strengths and weaknesses of their claims, but
27 are limited for two reasons. First, as part of the Claims Process, the parties will present to the
28 arbitrators information about the context of the decision-making, which would include
assessments of evidence adduced in the litigation. (Am. Agreement § 5.9.) The parties do not
wish to jeopardize their clients’ positions by exposing weaknesses not now known to the other
side. Similarly, should the Court decline to approve a settlement, the parties would litigate the
Stage I trial. The same concern about protecting their clients’ litigation position applies.

1 contend that this evidence includes:

2 Evidence of a uniform system of pre-selection and grooming of AGM and GM candidates,
3 orchestrated by the most senior corporate officials. (ECF No. 664 at 6.) This system includes (a)
4 the use of lists of “promotable” employees who are groomed for management and given
5 opportunities to develop personal relationships with high-level executives, (b) use of a
6 confidential “Green Room” at Corporate Headquarters, used by senior executives to assess the
7 “promotable” talent pool, (c) promotion from within, (d) no posting of open positions, (e) no
8 procedure for applying for open positions, (f) no written explanations of the qualifications
9 required for promotion or the process for being promoted, (g) no requirement that decision-
10 makers interview multiple candidates or consider more than one candidate, (h) no system of
11 keeping records regarding promotions, and (i) no validation of the criteria used for making
12 promotion decisions. (*Id.* at 6-7.)

13 Evidence that this uniform promotion system is implemented by a small group of senior
14 decision-makers who meet frequently and receive instructions from the CEO regarding criteria to
15 be applied in making promotion decisions. (*Id.* at 8.) This criteria includes, for example, “people
16 skills” and “merchandising skills,” with no written guidelines on how the criteria should be
17 applied. (*Id.*)

18 Evidence that some Costco managers held stereotyped perceptions about the roles of women
19 and men in the workplace. (*Id.* at 8-9.)

20 Evidence that Costco learned about barriers to promotion through its BOLD Initiative
21 programs in 1999 through 2001. (*Id.* at 9-13.) This included, for example, internal documents in
22 which focus group participants identified barriers such as a “good old boy” network, type-casting,
23 lack of consistent application of promotion systems, and use of word of mouth to evaluate talent.
24 (*Id.* at 9-10.)

25 Evidence that, in late 2001 or 2002, the Executive Committee, through the Rothman
26 Workplan, adopted some changes to lower level promotion and personnel practices “in response
27 to criticisms that Costco’s inconsistent promotion practices allowed for favoritism and individual
28 biases.” (*Id.* at 10-11.)

1 Evidence that Costco's senior management rejected a recommendation to post vacancies for
2 AGM and GM positions. (*Id.* at 11.)

3 Evidence that, after this action was filed, employees in a series of focus groups confirmed
4 potential barriers to women such as the need for consistent promotion criteria, getting promoted
5 based on "[w]ho you know," a tendency to promote "people like us," and "[l]ack of knowledge
6 about upcoming opportunities." (*Id.* at 11-12.)

7 This evidence is bolstered by expert testimony. Plaintiffs' sociological expert, Dr.
8 Barbara Reskin, conducted a social framework analysis and concluded that Costco's
9 "[c]entralized control, reinforced by a strong organizational culture, creates and sustains
10 uniformity in the personnel policies and practices throughout Costco's operational units." (ECF
11 No. 670 ¶ 9.) She described the culture as "characterized by unwritten rules and informal,
12 undocumented personnel practices featuring discretion by decision makers" and opined that
13 "[s]uch subjective personnel policies are likely to be tarnished by biases that operate against
14 women." (*Id.*)

15 Plaintiffs also contend they have statistical evidence to support their claims. Plaintiffs'
16 statistical expert, Dr. Richard Drogin, opined at class certification that between 1999 and 2005
17 there were statistically significant shortfalls in the selection of women for AGM positions. (ECF
18 No. 666.) Likewise, Plaintiffs' labor economist, Dr. Marc Bendick, performed a benchmarking
19 analysis to determine the available, qualified, and interested pool of applicants for Costco's AGM
20 and GM jobs. He concluded that the shortfall in female managers at Costco could not be
21 explained by a shortage of available, qualified, and interested women. (ECF No. 134 ¶¶ 30, 35.)

22 Costco, meanwhile, believes that its defenses are strong. The 1999-2004 statistics
23 available to the parties, and reviewed by the Court for purposes of class certification, differ
24 significantly from the statistics available now. For example, while the Court noted that there was
25 a "raw gender disparity" in all seven of Costco's non-Texas regions during the 1999-2004 period,
26 Costco's current statistics show a raw disparity in only three of those regions now, and show no
27 gender disparity in the Texas region (which should now be considered because much more data
28 for that region is now available).

1 Costco believes that this and other evidence defeat Plaintiffs' discrimination claims on the
2 merits and show that class certification is unwarranted now, even if it was before.

3 Other evidence that Costco would point to includes:

4 Evidence of a competitive promotion process for GM promotions, with just 33 of over 900
5 AGMs promoted annually. (ECF No. 543 at 6.)

6 Evidence of the need for crucial Merchandising Manager experience for promotion to AGM
7 (*id.* at 6), and evidence that Costco promoted female applicants to posted Merchandise Manager
8 positions in proportion to their availability.

9 Evidence of strong anti-discrimination policies and practices. (*Id.* at 7-8.) Costco's Code of
10 Ethics is to obey the law and take care of its employees. (*Id.* at 7.) Costco's employment policies
11 forbid discrimination, making promotions based on skill and ability, and using seniority when all
12 else is equal. (*Id.*) Costco also maintains an Open Door policy, which permits employees to
13 voice concerns to management without fear of retaliation. (*Id.* at 7-8.)

14 Evidence of formal diversity initiatives through the Bold Initiative, the Rothman Workplan,
15 and Diversity Action Council. (*See id.* at 8.) This includes (a) an explicit corporate diversity
16 goal, (b) annual performance appraisals, (c) explicit evaluation of management diversity efforts,
17 (d) posting job openings up to the Senior Staff Level, and (e) numerical diversity goals. (*Id.*)
18 Diversity is emphasized in employee publications and warehouse postings. (*Id.* at 8.)

19 Evidence that the focus group statements that Plaintiffs claims are "admissions" are actually
20 nothing more than speculative brainstorming comments about what potential barriers might exist,
21 with the goal of *encouraging* women and others to seek advancement.

22 Evidence that Costco's former CEO does not have stereotyped views about the role of
23 women, contrary to Plaintiffs' claim. (*See, e.g., id.* at 14.)

24 Evidence of hundreds of current and former female Costco employees who worked during the
25 relevant timeframe, succeeded, and disagree with Plaintiffs' claims of discrimination. (*See, e.g.,*
26 ECF No. 544 ¶ 2.)

27 Costco has also retained its own experts to rebut Plaintiffs' claims. For example, Costco's
28 statistical expert, Dr. Ali Saad, looked at the same employment data analyzed by Plaintiffs' expert

1 and concluded that there was no significant promotion disparity within the limitations period in
 2 any Costco region. (*E.g.*, ECF No. 620 ¶¶ 39-43.) Dr. Saad disputed Dr. Bendick's
 3 benchmarking analysis on various bases, and noted that a proper benchmark that accounted for
 4 income level (so that Costco's highly paid managers would not be compared with managers at
 5 small retail shops) would show the absence of any statistical shortfall in the number of female
 6 managers at Costco.

7 Costco contends that the statistics show Costco has (1) always promoted women to GM at
 8 levels in accordance with their availability in the AGM feeder pool, (2) not under-promoted
 9 women to AGM during the statutory period in any significant way, and (3) never under-promoted
 10 women to AGM if the critical factor of merchandising experience is properly considered. In
 11 Costco's view, Plaintiffs' expert erred by ignoring key merchandising job experience, ignoring
 12 regional differences in promotions, and analyzing limitations data from before the relevant
 13 limitations period while at the same time ignoring post-lawsuit events. (ECF No. 543 at 9.) And
 14 Costco also believes that the evidence gathered since this Court's class certification decision has
 15 only strengthened Costco's case on the merits and its contention that the class should be
 16 decertified.

17 Costco also disputes Dr. Reskin's conclusion that Costco's personnel policies led to any
 18 bias against women. Costco's own expert, industrial-organization psychologist Frank Landy,
 19 opined that Dr. Reskin did not engage in a proper social framework analysis. Dr. Landy
 20 concluded, on the basis of his own study, that Costco's promotional process has met or exceeded
 21 professional standards.

22 * * * * *

23 Accordingly, after nearly a decade of litigation, both sides remain confident in their
 24 positions. But both sides also have analyzed the risks. A loss for the Plaintiffs at trial would
 25 mean that the Class Members get none of the programmatic or monetary relief that they have
 26 sought for nearly a decade. Even a total victory for Plaintiffs at trial would still not guarantee
 27 compensation for the Class. Individual Stage II hearings would be required, followed by
 28 numerous appeals. And Costco has risk too. If Plaintiffs are successful, then the Court could

1 order immediate injunctive relief to change Costco's practices. The Court could schedule
 2 individual trials in which women would be entitled to seek wage loss, emotional distress
 3 damages, and instatement relief (i.e., promotions). In the Stage II hearings, Costco would bear all
 4 costs and attorneys' fees. *See, e.g., Kyriazi v. Western Elec. Co.*, 465 F. Supp. 1141, 1148 (D.N.J.
 5 1979) (ordering the defendant to pay fees of special masters during Stage II proceedings). In
 6 addition to the expense, these hearings would divert the time and attention of the company's
 7 employees. Costco could also be found liable for punitive damages.

8 C. Other Provisions

9 (1) Support for Service Awards – As set forth in the Motion for Preliminary Approval,
 10 Plaintiffs planned to file an application for award of service payments fourteen days after
 11 preliminary approval, which would set forth the factual basis for the request. (*See* ECF No. 755
 12 at 25-26.) However, in light of the Court's January 22, 2014 order, Plaintiffs are filing an
 13 application for service awards concurrently with the filing of this supplemental brief, supported
 14 by declarations detailing the work of the named Plaintiffs.

15 (2) Time Period for Objections – Following the Court's suggestion, the parties have
 16 modified Section 7.6.9 of the proposed settlement agreement so that the time period for objecting
 17 and submitting Opt-Out forms starts from the date the Class Administrator *finishes* sending out
 18 the Notice Packet to the Class Members. (Am. Agreement § 7.6.9.)⁴

19 D. Class Notice

20 Pursuant to the Court's Order, the parties have conferred regarding the class notice and
 21 amended the notice to address each of the issues identified by the Court. (Am. Agreement, Ex. 1
 22 (Am. Notice).)

23 (1) *Number of Challenges* – See language added to Amended Notice at Section 8.

24 (2) *Restrictions in Arbitration Process* – See new Section 11 (“How Does the Claims
 25 Process Differ From Having Your Own Case in Federal Court?”) added to Amended

26 ⁴ The language in the Agreement that refers to “first mailing” was intended to clarify that the 60-
 27 day clock for the intended recipient of a notice would run from the original mailing of that notice,
 28 rather than from the date that a particular notice was re-mailed following its return as non-
 deliverable by the postal service. If it were otherwise, then the notice period would be extended
 indefinitely, as a few notices predictably will be undeliverable.

1 Notice.

2 (3) *Fees Available for Claimant’s Retained Counsel* – See language added to Amended
3 Notice at Section 8.

4 (4) *No Charge for Class Counsel to Prosecute Claim* – See language added to Amended
5 Notice at Section 13 (“Can I Get Help in Deciding What Kind of Claim to File? Will I
6 have a Lawyer in the Claims Process?”).

7 (5) *Impact of Failure to Act* – See bolded language added above bullet points to Amended
8 Notice on Page 1.

9 (6) *Description of Release* – See new Section 22 (“What Claims Are Released by the
10 Settlement?”) added to Amended Notice.

11 SUPPLEMENTAL STATEMENT RE CONTINGENT DISTRIBUTION
12 OF EXCESS FUNDS

13 In their motion for preliminary settlement approval, Plaintiffs advised the Court that
14 although the parties had agreed to the use of *cy pres* to distribute unallocated settlement funds, the
15 specific recipient had not yet been designated. (ECF No. 755 at 20 & n.7.) The parties have now
16 selected the designee—Network of Executive Women, Consumer Products/Retail (“NEW”)
17 (www.newonline.org)—and amended the Agreement as follows:

18 Any funds not awarded to Class Members who prevail in the Monetary Claims Process
19 will be used as follows: (i) the first \$100,000, or fraction thereof, will be used to pay the
20 Independent Consultant to the extent that Independent Consultant fees exceed \$100,000;
21 (ii) any remainder will be donated to Network of Executive Women, Consumer
22 Products/Retail (“NEW”) (www.newonline.org) to fund scholarships or otherwise assist
23 women pursuing leadership roles in retail management. Within thirty (30) days of any
24 determination that there are funds available to distribute to NEW, the parties will confer as
25 to whether the funds should go entirely to scholarship recipients or to other NEW-related
26 recipients as well. Those other recipients may include female Costco employees or
27 programs whose interests reasonably approximate those of the Class Members, and
28 conform to the legal principles guiding *cy pres* distributions.

(Am. Agreement § 3.5.)

As explained on its website, the Network of Executive Women, Consumer Products/Retail
is a 501(c)(3) not-for-profit organization founded in 2001 by a group of industry executives who
believed there were not enough female leaders in consumer products and retail. (Larkin Decl.,
Ex. D at 1.) The organization has more than 8,000 members, 700 companies, 96 national

1 sponsors, and 20 regions in the U.S. and Canada. (*Id.*) Its mission is to attract, retain, and
 2 advance women in the retail and consumer products industry through education, leadership, and
 3 business development. (*Id.* at 2.) This mission is accomplished through education, events, best
 4 practices, research, and leadership development programs. (*Id.* at 2.)

5 Each year, the Network of Executive Women hosts two national conferences, more than
 6 30 regional educational events, and 60 local mixers and receptions. (*Id.* at 3.) These education
 7 and networking events attract more than 12,000 emerging, mid-level, and senior leaders annually
 8 from across the country. (*Id.*) NEW maintains regional groups in the following areas: Atlanta;
 9 the Carolinas; Chicago; Cincinnati; Denver; Florida; Greater Philadelphia; Mid-Atlantic; New
 10 England; New York Metro; North Central Texas; Northern California; Northwest Arkansas;
 11 Pacific Northwest; Phoenix; Southern California; South Texas; Toronto; Twin Cities; and
 12 Western Michigan. (*Id.* at 4.)

13 The parties' designation of the Network of Executive Women to receive any available *cy*
 14 *pres* funds should be approved. NEW's mission is directly tied to the objectives of this lawsuit—
 15 the advancement of women in retail management positions—and accounts for the broad
 16 geographic distribution of the class. *See, e.g., Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th
 17 Cir. 2011).

18 Dated: January 30, 2014

Respectfully submitted,

19 IMPACT FUND

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