

1 THE IMPACT FUND
Jocelyn D. Larkin (SBN: 110817)
2 Robert Schug (SBN: 249640)
Meredith Johnson (SBN: 291018)
3 125 University Avenue, Suite 102
Berkeley, CA 94710
4 Telephone: (510) 845-3473
Facsimile: (510) 845-3654
5 jlarkin@impactfund.org

DAVIS, COWELL & BOWE, LLP
Steve Stemerman (SBN: 067690)
Elizabeth A. Lawrence (SBN: 111781)
595 Market Street, #1400
San Francisco, CA 94105
Telephone: (415) 597-7200
Facsimile: (415) 597-7201
eal@dcbsf.com

6 LEWIS, FEINBERG, LEE,
RENAKER & JACKSON, P.C.
7 Bill Lann Lee (SBN: 108452)
Lindsay Nako (SBN: 239090)
8 476 9th Street
Oakland, CA 94607
9 Telephone: (510) 839-6824
Facsimile: (510) 839-7839
10 blee@lewisfeinberg.com

ALTSHULER BERZON LLP
James M. Finberg (SBN: 114850)
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
jfinberg@altshulerberzon.com

11 Kelly M. Dermody (SBN: 171716)
kdermody@lchb.com
12 Daniel M. Hutchinson (SBN: 239458)
dhutchinson@lchb.com
13 LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP
14 275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
15 Telephone: 415.956.1000
Facsimile: 415.956.1008

16 Attorneys for Plaintiffs and Certified Classes

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 FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

Hearing Date: May 22, 2014
Hearing Time: 1:30 p.m.
Courtroom: 5 (17th Floor)

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

	Page
NOTICE OF MOTION AND MOTION; RELIEF SOUGHT	1
INTRODUCTION	1
BACKGROUND	2
I. PROCEDURAL HISTORY.....	2
A. The Class Action Complaint.....	2
B. Discovery and Motion Practice.....	2
II. SETTLEMENT AND PRELIMINARY APPROVAL.....	4
III. THE NOTICE WAS DISTRIBUTED ACCORDING TO THE PRELIMINARY APPROVAL ORDER AND THERE ARE NO OBJECTIONS TO DATE.....	5
IV. THE TERMS OF THE PROPOSED SETTLEMENT	7
ARGUMENT	9
I. FINAL SETTLEMENT APPROVAL SHOULD BE GRANTED.....	9
A. The Legal Standards for Settlement Approval.....	9
B. The Relevant Factors Weigh in Favor of Granting Final Approval.....	10
1. Strength of the case	10
2. Risk, expense, complexity, and duration of further litigation.....	11
3. Risk of maintaining class status through trial	12
4. Amount offered in settlement versus outcome at trial	12
5. Extent of discovery completed and the stage of proceedings	13
6. Experience and views of counsel	14
7. The reaction of the class members	14
C. The Proposed <i>Cy Pres</i> Beneficiary is Reasonable	15
D. The Named Plaintiffs’ Request for Service Awards is Reasonable.....	16
E. Plaintiffs’ Request for Attorneys’ Fees and Costs is Reasonable	16
CONCLUSION	17

TABLE OF AUTHORITIES

		Page
1		
2		
3	Cases	
4	<i>Chun-Hoon v. McKee Foods Corp.</i> ,	
5	716 F. Supp. 2d 848 (N.D. Cal. 2010).....	15
6	<i>Dennis v. Kellogg Co.</i> ,	
7	697 F.3d 858 (9th Cir. 2012)	15
8	<i>Ellis v. Costco Wholesale Corp.</i> ,	
9	657 F.3d 970 (9th Cir. 2011)	3
10	<i>Ellis v. Naval Air Rework Facility</i> ,	
11	87 F.R.D. 15 (N.D. Cal. 1980),	
12	<i>aff'd</i> , 661 F.2d 939 (9th Cir. 1981).....	9
13	<i>Garner v. State Farm Mut. Auto. Ins. Co.</i> ,	
14	2010 WL 1687832 (N.D. Cal. Apr. 22, 2010).....	15
15	<i>Greko v. Diesel U.S.A., Inc.</i> ,	
16	2013 WL 1789602 (N.D. Cal. Apr. 26, 2013).....	12
17	<i>Hanlon v. Chrysler Corp.</i> ,	
18	150 F.3d 1011 (9th Cir. 1998)	9, 10
19	<i>In re Heritage Bond Litig.</i> ,	
20	2005 WL 1594403 (C.D. Cal. June 10, 2005).....	11
21	<i>In re Synacor ERISA Litig.</i> ,	
22	516 F.3d 1095 (9th Cir. 2008)	9
23	<i>Lane v. Facebook, Inc.</i> ,	
24	696 F.3d 811 (9th Cir. 2012),	
25	<i>cert. denied</i> , 134 S. Ct. 8 (2013).....	15
26	<i>Nachshin v. AOL, LLC</i> ,	
27	663 F.3d 1034 (9th Cir. 2011)	15
28	<i>Officers for Justice v. Civil Serv. Comm'n of San Francisco</i> ,	
	688 F.2d 615 (9th Cir.1982)	9, 14
	<i>Officers for Justice v. Civil Serv. Comm'n. of San Francisco</i> ,	
	473 F. Supp. 801 (N.D. Cal. 1979),	
	<i>aff'd</i> , 688 F.2d 615 (9th Cir. 1982).....	9
	<i>Pierce v. Rosetta Stone, Ltd.</i> ,	
	2013 WL 5402120 (N.D. Cal. Sept. 26, 2013).....	14
	<i>Rodriguez v. W. Publ'g Corp.</i> ,	
	563 F.3d 948 (9th Cir. 2009)	16

TABLE OF AUTHORITIES
(continued)

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

<i>Schaffer v. Litton Loan Servicing, LP</i> , 2012 WL 10274679 (C.D. Cal. Nov. 13, 2012)	9
<i>Staton v. Boeing Co.</i> , 327 F.3d 938 (9th Cir. 2003)	16
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011).....	11
<i>Wren v. RGIS Inventory Specialists</i> , 2011 WL 1230826 (N.D. Cal. Apr. 1, 2011), <i>supplemented</i> , 2011 WL 1838562 (N.D. Cal. May 13, 2011).....	15, 16
Statutes	
California Fair Employment & Housing Act, Government Code §§ 12940 <i>et seq.</i>	2
Title VII of the Civil Rights Act of 1964, 42 U.S.C §§ 2000(e) <i>et seq.</i>	2
Rules	
Fed. R. Civ. P. 23(b)(2)	3
Fed. R. Civ. P. 23(e)	1, 9

1 Service Awards to Class Representatives, the three Class Representatives have devoted
 2 substantial time to this case, pursuing it for nearly ten years with no guarantee of success. (ECF
 3 No. 771.) Service awards of \$10,000 each are appropriate. Likewise, as set forth in Plaintiffs’
 4 Motion for Attorneys’ Fees and Costs, Class Counsel have worked diligently and efficiently over
 5 the course of this litigation, and have obtained an excellent result. (ECF No. 760.) Costco does
 6 not oppose either of these requests, and the parties have stipulated to the amount of fees and costs
 7 as set forth in the parties’ joint Stipulation Regarding Motion for Attorneys’ Fees and Costs. (*See*
 8 ECF No. 770). Final approval should be granted.

BACKGROUND

I. PROCEDURAL HISTORY

A. The Class Action Complaint

11 Plaintiff Shirley “Rae” Ellis filed a class charge of discrimination with the EEOC on
 12 October 30, 2002. (ECF No. 1 at 18-22.) She filed this lawsuit on August 17, 2004. (*Id.* at 17.)
 13 In the Fourth Amended Complaint, the Named Plaintiffs—Ms. Ellis, Leah Horstman, and Elaine
 14 Sasaki—bring claims against Defendant Costco Wholesale Corporation on behalf of themselves
 15 and all others similarly situated, alleging violations of Title VII of the Civil Rights Act of 1964,
 16 42 U.S.C §§ 2000(e) *et seq.* (ECF No. 718.) Plaintiffs allege that Costco discriminates against
 17 female employees by using a uniform, corporate-directed system that fails to promote equally or
 18 better qualified women into Assistant General Manager (“AGM”) and General Manager (“GM”)
 19 positions. (*Id.* ¶¶ 115-130.) In addition to the class claims, the Named Plaintiffs bring individual
 20 discrimination claims under the California Fair Employment & Housing Act, Government Code
 21 §§ 12940 *et seq.* (*Id.* ¶¶ 131-135.) Ms. Ellis and Ms. Sasaki also allege individual Title VII
 22 retaliation claims. (*Id.* ¶¶ 136-147.)

B. Discovery and Motion Practice

24 As set forth in detail in Plaintiffs’ Motion for Preliminary Approval, the Named Plaintiffs
 25 pursued their claims and the claims of the class through extensive discovery. (ECF No. 755 at 2-
 26 3.) Over nine years of litigation, Class Counsel served a total of ten sets of requests for
 27 production, through which they obtained and reviewed several hundred thousand pages of
 28

1 documents. (*Id.*) Counsel also served twenty-eight interrogatories and took fifteen depositions,
2 including three Rule 30(b)(6) depositions. (*Id.*) Class Counsel defended the depositions of the
3 three Named Plaintiffs (twice each) and five class members. (ECF No. 760 at 4-5.) Counsel assisted
4 the Named Plaintiffs in responding to document requests, interrogatories, and requests for admissions.
5 (*Id.*) Plaintiffs also retained three experts, each of whom provided extensive analysis of the
6 employment practices at issue. (*Id.*) Costco deposed each of Plaintiffs' experts, and Class Counsel
7 also deposed three of Costco's four experts. (*Id.*)

8 The parties also engaged in extensive motion practice. (ECF No. 755 at 3-6.) On October
9 15, 2004, Costco filed a motion to transfer venue. (*See* ECF Nos. 6, 65, 66, 70, 74, 77, 81.) The
10 Court denied the motion on May 31, 2005. (ECF No. 98.)

11 On August 28, 2006, Plaintiffs filed their motion for class certification. (*See* ECF No.
12 127, 433, 435, 436, 447.) On January 11, 2007, the Court granted the motion and certified a class
13 under Fed. R. Civ. P. 23(b)(2) of "all current and former female Costco employees nationwide
14 who have been denied promotion to GM or AGM or denied promotion to Senior Staff positions
15 since January 3, 2002." (ECF No. 494 at 35-36.) The parties later stipulated to a slightly
16 narrower class definition. (ECF No. 509 ¶ 1.)

17 Costco sought and was granted permission to appeal under Fed. R. Civ. P. 23(f). (Case
18 No. 07-15838, ECF No. 1.) Oral argument was held on April 14, 2008. (Case No. 07-15838,
19 ECF No. 47.) However, the Ninth Circuit's decision was delayed by the appellate proceedings in
20 *Dukes v. Wal-Mart Stores, Inc.*, No. C01-02252 (N.D. Cal.). (*See* ECF No. 755 at 4-5.) After
21 several rounds of supplemental briefing, the Ninth Circuit issued its decision on September 16,
22 2011. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011). The Ninth Circuit
23 affirmed in part, vacated in part, and remanded. *See id.* at 974-75.

24 On remand, the parties agreed that Plaintiffs would file a Third Amended Complaint to
25 reflect the intervening change in the law. (ECF No. 535 at 5.) Costco filed a motion for an order
26 eliminating class claims, and Plaintiffs filed an affirmative motion for class certification. (ECF
27 Nos. 543, 664.) On September 25, 2012, the Court granted Plaintiffs' motion and certified an
28 Injunctive Relief Class:

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

All women who are currently employed or who will be employed at any Costco 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.

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

All women who have been employed at any Costco warehouse store in the U.S. since January 3, 2002 who have been subject to Costco's system for promotion to Assistant General Manager and/or General Manager positions.

(*Id.*) Costco's second petition to appeal under Fed. R. Civ. P. 23(f) was denied. (Case No. 12-80188, ECF No. 5.)

Court-approved notice was issued in December 2012. (*See* ECF No. 717.)

Approximately 100 class members opted out. (ECF No. 755 at 6.) The parties subsequently engaged in discovery in preparation for dispositive motions and trial. At the time the proposed settlement was reached, both parties were preparing to file multiple summary judgment and *Daubert* motions, and Costco was preparing a motion to decertify the classes. (*See, e.g.*, ECF Nos. 697, 747.)

II. SETTLEMENT AND PRELIMINARY APPROVAL

As detailed in Plaintiffs' Motion for Preliminary Approval, the parties devoted substantial time and effort over the course of the litigation to reaching the proposed settlement agreement. (ECF No. 755 at 6-8.) The parties attended five mediation sessions with Mark Rudy, an experienced and respected mediator—two sessions in 2004 and three in 2013. (*Id.*) The parties also conducted countless informal sessions—both in person and over the phone—in order to narrow the issues and negotiate the details of the agreement. (*Id.*) On October 11, 2013, the parties reached an agreement on the principal settlement terms of a class-wide settlement, which was submitted to the Court *in camera*. (*See* ECF No. 749.) A final agreement was signed on December 17, 2013. (ECF No. 755 at 8.)

On December 17, 2013, Plaintiffs filed an unopposed Motion for Preliminary Settlement Approval, as well as a Motion for Attorneys' Fees and Costs. (ECF Nos. 755, 760.) On January 22, 2014, the Court ordered the parties to submit supplemental briefing addressing various

1 questions about the proposed settlement. (ECF No. 767.) The parties filed a Joint Supplemental
2 Brief on January 30, 2014, addressing the issues identified by the Court, and notifying the Court
3 of the parties' selection of a proposed *cy pres* recipient, the Network of Executive Women,
4 Consumer Products/Retail. (ECF No. 775.) Plaintiffs also filed a Supplemental Application for
5 Service Awards to Class Representatives. (ECF No. 771.)

6 Prior to the hearing on preliminary approval, the parties filed a stipulation regarding
7 Plaintiffs' Motion for Attorneys' Fees and Costs. (ECF No. 770.) Under the stipulation, Costco
8 agreed not to oppose the motion, and agreed to pay an award equal to or lower than the following:
9 \$3,950,000 in attorneys' fees for work performed through November 30, 2013, \$633,959.64 in
10 expert fees and costs, and \$300,000 for future work monitoring and administering the settlement.
11 (ECF No. 770.)

12 A hearing on Plaintiffs' Motion for Preliminary Approval was held on February 6, 2014.
13 At the conclusion of the hearing, the Court indicated that the settlement would be preliminarily
14 approved. (Ex. 1 (2/6/14 Hearing Tr.) at 16:17-20.) The Court indicated that the settlement fund
15 was adequate, and provided meaningful relief in light of the litigation risks. (*Id.* at 12:21-13-2.)
16 The Court commended the parties on "a very finely honed settlement that you worked out, and
17 one that I think has appeared, from all appearances, fair and adequate." (*Id.* at 18:1-3.)

18 The Court granted preliminary approval on February 12, 2014. (ECF No. 780.) The
19 Court concluded that the proposed settlement was the product of extensive, arms' length
20 negotiations by counsel familiar with the strengths and weaknesses of the case. (*Id.* at 1.) The
21 Court found that the proposed settlement had no obvious defects and fell within the range of
22 approval such that notice was appropriate. (*Id.*) The Court also approved the proposed Class
23 Notice and distribution plan. (*Id.* at 2-3.)

24 **III. THE NOTICE WAS DISTRIBUTED ACCORDING TO THE PRELIMINARY**
25 **APPROVAL ORDER AND THERE ARE NO OBJECTIONS TO DATE**

26 Pursuant to the agreement, the notice process is being administered by Settlement
27 Services, Inc. (Am. Agreement § 2.12.) Notice of the proposed class action settlement has been
28 distributed in the form and manner approved by the Court. (*See* ECF No. 780 at 3.)

1 In preparation for mailing notice, Costco generated an updated class list, which was
2 shared with Class Counsel for review. (Larkin Decl. ¶ 3.) The 102 Class Members who had
3 previously opted out of the litigation were excluded, and any other discrepancies, such as
4 outdated addresses, were resolved. (*Id.*) The final list of the Class Members' names and
5 identifying information was provided to Settlement Services on February 20, 2014. (Patton Decl.
6 ¶ 3.) The final class list included 1,318 members. (*Id.*)

7 On February 26, 2014, Settlement Services mailed a notice packet to each of the class
8 members by post-marked First Class U.S. Mail.¹ (Patton Decl. ¶ 4.) Each notice packet
9 contained the Notice of Class Action Settlement and the Opt-Out Form, the form and content of
10 which was approved by the Court. (*Id.* ¶ 2.) Before mailing, Settlement Services used the United
11 States Postal Service National Change of Address Database to verify the addresses of the Class
12 Members. (*Id.* ¶ 3.) Approximately forty-one addresses were updated. (*Id.*) When Notices were
13 returned as undeliverable, they were mailed to updated addresses when possible. (*Id.* ¶ 5.) As of
14 the date of this brief, only thirty-two Notices were returned undeliverable, and all but two were
15 re-mailed to updated addresses. (*Id.*)

16 The reaction of the class members to the proposed settlement has been positive. As of
17 April 16, 2014, only seventy-seven of the 1,318 members have opted out, and no objections have
18 been filed.² (*Id.* ¶¶ 6-7.) The deadline for class members to opt out or file objections is April 28,
19 2014.³ (*See* ECF No. 780 at 3 (setting deadline sixty days from the completion of the first
20 mailing.) Pursuant to the Preliminary Approval Order, the parties will file responses to any
21 objections no later than one week before the final fairness hearing. (*Id.*)

23 ¹ Plaintiffs are informed that, on February 24, 2014, Costco mailed notice of the proposed
24 settlement to the Attorney Generals of all states where class members reside, as required by the
Class Action Fairness Act.

25 ² Costco has the right to rescind the agreement at any time up to ten days before the date of final
26 approval if ten or more class members opt out, or if the United States EEOC initiates an
enforcement proceeding alleging gender discrimination in connection with the promotions that
are the subject of this action. (Am. Agreement § 9.)

27 ³ Plaintiffs will supplement this filing after the opt-out deadline to provide the Court with the final
28 number of opt-outs and their identities for inclusion in the Proposed Order. (*See* Proposed
Order.)

1 **IV. THE TERMS OF THE PROPOSED SETTLEMENT**

2 The terms of the settlement are set forth in full detail in Plaintiffs' Motion for Preliminary
 3 Approval and the parties' Joint Supplemental Brief. (ECF No. 755 at 8-16; ECF No. 775.) The
 4 final Settlement Agreement is attached as Exhibit 1 to the Court's Order Granting Preliminary
 5 Approval. (ECF No. 780, Ex. 1 ("Am. Agreement").) The settlement provides class-wide
 6 programmatic relief tailored to the Title VII violations alleged, and also creates a formal claims
 7 procedure through which the discrimination claims of the class members may be finally resolved.
 8 (*See id.*) Costco will receive a release from the settlement class of all claims for individual and
 9 class-wide declaratory, injunctive, and monetary relief. (*See id.*) The settlement is supported by
 10 the Named Plaintiffs. (*See* ECF No. 757 (Ellis Decl.) ¶¶ 6-8; ECF No. 758 (Horstman Decl.) ¶ 5;
 11 ECF No. 759 (Sasaki Decl.) ¶¶ 6-7.) The core provisions are summarized below:

12 **Programmatic Relief:** The proposed programmatic relief is designed to address the specific
 13 gender promotion issues alleged in this litigation. (*See* Am. Agreement §§ 4, 13.) This relief
 14 includes:

- 15 • use of an industrial organizational psychologist to conduct job analyses, evaluate promotion
- 16 processes, and develop selection criteria and tools for AGM and GM promotions;
- 17 • a posting process for AGM promotions;
- 18 • a registration of interest system for GM promotions;
- 19 • a merchandising training class for Senior Staff managers;
- 20 • a promotion process for AGM positions, including comprehensive records maintenance;
- 21 • internal training and communication concerning the implemented programs; and
- 22 • compliance procedures, including annual reporting by Costco.

23 (*See id.*) None of these business practices, which are critical to discouraging gender
 24 discrimination at Costco, were in place prior to the start of this litigation.

25 **Monetary Relief:** The proposed settlement also provides extensive monetary relief. (*See id.*
 26 §§ 3, 5.) This includes:

- 27 • a claims process to distribute an \$8 million settlement fund, with nearly all of any remaining
- 28 amount going to the Network of Executive Women, Consumer Products/Retail, an

1 organization dedicated to attracting, retaining, and advancing women in the retail and
2 consumer products industry;⁴

- 3 • claims submitted either by written submission or through formal arbitration, with a
4 confidential option for claims made by written submission;
- 5 • for successful non-confidential claims by written submission, awards of up to \$150,000 for
6 AGM promotion claims, and up to \$300,000 for GM promotion claims;
- 7 • for successful confidential claims by written submission, awards of up to \$25,000 for AGM
8 promotion claims, and up to \$50,000 for GM promotion claims;
- 9 • for successful claims by formal arbitration, awards of up to \$250,000 for AGM promotion
10 claims, and up to \$600,000 for GM promotion claims;
- 11 • the option of representation by Class Counsel free of charge; and
- 12 • attorneys' fees and costs for prevailing claimants.

13 (*See id.*)

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

23 **Resolution of Named Plaintiffs' Claims:** A Named Plaintiff may choose to resolve all of
24 her claims against Costco by trial in this Court. (*Id.* § 10.) Any damages will not be taken from the
25 gross settlement fund. (*Id.*) In the alternative, a Named Plaintiff may submit only her promotion

26 ⁴ The settlement provides that any funds not awarded to class members through the claims
27 process "will be used as follows: (i) the first \$100,000, or fraction thereof, will be used to pay the
28 Independent Consultant to the extent that Independent Consultant fees exceed \$100,000; (ii) any
remainder will be donated" to the proposed *cy pres* beneficiary, the Network of Executive
Women. (Am. Agreement § 3.5.)

1 claims through the monetary claims process. (*Id.*) Under this scenario, any damages awarded will be
 2 taken out of the gross settlement fund. (*Id.*) The Named Plaintiffs may seek Court-approved service
 3 payments of up to \$10,000 each, to be paid from the gross settlement fund. (*Id.*)

4 **Attorneys' Fees and Costs:** The settlement permits Plaintiffs to apply for an award of
 5 reasonable attorneys' fees and costs for the litigation up to the date of final approval of the proposed
 6 settlement. (*Id.* § 11.) Plaintiffs may also seek an award of reasonable fees and costs for their
 7 anticipated services in monitoring the programmatic relief and administrating the monetary claims
 8 settlement. (*Id.*)

9 ARGUMENT

10 **I. FINAL SETTLEMENT APPROVAL SHOULD BE GRANTED**

11 **A. The Legal Standards for Settlement Approval**

12 Courts in this circuit have long recognized that “there is a strong judicial policy that
 13 favors settlements, particularly where complex class action litigation is concerned.” *Schaffer v.*
 14 *Litton Loan Servicing, LP*, 2012 WL 10274679, at *7 (C.D. Cal. Nov. 13, 2012) (quoting *In re*
 15 *Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008)). This is especially true in Title VII
 16 cases, where “cooperation and voluntary compliance are the preferred means for achieving the
 17 statutory goals.” *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661
 18 F.2d 939 (9th Cir. 1981); *see also, e.g., Officers for Justice v. Civil Serv. Comm’n of San*
 19 *Francisco*, 473 F. Supp. 801, 803 (N.D. Cal. 1979) (remaining “mindful . . . of the favored status
 20 of settlements in Title VII litigation”), *aff'd*, 688 F.2d 615 (9th Cir. 1982).

21 Under Rule 23(e), “[t]he claims, issues, or defenses of a certified class may be settled . . .
 22 only with the court’s approval.” Fed. R. Civ. P. 23(e). To meet the standard for approval, a
 23 settlement must be “fundamentally fair, adequate, and reasonable.” *Hanlon v. Chrysler Corp.*,
 24 150 F.3d 1011, 1026 (9th Cir. 1998). “It is the settlement taken as a whole, rather than the
 25 individual component parts, that must be examined for overall fairness.” *Id.* The district court
 26 has “the sound discretion” to approve or reject a settlement, since it has been “exposed to the
 27 litigants, and their strategies, positions and proof.” *Id.* (quoting *Officers for Justice v. Civil Serv.*
 28 *Comm’n of San Francisco*, 688 F.2d 615, 626 (9th Cir. 1982)). Factors considered by the district

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

7 **B. The Relevant Factors Weigh in Favor of Granting Final Approval**

8 **1. Strength of the case**

9 The proposed settlement fairly reflects the strength of Plaintiffs' case. While Plaintiffs
 10 believe their claims are meritorious, Costco remains confident that its defenses are strong. (*See*
 11 *ECF No. 775 at 7-12.*) As explained in the parties' Joint Supplemental Brief, Plaintiffs contend
 12 that they can prove their case by relying on certain evidence, including: evidence of a uniform
 13 system of pre-selection and grooming of AGM and GM candidates, implemented by a small
 14 group of senior decision-makers; evidence that some Costco managers held gender-based
 15 stereotypes; and evidence that Costco learned about gender-based barriers to promotion as early
 16 as 1999, among other evidence. (*See id.* at 7-9.) Plaintiffs have also obtained expert testimony
 17 and statistical evidence to support their claims. (*See id.* at 9.)

18 Costco, meanwhile, contends that it can defeat Plaintiffs' claims by pointing to: evidence
 19 that the statistics from 1999-2004 differ significantly from current statistics; evidence of the need
 20 for certain experience in order to be promoted to AGM positions; evidence of anti-discrimination
 21 policies and practices; evidence of formal diversity initiatives; and evidence of female employees
 22 who succeeded during the relevant time period, among other evidence. (*See id.* at 9-10.) In
 23 addition, Costco has retained experts who dispute the findings of Plaintiffs' experts, and contend
 24 that the statistical evidence supports Costco's position. (*See id.* at 10-11.)

25 Although Plaintiffs remain confident of their ability to prevail, they recognize that the
 26 statistical evidence is stronger for some time periods than for others. (*See Ex. 1 (2/6/14 Hearing*
 27 *Tr.) at 5:2-7.*) They also recognize the risk of loss at trial, as well as the inherent expense and

28 ⁵ The seventh factor is inapplicable here because there is no governmental entity involved.

1 delay associated with continuing to litigate. (*See supra*, Part 2.) In light of these factors, the
2 proposed settlement reflects the strength of Plaintiffs' case and represents a fair and reasonable
3 outcome.

4 2. Risk, expense, complexity, and duration of further litigation

5 The risks associated with further litigation also weigh in favor of final approval. As
6 described in Plaintiffs' Motion for Preliminary Approval, this case has been vigorously litigated
7 from the start. (*See* ECF No. 755 at 22.) In addition to aggressively opposing class certification,
8 Costco filed a motion to transfer venue, hired four expert witnesses to rebut Plaintiffs'
9 allegations, and filed approximately 200 declarations from current and former employees
10 purporting to disclaim any gender discrimination in Costco's warehouses. (*See id.*) Costco
11 continues to deny that it has discriminated against female warehouse employees. (*See id.*) The
12 history of this case suggests that further litigation would continue to be prolonged and difficult.

13 Plaintiffs believe that their case is strong. However, they also recognize that it would be
14 challenging to present evidence spanning a ten-year period to a jury. (*See* ECF No. 755 at 22.)
15 The passage of time would undoubtedly affect the quality of percipient witness testimony on both
16 sides. And if Plaintiffs lost, the class members would get none of the programmatic or monetary
17 relief that they have sought for nearly a decade. *Cf. In re Heritage Bond Litig.*, 2005 WL
18 1594403, at *7 (C.D. Cal. June 10, 2005) (“[W]hile Plaintiffs are confident of the strength of their
19 case, it is imprudent to presume ultimate success at trial and thereafter.”). Likewise, if Plaintiffs
20 prevailed on their disparate impact claims, but not their pattern or practice claims, their monetary
21 recovery would be limited to lost wages and interest, not compensatory and punitive damages.
22 (*See* ECF No. 693 at 86.) Even a total victory at trial would not guarantee compensation for the
23 class, because individual class members would still have to appear at Stage II hearings in San
24 Francisco, likely followed by numerous appeals. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct.
25 2541, 2561 (2011) (discussing Stage II *Teamsters* hearings).

26 Under any of these scenarios, continued litigation would increase the amount of attorneys'
27 fees incurred, without necessarily improving the likelihood of a favorable resolution and
28 monetary recovery for the class members. (*See* ECF No. 755 at 22.) In contrast, the proposed

1 settlement allows for immediate implementation of the programmatic relief, as well as an
2 expedited process for pursuing individual claims for monetary relief. (*See id.* at 22-23.) In sum,
3 the risks and potential delay of further litigation—especially in a case that has already been
4 litigated for nearly a decade—outweigh the immediate, concrete relief provided under the
5 proposed settlement agreement. *See, e.g., Greko v. Diesel U.S.A., Inc.*, 2013 WL 1789602, at *5
6 (N.D. Cal. Apr. 26, 2013) (approving a final settlement, and noting that “even with a strong case,
7 further litigation would be time-consuming and expensive”).

8 3. **Risk of maintaining class status through trial**

9 The settlement is also reasonable in light of the risks associated with maintaining class
10 status through trial. Prior to settlement, Costco indicated that it was planning to file a motion for
11 decertification. (ECF No. 747 at 3; *see also* ECF No. 755 at 22.) This would result in a third
12 round of briefing complex class certification issues, as well as substantial delay in obtaining
13 relief. While Plaintiffs are confident that they would defeat a decertification motion, the risks of
14 engaging in further litigation counsel in favor of approving the proposed settlement agreement.
15 *See Greko*, 2013 WL 1789602, at *4 (“A motion for decertification would, at the very least, entail
16 significant expense, and if successful, would have a dramatic effect on the ability of the absent
17 class members to obtain any monetary recovery whatsoever.”).

18 4. **Amount offered in settlement versus outcome at trial**

19 The amount offered in the proposed settlement is fair and reasonable. As explained in
20 detail in Plaintiffs’ Motion for Preliminary Approval, the programmatic relief will advance the
21 goal of equal promotion opportunities for female Costco warehouse employees. (ECF No. 755 at
22 17-19.) This relief includes: (1) the use of an industrial organizational psychologist to conduct
23 job analyses, evaluate promotion processes, and develop selection criteria for AGM and GM
24 promotions; (2) a posting process for AGM promotions; (3) a registration of interest system for
25 GM promotions; (4) a merchandising training class for Senior Staff managers; (5) a promotion
26 process for AGM positions, including comprehensive records maintenance; and (6) internal
27 training and communication concerning the implemented programs. (*See* ECF No. 755 at 8-12;
28 *see also* ECF No. 775 at 1-2.)

1 The monetary component is also substantial. The settlement provides for an \$8 million
2 settlement fund, distributed through a litigated claims process. (ECF No. 755 at 12-15.) Class
3 members have the option of either submitting written claims or making claims by formal
4 arbitration. (*Id.*) Class members who prevail on written claims can obtain up to \$150,000 for
5 AGM promotions, and up to \$300,000 for GM promotions; class members who prevail in
6 arbitration can obtain up to \$250,000 for AGM promotions, and up to \$600,000 for GM
7 promotions. (*Id.* at 19.) A confidential option is available for current employees submitting
8 written claims. (*Id.* at 14.)

9 The \$8 million fund is more than adequate when compared with a possible litigated
10 outcome. (ECF No. 775 at 5-7.) As the parties advised the Court at the preliminary approval
11 hearing, the shortfall in AGM promotions is relatively small, with Costco estimating a shortfall of
12 29.3 promotions, and Plaintiffs estimating a shortfall of 46 promotions. (Ex. 1 (2/6/2014 Hearing
13 Tr.) at 11:9-21.) Moreover, there would be no single Stage I verdict on damages if the case went
14 to trial. (ECF No. 775 at 5.) Stage II hearings would be required, with the amount of damages
15 awarded depending on various factors such as: (1) the types of damages available; (2) the
16 specific time period for which Costco is found liable; (3) whether class members could challenge
17 any promotion, or only promotions in regions where there was a shortfall; (4) whether the back
18 pay pool would be limited to the shortfall in promotions to women; and (5) whether prevailing
19 class members would share damages on a pro rata basis. (*Id.* at 5-7.)

20 In sum, the proposed settlement provides an avenue for obtaining significant monetary
21 relief that is faster, less expensive, and more convenient than a fully-litigated Stage II hearing. As
22 the Court recognized at the preliminary approval hearing, the fund “represents a fair reflection of
23 the risks” in this case, taking into account “the potential verdict value [discounted] by [the]
24 litigation risks,” such that the fund is “fair and adequate in that regard.” (Ex. 1 (2/6/2014 Hearing
25 Tr.) at 12:21-13:2.)

26 5. Extent of discovery completed and the stage of proceedings

27 The proposed settlement was reached after years of thorough investigation into the merits
28 of this case. Over almost a decade of litigation, the parties conducted extensive discovery that

1 included over twenty depositions, written discovery, the production and review of hundreds of
2 thousands of documents, and significant expert discovery. (ECF No. 755 at 2-3.) This thorough
3 investigation allowed both parties to fully understand and evaluate Plaintiffs' claims and Costco's
4 defenses. The parties further developed their cases through extensive motion practice, including
5 five separate rounds of class certification briefing—two before the district court, two on Rule
6 23(f) appeals, and one before the Ninth Circuit Court of Appeals.

7 The proposed settlement was reached through highly contested negotiations held at arms'
8 length, with the aid of Mark Rudy, a respected mediator, after five separate mediation sessions
9 and numerous rounds of informal negotiation. At the time of settlement, the litigation was at a
10 stage where both parties had a clear view of the strengths and weaknesses of their positions,
11 which weighs strongly in favor of approving the settlement. *See, e.g., Officers for Justice*, 688
12 F.2d at 627 (affirming the approval of a consent decree, where the case had been “aggressively
13 litigated . . . for six years,” resulting in a large record and many pre-trial orders, assuring the court
14 that the proposed settlement “was not hastily arrived at”).

15 6. Experience and views of counsel

16 The experience and views of Counsel also support approving the proposed settlement
17 agreement. As set forth more fully in Plaintiffs' Motion for Preliminary Approval and Motion for
18 Attorneys' Fees and Costs, Class Counsel have significant experience in both Title VII
19 discrimination cases and class action litigation. (*See* ECF No. 755 at 21; ECF No. 760 at 17.).
20 They have worked on this case for almost a decade and are familiar with Plaintiffs' claims and
21 Costco's defenses. The fact that Counsel believe this settlement is fair, reasonable, and adequate
22 weighs in favor of final approval. *See, e.g., Pierce v. Rosetta Stone, Ltd.*, 2013 WL 5402120, at
23 *5 (N.D. Cal. Sept. 26, 2013) (“Given the collective experience of the attorneys involved in this
24 litigation, the Court credits counsels' view that the settlement is worthy of approval.”).

25 7. The reaction of the class members

26 Finally, the reaction of the class members weighs in favor of approving the settlement.
27 On February 26, 2014, notice of the settlement was sent to the 1,318 class members by First Class
28 U.S. Mail, using their last-known addresses. As of April 16, 2014, only seventy-seven of the

1 class members have opted out, and no objections to the settlement have been filed. “Courts have
2 repeatedly recognized that the absence of a large number of objections to a proposed class action
3 settlement raises a strong presumption that the terms of a proposed class settlement action are
4 favorable to the class members.” *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687832,
5 at *14 (N.D. Cal. Apr. 22, 2010) (internal quotation marks omitted); *see also, e.g., Wren v. RGIS*
6 *Inventory Specialists*, 2011 WL 1230826, at *11 (N.D. Cal. Apr. 1, 2011) (same), *supplemented*,
7 2011 WL 1838562 (N.D. Cal. May 13, 2011); *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp.
8 2d 848, 852 (N.D. Cal. 2010) (concluding that class members had an “overwhelming positive
9 reaction” to the proposed settlement where “[a] total of zero objections and sixteen opt-outs
10 (comprising 4.86% of the class)” were made from a class of 329 members).

11 C. **The Proposed *Cy Pres* Beneficiary is Reasonable**

12 The Court should also approve the parties’ designated *cy pres* beneficiary. Under the
13 agreement, excess settlement funds will be used by the Network of Executive Women, Consumer
14 Products/Retail to fund scholarships or otherwise assist women pursuing leadership roles in retail
15 management. (Am. Agreement § 3.5.) This organization is comprised of “the next best class of
16 beneficiaries” in this lawsuit. *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (internal
17 quotation marks omitted), *cert. denied*, 134 S. Ct. 8 (2013). As the Ninth Circuit has explained, a
18 *cy pres* award should “bear[] a substantial nexus to the interests of the class members.” *Id.* at
19 821. This means that the award should account for “the nature of the plaintiffs’ lawsuit, the
20 objectives of the underlying statutes, and the interests of the silent class members, including their
21 geographic diversity.” *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011); *see also*
22 *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (stating that a *cy pres* award “must not
23 benefit a group too remote from the plaintiff class” (internal quotation marks omitted)). The
24 parties’ designation of the Network of Executive Women satisfies all of these requirements. The
25 organization was founded on the belief that there are not enough female leaders in consumer
26 products and retail, and it seeks to attract and advance women in this industry through
27 programming that includes education, events, research, and leadership development programs.
28 (See ECF 775 at 13-14.) It has more than 8,000 members spread all across the United States and

1 Canada. (*See id.*) Any funds awarded to the organization will be used specifically to further the
2 advancement of women in retail. (Am. Agreement § 3.5.)

3 **D. The Named Plaintiffs' Request for Service Awards is Reasonable**

4 Plaintiffs' request for service awards of \$10,000 for each of the three Class
5 Representatives should also be approved. As set forth in detail in Plaintiffs' Application for
6 Service Awards to Class Representatives, the Named Plaintiffs have risked their reputations and
7 ability to obtain future employment, devoted substantial time to the litigation, and pursued this
8 case for nearly ten years, without any guarantee of success. (ECF No. 771.) As such, they are
9 entitled to service awards to compensate them for the work done, to make up for financial and
10 reputational risks taken, and to recognize their willingness to enforce the law in this case. *See*
11 *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009); *Staton v. Boeing Co.*, 327
12 F.3d 938, 977 (9th Cir. 2003); *see also, e.g., Wren*, 2011 WL 1230826, at *31-32. In addition, the
13 service awards are reasonable and appropriate because they were not conditioned in any way on
14 the Named Plaintiffs' support for the Settlement Agreement. Each Plaintiff maintained the right
15 to separately and independently support, object to, or comment upon any settlement at any point
16 in the litigation, and none of the Named Plaintiffs had any conflicts with the class overall.

17 **E. Plaintiffs' Request for Attorneys' Fees and Costs is Reasonable**

18 Plaintiffs' request for attorneys' fees and costs is also reasonable. As explained in
19 Plaintiffs' Motion for Attorneys' Fees and Costs, Class Counsel achieved excellent results. They
20 twice obtained class certification, won virtually every significant motion that was litigated before
21 this Court, and achieved a proposed settlement with substantial programmatic and monetary
22 relief. (*See* ECF No. 760.) In a joint stipulation filed prior to the hearing on preliminary
23 approval, Costco agreed not to oppose Plaintiffs' motion and to pay an award equal to or lower
24 than the following: \$3,950,000 in attorneys' fees for work performed through November 30,
25 2013, \$633,959.64 in expert fees and costs, and \$300,000 for future work monitoring and
26 administering the settlement. (ECF No. 770.) These amounts are reasonable in light of the
27 duration of the litigation, the complexity of the issues, and the excellent results that Class Counsel
28 achieved, including substantial injunctive relief. As of the date of this brief, no class member has

1 objected to the attorneys' fee application or Costco's stipulation.

2 **CONCLUSION**

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

5

6 Dated: April 17, 2014

Respectfully submitted,

7

IMPACT FUND

8

By: s/ Jocelyn D. Larkin

9

Jocelyn D. Larkin

Attorneys for Plaintiffs and Certified Classes

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 THE IMPACT FUND
Jocelyn D. Larkin (SBN: 110817)
2 Robert Schug (SBN: 249640)
Meredith Johnson (SBN: 291018)
3 125 University Avenue, Suite 102
Berkeley, CA 94710
4 Telephone: (510) 845-3473
Facsimile: (510) 845-3654
5 jlarkin@impactfund.org

DAVIS, COWELL & BOWE, LLP
Steve Stemerman (SBN: 067690)
Elizabeth A. Lawrence (SBN: 111781)
595 Market Street, #1400
San Francisco, CA 94105
Telephone: (415) 597-7200
Facsimile: (415) 597-7201
eal@dcbsf.com

6 LEWIS, FEINBERG, LEE,
RENAKER & JACKSON, P.C.
7 Bill Lann Lee (SBN: 108452)
Lindsay Nako (SBN: 239090)
8 476 9th Street
Oakland, CA 94607
9 Telephone: (510) 839-6824
Facsimile: (510) 839-7839
10 blee@lewisfeinberg.com

ALTSHULER BERZON LLP
James M. Finberg (SBN: 114850)
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
jfinberg@altshulerberzon.com

11 LIEFF, CABRASER, HEIMANN
& BERNSTEIN, LLP
12 Kelly Dermody (SBN: 171716)
Daniel Hutchinson (SBN: 239458)
13 Embarcadero Center West
275 Battery Street, 30th Floor
14 San Francisco, CA 94111-3339
Telephone: (415) 956-1000
15 Facsimile: (415) 956-1008
kdermody@lchb.com
16

17 Attorneys for Plaintiffs and Certified Classes

18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA

20 SHIRLEY "RAE" ELLIS, et al.,)
)
21 Plaintiffs,)
)
22 v.)
)
23 COSTCO WHOLESALE CORPORATION)
)
24 Defendant.)
)
25)
26)
27)

Case No. C04-3341 EMC
Assigned to: Hon. Edward M. Chen
**[PROPOSED] ORDER GRANTING
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT**
Hearing Date: May 22, 2014
Hearing Time: 1:30 PM
Courtroom: 5 (17th Floor)

28

1 A proposed settlement in this case was preliminarily approved by this Court on February
2 12, 2014. The operative Amended Settlement Agreement is attached as Exhibit 1 to the Court's
3 Preliminary Approval Order. The Court conducted a final fairness hearing on May 22, 2014 as
4 required by Rule 23(e) of the Federal Rules of Civil Procedure. Before the Court was Plaintiffs'
5 unopposed Motion for Final Approval of Class Action Settlement, Plaintiffs' unopposed Motion
6 for Attorneys' Fees and Costs, and Plaintiffs' unopposed Application for Service Awards to
7 Class Representatives.

8 The Court has reviewed the materials submitted by the Parties and heard arguments
9 presented by counsel at the hearing. For the reasons cited below, the Court grants final approval
10 of the Settlement. The Court finds that the Settlement is fair, adequate, and reasonable to the
11 Class. The Court also grants Plaintiffs' Motion for Attorneys' Fees and Costs and Application
12 for Service Awards to Class Representatives. Accordingly, the Court orders as follows:

13 **FINAL SETTLEMENT APPROVAL**

- 14 1. Except as otherwise stated, for purposes of this Order, the Court incorporates by
15 reference the defined terms in the Settlement Agreement.
- 16 2. The Court has jurisdiction over the parties and the subject matter of this litigation.
- 17 3. The Court finds that this action satisfies the requirements for the settlement of a
18 class action under Federal Rule of Civil Procedure 23, and finds that the Classes have at all times
19 been adequately represented by the Named Plaintiffs and Class Counsel.
- 20 4. The Class Notice approved by the Court was provided by First Class mail to the
21 last-known address of each of the individuals identified as Class Members. In addition, follow-
22 up efforts were made to send the Notice to those individuals whose original Notices were
23 returned as undeliverable. The Notice adequately described all of the relevant and necessary
24 parts of the proposed Settlement Agreement, the request for service awards to the Class
25 Representatives, and Class Counsel's request for an award of attorneys' fees and costs. The
26 Court finds that the Notice given to the Class fully complied with Rule 23, was the best notice
27 practicable, satisfied due process, and provides the Court with jurisdiction over the Class
28 Members.

1 5. The Court has assessed the proposed Settlement in light of: (1) the strength of
2 Plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the
3 risk of maintaining class action status throughout the trial; (4) the amount offered in the
4 settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the
5 experience and views of counsel; (7) the presence of a governmental participant; and (8) the
6 reaction of the class members to the proposed settlement. *See Staton v. Boeing Co.*, 327 F.3d
7 938, 959 (9th Cir. 2003); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

8 6. The Court finds that the terms of the Agreement are fair, reasonable, and adequate
9 in all respects. The Court specifically finds that the programmatic and monetary relief of the
10 Settlement are reasonable in light of the types and amounts of relief offered, the strength of
11 Plaintiffs' and the Class Members' claims, and the risk, expense, complexity, and duration of
12 further litigation. The Court confirms its previous finding that the Settlement Agreement is the
13 result of arms-length negotiations between experienced counsel representing the interests of
14 Plaintiffs and Defendant, after thorough factual and legal investigation.

15 7. No Class Members have objected to any aspect of the Settlement, the request for
16 Class Representative service awards, or the request for attorneys' fees and costs. The reaction of
17 the Class also supports the conclusion that the Settlement is fair, reasonable, and adequate.

18 8. The individuals who timely opted out of the Settlement are identified in Exhibit A
19 to this Order. These individuals are excluded from the Settlement and are not bound by its
20 terms.

21 9. The Court approves the *cy pres* recipient identified in the Settlement, the Network
22 of Executive Women, Consumer Products/Retail. The Court finds that there is a "driving nexus
23 between the plaintiff class and the *cy pres* beneficiaries." *See Dennis v. Kellogg Co.*, 697 F.3d
24 858, 865 (9th Cir. 2012) (internal quotation marks omitted).

25 10. The Settlement is **HEREBY APPROVED** in its entirety.
26
27
28

1 **CLASS REPRESENTATIVE SERVICE AWARDS**

2 11. On January 30, 2014, Plaintiffs filed an Application for Service Awards to Class
3 Representatives. Plaintiffs request a service award of \$10,000 for each Class Representative,
4 Shirley “Rae” Ellis, Leah Horstman, and Elaine Sasaki.

5 12. In evaluating the reasonableness of a service award, courts consider factors such
6 as: (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree to
7 which the class has benefitted from those actions; (3) the duration of the litigation and the
8 amount of time and effort the plaintiff expended in pursuing it; and (4) the risks to the plaintiff in
9 commencing the litigation, including reasonable fears of workplace retaliation, personal
10 difficulties, and financial risks. *See Staton*, 327 F.3d at 977; *see also, e.g., Wren v. RGIS*
11 *Inventory Specialists*, 2011 WL 1230826, at *32 (N.D. Cal. Apr. 1, 2011), *supplemented*, 2011
12 WL 1838562 (N.D. Cal. May 13, 2011).

13 13. The Court finds that the Named Plaintiffs’ requests for service payments are
14 reasonable in light of their time and effort pursuing this litigation, the substantial benefit to the
15 Class from the Settlement, and the risks that they have faced in representing the Class.

16 14. Accordingly, **IT IS HEREBY ORDERED** that Shirley “Rae” Ellis, Leah
17 Horstman, and Elaine Sasaki are awarded service payments of \$10,000 each, to be paid
18 according to the terms of the Settlement Agreement.

19 **ATTORNEYS’ FEES AND COSTS**

20 15. On December 17, 2014, Class Counsel filed a Motion for Attorneys’ Fees and
21 Costs. Counsel requested an award of: (1) reasonable attorneys’ fees for work on the case-in-
22 chief and settlement through November 30, 2013, in the amount of \$4,304,564; (2) costs in the
23 amount of \$633,959.64; (3) fees and costs for monitoring and administering the settlement in the
24 amount of \$300,000; and (4) fees for work done on the fee motion.

25 16. On January 30, 2014, the Parties filed a stipulation regarding Plaintiffs’ Motion
26 for Attorneys’ Fees and Costs. Pursuant to the stipulation, Costco agreed not to oppose the
27 Motion for Attorneys’ Fees and Costs, and agreed to pay an award equal to or lower than the
28 following: \$3,950,000 in attorneys’ fees for work performed through November 30, 2013,

1 \$633,959.64 in expert fees and costs, and \$300,000 for future work monitoring and
2 administering the settlement.

3 17. Plaintiffs' motion for attorneys' fees and costs is granted.

4 18. Plaintiffs are a "prevailing party" for purposes of awarding attorneys' fees
5 pursuant to 42 U.S.C. § 2000e-5(k). *See Prison Legal News v. Schwarzenegger*, 608 F.3d 446,
6 451 (9th Cir. 2010).

7 19. The lodestar method is the appropriate means of calculating attorneys' fees in this
8 case, where a major part of the relief sought and obtained was injunctive. *See In re Bluetooth*
9 *Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

10 20. The number of hours that Class Counsel spent on this case was reasonable in light
11 of the length and complexity of the litigation and the excellent result obtained. Class Counsel
12 have reasonably accounted for and eliminated unnecessary or duplicative hours.

13 21. The rates used by Class Counsel are reasonable, and are in line with attorneys of
14 comparable skill, experience, and reputation who practice in the Northern District of California.
15 This conclusion is supported by the Declarations of Richard Pearl, Jocelyn D. Larkin, Daniel M.
16 Hutchinson, Bill Lann Lee, Elizabeth A. Lawrence, and James M. Finberg.

17 22. The use of current rates is appropriate here because of the very significant delay
18 in payment. *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 284 (1989).

19 23. The attorneys' fee requested, which is substantially less than the full lodestar, is
20 reasonable. No further reduction of the lodestar is necessary.

21 24. No cross-check against the percentage of recovery is required, since there is no
22 common fund in this case. However, even if the settlement were viewed as creating a
23 constructive or putative common fund, the lodestar is still reasonable, in light of the complexity
24 and duration of the litigation, Class Counsel's skill and experience, and the important injunctive
25 and monetary relief that Class Counsel obtained in this case. *See, e.g., Wren*, 2011 WL 1230826,
26 at *29.

27
28

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

32. This Court retains exclusive jurisdiction over this matter for purposes of enforcing the Settlement Agreement, including the disbursement of the Settlement Fund.

IT IS SO ORDERED.

Dated:

EDWARD M. CHEN
United States District Judge

Exhibit 1

**(To be provided to the Court once the Opt-Out and
Objection Periods have concluded.)**