

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SHIRLEY “RAE” ELLIS, *et al.*,

No. C-04-3341 EMC

Plaintiffs,

v.

**ORDER RE SUPPLEMENTAL  
BRIEFING**

COSTCO WHOLESALE CORPORATION,

Defendant.

Currently pending before the Court is Plaintiffs’ motion for preliminary approval of a class action settlement. Having reviewed the papers submitted, the Court hereby orders that the parties to submit supplemental briefing that addresses the following concerns of the Court:

A. Programmatic Terms

(1) Under Section 4.2.9, Costco commits itself (absent “good-faith concern”) to implementing the Selection Criteria and Assessment Tools proposed by DCI Consulting Group as to the Assistant General Manager (“AGM”) position. Class Settlement § 4.2.9. By contrast, Costco need only “consider for implementation any proposed Selection Criteria and Assessment Tools” for the General Manager (“GM”) position. *Id.* § 4.2.10. The rationale for this different treatment is unclear from the papers. Additionally, it is unclear why the dispute resolution procedure provided for in Section 13.9 would be insufficient to resolve any concerns the Parties may have regarding the GM position proposals.

(2) In Section 4.10.1, the Parties provide that the programmatic terms (the Posting of openings/Registration of Interest, the Job Analyses and Selection Criteria, and the Promotion Processes) “will take effect on the Effective Date and will remain in effect for two years after the

1 Implementation Date.” Class Settlement § 4.10.1. It appears that under this provision, Costco will  
2 be entirely free to return to the *status quo ante* (i.e., stopping the posting of AGM positions; ending  
3 the registration of interest programs; abandoning the job analyses, selection criteria, and assessment  
4 tools proposed by the Independent Consultant; etc.) after only two years.

5 B. Monetary Claims Process

6 (1) The proposed class settlement provides that to be valid, a Class Member’s claim must  
7 identify “for each promotion challenged, the warehouse, the position (AGM or GM), the  
8 approximate date of the promotion, and the name of the man promoted.” Class Settlement § 5.2.5.2.  
9 However, the Fourth Amended Complaint in this action contains a number of allegations which  
10 assert that openings for GM and AGM positions are not posted and there has not been a procedure  
11 for applying for GM and AGM positions. Fourth Amended Complaint ¶¶ 46-66. Similarly, Ms.  
12 Sasaki alleges that she “has been prevented from applying for specific openings in these warehouses  
13 because Costco does not post or otherwise notify employees of these openings.” *Id.* ¶ 109. Ms.  
14 Sasaki also expressed a willingness to relocate for a promotion. *Id.* ¶ 102. Based on these  
15 allegations, it is unclear whether, and if so, how, a Class Member will know (1) when there was an  
16 AGM or GM position open for which she was not considered; (2) the warehouse where that position  
17 was located; or (3) the identity of the man who was hired for that position.

18 (2) It is unclear why a Class Member who chooses to pursue her claims through the  
19 confidential Written Submission procedure should be limited to a maximum recovery that is 1/6 that  
20 of a Class Member who chooses to pursue her claims through the non-confidential Written  
21 Submission procedure. *See* Class Settlement §§ 5.10.4; 5.10.5.5; 5.10.5.6.

22 (3) Under the proposed class settlement, Class Members have the option of retaining  
23 their own counsel. Class Settlement § 5.6.2. The proposed settlement is unclear regarding the  
24 extent to which retained counsel would have access to the information and documents obtained by  
25 Class Counsel through the discovery process in this action.

26 (4) The Court is unable to determine the reasonableness of the \$8 million settlement fund  
27 amount. Part of this is due to the failure of the parties to provide an estimate of a Class Member’s  
28 potential jury verdict recovery (for denial of promotions to AGM and GM positions). In addition,

1 the Parties have failed to provide a detailed and specific discussion of the relative strengths and  
2 weaknesses of the Class Members’ claims and Costco’s defenses to permit the Court to analyze the  
3 litigation risk.

4 C. Other Provisions

5 (1) The Parties have not provided sufficient discussion as to the nature and scope of the  
6 named Plaintiffs’ involvement for this Court to determine whether they are entitled to an incentive  
7 payment, let alone \$10,000 per Plaintiff.

8 (2) Section 7.6.9 provides that the “entire period for objecting to the Settlement and  
9 timely submitting Opt-Out forms shall not exceed sixty (60) days from the date that the Class  
10 Administrator *first mails the Notice Packet to the Class.*” Class Settlement § 7.6.9 (emphasis  
11 added). This provision would apparently give those Class Members whose notice packets were sent  
12 out at the end less time to consider their options. Starting the 60 day clock from the date that the  
13 Class Administrator *finishes* sending out the Notice Packet to the Class appears to be more equitable  
14 to all Class Members.

15 D. Class Notice

16 (1) The class notice fails to notify Class Members that by opting into the Class, they are  
17 limiting themselves to three challenges to a promotional decision.

18 (2) The “How Does the Claims Process Work?” section of the class notice fails to notify  
19 Class Members that the arbitration process provided for under the proposed settlement limits the  
20 time, use of evidence, available discovery tools, and potential recovery when compared to a federal  
21 court action.

22 (3) The following statement is ambiguous: “If you choose, Class Counsel will represent  
23 you. If you win your claim, then Class Counsel will be entitled to ask that certain fees and costs be  
24 paid by Costco.” This statement fails to notify Class Members that they have the option of retaining  
25 their own attorneys. It further fails to note that if a Class Member retains their own counsel and is  
26 successful at arbitration, their retained counsel will also have the option of asking for certain fees  
27 and costs from Costco. *See* Class Settlement §§ 5.10.6; 5.11.12.

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1 (4) On Page 4, the Class Notice states that “[T]here is no charge to you for consulting  
2 with [Class Counsel] to decide whether to file a claim, or for preparing your claim.” This statement  
3 is ambiguous as it does not clearly convey that, for Class Members who choose to retain Class  
4 Counsel, there will be no charge to have the Class Counsel actually prosecute the claim.


5 (5) The Class Notice fails to state, in bold typeface on the first page of the Noticed (just  
6 before the bullet points) that if the Class Member takes no action, their legal rights will be impacted  
7 and they will be bound to the settlement.

8 (6) The Class Notice contains no description of the proposed settlement’s release  
9 provisions.

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11 The Parties’ response to the above is due no later than 5:00 p.m. on **January 30, 2014.**

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13 IT IS SO ORDERED.

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15 Dated: January 22, 2014

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EDWARD M. CHEN  
United States District Judge