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15 Attorneys for Plaintiffs and the Proposed Class
16

17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19

20 SHIRLEY "RAE" ELLIS, LEAH
21 HORSTMAN, and ELAINE SASAKI on
behalf of themselves and all others
22 similarly situated,

23 Plaintiffs,

24 v.

25 COSTCO WHOLESALE
CORPORATION,

26 Defendant.
27

Case No. C-04-3341 MHP

SECOND AMENDED COMPLAINT

[CLASS ACTION]

DEMAND FOR JURY TRIAL

1 **INTRODUCTION**

2 1. Costco is known for its “members only” wholesale clubs. For the public,
3 membership in a Costco club is easy to obtain. But for women employees trying to gain entry
4 into the most exclusive of the Costco clubs – store management – the door is too often barred.
5 Although women comprise almost half of Costco’s workforce, their numbers shrink considerably
6 at the management level. At the top two levels of Costco store management, Assistant Managers
7 and General Managers, fewer than one in six of the managers are female. These are the most
8 highly compensated positions in Costco’s stores. This glass ceiling for women cannot be
9 explained or justified by any reasonable business purpose, since Costco has virtually no
10 meaningful promotion process for these jobs; there are no published promotion criteria, nor any
11 posting or application processes. The substantial under representation of women in the most
12 lucrative store level positions Costco has to offer is the result of practices that purposefully
13 discriminate against women.

14 2. This class action is brought by a current female Costco employee, Elaine
15 Sasaki and two former Costco employees, Shirley “Rae” Ellis and Leah Horstman (“Plaintiffs”),
16 on behalf of themselves and all similarly situated current and former female Costco employees
17 who have been subjected to Costco’s continuing policies and practices of gender discrimination.
18 Plaintiffs, on behalf of themselves and the class they represent, charges that Costco discriminates
19 against its female employees by failing to promote equally or better qualified women to upper
20 store management positions. This class action seeks to end Costco’s discriminatory practices and
21 to provide monetary relief including punitive damages to those who have been affected by these
22 practices.

23 **JURISDICTION AND VENUE**

24 3. Plaintiffs’ claims arise under Title VII of the Civil Rights Act of 1964, 42
25 U.S.C. §§ 2000(e), et. seq. This Court has jurisdiction over this matter pursuant to 42 U.S.C.
26 §§ 1331 and 1343(a) (4). The Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367
27 over claims under the California Fair Employment & Housing Act, Government Code § 12940,
28 et. seq. Jurisdiction is proper in this Court because Plaintiffs Sasaki’s and Horstman’s claims

1 arose in California and because the Plaintiffs expressed interest in positions in California and
2 some of the positions that Plaintiffs were denied were in California.

3 4. Venue is proper in this district pursuant to 42 U.S.C. § 2000e5(f) and 28
4 U.S.C. § 1391(b) & (c). Plaintiff Sasaki's and Horstman's claims arose in California. In
5 addition, some of the positions that Plaintiffs were denied were in California. Members of the
6 class reside throughout the United States, including Northern California. Many of the acts
7 alleged in this Complaint occurred in this District and gave rise to the claims alleged.

8 PARTIES

9 5. Plaintiff Shirley Rae Ellis was employed by Costco Wholesale Corporation
10 until November 2004. She resides in Arvada, Colorado.

11 6. Plaintiff Leah Horstman was employed by Costco Wholesale Corporation
12 until July 2004. She resides in Alpine, California.

13 7. Plaintiff Elaine Sasaki is currently employed by Costco Wholesale
14 Corporation in its Bay Area Region. She resides in Fresno, California.

15 8. Defendant Costco Wholesale Corporation is a Washington corporation
16 with stores throughout California. Costco's corporate headquarters are in Issaquah, Washington.

17 CLASS ALLEGATIONS

18 9. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil
19 Procedure on behalf of a Title VII class of all women employed by Costco in the United States
20 denied promotion to assistant and/or general manager positions.

21 10. The members of the class are sufficiently numerous that joinder of all
22 members is impracticable. Plaintiffs are informed and believe that the class exceeds 650 former
23 and current female employees of Costco.

24 11. There are questions of law and fact common to the class and these
25 questions predominate over individual questions. Such questions include, among others: (1)
26 whether Costco's policies and practices have a disparate impact on female employees with
27 respect to promotion; (2) whether any disparate impact is justified by business necessity; (3)
28 whether the disparate impact constitutes a violation of Title VII of the 1964 Civil Rights Act, 42

1 U.S.C. § 2000e, et. seq.; (4) whether Costco has engaged in a pattern and practice of disparate
2 treatment adverse to female employees; (5) whether injunctive relief and other equitable
3 remedies (including back pay and front pay) and compensatory damages are warranted for the
4 female employee class, and (6) whether punitive damages are warranted.

5 12. The claims alleged by Plaintiffs are typical of the claims of the class.

6 13. The Plaintiffs will fairly and adequately represent the interests of the class.

7 14. Class certification is appropriate pursuant to Fed. R. Civ. P. 23 (b)(2)
8 because Costco has acted and/or refused to act on grounds generally applicable to the class,
9 making appropriate declaratory and injunctive relief with respect to Plaintiffs and the class as a
10 whole. The members of the class are entitled to injunctive relief to end Costco's common,
11 uniform, and unfair discriminatory personnel policies and practices.

12 15. Class certification is also appropriate pursuant to Fed. R. Civ. P. 23(b)(3)
13 because common questions of fact and law predominate over any questions affecting only
14 individual members of the class, and because a class action is superior to other available methods
15 for the fair and efficient adjudication of this litigation. The members of the class have been
16 damaged and are entitled to recovery as a result of Costco's common, uniform, and unfair
17 discriminatory personnel policies and practices.

18 16. Plaintiffs also bring this action pursuant to Fed. R. Civ. P. 23 on behalf of a
19 California Fair Employment & Housing Act subclass ("FEHA Subclass") of all women
20 employees of Costco denied promotions to Assistant Manager and/or General Manager positions
21 in California or who were employed in California and were denied such promotions outside of
22 California, in violation of Section 12940, et. seq. of the California Government Code, known as
23 the Fair Employment and Housing Act. The members of the subclass are sufficiently numerous
24 that joinder of all members is impracticable. Plaintiffs are informed and believe that the subclass
25 exceeds 250 former and current female employees of Costco.

26 17. There are questions of law and fact common to the subclass and these
27 questions predominate over individual questions. Such questions include, among others: (1)
28 whether Costco's policies and practices have a disparate impact on female employees with

1 respect to promotion; (2) whether any disparate impact is justified by business necessity; (3)
2 whether the disparate impact constitutes a violation of Government Code §12940, et. seq.; (4)
3 whether Costco has engaged in a pattern and practice of disparate treatment adverse to female
4 employees; (5) whether that disparate treatment violates Government Code § 12940, et. seq. (6)
5 whether injunctive relief and other equitable remedies (including back pay and front pay) and
6 compensatory and punitive damages are warranted for the female employee subclass.

7 18. The claims alleged by Plaintiffs are typical of the claims of the subclass.

8 19. The Plaintiffs will fairly and adequately represent the interests of the
9 subclass.

10 20. Class certification is appropriate pursuant to Fed. R. Civ. P. 23 (b)(2)
11 because Costco has acted and/or refused to act on grounds generally applicable to the subclass,
12 making appropriate declaratory and injunctive relief with respect to Plaintiffs and the subclass as
13 a whole. The members of the subclass are entitled to injunctive relief to end Costco's common,
14 uniform, and unfair discriminatory personnel policies and practices.

15 21. Class certification is also appropriate pursuant to Fed. R. Civ. P. 23(b)(3)
16 because common questions of fact and law predominate over any questions affecting only
17 individual members of the subclass, because a class action is superior to other available methods
18 for the fair and efficient adjudication of this litigation. The members of the subclass have been
19 damaged and are entitled to recovery as a result of Costco's common, uniform, and unfair
20 discriminatory personnel policies and practices. Plaintiffs are informed and believe and therefore
21 alleges that Costco has computerized payroll and personnel data that will make calculation of
22 back pay and front pay for specific members of the subclass relatively simple.

23 **COSTCO'S GENERAL PRACTICE OF DISCRIMINATION**

24 22. Costco Wholesale Corporation operates an international chain of
25 membership stores, mostly under the "Costco Wholesale" name. It refers to its stores as
26 "warehouses." Costco offers three levels of membership, Business, Gold Star, and Executive,
27 which come with different benefits. Costco, a Fortune 500 company, operates 443 warehouses
28 worldwide, with approximately 328 warehouses located in 36 U.S. states and Puerto Rico.

1 Nearly 100 of these warehouses are in the State of California. As of October 2003, Costco
2 claimed 42 million “cardholders,” covering over 23 million households. During its last reported
3 fiscal year, ended August 31, 2003, Costco reported almost \$42 billion in revenues. It employs
4 over 103,000 people worldwide, including over 78,000 in the United States.

5 23. In its warehouses throughout the U.S., Costco employs standardized
6 policies and procedures related to staffing and promotion. The hierarchy of job positions is the
7 same everywhere. At the warehouse level, this hierarchy includes the following classifications:
8 (1) hourly employees; (2) hourly supervisors; (3) Area Managers and Ancillary Managers; (4)
9 Staff Managers; (5) Assistant Managers; (6) General Managers.

10 24. The type of management positions in each warehouse is also standardized.
11 There are three Area Managers per warehouse and they oversee three different geographical
12 zones of the store. There are five Ancillary Managers who oversee particular departments, such
13 as the deli or tire center. Each warehouse normally has four Staff Managers, two or more
14 Assistant General Managers, and one General Manager. There are no warehouse level positions
15 above General Manager. The next higher position in the Costco hierarchy is at the district level.

16 25. At the warehouse level, promotion to General Manager is the brass ring.
17 General Managers report to the company’s Vice Presidents. General Managers are eligible for
18 bonuses, which can be substantial. Likewise, they are the only warehouse level employees
19 eligible for potentially lucrative stock options. The Assistant Manager position is the gateway to
20 General Manager. One becomes a General Manager almost always by promotion from Assistant
21 Manager. Although there are no written criteria for promotion to either Assistant Manager or
22 General Manager, Costco claims that such promotions are based on merit and experience, not
23 seniority.

24 26. The senior management of Costco is virtually all male. Nationwide, as of
25 January 2005, women hold 16 percent of General Manager positions and less in past years.
26 Among more than 30 Executive and Senior Officers of the company, only two are women. There
27 are no female operational Vice Presidents.
28

1 27. Promotions into Assistant Manager and General Manager positions are not
2 based on any stated criteria. Openings are not posted. Nor are there any application procedures
3 for such positions. Instead, such promotions are based on a “tap on the shoulder,” a tap usually
4 made by one of Costco’s all male operational Vice Presidents. On information and belief,
5 Plaintiffs are informed that those few women who do receive a “tap” mostly find themselves
6 relegated to the warehouse locations that generate the lowest revenue, which directly affects the
7 women’s earning potential. Consequently, promotion into Costco’s most lucrative warehouse
8 level positions is based on entirely subjective judgments, which are often infected with conscious
9 or unconscious prejudices and gender-based stereotypes, which explains why so few women out
10 of Costco’s large female employee population advance to senior store management positions.

11 28. Costco has pursued policies and practices on a continuing basis which have
12 had the effect of denying equal job opportunities to qualified women. Such policies and practices
13 include, without limitation:

14 a. Reliance upon unweighted subjective, gender-based and/or arbitrary
15 criteria utilized by a nearly all male managerial workforce in making promotion decisions;

16 b. Failure to follow a uniform job posting procedure to guarantee that
17 all employees have notice of openings;

18 c. Discouraging females from seeking or applying for senior store
19 level management positions;

20 d. Failing and refusing to consider females for promotion on the same
21 basis as males are considered;

22 e. Failing and refusing to promote females on the same basis as males
23 are promoted and compensated;

24 f. Failing to provide females with accurate and timely notice of
25 promotional opportunities;

26 g. Providing female employees interested in promotion shifting,
27 inconsistent and inaccurate statements about the requirements and qualifications necessary for
28 promotion;

1 h. Denying female employees the training and assignments that would
2 enhance their promotability;

3 i. Maintaining and fostering a reputation for discriminatory conduct
4 which deters females from pursuing promotional opportunities with Costco;

5 j. Establishing and maintaining arbitrary and subjective requirements
6 for promotions which have the effect of excluding qualified women and which have not been
7 shown to have any significant relationship to job performance or to be necessary to the safe and
8 efficient conduct of Costco's business;

9 k. Placing females who do attain the position of General Manager in
10 the least desirable locations, thereby depressing their earnings;

11 l. Failing and refusing to take adequate steps to eliminate the effects
12 of its past discriminatory practices; and

13 m. Retaliating against women employees who complain of unequal
14 treatment.

15 29. Plaintiffs are informed and believe that because of its discriminatory
16 policies, Costco promotes women to Assistant Manager positions at one half the rate that would
17 be expected based on the number of women in the pool of lower positions from which promotions
18 to Assistant Manager are made. This in turn has the effect of diminishing the pool of eligible
19 women for promotion to General Manager positions, since promotions to such positions are
20 usually drawn from the Assistant Manager ranks. Plaintiffs are further informed and believe that
21 it takes those women that are promoted to assistant and general manager positions a longer time
22 to get promoted than it takes men to get promoted.

23 30. As a result of Costco's discriminatory policies and practices, it lags behind
24 its competitors in the representation of women in management positions. As of year 2000, for
25 example, 26.4% of Costco's managers were female, compared to an industry average of more
26 than 33% for other large chains in the same business.

1 these openings have been filled mostly with males with less experience and inferior
2 qualifications.

3 35. On or about October 24, 2002, Ms. Ellis filed a charge of discrimination
4 with the United States Equal Employment Opportunity Commission (“EEOC”). Attached to this
5 Complaint as Exhibit A, and incorporated herein by reference, is a copy of that charge. Ms. Ellis
6 has received a Notice of Right to Sue from the EEOC and has timely filed this action. Under a
7 “work-sharing” agreement between the EEOC and the California Department of Fair
8 Employment and Housing, charges filed with the EEOC are to be automatically cross-filed with
9 the DFEH.

10 36. In 2004, after Ms. Ellis filed her charge of discrimination with the EEOC,
11 Costco retaliated against Ms. Ellis by, among other things, moving her from her warehouse in
12 Aurora, Colorado to a remote location, requiring a multi-hour commute. On or about April 23,
13 2004, Ms. Ellis filed a retaliation charge with the EEOC. In November 2004, Ms. Ellis resigned
14 her employment with Costco because the ongoing retaliation made her position untenable.
15 Attached hereto as Exhibit B and incorporated by reference is a copy of the charge of retaliation
16 Ms. Ellis filed. Ms. Ellis has received a Notice of Right to Sue from the EEOC and has timely
17 filed this action.

18 37. Costco has discriminated against Ms. Ellis on account of her gender as
19 follows:

20 a. By failing and refusing to consider her for promotional
21 opportunities on the same basis as males are considered;

22 b. By failing and refusing to provide her with timely and accurate
23 notice of employment opportunities;

24 c. By relying on subjective, arbitrary, and gender-based decision-
25 making by a nearly all-male managerial force to deny her promotional opportunities and equal
26 compensation;

27 d. By promoting similarly-situated and less qualified males more
28 rapidly than her; and

1 e. By retaliating against her for filing a charge of discrimination with
2 the EEOC .

3 38. Ms. Ellis is informed and believes that Costco has discriminated against
4 her in the same manner that it discriminates against the class generally; her primary intention with
5 regard to this is case is to end Costco's pattern and practice of discrimination.

6 **CLAIM OF NAMED PLAINTIFF LEAH HORSTMAN**

7 39. Plaintiff Leah Horstman, a female, was hired by Costco as a "caller" in
8 May 1981. When she left Costco in July 2004 Ms. Horstman held the position of Receiving
9 Manager at Costco's La Mesa, California warehouse.

10 40. Ms. Horstman was a Costco employee for 23 years. She began working for
11 Costco as a student and continued working for Costco after she received her college degree. She
12 served in numerous positions with Costco including approximately 15 years in management
13 positions.

14 41. During her tenure at Costco, Ms. Horstman consistently received excellent
15 performance reviews and was told that she was eligible for promotion and that promotion was
16 imminent. She repeatedly informed senior managers and executives at Costco of her interest in
17 being promoted to senior store management positions such as Assistant Warehouse Manager.
18 Ms. Horstman advised Costco of her willingness to move outside of California for an Assistant
19 Manager position. Despite the fact that Costco opened many new warehouses across the United
20 States, Ms. Horstman was not offered an Assistant Manager position in any of them. Ms.
21 Horstman was prevented from applying for specific openings in these warehouses because Costco
22 does not post or otherwise notify employees of these openings and has no application procedure
23 for such positions. Instead, Plaintiff is informed and believes that these openings have been filled
24 mostly with males with less experience and inferior qualifications.

25 42. Ms. Horstman ceased working for Costco in July 2004 because she became
26 convinced that despite her excellent performance, her 23 years of service, and her repeated
27 requests, Costco would never promote her to Assistant Manager.

28

1 43. On or about October 11, 2003, Ms. Horstman filed a charge of
2 discrimination with the United States Equal Employment Opportunity Commission (“EEOC”)
3 and the California Department of Fair Employment and Housing (“DFEH”). Attached to this
4 Complaint as Exhibit C, and incorporated herein by reference, is a copy of that charge.
5 Ms. Horstman has received a Notice of Right to Sue from the EEOC and has timely filed this
6 action.

7 44. Costco has discriminated against Ms. Horstman on account of her gender
8 as follows:

- 9 a. By failing and refusing to consider her for promotional
10 opportunities on the same basis as males are considered;
- 11 b. By failing and refusing to provide her with timely and accurate
12 notice of employment opportunities;
- 13 c. By relying on subjective, arbitrary, and gender-based decision-
14 making by a nearly all-male managerial force to deny her promotional opportunities;
- 15 d. By giving her shifting and inconsistent requirements for promotion;
- 16 e. By discouraging her from seeking promotion; and
- 17 f. By promoting similarly-situated and less qualified males more
18 rapidly than her.

19 45. Ms. Horstman is informed and believes that Costco has discriminated
20 against her in the same manner that it discriminates against the class generally; her primary
21 intention with regard to this case is to end Costco’s pattern and practice of discrimination.

22 **CLAIM OF NAMED PLAINTIFF ELAINE SASAKI**

23 46. Plaintiff Elaine Sasaki, a female, was hired by Costco as a front end cashier
24 in 1985. She is currently an Assistant Manager at Costco’s Visalia, California warehouse.

25 47. Ms. Sasaki has been a Costco employee for 20 years. Within five years of
26 being hired, Ms. Sasaki was promoted to staff-level manager and subsequently held every staff
27 level position in the Clovis, California warehouse. After a brief stint as Administrative Assistant
28 to the Regional Vice Presidents in the Bay Area Region, she was promoted to the position of

1 Assistant Manager and was assigned to the Chico, CA store in November 1996. In March 2001
2 she became an Assistant Manager in the Texas Region and then transferred to the Visalia,
3 California store in Costco's Bay Area Region as Assistant Manager in March 2002.

4 48. Throughout her time at Costco, Ms. Sasaki has received excellent
5 performance reviews and has been repeatedly told she was eligible for promotion. In 2000, she
6 was told she was on the "promotable list." From the time of her promotion to Assistant Manager
7 in 1996, Ms. Sasaki has repeatedly told Costco that she is interested in a promotion to General
8 Manager. Despite her desire to stay in the Bay Area region, in March 2001, she transferred to the
9 Texas region because she was informed and believed that there would be more opportunity for
10 promotion to General Manager in that region. In March 2002, Ms. Sasaki returned to Northern
11 California after being told she would be considered for a General Manager position within the
12 next one to two years either in the Visalia, California warehouse or in one of the half-dozen soon-
13 to-be-opened Costco warehouses. However, despite the fact that Costco has at least 100
14 warehouses in California and that there have been numerous openings in these and other
15 warehouses in the Bay Area Region during the relevant time, Ms. Sasaki has not been offered a
16 position in any of them. Ms. Sasaki has been prevented from applying for specific openings in
17 these warehouses because Costco does not post or otherwise notify employees of these openings.
18 Instead, Ms. Sasaki is informed and believes that these many of these openings have been filled
19 with males with less or similar experience and inferior qualifications.

20 49. On or about March 1, 2005, Ms. Sasaki filed a charge of discrimination
21 with the United States Equal Employment Opportunity Commission ("EEOC"), which, plaintiffs
22 are informed and believe, was cross-filed with the California Department of Fair Employment &
23 Housing. Attached to this Complaint as Exhibit D, and incorporated herein by reference, is a
24 copy of that charge. Plaintiffs will request a right to sue letter for this charge.

25 50. Costco has discriminated against Ms. Sasaki on account of her gender as
26 follows:

27 a. By failing and refusing to consider her for promotional
28 opportunities on the same basis as males are considered;

1 58. Plaintiffs request relief as provided for below in the Prayer.

2 **SECOND CLAIM FOR RELIEF**

3 (Title VII of the Civil Rights Act of 1964
4 42 U.S.C. §§ 2000(e), et. seq. on behalf of Title VII class)

5 59. Plaintiffs incorporate Paragraphs 1 through 58.

6 60. This claim is brought on behalf of Plaintiffs and the Title VII class.

7 61. The foregoing conduct violates Title VII of the Civil Rights Act, 42 U.S.C.
8 §§ 2000(e), et. seq.

9 62. Costco has engaged in a pattern and practice of intentional discrimination
10 against the class and has denied women the same opportunities for promotion afforded to
11 similarly situated male employees.

12 63. Costco's discriminatory practices described above have resulted in a loss of
13 past and future wages and other job benefits, and have caused Plaintiffs to suffer humiliation,
14 embarrassment and emotional distress.

15 64. Defendant did the acts alleged herein with malice or reckless indifference
16 to the protected rights of Plaintiffs and the class members. Plaintiffs and the class members are
17 thus entitled to recover punitive damages in an amount to be determined according to proof.

18 65. Plaintiffs request relief as provided for below in the Prayer.

19 **THIRD CLAIM FOR RELIEF**

20 (California Fair Employment And Housing Act,
21 Govt. Code §§ 12940, et. seq. on behalf of California subclass)

22 66. Plaintiffs incorporate Paragraphs 1 through 65.

23 67. This claim is brought on behalf of the Plaintiffs and the FEHA subclass .

24 68. The foregoing conduct violates the California Fair Employment and
25 Housing Act., Government Code §§ 12940, et. seq. Plaintiffs have received a right to sue letter
26 from the DFEH and have commenced this action in a timely manner.

1 d. instituting an affirmative action policy to insure that women receive
2 the share of Assistant Manager and General Manager positions they would have obtained were it
3 not for Costco's discriminatory practices; and

4 e. creating a monitoring and reporting system to insure that injunctive
5 relief is fully implemented.

6 6. A declaratory judgment that the practices complained of herein are
7 unlawful and violative of 42 U.S.C. §§ 2000(e), et. seq., Title VII of the Civil Rights Act of 1964,
8 and the California Fair Employment and Housing Act, Government Code §§ 12940, et. seq.

9 7. An order assigning Plaintiffs and the class and subclass to those jobs they
10 would have held but for Defendant's discriminatory practices;

11 8. An adjustment of the wage rates, benefits, and seniority rights for Plaintiffs
12 and the class and subclass to that level which Plaintiffs and the class would be enjoying but for
13 Defendant's discriminatory practices;

14 9. For prejudgment interest to the extent permitted by law;

15 10. For costs and expenses of suit incurred herein, including reasonable
16 attorneys' fees to the extent available by law; and

17 11. For such other and further legal and equitable relief as the Court may deem
18 just and proper.

19 Dated: March 15, 2005

Respectfully submitted,

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JURY DEMAND

Plaintiff and the class she represents demand a jury trial on all claims where such trial is authorized by law.

Dated: March __, 2005

Respectfully submitted,

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