Appeal No. 07-15838

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SHIRLEY RAE ELLIS, LEAH HORSTMAN, AND ELAINE SASAKI, on behalf of themselves and all others similarly situated,

Plaintiffs/Appellees,

v.

COSTCO WHOLESALE CORPORATION,

Defendant/Appellant.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT/APPELLANT COSTCO WHOLESALE CORPORATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus* states as follows:

The Chamber of Commerce of the United States of America has no parent corporation and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

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STATEMENT OF INTEREST OF THE *AMICUS*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing briefs in cases implicating issues of vital concern to the nation's business community. Many of the Chamber's members are employers subject to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e (2003) *et seq.*, and other equal employment statutes and regulations. The Chamber's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and establishment of compensation rates and structures. These member companies devote extensive resources to developing employment practices and procedures, and instituting compliance programs designed to ensure that all of their employment actions are consistent with Title VII and other applicable legal requirements.

Despite these efforts, the Chamber's members are likely to face exposure to billions of dollars in new claims certified for class treatment if the district court's

approach to class certification is upheld by this Court. The Order's numerous errors create perverse incentives, encouraging employers both to forego defending their rights in court in favor of settlement, and to forestall such lawsuits altogether by adopting quota-like policies that are antithetical to the purposes and spirit of Title VII. The Chamber's interest in this case stems from the Order's potentially disruptive and destructive effect on the Chamber's members. All parties have consented to the filing of this brief.

ARGUMENT

Amicus Chamber of Commerce of the United States of America agrees with the arguments set forth in Costco's Principal Brief; namely, that the district court improperly altered or ignored substantive law in: (1) finding commonality based on a flawed analysis of the evidence; (2) holding that the named plaintiffs' claims are typical of those of the putative class; (3) finding that the named plaintiffs are adequate representatives of the class; and (4) certifying a Rule 23(b)(2) class that includes claims for both compensatory and punitive damages. The Chamber submits this brief to highlight additional problems with the court's decision. Specifically, the district court failed to evaluate plaintiffs' proposed trial plan or otherwise to assess whether plaintiffs' claims can manageably be tried on a classwide basis.

Because Costco is entitled to present rebuttal evidence demonstrating the lawful basis for its employment decisions as to each putative class member in countless individual hearings, it is clear that aggregate litigation of these claims is not manageable. And while the district court might be tempted to adopt procedural shortcuts in order to try these claims to judgment, any alteration of Costco's rebuttal rights would violate Supreme Court precedent interpreting Title VII, the Due Process Clause, and the Rules Enabling Act. Moreover, if left unchecked, the court's numerous departures from Rule 23 – including the failure to ensure that class treatment is manageable – would have deeply destructive effects on the policies and practices of American employers, and thereby subvert the fundamental purposes of Title VII.

The implications of the decision are overwhelming. Absent reversal, it would: provide strong incentives for filing discrimination class actions that are dramatically overbroad; force employers to settle these huge claims no matter what their merit, effectively depriving them of their right to trial; and encourage employers to adopt the kinds of quota-like policies that Title VII was enacted to prevent. For these additional reasons, the district court's erroneous and destructive Order should be vacated.

I. THE DISTRICT COURT'S ORDER SANCTIONS CERTIFICATION OF IMPROPER, UNMANAGEABLE CLASS ACTIONS.

The district court's certification of a nationwide class under Rule 23(b)(2) allows plaintiffs to seek injunctive relief and backpay, as well as compensatory and punitive damages. As Costco explains in its Principal Brief, this decision is flatly contrary to Rule 23(b)(2) and controlling case law: the named plaintiffs in this case have no standing to seek declaratory or injunctive relief; it is inappropriate to rely on plaintiffs' self-serving declarations to determine that injunctive relief predominates; the requests for monetary relief plainly predominate here under any objective standard; and determination of punitive damages is an inherently individualized inquiry not susceptible to classwide determination.

But even assuming the district court's order did not suffer from these errors, certification of this nationwide class is problematic for another reason as well. Specifically, the district court in this case certified a nationwide class of current and former female employees of Costco seeking "compensatory damages, punitive damages, injunctive relief, declaratory relief and backpay," *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 642 (N.D. Cal. 2007), *without determining whether a class trial would even be manageable*. Indeed, the court staunchly refused to even address how the class claims might be tried, terming the question of a trial plan "premature." *Id.* at 644. The court's failure to recognize the

inherent unmanageability of class treatment of plaintiffs' claims provides yet another reason this Court should reverse the class certification order.

A. Class Certification Is Inappropriate Where Trial Of The Class Claims Would Be Unmanageable.

Under Rule 23(b)(2), a class cannot be certified if trial of the putative class claims would not be manageable. *See Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 164 (2d Cir. 2001) (a Rule 23(b)(2) class can be certified only if "class treatment would be efficient and manageable"); *Shook v. El Paso County*, 386 F.3d 963, 972-73 (10th Cir. 2004) (manageability is a relevant consideration in deciding whether to certify 23(b)(2) class); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 759 n.5 (4th Cir. 1998) (because "efficiency is one of the primary purposes of class action procedure" under both 23(b)(2) and (b)(3), "a district court may exercise its discretion to deny certification if the resulting class action would be unmanageable or cumbersome"), *vacated on other grounds*, 527 U.S. 1031 (1999); *Seidel v. Gen. Motors Acceptance Corp.*, 93 F.R.D. 122, 126 (W.D. Wash. 1981) ("manageability is and must be of fundamental concern in assessing adequacy of representation and the broader question of class certification in general").

The best – and perhaps the only – way a district court can assess manageability is to evaluate whether plaintiffs have presented a workable trial

plan. Thus, it is well-established in this Circuit and elsewhere that a trial plan is a necessary tool for evaluating whether the class members' claims can be efficiently tried in a single proceeding. As the most recent amendments to Rule 23 explain, in considering certification of a proposed class, "[a] critical need is to determine how the case will be tried" based on a "'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." Fed. R. Civ. P. 23 advisory committee's note (2003 Amendments). *See also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (plaintiff bears responsibility of demonstrating a workable trial plan); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (abuse of discretion to certify where "[t]here has been no showing by Plaintiffs of how the class trial could be conducted"); *In re Paxil Litig.*, 212 F.R.D. 539, 548 (C.D. Cal. 2003) ("At least in the Ninth Circuit, the presentation of a preliminary, unworkable trial plan, does not suffice for class certification."); *Colindres v. Quietflex Mfg.*, 235 F.R.D. 347, 380 (S.D. Tex. 2006) (denying certification under Rule 23(b)(2) in part because "the plaintiffs have not proposed a trial plan"); *Burrell v. Crown Cent. Petroleum, Inc.*, 197 F.R.D. 284 (E.D. Tex. 2000) (plaintiff's trial "plan does not pass muster under either 23(b)(2) or (b)(3)").[1]

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[1] The authority cited establishes that this obligation applies equally to Rule

Even the plaintiffs here recognized the need to submit a trial plan; nonetheless, the district court refused to address it, calling it "premature." *Ellis*, 240 F.R.D. at 644. Instead, the only hint the district court gave concerning how this litigation might actually be tried was a passing statement that "individualized determinations of compensatory damages need not defeat certification under Rule 23(b)(2); rather, the court can accommodate this need by bifurcating the trial into different phases." *Id*. at 643. As discussed below, if the court had properly

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23(b)(2) and (b)(3) classes. In any event, it was improper for the district court to evade the requirements of 23(b)(3) by ordering opt-out rights for a (b)(2) class. Although several courts have assumed without analysis that such a procedure falls within the court's discretionary authority under Rule 23(d), no textual support for that interpretation can be found in the rule. Rule 23(d) permits a court to order additional rounds of *notice* to class members as it deems appropriate, but it says nothing about opt-out rights. *See* Fed. R. Civ. P. 23(d); *In re Allstate*, 400 F.3d 505, 508 (7th Cir. 2005) (questioning whether permitting opt-out rights in a 23(b)(2) class action "is ever proper"; "such an effort to restructure Rule 23(b)(2) would be complicated and confusing – unnecessarily so, given the ready availability of the 23(b)(3) procedure"). Thus, plaintiffs should not be able to evade the additional requirements of Rule 23(b)(3) simply by importing an opt-out right into Rule 23(b)(2) classes. *See* Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 221-22 (2003) ("[C]lass counsel should not be permitted to avoid the additional requirements of predominance and superiority simply by the expedient of converting a 23(b)(3) damage claim into a mandatory 23(b)(2) declaratory judgment or injunctive relief action. Mandatory classes require cohesion among class members, and plaintiffs cannot manufacture the requisite cohesion by converting a heterogeneous damage class action into a declaratory judgment action. A class that could not otherwise be certified as a 23(b)(3) damage class because of lack of predominance and superiority ought not to be

considered a trial plan, it would have recognized that the claims here cannot manageably be tried in a class action.

B. *En Masse* Litigation Of Plaintiffs' Claims Is Not Manageable Because Costco Is Entitled To Rebut Plaintiffs' *Prima Facie* Case In Individual Hearings.

Assuming plaintiffs are able to present a *prima facie* case of discrimination,[2] the district court would then have only one option: to proceed with hundreds of individual mini-trials to establish each plaintiff's entitlement to backpay, compensatory damages and punitive damages, as well as the amount of those damages. Anything less would run afoul of controlling Supreme Court precedent construing Title VII, deprive Costco of its due process right to defend itself, and violate the Rules Enabling Act. On the other hand, conducting hundreds of mini-trials on liability and damages would create an administrative nightmare for the parties and the court, would produce no efficiency over the use of individual lawsuits, and plainly does not provide a manageable alternative.

Employers have a basic right to present evidence that their employment

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certifiable as 23(b)(2) action simply by repleading it as something else.").

[2] The court appears to already have so found, despite its reluctance to resolve any factual disputes that might bear on the merits of the case. *See Ellis*, 240 F.R.D. at 638-39 ("Plaintiffs have presented two categories of statistical evidence which raise the inference of gender-based disparities in management positions throughout Costco. . . . Therefore, the plaintiffs have presented compelling evidence of gender

decisions were not discriminatory. Binding Supreme Court precedent establishes that after a *prima facie* case of discrimination has been proffered in a pattern-or practice case like this one, the employer is entitled to put on evidence showing that particular plaintiffs who claim they suffered from discrimination are in fact not entitled to relief, because those particular employees were "denied an employment opportunity for lawful reasons." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977); *see also Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 148 (2000) ("an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision"). The opportunity to present case-specific rebuttal evidence of the lawful basis for an employment action (such as job qualifications, work performance, misconduct, economic need, attendance, lack of interest and others) has played a decisive role in myriad employment discrimination cases. For example, in *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282 (9th Cir. 2000), this Court affirmed summary judgment for an employer in an age discrimination case after the employer demonstrated that plaintiffs "were not as qualified as those employees chosen," and plaintiffs were unable to show that this justification was pretextual. *See also, e.g.*, *Lyons v. England*, 307 F.3d 1092, 1117 (9th Cir. 2002)

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disparities at this time sufficient to demonstrate class-wide impact.").

("whether [plaintiff was] as qualified as any of the promotion recipients is a factually intensive question best resolved by the jury"); *EEOC v. Ins. Corp. of N. Am.*, 49 F.3d 1418 (9th Cir. 1995); *Bateman v. U.S. Postal Serv.*, 151 F. Supp. 2d 1131, 1139-40 (N.D. Cal. 2001) (plaintiff could not overcome evidence that termination was based on misconduct, not race discrimination); *Tempesta v. Motorola, Inc.*, 92 F. Supp. 2d 973, 980 (D. Ariz. 1999) (plaintiff could not show that he had applied for any positions).

The Supreme Court has confirmed that individualized hearings are an integral part of both individual Title VII cases and class actions because they provide the employer with an opportunity to offer individualized substantive defenses to liability. In *Teamsters*, the Court explained that if plaintiffs prove that an employer has "engaged in a pattern of racial discrimination," the burden "shift[s] to the employer to prove that individuals who reapply were not in fact victims of previous hiring discrimination." *Teamsters*, 431 U.S. at 359 (internal quotation omitted). But plaintiffs' *prima facie* evidence "d[oes] not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice." *Id.* at 359 n.45. Thus, in cases where plaintiffs seek individual monetary relief, "a district court must usually conduct additional proceedings" – *i.e.*, individualized hearings – at which the employer can

"demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* at 361-62. For example, "the employer might show that there were other, more qualified persons who would have been chosen for a particular vacancy, or that the nonapplicant's stated qualifications were insufficient." *Id.* at 369 n.53. In short, the trial court "will have to make a substantial number of *individual determinations* in deciding which of the … employees were actual victims of the company's discriminatory practices." *Id.* at 371-72 (emphasis added). *See also Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 687 n.35 (N.D. Ga. 2001) (employer has "the right to rebut the presumption that the adverse employment action was due to discrimination and to show that individual members of the class are not entitled to back pay").

This reading of Title VII is firmly in keeping with a defendant's due process right to present evidence in its own defense. As the Supreme Court explained in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-30 (1982), the Due Process Clause is implicated when a party seeks to protect its property as a defendant in civil litigation. Specifically, a defendant has a due process right to "a hearing on the merits of [its] cause," *id.* at 429 (quotation and citation omitted) – *i.e.*, to present evidence on the merits of their defense. "If parties were barred from presenting defenses and affirmative defenses to claims which have been filed

against them, they would not only be unconstitutionally deprived of their opportunity to be heard, but they would invariably lose on the merits of the claims brought against them. Such a serious deprivation of property without due process of law cannot be countenanced in our constitutional system." *Nat'l Union Fire Ins. Co. v. City Sav., F.S.B.*, 28 F.3d 376, 394 (3d Cir. 1994).

This substantive right to present rebuttal evidence cannot be altered in order to facilitate class treatment. The Rules Enabling Act provides that "general rules of practice and procedure," like Rule 23, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a)-(b). *See also Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 345 (4th Cir. 1998) ("It is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members."). Thus, the court is not at liberty to adopt any sort of trial procedure that denies Costco the right to present individualized rebuttal evidence, such as the use of presumptions, formulas, or any other evidentiary shortcuts, in order to avoid the necessity of conducting countless individual hearings. *But see Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 176 (N.D. Cal. 2004), *aff'd*, 474 F.3d 1214 (9th Cir. 2007), *pet. for rehearing pending* (holding that defendant's right to present individual rebuttal evidence may be eliminated where it would be "impractical"). Anything less than a full opportunity to rebut

plaintiffs' *prima facie* case on an individual basis would force Costco to face liability for employment decisions it could readily defend if the claims were brought in the context of an individual action – for example, by offering proof that it selected a more qualified applicant for a promotion, denied a raise to an employee based on misconduct, or terminated an employee for poor attendance – and would therefore deprive Costco of a "substantive right."

Thus, although the district court refused to address how it planned to try plaintiffs' claims, individualized hearings will be required in order to determine whether each individual class member is entitled to compensation. Such a procedure plainly is not manageable. Where, as here, the issues of liability and damages would require "separate mini-trial(s) of an overwhelming large number of individual claimants," courts have found that the class device provides no benefits and instead leads to "staggering problems of logistics . . . render[ing] the case unmanageable as a class action." *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977) (internal quotation marks and footnotes omitted). Simply bifurcating the case and holding those hearings in a separate phase does nothing to alleviate these problems. *See id.* at 72 ("[w]hether dealt with in a unitary trial or in a severed trial, the problem of proof of the individual claims and of the essential elements of individual injury and damage will remain and severance could only

postpone the difficulty of such proof"). *Cf. Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421 (5th Cir. 1998) (upholding district court's denial of bifurcated class certification in racial discrimination suit because there is "no legal basis for the district court to certify a class action on the first stage of the plaintiffs' pattern or practice claim when there is no foreseeable likelihood that the claims for compensatory and punitive damages could be certified in the class action sought by the plaintiffs"); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 209 F.R.D. 323, 352-53 (S.D.N.Y. 2002) (rejecting bifurcated trial plan where "countless individual trials" would still have to be conducted). Thus, even if a *prima facie* case of discrimination could be proven on a classwide basis, that determination would do nothing to advance the litigation on the crucial, fact-specific question of individual discrimination, leaving the trial court to grapple with hundreds of individual trials.

In sum, the district court's order fails to come to terms with the need to conduct individualized hearings for each member of this nationwide class – a need that defeats the efficiencies sought by Rule 23 and renders class treatment completely unmanageable. And any shortcuts the court might seek to adopt in order to make litigation of these claims more convenient would deprive Costco of

its fundamental right – guaranteed by Title VII, the Due Process Clause, and the Rules Enabling Act – to present individualized rebuttal evidence in its defense.

II. IF ALLOWED TO STAND, THE DISTRICT COURT'S ORDER WOULD COERCE SETTLEMENTS AND SUBVERT THE PURPOSES OF TITLE VII.

If permitted to stand, the district court's Order would have two insidious effects. First, it would substantially raise the stakes of proposed discrimination class actions, creating strong pressures on employers to settle such suits regardless of their merit. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail."); *Dotson v. United States*, 87 F.3d 682, 686 (5th Cir. 1996). The kinds of class lawsuits permitted by the Order – massive, company-wide discriminatory treatment actions – are a paradigm case of potentially coercive class actions because of the potential for enormous exposure. This is all the more so because the inclusion of massive monetary claims in a 23(b)(2) class, including claims for punitive damages, means that the plaintiffs in these cases would be permitted to seek monetary relief, including potentially astronomical claims for punitive damages, without having to meet the requirements of Rule 23(b)(3).

Second, the district court's sweeping expansion of the standards for class certification encourages employers to adopt the kinds of quota-like policies Title

VII was adopted to prevent. If coercive classes are routinely certified without rigorous adherence to Rule 23's standards and without procedures ensuring a full opportunity to present rebuttal evidence, companies seeking to avoid liability would need to focus on making it impossible for any plaintiff to establish a *prima facie* case of discrimination in the first place. Under the district court's standards, this would mean ensuring there is *no* way to produce *any* kind of statistical case – no matter how illogical, and no matter at what level of statistical aggregation – that their policies have a statistically disparate effect.

But satisfying this standard would take employers well beyond the legitimate and necessary exercise of policing their employment policies and practices for true discrimination. As a plurality of the Supreme Court has observed,

> It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.

Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988) (plurality op.) (internal citation omitted). Unable to avoid lawsuits by aggressively rooting out true discrimination, employers may be pressured to adopt "inappropriate prophylactic measures." As the Court plurality also observed,

> If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met.

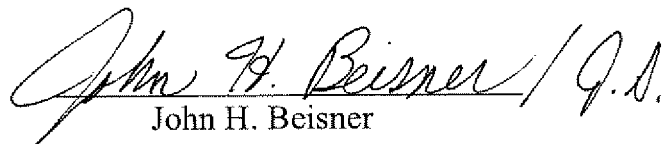
Id. at 992-93 (internal quotation marks and citations omitted). This result would be intolerable, because "[p]referential treatment and the use of quotas by public employers . . . can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with little choice but to adopt such measures would be far from the intent of Title VII." *Id.* (internal quotation marks and citations omitted). Yet this intolerable result is *precisely* what the district court's Order in this case would promote.

In sum, the district court's approach here – *i.e.*, its willingness to certify broad, unmanageable class actions under Rule 23(b)(2) with no apparent regard for the defendant's right to present rebuttal testimony – would force defendants to settle massive class actions regardless of their merit and, at the same time, encourage the adoption of quotas that undermine the goals of Title VII. For these reasons too, the Court should reaffirm the important limits placed on employment class actions by both Rule 23 and Title VII.

CONCLUSION

For the reasons stated, this Court should vacate the district court's certification order.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and Ninth Circuit Rule 32-1, the attached Brief Of *Amicus Curiae* Chamber Of Commerce Of The United States Of America In Support Of Defendant/Appellant Costco Wholesale Corporation is proportionally spaced (in Times New Roman type style), has a typeface of 14 points, and contains 3982 actual words (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

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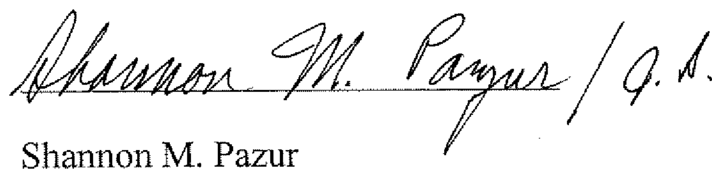

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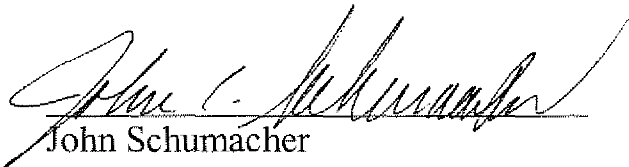

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