UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JACQUELINE A. COTE, on behalf of herself and others similarly situated, **Plaintiff,** **v.** **WAL-MART STORES, INC.,** **Defendant.**	**No. 15 Civ. 12945 (WGY)**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF THE PROPOSED NOTICE OF SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

OTHER AUTHORITIES

INTRODUCTION

Plaintiff Jacqueline Cote ("Plaintiff" or "Cote") respectfully submits this Memorandum in Support of her Motion for Preliminary Approval and Approval of the Proposed Notice of Settlement ("Preliminary Approval Motion"). Walmart does not oppose the Court granting preliminary approval of the proposed Settlement or the proposed Notice of Settlement.

In this putative class action filed in July 2015, Cote challenges the policy of Defendant Wal-Mart Stores, Inc. ("Defendant" or "Walmart") of not offering health insurance benefits to the same-sex spouses of employees prior to January 1, 2014. *See* ECF No. 1 (Compl.) ¶¶ 1-3. On December 2, 2016, Cote and Walmart entered into a Settlement Agreement ("Settlement") under which Walmart will pay $7.5 million to cover the claims by Settlement Class Members for the time period of January 1, 2011 to December 31, 2013 ("the Settlement Class Period"), as well as to make payments for attorneys' fees and costs, a service award to the proposed Settlement Class Representative, and the cost of having the proposed Claims Administrator, KCC Class Action Services, LLC ("KCC"), provide notice to Settlement Class Members and undertake other duties to administer the Settlement. *See* Declaration of Peter Romer-Friedman in Support of Plaintiff's Motion for Preliminary Approval and Approval of the Proposed Notice of Settlement and Plaintiff's Motion for Certification of a Settlement Class[1] ("Romer-Friedman Decl."), Ex. 1 (Settlement Agreement) §§ 5.1-5.6.[2]

To obtain Court approval of the Settlement Agreement, Cote is taking this necessary, first step of requesting that the Court grant preliminary approval of the Settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure; authorize notice to be provided to the proposed

---

[1] In a separate motion filed concurrently, Plaintiff asks the Court to certify a proposed Settlement Class for the purpose of settlement.

[2] Unless otherwise noted, all exhibits are to the Declaration of Peter Romer-Friedman.

Settlement Class Members under Rule 23(c) and (e) so that they can understand their rights under the Settlement and as Settlement Class Members, submit their claims to receive payments, and, if they so choose, comment on the Settlement or opt out of it; appoint a claims administrator to oversee administration of the Settlement; and approve the establishment of a Qualified Settlement Fund to facilitate the transfer of the settlement funds from Walmart, as required by the Settlement Agreement. The parties believe the Settlement is fair, reasonable, and adequate, and estimate as many as several thousand Settlement Class Members may be eligible to submit a claim for payment under the Settlement.

FACTUAL AND PROCEDURAL BACKGROUND

Before January 1, 2014, although Walmart offered health insurance benefits to the opposite-sex spouses of its employees, Walmart has an official, nationwide policy of not offering the same health insurance benefits to the same-sex spouses of its employees ("Walmart's Prior Policy"). ECF No. 16 (Answer) ¶ 37.[3] Jacqueline Cote began working for Walmart in 1999. ECF No. 1 ¶ 16. In 2004, Cote married Diana Smithson shortly after marriage for same-sex couples became legal in Massachusetts. *Id.* ¶ 23; *see Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). Smithson also worked at Walmart from 1999 until 2008, when she left her job to be the primary caregiver of Cote's ailing mother. ECF No. 1 ¶ 27. In 2008, Cote tried to enroll Smithson in Walmart's health insurance plan. *Id.* ¶ 31. Although Cote was qualified to receive spousal health benefits, her wife was denied benefits because at that time Walmart limited spousal coverage to the opposite-sex spouses of its employees. *Id.* ¶¶ 31-33.

[3] As confirmed in discovery, in 2011, 2012, and 2013, Walmart's health insurance plan documents stated that "Eligible dependents are limited to . . . Your legal spouse of the opposite gender," thereby excluding same-sex spouses from receiving health insurance benefits from Walmart; but in 2014 and thereafter, Walmart's health insurance plan documents have stated that a "spouse" may receive health insurance coverage without any language limiting eligibility to a legal spouse of the opposite gender. Romer-Friedman Decl. ¶ 26.

In 2012, Smithson lost her health insurance coverage from Mid-West Life Insurance Company of Tennessee and was unable to obtain other health insurance. ECF No. 1 ¶¶ 28, 36. In 2012 – while still lacking health insurance – Smithson was diagnosed with ovarian cancer and thereafter received a range of medical care to treat her cancer, side effects from chemotherapy, and other related health complications. *Id.* ¶¶ 34-36. Smithson and Cote ultimately incurred more than $150,000 of uninsured medical expenses to treat Smithson's cancer in 2012 and 2013. *Id.* ¶ 46; Ex. 2 (Pl.'s Resp. to Def.'s First Set of Interrogs.), Nos. 11 & 14.

On January 1, 2014, Walmart changed its policy and began providing same-sex spouses of employees the same health insurance benefits that Walmart provided to opposite-sex spouses of employees. *See* ECF No. 16 ¶ 37; Romer-Friedman Decl. ¶ 26. On September 19, 2014, Cote filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on behalf of herself and similarly situated Walmart employees who were married to same-sex spouses and were denied health benefits. ECF No. 1, Ex. 1. On January 29, 2015, the EEOC issued a determination on the merits of the charge that was favorable to Cote, *id.*, Ex. 2, and on May 5, 2015, Cote received a right to sue letter from the EEOC. *Id.*, Ex. 3.

On July 14, 2015, Cote filed this putative class action alleging that Walmart violated Title VII of the Civil Rights Act, the Equal Pay Act, and the Massachusetts Fair Employment Practices Law because Walmart did not offer health insurance benefits to the same-sex spouses of employees prior to January 1, 2014. *Id.* ¶¶ 1-3, 74-92. The Complaint alleged that Walmart violated these federal and state laws because Walmart's Prior Policy constituted a sex-based classification, sex-based stereotyping, and sex-based associational discrimination. *Id.* ¶¶ 2, 41-43, 63, 76-78, 88-90. The Complaint stated that Plaintiff would seek to represent a nationwide class of current and former Walmart employees who had lawful marriages to persons of the same

sex before 2014 but did not receive spousal health insurance benefits under Walmart's Prior Policy. *Id.* ¶ 54. Plaintiff sought damages for herself and other Class Members. *Id.* at 21-22.

On September 14, 2015, Walmart filed its Answer to the Complaint. *See* ECF No. 16. In its Answer, Walmart acknowledged that "prior to January 1, 2014, other than in some states where coverage may have been available through HMOs, Walmart did not provide same-sex spousal health insurance benefits to its U.S. associates." *Id.* ¶ 37. Walmart denied it was liable under federal or state law, *id.* ¶¶ 74-92, and raised a host of affirmative defenses, including failure to state a claim, preemption, statute of limitations, laches, waiver, release, estoppel, failure to exhaust administrative remedies, good faith actions, the lack of willfulness, lack of standing, the inability to certify a class, and due process, among others. *Id.* at 14-17.

On November 5, 2015, the Court approved the Parties' Amended Joint Statement Pursuant to Federal Rule of Civil Procedure 26(f) and Local Rule 16.1. ECF No. 24 (Order dated Nov. 5, 2015). Discovery commenced on November 1, 2015, and the trial was scheduled for November 2016. On October 28, 2015, the parties exchanged their initial disclosures. Romer-Friedman Decl. ¶ 23. In November 2015, the parties served written discovery on each other, including interrogatories, document requests, and requests for admission, *id.* ¶ 24, and in January 2016 the parties responded to those discovery requests. *Id.* ¶ 25.

In responding to Plaintiff's discovery requests, Walmart produced thousands of pages of documents about its health insurance plan from 2011 through 2016; hundreds of pages of personnel records regarding Cote; documents and information about prior charges that had been filed concerning the challenged policy; and personnel information on approximately 1,200 Walmart employees who enrolled their same-sex spouses in a Walmart medical, dental, or vision plan on or after January 1, 2014, the date that Walmart began providing spousal health insurance

to employees' same-sex spouses ("1,200 potential Class Members"). *Id.* ¶ 26; *see also* ECF No. 36-1 (Memorandum in Support of Pl.'s Unopposed Mot. for an Order Approving Notice of Request to Authorize Disclosure of Contact Information at 3-6 ("Notice Motion")). Walmart later supplemented its production, including by producing information on certain costs related to providing health insurance benefits to the spouses of Walmart associates. Romer-Friedman Decl. ¶ 27.

In January 2016, to resolve a discovery dispute over the production of Class Members' contact and personnel information and whether that information was protected by the Health Insurance Portability and Accountability Act, the parties agreed on a process to notify the 1,200 potential Class Members about the lawsuit and to obtain their consent to provide their contact information to Plaintiff's Counsel, and Plaintiff filed a motion to have the Court approve Notice that would be sent to the 1,200 potential Class Members. Notice Motion at 5-8.

On January 26, 2016, this Court approved the Notice, ECF No. 40 (Minute Order dated Jan. 26, 2016), and shortly thereafter a notice administrator mailed the notice to those 1,200 individuals. Romer-Friedman Decl. ¶¶ 28-29. More than 80 of the individuals returned consent forms indicating their consent to have information about their health insurance benefits and their contact information disclosed to Plaintiff's counsel. *Id.* ¶ 30. In February and March 2016, Plaintiff's counsel attempted to speak to or otherwise communicate with these individuals. Plaintiff's counsel connected with most of these individuals to document how they were impacted by Walmart's Prior Policy and estimate the Class' potential damages. *Id.* ¶ 31.

On February 22, 2016, the parties engaged in private mediation with an experienced labor and employment mediator, Mark Irvings, and shortly thereafter the parties sought a stay of all deadlines in the case for six weeks so that they could further explore settlement. ECF No. 44

(Joint Mot. for Stay). On April 6 and April 28, 2016, the parties engaged in two further full-day mediation sessions with Irvings, and shortly thereafter reached an agreement in principle. Romer-Friedman Decl. ¶ 32. On April 20, 2016, the Court administratively closed this action without entry of judgment, and directed that the case could "be reopened upon motion by any party." ECF No. 46 (Order dated April 20, 2016). Between May 2016 and November 2016, the parties' counsel exchanged numerous drafts of the Settlement Agreement; developed a claims process, claim forms, and a proposed Class Notice; and issued a Request for Proposal to five experienced claims administrators to jointly recommend a claims administrator to the Court. Romer-Friedman ¶ 34. On December 2, 2016, the parties executed a Settlement Agreement. Ex. 1. Today, the parties jointly moved to restore the case to the docket to allow the Court to consider and grant preliminary approval to the proposed Settlement.

SUMMARY OF THE SETTLEMENT TERMS

The proposed Settlement Agreement provides both monetary and programmatic relief to the Settlement Class Members. With respect to programmatic relief, Walmart has agreed that in the future it will continue to treat same-sex and opposite-sex spouses equally in the provision of health insurance benefits (as it has done since January 1, 2014). *Id.* § 6.1. With respect to monetary relief, Walmart will pay $7.5 million to cover the claims of Settlement Class Members during the January 1, 2011 to December 31, 2013 Settlement Class Period, as well as to pay attorneys' fees and costs, a service award to the Class Representative, and the cost of having KCC, the Claims Administrator, provide notice to Settlement Class Members and undertake other Settlement administration duties. *Id.* §§ 5.1-5.6.

The parties have agreed to define the Settlement Class as follows:

> (A) all current and former associates (as that term is used by Walmart to encompass all Walmart employees) who work or worked for Walmart in the 50 United States, the District of Columbia or Puerto Rico (whether at a retail Store, Supercenter, Neighborhood Market, Sam's Club, Distribution Center, Home Office, dotcom, or any other Walmart facility) during the Settlement Class Period [January 1, 2011 to December 31, 2013], who (B) (i) were legally married to a Legal Same-Sex Spouse during the Settlement Class Period; and (ii) would have been eligible to receive spousal Health Insurance Benefits from Walmart for that Legal Same-Sex Spouse during the Settlement Class Period but for the limitation during the Settlement Class Period on providing spousal Health Insurance Benefits to Legal Same-Sex Spouses; and (iii) did not receive same-sex spousal Health Insurance Benefits from Walmart (such as through an HMO Plan) during some or all of the Settlement Class Period during which they worked at Walmart. Excluded from the Settlement Class are any individuals who previously obtained a judgment regarding or entered into a settlement regarding Walmart's limitation during the Settlement Class Period on providing spousal Health Insurance Benefits to Legal Same-Sex Spouses.

Id. § 2.34. Settlement Class Members may opt out of the Settlement Class if they so desire. *Id.* § 9.1.

The parties already have identified more than 1,000 potential Settlement Class Members, and it is possible that there could be hundreds of additional potential Settlement Class Members who have not yet been identified. Romer-Friedman Decl. ¶¶ 49, 51. Among the approximately 1,200 Walmart workers who enrolled their same-sex spouses in a Walmart health insurance plan in 2014 or 2015, there are about 1,100 individuals who worked during the 2011-2013 Class Period and would have been subjected to Walmart's Prior Policy (if they were married to same-sex spouses during that period). *Id.* ¶ 49. As the list of potential Settlement Class Members that Walmart produced does not include (i) associates who ended their employment before January 1, 2014, or (ii) associates who did not enroll a same-sex spouse in Walmart's health insurance plan on or after January 1, 2014, there could be hundreds of Settlement Class Members who identify themselves through the notice and claims process that are proposed in the Settlement Agreement. *Id.* ¶¶ 49, 51.

Settlement Class Members who wish to remain in the Settlement Class will have two options to receive compensation under the Settlement—filing a Long Form Claim or a Short Form Claim that will be reviewed and adjudicated by the Claims Administrator. Ex. 1 § 5.3.3.

Settlement Class Members may file a Long Form Claim to seek to establish (a) out-of-pocket health care costs their same-sex spouses incurred during the Settlement Class Period when their spouses did not have health insurance (provided the costs would have been covered under the applicable Walmart health plan), and/or (b) the cost of purchasing health insurance policies for their same-sex spouses during the Settlement Class Period. *Id.* §§ 5.3.3.1, 5.3.3.2. Settlement Class Members who filed approved Long Form Claims will be eligible to receive a Settlement payment that is 1.0 times the qualifying costs they show to the satisfaction of the neutral Claims Administrator, and Settlement Class Members who had catastrophic out-of-pocket health care costs—$60,000 or more in the Class Period—will be eligible to receive a Settlement payment that is 2.5 times their qualifying costs. *Id.* §§ 5.3.3.1, 5.3.3.2. To file an approved Long Form Claim, documentation of costs must be submitted, such as statements of charges and declarations. *Id.* § 5.3.3.5.[4]

Alternatively, Settlement Class Members may choose to file a Short Form Claim and be eligible to receive a pro rata share of the Settlement Funds that are available after deduction of the amounts for approved Long Form Claims, Attorneys' Fees and Costs, the Service Award to the Settlement Class Representative, and the Notice and Administration Costs. *Id.* §§ 5.3.3.3, 5.3.3.7. Settlement Class Members who file Short Form Claims will not be required to submit

[4] The total amount of Long Form Claims that will be paid under the Settlement will not exceed $3.5 million—if the aggregate amount of Long Form Claimants' qualifying out-of-pocket health care costs and cost of purchasing health insurance policies exceeds $3.5 million, Class Members who filed Long Form Claims will have their payments reduced on a pro rata basis so that they collectively receive final payments that are equal to $3.5 million. *Id.* § 5.3.3.7.

documentation, but instead will provide basic personal information to confirm their membership in the Class and the months in the Class Period for which they may be eligible to receive a pro rata share. *Id.* § 5.3.3.3. The pro rata share for each Short Form Claim will be based on the number of months the Settlement Class Member would have been eligible for spousal health insurance benefits for a same-sex spouse during the Class Period but for Walmart's Prior Policy. *Id.* The maximum pro rata payment a Class Member can receive for a Short Form Claim is $5,000 per year, or $15,000 for the 36-month Class Period. *Id.* This $5,000 figure is slightly higher than the average annual amount that Plaintiff contends Walmart spent to provide health insurance benefits to spouses of Walmart associates during the Class Period. Romer-Friedman Decl. ¶¶ 42, 44.

Any successful Long Form Claim that would result in a payment that is less than the pro rata share for Short Form Claims will automatically be converted into a Short Form Claim so that Settlement Class Members are not penalized for attempting to seek a higher payment by filing a Long Form Claim. Ex. 1 § 5.3.3.6. Copies of the Long Form and Short Form Claims are included as an exhibit to the Settlement Agreement. *Id.*, Ex. A.

The Settlement Agreement provides that Class Counsel will receive attorneys' fees and costs. *Id.* § 5.4.1. The attorneys' fees and costs will be subject to approval by the Court, and will be paid from the $7.5 million Class Settlement Amount. *Id.* Class Counsel's request for attorneys' fees will not exceed 25 percent of the $7.5 million Class Settlement Amount. *Id.* Class Counsel also will request reimbursement of the reasonable expenses they have incurred in this litigation on behalf of the Class. *Id.* In addition to the relief Plaintiff Cote will receive as a member of the Settlement Class, the Settlement provides that, subject to approval by the Court, Cote will receive a $25,000 Service Payment to compensate her for her service as the sole Class

representative, and such payment will be made from the Class Settlement Amount. *Id.* § 5.5.1. Walmart takes no position on the amounts requested for Attorneys' Fees and Costs or the Service Award, but does not object to a reasonable award by the Court to be paid from the Class Settlement Amount.

ARGUMENT

I. The Court Should Grant Preliminary Approval of the Settlement.

The law favors compromise and settlement of class action suits. *See Durrett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (noting "the clear policy in favor of encouraging settlements" (internal quotation marks omitted)); *accord In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); William B. Rubenstein, Newberg on Class Actions § 11.41 ("The compromise of complex litigation is encouraged by the courts and favored by public policy.").

When parties have settled a class action, Rule 23(e) requires the Court to approve the settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Courts make this finding through a "'two-stage procedure,'" where "'[f]irst, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing,'" and second "'the final decision on approval is made after the hearing.'" *Hochstadt v. Bos. Sci. Corp.*, 708 F. Supp. 2d 95, 106-07 (D. Mass. 2010) (quoting Manual for Complex Litigation (4th ed.) § 13.14 (2004)); *accord In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 57 (D. Mass. 2005) (same); *see also In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 25 (1st Cir. 2012) (affirming class settlement where court applied the two stage procedure).

"At the preliminary approval stage, the Court need not make a final determination regarding the fairness, reasonableness and adequateness of a proposed settlement; rather, the Court need only determine whether it falls within the range of possible approval." *In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. 125, 140 (D.P.R. 2010) (collecting cases). As part of this inquiry, courts "examine the proposed settlement for obvious deficiencies before determining whether it is in the range of fair, reasonable, and adequate." *In re M3 Power Razor Sys. Mktg. & Sales Practice Litig.*, 270 F.R.D. 45, 62 (D. Mass. 2010) ("*In re MP3 Litig.*") (citing Manual for Complex Litigation (4th ed.) § 21.632)).

"Courts and commentators . . . have developed a presumption that the settlement is within the range of reasonableness when certain procedural guidelines have been followed." *In re MP3 Litig.*, 270 F.R.D. at 62-63. Those procedural guidelines are whether "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Lupron Mktg. & Sales Practices Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004) (internal quotation marks omitted); *accord In re M3 Litig.*, 270 F.R.D. at 62-63; *Hochstadt*, 708 F. Supp. 2d at 107. When the Court makes these "four findings . . . preliminary approval is appropriate." *In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. at 140.

The proposed Settlement Agreement falls within the range of possible approval. Although the precise amounts Settlement Class Members will recover under the Settlement will be determined by the number and types of claims that are filed, Plaintiff's counsel estimate that Settlement Class Members filing Long Form Claims will receive payments for a significant portion, and perhaps 100 percent, of the losses they claim to have suffered due to Walmart's challenged policy, even after attorneys' fees and costs, the service award, and the costs of notice

and claims administration are paid. Romer-Friedman Decl. ¶ 45. Plaintiff's counsel also estimate that Settlement Class Members who file Short Forms will receive payments that represent a significant portion of the alleged value of the benefits they were denied due to Walmart's Prior Policy. *Id.*

This substantial recovery is particularly meaningful given that the dispositive legal question in this case—did Walmart engage in unlawful sex discrimination by implementing a policy that constitutes a sex-based classification, sex-based stereotyping, or sex-based associational discrimination—is unsettled.[5] Furthermore, as described herein, all four factors that courts look to in order to evaluate the Settlement's fairness strongly weigh in favor of granting preliminary approval. The negotiations were undertaken at arm's length by counsel on both sides who are experienced in employment class action litigation, there was robust discovery before the parties negotiated the Settlement, and there are no objections to the Settlement to date.

---

[5] *Compare Hively v. Ivy Tech Cmty. Coll., South Bend*, 830 F.3d 698, 718 (7th Cir. 2016) (holding Title VII does not necessarily bar discrimination aimed at an employee's sexual orientation, even though the court "undoubtedly does not condone it" and "[t]he agency tasked with enforcing Title VII does not condone it"), *reh'g en banc granted and opinion vacated*, No. 15 Civ. 1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), *with Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, 10 (July 16, 2015) (holding that it is a violation of Title VII to treat gay and lesbian workers differently based on their sex or the sex of their spouse or partners, as such treatment constitutes a sex-based classification, sex-based stereotyping, and sex-based associational discrimination); *In re Levenson*, 587 F.3d 925, 929 (9th Cir. 2009) (holding the denial of benefits to same-sex spouses of public defender constitutes "sex discrimination," and stating that if the plaintiff's spouse "were female, or if [the plaintiff] himself were female, [the plaintiff] would be able to add [his male spouse] as a beneficiary"); *Hall v. BNSF Ry. Co.*, No. 13 Civ. 2160, 2014 WL 4719007, at *2-5 (W.D. Wash. Sept. 22, 2014) (holding railroad company that denied plaintiff's same-sex spouse benefits unlawfully discriminated against plaintiff under Title VII and Equal Pay Act based on sex, as the employer's policy relied on a sex-based classification); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (holding policies that "enforce heterosexually defined gender norms" can constitute illegal sex-based stereotyping"). While the First Circuit has not yet decided these issues, Plaintiff believes it has made clear that lesbian, gay, bisexual, and transgender ("LGBT") individuals are not precluded from asserting sex discrimination claims under federal law. *See Higgins v. New Balance Athletic Shoe, Inc*., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (discussing *Oncale v. Sundowner Offshore Serv., Inc*., 523 U.S. 75 (1998)).

A. The Parties Engaged in Arm's Length Negotiations.

Where the parties exchanged "multiple settlement proposals" and engaged in settlement discussions over a number of months, a settlement is "the result of negotiations conducted at arms' length." *Hochstadt*, 708 F. Supp. 2d at 107. In this case, the settlement negotiations spanned nine months, involved multiple proposals, and were facilitated by an experienced labor and employment mediator. Romer-Friedman Decl. ¶¶ 32-35. After obtaining substantial discovery about Walmart's policies and the putative Class Members, the parties engaged in three day-long mediation sessions on February 22, April 6, and April 28, 2016. *Id.* ¶¶ 24-32. Prior to, during, and between the three mediation sessions, the parties exchanged detailed written settlement proposals, and in May 2016 they reached an agreement in principle to settle the case. *Id.* ¶ 33. Each of the day-long mediation sessions was overseen by Mark Irvings, a mediator and arbitrator with decades of experience in the field of labor and employment law. *Id.* ¶ 32. After the parties reached an agreement in principle, the parties' lawyers spent six months exchanging drafts of the settlement and developing procedures and forms for a claims process. *Id.* ¶¶ 34, 36.

B. The Parties Exchanged Sufficient Discovery to Recommend Settlement.

Here, there was more than sufficient discovery for the parties and their counsel to make sound judgments about how to settle the case on reasonable terms. In this context, there is no "require[ment] that discovery be completed, but rather that sufficient discovery be conducted to make an intelligent judgment about settlement." *Hochstadt*, 708 F. Supp. 2d at 107.

As described above, before commencing the negotiations Walmart produced information to Plaintiff's counsel on a range of important subjects, including documents and information about Walmart's Prior Policy, prior complaints and charges by other employees, personnel information on Plaintiff Cote, and certain health insurance cost information. Walmart also

produced databases that contain detailed personnel information on nearly 1,200 potential Class Members. Romer-Friedman Decl. ¶¶ 26-27. Also, after nearly 1,200 potential Class Members received Court-authorized notice and more than 80 individuals responded to the Notice, Plaintiff's counsel communicated with dozens of these and other potential Class Members to understand how they were impacted by Walmart's Prior Policy and to evaluate the losses they could reasonably claim. *Id.* ¶¶ 28-31.

In developing Plaintiff's settlement proposals, Plaintiff's counsel consulted with labor and health care economists, analyzed studies that shed light on the number of Class Members who may have incurred significant health care costs during the Class Period and the average health care costs of American workers, and analyzed information Walmart produced on potential Class Members and information dozens of potential Class Members provided to Plaintiff's counsel. *Id.* ¶ 35. Given the substantial discovery that occurred and the detailed information the parties used to negotiate the Settlement, the parties clearly had "sufficient discovery . . . to make an intelligent judgment about settlement." *Hochstadt*, 708 F. Supp. 2d at 107.

C. The Proponents of the Settlement Are Experienced in Similar Litigation.

The third factor, that "the proponents of the settlement are experienced in similar litigation," *In re Lupron Mktg. & Sales Practices Litig*., 345 F. Supp. 2d at 137, is easily satisfied, as both parties are represented by lawyers who have substantial experience litigating employment class actions and other types of complex litigation. Plaintiff is represented by lawyers who are recognized as national leaders in LGBT rights, Declaration of Gary Buseck ¶¶ 1-7; class action employment lawyers who have been appointed as class counsel and successfully prosecuted numerous class actions, Romer-Friedman Decl. ¶¶ 7-20; Declaration of Matthew

Handley ¶¶ 3-5; and attorneys who have represented major corporations in complex litigation. Declaration of Peter Grossi ¶¶ 1-6.

Also, Defendant is represented by a number of accomplished litigators at Greenberg Traurig, an international law firm that has significant experience defending employment class actions. *See* Ex. 3 (Greenberg Traurig Background Information). These highly experienced litigators have endorsed the Settlement and believe that it is a fair, adequate, and reasonable resolution of the instant action. Ex. 1 § 3.4. As such, "[t]here is no doubt that proposing counsel teams have extensive experience in the field," and that the Settlement should be presumed to be reasonable. *Hochstadt*, 708 F. Supp. 2d at 108 (internal quotation marks omitted).

D. There Are No Objections to the Settlement.

Although Class Members will have an opportunity to comment on and object to the Settlement prior to final approval, currently there are no objections to the Settlement and the sole named Plaintiff strongly supports it. Romer-Friedman Decl. ¶ 46. Thus, "[t]he only practical way to ascertain the overall level of objection to the proposed settlement is for notice to go forward, and to see how many potential class members choose to opt out of the settlement class or object to its terms at the Final Fairness Hearing." *In re M3 Litig.*, 270 F.R.D. at 63.

II. The Court Should Approve the Proposed Class Settlement Notice and Plan for Providing Notice to the Class.

Under Rule 23(e), when parties have settled a class action lawsuit "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P 23(e)(1). In addition, when a court has certified a Rule 23(b)(3) class, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The notice must "clearly and concisely" inform class members of the following

information: "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." *Id.*

"To satisfy due process, the notice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Hill v. State St. Corp.*, No. 09 Civ. 12146, 2015 WL 127728, at *14 (D. Mass. Jan. 8, 2015) (quoting *In re Prudential Sec. Inc. Ltd. P'Ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y.), *aff'd sub nom. In re Prudential Sec. Inc. Ltd. P'ship Litig.*, 107 F.3d 3 (2d Cir. 1996)). While these Rule 23 and Due Process Clause standards "do not require that actual notice must be received by all class members," "the method of providing notice must be reasonably calculated to reach interested parties." *Id.* (internal quotation marks omitted).

It is well established that "individualized notice by first-class mail ordinarily satisfies the requirement that class members receive the best notice practicable under the circumstances." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 218 (D. Me. 2003) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974) ("individual notice must be provided to those class members who are identifiable through reasonable effort," and "[f]or these class members" whose addresses are "easily ascertainable" "individual notice is clearly the 'best notice practicable' within the meaning of Rule 23(c)(2)"), and *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992)); *see, e.g.*, *Hill*, 2015 WL 127728, at *15 (notice provided was "reasonable" where first-class mail was sent to potential class members, settlement information was published on a web site, and summary notice was published in a newspaper).

Where the parties cannot reasonably identify a portion of the class members—as it is impossible to locate them or would require significant time or expense—it is appropriate to use publication notice to inform unidentified class members of the settlement, and "individual notice is not required." *The Civil Rights Educ. & Enforcement Ctr. v. RLJ Lodging Trust*, No. 15 Civ. 0224, 2016 WL 314400, at *12 (N.D. Cal. Jan. 25, 2016) (citing *Lucas v. Kmart Corp*., 234 F.R.D. 688, 696 (D. Colo. 2006) (citing *Sollenbarger v. Mountain States Tel. & Tel. Co*., 121 F.R.D. 417, 437 (D.N.M. 1988) (publication notice sufficient to subgroup of class when efforts required for creating list of individuals would be excessive under the circumstances))).

The Notice the parties have proposed contains the information mandated by Rule 23(c) and (e). Ex. 1, Ex. C. In concise and plain language, the proposed Notice describes the nature of this action, how the class is defined, the types of federal and state claims Cote alleged on behalf of the Settlement Class, the Settlement's monetary and programmatic terms, how Settlement Class Members may file Long and Short Form Claims to obtain payments under the Settlement, how and when Settlement Class Members may opt out, how Settlement Class Members may enter an appearance by an attorney, the claims Settlement Class Members will release, and how Class Members will be bound if they do not opt out. *See id.*

Furthermore, the process that the parties propose to notify the Settlement Class Members of the Settlement is consistent with the well-established procedures for complying with Rule 23 and the Due Process Clause. Under that process, the approximately 1,100 known potential Settlement Class Members will receive direct notice via first-class mail at their last known addresses on file with the U.S. Postal Service. Ex. 4 (Declaration of Bernella Osterlund ("Osterlund Decl.")). In addition, the Settlement Class Members whom the parties cannot identify—either by name or by address—will receive publication notice through various

mediums, including: (1) paid advertisements in online and hard-copy publications that focus on LGBT issues or LGBT readers; (2) unpaid, earned media on the Settlement through issuance of press releases at the time of this Motion and when notice is provided to the Settlement Class Members; (3) Facebook advertisements that target members of the LGBT community who have worked for or have an interest in Walmart; (4) distribution through e-mail and social media to members of Walmart's LGBT affinity group; and (5) a web site on the Settlement that the Claims Administrator will establish. *Id.*, Ex. B. A full description of the proposed publication notice is located in the Osterlund Declaration. *See id.*, Ex. B.

In this case, publication notice is necessary as it would be difficult, if not impossible, to identify the Settlement Class Members whom Walmart has not already identified. During the Settlement Class Period (2011-2013), Walmart did not create or keep records on which of its employees were married to a spouse of the same sex. Romer-Friedman Decl. ¶ 48. Walmart has been able to identify 1,100 *potential* Class Members who worked during the Class Period because in 2014 and 2015 those individuals worked at Walmart and obtained spousal health insurance coverage in a Walmart health insurance plan for a same-sex spouse. These 1,100 individuals, however, do not include any Settlement Class Member who worked during the Settlement Class Period but did not work in 2014 or 2015, and they do not include any Settlement Class Member who worked at Walmart on or after January 1, 2014 but decided not to enroll his or her same-sex spouse in the Walmart health insurance plan in 2014 or 2015. *Id.* ¶ 49. Nor does this information identify which of the 1,100 potential Class Members were married to a same-sex spouse for some or all of the Settlement Class Period. Under the Notice Plan proposed by the parties, these potential Class Members who have not been identified will receive notice of

the Settlement via publication notice, and will have the opportunity to participate in, comment on, or opt out of the Settlement.

III. The Court Should Appoint KCC as the Claims Administrator.

Courts "often appoint a claims administrator or special master" to handle the administration of a class action settlement. Manual for Complex Litigation, § 21.661 (4th ed. 2004); *see, e.g.*, *Kiefer v. Moran Foods, LLC*, No. 12 Civ. 756, 2014 WL 3882504, at *1, *7 (D. Conn. Aug. 5, 2014). In this case, Plaintiff's counsel sent requests for proposals to five professional settlement administrators that had previously done business with Plaintiff's counsel or were recommended by counsel who are trusted by Plaintiff's counsel. Romer-Friedman Decl. ¶ 36. The proposals estimated the total amount of costs that would likely be incurred to provide notice to the Settlement Class, process and adjudicate the Claim Forms of Settlement Class Members who submit Claims, and undertake other duties called for by the Settlement. *Id.* Based on the proposals and further communications with some of the administrators, Plaintiff's counsel and Walmart jointly recommend that the Court appoint KCC as the Claims Administrator. KCC is a professional settlement firm with extensive experience administering class action settlements, including in employment class actions. *See* Osterlund Decl. ¶¶ 2-3.

IV. The Court Should Approve the Establishment of a Qualified Settlement Fund.

Under the Settlement, Walmart has agreed to transfer the required portions of the Class Settlement Amount into a Qualified Settlement Fund as described in Treasury Regulation § 1.468B-1, 26 C.F.R. § 1.468B-1, in full settlement and discharge of the Settlement Class Members' claims against Walmart that are included under the Settlement. Ex. 1 § 12.1. The Parties determined that establishing a Qualified Settlement Fund to receive and hold the settlement funds, and to distribute the funds according to the terms of the Settlement Agreement

and under the administration of the Claims Administrator would serve the Parties' best interests, and request that the Court approve the establishment of a Qualified Settlement Fund.[6]

Court approval of the establishment of the Qualified Settlement Fund serves the Settlement Class Members' interests by assuring that the Class Settlement Amount is transferred by Walmart following approval of this Motion, and benefits Walmart by assuring finality to the claims against it in this case that are the subject of the Settlement.[7]

V. The Court Should Establish Dates for the Fairness Hearing and Other Dates.

In Plaintiff's Motion, she proposes deadlines for a schedule of events, including a date for the Final Approval Hearing that provides for a sufficient amount of time for mailing of the Notice, for Settlement Class Members to file any objections to the Settlement or opt out, for Class Counsel to file a motion for attorneys' fees and costs, and for Plaintiff to move for a service award and for final approval. Plaintiff requests that the Court establish the dates set forth in the Motion.

CONCLUSION

For the reasons set forth above, Plaintiff's Motion should be granted.

---

[6] The Qualified Settlement Fund will be administered by the Claims Administrator, who, along with the Qualified Settlement Fund, will remain subject to the continuing jurisdiction of this Court. The Qualified Settlement Fund will be a segregated bank account opened at a financial institution mutually agreed by the Parties. The Qualified Settlement Fund account will receive the Class Settlement Amount from Walmart and will hold that sum, and the earnings thereon, until the Claims Administrator has completed all administration of such funds and income thereon, as well as disbursements to Settlement Class Members and Class Counsel, and payment of taxes and administrative costs, as more fully set forth in Section 12 of the Settlement Agreement and subject to further approval of this Court, if required.

[7] With the Court's approval, the parties intend for the establishment of a Qualified Settlement Fund to satisfy the requirements of Treasury Regulation § 1.468B-1(c), C.F.R. § 1.468B-1(c), by (a) being established under this Court's approval, (b) resolving and satisfying claims against Walmart for alleged violations of law, and (c) constituting a segregated account, as required by those regulations.

DATED: December 2, 2016

Respectfully submitted,

JACQUELINE COTE

By her attorneys,

/s/ Peter Romer-Friedman
Peter Romer-Friedman (*pro hac vice*)
prf@outtengolden.com
OUTTEN & GOLDEN LLP
718 7th Street NW
Washington, DC 20001
(202) 770-7886

Juno Turner (*pro hac vice*)
jturner@outtengolden.com
Sally Abrahamson (*pro hac vice*)
sabrahamson@outtengolden.com
OUTTEN & GOLDEN LLP
685 Third Avenue, 25th Floor
New York, NY 10017
(212) 245-1000

John A. Freedman (Bar No. 629778)
John.Freedman@aporter.com
Peter Grossi (*pro hac vice*)
Peter.Grossi@aporter.com
Sarah Warlick (*pro hac vice*)
Sarah.Warlick@aporter.com
ARNOLD & PORTER LLP
601 Massachusetts Ave., NW
Washington, DC 20001

Gary Buseck (Bar No. 067540)
gbuseck@glad.org
Allison W. Wright (Bar No. 684753)
awright@glad.org
GAY AND LESBIAN ADVOCATES & DEFENDERS
30 Winter Street, Suite 800
Boston, MA 02108
(617) 426-1350

Matthew K. Handley (*pro hac vice*)
Matthew_Handley@washlaw.org
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS
11 Dupont Circle, NW, Suite 400
Washington, DC 20036
(202) 319-1000

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd of December, 2016, this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Peter Romer-Friedman
Peter Romer-Friedman (*pro hac vice*)
prf@outtengolden.com
OUTTEN & GOLDEN LLP
718 7th Street NW
Washington, DC 20001