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 FINAL APPROVAL OF CLASS ACTION SETTLEMENT, FINAL APPROVAL OF SETTLEMENT CLASS, AND APPROVAL OF DISTRIBUTION OF SETTLEMENT FUNDS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

RULES

INTRODUCTION

Plaintiff Jacqueline Cote ("Cote") submits this Memorandum of Law in support of her Motion for Final Approval of Class Action Settlement, Final Approval of Settlement Class, and Approval of Distribution of Settlement Funds ("Final Approval Motion"). The proposed $7.5 million settlement of this class action lawsuit satisfies all of the criteria for final approval. Plaintiff thus seeks an order approving the class settlement as fair, adequate, and reasonable, as set forth in the Proposed Final Approval Order Granting Plaintiff's Motion for Final Approval, attached as Exhibit 1 to the Declaration of Peter Romer-Friedman, dated April 27, 2017 ("Romer-Friedman Decl.").[1] Defendant Wal-Mart Stores, Inc. ("Walmart") does not oppose the relief sought in this Final Approval Motion.

The Court has already taken the first step in the settlement approval process by granting preliminary approval on December 22, 2016, directing that Class Notice be disseminated to Class Members, and setting the date of the final fairness hearing for May 11, 2017. ECF No. 64 (Transcript of Hearing Before Judge William G. Young) (Dec. 16, 2016) at 8 ("Preliminary Approval Tr."). The Class Members have been notified of the terms of the Settlement, including the monetary and programmatic relief available to the Class, the claims process, the right to opt out, and the right to object to the Settlement. More than 300 Class Members have filed claims and no Class Members have objected or exercised their rights to opt out of the proposed Settlement. *See* Romer-Friedman Decl. ¶¶ 36-37. In light of such strong support for the Settlement, the outstanding relief provided to the Class Members, and other reasons stated below, Plaintiff respectfully requests that the Court grant final approval of the Settlement.

---

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

FACTUAL AND PROCEDURAL BACKGROUND

This Court, having presided over the entire action, is well-acquainted with the facts and history of the case. For purposes of this motion, Plaintiff provides an abbreviated background. For a more comprehensive history of the case, *see* Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement and Approval of the Proposed Notice of Settlement ("Plaintiff's Preliminary Approval Motion") at 2-6, ECF No. 51; and Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Certification of a Settlement Class ("Plaintiff's Settlement Class Certification Motion") at 2-6, ECF No. 53.

Before January 1, 2014, Walmart had an official, nationwide policy of not offering the same health insurance benefits to the same-sex spouses of its employees that Walmart provided to the opposite-sex spouses of its employees ("Walmart's Prior Policy"). ECF No. 16 (Answer) ¶ 37. On January 1, 2014, Walmart changed its policy and began providing spousal health insurance benefits to employees with same-sex spouses. *Id.* ¶ 37; Romer-Friedman Decl. ¶ 23.

On July 14, 2015, Plaintiff 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 spousal health insurance benefits to employees with same-sex spouses prior to January 1, 2014. ECF No. 1 ¶¶ 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. On September 14, 2015, Walmart filed its Answer to the Complaint, acknowledging 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." ECF No. 16 ¶ 37. Walmart denied it was liable under federal or state law and raised a host of affirmative defenses. *Id.* at p. 14-17.

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. ¶ 25. In November 2015, the Parties served written discovery, including interrogatories, document requests, and requests for admission, and in January 2016, the Parties responded to those discovery requests. *Id.* ¶ 26.

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 Plaintiff Cote; documents and information about prior charges that had been filed concerning the Prior 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 who have same-sex spouses. *Id.* ¶ 27. Walmart later supplemented its production, including by producing information on certain costs related to providing health insurance benefits to the spouses of Walmart associates. *Id.* ¶ 28.

In early 2016, the Parties agreed on a process to notify around 1,200 potential Class Members about the lawsuit and to obtain their consent to provide their contact information to Plaintiff's counsel, which this Court approved on January 26, 2016. ECF No. 40 (Minute Order dated Jan. 26, 2016). Shortly thereafter, a notice administrator disseminated the notice to those 1,200 individuals. Romer-Friedman Decl. ¶ 29. More than 80 of the individuals returned forms consenting 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 communicated with most of these individuals to document how they and their spouses were impacted by Walmart's Prior Policy and to estimate the Class' potential damages. *Id.* ¶ 31.

During this time, the Parties also worked to settle the class claims. On February 22, 2016, the Parties engaged in private mediation with an experienced labor and employment mediator, Mark Irvings, and on April 6 and April 28, 2016, the Parties engaged in two further full-day mediation sessions with Irvings, after which the Parties reached an agreement in principle. *Id.* ¶ 32. Between May 2016 and November 2016, the Parties' counsel exchanged numerous drafts of the Settlement Agreement, and developed a claims process, claim forms, and a proposed Class Notice. *Id.* ¶ 33. On December 2, 2016, the Parties executed a Settlement Agreement, ECF No. 54-1 ("Settlement Agreement," "Settlement" or "Agmt."), and jointly moved for preliminary approval of the Settlement Agreement. ECF No. 50. On December 22, 2016, this Court preliminarily approved the Settlement, and also approved and directed the dissemination of notice of class action settlement to the Settlement Class Members. ECF 64.

On January 20, 2017, the Claims Administrator, KCC Class Action Services, LLC ("KCC") sent Notice and Claim Forms to over 1,100 Settlement Class Members whom Walmart had previously identified through its personnel records—individuals who worked at Walmart during the January 1, 2011 to December 31, 2013 Class Period. Also, to notify unidentified Settlement Class Members about the Settlement, a robust campaign of publication notice was deployed by KCC. The publication notice included approximately 12.27 million advertisements via Facebook; banner advertisements on numerous lesbian, gay, bisexual, transgender, and queer ("LGBTQ") focused web sites, online publications, and online newsletters; print advertisements in LGBTQ-focused papers; Google advertisements, an e-mail blast to the listserve of Walmart PRIDE (the LGBTQ affinity group for Walmart employees); and a web site on the *Cote v.*

Walmart Settlement hosted by KCC. Declaration of Jenny Shawver of KCC Class Action Services, LLC ("Shawver Decl.") ¶¶ 5-10, attached as Exhibit 3 to the Romer-Friedman Decl.

As of the claim form filing deadlines, 309 Short-Form claims and 17 Long-Form claims have been filed with the Settlement Administrator. *Id.* ¶ 11.[2] Not a single Class Member has objected to the Settlement or requested to opt out of the Settlement. *Id.* ¶¶ 12-13.

SUMMARY OF THE SETTLEMENT TERMS

The proposed Settlement Agreement provides both programmatic and monetary relief to the Settlement Class Members. With respect to programmatic relief, the Settlement provides that in the future Walmart will continue to treat same-sex and opposite-sex spouses equally in the provision of health insurance benefits, as it began to do on January 1, 2014. Agmt. § 6.1.

With respect to monetary relief, Walmart will pay a Class Settlement Amount of $7.5 million, which will be used to make payments to Settlement Class Members after the payment of (1) a proposed service award for Plaintiff Cote in recognition of her service to the Class as the sole Class Representative, not to exceed $25,000;[3] (2) attorneys' fees, not to exceed 25% of the Class Settlement Amount, *i.e.*, $1,875,000, and reimbursement of out-of-pocket expenses;[4] (3) all costs of the Claims Administrator KCC in providing notice to Settlement Class Members and undertaking other Settlement administration duties; and (4) a portion of the total applicable employer's payroll taxes that Walmart is responsible for paying (about $65,000 or less).[5] *Id.* §§

---

[2] A number of claim forms were filed after the claim deadline. Ex. 3 (Shawver Decl.) ¶ 11. The Parties are reviewing these claims and will provide the Court with an update as to how they will be processed prior to the Final Fairness Hearing. Romer-Friedman Decl. ¶ 37.

[3] Plaintiff brought a separate Motion for Approval of Service Payment, filed concurrently with this Motion.

[4] Plaintiff brought a separate Motion for Approval of Attorneys' Fees and Reimbursement of Expenses, filed concurrently with this Motion.

[5] On April 26, 2017, the parties amended the Settlement Agreement to expand the final payments that all successful claimants will be eligible to receive under the Settlement

5.1-5.6. None of the $7.5 million Class Settlement Amount reverts to Walmart. *Id.* § 5.1.

Under the Settlement, the Settlement Class is defined 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 had two options to file claims and 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. *Id.* § 5.3.3.

Seventeen Settlement Class Members filed Long Form Claims. Ex. 3 (Shawver Decl.) ¶ 11. Under the Settlement, Long Form Claimants were required to provide documentation to establish: (a) out-of-pocket health care costs their same-sex spouses incurred during the Settlement Class Period (2011-2013) 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

---

Agreement. Ex. 2 (Amended Settlement Agreement), ¶¶ 1-4 ("Am. Agmt."). As part of the amendment the Parties agreed that a modest amount of the $7.5 million Class Settlement Amount will be used to pay a portion of the payroll taxes that Walmart will be required to pay with respect to the increased payments it is making to its employees and former employees under the Settlement. Ex. 2 (Am. Agmt.), ¶ 6; Romer-Friedman Decl. ¶¶ 44-45 (summarizing the amendments). Class Counsel estimate that this amount is likely to be $65,000 or smaller. Romer-Friedman Decl. ¶ 44.

of purchasing alternative health insurance policies for their same-sex spouses during the Settlement Class Period. *Id.* §§ 5.3.3.1, 5.3.3.2. Under the Amended Settlement Agreement, Settlement Class Members who filed approved Long Form Claims are eligible to receive a Settlement payment that is 1.5 times[6] 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—are eligible to receive a Settlement payment that is 3.0 times[7] their qualifying costs. *Id.*; Ex. 2 (Am. Agmt.) ¶¶ 1-2. To file an approved Long Form Claim, Class Members had to submit documentation of costs through statements of charges, declarations, and other forms of proof. Agmt. § 5.3.3.5.[8]

In total, 309 Settlement Class Members filed Short Form Claims. Ex. 3 (Shawver Decl.) ¶ 11. Under the Amended Settlement Agreement, Class Members who filed approved Short Form Claims are 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, the notice and administration costs, and a portion of the employer's payroll taxes. *Id.* §§ 5.3.3.3, 5.3.3.7; Ex. 2 (Am. Agmt.) ¶ 5. Settlement Class Members who filed Short Form Claims were not required to submit documentation of their costs, but instead were asked to provide basic personal information to confirm their membership in the Class and the months in

---

[6] The original Settlement Agreement stated Long Form Claimants would receive 1.0 times their qualifying costs, but the Amended Settlement Agreement, which the Parties entered on April 26, 2017, allows them to receive 1.5 times their qualifying costs. Ex. 2 (Am. Agmt.) ¶ 2.

[7] The original Settlement Agreement stated that Long Form Claimants with $60,000 or greater qualifying costs would receive 2.5 times their qualifying costs, but the Amended Settlement Agreement allows them to receive 3.0 times their qualifying costs. *See* Ex. 2 (Am. Agmt.) ¶ 1.

[8] The Settlement Agreement imposes a $3.5 million cap on the total amount of Long Form Claims that will be paid under the Settlement. Agmt. § 5.3.3.7. However, due to the number of Long Form Claims that were submitted, the $3.5 million cap on Long Form Claim payments will not affect the amount that Long Form Claimants are eligible to receive under the Settlement. Romer-Friedman Decl. ¶ 48.

the Class Period for which they are eligible to receive a pro rata share. Agmt. § 5.3.3.3. The pro rata share for each approved 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 2011-2013 Class Period but for Walmart's Prior Policy. *Id.*[9]

Given the number of Long Form Claims that were filed and the amounts of costs those claims identified, and given the number of Short Form Claims that were filed (309), Class Counsel estimate that the average approved Short Form Claim will receive a payment of approximately $16,000 and that the maximum payment for approved Short Form Claims will be approximately $27,000. Romer-Friedman Decl. ¶ 49.[10]

ARGUMENT

I. The Proposed Settlement is Fair, Reasonable, and Adequate, and Should be Approved.

Federal Rule of Civil Procedure 23(e) requires court approval for a class action settlement to ensure that it is procedurally and substantively fair, reasonable, and adequate. Fed. R. Civ. P. 23(e). As this Court has recognized, "[a]lthough settlement is often a more favorable result than litigation, the court has a fiduciary duty to absent members of the class in light of the potential for conflicts of interest among class representatives and class counsel and the absent members." *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 71 (D. Mass. 2005) (quoting *In re Lupron Mkt. & Sales Practices Litig.*, 228 F.R.D. 75, 94 (D. Mass 2005) (internal quotations

[9] Although the original Settlement Agreement required that the Short Form Claim payments were capped at $5,000 per year, or $15,000 for the 36-month Class Period, the Parties eliminated that provision in their Amended Settlement Agreement, so that Short Form Claims are no longer subject to any caps. Romer-Friedman Decl. ¶ 47.

[10] Any of the 17 Long Form Claims that is approved and would result in a payment less than the pro rata share for Short Form Claims will automatically be converted into a Short Form Claim so that Settlement Class Members receive the maximum payment for which they are eligible. Agmt. § 5.3.3.6.

omitted) (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods.*, 55 F.3d 768, 805 (3rd Cir. 1995)).

In exercising its fiduciary duty to determine whether a settlement is fair, reasonable, and adequate, courts first examine whether there was procedural fairness in the negotiation process leading to settlement. *In re Lupron*, 228 F.R.D. at 93 (recognizing there is a presumption in favor of settlement "if a settlement is untainted by collusion," by determining whether there has been "sufficient discovery" and "arms-length" bargaining). Courts then consider substantive fairness to determine whether the settlement's terms are fair, adequate, and reasonable by examining the litigation itself, its complexity and risks, and the possible recovery. *See, e.g.*, *In re Relafen*, 231 F.R.D. at 71-72; *In re Lupron*, 228 F.R.D. at 93.

While the First Circuit has not established a fixed test for evaluating the fairness of a class settlement, several courts in this circuit, including this Court, have looked to the factors set forth by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), to determine substantive fairness. *See, e.g.*, *In re Lupron*, 228 F.R.D. at 93 (noting that *Grinnell* has supplied the "most commonly referenced factors," and applying them); *In re Relafen*, 231 F.R.D. at 71-72; *New Eng. Carpenters Health Benefits Fund v. First DataBank, Inc.*, 602 F. Supp. 2d 277, 280-81 (D. Mass. 2009). The *Grinnell* factors are the following:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Grinnell, 495 F.2d at 463 (citations omitted).

In granting preliminary approval of this Settlement, this Court "praise[d]" the Settlement, stating that the Court was "fully satisfied with the various parameters" of the Settlement, and that "this seems to be an exemplary arm's-length dispute resolution." ECF No. 64 (Preliminary Approval Tr.) at 3:23-25. Plaintiff now respectfully requests final approval of the Settlement as fair, reasonable, and adequate.

A. The Settlement is Procedurally Fair.

The proposed Settlement is procedurally fair because it was reached through arm's-length negotiations and after experienced counsel had adequately evaluated the merits of the claims. Where the parties exchange "multiple settlement proposals" and engage in settlement discussions over a number of months, a settlement is "the result of negotiations conducted at arms' length." *Hochstadt v. Bos. Sci. Corp.*, 708 F. Supp. 2d 95, 107 (D. Mass. 2010).

Here, the settlement negotiations between the Parties spanned nine months, involved numerous proposals, and were facilitated by an experienced labor and employment mediator. Romer-Friedman Decl. ¶ 50. 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.* ¶ 51. 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.* ¶ 52. 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.* ¶ 53. 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 notice and claims process. *Id.* ¶ 54.

At all times during this process, the Parties' respective counsel bargained vigorously on behalf of their clients. *Id.* ¶ 55. These arm's-length negotiations involved counsel well-versed in

class action litigation and employment law. Plaintiff and the Settlement Class are represented by lawyers who are recognized as national leaders in LGBTQ rights, class action employment lawyers who have been appointed as class counsel and successfully prosecuted numerous employment class actions, and attorneys who have represented major corporations in complex litigation. *See* ECF No. 53 at 14-16 (citing Declarations of Peter Romer-Friedman, Gary Buseck, Matthew Handley, and Peter Grossi). Also, Walmart is represented by seasoned litigators at Greenberg Traurig, an international law firm that has significant experience defending employment class actions. *See* ECF No. 51 at 15 & Ex. 3. These highly experienced litigators have endorsed the Settlement and believe that it is a fair, adequate, and reasonable resolution of this action. Agmt. § 3.4. Because "[t]here is no doubt that proposing counsel teams have extensive experience in the field," the Settlement should be presumed to be reasonable. *Hochstadt*, 708 F. Supp. 2d at 108 (internal quotation marks omitted).

B. The Settlement is Substantively Fair.

The relevant *Grinnell* factors weigh strongly in favor of final approval of the Settlement.

1. Litigation Through Trial Would Be Complex, Costly, and Long.

By reaching a favorable settlement prior to class certification, summary judgment, or trial, plaintiffs avoid significant expense and delay, and ensure a risk-free recovery for the class. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & Ger. Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000). This case is no exception, with thousands of potential Class Members across the country, and complex legal claims brought under federal and state law.

As outlined below, the Parties have exchanged significant discovery. Absent settlement, the next step would be numerous depositions, rounds of expert reports on potential damages, class certification briefing, and summary judgment motions on the merits of Plaintiff's claims

and Defendant's affirmative defenses. Engaging in this further litigation would be timely and costly, as it would require the Parties to review tens of thousands of documents, obtain supporting affidavits from numerous Class Members, and take and defend numerous depositions of fact and expert witnesses.

While some of the key legal issues in this case might be decided through summary judgment motions, a trial undoubtedly would be expert intensive and add to the complexity and cost of the litigation. *See In re Relafen*, 231 F.R.D. at 72 ("Costs would include . . . the cost of a four-week trial which promises to feature a battle of various experts."). And given the lack of appellate authority on the key issue in the case—whether the denial of benefits to an employee based on the sex of her same-sex spouse constitutes sex discrimination under Title VII—it is likely there would be an appeal of an order granting class certification or summary judgment, either before or after a trial. Any appeal would extend the duration of the litigation for years.

The proposed Settlement, on the other hand, provides substantial monetary and programmatic relief available to Class Members in a certain, prompt, and efficient manner.

2. The Reaction of the Class Supports Final Approval.

The uniformly positive reaction of the Class strongly supports granting final approval, as no Class Member has objected to the Settlement, no Class Member has opted out of the Settlement, and the sole Class Representative strongly supports it. Romer-Friedman Decl. ¶ 61.

The Notice disseminated to more than 1,100 potential Class Members and provided to other Class Members through publication notice included a detailed explanation of how Class Members could obtain compensation under the Settlement, how to object to the Settlement, and how to exclude themselves from the Settlement. Ex. 3 (Shawver Decl.) ¶ 5. As of April 26, 2017, the Claims Administrator had received more than 342 claim forms from Class Members, but not a single Class Member objected to the Settlement or its terms. *Id.* ¶¶ 11-13.

"The favorable reaction of class to settlement, albeit not dispositive, constitutes strong evidence of fairness of proposed settlement and supports judicial approval." *Hill v. State St. Corp.*, No. 09 Civ. 12146, 2015 WL 127728, at *8 (D. Mass. Jan. 8, 2015), *appeal dismissed*, 794 F.3d 227 (1st Cir. 2015) (internal quotations omitted) (quoting *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999), and citing *In re P.R. Cabotage Antitrust Litig.*, 815, F. Supp. 2d 448, 473 (D.P.R. 2011)); *see also Greenspun v. Bogan*, 492 F.2d 375, 380 (1st Cir. 1974) ("The absence of any detailed opposition is a relevant, if not always reliable, factor in assessing the fairness of [a proposed settlement].").

Currently, there are no objectors or opt outs. To date, the only affirmative feedback that Plaintiff's counsel have received from Class Members has been uniformly positive. Romer-Friedman Decl. ¶ 61. Therefore, this factor also supports final approval.

3. Discovery Has Advanced Far Enough to Allow the Parties to Resolve the Case Responsibly.

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. The fact that the "parties were sufficiently informed" despite "limited discovery" evidences that sufficient discovery had been undertaken to allow an informed judgment. *In re P.R. Cabotage*, 269 F.R.D. at 141.

Here, 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 Walmart employees, personnel information on Plaintiff Cote, and certain information on the cost of insuring employees' spouses in

Walmart's health insurance plan. Walmart also produced databases that contain detailed personnel information on about 1,200 potential Class Members. Romer-Friedman Decl. ¶ 57. Also, after about 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.* ¶ 58.

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.* ¶ 59. Given the substantial discovery that occurred and the detailed information the Parties used to negotiate the Settlement, they clearly had "sufficient discovery . . . to make an intelligent judgment about settlement." *Hochstadt*, 708 F. Supp. 2d at 107.

4. Plaintiff Would Face Substantial Risks if the Case Proceeded, and the Settlement Fund is Substantial, Even in Light of the Best Possible Recovery.

Although Plaintiff believes her claims have merit and are suitable for class action treatment, Plaintiff also recognizes that she and the Class would face significant legal, factual, and procedural obstacles to recovering damages on their claims, including establishing liability, defeating Walmart's affirmative defenses, certifying a class, and proving damages.

"As any experienced lawyer knows, a significant element of risk adheres to any litigation taken to binary adjudication." *In re Lupron*, 228 F.R.D. at 97. This is particularly true here, where the dispositive legal question in this case—whether Walmart engaged in unlawful sex

discrimination under federal and state law by denying benefits to employees due to the sex of their spouses—is unsettled. Although the Seventh Circuit recently reversed its prior precedent on the question and "conclude[d] that discrimination on the basis of sexual orientation is a form of sex discrimination," *Hively v. Ivy Tech Cmty. Coll. of Indiana*, __ F.3d __, 2017 WL 1230393, at *1, 4 (7th Cir. Apr. 4, 2017) (adopting the "position that Title VII's prohibition against sex discrimination encompasses discrimination on the basis of sexual orientation"), other circuits continue to maintain the opposite position. *See, e.g., Evans v. Georgia Reg. Hosp.*, 850 F.3d 1248, 1254-55 (11th Cir. Mar. 10, 2017) (recognizing that "[d]iscrimination based on failure to conform to gender stereotypes is sex-based discrimination," but holding that "binding precedent forecloses" a conclusion that Title VII prohibits "discrimination because of [an employee's] sexual orientation"). And the law is still unsettled in this circuit.[11]

Walmart has denied that its pre-2014 policy of denying spousal health insurance benefits to employees with same-sex spouses is unlawful, and contests the propriety of class certification. ECF No. 16 at 15-16. If the case were further litigated, Plaintiff expects that Walmart would challenge Plaintiff's claims at every stage of the litigation, including at summary judgment, trial, and various pre- and post-trial appeals.

Plaintiff also expects that Walmart would argue that most of the Class Members did not suffer any harm if they cannot prove out-of-pocket medical expenses or that any damages should be offset if Class Members' spouses obtained health insurance through other means. *See id.* While Plaintiff would dispute these arguments and assert that there are readily accessible ways to determine Class Members' overall and individual damages—including by estimating the

[11] Although the First Circuit has not yet squarely decided the precise questions presented here, it has made clear that LGBTQ individuals may assert gender-stereotyping 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)).

economic value of the health insurance benefits Class Members and their spouses were denied—further litigation could result in many, if not most, Class Members receiving a far smaller recovery than they stand to gain under the Settlement Agreement. *See In re Celexa & Lexapro Mktg. & Sales Prac. Litig.*, No. MDL 09-2067, 2014 WL 4446464, at *7 (D. Mass. Sept. 8, 2014) (stating that "plaintiffs risked recovering significantly less than what their own expert estimated in damages if they proceeded to trial").

Furthermore, Walmart's affirmative defenses, especially its timeliness defense, could eliminate or substantially reduce the relief that Class Members could receive. ECF No. 16 at 14. Because Plaintiff filed her EEOC charge on September 19, 2014, nearly ten months after Walmart began providing spousal health insurance benefits to employees with same-sex spouses, ECF No. 1, Ex. 1 (Charge of Discrimination), Walmart would likely argue that *at best* Plaintiff and the Class Members could only recover damages from September 19, 2012 (two years prior to the filing of her charge) through December 31, 2013 (the date the Prior Policy ended), and that the claims of employees who were not affected by the Prior Policy in December 2013 (300 days before the charge) are completely time-barred. *See* 42 U.S.C. § 2000e-5(e)(1), (3)(B). In contrast to this very limited period of recovery for which Walmart would likely advocate, under the Settlement Agreement Class Members are eligible to receive payments for a 36-month period—January 1, 2011, through December 31, 2013. Agmt. §§ 2.37, 5.3.3.

Furthermore, the $7.5 million monetary payment represents an outstanding recovery for the Class Members, given the major risks involved in this litigation, the significant individual payments they will receive, and the important programmatic relief that the Settlement provides by ensuring that Walmart will not revert to its Prior Policy of excluding same-sex spouses from its health plan. Based on the number of Long and Short Form Claims that have been filed,

Plaintiff's counsel estimate that all approved Long Form Claimants will receive final payments that are 1.5 times their out-of-pocket costs (or 3.0 times their out-of-pocket costs in the case of those who had $60,000 or greater costs during the Class Period), and all approved Short Form Claimants will receive final payments that are substantially greater than the value of the spousal health care benefits they were denied or the out-of-pocket costs they incurred during the Class Period. The average Short Form Claim payment will be around $16,000, and the maximum Short Form Claim payment will be about $27,000. Romer-Friedman Decl. ¶ 49.

Given that every Class Member who filed a timely, approved claim form will receive payments that represent *more than 100 percent* of the estimated value of the benefits they were denied or their actual out-of-pocket losses, *id.*, Plaintiff respectfully submits that this Settlement far exceeds the minimum standard for approval. *See In re Celexa & Lexapro*, 2014 WL 4446464, at *7 ("A settlement need not reimburse 100% of the estimated damages to class members in order to be fair").

5. Maintaining the Class Through Trial Would Not Be Simple.

The risk of obtaining class certification pursuant to Rule 23 and maintaining certification through trial militates in favor of settlement. The Court has not yet certified a class and such a determination would likely be reached only after extensive discovery and briefing by both Parties. Walmart likely would argue that individual questions preclude class certification, and point to obstacles to proving classwide and individual damages. *See* Agmt. § 3.5; ECF No. 16 at 15-16. Should the Court certify a class, Walmart would likely seek permission to file an interlocutory appeal under Rule 23(f) or challenge class certification or the propriety of calculating Class Members' damages in a post-trial appeal. *See* Fed. R. Civ. P. 23(f); 28 U.S.C. § 1291; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 342 (2011) (decertifying nationwide class in interlocutory appeal under Rule 23(f) that challenged class certification after a decade of

litigation); *Braun v. Wal-Mart Stores, Inc.*, 106 A.3d 656 (Pa. 2014) (rejecting post-trial appeal by Walmart challenging the calculation of class members' damages with respect to claims that dated back to 1998). Risk, expense, and delay permeate such a process. Settlement eliminates this risk, expense, and delay.

6. Defendant's Ability to Withstand a Greater Judgment Does Not Detract from the Fairness of the Settlement.

Plaintiff does not have any reason to think that Walmart lacks the ability to withstand a greater judgment, given the monetary value of the Settlement. But this factor, standing alone, "does not suggest that the settlement is unfair." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (quoting *In re Austrian & Ger. Bank Holocaust Litig.*, 80 F. Supp. 2d 164,178 n.9 (S.D.N.Y. 2000). At best, the factor is neutral, and does not weigh against approval. *In re Lupron*, 228 F.R.D. at 97 ("This defendant-oriented factor is largely neutral as there seems little doubt that [defendant corporations] are defendants with classic deep pockets.").

Because all the relevant *Grinnell* factors support final approval, Plaintiff's motion for final approval should be approved.

C. The Plan of Allocation Is Fair, Reasonable, and Adequate.

"A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate." *Hill*, 2015 WL 127728, at *11 (citing *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 262 (D.N.H. 2007)). Moreover, "[a] plan of allocation is fair and reasonable as long as it has a 'reasonable, rational basis.'" *Id.* (quoting *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012)). To be reasonable, a plan of allocation does not have to treat all class members the same, but "may allocate funds based on the extent of class members' injuries and 'consider the relative strength and values of different categories of claims.'" *Id.* (quoting *In re IMAX Sec. Litig.*, 283, F.R.D. at 192). The view of

experienced counsel is given "great weight" on the reasonableness of a plan of allocation. *Id.* (citing *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011) (to determine if "a plan of allocation is fair, courts look primarily to the opinion of counsel")).

The proposed Plan of Allocation—described in Section 5.3.3 of the Settlement Agreement, as amended—satisfies these standards because it would distribute the Net Settlement Fund to Class Members based on a formula and a claims process that consider each Class Member's potential or actual damages and gives each Class Member an opportunity to present evidence to maximize his or her payment under the Settlement. Moreover, under the proposed Plan of Allocation Plaintiff's counsel estimate that each Class Member will receive over 100 percent of his or her actual or estimated losses. Romer-Friedman Decl. ¶ 49.[12] The Plan of Allocation sets forth a reasonable, rational basis to compensate Class Members based on the harm they have suffered and the relief they could have obtained. *Hill*, 2015 WL 127728, at *11.

Courts also consider the reaction of a class to a plan of allocation. *Id.* at *11-12. The Notice provided to Class Members described the proposed Plan of Allocation in detail and indicated that the deadline for objecting to the Plan of Allocation was April 20, 2017. To date, no objections have been made. Romer-Friedman Decl. ¶ 38. Accordingly, because the Plan of

[12] For every Class Member who demonstrates through a Long Form Claim that his or her spouse had out-of-pocket health expenses or alternative health insurance costs, the Class Member will receive a payment that is at least 1.5 times of qualifying costs. Class Members who experienced catastrophic costs of $60,000 or more during the Class Period will receive an even higher payment (3.0 times their actual costs) in light of the potential non-economic and punitive damages that such Class Members could obtain in litigation. Romer-Friedman Decl. ¶ 49; Agmt. §§ 5.3.3.1, 5.3.3.2; Ex. 2 (Am. Agmt.) ¶¶ 1-2. For all other Class Members who submitted an approved Short Form Claim (individuals who did not experience significant out-of-pocket expenses or who chose not to submit proof of those costs), the Plan of Allocation provides them with a pro-rata share of the net Settlement Fund—an amount that is estimated to exceed the economic value of the health insurance benefits that their spouses were denied during the Class Period. Agmt. § 5.3.3.3.

Allocation is fair, reasonable, and adequate, is recommended by experienced and competent counsel, and is not opposed by any Class Member, it should be approved.

II. Final Certification of the Proposed Class is Appropriate.

On December 22, 2016, the Court granted preliminary approval of the Settlement that defines the Settlement Class as described in § 2.34 of the Settlement Agreement. ECF No. 64. Since that time, nothing has changed to alter the propriety of certification. For all the reasons stated in Plaintiff's Settlement Class Certification Motion, incorporated herein by reference, Plaintiff now requests that the Court grant final certification of the Class for the purpose of effectuating the Settlement, pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), and requests that the Court appoint Plaintiff as Class Representative, and appoint as Class Counsel the law firms and organizations set forth in Section 2.7 of the Settlement.

CONCLUSION

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

DATED: April 27, 2017

Respectfully submitted,

JACQUELINE COTE

By her attorneys,

/s/ Peter Romer-Friedman

Peter Romer-Friedman (*pro hac vice*)

Peter Romer-Friedman (*pro hac vice*)
prf@outtengolden.com
Sally Abrahamson (*pro hac vice*)
sabrahamson@outtengolden.com
OUTTEN & GOLDEN LLP
601 Massachusetts Ave. NW
Second Floor West
Washington, DC 20001
(202) 847-4400

Juno Turner (*pro hac vice*)
jturner@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 KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

Gary Buseck (Bar No. 067540)
gbuseck@glad.org
Allison W. Wright (Bar No. 684753)
awright@glad.org
GLBTQ LEGAL 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 27th of April, 2017, 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
601 Massachusetts Ave. NW
Second Floor West
Washington, DC 20001
(202) 847-4400