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)**

PLAINTIFF'S MOTION FOR CERTIFICATION OF A SETTLEMENT CLASS IN CONJUNCTION WITH PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PROPOSED NOTICE OF SETTLEMENT

Plaintiff Jacqueline Cote ("Plaintiff" or "Cote") respectfully submits the following Motion for Certification of a Settlement Class in Connection with Plaintiff's Separate Motion for Preliminary Approval of Class Action Settlement and Approval of the Proposed Notice of Settlement ("Motion"). For the reasons set forth in the Memorandum of Law in Support of Plaintiff's Motion, the Declarations of Peter Romer-Friedman, Gary Buseck, Matthew Handley, and Peter Grossi in Support of Plaintiff's Motion, and the exhibits attached thereto, Plaintiff respectfully requests that the Court enter an Order:

(1) certifying the following proposed Settlement Class under Fed. R. Civ. P. 23(a) and (b)(3) for purposes of effectuating the settlement:

> (A) all current and former associates (as that term is used by Walmart to encompass all Walmart employees) who (A) 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.

(2) appointing Jacqueline Cote as the Class Representative; and

(3) appointing Outten & Golden LLP, GLBTQ Legal Advocates & Defenders (GLAD), the Washington Lawyers' Committee for Civil Rights & Urban Affairs, and Arnold & Porter LLP as Class Counsel.

Walmart does not oppose certification of the Settlement Class solely for purposes of Settlement.

DATED: December 2, 2016

Respectfully submitted,
JACQUELINE COTE

By her attorneys,

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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.

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR CERTIFICATION OF A SETTLEMENT CLASS

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INTRODUCTION

Plaintiff Jacqueline Cote ("Plaintiff" or "Cote") respectfully submits this Memorandum in Support of her Motion for Certification of a Settlement Class in Connection with Plaintiff's Separate Motion for Preliminary Approval of Class Action Settlement and Approval of the Proposed Notice of Settlement ("Motion"). Walmart does not oppose certification of the Settlement Class solely for the purposes 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[1] and Plaintiff's Motion for Certification of a Settlement Class ("Romer-Friedman Decl."), Ex. 1 (Settlement Agreement) §§ 5.1-5.6.[2]

Before the Court can provide the proposed Settlement Class with notice of the Settlement Agreement or approve the Settlement, it is necessary to certify a Settlement Class. Thus, Cote requests that the Court certify the proposed Settlement Class under Rule 23(a) and (b)(3) of the

[1] In a separate motion filed concurrently, Plaintiff has moved the Court to preliminarily approve the Settlement Agreement and the proposed Notice to Settlement Class Members.

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

Federal Rules of Civil Procedure. As described herein, Cote and the members of the proposed Settlement Class satisfy all of the requirements of Rule 23 to certify the Settlement Class.

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 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.

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

[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.

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 its 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 January 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 Decl. ¶ 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 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

[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.

$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.

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 Certify the Proposed Settlement Class.

The Court should certify the Proposed Settlement Class under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure. The Proposed Settlement Class satisfies Rule 23(a)'s four requirements of numerosity, commonality, typicality and adequacy, as well as Rule 23(b)(3)'s predominance and superiority standards. Walmart does not oppose certification of the proposed Settlement Class. Ex 1 §§ 3.5 & 4.3.

A. The Requirements of Rule 23(a) Are Satisfied.

1. Numerosity is Satisfied.

Rule 23(a)'s numerosity standard is met when "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The threshold for numerosity is "low," and will usually be satisfied if the number of potential plaintiffs exceeds 40. *García-Rubiera v. Calderón*, 570 F.3d 443, 460 (1st Cir. 2009) (citing *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3rd Cir. 2001) ("No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met.")).

Here, the parties have identified more than 1,000 potential Settlement Class Members, and it is possible that there could be hundreds of additional Settlement Class members who have not yet been identified. Romer-Friedman Decl. ¶¶ 49, 51; *see supra* at 4-5, 7. The size of the potential settlement class thus satisfies the numerosity requirement. *García-Rubiera*, 570 F.3d at 460; *see, e.g.*, *Mooney v. Domino's Pizza, Inc.*, No. 14 Civ. 13723, 2016 WL 4576996, at *2 (D. Mass. Sept. 1, 2016) ("[e]ven sixty to seventy drivers would satisfy Rule 23(a)(1)"); *Guardian Angel Credit Union v. MetaBank*, No. 08 Civ. 261, 2010 WL 1794713, at *3 (D.N.H. May 5, 2010) (finding numerosity met in class of 38). In addition to the size of the Class, the

"geographic distribution" of the Class shows that joinder is impracticable. *See Guardian Angel Credit Union*, 2010 WL 1794713, at *3 (finding it impracticable to join class members "whose diverse geographic locations span the United States"). Walmart is a national retailer with stores in all 50 states, as well as the District of Columbia and Puerto Rico, and Walmart's records show there are potential Settlement Class Members in nearly every state. Romer-Friedman Decl. ¶ 50.

2. Commonality is Satisfied.

Commonality is satisfied here. Rule 23(a)(2) requires a showing that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Supreme Court has explained that "common contention" in a class action "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). But this "analysis does not depend upon the number of common questions; one significant question will do." *Tigges v. AM Pizza, Inc.*, No. 16 Civ. 10136, 2016 WL 4076829, at *7 (D. Mass. July 29, 2016) (citing *Dukes*, 564 U.S. at 359 ("[F]or purposes of Rule 23(a)(2) even a single common question will do."). Moreover, "[i]n general, where "implementation of [a] common scheme is alleged, the commonality requirement usually is satisfied." *Id.* (internal quotation marks omitted).

The Proposed Settlement Class satisfies this standard. As described above, Walmart had an official, uniform nationwide policy of not offering spousal health benefits to the same-sex spouses of employees. ECF No. 16 ¶ 37. As Plaintiff Cote learned when she tried to obtain spousal health insurance benefits for her wife, Walmart did not exempt employees from this uniform national policy. Ex. 2 (Pl.'s Resp. to Def.'s First Set of Interrogs.), No. 11.

Walmart's implementation of a uniform, national policy on spousal health insurance benefits is precisely the type of "common scheme" that generally satisfies the commonality

requirement. *Tigges*, 2016 WL 4076829, at *8 (holding plaintiffs "allege such common schemes" where they alleged "Defendants violated Massachusetts law by paying the delivery drivers a tipped minimum wage without notification"); *Overka v. Am. Airlines, Inc*., 265 F.R.D. 14, 18 (D. Mass. 2010) (holding charging a curbside check-in fee in terminals nationwide involved "implementation of the common scheme" that satisfies commonality) (citing *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) ("Commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.")).

Here, the liability question – whether Walmart's Prior Policy of not providing spousal health insurance to same-sex spouses was unlawful – would be the same for every member of the Settlement Class, such that "establishing liability for one employee necessarily establishes liability for the entire class." *Garcia v. E.J. Amusements of N.H., Inc.*, 98 F. Supp. 3d 277, 286 (D. Mass. 2015) (holding "claims involving system-wide practices or policies are appropriate for class treatment" since liability is the same for all employees); *accord Stockwell v. City & Cty. of San Francisco*, 749 F.3d 1107, 1113-15 (9th Cir. 2014) (holding commonality satisfied where "putative class is challenging a single employment practice" and where same evidence and legal theory "affect every class member's claims uniformly," as "their claims rise and fall together").

With respect to the factual questions, discovery confirmed that Walmart implemented the same Prior Policy nationwide that prevented Cote and other similarly situated employees with same-sex spouses from receiving spousal health benefits. *See supra* at 4-5. Thus, under this national policy every Walmart employee who had a same-sex spouse during the Class Period was denied the opportunity to enroll that same-sex spouse in Walmart's health insurance plan.[5]

[5] It is possible a small portion of the potential Class Members who worked in certain states and in certain stores were able to enroll their same-sex spouses in a Walmart-sponsored Health Maintenance Organization plan. Romer-Friedman Decl. ¶ 50. Under the Settlement Class

Accordingly, it is appropriate to certify a class of employees who were all "'prejudiced by'" the same "companywide" procedure or method "that can be charged with bias." *Dukes*, 564 U.S. at 353 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982)).

In sum, each member of the Proposed Class would face the same basic legal questions that would be dispositive of their federal or state claims: 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. These are largely, if not completely, purely legal questions that would be answered in the same way for every member of the Settlement Class in this case—notwithstanding the fact that the answer to these legal questions is currently unsettled. *See* Plaintiff's Motion for Preliminary Approval at 12 & n.5.

3. Typicality is Satisfied.

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality "is satisfied 'if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory.'" *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 338 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015) (quoting *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 89 (D. Mass. 2005)); *accord García-Rubiera*, 570 F.3d at 460 (stating the same). It is sufficient that the claims "share essential characteristics, but they need not be precisely identical." *Bezdek*, 79 F. Supp. 3d at 338.

Here, the claims of Cote and all other proposed Settlement Class Members arise from Walmart's policy of not offering spousal health benefits to employees with same-sex spouses,

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Definition, individuals who received spousal Health Insurance Benefits from Walmart during the entire period in which they worked for Walmart from 2011 to 2013 would be excluded from the Class, as they received health insurance benefits for their same-sex spouses and did not suffer the same injury as Plaintiff and other members of the Settlement Class. Ex. 1 § 2.34.

and all of these claims rely on identical legal theories. As noted above, all of the claims are based upon the same legal theory that Walmart's Prior Policy constitutes sex-based classification, sex-based stereotyping, and sex-based associational discrimination, which Plaintiff alleges violates federal and state laws that prohibit sex discrimination in employment. Also, most, if not all, of Walmart's affirmative defenses would apply in the same manner to all of the Settlement Class Members.

4. Adequacy of Representation is Satisfied.

Adequacy requires that "the representative parties will fairly and adequately protect the interests of the class," Fed R. Civ. P. 23(a)(4), and involves two separate inquiries. "'[T]he moving party must show first that the interests of the representative party will not conflict with the interests of any class members.'" *Mooney*, 2016 WL 4576996, at *8 (quoting *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)). "Second, the moving party must show that chosen counsel 'is qualified, experienced and able to vigorously conduct the proposed litigation.'" *Id.* (quoting *Andrews*, 780 F.3d at 130).

Plaintiff Cote and her counsel easily satisfy these standards. First, Cote possesses identical interests as other Settlement Class Members: obtaining compensation for the health insurance benefits they were denied before 2014 and securing Walmart's commitment to provide spousal health insurance benefits to same-sex spouses on the same terms as opposite-sex spouses in the future. Cote and her counsel are unaware of any conflicts between Cote and other Class Members. Also, Cote has already demonstrated her adequacy and her willingness to put the interests of the Settlement Class ahead of her own personal interests by negotiating for and securing excellent monetary and programmatic relief for the Settlement Class.

Second, Plaintiff's counsel are qualified and experienced and have the resources and skills to vigorously prosecute this class action. Plaintiff's attorneys from GLBTQ Legal

Advocates & Defenders ("GLAD"), including its legal director Gary Buseck, are national leaders in advocating for equality and justice for the lesbian, gay, bisexual, and transgender ("LGBT") community, and have won some of the most significant civil rights victories for the LGBT community, including *Goodridge*, 798 N.E.2d at 969 (holding Massachusetts had to allow persons of the same sex to marry each other), and *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015) (holding states are constitutionally required to issue marriage licenses to same-sex couples and recognize the marriages of same-sex couples lawfully performed in sister states). Declaration of Gary Buseck ¶¶ 1-2, 5-7 & Exs. A-C (Nov. 18, 2016).

Plaintiff's attorneys from Outten & Golden LLP, a 50-plus attorney employment law firm, and the Washington Lawyers' Committee for Civil Rights and Urban Affairs, a 48-year-old civil rights non-profit organization, have substantial experience litigating class action lawsuits on behalf of plaintiffs in a range of legal areas, including employment discrimination, employee benefits, wage and hour law, housing discrimination, public accommodations, and securities law. *See* Romer-Friedman Decl. ¶¶ 7-20; Declaration of Matthew Handley ¶¶ 3-5 & Exs. A-B (Nov. 21, 2016). The attorneys working on this matter from Outten & Golden and the Washington Lawyers' Committee have been designated as Class Counsel in numerous employment and civil rights class actions.[6] Finally, Plaintiff's attorneys from Arnold & Porter LLP have decades of

[6] *See, e.g.*, *Kiefer v. Moran Foods, LLC*, No. 12 Civ. 756, 2014 WL 3882504, at *7-8 (D. Conn. Aug. 5, 2014) (Young, J.) (appointing Outten & Golden LLP as Class Counsel, including Juno Turner, and stating "[t]he work that Class Counsel has performed in litigating and settling this case demonstrates their commitment to the class and to representing the class's interests"); *Aros v. United Rentals, Inc.*, No. 10 Civ. 73, 2012 WL 3060470, at *6 (D. Conn. July 26, 2012) ("Plaintiffs' Counsel, Outten & Golden LLP . . . are experienced employment lawyers with good reputations among the employment law bar."); Ex. 5 (Order Appointing Peter Romer-Friedman as Class Counsel in *Allman v. Am. Airlines, Inc. Pilot Ret. Benefit Program Variable Income Plan*, No. 14 Civ. 10138 (D. Mass. Mar. 28, 2016); *Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1008 (D. Colo. 2014) (recognizing "specialized knowledge and experience" of Class Counsel that included Peter Romer-Friedman, and the "results achieved for the Plaintiff class in

experience litigating class actions, mass actions, and other types of complex litigation, and have tried numerous complex cases. Declaration of Peter Grossi ¶¶ 1-6 & Exs. A-B (Nov. 21, 2016).

B. The Requirements of Rule 23(b)(3) Are Satisfied.

1. Predominance is Satisfied.

Rule 23(b)(3) requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members[.]" Fed. R. Civ. P. 23(b)(3). "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal quotations omitted). It "requires only that individual questions not 'overwhelm common ones.'" *Tigges*, 2016 WL 4076829, at *10 (quoting *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015)). "Where 'a sufficient constellation of common issues binds class members together,' notwithstanding the existence of some individualized issues, a class may still be certified under Rule 23(b)(3)." *Glass Dimensions, Inc. v. State St. Bank & Trust Co.*, 285 F.R.D. 169, 179-80 (D. Mass. 2012) (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000)).

Here, predominance is easily satisfied. Liability for all Settlement Class Members' claims can be determined based on the same common proof—undisputed facts that Walmart implemented a nationwide practice of not offering spousal health insurance to employees with same-sex spouses—and will turn on the same legal theories. *See supra* at 4-5, 12-13.

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this case were outstanding, worthy of being emulated by . . . counsel"); Ex. 6 (Order Approving Peter Romer-Friedman as Class Counsel in *Keepseagle v. Vilsack*, No. 99 Civ. 3119 (D.D.C. Nov. 1, 2010) (approving Peter Romer-Friedman as Class Counsel in credit discrimination action that obtained a $760 million settlement for Native American farmers); *Scott v. Clarke*, 61 F. Supp. 3d 569, 590 (W.D. Va. 2014) (recognizing Washington Lawyers' Committee as a "well-known public interest legal services organization[] with substantial experience with respect to and involvement in civil rights litigation, including class actions"); *Thomas v. Christopher*, 169 F.R.D. 224, 238 (D.D.C. 1996) (noting extensive class action experience of Washington Lawyers' Committee).

Because there are no factual or legal differences between the putative Class Members' claims on the issue of liability, the common issues that bind the Settlement Class Members together cannot possibly be overwhelmed by the single way in which their claims differ—the amount of damages. As the First Circuit explained, "where . . . common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain," particularly "where individual factual determinations can be accomplished using computer records, clerical assistance, and objective criteria--thus rendering unnecessary an evidentiary hearing on each claim." *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003); *accord Tigges*, 2016 WL 4076829, at *10. Thus, "the need for individualized damage decisions does not ordinarily defeat predominance where there are still disputed common issues as to liability." *Tardiff v. Knox Cnty.*, 365 F.3d 1, 6 (1st Cir. 2004).

The Supreme Court and the First Circuit recently reaffirmed that predominance will ordinarily be satisfied even though separate calculations or proceedings may be needed to calculate damages. *Tyson Foods*, 136 S. Ct. at 1045 ("When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.") (internal quotation marks omitted); *In re Nexium Antitrust Litig.*, 777 F.3d at 21. As the First Circuit reasoned, the need to calculate individualized damages does not defeat certification because "Rule 23(b)(3) 'does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof.'" *In re Nexium Antitrust Litig.*, 777 F.3d at 21 (emphasis omitted) (quoting *Amgen v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184,

1196 (2013)). Thus, here the numerous common issues predominate notwithstanding the fact that members of the Settlement Class may have different amounts of damages.

2. Superiority is Satisfied.

Plaintiff easily satisfies the superiority requirement, which requires her to show that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).; *accord Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (internal quotation marks omitted)). Rule 23(b)(3) sets forth a non-exclusive list of factors pertinent to judicial inquiry into the superiority of a class action, including: "the class members' interests in individually controlling the prosecution or defense of separate actions"; "the extent and nature of any litigation concerning the controversy already begun by or against class members"; and "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. 23(b)(3).[7]

These factors strongly weigh in favor of a finding that a class action is superior to trying hundreds or even thousands of actions that challenge the same uniform, nationwide policy.

First, the putative Settlement Class Members have little interest in controlling the litigation through individual claims, as most of the Settlement Class Members have modest

[7] Although one of the factors is "the likely difficulties in managing a class action," Fed. R. Civ. P. 23(b)(3)(D), "this Court, in deciding whether to certify a settlement-only class, 'need not inquire whether the case, if tried, would present intractable management problems.'" *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 72 (D. Mass. 1999) (quoting *Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a [trial] court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial.")); *accord In re Volkswagen & Audi Warranty Extension Litig.*, 273 F.R.D. 349, 354 (D. Mass. 2011). In any event, there would be no difficulty trying this case as a class action, as all Class Members share the same claims on liability, and Plaintiff's counsel have developed feasible ways to calculate the Class Members' damages.

amounts of damages and their potential damages pale in comparison to the significant cost of litigating these claims. *See* Fed. R. Civ. P. 23(b)(3)(A); *Gintis v. Bouchard Transp. Co*., 596 F.3d 64, 68 (1st Cir. 2010) (Souter, J.) (observing that where "potential individual recoveries are probably in the $12 to $39 thousand range[,]" "there is a real question whether the putative class members could sensibly litigate on their own for these amounts of damages, especially with the prospect of expert testimony required"); *Tigges*, 2016 WL 4076829, at *10 (holding "[t]he aggregation of the many delivery drivers' small individual claims, where each delivery charge claimed is only a couple of dollars, is superior to individual adjudication ," and following *Gintis*, 596 F.3d at 68); *Applegate v. Formed Fiber Techs., LLC*, No. 10 Civ. 00473, 2012 WL 3065542, at *9 (D. Me. July 27, 2012) (holding where workers each sought 60 days of back pay under the WARN Act that "it is clear that damages per putative class member are small and are unlikely to be litigated on an individual basis," and following *Gintis*, 596 F.3d at 68).

Here, as the vast majority of the Settlement Class Members have potential damages ranging from hundreds of dollars to $15,000 (based on the alleged value of benefits employees' spouses were denied, Romer-Friedman Decl. ¶ 44), it would be irrational to litigate hundreds or thousands of these claims individually. *See Gintis*, 596 F.3d at 68; *Applegate*, 2012 WL 3065542, at *9. Indeed, the existence of modest claims "go[es] to the very reason for Rule 23(b)(3) . . . *i.e*., to make room for claims that plaintiffs could never afford to press one by one." *Gintis*, 596 F.3d at 67-68.

Moreover, concentrating this litigation in a single district is desirable, as it "will promote judicial economy and uniformity of outcome" for Walmart and the Settlement Class Members who were impacted by the same uniform, nationwide policy. *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 312 (D. Mass. 2004).

CONCLUSION

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

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Respectfully submitted,

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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.

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