IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-24818-CIV-MARTINEZ-GOODMAN

JAMIE BRYANT, individually and on behalf of all others similarly situated,

Plaintiff,

v.

WAL-MART STORES, INC.,

Defendant.

MOTION OF THE RETAIL LITIGATION CENTER, INC. FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Retail Litigation Center, Inc. respectfully moves for leave to file the brief that accompanies this motion as *Amicus Curiae* in support of Defendant's Motion for Summary Judgment.

ARGUMENT

This Court has the inherent authority to grant an *amicus curiae* leave to participate in a matter. *See, e.g.*, *Bayshore Ford Trucks Sales, Inc. v. Ford Motor Co.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006) ("[D]istrict courts possess the inherent authority to appoint "friends of the court" to assist in their proceedings."); *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1500 (S.D. Fla. 1991). The participation of an *amicus curiae* can "alert the court to the legal contentions of concerned bystanders." *Resort Timeshare*, 764 F. Supp. at 1501.

The Retail Litigation Center, Inc. ("RLC") is the only trade organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. These leading retailers employ millions of workers in the

United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an amicus in more than 150 judicial proceedings of importance to retailers.

The RLC and its members have a significant interest in the subject matter of this case. RLC members employ millions of American workers, and many of these employees participate in employer health plans regulated under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). Each time the employment relationship of a plan participant ends for any reason other than "gross misconduct," 29 U.S.C. § 1163, that plan participant and related participants must receive a notice of continuation coverage, 29 U.S.C. § 1166.

The RLC's brief will assist the court. The brief provides background on the important role that third-party administrators play in ensuring timely and accurate COBRA notices. The brief also explains that COBRA's purpose of promoting notice that can be understood by an ordinary purpose could be undermined by cases, like this one, seeking class damages based on alleged technical defects in notice. Finally, the brief explains that importance of conducting a searching examination of standing at this stage of litigation.

CONCLUSION

For the foregoing reasons, the RLC respectfully requests that this Court grant leave to file an *amicus curiae* brief and accept the brief accompanying the motion.

LOCAL RULE 7.1 CERTIFICATION

In compliance with Local Rule 7.1, undersigned counsel hereby certifies that counsel for Retail Litigation Center has conferred with counsel for all parties regarding this Motion, and counsel for Plaintiffs opposes this motion.

Dated: June 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2020, I caused the foregoing document to be filed with the Clerk of this Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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INTEREST AND IDENTITY OF *AMICUS CURIAE*

The Retail Litigation Center, Inc. ("RLC") is the only trade organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. These leading retailers employ millions of workers in the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an amicus in more than 150 judicial proceedings of importance to retailers.

The RLC and its members have a significant interest in the subject matter of this case. RLC members employ millions of American workers, and many of these employees participate in employer health plans regulated under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). Each time the employment relationship of a plan participant ends for any reason other than "gross misconduct," 29 U.S.C. § 1163, that plan participant and related participants must receive a notice of continuation coverage, 29 U.S.C. § 1166.

Because a complex web of requirements governs these notices, many of the RLC's members retain third-party administrators who are experts in COBRA administration to provide plan participants with this information. These third-party administrators also assist plan participants who choose to continue coverage under COBRA.

Recently, a flurry of lawsuits has been filed challenging notices of continuation coverage issued by third-party administrators. These lawsuits allege technical defects in COBRA continuation coverage notices, and seek to invoke COBRA's system of statutory penalties on behalf of a class of plan participants who received a similar notice. But the threat of substantial damages against retailers based on alleged technical defects will not serve COBRA's purpose of

ensuring that participants receive the information that will allow them to make an informed decision about whether to choose continuation coverage. Instead, it will pressure employers to provide lengthy, verbose notices designed to ensure that there can be no allegation of a technical defect, at the expense of providing a notice that will effectively and simply convey the relevant information.

INTRODUCTION

Congress enacted COBRA to ensure that participants in a health plan who lose coverage because of a qualifying event—like the end of an employment relationship—have a chance to continue that coverage. *See Branch v. G. Bernd Co.*, 955 F.2d 1574, 1580 (11th Cir. 1992). To protect the opportunity to exercise this right, COBRA requires notice to any participant who has the right to continue coverage after a qualifying event. *See* 29 U.S.C. § 1166(a). These notices must be written so that the plan participant can make an "informed decision" about continuation coverage. *Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223, 1230 (11th Cir. 2002). But COBRA continuation coverage notices are also subject to a complicated regime of regulations. These regulations spell out detailed requirements for the contents of a notice. *See* 29 C.F.R. § 2590.606-4.

This case is part of a wave of recent cases seeking class damages based on alleged technical failures to comply with the regulations governing continuation coverage notices. To establish standing, these cases rely on allegations of harm like the one here—allegations that the plaintiff lost coverage as a result of the notice deficiencies, but without explaining why or how that could have happened. *See* First Amended Complaint ¶ 48, ECF No. 18. These cases complain that the notices named a third-party administrator—an expert hired to provide assistance with COBRA benefits—as the entity employees should contact with questions. *See id.* ¶¶ 22–32. With no clear

explanation of how the notices caused them a pecuniary loss, these cases instead seek damages based on COBRA's unique system of statutory penalties for notice errors. *See id.* ¶ 48.

These cases undermine the purposes of COBRA. Facing the prospect of significant statutory penalties, an employer runs a substantial risk in class litigation over alleged technical defects in notice documents, including, as in this case, directing questions about continuation coverage to an expert third-party administrator who in fact may have *more* knowledge about the subject matter and be in a better position to help employees. Imposing liability for that kind of alleged "defect" is not merely unjust – it would encourage employers to amend their notices to avoid potential liability, even if it reduces or obscures the relevant information employees need to decide about continuation coverage. That cannot be consistent with the law's purpose or the result Congress intended.

These cases also invite the courts to act based on an inadequate showing to invoke the jurisdiction of the federal courts. Rather than relying on allegations of harm that are unsupported—and cannot be supported—by any specific factual allegations, a court should demand a more specific showing before proceeding to the merits of the case even if the allegations may survive a motion to dismiss. Such a showing generally cannot be made.

ARGUMENT

I. BOTH EMPLOYERS AND EMPLOYEES BENEFIT FROM THE SERVICES OF THIRD-PARTY ADMINISTRATORS.

COBRA creates a complex scheme of duties owed to employees. These duties include providing notices to employees and former employees, reinstating insurance coverage for eligible employees, collecting premiums, and maintaining records. *See* Meharry and Jancar, *COBRA Outsourcing: What You Need to Know*, 26 Journal of Compensation and Benefits 5 (2010). While these tasks sound straightforward, the notice obligations of COBRA alone demand substantial

expertise and resources. *See id*. The regulations implementing COBRA require several different kinds of notices. 29 C.F.R. § 2590.606-4. The regulations require a notice of the right to elect continuation coverage, 29 C.F.R. § 2590.606-4(b), notice of unavailability of continuation coverage, 29 C.F.R. 2590.606-4(c), and notice of termination of continuation coverage, 29 C.F.R. § 2590.606-4(d). Each of these notices has a different triggering event, a different deadline, and different substantive requirements. *See* 29 C.F.R. § 2590.606-4(b)–(d).

Because of this complicated regime, many employers opt to have a third-party administer its COBRA program. A third-party administrator can bring expertise on COBRA compliance. *See* Glass, *COBRA Tasks: Should They Stay or Should They Go?*, 24 Mandated Health Benefits – The COBRA Guide Newsletter 12 (2011). Third-party administrators have knowledge about COBRA requirements and experience applying those requirements to individual cases. See *id.* Many third-party administrators also use state-of-the art information technology to maintain systems to ensure COBRA compliance. *See* Hirschman, *Sending COBRA Off to the Experts*, Human Resources Magazine (2006) (available at https://www.shrm.org/hr-today/news/hr-magazine/pages/0306srhirschman.aspx) (visited June 11, 2020). And importantly, third-party administrators develop systems to ensure quality customer service. *See id*.

Both employers and employees benefit when a third-party administrator implements a COBRA program. For employers, the expertise brought by third-party administrators often results in more efficient and reliable COBRA compliance, resulting in cost savings. *See* Meharry and Jancar, *COBRA Outsourcing: What You Need to Know*. For employees, the expertise and systems maintained by third-party administrators often lead to improved customer service. Third-party administrators ordinarily maintain call centers with employees trained to efficiently and accurately resolve any issues raised by an employee. *See* Glass, *COBRA Tasks: Should They Stay or Should*

They Go. Because of the expertise of third-party administrators, these call centers can often provide accurate responses to plan participants more efficiently than an employer could.

The reasons for using a third-party administrator have special force in the retail industry. Third-party administrators "can be especially useful for companies with high turnover." *See* Hirschman, *Sending COBRA Off to the Experts*. An employer must provide a notice to each former employee who participated in a health plan. *Id*. So third-party administration is most important to "retailers and others with many part time employees." *Id*.

Third-party administrators are also particularly important in times of economic difficulty, like the current COVID-19 pandemic, where major employers have had to furlough or lay-off employees. This kind of economic disaster will require a massive increase in the number of notices sent, not to mention other COBRA compliance activities. Employees will need prompt and informative notices to allow them to make knowledgeable decisions about their benefits during a difficult time. Third-party administrators exist to efficiently respond to this need. Their expertise on COBRA and established systems for ensuring timely and fulsome notice equip them to provide the information that employees need.

But suits like this one seek to impose liability for directing questions about continuation coverage to third-party administrators. The notice in this case directed any questions about COBRA continuation coverage to CONEXIS, a third-party administrator. *See* First Amended Complaint, Exhibit B at 2, ECF No. 18-2. Requiring additional information would not add anything to that notice, but it could cause confusion about how to seek help with continuation coverage. This would undermine the purpose of COBRA's notice requirements.

II. ABUSIVE LITIGATION ABOUT NOTICE REQUIREMENTS UNDERMINES THE PURPOSE OF COBRA.

"Congress' broad purpose in enacting COBRA was to 'provide continued access to affordable private health insurance.'" *Branch*, 955 F.2d at 1580 (quoting H.R. Rep. No. 241, Part 1, 99th Cong. 2d Sess. 44). COBRA accomplishes this purpose by providing "beneficiaries who would otherwise lose health coverage as a result of a qualifying event" with an "opportunity to continue that coverage." *Id*. at 1581. Specifically, an "employer's health plan must allow its beneficiaries at least 60 days" to choose to continue coverage "after notice" of that right. *Id*.

COBRA continuation coverage notices advance this purpose because "employees are not expected to know instinctively of their right to continue their healthcare coverage." *DeBene v. BayCare Health Sys., Inc.*, 688 F. App'x 831, 839 (11th Cir. 2017). So a COBRA "notice must be sufficient to permit the discharged employee to make an informed decision whether to elect coverage." *Scott*, 295 F.3d at 1230. And it must "be written in a manner calculated to be understood by the average plan participant." 29 C.F.R. § 2590.606-4(b)(4).

COBRA notices, however, are subject to a complex web of requirements. COBRA itself provides only that eligible plan participants must receive "written notice . . . of the right[]" to opt for continuation coverage. 29 U.S.C. § 1166(a)(1). Beyond that, "regulations prescribed by the Secretary" of Labor govern the contents of a continuation coverage notice. *Id*. § 1166(a). Those regulations provide a detailed list of information that a notice "shall contain." 29 C.F.R. § 2590.606-4(b)(4). Among the 24 listed requirements, a continuation coverage notice must include "[a]n explanation of the consequences of failing to elect or waiving continuation coverage," *id*. § 2590.606-4(b)(4)(vi), "[a]n explanation of the circumstances (if any) under which the maximum period of continuation coverage may be extended," *id*. § 2590.606-4(b)(4)(ix), and "[a] description of . . . the consequences of delayed payment and nonpayment," *id*. § 2590.606-4(b)(4)(xii). The

list of required information also includes "the name, address and telephone number of the party responsible under the plan for the administration of continuation coverage benefits." *Id.* § 2590.606-4(b)(4)(i).

Recently, a proliferation of litigation has seized on these detailed requirements. In the past three months alone, dozens of these lawsuits have been filed. *See* Wille, *Starbucks Sued Over Health Coverage Notices Sent to Ex-Employees*, Bloomberg Law, Benefits & Executive Compensation News (June 9, 2020) (available at https://news.bloomberglaw.com/employee-benefits/starbucks-sued-over-health-coverage-notices-sent-to-ex-employees) (visited June 11, 2020). Many of these cases have been brought in federal courts in Florida. *See* Mardy and McConnell, *Florida Class Actions Show Why Correct COBRA Notices Matter*, Law 360 (Oct. 21, 2019) (available at https://www.law360.com/articles/1209584/fla-class-actions-show-why-correct-cobra-notices-matter) (visited June 11, 2020).

While the details vary, these cases share several common features. To begin, each of these cases seeks to recover for alleged technical deficiencies. Each case also seeks to recover not only for an individual plaintiff, but on behalf of a large class of participants who received similar continuation coverage notices. To obtain damages, these suits rely on COBRA's unique system of statutory penalties. An administrator who fails to comply with the requirements for a continuation notice is subject, at the discretion of the court, to a $110 penalty per participant for each day that a proper notice has not been sent—roughly $40,000 per year per terminated employee. 29 U.S.C. § 1132(c).

Despite the technical nature of the deficiencies alleged, the staggering amounts of statutory damages potentially available in these cases can place substantial pressure to settle on defendants. As the Supreme Court has explained, a defendant may be "pressured into settling questionable

claims" by "even a small chance of a devastating loss." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

So it is unsurprising that several of these cases have resulted in large settlements, with only a small amount of the settlement amount going to class members. For example, in *Hicks v. Lockheed Martin Corporation*, the parties agreed to settle class claims for $1.25 million. *See* Joint Motion for Final Approval of Class Settlement, *Hicks v. Lockheed Martin Corp.*, No. 8:19-cv-261, ECF No. 37 at 8 (M.D. Fla. Nov. 26, 2019). The settlement provided for a payment of "approximately $14.00" to each of the 54,000 class members. *See id*. at 9. Meanwhile, class counsel received one-third of the fund in fees and additional litigation costs. *See id*. at 10; Order, *Hicks v. Lockheed Martin Corp.*, No. 8:19-cv-261, ECF No. 41 at 5 (M.D. Fla. Dec. 11, 2019).

Similarly, in another case Marriott agreed to settle class claims for $250,000. *See* Joint Motion of Approval for Final Settlement, *Vazquez v. Marriot International, Inc*., No. 8:17-cv-116, ECF No. 125 at 7 (M.D. Fla. Feb. 14, 2020). This settlement contemplated that each class member would receive a "net payment of approximately $5.00." *Id*. at 8. But class counsel received more than $100,000 in fees and costs. *See id*. at 9; Order, *Vazquez v. Marriot International, Inc.*, No. 8:17-cv-116, ECF No. 127 at 2 (M.D. Fla. Feb. 27, 2020).

Another class action settled for $390,000, with an expected payment to class members of $100. *See* Joint Motion for Final Approval of Class Settlement, *Valdivieso v. Cushman Wakefield, Inc.*, No. 8:17-cv-118, ECF No. 90 at 9 (M.D. Fla. Oct. 30, 2018). The class counsel again received one-third of the settlement fund, totaling $129,999.87. *See* Order, *Valdivieso v. Cushman Wakefield, Inc.*, No. 8:17-cv-118, ECF No. 92 at 3 (M.D. Fla. Dec. 7, 2018).

Beyond the pressure to settle, these suits might cause employers to amend their COBRA notices to try to avoid even the most technical allegation. But a COBRA notice designed to avoid

even the most technical alleged defect would make it more difficult for an employee to understand and exercise her rights, undermining the intent behind COBRA.

This case provides an example. The notice in this case states that a plan participant should direct "any questions about this notice or your rights to COBRA continuation coverage" to "CONEXIS," and provides a phone number to contact CONEXIS. *See* First Amended Complaint, Exhibit B at 2, ECF No. 18-2. CONEXIS—the third-party administrator for Wal-Mart's plan—is actually the party best positioned to assist a plan participant with a question or request.

Plaintiffs, however, object that the notice does not separately name a "plan administrator." *See* Opposition to Motion to Dismiss at 10–13, ECF No. 33. A notice that separately identified some different "plan administrator" to avoid potential liability, however, could only make it *more difficult* for an employee to understand the best way to get her questions answered. If the notice identifies anyone other than the third-party administrator, the participant may direct questions to the wrong entity.

III. COURTS SHOULD CONDUCT A SEARCHING REVIEW OF A PLAINTIFF'S EVIDENCE OF STANDING EARLY IN LITIGATION.

Plaintiffs have sought to establish standing by relying on general allegations about harm suffered as a result of the COBRA notice. To establish standing, a plaintiff must show "(1) . . . an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Injury-in-fact is the "first and foremost" of these elements. *Id*.

Plaintiff Bryant has alleged that she "suffered a tangible injury in the form of loss of insurance coverage." First Amended Complaint ¶ 48, ECF No. 18. But every ex-employee under COBRA loses insurance coverage; when they sign up for COBRA, insurance appears and is made retroactive to the employee's termination. That is what happened here when Plaintiff Bryant

joined her domestic partner's insurance plan. Defendant's Motion for Summary Judgment at 5–7, ECF No. 158. Plaintiff thus does not connect her loss of coverage to the content of the notice she received. This kind of allegation is typical of the attempts to show injury in similar litigation. *See, e.g.*, Complaint ¶ 28, *Torres v. Starbucks Coffee Co.*, No. 8:20-cv-1311, ECF No. 1 (M.D. Fla. June 8, 2020).

Standing limits the authority of a federal court to address the merits of a claim. The Eleventh Circuit has acknowledged that standing is "'perhaps the most important' jurisdictional doctrine." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005). The doctrine "stems directly from Article III's 'case or controversy' requirement." *Id*. (quoting *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1242 (11th Cir. 2003)). And it "implicates [the] subject matter jurisdiction" of a federal court. *Id*.

Since it is an important jurisdictional limit, a court should conduct a searching standing inquiry early in litigation. The Eleventh Circuit found "the principle that a court should inquire into whether it has subject matter jurisdiction," including standing, "at the earliest possible stage in the proceedings" to be "unremarkable." *Id*. at 975. Standing is a "threshold jurisdictional question" that a court must address "prior to and independent of the merits of a party's claims." *Dillard v. Baldwin Cty. Comm'rs*, 225 F.3d 1271, 1275 (11th Cir. 2000), *abrogated on other grounds by Dillard v. Chilton Cty. Comm'n*, 495 F.3d 1324 (11th Cir. 2007).

When confronted with allegations like those in this case, a court should consider standing in light of two important considerations. *First*, the plaintiff bears the burden to satisfy the standing requirements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing these elements."). *Second*, these elements are "not mere pleading requirements." *Id*. Instead, a plaintiff must show "each element . . . in the same way as any other matter on which the plaintiff bears the burden of proof." *Id*. That means the

plaintiff must produce "the manner and degree of evidence required at the successive stages of litigation." *Id*. So while "general factual allegations of injury . . . may suffice" at the motion to dismiss stage, a plaintiff cannot rest on those same "mere allegations" at the motion for summary judgment stage. *Id*. (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)).

Given these principles, a court should demand that a plaintiff make a specific and substantial showing of an actual injury at an early stage. This Court should not allow Plaintiffs to make a conclusory allegation that they were injured by losing health coverage as a result of a defective notice. Instead, it should require evidence to support a detailed explanation of how exactly Plaintiffs were injured by the allegedly deficient notice.

Applying this approach, Plaintiffs cannot establish standing at this stage. To begin, Plaintiffs allege that they have standing based only on the "informational injury" caused by not receiving a proper notice. *See* First Amended Complaint ¶¶ 46–47, ECF No. 18. But this kind of informational injury, without more, is not enough for standing. *See Spokeo*, 136 S. Ct. at 1549 (noting that certain deficiencies in a required notice may not create injury sufficient for standing). Plaintiff Bryant next asserts that she "suffered a tangible injury in the form of loss of insurance coverage due to Defendant's deficient Notice." First Amended Complaint ¶ 48, ECF No. 18. But Plaintiff Bryant provides no additional details about how the loss of coverage caused her to suffer a gap in coverage. And in fact, the record here undermines that allegation. Plaintiff Bryant has acknowledged that she did not lose coverage until April 13. *See* Motion for Summary Judgment at 5–7, ECF No. 154. Her coverage on her domestic partner's plan was backdated to April 14 after she joined that plan. *See id*. Even if Plaintiff's unsupported allegation that the notice caused her to lose coverage was enough at the motion to dismiss stage, it is no longer sufficient. *See* Order Granting in Part and Denying in Part Defendant's Motion to Dismiss at 5, ECF No. 64 (finding that allegation of loss of coverage was enough "at this stage").

Nor does it make sense that a plaintiff would suffer any harm—informational or actual—from notices like the ones in this case. A notice that gives the name and contact information of an expert third-party administrator, when that is *exactly* the best entity for the employee to call for information about COBRA or the employee's status, creates no harm.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests that the Court grant Defendant's motion for summary judgment in full.

Dated: June 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 29, 2020, I caused the foregoing document to be filed with the Clerk of this Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Sara F. Holladay-Tobias
Sara F. Holladay-Tobias

Counsel for Retail Litigation Center