EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

JAMIE BRYANT, DAWN SMITH, CURTIS BAKER, and EARNEST PENEDIANCO, on behalf of all others similarly situated, Plaintiffs, v. WALMART STORES, INC., ADMINISTRATIVE COMMITTEE OF THE WALMART STORES, INC. ASSOCIATES' HEALTH AND WELFARE PLAN, Defendants.	CIVIL ACTION NO. 16-24818-CIV-MARTINEZ-GOODMAN

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTEREST OF *AMICUS CURIAE*

The ERISA Industry Committee ("ERIC") is a national nonprofit organization exclusively representing large employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. ERIC's member companies voluntarily provide benefits, through plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), that cover millions of active and retired workers and their families across the country. With member companies that are leaders in every sector of the economy, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans and to lawfully operate under ERISA's protection from a patchwork of different and conflicting state and local laws in addition to federal law. ERIC participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit plan design or administration, and initiates litigation to protect federal ERISA preemption against state and local government mandates.

INTRODUCTION

This action presents a simple question: Must a COBRA[1] election notice provide the name and contact information of the formal plan "Administrator," a term defined by ERISA,[2] such that this omission constitutes a violation of ERISA even where the COBRA notice *does provide* the name and contact information of the entity actually responsible for administering the ERISA plan's COBRA benefits? The U.S. Department of Labor ("DOL") regulations applicable to

[1] Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"), Pub. L. 99-272, 100 Stat. 81, 222-37 (Title X of the Act codified as amended at 29 U.S.C. §§ 1161-1168).

[2] 29 U.S.C. § 1002(16)(A) ("The term 'administrator' means . . . the person specifically so designated by the terms of the instrument under which the plan is operated.").

COBRA say no.[3] In fact, the relevant provision does not refer to the "plan administrator" at all. Rather, the DOL regulations set forth a straightforward requirement: the election notice must "contain . . . the name, address and telephone number *of the party responsible under the plan for the administration of continuation coverage benefits*." 29 C.F.R. § 2590.606-4(b)(4)(i) (emphasis added). This language is clear and unambiguous. It requires the election notice to include the name of *whatever entity* is responsible for COBRA administration—be it the plan sponsor's benefits department, the plan's health insurance provider, or a third-party administrator—in order to ensure that beneficiaries know whom to contact to have their enrollment questions answered in a timely and accurate manner.

The notice requirement is grounded in the practical realities of COBRA. Congress intended COBRA to provide the unemployed temporary access to their former employer's health insurance in order to reduce the number of uninsured in the United States. To achieve that goal, Congress mandated COBRA coverage broadly to include all U.S. employers with a group health plan and more than twenty employees. *See* 29 U.S.C. § 1161(b). And because the law encompassed small and larger employers alike, Congress crafted it to recognize the significant differences in how different employers would necessarily administer COBRA benefits. For small employers, COBRA might be most efficiently administered by their own benefits department or entirely outsourced to a third-party administrator. But for large employers like Walmart and ERIC's member companies, COBRA administration nearly always requires the specialized knowledge and dedicated resources of a third party capable of handling the notice requirements and benefits administration for hundreds of thousands of former employees and their families. Based on these significant and inevitable differences, neither Congress nor the DOL made one

[3] *See* 29 C.F.R. §§ 2590.606-1 to 2590.606-4.

particular entity responsible for COBRA administration. Both COBRA and the DOL's regulations reflect this key policy decision. Rather than directing qualified beneficiaries to the "plan sponsor" or "plan administrator," the law requires the election notice to name *whatever* entity, for that specific employer, is "responsible under the plan for the administration of continuation coverage benefits"—whether a third-party administrator, the plan sponsor's own benefits center, or the formal Plan Administrator. Nowhere do the regulations, let alone the statute, require COBRA notices to provide contact information for the formal Plan Administrator as such. The Court should decline Plaintiffs' invitation to fashion a new requirement where none exists.

This issue has far-ranging consequences for employers and beneficiaries alike. COBRA requirements apply to a large and diverse set of U.S. employers. The Kaiser Family Foundation estimates that, in 2018, more than 158 million Americans—or approximately 49% of the U.S. population—were covered through employer-sponsored health insurance.[4] Over 1.3 million beneficiaries enrolled in COBRA coverage in 2018 alone.[5] Based on surveys of COBRA acceptance rates, employers are estimated to send between 4.3 million and 13 million COBRA election notices each year, mainly to terminated employees and their families.[6] Plaintiffs'

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[4] Kaiser Family Foundation, *Health Insurance Coverage of the Total Population, 2018*, https://www.kff.org/other/state-indicator/total-population/?dataView=0&currentTimeframe=0&selectedDistributions=employer&sortModel=%7B%22colId%22:%22Employer%22,%22sort%22:%22desc%22%7D.

[5] Medical Expenditure Panel Survey, Agency for Healthcare Research and Quality, U.S. Department of Health & Human Services, *2018 National totals for enrollees and cost of hospitalization and physician service health plans,* Table IV.A.1 (private sector) & Table IV.B.1 (government sector), at https://meps.ahrq.gov/data_stats/summ_tables/insr/national/series_4/2018/tiva1.htm; https://meps.ahrq.gov/data_stats/summ_tables/insr/national/series_4/2018/tivb1.htm.

[6] This estimate is based on survey data of reported COBRA acceptance rates, which found that between 10% and 27% of qualified beneficiaries enrolled in COBRA coverage. *See*

arguments thus have the potential to affect the information millions of terminated employees receive each year regarding potential COBRA benefits and significantly impair the ability of those employees to have their individual questions about COBRA answered in a timely and accurate manner. And, further, Plaintiffs' argument puts employers into an unwinnable situation: either they continue to direct qualified beneficiaries to the actual party responsible for COBRA administration—a party able to assist notice recipients with coverage and enrollment questions—and risk penalties under ERISA,[7] or employers can revise their notices to provide the address and phone number of the "Plan Administrator" when that Administrator plays *no role* in COBRA administration and will only waste valuable time and resources directing those questions back to the actual COBRA administrator, frustrating individuals and their families and wasting their time as well.

The Court now has a critical opportunity to affirm the plain meaning of this notice requirement. That decision will not only protect and assist the recipients of such election notices—those who most directly need to contact the proper COBRA administrator—but also employers like Walmart that have been repeatedly subjected to lawsuits like the present one, alleging hyper-technical deficiencies in election notices. To date, at least thirty-five employers have been subject to such class-action complaints, forcing them to engage in expensive and time-

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Congressional Research Service, *Health Insurance Continuation Coverage under COBRA*, at 10, at https://digitalcommons.ilr.cornell.edu/key_workplace/1495/. When the DOL promulgated its COBRA regulations in 2004, it estimated that there were "roughly 5 million COBRA election notices provided each year." 69 Fed. Reg. 30,094 (May 26, 2004).

[7] *See* 29 U.S.C. § 1132(c)(1) (penalties of "up to $100 a day" may be imposed for an inadequate election notice starting from the date that notice was required). Because Plaintiffs claim to represent a putative class that, for large employers like Walmart, could have tens of thousands of terminated employees, such statutory penalties could run into the billions of dollars.

consuming litigation.[8] And make no mistake: the present action is not designed to help plan participants genuinely confused about COBRA benefits and enrollment. Plaintiffs' argument would have exactly the opposite effect by directing qualified beneficiaries to an entity that is typically *not* responsible for COBRA administration and would *not* be able to provide timely and accurate information on COBRA coverage and enrollment. Adopting Plaintiffs' argument would thus hurt the very persons COBRA was designed to assist.

For these reasons, it is crucial that this Court reject Plaintiffs' interpretation and find that the DOL's regulation means exactly what it says—that the election notice must "contain . . . the name, address, and telephone number of the party responsible under the plan for the

[8] *See Slipchenko v. Brunel Energy, Inc.*, No. 11-cv-01465 (S.D. Tex. Apr. 15, 2011); *Gilbert v. SunTrust Banks*, No. 9:15-cv-80415-DLB (S.D. Fla. Apr. 1, 2015); *Delaughter v. ESA Management LLC*, No. 8:16-cv-03302 (M.D. Fla. Dec. 1, 2016); *Vazquez v. Marriott Int'l, Inc.*, No. 8:17-cv-00116 (M.D. Fla. Jan. 17, 2017); *Valdivieso v. Cushman & Wakefield Inc.*, No. 8:17-cv-00118 (M.D. Fla. Jan. 17, 2017); *Tadal v. Pavestone, LLC*, No. 8:19-cv-00053 (M.D. Fla. Jan. 8, 2019); *Hicks v. Lockheed Martin Corp.*, No. 19-CA-000266 (Fla. Cir. Ct. Jan. 9, 2019); *Riddle v. PepsiCo, Inc.*, No. 8:19-cv-00250 (M.D. Fla. Jan. 30, 2019); *Rigney v. Target Corp.*, No. 8:19-cv-01432 (M.D. Fla. June 13, 2019); *Grant v. JPMorgan Chase*, No. 8:19-cv-1808-T-02SPF (M.D. Fla. June 14, 2019); *Strickland v. United Healthcare Servs., Inc.*, No. 8:19-cv-01933 (M.D. Fla. June 26, 2019); *Conklin v. Coca Cola Beverages Fla., LLC*, No. 8:19-cv-02137 (M.D. Fla. Aug. 1, 2019); *Robles v. Lowe's Cos., Inc.*, No. 8:19-cv-02713 (M.D. Fla. Oct. 31, 2019); *Silberstein v. Petsmart, Inc.*, No. 8:19-cv-02800-SCB-AAS (M.D. Fla. Nov. 12, 2019); *Morris v. U.S. Foods Inc.*, No. 8:20-cv-00105 (M.D. Fla. Jan. 14, 2020); *Pruitt v. Best Buy Co., Inc.*, No. 8:20-cv-00110 (M.D. Fla. Jan. 15, 2020); *Eierstock v. Delta Air Lines, Inc.*, No. 8:20-cv-00269 (M.D. Fla. Feb. 4, 2020); *Roll v. Enhanced Recovery Co.*, No. 6:20-cv-212 (M.D. Fla. Feb. 7, 2020); *Taylor v. Citizens Telecom Servs. Co. LLC*, No. 8:20-cv-00509-TPB-CPT (M.D. Fla. Mar. 4, 2020); *Small v. Paypro, USA, Inc.*, No. 5:20-cv-00553 (C.D. Cal. Mar. 17, 2020); *Ousley v. Amazon Corporate, LLC*, No. 8:20-cv-00701 (M.D. Fla. Mar. 25, 2020); *Holmes v. WCA Waste Systems, Inc.*, No. 8:20-cv-00766-SCB-JSS (M.D. Fla. Apr. 1, 2020); *Smith v. Home Depot USA Inc.*, No. 8:20-cv-00850-JSM-CPT (M.D. Fla. Apr. 13, 2020); *York v. Nestle Waters N. Am., Inc.*, No. 8:20-cv-00973 (M.D. Fla. Apr. 28, 2020); *Pinazo v. Citigroup*, No. 1:20-cv-21866 (S.D. Fla. May 4, 2020); *Alexander v. Spectrum Charters, LLC*, No. 8:20-cv-01127 (M.D. Fla. May 14, 2020); *Walker v. Sysco Corp.*, No. 2:20-cv-02374 (W.D. Tenn. May 26, 2020); *Rodriguez v. Bank of Am. Corp.*, No. 8:20-cv-01272 (M.D. Fla. June 3, 2020); *Torres v. Starbucks Coffee Co.*, No. 8:20-cv-01311 (M.D. Fla. June 8, 2020); *Carter v. Southwest Airlines Co. Bd. of Trustees*, No. 8:20-cv-01381 (M.D. Fla. June 15, 2020).

administration of continuation coverage benefits," 29 C.F.R. § 2590.606-4(b)(4)(i), whether that "party" is the plan's insurance provider, a third-party administrator, or some other entity. As there is no dispute that the Walmart's election notice ("Walmart Notice") does this, the Court should grant summary judgment to Walmart.

ARGUMENT

I. THE LAW REQUIRES COBRA ELECTION NOTICES TO NAME ONLY THE "PARTY RESPONSIBLE . . . FOR ADMINISTRATION OF CONTINUATION COVERAGE BENEFITS," NOT THE FORMAL PLAN ADMINISTRATOR.

A. The Plain Language of Section 2590.606-4(b)(4)(i) Requires the COBRA Election Notice to Contain the Name and Contact Information of the Plan's COBRA Administrator.

The DOL's COBRA regulations do not require the election notice to include the name of the "Plan Administrator," as Plaintiffs claim, but only to "contain . . . the name, address, and telephone number of the party responsible under the plan for the administration of continuation coverage benefits." 29 C.F.R. § 2590.606-4(b)(4)(i). Crucially, the COBRA statute itself does not designate a specific "party" as responsible for administering COBRA benefits. *See generally* 29 U.S.C. §§ 1161-1168. And nowhere in the applicable regulations does the DOL designate a named entity as responsible for COBRA administration. *See* 29 C.F.R. §§ 2590.606-1 to 2590.606-4. Accordingly, the "party responsible" for COBRA administration could be the employer's own in-house benefits group, a third-party COBRA administrator, the plan's health insurance provider, or another entity. The DOL regulation requires only that the notice contains the name and contact information of the actual COBRA administrator. It is undisputed that Walmart's COBRA election notice satisfies this requirement by including the name, address, and

telephone number of CONEXIS, the plan's third-party COBRA administrator.[9]

The DOL's regulations were promulgated in this manner to reflect a fundamental policy decision by Congress. Congress did not designate any specific "party" legally responsible for the administration of COBRA benefits.[10] And, similarly, section 2590.606-4(b)(4)(i) itself does not purport to name, in advance, any individual entity—whether the "plan sponsor," the "plan administrator," or any other entity—as legally responsible for COBRA administration. It merely states that, *whatever entity the plan sponsor has designated as responsible for administering the plan's COBRA benefits*, the election notice must contain the name, address, and telephone number of that entity.[11] The DOL's model election notice confirms this fact. In the section of the model

[9] At the start of the action, Plaintiff alleged that it was unclear which entity administered COBRA benefits for the plan, so there was a plausible allegation that the "party responsible" for COBRA administration was not named in the Walmart Notice. *See* Dkt. 18 (First Amended Complaint) ¶ 23. But through discovery in this matter, it is now undisputed that CONEXIS, and not the "Plan Administrator" (as defined under ERISA), is, in fact, "the party responsible under the plan for the administration of continuation coverage benefits." *See* Dkt. 155-11 (Walmart Summary Plan Document) ("Walmart SPD") at 108 ("The Plan contracts with CONEXIS to administer COBRA."). Plaintiffs now admit that the Walmart Notice names "CONEXIS, Walmart's COBRA administrator." *See* Dkt. 145 (Second Amended Complaint ("SAC")) ¶ 42 ("Plaintiffs were each mailed a copy of Defendants' COBRA notice . . . by CONEXIS, Walmart's COBRA administrator."); *id*. ¶¶ 52-53 (the Walmart Notice states "the Notice is being sent from CONEXIS" and "informs employees to contact . . . CONEXIS"). Based on such undisputed facts, the Court should grant summary judgment to Walmart under Rule 56.

[10] To be sure, COBRA and its related regulations do impose specific legal obligations on specific entities related to continuation coverage benefits. *See, e.g.*, 29 U.S.C. § 1161(a) (requiring the "plan sponsor" to provide eligible qualified beneficiaries the opportunity to elect COBRA coverage within the election period); 29 C.F.R. § 2590.606-2(a) (requiring the "employer" of a covered employee to notify the plan administrator of the occurrence of a "qualifying event," such as the covered employee's death or termination of employment). But regarding the *administration* of COBRA benefits—activities like enrolling eligible beneficiaries in benefits and responding to questions from employees and beneficiaries—COBRA is silent on the specific entity responsible, thereby allowing employers to select the appropriate entity based on their individualized needs.

[11] The DOL's approach is also reflected in the guidance that it provides employees regarding COBRA health benefits. *See, e.g.*, United States Department of Labor, *An Employee's Guide to Health Benefits Under COBRA* at 6 (explaining to employees that the COBRA election notice

notice called "For more information," it states:

> If you have questions about the information in this notice, your rights to coverage, or if you want a copy of your summary plan description, contact [*enter name of party responsible for COBRA administration for the Plan, with telephone number and address*].[12]

Of course, if the DOL intended for that entity to always—as a matter of law—be the Plan Administrator, the DOL would have said so, just like it did in other regulations. *See infra* at 14. But both Congress and the DOL prudently left the selection of the COBRA administrator to the sound discretion of the plan sponsor and required only that, whatever entity is selected, its name and contact information be provided to notice recipients who need that information.

B. Section 2590.606-4(b)(4)(i) Reflects the Practical Necessity for Large Employers to Use Third-Party COBRA Administrators.

Neither COBRA nor its regulations require that any specific entity administer COBRA benefits, a policy decision founded on the practical reality—evident to both Congress and the DOL—that COBRA's reach extends to a diverse range of employers that will need to handle their particular COBRA administration in very different ways. A small business with fifty employees would naturally handle COBRA administration differently from a large corporation like Walmart, which has more than 1.5 million health plan participants.[13] And large employers like Walmart

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"should also give you the name of the plan's COBRA administrator and tell you have to get more information"), at https://www.dol.gov/sites/dolgov/files/legacy-files/ebsa/about-ebsa/our-activities/resource-center/publications/an-employees-guide-to-health-benefits-under-cobra.pdf.

[12] United States Department of Labor, *Model COBRA Continuation Coverage Election Notice* ("DOL Model Notice") at 5, https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra (select link to "Model Election Notice"). Although the model election notice is "not mandatory," "[u]se of the model notice, appropriately modified and supplemented, will be deemed to satisfy the notice content requirements." 29 C.F.R. § 2590.606-4(g).

[13] *See* the Form 5500, Wal-Mart Stores, Inc. Associates' Health and Welfare Plan ("Walmart Form 5500"), at 2 (line 6(a)(1)), *available at* https://www.efast.dol.gov/portal/app/disseminate?execution=e1s1.

nearly always rely upon third parties to administer COBRA continuation coverage.[14] Indeed, in ERIC's own membership of approximately one hundred of the nation's largest employers, it is aware of no plan sponsor that does not use a third-party COBRA administrator. Such third-party administrators are critical for large employers, in particular, not only due to the large number of employees and qualified beneficiaries affected by COBRA's requirements, but also given the regulatory complexities of COBRA and the statutorily mandated time periods imposed on plan sponsors for both general and election notification. Such third-party administrators possess the institutional capacity and specialized knowledge to ensure compliance with COBRA's intricate statutory and regulatory requirements on the scale required for the nation's largest employers.[15] Large employers, and publicly traded companies in particular, take regulatory compliance seriously. They work to ensure that vendors chosen have the expertise and capacity needed to handle the specificity of the employer's plan and respond to a potentially large number of participant inquiries in a timely way. In drafting COBRA, Congress recognized that its day-to-day administration could not be handled effectively by every plan sponsor in the same way, but would necessarily differ based on the individual circumstances of individual plan sponsors. Mandating a single, uniform COBRA administrator could render COBRA inefficient and

[14] *See* Dkt. 155-6 (Expert Report of Roberta Casper Watson ("Watson Rep.")) ¶¶ 13-14 (explaining that employers use different COBRA administrators, including the plan's insurer or a dedicated third-party administrator).

[15] For instance, the eligibility period for COBRA benefits is normally eighteen months, but can be extended to thirty-six months based on certain occurrences, such as disability. *See* 29 U.S.C. § 1162(2)(A)(ii). Furthermore, COBRA permits additional extensions based on the occurrence of a second "qualifying event." *Id*. For these reasons, COBRA administration requires familiarity with the applicable laws and regulations to ensure that qualified beneficiaries receive accurate information in a timely manner and that continuation coverage complies with these requirements. For large employers with thousands of terminated employees who are annually eligible for COBRA coverage, a third-party COBRA administrator may be the only, and certainly most efficient, means of ensuring such issues are handled properly.

unwieldy, ultimately harming the very beneficiaries it was designed to help.

In fact, the DOL explicitly recognized the role of third-party COBRA administrators when promulgating its rules related to COBRA. For instance, in discussing the effects of its proposed COBRA rules, the DOL noted that COBRA's potential administrative costs would be reduced by plans' use of a relatively small group of third-party COBRA administrators:

> Economies of scale also tend to moderate COBRA administrative costs because the majority of notice obligations are met through the purchase of COBRA administrative services from a number of providers that is small relative to the number of group health plans they serve.

68 Fed. Reg. 31,837 (May 28, 2003). In its final rule-making, the DOL similarly noted the important role third-party administrators were expected to play for small plans in particular:

> The Department believes that, because of the expertise required, small plans will use COBRA administrators to review notices and to modify or adapt the Department's model notices for use by the plan administrator. Generally, COBRA administrators offer plans ongoing administrative services, such as notifying employees about their group health plan continuation coverage, distributing and processing election forms, collecting and applying premium payments, and monitoring COBRA compliance. Small plans, in particular, are less likely to have in-house capabilities to handle these administrative tasks.

69 Fed. Reg. 30,095-30,096 (May 26, 2004). The DOL here also recognizes the different role played by the formal "plan administrator" in contrast to the "COBRA administrator" who is actually tasked with "notifying employees" and "distributing and processing election forms." *Id*. Later in the same discussion, the DOL notes that the financial impact of its proposed COBRA regulations would be reduced because a discrete group of approximately "3,000 entities that perform COBRA administration for the majority of all plans" would need to "review . . . their notices and procedures in response to this regulatory guidance," rather than requiring each plan sponsor to separately undertake such action. *See id*. at 30,094 (May 26, 2004). As these and

other passages show,[16] the DOL explicitly recognized that COBRA administration was being carried out by a number of entities (such as in-house benefits personnel, third-party administrators, and others), and that third-party administrators, in particular, played a critical role for small and large plans alike.

Section 2590.606-4(b)(4)(i) was written with this practical reality in mind. The DOL drafted it to ensure qualified COBRA beneficiaries received critical contact information for the plan's COBRA administrator—whatever "party" that might actually be for that plan—putting beneficiaries directly in touch with the entity best able to provide timely and accurate information on continuation coverage.[17] To adopt Plaintiffs' argument that the notice should always name the "plan administrator" (regardless of who actually administers COBRA) would be to ignore the intentions of Congress and the DOL, as well as the practical necessities COBRA reflects.

C. The Court Should Reject Plaintiffs' Argument That the COBRA Election Notice Must Name the "Plan Administrator" Regardless of Whether It Is the "Party Responsible" for COBRA Administration.

1. The DOL Regulations Do Not Require the Election Notice to Name the "Plan Administrator" Unless It Is the "Party Responsible" for COBRA Administration.

Ignoring the language of the actual regulations, Plaintiffs assert that section 2590.606-4(b)(4)(i) requires Walmart to identify the "Plan Administrator" in its election notice (regardless

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[16] *See also* 68 Fed. Reg. 31,840 (May 28, 2003) ("For the purpose of determining the number of service providers involved in preparing and distributing the 1% of COBRA notices that may require revision, the Department took into consideration the fact that service providers are known to use standardized forms, and *that a small number of service providers are known to provide COBRA administration to a very large number of plans*.") (emphasis added).

[17] As the DOL noted when promulgating proposed rules related to COBRA: "The provision of timely and adequate notifications regarding COBRA rights, the occurrence of qualifying events, and election rights is critical to the effective exercise of COBRA rights." 68 Fed. Reg. 31,833 (May 28, 2003).

of whether it is the COBRA administrator or not) and include the Plan Administrator's name, address, and telephone number. *See* SAC ¶¶ 42-53. This is wrong. As discussed above, there is nothing in COBRA or its regulations that requires the formal "Plan Administrator" to be the "party responsible under the plan for administration of continuation coverage benefits." *See* Section I.A, *supra*.[18]

On a more fundamental level, Plaintiffs' argument is premised on a faulty understanding of large employer health plans and the key roles played by third-party administrators. Plaintiffs presume that the "Plan Administrator" is the only relevant "administrator" for qualified benefit plans (leading to the faulty assumption that, although the regulation never refers to the "plan administrator" at all, if this is the *only* administrator for the plan, it must be the relevant "party" under the regulations). *See* SAC ¶¶ 59-61. But this is wrong. Efficient administration of large employer health plans requires the extensive use of different outsourced service providers, working in collaboration with those employers' internal benefits departments. Walmart's health

[18] In the Second Amended Complaint, Plaintiffs suggest that section 2590.606-4(b)(4)(i) imposes an additional requirement as well: not only that the election notice include the name of "Plan Administrator," but that it also affirmatively *explain* that this entity *is* the "Plan Administrator." *See, e.g.*, SAC ¶¶ 43-44 (alleging Walmart's Notice "does not identify the party responsible for administering continuation coverage" and that Plaintiffs could not "ascertain" the name of the party responsible for administering continuation coverage). There is no legal basis for this additional requirement. Section 2590.606-4(b)(4) requires only that "[t]he notice . . . shall contain . . . the name, address and telephone number of the party responsible under the plan for the administration of continuation coverage benefits." It does not require any further information or explanation. This is confirmed by the DOL's model election notice, which does not include any affirmative identification of the COBRA administrator or explanation regarding who the COBRA administrator is. Rather, the model notice satisfies section 2590.606-4(b)(4)(i) with the statement: "If you have questions about the information in this notice, your rights to coverage, or if you want a copy of your summary plan description, contact [*enter name of party responsible for COBRA administration for the Plan, with telephone number and address*]." *See* DOL Model Notice at 6. Contrary to Plaintiffs' claims, the DOL's model notice does not contain language like "the COBRA administrator is . . ." or "the plan administrator is . . ." because there is no such requirement in the DOL regulations. Walmart's election notice "contains . . . the name, address, and telephone number" of the plan's COBRA administrator. Nothing more is required.

plan, for instance, has over 1.5 million participants,[19] and its Summary Plan Description identities four different third-party administrators for its medical plan that participants deal with directly in connection with their medical benefits: Aetna, BlueAdvantage Administrators of Arkansas, HealthSCOPE Benefits, and UnitedHealthcare. *See* Walmart SPD at 40. Walmart and other large employers also typically rely upon additional third-party administrators to perform other types of plan administration, including processing medical and prescription drug claims, reviewing medical bills, and reviewing appeals for denied benefit claims.[20] The prominence of these third-party administrators has been recognized by courts, which are frequently asked to preside over actions involving third-party plan administrators, testifying to the many critical roles they play in plan administration.[21] And undisputed evidence from this action shows that CONEXIS is, in fact, the third-party COBRA administrator for the plan.[22] For all of these reasons, Plaintiffs are simply

[19] *See* Walmart Form 5500 at 2.

[20] In fact, Plaintiffs acknowledge that ERISA plans frequently rely on other administrators to help manage benefits, including claims administrators. *See* SAC ¶¶ 59-60 (discussing "claims administrators" used by ERISA health plans to process participant medical benefit claims).

[21] *See, e.g., IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1416-18, 1421 (9th Cir. 1997) (reversing dismissal of claims against the health plan's third-party administrator because the administrator was plausibly alleged to function as an ERISA fiduciary based on its discretionary authority to "process claims, and pay or deny them," including its ability to decide whether "contested or doubtful claims or benefits amounts" should be referred to the plan for further evaluation, as well as the administrator's direct control over "money in the plan's bank account"); *Technibilt Grp. Ins. Plan & Technibilt Ltd. v. Blue Cross & Blue Shield of N.C.*, No. 5:19-cv-00079-KDB-DCK, 2020 WL 534951, at *5 (W.D.N.C. Feb. 2, 2020) (denying third-party health insurance administrator's motion to dismiss claims that it breached its fiduciary duty by failing to timely pay participant medical expenses, noting plaintiffs plausibly alleged the third-party administrator "controlled if and when claims were made to Plan participants" and "had discretion when to invoice [the plan sponsor] to fund the account and ultimately pay out the claims").

[22] *See* Walmart SPD at 108 ("The Plan contracts with CONEXIS to administer COBRA."); SAC ¶ 42 (stating "CONEXIS" is "Walmart's COBRA administrator").

wrong to presume that the "party responsible . . . for administration of continuation coverage benefits" has to be the "plan administrator." It does not, and it is not.

Further, the DOL would have referred explicitly to the "plan administrator" in section 2590.606-4(b)(4)(i) if it meant to require the Plan Administrator's name and contact information be included in the notice. In the regulations for COBRA, the DOL repeatedly refers to the "administrator" to prescribe specific legal obligations for that entity. For instance, section 2590.606-1(a) requires "the administrator of a group health plan" to provide the general notice of continuation coverage to covered employees. Moreover, section 2590.606-4—entitled "Notice Requirements for Plan Administrators"— refers to the "administrator" or "plan administrator" more than sixteen times in setting forth election notice requirements.[23] Thus, the DOL clearly and consistently uses the term "administrator" throughout the COBRA regulations when it intended to refer to that defined entity.

In contrast, section 2590.606-4(b)(4)(i) does not use the term "administrator" or "plan administrator" at all. Rather, by expressly referring to the "party responsible . . . for the administration of continuation coverage benefits," the DOL carefully crafted this provision to refer to the plan's COBRA administrator *whoever that administrator might be*. Plaintiffs have no response to these arguments. Instead, in prior briefing, Plaintiffs have studiously avoided the language of section 2590.606-4(b)(4)(i), as well as the fact that "administrator" is never used in this provision but is used consistently in other sections of COBRA and the DOL regulations. Nor do Plaintiffs engage with the underlying policy concerns this language reflects regarding COBRA

[23] *See, e.g.*, 29 C.F.R. § 2590.606-4(a) (requiring "the administrator" of a group health plan subject to COBRA requirements to provide an election notice to qualified beneficiaries); *id*. § 2590.606-4(b)(1), (2) (requiring "the administrator of the plan" to furnish an election notice within a prescribed time period).

administration. Plaintiffs have offered no grounds, nor any reasoning, on which to interpret section 2590.606-4(b)(4)(i) as requiring the name of the "plan administrator" when it is not the plan's actual COBRA administrator. Plaintiffs have, instead, consistently *presumed* that this provision refers to the "plan administrator" and then tried to reframe the argument around whether or not it appears in the Walmart's notice.[24] Plaintiffs' argument and its false premise should be rejected.

2. Adopting Plaintiffs' Proposed Interpretation of Section 2590.606-4(b)(4)(i) Would Lead to Harmful and Absurd Consequences.

Finally, adopting Plaintiffs' proposed interpretation of section 2590.606-4(b)(4)(i) would have a number of direct negative consequences upon the plan sponsors and beneficiaries COBRA was designed to help. Such results illustrate the absurdity of Plaintiffs' arguments.

Significantly, requiring the election notice to always name the "plan administrator" (regardless of who actually administers COBRA benefits) will harm qualified beneficiaries needing information about their COBRA rights and the enrollment process, which are the reasons for the notice in the first place.[25] Notice recipients can be expected to have questions related to COBRA coverage and enrollment, including the types of continuation coverage

[24] For instance, Plaintiffs' opposition to Walmart's Motion to Dismiss cites the relevant regulatory language and then states, without any reference to or interpretation of that language: "Defendant never bothers disputing that the Plan Administrator is not identified in its election notice." Dkt. 33 at 10. Plaintiffs ignore the fact that section 2590.606-4(b)(4)(i) makes *no reference* to the "Plan Administrator" and does not require the "Plan Administrator" to be named in the election notice (unless it is also the "party responsible" for COBRA administration). *See also* SAC ¶¶ 45-47 (quoting section 2590.606-4(b)(4)(i) and then asserting, without analysis or interpretation, that Walmart's failure to identify "the Plan Administrator" violates the requirement).

[25] Such a result would directly undermine the purpose behind COBRA's notice provision, as the DOL explained in promulgating its proposed rules: "The provision of timely and adequate notifications regarding COBRA rights, the occurrence of qualifying events, and election rights is critical to the effective exercise of COBRA rights." 68 Fed. Reg. 31,833 (May 28, 2003).

benefits available, who is covered by those benefits, how long coverage will last, the cost of coverage, the deadline to elect coverage, and how to arrange for payment and enrollment. The notice under Plaintiffs' construct would direct those beneficiaries to an "administrator" with little or no knowledge of COBRA administration that would then have to forward those questions to the actual COBRA administrator, creating the potential for confusion, delay, and miscommunication.[26] Such absurd results cannot be what Congress or the DOL intended.

Moreover, Plaintiffs' interpretation would—if adopted by this Court—potentially expose large employers like Walmart to further lawsuits of alleged COBRA violations. In the present action, it is undisputed that the "party responsible" for the plan's COBRA administration is CONEXIS. *See* SAC ¶ 42. It is also undisputed that Walmart's health plan "Administrator" is *not* responsible for COBRA administration. *See* Dkt. 155-10 (Administrative Services Agreement) at 2 (Administrative Committee has retained Conexis "for the purpose of administering its health care continuation coverage"). Given these facts, if Walmart's COBRA election notice identified the plan's Administrative Committee as the "plan administrator" in an effort to satisfy section 2590.606-4(b)(4)(i), a different plaintiff could turn around and sue Walmart for violating this very same provision. And the evidence would prove them right: Walmart would *not* satisfy section 2590.606-4(b)(4)(i) by including the name of the Administrative Committee in the election notice because the Administrative Committee is *not* "responsible . . . for administration of continuation coverage benefits." If Walmart amended its election to name both entities—the Administrative Committee and CONEXIS—the notice would

[26] *See* Watson Rep. ¶ 16 (explaining that if beneficiaries are directed to the Plan Administrator with COBRA questions, the benefits staff assisting the Plan Administrator will usually be forced to refer questions back to the COBRA administrator, "adding an extra, wasteful, and time-consuming step to the process").

risk confusing qualified beneficiaries about the appropriate entity to contact with questions on COBRA benefits. And, in any case, it makes no sense to read section 2590.606-4(b)(4)(i) as requiring multiple entities to be included in the notice. Plaintiffs' argument leads to a true "Catch-22" where large plan sponsors like Walmart can be sued whether they identify the Plan Administrator or not.

Accordingly, this Court should reject that Plaintiffs' argument and the illogical, harmful consequences it would create.

II. LIKE THE NOTICES PROVIDED BY OTHER LARGE EMPLOYERS, WALMART'S NOTICE SATISFIES THE DOL REGULATIONS BY PROVIDING THE NAME AND CONTACT INFORMATION OF THE PLAN'S COBRA ADMINISTRATOR.

The Walmart Notice is typical of the COBRA election notices offered by many large employers. It provides qualified beneficiaries with nine pages of detailed information regarding their individual COBRA rights, including the name, address, and telephone number of Walmart's third-party COBRA administrator, so they know whom to call if they have questions about their COBRA elections. The Walmart Notice satisfies the requirements of section 2590.606-4(b)(4)(i).

The facts are not in dispute. First, CONEXIS is the plan's COBRA administrator. The Summary Plan Description for Walmart's group health plan (which also acts as the operative plan document) explicitly identifies CONEXIS as the plan's COBRA administrator.[27] And Plaintiffs now admit this fact in the Second Amended Complaint. *See* SAC ¶ 42 (stating "CONEXIS" is "Walmart's COBRA administrator").

[27] Specifically, under the heading "COBRA," the Summary Plan Description states: "The Plan contracts with CONEXIS to administer COBRA." *See* Walmart SPD at 108. The Summary Plan Description then urges participants to "[c]ontact CONEXIS for questions regarding [COBRA] eligibility, enrollment, premiums and notification of a second qualifying event" by calling CONEXIS or going online to mybenefits.conexis.com. *Id*.

Second, the Walmart Notice names CONEXIS repeatedly, urging recipients to call CONEXIS with their COBRA questions and providing CONEXIS's address and telephone number. The second page of the Notice states:

> If you have questions about this notice or your rights to COBRA continuation coverage, you should contact CONEXIS at (800) 570-1863, or refer to the COBRA section of your Associate Benefits Book.

Dkt. 145-2 (Walmart Notice, Exhibit B to SAC ("Ex. B")) at 3. Under the heading "For More Information," it further explains:

> If you have any questions concerning the information in this notice or your rights to coverage, you should contact CONEXIS at (800) 570-1863.

Id. at 10. And under the heading "How to Contact CONEXIS," the Notice provides the address and telephone number of CONEXIS:

> All required notices should be sent to CONEXIS at P.O. Box 226101 Dallas, TX 75222 or by fax to (877) 353-2948. You may also call (800) 570-1863.

Id.[28] In fact, it is impossible to read the Walmart Notice without seeing the thirty-three references to CONEXIS. *See id*. at 2-3, 6-9. The Walmart Notice thus clearly "contains . . . the name, address, and telephone number of the party responsible under the plan for administration of continuation coverage benefits." 29 U.S.C. § 2590.606-4(b)(4)(i).[29] Plaintiffs admit these facts. They state in the Second Amended Complaint that "CONEXIS" is "Walmart's COBRA administrator," SAC ¶ 42, and that the Walmart Notice names CONEXIS and directs recipients

[28] The notice here refers to "required notices" because qualified beneficiaries who enroll in COBRA coverage can extend that coverage for an additional period if they are disabled or there is a second qualifying event provided they provide adequate notice to the COBRA administrator. *See* Ex. B at 6.

[29] The first page shows the Notice was sent by CONEXIS. Ex. B at 2. The Notice directs recipients to enroll online at mybenefits.conexis.com and provides the telephone number for CONEXIS three times. *See id*. at 3, 10.

"to contact . . . CONEXIS" with questions, *id.* ¶ 53. The Walmart Notice thus clearly satisfies the requirements of section 2590.606-4(b)(4)(i).

The importance of this issue extends beyond Walmart's own Notice, for the vast majority of large employers use similar language in their election notices to direct qualified beneficiaries to third-party COBRA administrators.[30] This fact has, of course, been seized upon by Plaintiffs' counsel (as well as others) to file more than thirty-five lawsuits, mainly in Florida federal courts, that allege technical violations of election notice requirements, including a failure to name the "Plan Administrator" in the election notice. Yet these notices—like the Walmart Notice discussed above—contain the name and contact information of the plan's COBRA administrator.[31] Imposing these litigation costs, risks, and burdens on ERISA plans and their sponsors does not provide additional meaningful information to plan participants, but does discourage employers from offering employee benefits in the first place; that is not what

[30] As Roberta Casper Watson explains in her expert report, these third-party administrators sometimes administer COBRA benefits in their own names (i.e., the election notice refers to the administrator by name, such as "CONEXIS"), while other times the employers have these third-party administrators handle administration in the employer's name (i.e., the election notice refers to the employer's benefits center, such as "my HR Benefits") in order to provide employees with a streamlined way of accessing employer benefits. *See* Watson Rep. ¶ 14. Whatever name is used to refer to the COBRA administrator—the employer's benefits center or the administrator's own name—section 2590.606-4(b)(4)(i) is satisfied so long as the notice contains the name and contact information of the COBRA administrator.

[31] *See, e.g.*, *Hicks v. Lockheed Martin Corp.*, No. 8:19-cv-00261, ECF No. 1-1 at 21 (Exhibit A to Class Action Complaint) (M.D. Fla. Jan. 31, 2019) (directing notice recipients to "contact CONEXIS at 800-482-4105" with "any questions about this notice" or for "further information about your rights to elect COBRA coverage"); *Silberstein v. Petsmart, Inc.*, No. 8:19-cv-02800, ECF No. 1-1 at 3 (Exhibit A to Class Action Complaint) (M.D. Fla. Nov. 12, 2019) (directing notice recipients to "contact WageWorks at 1-877-722-2667" with "any questions about this notice" or for "further information about your rights to elect COBRA coverage"); *Vazquez v. Marriott Int'l, Inc.*, No. 8:17-CV-116, ECF No. 68-2 at 16 (Exhibit B to Plaintiff's Motion to Strike) (M.D. Fla. Oct. 26, 2018) (directing notice recipients to "contact myHR Service Center at 1-888-88-4myHR" with "any questions concerning the information in this notice or your rights to coverage").

Congress intended. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010) ("ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans. Congress sought to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.") (internal citations and quotations omitted).

CONCLUSION

For the above reasons, the Court should hold that section 2590.606-4(b)(4)(i) requires the COBRA election notice to "contain . . . the name, address, and telephone number" of whatever entity is "the party responsible under the plan for the administration of continuation coverage benefits." Because there is no dispute that the Walmart Notice contains this information for its COBRA administrator, CONEXIS, the Court should grant summary judgement to Walmart.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 29, 2020, I electronically filed the foregoing document through the electronic filing system, which in turn will serve it via electronic mail on all counsel of record.

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