

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN**

TIARA YACHTS, INC.,

Case No. 22-cv-00603

Plaintiff,

Honorable Robert J. Jonker
Magistrate Judge Ray Kent

v.

BLUE CROSS BLUE SHIELD OF
MICHIGAN,

Defendant.

JOINT STATUS REPORT

A Rule 16 Scheduling Conference is scheduled for September 21, 2022, at 3:00 p.m., before the Hon. Robert J. Jonker. Appearing for the parties as counsel will be: Perrin Rynders, Aaron Phelps, and Chloe Cunningham for Tiara Yachts, Inc. (“Tiara Yachts”) and Sarah L. Cylkowski and Samantha Van Sumeren for Blue Cross Blue Shield of Michigan (“BCBSM”).

1. **Jurisdiction**: The basis for the Court’s jurisdiction is federal question of ERISA law pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). Neither subject matter jurisdiction nor personal jurisdiction is contested. The case does not include any pendent state law claims.

2. **Jury/Bench Trial**: This case is to be tried before the Court as trier of law and fact.

3. **Judicial Availability:** The parties do not agree to have a United States Magistrate Judge conduct any and all further proceedings in the case, including trial, and to order the entry of final judgment.

4. **Statement of the Case:**

Plaintiff's Position: This case addresses a dispute between a self-funded plan sponsor on behalf of its ERISA welfare benefit plan (the Plaintiff) and the third-party claims administrator for that plan (the Defendant). Tiara Yachts alleges that Blue Cross Blue Shield of Michigan (BCBSM) overpays healthcare claims due to various flaws in the latter's claims administration system, including but not limited to an intentional programming process known internally at BCBSM as "flip logic." BCBSM itself described "flip logic" as allowing providers to bill highly inflated amounts without any scrutiny by BCBSM. Other flaws in BCBSM's claims administration system repeatedly allowed for such errors as duplicate payments, improper unbundling of medical services, upcoding, payment of uncovered claims, and violation of payment guidelines. These intentional and negligent flaws in BCBSM's system resulted in BCBSM using plan assets to pay excessive claims contrary to the requirements of the governing ERISA plan. BCBSM is a fiduciary with an obligation to preserve plan assets; it did the opposite by squandering plan assets. BCBSM concealed its system flaws from Tiara Yachts and its welfare benefit plan.

In recent years, BCBSM compounded its breaches of fiduciary duty by instituting a Shared Savings Plan that forced self-funded customers to pay a fee to BCBSM for avoiding fraudulent or otherwise improper claims, all of which should have been rejected as part of BCBSM's normal claims administration responsibilities. In other words, BCBSM devised and implemented a scheme that allowed it to profit from its own mismanagement of ERISA plan assets. This violated ERISA's self-dealing prohibition.

Defendant's Position: BCBSM disputes that it breached its fiduciary duties under ERISA in any way. As set forth in BCBSM's pending Motion to Dismiss, ECF Nos. 11 and 12, Tiara Yachts' Complaint is nothing more than a belated challenge to the thousands of healthcare claims that BCBSM processed for more than a decade for the participants in Tiara Yachts' health benefit plan. Tiara Yachts and BCBSM signed a series of Administrative Services Contracts (ASCs) to govern the services that BCBSM would provide in processing those claims, which included the ability of BCBSM to process claims according to flip logic. The "fraudulent" and "concealed" "schemes" that Tiara Yachts complains of are all actions provided for in the contractual agreements between the parties. The ASCs also set forth specific mechanisms by which Tiara Yachts could challenge BCBSM's processing of the claims, which Tiara Yachts never took advantage of. As a result, the time for Tiara Yachts to dispute the processed claims has lapsed, and BCBSM has no duty to review decades-old claims that have long since been adjudicated and paid. Tiara

Yachts is not entitled to any relief under ERISA because these claims were paid according to contract terms, and there is no cognizable claim of breach of fiduciary duty.

BCBSM also disputes that Tiara Yachts has pleaded a cognizable claim regarding the Shared Savings Program. The Shared Savings Program is a voluntary contractual agreement between the parties, under which BCBSM has no ERISA fiduciary duty to Tiara Yachts. ERISA allows contractually-agreed upon service arrangements between providers that allow a provider to charge a fee for those services. Tiara Yachts had notice of the Shared Savings Program and voluntarily agreed to its terms. Any fees which BCBSM retained for its service are not considered fraudulent under ERISA.

5. **Joinder of Parties and Amendment of Pleadings**: The parties expect to file all motions for joinder of parties to this action and to file all motions to amend the pleadings within thirty (30) days after a ruling on BCBSM's Motion to Dismiss, ECF Nos. 11 and 12, or when permitted under the Federal Rules of Civil Procedure, whichever is later.

6. **Disclosures and Exchanges**: Subject to the Court's approval, the parties believe it would be most efficient to defer Rule 26(a) disclosure deadlines until we have resolution on BCBSM's pending Motion to Dismiss, ECF Nos. 11 and 12, which will be fully briefed by October 6, 2022. For that reason, the proposed

disclosure deadlines set forth below are triggered by the Court's resolution of the Motion to Dismiss.

i. Fed.R.Civ.P. 26(a)(1) Disclosures:

The parties propose Rule 26(a)(1) disclosures be exchanged fourteen (14) days after a ruling on BCBSM's Motion to Dismiss.

ii. Fed.R.Civ. P. 26(a)(2) Disclosures:

The parties propose Plaintiff's Rule 26(a)(2) expert disclosures be made four (4) months after a ruling on BCBSM's Motion to Dismiss, and Defendant's Rule 26(a)(2) Expert Disclosures be made five (5) months after a ruling on BCBSM's Motion to Dismiss.

iii. Fed.R.Civ.P. 26(a)(3) Disclosures:

The parties propose preliminary Rule 26(a)(3)(A)(i) lay witness disclosures be made three (3) months after a ruling on BCBSM's Motion to Dismiss, and all other Rule 26(a)(3) disclosures be made sixty (60) days before trial.

iv. Voluntary Productions:

The parties are continuing to discuss whether there are certain categories of documents and/or data productions that the parties can agree to exchange without formal discovery requests, with the goal of reaching consensus on the issue prior to any ruling on BCBSM's pending Motion to Dismiss. The parties agree, however, that no such productions should occur until after a ruling on the Motion to Dismiss, once the parties understand the scope of the claims that will proceed in the litigation.

7. **Discovery**: The parties believe that all discovery can be completed within six (6) months after a ruling on BCBSM's Motion to Dismiss, ECF Nos. 11 and 12, and that the parties can utilize the time between now and the forthcoming ruling to: (1) negotiate a stipulated protective order governing confidentiality; (2) negotiate a protocol that that will govern format in which electronically stored information will be collected and produced in this action; and (3) identify categories of documents and/or data to be exchanged without formal discovery requests shortly following a ruling on the Motion to Dismiss. The parties recommend the following discovery plan, subject to the Court's approval:

i. **Subjects of Discovery**:

The parties agree that discovery may include the full range of issues implicated in the Complaint, ECF No. 1, as modified by any ruling from the Court on BCBSM's pending Motion to Dismiss, ECF Nos. 11 and 12.

ii. **Timing of Discovery**:

Defendant's Position: BCBSM submits that it would be most efficient to defer all discovery until the Court has resolved BCBSM's pending Motion to Dismiss, ECF Nos. 11 and 12. "District courts have broad discretion and power to limit or stay discovery until preliminary questions which may dispose of the case are answered." *Bangas v. Porter*, 145 F. App'x 139, 141 (6th Cir. 2005). While most courts are not inclined to stay discovery while a motion to dismiss is pending, there may be "special circumstances" where a stay of discovery is appropriate. *Wilson v.*

Ancestry.com LLC, No. 22-861, 2022 U.S. Dist. LEXIS 110128, at *3 (S.D. Ohio June 21, 2022). When considering special circumstances, the court may weigh “the burden of proceeding with discovery upon a party from whom discovery is sought against the hardship which would be worked by a denial of discovery.” *Id.* at *4.

This case has the special circumstances that warrant a stay of discovery. Tiara Yachts’ Complaint spans numerous subjects, including: (1) the parties’ 13-year contractual relationship; (2) BCBSM’s Shared Savings Program; (3) BCBSM’s clinical editing policies and procedures; (4) BCBSM’s claims processing logic; and (5) hundreds of thousands of healthcare claims processed over the course of more than a decade. Discovery will require the parties to engage in time-intensive, technical negotiations about the specific claims data fields to be produced and the parties each expect to retain expert witnesses to present analysis of the claims data. The specific fields to be produced and the time period for which the data will be produced, however, are wholly dependent on which of Tiara Yachts’ allegations, if any, survive the Motion to Dismiss. Forcing the parties to proceed with such discovery when there is uncertainty regarding the scope of viable claims will only lead to protracted litigation and expensive discovery disputes that waste both the parties’ and the Court’s resources. *See e.g.*, Order Denying Plaintiff’s Motion for Sanctions, *Comau LLC v. Blue Cross Blue Shield of Michigan*, Case No. 19-12623, ECF No. 172, PageID.6804-6807 (E.D. Mich. Mar. 24, 2022).

Nor is discovery on any other topic appropriate during the pendency of the Motion to Dismiss. BCBSM has moved to dismiss all counts as a matter of law, and no amount of fact discovery will create cognizable claims against BCBSM under ERISA. Courts have found a stay of discovery is warranted where the motion to dismiss “presents a case-dispositive legal issue” “that no amount of discovery will alter.” *Anderson v. Catalina Structured Funding, Inc.*, No. 21-197, 2021 U.S. Dist. LEXIS 260116, *3-4 (W.D. Mich. July 1, 2021); *see also Anthony v. Gilman*, No. 1:05-426, 2006 U.S. Dist. LEXIS 23011, *6 (W.D. Mich. Apr. 25, 2006) (“A plaintiff’s right to discovery before a ruling on a motion to dismiss may be stayed when the requested discovery is unlikely to produce facts necessary to defeat the motion.” (citation omitted)). Moreover, it would be unduly burdensome to proceed with depositions on only a subset of allegations in the Complaint given the high likelihood that witnesses could have to be recalled at a later date to testify about all remaining allegations.

Plaintiff’s Position: Tiara Yachts submits that document and deposition discovery relative to BCBSM’s “flip logic” decision is appropriate immediately. It further submits that claims data is something to which Tiara Yachts is inherently entitled as a named fiduciary of its welfare benefit plan and therefore should be discoverable, if not immediately then for production without delay once the Court has ruled on BCBSM’s pending Motion to Dismiss, ECF Nos. 11 and 12.

However the foregoing viewpoints are reconciled by this Court, the parties agree that the claims data needs to be prioritized early in discovery to provide the experts with sufficient time for analysis.

iii. Limitations on Discovery:

The parties do not propose any limitations to discovery, other than the timing of discovery pending resolution of BCBSM's Motion to Dismiss, ECF Nos. 11 and 12, as discussed in Paragraph 7(ii) above. Should the Court direct the parties to proceed with discovery during the pendency of the Motion to Dismiss, the parties reserve their rights to revisit the issue of whether any limitations are appropriate. The parties do not propose any modifications to the presumptive limits for interrogatories and depositions as set forth in the Federal Rules of Civil Procedure.

iv. Issues Related to Electronically Stored Information:

The parties do not currently foresee any issues in preserving discoverable information. The parties are negotiating, and plan to submit to the Court for entry, a protocol governing the method in which electronically stored information will be collected and produced in this action (the "ESI Protocol"). The parties anticipate that this protocol will: (1) note the information parties must disclose and discuss about their search methodologies in advance of any production; (2) outline the parties' collection obligations; and (3) set forth the information that the parties are required to include in their privilege logs.

v. Issues Related to Claims of Privilege:

As noted above, the parties are negotiating an ESI Protocol that will govern the format of the parties' privilege logs in this action.

vi. Orders that the Court Should Issue Under Rule 26(c) or Under Rule 16(b) and (c):

The parties plan to submit to the Court pursuant to Federal Rule of Civil Procedure 26(c): (1) a stipulated protective order governing confidentiality; and (2) a stipulated protocol governing the format of electronically stored information produced in this action. The parties believe that these orders will streamline discovery and minimize the number of discovery disputes.

8. **Motions:** The parties anticipate that all dispositive motions will be filed by thirty (30) days after the close of discovery. The parties acknowledge that it is the policy of this Court to prohibit the consideration of non-dispositive discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion.

BCBSM further notes that it recently uncovered an executed agreement between the parties that "fully and finally settles, releases, and discharges . . . all claims that are known, unknown, liquidated, non-liquidated, incurred-but-not-reported [], adjustments, recoupments, receivables. Recoveries, rebates, hospital settlements, and other sums of money" between BCBSM and Tiara Yachts arising under the ASC arrangement. BCBSM provided Tiara Yachts with the release and

asked Tiara Yachts to confirm whether it will voluntarily dismiss some or all of the claims in the Complaint in light of the release. Tiara Yachts has informed BCBSM that it will not dismiss any of the claims in light of the release. BCBSM believes the release provides a basis to dispose of the case, to the extent the claims are not dismissed under Rule 12(b)(6), and intends to pursue an early dispositive motion if the parties do not reach resolution of this matter.

9. **Alternative Dispute Resolution**: The parties recommend that this case be submitted to the following method of alternative dispute resolution: facilitative mediation in front of a private mediator with experience in ERISA law selected by the parties no later than three (3) months following a ruling on BCBSM's Motion to Dismiss, ECF Nos. 11 and 12, and to occur no later than four (4) months following a ruling on BCBSM's Motion to Dismiss.

10. **Length of Trial**: Counsel estimate the trial will last approximately four to seven (4-7) days total, allocated as follows: five (5) days for plaintiff's case, three and a half (3.5) days for defendant's case, no days for other parties. Counsel will refine their estimate as the case progresses and apprise the Court of any changes.

11. **Prospects of Settlement**: The status of settlement negotiations is: The parties have not engaged in any settlement discussions to date.

Plaintiff's Position: Tiara Yachts is open to discuss settlement whenever BCBSM is ready to do so. Nothing can be resolved, however, until all of the claims

data has been produced so the financial impact of BCBSM's claims administration can be calculated.

Defendant's Position: BCBSM does not believe settlement discussions will be productive until after the Court has ruled on BCBSM's pending Motion to Dismiss, ECF Nos. 11 and 12, and as well as any dispositive motion concerning the executed release between the parties.

12. **Electronic Document Filing System:** Counsel understands that Local Civil Rule 5.7(a) now requires that attorneys file and serve all documents electronically, by means of the Court's CM/ECF. Counsel are reminded that Local Civil Rule 5.7(a) now requires that attorneys file and serve all documents electronically, by means of the Court's CM/ECF system, unless the attorney has been specifically exempted by the Court for cause or a particular document is not eligible for electronic filing under the rule. The Court expects all counsel to abide by the requirements of this rule. Pro se parties (litigants representing themselves without the assistance of a lawyer) must submit their documents to the Clerk on paper, in a form complying with the requirements of the local rules. Counsel opposing a pro se party must file documents electronically but serve pro se parties with paper documents in the traditional manner.

13. **Other:** Finally, the parties note that the number of days needed for trial will depend significantly on the format of any presentations on data analyses at trial. As discussed above, Tiara Yachts' Complaint concerns the method by which

BCBSM processed many thousands of healthcare claims over the span of more than a decade. Both parties anticipate retaining expert witnesses to present analysis of the claims data, and are open to exploring the ways in which such presentations can be streamlined for purposes of trial at a later stage in the litigation.

Dated: September 14, 2022

/s/ Perrin Rynders (w/ permission)

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2022, I electronically filed the foregoing paper with the Court using the ECF Utilities function and delivered a copy to all counsel of record.

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