UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIARA YACHTS, INC.,	Case No. 1:22-cv-603
Plaintiff,	Honorable Robert J. Jonker
v.	Magistrate Judge Ray Kent
BLUE CROSS BLUE SHIELD OF MICHIGAN,	
Defendant.	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS

I. INTRODUCTION

BCBSM sought dismissal of Tiara Yachts' Complaint on the pleadings, arguing this was not an ERISA case because Tiara Yachts was suing on its own behalf, and not as a fiduciary of its ERISA-governed Plan. The Court agreed, holding the Complaint "sounds more like an ordinary contract dispute than an ERISA fiduciary duty case." Order, ECF No. 23, PageID.467. Not wanting to be a victim of its own success, BCBSM now turns to ERISA as the singular legal basis for awarding it attorneys' fees, in what was – until now apparently – NOT an ERISA case. As BCBSM knows, ERISA only provides for attorneys' fees in cases "by a participant, beneficiary, or fiduciary," though these important words were omitted from its quote of the statute on page 6 of its brief. BCBSM cannot have it both ways.

Regardless, BCBSM's present motion would be denied in any event because controlling law establishes that awarding fees to prevailing ERISA defendants is rare, and only justified by a showing of egregious, culpable conduct, such as bad faith or persistent filing of frivolous claims

by ERISA plaintiffs. Tiara Yachts filed this lawsuit against BCBSM in good faith and based on a long line of established precedent (over 200 cases, actually). There is simply no basis in law or fact to award BCBSM attorneys' fees to BCBSM.

II. ANALYSIS

A. BCBSM CANNOT RECOVER ATTORNEYS' FEES UNDER ERISA WHERE ERISA DOES NOT APPLY.

Under 29 U.S.C. § 1132(g)(1), "[i]n any action under this subchapter … by a participant, beneficiary, or fiduciary," the Court has the discretion to allow reasonable attorneys' fees and costs. 29 U.S.C. § 1132(g)(1) (emphasis added). BCBSM argued and this Court held, however, that this action was not brought by Tiara Yachts in its fiduciary capacity on behalf of its Plan.

On the record, BCBSM's counsel argued, "it's quite clear from the face of the complaint **it's unambiguous that Tiara Yachts is seeking compensation for itself**." 11/15/2022 Hearing Transcript, ECF No. 22, PageID.424 (emphasis added). In briefing, BCBSM again affirmed this position: "That is **definitive here**, because Tiara Yachts' Complaint makes clear that Tiara Yachts is the only plaintiff—and **the relief it seeks is for its own benefit, not for the Plan**." BCBSM's Mot. to Dismiss, ECF No. 12, PageID.119 (emphasis added).

The Court agreed, holding that Tiara Yachts' claims amounted to "an ordinary contract dispute." Order, ECF No. 23, PageID.467. The Court explained:

> Tiara Yachts wants money back in its own coffers based on what it says was poor performance by BCBSM under the contract. A win for Tiara Yachts here does not augment the resources of any ERISA plan—indeed, the Plan itself is not even a party and **Tiara Yachts is not seeking in its Complaint for anything on behalf of the Plan itself**.

Id. (emphasis added).

If Tiara Yachts was not bringing claims in its fiduciary capacity on behalf of its Plan, as BCBSM argued and this Court held, then attorneys' fees and costs under 29 U.S.C. § 1132(g)(1), which are applicable to claims brought by a fiduciary, do not apply.

B. BCBSM Is Not Entitled to Any Attorneys' Fees Under 29 U.S.C. § 1132(g)(1), in any Event.

Assuming for argument's sake the Court finds that Tiara Yachts brought its Complaint as a fiduciary to its Plan, attorneys' fees and costs would nonetheless be inappropriate.

Pursuant to 29 U.S.C. § 1132(g)(1), "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." *See also, Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 446 (6th Cir. 2006) ("there is no presumption of award of attorneys' fees to the prevailing party in an ERISA action."). In guiding the exercise of its discretion, a district court may consider the traditional "*King*" five-factor fee-shifting test. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 254-55 (2010); *see also, Huizinga v. Genzink Steel Supply and Welding Co.*, 984 F. Supp.2d 741, 745 (W.D. Mich. 2013) (Jonker, R.). "[I]n most ERISA cases, the nature of the *King* factors makes it less likely that the factors will favor an award to defendants." *Huizinga*, 984 F. Supp.2d at 745.

1. Attorneys' Fees Awards Against Plaintiffs Are Disfavored.

ERISA was enacted to "protect … the interests of participants in employee benefit plants." 29 U.S.C. § 1001(b). In light of that goal, numerous federal courts, including this Court, have recognized that "the five factors very frequently suggest that attorney's fees should not be charged against ERISA plaintiffs." *Toussaint v. JJ Weiser, Inc*., 648 F.3d 108, 111 (2d Cir. 2011) (citing *Salovaara v. Eckert*, 222 F.3d 19, 28 (2d Cir. 2000)); *see also, West v. Greyhound Corp*., 813 F.2d 951, 957 (9th Cir. 1987) (cautioning that the five factors "very frequently suggest that attorney's fees should not be charged against ERISA plaintiffs"); *Gray v. New England Tel. & Tel. Co.*, 792

F.2d 251, 259 (1st Cir. 1986) (recognizing a "'bias' in the standard" against awarding attorneys' fees to defendants). Subjecting a plaintiff who in good faith brought an action seeking benefits with a significant award of attorney fees thwarts ERISA's very purpose. *See Meredith v. Navistar Int'l Transp. Co.*, 935 F.2d 124, 129 (7th Cir. 1991) (noting that "[a]dherence to this policy often counsels against charging fees against ERISA beneficiaries since private actions by beneficiaries seeking in good faith to secure their rights under employee benefit plans are important mechanisms for furthering ERISA's remedial purpose"); *see also*, *Jones v. O'Higgins*, 736 F. Supp. 1243, 1245 (N.D.N.Y. 1990).

A recent decision from this Court reflects this view. *See Huizinga*, 984 F.Supp.2d at 745, n. 3 (Jonker, R.) ("it is hard to envision a case in which the key factors or other factors would weigh in favor of an award to an ERISA defendant"). The United States District Court for the Eastern District of Michigan has also repeatedly upheld this view, as have other District Courts throughout the Sixth Circuit. *See Saginaw Chippewa Indian Tribe of Mich v. Blue Cross Blue Shield of Michigan*, No. 16-cv-10317, 2018 WL 453762, at *4 (E.D. Mich. Jan. 17, 2018) ("As other courts of appeal have observed, the relevant factors will often weigh against imposing attorney fees on a non-prevailing ERISA plaintiff.") (aff'd in part, reversed on other grounds); *Guest-Marcotte v. Metaldyne Powertrain Components, Inc.*, No. 15-cv-10738, 2017 WL 2403569, at *2 (E.D. Mich. June 2, 2017) (Ludington, J.) ("While Defendants indisputably achieved success on the merits, they [had] not demonstrated that Plaintiff acted in bad faith, or that other persons should be deterred from bringing similar claims."); *see also*, *Hall v. Ohio Educ. Ass'n*, 984 F. Supp. 1144 (S.D. Ohio 1997); *Duncan v. Minnesota Life Ins. Co.*, Case No. 3:17-cv-00025, 2021 WL 1759634 (S.D. Ohio May 4, 2021).

BCBSM's contention that "[t]he Sixth Circuit routinely affirm[s] an award of attorney's fees to prevailing Defendants in an ERISA suit" is wrong. In *Moore v. IBEW, Loc. 58*, the Sixth Circuit explained that it was affirming the district court's award of attorneys' fees to an ERISA defendant where (1) the plaintiff had failed even to timely file his objection to the defendant's motion for attorneys' fees and (2) the plaintiff brought his claims in bad faith and "was a vexatious litigant who had pursued frivolous labor claims for fifteen years in various jurisdictions." *Moore v. Int'l Bhd. of Elec. Workers, Loc*. 58, 60 Fed. App'x 581, 582 (6th Cir. 2003). Such facts are not even remotely present here.

2. <u>Tiara Yachts Is Not Culpable and Did Not Pursue Its Claims In Bad Faith.</u>

"[G]iven ERISA's policy of protecting plan beneficiaries, colorable claims pursued in good faith, even if ultimately unsuccessful, should not be discouraged by awards of attorney's fees to prevailing defendants." *Mahoney v. J.J. Weiser & Co.*, 646 F. Supp. 2d 582, 586 (S.D.N.Y. 2009). Culpability for a losing plaintiff is much different than culpability of a losing defendant:

> The culpability of a losing plaintiff significantly differs from that of a losing defendant: A losing defendant must have violated ERISA, thereby depriving plaintiffs of rights under a pension plan and violating a Congressional mandate. A losing plaintiff, on the other hand, will not necessarily be found "culpable," but may be only in error or unable to prove his case.

Salovaara, 222 F.3d at 28. "Culpable conduct is conduct that is blamable or involving the breach of a legal duty or commission of fault." *Taylor v. United Techs. Corp.*, No. 3:06CV1494, 2010 WL 2793938, at *1-*2 (D. Conn. July 13, 2010) (citing *Slupinski v. First Unum Life Ins.*, 554 F.3d 38, 48 (2d Cir. 2009)).

Simply put, "[a] losing case is not bad faith." *Boland v. Thermal Specialties, Inc.*, 966 F. Supp. 2d 8, 10-15 (D.D.C. 2013). Indeed, were it otherwise "our system would run perilously close to one in which a losing plaintiff always pays, even if he brought suit due to an honest

disagreement about the state of the law." *Id.* (citing *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 414 (9th Cir. 1994).

The Supreme Court has warned against *post hoc* reasoning in the context of awarding attorneys' fees to a defendant, stating:

> [i]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978) (Stewart, J.).

Here, Tiara Yachts neither filed nor pursued any of its claims against BCBSM in bad faith. *See* Rynders Decl. ¶ 10, **Exhibit 1**; *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 557 (6th Cir. 1987) (relying upon an affidavit from counsel for this factor, and ultimately finding the district court abused its discretion in awarding attorneys' fees to a defendant).

First, BCBSM claims that because Tiara Yachts' Complaint is a "copycat lawsuit" from the Comau litigation, it is brought in bad faith. What BCBSM refers to as "copycat" litigation is what most practitioners would call "precedent." In fact, this case is the latest in a long line of precedent, reaching back more than a decade. BCBSM has been sued by Plan sponsors for breach of fiduciary duty at least 200 times since 2011—each of these cases involved BCBSM's mis-handling of ERISA Plan assets pursuant to Administrative Services Contracts nearly identical to the one at issue in this case. *See* Table of BCBSM Cases, **Exhibit 2**. These 200 cases were assigned to at least 23 U.S. District Judges. *Id.* Only one court ever agreed with BCBSM's argument that ERISA did not govern the case, and that court was reversed on appeal. *See Saginaw Chippewa Indian Tribe of Michigan v. Blue Cross Blue Shield of Michigan*, 748 Fed. App'x 12, 21 (6th Cir. Aug. 30, 2018). This long line of cases, which generated three Sixth Circuit decisions,

uniformly held that BCBSM was an ERISA fiduciary when administering an ERISA-governed health plan pursuant to a written contract.

Most recently, in 2019, Comau LLC sued BCBSM for breach of fiduciary duty alleging mismanagement of plan assets. *Comau LLC v. BCBSM*, No. 19-CV-12623, 2020 WL 7024683, at *1 (E.D. Mich. Nov. 30, 2020).[1] BCBSM says Tiara Yachts' claims are a "copycat" of the Comau litigation and that "without the deterrent effect of a fee award, Tiara Yachts' counsel may pursue similar meritless lawsuits on behalf of other clients in the future." BCBSM's Mot. for Fees, ECF No. 26, PageID.491. BCBSM apparently wants this Court to think the *Comau* case was unsuccessful, when just the opposite is true.

Even though the allegations in *Comau* were the same as in the present case ("copycat"), BCBSM never even moved to dismiss on the basis that the case wasn't governed by ERISA. Instead, BCBSM moved to dismiss on completely different grounds: (1) the complaint sounded in fraud and failed to meet Rule 9(b)'s pleading standard; (2) the complaint failed to meet the requirements of 8(a); and (3) the statute of limitations barred any claims based on payments made more than six years before the filing of the action. *Id.* The court denied BCBSM's motion, allowing Comau's claim for breach of fiduciary duty against its "contractor" to go forward. *Id.* at *9.

In discovery, BCBSM produced Comau's claims data, which Comau's expert analyzed to assess the scope and nature of improper claims paid by BCBSM using plan assets. *See Comau LLC v. BCBSM*, No. 19-12623, 2021 WL 5989023, at *3 (E.D. Mich. Dec. 16, 2021). "Comau's expert identified $9 million in improper payments stemming from errors including duplicative payments, unbundling, upcoding or wrong code, medically unlikely services, and non-adherence

[1] Unpublished cases are attached at **Exhibit 3**.

to payment guidelines." *Id.* (emphasis added). Additionally, the internal BCBSM documents produced in discovery revealed details of BCBSM's Shared Savings Program. *Comau LLC v. BCBSM*, No. 19-12623, 2022 WL 2373352, at *1 (E.D. Mich. June 30, 2022).

Comau filed a Second Amended Complaint, which BCBSM argued "advance[d] nearly the exact same theories as" Tiara Yachts' Complaint here. *Id.* at *3-4; ECF No. 26, PageID.493. In or about that time, the court also compelled BCBSM to produce its then current and former employees for depositions after two and a half years of stonewalling. *See Comau*, 2021 WL 5989023, at *5.

Less than a week after Comau filed its Second Amended Complaint, and shortly before the first BCBSM employees were set to be deposed, BCBSM's counsel requested a stay "to enable the parties to focus on mediation efforts" and agreed to pay for the full cost of mediation. E-mail from Counsel for BCBSM, **Exhibit 4**. Thus, when BCBSM was faced with what it says was "nearly the exact same" complaint as the one brought by Tiara Yachts, it was eager to settle the case.

Furthermore, BCBSM's allegation that "Tiara Yachts and Varnum sued BCBSM without knowing *any* facts related to Tiara Yachts' own Plan" is made up. BCBSM's Mot. for Fees, ECF No. 26, PageID.502. BCBSM cannot speak to the knowledge held by Tiara Yachts or its counsel, and internal BCBSM emails confirm that BCBSM knew it breached its fiduciary duty to numerous self-funded customers, *including Tiara Yachts*, by wasting plan assets and routinely paying for claims suffering from fraud, waste, and abuse. BCBSM explicitly identified the category of impacted customers as the "non-Auto groups on NASCO Classic," which included Tiara Yachts. BCBSM Email, ECF No. 1-2, PageID.27; Compl., ECF No. 1, PageID.7, 19. As one of BCBSM's self-funded customers in this category of impacted customers, Tiara Yachts has a more than

reasonable basis to believe that its Plan was harmed by BCBSM's malfeasance. BCBSM makes much over the fact that the same documents were attached to Comau's Second Amended Complaint as Tiara Yachts' Complaint, inferring that these documents are specific to Comau. This too is false. These documents are just as applicable to Tiara Yachts because both entities were among the class of non-auto groups on NASCO classic impacted by BCBSM's misconduct.

Second, BCBSM claims that "perhaps most troublingly, Tiara Yachts attempted to use ERISA to win money *for itself*" as a basis for showing bad faith. Def's Br. at p. 17, ECF No. 26, PageID.503. Tiara Yachts' Complaint made abundantly clear that it seeks to recover on behalf of its Plan. Further, in its Response to BCBSM's Motion to Dismiss, Tiara Yachts affirmed that Tiara Yachts sought relief "on behalf of its welfare benefit Plan." Tiara's Resp., ECF No. 16, PageID.195-96. Moreover, at the hearing on BCBSM's Motion to Dismiss, Tiara Yachts' counsel confirmed the same to the Court:

> My client is the plan sponsor of the plan. Under ERISA my client is a named fiduciary of the plan. Therefore**, it may bring an action on behalf of the plan, and that's what it's doing in this case. Tiara Yachts is not seeking a recovery for itself**. And in fact, in case after case after case that I have litigation against Blue Cross Blue Shield we have settled the cases and we have always made it clear that the recovery constitutes a recovery of plan assets, and that's what's going to happen here. **So whether there is a judgment or a settlement, whatever, it will be a recovery of plan assets which need to be used for purposes of the plan**.

11/15/2022 Hearing Transcript at p. 26, ECF No. 22, PageID.443 (emphasis added).

***Third*,** BCBSM claims this case was brought in bad faith because Tiara Yachts executed a so-called "release" that BCBSM believes bars Tiara's claims. BCBSM's Mot. for Fees, ECF No. 26, PageID.501. If BCBSM truly believed this argument had merit, one would think that its counsel—who believes they were dazzling enough to charge $390,000 for a motion to dismiss—would have moved on this issue for a merits decision. Instead, BCBSM and its counsel never raised this argument. Accordingly, it cannot ask the Court to merely assume it would prevail, and

then use its presumed success as a basis for attorneys' fees. Further, the so-called "release" actually supports Tiara Yachts because it shows BCBSM was concerned about its liability to Tiara Yachts for breaching its fiduciary duties under ERISA to Tiara Yachts and the Plan. Otherwise, why would BCBSM attempt to extort a release from Tiara Yachts? Finally, Tiara Yachts disagrees that the release has any bearing on the claims pled in the Complaint, and if and when the issue is properly before the Court, it will be addressed.

3. Tiara Yachts' Plan Can Satisfy BCBSM'S Fees, But A Fee Award Is Not an Appropriate Use of Plan Assets.

As discussed above, if this Court ultimately affirms its Order granting dismissal, then, according to this Court, Tiara Yachts did not sue BCBSM in its fiduciary capacity on behalf of the Plan, and fees under Section 1132(g)(1) are inapplicable. Nonetheless, if the Court applies Section 1132(g)(1), Tiara Yachts is a Plaintiff in a fiduciary capacity for its ERISA Plan. Tiara Yachts' Plan makes no profit, and all assets of the Plan are "plan assets" under ERISA, which can only be used for the exclusive benefit of plan participants and beneficiaries. *See* 29 U.S.C. § 1103(c). A fee award is not an appropriate use of plan assets. As the Sixth Circuit has previously explained, "this factor is relevant 'more for exclusionary than for inclusionary purposes'." *Trs. of Detroit Carpenters Fringe Ben. Fund v. Patrie Constr. Co.*, 618 Fed. App'x 246, 259 (6th Cir. 2015) (quoting *Warner v. DSM Pharma Chemicals North America, Inc.*, 452 Fed. App'x 677, 681-82 (2011) (quoting *Gribble v. CIGNA Healthplan of Tenn., Inc*., 36 F.3d 1097 (6th Cir. 1994) (per curiam) (unpublished table decision) (internal quotation marks omitted)). Therefore, this factor weighs against awarding BCBSM attorneys' fees.

4. Awarding BCBSM Fees Would Chill Future ERISA Claims.

The parties are on the same page with this factor—an award of attorneys' fees to BCBSM would deter future ERISA claims. Of course, for BCBSM this is a good thing. However, the

deterrent analysis is intended "as a shield, to protect beneficiaries from the fear of having to pay to pursue an ERISA claim in the event of failing to prevail," rather than as a sword to discourage litigants from pursuing claims. *Gibbs v. Gibbs*, 210 F.3d 491, 505 (5th Cir. 2000). As this Court has previously explained, "[t]his factor is an inquiry into the deterrent effect of an attorney's fees award on other parties, such as plan administrators, employers, or 'others similarly situated' to the defendants." *Huizinga*, 984 F. Supp. at 746-47 (quoting *Gaeth v. Hartford Life Ins. Co*., 538 F.3d 524, 531 (6th Cir. 2008)).

As discussed *supra*, Tiara Yachts' claims were not brought in bad faith, nor has this Court found them to be frivolous, therefore, this factor weighs against awarding attorneys' fees to BCBSM.

5. BCBSM Did Not Seek To Confer A Common Benefit on ERISA Plan Participants and Beneficiaries Or Resolve Significant Legal Questions Regarding ERISA.

BCBSM contends the fourth factor is inapplicable where an ERISA Defendant seeks an award of attorneys' fees. *See* Def's Br. at p. 7, ECF No. 26, PageID.497. That is wrong. Instead, this Court has held that where an ERISA Defendant seeks to protect only itself in defending an ERISA action, this factor weighs against an award of attorneys' fees. *See Huizinga*, 984 F. Supp. 2d at 747 ("The retaliatory discharge claim did not raise a significant ERISA legal issue, and Defendants sought only to protect themselves in defending it. Defendants do not argue otherwise. This factors weighs against an award."); *see also*, *Boland*, 966 F. Supp. 2d at 15 (finding this factor in favor of unsuccessful plaintiffs on the same grounds).

Similarly here, BCBSM has sought only to protect itself in defending the ERISA claim brought against it, and therefore this factor weighs against an award of fees in favor of BCBSM.

6. Tiara Yachts Zealously Litigated Its Honest Disagreements With BCBSM.

The Court should not award attorneys' fees where BCBSM has produced no evidence of bad faith and where Plaintiff's claims are "'no more devoid of merit than [those] of any other losing litigant.'" *Trs. of Detroit Carpenters Fringe Ben. Fund*, 618 F. App'x at 260 (quoting *Shelby Cty. Health Care Corp. v. Majestic Star Casino, LLC Grp. Health Benefit Plan*, 581 F.3d 355, 378 (6th Cir. 2009). This factor does not favor BCBSM because there is no evidence demonstrating that Tiara Yachts acted frivolously or in bad faith. *See, e.g.*, *Guest-Marcotte*, 2017 WL 2403569, at *2; *see also*, *Mahoney*, 646 F. Supp. 2d at 586. Additionally, Tiara Yachts respectfully adopts by reference each of the arguments included in the Motion for Reconsideration it has filed simultaneously with this Response to Defendant's Motion for Attorneys' Fees and Costs.

On balance, the *King* factors weigh against a fee award to BCBSM. Therefore, the Court should deny BCBSM's motion outright.

C. BCBSM'S REQUEST IS EXCESSIVE AND UNREASONABLE, OR AT LEAST IT IS IMPOSSIBLE TO DISCERN OTHERWISE.

The party seeking an award of attorneys' fees has the burden of demonstrating the reasonableness of hours worked on a given matter. *Blum v. Stenson*, 465 U.S. 886, 897 (1984). The moving party must demonstrate the hours requested are "reasonably expended on the litigation," and "[c]ourts should exclude hours that are not reasonably expended." *Mehney-Egan v. Mendoze*, 130 F. Supp. 2d 884, 886 (E.D. Mich. 2001). "Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary." *Id.*

Although the Federal Rules of Civil Procedure committee comments provide that a party need not support a motion for attorneys' fees with evidentiary material at the time of filing and therefore BCBSM was not required to submit evidentiary material supporting its claim for $390,000 in attorneys' fees as of yet, the sheer amount of attorneys' fees claimed in responding to

a complaint by filing a motion to dismiss, prior to the commencement of discovery, calls in to question whether counsel for BCBSM exercised the "'billing judgment' with respect to hours worked" required of counsel when seeking an award of attorneys' fees. *See Segovia v. Montgomery Cnty.*, 593 Fed. App'x 488, 491 (6th Cir. Dec. 8, 2014) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

D. ERISA Does Not Provide For An Award Of Attorneys' Fees Against Varnum.

Section 1132(g)(1) of ERISA does not provide for the award of attorneys' fees against a party's counsel. Section 1132(g)(1) provides only that "[i]n any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1).

Under "the bedrock principal known as the 'American Rule': Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt v. Reliance Standard Life Ins. Co*., 560 U.S. 242, 253 (2010) (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res*., 532 U.S. 598, 602-03 (2001); *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550 (2010). Section 1132(g)(1) is one of the statutory divisions from the American Rule, which allows fee shifting between litigants. *Hardt*, 560 U.S. at 253-54; *see also Huizinga*, 984 F. Supp. 2d at 745 (recognizing ERISA is a "fee shifting" statute). Fundamentally, fee-shifting is amongst parties—not parties' counsel.

The *King* factors further illustrate this principal. These factors look to "(1) the degree of the **opposing party's** culpability or bad faith; (2) the **opposing party's** ability to satisfy an award of attorney's fees' … and (5) the relative merits of the **parties' positions**." *King*, 775 F.2d at 669

(emphasis added). These factors do not look to the positions and conduct of the parties' counsel. This further demonstrates that ERISA's fee-shifting statute is not a means for pursuing an award of attorneys' fees against a party's counsel.

The one case cited by BCBSM does not support its request for attorneys' fees against Varnum under ERISA. *Moore*, 458 F.3d at 446 (holding "[t]he district court did not abuse its discretion in awarding attorney fees' against Plaintiff" under ERISA (emphasis added)). In short, ERISA does not support an award of attorneys' fees against Varnum.

III. CONCLUSION

Based on the foregoing, Tiara Yachts respectfully requests that the Court deny Defendant's Motion in its entirety.

Respectfully submitted,

VARNUM LLP
Attorneys for Tiara Yachts, Inc.

Dated: March 27, 2023

By: */s/ Aaron M. Phelps*

Perrin Rynders (P38221)
Aaron M. Phelps (P64790)
Kyle P. Konwinski (P76257)
Chloe N. Cunningham (P83904)
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
prynders@varnumlaw.com
amphelps@varnumlaw.com
kpkonwinski@varnumlaw.com
cncunningham@varnumlaw.com

CERTIFICATE OF COMPLIANCE

Pursuant to L. Civ. R. 7.3(b)(ii), I hereby certify that this document complies with L. Civ. R. 7.3(b)(i) because this document, generated using Microsoft Word 2010, contains 4250 words.

/s/ Chloe N. Cunningham
Chloe N. Cunningham (P83904)

20845108.1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIARA YACHTS, INC.,

Plaintiff,

v.

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant.

Case No. 1:22-cv-603

Honorable Robert J. Jonker

Magistrate Judge Ray Kent

INDEX OF EXHIBITS IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS

Exhibit	Description
1	Declaration of Perrin Rynders
2	Table of BCBSM Cases
3	Unpublished Cases
4	Email from Counsel for BCBSM

EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIARA YACHTS, INC.,

Plaintiff,

v.

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant.

Case No. 1:22-cv-603

Honorable Robert J. Jonker

Magistrate Judge Ray Kent

DECLARATION OF PERRIN RYNDERS

I, Perrin Rynders, hereby declare pursuant to 28 U.S.C. §1746:

1. I am over the age of 18 and competent to make the following declaration.

2. I am an equity partner with the law firm Varnum LLP. I graduated from the University of Michigan Law School, *cum laude*, in 1985 and have been practicing law with Varnum continuously since then.

3. My practice focuses on civil litigation. I have prosecuted and defended a wide variety of business, commercial, employment, product liability, personal injury, and tax matters.

4. A substantial portion of my time is currently spent on complex litigation matters brought on behalf of ERISA health and welfare benefit plans and their sponsors. For example, I have been lead counsel for roughly 200 lawsuits related to ERISA matters, where hundreds of millions of dollars were in dispute.

5. I have tried more than three dozen cases in state and federal courts, plus several arbitrations and various administrative contested cases and evidentiary hearings. My trial practice

has been conducted in federal and state courts around the country (with trials in Florida, Illinois, Indiana, Ohio, and Michigan).

6. I am admitted to practice in all Michigan courts and the following federal courts:

a. United States District Court, Eastern District of Michigan
b. United States District Court, Western District of Michigan
c. United States District Court, Northern District of Indiana
d. United States Court of Federal Claims
e. United States Court of Appeals for the Sixth Circuit
f. United States Court of Appeals for the Eighth Circuit
g. United State Court of Appeals for the Ninth Circuit
h. United States Court of Appeals for the Eleventh Circuit
i. United States Court of Appeals for the Federal Circuit

7. I am a fellow of the American College of Trial Lawyers.

8. I have been, and remain, involved in many bar association activities. For example, I am the past chair of the Ethics & Professionalism and Trial Techniques committees of the TIPS Section of the American Bar Association. I have served on various councils and committees of the State Bar of Michigan and Grand Rapids Bar Association, and I served on the Litigation Advisory Board of the Institute of Continuing Legal Education.

9. I am a fellow of the Michigan State Bar Foundation and the Litigation Counsel of America. I have a Martindale Peer Review Rating of AV® Preeminent™ (5.0 out of 5). I was first listed in *Michigan Super Lawyers* in 2007, and I have been listed in *Best Lawyers* since 2012.

10. Plaintiff filed this lawsuit and pursued each cause of action in good faith and with the genuine belief that Defendant violated ERISA in each instance alleged. This lawsuit was pursued in the context of what I had learned over a period that spans more than a decade representing more than 200 clients regarding ERISA issues. I have litigated this case to the best of my ability: professionally, zealously, but respectfully.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 27, 2023.

Perrin Rynders

20847727.1

EXHIBIT 2

	CASE NAME	CASE #	JUDGE
1	Hi-Lex, et al. v Blue Cross Blue Shield of Michigan (BCBSM)	11-cv-12557	Roberts, Victoria A.
2	Borroughs, et al. v BCBSM	11-cv-12565	Roberts, Victoria A.
3	Ironworkers, et al. v BCBSM	11-cv-12796	Roberts, Victoria A.
4	Flexfab, et al. v BCBSM	11-cv-14213	Roberts, Victoria A.
5	American Seating, et al. v BCBSM	11-cv-14326	Roberts, Victoria A.
6	Great Lakes Castings, et al. v BCBSM	11-cv-14328	Roberts, Victoria A.
7	Star of the West, et al. v BCBSM	11-cv-14332	Roberts, Victoria A.
8	Magna International, et al. v BCBSM	11-cv-14828	Roberts, Victoria A.
9	Eagle Alloy, et al. v BCBSM	11-cv-15062	Roberts, Victoria A.
10	Whitehall Products, et al. v BCBSM	11-cv-15136	Roberts, Victoria A.
11	Morbark, et al. v BCBSM	12-cv-12843	Roberts, Victoria A.
12	Lumbermen's, Inc., et al. v BCBSM	12-cv-15606	Duggan, Patrick J.
13	Trillium Staffing, et al. v BCBSM	12-cv-15611	Duggan, Patrick J.
14	Terryberry Company, LLC, et al. v BCBSM	12-cv-15612	Leitman, Matthew
15	Adrian Steel, et al. v BCBSM	12-cv-15614	Roberts, Victoria A.
16	ADAC, et al. v BCBSM	12-cv-15615	Hood, Denise Page
17	East Jordan Plastics, et al. v BCBSM	12-cv-15621	Drain, Gershwin A.
18	Petoskey Plastics, Inc., et al. v BCBSM	12-cv-15642	Edmunds, Nancy G.
19	VEC (USA) Inc., et al. v BCBSM	12-cv-15671	Borman, Paul D.
20	Premier Tool & Die, et al. v BCBSM	12-cv-15685	Steeh, George C.
21	Auto-Wares / APC Stores, et al. v BCBSM	13-cv-11827	Lawson, David M.
22	Pridgeon & Clay, Inc., et al. v BCBSM	13-cv-11830	Murphy, Stephen J.
23	SAF-Holland, Inc., et al. v BCBSM	13-cv-11832	Cohn, Avern
24	Thelen, Inc., et al. v BCBSM	13-cv-11833	Ludington, Thomas L.
25	Wade Trim Group, Inc., et al. v BCBSM	13-cv-11834	Battani, Marianne O.
26	Dykema Excavators, Inc., et al. v BCBSM	13-cv-12151	Lawson, David M.
27	LaBelle Management, et al. v BCBSM	13-cv-12500	Ludington, Thomas L.
28	Buist Electric, Inc., et al. v BCBSM	13-cv-12846	Borman, Paul D.

	CASE NAME	CASE #	JUDGE
29	Bandit Industries, Inc., et al. v BCBSM	13-cv-12922	Goldsmith, Mark A.
30	Wesco, Inc., et al. v BCBSM	13-cv-13004	Lawson, David M.
31	Wirtz Manufacturing, et al. v BCBSM	13-cv-13008	Murphy, Stephen J.
32	Fisher & Company, et al. v BCBSM	13-cv-13221	Rosen, Gerald E.
33	Baker College, et al. v BCBSM	13-cv-13226	Cleland, Robert H.
34	Frankenmuth Bavarian Inn, Inc., et al. v BCBSM	13-cv-13230	Ludington, Thomas L.
35	Truss Technologies, et al. v BCBSM	13-cv-14744	Cohn, Avern
36	Industrial Steel Treating, et al. v BCBSM	13-cv-14935	Drain, Gershwin A.
37	Gill-Roy's, et al. v BCBSM	13-cv-14937	Edmunds, Nancy G.
38	Tooling & Equipment International Corp., et al. v BCBSM	14-cv-10121	Rosen, Gerald E.
39	Grand Traverse Band, et al. v BCBSM	14-cv-11349	Levy, Judith E.
40	Master Automatic, et al. v BCBSM	14-cv-12542	Parker, Linda V.
41	Automatic Spring, et al. v BCBSM	14-cv-12545	Levy, Judith E.
42	Alma Products I, Inc., et al. v BCBSM	14-cv-13066	Ludington, Thomas L.
43	Kent Companies, Inc., et al. v BCBSM	14-cv-13070	Steeh, George C.
44	DM Companies, Inc., et al. v BCBSM	14-cv-13079	Hood, Denise Page
45	Corrigan Moving, et al. v BCBSM	14-cv-13233	Berg, Terrence G.
46	ABC Appliance, Inc., et al. v BCBSM	14-cv-13237	Steeh, George C.
47	FloraCraft Corporation, et al. v BCBSM	14-cv-13354	Berg, Terrence G.
48	Huizenga Mfg. Group, et al. v BCBSM	14-cv-13357	Roberts, Victoria A.
49	Stone Transport Holding, Inc., et al. v BCBSM	14-cv-13407	Ludington, Thomas L.
50	Tarus Products, Inc., et al. v BCBSM	14-cv-13433	Borman, Paul D.
51	Gemini Group, Inc., et al. v BCBSM	14-cv-13525	Ludington, Thomas L.
52	Adrian College, et al. v BCBSM	14-cv-13731	Goldsmith, Mark A.
53	Magnesium Products, et al. v BCBSM	14-cv-14439	Lawson, David M.
54	Michigan Milk Producers Association, et al. v BCBSM	14-cv-14667	Edmunds, Nancy G.
55	Griffin Beverage, et al. v BCBSM	14-cv-14690	Ludington, Thomas L.
56	SRS Industries, LLC, et al. v BCBSM	14-cv-14718	Cleland, Robert H.

	CASE NAME	CASE #	JUDGE
57	Tom's Food Market, et al. v BCBSM	14-cv-14822	Roberts, Victoria A.
58	Star Cutter Company, et al. v BCBSM	14-Cv-14830	Rosen, Gerald E.
59	Advance Turning & Mfg, Inc., et al. v BCBSM	14-cv-14952	Goldsmith, Mark A.
60	Fullerton Tool, et al. v BCBSM	15-11551	Ludington, Thomas L.
61	Trendway Corporation, et al. v BCBSM	15-11552	Hood, Denise Page
62	Yeo & Yeo, P.C., et al. v BCBSM	15-cv-10399	Ludington, Thomas L.
63	Commercial Steel Treating, et al. v BCBSM	15-cv-11355	Cohn, Avern
64	Roskam Baking Company, et al. v BCBSM	15-cv-11356	Drain, Gershwin A.
65	Technical Training, Inc., et al. v BCBSM	15-cv-11357	Steeh, George C.
66	Garber Management Group, Inc., et al. v BCBSM	15-cv-11548	Ludington, Thomas L.
67	BNP Media, et al. v BCBSM	15-cv-11567	Tarnow, Arthur
68	Burnette Foods, Inc., et al. v BCBSM	15-cv-11695	Cohn, Avern
69	Dennen Steel Corp., et al. v BCBSM	15-cv-11697	Rosen, Gerald E.
70	NICA, Inc./CNI, et al. v BCBSM	15-cv-11698	Cohn, Avern
71	Calgary Services, LLC, et al. v BCBSM	15-cv-11732	Ludington, Thomas L.
72	Storage and Transportation, Inc., et al. v BCBSM	15-cv-11733	Friedman, Bernard A.
73	Omega Plastics, Inc., et al. v BCBSM	15-cv-11981	Borman, Paul D.
74	Blarney Castle Oil Co., et al. v BCBSM	15-cv-11982	Steeh, George C.
75	CHS Hamilton, et al. v BCBSM	15-cv-11983	Levy, Judith E.
76	Stevens Group, et al. v BCBSM	15-cv-11984	Ludington, Thomas L.
77	ETO Magnetic Corp., et al. v BCBSM	15-cv-12142	Friedman, Bernard A.
78	Walbridge Aldinger, LLC, et al. v BCBSM	15-cv-12143	Lawson, David M.
79	Quality Dairy Company, et al. v BCBSM	15-cv-12145	Parker, Linda V.
80	TCF Financial Corporation, et al. v BCBSM	15-cv-12146	Borman, Paul D.
81	Tamaroff Motors, Inc., et al. v BCBSM	15-cv-12152	Cleland, Robert H.
82	HTC Global Services, et al. v BCBSM	15-cv-12260	Cohn, Avern
83	RL Adams Plastics, Inc., et al. v BCBSM	15-cv-12266	Berg, Terrence G.
84	ND Industries, Inc., et al. v BCBSM	15-cv-12383	Cohn, Avern

	CASE NAME	CASE #	JUDGE
85	NYX, Inc., et al. v BCBSM	15-cv-12384	Levy, Judith E.
86	Douville-Johnston, et al. v BCBSM	15-cv-12414	Ludington, Thomas L.
87	Eberspaecher North America, Inc., et al. v BCBSM	15-cv-12458	Edmunds, Nancy G.
88	Efficiency Production, et al. v BCBSM	15-cv-12571	Cleland, Robert H.
89	The Cypress Companies, et al. v BCBSM	15-cv-12587	Murphy, Stephen J.
90	Tim Tyler Motors, Inc., et al. v BCBSM	15-cv-12588	Battani, Marianne O.
91	Flagstar Bank, FSB, et al. v BCBSM	15-cv-12589	Michelson, Laurie
92	L & W Engineering, et al. v BCBSM	15-cv-12609	Rosen, Gerald E.
93	Metalworks, Inc., et al. v BCBSM	15-cv-12730	Friedman, Bernard A.
94	Oliver Products, Inc., et al. v BCBSM	15-cv-12784	Michelson, Laurie
95	Aero Communications, Inc., et al. v BCBSM	15-cv-12964	Berg, Terrence G.
96	West Michigan Molding, Inc., et al. v BCBSM	15-cv-13012	Berg, Terrence G.
97	Corrigan Employment, LLC, et al. v BCBSM	15-cv-13072	Borman, Paul D.
98	Models & Tools, Inc., et al. v BCBSM	15-cv-13168	Lawson, David M.
99	APCO, Inc., et al. v BCBSM	15-cv-13253	Battani, Marianne O.
100	Michigan Paving and Materials Co., et al. v BCBSM	15-cv-13281	Goldsmith, Mark A.
101	DCS Industries f/k/a Lyle Industries, et al. v BCBSM	15-cv-13324	Ludington, Thomas L.
102	Wynnestone Communities , et al. v BCBSM	15-cv-13405	Cleland, Robert H.
103	Graceland Fruit, Inc., et al. v BCBSM	15-cv-13438	Edmunds, Nancy G.
104	Merrill Tool Holding Company, et al. v BCBSM	15-cv-13524	Ludington, Thomas L.
105	West Michigan Plumbers, et al. v BCBSM	15-cv-13546	Cox, Sean F.
106	Melling Tool Co., et al. v BCBSM	15-cv-13554	Borman, Paul D.
107	Davis Cartage Co., et al. v BCBSM	15-cv-13581	Cleland, Robert H.
108	CCI Systems, Inc., et al. v BCBSM	15-cv-13583	Leitman, Matthew F.
109	Fori Automation, Inc., et al. v BCBSM	15-cv-13675	Cohn, Avern
110	JD Norman, et al. v BCBSM	15-cv-13695	Murphy, Stephen J.
111	Little River Band of Ottawa Indians, et al. v BCBSM	15-cv-13708	Lawson, David M.
112	Alma College, et al. v BCBSM	15-cv-13718	Ludington, Thomas L.

	CASE NAME	CASE #	JUDGE
113	Universal-Macomb Ambulance Service, et al. v BCBSM	15-cv-13720	Parker, Linda V.
114	Painters Supply and Equipment, et al. v BCBSM	15-cv-13782	Cleland, Robert H.
115	Lti Printing, inc., et al. v BCBSM	15-cv-13836	Cox, Sean F.
116	Euclid Industries, Inc., et al. v BCBSM	15-cv-13875	Ludington, Thomas L.
117	LC Manufacturing, et al. v BCBSM	15-cv-13883	Lawson, David M.
118	Flint Boxmakers, Inc., et al. v BCBSM	15-cv-13949	Hood, Denise Page
119	Wright & Filippis, et al. v BCBSM	15-cv-14007	Steeh, George C.
120	SET Enterprises, et al. v BCBSM	15-cv-14046	Michelson, Laurie
121	Heritage Broadcasting, et al. v BCBSM	15-cv-14119	Michelson, Laurie
122	The Cold Heading Co., et al. v BCBSM	15-cv-14140	Cohn, Avern
123	Howard Ternes Packaging Company	15-cv-14217	Murphy, Stephen J.
124	Engine Power Components, Inc., et al. v BCBSM	15-cv-14244	Murphy, Stephen J.
125	CKGP/PW & Associates, Inc., et al. v BCBSM	15-cv-14283	Cox, Sean F.
126	Gill Industries, Inc., et al. v BCBSM	15-cv-14293	Cohn, Avern
127	Mars Advertising, et al. v BCBSM	15-cv-14308	Michelson, Laurie
128	Renosol Corporation, et al. v BCBSM	15-cv-14385	Ludington, Thomas L.
129	Duncan Aviation, Inc., et al. v BCBSM	15-cv-14389	Hood, Denise Page
130	MOKA Corporation, et al. v BCBSM	15-cv-14399	Borman, Paul D.
131	Brazeway, Inc., et al. v BCBSM	15-cv-14474	Borman, Paul D.
132	Knape & Vogt Manufacturing Company, et al. v BCBSM	16-cv-10053	Leitman, Matthew F.
133	Maxion Wheels, et al. v BCBSM	16-cv-10129	Friedman, Bernard A.
134	Production Tool Supply Company, LLC, et al. v BCBSM	16-cv-10138	Cleland, Robert H.
135	Board of Trustees of Electrical Workers' Insurance Fund, et al. v BCBSM	16-cv-10146	Drain, Gershwin A.
136	Zeigler Motorsports, LLC, et al. v BCBSM	16-cv-10292	Leitman, Matthew F.
137	Saginaw Chippewa Indian Tribe of Michigan, et al. v BCBSM	16-cv-10317	Ludington, Thomas L.
138	JRB Personnel, LLC, et al. v BCBSM	16-cv-10498	Ludington, Thomas L.
139	Nemak USA, Inc., et al. v BCBSM	16-cv-10671	Edmunds, Nancy G.
140	KRC, Inc., et al. v BCBSM	16-cv-10734	Leitman, Matthew F.

	CASE NAME	CASE #	JUDGE
141	Murk's Village Market, Inc., et al. v BCBSM	16-cv-10762	Edmunds, Nancy G.
142	Easling Construction, et al. v BCBSM	16-cv-10920	Michelson, Laurie
143	Peterson American, et al. v BCBSM	16-cv-10967	Tarnow, Arthur
144	By-Lo Oil, et al. v BCBSM	16-cv-11174	Friedman, Bernard A.
145	Acemco, et al. v BCBSM	16-cv-11183	Borman, Paul D.
146	Dart Energy Corp., et al. v BCBSM	16-cv-11370	Cohn, Avern
147	John's Lumber and Hardware Co., et al. v BCBSM	16-cv-11623	Borman, Paul D.
148	Albion College, et al. v BCBSM	16-cv-11624	Cohn, Avern
149	Jacquart Fabric Products, Inc., et al. v BCBSM	16-cv-12289	Steeh, George C.
150	ETNA Shared Services, et al. v BCBSM	16-cv-12418	Borman, Paul D.
151	Atlas Tool, Inc., et al. v BCBSM	16-cv-12488	Cleland, Robert H.
152	Comau LLC, et al. v BCBSM	16-cv-12870	Cox, Sean F.
153	Sur-Flo Plastics, et al. v BCBSM	16-cv-12958	Levy, Judith E.
154	Barker Manufacturing Co., et al. v BCBSM	16-cv-13132	Levy, Judith E.
155	FIAMM Technologies, LLC, et al. v BCBSM	16-cv-13180	Cleland, Robert H.
156	Warren Industries, Inc., et al. v BCBSM	16-cv-13183	Parker, Linda V.
157	Loeks Theatres, Inc., et al. v BCBSM	16-cv-13554	Berg, Terrence G.
158	Burton Industries, et al. v BCBSM	16-cv-13819	Parker, Linda V.
159	Fitness Management Corp., et al. v BCBSM	16-cv-14004	Parker, Linda V.
160	Heartland Employment Services, LLC, et al. v BCBSM	16-cv-14486	Drain, Gershwin A.
161	Hastings Manufacturing, et al. v BCBSM	17-cv-10135	Steeh, George C.
162	G & R Felpausch Company, et al. v BCBSM	17-cv-10691	Roberts, Victoria A.
163	Pontiac Coil, Inc., et al. v BCBSM	17-cv-11561	Leitman, Matthew
164	Ajax Paving Industries, Inc., et al. v BCBSM	17-cv-12581	Roberts, Victoria A.
165	Delta Faucet Company a/k/a Alsons a/k/a Masco Corporation of Indiana, et al. v BCBSM	17-cv-12582	Roberts, Victoria A.
166	Dayton Lamina Corporation, et al. v BCBSM	17-cv-12583	Roberts, Victoria A.
167	Decorative Panels International Inc., et al. v BCBSM	17-cv-12584	Roberts, Victoria A.
168	Fuel Systems, Inc., et al. v BCBSM	17-cv-12585	Lawson, David M.

	CASE NAME	CASE #	JUDGE
169	Husky Envelope Products, et al. v BCBSM	17-cv-12592	Cox, Sean F.
170	Unified Brands, Inc., et al. v BCBSM	17-cv-12594	Roberts, Victoria A.
171	Rhema Holdings, LLC, et al. v BCBSM	17-cv-12595	Roberts, Victoria A.
172	Ritsema Associates, et al. v BCBSM	17-cv-12596	Roberts, Victoria A.
173	Ross Education, LLC, et al. v BCBSM	17-cv-12600	Lawson, David M.
174	Trans-Matic Mfg. Co., Incorporated, et al. v BCBSM	17-cv-12601	Roberts, Victoria A.
175	W & P Management LLP, et al. v BCBSM	17-cv-12602	Leitman, Matthew
176	Wendricks Truss, Inc., et al. v BCBSM	17-cv-12603	Cleland, Robert H.
177	General Die Casting Company, et al. v BCBSM	17-cv-12604	Roberts, Victoria A.
178	Plastomer Corporation, et al. v BCBSM	17-cv-12605	Roberts, Victoria A.
179	Williams Chevrolet, Inc., et al. v BCBSM	17-cv-12606	Goldsmith, Mark A.
180	ArtiFlex Manufacturing, LLC, et al. v BCBSM	17-cv-12616	Roberts, Victoria A.
181	HealthSource Saginaw, Inc., et al. v BCBSM	17-cv-12632	Lawson, David M.
182	Optimal CAE, Inc., et al. v BCBSM	17-cv-12633	Roberts, Victoria A.
183	Lear Corporation, et al. v BCBSM	17-cv-12634	Parker, Linda V.
184	L. E. Jones Company, et al. v BCBSM	17-cv-12635	Cox, Sean F.
185	Oakland Stamping, LLC, et al. v BCBSM	17-cv-12638	Roberts, Victoria A.
186	Auto Club Services, Inc., et al. v BCBSM	17-cv-12640	Roberts, Victoria A.
187	Imlach Movers, Inc., et al. v BCBSM	17-cv-12645	Roberts, Victoria A.
188	Mayco International, LLC, a/k/a NJT Enterprises LLC, et al. v BCBSM	17-cv-12649	Roberts, Victoria A.
189	N-K Manufacturing, et al. v BCBSM	17-cv-12650	Roberts, Victoria A.
190	Gardner-White Furniture Co., Inc., et al. v BCBSM	17-cv-12651	Roberts, Victoria A.
191	ThyssenKrupp Materials NA, Inc., et al. v BCBSM	17-cv-12652	Steeh, George C.
192	Phillips Service Industries, Inc., et al. v BCBSM	17-cv-12653	Roberts, Victoria A.
193	Hillsdale College, et al. v BCBSM	17-cv-12684	Roberts, Victoria A.
194	Brooks Kushman, PC, et al. v BCBSM	17-cv-14052	Roberts, Victoria A.
195	Textron Inc., et al. v BCBSM	18-cv-13799	Drain, Gershwin A.
196	Chippewa-Luce-Mackinac Community Action Human Resource Authority, Inc., et al. v BCBSM	19-CV-10507	Goldsmith, Mark A.

	CASE NAME	CASE #	JUDGE
197	Oak Point Partners, LLC, et al. v BCBSM	19-cv-10662	Lawson, David M.
198	Blinds and Designs, et al. v BCBSM	19-cv-11123	Cox, Sean F.
199	Passage Ways Travel Service, Inc., et al. v BCBSM	19-cv-11707	Leitman, Matthew F.
200	Comau LLC, et al. v BCBSM	19-cv-12623	Friedman, Bernard A.

EXHIBIT 3

KeyCite Red Flag - Severe Negative Treatment
Affirmed in Part, Reversed in Part and Remanded by Saginaw Chippewa Indian Tribe of Michigan v. Blue Cross Blue Shield of Michigan, 6th Cir. (Mich.), August 30, 2018

2018 WL 453762
United States District Court, E.D. Michigan, Northern Division.

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, et al., Plaintiffs,
v.
BLUE CROSS BLUE SHIELD OF MICHIGAN, Defendant.

Case No. 16-cv-10317
Signed 01/17/2018

Attorneys and Law Firms

Aaron M. Phelps, Bryan R. Walters, Perrin Rynders, Varnum, Riddering, Jeffrey David Koelzer, John Joseph Rolecki, Kyle Patrick Kouwinski, Varnum LLP, Grand Rapids, MI, William L. Thompson, Varnum LLP, Novi, MI, for Plaintiffs.

Aimee R. Gibbs, Dickinson Wright PLLC, Ann Arbor, MI, Brandon C. Hubbard, Nolan John Moody, Samantha A. Pattwell, Scott R. Knapp, Dickinson Wright PLLC, Lansing, MI, Carmen Dorris, Kathleen A. Lang, Michelle L. Alamo, Phillip J. Derosier, Rebecca D. O'Reilly, Randall L. Tatem, Salina M. Hamilton, Dickinson Wright PLLC, Detroit, MI, Farayha J. Arrine, Dickinson Wright PLLC, Troy, MI, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR ATTORNEY FEES, GRANTING IN PART PLAINTIFFS'S MOTION FOR ATTORNEY FEES, AND GRANTING IN PART MOTION TO REVIEW TAXED BILL OF COSTS

THOMAS L. LUDINGTON, United States District Judge

*1 On January 29, 2016, Plaintiffs Saginaw Chippewa Indian Tribe of Michigan and the Welfare Benefit Plan ("Plaintiffs" or "the Tribe") brought suit against Blue Cross Blue Shield of Michigan ("BCBSM"). Plaintiffs' suit took issue with BCBSM's management of Plaintiffs' "self-insured employee benefit Plan." Am. Compl. at 1, ECF No. 7. On April 10, 2017, the parties filed cross motions for partial summary judgment on the remaining claims. *See* ECF No. 79, 81. Both Defendant's and Plaintiffs' motions for partial summary judgment were granted in part. ECF No. 112. Now, both parties have filed motions for attorney fees and costs. ECF Nos. 118, 119. BCBSM has also filed a motion, ECF No. 123, seeking review of the taxed bill of costs issued against it, ECF No. 120. BCBSM seeks an award of attorney fees and costs in the amount of $1,588,720.31 and $17,734.83, respectively. BCBSM also seeks sanctions against the Tribe in the amount of $493,055 in fees and $8,658.54 in costs. The Tribe seeks an award of $1,179,721.13 in fees and nontaxable costs. For the reasons that follow, BCBSM's motion for attorney fees and costs will be denied, the Tribe's motion for attorney fees and costs will be granted in part, and BCBSM's motion for review of the bill of costs will be granted in part.

I.

The procedural history and underlying facts were summarized in the July 14, 2017, opinion and order. ECF No 112. That summary will be adopted as if restated in full in this order. For clarity, several relevant facts will be repeated here.

A.

This action is one of many that has been brought against BCBSM alleging that BCBSM breached its fiduciary duty by charging its clients "hidden fees." In *Hi-Lex Controls Inc. et. al v. BCBSM*, 2013 WL 2285453, No. 11-12557 (E.D. Mich. May 23, 2013), Plaintiff Hi-Lex Inc. brought suit on a "hidden fees" theory. After a bench trial, United States District Judge Roberts entered judgment for Hi-Lex. In the findings of fact, Judge Roberts explained that, to regain financial stability, BCBSM started charging various fees to self-funded customers in the early 1990s. After receiving extensive complaints from customers, the fees were replaced with a " 'hidden' administrative fee buried in marked-up hospital claims." *Id.* at 8. These charges were invisible to the consumer and were never disclosed. BCBSM had "complete discretion to determine the amount of the Disputed Fees, as well as which of its customers paid them." *Id.* at 11. As a result of the hidden nature of the fees, the savings from using BCBSM as an administrator appeared greater to customers than they truly were. Judge Roberts found that BCBSM was an ERISA fiduciary and that BCBSM violated

its fiduciary duties through fraudulent concealment and self-dealing. On appeal, Judge Robert's decision was affirmed. *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan*, 751 F.3d 740 (6th Cir. 2014). The *Hi-Lex* decision has been treated as establishing BCBSM's liability as an ERISA fiduciary for charging the hidden fees.

B.

*2 Typically, BCBSM has settled post-*Hi-Lex* cases alleging that BCBSM charged hidden fees. This suit proceeded to the summary judgment stage, however, because the Tribe has two health insurance group policies associated with BCBSM. Specifically, the Tribe has a health insurance policy for its employees (which includes some individuals who are not members of the Tribe), and a health insurance policy for its members (a group which excludes some employees of the Tribe). At summary judgment, the parties disputed whether the two policies should be construed as a single plan or two separate plans and, relatedly, whether the two policies were both covered by ERISA. [1]

[1] At the motion to dismiss stage, BCBSM prevailed in achieving dismissal of the Tribe's claim that BCBSM "violated its fiduciary duty to Plaintiff by not paying [Medicare-Like Rates] for certain health services procured by Plan members." August 3, 2016, Op. & Order at 1, ECF No. 22.

Both the Tribe and BCBSM agreed that, if the plans were considered separately under ERISA, "the Employer Plan is governed by ERISA and BCBSM is liable for the hidden fees paid for the Tribe for that plan." July 14, 2017, Op. & Order at 16. In response to the Tribe's argument that the two benefit policies should be construed as alternative coverage options, not separate plans, BCBSM did briefly argue that such a holding would mean ERISA did not cover the (combined) plan. But that argument was not the focus of the briefing on the motions for summary judgment. The Court concluded that both plans should be analyzed separately under ERISA. Accordingly, and because BCBSM admitted to charging hidden fees under the Employee Plan, judgment on those uncontested claims was entered for the Tribe. *Id.* at 17.

The contested issues in the motions for summary judgment were three-fold. First, the parties disputed whether the two policies were a single plan with multiple coverage options or two separate plans. As already explained, the Court found that the two policies represented two separate plans. The second issue was whether the Member Plan, considered on its own, was covered by ERISA. The Court concluded that "the Member Plan must have been created to provide healthcare coverage to non-employee members" and thus did not qualify as an ERISA plan. *Id.* at 23. Third, the parties disputed whether BCBSM's operation of its Physician Group Incentive Program (PGIP) violated BCBSM's fiduciary duties. By way of summary explanation, the PGIP was a program wherein BCBSM reallocated payments to specific providers that would have otherwise been shared among all providers, thus creating performance incentives. After finding that "[t]he Tribe is ... effectively challenging BCBSM's negotiation and administration of a performance-based rewards program with its in-network physicians," the Court held that BCBSM's operation of PGIP did not violate its fiduciary duties. *Id.* at 30.

Accordingly, the Court granted both motions for summary judgment in part. Judgment was entered for the Tribe on its access fee claims related to the Employee Plan. Judgment was granted for BCBSM on the Tribe's claims related to the Member Plan and PGIP.

Now, both BCBSM and the Tribe have moved for an award of attorney fees. ECF No. 118, 119. Plaintiffs and Defendant both assert that they achieved substantial success on the merits and thus that the opposing party should cover their fees and costs. BCBSM has also requested review of the Taxed Bill of Costs issued by the Clerk's Office directing BCBSM to pay $5,248.75 of the Tribe's deposition costs. ECF No. 123.

II.

Both BCBSM and the Tribe seek an award of fees and costs, relying upon 29 U.S.C. § 1132(g). Pursuant to § 1132(g), "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The party seeking fees need not be a " 'prevailing party' to be eligible for an attorney's fees award." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252 (2010). Rather, they must simply achieve "some success on the merits." *Id.* at 256. Importantly, there is "no presumption as to whether attorney fees will be awarded." *Foltice v. Guardsman Prod., Inc.*, 98 F.3d 933, 936 (6th Cir. 1996). One purpose of awarding attorney fees is to punish bad faith litigants, but punishment is not the only legitimate purpose. *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1304 (6th Cir. 1991). Rather, "[t]he authorization was intended to enable pension claimants to obtain competent

counsel and to distribute the economic burden of litigation in a fair manner." *Ford v. N.Y. Cent. Teamsters Pension Fund*, 506 F. Supp. 180, 182 (W.D.N.Y. 1980). When determining whether to award fees, courts consider the following five factors:

> *3 (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

Sec'y of Dep't of Labor v. King, 775 F.2d 666, 669 (6th Cir. 1985). "The *King* factors—as they have been dubbed in this Circuit—are not statutory and thus should be viewed flexibly, with no one factor being " 'necessarily dispositive.' " *Geiger v. Pfizer, Inc.*, 549 Fed.Appx. 335, 338 (6th Cir. 2013) (quoting *Foltice*, 98 F.3d at 937).

III.

BCBSM contends that it obtained "some success on the merits" because it prevailed in defending against the Tribe's claims regarding the Member Plan, PGIP, and the Medicare-like Rates. *Hardt*, 560 U.S. at 256. The Tribe argues that it achieved some success on the merits because it obtained an $8.5 million judgment on its claims involving the Employee Plan.

The initial question is whether either party has achieved "some" success on the merits. That standard requires a showing of more than "trivial success on the merits, or purely procedural victories." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688 n.9 (1983). But a district court has discretion to award attorney fees "if the court can fairly call the outcome of the litigation some success on the merits without conducting a 'lengthy inquir[y] into the question whether a particular party's success was 'substantial' or occurred on a 'central issue.' " *Hardt*, 560 U.S. at 255 (quoting *Ruckelshaus*, 463 U.S. at 688 n.9).

Here, both parties can fairly be said to have achieved partial success. The Tribe obtained an $8.5 million dollar judgment, while BCBSM successfully defended against claims of liability for access fee payments made by the Member Plan, for the PGIP program, and for the failure to pay Medicare-like rates.[2] It is unclear whether BCBSM is arguing that the Tribe did not achieve even "some" success on the merits. BCBSM devotes significant portions of its briefing to the assertion that liability for the claim on which the Tribe prevailed, access fee payments for the Employee Plan, was uncontested by BCBSM. However, in the "Argument" section of its response brief, BCBSM simply argues that the Tribe is not entitled to attorney fees when the *King* factors are considered. *See* Def. Resp. Pl. Mot. at 14, ECF No. 125. The only issue which the Tribe prevailed upon was not meaningfully contested at summary judgment. For that reason, the success achieved by the Tribe was modest. The Tribe did, nevertheless, receive a substantial judgment on part of its claims. The Supreme Court has instructed lower courts to not engage in a "lengthy inquiry" into whether some success was achieved. Given that admonition, an $8.5 judgment on a largely uncontested claim is sufficient to constitute "some success on the merits."

2 The Tribe does not contest the BCBSM obtained some success on the merits. They simply argue that the *King* factors do not justify an attorney fee award. *See* Pl. Resp. Br. at 2, ECF No. 124.

A.

BCBSM's motion for attorney fees will be considered first. As an initial matter, the Tribe argues that "this Court has no authority to award attorneys' fees and costs to BCBSM related to claims raised by the Member Group" because the Court held that "ERISA does not apply to any claim raised by the Member Group." Pl. Resp. Def. Mot. at 15, ECF No. 124. That proposition is incorrect. *See Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 441 (6th Cir. 2006) (holding that the district court had authority to impose attorney fees against the plaintiff even though the district court concluded that the plaintiff was "ineligible to recover benefits under an ERISA cause of action"). *See also Credit Managers Ass'n of S. California v. Kennesaw Life & Acc. Ins. Co.*, 25 F.3d 743, 747 (9th Cir. 1994) ("[I]t would be unjust to permit CMA to insulate itself from liability for attorney's fees simply

because it failed to produce sufficient evidence to prevail on its claims.").

*4 The Tribe further argues that attorney fees are rarely rewarded for prevailing Defendants in ERISA actions. In support of that proposition, the Tribe cites several cases from other Courts of Appeal. *See Toussaint v. JJ Weiser, Inc.*, 648 F.3d 108, 111 (2d Cir. 2011) (" '[T]he five factors very frequently suggest that attorney's fees should not be charged against ERISA plaintiffs.' ") (quoting *Salovaara v. Eckert*, 222 F.3d 19, 28 (2d Cir. 2000)); *Marquardt v. N. Am. Car Corp.*, 652 F.2d 715, 720–21 (7th Cir. 1981) ("Although the five factors used as guidelines above do not explicitly differentiate between plaintiffs and defendants, consideration of these factors will seldom dictate an assessment of attorneys' fees against ERISA plaintiffs."); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 258 (1st Cir. 1986) (noting that the factors governing ERISA attorney fee awards are biased towards a "prevailing plaintiff more strongly than a prevailing defendant" but noting that defendants are not barred from receiving attorney fees); *Operating Engineers Pension Tr. v. Gilliam*, 737 F.2d 1501, 1506 (9th Cir. 1984) (explaining that the relevant "factors very frequently suggest that attorney's fees should not be charged against ERISA plaintiffs").

Neither party has identified Sixth Circuit authority which expressly considers this issue. But, as BCBSM points out, the Sixth Circuit has affirmed awards of attorney fees against ERISA plaintiffs. *See Moore*, 458 F.3d at 445–46. In *Moore*, the Sixth Circuit considered the *King* factors and concluded that the district court did not abuse its discretion by awarding attorney fees to the defendant. The *Moore* opinion emphasized that "[t]he district court need not determine that the entire matter was pursued in bad faith to find some level of culpability on the part of Plaintiff for the unnecessary scope of litigation." *Id.* at 445. Similarly, the Sixth Circuit explained, approvingly, that the district court's "objective was not to deter plaintiffs from bringing colorable claims for benefits, but from unnecessarily expanding the scope and complexity of litigation." *Id.* at 446. ***But see*** *Huizinga v. Genzink Steel Supply & Welding Co.*, 984 F. Supp. 2d 741, 745 (W.D. Mich. 2013) (explaining that fee awards are often unwarranted for ERISA defendants and declining to grant the defendant's motion for fees after consideration of the *King* factors).

Moore makes clear that the *King* factors govern regardless of the party moving for attorney fees. As other courts of appeal have observed, the relevant factors will often weigh against imposing attorney fees on a non-prevailing ERISA plaintiff. These cases do not suggest that the *King* factors are inapplicable. Rather, the best approach is to consider the policies and protections that ERISA was meant to effectuate while reviewing the *King* factors.

1.

The first factor to consider is the "degree of the opposing party's culpability or bad faith." *King*, 775 F.2d at 669. BCBSM contends that the Tribe unnecessarily expanded the scope and complexity of the litigation, citing *Moore*, 458 F.3d at 446, by asserting "their meritless argument that there was just one ERISA-governed plan sponsored by the Tribe." Def. Mot. Fees at 13. BCBSM argues that there was "clear legal authority" which demonstrated the frivolity of that position. *Id.* The company additionally asserts that the Tribe demonstrated bad faith behavior when they "baseless[ly] deni[ed]" BCBSM's requests for admissions seeking to establish that the Tribe had two plans with BCBSM. *Id.* BCBSM similarly faults the Tribe for refusing to admit that it had two separate plans during early mediation sessions and thus preventing an expeditious settlement. Finally, BCBSM argues that the Tribe's PGIP claim was manifestly foreclosed by controlling Sixth Circuit authority.

While considering these arguments, it must be remembered that "the course of litigation is rarely predictable." *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422 (1978). "Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Id.* at 701. Accordingly, "the mere fact that an action is without merit does not amount to bad faith." *BDT Prod., Inc. v. Lexmark Int'l, Inc.*, 602 F.3d 742, 753 (6th Cir. 2010).

*5 The Tribe's assertion that ERISA applied to both the Member and Employee Plans, though ultimately unpersuasive, was not made in bad faith. The questions of law implicated by the Tribe's argument were complex. The Court's analysis of ERISA's application to the Member Plan spanned over fifteen pages in the July 14, 2017, Op. & Order. *See id.* at 10–26. After the applicable statutory definitions and judicial interpretations were summarized and parsed, the Court concluded that ERISA's protections did not cover the Member Plan. But that conclusion was based, in large part, on the Tribe's dual role as employer and sovereign. Native American Tribes are not for-profit businesses, and

that difference was determinative here. Accordingly, there was a significant factual and legal distinction between the present case and the other access fee cases which BCBSM is currently defending. BCBSM makes much of the Court's "strong language" rejecting the Tribe's "one plan" argument. Def. Mot. Fees at 14. But the focus on the Court's conclusions, as opposed to the depth of its *analysis*, is unhelpful *post hoc* reasoning. *See Christiansburg*, 434 U.S. at 421–22 ("[A] district court [must] resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation"). After the work of reviewing and interpreting the relevant legal authority is completed, the application to a particular case will often be evident. A party did not necessarily litigate in bad faith simply because, in retrospect, the ultimate resolution was not a close question. BCBSM is correct that the Tribe's claim was questionable from the outset, but, especially given the complex legal and factual issues involved, the company has not shown that the Tribe brought the Member Plan claims in bad faith.

For similar reasons, BCBSM's assertion that the Tribe denied certain requests for admission in bad faith is not convincing. BCBSM argues that the Tribe refused to admit "incontrovertible" facts, like that "there is no requirement that a participant be a current or former 'employee' of Plaintiff Saginaw Chippewa Indian Tribe of Michigan ... to participate in the welfare benefit plan associated with ... Group Number 61672." Pl. Resp. Def. Sec. RTA at 7, ECF No. 118, Ex. I. In the Tribe's response, it denied the request

> because the request is premised on the false assumption that the enrollees in Group Number 61672 are participants in a plan that is different than the plan that is associated with the enrollees of Group Number 52885.... [I]n that sense, some participants are required to be an employee to be a part of the welfare benefit plan, and thus the request is denied.

Id.

The other requests for admission which BCBSM identifies likewise sought resolution of legally determinative factual issues. As explained above, the Tribe's factual and legal arguments regarding the significance of the two plans it maintained with BCBSM were rejected. But the distinctions and arguments the Tribe relied upon were not so manifestly meritless as to constitute bad faith, culpable behavior.[3]

3 For these reasons, BCBSM is not entitled to Federal Rule of Civil Procedure 37(c)(2) sanctions. The Tribe denied the requests for admission because BCBSM was seeking admissions regarding determinative factual issues that were unresolved. *See* Rule 37(c)(2)(C) & (D).

Because the Tribe's argument, at summary judgment, that the Member Plan was covered by ERISA was not made in bad faith, the Tribe cannot be faulted for refusing to settle at "two early mediation sessions." Def. Mot. Fees at 14. Indeed, BCBSM seems to imply that this case, like most access fees cases BCBSM is defending, should have been settled. But BCBSM can hardly assert an entitlement to settlement, especially because this case involved facts which differentiated it from other access fee cases.

The Tribe's arguments regarding its PGIP claim came closest to evidencing bad faith. Both the complaint and the Tribe's briefing at the summary judgment stage advanced an understanding of PGIP which was unsupported by the evidence presented. In dismissing the Tribe's PGIP claim, the Court explained that "the Tribe misconstrues the operation of PGIP." July 14, 2017, Op. & Order at 28. At summary judgment, BCBSM presented unrefuted evidence that PGIP was funded "by an internal reallocation of fees which would have been collected [from customers like the Tribe] anyway." *Id.* For that reason, the Court found that "the Tribe's assertion that PGIP violates BCBSM's fiduciary duty is puzzling."

Importantly, the Tribe's *allegations* framing its PGIP claim were not legally deficient. As recognized in the July 14, 2017, opinion and order, the Tribe's allegations "properly frame[d] the factual predicate that the Tribe would have to show to establish an ERISA fiduciary violation." *Id.* at 29. But the Tribe could not corroborate those assertions with evidence. The Tribe primarily relied upon two pieces of evidence in advancing its PGIP claim. A January 3, 2005, letter prepared by BCBSM did "suggest that the PGIP payment was *added onto* the yearly fee update, as opposed to contained within it." *Id.* at 31 (emphasis in original). Because deposition testimony clarified that, "for 2005, the amount of the fee update was

reduced by the amount of the PGIP payment," the letter was insufficient to demonstrate a genuine issue of material fact. The Tribe also referenced an email drafted by an employee which analogized the PGIP payments to the hidden access fee payments which BCBSM has admitted liability for. The employee later clarified that she had no direct knowledge of the program (and the Tribe declined to depose her). Given the dearth of any other supporting evidence in the record, the Court dismissed the Tribe's PGIP claim.

*6 However, the Court's opinion and order dismissing the Tribe's PGIP claim was the first instance, in any of the many cases currently being brought against BCBSM, where the PGIP claim was considered on its merits at summary judgment. In *Moore*, the Sixth Circuit affirmed an award of attorney fees against an ERISA plaintiff. In so holding, the Court noted that "Plaintiff unnecessarily prolonged litigation by filing unreliable briefs and pursuing arguments *even after their rejection by the court*." 458 F.3d at 445 (emphasis added). In this instance, the Tribe's PGIP claim had not been previously rejected by this or any other court. The Tribe was entitled to judicial consideration of its PGIP claim, despite the tenuous factual support for the claim. Accordingly, the Tribe did not act in bad faith when it sought adjudication of whether genuine issues of material fact existed.

Given the barebones evidentiary support for the Tribe's PGIP claim, the Tribe's decision to advance that claim through summary judgment approached the bounds of good faith advocacy. That said, the Tribe was advancing a colorable legal theory and, although it fell short of identifying sufficient supporting evidence to demonstrate a genuine issue of material fact, the Tribe did proffer *some* supporting evidence. The Tribe's "one plan" argument, similarly, was colorable. The Tribe did not act culpably or in bad faith while litigating this suit. The legal and factual support for the Tribe's claims, however, was limited, and so this factor does not strongly weigh against a fee award.

2.

The second factor to consider is whether the Tribe has the ability to satisfy an attorney fees award. The Tribe does not contest that it has the financial resources to satisfy an award, but alleges that an award is "not an appropriate use of plan assets" because all assets of the Plaintiff Welfare Benefit Plan should be used "for the exclusive benefit of plan participants and beneficiaries." Pl. Resp. Mot. Fees at 6, ECF No. 124 (citing 29 U.S.C. § 1103(c)).[4] At this stage, an exhaustive inquiry into whether the Benefit Plan can be required to use plan assets to satisfy a fee award is unnecessary. Both parties agree that the Plaintiffs possess significant financial resources. This factor weighs in favor of a fee award.

4 Plaintiffs contend that Plaintiff Saginaw Chippewa Indian Tribe of Michigan is "a Plaintiff in merely a fiduciary capacity for the other Plaintiff." *Id.*

3.

Third, the Court must consider "the deterrent effect of an award on other persons under similar circumstances." *King*, 775 F.2d at 669. BCBSM argues that "[a]n award of attorney's fees may dissuade other potential Access Fee plaintiffs from overreaching in an attempt to inflate their damages beyond what is recoverable under *Hi-Lex*." Def. Mot. Fees at 15. In response, the Tribe contends that "BCBSM's position would chill potential plaintiffs from thoroughly analyzing transactions with BCBSM to determine BCBSM's culpability on a case by case basis." Pl. Resp. Mot. Fees at 7.

If the Tribe had litigated its claims in a bad faith attempt to unnecessarily prolong and expand the litigation, this factor would weigh in favor of an award of fees. But, as explained above, the Tribe did not litigate in bad faith. It must be repeated that this lawsuit involved several factual and legal issues which were not implicated or resolved in *Hi-Lex*. First, the plaintiff in this case is a sovereign Native American Tribe which maintained two plans with BCBSM. As a sovereign entity, the Tribe was dissimilarly situated from other access fee plaintiffs. The *Hi-Lex* decision did not involve a multi-plan scenario involving a Native American Tribe. Likewise, the *Hi-Lex* decision did not consider whether BCBSM should be liable for its operation of PGIP. Given these unresolved issues, the Tribe has not engaged in an unreasonable attempt to overreach and unjustifiably expand the scope of litigation. To the contrary, the Tribe sought resolution of novel issues which *Hi-Lex* neither considered nor foreclosed.

*7 The "deterrent effect of a fee award ... is likely to have more significance in a case where the defendant is highly culpable." *Faltice v. Guardsman Prod., Inc.*, 98 F.3d 933, 937 (6th Cir. 1996). A fee award may be warranted if it deters the plaintiff from "unnecessarily expanding the scope of complexity of litigation." *Moore*, 458 F.3d at 446. But courts must take care not to "deter plaintiffs from bringing

colorable claims for benefits." *Id. See also Gibbs v. Gibbs*, 210 F.3d 491, 505 (5th Cir. 2000) (explaining the deterrence factor should not be used as a sword to discourage beneficiaries from pursuing a claim," but should rather be used "as a shield ... to encourage beneficiaries to assert their rights without fear of being responsible for the fees and costs of their opponent's attorneys if they failed to prevail"); *Salovaara v. Eckert*, 222 F.3d 19, 31 (2d Cir. 2000) ("[W]here, as in this case, an ERISA plaintiff has pursued a colorable (albeit unsuccessful) claim, the third *Chambless* factor likely is not merely neutral, but weighs strongly against granting fees to the prevailing defendant."); *Mahoney v. J.J. Weiser & Co.*, 646 F. Supp. 2d 582, 586 (S.D.N.Y. 2009), *aff'd sub nom. Toussaint v. JJ Weiser, Inc.*, 648 F.3d 108 (2d Cir. 2011) ("[G]iven ERISA's policy of protecting plan beneficiaries, colorable claims pursued in good faith, even if ultimately unsuccessful, should not be discouraged by awards of attorney's fees to prevailing defendants."). Indeed, ERISA plaintiffs are already deterred from advancing nonmeritorious suits because they must pay their own costs and fees if they do not prevail. *See Marquardt v. N. Am. Car Corp.*, 652 F.2d 715, 721 (7th Cir. 1981) ("[I]t generally is sufficient that plaintiff bears his own attorneys' fees and costs to deter institution of a frivolous or baseless suit.").

The Tribe's claims here were sufficiently colorable that deterrence would run counter to ERISA's underlying policies. Indeed, some perspective is necessary. This lawsuit is one of many which has been brought against BCBSM in recent months. These lawsuits all center on a core allegation: that BCBSM violated its fiduciary duty by charging hidden access fees to customers. After *Hi-Lex*, BCBSM has generally ceased defending those accusations (at least at summary judgment). Given BCBSM's concession that it violated its fiduciary duties in one area, the Tribe can hardly be faulted for advancing claims which allege that BCBSM violated its fiduciary duties in other areas. The third factor weighs strongly against a fee award.

4.

The fourth factor to consider is "whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA" *King*, 775 F.2d at 669. BCBSM argues, correctly, that this factor is largely inapplicable. *See Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 557 (6th Cir. 1987) (holding that "the city clearly was not attempting to confer a common benefit upon plans' participants" and further indicating that the third and fourth *King* factors are more relevant to motions for a fee award brought by plaintiffs). If anything, this factor weighs against a fee award. Prior to the July 14, 2017, opinion and order, the claim that BCBSM violated its fiduciary duties by operating PGIP had not been considered by any court at the summary judgment stage. The parties agree that many PGIP claims have been brought by various plaintiffs against BCBSM. To the extent the Tribe's decision to fully litigate the PGIP claim here has clarified the meritoriousness of PGIP claims in other similar lawsuits, the Tribe helped resolve an outstanding question regarding ERISA. Considered from this perspective, the Tribe's decision to litigate a broader universe of issues in this case arguably narrowed the universe of claims pending against BCBSM generally.[5] This factor weighs against a fee award.

5 It is worth noting that, to the Court's knowledge, all access fees plaintiffs, including the Tribe, are represented by the same law firm. BCBSM and Plaintiff's counsel, then, are waging a war on many fronts, not just this one.

5.

The final consideration is the relative merit of the parties' positions. This factor is closely related to the first factor (the opposing party's bad faith or culpability). BCBSM must show that the Tribe's positions were "more devoid of merit than that of [a typical] losing litigant." *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1304 (6th Cir. 1991), abrogated on other grounds by *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015). If the case involved an "important, complex issue of first impression," then the fifth factor weighs against a grant of attorney fees. *Firestone*, 810 F.3d at 557.

*8 BCBSM correctly asserts that all contested issues at summary judgment were resolved in its favor. But, as explained throughout this opinion, the Tribe's claims were colorable, particularly because some of the legal issues implicated by the Tribe's suit were complex and distinct from those litigated in *Hi-Lex*. For substantially the same reasons that the first *King* factor does not weigh in favor of a fee award, the fifth favor does support an award.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

6.

To summarize, only the second factor unequivocally supports a fee award. The first and fifth factors are relatively neutral. The fourth factor weighs against a fee award, though not strongly. The third factor, however, strongly favors the Tribe. Although there is no per se rule against awarding fees to prevailing defendants in ERISA cases, this is not one of the rare cases where doing so would be appropriate. ERISA was established to protect beneficiaries, not insurance providers. *See Gibbs*, 210 F.3d at 505. In the absence of clearly abusive and unwarranted litigation strategies, a fee award for defendants is typically unwarranted. Consideration of the five *King* factors demonstrates that BCBSM's motion for attorney fees must be denied.

B.

The Tribe has filed a motion for attorney fees and costs seeking compensation for hours billed regarding the Employee Plan's hidden fees claim (on which it prevailed). However, the Tribe admits that "[t]o the extent that an event related to *both* Hidden Fees charged to the Employee Group and other issues, those costs and fees are included in this motion because the event would have occurred regardless." Pl. Mot. Fees at 16, ECF No. 119 (emphasis in original). After consideration of the *King* factors, the Tribe is entitled to a partial fee award.

1.

The first consideration is whether BCBSM has acted culpably or with bad faith. In arguing that this factor weighs in favor of a fee award, the Tribe focuses on BCBSM's behavior in charging the hidden access fees. BCBSM, however, argues that this factor does not support a fee award because BCBSM "acted in good faith to settle the portion of the case for which it knew it was liable." Def. Resp. Mot. Fees at 15, ECF No. 125. Although courts sometimes consider whether the opposing party litigated in bad faith while weighing the first *King* factor, that approach is most applicable when a *defendant* seeks a fee award. *See Moore*, 458 F.3d at 446. Typically, the first factor analysis focuses on the plan administrator's underlying behavior which gave rise to the ERISA plaintiff's claim. *See Moon v. Unum Provident Corp.*, 461 F.3d 639, 643 (6th Cir. 2006) (explaining that the plan administrator had arbitrarily and capriciously denied benefits and thus that the defendant had engaged in culpable conduct). BCBSM's argument regarding its willingness to settle the access fees claims regarding the Employee Plan is most relevant to the fifth factor, which considers the relative merit of the parties' positions during the litigation.

After the proper scope of inquiry is defined, it becomes clear that BCBSM acted culpably and in bad faith when it charged hidden administrative fees to customers. In *Hi-Lex*, Judge Roberts expressly found that BCBSM "engaged in fraud and concealment to hide its violations ... [and] exhibited bad faith that precludes imputation for the purpose of its statute of limitations defense or otherwise." *Hi-Lex Controls Inc.*, 2013 WL 2285453, at *30. These findings of fact were affirmed on appeal, and BCBSM does not now contend that Judge Roberts mischaracterized the nature of the violations or that the access fees were handled differently with the Tribe. In this litigation, BCBSM has not contested that it charged hidden access fees to the Employee Plan or that the Tribe would prevail on claims premised on those fees. BCBSM thus acted in bad faith, and the first *King* factor weighs in favor of a fee award.

2.

*9 The second factor likewise weighs in favor of a fee award. BCBSM is a large corporation which has significant financial resources. *See Moon*, 461 F.3d at 644.

3.

Analysis of the third *King* factor focuses on whether a fee award would deter the offending party and similarly situated defendants from acting as the opposing party did. *See Gaeth v. Hartford Life Ins. Co.*, 538 F.3d 524, 531 (6th Cir. 2008). The Sixth Circuit has explained that the "deterrent effect of a fee award ... is likely to have more significance in a case where the defendant is highly culpable." *Foltice*, 98 F.3d at 937 (6th Cir. 1996). On the other hand, when the opposing party merely made "[h]onest mistakes," a fee award will have minimal benefit as a deterrent. *Id.*

As explained above, Judge Roberts found that BCBSM's decision to charge hidden access fees was more than an honest mistake. BCBSM was found to have fraudulently concealed a program whereby it charged customers for administrative fees without their knowledge. That behavior should be deterred.

BCBSM argues that a fee award would not operate as a deterrent in this matter because "[a]ny deterrent effect related to the charging of Access Fees by BCBSM and other [insurance providers] stems from the result in *Hi-Lex*.... This case adds nothing to that analysis and creates no new precedent or deterrent effect." Def. Resp. Mot. Fees at 16.

BCBSM has identified no authority which supports its assertion that an adverse judgment in a related case operates as an adequate deterrent to bad faith conduct in a separate lawsuit involving a different plaintiff.[6] This argument conflates notice with deterrence. BCBSM appears to suggest that, once an insurer has been informed of the error of their ways, fee awards for similar conduct serve no purpose. But most successful ERISA plaintiffs will not be advancing a novel legal theory which redefines the obligations of ERISA fiduciaries. Rather, many ERISA plaintiffs will simply be alleging that the defendant improperly denied their claim for disability benefits. *See, e.g., Moon*, 461 F.3d at 643. In determining whether a fee award will have a deterrent effect, the Sixth Circuit focuses on the culpability of the defendant's behavior, not the novelty of the claim. To be sure, if the plaintiff prevails on a novel claim, then the defendant's conduct was likely not highly culpable because the defendant may not have been on notice of their obligations prior to the lawsuit.

6 Importantly, Judge Roberts did not actually award attorney fees in *Hi-Lex*. Hi-Lex filed a motion for fees, but consideration of that motion was stayed during the appellate proceedings. After all appeals were exhausted, the parties submitted a stipulated proposed order dismissing the suit with prejudice. Case No. 2:11-cv-12557, ECF No. 311.

But this is not such a case. In *Hi-Lex*, BCBSM was found liable for charging hidden administrative fees to customers (a practice instituted after BCBSM tried to publically charge the fees and received significant customer criticism). The circumstances of the practice indicated that BCBSM was increasing fee collection from customers while purposefully concealing the fees in question. This was manifestly bad faith conduct. BCBSM cannot reasonably argue that it was unaware that this fraudulent self-dealing violated its fiduciary duties. Accordingly, a fee award is likely to operate as a valuable deterrent. *See Foltice*, 98 F.3d at 937.

*10 BCBSM's argument that *Hi-Lex* renders a fee award in this case redundant also overlooks another factor. *Hi-Lex* resolved only the claims by Hi-Lex Controls Inc., not any other potential plaintiff. At the same time, the *Hi-Lex* decision strongly suggested that BCBSM had violated its fiduciary duties to many of its customers. Accordingly, to vindicate their rights, those customers must bring suit against BCBSM. And BCBSM's practice appears to be to conduct discovery in access fee cases before settling the claims. In this suit, at least, BCBSM sought discovery related to a potential statute of limitations defense of the access fee claims. *See* Feb. 3, 2017 Letter, at 2, ECF No. 128, Ex. B. Discovery is expensive. Customers seeking to recover damages for BCBSM's breach of its fiduciary duty must thus expend a nontrivial amount of resources in advancing their claim.

BCBSM cannot be faulted for reviewing claims made by potential access fee plaintiffs and requiring substantiation of their entitlement to relief before admitting liability. But BCBSM's misconduct is what necessitated initiation of litigation in the first place, and plaintiffs with manifestly meritorious claims should not be required to bear the full cost of vindication. For that reason, *Hi-Lex* cannot operate as an adequate deterrent for the full scope of BCBSM's conduct, especially because no fee award was entered in that case.[7]

7 The third *King* factor necessarily establishes that an adverse judgment is not an adequate deterrent in all cases, especially when the judgment arises out of bad faith conduct. BCBSM's argument appears to be that *no* fee award is justified in any access fees case because BCBSM was found liable for the underlying conduct. That assertion cannot be true because it would render the third *King* factor essentially superfluous.

Hi-Lex established BCBSM's liability for the hidden access fees and compensated Hi-Lex Controls, Inc., for its expenses in bringing suit. But the *Hi-Lex* award did not consider the additional costs imposed by BCBSM's wrongful conduct: the litigation expenses other plaintiffs would incur in bringing demonstrably meritorious claims. The scope of BCBSM's wrongdoing, and not just the culpability revealed in *Hi-Lex*, is a proper consideration when determining whether a fee award would provide additional deterrent value. ERISA was intended to protect beneficiaries from the expenses that prevailing claims inevitably involve. *See Gibbs*, 210 F.3d at 505; *Ford*, 506 F. Supp. at 182. Given the limited scope of the *Hi-Lex* decision, a fee award in this matter would provide additional deterrent value. The third factor weighs in favor of a fee award.

4.

The fourth factor to consider is whether the Tribe conferred a common benefit on all participants or resolved significant legal questions. Because the Tribe is only seeking an award of fees related to its litigation of the access fees paid by the Employee Plan, only those claims are relevant. BCBSM's liability for the access fees paid by the Employee Plan was not contested in this suit. Rather, both parties agreed that, assuming the two plans were considered separately, BCBSM was liable for the fees paid by the Employee Plan. The claims on which the Tribe prevailed were thus completely derivative of those in *Hi-Lex*. The fourth factor weighs against a fee award.

5.

The final consideration is the relative merit of the parties' positions. At summary judgment, both parties agreed that BCBSM was liable for charging access fees related to the Employee Plan, assuming that plan was considered separately from the Member Plan. Because the parties asserted the same argument, the relative merit of their positions was identical.

The Tribe faults BCBSM for denying liability in its answer and for refusing to stipulate to liability regarding the Employee Plan early in the litigation. Defendants commonly proffer blanket denials in their answers even when they intend to settle. And, given the Tribe's insistence that the Member Plan and Employee Plan should be considered as a single plan for ERISA purposes, BCBSM's decision to withhold settlement on that claim until the scope of ERISA's applicability had been resolved was reasonable. In other words, a review of the whole record and particularly of the Tribe's litigation strategies makes clear that the Employee Plan access fees claims were not settled because the Tribe sought recovery of damages for access fees paid by the Member Plan. The Tribe did not prevail on that issue, and thus cannot condemn BCBSM for refusing to settle a related claim. The fifth factor is largely neutral. At best, it weighs slightly against a fee award.

6.

*11 In short, three of the five *King* factors support a fee award. The remaining two factors do not weigh heavily against an award. Accordingly, the Tribe's motion for fees and costs will be granted. However, given the limited nature of the Tribe's success and the fact that, at summary judgment, the claims on which the Tribe prevailed were uncontested, the Tribe is not entitled to the full amount it seeks. The lodestar analysis will be conducted, below, after BCBSM's motion for review of taxed costs is considered.

C.

After judgment was entered for the Tribe and against BCBSM in the amount of $8,426,278, the Clerk of Court taxed costs in favor of the Tribe in the amount of $5,738.35. ECF No. 120. In the bill of costs, the Tribe requested $5,548.40 in fees attributable to depositions. The clerk taxed $5,248.75 in deposition costs, declining to tax "[c]ourt reporter fees as to witness Brandy Pelcher ... [because] her corresponding deposition transcript was used only by the defendant in support of its motion for partial summary judgment and not by the prevailing plaintiff." ECF No. 120 at 2. Now, BCBSM has filed a motion for review of the taxed costs. BCBSM emphasizes that the Tribe prevailed only on their claim for access fees related to the Employee Plan and did not rely on any depositions in support of that claim. Accordingly, BCBSM argues that costs related to depositions the Tribe conducted on issues on which it did not prevail should be disallowed.

Federal Rule of Civil Procedure 54(d)(1) provides that "costs—other than attorney's fees—should be allowed to the prevailing party." The Rule further provides that "[t]he clerk may tax costs on 14 days' notice" and that, upon a timely motion, "the court may review the clerk's action." *Id.* Pursuant to 28 U.S.C. § 1920(2), "[f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case" may be taxed as costs. "Necessity is determined as of the time of taking, and the fact that a deposition is not actually used at trial is not controlling." *Sales v. Marshall*, 873 F.2d 115, 120 (6th Cir. 1989). To repeat: "[A] deposition does not have to be used as evidence to be taxed as an expense." *Baker v. First Tennessee Bank Nat. Ass'n*, 142 F.3d 431 (6th Cir. 1998).

Thirteen depositions are currently at issue. Of those depositions, nine involved deponents which BCBSM had listed as trial witnesses in their pretrial disclosures. *See* Def. Not. Pretrial. Discl., ECF No. 105. That notice of trial

witnesses was filed less than a month before the Court granted partial summary judgment for both parties (and after the motions for summary judgment had been fully briefed). The Tribe also asserts (and BCBSM does not contest) that eight of the thirteen depositions, including the remaining deponents which BCBSM did not identify as trial witnesses, were initiated by BCBSM.

Since BCBSM either initiated or relied upon the depositions in question, the company cannot reasonably argue that the depositions were irrelevant to the claims resolved at summary judgment. *See Irani v. Palmetto Health*, No. 3:14-CV-3577-CMC, 2016 WL 3922329, at *3 (D.S.C. July 21, 2016) ("Having been the party who noticed these depositions, Plaintiff cannot ... argue the depositions themselves were unnecessary."); *Kaimowitz v. Howard*, 547 F. Supp. 1345, 1353 (E.D. Mich. 1982), aff'd, 751 F.2d 385 (6th Cir. 1984) (finding that there was "a reasonable need" for the defendants to depose individuals listed as witnesses by the plaintiff).

Accordingly, even though the challenged depositions were not relied upon by the Tribe in support of its Employee Plan claims, the depositions were arguably necessary at the time they were conducted. BCBSM contends that, even if that is true, the depositions were not necessary to prepare for the only claim on which the Tribe prevailed. When a party obtains only partial success in an action, courts sometimes "reduce the size of the prevailing party's award to reflect the partial success." 10 Charles Alan Wright and Arthur R. Miller, *Award of Costs to Prevailing Party*, Fed. Prac. & Proc. Juris. § 2667 (3d ed.). *See also United States v. Terminal Transp. Co.*, 653 F.2d 1016, 1021 (5th Cir. 1981) (affirming the taxation of only one-half of costs because the plaintiffs were only partially successful); *Pierce v. Cty. of Orange*, 905 F. Supp. 2d 1017, 1049 (C.D. Cal. 2012) (reducing costs taxed by 15% because of partial success); *Armstead v. Starkville Mun. Separate Sch. Dist.*, 395 F. Supp. 304, 312 (N.D. Miss. 1975) (reducing costs taxed by twenty-five percent because of partial success).

*12 Three categories of claims were addressed at summary judgment. The Tribe prevailed only on the first category of claims, which were related to the access fees paid by the Employee Plan. BCBSM's liability for those claims was essentially uncontested, and the Tribe did not rely on deposition testimony in its briefing on these claims. The Tribe did not prevail on its remaining claims (Member Plan access fee claims and the PGIP claim). BCBSM does not specifically identify the subject of each depositions (and independent verification would require a significant outlay of time). The Tribe argues that the depositions were all necessary because BCBSM noticed the depositions "without identifying specific claim or claims to which the deposition was to pertain." Pl. Resp. Br. Review Costs at 7, ECF No. 129. For that reason, the Tribe was required to participate in the depositions to protect its interests in all three claims. The assertion that the depositions included relevant information regarding all three claims is reasonable. In the absence of specific, contradictory information, the Court will reduce the Tribe's taxable costs by two-thirds (to account for the Tribe's partial success).

When the Tribe's deposition costs ($5,248.75) are multiplied by .34, the resulting sum is $1,784.58. The Tribe also asserts costs of $489.60 which BCBSM does not contest. BCBSM's motion for review of the taxed costs will be granted in part, and BCBSM will be directed to pay taxed costs of $2,274.18 to the Tribe.

IV.

Because the Tribe is entitled to a fee award of some amount, the only remaining question is what a reasonable award would be given the circumstances. The Tribe seeks compensation for 2,673 billed hours (that is, more than 66 work weeks), totaling in a requested award of $1,179,721.13.

The starting point in determining the reasonableness of attorneys' fees is the "lodestar" method. *Wayne v. Vill. of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994). Under this method, a reasonable rate is calculated by multiplying "the number of hours reasonably expended" by "a reasonable hourly rate." *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)) (internal quotation marks omitted). "Next, the resulting sum should be adjusted to reflect the result obtained." *Id.* (internal quotation marks omitted). Adjustments may be made "to reflect relevant considerations peculiar to the subject litigation." *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000).

The last step in the lodestar analysis is determining if any reductions to the lodestar figure are warranted. The Sixth Circuit has incorporated the twelve factors set forth by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974), as a starting point for determining if adjusting the lodestar figure is warranted. *Adcock-Ladd*, 227 F.3d at 349.[8] "Accordingly, modifications [to the lodestar] are proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence'

on the record and detailed findings by the lower courts." *Adcock-Ladd*, 227 F.3d at 349-50 (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986)). A district court awarding fees "must provide a clear and concise explanation of its reasons for the fee award." *Wayne*, 36 F.3d at 533 (quoting *Hadix v. Johnson*, 65 F.3d 532, 535 (6th Cir. 1995)).

8 "These factors are: (1) the time and labor required by a given case; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Reed v. Rhodes*, 179 F.3d 453, 471–72 n.3 (6th Cir. 1999) (citing *Johnson*, 488 F.2d at 717–19).

A.

BCBSM argues that the Tribe's counsel is seeking an unreasonable hourly rate and an unreasonable number of hours. BCBSM also contends that the Tribe's fee award should be reduced because the Tribe prevailed on only one issue, and that issue was essentially uncontested at summary judgment. Those challenges will be addressed in turn. It must be remembered, however, that the "essential goal in [awarding reasonable fees] is to do rough justice, not to achieve auditing perfection." *Fox v. Vice*, 563 U.S. 826, 838 (2011).

1.

***13** The initial task is to determine the reasonable rate. The firm representing the Tribe is seeking an average hourly rate of $428. In lead counsel Perrin Rynder's declaration, he explains that "the rates for equity partners range from $650 to $510." Rynders Decl. at 5, ECF No. 119, Ex. D. He further indicates that the "rate for non-equity partners is $355" and the "rates for associates range from $340 to $230." *Id.* The billing rate for paralegals ranges from $235 to $155. *Id.*

"To arrive at a reasonable hourly rate, courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). In other words, the appropriate rate "is not necessarily the exact value sought by a particular firm, but is rather the market rate in the venue sufficient to encourage competent representation." *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 618 (6th Cir. 2007).

The parties agree that the 2014 Economics of Law Practice Report provides probative data regarding the prevailing market rate for Michigan attorneys. *See* 2014 Econ. Law. Rep., ECF No 119, Ex. F. Varnum LLP is a large firm with its primary offices in Grand Rapids and Detroit. According to the Economics of Law Practice Report, attorneys in firms of more than 50 people bill at a mean hourly rate of $377, a 75% hourly rate of $475, and a 95% hourly rate of $570. *Id.* at 5. Similarly, attorneys in firms located in downtown Detroit bill at a mean hourly rate of $304, a 75% hourly rate of $400, and a 95% hourly rate of $550. *Id.* Attorneys in firms located in Grand Rapids bill at a mean hourly rate of $298, a 75% hourly rate of $370, and a 95% hourly rate of $510. *Id.* The Economics of Law Practice Report also provides billing rates for fields of practice. Attorneys practicing civil litigation bill at a mean hourly rate of $290, a 75% hourly rate of $345, and a 95% hourly rate of $500. Attorneys practicing insurance law bill at a mean hourly rate of $236, a 75% hourly rate of $300, and a 95% hourly rate of $455.

BCBSM, first, takes issue with the Tribe's contention that its requested rate is reasonable because the average hourly rate for the hours expended in this matter comes to $428. BCBSM argues that the reasonableness of the rate charged by each individual attorney should be examined separately. In support of that proposition, BCBSM cites two cases where the district court awarded attorney fees in an ERISA suit and analyzed the reasonable hourly rate separately for each attorney. *See Potter v. Blue Cross Blue Shield of Michigan*, 10 F. Supp. 3d 737, 743 (E.D. Mich. 2014); *Van Loo v. Cajun Operating Co.*, No. 14-CV-10604, 2016 WL 6211692, at *3 (E.D. Mich. Oct. 25, 2016).

As explained above, the reasonable hourly rate analysis focuses on the "market rate in the venue sufficient to encourage competent representation," not "necessarily the exact value sought by a particular *firm*." *Gonter*, 510 F.3d at 618 (emphasis added). The "skill and experience" of

the attorneys seeking a fee award is thus relevant, but only to enable an accurate calculation of the appropriate market rate. *Geier v. Sundquist*, 372 F.3d at 791. Given this background, BCBSM has not demonstrated why "the attorney's hourly rates must be examined individually." Def. Resp. Mot. Fees at 19 n.9. Complex civil litigation like the present suit is litigated by teams of attorneys. This division of labor enables higher-billing attorneys to delegate some time-intensive tasks to lower-billing associates and support staff. The cost-saving which results should be encouraged. *See Hemlock Semiconductor Operations, LLC v. SolarWorld Indus. Sachsen GmbH*, 702 Fed.Appx. 408, 415 (6th Cir. 2017) ("Orrick kept the number of hours that those attorneys billed relatively low by using a large number of lower-cost attorneys and support staff. Orrick's average hourly rate, or firm-wide total fee divided by the total hours worked, was $470."). The most relevant consideration, then, appears to be whether the firm-wide rate for the hours billed on a given case was reasonable, not whether the hourly rate of every attorney who participated in the litigation was reasonable in a vacuum.

*14 The averaged rate which Varnum seeks ($428) is between the mean rate ($377) and 75% rate ($475) for attorneys at firms of more than fifty people. Varnum's proposed rate falls between the 75% and 95% of the hourly rates at firms located in Detroit and Grand Rapids. Similarly, Varnum's proposed rate comes closer to the 95% rates for civil litigation ($500) and insurance law ($455) than the 75% rates ($345 and $300, respectively).

The hourly rates for Varnum partners in this litigation (which range from $510 to $650) are thus significantly higher than the 95% rates for comparable attorneys in Michigan. The rates for Varnum associates (which range from $230 to $340), on the other hand, are at or below the mean rate for similar attorneys. Given their experience, reputation, and diligent work in this case, the averaged rate sought by Varnum is not unreasonable. As explained above, however, the aim of this analysis is to identify the market rate sufficient to attract competent counsel. The average rate which Varnum seeks is well above the mean rate for comparable attorneys. At the same time, the scope and complexity of this suits justifies an above average hourly rate. A rate between the mean and 75% rates for comparable attorneys is reasonably calculated to attract competent counsel in cases of this nature. The mean hourly rate for attorneys in firms of more than 50 attorneys is $377, while the 75% hourly rate for firms in Detroit and Grand Rapids and for attorneys engaging in civil litigation and insurance law ranges from $300 to $400. Those characteristics are most probative here. An hourly rate of $380 will be used here.

2.

Next, the Court must determine the reasonable number of hours expended. In its motion for attorney fees, the Tribe contends that it is seeking compensation only for work it did regarding the issue on which it prevailed: the Member Plan's access fee payments. BCBSM argues, first, that Varnum's billing records reveal that it is seeking compensation for work spent solely on claims which were rejected. Second, BCBSM argues that Varnum's is billing for hours spent on work which involved both meritorious and nonmeritorious claims. The company argues that billable hours in the first category should be entirely excluded and that the remaining total of hours should be reduced to reflect the fact that the Tribe prevailed on only one (largely uncontested) claim.

When "the plaintiff's claims for relief ... involve a common core of facts or [are] based on related legal theories," then "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). But "work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' " *Id.* (quoting *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444, at 5049 (C.D. Cal. 1974)).

In their brief and in an attached exhibit, BCBSM identifies a number of billing entries which are clearly related solely to work which Varnum did on nonmeritorious issues.[5] Specifically, Varnum's billing records include 40.5 hours related to research for their motion for reconsideration of the August 3, 2016, opinion and order granting BCBSM's motion for dismissal of the MLR claim. *See* Varnum Invoices at 1–25, ECF No. 119, Ex. E. The Tribe argues that it partially prevailed on its motion for reconsideration. And the Court did amend its previous order to clarify that Count One had been dismissed only to the extent it alleged claims related to BCBSM's obligation to pay Medicare-like Rates, and not to the extent it alleged that BCBSM violated its fiduciary duty by charging hidden access fees. That analysis in the order partially granting the motion for reconsideration spanned only five sentences. *See* Oct. 27, Op. & Order at 8, ECF No. 29. And, importantly, that ruling involved essentially the correction of a clerical error (because the substance of the Court's previous opinion had made clear that no access

fee claims were being dismissed). The Tribe's challenge to the dismissal of the MLR claim was rejected on its merits. Because all research and essentially all drafting for the motion for reconsideration involved arguments which were squarely rejected, the 40.5 hours spent researching and drafting the motion will be excluded.

9 Varnum's invoice is 150 pages. BCBSM has submitted a "marked-up" copy of the invoice where it highlights entries which it believes should be excluded from the fee award calculations. Given the number of entries contested, it is unfeasible to individually address each one. The Court has reviewed each contested entry and determined whether it is arguably related to an issue on which the Tribe prevailed. Entries which clearly relate to losing claims will be excluded. To the extent an entry arguably contained work on both meritorious and nonmeritorious issues, that entry has not been excluded. Rather, and as explained below, the overall fee award will be reduced by 75% to reflect the fact that the Tribe prevailed on only one, uncontested, issue.

*15 Varnum also spent a tremendous amount of time researching and drafting its briefing on the cross motions for summary judgment. After review of the contested invoice entries, the Court has identified 481.47 in hours spent researching and drafting the briefing (that is, more than 12 work weeks). Although the Tribe prevailed on the Employee Plan claim, these hours will be excluded for several reasons. First, the Employee Plan issue was uncontested at summary judgment. Accordingly, neither party devoted meaningful briefing space to the issue. Second, the Tribe did not support its claim for relief regarding the Employee Plan with any deposition testimony or other evidence. The Tribe relied exclusively on *Hi-Lex* and BCBSM's admission of liability. Third, if the Employee Plan claim was the only claim asserted by the Tribe, this suit would not have proceeded to summary judgment. As with the vast majority of other access fee cases, BCBSM would have settled the suit. Thus, the time and resources expended by both parties at summary judgment is almost solely attributable to the nonmeritorious arguments which the Tribe advanced regarding the Member Plan and PGIP. Because the Tribe should not be compensated for hours spent on those claims, the 481.47 hours spent preparing the briefing on the motions for summary judgment will be excluded.

However, several categories of entries which BCBSM challenges will not be excluded. First, BCBSM challenges time billed by Varnum related to certain depositions. The company contends that these depositions were related solely to issues on which the Tribe lost. But the truth of that assertion cannot be confirmed by review of the invoices or even by review of the briefing on the motions for summary judgment. And the Tribe argues that these depositions provided information which was relevant to all claims. Accordingly, the Court would need to peruse the transcripts of each deposition in question. That expenditure of resources is neither reasonable nor possible (the full transcripts of all contested depositions have not been provided to the Court).

BCBSM also challenges hours that Varnum billed preparing for Neil Steinkamp's deposition and responding to BCBSM's motion to strike Steinkamp's prejudgment interest rate analysis, ECF No. 72. In the motion, BCBSM argued that Steinkamp's opinion was contrary to law because the interest rate he proposed was higher than the interest rate rejected by the district court in *Hi-Lex*. The Court rejected that argument. BCBSM also argued that Steinkamp's analysis was purely speculative and thus inherently unreliable. The Court also rejected that argument, explaining that "any unreliability in Steinkamp's analysis can be adequately challenged" later, at trial. May 16, 2017, Op. & Order at 13, ECF No. 99. Thus, the Tribe prevailed on this issue.

BCBSM argues that Varnum should not be compensated for these billed hours because it did not ultimately obtain prejudgment interest. But the reason for that is simple. In the Tribe's motion for partial summary judgment, the Tribe did not attach Steinkamp's opinion or brief a request for prejudgment interest. Rather, the Tribe simply sought "[p]artial judgment regarding hidden access fees in the amount of $13,461,423; plus interest and attorneys' fees to be determined later." Pl. Mot. Summ. J. at 24, ECF No. 81. No motion seeking interest was ever filed. Accordingly, the Tribe's entitlement to prejudgment interest was not considered, much less rejected, on its merits. The Tribe is entitled to partial compensation for the hours spent regarding Steinkamp's report because it prevailed in defending the motion to strike, and the issue was not further litigated.

Finally, BCBSM argues that the Tribe should not be compensated for the hours it spent after the Court's July 14, 2017, opinion and order reviewing the opinion and discussing whether to file a motion for reconsideration or file an appeal. No motion for reconsideration was filed, but the Tribe has

appealed. ECF No. 114. Given the modest amount of hours invested in reviewing the opinion and because an appeal was, in fact, filed, no hours will be excluded simply because Varnum *might* have spent them researching a motion for reconsideration which it chose not to file.

To summarize, the Tribe seeks compensation for 2,673 hours of work. For the reasons just articulated, 521.97 of those hours will be entirely excluded from the lodestar calculations. The number of hours arguably partially expended on meritorious claims comes to 2,151.03. When that amount is multiplied by the reasonable hourly rate of $380, the initial lodestar sum comes to $817,391.40.

3.

*16 Next, the lodestar calculation "should be adjusted to reflect the 'result obtained.' " *Wayne*, 36 F.3d at 531 (quoting *Hensley*, 461 U.S. at 434). To determine if an adjustment is appropriate, two questions arise: "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Hensley*, 461 U.S. at 434.

For a number of reasons, a significant downward adjustment is necessary in this case. The Tribe's amended complaint framed four categories of claims. First, the Tribe alleged that "BCBSM breached its fiduciary duty to Plaintiff under [ERISA] when it did not authorize payment of Medicare-like Rates ... for certain health services." August 3, 2016, Op. & Order at 1. That claim was dismissed at the pleading stage. Second, the Tribe alleged that BCBSM breached its fiduciary duty when it charged the Tribe's Employee Plan hidden fees. Third, and relatedly, the Tribe alleged that BCBSM breached its fiduciary duty when it charged the Tribe's Member Plan hidden fees. Finally, the Tribe alleged that BCBSM violated its fiduciary duty through the operation of PGIP. This claim was rejected at summary judgment.

If the Tribe's complaint had framed only the Employee Plan access fees claims, no motions for summary judgment would have been filed and significantly less discovery would have been conducted. At summary judgment, the Tribe asserted simply that BCBSM has conceded liability for this claim, assuming that the two plans were considered separately. The Tribe devoted two paragraphs of briefing to this claim and submitted no supporting evidence. The Tribe argued that they should be considered together, and that argument was rejected. Accordingly, the contested issues at summary judgment (and the manifest reason that summary judgment was necessary) are directly traceable to the Tribe's decision to advance certain claims and arguments which were rejected on their merits.

The Tribe contends that BCBSM refused to stipulate to liability on the Employee Plan claims early in the litigation and thus the Tribe was required to engage in substantial discovery and litigation. As explored throughout this opinion, however, the primary issue the parties disputed was how to characterize the two insurance plans at issue. Given the Tribe's attempt to package the Employee Plan and Member Plan together for purposes of liability, BCBSM's cannot be faulted for refusing to stipulate to liability for the Employee Plan claims. Rather, BCBSM correctly argued that the two plans should be separately considered for ERISA purposes.

BCBSM concedes that *some* discovery was necessary on the Employee Plan issue. *See* Def. Resp. Mot. Fees at 20 (arguing that any fee award should be reduced to an amount consistent with the work required for the Employee Plan claims and noting that it spent approximately $150,000 on those claims). Indeed, BCBSM advanced a statute of limitations affirmative defense until it was dismissed by stipulation in March 2017. ECF No. 75. Likewise, some (maybe all) of the depositions conducted likely produced information relevant to the Employee Plan claims.

In general, however, there can be no dispute that the vast majority of the discovery and motions practice was solely focused on claims on which the Tribe did not prevail. If the Tribe had advanced only the Employee Plan claim, Varnum would not have spent upwards of 2,600 hours (a number which Varnum contends already excludes hours spent solely on meritless claims). The Supreme Court has explained that, in determining the proper award of a fee award, "the most critical factor is the degree of success obtained." *Hensley*, 461 U.S. at 424. Here, the Tribe prevailed on only one of the four categories of claims it advanced. Assuming that the time spent by Varnum preparing for the claims produced equal value for each claim, the fee award should be reduced by 75% to account for the Tribe's limited success. *See Helfman v. GE Grp. Life Assur. Co.*, No. 06-13528, 2011 WL 1464678, at *10 (E.D. Mich. Apr. 18, 2011) (reducing fee award by 87.5% because the plaintiff sought benefits for a 48 month period but only obtained benefits for six months). This reduction is,

if anything, conservative, because the one issue on which the Tribe prevailed was uncontested for much of the litigation, and thus would have necessitated minimal work.

***17** For the reasons just articulated, the initial lodestar amount ($817,391.40) will be reduced by 75%. After that reduction, the reasonable fee award comes to $204,347.85.

4.

The final step is to consider twelve factors and determine whether any further reduction in the lodestar amount is necessary.

> These factors are: (1) the time and labor required by a given case; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Reed v. Rhodes, 179 F.3d 453, 471–72 n.3 (6th Cir. 1999) (citing *Johnson*, 488 F.2d at 717–19). Neither party has directly addressed the applicability of these additional factors. Given the significant reductions already imposed, no further reduction is appropriate. BCBSM will be directed to compensate the Tribe $204,347.85 for attorneys related to the Employee Plan claims.

B.

The final issue to resolve is the Tribe's request for costs it incurred related to the Employee Plan claims. Varnum seeks an award of nontaxable costs in the amount of $36,072.13. "As with attorney's fees, the Court has broad discretion to award costs to parties in ERISA action who have shown some degree of success on the merits." *Potter v. Blue Cross Blue Shield of Michigan*, 10 F. Supp. 3d 737, 753 (E.D. Mich. 2014). BCBSM objects to several categories of costs sought.

First, BCBSM argues that the $24,657.50 in expert witness fees which the Tribe seeks are not recoverable. Pursuant to 29 U.S.C. § 1132(g)(1), the Court may "in its discretion ... allow a reasonable attorney's fee and costs of action to either party." Some courts have held that this discretion is limited to the types of costs which are permitted in other statutory provisions, like 28 U.S.C. § 1920. *Agredano v. Mut. of Omaha Companies*, 75 F.3d 541, 544 (9th Cir. 1996) (holding in an ERISA action that the court was empowered "to award only the types of 'costs' allowed by 28 U.S.C. § 1920, and only in the amounts allowed by section 1920 itself ... or by similar such provisions"). Because § 1920 does not permit fee shifting for expert witness fees, some courts have refused to award such fees in ERISA actions. *Id.* Although an award of costs for expert witness fees is not required, district courts appear to have discretion to award such fees. *Id.* ("[W]e note that the district court denied Agredano's motion for expert witness fees in its entirety, rather than considering whether to exercise its discretion and award her witness fees to the extent allowed by 28 U.S.C. §§ 1920(3) and 1821(b)."). *See also Antolik v. Saks Inc.*, 407 F. Supp. 2d 1064, 1082 (S.D. Iowa), rev'd and remanded on other grounds, 463 F.3d 796 (8th Cir. 2006) (explaining that expert witness were "not recoverable as costs in this action" but indicating that because the court reviewed the expert report and such expenses are normally passed on to clients, the fees would be permitted "as an addition" to the attorney fees but at a 15% discount).

***18** The Sixth Circuit has not addressed this issue. But several courts in this district have awarded such costs. *See Potter v. Blue Cross Blue Shield of Michigan*, 10 F. Supp. 3d 737, 753 (E.D. Mich. 2014) (identifying four district courts which permitted recovery of fees not expressly contemplated in § 1920 and following their approach). In *Schumacher v. AK Steel Corp. Ret. Acc. Pension Plan*, the court explained that non-taxable costs which are *not* listed in § 1920 may be awarded "if such expenses are reasonable and necessary, and are typically billed to clients under prevailing practice in the jurisdiction." 995 F. Supp. 2d 835, 853 (S.D. Ohio 2014) (citing *Northcross v. Bd. of Ed. of Memphis City Sch.*, 611 F.2d 624, 639 (6th Cir. 1979) and *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1036 (8th Cir. 2008)). The practice in the

Eastern District appears to be for attorneys to bill expert fees to clients and for courts to permit recovery of those fees to the extent they are reasonable and necessary. *See, e.g., Huizinga v. Genzink Steel Supply & Welding Co.*, 984 F. Supp. 2d 741, 754 (W.D. Mich. 2013); *May v. Nat'l Bank of Commerce*, No. 03-2112 M1/P, 2006 WL 328144, at *1 (W.D. Tenn. Feb. 10, 2006). Accordingly, the Tribe's expert fees are recoverable to the extent they are reasonable.

BCBSM also challenges the $1,579.50 in mediator fees which the Tribe seeks. BCBSM relies upon the same statutory arguments regarding § 1132(g) which were rejected above. Such costs are of the type normally billed to clients, *see, e.g, May*, 2006 WL 328144. BCBSM argues that this request is "bizarre" because the Tribe "rejected a mediated settlement of their Employee Plan claim in excess of the judgment they ultimately claimed." Def. Resp. Mot. Fees at 22 n. 13. A similar argument was addressed above: BCBSM reasonably insisted on a global settlement of claims and, given the unresolved legal issues at the time of mediation, the Tribe's refusal to settle was also reasonable. Fees incurred in mediation are not per se unrecoverable.

However, the fact that all costs which the Tribe seeks to recover are potentially recoverable does not mean that the amount sought is reasonable. BCBSM argues that the Tribe should be permitted to recover only a quarter of its costs to reflect the limited recovery it received. As discussed above, the only issue on which the Tribe prevailed was uncontested for a significant portion of the litigation. For that reason, only a small portion of the costs the Tribe incurred during litigation can be reasonably attributed to that claim. Like the attorney fee award, the Tribe's request for costs will be reduced by 75% to approximate the amount of reasonable costs that could have been incurred litigating just the Employee Plan issue. The Tribe will be awarded nontaxable costs in the amount of $9,018.03. In total, the Tribe will be awarded $213,365.88 in fees and nontaxable costs.

V.

Accordingly, it is **ORDERED** that Defendant Blue Cross Blue Shield of Michigan's motion for fees and costs, ECF No, 118, is **DENIED.**

It is further **ORDERED** that Plaintiffs Saginaw Chippewa Indian Tribe of Michigan's and the Welfare Benefit Plan's motion for fees and costs, ECF No. 119, is **GRANTED in part.**

It is further **ORDERED** that Defendant Blue Cross Blue Shield of Michigan's motion for review of the taxed bill of costs, ECF No. 123, is **GRANTED in part.**

It is further **ORDERED** that Defendant Blue Cross Blue Shield of Michigan is **DIRECTED** to pay fees and nontaxable costs of **$213,365.88** to the Plaintiffs.

***19** It is further **ORDERED** that Defendant Blue Cross Blue Shield of Michigan is **DIRECTED** to pay taxed costs of **$2,274.18** to the Plaintiffs.

All Citations

Not Reported in Fed. Supp., 2018 WL 453762, 2018 Employee Benefits Cas. 14,561

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

2017 WL 2403569
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Northern Division.

Kimberly J. GUEST-MARCOTTE, Plaintiff,
v.
METALDYNE POWERTRAIN COMPONENTS, INC., et al., Defendants.

Case No. 15-cv-10738
|
Signed 06/02/2017

Attorneys and Law Firms

Karen S. Kienbaum, Karen Smith Kienbaum Assoc., Detroit, MI, for Plaintiff.

Brian M. Schwartz, Miller, Canfield, Detroit, MI, for Defendants.

ORDER DENYING MOTION FOR ATTORNEYS' FEES

THOMAS L. LUDINGTON, United States District Judge

*1 Plaintiff Kimberly J. Guest-Marcotte initiated this case by filing her two-count complaint on February 27, 2015, alleging that Defendants violated her rights under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B) and (a)(2), in denying her request for short term disability benefits. She further alleges that Defendants violated her rights under Michigan's Persons with Disabilities Civil Rights Act ("PWDCRA") in subsequently terminating her employment. *See* Compl. ECF No. 1. Plaintiff filed an amended complaint on April 19, 2016. *See* Am. Compl., ECF No. 44.

On December 1, 2016 the magistrate judge issued a report, recommending that Plaintiff's motion for judgment be denied and that Defendant's motion for judgment be granted. *See* ECF No. 63. The magistrate judge reasoned that Plaintiff had not demonstrated that the Plan Administrator's decision to deny her benefits was in error under the arbitrary and capricious standard, particularly given the lack of objective medical evidence. The magistrate judge further reasoned that Defendant Metaldyne's subsequent decision to terminate Plaintiff's employment was not inconsistent with the plan administrator's disability determination. The magistrate judge therefore recommended that Plaintiff's complaint be dismissed with prejudice. By an order dated January 6, 2017, Plaintiff's objections were overruled and the magistrate judge's report was adopted. *See* ECF No. 67. Judgment then entered against Plaintiff on February 2, 2017. *See* ECF No. 73.

I.

After the entry of judgment, on March 2, 2017, Defendants filed a joint motion for attorneys' fees pursuant to 29 U.S.C. § 1132(g)(1). *See* ECF No. 74. That section provides that in an ERISA action "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." *Id.* This rule serves as a slight abrogation from the presumptive "American Rule," under which "each litigant pays his or her own attorney's fees, win or lose, unless a statute or contract provides otherwise." *See Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 253 (2010) (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983)). To justify an award of fees under § 1132(g)(1), a party must show "some degree of success on the merits." *Id.* at 255. "A claimant does not satisfy that requirement by achieving 'trivial success on the merits' or a 'purely procedural victor[y].' " *Id.* (quoting *Ruckelshaus*, 463 U.S. at 688).

In guiding the exercise of its discretion, a district court may consider the traditional "King" five-factor fee-shifting test, but consideration of the factors is not required. *Id.* at 254-55. Nevertheless, the King factors are as follows:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

> (5) the relative merits of the parties' positions.

*2 *See First Trust Corp. v. Bryant*, 410 F.3d 842 (6th Cir. 2005).

Defendants have not demonstrated that discretionary fees are justified in this matter. While Defendants indisputably achieved success on the merits, they have not demonstrated that Plaintiff acted in bad faith, or that other persons should be deterred from bringing similar claims. While Plaintiff's claim was brought only on her own behalf, the case presented somewhat unusual factual and legal issues regarding the interaction between benefits determinations and employment actions. Defendants also have not demonstrated any inability to bear their own fees, and requiring Plaintiff to bear Defendant's costs would result in an onerous financial burden. Defendants have not identified any other factor weighing in favor of a discretionary award of fees. Because the balance of factors weighs against an award of fees, Defendants' motion will be denied.

II.

Accordingly it is **ORDERED** that Defendant's motion for Attorneys' fees, ECF No. 74, is **DENIED.**

All Citations

Not Reported in Fed. Supp., 2017 WL 2403569

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

2021 WL 1759634
Only the Westlaw citation is currently available.
United States District Court, S.D. Ohio, Western Division, at Dayton.

Charlie DUNCAN, et al., Plaintiffs,
v.
MINNESOTA LIFE INSURANCE COMPANY, Defendant.

Case No. 3:17-cv-00025
|
Signed 05/04/2021

Attorneys and Law Firms

Perry R. Staub, Jr., Pro Hac Vice, Taggart Morton Ogden Staub Rougelot & O'Brien LLC, New Orleans, LA, Darrell Arthur Clay, Walter & Haverfield LLP, Cleveland, OH, for Plaintiffs.

Brett K. Bacon, Angela D. Lydon, Olivia Lin Southam, Frantz Ward LLP, Cleveland, OH, for Defendant.

ENTRY AND ORDER DENYING DEFENDANT'S MOTION FOR AWARD OF ATTORNEYS' FEES AND SUPPLEMENTAL APPLICATION FOR AWARD OF ATTORNEYS' FEES

THOMAS M. ROSE, UNITED STATES DISTRICT JUDGE

*1 Pending before the Court in this ERISA case is Defendant's Motion for Award of Attorneys' Fees (Doc. 72) (the "Motion"), filed by Defendant Minnesota Life Insurance Company ("Minnesota Life"), and the parties' associated briefing on the Motion (Docs. 73, 74, 78, and 79).[1] As the Motion's title indicates, Minnesota Life seeks certain attorneys' fees it incurred during this litigation. Following the Mandate issued by the Sixth Circuit Court of Appeals (Doc. 77), as well as completion of supplemental briefing on the Motion, the matter is ripe for review and decision.

1 The Plaintiffs in this action are Charlie Duncan, as Executor of the Estate of Paul W. McVay, and Janet Freel, as Beneficiary of the Estate of Paul W. McVay. They will collectively be referred to as "Plaintiffs."

In certain ERISA actions, "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1); *see also Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 446 (6th Cir. 2006) ("there is no presumption of award of attorneys' fees to the prevailing party in an ERISA action"). The Sixth Circuit Court of Appeals has identified five factors to guide district courts in deciding whether to grant attorney's fees under 29 U.S.C. § 1132(g)(1). *Sec'y of Dep't of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985) ("*King*"). Those factors are: "(1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions." *Id.* "No single factor is determinative." *Trs. of Detroit Carpenters Fringe Benefit Funds v. Patric Constr. Co.*, 618 F. App'x 246, 258 (6th Cir. 2015).

The Court initially finds that Minnesota Life has achieved more than the requisite " 'some degree of success on the merits' before a court may award attorney's fees under § 1132(g)(1)." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 255, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010). However, the Court, in its discretion, declines to award Minnesota Life any attorney's fees. 29 U.S.C. § 1132(g)(1).

In making this determination, the Court considered each of the *King* factors referenced above. *King*, 775 F.2d at 669; *see also Hardt*, 560 U.S. at 255 n.8. Regarding the first and fifth *King* factors, the Court disagrees with Minnesota Life's assertion that "Plaintiffs went to extraordinary lengths to pursue baseless theories long after they should have realized their frivolity." (Doc. 72 at PageID 2344.) Although the Court disagreed with the merits of Plaintiffs' positions on their claim, the claim was not frivolous, pursued in bad faith, or any "more devoid of merit than those of any other losing litigant." *Trs. of Detroit Carpenters Fringe Benefit Funds*, 618 F. App'x at 260 (internal quotation marks omitted) (alterations adopted). The Court believes that Plaintiffs pursued their theory of entitlement to benefits—and discovery and reconsideration of this Court's January 28, 2020 Order and appeal of that same order—strongly and relentlessly while advocating for their positions. Plaintiffs are not culpable in pursuing this litigation.

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

*2 Similarly, regarding the third *King* factor, the Court disagrees with Minnesota Life's position that a fees award against Plaintiffs "will cause claimants and counsel alike to give pause before 'rolling the dice' to maintain baseless litigation." (Doc. 72 at PageID 2347.) This is because the litigation here was not baseless, and Plaintiffs' behavior in pursuing their claim is not the type of behavior that the Court is concerned about deterring. *See Hall v. Ohio Educ. Ass'n*, 984 F. Supp. 1144, 1148 (S.D. Ohio 1997) ("this is not the type of case that presents a degree of culpability on behalf of Plaintiff that warrants punishment in this case or deterrence in others"); *Trs. of Detroit Carpenters Fringe Benefit Funds*, 618 F. App'x at 259 (when the court finds that the plaintiff did not bring the lawsuit in bad faith, "a fee award is even less appropriate for deterrent purposes"). The Court is more concerned with how an award in this case might discourage proper ERISA claimants from bringing claims in good faith.

Along the same lines, regarding the fourth *King* factor, the Court finds inapplicable to this case Minnesota Life's assertion that "[w]hen insurers have to defend frivolous claims and/or pay 'nuisance value' settlements to avoid incurring substantial litigation costs, there is a detrimental effect on all of the plan participants and beneficiaries." To the extent that the fourth *King* factor is applicable, it does not weigh strongly either way in this case. *See Hall*, 984 F. Supp. at 1148 (finding factor irrelevant); *Trs. of Detroit Carpenters Fringe Benefit Funds*, 618 F. App'x at 259 (explaining that the district court found this factor inapplicable and that, "[i]n a case like this, where a fee-award claimant seeks benefits only for himself, this Court generally has found the common-benefit factor to weigh against an attorney-fee award") (internal quotation marks omitted) (alterations adopted). Finally, regarding the second *King* factor, it is unclear to what extent Plaintiffs could satisfy an award of attorney's fees. (*See* Doc. 73 at PageID 2361-62.)

The Court understands Minnesota Life's frustration and decision to file the Motion (it too certainly is not frivolous). The Court also commends Minnesota Life for not simply asking for all of its fees, but instead limiting its request to specific categories. However, the Court, in its discretion, declines to award attorney's fees. The Court "finds that the circumstances of this case and the factors listed in *King* do not justify an award of attorney's fees." *Hall*, 984 F. Supp. at 1148. For the reasons stated above, the Court **DENIES** Defendant's Motion for Award of Attorneys' Fees (Doc. 72) and Defendant's Supplemental Application for Award of Attorneys' Fees (Doc. 78). This case shall remain terminated on the Court's docket.

DONE and **ORDERED** in Dayton, Ohio, this Tuesday, May 4, 2021.

All Citations

Slip Copy, 2021 WL 1759634

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

2010 WL 2793938
Only the Westlaw citation is currently available.
United States District Court, D. Connecticut.

David S. TAYLOR, Jim Conlin, and Karl Todd, individually and on behalf of all similarly situated persons, Plaintiffs,
v.
UNITED TECHNOLOGIES CORPORATION, et al., Defendants.

No. 3:06cv1494 (WWE).

July 13, 2010.

Attorneys and Law Firms

Drey A. Cooley, Jason P. Kelly, Jerome J. Schlichter, Kelly A. Weekes, Nelson G. Wolff, Troy A. Doles, Schlichter, Bogard & Denton, St. Louis, MO, Stuart M. Katz, Cohen & Wolf, P.C., Bridgeport, CT, for Plaintiffs.

Jeffrey G. Huvelle, Peter A. Swanson, Thomas L. Cubbage, III, Covington & Burling, LLP, Washington, DC, Steven M. Greenspan, Day Pitney LLP, Zachary R. Osborne, United Technologies Corp., Hartford, CT, for Defendants.

ORDER ON DEFENDANTS' MOTION FOR ATTORNEYS' FEES

WARREN W. EGINTON, Senior District Judge.

*1 Defendants argue that, as prevailing parties, they are entitled to reasonable attorney fees and costs.

The Employee Retirement Income Security Act of 1974 ("ERISA") provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). In determining whether to grant a request for attorneys' fees in an ERISA action, the Second Circuit has delineated five factors to be considered: (1) the degree of the offending party's culpability or bad faith; (2) the ability of the offending party to satisfy an award of attorneys' fees; (3) whether an award of fees would deter other persons from acting similarly under like circumstances; (4) the relative merits of the parties' positions; and (5) whether the action sought to confer a common benefit on a group of pension plan participants. *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir.1987). No single factor is determinative. *Mahoney v. J.J. Weiser & Co.*, 646 F.Supp.2d 582, 590 (S.D.N.Y.2009).

The Second Circuit instructs that ERISA's attorney fee provision must be construed to protect the statutory purpose of vindicating retirement rights. *Locher v. Unum Life Ins. Co. of Am.*, 389 F.3d 288, 298 (2d Cir.2004). The *Chambless* factors tend to balance against an award of attorneys' fees favoring the defense due to the differing postures of a prevailing defendant and plaintiff. *See Celardo v. GNY Auto. Dealers Health & Welfare Trust*, 318 F.3d 142, 147 (2d Cir.2003). While a defendant loses an ERISA case due to a finding of a statutory violation, a plaintiff loses in most cases due to an error in interpretation or deficiency as to proof. *See Salovaara v. Eckert*, 222 F.3d 19, 28 (2d Cir.2000).

Prevailing defendants may recover attorneys' fees under unusual circumstances, which are commonly found when there is evidence of intentional dishonesty on the plaintiff's part. *See, e.g., Seitzman v. Sun Life Assur. Co. of Canada, Inc.*, 311 F.3d 477, 484–85 (2d Cir.2002).

Defendants argue that the instant case was so meritless that the first, third and fourth factors weigh heavily in favor of a defense award of attorneys' fees. Defendants maintain that the award would work in favor of deterrence of other similar claims and that plaintiffs are able to satisfy the requested award of $1,783,276. Defendants assert further that their successful defense of this case will assist other employers defending against similar claims.

Plaintiffs did not prevail on their claims, which may be characterized as weak, but they did not act with the requisite standard of culpability in filing suit. Culpable conduct is conduct that is blameable or involving the breach of a legal duty or commission of fault. *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 48 (2d Cir.2009). Here, the claims were not so meritless that plaintiffs could be considered to have breached a legal duty in filing this action. The Court denied the motion to dismiss for failure to state a claim, and it granted summary judgment in defendants' favor after review of the evidence demonstrated that defendants had not violated the prudent person standard or otherwise breached their fiduciary duties. Further, despite defendants' proffer that the plaintiffs have some assets, it appears more likely that the individual plaintiffs would bear a financial hardship of depleting their assets to satisfy the requested award.

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

*2 In the instant case, an award of attorneys' fees would represent over-deterrence that, as the Second Circuit has warned, would likely deter beneficiaries from "bringing suits in good faith for fear that they would be saddled with their adversary's fees in addition to their own in the event that they failed to prevail; this, in turn, would undermine ERISA's essential remedial purpose." *Salovaara*, 222 F.3d at 31. This Court is reluctant to transform the attorneys' fee provision from a shield into a sword. *See Seitzman*, 311 F.3d 477, 486 (2d Cir.2002).

Accordingly, the first four factors do not weigh in favor of an attorneys' fee award to defendants. As to the fifth factor, whether the action conferred a common benefit on a group of plan participants, the parties appear to agree that it does not bear substantially on the instant attorney fees calculus. *See Mahoney v. J.J. Weiser & Co.*, 646 F.Supp.2d 582, 594 (S.D.N.Y.2009) (fifth factor is generally regarded as inapplicable or neutral where prevailing defendant is seeking fees).

In light of the foregoing discussion, the motion for attorneys' fees [doc. # 216] is DENIED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 2793938

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

2020 WL 7024683
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

COMAU LLC, Plaintiff,
v.
BLUE CROSS BLUE SHILED OF MICHIGAN, Defendant.

Case No. 19-cv-12623
|
Signed 11/30/2020

Attorneys and Law Firms

Kyle Patrick Konwinski, Seth Arthur, Perrin Rynders, Aaron M. Phelps, Varnum, Riddering, Grand Rapids, MI, for Plaintiff.

G. Christopher Bernard, Maria L. Martinez, Blue Cross Blue Shield of Michigan, Detroit, MI, Kathleen Carlson, Tacy F. Flint, Thomas D. Cunningham, Sidley Austin LLP, Chicago, IL, for Defendant.

OPINION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT [#19]

Stephanie Dawkins Davis, United States District Court Judge

I. INTRODUCTION

*1 Plaintiff, Comau LLC, brought the present action against Defendant Blue Cross Blue Shield of Michigan ("BCBSM") alleging breach of fiduciary duty for paying inflated claims to healthcare providers on Comau's behalf. Before the court is BCBSM's Motion to Dismiss Plaintiff's First Amended Complaint for Failure to State a Claim. (ECF No. 19). BCBSM contends that Comau's complaint allegations sound in fraud; therefore, the complaint must meet the heightened pleading requirements of Fed. R. Civ. P. 9(b). BCBSM asserts that the complaint does not meet the 9(b) requirements. Comau argues that its complaint alleges a breach of fiduciary duty claim and does not sound in fraud; as a result, the complaint is not required to meet Rule 9(b)'s heightened pleading standard. Pursuant to Local Rule 7.1(f)(2), the court has determined that this Motion is suitable for determination without a hearing. For the reasons discussed below, the Motion is DENIED.

II. FACTUAL AND PROCEDURAL BACKGROUND

Comau LLC develops and produces automation, manufacturing, and service products. (ECF No. 15, PageID.290). During the time period relevant to this case, Comau provided health care benefits to its employees through a self-insured benefit plan (the "Plan"). *Id.* Comau paid the health care costs of its employees up to a certain threshold instead of buying an insurance policy. *Id.* Comau retained Blue Cross Blue Shield of Michigan several years ago to administer its healthcare plan. *Id.* BCBSM used funds provided by Comau (in the form of prepayments to a BCBSM-owned bank) to pay covered employee healthcare claims. (ECF No. 15 PageID.291, ECF No. 21, PageID.493). Essentially, BCBSM processed and paid claims on behalf of Comau using Comau's funds. *Id.* Comau paid BCBSM an administrative fee to administer its healthcare plan. *Id.*

Comau alleges that since at least 1997, BCBSM has paid grossly inflated healthcare claims on Comau's behalf. (ECF No. 15, PageID.296). On September 6, 2019, Comau filed its first complaint in this court. (ECF No. 1). The complaint brought one count of breach of fiduciary duty for BCBSM's alleged failure to prudently oversee Comau's healthcare plan. *Id.* BCBSM filed its first motion to dismiss Comau's complaint on November 8, 2019. (ECF No. 9). BCBSM's motion to dismiss asserted that Comau's complaint failed to allege fraud with particularity pursuant to Fed. R. Civ. P. 9(b), that the complaint failed to state a claim for breach of fiduciary duty pursuant to Fed. R. Civ. P. 8(a), and that the claims for payments that were more than six years old were time-barred. *Id.* On November 22, 2019, without assessing the merits of BCBSM's motion, Judge Sean Cox entered an Order requiring Comau to either file an amended complaint or file a response to BCBSM's motion to dismiss. (ECF. No. 14).

Comau filed its First Amended Complaint ("FAC") on December 13, 2019. (ECF No. 15). The FAC states that Comau discovered that BCBSM was paying inflated claims when BCBSM's account manager, Dennis Wegner, informed Comau of the alleged improper payments. (*Id.* at PageID.297). A BCBSM customer alerted Wegner to a large medical bill, prompting Wegner to investigate the bill and discover that BCBSM was grossly overpaying the healthcare provider for medical testing. (*Id.* at PageID.298). The FAC alleges that Wegner discovered that BCBSM had overpaid this healthcare provider more than $600,000 within

a two-year period. *Id.* The FAC states that Wegner alerted BCBSM to the overpayment issue. In response, BCBSM's management informed Wegner it knew that it paid improper claims but had done nothing to stop it. *Id.*

*2 Wegner then researched claims and billing for two additional BCBSM customers and found similar overpayments, totaling $125,000 in one case and $75,000 in the other case. *Id.* According to the FAC, Wegner "has personal knowledge" of BCBSM's records and knows that BCBSM overpaid healthcare providers "many thousand dollars" on behalf of Comau. (*Id.* at PageID.299). Wegner brought his concerns about overpayment to BCBSM. However, BCBSM told him not to alert BCBSM customers about its payment of improper claims. (*Id.* at PageID.300). BCBSM terminated Wegner's employment on November 14, 2018. *Id.*

In its FAC, Comau alleges that Wegner had access to BCBSM's customer records, billing, accounting, healthcare claims information, healthcare claims processing system, software, and billing system. *Id.* Further, the complaint asserts that BCBSM used the same processing system, software, and billing system on all of its customer accounts. *Id.* The FAC asserts that BCBSM's systems are organized in a way that guarantees Comau was impacted by BCBSM's overpayment of healthcare claims. (*Id.* at PageID.298). Comau also alleges that many BCBSM employees knew about the improper payments, including Rod Begosa, Lori Shannon, Gary Gavin, and Ken Dallafior. (*Id.* at PageID.300).

Comau's FAC asserts one count of breach of fiduciary duty. (*Id.* at PageID.304). The alleged breaches include, "but [are] not limited to[,]" the following:

> (a) [BCBSM] [i]ntentionally and knowingly pa[id] grossly inflated and knowingly inflated healthcare claims to Providers;
>
> (b) [BCBSM] [f]ail[ed] to correct/update its Billing System to avoid Plan assets being used to pay improper charges and conceal[ed] from, and otherwise fail[ed] to disclose to[ ] Plaintiff the payment of improper claims; [and]
>
> (c) [BCBSM] [f]ail[ed] to exercise the care, skill, prudence, and diligence under the circumstances that a prudent fiduciary acting in a like capacity and familiar with such matters would use in paying for healthcare claims.

(*Id.* at PageID.305). Throughout the FAC, Comau consistently states that BCBSM knew that it was paying inflated claims. (*Id.* at PageID.296, 298, 300, 301). The FAC also posits that BCBSM recklessly paid healthcare providers with Plan assets. *Id.* at PageID.301). Additionally, the FAC alleges that BCBSM has misrepresented itself as a leader in fraud prevention. (*Id.* at PageID.303, 304). The FAC further asserts that BCBSM's payment of claims it knew were improper is inconsistent with health insurance industry standards. (*Id.* at PageID.302).

Comau's FAC states that, as an example, a Comau employee receives a urinalysis from a healthcare provider. (ECF No. 15, PageID.296). The provider then charges $18,000 for the test —a grossly inflated amount—and bills BCBSM. *Id.* BCBSM then uses Comau's Plan assets to pay the inflated bill. *Id.*

On January 31, 2020, this case was reassigned to the undersigned. BCBSM filed the present Motion to Dismiss Plaintiff's First Amended Complaint for Failure to State a Claim on January 15, 2020. (ECF No. 19). BCBSM accepts Comau's factual allegations as true for purposes of the Motion. (*Id.* at PageID.362). BCBSM argues that the FAC contains the same deficiencies as Comau's first complaint. According to BCBSM, the FAC's breach of fiduciary duty claim is grounded in fraud; therefore, Federal Rule of Civil Procedure 9(b) governs, and the FAC fails to meet 9(b)'s strict pleading standard. (*Id.* at PageID.369). Alternatively, if this Court finds that the FAC as a whole is not subject to Rule 9(b), BCBSM contends that the Court should dismiss any allegations of fraud that Comau has inadequately pleaded. (*Id.* at PageID.377). Next, the Motion states that the FAC also fails to adhere to the pleading requirements of Rule 8(a). (*Id.* at PageID.378). Finally, BCBSM contends that the statute of limitations bars any claims that are based on payments made more than six years before the filing of this action. (*Id.* at PageID.382).

*3 In response, Comau contends that the claims in its FAC do not sound in fraud. Therefore, the claims do not need to adhere to the particularity requirements of Rule 9(b). (ECF No. 21, PageID.498). However, if the court determines that 9(b) does apply, Comau asserts that this court can relax the requirements where information is only known by the opposing party. (*Id.* at PageID.501). Second, Comau argues that its FAC conforms to the requirements of 8(a). (*Id.* at PageID.501). Lastly, Comau states that the court cannot determine if its FAC is time-barred at this stage because the trier of fact must determine when BCBSM breached

its duty of care—and thus, when the statute of limitations has run. (*Id.* at PageID.507). Further, Comau states that a determination of what limitations period applies depends on the facts developed during discovery. (*Id.* at PageID.508). BCBSM filed a reply largely reiterating the points set forth in its original Motion. (ECF No. 22).

III. LEGAL STANDARD

Pursuant to Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must state "a short and plain statement of the claim showing that the pleader is entitled to relief." *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). This standard does not require "detailed factual allegations." *Id.* However, it does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id.*

Federal Rule of Civil Procedure 12(b)(6) governs motions to dismiss. The Court must construe the complaint in favor of the plaintiff, accept the allegations of the complaint as true, and determine whether plaintiff's factual allegations present plausible claims. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must "allege enough facts to make it plausible that the defendant bears legal liability." *Agema v. City of Allegan*, 826 F.3d 326, 331 (6th Cir. 2016). The facts need to make it more than "merely possible that the defendant is liable; they must make it plausible." *Id.* "Bare assertions of legal liability absent some corresponding facts are insufficient to state a claim." *Id.* A claim will be dismissed "if the facts as alleged are insufficient to make a valid claim or if the claim shows on its face that relief is barred by an affirmative defense." *Riverview Health Inst., LLC v. Med. Mut. Of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010).

Federal Rule of Civil Procedure 9(b) governs the pleading standards for fraud and mistake claims. The Rule requires that a party "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The Sixth Circuit has interpreted Rule 9(b) to require "plaintiffs to allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 551 (6th Cir. 2012).

IV. DISCUSSION

A. Applicable Pleading Standard

This court must first determine whether Fed. R. Civ. 8(a) or 9(b) applies to the allegations in Plaintiff's FAC. To do so, the court must ascertain whether the FAC alleges a breach of fiduciary duty or fraud claim. BCBSM asserts that the FAC sounds in fraud and should be governed by the pleading standards of Fed. R. Civ. P. 9(b). Alternatively, BCBSM contends that this court should dismiss the portions of the FAC that assert claims sounding in fraud. Comau responds that its claims do not sound in fraud and therefore do not need to meet the pleading requirements of 9(b). Alternatively, Comau argues that if the court finds that its claims do sound in fraud, it should not be required to meet the 9(b) standards because BCBSM holds all of the inside information relevant to this case.

The Sixth Circuit has looked to the elements of common-law fraud when assessing whether a complaint sounds in fraud. *See Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 551 (6th Cir. 2012). In *Cataldo*, the complaint alleged a breach of fiduciary duty, but the Sixth Circuit concluded that the primary theory of liability sounded in fraud where the plaintiffs alleged that defendants gave false representations about how plaintiffs' retirement would be calculated. *Id.* The Court noted that a different group of plaintiffs did not allege detrimental reliance on the defendants' alleged misrepresentations, which is "an essential element in a claim of fraud." *Id.* at n.7.

*4 The elements of common-law fraud are: "(1) a material false representation or omission of an existing fact; (2) knowledge of falsity; (3) intent to defraud; (4) reasonable reliance; and (5) damages." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 191 (2d Cir. 2001). Following the *Cataldo* court, this court will assess whether the allegations in the FAC meet the elements of common-law fraud in order to determine whether the FAC sounds in fraud.

The FAC alleges one count of breach of fiduciary duty and asserts that BCBSM breached its fiduciary duty in several ways. The alleged breaches include, "but [are] not limited to[,]" the following:

> (d) [BCBSM] [i]ntentionally and knowingly pa[id] grossly inflated and knowingly inflated healthcare claims to Providers;
>
> (e) [BCBSM] [f]ail[ed] to correct/update its Billing System to avoid Plan assets being used to pay improper charges and conceal[ed] from, and otherwise fail[ed] to disclose to[ ] Plaintiff the payment of improper claims; [and]

> (f) [BCBSM] [f]ail[ed] to exercise the care, skill, prudence, and diligence under the circumstances that a prudent fiduciary acting in a like capacity and familiar with such matters would use in paying for healthcare claims.

(ECF No. 15, PageID.305). Additionally, the FAC repeatedly states that BCBSM knew that it was paying inflated claims on behalf of Comau. (*Id.* at PageID.296, 298, 300, 301). It further asserts that BCBSM recklessly paid healthcare providers with Plan assets and that BCBSM has misrepresented itself as a leader in fraud prevention. (*Id.* at PageID.301, 303, 304). The FAC asserts that BCBSM's payment of claims it knew were improper is inconsistent with health insurance industry standards. (*Id.* at PageID.302).

Comau expressly disclaims that it is claiming fraud, and it cites several cases decided within this district in which the court concluded that ERISA breach of fiduciary duty claims did not sound in fraud and were subject to the 8(a) pleading requirements. For instance, in *Rankin v. Rots*, the plaintiffs alleged several breaches of fiduciary duty against the officers and directors of their employer. 278 F. Supp. 2d 853, 853 (E.D. Mich. 2003) (Cohn, J.). The plaintiffs alleged breaches of fiduciary duty, including, "[i]nvesting in an unreasonably large percentage of the Plans' assets[,]" "[f]ailing to investigate and monitor the merits of ... investments[,]" "[f]ailing to take steps to eliminate or reduce the amount of Company Stock in the Plan," "[f]ailing to give Plan participants accurate, complete, non-misleading and adequate information about the compositions of the Plan's portfolios and [the employer's] true financial condition[,]" "[a]llowing continued investment in the Company Stock Fund, when a reasonable fiduciary would have know[n] the investment was not prudent[,]" and "[c]ompelling continued investment of employer matching contributions in the Company Stock when a reasonable fiduciary would have know[n] the investment was imprudent[.]" *Id.* at 863. The court concluded that the plaintiffs' breach of fiduciary duty claims did not sound in fraud. *Id.* at 866. The court reasoned that some of the allegations that alleged providing false and misleading information in the complaint sounded similar to fraud claims, but the "gravamen" of the breach of fiduciary duty claim was grounded in ERISA. *Id.*

The court also found that the plaintiffs' breach of fiduciary duties claim did not sound in fraud in *In re CMS Energy ERISA Litigation*. 312 F. Supp. 2d 898, 909 (E.D. Mich. 2004) (Steeh, J.). The plaintiffs in *CMS Energy* were ERISA plan holders and the defendants were employers and the employers' officers. The plaintiffs alleged that the defendants communicated inaccurate information and failed "to disclose transactions which rendered the financial statements of the employers materially false." *Id.* The court reasoned that the plaintiffs' allegations asserted a breach of fiduciary duty, and not an intent to deceive. *Id.*

*5 However, the Sixth Circuit agreed with the district court that one count of plaintiffs' complaint sounded in fraud where the plaintiffs alleged that the defendant issued misleading statements about its revenues because the revenue numbers were inflated by non-compliance with Generally Accepted Accounting Principles. *Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 941, 948 (6th Cir. 2009).

BCBSM also cites courts in the Northern District of California to advance their proposition that the FAC sounds in fraud. The Northern District of California found that a breach of fiduciary duty claim sounded in fraud where "the gravamen of the [p]laintiff's Amended Complaint [was] that [the defendants] breached [their] fiduciary duties to the Plan by disseminating misleading and incomplete information to Plan participants, and failing to inform participants ... of material information regarding participants' investments in Company stock." *In re Calpine Corp. ERISA Litig.*, No. C 03-1685 SBA, 2005 WL 3288469, at *7 (N.D. Cal. Dec. 5, 2005) (internal quotations omitted); *see also Vivien v. Worldcom, Inc.*, No. C 02-01329 WHA, 2002 WL 31640557, at *6 (N.D. Cal. July 26, 2002). In *Vivien*, the plaintiffs' complaint alleged that the defendants made "false, misleading, incomplete, and inaccurate disclosures and representations to the Plans' participants...." The court found that "[c]ontrary to plaintiffs' contention, the third claim clearly sounds in fraud." *Id.* at *7.

The gravamen of Comau's FAC alleges that BCBSM knowingly paid inflated healthcare claims to providers on behalf of Comau and that it failed to update its billing system to avoid the payment of improper claims. These allegations do not trace the elements of common-law fraud. Namely, the FAC's allegations do not assert a material false representation, an intent to defraud, or reasonable reliance.

The FAC does use the word fraud in various spots throughout the complaint. *See, e.g.*, ECF No. 15, PageID.301, 302 ("Providers submitting [incorrect] claims are considered to be fraudulent[,]" "BCBSM's own website warns the public about the dangers of health care fraud."). However, the FAC's use of the word fraud is primarily used when it

describes the submission of incorrect claims by healthcare providers, and not BCBSM's actions. The FAC also alleges that BCBSM's payment of inflated claims is inconsistent with the representations that it makes to its customers, and that BCBSM provided Comau with "limited reporting information" concerning its practice of paying providers' inflated claims. (ECF No. 15, PageID.303). While the allegations about BCBSM's representations and limited reporting information may sound similar to a fraud claim, the FAC's breach of fiduciary duty claim is still grounded in ERISA, similar to the conclusion of the *Rankin* court. Unlike the allegations in *Omnicare, Inc.*, *In re Calpine Corp.*, and *Vivien*, the allegations in this case do not primarily allege that BCBSM issued misleading statements. The gravamen of the FAC does not allege an intent to deceive and therefore does not sound in fraud—this is similar to the conclusion reached by the *CMS Energy* court.

The FAC's allegations do not meet the elements of common law fraud, nor do the allegations primarily allege that BCBSM circulated misleading and incomplete information. The court finds that the FAC alleges a breach of fiduciary duty claim and not fraud. Therefore, the FAC is subject to the 8(a) pleading standard.

B. Sufficiency of the FAC Claims under Fed. R. Civ. P. 8(a)

*6 Next, BCBSM claims that the court should dismiss Comau's amended complaint because it does not meet the pleading requirements of Fed. R. Civ. P. 8(a). (ECF No. 19, PageID.378). BCBSM asserts that Comau's FAC does not meet the pleading requirements because the only facts alleged in the FAC are facts that are borrowed from Wegner's whistleblower complaint. (*Id.* at PageID.379). BCBSM contends that the FAC alleges that a provider fraudulently overbilled a different BCBSM customer for routine medical testing and then tries to tie these overbillings to Comau by alleging that BCBSM uses the same technology and software to process, bill, and pay all of its client healthcare claims. *Id.* BCBSM then argues that the bare allegation that it uses the same claims-processing software for all of its customers, without alleging how the software functions or how a prudent software system would function, cannot support an inference that it acted imprudently. *Id.* BCBSM asserts that Comau has failed to allege facts sufficient to establish that a prudent fiduciary would have prevented such overpayments. (*Id.* at PageID.380). BCBSM also states that Comau's lack of facts about BCBSM's alleged claims-processing system function failures is particularly striking because information regarding BCBSM's methods and actual knowledge is not only in BCBSM's possession, but also in Wegner's possession—and Wegner is working in cooperation with Comau. (*Id.* at PageID.381).

Comau argues that its FAC meets the pleading requirements. (ECF No. 21, PageID.501). Comau states that its allegations that Wegner discovered BCBSM overpayments, brought the overpayments to BCBSM's attention, confirmed that Comau was subject to the same system that overbilled other BCBSM customers, and confirmed that BCBSM paid overbilled claims on behalf of Comau sufficiently allege that BCBSM breached its fiduciary duty. (*Id.* at PageID.502). Comau also asserts that it is not required to plead specific facts that explain exactly how BCBSM's conduct was unlawful. (*Id.* at PageID.502–03).

To state a claim for breach of fiduciary duty under ERISA, a plaintiff must allege that "(1) the defendant was a fiduciary of an ERISA plan who, (2) acting within his capacity as a fiduciary, (3) engaged in conduct constituting a breach of his fiduciary duty." *In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d 1002, 1016 (S.D. Ohio 2006); *see also* 29 U.S.C. § 1109. The parties in this case do not dispute that BCBSM was a fiduciary to Comau acting within its capacity as a fiduciary when it administered its benefit plan. (*See* ECF Nos. 15, PageID.291; ECF No. 19). Therefore, only the third element is at issue here.

The parties, having failed to identify any Sixth Circuit cases directly on point, cite cases from other circuits on the issue of the sufficiency of the pleadings. Upon review of the parties' cited authority, the court finds that Comau's complaint meets the 8(a) pleading requirements.

To survive a motion to dismiss, a complaint alleging a breach of fiduciary duties under ERISA must demonstrate facts that raise a plausible inference of misconduct. *Agema*, 826 F.3d at 331. In an ERISA case alleging that a benefit plan was mismanaged, "a claim alleging a breach of fiduciary duty may still survive a motion to dismiss if the court, based on circumstantial factual allegations, may reasonably infer from what is alleged that the process [by which the plan was managed] was flawed." This is because "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013) (quoting *Braden v. Wal-Mart Stores,*

Inc., 588 F.3d 585, 596 (8th Cir. 2009)) (internal quotations omitted).

*7 Therefore, a breach of fiduciary duty claim under ERISA can survive a motion to dismiss without "well-pleaded factual allegations relating directly to the methods employed by the ERISA fiduciary if the complaint alleges facts that, if proved, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." *St. Vincent*, 712 F.3d at 718 (quoting *In re Citigroup ERISA Litig.*, 662 F.3d 128, 141 (2d. Cir. 2011)) (internal quotations omitted). The court must be able to "infer more than the mere possibility of misconduct" from the factual allegations of a plaintiff's complaint. *St. Vincent*, 712 F.3d at 719. Comau's claim essentially asserts that BCBSM, in paying inflated or otherwise improperly-billed health claims out of its funds, mismanaged the Plan's funds. This is similar to cases challenging an administrator's improvident investments using plan funds. The Seventh Circuit analyzed the sufficiency of an ERISA breach of fiduciary duty claim alleging an improvident investment in *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 678 (7th Cir. 2016). In *Allen*, the central allegation of the complaint was that GreatBanc did not conduct an adequate inquiry into the value of the employer's stock. *Id.* The plaintiffs' complaint did not describe in detail the process that GreatBanc used in order to value stock. *Id.* The Seventh Circuit held that detailing GreatBanc's process for valuing stock was not necessary in order for the complaint to be sufficient. *Id.* at 678–79. The court reasoned that it was enough that the plaintiffs "alleged that the stock value dropped dramatically after the sale (implying that the sale price was inflated), that the loan came from the employer-seller rather than from an outside entity (indicating that outside funding was not available), and that the interest rate was uncommonly high (implying that the sale was risky....)." *Id.* at 678. The court concluded that the complaint's facts supported an inference that GreatBanc breached its fiduciary duty by failing to conduct an adequate inquiry into the proper valuation of the shares of stock or by facilitating an improper transaction. *Id.* at 678–79.

Similar to the complaint in *Allen*, the complaint in this case also alleges that a process/system is flawed, but does not detail how BCBSM's processing system that pays healthcare providers works. The complaint here alleges that BCBSM grossly overpaid many claims on behalf of Comau, that BCBSM's processing system is organized in a way that guarantees that BCBSM overpaid claims on behalf of Comau, and that BCBSM was aware that it was paying inflated claims and failed to correct its billing system to avoid overpayments. These allegations, although not specific, contain comparable detail to the complaint in *Allen*.

The Eighth Circuit similarly found that an ERISA breach of fiduciary duty complaint met the 8(a) pleading requirements in *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595–96 (8th Cir. 2009). The complaint in *Braden* alleged that the defendants failed to adequately "evaluate the investment options included in the benefit plan." *Id.* at 590. It also alleged that "the process by which the mutual funds were selected was tainted by [the defendants'] failure to consider trustee Merrill Lynch's interest in including funds that shared their fees with the trustee." *Id.* The complaint alleged that some or all of the investment options in the plan charged excessive fees as a result of the defendants' failures. *Id.* The *Braden* court noted that the plaintiff did not have to plead specific facts that explained exactly how the defendant's conduct was unlawful. *Id.* at 595. It was enough to plead facts that "indirectly show[ed] unlawful behavior," as long as the facts gave "the defendant fair notice" of the claim and "the grounds upon which" the claim rested. *Id.* Therefore, even though the allegations of the complaint failed to directly address the process by which the plan was managed, it was sufficient to withstand the defendant's motion to dismiss because the court could reasonably "infer from what [was] alleged that the [defendant's] process was flawed." *Id.* at 596.

Like *Braden*, this case alleges that a process was flawed. The *Braden* court concluded that the plaintiff did not have to state facts that specifically alleged how the defendant's conduct was unlawful; it was adequate to plead facts that indirectly showed unlawful behavior. In this case, the complaint does not allege how BCBSM's alleged defective processing system works; instead, it alleges that BCBSM knew that its system was faulty and resulted in the payment of inflated claims; however, BCBSM did not fix its system. These claims, accepted as true and in the light most favorable to Comau, are enough for the court to infer that BCBSM's process was flawed.

BCBSM asserts that Comau must do more than allege that BCBSM's claims-processing system failed to prevent the payment of all improper healthcare claims. (ECF No. 19, PageID.380). BCBSM contends that Comau cannot just focus on the results, but must focus on the fiduciary's conduct in arriving at a decision. (*Id.* at PageID.379). BCBSM cites the Seventh Circuit for this proposition. *DeBruyne v. Equitable Life Assur. Soc. of U.S.*, 920 F.2d 457, 465 (7th

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Cir. 1990). The *DeBruyne* plaintiff alleged breach of fiduciary duty where the defendants lost money as a result of an investment strategy. *Id.* The court concluded that "the ultimate outcome of an investment is not proof of imprudence[,]" and dismissed the claim. *Id.* The *St. Vincent* court reached a similar conclusion. *St. Vincent*, 712 F.3d at 716 (stating that courts "cannot rely, after the fact, on the magnitude of the decrease in the [plan investment's] price" as evidence of imprudence). This case is distinguishable from *DeBruyne* and *St. Vincent* because Comau is not merely asserting that BCBSM made an imprudent investment decision/plan and overpaid money to providers. Comau is asserting that BCBSM's processing system is defective and led to many overpayments to healthcare providers. Comau also asserts that BCBSM knew about the defect in its processing system —thus implying that a prudent fiduciary would have fixed the defective system in order to prevent overpayments that it knew routinely occurred.

*8 In this case, the FAC alleges that Wegner discovered that BCBSM had paid inflated claims on behalf of several customers. Wegner brought the overpayments to BCBSM's attention and BCBSM told Wegner that it knew that its billing system paid improper claims from providers; however, BCBSM did nothing to stop the improper payments. It alleges that several other BCBSM employees knew that BCBSM was paying inflated claims from providers. Further, the FAC alleges that BCBSM used the same processing system to bill all of its customers; therefore, Comau was subject to the same overpayments on the claims that it paid on behalf of its employees. More important, the FAC states that Wegner has personal knowledge of BCBSM's records *and knows that it paid inflated claims on behalf of Comau.*

The facts alleged in the FAC, considered together and in the light most favorable to Comau, allow the court to reasonably infer that BCBSM's processing system was flawed and that it paid inflated claims to healthcare providers on behalf of Comau. If the allegations in the FAC are proved, then they would show that an adequate investigation would have revealed to BCBSM and a reasonable fiduciary that the system was flawed. *See St. Vincent*, 712 F.3d at 718. The facts alleged in the FAC also give BCBSM fair notice of Comau's claims against it—the payment of inflated claims and the failure to fix its processing systems in order to prevent the payment of inflated claims. *Braden*, 588 F.3d at 595. The facts additionally support an inference that BCBSM breached its fiduciary duty by failing to correct its processing system which it knew resulted in the payment of inflated claims. *Allen*, 835 F.3d at 678–79. Therefore, similar to the complaints in *Allen* and *Braden*, the FAC in this case pleads facts that allege a plausible breach of fiduciary duty.

BCBSM asserts that Comau is in possession of information about how the BCBSM claims processing system functions worked and therefore should have alleged those facts in its FAC. (ECF No. 19, PageID.381). However, it is not clear to the court that Comau is currently in possession of BCBSM's claims processing system information. The FAC alleges that BCBSM's payment of inflated claims became known to Comau after Wegner investigated BCBSM's system and discovered the overpayments. (ECF No. 15, PageID.297–98). It also states that Wegner has personal knowledge that Comau was affected by BCBSM's payment of inflated claims. (*Id.* at PageID.299). However, Comau does not claim currently to have any information about BCBSM's systems in its possession. Further, the FAC states that Wegner is no longer employed by BCBSM (ECF No. 15, PageID.300) —therefore, Wegner does not currently have access to information regarding BCBSM's systems and Comau's FAC need not include information about BCBSM's processing systems. For the reasons discussed above, the court concludes that the FAC meets the pleading requirements of Fed. R. Civ. P. 8(a) and it will not dismiss the FAC for failure to plead sufficient facts.

C. Statute of Limitations

Lastly, this court must address a statute of limitations issue. BCBSM asserts that Comau's claims that are based on payments made more than six years before Comau filed this action are untimely. (ECF No. 19, PageID.382). Comau contends that BCBSM's statute of limitations argument is premature because it asks this court to make factual determinations about the date of the last action that constituted an alleged breach of fiduciary duty. (ECF No. 21, PageID.506). ERISA contains the following limitations period:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of-
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

*9 except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113. Here, it is unclear from the face of the amended complaint when the last action occurred that constituted an alleged breach of fiduciary duty, or the date on which Comau had actual knowledge of BCBSM's actual breach. *See e.g.*, *Computer & Eng'g Servs., Inc. v. Blue Cross Blue Shield of Mich.*, No. 12-15611, 2013 WL 1976234, at *4 (E.D. Mich. May 13, 2013) (concluding that it was premature at the motion to dismiss stage to determine the applicable statute of limitations where it was unclear from the complaint when the plaintiffs acquired actual knowledge of the alleged ERISA violations); *E. Jordan Plastics, Inc. v. Blue Cross & Blue Shield of Mich.*, No. 12-CV-15621, 2013 WL 1876117, at *6 (E.D. Mich. May 3, 2013) (same).

Because it is too early for this court to determine when the facts giving rise to the statute of limitations occurred, the court cannot determine at this time what the applicable statute of limitations is.

V. CONCLUSION

BCBSM brought this Motion to Dismiss moving the court to dismiss Comau's FAC for failure to meet the 9(b) pleading requirements. This court concludes that the FAC does not sound in fraud; therefore, it is subject to the pleading requirements of Rule 8(a) and not 9(b). Next, BCBSM moved the court to find that the FAC did not meet the pleading requirements of Fed. R. Civ. P. 8(a). However, this court finds that the FAC meets the plausibility standard required under 8(a) and puts BCBSM on notice of the claims alleged against it. Lastly, BCBSM moved the court to find that Comau's claims that are based on payments made more than six years before Comau filed this action are untimely. This court concludes that undecided factual determinations render it premature to decide when the statute of limitations runs in this case. This conclusion thus does not foreclose the possibility for the issue to be raised once greater factual development has occurred. For these reasons and the reasons discussed herein, the court will DENY BCBSM's Motion to Dismiss.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 7024683

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

2021 WL 5989023
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

COMAU LLC, Plaintiff,
v.
BLUE CROSS BLUE SHIELD OF MICHIGAN, Defendant.

Case No. 19-12623
|
Signed 12/16/2021

Attorneys and Law Firms

Chloe Cunningham, Kyle Patrick Konwinski, Seth Arthur, Perrin Rynders, Aaron M. Phelps, Varnum, Riddering, Grand Rapids, MI, for Plaintiff.

Elizabeth Y. Austin, Kathleen Carlson, Tacy F. Flint, Thomas D. Cunningham, Sidley Austin LLP, Chicago, IL, G. Christopher Bernard, Michelle R. Heikka, Blue Cross Blue Shield of Michigan, Rebecca D. O'Reilly, Samantha K.W. Van Sumeren, Sarah L. Cylkowski, Bodman PLC, Detroit, MI, for Defendant.

ORDER GRANTING IN PART BCBSM'S MOTION TO COMPEL ALIGNMENT OF EXPERT REPORT (ECF No. 88, 138, 139), GRANTING IN PART COMAU'S EMERGENCY MOTION TO EXTEND DISCOVERY (ECF No. 115), AND SCHEDULING STATUS CONFERENCE REGARDING DISCOVERY DISPUTES

Curtis Ivy, Jr., United States Magistrate Judge

I. BACKGROUND

A. Procedural History

*1 Comau LLC commenced this ERISA case on September 6, 2019. (ECF No. 1). Comau amended its complaint on December 12, 2019. (ECF No. 15). This matter was referred to the undersigned for all pretrial proceedings except dispositive motions. (ECF No. 91).

On September 29, 2021, Defendant Blue Cross Blue Shield of Michigan ("BCBSM") filed a sealed and unsealed but redacted copy of its Motion to Compel Plaintiff to Align its Expert Report with the Allegations in its Complaint and to Stay Discovery Until Plaintiff Does So. (ECF Nos. 87, 88). Along with the motion to compel, BCBSM filed numerous motions to seal briefs and exhibits related to this and other pending motions. The Court denied in part those motions to seal. (ECF No. 128). BCBSM then timely filed unsealed, unredacted copies of its motion to compel. (ECF Nos. 138, 139). In this Order, the Court references the opening brief filed at ECF No. 138 and response brief at ECF No. 97.

Comau filed an Emergency Motion to Extend Discovery which is also addressed below. (ECF No. 115).

The Court held a hearing on BCBSM's motion to compel on December 14, 2021. For the reasons explained below, the motion to compel is **GRANTED IN PART, DENIED IN PART.** The motion to extend discovery is **GRANTED IN PART.**

B. Amended Complaint Allegations

Comau develops and produces process automation, manufacturing, and service products. (ECF No. 15, PageID.290). During the relevant period, Comau provided health care benefits to its employees through a self-insured benefit plan (the "Plan"). (*Id.*). Comau paid the health care costs of its employees up to a certain threshold rather than buying an insurance policy. (*Id.*). Comau retained BCBSM several years ago to administer its healthcare plan. (*Id.*). BCBSM used funds provided by Comau (in the form of prepayments to a BCBSM-owned bank account) to pay covered employee healthcare claims. (*Id.* at PageID.291).

The current dispute centers on BCBSM's handling of plan assets. Comau alleges BCBSM has been paying grossly inflated healthcare claims from healthcare providers since 1997. (*Id.* at PageID.296, at ¶ 38). As an example, Comau provided: a provider charges $18,000 for a routine urinalysis on a Comau employee, but the actual cost of the routine urinalysis is $10.00 or less. BCBSM knows the bill is grossly inflated, but it used Plan assets to pay the grossly inflated bill anyway. (*Id.* at ¶ 39-40). Citing news articles related to inflated urinalysis bills, Comau asserts these "improper claims" are well-known in the health care industry. (*Id.* at ¶ 41-42).

According to Comau, BCBSM's account manager, Dennis Wegner, learned of gross overpayments for routine medical testing on other accounts. Wegner had access to customer records and billing, and to BCBSM's healthcare claims

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

processing system, software, and billing system, which were used universally on all customer accounts. (*Id.* at PageID.297, at ¶ 47-48). Wegner questioned claims processing for overpayments on three non-Comau accounts. Because BCBSM's systems are applied universally to its customers, Comau's healthcare claims would have been processed, billed, and paid using the same BCBSM systems as the other customers. As a result, Comau alleges the same systems failures that gave rise to the three other overpayment cases would have subjected Comau to the same issues. In fact, Comau alleges Wegner knows of and confirmed to Comau that it was affected by BCBSM's payment of improper claims. (*Id.* at PageID.298-99). Wegner allegedly alerted executives at BCBSM, yet the company did not act to stop the payment of improper claims. (*Id.* at PageID.300, at ¶ 66). Wegner was terminated from his employment during November 2018. (*Id.* at ¶ 68).

*2 Comau alleges payment of claims it knows to be improper is inconsistent with health insurance industry standards and breaches BCBSM's fiduciary duty pursuant to the Employee Retirement Income Security Act in the following not limited ways:

> (a) Intentionally and knowingly paying grossly inflated and knowingly inflated healthcare claims to Providers;
>
> (b) Failing to correct/update its Billing System to avoid Plan assets being used to pay improper charges and concealing from, and otherwise failing to disclose to[ ] Plaintiff the payment of improper claims;
>
> (c) Failing to exercise the care, skill, prudence, and diligence under the circumstances that a prudent fiduciary acting in a like capacity and familiar with such matters would use in paying for healthcare claims

(*Id.* at PageID.305, at ¶ 94).

C. BCBSM's January 15, 2020 Motion to Dismiss the Amended Complaint

BCBSM moved to dismiss the amended complaint. It argued (1) Comau did not allege fraud with the requisite Fed. R. Civ. P. 9(b) particularity, (2) Comau failed to state a claim for breach of fiduciary duty, and (3) the claims based on payments made more than six years before this action are untimely. (ECF No. 19). BCBSM argued the facts were borrowed from Dennis Wegner's whistleblower complaint and the amended complaint never alleges any specific fraudulent payments made using Plan assets or alleges facts to plausibly suggest such fraudulent payments occurred. Comau challenged each of these arguments. (ECF No. 21). Comau argued it sufficiently stated a claim to relief because it alleged facts from which to infer BCBSM's payment systems were flawed, resulting in misuse and loss of Plan assets, and that it is premature to determine the triggering date for the statute of limitations.

District Judge Stephanie Dawkins Davis denied the motion to dismiss. Judge Davis first concluded Comau alleged a breach of fiduciary duty claim, not fraud. Thus, Comau's amended complaint is subject to the Rule 8(a) pleading standard, not the Rule 9(b) pleading standard. (ECF No. 25, PageID.569-75). Next, Judge Davis found the amended complaint meets the pleading requirements of Rule 8(a). She noted "Comau's claim essentially asserts that BCBSM, in paying inflated or otherwise improperly-billed health claims out of its funds, mismanaged the Plan's funds." (*Id.* at PageID.578). That the amended complaint does not detail how BCBSM's alleged defective systems works did not undermine the sufficiency of the pleading because the court could reasonably infer from the allegations that BCBSM's process was flawed. (*Id.* at PageID.580-81). The Court described the amended complaint as follows:

> If the allegations in the [first amended complaint] are proved, then they would show that an adequate investigation would have revealed to BCBSM and a reasonable fiduciary that the system was flawed. The facts alleged in the FAC also give BCBSM fair notice of Comau's claims against it —the payment of inflated claims and the failure to fix its processing systems in order to prevent the payment of inflated claims. The facts additionally support an inference that BCBSM breached its fiduciary duty by failing to correct its processing system which it knew resulted in the payment of inflated claims.

*3 (*Id.* at PageID.583) (internal citations omitted).

Finally, the Court found it is too early to determine when the facts giving rise to the statute of limitations occurred, so

the Court did not determine what the applicable statute of limitations is. (*Id.* at PageID.585).

D. Instant Motion

BCBSM moves pursuant to Fed. R. Evid. 702 for an order excluding Comau's expert report drafted by Dawn Cornelis of ClaimInformatics. In the alternative, BCBSM seeks an order deeming waived Comau's "new theories presented in its expert report, which are wholly unrelated to the Amended Complaint," unless Comau amends a second time to include the purported new theories. (ECF No. 138, PageID.5104). And BCBSM seeks leave to file a dispositive motion without prejudice to potential later dispositive motions and for a stay of discovery until this motion is resolved.

BCBSM's argument for exclusion of the expert report is this: in the amended complaint, Comau alleged BCBSM breached its fiduciary duty by paying grossly inflated claims filed by non-participating providers for routine urine screening. (*Id.* at PageID.5114-17). Yet, despite the limited nature of the claim, Comau's expert identified "supposed coding deficiencies," including "allegedly improper bundling of claims, payments that were supposedly medically unnecessary or 'upcod[ed]' (with no indication of how that information could be derived from simply looking at claims), supposed 'duplicate payments,' and other supposed failures to adhere to coding guidelines." (*Id.* at PageID.5123). BCBSM asserts none of these issues bear any relation to the payment of grossly inflated urinalysis bills. (*Id.* at PageID.5123-25).

BCBSM argues the expert report should be excluded because it does not "fit with the facts of the case." It compares this case to *Argus & Assocs., Inc. v. Pro. Benefits Servs., Inc.*, 2009 WL 1297374, at *3 (E.D. Mich. May 8, 2009), a case in which it says the court sanctioned the plaintiff "by prohibiting use of certain expert testimony as proof at trial where the report failed to identify any examples of the healthcare claims at issue." (ECF No. 138, PageID.1527, 1528).

As to BCBSM's alternative request to deem the "new theories" of improper payments waived unless Comau amends the complaint to include them, (*id.* at PageID.5129), BCBSM says if Comau filed a second amended complaint to include these claims, it will be able to move to dismiss the new claims. According to the company, there are many problems with the proposed new claims, such as the fact that technical issues raised in the report are required to be addressed according to the audit procedures set forth in the contract between the parties, not in litigation in this Court. (*Id.*).

Comau insists its amended complaint allegations are not limited to payments of grossly inflated urinalysis bills submitted by non-participating providers. Rather, Comau asserts it alleged improper payments of grossly inflated healthcare claims *and* that the amended complaint defined "improper payments" to include "a payment for an incorrect amount (including overpayments and underpayments), a payment to an ineligible provider, double billing, payment for services not received, and payment for noncovered services. Providers submitting claims such as these are considered to be fraudulent." (ECF No. 97, PageID.2531, 2540; ECF No. 15, PageID.301). Comau's expert identified $9 million in improper payments stemming from errors including duplicative payments, unbundling, upcoding or wrong code, medically unlikely services, and non-adherence to payment guidelines. (ECF No. 97, PageID.2533). Comau argues its expert report identifies specific improper payments and thus is relevant to the claims in the amended complaint. (*Id.* at PageID.2541).

*4 In reply, BCBSM maintains the amended complaint is not about double billing or payment for noncovered services. BCBSM reiterates its position that the complaint is based on gross overpayments by non-participating labs, highlighting in an appendix all the references to urinalysis in both Wegner's employment complaint and Comau's amended complaint. (ECF No. 103, PageID.2955-56, 2959-61).

Apart from these arguments, Comau contends its expert could not conduct a comprehensive review of the claims data because of deficiencies in the data produced by BCBSM. The issues include missing provider information, missing payee information, and missing claims. (ECF No. 97, PageID.2533-36). In response, BCBSM asserts Comau has all the information it needs to identify these gross overpayments —the service provided, charged and paid amounts, and whether the provider was participating or non-participating. (ECF No. 103, PageID.2956-57). At the hearing, Comau asserted nearly $5.4 million in claims data are missing. Counsel for BCBSM represented on the record there is no more claims data to produce.

II. DISCUSSION

A. The Expert Report and Amended Complaint

Expert testimony is admissible if:

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.[1] In this circuit, "[t]he Rule 702 analysis proceeds in three stages." *United States v. Rios*, 830 F.3d 403, 413 (6th Cir. 2016). "First, the witness must be qualified by 'knowledge, skill, experience, training, or education.' Second, the testimony must be relevant, meaning that it 'will assist the trier of fact to understand the evidence or to determine a fact in issue.' Third, the testimony must be reliable." *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529 (6th Cir. 2008) (quoting Fed. R. Evid. 702). Only the second step is at issue. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993) (quoting 3 Weinstein & Berger ¶ 702[02], p. 702-18).

1 The Court's ruling on BCBSM's motion should not be construed as prejudicial to any future motion to exclude Comau's expert report on a basis different from that asserted here.

Comau's expert reviewed the existing claims data and identified potential breaches of fiduciary duty. To begin, the expert found 8,634 claims that had no provider information listed and 30,091 claims that had no payee information listed. The expert stated these issues raised fiduciary oversight concerns and these claims were excluded from its claims data analysis. (ECF No. 87-7, PageID.1722).[2] The remaining claims totaled an aggregate $109 million in paid claims. Of this amount, the expert identified $9 million in excessive payments among five error types: duplicate payments, unbundling/incidental/mutually exclusive, upcoding/wrong code, medically unlikely, and non-adherence to payment guidelines. (*Id.*).

2 The Court references the expert report in the sealed filing at ECF No. 87. The Court recently stayed its Order directing BCBSM and Comau to file the report unsealed pending resolution of BCBSM's planned objection. Until the dispute regarding the report is resolved, it remains sealed.

*5 The expert report provides examples of unbundling and upcoding. "Unbundling" occurs when, for example, a provider bills for two services but one of those services is included in the second (codes A and B are billed but code A is included in code B) or both should be billed under a single, more comprehensive code (codes A and B should be billed as code C). (ECF No. 87-7, PageID.1727; *see id.* at PageID.1728 for examples of upcoding). "Upcoding" happens when services are billed at a higher-level service although a lower-level service is warranted or performed. For example, the expert identified an emergency department claim billed at the highest level of emergency department care, usually reserved for a life threatened event. Here, however, the patient was treated in the emergency department for "Laceration of lip and oral cavity without foreign body." The expert characterized this is a non-life-threatening lower-level emergency department visit. (*Id.* at PageID.1728). Unbundling and upcoding are essentially examples of overcharged provider bills.

There do not appear to be examples or explanations of the other purported claims errors—duplicate payments, medically unlikely, and non-adherence to payment guidelines.

BCBSM characterizes the amended complaint as alleging breach of fiduciary duty only by paying grossly inflated claims submitted by non-participating providers for urinalysis. BCBSM thus argues the expert report which speaks of "unbundling" or "non-adherence to payment guidelines" is irrelevant to overpayments for urinalysis.[3]

3 BCBSM cites *Argus & Assocs., Inc. v. Pro. Benefits Servs., Inc.*, 2009 WL 1297374 (E.D. Mich. May 8, 2009), as a case that excluded portions of an expert report for failure to identify an inappropriately paid claim. (ECF No. 138, PageID.5127, 5128). BCBSM overreaches in its description of that case. The court excluded some of the expert report and evidence because the plaintiff did not timely provide the report or respond to discovery. The court previously warned the plaintiff failure to do so would result in a limitation on the presentation of proofs at trial. The report was not partially excluded because it did not identify the claims alleged in the complaint. *Argus*, 2009 WL 1297374, at *2-3.

The Court finds BCBSM's characterization of the amended complaint too narrow. As explained in the Opinion and Order denying the motion to dismiss, the amended complaint alleges BCBSM breached its fiduciary duty through "the payment of inflated claims and the failure to fix its processing systems in order to prevent the payment of inflated claims." (ECF No. 25, PageID.583). The amended complaint did not limit the factual basis to provider billing for routine urinalysis—urinalysis was used only as an example of a grossly inflated provider bill paid by BCBSM. The amended complaint is also not limited to claims submitted by non-participating providers. Comau defined "Providers" as "health care providers," without limitation to those who were non-participating. (ECF No. 15, PageID.296, at ¶ 38). The ruling on the motion to dismiss did not address a limitation to "non-participating" providers. (ECF No. 25).

Comau views its amended complaint too broadly. The repeated theme throughout the complaint is that BCBSM knowingly paid inflated healthcare claims. Comau began its complaint discussing Wegner's investigation into BCBSM's overpayment of routine lab testing. Comau asserted the overpayments came down to a system error that would have existed for Comau's healthcare claims as well. In Count I of the complaint, the alleged breaches include, but are not limited to, "Intentionally and knowingly paying grossly inflated and knowingly inflated healthcare claims to Providers." (ECF No. 15, PageID.305, at ¶ 94). The District Judge read the amended complaint to allege breach of fiduciary duty by making payments of inflated claims and failure to fix the system issue. She described the amended complaint as alleging "BCBSM, in paying inflated or otherwise improperly-billed health claims out of its funds, mismanaged the Plan's funds."[4] (ECF No. 25, PageID.578).

4 See also Comau's response to the motion to dismiss in which it argued it sufficiently pleaded that its health care claims were subject to BCBSM's universal processing systems and the system failure giving rise to the other *overpayment* cases subjected to Comau to the same issues. (ECF No. 21, PageID.502). In other words, in defending its amended complaint the first time, Comau repeated its claim that BCBSM knowingly paid inflated healthcare claims.

*6 Comau relies on paragraph 75 of its amended complaint to support its position that the complaint captures all the errors identified in the expert report because those errors are "improper claims." In a section titled, in part, "BCBSM's Practice of Willingly Paying Improper Claims is Inconsistent with Industry Standards, ..." Comau alleges the health insurance industry has standards for evaluating improper claims payments. Next, at paragraph 75, Comau defines "improper payments" to "include a payment for an incorrect amount (including overpayments and underpayments), a payment to an ineligible provider, double billing, payment for services not received, and payment for noncovered services. Providers submitting claims such as these are considered to be fraudulent." (ECF No. 15, PageID.301, at ¶ 75). It is Comau's position that this paragraph defines improper claims for the entire complaint, and thus errors such as duplicate payments and payments to ineligible providers are encompassed in the amended complaint. (ECF No. 97, PageID.2537).

The Court is not convinced. Taken in context, paragraph 75 (which is the only paragraph to mention payments to an ineligible provider, double billing, payment for services not received, or payment for noncovered services in the entire amended complaint) is not a definition of "improper payments" to be applied to every instance in which Comau uses the term "improper claims" or "improper payments." Rather, paragraph 75 lays the ground for Comau's point that BCBSM's payment of improper claims goes against industry standards, is inconsistent with how BCBSM holds itself out to the public, and is inconsistent with representations BCBSM makes to its customers. (ECF No. 15, PageID.303-05). According to Comau, BCBSM holds itself out as a leader in the industry in identifying and rooting out health insurance fraud. Considering BCBSM's representations, Comau believed the insurance company was acting in its best interest, but as alleged elsewhere in the amended complaint, its belief was incorrect. (*Id.* at PageID.304, at ¶ 89).

The amended complaint survived the motion to dismiss because Comau adequately tied allegations of overpayments and systems issues to itself through Dennis Wegner's first-hand knowledge Comau was subject to the same errors. Comau made no similar attempt to tie the list of potential improper payments listed in paragraph 75 to Comau. There are no allegations supporting an inference, for example, that BCBSM paid an ineligible provider, paid a double bill, paid for services not received, or paid for noncovered services. As discussed above, the amended complaint is about payments of "grossly inflated" healthcare provider bills and a system-wide problem that should have been fixed.

The expert's discussion of claims paid that were improperly "unbundled/incidental/mutually exclusive" and "upcoding/wrong code" is relevant to the complaint. These alleged errors show inflated provider healthcare charges for which BCBSM made payments. ERISA plaintiffs are given some leeway in their pleading because they "generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009). The amended complaint gives BCBSM ample notice that the claims here center on overpayments for healthcare, and not just for urinalysis and/or claims submitted by non-participating providers. Discovery has revealed more details about inflated and overpaid healthcare charges. The Court finds nothing inappropriate about this. It is true Comau wrote of "grossly inflated" claims in the amended complaint, but "grossly inflated" was not defined. Whether the upcoding, unbundling, and so forth amounts to "gross inflation" can be determined at a later date. What matters here is these errors evince overpayments and the amended complaint is about overpayments. Thus, the expert report as it relates to these overcharges is relevant to the claims here.

The remaining errors making up the alleged $9 million in excessive payments identified in the expert report—duplicate payments, medically unlikely services, and non-adherence to payment guidelines—do not describe inflated claims paid for healthcare services and are essentially new claims about BCBSM's breach of fiduciary duty. Likewise, the expert's identification of further potential breaches of fiduciary duty with respect to missing claims data fields are not part of the amended complaint. (ECF No. 87-7, PageID.1722). Comau did not allege or even suggest BCBSM breached its fiduciary duty by excluding provider information or payee information in a small portion of its claims data. These findings by the expert are not relevant to this case.

*7 For these reasons, BCBSM's motion to compel is **GRANTED IN PART, DENIED IN PART**. The Court will not exclude the expert report in whole, but portions of the report are irrelevant to the claims here as discussed above. Those portions of the report should not be used later as proof of breach of fiduciary duty.

The Court will not order Comau to amend the complaint a second time. This case has been pending for more than two years. This litigation must move forward. Further, Comau has not moved to the amend the complaint and opposes amendment now. The claims in this case are as characterized by the Court in the Opinion denying the motion to dismiss—payments of inflated healthcare charges.

Now, the request to stay discovery pending resolution of BCBSM's motion to compel is moot. Discovery deadlines are addressed below.

The Court will **DENY WITHOUT PREJUDICE** BCBSM's motion to compel as it relates to the request for permission to file more than one motion for summary judgment. The Court is not inclined to grant permission to file more than one motion for summary judgment until one is filed and defeated.[5] BCBSM seeks leave to file a "preliminary" motion for summary judgment because Comau cannot identify any instance in which "BCBSM paid a grossly inflated charge to a non-participating provider for routine urine screenings." (ECF No. 138, PageID.5130). Again, the claims here are not so limited. Thus, it is not clear at this point BCBSM would still move on that basis.

5 Additionally, this case was not referred to the undersigned to address dispositive motions. Requests regarding dispositive motions should be addressed to the District Judge.

B. Discovery

Comau asserts its expert could not complete a comprehensive review of the claims data because of missing provider and payee information. Comau has also intimated it has not received a full production of claims data. At the hearing on the motion, Comau explained there are nearly $5.4 million in missing claims data that has yet to be produced. BCBSM's counsel stated on the record there is no more claims data to produce. Were this issue before the Court on a motion to compel production of claims data, the Court would be unable to compel production of documents that do not exist. This issue, however, is not before the Court on a motion, and so the Court will not make a ruling.

Discovery must continue on the claims as discussed above, and these claims only. The Court will **GRANT IN PART** Comau's Emergency Motion to Extend Discovery. (ECF No. 115). The following case management deadlines are extended by two months from the original dates set at ECF No. 35: the discovery deadline is moved to **January 24, 2022** and the dispositive motion cut-off is moved to **March 10, 2022**. The parties must work diligently to meet these deadlines and must work cooperatively to schedule the exchange of discovery, including scheduling depositions.

Comau has three motions to compel pending before the Court. (ECF Nos. 92, 121, 131). As it is possible the Court's ruling here impacts some of the relief requested in some or all of those motions, including BCBSM's responses, the parties are directed to confer on the remaining discovery disputes. Specifically, the parties must confer and determine whether any of the requests for discovery or objections to discovery requests should no longer be pressed considering this Order and can be resolved without Court intervention. The Court will hold a status conference about the discovery disputes on **December 27, 2021 at 11:00 a.m.** Call-in information will be filed separately.

***8 IT IS SO ORDERED.**

The parties to this action may object to and seek review of this Order, but are required to file any objections within 14 days of service as provided for in Federal Rule of Civil Procedure 72(a) and Local Rule 72.1(d). A party may not assign as error any defect in this Order to which timely objection was not made. Fed. R. Civ. P. 72(a). Any objections are required to specify the part of the Order to which the party objects and state the basis of the objection. When an objection is filed to a magistrate judge's ruling on a non-dispositive motion, the ruling remains in full force and effect unless and until it is stayed by the magistrate judge or a district judge. E.D. Mich. Local Rule 72.2.

All Citations

Slip Copy, 2021 WL 5989023

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

2022 WL 2373352
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

COMAU LLC, Plaintiff,
v.
BLUE CROSS BLUE SHIELD OF MICHIGAN, Defendant.

Case No.: 19-12623
Signed June 30, 2022

Attorneys and Law Firms

Chloe Cunningham, Kyle Patrick Konwinski, Seth Arthur, Varnum LLP, Grand Rapids, MI, Perrin Rynders, Aaron M. Phelps, Varnum, Riddering, Grand Rapids, MI, for Plaintiff.

Elizabeth Y. Austin, Kathleen Carlson, Tacy F. Flint, Thomas D. Cunningham, Sidley Austin LLP, Chicago, IL, G. Christopher Bernard, Michelle R. Heikka, Blue Cross Blue Shield of Michigan, Detroit, MI, Rebecca D. O'Reilly, Samantha K.W. Van Surneren, Sarah L. Cylkowski, Bodman PLC, Detroit, MI, for Defendant.

ORDER ON MOTIONS (ECF Nos. 92, 121, 151, 160, 162)

Curtis Ivy, Jr., United States Magistrate Judge

*1 Plaintiff Comau LLC filed this Employee Retirement Income Security Act case on September 6, 2019 against Blue Cross Blue Shield of Michigan ("BCBSM"). (ECF No. 1). This matter was referred to the undersigned for all pretrial proceedings excluding dispositive motions. (ECF No. 91). Before the Court is Comau's motion for leave to file a second amended complaint (ECF No. 160), a motion to seal exhibits related to the motion for leave (ECF No. 162), and discovery motions filed by both parties (ECF Nos. 92, 121, 151). This Order first addresses the motion for leave to amend the complaint and motion to seal related exhibits. For the reasons discussed below, the motions for leave to amend and to seal exhibits are granted. Then, this Order addresses the discovery motions.

A. Motion for Leave to Amend the Complaint (ECF No. 160)

The exact claims being litigated here has been the subject of arguments and motion practice for some time. During discovery, BCBSM objected to some requests claiming that they were irrelevant because they did not pertain to the payment of grossly inflated urinalysis bills—the only claim it asserted was raised in the complaint. Comau sought discovery targeted at BCBSM's claims processing systems and issues raised by its expert about BCBSM's data. These issues included the payment of bills that were, for instance, upcoded, unbundled, or not medically necessary. BCBSM maintained that these issues were not part of the First Amended Complaint ("FAC"). So BCBSM filed a motion to compel Comau to align its expert report with the allegations in the FAC or to compel Comau to amend the complaint to add those claims. (ECF No. 88, 138, 139). The Court granted that motion in part.[1] (ECF No. 143). Comau's view of the FAC was too broad, while BCBSM's view was too narrow. The Court found that the FAC alleges that BCBSM breached its fiduciary duty by paying inflated healthcare claims and by failing to fix its processing systems to prevent payment of inflated claims. The FAC was not limited to claims for urinalysis testing and was not limited to claims submitted by non-participating providers. (ECF No. 143, PageID. 5550). Thus, the FAC related to claims concerning inflated provider bills, including bills that were upcoded, unbundled, or where the service codes were mutually exclusive. (*Id.* at PageID.5553). The other errors identified by the expert (duplicate payments, medically unlikely services, missing data fields, and non-adherence to payment guidelines) do not describe inflated claims for healthcare, and thus were found irrelevant to the FAC allegations. (*Id.* at PageID.5554).

1 This Order was affirmed by the District Judge after Comau filed objections. (ECF No. 154).

A little over a month after the Court issued that Order, Comau moved for leave to file a Second Amended Complaint ("SAC") under Fed. R. Civ. P. 15(a).[2] (ECF No. 160). The SAC includes information about those items found to be beyond the scope of the FAC, as well as a new claim about BCBSM's Shared Savings Program ("SSP") under which BCBSM retains 30% of amounts recovered from overpaid healthcare claims.

2 Comau did not file a copy of the proposed second amended complaint because it is the subject of

BCBSM's motion to seal. Below the Court orders Comau to file the second amended complaint.

*2 Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." "Because Rule 15(a) envisions liberal allowance of amendments to pleadings, there must be some substantial reason justifying denial of the motion." *Sun Life Assurance Co. of Canada v. Conestoga Trust Servs., LLC*, 263 F. Supp. 3d 695, 697 (E.D. Tenn. 2017) (citing *Smith v. Garden Way, Inc.*, 821 F. Supp. 1486, 1488 n. 2 (N.D. Ga. 1993)). There are several factors courts consider in deciding whether to allow amendment: "the delay in filing, the lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." *Perkins v. Am. Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 605 (6th Cir. 2001).

1. Delay

The Sixth Circuit has noted that "delay alone, regardless of its length is not enough to bar" the amendment "if the other party is not prejudiced." *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999) (quotation marks and citations omitted). Amendment after the close of discovery may be considered significant prejudice. *Id.*

Comau argues it did not delay—it did not have final production of documents until November 24, 2021, a prior discovery cut-off date, and it moved to amend one month after the Court's Order on the scope of the FAC. As to the timing of discovery, Comau asserts much of the details about the issues raised in the expert report and about the SSP did not surface until the November 24, 2021 production. And as to the scope of the FAC, it asserts it did not move for leave to amend sooner because it believed all of its claims, except the SSP claim, were encompassed in the FAC.

BCBSM insists it is too late to amend the complaint. It argues that discovery was not delayed, it simply did not get to Comau when Comau wanted it, that Comau knew the facts needed to plead its claim at the beginning of the litigation, and that courts routinely deny such motions this late into litigation.

The Court finds no undue delay. To begin, the January 20, 2022, motion comes before the close of discovery. The Court extended the discovery deadline to January 24, 2022 in the Order on the motion to align the expert report with the FAC. (ECF No. 143). On January 25, 2022, the Court held in abeyance the discovery motions addressed herein until resolution of the motion to amend. (ECF No. 161). So while the period of open discovery technically closed January 24, 2022, the discovery period is incomplete and there is no per se prejudice.

Second, Comau did not delay in bringing this motion. Throughout discovery motion practice it maintained that the FAC encompassed all its claims (except the SSP claim). It is reasonable, then, that Comau did not move for leave to amend until after the Court determined the scope of the FAC is smaller than it believed. And there is no reason to doubt that Comau did not learn all the details of its claims until the production of discovery on November 24, 2021. The motion to amend came about two months later.

2. Notice

As for notice, BCBSM cannot be surprised to see all but one of the claims in the proposed second amended complaint—Comau has been arguing those claims were part of the FAC for some time. The SSP claim is new, but BCBSM is in possession of the evidence it needs, or can obtain discovery from Comau, to defend against it. This factor does not weigh against allowing amendment.

3. Prejudice

Even if there were some undue delay, "[d]elay by itself is not sufficient reason to deny a motion to amend." *Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 458 (6th Cir. 2001). To deny amendment the Court would also have to find significant prejudice to BCBSM. *See Moore v. City of Paducah*, 790 F.2d 557, 562 (6th Cir. 1986). The Sixth Circuit "has held that allowing amendment after the close of discovery creates significant prejudice, and other Circuits agree." *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999) (citations omitted). But again, this motion does not come after the close of all discovery, so there is no per se prejudice. In determining potential prejudice, the court considers whether the amendment would "require the opponent to expend significant additional resources to conduct discovery and prepare for trial [or] significantly delay the resolution of the dispute." *Phelps v. McClellan*, 30 F.3d 658, 663 (6th Cir. 1994).

*3 BCBSM argues it will suffer undue prejudice from late amendment. It contends the amendment would restart the clock on many aspects of the litigation and require it to build its case "from the ground up" two years into this litigation, especially as to the new SSP claim. BCBSM argues

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

amendment would add more time to the litigation. (ECF No. 164, PageID.6474-79).

The Court knows that this case has been pending since the latter part of 2019 and that allowing a second amended complaint now would add time to the litigation. But the Court is not convinced there will be significant further delay in resolution of this case. Claims that were deemed not part of the FAC and added to the SAC will require additional discovery for both parties, but some discovery has already taken place. For instance, BCBSM has already produced the claims data and Comau's expert has, likely by now, reviewed all the data. Discovery on the SSP claim will be required, but BCBSM likely has much of the information it needs to formulate its defense. And Comau's motions to compel depositions would likely have been granted, at least in part, even without amendment based on the scope of the claims in the FAC, so discovery would continue anyway. The amendment will cause delay in resolution of this case, although a large part of the reason this case has not moved quickly is that the parties have been disputing the sufficiency and scope of the claims since the beginning. Comau also says if leave is not granted it will file a new lawsuit with these claims, which will only serve to truly start the clock anew against BCBSM in a separate litigation. With this SAC, a final amendment, the claims are clear and the litigation will move towards completion. Of course, how much time will be added to the case is unclear. BCBSM asserts that it will likely file a motion to dismiss the SAC or some claims in it. If successful, that will obviate the need for discovery on the dismissed issues, speeding the case along.

BCBSM cites *Nolan v. Thomas*, 2018 WL 3122597 (E.D. Mich. June 26, 2018), in part to support the proposition that courts routinely deny these late-filed motions to amend, especially where the moving party has been aware of the facts giving rise to its claims. There, the court denied the motion for leave to amend the complaint because it was filed after oral argument on dispositive motions and because the plaintiff was aware of the necessary facts of the new claim when the original complaint was filed. *Id.* at *9-10. These facts are distinguishable from this case. This case has yet to pass the discovery phase, so it is not in its "late stages." All pending scheduling order dates have been adjourned (and discovery is extended below). (ECF No. 173). Second, the added detail to the proposed second amended complaint comes from discovery; it was not information known at the time of the original complaint. As for the SSP claim, the new claim, Plaintiff asserts they learned details about the program in the November 24, 2021 production, and those details form part of the claim. So unlike in *Nolan*, the Court cannot say Comau was aware of the facts necessary to state a viable claim when they filed the original complaint.

4. Bad Motive

The discussion above of Comau's actions shows it did not act in bad faith or with bad motive in bringing this motion. This factor does not weigh against allowing amendment.

5. Repeated Failure to Cure Deficiencies and Futility

*4 There have not been repeated failures to cure deficiencies. This factor does not weigh against amendment. BCBSM does not argue amendment would be futile except to assert that it will likely file a motion to dismiss the second amended complaint.

On balance, the factors counsel in favor of granting Comau leave to amend. The motion is **GRANTED**.

B. Motion to Seal Exhibits

As explained in the Court's Order on prior motions to seal (ECF No. 128), the Sixth Circuit has long recognized a "strong presumption in favor of openness" in court records. *Rudd Equipment Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir. 2016) (citing *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983)). The "heavy" burden of overcoming that presumption rests with the party seeking to seal the records. *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016). The moving party must show that it will suffer a "clearly defined and serious injury" if the judicial records are not sealed. *Id.* at 307. This burden must be met even if no party objects to the seal, and it requires a "document-by-document, line-by-line" demonstration that the information in the document meets the "demanding" requirements for the seal. *Id.* at 308. In delineating the injury to be prevented, "specificity is essential." *Id.* Typically, "only trade secrets, information covered by a recognized privilege (such as attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault)" are enough to overcome the presumption of access. *Id.*

Should the Court order a document to be sealed, the Court must articulate why the interests supporting nondisclosure are compelling, why the interests supporting public access are not

as compelling, and why the scope of the seal is no broader than necessary. *Id.* at 306.

The remaining dispute in BCBSM's motion to seal exhibits is over three sentences in a four-paragraph email chain and two slides in a 25-slide internal presentation, both marked "confidential" by BCBSM in discovery. It seems the parties could have come to an agreement on three sentences and two slides. All the same, the Court resolves the motion in BCBSM's favor.

BCBSM argues the three sentences in the email chain should be redacted because they describe a specific aspect of its claims processing logic that could be used as a roadmap by bad actors to perpetrate fraud, waste, and abuse. Specifically, these sentences describe information bad actors could include on submitted claims to try to increase their reimbursement. (ECF No. 162, PageID.6259-60). According to the defendant, the two slides describe red flags its investigation unit looks for to identify potential fraud, waste, and abuse and could be used as a roadmap to evade detection by the investigation unit. BCBSM insists the public need not view these sentences or slides to understand the SAC or the Court's ruling on the motion for leave to file the SAC. (*Id.* at PageID.6260-61).

Comau argues against sealing or redacting because the information in the three sentences is publicly available in other documents that BCBSM agreed to de-designate as confidential. (ECF No. 168, PageID. 6662). BCBSM rebuts this with compelling argument that the information in this particular email is more specific providing specific "indicators" a bad actor could use to try to game the system (should BCBSM begin using the logic again). (ECF No. 169). Comau also argues the information in the two slides is publicly available and presents only generic information about fraud detection. (ECF No. 168, 6663-64). Again, BCBSM argues what is on these two slides is more specific—they provide data points BCBSM uses to detect fraud. A bad actor might steer clear of these data points to avoid detection.

*5 BCBSM's requests are narrowly tailored to achieve their goal of preventing potential future fraud. It is conceivable that a healthcare provider with bad intent could use the information to tailor its payment submissions in a way to attempt to game the system. BCBSM's argument that both items to be redacted are more detailed than a generic statement about fraud and what is publicly available is well taken. BCBSM has also made the case that the public does not have great interest in viewing these portions of the record because the information does not help to understand the pleadings or arguments about leave to amend.

The motion is **GRANTED**. BCBSM is **DIRECTED** to file unredacted, unsealed versions of those exhibits no longer contested and a redacted, unsealed version of the two documents addressed here within **14 days** of this Order. Comau is **DIRECTED** to file an unsealed version of the SAC within **14 days** of this Order.

C. Plaintiff's Motions to Compel (ECF Nos. 92, 121), BCBSM's Motion for Protective Order (ECF No. 151)

In light of the Order granting Comau leave to file a second amended complaint, the arguments raised in Comau's motions to compel at ECF Nos. 92 and 121 and BCBSM's motion for protective order against depositions (ECF No. 151) are stale. At ECF No. 92, Comau seeks to depose various BCBSM employees or former employees. BCBSM's objections to those depositions largely revolved around its argument that the requests were irrelevant because they did not relate to the claims in the FAC. They filed a motion to prevent these depositions from going forward for that reason. The second motion seeks an order compelling responses to interrogatories and requests for documents. Here, too, BCBSM objected on the grounds of relevance and burden arguing the requests were not relevant to the claims in the FAC.

Since the SAC makes some changes to the claims, ruling on specific arguments in these three pending motions would not be an exercise in judicial economy. That said, BCBSM's arguments against the discovery alleging that they seek information not relevant to the FAC now appears moot. The Court will **GRANT** Plaintiff's motions to compel, but without prejudice to BCBSM objecting to those discovery requests that have not been addressed by the Court. BCBSM's motion for protective order is **DENIED AS MOOT**, but again without prejudice to the company raising proper objections to the noticed depositions. To allow for the completion of discovery, discovery will be extended three months from this Order, to **September 30, 2022**. Dispositive motion cut-off will be **October 31, 2022**, or a date to be set by the District Judge.[3] The parties should confer on remaining discovery disputes and anticipated lines of discovery to find the most efficient means to complete discovery by this deadline.

3 Remaining case deadlines will be determined by the District Judge.

IT IS SO ORDERED.

The parties to this action may object to and seek review of this Order, but are required to file any objections within 14 days of service as provided for in Federal Rule of Civil Procedure 72(a) and Local Rule 72.1(d). A party may not assign as error any defect in this Order to which timely objection was not made. Fed. R. Civ. P. 72(a). Any objections are required to specify the part of the Order to which the party objects and state the basis of the objection. When an objection is filed to a magistrate judge's ruling on a non-dispositive motion, the ruling remains in full force and effect unless and until it is stayed by the magistrate judge or a district judge. E.D. Mich. Local Rule 72.2.

All Citations

Slip Copy, 2022 WL 2373352

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

EXHIBIT 4

From: Rynders, Perrin <prynders@varnumlaw.com>
Sent: Monday, July 25, 2022 12:57 PM
To: Cylkowski, Sarah
Cc: Flint, Tacy F.; O'Reilly, Rebecca; Carlson, Kathleen; Van Sumeren, Samantha; Austin, Liz; Phelps, Aaron M.; Konwinski, Kyle P.; Cunningham, Chloe N.; Harner, Laura J.
Subject: RE: Comau v. BCBSM

Sarah:

Regarding your letter from late afternoon Friday, please be advised that Comau does not accept BCBSM's settlement offer. However, it remains willing to pursue settlement negotiations. You have indicated that BCBSM prefers to negotiate within the mediation setting and is willing to pay for that. Our client is amendable to that, and both August 9 and 10 are open. Mediator Denny Barnes is also available on those dates if you decide to use his services.

We do not agree to stay proceedings because that is not necessary. If BCBSM takes advantage of the opportunity to mediate on either August 9 or 10 (or both), we will re-notice depositions to dates certain starting the week of August 15.

And if BCBSM provides dates certain starting the week of August 15 for the requested depositions, we will agree to extend the deadline for BCBSM to answer the amended complaint. I think you suggested two weeks, but presumably you want the answer deadline to fall after mediation. Perhaps August 15 makes sense.

All of this needs to be nailed down before this agreement goes into effect—in other words, we need to agree to the mediation date(s) and the deposition dates by close of business tomorrow.

Lastly, assuming this is going to come together, Comau accepts BCBSM's invitation to provide written instructions explaining how to identify from the claims data Comau healthcare claims subject to flip logic, and to do so ahead of the mediation.

Thanks.

From: Cylkowski, Sarah <SCylkowski@BODMANLAW.COM>
Sent: Friday, July 22, 2022 4:40 PM
To: Phelps, Aaron M. <amphelps@varnumlaw.com>; Rynders, Perrin <prynders@varnumlaw.com>; Konwinski, Kyle P. <kpkonwinski@varnumlaw.com>; Cunningham, Chloe N. <cncunningham@varnumlaw.com>; Johnson, Jodi L. <jljohnson@varnumlaw.com>; Harner, Laura J. <ljharner@varnumlaw.com>
Cc: Carlson, Kathleen <kathleen.carlson@sidley.com>; Flint, Tacy F. <tflint@sidley.com>; O'Reilly, Rebecca <ROReilly@BODMANLAW.COM>; Van Sumeren, Samantha <SVanSumeren@BODMANLAW.COM>; Austin, Liz <laustin@sidley.com>
Subject: RE: Comau v. BCBSM

Counsel,

Please see attached.

Sarah L. Cylkowski
313-392-1077
SCylkowski@BODMANLAW.COM

bodman
ATTORNEYS & COUNSELORS

From: Phelps, Aaron M. <amphelps@varnumlaw.com>
Sent: Wednesday, July 20, 2022 10:28 PM
To: Cylkowski, Sarah <SCylkowski@BODMANLAW.COM>; Rynders, Perrin <prynders@varnumlaw.com>; Konwinski, Kyle P. <kpkonwinski@varnumlaw.com>; Cunningham, Chloe N. <cncunningham@varnumlaw.com>; Johnson, Jodi L. <jljohnson@varnumlaw.com>; Harner, Laura J. <ljharner@varnumlaw.com>
Cc: Carlson, Kathleen <kathleen.carlson@sidley.com>; Flint, Tacy F. <tflint@sidley.com>; O'Reilly, Rebecca <ROReilly@BODMANLAW.COM>; Van Sumeren, Samantha <SVanSumeren@BODMANLAW.COM>; Austin, Liz <laustin@sidley.com>
Subject: RE: Comau v. BCBSM

Sarah,

We've discussed BCBSM's request with Comau and respond as follows:

1. We don't feel formal mediation is necessary. The parties and their counsel can exchange offers and resolve their disputes informally (as we've done many times), saving time and money;
2. If BCBSM insists on using a mediator, we will not oppose it and will attend subject to the below, but we will not share in that cost;
3. Any settlement must include resolution of all disputes, including the pending state court litigation; and
4. BCBSM must promptly, before mediation, produce its internal analysis of the cost of the flip logic issue as described in bates number BCBSM-Comau 00029315, in which BCBSM found a potential savings of $23 million in benefit costs, along with any and all other analysis BCBSM has done to examine the scope and cost of the flip logic issue.

Assuming the foregoing are acceptable, we can agree to adjust the current deposition schedule in order to efficiently accommodate settlement efforts. However, we cannot agree to stay discovery (yet again), especially in light of the very limited time we have and the significant work ahead of us. We have currently noticed our first deposition for August 2 and others after that. We can agree to adjourn those depositions to dates certain, starting immediately on or after August 22. That would give the parties over 30 days to explore settlement without incurring the cost of depositions, and would also ensure the parties make meaningful progress with discovery if settlement fails, consistent with Judge Ivy's Order. To be clear, the dates of the depositions on or after August 22 must be established prior to mediation occurring.

I do realize that booking mediators on short-notice is very difficult (which is why you should have made your request months ago), but as you may know, Denny Barnes now has a full time ADR practice. I've inquired as to his availability (but have not shared with him the nature or parties involved in the matter). Denny is available to mediate on August 9 or 10. Varnum, and our client, are also available on those dates.

Regards,

VARNUM

Varnum LLP
333 Bridge Street NW, Suite 1700
Grand Rapids, Michigan 49504
varnumlaw.com

Aaron M. Phelps
Partner

Direct 616-336-6257
Cell 616-915-2198
Email amphelps@varnumlaw.com

****
CONFIDENTIAL

The information contained in this communication is confidential, may be attorney-client privileged, may constitute inside information, and is only for viewing and use of the intended recipients. If you are not an intended recipient, you are hereby notified that any use, disclosure, or copying is strictly prohibited and may be unlawful. If you have received this communication in error, please immediately notify the sender at 616-336-6000.
****

From: Cylkowski, Sarah <SCylkowski@BODMANLAW.COM>
Sent: Tuesday, July 19, 2022 1:19 PM
To: Phelps, Aaron M. <amphelps@varnumlaw.com>; Rynders, Perrin <prynders@varnumlaw.com>; Konwinski, Kyle P. <kpkonwinski@varnumlaw.com>; Cunningham, Chloe N. <cncunningham@varnumlaw.com>; Johnson, Jodi L. <jljohnson@varnumlaw.com>; Harner, Laura J. <ljharner@varnumlaw.com>
Cc: Carlson, Kathleen <kathleen.carlson@sidley.com>; Flint, Tacy F. <tflint@sidley.com>; O'Reilly, Rebecca <ROReilly@BODMANLAW.COM>; Van Sumeren, Samantha <SVanSumeren@BODMANLAW.COM>; Austin, Liz <laustin@sidley.com>
Subject: Comau v. BCBSM

Counsel,

BCBSM believes the parties should explore mediation in the near term to see if an amicable resolution can be reached before further resources are expended on litigation. If Comau is open to mediation, BCBSM suggests the parties ask the Court to stay all proceedings for 45 days to enable the parties to focus on mediation efforts.

Please let us know if Comau is interested in mediation and amenable to requesting a 45-day stay from the Court.

Thank you,

Sarah L. Cylkowski
1901 St. Antoine Street | 6th Floor at Ford Field | Detroit MI 48226
o: 313-392-1077 | SCylkowski@BODMANLAW.COM

| Bio | vCard | *b inclusive*

bodman
ATTORNEYS & COUNSELORS

CONFIDENTIALITY NOTICE The contents of this message from Bodman PLC may be privileged and confidential. Therefore, if this message has been received in error, please delete it without reading it. Your receipt of this message is not intended to waive any applicable privilege. Please do not disseminate this message without the permission of the author.