

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

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

**DEFENDANT’S MOTION FOR LEAVE TO FILE REPLY
IN SUPPORT OF ITS ATTORNEYS’ FEES AND COSTS**

Pursuant to Local Civil Rule 7.3(c), Defendant Blue Cross Blue Shield of Michigan (“BCBSM”), through its undersigned counsel, hereby moves for leave to file its Reply in Support of Motion for Award of Attorneys’ Fees and Costs (attached hereto as Exhibit A).

On March 13, 2023, BCBSM filed a Motion for Award of Attorneys’ Fees and Costs (ECF Nos. 25, 26). Plaintiff filed its Response on March 27, 2023 (ECF No. 31). BCBSM’s Motion is non-dispositive. *See* W.D. Mich. LCivR 7.2(a) & 7.3(a). Accordingly, “[r]eply briefs may not be filed without leave of court.” W.D. Mich. LCivR 7.3(c). BCBSM respectfully requests leave to file the reply brief attached hereto as Exhibit A in support of its Motion for Award of Attorneys’ Fees and Costs.

For the reasons demonstrated in BCBSM's Reply, Tiara Yachts' Response propounds multiple new arguments that warrant a response from BCBSM, including Plaintiff's inaccurate theory that Section 1132(g)(1) of ERISA does not apply to this matter and factual assertions that lack any reasonable basis. The Western District of Michigan routinely grants a party's motion for leave to file a reply brief in support of a non-dispositive motion in order to respond to new arguments raised in a party's response brief. *See Wyrick v. Octapharma Plasma, Inc.*, 2011 WL 6888549, at *2 (W.D. Mich. Dec. 29, 2011) (granting leave to file a reply brief in support of non-dispositive motion in order to respond to new arguments raised in a response brief); *see also Palatka v. Savage Arms, Inc.*, 2016 WL 9777357, at *2 (W.D. Mich. Sept. 6, 2016) (Jonker, J.) (granting motion for leave to file reply brief in support of motion for attorneys' fees); *AT&T Corp. v. Dakkota Integrated Sys.*, 2020 WL 13527528, at *3 (W.D. Mich. Apr. 14, 2020) (Jonker, J.) (granting motion for leave to file reply brief in support of non-dispositive Rule 11 motion). BCBSM respectfully requests that the Court do so here.

Pursuant to Local Civil Rule 7.1(d), BCBSM's counsel, Sarah L. Cylkowski, in good faith sought concurrence in the relief requested in this motion from counsel for Plaintiff Tiara Yachts via e-mail on April 5, 2023. Tiara Yachts' counsel opposed the requested relief.

Dated: April 5, 2023

Respectfully submitted,

/s/ Tacy F. Flint

Tacy F. Flint
Kathleen R. Carlson
Elizabeth Y. Austin
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, Illinois 60603
Telephone: (312) 853-7000
tflint@sidley.com
kathleen.carlson@sidley.com
laustin@sidley.com

Rebecca D'Arcy O'Reilly (P70645)
Sarah L. Cylkowski (P75952)
Samantha K. W. Van Sumeren (P82948)
BODMAN PLC
6th Floor at Ford Field
1901 St. Antoine Street
Detroit, Michigan 48226
Telephone: (313) 259-7777
roreilly@bodmanlaw.com
scylkowski@bodmanlaw.com
svansumeren@bodmanlaw.com

EXHIBIT A

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

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

**DEFENDANT’S REPLY IN SUPPORT OF ITS
MOTION FOR ATTORNEYS’ FEES AND COSTS**

TABLE OF CONTENTS

I. Tiara Yachts’ Argument that Section 1132(g)(1) of ERISA Does Not Apply is Plainly Incorrect.1

II. An Award to Defendant is Appropriate Here.2

III. Tiara Yachts’ Arguments Regarding the Parties’ Jointly-Signed Release Agreement are Factually Outlandish and Legally Inaccurate.....3

IV. The Court Need Not Consider the Amount of Fees at This Stage.....4

V. Conclusion.....4

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Astor v. IBM Corp.</i> , 7 F.3d 533 (6th Cir. 1993)	2
<i>Buck v. City of Highland Park, Mich.</i> , 733 F. App'x 248 (6th Cir. 2018)	4
<i>Dublin Eye Assocs., P.C. v. Mass. Mut. Life Ins. Co.</i> , 2014 WL 1217664 (E.D. Ky. Mar. 24, 2014)	3
<i>Moore v. Lafayette Life Ins. Co.</i> , 458 F.3d 416 (6th Cir. 2006)	1
<i>Paddack v. Morris</i> , 783 F.2d 844 (9th Cir. 1986)	1
<i>Pearson v. Voith Paper Rolls, Inc.</i> , 656 F.3d 504 (7th Cir. 2011)	3
<i>RAI Care Ctrs. of Mich. I, LLC v. Admin. Sys. Research Corp. Int'l</i> , 2021 WL 5924341 (W.D. Mich. Mar. 8, 2021).....	3
<i>Trs. of Detroit Carpenters Fringe Benefit Funds v. Patrie Const. Co.</i> , 618 F. App'x 246 (6th Cir. 2015)	2

In its Response to BCBSM’s Motion for Attorneys’ Fees and Costs (ECF No. 31), Tiara Yachts propounds multiple new arguments that lack any reasonable basis in either law or fact and therefore warrant a reply. Tiara Yachts’ erroneous arguments should be disregarded.

I. Tiara Yachts’ Argument that Section 1132(g)(1) of ERISA Does Not Apply is Plainly Incorrect.

Tiara Yachts contends that Section 1132(g)(1) of ERISA does not apply because BCBSM argued—and the Court held—that this case is “NOT an ERISA case.” ECF No. 31, PageID.637. Tiara Yachts is flat wrong. It brought its case under ERISA—and now seeks leave to file a *new* complaint again seeking relief under ERISA. The fact that Tiara Yachts’ claim does not satisfy ERISA’s requirements does not somehow insulate Tiara Yachts from the consequences of its misuse of ERISA’s provisions. *See Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 441, 446 (6th Cir. 2006) (Section 1132(g)(1) applies when Plaintiffs attempt to “unnecessarily expand[] the scope and complexity of litigation” under ERISA, and awarding fees to Defendant); *see also Paddack v. Morris*, 783 F.2d 844, 847 (9th Cir. 1986) (one purpose for Section 1132(g)(1) is to “discourage [Plaintiffs] from asserting . . . claims with no basis in law or fact” under ERISA). Indeed, the Sixth Circuit has declared this exact theory—that a plaintiff can escape ERISA’s fee-shifting provision simply because the court dismissed its ERISA claims—to be “self-serving and incorrect.” *See Moore*, 458 F.3d at 441.

II. An Award to Defendant is Appropriate Here.

Tiara Yachts contends that a fee award to BCBSM as the Defendant is “inappropriate.” ECF No. 31, PageID.639-641. To be sure, an award to a prevailing ERISA defendant may be inappropriate if it would “deter similar suits by *plan participants* . . . who lack the resources to risk paying the other party’s costs and attorneys’ fees” or if it would “reduc[e] the amount of benefits available to other *beneficiaries*.” *Astor v. IBM Corp.*, 7 F.3d 533, 537, 540 (6th Cir. 1993) (emphasis added); *Trs. of Detroit Carpenters Fringe Benefit Funds v. Patrie Const. Co.*, 618 F. App’x 246, 258–59 (6th Cir. 2015). Indeed, *every single case* Tiara Yachts cites involved a fee award that would have adversely affected an ERISA plan or beneficiary.¹

But that is not this case. The only Plaintiff here is Tiara Yachts, a company that freely contracted with BCBSM for its services, and that brought an ERISA

¹ See ECF No. 31, PageID.639-640 (citing *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”) (emphasis added); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 259 (1st Cir. 1986); *Toussaint v. JJ Weiser, Inc.*, 648 F.3d 108, 109 (2d Cir. 2011); *West v. Greyhound Corp.*, 813 F.2d 951, 952 (9th Cir. 1987); *Jones v. O’Higgins*, 736 F. Supp. 1243, 1243 (N.D.N.Y. 1990); *Huizinga v. Genzink Steel Supply & Welding Co.*, 984 F. Supp. 2d 741, 747 (W.D. Mich. 2013); *Saginaw Chippewa Indian Tribe of Mich. v. Blue Cross Blue Shield of Mich.*, 2018 WL 453762, at *6 (E.D. Mich. Jan. 17, 2018), *rev’d in part on other grounds*, 736 F. App’x 140 (6th Cir. 2018); *Guest-Marcotte v. Metaldyne Powertrain Components, Inc.*, 2017 WL 2403569, at *1-2 (E.D. Mich. June 2, 2017); *Hall v. Ohio Educ. Ass’n*, 984 F. Supp. 1144, 1148 (S.D. Ohio 1997); *Duncan v. Minn. Life Ins. Co.*, 2021 WL 1759634, at *1 n.1 (S.D. Ohio May 4, 2021)).

claim to seek contract damages *for itself*—“not . . . on behalf of the Plan.” ECF No. 23, PageID.467. Just like Tiara Yachts’ complaint would not have conferred benefits to anyone other than itself, an award of fees against Tiara Yachts would not draw *any* detriment to the Plan or its participants.² Accordingly, the judicial policy disfavoring fee awards against ERISA Plaintiffs does not apply here. *See Dublin Eye Assocs., P.C. v. Mass. Mut. Life Ins. Co.*, 2014 WL 1217664, at *5 (E.D. Ky. Mar. 24, 2014) (“Plaintiffs’ complete lack of diligence in their role as Trustees and their insistence in pursuing untimely claims are not deserving of the protection ERISA affords individual participants pursuing claims in good faith.”).

III. Tiara Yachts’ Arguments Regarding the Parties’ Jointly-Signed Release Agreement are Factually Outlandish and Legally Inaccurate.

There is no merit to Tiara Yachts’ efforts to waive away the release it signed. Tiara Yachts proclaims it was “extort[ed]” to sign the release, ECF No. 31, PageID.645-646, but neither its brief nor its counsel’s declaration offers even a scintilla of support for this outlandish assertion. If anything, this baseless charge underscores BCBSM’s argument that Tiara Yachts and its counsel’s conduct reflects bad faith.

² Tiara Yachts’ suggestion that its Plan would be compelled to pay any fee award, ECF No. 31, PageID.646, makes no sense. Under ERISA, a Plan must be separate from its sponsor. *RAI Care Ctrs. of Mich. I, LLC v. Admin. Sys. Research Corp. Int’l*, 2021 WL 5924341, at *1 n.1 (W.D. Mich. Mar. 8, 2021); *Pearson v. Voith Paper Rolls, Inc.*, 656 F.3d 504, 510 (7th Cir. 2011). Tiara Yachts’ Plan is not a party to this lawsuit, ECF No. 18, PageID.380-381, and any fee award entered in this lawsuit would accordingly run against Tiara Yachts, not its Plan.

Second, BCBSM had no reason to argue for dismissal based on the release before it moved to dismiss Tiara Yachts' complaint as facially defective. *See Buck v. City of Highland Park, Mich.*, 733 F. App'x 248, 251 (6th Cir. 2018) ("A motion pursuant to Federal Rule of Civil Procedure 12(b) is the typical vehicle for testing a complaint's sufficiency before the pleadings have closed."). BCBSM raised the release with Tiara Yachts' counsel so that the need to file a 12(b)(6) motion could be avoided, and timely informed the Court that it would address the release if the complaint were not dismissed due to its facial deficiencies. *See* ECF No. 13, PageID.172 ("BCBSM believes the release provides a basis to dispose of the case, to the extent the claims are not dismissed under Rule 12(b)(6).").

IV. The Court Need Not Consider the Amount of Fees at This Stage.

The Court can simply disregard Tiara Yachts' arguments regarding the amount of fees. ECF No. 31, PageID.648–649. Tiara Yachts can advance, and the Court can consider, any appropriate challenge to the amount of fees later.

V. Conclusion

BCBSM's Motion for Attorneys' Fees and Costs should be granted.

Dated: April 5, 2023

Respectfully submitted,

/s/ Tacy F. Flint

Tacy F. Flint
Kathleen R. Carlson

Elizabeth Y. Austin
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, Illinois 60603
Telephone: (312) 853-7000
tflint@sidley.com
kathleen.carlson@sidley.com
laustin@sidley.com

Rebecca D'Arcy O'Reilly (P70645)
Sarah L. Cylkowski (P75952)
Samantha K. W. Van Sumeren (P82948)
BODMAN PLC
6th Floor at Ford Field
1901 St. Antoine Street
Detroit, Michigan 48226
Telephone: (313) 259-7777
roreilly@bodmanlaw.com
scylkowski@bodmanlaw.com
svansumeren@bodmanlaw.com

Attorneys for Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to L. Civ. R. 7.3(b)(i), I hereby certify that this document complies with L. Civ. R. 7.3(b)(ii) because this document, generated using Microsoft Word 2010, contains 1,110 words.

/s/ Tacy F. Flint
Tacy F. Flint