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 RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

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INTRODUCTION

Tiara Yachts, Inc. ("Tiara Yachts") falls short of its "heav[y] burden" to obtain leave to amend the Complaint after entry of judgment. *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 616 (6th Cir. 2010). First, amendment would be futile. The Court dismissed Tiara Yachts' Complaint for multiple, independent reasons. The Court first determined that all of Tiara Yachts' claims failed on the merits because the Blue Cross Blue Shield of Michigan ("BCBSM") actions Tiara Yachts challenged were not fiduciary acts under the Sixth Circuit's decisions in *DeLuca v. BCBSM*, 628 F.3d 743 (6th Cir. 2010), and *Seaway Food Town, Inc. v. Med. Mut. of Ohio*, 347 F.3d 610 (6th Cir. 2003). ECF No. 23, PageID.474-480. None of the new allegations in the Proposed Amended Complaint resolve this fatal defect. Indeed, Tiara Yachts' Proposed Amended Complaint fully retains the initial Complaint's focus on supposed "[c]ommon errors associated with BCBSM's NASCO claims processing *system*." ECF No. 33-2, PageID.743 ¶ 70 (emphasis added). This alone makes amendment futile, because Tiara Yachts' continued failure to allege fiduciary acts compels dismissal of the Complaint in its entirety.

Separately, the Court held that Tiara Yachts could not recover overpayments BCBSM allegedly made to providers either under § 1132(a)(3), because such relief was not equitable, or under § 1132(a)(2), because Tiara Yachts sought relief for

itself and not for the Plan. ECF No. 23, PageID.480-483. The Proposed Amended Complaint equally fails to resolve these defects. The new allegations do not and could not turn the relief Tiara Yachts seeks—classic contract damages—into equitable relief. And, Tiara Yachts still has neither named the Plan as a Plaintiff nor stipulated that all relief will benefit the Plan and Plan participants.

Beyond the futility of Tiara Yachts' proposed amendments, the Court would be well within its discretion to deny amendment on the ground that Tiara Yachts lacked any "compelling" reason to wait to amend until after it had an opportunity to review the Court's opinion. *See Leisure Caviar*, 616 F.3d at 616-17. Unlike a typical Rule 15 motion, which is generally freely granted, a post-judgment motion for leave to amend requires the Court to "consider the competing interest of protecting the finality of judgments and the expeditious termination of litigation." *Id.* at 615-16 (internal quotation marks and citation omitted). The Sixth Circuit has advised against a "permissive amendment policy . . . after adverse judgments" because it would allow a plaintiff to "use the court as a sounding board to discover holes in [its] arguments." *Id.* at 616.

For these reasons, the motion for leave to amend should be denied.

BACKGROUND

I. Tiara Yachts' Complaint

On July 1, 2022, Tiara Yachts filed a Complaint alleging that, under ERISA, BCBSM breached its fiduciary duty to Tiara Yachts and engaged in a prohibited transaction in violation of 29 U.S.C. § 1106. Tiara Yachts' Complaint asserted four primary allegations:

> (1) some unspecified non-participating providers were improperly paid at the full amount they charged due to a software flaw in BCBSM's claims processing system called "flip logic." *See* ECF No. 1, PageID.6-9 ¶¶ 37-65.
>
> (2) BCBSM allowed providers to submit claims with improper clinical editing—that is, in a format that enabled providers to receive "improper payments" from other customers serviced by BCBSM. *See id.*, PageID.15-16 ¶¶ 101-108.
>
> (3) BCBSM had potential deficiencies in the claims data that it collected and maintained. *See id.*, PageID.12-15 ¶¶ 86-100; and
>
> (4) BCBSM devised a scheme through the Shared Savings Program to profit from "knowingly and improperly" paying inflated claims. *See id.*, PageID.9-12 ¶¶ 70-85.

As this Court explained, at bottom, "Tiara Yachts' allega[tions] [were] that BCBSM paid too much out of Plan funds for certain claims it processed during [its] contractual relationship" with BCBSM. ECF No. 23, PageID.469. Indeed, "[s]tripped to essentials, the allegations in the Complaint [were] that BCBSM paid actual claims submitted by actual providers at the actual rates charged by those

providers for services actually provided to beneficiaries, some of which should allegedly have been at lower rates." *Id.*, PageID.467-468.

On August 25, 2022, BCBSM moved to dismiss Tiara Yachts' Complaint under Federal Rule of Civil Procedure 12(b)(6). The Court stayed discovery while BCBSM's motion to dismiss was pending. *See* ECF No. 21, PageID.413-414.

II. The Court Raised Questions about Tiara Yachts' Complaint—But Tiara Yachts Did Not Amend.

After BCBSM filed its motion to dismiss, on September 21, 2022, the Court held a conference to discuss the parties' joint status report for case management. During that hearing, the Court preliminarily raised concerns it had with Tiara Yachts' Complaint. In particular, the Court questioned "why is this an ERISA case," because "when I read through the complaint . . . I am thinking why isn't this just a matter of contract between the plan sponsor and a service provider." ECF No. 21, PageID.401-402. The Court further stated that "[t]o the extent there is any fiduciary duties it would seem . . . to be [to] the plan itself," but "the plan isn't a party." *Id.*, PageID.401.

A few months later, on November 15, 2022, the Court held a hearing on BCBSM's motion to dismiss, and raised similar questions. The Court again questioned why Tiara Yachts "should . . . be allowed to work around the [parties'] contract" and bring a "fiduciary duty theory when it seems like that's exactly what the contract is addressing." ECF No. 22, PageID.447. The Court further stated that

it was "having a hard time conceptually understanding how [Tiara Yachts] get[s] recovery out of a case like this," including because any recovery "goes right into a Tiara account" since the Plan was not a party. *Id.*, 443, 445. Tiara Yachts acknowledged that if "there is some doubt about" whether Tiara Yachts (the only Plaintiff here) or the Plan (a non-Plaintiff) would recover from the lawsuit, then Tiara Yachts could "plead something" to address it, *id.*, 444, but Tiara Yachts did not then seek leave to amend the Complaint.

III. The Court Dismissed Tiara Yachts' Complaint.

On February 27, 2023, the Court issued a written opinion ("Opinion") dismissing Tiara Yachts' Complaint, ECF No. 23, and entered judgment for BCBSM, ECF No. 24.

The Court identified multiple, independent grounds for dismissing Tiara Yachts' claims. First, the Court held that Tiara Yachts' claims processing and claims data allegations did not state a claim under ERISA because the challenged conduct—BCBSM's business decision, across its entire NASCO system, to use "flip logic" and other allegedly inadequate procedures in processing claims—was not a fiduciary act under the Sixth Circuit's decision in *DeLuca*. ECF No. 23, PageID.475-477. As the Court explained, "[t]hese are not ERISA fiduciary duty violations, but simply complaints about BCBSM as a contractor." *Id.*, PageID.475. The Court likewise determined that Tiara Yachts did not state a claim with respect

to BCBSM's Shared Savings Program: BCBSM's retention of "a contractually fixed percentage of 30% of recovered third-party payments" did not create "fiduciary status because, like in *Seaway*, there was no BCBSM discretion" in determining its own compensation. *Id.*, PageID.479-480.

Independent of its conclusions as to fiduciary status, the Court held that ERISA "does not provide a pathway . . . to recover on the alleged overpayments" to providers. *Id.*, PageID.480. Recovery of those overpayments would not constitute equitable relief available under 29 U.S.C. § 1132(a)(3), because the funds were not in BCBSM's possession, and payment of them to Tiara Yachts would not qualify as "surcharge" as described in *CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011). *Id.*, PageID.481-482. Nor was recovery available under § 1132(a)(2), because Tiara Yachts Complaint "expressly seeks relief for Tiara Yachts, the employer, and not the Plan" or any plan participant. *Id.*, PageID.482-483.

IV. Tiara Yachts' Proposed Amended Complaint Asserts Substantively the Same Allegations as its Complaint.

Four weeks after judgment was entered, on March 27, 2023, Tiara Yachts filed a Motion for Leave to File an Amended Complaint (hereinafter "Motion"), attaching a Proposed Amended Complaint. *See* ECF No. 33-2 and Ex. A, Redlined Comparison of Complaint to Proposed Amended Complaint. The Proposed Amended Complaint asserts the same causes of action under ERISA for breach of

fiduciary duty and a prohibited transaction in violation of 29 U.S.C. § 1106. *See* ECF No. 33-2, PageID.753-757 ¶¶ 132-144. The Proposed Amended Complaint asserts that the suit is brought "on behalf of the Plan" and by Tiara Yachts "as sponsor of the Plan," *id.*, PageID.752-755 ¶¶ 129-137, Case Caption, and Introduction, but it does not add the Plan as a Plaintiff.

The Proposed Amended Complaint adds minimal factual allegations related to Tiara Yachts' Plan or BCBSM's actions in connection with the Plan. The majority of the new factual allegations address an expert report filed in *Comau LLC v. BCBSM*, No. 19-CV-1263 (E.D. Mich. 2019)—which purportedly identified processing errors in Comau's claims data, but did not address Tiara Yachts' Plan—and irrelevant details about the settlement of that case.[1] *Id.*, PageID. 742-745 ¶¶ 67-77. Tiara Yachts alleges no additional facts related to any actions BCBSM took with respect to Tiara Yachts' Plan or the Shared Savings Program.

LEGAL STANDARD

Tiara Yachts raises its Motion for Leave to File an Amended Complaint pursuant to Federal Rules 15(a)(2) and 59(e). This Court "has considerable discretion in deciding whether to grant either type of motion." *Leisure Caviar*, 616

[1] To the extent that Plaintiff's proposed amendments imply that BCBSM's settlement of *Comau* is an admission of the validity of Comau's claims (ECF No. 33-2, PageID.743-745 ¶¶ 69, 76-77), no such assertion can be supported under Federal Rule of Evidence 408. *See* Fed. R. Evid. 408(a) (evidence of settlement is "not admissible . . . either to prove or disprove the validity . . . of a disputed claim").

F.3d at 615. Factors relevant to whether leave to amend should be granted include, as relevant here, "[the movant's] undue delay in filing" and "futility of amendment." *Head v. Jellico Hous. Auth.*, 870 F.2d 1117, 1123 (6th Cir. 1989) (quoted source omitted). In particular, "[a]n amendment is futile if it could not withstand a Rule 12(b)(6) motion," which is sufficient grounds on its own to deny leave to amend. *Bush v. N. Mich. Univ.*, 2014 WL 1952267, at *4 (W.D. Mich. May 15, 2014).

"Rule 15 requests to amend the complaint are . . . generally speaking, 'freely' allowed. But when a Rule 15 motion comes *after* a judgment against the plaintiff, that is a different story." *Leisure Caviar*, 616 F.3d at 615. In those instances, the party not only must satisfy typical standards for leave to amend, but also "must meet the requirements for reopening a case established by Rules 59 or 60." *C & L Ward Bros., Co. v. Outsource Sols., Inc.*, 547 F. App'x 741, 743 (6th Cir. 2013). As applicable here, Rule 59 motions may be granted only based on "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Leisure Caviar*, 616 F.3d at 615.[2] In addition to the above, the Court also must consider whether Tiara Yachts "has made a 'compelling explanation' for failing to seek leave to amend

[2] Pursuant to the Court's order (ECF No. 40), BCBSM will separately respond to Tiara Yachts' motion under Rule 59(e) by April 24, 2023.

prior to the entry of judgment." *Pond v. Haas*, 674 F. App'x 466, 473 (6th Cir. 2016) (citing *Leisure Caviar*, 616 F.3d at 617).

ARGUMENT

I. Tiara Yachts' Proposed Amendment Would Be Futile.

The Court identified multiple grounds for dismissing Tiara Yachts' claims. First, the Court concluded that all of the claims should be dismissed because Tiara Yachts had failed to allege that BCBSM acted as a fiduciary, either in connection with BCBSM's purported systemwide overpayments to providers or in connection with the Shared Savings Program. Independently, the Court held that ERISA's provisions regarding relief would not permit Tiara Yachts to recover alleged overpayments made to providers.

With respect to Tiara Yachts' claims premised on purported overpayments, any amendment would be futile unless it overcame *both* of the independent bases the Court identified for dismissal. With respect to Tiara Yachts' claim premised on the Shared Savings Program, any amendment would be futile unless Tiara Yachts could somehow demonstrate that BCBSM's receipt of bargained-for compensation pursuant to contractually specified terms was a fiduciary act. The new allegations in the Proposed Amended Complaint do not overcome any of these hurdles—so amendment should be denied as futile.

A. The Proposed Amended Complaint Does Not Overcome the Grounds for Dismissal Identified in the Court's Opinion.

1. *Tiara Yachts Has Failed to Establish That the Challenged Conduct Constitutes Fiduciary Acts.*

Claims Processing. More than simply finding that Tiara Yachts' Complaint was "sparse on alleged facts," ECF No. 23, PageID.477, the Court dismissed Tiara Yachts' claims processing claim at its roots because "Tiara Yachts' Complaint is clear that its complaints are part of overarching business dealings"—that is, "systemwide BCBSM practices," not actions BCBSM took *with respect to Tiara Yachts' plan*. *Id.*, PageID.475. In the Court's words, "[a]s Tiara Yachts' own allegations recognize, it's the way BCBSM ran its overall claims processing operation, not specific decisions made about the Tiara Yachts' sponsored Plan in particular, that are at the root of the claimed problems." *Id.*, PageID.476; *see also id.*, PageID.477-478 ("The same result follows with respect to the Tiara Yachts' claims regarding claims data," which "depend[] on claims and accusations about BCBSM practices generally."). As the Court recognized, such a claim is squarely foreclosed under *DeLuca*, which holds that BCBSM does not act as a fiduciary when it engages in "business dealings . . . not directly associated with the benefits plan at issue . . . , but [instead] generally applicable to a broad range of health-care consumers." 628 F.3d at 747.

Tiara Yachts' Proposed Amended Complaint embraces the very same theory, alleging the same purported systemwide claims processing errors that this Court found incompatible with ERISA. *See* ECF No. 33-2, PageID.738-745 ¶¶ 41-77. The crux of Tiara Yachts' theory remains that—as a result of "[c]ommon errors associated with BCBSM's NASCO claims processing system . . . that BCBSM regularly makes when processing claims for non-auto NASCO customers" (*id.*, PageID.743-744 ¶¶ 70, 75), as well as a "systems flaw" in an internal policy known as "flip logic" (*id.*, PageID.739 ¶ 50)—BCBSM's systemwide claims processing practices supposedly result in overpayments to providers. As in its initial Complaint, the overpayment claim in Tiara Yachts' Proposed Amended Complaint remains premised on allegations of purported systemwide errors—not any actions BCBSM allegedly took in connection with Tiara Yachts' Plan.

The new material in the Proposed Amended Complaint does not change the analysis. Tiara Yachts still fails to "identif[y] any actual claim that BCBSM paid out from [Tiara Yachts' Plan] that suffer[ed] from . . . alleged deficiencies." ECF No. 23, PageID.477. Tiara Yachts adds allegations regarding an expert report filed in the unrelated *Comau* lawsuit, but to the extent that has any relevance here at all, it goes only to BCBSM's alleged systemwide business decisions—not any fiduciary act BCBSM supposedly took in connection with Tiara Yachts' Plan.

With respect to claims data, the Proposed Amended Complaint alleges that the "claims data Plaintiff does possess is so deficient it is incapable of being meaningfully analyzed." ECF No. 33-2, PageID.748, 789 ¶ 100. Accepting as true this statement about the claims data Plaintiff possesses, the Proposed Amended Complaint adds no factual allegations regarding *BCBSM's conduct* in connection with Tiara Yachts' claims data. Just as the Court observed of the initial Complaint, the Proposed Amended Complaint "does not allege, even at a broad level, that there were data deficiencies in the claims processed by BCBSM. Rather, it depends on claims and accusations about BCBSM practices generally, and other BCBSM customers." ECF No. 23, PageID.478.

Because nothing has meaningfully changed in Tiara Yachts' allegations, nothing changes in this Court's analysis under *DeLuca*. The Court's opinion quotes *DeLuca*'s holding that, even if systemwide actions may "'have an effect on an ERISA plan,'" generally applicable policies do *not* "'constitute[] management or administration of *the plan*,'" and thus do not give rise to fiduciary status under ERISA. ECF No. 23, PageID.476 (quoting *DeLuca*, 628 F.3d at 747) (emphasis in original). That holding would equally compel dismissal of the overpayment claim in Tiara Yachts' Proposed Amended Complaint.

Shared Savings Program. The Proposed Amended Complaint similarly fails to address this Court's ruling on the Shared Savings Program. *See* ECF No. 33-2,

PageID.745-747 ¶¶ 78-93. The Court held that "whether under Rule 9 or Rule 8, the allegations in Tiara Yachts' Complaint fail to state a viable claim that BCBSM was functioning as a fiduciary" when it "retain[ed] a contractually fixed percentage of 30% of recovered third-party payments as an administrative fee." ECF No. 23, PageID.479 (citing *Seaway*, 347 F.3d at 619). In particular, the Court held that the Complaint alleged no facts to support Tiara Yachts' assertion that "BCBSM had unilateral control" of the recoveries that the contractually fixed administrative fee would be applied to. *Id.*, PageID.480.

The Proposed Amended Complaint does not add any substantive allegations regarding the Shared Savings Program—much less allege facts that could establish BCBSM had unilateral control over its own compensation. *See* Ex. A ¶¶ 78-93. Tiara Yachts' claim as to the Shared Savings Program in the Proposed Amended Complaint would be dismissed for the same reasons identified in the Court's Opinion, and amendment would therefore be futile.

2. *ERISA Does Not Support Any Monetary Relief in Connection with the Alleged Provider Overpayments.*

Because the Proposed Amended Complaint does not overcome the Court's holding that Tiara Yachts has failed to establish that any of BCBSM's challenged conduct constituted fiduciary acts under ERISA, the amendment cannot overcome dismissal—and leave to amend should be denied as futile on that ground alone. *See, e.g.*, *Holland v. United States*, 2019 WL 1077123, at *9 (E.D. Mich. Mar. 7,

2019) (denying leave to amend as futile where, even though proposed amendment would "cure [one] apparent deficiency in Holland's initial complaint, it would do nothing to address, much less overcome, the separate and independent ground for dismissal"). Regardless, the Proposed Amended Complaint also does not overcome the Court's rulings regarding the availability of monetary relief for alleged provider overpayments under ERISA.

The Proposed Amended Complaint does not attempt to (and cannot) cure the problem identified by the Court under Section 1132(a)(3) of ERISA. *See* ECF No. 23, PageID.480-482 (citing, *inter alia*, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002)). As the Court reasoned, because Tiara Yachts' claim is "that BCBSM paid out too much money out of plan funds, not that it retained any funds, . . . [t]here is no fund of Plan money sitting out there for potential disgorgement." *Id.*, PageID.481. Accordingly, any recovery of the purported overpayments would be legal, not equitable, relief, and therefore unavailable under § 1132(a)(3). *Id.*

Nor does the Proposed Amended Complaint resolve the Complaint's flaws under Section 1132(a)(2). In particular, Tiara Yachts does not propose to add the Plan as a named plaintiff, and—while Tiara Yachts proposes to add an allegation that it has brought this lawsuit "as sponsor for the [Plan]" (*see*, *e.g.*, ECF No. 33-2, PageID.752-755)—the Court already recognized in its dismissal Opinion that

"Tiara Yachts qualifies as the plan sponsor," ECF No. 23, PageID.468 n.1. As was true with the initial Complaint, the allegations in the Proposed Amended Complaint make clear that the Plan's beneficiaries "are already whole, and obtained the healthcare coverage they were owed." *Id.*, PageID.482. *Compare Guyan Int'l, Inc. v. Pro. Benefits Adm'rs, Inc.*, 689 F.3d 793, 800 (6th Cir. 2012) ("Plaintiffs allege harm to the Plans themselves and the Plan participants, some of whom have been refused medical care and received collection notices, all because PBA diverted Plan funds for its own use rather than pay the claims as it promised."). In any event, even if the Proposed Amended Complaint adequately alleged that relief would be directed to the Plan, amendment would nonetheless be futile because the Proposed Amended Complaint does not establish any breach of fiduciary duty, as set forth above.

B. Because Tiara Yachts' Proposed Amendment Would Be Futile, the Case Law It Cites Does Not Support Granting Leave to Amend.

Tiara Yachts contends that if leave to amend is not granted, it "will be deprived of its Sixth Circuit-required 'one chance' to amend." ECF No. 33, PageID.723 n.1 (citing *Southwell v. Summit View of Farragut, LLC*, 494 F. App'x 508, 513 (6th Cir. 2014)). But there is no "one chance" requirement. "A court need not grant leave to amend . . . where amendment would be 'futile.'" *Miller v. Calhoun Cty.*, 408 F.3d 803, 817 (6th Cir. 2005) (citing *Foman v. Davis*, 371 U.S.

178, 182 (1962)). The authorities that Tiara Yachts cites allowed amendment only where the Plaintiff could allege facts that would cure defects in the initial complaint. *See, e.g.*, *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 644 (6th Cir. 2003) (granting leave to replead so that plaintiff could attempt to satisfy newly imposed Rule 9(b) requirements); *Southwell*, 494 F. App'x at 513 (granting leave to amend where Plaintiff's ordinary negligence claim "could go forward"); *Willingham v. Kneeland Indus., Inc.*, 415 F.2d 755, 756 (6th Cir. 1969) (granting leave to amend because the Court provided no explanation for denying Plaintiff's motion); 6 Charles Alan Wright & Arthur R. Miller, Fed. Practice & Procedure § 1483 (3d ed.) (a court "should dismiss the action without leave to replead . . . if the repleading could not possibly correct the defects in the party's claim").

Here, as the Court's Opinion recognizes, Tiara Yachts' theory fails because neither BCBSM's systemwide business practices nor its retention of contractually specified compensation constitutes a fiduciary act under ERISA as a matter of law—and no amendment can change those well-established legal principles. Moreover, review of Tiara Yachts' Proposed Amended Complaint confirms that it would be dismissed for the same reasons as the initial Complaint was. In these circumstances, no additional "chance" need be granted to Tiara Yachts.

II. Tiara Yachts Could Have Moved to Amend Its Complaint Earlier, Rather than Wait for the Court to Issue an Advisory Opinion.

As a final matter, Tiara Yachts had no "compelling" reason to wait to amend at this late stage, "other than news that the court had dismissed [its] first . . . complaint." *Leisure Caviar*, 616 F.3d at 616. Tiara Yachts could have amended its complaint as of right when BCBSM filed its motion to dismiss, which argued all of the grounds for dismissal later addressed in the Court's Order. *See* Fed. R. Civ. P. 15(a)(1). Or it could have moved for leave to amend when the Court first raised questions as to the soundness of the Complaint, *see* ECF No. 21, PageID.401-402, or after the second time the Court questioned whether Tiara Yachts had pled a valid ERISA claim, *see* ECF No. 22, PageID.447.

But it didn't. Instead, Tiara Yachts chose to stand on its initial Complaint, seeking leave to amend only *after* it had the benefit of the Court's 18-page written Opinion to guide its repleading. Notably, the allegations Tiara Yachts added—including the *Comau* expert report, references to its role as Plan sponsor, and a description of the claims data in its possession—all relate to facts known to Tiara Yachts well before this Court's Opinion was entered, and that Tiara Yachts could have added through an amended pleading at any time. *See Leisure Caviar*, 616 F.3d at 616-17 (post-judgment motion properly denied where plaintiff sought leave to add previously known facts). As the Sixth Circuit has explained, in these circumstances, the Court "must consider the competing interest of protecting the

finality of judgments and the expeditious termination of litigation. . . . If a permissive amendment policy applied after adverse judgments, plaintiffs could use the court as a sounding board to discover holes in their arguments, then reopen the case by amending their complaint to take account of the court's decision." *Id.* at 615-16 (cleaned up). As in *Leisure Caviar*, this Court would "not abuse its discretion" in denying leave to amend because Tiara Yachts "could have filed this claim before [it] lost the original case." *Id.* at 617.

Tiara Yachts suggests that its delay should be excused because Plaintiff's counsel "offered to file an amended complaint" during the parties' hearing with the Court in November 2022, but "[t]he Court did not take counsel up on his offer." ECF No. 33, PageID.721. But Tiara Yachts did not move for leave to file an amended complaint at the November 2022 hearing. To the contrary, Plaintiff's counsel acknowledged there may be "some doubt" about its claims, and stated that it would be "happy" to "plead something"—but it failed to do so until after judgment. ECF No. 22, PageID.443-444. Indeed, "[f]ar from clarifying that [Tiara Yachts] sought leave to amend" in its so-called offer to the Court, its counsel's statements merely suggested that Tiara Yachts "may seek leave to amend the complaint . . . at some future date." *C & L Ward Bros.*, 547 F. App'x at 746. It was incumbent on Tiara Yachts to take action—not, as Tiara Yachts suggests, the Court's job to "take counsel up on his offer" by requesting an amendment. ECF

No. 33, PageID.721. To be sure, "many plaintiffs would enjoy an opportunity to amend their complaint after judgment," but this is still an attempt to use the district court as a "vehicle to identify pleading deficiencies." *Pond*, 674 F. App'x at 474.

CONCLUSION

BCBSM respectfully requests that this Court deny Tiara Yachts' motion for leave to file an amended complaint.

Dated: April 17, 2023

Respectfully submitted,

/s/ Tacy F. Flint

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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 4,294 words.

/s/ *Tacy F. Flint*
Tacy F. Flint

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

TIARA YACHTS, INC.,	)	
	)	
Plaintiff,	)	Case No. 1:22-cv-603
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v.	)	
	)	Judge Robert J. Jonker
BLUE CROSS BLUE SHIELD OF MICHIGAN,	)	
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Ex.	Description
A	Redlined Comparison of Complaint to Proposed Amended Complaint

Exhibit A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIARA YACHTS, INC., AS PLAN SPONSOR FOR THE TIARA YACHTS, INC. HEALTH AND WELFARE BENEFIT PLAN, Plaintiff, v. BLUE CROSS BLUE SHIELD OF MICHIGAN, Defendant.	Case No. 1:22-cv-603 Honorable Robert J. Jonker ~~Honorable~~ Magistrate Judge Ray Kent

FIRST AMENDED COMPLAINT

Plaintiff, Tiara Yachts, Inc., formerly S2 Yachts, Inc. ("Tiara Yachts"), in its capacity as Plan Sponsor on behalf of the Tiara Yachts Health and Welfare Benefit Plan (hereafter referred to as the "Plan"), by and through its counsel, Varnum LLP, hereby states for its Complaint against Defendant Blue Cross Blue Shield of Michigan ("BCBSM") as follows:

NATURE OF ACTION

1. Tiara Yachts ~~hired BCBSM to administer its self-funded health benefits plan (the "Plan") that Tiara Yachts offers to~~ is in the business of designing and manufacturing boats. Tiara Yachts sponsors a self-funded health insurance Plan to cover the health care needs of its employees and their dependents. Because Tiara Yachts is in the business of boating, not healthcare, it hired BCBSM, a proclaimed expert in claims processing, to serve as the Plan's claims processing administrator. This arrangement is governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and the terms of the Plan.

2. Throughout its relationship with BCBSM, Tiara Yachts sent millions of dollars to a BCBSM-owned and controlled bank account to cover the Plan's health care claims that were processed and paid by BCBSM. As discussed below, and as will be established at trial, hundreds of thousands, if not millions, of those dollars were unnecessarily spent because BCBSM failed to

adequately detect and prevent the payment of health care claims involving fraud, waste, and abuse.

3. ~~2.~~ Tiara Yachts recently discovered that BCBSM is aware of flaws in its claims processing system that caused it to overpay ~~for~~ claims with ~~Tiara Yachts' money~~assets of the Plan. Instead of fixing ~~the~~its claims processing system failures, BCBSM concealed them from Tiara Yachts for reasons that ~~appear to~~ advance BCBSM's own interests. BCBSM continues to conceal its misconduct, in part, by maintaining exclusive control of ~~Tiara Yachts' complete~~ claims data and other information related to the Plan, which is necessary to comprehensively identify all improper payments and other wrongdoing.

4. ~~3.~~ BCBSM's mismanagement of Plan Assets clearly constitutes a breach of BCBSM's fiduciary duty of care under ERISA. Tiara Yachts brings this suit, in its capacity as Plan Sponsor on behalf of the Plan, to recover the misappropriated funds and obtain all other relief to which it is entitled.

PARTIES, JURISDICTION AND VENUE

5. ~~4.~~ Tiara Yachts is a Michigan corporation, with its principal location in Holland, Michigan.

6. ~~5.~~ BCBSM is a Michigan non-profit health care corporation organized under the Nonprofit Health Care Corporation Reform Act, MCL 550.1101, *et seq.*

7. Section 1132(a)(2) authorizes fiduciaries, like Tiara Yachts as the Plan Sponsor, to bring a civil suit for the relief specified in § 1109(a). 29 U.S.C. § 1132(a)(2). Section 1109, in turn, makes a fiduciary who breaches a fiduciary duty "personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a).

8. ~~6.~~ This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132 because ~~Tiara Yachts'~~Plaintiff's representative claims arise under ERISA.

9. ~~7.~~ Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because BCBSM resides in the Western District of Michigan and a substantial part of the events or omissions

giving rise to the claim occurred in the Western District of Michigan. Venue is also proper pursuant to 29 U.S.C. § 1132(e)(2).

GENERAL ALLEGATIONS

10. ~~8.~~ Tiara Yachts hereby incorporates by reference the allegations contained in the preceding paragraphs.

11. ~~9.~~ Tiara Yachts, formally S2 Yachts, Inc., is in the business of designing and manufacturing boats.

12. ~~10.~~ Tiara Yachts offers health care benefits through the Plan. Rather than buy health insurance to cover employee health care claims under the Plan, during the relevant time period Tiara Yachts opted to self-insure. As such, Tiara Yachts served as the Plan Sponsor and paid the actual employee health care costs covered by the Plan, up to a large threshold. Tiara Yachts bought "stop loss" insurance to cover claims that exceeded that threshold.

13. ~~11.~~ Years ago, BCBSM began providing administrative services to Tiara Yachts and Tiara Yachts' self-funded ~~health~~welfare benefits Plan.

14. ~~12.~~ A self-funded arrangement is one in which the company (Tiara Yachts in this case) self-insures the health care claims of its employees instead of buying an insurance policy. Generally speaking, for every dollar of claims incurred by an employee, the self-funded entity pays that dollar. In order to self-fund, the company contracts with ~~an~~a third-party administrator ("TPA") to process and pay the claims in exchange for a disclosed fee.

A. TIARA YACHTS HIRED BCBSM TO SERVE AS THE PLAN'S ADMINISTRATOR.

15. Because Tiara Yachts ~~hired BCBSM to provide administrative services~~has no experience or expertise administering a health care plan, or in processing, evaluating, and approving or denying health care claims, Tiara Yachts retained BCBSM to perform those functions for the Plan.

16. In exchange, BCBSM charged ~~Tiara Yachts~~ a monthly administrative fee.

17. BCBSM's administrative fee included a host of services, including but not limited to claims processing, check writing, case management, anti-fraud services, and cost containment.

18. BCBSM was to perform its administrative services in accordance with the Plan's terms and benefits.

19. ~~17.~~ BCBSM and Tiara Yachts first executed an Administrative Services Contract ("ASC") on January 1, 2006. They renewed the ASC annually, until Tiara Yachts terminated the relationship ~~in or about December~~effective the end of 2018.

20. ~~18.~~ The ASC delegates to BCBSM certain Plan administration responsibilities and discretionary authority that Tiara Yachts would otherwise retain, including but not limited to interpreting Plan terms, calculating benefits, and using ~~Tiara Yachts'~~ Plan assets to pay for health care services.

~~19. BCBSM's administrative fee included a host of services, including but not limited to claims processing, check writing, case management, anti-fraud services, and cost containment.~~

~~20. BCBSM was to perform its administrative services in accordance with the health care benefits selected by Tiara Yachts.~~

21. As the TPA, BCBSM was responsible for determining whether a claim should be approved or denied in accordance with the Plan terms and benefits. From the outset of BCBSM's role as TPA for the Plan, and for the duration of BCBSM's service in that capacity, Tiara Yachts delegated to BCBSM the responsibility for reviewing health care claims submitted to the Plan and determining whether such health care claims should be approved or denied.

22. Tiara Yachts also delegated to BCBSM the responsibility for paying health care claims from Plan assets. From the outset of BCBSM's role as a TPA, and for the duration of BCBSM's service in that role, once BCBSM approved a claim for payment BCBSM was responsible for paying that health care claim on behalf of the Plan.

23. Although Tiara Yachts funded the Plan, it was BCBSM that exercised discretion to determine which claims to pay and how much to pay.

24. All paid claims were paid using assets belonging to the Plan.

25. ~~21. In essence~~Thus, BCBSM would exercise discretion to process and pay claims on behalf of ~~Tiara Yachts~~the Plan using ~~Tiara Yachts'~~ Plan assets.

26. ~~22.~~ Tiara Yachts ~~sent the required prepayments to~~pre-funded a BCBSM-owned and -controlled bank account, on a periodic basis, ~~in order for~~from which BCBSM drew money to pay claims ~~on Tiara Yachts' behalf~~, as BCBSM determined in its sole discretion.

27. ~~23.~~ The prepayments sent to BCBSM's bank account were "Plan Assets" as defined by ERISA. *See* Findings of Fact & Conclusions of Law in *Hi-Lex Controls, Inc. v. BCBSM*, No. 11-cv-12557, 2013 WL 3773364 (E.D. Mich. July 17, 2013), and *aff'd sub nom. Hi-Lex Controls, Inc.*

v. BCBSM, 751 F.3d 740 (6th Cir. 2014), (the "*Hi-Lex* FFCL") at ¶¶ 5, 6, & 180; *Hi-Lex*, 751 F.3d at 745-46.

28. ~~24.~~ BCBSM had complete authority and control over the bank account and the Plan assets sent to it by Tiara Yachts.

29. ~~25.~~ BCBSM (a) exercised discretionary authority and control with respect to management of the Plan; (b) exercised authority and control with respect to management and disposition of Plan ~~Assets~~assets; or (c) had discretionary authority and responsibility in the administration of the Plan. *Hi-Lex* FFCL, at ¶¶ 180-82; *Hi-Lex*, 751 F.3d at 744-47.

30. ~~26.~~ BCBSM functioned as a fiduciary in its administration of the Plan. *See* 751 F.3d at 747 ("common law supports the conclusion that BCBSM was holding the funds wired by ~~Hi– Lex~~Hi–Lex 'in trust' for the purpose of paying plan beneficiaries' health claims and administrative costs. Accordingly, the district court did not err in finding that BCBSM held plan assets of the Hi–Lex Health Plan and, in doing so, functioned as an ERISA fiduciary").

31. In short, BCBSM had discretionary authority and control over the management and administration of the Plan by virtue of its authority to approve and deny health care claims. BCBSM also exercised its discretionary authority over the processes, systems, and procedures it employed to process the Plan's claims. Furthermore, BCBSM had authority and control regarding management of Plan assets by virtue of directing and controlling Plan assets for the payment of health care claims BCBSM approved. Thus, under ERISA, BCBSM was a fiduciary to the Plan from the outset and for the duration of its service in that role.

B. CLAIMS ASSOCIATED WITH OUT-OF-STATE PROVIDERS.

32. ~~27.~~ BCBSM was ~~also~~ responsible for administering the ~~plan~~Plan with respect to claims submitted by out-of-state providers.

33. ~~28.~~ BCBSM is an independent licensee of the Blue Cross and Blue Shield Association ("Association").

34. ~~29.~~ The Association is a national federation compromised of 38 independently licensed, community-based, and locally operated Blue Cross Blue Shield Companies. These companies are colloquially known as "The Blues."

35. ~~30.~~ BCBSM and other Blues participate in the BlueCard Program. The BlueCard Program is a national program that enables members of one Blue Plan to obtain health care service benefits while traveling or living in another Blue Plan's service area (the "Host Blue").

36. ~~31.~~ The BlueCard Program links participating health care providers with the independent Blue Plans operating throughout the world through a single electronic network for claims processing and reimbursement.

37. ~~32.~~ This program allows BCBSM to instantly transfer and receive claim and member-eligibility information between the Blues when processing out-of-state claims.

38. ~~33.~~ BCBSM remains responsible ~~to the Group~~ for fulfilling BCBSM's contractual obligations when members access covered health care services within the geographic area served by a Host Blue.

39. ~~34. The Group's liability on~~What is supposed to be paid regarding claims submitted by participating providers is based on the negotiated price made available to BCBSM by the Host Blue.

40. ~~35.~~ BCBSM charged ~~Tiara Yachts~~the Plan host fees for claims processed through the BlueCard Program, including but not limited to fees and compensation BCBSM pays to the Host Blues, the Association, and other vendors, an additional administrative service fee, and, if applicable, a network access fee.

C. BCBSM'S PRACTICE OF PAYING IMPROPER CLAIMS COMES TO LIGHT.

41. ~~37.~~ Dennis Wegner was a senior account manager at BCBSM. He worked at BCBSM for 18 years, serving many customers, and is now credited for bringing BCBSM's prolific mismanagement of customers' assets to light.

42. ~~38.~~ While serving as an account manager, Dennis Wegner was alerted by a BCBSM customer about a significant medical claim the customer received ~~in excess of~~that exceeded $250,000.

43. ~~39.~~ Dennis Wegner investigated the customer's complaint and discovered that BCBSM was overpaying for routine medical testing.

44. ~~40.~~ In that particular customer's case, BCBSM had overpaid more than $600,000 within a two-year period.

45. ~~41.~~ Dennis Wegner brought the issue to BCBSM's attention, and to Dennis Wegner's surprise BCBSM's management confirmed that BCBSM's payment of improper claims ~~are~~was known to happen in the BCBSM billing system, but BCBSM ~~has~~had done nothing to stop ~~them~~it from happening.

46. ~~42.~~ Alarmed that BCBSM's payment of improper claims may not be isolated to one customer, Dennis Wegner researched claims and billings for two other BCBSM customers and found similar overpayments, totaling $125,000 in one case~~,~~ and $75,000 in another case.

47. ~~43.~~ Again, Dennis Wegner brought his concerns about overpayments to BCBSM's attention, but was told to cease researching the issue, to "stand down," and to refrain from alerting any BCBSM customers of improper payments made by BCBSM.

48. ~~44.~~ The improper charges were known by many key employees and executives within BCBSM, including Rod Begosa, David Malik, Lori Shannon, Gary Gavin, Ken Dallafior, Carol Gawronski, Robert Hopper, Dianne Malmgren, Nadiya Delaney, Kimberly Jones-Schneider, Teresa Henry, Pamela A. Braund, Sandra Fester, Aaron Friedkin, Jason M. Hover, Michael McKay Jr., Paul E. Ragos, Robert Rizzo, Diane VanEck, and Jeffrey Connolly. Yet no one at BCBSM took any action to stop the payment of improper claims.

49. ~~45.~~ After Dennis Wegner sounded the alarm, BCBSM's executives held a meeting to discuss the issue and afterwards sent a recap revealing troubling details. 9/14/2017 BCBSM Email Chain, **Exhibit A**.

50. ~~46.~~ BCBSM knew that the majority, if not all, of self-funded, non-auto customers on its NASCO platform, including Tiara Yachts and the Plan, were impacted by this systems flaw. *Id.*

51. ~~47.~~ BCBSM maintained lists of customers that were affected by this problem. *See e.g.*, *id.*, with 2017 List of Customers Impacted by Flip Logic, **Exhibit B**. Tiara Yachts is one of customers impacted by this issue.

52. ~~48.~~ BCBSM attributed this problem to an intentional design in its programming called "flip logic." Ex. A, 9/14/2017 BCBSM Email Chain.

53. ~~49.~~ BCBSM implemented flip logic in 1997. Under the logic, when a claim is submitted associated with a non-participating provider, BCBSM's system "flips" the non-participating provider's status and processes the claim at charge. 9/19/2017 BCBSM Email Chain, **Exhibit C**.

54. ~~50.~~ Thus, by using the flip logic, BCBSM allowed "providers [to] bill and get fully reimbursed for highly inflated cost of services." Ex. A, 9/14/2017 BCBSM Email Chain. Essentially, BCBSM would pay whatever was charged for a service, regardless of whether the

claim was proper under the plan terms or other applicable reimbursement guidelines and policies. *Id.*

55. ~~51.~~ To be clear, this problem was not isolated to claims associated with laboratory services. The improper payments were not only associated with laboratories, but also with, for example, hospitals, x-rays, and office visits. ~~In reality, anyone~~Any provider could take advantage of BCBSM's flawed ~~system logic~~payment practices.

56. ~~52.~~ BCBSM knew that this "ha[d] been an issue within the company for a number of years." Ex. C, 9/19/2017 BCBSM Email Chain. But, "[i]n the absence of controls in the system logic that would flag suspicious claim activity, claims continue to be processed as '*pay sub at charge*,' often many times over and above the customary amount for such services." *Id.*

57. ~~53.~~ Compounding the issue, BCBSM identified at least 201 customers ~~which~~that had "elected to pay at the Host-allowed rate for non-par claims." Ex. C, 9/19/2017 BCBSM Email Chain, *with* Ex. B, 2017 List of Customers Impacted by Flip Logic. Tiara Yachts is amongst this group of impacted customers.

58. ~~54.~~ Thus, according to ~~Tiara Yachts'~~the Plan, ~~Tiara Yachts~~BCBSM should have been paying ~~for~~ out-of-state, non-par claims at a lower rate set by the applicable Host Blue plan, yet it failed to process such claims according to such benefit selection. BCBSM knew this, stating "'Flipping' logic is in direct contradiction with the group-elected benefit." Ex. C, 9/19/2017 BCBSM Email Chain.

59. ~~55.~~ In 2016 alone, "BCBSM processed 30,000 non-par claims at charge when Host pricing was available. The sum of those [flip] charges was $30.5M and resulted in a payment amount of $26.7M." Had BCBSM applied the Host plan pricing as it was required to do, "the total allowed amount for these claims would have been $7.1M; a potential savings of $23.0M in benefit costs." *Id.* (emphasis added).

60. ~~56.~~ It gets worse. BCBSM expressly recognized that it had a "fiduciary responsibility to [its] ASC customers" and that its "lack of control over the issue [would be] viewed as a failure to fulfill this responsibility." *Id.*

61. ~~57.~~ However, instead of accepting responsibility as fiduciary for a flawed logic that it created over four decades ago and failed to correct, BCBSM worked to conceal the issue.

62. ~~58.~~ BCBSM acknowledged that its "customers may not be fully aware of the implications of the 'flipping' system logic," and took active steps to conceal the problem from ~~its customers, including~~ Tiara Yachts and its other self-funded customers within the impacted category. Ex. A, 9/14/2017 BCBSM Email Chain.

63. ~~59.~~ BCBSM was worried that a "Provider pursuing [a] member for [a] large balance may cause a spike in member inquires and groups' dissatisfaction." *Id.* Thus, BCBSM would temporarily assume liability for any inconspicuous overcharges that resulted from the flip logic, ~~in order~~ to keep its mismanagement of ~~its~~ customers' plans hidden. *Id.*

64. ~~60.~~ Some BCBSM employees suggested that BCBSM "make a global change to discontinue the logic and pay at Host allowed." *Id.* Essentially, the suggestion was to process claims in compliance with customers' selected benefit plans—what BCBSM should have been doing all along. Additionally, the BCBSM employees suggested making impacted customers "aware, educated, and their concurrence be documented." *Id.* These suggestions were ignored if not outright rejected.

65. ~~64.~~ BCBSM continued to conceal its misconduct from Plaintiff, and on November 14, 2018, BCBSM terminated Dennis Wegner's employment after he refused to cease investigating and pressing the issue.

66. ~~65.~~ On February 5, 2019, Dennis Wegner filed a lawsuit against BCBSM, alleging violations of the Michigan Whistleblowers' Protection Act and Michigan Bullard-Plawecki Employee Right-to-Know-Act. *See Dennis Wegner v. BCBSM*, No 19-001808-CD (Wayne Cnty. Cir. Ct.), attached as Exhibit D.

D. COMAU, ANOTHER ONE OF BCBSM'S SELF-FUNDED CUSTOMERS, FILES SUIT AND FURTHER EXPOSES BCBSM'S FAILURE TO PROTECT AGAINST CLAIMS INVOLVING FRAUD, WASTE, AND ABUSE.

67. After Dennis Wegner blew the whistle of BCBSM's mismanagement, another one of BCBSM's self-funded customers on the NASCO system, Comau, caught wind of BCBSM's misfeasance and sued BCBSM under ERISA alleging mismanagement of plan assets.

68. In discovery, BCBSM produced a portion of Comau's claims data, which Comau's expert analyzed to assess the scope and nature of improper claims paid by BCBSM using plan assets.

69. Comau's expert identified over $9 million in claims reimbursed by BCBSM involving fraud, waste, and abuse. These claims suffered from a variety of issues, including duplicative payments, unbundling, upcoding or wrong code, medically unlikely services, and non-adherence to payment guidelines. A copy of the expert report is attached as **Exhibit E**.

70. Common errors associated with BCBSM's NASCO claims processing system include, for example: unbundling, upcoding, medically unlikely claims, non-adherence to payment guidelines, and BCBSM's flip logic. *Id.*

71. **Unbundling.** Unbundling is when a health care service provider uses the billing codes for two or more separate procedures when the procedures were actually performed together and only one code should be paid. Within the health care industry, procedure-to-procedure ("PTP") edits are used to identify various types of unbundling. These edits work by defining pairs of Healthcare Common Procedure Coding System ("HCPCS") and Current Procedural Terminology ("CPT") codes that should not be reported together on a claim for a variety of reasons, such as a provider performing several laboratory tests for a patient that are commonly grouped as a panel and fall under a single billing code. The provider may try to increase their reimbursement by submitting claim codes for each individual test in the panel. The purpose of the PTP edits is to prevent improper payments when incorrect code combinations are reported. As the Plan administrator tasked with responsibility of processing claims, BCBSM should not allow and pay unbundled claims.

72. **Medically Unlikely Edits (MUE).** An MUE for a code is the maximum units of service that a provider would report under most circumstances for a single patient on a single date of service. In other words, MUEs represent an upper limit that unquestionably requires

further documentation to support. These edits are designed to limit fraud and/or coding errors. As the Plan administrator tasked with responsibility of processing claims, BCBSM should not allow and pay claims that exceed the maximum number of units allowed.

73. **Upcoding.** Upcoding occurs when health care providers submit inaccurate billing codes to insurance companies in order to receive inflated reimbursements. As the Plan administrator, BCBSM should not allow and pay upcoded claims.

74. **Non-Adherence to Payment Guidelines.** Payment guidelines are established to determine the appropriate reimbursement amounts when processing a claim. In general, Payment Guidelines dictate the reimbursement methodology used to determine the maximum allowable for any given service and provider type. As the Plan administrator, BCBSM must adhere to payment guidelines when processing and paying claims.

75. The aforementioned improper payments are non-exclusive examples of claims involving fraud, waste, and abuse, that BCBSM regularly makes when processing claims for non-auto NASCO customers, and also made when processing claims for Tiara Yachts Plan on the identical platform. This Complaint is intended to cover all further improper payments and misuses of Plan assets discovered hereafter once Plaintiff has the opportunity to analyze the complete set of data relating to claims BCBSM paid using Plan assets.

76. The *Comau* litigation was resolved when the time came to depose BCBSM's employees. For the two and one-half years, BCBSM had refused to allow Comau to depose any of BCBSM's witnesses. Things took a turn in the summer of 2022, when Comau obtained leave and filed its Second Amended Complaint and the court compelled BCBSM to produce current and former employees for depositions.

77. Less than a week after Comau filed its Second Amended Complaint, and shortly before the first BCBSM employees were to be deposed, the case settled.

E. ~~D.~~ BCBSM CAPITALIZES ON ITS ~~MISCONDUCT AND MISMANAGEMENT OF ITS CUSTOMERS' PLAN ASSETS~~PAYMENT OF CLAIMS INVOLVING FRAUD, WASTE, AND ABUSE.

78. ~~70.~~ Around the time BCBSM's practice of reimbursing claims at charge was being called into question by Dennis Wegner, BCBSM ~~formulated a plan to capitalize on its misconduct~~created a program which financially rewarded BCBSM for paying claims involving fraud, waste, and abuse.

79. ~~71.~~ Effective January 1, 2018, BCBSM implemented a package of Payment Integrity Services for all of its self-funded customers using a shared savings arrangement (collectively called the shared savings program ("SSP")). SSP Internal Memo, Exhibit ~~E~~F.

80. ~~72.~~ The SSP includes four primary services: a pre-pay forensic bill review, advanced payment analytics, subrogation, and credit balance recovery. *Id.*

81. ~~73.~~ "Pre-pay Forensic Bill Review provides a review of high cost inpatient claims to detect and resolve billing errors *after* adjudication, but prior to payment." These services are performed by a third-party vendor called Equian. *Id.*

82. ~~74.~~ Equian reviews "all claims meeting [a] $25,000 threshold that are inpatient and are paid as outliers to current diagnostic edit process, OR are paid under a percent charge reimbursement methodology. This includes both in and out-of-state claims, and Par and Non-par providers." *Id.*

83. ~~75.~~ Subrogation generally "involves the detection and recovery of 3rd-party liability claims where a 3rd party is accountable for the expense." *Id.*

84. ~~76.~~ Credit Balance Recovery entails the detection and recovery of credit balances on hospital patient accounting systems due to ASC customers, such as Tiara Yachts. *Id.*

85. ~~77.~~ Last, Advanced Payment Analytics works to identify "claim overpayments not previously detected and recover the overpayment from providers after payment is rendered." These services are performed by a third-party vendor called Cotiviti. *Id.*

86. ~~78.~~ Prior to implementing Advanced Payment Analytics, BCBSM purportedly performed several post-pay claim review services, included as part of its administrative services fee. These included data mining for provider billing errors, coordination of benefits, and

overpayment identification. Cotiviti differs from these services in that it offers a "2nd pass" review for improper payments. *Id.*

87. ~~79.~~ BCBSM's engagement with Cotiviti was not new. BCBSM had previously engaged Cotiviti to provide improper payment detection services for BCBSM's own fully insured book of business, and had realized savings of $12–15 million per year. BCBSM, however, did not engage Cotiviti for its self-insured groups until 2018. *Id.*

88. ~~80.~~ The SSP came with a catch. For any improper payments detected and recovered in connection with these programs, *but only as they applied to BCBSM's self-funded customers*, BCBSM would retain 30 percent of the avoided or recovered payment. BCBSM marketed its compensation as "administrative compensation." *Id.*

89. ~~81.~~ BCBSM also made it mandatory for its self-insured customers to participate and automatically opted all self-funded customers into the program. *Id.*

90. ~~82.~~ Cotiviti's review in particular would apply retroactively to improper payments extending back to January 1, 2016. *Id.*

91. ~~83.~~ In effect, for any improper payments Cotiviti detected and recovered—including the improper payments BCBSM knew existed as a result of its flip logic and beyond—BCBSM would take a 30 percent cut.

92. ~~84.~~ Essentially, BCBSM ~~devised a scheme~~employed a program that would allow it to profit on its own mismanagement of ~~plan~~Plan assets. The more ~~improper payments BCBSM let slide through its system~~claims involving fraud, waste, and abuse BCBSM paid using Plan assets on the front end, the more money ~~it~~BCBSM would make on the back end. Unfortunately, this came at the expense of the plans of BCBSM's self-insured customers, including ~~Tiara Yachts~~the Plan.

93. ~~85.~~ As an ERISA fiduciary, BCBSM must avoid any conflicts of interest concerning the manner in which it performs its fiduciary duty. The SSP creates an impermissible conflict of interest.

F. ~~E.~~ BCBSM FURTHER CONCEALS ITS MISCONDUCT BY GATEKEEPING, INFORMATION NECESSARY TO IDENTIFY IMPROPER CHARGES.

94. ~~86.~~ BCBSM has designed a system in which it ~~knowingly and improperly~~ pays claims involving fraud, waste, and abuse, later corrects the claim charge to what it should have been in the first place, at its discretion, and then collects a recovery fee for "catching" the error.

95. ~~87.~~ BCBSM impedes its self-funded customers, including Tiara Yachts', ability to evaluate whether BCBSM is properly paying claims by significantly limiting access to each customers' claims data and other documents that set forth the guidelines and rules for claims processing and pricing.

96. ~~88.~~ Claims data is incredibly in-depth electronic information gathered from medical bills or claims submitted to BCBSM. For example, claims data identifies who rendered a service, the rendering provider(s) ~~specialties~~specialty(ies) and credentials, what service(s) was performed, what amount was billed for the service, what amount BCBSM allowed to be paid out of what was charged, who BCBSM paid, when and where the service was provided, the patient's identity and age, and diagnoses.

97. ~~89.~~ Claims data also shows the line-item detail associated with each claim. For example, when a provider submits a claim for orthopedic surgery, the claim will have each associated cost and service broken down by service line showing the total the provider charged, the amount BCBSM allowed, and what was ultimately paid.

98. ~~90.~~ Claims data is essential to identifying improper claims and payments.

99. ~~91.~~ Throughout the parties' relationship, BCBSM maintained exclusive control and access to ~~Tiara Yachts~~the claims data~~. Tiara Yachts~~ relating to claims BCBSM paid using Plan assets. Plaintiff never had and still does not have access to ~~its own~~the *complete* claims data~~.~~ relating to claims paid using Plan assets.

100. The very limited set of claims data Plaintiff does possess is so deficient it is incapable of being meaningfully analyzed. For example, the data does not contain line-item

detail, information regarding the provider who rendered a service or procedure, or even the amount charged by the provider or facility.

101. BCBSM's exclusive control and access to ~~its customers'~~ claims data is yet another tool BCBSM utilizes to conceal its misconduct.

102. ~~92. Tiara Yachts' claims data~~The data relating to claims BCBSM paid using Plan assets should reflect all information necessary to ascertain whether a claim was properly processed and/or paid. To the extent it does not, BCBSM's failure to collect and/or maintain such data would itself be a breach of fiduciary duty.

103. ~~93.~~ Such data deficiencies ~~may~~ include, for example: missing provider information, missing payee information, rolled-up financials, financials that do not reconcile, claims showing as rejected but still paid, fields compromised by BCBSM's flip logic, or even claims that are altogether missing.

104. ~~94.~~ **Missing Provider Information.** An NPI is a unique government ID number issued to medical professionals and businesses and is required to be used in health care transactions by the Health Insurance Portability and Accountability Act ("HIPAA"). Claims without provider information, such as an NPI, are incapable of being analyzed for the identification of improper payments. BCBSM requires an NPI on every claim prior to reimbursement. *See, e.g.*, BCBSM Provider Manual[1] ("If NPI is missing or illegible, claim will be rejected."). It is the responsibility of BCBSM, as the Plan fiduciary, to provide industry standard oversight, such as confirming that the health care service provider is a covered entity as described within the plan document.

105. ~~95.~~ **Missing Payee Information.** Claims missing payee information fail to disclose where or to whom plan funds were spent. As the fiduciary, BCBSM was responsible for tracking to whom and where ~~plan~~Plan assets are distributed.

[1] https://www.bcbsm.com/content/dam/public/Providers/Documents/help/medicare-plus-blue-ppo-manual.pdf.

106. ~~96.~~ **Rolled-Up Financial Details.** Claims should reflect a line-by-line detail of each claim's associated costs and reimbursements. For example, each item within a claim should have itemized details regarding the amounts billed and paid. A consolidation, or "roll-up", of a claim's line-by-line detail makes it impossible to verify whether a claim was properly made and/or paid.

107. ~~97.~~ **Claim Financials Do Not Add Up.** The maximum reimbursement for health care service is determined by the contracted rate applicable to each service billed. The maximum reimbursement is paid by the Plan after member liability (deductible, co-insurance, and co-pays) has been applied. Thus, the combination of plan paid amount and member liability should represent maximum reimbursement to a network health care provider. When this combination does not reconcile with BCBSM's allowable amount (also called the approved amount), the claim financials do not add up and this raises fiduciary concerns.

108. ~~98.~~ **Rejected Claims that Report as Paid**. Claims that are rejected should be denied with no payable amount. If rejected claims showing a paid amount were in actually paid, these claims are a fiduciary violation and would be considered improper payments.

109. ~~99.~~ **Systematic Pricing Failure of Out-of-Network Claims – Flip Logic**. Due to BCBSM's flip logic, many claims may be labeled as in-network in the data and allowed at 100 percent, when in fact they were out-of-network and should have been reduced according to ~~Tiara Yacht's~~ elected Plan benefits.

110. ~~100.~~ **Missing Claims Data**. ~~Tiara Yacht's claims~~Claims data should reconcile with the financial transactions BCBSM reported to ~~Tiara Yacht's~~Plaintiff. A gap between the paid amounts in the claims data and financial reports, means that either claims data is missing or ~~Tiara Yachts~~Plaintiff was overcharged.

~~101. BCBSM processes all claims for all non-auto NASCO customers, such as Tiara Yachts, on the same claims processing system. Thus, errors or deficiencies identified in claims associated with one customer can reasonably be expected to exist for other customers using the same system.~~

102. BCBSM's NASCO claims processing system has been found to consistently result in improper payments of claims. These processing errors result in wasted Plan assets in breach of BCBSM's fiduciary duty.

103. Common errors associated with BCBSM's NASCO claims processing system include, for example: unbundling, upcoding, medically unlikely claims, non-adherence to payment guidelines, and BCBSM's flip logic.

104. **Unbundling.** Unbundling is when a health care service provider uses the billing codes for two or more separate procedures when the procedures were actually performed together and only one code should be paid. Within the health care industry, procedure-to-procedure ("PTP") edits are used to identify various types of unbundling. These edits work by defining pairs of Healthcare Common Procedure Coding System ("HCPCS") and Current Procedural Terminology ("CPT") codes that should not be reported together on a claim for a variety of reasons, such as a provider performing several laboratory tests for a patient that are commonly grouped as a panel and fall under a single billing code. The provider may try to increase their reimbursement by submitting claim codes for each individual test in the panel. The purpose of the PTP edits is to prevent improper payments when incorrect code combinations are reported. As the Plan administrator tasked with responsibility of processing claims, BCBSM should allow and pay unbundled claims.

105. **Medically Unlikely Edits (MUE).** An MUE for a code is the maximum units of service that a provider would report under most circumstances for a single patient on a single date of service. In other words, MUEs represent an upper limit that unquestionably requires further documentation to support. These edits are designed to limit fraud and/or coding errors.

As the Plan administrator tasked with responsibility of processing claims, BCBSM should not allow and pay claims that exceed the maximum number of units allowed.

106. **Upcoding.** Upcoding occurs when health care providers submit inaccurate billing codes to insurance companies in order to receive inflated reimbursements. As the Plan administrator, BCBSM should not allow and pay upcoded claims.

107. **Non-Adherence to Payment Guidelines.** Payment guidelines are established to determine the appropriate reimbursement amounts when processing a claim. In general, Payment Guidelines dictate the reimbursement methodology used to determine the maximum allowable for any given service and provider type. As the Plan administrator, BCBSM must adhere to payment guidelines when processing and paying claims.

108. The aforementioned improper payments are non-exclusive examples of improper payments BCBSM regularly makes when processing claims for NASCO customers, and therefore also made when processing claims for Tiara Yachts. This Complaint is intended to cover all further improper payments and misuses of plan assets discovered hereafter once Tiara Yachts has the opportunity to analyze its own complete claims data.

G. ~~F.~~ BCBSM'S PRACTICE OF KNOWINGLY PAYING IMPROPER CLAIMS IS INCONSISTENT WITH INDUSTRY STANDARDS, INCONSISTENT WITH HOW BCBSM HOLDS ITSELF OUT TO THE PUBLIC, AND INCONSISTENT WITH REPRESENTATIONS IT ~~MAKES~~MADE TO ~~CUSTOMERS~~TIARA YACHTS.

111. As BCBSM is well aware, health care claims involving fraud, waste, and abuse have been and remain a significant issue in the health care industry.

112. BCBSM acknowledges the scope of the problem on its website: "The National Heath Care Anti-Fraud Association estimates conservatively that health care fraud costs the nation about $68 billion annually — about 3 percent of the nation's $2.26 trillion in health care spending. Other estimates range as high as 10 percent of annual health care expenditure, or $230 billion."

113. Health care claims involving fraud, waste, and abuse appear in many guises. Far too often, health care providers, pharmacies, and other medical professionals submit inflated, improper, unnecessary, or erroneous medical claims to health care plans.

114. Such claims can take a myriad of forms, and it is incumbent on the claim administrator (in this case, BCBSM) to take appropriate measures to ensure that Plan assets are not diminished by the payment of claims that should not be paid.

115. Such measures would include either denying such claims outright or, when appropriate, denying the claim pending receipt of additional material establishing that the claims should be approved.

116. Among the many markers for health care claims that should not be approved because of concerns of fraud, waste, and abuse would be treatment that does not appear to be medically necessary in light of the reported health issue or CPT codes presented; repetitive dosages or treatment that cannot be justified or that exceed the standard of care; and costs the clearly exceed what would be typical or reasonable for the treatment at issue.

117. In short, there are numerous fundamental discrepancies that arise among submitted health care claims that demand further review by the TPA and, unless additional

information can be provided verifying the claim, rejection of the claim due to indicia of fraud, waste, and abuse.

118. BCBSM was obligated as TPA to employ adequate policies, procedures and/or safeguards to detect and reject health care claims submitted to the Plan involving fraud, waste, and abuse, but BCBSM did not do so.

119. ~~95.~~ BCBSM's practice of paying ~~Providers'~~ improper claims is contrary to standards and norms in the health insurance industry, contrary to how BCBSM markets itself to the public, and is contrary to representations it makes to customers, including Tiara Yachts and the Plan.

120. ~~96.~~ BCBSM represents that its "claims processing practices consistently deliver industry-leading outcomes with respect to claim payments, and average above 99% accuracy." Payment Integrity Presentation, **Exhibit ~~F~~G**.

121. ~~97.~~ BCBSM says that it "takes actions to ensure health claims are submitted, and paid accurately, proactively and correctly, by the responsible party, for eligible members, according to medical, benefit and reimbursement policies and contractual term. Not in error or duplicate and free of wasteful or abusive practices." *Id.*

122. ~~98.~~ Indeed, BCBSM charges its customers for its investigation, detection, and recovery of improper claims.

123. ~~99.~~ BCBSM's practice of knowingly paying improper claims is entirely inconsistent with such representations, and with industry standards.

124. ~~100.~~ Likewise, BCBSM's payment of claims that lack basic information, such as the provider's identity and qualifications that is essential to avoiding improper payments, is inconsistent with industry standards and BCBSM's own policies.

125. ~~101.~~ Tiara Yachts never imagined, nor had reason to imagine based on BCBSM's own representations, that BCBSM knowingly paid ~~Providers'~~ improper claims ~~or that BCBSM~~,

knew of flaws in its system affecting ~~Tiara Yachts~~the Plan and Plan assets, and failed to disclose and correct ~~the issue~~these flaws.

126. ~~102.~~ The limited reporting information BCBSM provided to Tiara Yachts as sponsor of the Plan contained no information about BCBSM's practice of paying Providers' improper claims or its flawed systems.

127. ~~103.~~ Based on BCBSM's own representations – that BCBSM is as an industry expert in fraud prevention – and the fact that information BCBSM provided Tiara Yachts contained no information about its practice of paying ~~Providers'~~ improper claims, Tiara Yachts trusted and believed that BCBSM was acting in ~~Tiara Yachts'~~the best ~~interest~~interests of the Plan. As explained above, Tiara Yachts was ~~wrong~~sadly mistaken.

128. ~~104.~~ BCBSM, as a fiduciary to ~~Tiara Yachts~~the Plan, had a duty to disclose all material facts related to its claims processing, including all Plan assets that had been mis-mismanaged. BCBSM failed to do so.

H. TIARA YACHTS PLAN HAS BEEN DAMAGED BY BCBSM'S CONDUCT.

129. The Plan suffered hundreds of thousands, if not millions, of dollars in losses as a consequence of BCBSM's improper payment of claims involving fraud, waste, and abuse.

130. These losses took the form of money Plaintiff contributed on behalf of the Plan that would not have been needed, and could have been used for other or additional Plan benefits, had BCBSM exercised its discretion over the processing and payment of claims on behalf of the Plan properly.

131. BCBSM's misfeasance resulted in hundreds of thousands, if not millions, of dollars wasted in Plan assets. Accordingly, Tiara Yachts, in its capacity as the Plan Sponsor on behalf of the Plan, brings this action against BCBSM seeking reimbursement of any and all losses the Plan has suffered as a result of BCBSM's conduct, as well as for recovery of attorneys' fees, costs, and expenses.

COUNT I
Breach of Fiduciary Duty – ERISA

132. ~~105.~~ Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs.

133. ~~106.~~ At all times relevant, BCBSM was a fiduciary pursuant to 29 U.S.C. § 1002(21)(A) with respect to the Tiara Yachts'~~—~~ Plan because (a) it exercised discretionary authority and control over management of the Plan; (b) it exercised authority and control over management and disposition of the Plan's assets; or (c) it had discretionary authority and responsibility in the administration of the Plan.

134. ~~107.~~ As a fiduciary, BCBSM was required, among other things, to discharge its duties solely in the interest of the employees and beneficiaries of the Plan, preserve Plan assets, fully disclose its actions, avoid making false or misleading statements, avoid conflicts of interest, and abide by any statutory obligations or restrictions imposed on it. BCBSM also held a duty to act in accordance with the documents and instruments governing the Plan.

135. Because BCBSM was supposed to be an expert in evaluating health care claims, Tiara Yachts as Plan Sponsor relied on BCBSM to evaluate the millions of claims made over the years to the Plan. Thus, as the purported expert in health claims administration, BCBSM alone made the decision whether to use Plan assets to pay each of the claims at issue in this action.

136. Tiara Yachts has standing as a fiduciary of the Plan to pursue this action against BCBSM for BCBSM's breach of fiduciary duties.

137. ~~108.~~ BCBSM breached its fiduciary duties in numerous ways, including, but not limited

to:

(a) Knowingly using Tiara Yachts'~~—~~ Plan assets to pay claims impacted by BCBSM's systems flip logic, fully aware such flip logic had been flawed for decades and was causing the Tiara Yachts'~~—~~ Plan to overpay for benefits;

(b) Failing to implement or correct controls in its systems logic that would flag suspicious claim activity, when BCBSM knew that its systems logic was flawed and causing claims to be processed at charges in contradiction with Tiara Yachts' elected Plan benefits;

(c) Concealing from, and otherwise failing to disclose to Tiara Yachts, the full implications of and flaws associated with its systems logic and the overpayments BCBSM made as a result;

(d) Misleading and deceiving Tiara Yachts by implementing a Shared Savings Program when it knew ~~Tiara Yachts'~~ Plan assets were being used to overpay for benefits, allowing BCBSM to capitalize on its own misconduct and mismanagement, which was a clear conflict of interest;

(e) Using its considerable discretionary authority to advance interests other than those of the Tiara Yachts~~'~~ Plan or its ~~members~~participants/beneficiaries;

(f) Failing to implement and exercise sufficient quality control and oversight of BCBSM's claims processing systems and discretionary review of claims pre- and post-payment;

(g) Consistently paying claims suffering from a range of coding and billing issues, including but not limited to unbundling, upcoding, medically unlikely services, and reimbursing claims in non-adherence to its own and/or industry standard reimbursement guidelines;

(h) Failing to implement industry standard claims processing edits to prevent ~~Tiara Yachts'~~ Plan assets from being used to pay improper charges;

(i) Concealing from, and otherwise failing to disclose to Tiara Yachts, as sponsor of the Plan, the payment of improper claims;

(j) Concealing from, and otherwise failing to disclose to Tiara Yachts, as sponsor of the Plan, all documents and information that govern BCBSM's methodology

for determining covered charges under ~~Tiara Yachts'~~the Plan and amounts to be paid to providers, affording BCBSM complete discretionary control and preventing Tiara Yachts from verifying whether reimbursements made by BCBSM using its Plan assets were calculated and made in accordance with the Plan's terms, operative pricing rates, rules, policies, and contracts;

(k) Paying claims lacking standard information necessary to properly adjudicate claims in accordance with industry standards and BCBSM's own policies and procedures, or otherwise failing to maintain claims data necessary to identify and recover incorrectly paid amounts and identify the full scope of BCBSM's misconduct and mismanagement;

(l) 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 health care claims, and otherwise administering Tiara Yachts' ERISA-governed Plan.

138. ~~109.~~ BCBSM's breach of its fiduciary duty has proximately caused substantial damages to the Tiara Yachts Plan.

COUNT II
Engaging in Prohibited Transactions

139. ~~110.~~ Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs.

140. ~~111.~~ At all times relevant, and with respect to the actions described above, BCBSM was an ERISA fiduciary. Therefore, under 29 U.S.C. § 1106, BCBSM was prohibited from dealing with the assets of the Tiara Yachts~~'~~ Plan in its own interest or for its own account.

141. ~~112.~~ As described above, BCBSM instituted a mandatory Shared Savings Program whereby it was paid 30 percent of certain recoveries.

142. ~~113.~~ Whether Tiara Yachts agreed to pay 30 percent is immaterial, because the amount of the "recoveries" were in the unilateral control of BCBSM.

143. ~~114.~~ The more improper claims ~~that~~ BCBSM failed to detect on the front end, the higher the recoveries on the back end, and the more it got paid.

144. ~~115.~~ By instituting a system that allowed it to unilaterally control the amount of its own compensation, BCBSM dealt with Tiara Yachts~~'~~ Plan assets in its own interest and for its own account in violation of Section 1106.

PRAYER FOR RELIEF

Plaintiff respectfully requests that this Court enter judgment in its favor, on behalf of the Plan, and against BCBSM as follows:

A. Order BCBSM to provide a full and complete accounting of all payments and uses of the Tiara Yachts~~'~~ Plan assets;

B. Order BCBSM to provide a full and complete accounting of all monies taken or charged by BCBSM to Tiara Yachts as sponsor of its Plan;

C. Declare that BCBSM breached its fiduciary duty owed to Tiara Yachts and the Plan and otherwise violated federal law by (1) mismanaging the Tiara Yachts~~'~~ Plan assets; (2) not exercising the care, skill, prudence, and diligence under the circumstances that a prudent fiduciary acting in a like capacity and familiar with the such matters would use in paying for health care claims, or otherwise administering Tiara Yachts~~'~~ Plan; (3) not making decisions, regarding Plan assets, with an eye single to the interests of Tiara Yachts~~'~~ Plan participants and beneficiaries; (4) concealing and failing to implement or correct controls in its claims processing system known to cause Tiara Yachts to overpay for elected benefits; (5) using its considerable discretionary authority to advance interests other than those of Tiara Yachts~~'~~ Plan or its

members; (6) failing to disclose its mistakes, overpayments, improper payments or other mismanagement of Plan assets; (7) capitalizing on its own mismanagement and misconduct, at the expense of Tiara Yachts' Plan; (8) failing to implement and exercise sufficient quality control and oversight of claims progressing, review, and payment; (9) consistently reimbursing improper claims causing Tiara Yachts' plan to overpay for benefits; (10) failing to implement standard claims processing edits to avoid overcharges to Tiara Yachts' Plan; (11) concealing from Tiara Yachts all documents and information necessary to verify whether reimbursements made by BCBSM with Tiara Yachts' Plan assets were calculated and made in accordance with the Plan's terms, operative pricing rates, rules, policies, and controls; and (12) paying claims lacking information necessary to properly adjudicate and reimburse claims in accordance with industry standards and BCBSM's own policies and procedures, or otherwise failing to maintain claims data necessary to identify and recover overpaid amounts and/or identify the full scope of BCBSM's misconduct or mismanagement;

D. Awarding restitution to Tiara Yachts, on behalf of its Plan, for all improper misuses of Tiara Yachts' Plan assets;

E. Awarding restitution to Tiara Yachts, on behalf of its Plan, for all administrative compensation collected by BCBSM under its Shared Savings Program;

F. Awarding monetary damages, costs, interest, disgorgement of BCBSM's profits, and attorneys' fees (including statutory attorneys' fees under ERISA) to Tiara Yachts, on behalf of its Plan, to the fullest extent of the law; and

G. Awarding all other relief to which Tiara Yachts, on behalf of its Plan, may be entitled.

Respectfully submitted,

VARNUM LLP
Attorneys for Plaintiff

Dated: ~~July 1~~_____, ~~2022~~2023 By:
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