

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIARA YACHTS, INC.,

Plaintiff,

v.

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant.

Case No. 1:22-cv-603

Honorable Robert J. Jonker

Magistrate Judge Ray Kent

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO STAY
DISCOVERY PENDING RESOLUTION OF ITS MOTION TO DISMISS**

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I. INTRODUCTION

BCBSM—in its newest attempt at delay—now seeks to stay or limit discovery. Its argument is wholly predicated on the mere fact that it filed a *second* motion to dismiss after it lost or abandoned all arguments in its first motion to dismiss before the Sixth Circuit Court of Appeals. Case law, however, is clear that any stay of discovery is inappropriate under these circumstances. BCBSM's motion should be denied for the following independent reasons: *First*, BCBSM's pending motion to dismiss is not clearly case-dispositive, as it merely rehashes arguments already rejected by the Sixth Circuit and/or arguments necessarily fact-intensive on which discovery is necessary. *Second*, BCBSM makes no effort to demonstrate "good cause" under Rule 26(c) for its blanket stay. And its request to limit discovery to "release" is speculative and lacks legal and factual justification. *Third*, Plaintiff will suffer undue prejudice by BCBSM's attempts at continued delay, as this case was initiated over three years ago and is still in the pleadings stage. BCBSM's motion should be denied, and Plaintiff should be allowed to commence discovery on its claims.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. BCBSM ADMINISTERED TIARA YACHTS' SELF-FUNDED PLAN UNDER ERISA.

Tiara Yachts contracted for BCBSM to administer Tiara Yachts' self-funded welfare benefits plan (the "Plan") and process and pay Plan claims through an administrative services contract ("ASC") drafted by BCBSM. *Id.*, ¶¶15-21 (PageID.3). The ASC delegated to BCBSM discretionary authority over Plan management to interpret the Plan, adjudicate Plan benefits claims, deny or grant those claims, and when granted, pay those claims using prepayments Tiara Yachts sent to a BCBSM-owned-and-controlled bank account. *Id.*, ¶¶15-26 (PageID.3-4). BCBSM exercised discretionary authority and control over Plan management and Plan Assets, and

responsibility in Plan administration. *Id.*, ¶¶24-26 (PageID.4). Accordingly, "BCBSM functioned as an ERISA fiduciary in its administration of the Plan." *Id.*; *see also Tiara Yachts v. BCBSM*, 138 F.4th 457, 466 (6th Cir. 2025) ("BCBSM was acting as an ERISA fiduciary[.]").

As an ERISA fiduciary, BCBSM was required 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, abide by any statutory obligation or restrictions imposed on it, and follow the documents and instruments governing the Plan. Compl., ¶107 (ECF No. 1, PageID.18).

B. BCBSM KNOWINGLY WASTED PLAN ASSETS BY PROCESSING AND PAYING CLAIMS IN VIOLATION OF PLAN REQUIREMENTS.

Unbeknownst to Tiara Yachts, BCBSM, acting as an ERISA fiduciary, secretly subjected the Plan's claims from non-participating providers to an *intentionally* flawed benefits adjudication system BCBSM called "flip logic." *Id.*, ¶¶46-65 (PageID.7-9); *see also Tiara Yachts*, 138 F.4th at 466 ("BCBSM was acting as an ERISA fiduciary" when "it was overpaying claims to medical providers"). "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," as if the provider were a participating provider. Compl., ¶49 (ECF No. 1, PageID.7). This violated Plan terms and participants' selected benefits. *Id.*, ¶¶37-65, 108 (PageID.6-9, 19-20). BCBSM knew of this issue, specifically identifying customers—*including Tiara Yachts*—who "elected to pay at the Host-allowed rate for non-par claims." *Id.*, ¶¶53-54 (PageID.8). But instead of adjudicating Plan claims per Plan terms and participants' elected benefits, "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.*, ¶50 (PageID.7). BCBSM admitted flip logic caused Plan payments "for highly inflated cost of services." *Id.*; (ECF

No. 1-2. PageID.27). Further, BCBSM paid (at charge) suspicious claims "many times above the customary amounts for such services." Compl., ¶52 (ECF No.1, PageID.8). BCBSM admitted a lack of "controls in the system logic that would flag suspicious claim activity," directly damaging the Plan. *Id.* "The improper payments were not only associated with laboratories, but also with, for example, hospitals, x-rays, and office visits." *Id.*, ¶51 (PageID.7-8).

At all relevant times, BCBSM knew this was in violation of the Plan and participants' elected benefits. *Id.*, ¶54 (PageID.8) ("[f]lipping' logic is in direct contradiction with the group-elected benefit."). While engaging in this squandering of Plan assets, 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.*, ¶56. Nevertheless, rather than comply with its fiduciary responsibilities, BCBSM "[c]onceal[ed] from, and otherwise fail[ed] to disclose to Tiara Yachts, the full implications of and flaws associated with its systems logic and the overpayments BCBSM made as a result." *Id.*, ¶108(c) (PageID.19).

BCBSM acknowledged its "customers may not be fully aware of the implications of the 'flipping' system logic," but "conceal[ed] the problem from its customers, including Tiara Yachts." *Id.*, ¶58 (PageID.9). For example, "BCBSM would temporarily assume liability for any inconspicuous overcharges that resulted from the flip logic, to keep mismanagement of its customers' plans hidden." *Id.*, ¶59. Worse, BCBSM silenced employees who tried to correct its mismanagement. *Id.*, ¶¶37-65 (PageID.6-9). Senior Account Manager Dennis Wegner discovered BCBSM overpaid over \$600,000 in claims within a two-year period for one customer. *Id.*, ¶¶39-40 (PageID.6). Wegner also discovered BCBSM made similar overpayments using other customers' Plan assets, including Tiara Yachts. *Id.*, ¶¶41-42; (ECF Nos. 1-2, 1-3, PageID.26-39). Wegner alerted senior BCBSM management about the "flip logic" damage to BCBSM plans in

September 2017. Compl., ¶41 (ECF No. 1, PageID.6). BCBSM's management confirmed they were aware, (ECF No. 1-2, PageID.27), and, rather than accept responsibility, commanded Wegner to "stand down" and not alert customers, including Tiara Yachts, of its improper payments and Plan violations. Compl., ¶43 (ECF No. 1, PageID.6). In 2016 alone, "The sum of those [flip] charges was \$30.5M and resulted in a payment amount of \$26.7M." *Id.*, ¶55 (PageID.8). "Had BCBSM applied the Host plan pricing as required, 'the total allowed amount for these claims would have been \$7.1M; a potential savings of \$23.0M in benefit costs.'" *Id.*; (ECF No. 1-4, PageID.41). Ultimately, BCBSM's executives ignored suggestions to educate customers on the issue, instead opting to terminate Dennis Wegner's employment and cover up the issue. Compl., ¶64 (ECF No. 1, PageID.9); (ECF No. 1-2, PageID.27).

C. BCBSM KNOWINGLY WASTED THE PLAN'S ASSETS THROUGH OVERPAYMENTS TO PROVIDERS.

"The issues with BCBSM's claims processing extended beyond flip logic." *Tiara Yachts*, 138 F.4th at 462. BCBSM also wasted Plan assets by "[c]onsistently 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." Compl., ¶108(g) (ECF No.1, PageID.19-20). Further, BCBSM paid "claims lacking standard information necessary to properly adjudicate claims in accordance with industry standards and BCBSM's own policies and procedures" and "otherwise fail[ed] to maintain claims data necessary to identify and recover incorrectly paid amounts and identify the full scope of BCBSM's misconduct and mismanagement." *Id.*, ¶108(k) (PageID.20).

Specifically, "BCBSM processes all claims for all non-auto NASCO customers, such as Tiara Yachts, on the same claims processing system." *Id.*, ¶101 (PageID.15). "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." *Id.*, ¶102. For example, "[c]ommon 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.*, ¶103. These 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." *Id.*, ¶108 (PageID.16). And as the Sixth Circuit noted, improper claims were paid by BCBSM *using Tiara Yachts' Plan assets*. See *Tiara Yachts*, 138 F. 4th at 462 ("The platform BCBSM used to manage claims for all similarly situated customers, including Tiara Yachts, allegedly suffered from 'processing errors' that allowed providers to improperly code for their services and overbill the Plan, which 'consistently result[ed] in improper payments of claims.'"). "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." Compl., ¶95 (ECF No. 1, PageID.17).

"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 and failed to disclose and correct the issue." *Id.*, ¶101. That's because BCBSM "[c]onceal[ed] from, and otherwise fail[ed] to disclose to Tiara Yachts the payment of improper claims." *Id.*, ¶108(i) (PageID.20).

D. BCBSM IMPLEMENTS A SCHEME TO CAPITALIZE ON ITS MISMANAGEMENT OF PLAN ASSETS.

Rather than disclose and correct its mismanagement, "BCBSM implemented a program to profit from its practice of overpaying claims." *Tiara Yachts*, 138 F.4th at 461; Compl., ¶70 (ECF No. 1, PageID.9). It "mis[led] and deceiv[ed] Tiara Yachts by implementing [the] Shared Savings

Program ["SSP"] when it knew Tiara Yachts' Plan assets were used to overpay for benefits, allowing BCBSM to capitalize on its own mismanagement, which was a clear conflict of interest." Compl., ¶108(d) (ECF No.1, PageID.19).

With the SSP, BCBSM "designed a system in which it knowingly and improperly pays claims, later corrects the claims charge to what it should have been in the first place, at its discretion, and then collects a recovery fee for 'catching' the error." *Id.*, ¶86 (PageID.12). "Tiara Yachts alleges the self-dealing was nefarious: BCBSM intentionally inflated the pool of overpayments from which it could profit." *Tiara Yachts*, 138 F.4th at 468. "The more overpayments BCBSM made on the front-end while processing claims, the more money it could receive on the back-end through the SSP." *Id.*

This SSP was unilaterally imposed on the Plan by BCBSM. Compl., ¶71 (ECF No. 1, PageID.10). "BCBSM . . . made it mandatory for its self-insured customers to participate and automatically opted all self-funded customers into the program." *Id.*, ¶81 (PageID.11). In other words, BCBSM unilaterally subjected Tiara Yachts and the Plan to its concocted scheme to capitalize on its mismanagement of Plan assets. *Id.*, ¶70-71 (PageID.9-10); *see also Tiara Yachts*, 138 F.4th at 461. Worse, BCBSM applied the SSP "*retroactively* to improper payments extending back to January 1, 2016." Compl., ¶82 (ECF No. 1, PageID.11) (emphasis added).

"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." *Id.*, ¶85 (PageID.12). Specifically, "[t]he more improper claims that BCBSM failed to detect on the front end, the higher the recoveries on the back and then, and the more it got paid." *Id.*, ¶114 (PageID.21). "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 account in violation of Section 1106." *Id.*, ¶115.

E. BCBSM CONCEALS ITS MISCONDUCT BY WITHHOLDING CLAIMS DATA AND MISREPRESENTING ITS CLAIMS ADJUDICATIONS.

"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." *Id.*, ¶87 (PageID.12). BCBSM exclusively controlled Tiara Yachts' claims data. *Id.*, ¶91, (PageID.13). Ignoring requests, BCBSM has never provided that information to Tiara Yachts, instead opting to conceal it to forestall discovery of its unlawful conduct. *Id.*, ¶¶91-92, 102 (PageID.13, 18); *see also Tiara Yachts*, 138 F. 4th at 462 ("Tiara Yachts does not cite specific claims that BCBSM overpaid from Plan assets. But that's because, Tiara Yachts says, BCBSM concealed flip logic from its customers and limited access to claims data and explanatory documents."). BCBSM coupled this concealment with misleading statements that its "claims processing practices consistently deliver industry-leading outcomes with respect to claim payments, and average above 99% accuracy." Compl., ¶96 (ECF No. 1, PageID.17). BCBSM further misrepresented 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.*, ¶97. These representations were false. *Id.*, ¶99.

F. PROCEDURAL POSTURE.

Tiara Yachts, after discovering BCBSM's wrongdoings, filed the present action alleging: (1) BCBSM breached of ERISA fiduciary duties; and (2) BCBSM engaged in transactions prohibited by ERISA. Compl., (ECF No. 1, PageID.1-23). As illustrated by the Sixth Circuit,

Tiara Yachts "alleges that BCBSM knowingly squandered plan assets by systematically overpaying some categories of claims. BCBSM then allegedly profited from its mismanagement by implementing a program through which it caught overpayments, clawed them back, and kept a portion of those 'savings' for itself." *Tiara Yachts*, 138 F.4th at 460-61. BCBSM moved to dismiss Tiara Yachts' Complaint (ECF No. 12, PageID.103-135), and this District Court erroneously granted that motion (ECF No. 23, PageID.466-483).

After subsequent motions to alter this Court's Order and Judgment and to amend its Complaint (ECF Nos. 28-29, 32-33) proved fruitless (ECF No. 47), Tiara Yachts timely appealed this Court's Orders and Judgment to the Sixth Circuit. The Sixth Circuit—in a unanimous, published decision—"reverse[d] the district court's dismissal of Tiara Yachts' complaint and remand[ed] for proceedings consistent with this opinion." *Tiara Yachts*, 138 F.4th at 473. Undeterred by the binding nature of the Sixth Circuit's findings, BCBSM filed a successive motion to dismiss. (ECF No. 66, PageID.1100-1114). As explained by Plaintiff's response, that motion patently lacks merit—as it wholly ignores the Sixth Circuit's rulings and mischaracterizes the Complaint—and was filed solely to delay. (ECF No. 72, PageID.1134-1173). Bolstering such conclusion is that BCBSM has now filed a motion to stay discovery, predicated on the assertion that its meritless *second* motion to dismiss might somehow end up being successful. (ECF No. 70, PageID.1121-1128). This brazen attempt at delay fails.

III. LAW AND ARGUMENT

A. STAY OF DISCOVERY IS DISFAVORED AND BCBSM FAILS TO MEET THE SIXTH CIRCUIT'S STANDARD.

While this Court has "broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined[,]" *Hahn v. Star Bank*, 190 F.3d 708, 719 (6th Cir. 1999), the Sixth Circuit has established clear contours of when such a stay is

appropriate. Rule 26(c) requires the party moving for a stay of discovery to show "good cause," which contemplates "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Nemir v. Mitsubishi Motors Corp.*, 381 F.3d 540, 550 (6th Cir. 2004) (internal citation and quotation omitted).

Importantly, "It is [] well established that the filing of a motion to dismiss does not automatically warrant a stay of discovery." *Serenity Point Recovery, Inc. v. BCBSM*, No. 1-19-CV-620, 2021 WL 5710724, at *1 (W.D. Mich. Apr. 8, 2021) (quoting *AFT Michigan v. Project Veritas*, 294 F. Supp. 3d 693, 694 (E.D. Mich. 2018)); *see also Michigan Dep't of Env't v. Mueller*, No. 1:20-CV-528, 2022 WL 21804722, at *1 (W.D. Mich. June 15, 2022) ("[M]erely filing a motion to dismiss did not warrant a stay of discovery[.]"); *Wilson v. McDonald's Corp.*, No. 14-11082, 2015 WL 13047572, at *3 (E.D. Mich. Apr. 28, 2015) ("Generally, the filing of a dispositive motion is insufficient to warrant a stay of discovery."); *Williams v. New Day Farms, LLC*, No. 2:10-CV-0394, 2010 WL 3522397, at *1 (S.D. Ohio Sept. 7, 2010) ("[O]ne argument that is usually deemed insufficient to support a stay of discovery is that a party intends to file, or has already filed, a motion to dismiss for failure to state a claim under Rule 12(b)(6).").

Instead, there is a narrow circumstance—inapplicable here—where a dispositive motion may warrant staying discovery. That circumstance is limited to instances where claims may be dismissed "based on legal determinations that could not have been altered by any further discovery." *Muzquiz v. W.A. Foote Memorial Hosp., Inc.*, 70 F.3d 422, 430 (6th Cir. 1995). This has typically been applied only with respect to immunity defenses. *See e.g., Williams*, 2010 WL 3522397, at *2 ("[U]nless the motion raises an issue such as immunity from suit, which would be substantially vitiated absent a stay, or unless it is patent that the case lacks merit and will almost

certainly be dismissed, a stay should not ordinarily be granted to a party who has filed a garden-variety Rule 12(b)(6) motion.").

Indeed, to justify a stay, BCBSM bears the burden of "show[ing] that [it] will suffer a clearly defined and serious injury if they respond to Plaintiffs' discovery[.]" *Greenbush Brewing Co. v. Michigan Liquor Control Comm'n*, No. 1:19-CV-536, 2019 WL 7582856, at *1 (W.D. Mich. Nov. 20, 2019) (internal citation and quotation omitted); *see also Bowens v. Columbus Metro. Library Bd. of Trustees*, No. 2:10-cv-00219, 2010 WL 3719245, at *2 (S.D. Ohio Sept. 16, 2010). Yet here, BCBSM wholly fails to even attempt demonstrating such injury. Instead, it brazenly asks this Court to use its discretion to stay discovery because its "garden-variety 12(b)(6) motion" *might* be successful. *Williams*, 2010 WL 546349, at *2. Without a requisite showing of serious injury, BCBSM's motion should be denied for lack of good cause under Rule 26(c).

Lacking good cause, BCBSM's request is predicated on its discussion of various arguments for dismissal plus the added qualifier of "[i]f this argument is successful" to conclude that discovery should be stayed or limited. Mtn. to Stay Discovery (ECF No.70, PageID.1125-1126). Such an argument is patently insufficient:

[T]he mere presence of a dispositive motion is insufficient to stay discovery. Because the parties' arguments on the instant motion **rely solely on the presence of the motion to dismiss**, the arguments now before the Court are necessarily intimately connected with the merits of the case. **To decide this motion based on Defendants' argument that their motion to dismiss will ultimately prevail would require this Court to make a preliminary determination on the merits.** The Court declines to make such a determination at this time.

Greenbush Brewing Co., 2019 WL 7582856, at *1 (emphasis added). Likewise, BCBSM's assertion that granting their motion to stay discovery will conserve resources and promote judicial economy is precisely the sort of claim that courts have repeatedly rejected as insufficient to meet the burden of a party requesting a stay. *See, e.g., Baker v. Swift Pork Co.*, No. 3:15-CV-663-JHM,

2015 WL 6964702, at *1 (W.D. Ky. Nov. 10, 2015) ("[T]he Court finds that the interest of plaintiff in prosecuting her claims outweighs the burden on defendant to engage in discovery, especially in light of the fact that this case does not present overly complex legal issues or facts. Therefore, the Court finds that, under the circumstances of this case, the Motion to Stay Discovery should be denied."); *see also DiYanni v. Walnut Twp. Bd. of Educ.*, No. 2:06-CV-0151, 2006 WL 2861018, at *3 (S.D. Ohio Oct. 4, 2006) (denying to stay discovery pending resolution of the defendant's motion for judgment on the pleadings). BCBSM does not establish that there is a pressing need to delay discovery and to prevent Plaintiff from commencing what will not be an overly burdensome amount of discovery.

B. THE SIXTH CIRCUIT ALREADY REJECTED BCBSM'S ARGUMENTS FOR DISMISSAL.

In any event, BCBSM's claim that its current motion to dismiss could dispose of the case is wrong, as BCBSM's motion to dismiss should be denied. BCBSM first challenges whether Tiara Yachts has sufficiently pleaded breach of ERISA fiduciary duty and prohibited transactions. However, the Sixth Circuit—in reversing this Court's previous dismissal—has already established that Tiara Yachts *did* plausibly allege both fiduciary breach and prohibited transaction claims under ERISA. *See Tiara Yachts*, 138 F.4th at 464-68. It further found that "BCBSM has abandoned any challenge to the other elements of Tiara Yachts' ERISA claims." *Id.* at 463 n. 3. BCBSM's arguments about whether the Complaint adequately alleges a fiduciary breach or prohibited transaction, therefore, merely repackage arguments already considered and rejected by the Sixth Circuit. BCBSM ignores that the Sixth Circuit already ruled it abandoned any challenges on the pleadings to the other elements of Plaintiff's ERISA claims and wholly fails to address the Sixth Circuit's other determinations, despite this Court and BCBSM being bound by such findings under the mandate rule and law-of-the-case doctrine. *See Hanover Ins. Co. v. American*

Engineering Co., 105 F.3d 306, 312 (6th Cir. 1997); *Kindle v. City of Jeffersontown, Ky.*, 589 F. App'x 747, 753 (6th Cir. 2014). For BCBSM's failure to follow the Sixth Circuit's opinion alone, its motion to dismiss will not be successful. *See id.*

BCBSM's pending motion to dismiss also re-raises a statute of limitations defense. This defense fails for the same reason BCBSM's requested stay of discovery is improper—determining the applicable statute of limitations is a fact-intensive contention that should only be resolved *after* discovery. The statute of limitations under ERISA, particularly the "actual knowledge" standard under 29 U.S.C. § 1113, is inherently fact-bound and very rarely susceptible to resolution on the pleadings. *See Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012) ("[A] motion under Rule 12(b)(6), which considers only the allegations in the complaint, is generally an inappropriate vehicle for dismissing a claim based upon the statute of limitations.").

Determining when Plaintiff acquired "actual knowledge" of BCBSM's breaches is not something that BCBSM can "impute" on Plaintiff as it tries to do, *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 181 (2020), especially given Plaintiff's repeated allegations that BCBSM engaged in deceptive practices and concealment to forestall Plaintiff's ability to uncover BCBSM's misconduct, *see e.g.*, Compl. ¶¶ 1, 57-58, 87, 91, 108(c) (ECF No. 1, PageID.1, 8-9, 12-13, 19). It is particularly for this reason that the general rule that "the filing of a motion to dismiss does not automatically warrant a stay of discovery" exists, *Serenity Point Recovery, Inc.*, 2021 WL 5710724, at *1, and such stays are only appropriate when the underlying motion to dismiss contains issues upon which no factual development would impact the applicability of the defense, *i.e.* immunity defenses, *Muzquiz*, 70 F.3d at 430.

Under no circumstance would a stay of discovery be appropriate here. The Sixth Circuit has already resolved BCBSM's first motion to dismiss in Plaintiff's favor, and BCBSM's second

motion likewise fails because it simply regurgitates arguments already rejected by the Sixth Circuit and/or otherwise relies on issues that are inherently fact-intensive such as when Plaintiff obtained "actual knowledge" of BCBSM's fiduciary breaches, which is an inquiry only appropriate for resolution after discovery and/or at trial.

C. A STAY WOULD PREJUDICE PLAINTIFF AND UNDERMINE THE EFFICIENT RESOLUTION OF THIS CASE.

This case has been pending for over three years. Nevertheless, it is still at the pleadings stage, as BCBSM has yet to even answer Plaintiff's Complaint. Plaintiff has already endured substantial delay due to BCBSM's procedural tactics and delays. Further deferring discovery would prejudice Plaintiff's ability to obtain relevant documents and testimony while memories fade and records become more difficult to locate. In contrast, the only "burden" BCBSM cites is the general burden of litigation—hardly a compelling basis for a stay. The mere fact that discovery may impose some burdens or expense is not in itself a sufficient justification for a stay. *See Bowens v. Columbus Metro. Libr. Bd. of Trs.*, No. CIV.A. 2:10-CV-00219, 2010 WL 3719245, at *2 (S.D. Ohio Sept. 16, 2010) ("[S]ome discovery imposes little burden—whether directed to the merits or non-merits issues."). This Court should decline to stay discovery, as BCBSM is obviously intent on attempting to abuse the discovery process by repeatedly filing dispositive motions to purportedly justify a stay of discovery, even after the Sixth Circuit has already held Plaintiff states meritorious claims against BCBSM.

D. BCBSM'S DEMAND TO LIMIT DISCOVERY TO ITS "RELEASE" DEFENSE IS MERITLESS.

BCBSM's alternative request to limit discovery to its "release" defense is premature at best, as no such defense has actually been asserted by BCBSM in its first or second motion to dismiss. Mtn. to Stay Discovery (ECF No. 70, PageID.1126-1127). Instead, BCBSM threatens to raise this purported "release" in a not-yet-filed Rule 12(c) motion (further demonstrating BCBSM's litigation

strategy to delay this case at all costs). *Id.* Such a "defense"—premised on contract interpretation—would do nothing but implicate more factual questions that could not be resolved in a vacuum absent discovery.

Moreover, the contractual release cited by BCBSM does not encompass fiduciary breach claims under ERISA, making any potential motion for dispositive relief predicated upon it meritless. To the extent BCBSM disagrees, the issue of "release" would require factual development. See *Ososki v. St. Paul Surplus Lines*, 156 F. Supp. 2d 669, 675 (E.D. Mich. 2001), *aff'd sub nom.* 60 F. App'x 602 (6th Cir. 2003) ("If the Court finds the contract terms are ambiguous, then the trier of fact determines the intent of the parties and, therefore, summary judgment is inappropriate."). Accordingly, this Court should deny BCBSM's demand to limit discovery on such the speculative basis that it *might* later raise a purported release defense that *might* not require factual development because it *might* forestall Plaintiff's requested relief.

Further, there are other grounds for why BCBSM's "release" argument fails, which will be briefed if and when BCBSM actually makes that argument.

IV. CONCLUSION

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

Respectfully submitted,

VARNUM LLP
Attorneys for Tiara Yachts, Inc.

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By: 

Perrin Rynders (P38221)
Aaron M. Phelps (P64790)
Herman D. Hofman (P81297)
Varnum LLP
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352

prynders@varnumlaw.com
amphelps@varnumlaw.com
hdhofman@varnumlaw.com

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 4,251 words.

/s/ Aaron M. Phelps
Aaron M. Phelps (P64790)