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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

<p>SURGERY CENTER OF CLIFFSIDE, LLC,</p> <p>Plaintiff,</p> <p>v.</p> <p>HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY and EMPIRE BLUE CROSS BLUE SHIELD,</p> <p>Defendants.</p>	<p><i>Document filed electronically</i></p> <p>Case No.: 2:18-cv-11346</p> <p>Civil Action</p> <p><b>COMPLAINT AND JURY DEMAND</b></p>
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Plaintiff Surgery Center of Cliffside LLC (“Cliffside”) for its Complaint against Horizon Blue Cross Blue Shield of New Jersey (“Horizon”) and Empire Blue Cross Blue Shield (“Empire,” collectively with Horizon, the “Defendants”), states as follows:

**NATURE OF ACTION**

1. This action arises out of the Defendants’ failure to pay Cliffside for proper fees for surgical services rendered by Cliffside to an Empire insured (the “Insured”), who will not be identified herein for purposes of patient confidentiality.
2. Specifically, the Defendants have refused to provide reasonable and customary rates for Cliffside’s facility charges, despite previous representations to do so.
3. As a result of the misrepresentations and breaches, Cliffside has sustained damage.

**THE PARTIES**

4. Cliffside is a limited liability company formed in the State of New Jersey. Cliffside operates as an ambulatory surgery center and is located at 663 Palisade Avenue, Suite 303, Cliffside Park, NJ 07010.

5. Upon information and belief, Horizon is a licensee of the Blue Cross and Blue Shield Association (“BCBS”), with its principal place of business in 3 Penn Plaza, Newark, NJ 07105.

6. Upon information and belief, Empire is a licensee of BCBS, with a mailing address of 165 Broadway, New York, NY 10006.

**JURISDICTION AND VENUE**

7. This Court has subject matter jurisdiction under the laws of the United States, 28 U.S.C. § 1331, over this civil action encompassing violations of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), 29 U.S.C. § 1132. This Court has supplemental jurisdiction over Cliffside’s state law claims pursuant to 28 U.S.C. § 1367(a).

8. Venue is proper in this Court under 28 U.S.C. § 1391(b) and 29 U.S.C. § 1132(e)(2) because Horizon resides in this district and because a substantial part of the events giving rise to this action occurred in this district.

**STATEMENT OF FACTS**

9. Cliffside operates as an ambulatory surgery center and as an out of network provider with Empire.

10. As a matter of course, Cliffside obtains signed assignments of benefits from its patients insured by each of the Defendants, which authorizes Cliffside to seek payment from the Defendants.

11. However, Empire requires that all insurance claims be submitted to Horizon, the local BCBS licensee. Specifically, the back of the insurance card of the Insured states “Providers: submit all claims to your local BlueCross and/or BlueShield Plan.”

12. Here, the Insured suffered from a rapidly growing lesion on her face/right ear. The lesion had a foul smell and yellow-like discharge. The lesion was both hypertrophic and caused pain to the Insured.

13. Conservative treatment options failed the Insured, necessitating surgery to alleviate the pain and discomfort. As a result, the Insured sought out services from Cliffside.

14. Prior to surgery, the Insured provided an assignment of benefits to Cliffside.

15. On January 24, 2018, a representative of Cliffside contacted Empire to confirm the nature of the Insured’s benefits in preparation of the procedure and whether pre-authorization was necessary prior to the incurring of facility fees.

16. During the January 24, 2018 telephone conversation, an Empire representative identified as Sunitha confirmed that pre-authorization for the procedure was unnecessary and 80% of Cliffside’s facility charge would be covered by Empire, after the Insured met the \$200.00 deductible. Further, Sunitha stated Empire would pay the reasonable and customary rates for the facility charges incurred by Cliffside. Empire catalogued the telephone conversation as Reference No. 3-586783547.

17. Based on Sunitha’s representations, the Insured was scheduled for surgery.

18. Thereafter, her surgical procedure was undertaken.

19. As a result of the Insured’s surgery, Cliffside incurred facility charges. Cliffside calculated the total amount due to be \$60,800.00. Accordingly, in accordance with Empire’s procedures, Cliffside submitted a claim to Horizon in this amount.

20. Thereafter, Cliffside received payment from Horizon in the amount of \$2,679.60.

21. As the amount received from Horizon was far less than expected, Cliffside submitted a first level appeal for the claim on or about March 30, 2018 to Horizon. Horizon denied the first level appeal stating it “correctly paid-out-of-network pricing and policy due to nonparticipating physicians” without any proof to support this decision. Moreover, Horizon did not provide any calculation utilized to justify payment in the amount of \$2,679.60.

22. On May 4, 2018, a representative of Cliffside contacted Empire to re-verify the Insured’s benefits. An Empire representative identified as Erika confirmed that services rendered by Cliffside will be reimbursed at 80% of reasonable and customary charges. Erika also stated that Empire does not price claims or review appeals. Rather, Erika stated that Horizon prices claims and reviews appeals. Erika clarified that reimbursement is based on the “Average County Rate” and Cliffside could obtain additional information by contacting Debra Gablonski at Provider Relations. With regard to appeals, Erika stated Empire “does not handle appeals for low payments.” Rather, Empire “only handles appeals in regards of benefits and coverage.” Accordingly, Erika initiated a three-way call with representatives Kay and Jenny from Horizon to discuss pricing. Empire catalogued the telephone conversation as Reference No. 050418007179.

23. During the May 4, 2018 call, Kay stated that Horizon does not review appeals. Once Horizon receives an appeal, Horizon forwards all documents to Empire. Kay also mentioned that Cliffside’s facility fee was processed at 150% of Medicare rate by Empire’s plan. Erika stated that Kay’s reference to Medicare was incorrect, and insisted that Empire does not price claims. Kay and Erika continued to dispute who reviewed the appeal and priced the claim, each stating that the other was responsible for reviewing the appeal and pricing the claim. Due to a lack of progress, the Cliffside representative requested to speak to manager. The call was then transferred

to the escalation department within Horizon to a Horizon representative named Jenny. Horizon catalogued the telephone conversation as Reference No. 1-6852800400U.

24. Jenny confirmed that Horizon is supposed to review Cliffside's appeal. Jenny further explained that Horizon will receive an appeal and forward documents to Empire. Since Empire does not handle the type of appeal submitted by Horizon, Empire will reject the appeal and forward the appeal back to Horizon. In this matter, Horizon did not re-review the appeal rejected by Empire, which resulted in the generation of the March 30, 2018 letter.

25. In addition, a Cliffside representative called Debra Gablonski at Provider Relations in accordance with Erika's instructions. However, the Cliffside representative was forced to leave a voicemail message. To date, Cliffside has not received a response to the voicemail message.

26. Accordingly, on or about May 10, 2018, Cliffside submitted a second level appeal to Horizon.

27. On or about June 27, 2017, Cliffside received a response from Horizon dated June 14, 2018 as to its second level appeal. The response provides that "we have determined that the claim was processed correctly. Therefore, no additional payment will be made." No other detail was provided.

28. Upon information and belief, Empire delegated authority to Horizon to determine pricing for the claim and review the appeals concerning insufficient payment, as Erika advised that Empire "does not price claims," but only determines "benefits and coverage." Jenny confirmed that Horizon was responsible for reviewing the appeals, but failed to do so.

29. To date, Cliffside has not been offered any reasonable explanation for the decision rendered with regard to its original claim, or its appeals. In fact, Cliffside has not been offered a calculation as to how Horizon arrived at the figure of \$2,679.60. Rather, Cliffside has been

stranded in a kind of bureaucratic limbo in which the Defendants each blame the other for the problem. Cliffside has been denied its opportunity to appeal the decision due to bureaucratic issues between the Defendants.

30. As a result of Horizon's actions and omissions, Cliffside has received \$58,120.40 less than it expected to receive for the services provided to the Insured in good faith.

**COUNT ONE**

**(Claim For Benefits Under ERISA § 502(a)(1)(B))**

(As to the Defendants)

31. Cliffside repeats, re-alleges, and restates all statements made above, as if stated herein at length.

32. Upon information and belief, the Defendants are plan co-administrators for an employee group health benefits plan organized and existing under the provisions of ERISA, in which the Insured is a participant and beneficiary (the "Plan"). Empire had discretionary authority or control to determine benefits and coverage, while Horizon had discretionary authority to determine and control pricing. The Defendants shared authority to manage the administration of the Plan.

33. Pursuant to ERISA § 502(a)(1)(B), "a participant or beneficiary may bring an action to recover benefits due to him under the terms of the plan, to enforce rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

34. By way of its valid assignment of benefits, Cliffside is a beneficiary within the meaning of ERISA § 502(a)(1)(B), and therefore, is permitted to bring this action against Empire, who insures and/or administers the Plan.

35. In order to receive payment for the services it performed, in accordance with ERISA claims procedures and guidelines, Cliffside properly submitted the claim in the amount of \$60,800.00.

36. To date, the Defendants refuse to tender the proper payment, and therefore, are improperly withholding benefits due to Cliffside. The Defendants have breached the terms of the Plan, by yielding a claim determination that has had the effect of reimbursing Cliffside less than the prescribed percentage in the Plan, without any basis to do so.

37. Cliffside used its best efforts and exhausted numerous internal remedies to resolve this issue. However, even if the Court concludes that Cliffside did not exhaust all available remedies, Cliffside is nevertheless excused from exhausting these additional remedies because Cliffside's continued efforts have proved to be futile. In fact, lack of proper communication channels between the Defendants have apparently stranded Cliffside in bureaucratic limbo.

38. Even though Cliffside has demonstrated that the Defendants' reasoning for insufficient payment is incorrect, the Defendants have failed to provide an adequate explanation as to its decision.

39. Cliffside has been denied meaningful access to a full and fair review of its claims under ERISA, as well as the Plan's administrative procedures and remedies. Each attempt has shown that it would be futile for Cliffside to seek assistance from the Defendants, at this point, since the Defendants' internal administrative remedies are certain to yield a claim determination that is not in accordance with the Plan.

40. Thus, as an assignee and beneficiary of the Insured under 29 U.S.C. § 1132(a)(1)(B), Cliffside is categorically entitled to bring this action to enforce the terms of the Plan and collective insurance benefits due.

41. Based on the Defendants' failure to pay for services rendered, and the Defendants' inability to follow proper claims processing procedures and regulations, Cliffside seeks damages in the amount of \$58,120.40.

42. Additionally, Cliffside seeks an award of pre-judgment interest on the claim to compensate Cliffside for the unjustifiable delay in issuing benefits for covered services and an award of reasonable attorneys' fees and costs.

### **COUNT TWO**

#### **(Claim For Breach of Fiduciary Duty Under ERISA § 502(a)(2))**

(As to the Defendants)

43. Cliffside repeats, re-alleges, and restates all statements made above, as if stated herein at length.

44. Pursuant to 29 U.S.C. § 1132(a)(2), "a civil action may be brought ... by a participant, beneficiary or fiduciary for appropriate relief under Section 1109 of this title," which imposes liability for breach of fiduciary duty. Section 502(a)(2) of ERISA authorizes a cause of action for breach of that duty.

45. At all relevant times, the Defendants served as co-administrators and co-fiduciaries of the Plan.

46. Here, Empire had complete discretionary authority and control to determine benefits and coverage, while Horizon had discretionary authority to determine and control pricing.

47. The Defendants' responsibilities listed above are inherently fiduciary functions that must be carried out in accordance with the documents and instruments governing the Plan, and not in a manner in which the Defendants acted.



48. By engaging in the conduct described herein, the Defendants failed to act with the care, skill, and diligence that a prudent plan administrator would use in similar circumstances, of like character.

49. The Defendants did not act as prudent plan administrators and breached the fiduciary duties when the Defendants failed to manage the Plan's assets appropriately and withheld benefits rightfully owed to Cliffside.

50. Furthermore, as ERISA fiduciaries, the Defendants are obligated to disclose material information to participants and beneficiaries, and each have a duty not to mislead a plan participant and/or beneficiaries.

51. At all relevant times herein, the Defendants continually failed to furnish material information in connection with Cliffside's claim submissions, and have misled Cliffside to believe that its claim will be processed and reimbursed at a rate in accordance with the terms of the Plan. The Defendants are obligated to make decisions in the interest of Plan participants and beneficiaries. Here, the Defendants appear to have served their own interest rather than the Plan beneficiaries maximizing their own profit rather than issuing benefits.

52. As a direct and proximate result of Horizon's actions, Cliffside has been damaged and is entitled to relief under ERISA.

### **COUNT THREE**

#### **(Claim to Enjoin Defendants' Acts and/or Practices in Violation of the Terms of the Plan Pursuant to ERISA § 502(a)(3))**

(As to the Defendants)

53. Cliffside repeats, re-alleges, and restates all statements made above, as if stated herein at length.

54. In the alternative to an award under Section 502(a)(1)(B), Cliffside is entitled to relief under Section 502(a)(3) of ERISA for the same allegations set forth above.

55. As discussed above, the Defendants failed to process Cliffside's claims in accordance with the terms of the Plan.

56. ERISA Section 502(a)(3), codified as 29 U.S.C. § 1132(a)(3) provides that a participant or beneficiary may bring a civil action to "(A) enjoin any act or practice which violates any provision of ERISA or the terms of the plan, or (B) to obtain other appropriate relief (i) to redress violations of ERISA or the terms of the plan or (ii) to enforce any provisions of ERISA or the terms of the plan." (emphasis added).

57. To the extent full relief is not available under ERISA § 502(a)(1)(b) or ERISA § 502(a)(2), Cliffside seeks to enjoin the Defendants from directing blame at the other to effectively deny Cliffside the opportunity to appeal the Defendants' decisions. The Defendants each appear to utilizing this tactic to shield itself from their obligations to properly process Cliffside's claims and appeals, and issue payment for services rendered.

#### **COUNT FOUR**

##### **(Breach of Contract)**

##### **(As to the Defendants)**

58. Cliffside repeats, re-alleges, and restates all statements made above, as if stated herein at length.

59. The Insured's assignment of benefits confers onto Cliffside the ability to pursue the Defendants for reimbursement for services rendered.

60. Moreover, Empire represented to Cliffside that it would tender payment at reasonable and customary rates, both before and after the surgery.

61. The Defendants' course of conduct and interaction with Cliffside constitute the formation of a contract with both Defendants. Accordingly, the Defendants are obligated to pay Cliffside for services rendered at reasonable and customary rates.

62. However, a lack of communication between the Defendants has denied Cliffside the benefit of its bargain.

63. Empire's tender of payment is only a fraction of the usual, customary, and reasonable amount, and runs contrary to the Defendants' representations to Cliffside. Accordingly, Empire's failure to tender the proper payment constitutes a breach of contract.

64. As a result of the Defendants' actions, Cliffside has incurred damage.

#### **COUNT FIVE**

#### **(Promissory Estoppel)**

(As to Empire)

65. Cliffside repeats, re-alleges, and restates all statements made above, as if stated herein at length.

66. Empire represented that it would tender payment at reasonable and customary rates.

67. Empire should have expected that Cliffside would rely on its representations when Cliffside contacted Empire to confirm the nature of the Insured's benefits prior to surgery.

68. Cliffside relied on Empire's representations, and thereafter, provided services to the Insured.

69. As a result of Empire's representations regarding reimbursement, Cliffside has incurred damages.

**COUNT SIX**

**(Unjust Enrichment)**

(As to the Defendants)

70. Cliffside repeats, re-alleges, and restates all statements made above, as if stated herein at length.

71. Cliffside provided services to the Insured, under circumstances pursuant to which Empire reasonably should have known that Cliffside would expect to be compensated.

72. Upon information and belief, Empire received premium payments to cover medical claims filed on behalf of the Insured.

73. Upon information and belief, Horizon received compensation to price and process Cliffside's claim, including but not limited to fees and reciprocal agreements from Empire.

74. Yet, the Defendants failed to fully compensate Cliffside for the medical care and treatment Cliffside provided to the Insured.

75. Consequently, the Defendants have been unjustly enriched through the receipt of insurance premium payments. This unjust enrichment occurred, through the provision of services to the Insured, at Cliffside's expense. To permit the Defendants to retain benefits without payment would be unjust, and therefore Cliffside is entitled to recover the amounts wrongfully withheld by the Defendants.

**COUNT SEVEN**

**(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

(As to the Defendants)

76. Cliffside repeats, re-alleges, and restates all statements made above, as if stated herein at length.

77. Empire represented that it would tender payment at reasonable and customary rates.

78. Despite Empire's representations, the Defendants tendered payment in an amount far less than what was is reasonable and customary.

79. Moreover, the Defendants' failure to adequately respond to both Cliffside's first level and second level appeals runs contrary to both industry standards and the Defendants' past conduct. In fact, the Defendants have failed to explain the reasons for its decision to reimburse at the low amount, or provide any detail as to the calculations underlying the final determination. Seemingly, the Defendants' lack of communication has stranded Cliffside in bureaucratic limbo, with no proper channel to appeal the decisions outside of filing the present lawsuit.

80. Therefore, the Defendants failed to observe reasonable commercial standards of fair dealing and to conduct themselves in a decent, fair or reasonable matter. Specifically, the Defendants failed to conduct itself in an honest manner by providing false and misleading information to Cliffside and failing to recognize communication issues with Empire.

81. As a result of the Defendants' conduct, Cliffside has been damaged because it received payment far less than what is reasonable and customary.

**COUNT EIGHT**

**(Negligent Misrepresentation)**

(As to Empire)

82. Cliffside repeats, re-alleges, and restates all statements made above, as if stated herein at length.

83. Empire, represented that it would tender payment in an amount equal to 80% of the facility charges at reasonable and customary rates, after the Insured's \$200.00 deductible is met.

84. Empire made this representation prior to the creation of the contractual relationship between Empire and Cliffside, and therefore, induced Cliffside into the contract.

85. As the statement was false, Empire acted negligently in providing incorrect information concerning reimbursement rates to Cliffside.

86. Empire could have reasonably expected that Cliffside would rely on its representations concerning reimbursement rates, because the purpose of the initial telephone call was to confirm the nature of the Insured's benefits.

87. Cliffside relied on Horizon's representations, and thereafter, provided services to the Insured.

88. As a result of Empire's representations regarding reimbursement, Cliffside has incurred damages.

### **COUNT NINE**

#### **(Declaratory Judgment Pursuant to N.J.S.A. 2A:16-52)**

(As to the Defendants)

89. Cliffside repeats, re-alleges, and restates all statements made above, as if stated herein at length.

90. An actual controversy has arisen and now exists relating to the rights and duties of the Defendants and Cliffside.

91. The Defendants owe compensation to Cliffside at reasonable and customary rates, but, to date, have failed to tender a proper payment contrary.

92. Empire contends that Horizon is responsible for pricing. However, Horizon denies this assertion in addition to denying it is responsible to review appeals as to pricing. Horizon has

simply forwarded pricing appeals to Empire for review. In turn, Empire returns the appeals to Horizon.

93. The cyclical nature of this process has stranded Cliffside in bureaucratic limbo. As a result, the Defendants have avoided the responsibility to offer justification for their decisions to Cliffside.

94. Cliffside thus seeks a judicial declaration of the rights and duties of the parties in connection with the above controversies.

95. A judicial declaration is necessary and appropriate at this time to ensure the parties may ascertain their rights and duties with respect to the controversy alleged above.

WHEREFORE, Cliffside requests judgment in its favor as and against the Defendants as follows:

- A. The Defendants are jointly and severally liable to Cliffside for compensatory damages in the amount of \$58,120.40;
- B. The Defendants are jointly and severally liable to Cliffside for exemplary and punitive damages;
- C. The Defendants are jointly and severally liable to Cliffside for attorneys' fees, costs, and pre-judgment and post-judgment interest as permitted by law;
- D. The Defendants are enjoined from blaming the other for the failure to properly process Cliffside's claims and appeals;
- E. It is determined which of the Defendants is responsible for pricing of claims and reviewing appeals concerning pricing;
- F. The Defendants are compelled to provide reasoning, calculations, and justifications for their decision regarding approval and pricing of Cliffside's claim;

G. Such other and further relief to which Cliffside may be entitled.

Dated: July 3, 2018

EVAN SAMPSON, ESQUIRE  
*Attorney for Plaintiff,*  
*Surgery Center of Cliffside, LLC*

By:           /s/ Evan Sampson            
EVAN SAMPSON

**JURY DEMAND**

Cliffside hereby requests a trial by jury on all issues so triable.

Dated: July 3, 2018

EVAN SAMPSON, ESQUIRE  
*Attorney for Plaintiff,*  
*Surgery Center of Cliffside, LLC*

By:           /s/ Evan Sampson            
EVAN SAMPSON