

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(FORT LAUDERDALE)

Case No. _____

K.B., Individually and on Behalf of a)
Class of All Others Similarly Situated,)
)
Plaintiff,)

v.)

NECA-IBEW WELFARE TRUST FUND,)
)
Defendant.)

Removed from:
Broward County Circuit Court
Case No. CACE18001182
Hon. Michael A. Robinson

NOTICE OF REMOVAL FROM STATE COURT

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1331, 1441(a) and 1446, and U.S. District Court for the Southern District of Florida Civil Filing Requirements Section 5H, the above-captioned action, which is currently pending in the Circuit Court for the County of Broward in the State of Florida, is hereby removed by Defendant NECA-IBEW Welfare Trust Fund (the “Removing Defendant”) to the United States District Court for the Southern District of Florida. As grounds for removal the Removing Defendant states as follows:

1. On or about January 16, 2018, Plaintiff filed an action in the Circuit Court of Broward County, Florida, entitled *K.B., Individually and on Behalf of a Class of All Others Similarly Situated v. NECA-IBEW Welfare Trust Fund*, Case No. CACE18001182 (the “State Court Action”). Pursuant to 28 U.S.C. § 1446(a), a complete copy of all “process, pleadings, and orders” received by the Removing Defendant in the State Court Action is attached as **Exhibit A**.

2. The Complaint in the State Court Action was served on Removing Defendant on January 26, 2018, although the docket in the State Court Action does not appear include an executed *Summons*, or other proof of service.

3. Pursuant to 28 U.S.C. §1446(b), this Notice of Removal is timely because it is being filed within 30 days after the Removing Defendant’s receipt of the Summons and Complaint, as well as within 20 days after the Removing Defendant’s receipt of the Summons and Complaint, as required by state law. The Notice of Removal is filed with the concurrence of all Defendants in this matter.

4. This Court is the district and division “embracing the place where [the State Court Action] is pending.” 28 U.S.C. §1441(a). The Broward County Circuit Court is located within the United States District Court for the Southern District of Florida, Fort Lauderdale Division.

Federal Question Jurisdiction Exists

5. This action is removable to this Court pursuant to 28 U.S.C. §1441(a) because it is a civil action over which this Court has original jurisdiction pursuant to 28 U.S.C. §1331. A party may timely remove a pending state court action to federal district court if the federal district court would have had original jurisdiction. 28 U.S.C. §1441. Federal district courts have original jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States. 28 U.S.C. §1331.

6. The Complaint explicitly invokes jurisdiction pursuant to the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §1001, et seq. In Count I, Plaintiff alleges, “*This count is brought under 29 U.S.C. §1132 (a)(1)(B).*” (¶ 60) (emphasis added). Plaintiff further alleges the existence of “applicable federal law” (ERISA) regulating Defendant (¶ 61). Count I identifies ERISA §502(a)(3), 29 U.S.C. §1132(a)(3), as the basis of Plaintiff’s claim to “injunctive relief and damages, together with attorneys’ fees and costs.” (¶ 65).

7. Count II is expressly premised upon ERISA §502(a)(3)(B) and “seeks to redress... *breaches of fiduciary duties...*” (¶ 68) (emphasis added). Count II specifically alleges Removing

Defendant is an ERISA fiduciary and breached alleged fiduciary duties. (¶¶ 69, 70, 71). Plaintiff alleges Removing Defendant was unjustly enriched and seeks (alleged) ERISA equitable remedies of “restitution, disgorgement, surcharge and other appropriate equitable relief, together with attorneys’ fees and costs.”

8. As to Count I, there is concurrent federal and State court jurisdiction over claims arising pursuant ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B). 28 U.S.C. §1441(a) “allows defendants in a state court action to remove the case to a district court having original jurisdiction of the case.” Chilton v. Savannah Foods & Indus., Inc., 814 F.2d 620, 622-23 (11th Cir. 1987). The district court having original jurisdiction is the Southern District of Florida. Count II is brought pursuant to ERISA §502(a)(3)(B), 29 U.S.C. §1132(a)(3)(B) and the District Courts have “exclusive jurisdiction over claims under §1132(a)(3)(B).” Glasser v. Amalgamated Workers Union Local 88, 806 F.2d 1539, 1541 n.3 (11th Cir. 1986) (emphasis added). All ERISA claims in the Complaint are thus properly removed. Because this Court has original jurisdiction under 28 U.S.C. §1331 generally and ERISA specifically, and because all other prerequisites for removal exist or have been satisfied, this action is removable under 28 U.S.C. § 1441.

9. Having federal question jurisdiction, this Court may exercise its supplemental jurisdiction over any remaining related state law claims, including Counts III and IV. *See* 28 U.S.C. §1367.

10. A Notice of Filing Notice of Removal and a Copy of this Notice of Removal from State Court will be filed with the Broward County Circuit Court as required by 28 U.S.C. §1446(d). See **Exhibit B**. Copies of same will be served upon counsel of record upon the filing of this Notice.

WHEREFORE, Defendant NECA-IBEW WELFARE TRUST FUND hereby removes the State Court Action from the Circuit Court of Broward County, State of Florida, to this Court, and

requests that the Court take jurisdiction of this civil action to the exclusion of any further proceedings in the State court.

Respectfully Submitted,

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Attorneys for Defendant NECA-IBEW
Welfare Trust Fund

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing “Notice of Removal From State Court” was filed using the Court’s CM/ECF system this 15th day of February, 2018, and further that a copy of the same was sent by email to JEggnatz@JusticeEarned.com and placed in the United States Mail, First Class Postage prepaid, for service upon:

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EXHIBIT A

000079

CIVIL ACTION SUMMONS

IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

K.B. individually and on behalf of a
class of all others similarly situated,

Plaintiff,

v.

NECA-IBEW WELFARE
TRUST FUND

Defendant.

SUMMONS
PERSONAL SERVICE ON A CORPORATION

TO DEFENDANT(S):

NECA-IBEW WELFARE TRUST FUND
ATTN: Steven L. Myers (As Registered Agent)
2120 Hubbard Avenue
Decatur, IL 62526-2871

IMPORTANT

A lawsuit has been filed against you. You have 20 calendar days after this summons is served on you to file a written response to the attached complaint/petition with the Clerk of this Court, located at 201 SE 6th Street, Fort Lauderdale, FL 33301. A phone call will not protect you. Your written response, including the case number given above and the names of the parties, must be filed if you want the Court to hear your side of the case. If you do not file your response on time, you may lose the case, and your wages, money, and property may thereafter be taken without further warning from the Court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

If you choose to file a written response yourself, at the same time you file your written response to the Court you must also mail or take a copy of your written response to the "Plaintiff/Plaintiff's Attorney" named below.

Joshua H. Eggatz, Esq. (Fla. Bar. No.: 0067926)
JEggatz@JusticeEarned.com
Michael J. Pascucci, Esq. (Fla. Bar No.: 83397)
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THE STATE OF FLORIDA

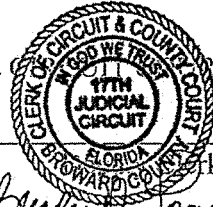
TO EACH SHERIFF OF THE STATE: You are commanded to serve this Summons and a copy of the complaint/petition in this lawsuit on the above named defendant(s).

DATED ON JAN 17 2018

(SEAL)

CLERK OF THE COURT

BY: _____



Brenda D. Forman
BRENDA D. FORMAN

(See reverse side)
(Vease al revés)
(Voir de l'autre cote de)

SEVENTEENTH CIRCUIT – BROWARD:

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator, Room 470, 201 S.E. Sixth Street, Fort Lauderdale, Florida 33301, 954-831-7721 at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.

IMPORTANTE

Usted ha sido demandado legalmente. Tiene 20 Dias, contados a partir del recibo de esta notificacion, para contestar la demanda adjunta, por escrito, y presentarla ante este tribunal. Una llamada telefonica no lo protegera. Si usted desea que el tribunal considere su defensa, debe presentar su respuesta por escrito, incluyendo el numero del caso y los nombres de las partes interesadas. Si usted no contesta la demanda a tiempo, podiese perder el caso y podria ser despojado de sus ingresos y propiedades, o privado de sus derechos, sin previo aviso del tribunal. Existen otros requisitos legales. Si lo desea, puede usted consultar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a una de las oficinas de asistencia legal que aparecen en la guia telefonica.

Si desea responder a la demanda por su cuenta, al mismo tiempo en que presenta su respuesta ante el tribunal, debera usted enviar por correo o entregar una copia de su respuesta a la persona denominada abajo como "Plaintiff/Plaintiff's Attorney" (Demandante o Abogado del Demandante).

IMPORTANT

Des poursuites judiciaires ont ete entreprises contre vous. Vous avez 20 jours consecutifs a partir de la date de l'assignation de cette citation pour déposer une reponse ecrite a la plainte ci-jointe aupres de ce tribunal. Un simple coup de telephone est insuffisant pour vous proteger. Vous etes oblige de déposer votre reponse ecrite, avec mention du numero de dossier ci-dessus et du nom des parties nommees ici, si vous souhaitez que le tribunal entende votre cause. Si vous ne deposez pas votre reponse ecrite dans le relai requis, vous risquez de perdre la cause ainsi que votre salaire, votre argent, et vos biens peuvent etre saisis par la suite, sans aucun preavis ulterieur du tribunal. Il y a d'autres obligations juridiques et vous pouvez requerir les services immediats d'un avocat. Si vous ne connaissez pas d'avocat, vous pourriez telephoner a un service de reference d'avocats ou a un bureau d'assistance juridique (figurant a l'annuaire de telephones).

Si vous choisissez de déposer vous-meme une reponse ecrite, il vous faudra egalement, an meme temps que cette formalite, faire parvenir ou expedier une copie de votre reponse ecrite au "Plaintiff/Plaintiff's Attorney" (Plaignant ou a son avocat) nomme ci-dessous.

**IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA**

K.B. individually and on behalf of a
class of all others similarly situated,

Plaintiff,

v.

NECA-IBEW WELFARE
TRUST FUND

Defendant.

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff K.B.¹ (hereinafter Plaintiff), individually and on behalf of a class of all others similarly situated, files this Class Action Complaint and Demand for Jury Trial against NECA-IBEW WELFARE TRUST FUND (“NECA-IBEW” or “Defendant”), states as follows:

INTRODUCTION

This case arises from Defendant’s uniform unlawful conduct, which has uniformly injured thousands of people in exactly the same way. Defendant’s unlawful conduct is embodied in, and carried out through, a fraudulent and dishonest scheme to deny paid-for health insurance coverage benefits for acupuncture services for pain management to patients who are concurrently undergoing behavioral health treatment. Additionally, and/or in the alternative, the putative class includes patients who were denied paid for acupuncture benefits because they were not simultaneously receiving acupuncture treatment in conjunction with a formal physical therapy program.

1. The Plaintiff, an insured of Defendant, and patient of Mibaso S Corp, is referred to as K.B. throughout this Complaint to protect the privacy and confidentiality of the patient in this public filing, and to otherwise protect against the public disclosure of sensitive HIPPA protected and other personally identifiable information. Plaintiff’s full name and other identifiable information will be provided to Defendant upon entry of appearance in this action.

NATURE OF THE ACTION

1. All medical professionals, and all who work with them, including health insurers, learn that the first rule of medicine is to “do no harm.” This case arises not merely from Defendant’s callous indifference to doing harm, but from its deliberate choice to do harm, in order to maximize profits by avoiding costs. Defendant has intentionally chosen to deny the paid for benefits of Plaintiff and the class in the interest of profits.

2. Defendant NECA-IBEW markets, sells, and administers health insurance contracts (the “Policies”) to thousands of people in Florida and across the nation (the “Insureds”), who have the right to rely on Defendant to handle their health insurance claims with the utmost good faith.

3. Defendant, acting in concert with others, is engaged in an unlawful pattern and practice of using inherently fraudulent, pretextual cost-avoidance criteria to deny coverage for acupuncture benefits that were contracted for and promised to Plaintiff and the class as policy holders. Defendant’s wrongful conduct has caused serious harm, and threatens to cause more harm, to Plaintiff and the Class.

4. Chronic Pain is a debilitating, degenerative disease that causes physical pain, psychological pain and leads to depression.² The National Institute of health estimates that 11% of the population (25 million people) suffers from chronic pain.³ Many Americans turn to powerful painkillers like opioids and steroids to manage their pain, but those treatments merely mask the pain, and often lead to detrimental drug addictions. For those patients who do not want to jeopardize becoming a drug addict, acupuncture is a popular, non-invasive treatment that helps treat chronic pain.

2. <http://www.mayoclinic.org/diseases-conditions/depression/expert-answers/pain-and-depression/faq-20057823> (last visited January 16, 2018).

3. https://www.washingtonpost.com/news/to-your-health/wp/2015/08/11/nih-more-than-1-in-10-american-adults-experience-chronic-pain/?utm_term=.dce8ad5fb949 (last visited January 16, 2018).

5. In Policy and Policy-related disclosures to Plaintiffs and Class Members that are uniform in all material respects, Defendant consistently, expressly, and uniformly represented that coverage and treatment decisions under the Policies are made on the basis of “medical necessity.”⁴ As a matter of law and logic, a drug-free, non-invasive treatment, that is listed in the Plaintiff’s Policy as a covered expense and is commonly prescribed by Medical Doctors, is medically necessary. But contrary to Defendant’s express representations, and in furtherance of a common, unlawful scheme, Defendant, is and has been systematically and continuously breaching its promises, by intentionally misrepresenting and failing to disclose that it will not provide this medically necessary coverage if the patient: a) is concurrently seeking behavior health treatment; or b) not simultaneously participating in a formal physical therapy program. Despite NECA-IBEW agreeing to provide K.B. 48 acupuncture visits per year, it wrongfully denied the contracted for benefits based on non-existent and made up exclusions.

6. To carry out and conceal its unlawful scheme, Defendant attempted to conjure up erroneous medical explanations to justify its wrongful denial of acupuncture benefits. Defendant has taken the odd and untenable position that otherwise covered acupuncture benefits are not covered if the patient is concurrently undergoing behavioral health treatment. Defendant further claims that acupuncture is only appropriate and medically necessary when administered in conjunction with a formal physical therapy program.⁵ However, nowhere in Defendant’s advertisements, Policy, or Summary Plan Description of acupuncture benefits, does Defendant disclose that acupuncture is not covered under these circumstances. Defendant is not permitted to re-write its Policy language “after-the-fact” to gain an unjust profit.

4. See Summary Plan Description, attached and incorporated hereto as “**Exhibit A.**”

5. Id.

7. Further, Defendant expressly provided pre-authorization over the phone to Mibaso S Corp (“Mibaso”), Plaintiff’s acupuncture provider, and advised that acupuncture was covered under Plaintiff’s Policy for the treatment of chronic pain. Therefore, Defendant is now estopped from denying these benefits after-the-fact, as Mibaso and K.B. have detrimentally relied on Defendant’s pre-authorization and have now suffered harm.

8. Acupuncture is medically necessary by any objective definition (including the definition in the Policy), and Defendant must provide the coverage it promised to provide, or pay the retail costs of obtaining it, together with such other relief as is necessitated by its wrongful conduct. Plaintiffs and Class Members have suffered long enough.

I. JURISDICTION AND VENUE

9. Jurisdiction exists pursuant to *Florida Statute* § 48.193(1)(a)(1), because Defendant operates, conducts, engages in, and carries on its business in this state.

10. Venue exists pursuant to *Florida Statutes* §§ 47.011, 47.041, and 47.051, because Plaintiff’s causes of action accrued in this County. Defendant conducts business in Broward County, Florida, and the events, acts, misrepresentations, and/or omissions giving rise to Plaintiff’s causes of action occurred in this County.

II. PARTIES

11. Plaintiff, K.B., is a resident of Broward County, Florida. Mibaso is a Florida corporation with its principle place of business in Broward County, Florida. Mibaso rendered acupuncture services to K.B. in Broward County, Florida. K.B. provided Mibaso written authorization to act on behalf of K.B., and NECA-IBEW accepted and otherwise acknowledged Mibaso as a representative and third-party beneficiary to act and collect health insurance benefits on behalf of K.B. in Broward County.

12. Defendant, NECA-IBEW is an Illinois corporation with its principle place of business listed as 2120 Hubbard Avenue, Decatur, IL 62526, and is therefore a “citizen” of the state of Illinois. Defendant lists a registered agent as Steven L. Myers, located at 2120 Hubbard Avenue, Decatur, IL 62526-2871. Defendant also owns and maintains a website, <https://www.neca-ibew.org/Welfare-Trust-Fund/>, which lists the Plaintiff’s insurance policy providing coverage for Acupuncture services.

13. Defendant and its employees, subsidiaries, affiliates, and other related entities, were, at all times relevant herein, agents, servants and employees of each other, and at all times herein mentioned, each was acting within the purpose and scope of said agency and employment. Whenever reference in this Complaint is made to any act or transaction of Defendant, such allegation shall be deemed to mean that the principals, officers, directors, employees, agents, and/or representatives of Defendant committed, knew of, performed, authorized, ratified and/or directed such act or transaction on behalf of Defendant, while actively engaged in the scope of their duties.

III. FACTUAL ALLEGATIONS

A. The Contract of Insurance that Defendant sold to K.B.

14. K.B. is covered by the employee-sponsored health insurance policy issued by Defendant. The Policy promises coverage for medically necessary care in exchange for the payment of premiums. In exchange for the benefits promised by the Policy, K.B. pays and paid a monthly premium.

15. The Policy defines medically necessary care to be a service or supply that is:
- Provided by or under the direction of a physician or other duly licensed health care practitioner who is authorized to provide and prescribe it;
 - Necessary in terms of generally accepted American medical standards;

- Consistent with the symptoms or diagnosis and treatment of a Sickness or Injury;
- Not provided solely for the convenience of the patient, physician, hospital, health care provider or facility;
- Appropriate, as defined by the Plan, given the patient's circumstances and conditions;
- Cost-efficient, as defined by the Plan, for the supply or level of service that can be safely provided to the patient; and
- Safe and effective for the Sickness or Injury for which it is used.

16. Acupuncture is a covered treatment under K.B.'s Policy and by any lawful standard of objective reasonableness, acupuncture is generally accepted as medically necessary and appropriate for the treatment of chronic pain. In fact, the plain language of the Policy itself acknowledges the medical necessity and appropriateness of acupuncture, subject to a 48-visit limit. Accordingly, K.B. was and is entitled to coverage for the acupuncture services rendered by Mibaso.

17. The Policy that Defendant sold to Class Members were uniform and standardized in all material respects that are relevant to Plaintiff's and Class Members' claims.

18. All Policies that Defendant sold to Class Members contained substantially similar definitions of "medical necessity," or contained definitions with immaterial differences. All Policies sold to Class Members promised to cover the cost of acupuncture treatment where such treatment satisfied the "medical necessity" definition set forth above, or the materially identical definitions in the other Policies.

19. Plaintiff and Class Members reasonably relied on Defendant's express and implied representations that they would be covered for medically-necessary services.

B. KB and Class Members are Diagnosed with Chronic Pain

20. K.B. and Class Members were all prescribed acupuncture therapy for the purpose of pain management. Medical providers prescribed acupuncture as a viable, non-drug related, non-invasive, treatment to treat chronic pain.

C. Acupuncture is a Common Treatment for Patients with Chronic Pain

21. Plaintiff's licensed and qualified Medical Doctor prescribed acupuncture as a treatment for K.B.'s chronic pain, as an alternative to powerful and addictive pain medication. Over prescribing of pain medication has led to the opioid crises plaguing nearly every community in our nation. Acupuncture comes is prescribed as a logical alternative to addictive drugs and surgery for treatment of chronic pain

22. Acupuncture has long been recognized as an effective treatment for chronic pain. In 2012, as study found acupuncture was "better than no acupuncture or simulated acupuncture for the treatment of four chronic pain conditions: (1) Back and Neck pain, (2) Osteoarthritis, (3) Chronic Headache, and (4) Shoulder Pain.⁶

23. Surveys have indicated that nearly 3.5 Million people annually used acupuncture to deal with chronic pain.⁷

24. Clearly Acupuncture is a reasonable treatment for Plaintiff and Class Members who do not desire the risks of surgery and powerful drugs.

D. Defendant Denies Plaintiff and Class Members Coverage for Acupuncture Coverage

25. K.B. was prescribed acupuncture by his licensed Medical Doctor to treat his chronic pain. Defendant does not deny that K.B. suffers from chronic pain.

6. <http://www.webmd.com/pain-management/features/acupuncture-pain-killer#1>

7. Id.

26. In May 2016, Mibaso's billing agent confirmed over the telephone that the prescribed and to-be rendered acupuncture services were covered benefits under K.B.'s Policy. The Defendant assured Mibaso's billing agent that acupuncture was covered.

27. Additionally, it explicitly states in the NECA-IBEW Welfare Trust Fund "Summary Description Plan" that "Acupuncture subject to a 48-visit limit," is a "Covered Medical Expense."⁸

28. In reliance upon Defendant's representations and Policy language, Mibaso provided covered acupuncture services to K.B in the amount of \$12,600.00, which is due and owed.

29. Despite providing the Defendant with all the required documentation, Defendant refused to pay Mibaso as contractually required by KB's plan.

30. Defendant's initial explanation for the denial of payment was that K.B. was being treated for alcoholism. However, Mibaso did not treat K.B. for alcoholism or submit bills to Defendant for alcoholism related treatment. Mibaso only treated K.B. and subsequently submitted bills for reimbursement only for treatment of K.B.'s chronic pain.

31. Plaintiff and Mibaso appealed the Defendant's initial denial of benefits, explaining that Defendant was mistaken about the nature of K.B.'s treatment, and that no bills were submitted for the treatment alcoholism. Rather, all the billing was for the treatment of chronic pain. Defendant, realizing its mistake, again denied the appeal, but this time changed the basis for its denial claiming that the acupuncture treatment was not covered because K.B. was: a) concurrently seeking behavior health treatment, and b) not simultaneously participating in a formal physical therapy program.

8. NECA-IBW Welfare Trust Fund 2013 Summary Plan Description, *Covered Medical Expenses 39*, available at <https://www.neca-ibew.org/Welfare-Trust-Fund/>

32. K.B. has satisfied all conditions precedent to be entitled to the benefits of K.B.'s Policy. K.B. and Mibaso have exhausted their appeal rights under the Policy with continued adverse determination. As a result, Defendant is in Breach of Contract and in Violation of ERISA for not providing the contractually owed benefits. The Policy specifically authorizes Plaintiff to initiate civil action in state court since his claim for benefits have been denied.

ERISA ALLEGATIONS

33. ERISA requires that all employee benefit plans establish and maintain reasonable claims procedures. Specifically, 29 C.F.R. section 2560.503- 1(b)(5) requires that “[t]he claims procedures contain administrative processes and safeguards designed to ensure and to verify that benefit claim determinations are made in accordance with governing plan documents and that, where appropriate, the plan provisions have been applied consistently with respect to similarly situated claimants.” 29 C.F.R. § 2560.5031(b)(5).

34. Moreover, ERISA only allows claims administrators to rely on internal rules or policies in construing the terms of an employee benefits plan if those rules or policies reasonably interpret the applicable plan.

35. By issuing coverage guidelines and making coverage determinations on behalf of ERISA-governed insurance plans, Defendant has acted, and is acting, as a plan administrator and its actions give rise to a fiduciary duty on behalf of the ERISA governed plans that it administers. As a fiduciary, Defendant is legally required to discharge its duties “solely in the interests of the participants and beneficiaries” and for the “exclusive purpose” of providing benefits to participants and their beneficiaries and paying reasonable expenses of administering the plan.

36. Defendant has an inherent conflict of interest in its administrative role because every claim it denies increases its profits

37. Defendant, as a plan administrator with discretionary authority to determine whether claimants are entitled to benefits under the insurance plan, has systematically disregarded

the medically necessary acupuncture treatment of K.B. and Class Members', and used internal self-serving after-the-fact clinical guidelines that are inconsistent with the plain language of subject Policy and prevailing medical standards.

38. Defendant's first excuse for denying K.B.'s benefits was that K.B. was being treated for Alcoholism. However, no acupuncture was billed for Alcoholism and in fact all billing submitted was specifically for the treatment of K.B.'s documented chronic pain. When Plaintiff appealed the denial of the claim and advised Defendant that its reason for denial was factually inaccurate, Defendant backtracked and provided a different, but nonetheless erroneous, excuse for their denial.

39. Defendant's second excuse involved a two-part explanation. First, Defendant claims that acupuncture was not medically necessary because K.B. was receiving acupuncture therapy while concurrently in a substance abuse treatment facility. Defendant's position that a patient is prohibited from receiving acupuncture therapy for pain management because they are also receiving behavioral health treatment, without any explanation, is in bad faith, illogical, defies reason, flies in the face of public policy, and is in clear contractual breach of the plain Policy language.

40. Second, Defendant claims that acupuncture is only "medical necessity" if it is prescribed in conjunction with a formal physical therapy preprogram. Defendant's invention of non-existent exclusions is not a reasonable claim procedure. Defendant cannot escape its contractual obligation to reap an unfair profit. This practice is wholly inconsistent with the terms of K.B. and Class Members' policies, and contravenes 29 C.F.R. section 2560.503- l(b)(5). Defendant's employment of fraudulent explanations is flatly inconsistent with the "broadly protective' purposes of ERISA" and would allow Defendant free reign to fabricate an explanation every time they feel the need to deprive a policy holder of their entitled benefits.

CLASS ALLEGATIONS

A. Class Definition

41. Plaintiff brings this class action individually, and on behalf of a putative class of similarly situated purchasers of the Products, and pursuant to *Florida Rules of Civil Procedure* 1.220(b)(1) and/or 1.220(b)(2), and in the alternative, 1.220(b)(3), seeks class certification of the claims and issues pleaded in this Complaint, on behalf of the Class defined as follows:

All participants or beneficiaries of an insurance plan governed by ERISA, for which NECA-IBEW Welfare Trust Fund, its affiliates, subsidiaries, agents, or entities, have, or have been delegated, the authority to make coverage decisions with respect to claims for Acupuncture treatment, who were denied coverage and/or payment for acupuncture treatment by Defendant because: (1) the participant or beneficiary was concurrently undergoing behavioral health treatment; or (2) the participant or beneficiary was not receiving acupuncture in conjunction with a formal physical therapy program.

42. Excluded from the Class are governmental entities, Defendant, any entity in which Defendant has a controlling interest, and Defendant's officers, directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries, and assigns. Also excluded from the Class is any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff.

43. Plaintiff reserves the right to modify or amend the definition of the proposed class before the Court determines whether class certification is appropriate.

Numerosity

44. The individual Class Members are so numerous that their individual joinder is impracticable. Defendant sells many thousands of health insurance policies in the state of Florida and throughout the country and, as a general business practice, has failed to comply with applicable law. Moreover, individual Class Members easily can be identified from Defendant's business

records, because Defendant knows (a) who the Insureds are, (b) which plans they are insured under, (c) what types of claims they have filed, and (d) how those claims were adjudicated.

45. On information and belief, the number of Class Members is in the thousands. The precise number will be determined through discovery, but they are too numerous to be consolidated in one complaint, and it is impractical for each to bring an individual action.

Commonality

46. There are questions of law and fact that are common to Plaintiff's and Class Members' claims.

47. Common questions of law and fact include, but are not limited to, the following:

- (a) Whether Defendant is categorically denying coverage for acupuncture treatment to Class Members who concurrently receiving behavior health treatment;
- (b) Whether Defendant is categorically denying coverage for acupuncture treatment to Class Members because they are not undergoing a formal physical therapy program;
- (c) Whether Defendant is acting and/or refusing to act on grounds generally applicable to Plaintiff and Class Members;
- (d) Whether Defendant's pattern and practice of denying coverage for acupuncture treatment for Plaintiff and Class Members constitutes a wrongful denial of plan benefits under ERISA;
- (e) Whether Defendant has breached its fiduciary duties under ERISA in the administration of Plaintiff's and Class Members' claims for plan benefits;
- (f) Whether creation of inherently deceptive and fraudulent coverage guidelines in service of a cost-avoidance scheme constitutes a breach of fiduciary duty;

(g) Whether Defendant's misrepresentations as to medical necessity and its failure to disclose a cost-avoidance scheme intended to disregard the Policies' definition of medical necessity, and other practices described above, violated Defendant's fiduciary duties to refrain from misrepresentations and make truthful disclosures to Plaintiff and Class Members;

(h) Whether Defendant is liable to Plaintiffs and Class Members for damages and injunctive relief from its ERISA violations;

48. The above-identified common questions predominate over questions, if any, that might affect only individual Class Members.

49. Defendant has subjected (and is subjecting) Plaintiff and Class Members to the same harm in the same manner. The conduct described above constitutes Defendant's standard business practice.

Typicality

50. Defendant's own records demonstrate that Plaintiffs are members of the Class. Plaintiff's claims are typical of the claims of Class Members because they are based on the same legal theories, arise from the similarity, uniformity, and common purpose of Defendant's unlawful conduct, and are not subject to any unique defenses. Members of the Class have sustained, and will continue to sustain, damages in the same manner as Plaintiff's as a result of Defendant's wrongful conduct.

51. Moreover, as to the Class Members, Defendant issued and administered Policies in which it made promises materially identical to those it made to K.B. — to cover medically necessary treatment—and engaged in materially identical conduct in wrongfully denying those claims. Thus, the promises, practices, and decisions that Defendant made with respect to K.B.'s

claim for acupuncture coverage is materially the same as those it made with regard to the Class Members' claims for acupuncture coverage.

Adequacy of Representation

52. Plaintiff is an adequate representative of the Class and will fairly and adequately protect the interests of its Members. Plaintiff is committed to the vigorous prosecution of this action, and has retained competent counsel who are experienced in litigation of this nature to represent him. There are no conflicts or antagonism between the interests of Plaintiff and unnamed Class Members.

53. To prosecute their case, Plaintiff has chosen the law firm of Eggnatz & Pascucci LLP, and is obligated to pay a fee for that representation. This firm is experienced in class action litigation and possesses the financial and legal resources to deal with the costs and legal issues inherent in this action.

Requirements of *Florida Rule of Civil Procedure 1.220(b)(3)*

54. Questions of law or fact common to Plaintiff's and Class Members' claims predominate over any questions of law or fact affecting only individual Class Members. All claims by Plaintiff and Class Members arise from Defendant's common course of unlawful conduct, in breach of the Policies and violation of ERISA. The predominating questions of law and fact include those set forth above in Paragraph 33.

55. Common issues predominate where, as here, liability can be determined on a class-wide basis, even if there might be the need for some individualized damages determinations. As a result, in determining whether common questions predominate, courts focus on the liability issue, and if the liability issue is common to the class, as it is in this case, common questions will be held to predominate over individual questions.

Superiority

56. A class action is superior to individual actions, in part because of the following, non-exhaustive list of factors:

- a. Individual joinder of all Class Members would impose extreme hardship and inconvenience on them, because they reside all across the nation;
- b. Individual claims by Class Members are impractical because the cost of pursuing an individual claim could exceed its value. As a result, individual Class Members have no interest in prosecuting and controlling separate actions;
- c. There are no known Class Members who are interested in individually controlling the prosecution of separate actions;
- d. The interests of justice will be served by resolving the common disputes of all Class Members in one forum;
- e. Judicial and party resources will be conserved by resolving the common disputes of all Class Members in one forum;
- f. Individual claims would not be cost effective or economically feasible to pursue through individual actions;
- g. The action is manageable as a class action.

H. Requirements of *Florida Rule of Civil Procedure 1.220(b)(2)*

57. The prosecution of separate actions by (or against) individual Class Members would create a risk of inconsistent or varying adjudications with respect to individual Class Members that would establish incompatible standards of conduct for Defendant and any other party opposing the Class.

58. Defendant has acted or failed to act in a manner generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to all Class Members.

COUNT I
Claim for Improper Denial of Benefits

59. Plaintiff and the Class Members re-allege paragraphs 1 through 58, as if fully set forth here.

60. This count is brought under 29 U.S.C. § 1132(a)(1)(B).

61. Plaintiff and Class Members are covered by insurance plans issued by Defendant. Under the terms and conditions of the insurance plans and applicable federal law, Defendant is required to cover and approve payment for treatment that is medically necessary. Such treatment indisputably includes treatment for acupuncture—a standard treatment used in healing chronic pain—which is medically necessary under any standard of objective reasonableness.

62. Defendant is the entity responsible for administering and making benefit determinations under Plaintiff's and Class Members' health insurance plans, and for developing internal practices and policies that are applied to such determinations. Specifically, Defendant, among other things, exercises discretionary authority or control over the management of the plans, exercises authority or control over management or disposition of the plans' assets, and has the authority to make decisions (and does make decisions) regarding claims for benefits and appeals thereof, including approving payment and writing checks for coverage.

63. Defendant has abused its discretion and wrongfully denied claims submitted by Plaintiff and Class Members, in furtherance of an unlawful cost-avoidance scheme that employed policies and practices that are inconsistent with the relevant terms of K.B.'s and Class Members' health insurance plans and ERISA.

64. Defendant's improper denials have caused damage to Plaintiff and Class Members in the form of uncovered and unreimbursed claims for acupuncture treatment.

65. Pursuant to 29 U.S.C. § 1132(a)(3), Plaintiff KB and Class Members have a right to injunctive relief and damages, together with attorneys' fees and costs.

WHEREFORE, Plaintiff, individually and on behalf of the putative Class, seeks actual damages, injunctive relief, equitable relief including declaratory relief, restitution, pre-and post-judgment interest, reimbursement of costs, attorneys' fees, and for any other relief that this Court deems just, appropriate, and proper

COUNT II
Claim for Other Appropriate Equitable Relief

66. Plaintiff and the Class Members re-allege paragraphs 1 through 58, as if fully set forth here.

67. This Count is brought under 29 U.S.C. § 1132(a)(3)(B), and is separate and distinct from the relief sought under Count I.

68. Specifically, this Count seeks to redress Defendant's breaches of fiduciary duties through its across-the-board, mechanical application of pretextual, inherently fraudulent coverage guidelines to elevate profits over the needs of plan Insureds. Relief under Count I will not make Plaintiff and the Class Members whole.

69. As the entity responsible for making benefit determinations under K.B.'s and Class Members' health insurance plans, and for developing internal practices and policies applied in making such determinations, Defendant is an ERISA fiduciary within the meaning of 29 U.S.C. §§ 1109(a) and 1002(21)(A). Specifically, Defendant, among other things, exercises discretionary authority or control over the management of the plans, exercises authority or control over management or disposition of the plans' assets, and has the authority to make decisions (and does

make decisions) regarding claims for benefits and appeals thereof, including approving payment and writing checks for coverage.

70. As an ERISA fiduciary, Defendant owed K.B. and Class Members numerous fiduciary duties, including the duty to make decisions in accordance with plan terms and ERISA requirements.

71. Notwithstanding its fiduciary obligations, Defendant developed and relied on an inherently fraudulent cost-avoidance scheme and pre-authorization “guidelines” that improperly restricted acupuncture coverage in contravention of Plaintiff and Class Members’ health insurance plan terms and ERISA requirements. In doing so, Defendant violated its fiduciary obligations. Plaintiff and Class Members have been harmed by Defendant’s breaches of fiduciary duty, because their claims have been subjected to inherently fraudulent and unlawful restrictions that are not part of the health insurance plans at issue, which violates ERISA.

72. Additionally, by engaging in this misconduct, Defendant has been unjustly enriched insofar as it has reaped (and kept) millions of dollars in premiums that it never honored by providing contractually-promised coverage for medically-necessary treatment.

73. Pursuant to 29 U.S.C. § 1132(a)(3)(B), Plaintiff KB and the Class Members have a right to restitution, disgorgement, surcharge and other appropriate equitable relief, together with attorneys’ fees and costs.

WHEREFORE, Plaintiff, individually and on behalf of the putative Class, seeks actual damages, injunctive relief, equitable relief including declaratory relief, restitution, pre and post judgment interest, reimbursement of costs, attorneys’ fees, and for any other relief that this Court deems just, appropriate, and proper.

COUNT III
Breach of Contract

73. Plaintiff and the Class Members re-allege paragraphs 1 through 58, as if fully set forth here.

74. K.B. and other Class Members entered into a contract with Defendant to provide health care services.

75. Plaintiff and other members of the class, were the intended beneficiaries of such contract.

76. K.B. agreed to the terms and conditions to the contract and performed his end of the bargain by timely paying his premiums.

77. Similarly, at various times during the class period, numerous other class members entered into health care services contract with Defendant which by their terms are to provide almost identical services in an almost identical cost scheme.

78. Similarly, all of the other class members agreed to the terms and conditions to their contracts and performed their end of the bargain by timely paying their premiums.

79. Defendant failed to satisfy its obligations under the contract in that it failed to provide coverage or reimbursement for payment for covered acupuncture services.

80. As a result, Defendant has breached its contract with Plaintiff and Class Members, and has been damaged in an amount equal to the unreimbursed but otherwise covered acupuncture services, the actual costs paid by beneficiaries or participants for covered acupuncture services, and/or market value for acupuncture services that should have otherwise been covered.

81. In addition, Defendants should be ordered to perform its contractual obligations going forward.

WHEREFORE, Plaintiff, individually and on behalf of the putative Class, seeks actual damages, injunctive relief, equitable relief including declaratory relief, restitution, pre and post

judgment interest, reimbursement of costs, attorneys' fees, and for any other relief that this Court deems just, appropriate, and proper. .

COUNT IV
Unjust Enrichment

82. Plaintiff and the Class Members re-allege paragraphs 1 through 58, as if fully set forth here.

83. K.B. and the other members of the proposed Class conferred a benefit on Defendant by purchasing insurance and paying premiums.

84. Defendant has further benefited monetarily from the improper conduct by failing to provide the full benefit of benefits to which K.B. and the other members of the class are entitled thus reducing its cost.

85. Defendant benefit came at the expense and detriment of Plaintiff and the other Class members.

86. Defendant has thus unjustly enriched itself in retaining the premiums derived from the deceptive insurance contracts.

87. Plaintiff and the other Class Members were injured as a direct and proximate result of Defendant deceptive and unfair activities.

88. Because Defendant's retention of the non-gratuitous benefit conferred on it by K.B. and the Class Members is unjust and inequitable, Defendant must pay restitution to Plaintiff's assignor and the other members of the proposed class for its unjust enrichment, as ordered by the Court.

89. Equity and good conscience require that Defendant to disgorge its profits made thereby, and Plaintiff and the other members of the class further seek restitution on this basis.

WHEREFORE, Plaintiff, individually and on behalf of the putative Class, seeks actual damages, injunctive relief, equitable relief including declaratory relief, restitution, pre and post judgment interest, reimbursement of costs, attorneys' fees, and for any other relief that this Court deems just, appropriate, and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff on its own behalf and on behalf of all similarly situated Class Members (as defined above), demand judgment against Defendant as follows:

- a. For an order certifying the proposed class, appointing Plaintiff and its counsel to represent the proposed class and notice to the proposed classes to be paid by Defendants;
- b. Declaring that Defendant's cost-avoidance scheme and fraudulent coverage guidelines are contrary to, and violate, the terms of ERISA;
- c. For injunctive relief requiring Defendant to cease and desist from engaging in the unlawful, unfair, and/or deceptive practices alleged in the Complaint
- d. Ordering Defendant to recalculate and issue unpaid benefits to Plaintiff and Class Members, whose claims were denied as a result of Defendant's unlawful conduct;
- e. For injunctive relief requiring Defendant to cease and desist from engaging in the unlawful, unfair, and/or deceptive practices alleged in the Complaint;
- f. Awarding other appropriate relief to Plaintiff and Class Members (under 29 U.S.C. § 1132(a)(3)), including (a) enjoining Defendant from using hidden criteria to deny coverage of medically-necessary acupuncture treatment in furtherance of an unlawful cost avoidance scheme, (b) restitution of premiums, (c) disgorgement of profits, and (c) a surcharge remedy.
- g. Awarding Plaintiff and Class Members their costs and disbursements, and reasonable allowances for fees and reimbursement of expenses, including reasonable attorney and expert fees. pursuant to 29 U.S.C. § 1132(g), in amounts to be determined by the Court;
- h. For damages suffered by Plaintiff and the other members of the proposed class;
- i. For Plaintiff's reasonable attorneys' fees and costs incurred, as permitted by law;
- j. For pre-judgment and post-judgment interest at the maximum allowable rate on any amounts awarded; and

- k. For such other and further relief that this Court deems just and proper under equity or law, including the award of punitive damages.

JURY DEMAND

Plaintiff demands a trial by jury on all counts so triable.

DATED: 1/16/2018

Respectfully Submitted,

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This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Lawsuit: Insurance Plan Refuses to Pay for Pre-Approved Acupuncture Treatments](#)
