UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

In its Response to BCBSM's motion to dismiss, Tiara Yachts fails to explain why it did not follow the parties' clear contractual provisions governing this dispute. Ignoring the fact that the parties' Administrative Services Contracts (ASCs) specify a clear and time-limited process through which Tiara Yachts could dispute the amounts that BCBSM paid to providers on participants' behalf, Tiara Yachts contends that it is entitled to bring this ERISA suit based upon (1) *untested allegations* from another lawsuit about a different customer, and (2) allegations related to clinical editing and the Shared Savings Program that do not implicate ERISA in any event. According to Tiara Yachts, any "breach of contract claims are preempted" by ERISA. ECF No. 16, PageID.184, 195. Tiara Yachts' position is nonsensical for the simple reason that preemption does not come into play where ERISA is not implicated in the first place—for each of the reasons discussed below.

ARGUMENT

I. ERISA's Remedial Scheme Does Not Authorize the Relief Tiara Yachts Seeks.

A. *Amara* Does Not Support Relief to Tiara Yachts Under Section 1132(a)(3).

Tiara Yachts contends that BCBSM paid claims to providers in an amount greater than what the parties' ASC provided for, and Tiara Yachts now asks the Court to order BCBSM to pay monetary compensation to Tiara Yachts that would give it the benefit of its alleged contractual bargain. What Tiara Yachts seeks is basic contract damages. *See* Restatement (Second) of Contracts § 347 (1981) ("Contract damages are . . . intended to give [the plaintiff] the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed."). A suit for damages is "quintessentially an action at law" that may not be pursued under Section 1132(a)(3), which authorizes only equitable remedies. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534

U.S. 204, 210 (2002) (internal quotation marks and citations omitted).

Nothing in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), or the other cases Tiara Yachts cites, supports its requested remedy here. In *Amara*, CIGNA had modified the terms of its employees' retirement plan in a manner that caused some beneficiaries to receive reduced benefits, but saved CIGNA $10 million annually. 563 U.S. at 426–29. The district court found that CIGNA's change in plan terms was a breach of fiduciary duty, and ordered CIGNA to: (1) reform the terms of the plan, and (2) pay out benefits according to the terms of the plan as reformed. In dicta,[1] the Supreme Court stated that these two forms of relief could be consistent with traditional equitable relief available under Section 1132(a)(3). In particular, the order requiring CIGNA to pay beneficiaries under the terms of the reformed plan was consistent with the equitable remedy of surcharge, a remedy against a fiduciary and in favor of a beneficiary that is designed to make the beneficiary whole and prevent unjust enrichment of the fiduciary. *Id.* at 442.

Amara has no relevance here because the remedy Tiara Yachts seeks is plainly not surcharge as described in *Amara*'s dicta. First, surcharge is a remedy paid by a trustee to a beneficiary—not a remedy paid by one fiduciary to another, as Tiara Yachts seeks here. *See* Restatement (Third) of Trusts § 95 (2012) (cited in *Amara*, 563 U.S. at 442). Unsurprisingly, therefore, every case Tiara Yachts cites as allowing a surcharge remedy against a fiduciary was brought by a plan beneficiary—not by an alleged co-fiduciary like Tiara Yachts. *See Amara*, 563 U.S. at 442; *Teisman v. United of Omaha Life Ins. Co.*, 908 F. Supp. 2d 875, 879-80 (W.D. Mich. 2012); *Van Loo v. Cajun Operating Co.*, 64 F. Supp. 3d 1007, 1026 (E.D. Mich. 2014).[2]

[1] *See Rochow v. Life Ins. Co. of N. Am.*, 780 F.3d 364, 375 n.4 (6th Cir. 2015) ("The statements made by the Supreme Court in *Amara* regarding the equitable remedies available to courts under § 502(a)(3) are merely dicta.").

[2] In *In re Iron Workers Local 25 Pension Fund*, 2011 WL 1256657, at *16 (E.D. Mich. Mar. 31,

Second, the beneficiaries of Tiara Yachts' Plan would not be made whole by the relief Tiara Yachts seeks here. The money would go to Tiara Yachts, not Plan beneficiaries, and in any event the beneficiaries are already "whole": according to the Complaint, they obtained the health care coverage they were entitled to when BCBSM paid their providers. *Compare Guyan Int'l, Inc. v. Pro. Benefits Adm'rs, Inc.*, 689 F.3d 793, 800 (6th Cir. 2012) (alleged breach of fiduciary duty harmed "Plan participants, some of whom have been refused medical care and received collection notices, all because [the defendant] diverted Plan funds for its own use rather than pay the claims as it promised"). Here, it is only Tiara Yachts—which contracted with BCBSM—that claims to be injured because BCBSM allegedly did not perform its contractual obligations. *See* ECF No. 1, PageID.3, ¶¶ 18–20. And third, unlike *Amara*, BCBSM was not unjustly enriched when it made allegedly excessive payments to providers. Instead, as the Complaint makes clear, these funds were *paid out* to providers, and not retained by BCBSM. *See* ECF No. 12, PageID.117 (citing ECF No. 1, PageID.7, ¶ 50). Section 1132(a)(3) does not support this lawsuit.

B. Tiara Yachts May Not Obtain a Pay-Out Under Section 1132(a)(2).

Sections 1132(a)(2) and 1109(a) on their face authorize relief only "to such plan" for "losses to the plan." 29 U.S.C. § 1109(a). Tiara Yachts' argument that this Court should award relief to *it*—the employer, not the Plan—based on *its* losses ignores binding Sixth Circuit precedent.

First, Tiara Yachts argues that the Court may order relief to it rather than the Plan because "ERISA does not even empower the Plan itself to bring a civil action." ECF No. 16, PageID.191. Tiara Yachts cites one out-of-Circuit case for this assertion, *Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 983 (9th Cir. 1999). *Id.* But Tiara Yachts fails to

2011), the beneficiary plaintiffs sought equitable restitution of a specific res held in trust—not surcharge.

inform the Court that the Ninth Circuit in *Nor-Cal Plumbing expressly departed from* the Sixth Circuit. 185 F.3d at 983 ("The [plaintiffs] urge and adopt the Sixth Circuit's approach to suits brought by plans under ERISA . . . . [H]owever, we are not free to follow the Sixth Circuit and we decline to do so."). Although Tiara Yachts fails to cite it, the Sixth Circuit has squarely held that a "plan, as a party, . . . comes under the ERISA definition of a 'fiduciary'" under Section 1132 and can bring a civil action on its own behalf. *Saramar Aluminum Co. v. Pension Plan for Emps. of Aluminum Indus. & Allied Indus. of Youngstown Ohio Metro. Area*, 782 F.2d 577, 581 (6th Cir. 1986).

Second, Tiara Yachts argues that two cases—*Borroughs Corp. v. BCBSM*, 2012 WL 3887438 (E.D. Mich. Sept. 7, 2012), and *Guyan*, 689 F.3d 793—allow an employer to obtain relief under Sections 1132(a)(2) and 1109(a). ECF No. 16, PageID.192. Not so.

In *Borroughs*, the court held that an employer could pursue suit under Section 1132(a)(2) where the employer expressly stipulated that "[a]ny recovery [would] be credited by BCBSM against Plaintiffs' future claims or . . . held in constructive trust for the benefit of the Plaintiff Plans." *Borroughs*, 2012 WL 3887438, at *10. Based upon this language, the court held that "[t]his [stipulation] is sufficient under *Guyan* to demonstrate that Plaintiffs seek relief on behalf of the plans." *Id.* Similarly, in *Guyan*, the court held that an employer may sue for relief under Section 1332(a)(2) only if the complaint "demonstrate[s] that plaintiffs' actions seek recovery on behalf of [the Plan]." *Guyan*, 689 F.3d at 800. The *Guyan* court held this requirement of Sections 1332(a)(2) and 1109(a) satisfied because the complaint specifically alleged that "*the Plan* was damaged as a result of [the defendant's] conduct," that the defendant owed "fiduciary duties toward *the Plan*," and that "*the Plan* [is] . . . entitled to money damages." *Id.* at 801 (emphasis added).

Here, Tiara Yachts' Complaint explicitly seeks relief directed to Tiara Yachts—and not the Plan. ECF No. 12, PageID.119–120 (collecting relevant allegations). Moreover, when faced with BCBSM's motion to dismiss, Tiara Yachts did not amend the Complaint to seek relief directed to the Plan, nor did it stipulate that any relief would be held in trust for its Plan. Instead, Tiara Yachts' Response maintains that relief should be directed to it—an outcome barred by the text of Section 1109(a) and the cases applying it. ECF No. 12, PageID.118–120 (collecting authorities).

II. Tiara Yachts' Allegations Regarding Claims Processing Errors Fail to State a Claim.

A. Tiara Yachts Does Not Allege Facts to Establish BCBSM Was a Fiduciary With Regard to Clinical Editing.

Tiara Yachts has failed to allege facts establishing that BCBSM acts as a fiduciary with regard to clinical editing.[3] Tiara Yachts asks the Court to excuse it from this obligation because, it says, the Sixth Circuit already has "established that BCBSM functions as an ERISA fiduciary in its administration of self-funded plans." ECF No. 16, PageID.198 (citing *Hi-Lex Controls, Inc. v. BCBSM*, 751 F.3d 740, 742 (6th Cir. 2014) and *Pipefitters Loc. 636 Ins. Fund v. BCBSM*, 722 F.3d 861, 867 (6th Cir. 2013)). But the question is whether BCBSM is a fiduciary *for the specific act at issue*. *DeLuca v. BCBSM*, 628 F.3d 743, 747 (6th Cir. 2010) ("In determining liability for an alleged breach of fiduciary duty in an ERISA case, the courts '*must examine the conduct at issue.*'") (emphasis added); *see also Pegram v. Herdrich*, 530 U.S. 211, 226 (2000) ("In every case charging breach of ERISA fiduciary duty, . . . the threshold question is . . . whether that

[3] Tiara Yachts takes issue with BCBSM's use of the phrase "clinical editing." ECF No. 16, PageID.197. As explained in BCBSM's motion to dismiss, "clinical editing" is a commonly used term for the "claims processing edit[ing]" that is described in Tiara Yachts' Complaint. ECF No. 1, PageID.20, ¶ 108(h); *see also*, *e.g.*, ECF No. 1-7, PageID.65 (exhibit to Complaint using the term "clinical editing"); ECF No. 1-6, PageID.54 ("clinical review").

person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint."). Thus, whether BCBSM was held to be a fiduciary for *other acts* in plan administration is immaterial.

When it comes to its actual allegations regarding BCBSM's clinical editing requirements, Tiara Yachts' assertion that BCBSM is a fiduciary is contrary to Sixth Circuit case law holding that BCBSM does not act as a fiduciary when it sets systemwide requirements for providers. The focus of Tiara Yachts' clinical editing claim is the form in which BCBSM requires providers to submit their claims data. *See, e.g.*, ECF No. 1, PageID.15-16, ¶¶ 102–108. Specifically, Tiara Yachts alleges that, *across the NASCO claims processing system*, BCBSM improperly allows providers to use medical coding documentation that is, in Tiara Yachts' judgment, faulty. For example, according to Tiara Yachts, BCBSM pays claims when a provider lists two separate codes when Tiara Yachts says only one should have been used (*id.*, PageID.15, ¶ 104), or when the code provided exceeds a limit Tiara Yachts says should have been set for a date of service (*id.*, PageID.16, ¶ 105). In short, Tiara Yachts alleges that BCBSM—when acting as a middle man between providers and plans—engaged in a systemwide practice of "allow[ing] and pay[ing] claims" where providers used a form of coding that Tiara Yachts alleges is inappropriate. *Id.*, PageID.16, ¶¶ 105–107.

But the Sixth Circuit has held BCBSM does *not* act as a fiduciary when it establishes systemwide provider arrangements. In *DeLuca*, the Sixth Circuit held that "BCBSM [did] not act as a fiduciary when negotiating system-wide payment schedules for the various levels of its health insurance coverage." 628 F.3d at 744, 747; *see also* No. 12, PageID.122-123. The court explained that "those business dealings were not directly associated with the benefits plan at issue . . . but were generally applicable to a broad range of health-care consumers." *DeLuca*, 628 F.3d at 747.

Thus, even though the system-wide payment schedules BCBSM and providers agreed to would "ha[ve] an effect on an ERISA plan," these generally applicable policies would not "constitute[] management or administration of *the plan*." *Id.* (quoting *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 718 (6th Cir. 2000)) (emphasis in original) (internal quotation marks omitted).

The same is true of BCBSM's alleged clinical editing policies at issue here. Just like the *systemwide* provider payment schedules at issue in *DeLuca*, Tiara Yachts challenges the *systemwide* claims submission requirements BCBSM imposes on providers (such as whether providers must unbundle codes or submit no more than a maximum number of units of service in a day to obtain payment on their claims, ECF No. 1, PageID.15–16, ¶¶ 104–105). Indeed, Tiara Yachts is explicit that it is *not* challenging specific claims processed for *its* Plan, but instead the "claims processing system" that BCBSM allegedly uses for "all non-auto NASCO customers." *Id.*, PageID.15, ¶ 101; *see also* ECF No. 16, PageID.202 (arguing that "customers' claims were processed by BCBSM using the same system").

Tiara Yachts' tactical decision to argue breach of fiduciary duty on a systemwide basis, rather than with respect to alleged actions BCBSM took in connection with its Plan specifically, means that the Complaint fails under *DeLuca*. Further, it distinguishes this case from the authority Tiara Yachts points to. For instance, in *Little River Band*, the plaintiff did not allege that BCBSM's systemwide payment arrangements were improper, but that BCBSM made improper claims decisions specific to Little River Band's plan. *Little River Band v. BCBSM*, 183 F. Supp. 3d 835, 838 (E.D. Mich. 2016) (outlining the plaintiff's allegations that BCBSM failed "to pay Medicare-participating hospitals at rates no higher than those allowed by Medicare for services rendered to members of the Band covered under the plan"); *see also Hillman v. Atonne Grp., LLC*, 2021 WL 5546708, at *1-2 (W.D. Mich. Mar. 5, 2021) (plaintiff's allegation related

to a single denied claim for payment for breast reduction surgery); *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 777 F. Supp. 2d 869, 875, 885 (E.D. Pa. 2011) (plaintiff's allegation related to a specific and identifiable "death benefit claim"). Because Tiara Yachts takes issue solely with systemwide business decisions made regarding claims submission requirements, it has failed to plead that BCBSM acted as a fiduciary in connection with this claim.

B. Tiara Yachts Does Not Allege Sufficient Facts to Establish Breach of Fiduciary Duty.

Tiara Yachts also fails to allege facts establishing that BCBSM breached any fiduciary duty through the clinical editing actions alleged in the Complaint. Most obviously, Tiara Yachts has not identified any actual improperly paid claims *in connection with its Plan.* Instead, Tiara Yachts' Response references a supposedly "exhaustive expert analysis" of a *different* customer's claims, and states that *if Tiara Yachts reviewed its own claims data*, it expects to find similar results. ECF No. 16, PageID.201. Tiara Yachts' Complaint fails at the outset by not identifying any actions BCBSM took specific to its Plan.

Moreover, Tiara Yachts has failed to allege facts establishing that the clinical editing practices it says BCBSM failed to follow are mandated by ERISA. To state a claim for breach of fiduciary duty, Tiara Yachts must allege facts regarding (1) what a prudent fiduciary duty would do, and (2) how BCBSM's alleged actions fell short of that standard. *See, e.g.*, *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018). But the Complaint does not allege facts as to either how a prudent fiduciary would review claims or how BCBSM's actions departed from that (unidentified) standard. Unable to point to facts regarding the overall standard of prudence, Tiara Yachts argues that BCBSM has represented that its claims processing is "industry-leading" and "average[s] above 99% accuracy," ECF No. 16, PageID.203–204—but this commentary is entirely beside the point, because none of the claims processing decisions Tiara Yachts takes

issue with contradict those representations in any way.

For these reasons, the Complaint is dramatically different from the case law on which Tiara Yachts relies. For instance, Tiara Yachts cites *Garcia* to argue that it can survive a motion to dismiss with only vague allegations because "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." ECF No. 16, PageID.202–203 (quoting *Garcia v. Alticor, Inc.*, 2021 WL 5537520, at *4 (W.D. Mich. Aug. 9, 2021)). But the *Garcia* plaintiff clearly stated the standard he alleged defendants did not meet, going as far as to "support each of [his] arguments with tables and charts comparing various investment options" to the ones actually selected by the defendants. 2021 WL 5537520, at *4.

Two other cases Tiara Yachts cites—*Group 1 Auto, Inc. v. Aetna Life Ins. Co.*, 2020 WL 8299592 (S.D. Tex. Nov. 9, 2020) and *Guardsmark, Inc. v. BCBST*, 169 F. Supp. 2d 794 (W.D. Tenn. 2001)—further demonstrate the problem with the vague assertions of impropriety Tiara Yachts makes. In *Group 1 Auto*, the court denied a motion to dismiss plaintiff's ERISA claims because plaintiff pleaded "well recognized indicia of fraud, waste or abuse," that "one or more of these characteristics *appeared in many claims Aetna paid* on [the plan's] behalf," and that "the wrongful payment of these claims caused substantial financial harm to Group 1's benefit plan." *Grp. 1 Auto*, 2020 WL 8299592, at *1, 3-4 (emphasis added). *Guardsmark* is even farther afield. That case centered upon whether BCBST, for instance, lost claims, failed to maintain accurate records of lifetime policy limits, or improperly withheld certain prescription drug rebates. *Guardsmark*, 169 F. Supp. 2d at 797. No such allegations of actual impropriety exist here. The remaining cases cited by Tiara Yachts are the same. *See Grand Traverse Band of Ottawa & Chippewa Indians v. BCBSM*, 2017 WL 3116262, *1-2 (E.D. Mich. July 21, 2017) (detailing

how plaintiffs specifically alleged that, after conducting an audit, BCBSM breached its fiduciary duties because it was not satisfying the federal standard for paying close to the "Medicare . . . rates of payment" for the plan's claims); *Sherrill v. Fed.-Mogul Corp. Ret. Programs Comm.*, 413 F. Supp. 2d 842, 849-55 (E.D. Mich. 2006) (detailing how plaintiff's complaint contained over 20 specific factual allegations and a day-by-day timeline of how a prudent fiduciary would have noticed "serious financial problems" in the asbestos industry after a recent United States Supreme Court decision).

In sum, no case supports Tiara Yachts' assertions that the Court should permit a system-wide series of complaints premised on vague allegations that BCBSM failed to live up to some entirely unstated standard with respect to clinical editing. Its fiduciary duty claims premised on allegedly improper clinical editing standards should be dismissed.

III. Tiara Yachts' Allegations Regarding the Shared Savings Program Do Not State a Claim.

A. The Complaint Does Not Satisfy Rule 9(b) or Rule 8.

Tiara Yachts says Rule 9(b) "will not be imposed where the claim is for a breach of fiduciary duty under ERISA." ECF No. 16, PageID.208 (internal quotation marks and citation omitted). The Sixth Circuit has said otherwise. *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 551 (6th Cir. 2012) (Rule 9(b) applied where "the primary theory of liability contained in plaintiffs' fiduciary-duty claims does sound in fraud"). Here, the Complaint alleges that BCBSM knowingly paid inflated claims so that it could steal its customers' money at the back end, misrepresenting its actions as "saving" the customer's money. ECF No. 1, PageID.11, ¶¶ 83-84. That sounds in fraud. *See, e.g.*, *Aquilina v. Certain Underwriters at Lloyd's Syndicate #2003*, 406 F. Supp. 3d 884, 900 (D. Haw. 2019) (Rule 9(b) applied to claim regarding a "deceptive scheme" whereby insurance underwriters steered plaintiffs into purchasing poor policies in order

to increase revenue); *Herrington v. Household Int'l, Inc.*, 2004 WL 719355, at *7 (N.D. Ill. Mar. 31, 2004) (Rule 9(b) applied to ERISA claim that defendants made "intentional misrepresentations" in order to increase their compensation).

Tiara Yachts is also wrong to argue that the "same" Rule 9(b) argument was rejected in *Comau LLC v. BCBSM*, 2020 WL 7024683, at *5 (E.D. Mich. Nov. 30, 2020). ECF No. 16, PageID.208. *Comau* did not involve the Shared Savings Program. Comau claimed that BCBSM allegedly failed to root out inflated claims—but there was no allegation that it did so as part of a knowing scheme to increase its own compensation by falsely claiming to save money for its customers.

Tiara Yachts' recitation of the "who, what, where, when, how" is grossly inadequate. ECF No. 16, PageID.208. Missing from Tiara Yachts' explanation is any identification of BCBSM's specific misrepresentations—that is, what claims BCBSM knowingly improperly paid and later "recovered"—much less who participated in the supposed misrepresentations, when, where, or how. Tiara Yachts' failure to identify any knowingly inflated payments that were recovered on the back end fails even to satisfy Rule 8.

B. Tiara Yachts Fails to Allege Facts Establishing That BCBSM Acted as a Fiduciary in Retaining Expressly Disclosed Compensation.

BCBSM did not act as a fiduciary in retaining fixed, non-discretionary compensation under the Shared Savings Program. As the Sixth Circuit has held, where a contract term "confers on one party the unilateral right to retain funds as compensation for services rendered with respect to an ERISA plan, that party's adherence to the term does not give rise to ERISA fiduciary status unless the term authorizes the party to exercise discretion with respect to that right." *Seaway Food Town, Inc. v. Med. Mut. of Ohio*, 347 F.3d 610, 619 (6th Cir. 2003). Tiara Yachts' and BCBSM's contract afforded BCBSM no discretion either to alter the percentage

retained under the Program (30%) or to choose which recovered costs the percentage would apply to. ECF No. 12-4, PageID.158; ECF No. 12-5, PageID.161.

Tiara Yachts is thus wrong to liken the Shared Savings Program to the fees at issue in *Hi-Lex* and *Pipefitters.* ECF No. 16, PageID.210. *Hi-Lex* turned on the fact that BCBSM had "flexibility to determine how and when access fees were charged," 751 F.3d at 744, and the *Pipefitters* court found "crucial[]" to its decision the fact that the ASC "did not fix the rate that [BCBSM] charged each customer," 722 F.3d at 867. And in both *Hi-Lex* and *Pipefitters*, the Sixth Circuit emphasized that the customer was not aware of the fees in question, *Hi-Lex*, 751 F.3d at 743-44; *Pipefitters*, 722 F.3d at 866, whereas the Shared Savings Program was clearly and expressly disclosed, and Tiara Yachts had the right to opt out.

Tiara Yachts is also wrong to contend that BCBSM had discretion with respect to its compensation under the Shared Savings Program because it supposedly had "unilateral control" of the amounts recovered. ECF No. 16, PageID.211. The amounts recovered were controlled in part by independent third-party vendors, as well as providers from whom payments were clawed back. ECF No. 12, PageID.131–132. The Eighth Circuit rejected a factually similar claim in *Central Valley Ag Cooperative v. Leonard*, 986 F.3d 1082 (8th Cir. 2021). There, the plaintiff employer sued two claims processors for allegedly violating ERISA by increasing their own compensation. *Id.* at 1085. Under the parties' contract, the claims processors were paid 30% of the "savings" achieved when the claims processors recommended that the plan pay less than the full amount billed and the plan followed the recommendation. *Id.* The plaintiff contended that the defendants could "increase their compensation" by "increas[ing] the number of claims" they reviewed and recommended low payments on. *Id.* at 1087. But the Eighth Circuit disagreed, holding that the claims processors did not unilaterally control "what portion of each medical bill

was paid." *Id.* at 1087–88. Precisely the same is true here: BCBSM does not exercise unilateral control of the amounts recovered through the Shared Savings Program, and therefore does not determine its own compensation.

IV. Tiara Yachts' Claims Are Time-Barred.

Tiara Yachts does not dispute that the only information it needed to have actual knowledge of the purported breaches was the amount that BCBSM paid on claims in connection with its Plan. Moreover, the documents that Tiara Yachts attached to its own Complaint state that Tiara Yachts received this information monthly, and Tiara Yachts' ability to exercise its time-limited right to dispute any claims' payments required it to timely review this information. ECF No. 12, PageID.133. This is sufficient to demonstrate that Tiara Yachts had actual knowledge of the purported breaches more than three years before suit was filed—or at the very least that Tiara Yachts' claims are untimely with respect to claims paid prior to July 1, 2016 under ERISA's six-year statute of repose. *Id.*, PageID.133–134.

Tiara Yachts' arguments under the fraud and concealment exception to ERISA's timeliness requirements miss the mark. Tiara Yachts chose not to exercise *any* of its contractual rights allowing it to acquire knowledge about its claims processing. Tiara Yachts' decision to ignore the parties' contract, file an ERISA civil suit years later, and declare that the claims information was "concealed"—without any factual allegations supporting such a claim—is not enough to establish fraud and concealment. *See, e.g.*, *Grand Traverse Band of Ottawa & Chippewa Indians v. BCBSM*, 2017 WL 6594220, at *3 (E.D. Mich. Dec. 26, 2017) (rejecting application of fraud and concealment exception because plaintiffs were not diligent in auditing their agreement with BCBSM).

CONCLUSION

The Complaint should be dismissed with prejudice.

Dated: October 6, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to L. Civ. R. 7.2(b)(i), I hereby certify that this document complies with L. Civ. R. 7.2(b)(ii) because this document, generated using Microsoft Word 2010, contains 4,283 words.

/s/ Tacy F. Flint
Tacy F. Flint