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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

TIARA YACHTS, INC.,

Plaintiff, No. 1:22cv603

vs.

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant.

Before:

THE HONORABLE ROBERT J. JONKER  
U.S. District Judge  
Grand Rapids, Michigan  
Tuesday, November 15, 2022  
Oral Argument Proceedings

APPEARANCES:

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On behalf of the Defendant.

REPORTED BY: MR. PAUL G. BRANDELL, CSR-4552, RPR, CRR

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11/15/2022

(Proceedings, 2:59 p.m.)

LAW CLERK: The United States District Court for the Western District of Michigan is now in session. The Honorable Robert J. Jonker, United States District Judge, presiding.

THE COURT: All right. We're here on the case of Tiara Yachts against Blue Cross/Blue Shield, 1:22cv603, and we have oral argument set today on the Defendant's motion to dismiss. Let's start with appearances and go from there.

MR. RYNDERS: Good afternoon, Your Honor. Perrin Rynders on behalf of the Plaintiff from Varnum, and I am here with my colleague, Chloe Konwinski, also from Varnum.

MS. FLINT: Good afternoon, Your Honor. Tacy Flint from Sidley Austin on behalf of Blue Cross Blue Shield. Also here from my office is my co-counsel, Rebecca O'Reilly, of Bodman, and in-house counsel, Michelle Heikka, from Blue Cross Blue Shield of Michigan.

THE COURT: All right. Great. Thanks and welcome. So we had at least a limited discussion of some of the issues back at the Rule 16 and decided at that point that we'd wait for a preliminary briefing, have a hearing, which is why we are here today, and really what I want to do is give both sides a chance to focus me and encapsulate the key issues you see from each side. You have already done that in the briefing. I don't know how much more I'll learn today because your briefing

1 definitely on both sides has focused the issues, but I do want  
2 to give you a chance to do that.

3 Coming in I still have the sense, especially with the  
4 Count 1 claims on the flip logic, and what I would call claims  
5 processing issues, that this seems a lot more like a contract  
6 dispute than an ERISA fiduciary duty dispute. It's a little  
7 less clear to me on the -- excuse me, on the shared savings  
8 program. But for both sides I'll tell you that, and I haven't  
9 made any final decisions and don't plan to make any final  
10 decisions today, but at least you'll know where I am coming in.  
11 And why don't -- sorry about all the coughing. I had animal  
12 crackers for lunch just before coming out here and I shouldn't  
13 have done that obviously.

14 But why don't we go to the moving party first, go over  
15 to Mr. Rynders for his response or Ms. Cunningham, whoever is  
16 going to argue, and get a little rebuttal, and I think in the  
17 course of going through 20 to 30 minutes a side we'll get  
18 through everything that you all need to tell me and hopefully  
19 will focus my final decisions. And if I recall correctly, I  
20 promised you I'd decide this before we delve deeply into the  
21 case. So if I go with the Defense you can go up to the court  
22 of appeals or wherever you need to go next, and if I go with  
23 Mr. Rynders' position, you can all get into the discovery you  
24 need to do. So why don't we start and I'll go. Is it  
25 Ms. Flint?

1 MS. FLINT: Yes. Thank you, Your Honor. Flint like  
2 the city.

3 Thanks for that introduction.

4 Let me start with the claims -- processing claim in  
5 Count 1. Certainly I agree that this is primarily a contract  
6 claim. The contract is very explicit in creating a mechanism  
7 for disputing claims, payments for disputing how claims were  
8 processed, but I want to focus on just a couple of points that  
9 I think really make clear that these cannot be an ERISA  
10 fiduciary duty claim.

11 So first of all, ERISA just doesn't support this kind  
12 of relief to an entity like Tiara Yachts. So there are two  
13 possible remedy provisions at issue. One is § 1132(a)(3),  
14 which provides for appropriate equitable relief for a breach of  
15 ERISA fiduciary duty.

16 There is no appropriate equitable relief available to  
17 Tiara Yachts under 1132(a)(3). The only potentially available  
18 relief here is monetary relief because the ASC, the  
19 Administrative Services Contract, between Tiara Yachts and Blue  
20 Cross has terminated. There is no ongoing relationship. There  
21 isn't going to be any prospective injunctive relief between  
22 these two parties. But 1132(a)(3) doesn't allow the kind of  
23 legal remedies that Tiara Yachts is seeking. It doesn't allow  
24 damages. It doesn't allow legal restitution. 1132(a)(3) does  
25 allow equitable restitution, but the Supreme Court has said in

1 a series of cases that we cite in our briefs that equitable  
2 restitution has to be about specific property held by the  
3 Defendant, and the money that Tiara Yachts is pursuing here is  
4 money that we allegedly improperly paid to providers, money  
5 that on the face of the complaint is not in the possession of  
6 Blue Cross.

7 So in its opposition brief Tiara Yachts has said that  
8 it can obtain monetary relief under 1132(a)(3) under the  
9 Supreme Court's decision in CIGNA versus Amara, saying that  
10 this relief would be similar to the surcharge relief that was  
11 discussed in dicta in that case, but Tiara Yachts is not  
12 seeking surcharge. Surcharge is a form of relief that trust  
13 beneficiaries can obtain from trustees to make the beneficiary  
14 whole or to avoid unjust enrichment to the trustee. But Tiara  
15 Yachts is not a trust beneficiary. It's the plan sponsor.  
16 It's the entity that contracted with Blue Cross, and Tiara  
17 Yachts hasn't cited a case in which a fiduciary to a plan like  
18 Tiara Yachts itself can win surcharge from another alleged  
19 fiduciary, Blue Cross.

20 Now, just to put a fine point on it, it's quite clear  
21 from the face of the complaint it's unambiguous that Tiara  
22 Yachts is seeking compensation for itself -- itself as the  
23 employer. It's the only Plaintiff named on the complaint.  
24 Nothing in the complaint says that it is attempting to recover  
25 money for the plan, that it's pursuing this relief on behalf of

1 the plan. Didn't say anything like that in its opposition to  
2 our motion to dismiss. And the plan beneficiaries are not  
3 going to be made whole by an award to their employer. In fact,  
4 they are whole. They received the health care coverage they  
5 were entitled to. So it's -- according to the complaint it's  
6 Tiara Yachts who claims to be injured.

7 So it's not equitable relief. So the only other  
8 potentially applicable remedial provision is 1132(a)2) under  
9 which a fiduciary can be ordered to pay monetary relief, and it  
10 doesn't have to be equitable monetary relief under 1132(a)2).  
11 But on the text of § 1109(a), which 1132(a)2) cross references,  
12 the relief does have to go to such plan. So any relief ordered  
13 under 1109(a) has to go to a plan, but as I just discussed, the  
14 plan is not a Plaintiff here and there is no allegation that  
15 money would go to the plan.

16 The response we saw from Tiara Yachts in the briefing  
17 don't really work. First, they said that plans cannot sue  
18 under Sixth Circuit law. That's simply incorrect. We cited  
19 the Saramar Aluminum case that says exactly the opposite of  
20 what Tiara Yachts argued. One of the cases they cite, and we  
21 also cite, Guyan, has a plan as a plaintiff, and that's a Sixth  
22 Circuit case. So that's just wrong.

23 Tiara Yachts also says that this argument that the  
24 employer can't be the only Plaintiff under -- to win relief  
25 under 1109(a), they say that argument was rejected in Guyan,

1 the Sixth Circuit I just mentioned, and in the Eastern District  
2 of Michigan case called Borroughs. That's also incorrect. In  
3 both of those cases the plan was a Plaintiff. The plan was one  
4 of the entities it was going to receive relief. The question  
5 was whether it was proper for the employer to also be a  
6 Plaintiff, and in both cases the court said it was okay because  
7 the pleadings and the motions and the stipulations submitted by  
8 the employer in Borroughs made clear that the plan would -- the  
9 relief would inure to the plan, but that's just not what we see  
10 in this complaint where the plan is not a Plaintiff and the  
11 money sought is for the employer itself.

12 Okay. So that's one argument that ERISA doesn't  
13 support this relief. It's one argument for why this can't be  
14 an ERISA breach of fiduciary duty claim. Another argument is  
15 that the allegations of this complaint just don't state a claim  
16 under Sixth Circuit law for a breach of fiduciary duty because  
17 they don't establish that Blue Cross was acting as a fiduciary  
18 when it made the decisions in question. So what the complaint  
19 alleges, and it's quite explicit, and the opposition is perhaps  
20 even more explicit, what the complaint alleges is that Blue  
21 Cross's system wide NASCO claims processing system processes  
22 claims incorrectly. The Tiara Yachts is very clear. They are  
23 alleging -- they are not talking about claims from their own  
24 employees or pointing to specific facts about their own claims.  
25 They are saying the system was designed incorrectly. Their



1 theory is that the system is wrong because it uses flip logic  
2 or because it allows providers to submit claims with editing  
3 that Tiara Yachts says is inappropriate.

4 Just a brief pause here to talk about what flip logic  
5 is. I understand that was something that came up at the prior  
6 hearing. So flip logic, this is from the complaint and the  
7 exhibits to the complaint, it's part of the programming that  
8 Blue Cross uses to process certain claims from out-of-state  
9 providers.

10 So just to talk through how it works. First, there  
11 has to be an out-of-state claim. So for example, you are on  
12 vacation in Florida and you obtain medical care. It can only  
13 be that kind of out-of-state care that's at issue. And second,  
14 the claim has to be submitted by a nonparticipating provider  
15 who is connected to a participating provider, a provider who is  
16 participating in that other state's Blue -- Blue Cross Blue  
17 Shield entity. So for example, a participating provider in  
18 that state may have referred a Tiara Yachts' member to a  
19 nonparticipating provider for some ancillary service like  
20 urinalysis or labs or something like that. Now, because the  
21 nonparticipating provider is connected to a participating  
22 provider, using flip logic we pay the claim at charge, meaning,  
23 we pay the full amount of the claim just as we do when we pay  
24 claims submitted by participating providers.

25 Why is that? It is in order to avoid having the

1 member, the individual getting the health care, the balance  
2 billed. This is discussed in Exhibit C to the complaint at  
3 page ID 41. Usually in these situations the member is not even  
4 aware that they have been referred to a nonparticipating  
5 provider. They don't know that whoever is, you know, handling  
6 their labs or whatever is a nonparticipating provider. So if  
7 they came back to Michigan and suddenly got a bill for whatever  
8 amount of the claim wasn't paid, they would be surprised by  
9 this balance bill, and to avoid that balance billing situation  
10 the system flipped the claim from the nonparticipating provider  
11 to be treated as if it came from a participating provider so  
12 that it was paid in full with no balance billed to the member.  
13 All right. That's what flip logic is.

14 It is part of Blue Cross's system wide method for  
15 paying providers according to the complaint. It applies across  
16 the NASCO claims processing system. And Tiara Yachts says, you  
17 know, we didn't sign up for having claims paid using flip  
18 logic. But the Sixth Circuit has held that a Plaintiff  
19 complaining about how the claims processing system works, we  
20 are -- or saying they don't like whatever the system does, they  
21 don't like the Blue Cross product that they contracted for,  
22 claims like that do not state a claim for breach of fiduciary  
23 duty. That's what the Sixth Circuit said in Deluca, and I am  
24 reading from the case here. This is at 628 F.3d at 747. The  
25 Court said, "In determining liability for an alleged breach of

1 fiduciary duty in an ERISA case, the courts must examine the  
2 conduct at issue to determine whether it constitutes management  
3 or administration of the plan or merely a business decision  
4 that has an effect on an ERISA plan."

5 And in that case the Sixth Circuit held that Blue  
6 Cross was not administering the plan that was before the Court  
7 when it took actions that applied system wide. That case was a  
8 case about negotiating provider rates. It was about dealing  
9 with Blue Cross's provider network across health plans, across  
10 plans not just with respect to a specific plan.

11 So the court said, when Blue Cross's actions -- I am  
12 quoting again -- were not directly associated with the benefits  
13 plan at issue here but were generally applicable to a broad  
14 range of health care consumers it's not a fiduciary act. Blue  
15 Cross, in making that kind of -- taking that kind of action,  
16 making that kind of system-wide decision is not acting as a  
17 fiduciary to a particular plan.

18 Well, that's exactly what these claims processing  
19 claims are about. It's just how Tiara Yachts has set up its  
20 complaint. As I said before, it really could not be more clear  
21 in its complaint and even perhaps clearer in its opposition  
22 that its arguments are directed to the NASCO claims processing  
23 system as a whole. It has a -- it disagrees with how Blue  
24 Cross is processing claims and the system as a whole. It does  
25 not -- it is not challenging alleged actions taken that are

1 specifically to its plan.

2 But if the problem is that Blue Cross established its  
3 claim of processing system poorly, according to Tiara Yachts,  
4 it's not a fiduciary problem under DeLuca. It's a contract  
5 problem. It's Tiara Yachts saying it didn't get what it  
6 thought it was contracting for when it entered into the  
7 administrative services contract. And as I mentioned earlier,  
8 that contract gave Tiara Yachts very explicit and clear  
9 remedies for disputing claims, for requesting an audit of  
10 claims, for taking action if it thought, excuse me, Blue Cross  
11 was not paying claims the way it had contracted to do. Tiara  
12 Yachts didn't take those actions and instead brought this ERISA  
13 claim, but it doesn't work.

14 And briefly, one more problem with the claims relating  
15 to clinical editing, data deficiencies. The factual  
16 allegations just don't support the elements of duty and breach.  
17 The complaint lays out several actions related to clinical  
18 editing or claims editing or claims processing. It talks  
19 about, you know, you can require claims to be unbundled or not  
20 unbundled, provide more information, provide less information,  
21 but it just doesn't allege facts to establish what the ERISA  
22 standard of prudence or standard of care requires with respect  
23 to clinical editing or claims editing. And it doesn't allege  
24 facts about what Blue Cross actually is supposed to have done  
25 with Tiara Yachts' claims.

1           So that separates this case from the cases that Tiara  
2           Yachts relies on. I will just take one example. Group 1  
3           Automotive. In that case the Plaintiff alleged that Aetna paid  
4           certain claims that had, according to the complaint,  
5           well-recognized indicia of fraud but did so without any  
6           investigation, and the court said, okay, that can survive the  
7           motion to dismiss. But we just don't have factual allegations  
8           like that. We don't have factual allegations about a  
9           well-recognized ERISA standard here, and no facts about how  
10          Blue Cross is supposed to have breached whatever standard might  
11          apply.

12                        So that's all that I was going to say about claims  
13          processing, and unless Your Honor has questions, I'll move onto  
14          shared savings?

15                        THE COURT: All right. The second argument about no  
16          breach of fiduciary duty because it's a claims processing  
17          issue. So I think I understand where you go with that and the  
18          cases on the whole set of what I am calling I think you maybe  
19          summarized as claims processing issues, the unbundling, maybe  
20          up charges, whatever they've been, up coding. The flip logic  
21          potentially seems different to me because that first set of  
22          claims processing rules, however you are going to handle a  
23          particular claim, is as the case you mention, all embedded in  
24          the negotiations you have with your providers. But if I am  
25          understanding the flip logic problem, it's at least in part

1 because they are not people you have contractual relationships  
2 with. They are nonparticipating providers and you make an  
3 assumption for purposes of moving the claim through the system  
4 that they are going to be treated like your participating  
5 people, and therefore, you are going to pay whatever --  
6 whatever price is on the bill.

7 So that strikes me as a little different. I don't  
8 know whether that's any different when it comes to your first  
9 argument but on the breach argument that seems different to me.

10 MS. FLINT: It's -- I agree that it's different in the  
11 way you described. I think the legal analysis, certainly as to  
12 the first argument, is the same. It's still a question of Blue  
13 Cross's relationship with providers, how it -- you know, what  
14 rates it provides to providers, and it's certainly something  
15 that applies across the broader group of health care consumers  
16 and certainly not to just this Plaintiff.

17 As to the second argument, I also don't think there is  
18 an allegation that using flip logic, that engaging in this form  
19 of paying of claims, you know, with this particular category of  
20 out-of-state providers to avoid balanced billing, that that  
21 violates an ERISA standard. There isn't an allegation that,  
22 you know, these claims universally have indicia of fraud that  
23 weren't investigated. There is an allegation that some flip  
24 logic claims in the entire world involved fraud, but we haven't  
25 seen an allegation like that about Tiara Yachts' claims

1 specifically.

2 And just as a side note, that actually distinguishes  
3 the Tiara Yachts' complaint from the Comau complaint that the  
4 Plaintiff has pointed to in their opposition. In that  
5 complaint, the one where the 2020 opinion in which Judge Davis  
6 declined to dismiss the First Amended Complaint, essentially  
7 the original complaint, Judge Davis pointed to the fact and  
8 emphasized that Dennis Wegner, the former Blue Cross employee  
9 who, you know, argued about this overpayment issue, that he had  
10 specifically indicated to Comau that Comau's claims were paid  
11 inappropriately, and Judge Davis, in her opinion, emphasized  
12 that that was important. That was part of why that case wasn't  
13 dismissed. We don't have that here.

14 So I think I agree with Your Honor that it's  
15 different, but I think the legal analysis, both the first one I  
16 went through and the second one, apply with respect to flip  
17 logic and either way the claim should be dismissed. Does that  
18 answer the question?

19 THE COURT: All right. Why don't you go onto the  
20 shared savings argument and we'll let you get all of that in  
21 and see where we are on the timing and then give Mr. Rynders a  
22 chance to respond to both at the same time.

23 MS. FLINT: Thank you, Your Honor.

24 THE COURT: Okay.

25 MS. FLINT: Okay. So the theory here, one difference

1 about the shared savings program from all the claims processing  
2 allegations that we were discussing is that this is allegedly  
3 about Blue Cross determining its own compensation. This is  
4 money that Blue Cross retained rather than that it paid out to  
5 providers. The theory of the claim is that Blue Cross breached  
6 its fiduciary duty and engaged in a prohibited transaction by  
7 determining how much it was going to keep using discretion.  
8 And it has to be about discretion because it's clear that there  
9 is no -- it is not a fiduciary act. It is not a breach of  
10 fiduciary duty or a prohibited transaction for a service  
11 provider to an ERISA plan to retain compensation that is fixed  
12 by contract, compensation that it has a unilateral contractual  
13 right to. Sixth Circuit held that in Seaway.

14 So this contract, the shared savings provisions, make  
15 clear that Blue Cross will retain a fixed amount, 30 percent of  
16 the savings recovered through the shared savings program, which  
17 is four specific sets of actions. So amounts recovered or  
18 retained through those four specific sets of actions, 30  
19 percent of that amount will be retained by Blue Cross. That is  
20 not subject to discretion. Thirty percent is an explicit  
21 contractual amount and the amount subject to the 30 percent is  
22 also clearly established in the contract.

23 Now, Tiara Yachts says, actually, we do have  
24 discretion because we are supposedly in -- we supposedly have  
25 unilateral control over the amounts that are recovered through



1 those four processes set out in the administrative services  
2 contract. So the way this works, they say, is that we  
3 deliberately, knowingly overpay claims, pay claims improperly,  
4 claims that the providers are not entitled to, and then we  
5 exercise our supposed unilateral control to recover that money  
6 through the shared savings program and voilà we get to keep 30  
7 percent of that. So in that way we are supposedly able to  
8 control the ultimate amount of our compensation.

9 As a factual matter that argument is just -- it can't  
10 be squared with the complaint and the contract which is  
11 attached to our motion to dismiss. We don't have unilateral  
12 control over the amount of savings that are recovered. There  
13 are multiple third parties involved in that. There are three  
14 third-party vendors who do the actions to require to recover  
15 any money at all, and this is just even accepting at face value  
16 that we do deliberately and knowingly have total control over  
17 payments.

18 On the back end there are three third-party vendors  
19 that do the actions that causes those amounts to be recovered,  
20 and then there is the providers. There are the providers who  
21 give the money back when we or our vendors say, you are not  
22 entitled to this money. You need to return it. All of that is  
23 outside our unilateral control. And just to emphasize, it has  
24 to be unilateral control. That's what the complaint alleges  
25 because that's what the case law requires and that just doesn't

1 exist here.

2           So we cited to the Court in our reply brief an Eighth  
3 Circuit case, Central Valley AG, A-g, Cooperative, that  
4 rejected a very similar claim. That was also a shared savings  
5 model where service providers recommended that the plan pay  
6 less on certain provider claims that were according to the  
7 service providers inflated, and then the service employers got  
8 a specific percentage, which was also 30 percent of any amounts  
9 that the plan actually saved, that the plan actually paid less  
10 on. Thirty percent went to the service providers. And the  
11 Plaintiff, just like Tiara Yachts, said, because these service  
12 providers can decide how many claims they review and how many  
13 times they recommend a low payment they are controlling their  
14 own compensation and they are engaging in a fiduciary act, and  
15 the Eighth Circuit said that's just not right because they do  
16 not have ultimate control of how much is actually paid on those  
17 claims. It's true they have control over what claims they  
18 review and what recommendations they make, but they don't have  
19 unilateral control over how much is paid or unilateral control  
20 over the base amount that their 30 percent is applied to. That  
21 exact same analysis applies here.

22           And one more point on shared savings. Tiara Yachts'  
23 claims on shared savings are subject to Rule 9(b), and just to  
24 reiterate the theory here, the theory that a claim comes in,  
25 Blue Cross knows that this is a bad claim. It's clearly much

1 more than this provider is entitled to. Blue Cross says, I  
2 will pay this amount even though I know that it is wrong, and  
3 then after the payment goes out I will recover the payment  
4 through shared savings and I will misrepresent to the plan, to  
5 the customer, that I have saved this money when, in fact, I am  
6 the one who created this whole scenario. I mean, this is  
7 factually similar to kidnapping your neighbor's cat and then  
8 returning it for the reward money and saying that you found it.  
9 It is a fraudulent scheme. There is simply no other way to  
10 understand a scheme like that as anything other than a  
11 fraudulent scheme that requires a misrepresentation of saving  
12 your customers money when, in fact, you know that that is not  
13 the case, and so as a result it is subject to Rule 9(b).

14 And the complaint certainly does not satisfy those  
15 requirements. Does not identify a payment recovered for Tiara  
16 Yachts. It does not identify who made any of these  
17 representations or when. There are simply no actual facts  
18 about payments recovered in connection with Tiara Yachts'  
19 plans -- plan for the shared savings plan.

20 THE COURT: All right. So put aside the 9(b) issues  
21 or just generally what's been pleaded on -- pleaded on unshared  
22 savings. But from a theory point of view I guess what I read  
23 the Plaintiff is trying to say was tied back mostly to the flip  
24 logic and the idea that if you make a decision like what the,  
25 you know, the memo or I guess it's the e-mail chain in Exhibit

1 A to the complaint suggests, to pay claims from  
2 nonparticipating people as though they were participating, so  
3 you don't -- for whatever reason, whether it's not to get a  
4 balanced bill or otherwise, but in fact, there is a reason that  
5 that's not the right amount. It should be a lower amount if,  
6 for instance, they were part of the Blue Care Network problem  
7 or the host issue, being a host in another state and they'd  
8 have to pay at a lower rate for example. Then, when I hear the  
9 Plaintiff saying is, if you go out and you have made that  
10 policy decision to pay the claims at the higher billed rate,  
11 and then you introduce a program to go and recoup money that's  
12 overpaid and keep 30 percent, you know, that's a fiduciary duty  
13 problem or at least could be. And I know you don't accept the  
14 factual allegations either as a matter of fact or that they  
15 have even been pleaded properly, but if that turned out to be  
16 true in a given case, is that a fiduciary duty problem under  
17 ERISA and 1109, a prohibited transaction or not?

18 MS. FLINT: No. It's not because what is necessary  
19 for the claim is to establish that Blue Cross had unilateral  
20 control over the action leading up to its compensation.

21 THE COURT: Who other than Blue Cross in that example  
22 had control over the decision as we are summarizing it, the  
23 flip logic decision? Wouldn't that be their unilateral  
24 decision?

25 MS. FLINT: The flip logic as alleged would be their

1 unilateral decision, but how much is recovered, which is what  
2 ultimately determines Blue Cross's compensation, is not in Blue  
3 Cross's unilateral control, and I think that is clear from the  
4 face of the complaint and from the contract itself, and that's  
5 because there are third-party vendors that actually take these  
6 actions. I mean, if this were a Blue Cross scheme to set its  
7 own compensation, at the very least you would think it alone  
8 would be determining which payments it would recover through  
9 the shared savings program, but it doesn't. It has third-party  
10 vendors doing that work.

11 On top of that there is the provider. I mean, there  
12 is no allegation that flip logic is a deliberate scheme, as  
13 Your Honor pointed out before, in the claims processing  
14 discussion. We have no control over these nonparticipating  
15 providers who submit these claims. Even if we do have control  
16 of our own internal software of applying the flip logic to  
17 these claims, we don't have control over the amount of claims  
18 that are submitted, and we certainly don't have control over  
19 getting that money back as recovery through the saved savings  
20 program.

21 And like I said, the complaint itself uses the phrase  
22 unilateral control because that is the legal requirement here  
23 for us to be found to be determining our own compensation in a  
24 form that is a breach of fiduciary duty or prohibited  
25 transaction, and the allegations and the contract just don't

1 square with that.

2 THE COURT: Okay. Well, good. Why don't we do this.  
3 You have been going about 30 minutes or so, Ms. Flint. We'll  
4 go over to Mr. Rynders or Ms. Cunningham, whoever is going to  
5 argue, get their perspective on this and give you a little  
6 chance for rebuttal.

7 MS. FLINT: Thank you, Your Honor.

8 THE COURT: Thank you.

9 Mr. Rynders?

10 MR. RYNDERS: Good afternoon, Your Honor.

11 So let me take my lead from the Guyan decision, Sixth  
12 Circuit ruling. When it was faced with how to analyze the  
13 dispute like this it said that the first issue is whether the  
14 district court correctly ruled that the defendant there was a  
15 fiduciary under ERISA. So I have alleged an ERISA case, and  
16 the first issue, then, is whether the defendant is a fiduciary?  
17 And interestingly enough, Blue Cross has made that easy for us.  
18 You don't need to look at the Sixth Circuit authorities or the  
19 other district courts that have considered cases where Blue  
20 Cross Blue Shield of Michigan is a defendant. At the  
21 introductory paragraph of their first brief they say, "That for  
22 every health care claim" -- that's a quote -- "that they  
23 handled on behalf of Tiara..." Then I'll continue quoting,  
24 "BCBSM reviewed the claim, determined the amount owed to the  
25 provider, and processed the claim including sending payment for

1 the claim to the provider." That also is a quote from their  
2 introduction.

3 So this was with respect to every claim that would be  
4 at issue in this case they determined the amount that was owed  
5 and they actually paid it. And how did they pay it? Well, in  
6 paragraph 22 of our complaint we allege, and I'm sure it will  
7 never be denied, that Tiara Yachts, previously S2 Yachts,  
8 funded a bank account controlled by Blue Cross Blue Shield of  
9 Michigan, and it was out of that account that these claims  
10 would be paid. So we know that Blue Cross Blue Shield made  
11 decisions about what to pay and then actually paid claims  
12 because it had custody or control of the plan assets used to  
13 pay those claims.

14 So as a first point, it is undisputed, and Blue Cross  
15 actually acknowledges it, that they are a fiduciary with  
16 respect to the payment of claims, which is what this case is  
17 about. Guyan goes on. It says, "Having determined that the  
18 defendant was a fiduciary, the second question is whether it  
19 breached its fiduciary duties." And the court found that that  
20 was an easy answer that of course it had. Of course, we are at  
21 the pleading stage so we haven't proven anything. Neither side  
22 has proven anything, but that would be the second question.  
23 Having shown that they are fiduciary, did they breach those  
24 fiduciary duties?

25 What's interesting about the Guyan case -- there is

1 actually a lot interesting about the Guyan case I would submit  
2 because it answers pretty much all of the arguments that Blue  
3 Cross has thrown up in this case. In Guyan, the plaintiff  
4 brought ERISA breach of fiduciary duty claims and also state  
5 court or state law breach of contract claims and the court held  
6 that because the defendant was a fiduciary and the enforcement  
7 mechanism of § 1132 was essentially what they were asking for  
8 in their breach of contract claims that the breach of contract  
9 claims were preempted.

10 Now, when Blue Cross files their motion to dismiss,  
11 they would -- for some reason I guess they would love to have  
12 this be a breach of contract case under federal -- under state  
13 law maybe to get it into a state court, but the fact of the  
14 matter is that the relief that's being sought here is exactly  
15 what ERISA provides in a state court claim -- state law claim,  
16 excuse me, seeking that sort of relief would be preempted by  
17 ERISA.

18 Now, there was talk about § 1132(a). I am going to  
19 give you two numbers because sometimes the courts cite to the  
20 29 USC number and sometimes they cite to the ERISA number.  
21 1132 is the same as § 502 of ERISA, and that provision  
22 subsection (a) (2) allows a civil action to be brought by the  
23 secretary or by a participant, beneficiary or fiduciary for  
24 appropriate relief under § 1109 of this title. 1109 is also  
25 known as § 409 of ERISA.



1                   By the way, let me step back for just a minute. I  
2 want to make sure that we are abundantly clear on something.  
3 This provision says a civil action may be brought by the  
4 secretary or participant, a beneficiary or a fiduciary. My  
5 client is the plan sponsor of the plan. Under ERISA my client  
6 is a named fiduciary of the plan. Therefore, it may bring an  
7 action on behalf of the plan, and that's what its doing in this  
8 case. Tiara Yachts is not seeking a recovery for itself. And  
9 in fact, in case after case after case that I have litigated  
10 against Blue Cross Blue Shield we have settled the cases and we  
11 have always made it clear that the recovery constitutes a  
12 recovery of plan assets, and that's what's going to happen  
13 here. So whether there is a judgment or a settlement,  
14 whatever, it will be a recovery of plan assets which need to be  
15 used for purposes of the plan.

16                   THE COURT: But I mean, how can that be here? As a  
17 practical matter if there is any recovery it goes right into a  
18 Tiara account, right? You are saying it's going to get pulled  
19 back and get used to pay future expenses under the plan?

20                   MR. RYNDERS: It would be used to pay -- only used to  
21 pay expenses of the plan.

22                   THE COURT: Meaning future medical bills submitted by  
23 beneficiaries, providers?

24                   MR. RYNDERS: Correct. There's been a lot of  
25 conversation about things that are outside of the pleadings.

1 As long as Your Honor knows that, then I don't have a problem  
2 with it. The way that's done is the plan sponsor sets up a  
3 separate account so that the recovery is not commingled with  
4 corporate assets. So there is a separate asset -- excuse me, a  
5 separate account into which the recovery goes, which are plan  
6 assets. They belong to the plan, and they can only be used for  
7 purposes of the plan. That's what -- that's what's going to  
8 happen here. If there is some doubt about that and you want me  
9 to plead something I am happy to do that, but that's what's  
10 going on here.

11 So again, this provision that says it's a fiduciary  
12 that may bring the action, you may -- they may bring the action  
13 to seek appropriate relief under § 1109. Well, if we look at §  
14 1109, also § 409 of the act, it allows for the recovery of --  
15 well, excuse me, actually it doesn't. It's not put together  
16 that way. It says any person who is a fiduciary, so in this  
17 case Blue Cross Blue Shield of Michigan, who breaches any of  
18 the responsibilities or obligations or duties imposed by ERISA,  
19 shall be personally liable to make good to such plan any losses  
20 to the plan resulting from each such breach and shall be  
21 subject -- and I am skipping here a little bit -- and shall be  
22 subject to such other equitable or remedial relief as the court  
23 may deem appropriate.

24 So a couple points that I think need to be clear.  
25 It's a recovery for the plan of plan assets that have been

1 squandered, used only for the purposes of plan -- paying plan  
2 obligations.

3 THE COURT: How does that work as a practical matter  
4 if you have a self-funded plan? It might not even be here  
5 three years from now or one year from now because Tiara might  
6 decide they are not going to do it anymore? I don't think it's  
7 pleaded that way either.

8 MR. RYNDERS: Yeah.

9 THE COURT: But as a practical matter I don't  
10 understand how that could possibly work in the recovery?

11 MR. RYNDERS: Well, first of all, I don't think Tiara  
12 Yachts plans on not being here in three years.

13 THE COURT: But their plan might not be or they might  
14 decide to go with an insured plan or they might decide to do  
15 any number of things, but when you have a self-funded plan  
16 that's periodically refreshing an account, the plan account to  
17 pay for benefits --

18 MR. RYNDERS: Right.

19 THE COURT: -- I am having a hard time conceptually  
20 understanding how you get a recovery out of a case like this  
21 that then just sits there for some future purpose on a plan  
22 that may or may not even continue. Certainly isn't going to  
23 continue as it currently is because Blue Cross isn't the  
24 administrator, but I am having a conceptual time -- do you  
25 actually have case law where that's happened?

1 MR. RYNDERS: Do I have case law where that's happened  
2 that I can cite to you? No. I have settled cases like that.  
3 I have settled cases where the company went out of business,  
4 the plan was terminated, and under ERISA those plan benefits --  
5 or plan assets have to be used first to satisfy any obligations  
6 that might remain that the plan has, and once those have been  
7 fully satisfied are returned to the plan sponsor.

8 THE COURT: Right. But I mean, aren't those cases  
9 where there's bills out there that aren't getting paid because  
10 the plan hasn't been funded and so the beneficiaries aren't  
11 getting services or they are getting dunned by the providers  
12 maybe because there is a shortfall? Here everybody has been  
13 paid. In fact, if anything, the claim is they have been paid  
14 too much.

15 MR. RYNDERS: Yeah.

16 THE COURT: I am not understanding the parallel. I  
17 just don't understand how the recovery would work as a  
18 practical matter.

19 MR. RYNDERS: Well, I guess -- one thing I guess I  
20 want to say is we don't know if this is going to happen and if  
21 we are going to let a concern about a possibility or a  
22 hypothetical let a fiduciary like Blue Cross get away with  
23 squandering plan assets, then that would be --

24 THE COURT: Right.

25 MR. RYNDERS: -- antithetical to ERISA.

1 THE COURT: Let me redirect you to a different form of  
2 the question then. Why aren't you fully satisfied by suing  
3 them under your contract for mismanaging the claims processing?  
4 I know there is time limits and all the rest, but why should  
5 you be allowed to work around the contract to go back and look  
6 at the full relationship you have had over the years with Tiara  
7 on a fiduciary duty theory when it seems like that's exactly  
8 what the contract is addressing? Hey, you shouldn't have paid  
9 the claim. We want an audit or something like that. And then,  
10 you know, if they did misspend, yeah, the money properly goes  
11 into Tiara's account. I don't understand why that doesn't give  
12 you the satisfaction you are entitled to.

13 MR. RYNDERS: Well, because according to the Sixth  
14 Circuit, and actually, the language of ERISA, that claim is  
15 preempted by ERISA.

16 THE COURT: Well, I mean, it is -- that's assuming you  
17 are right about the ERISA. But I mean, what don't you get  
18 under your contract that you get here other than longer  
19 timeline and all the rest? I mean, why can't you sue them  
20 under the contract for screwing up the claims processing?

21 MR. RYNDERS: First of all, I want to say the plan is  
22 not a party to the administrative services contract. The plan  
23 sponsor is. This is a claim on behalf of the plan.

24 THE COURT: Yeah. Okay.

25 MR. RYNDERS: And ERISA says that that claim, if

1 brought under -- now I've got it. Sorry.

2 THE COURT: It's contagious.

3 MR. RYNDERS: If a claim is brought, whether it's by  
4 the plan or the plan sponsor, I mean, we can continue to debate  
5 that, but for the benefit of the plan, under state law it would  
6 be preempted by ERISA. ERISA --

7 THE COURT: But I mean, you are saying you can't sue  
8 your claims processor for screwing up the contract? I mean,  
9 what --

10 MR. RYNDERS: I think --

11 THE COURT: You certainly have the right to sue in  
12 contract, both sides do if there is a breach, don't they?

13 MR. RYNDERS: If Tiara Yachts wanted to sue Blue Cross  
14 in state court under a state law theory for breach of the  
15 administrative services contract, perhaps it can do that.

16 THE COURT: Right.

17 MR. RYNDERS: I am -- I'm -- when I did that in the  
18 initial set of access fee cases I was met with a motion to  
19 dismiss.

20 THE COURT: That's a different case. Stay with me.  
21 So it's not as though every claim that could potentially be  
22 brought under the contract is preempted by ERISA. There are  
23 certainly some opportunity for both sides to enforce their  
24 contractual rights. Why doesn't that work here? Put -- put  
25 preemption aside. If -- they had obligations under the

1 contract to pay in accordance with the plan and things like  
2 that. If they screwed it up, to your client's detriment, why  
3 isn't that the kind of claim that a contract handles and puts  
4 money back in your client's pocket if it deserves it?

5 MR. RYNDERS: Well, first of all, I am going to answer  
6 it the same way. ERISA would preempt that claim and I am not  
7 going to move off that point.

8 THE COURT: All right.

9 MR. RYNDERS: But I would also suggest, and I haven't  
10 read the administrative services contract, Your Honor, with  
11 this specific question in mind. I am not sure there is  
12 anything in the ASC that addresses pricing at all. I don't  
13 think the ASC, administrative services contract, addresses how  
14 much providers get paid. I am pretty sure it doesn't. It  
15 doesn't say what the arrangements are going to be in terms of  
16 how claims are paid. In fact, I am pretty sure they don't,  
17 those agreements. So I don't know that the ASC is the document  
18 which would require Blue Cross Blue Shield of Michigan to act  
19 in a way that is in the best interests of the plan just like  
20 ERISA would. So if two parties contract with each other, the  
21 obligations between those two parties are whatever the contract  
22 says. Congress came along and created a brand new scheme in  
23 1974 called ERISA, which created a whole bunch of new rights,  
24 new obligations, new --

25 THE COURT: Right. We don't have enough time to go

1 into, you know, what amounts to a jury argument. I am aware of  
2 ERISA. I have got a lot of ERISA cases. Not the same kind  
3 that you do. I admit that.

4 MR. RYNDERS: Right.

5 THE COURT: But move onto, you know, to the more  
6 knitty gritty of what's at issue here, because you know, it  
7 still feels to me like a contract case, and I don't think  
8 Congress meant to write contract law out of ERISA. It  
9 certainly meant to protect beneficiaries, but here no  
10 beneficiary has been hurt. I mean, every -- I mean, one way to  
11 characterize the claims, you know, not your way, but one way is  
12 to say, you know, Blue Cross Blue Shield paid claims for actual  
13 services provided to beneficiaries at the prices actually  
14 billed, and why is that an ERISA problem? That seems to be  
15 what ERISA is meant to do, unlike Guyan where there were claims  
16 that weren't paid and now if they overpaid, if that's the  
17 problem because they mishandled the claim or misinterpreted it  
18 or didn't apply the rules properly, why aren't you satisfied in  
19 contract, because, I mean, the result of that misapplication in  
20 your view is that Tiara had to pay more money for the plan than  
21 it otherwise would. I don't see how the plan gets anything out  
22 of this.

23 MR. RYNDERS: The plan had to pay more.

24 THE COURT: But the plan here is Tiara. It's a  
25 self-funded plan.



1 MR. RYNDERS: It's a self-funded plan.

2 THE COURT: There is no money sitting out there until  
3 Tiara puts it there.

4 MR. RYNDERS: Tiara puts the money -- the  
5 employer/sponsor puts the money into a Blue Cross account.  
6 That money, now, before it's spent, before anything has  
7 happened, becomes a plan asset.

8 THE COURT: And here every single penny of the plan  
9 asset was spent on bills actually submitted by your  
10 beneficiaries. Maybe they spent too much, but I mean, I don't  
11 see how that's a fiduciary duty problem in a case like this.

12 MR. RYNDERS: Well, let's look to see -- first of all,  
13 if that was right, Your Honor, then we'd have to wonder how did  
14 hundreds of access fee cases proceed through the federal courts  
15 under the same ERISA legal theory, and how did the Sixth  
16 Circuit find that it was a breach of fiduciary --

17 THE COURT: What do you mean access fee cases? You  
18 mean on the what?

19 MR. RYNDERS: The Hi-Lex cases versus Blue Cross Blue  
20 Shield of Michigan.

21 THE COURT: You talking about pension cases?

22 MR. RYNDERS: It's not a pension case. It's a case  
23 that I litigated where the allegation that was proven in trial  
24 was that Blue Cross overcharged the plan for claims that  
25 were -- that were incurred, paid less to the hospital, kept

1 some of the money for itself, so in effect, stole that money,  
2 but the claims got paid. The beneficiaries got the services  
3 they were after. The participants of the ben -- the  
4 participants and their beneficiaries all got their claims paid.  
5 Didn't have to -- you know, there wasn't a balance billing  
6 issue and the recovery went back to the plan because it was a  
7 breach of their fiduciary duty, which is defined in § 1104,  
8 which would also be § 404, which is that a fiduciary shall  
9 discharge his -- let's say its duties with respect to a plan  
10 solely in the interest of the participants and beneficiaries,  
11 and for the exclusive purpose of providing benefits to  
12 participants and their beneficiaries with this care, skill,  
13 prudence and diligence under the circumstances then prevailing  
14 that a prudent man or fiduciary acting in a like capacity and  
15 familiar with such matters would use.

16 Now, if -- this isn't a case where we just allege  
17 mistakes were made. This is a case where we allege that Blue  
18 Cross knew that mistakes were made and intentionally decided  
19 not to do anything about it. It knew that there were excessive  
20 claims being presented and because it had made the  
21 discretionary decision to not evaluate those claims for  
22 reasonableness, usual and customarily, that's some of the  
23 verbiage that's used in the industry, Blue Cross, using plan  
24 assets, not their own money, plan assets, overpaid those claims  
25 to the detriment of the plan and not in accordance with the

1 care, skill, prudence and diligence that a fiduciary with  
2 like -- under like circumstances would exercise. They knew  
3 better. They decided they didn't care. They did it anyway,  
4 and that was an injury to the plan. When you over charge the  
5 plan, then the plan can't do other things with that money.

6 What happens often times in the health care industry  
7 is when health care costs go up employers back -- back off what  
8 they -- what they are able to provide to employees, their plan  
9 participants, and so an injury to the plan by paying -- taking  
10 those plan assets and paying more than is appropriate is a  
11 breach of the fiduciary duty. That's what makes it an ERISA  
12 case. The standard of care, which I heard counsel talk about,  
13 is spelled out right there in § 404, which is to act with the  
14 care, skill, prudence and diligence of a fiduciary acting in a  
15 like capacity and familiar with such matters.

16 They didn't do that. That's what's been alleged. I  
17 am going to -- I have to prove it. I intend to prove it, but  
18 that's what's been alleged. They breached their fiduciary  
19 duty. The remedy is to recover the losses that were sustained  
20 as a result. And the Sixth Circuit in Guyan and elsewhere has  
21 made it clear that -- in fact, that's where I was going when I  
22 walked away briefly. I grabbed the wrong thing. The Guyan  
23 case, the Plaintiff brought ERISA claims and state law claims,  
24 and at the end of the decision the Court ruled that the state  
25 law claims were preempted. ERISA preempts state laws that

1 provide alternate enforcement mechanisms. So sure, you could  
2 file a state court breach of contract claim to recover these  
3 losses, but that's just an alternate enforcement mechanism to  
4 what ERISA has already provided, which is the recovery of  
5 losses sustained by the plan as a result of a breach of  
6 fiduciary duty. Again, that standard having been laid out  
7 right in ERISA.

8           You can't have both. The federal government has  
9 decided -- the Congress has decided that ERISA is the mechanism  
10 by which plans will be made whole from any losses caused by a  
11 breach of fiduciary duty by a fiduciary. That's what we have  
12 alleged and we are in the right place with the right kind of  
13 claim, and I think ironically if I was to file this as a state  
14 court breach of contract case the first thing I'd see was, you  
15 know, a dismissal because this claim has been preempted by  
16 ERISA. That's literally what happened in the first access fees  
17 case that I filed. I filed actually ERISA claims and state  
18 court -- or state law claims, and the state law claims were  
19 dismissed because of ERISA preemption.

20           I don't want to get too deep here. Your Honor noted a  
21 few moments ago that you are familiar with the denial of  
22 benefits cases. There the jurisdiction is concurrent. You can  
23 bring a breach of -- denial of benefits case in state court or  
24 federal court, but a breach of fiduciary duty case must be  
25 brought in federal court. It's preempted by ERISA. ERISA is

1 going to govern that case.

2 I am worried that I have used up my time. I haven't  
3 gotten to any of the things in my outline, but if I am  
4 answering your questions then --

5 THE COURT: Take another, you know, five or so  
6 minutes, seven minutes just to highlight what you've got left  
7 that you haven't gotten to, and then we'll give a little  
8 rebuttal time to the Plaintiff or to the Defendant.

9 MR. RYNDERS: Sure. I do want to quickly say that the  
10 description by my colleague representing Blue Cross about what  
11 flip logic is, is, I think, not -- not exactly a fair  
12 description of what happens.

13 The -- if you want to know, the way it's -- the way I  
14 figured it out from the documents I have seen so far is the  
15 NASCO platform, and that's what we are talking about here,  
16 that's referencing kind of a national multistate product for  
17 employers that have multiple facilities often in multiple  
18 states. There are many options that Blue Cross can employ or  
19 deploy or not, and one of those options is to treat  
20 out-of-network claims differently than in-network claims. And  
21 by the way, they don't have to be out of state because there  
22 are providers in the State of Michigan that are also out of  
23 network. But any out-of-network claim can be treated -- can be  
24 processed as an out-of-network claim or what they did here was  
25 they turned off that part of the program and they flipped it

1 over to treat those claims like they were in-network claims.  
2 Now, in-network claims are coming from somebody who already has  
3 a provider agreement and so the reimbursement rate has already  
4 been determined for that procedure.

5 When you turn in -- when you -- when you treat  
6 out-of-network claims the same way, then no matter what the  
7 amount is that's charged gets paid at the amount that's  
8 charged, and that's actually not consistent with the  
9 obligations that Blue Cross has accepted, which is to pay  
10 claims, you know, at a reasonable and customary rate, and it's  
11 not consistent with the obligations of the plan documents,  
12 which would require Blue Cross to pay the claims at the usual  
13 and customary rate.

14 They made that decision as a strategic policy  
15 decision. It wasn't just that their computer program was  
16 poorly programmed, poorly written, that something happened as a  
17 glitch. That's not a software flaw as they like to describe  
18 it. What it is is they made a conscious policy business  
19 decision to treat out-of-network claims differently than they  
20 had been, and then they compounded that problem by deciding not  
21 to tell anybody about it.

22 By the way, getting back to our first conversation  
23 about why isn't this a breach of contract case? The contract  
24 is over, right? It was terminated at the end of 2020. The  
25 contract allows audits only going back 24 months, so at the

1 time that this lawsuit was filed my client didn't even have the  
2 right to do any kind of audit and it wouldn't have known to do  
3 an audit back when it had the right to do an audit because all  
4 of this information was hidden from it.

5 So what we have alleged is a conscious business  
6 decision to handle certain claims a certain way, not tell  
7 anybody about it, and then at the point in time when my client  
8 couldn't even have done something about it if it had been told  
9 by Blue Cross what was going on, it might have done something  
10 about it under the contract, at least as Your Honor was  
11 positing it, but in this case it wouldn't have even been an  
12 option, so maybe that's why they want this to be a contract  
13 case because they'd say, well, you can't do anything about it  
14 anyway at this point. You are too late.

15 Just on the 9(b) issue. The 9(b) standard is not  
16 you've got to know everything there is and put it in your  
17 complaint, and it's especially not as strict as Blue Cross  
18 would like it to be where the defendant owns all of the  
19 information, controls all the information and the Plaintiff  
20 doesn't. So we have very clearly laid out what the shared  
21 savings program is, how it works, and we've told the Court and  
22 Blue Cross what we are complaining about, why, who, where, when  
23 and all of that. Blue Cross knows what that claim is about.  
24 This isn't a situation where somebody is being accused of fraud  
25 and they just don't understand the nature of the claim. Blue

1 Cross understands that quite well.

2 I think that's it. My last words, unless you've got  
3 questions, are I think that between the Hi-Lex decision, the  
4 Guyan decision, we've got -- there are other cases, but the  
5 Sixth Circuit decisions where Blue Cross was a party and then  
6 plus Guyan, are -- answer the questions in the Plaintiff's  
7 favor that are raised by Blue Cross in this case. So thank  
8 you, Your Honor, for your time. Appreciate it.

9 THE COURT: All right. Do you want to say anything at  
10 all about the shared savings program or not? Do you want to  
11 say anything at all about the shared savings program?

12 MR. RYNDERS: I'm sorry. I thought you were not  
13 talking to me. I just did just dealing with the 9(b) issue.

14 THE COURT: Fair enough.

15 MR. RYNDERS: I think that's enough. Everything else  
16 has been covered by the briefing.

17 THE COURT: All right. Thank you.

18 Let's go back for any rebuttal from Ms. Flint. Take  
19 five to ten minutes or so.

20 MS. FLINT: Thank you, Your Honor.

21 On the first set of questions about how recovery would  
22 work or how recovery would go to the plan, I think my colleague  
23 on the other side is reading a different complaint from the one  
24 I am reading. The only Plaintiff is the employer. Multiple  
25 paragraphs request relief to Tiara Yachts. There is no



1 allegation that the claim is on behalf of the plan. I  
2 certainly appreciate Mr. Rynders' comments on this, but prayer  
3 for relief D asks the Court to award restitution to Tiara  
4 Yachts and because that's the only Plaintiff, that simply means  
5 Tiara Yachts the employer, which is not consistent with  
6 1109(a).

7 THE COURT: Well, let's say he asks for permission to  
8 change that to say, look, let me take any doubt off the table.  
9 I don't want a single penny to go to Tiara Yachts. I want it  
10 all to go to the plan.

11 MS. FLINT: So to file a new complaint in which the --

12 THE COURT: Whatever. I mean, he's -- either an  
13 amended complaint or anything. Does that change anything in  
14 your motion from your perspective or not?

15 MS. FLINT: If the plan where the Plaintiff, if there  
16 were allegations regarding how the recovery would go to benefit  
17 the plan rather than to the employer that would be a different  
18 analysis under 1109(a). That's simply not the complaint that  
19 we have in this case.

20 THE COURT: All right.

21 MS. FLINT: Your Honor's questions about going around  
22 the contract and why is this a not a contract claim rather than  
23 a breach of fiduciary duty claim. I think one of the answers  
24 from Mr. Rynders was this case is just like Hi-Lex. The claim  
25 processing claims are just like Hi-Lex, and those claims went

1 forward as ERISA fiduciary duty claims and the contract claims  
2 were dismissed. The case is nothing like Hi-Lex.

3 So what happened in Hi-Lex is the district court and  
4 the Sixth Circuit both concluded that fees that Blue Cross  
5 retained when administering claims were subject to Blue Cross's  
6 discretion. Blue Cross could determine the amount, could  
7 determine, according to the Court's understanding of it, could  
8 determine the amount, could determine when and who paid the  
9 access fees, and they were described in the case, and the Court  
10 said that's a breach of fiduciary duty and it's a prohibited  
11 transaction if the service provider has control in that case,  
12 unilateral control over its own compensation, which Blue Cross  
13 was found to have done in that case.

14 Well, that has nothing to do with the claims  
15 processing claims in this case. As the Court observed, all  
16 that money went to providers for care that was received by  
17 employees of Tiara Yachts or other participants in Tiara  
18 Yachts' plans. This is money that Blue Cross paid out for  
19 health care that as far as we know was legitimately obtained.  
20 It is not about compensation that Blue Cross retained for  
21 itself. It's a completely different claim, and Hi-Lex says  
22 nothing about whether this is, in fact, a contract claim or a  
23 breach of fiduciary duty claim.

24 Now, on flip logic, I am not sure, I may have  
25 misunderstood. I think that there may have been a suggestion

1 that I departed from the record in describing how flip logic  
2 works, and I respectfully disagree if that was the suggestion.  
3 Flip logic is described in the complaint. It's discussed in  
4 the exhibits to the complaint, including Exhibits C and either  
5 B or D. I'm sorry I left my notes on that over there. And  
6 it's described just as I described it.

7 Now, when Mr. Rynders was going through flip logic,  
8 the first thing he said was that it does not have to be related  
9 to out-of-state care. That's simply incorrect based on what  
10 the complaint says. I pointed the Court to paragraph 54 for  
11 one example and what the attachments to the complaint say.  
12 Flip logic is about out-of-state care provided by  
13 nonparticipating providers who are connected to participating  
14 providers as I described. But there was something that  
15 Mr. Rynders said in discussing flip logic that I thought was  
16 very interesting. He described the decision to use flip logic  
17 as a business decision of the NASCO claims processing system.  
18 Well, if that is what flip logic is, a business decision for  
19 how the NASCO system processes claims, how it determines what  
20 providers are entitled to, that is DeLuca. That is exactly  
21 what DeLuca holds is not a fiduciary act when Blue Cross is  
22 deciding how much to pay providers across its system, across  
23 multiple health care plans when it's making a business decision  
24 that may have an impact on plans but are not made in direct  
25 connection with a particular plan. That is not a fiduciary act

1 under DeLuca and it cannot support a breach of fiduciary duty  
2 claim. We certainly submit that that's true with respect to  
3 flip logic and to the claims processing discussions.

4 On the shared savings topic, just to reiterate, the  
5 absence of unilateral control. Now, as Mr. Rynders was  
6 emphasizing when discussing nonparticipating providers who  
7 submit claims that are paid pursuant to flip logic, those, as  
8 he described, are nonparticipating providers who have not  
9 agreed with us, not reached an agreement with Blue Cross about  
10 how much they will charge or what the payment they will accept  
11 for particular services. They are outside our control. And so  
12 the implication of that for the shared savings program is we  
13 don't have control over what claims are submitted to us or how  
14 much any particular claim is charged at by a nonparticipating  
15 provider. We don't have control on that side. We also don't  
16 have control on the payment side -- excuse me, on the payment  
17 recovery side for the reasons I talked about before. We can't  
18 control what those nonparticipating providers will actually  
19 provide to us. The shared savings program applies a  
20 contractually fixed percentage, 30 percent, to an amount of  
21 recovery that is outside our unilateral control on the face of  
22 the complaint and the contract.

23 And finally, with respect to Rule 9(b). Mr. Rynders  
24 said it's satisfied because Blue Cross understands quite well  
25 what this claim is about. It's true that we understand the

1 shared savings program. We do have that, but what we don't  
2 understand is which recoveries Tiara Yachts believes are these  
3 unlawful, subject to our unilateral control, recoveries, the  
4 ones where we engaged in this deceptive, deliberate scheme.  
5 They used the word scheme in the complaint to jack up the  
6 amount that we paid out on the -- on -- at the beginning and  
7 then jack up the 30 percent we recovered on the back end.  
8 Which claims is that about? When did we misrepresent the  
9 amount that we were saving when, in fact, we weren't saving it  
10 but costing it to the plan? None of that is in the complaint.  
11 Not one word. So Rule 9(b) is clearly not satisfied.

12 Are there any other questions, Your Honor, that I can  
13 address.

14 THE COURT: I don't think so. Thank you.

15 MS. FLINT: Thank you very much.

16 THE COURT: All right. Thank you both, counsel. So I  
17 will go back and reflect on what we have heard today and read  
18 some of these cases again and read into the record a little  
19 more deeply and then hopefully get you a written decision soon  
20 so you know which way we are going, because am I right, did we  
21 make this a gateway decision? In other words, I am going to  
22 decide this first and if I deny the motion then we move into  
23 the discovery and all the rest and if I grant the motion then  
24 you go to the court of appeals or whatever comes next, right?  
25 Okay. So we'll put this on our priority list.

1 MR. RYNDERS: Right. We kind of postponed the Rule 16  
2 conference.

3 THE COURT: That's my memory, too. All right. Very  
4 good. And thank you for coming earlier today. We were  
5 supposed to be in trial today and the case settled, and this, I  
6 think, will allow everybody to get out a little bit easier  
7 without the traffic, and especially if it's snowing it's nice  
8 to get a little jump on things. Thank you very much.

9 MR. RYNDERS: Thank you, Your Honor.

10 LAW CLERK: Court is in recess.

11 (Proceeding concluded, 4:11 p.m.)  
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REPORTER'S CERTIFICATE

I, Paul G. Brandell, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Paul G. Brandell

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