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.	)	
	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S
MOTION TO ALTER OR AMEND JUDGMENT

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INTRODUCTION

Tiara Yachts, Inc.'s ("Tiara Yachts'") Motion to Alter or Amend Judgment ("Reconsideration Motion") "relitigate[es] the same facts, issues, and arguments" that Tiara Yachts previously raised and that this Court already "considered and decided." *Jones v. Stapleton,* 2012 WL 3186108, at *2 (W.D. Mich. Aug. 3, 2012) (citing *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 616 (6th Cir. 2010), as well as six other Sixth Circuit or Western District cases). Indeed, Tiara Yachts relitigates every issue decided by the Court, largely raising the same arguments and citing the same case law already considered by the Court—in some cases verbatim or nearly so. This rehashing of points already made does not demonstrate any "clear error" in the Court's ruling, as would be necessary to reverse the Court's prior decision. *Leisure Caviar*, 616 F.3d at 615.

As it did in its Opposition to Blue Cross Blue Shield of Michigan's Motion to Dismiss ("Opp."), Tiara Yachts fails to demonstrate how its allegations regarding Blue Cross Blue Shield of Michigan's ("BCBSM's") claims processing system involve fiduciary acts *with respect to Tiara Yachts' Plan*. As already decided in this Court's February 27, 2023 Opinion ("Opinion"), Tiara Yachts' Complaint is about how BCBSM "ran its overall claims processing operation, not specific decisions made about the Tiara Yachts' sponsored Plan," and such allegations are plainly foreclosed by *DeLuca v. Blue Cross Blue Shield of*

Michigan, 628 F.3d 743, 747 (6th Cir. 2010). Opinion, ECF No. 23, PageID.475-477. Tiara Yachts argues that BCBSM must be deemed a fiduciary for all purposes because it allegedly controlled plan assets, but Tiara Yachts' argument was explicitly rejected in *DeLuca* as well as the cases Tiara Yachts itself cites. As this Court recognized, the Court "'must examine the conduct at issue'" to determine whether the defendant is acting as a fiduciary when engaging in that conduct, *id.*, PageID.476 (quoting *DeLuca*, 628 F.3d at 747)—and "whether BCBSM exercised discretionary authority or control over plan assets in some other contexts" is irrelevant, *DeLuca*, 628 F.3d at 747-48. Tiara Yachts' attempts to undermine *DeLuca* and its application to this case fall short for the reasons previously identified by the Court.

Tiara Yachts' arguments with respect to the Shared Savings Program are all but identical to what it said before—including citing *Hi-Lex Controls, Inc. v. BCBSM*, 751 F.3d 740 (6th Cir. 2014) and *Pipefitters Loc. 636 Ins. Fund v. BCBSM*, 722 F.3d 861 (6th Cir. 2013), the same cases that this Court already considered and explicitly distinguished. Tiara Yachts again fails to demonstrate how its allegations state a viable claim that BCBSM functioned as a fiduciary "when it retained a contractually fixed percentage of 30% of recovered third-party payments as an administrative fee." Opinion, ECF No. 23, PageID.479 (citing *Seaway Food Town, Inc. v. Med. Mut. Of Ohio*, 347 F.3d 610, 619 (6th Cir. 2003)).

Finally, Tiara Yachts—once more re-arguing the same points—fails to show that the Court erred in finding that Sections 1132(a)(3) and (a)(2) do not provide relief for Tiara Yachts. The Court correctly held the first time that both sections "do[] not provide a pathway for Tiara Yachts to recover on the alleged overpayments because the funds were paid out to providers and do not relate to funds that BCBSM allegedly retained from Plan funds." Opinion, ECF No. 23, PageID.480.

In sum, Tiara Yachts has failed to identify any error in the Court's ruling, much less the clear error necessary to disturb the Court's judgment. The Reconsideration Motion should be denied.

LEGAL STANDARD

Tiara Yachts' Reconsideration Motion asking the Court to "reconsider its ruling" granting BCBSM's motion to dismiss is governed by Federal Rule of Civil Procedure 59(e) and Local Rule 7.4. *See, e.g.*, *Matheny v. Kmart Corp.*, 2007 WL 2127661, at *1, *5 (W.D. Mich. July 23, 2007) (applying Local Rule 7.4 to motion to alter or amend judgment pursuant to Federal Rule 59(e)); *ITT Indus., Inc. v. BorgWarner, Inc.*, 2006 WL 2811310, at *1 (W.D. Mich. Sept. 28, 2006) (same). Both Rules provide that reconsideration is to be infrequently granted, and only where the movant demonstrates significant error in the Court's ruling.

As the Sixth Circuit and this Court recognize, Rule 59(e) relief is an "extraordinary" remedy which must only "be used sparingly," particularly given the parties' "interests in finality and [the] conservation of scarce judicial resources." *See, e.g.*, *Jones*, 2012 WL 3186108, at *2 (W.D. Mich. Aug. 3, 2012); *In re Ingram*, 2010 WL 321599, at *3 (B.A.P. 6th Cir. 2010). Accordingly, a court may only alter a prior judgment under Rule 59(e) based on: "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest justice." *Leisure Caviar*, 616 F.3d at 615. Likewise, Local Rule 7.4(a) requires that, for reconsideration to be granted, "[t]he movant shall not only demonstrate a palpable defect by which the court and the parties have been misled, but also show that a different disposition of the case must result from a correction thereof."

Moreover—and critical here—both Rules preclude reconsideration on the basis of arguments previously raised to and considered by the Court. "A Rule 59(e) motion cannot be used to relitigate the same facts, issues, and arguments that have previously been considered and decided by the District Court." *Jones*, 2012 WL 3186108, at *2 (citing *Leisure Caviar*, 616 F.3d at 616, as well as six other Sixth Circuit or Western District cases); *see also Zink v. Gen. Elec. Cap. Assurance Co.*, 73 F. App'x 858, 861 (6th Cir. 2003) ("A motion to reconsider does not afford parties an opportunity to reargue their case."). Similarly, Local Rule 7.4(a) states

that "[g]enerally, . . . motions for reconsideration which merely present the same issues ruled upon by the court shall not be granted." The Court accordingly will not grant a motion that "raise[s] the very issues that the Court previously considered and determined in Defendant's favor in . . . granting Defendant's motion to dismiss." *Saco v. Deutsch Bank Nat'l Tr. Co.*, 2014 WL 12530939, at *1 (W.D. Mich. June 25, 2014).

Nor can a "Rule 59(e) motion be used to present new issues and arguments that should have been raised prior to entry of the judgment being challenged." *Jones*, 2012 WL 3186108, at *2 (citing again *Leisure Caviar*, 616 F.3d at 616, as well as six other Sixth Circuit or Western District cases). Indeed, a court will not consider "arguments which could, and should, have been made before judgment issued." *Latham v. Allstate Ins. Co.*, 331 F. App'x 368, 370 (6th Cir. 2009) (quoting *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)).

ARGUMENT

I. Tiara Yachts Cannot Identify Any Palpable Error in the Court's Ruling that the Complaint Does Not Allege Fiduciary Acts.

Tiara Yachts' Reconsideration Motion fails to demonstrate that this Court committed any "clear error" in holding that Tiara Yachts failed to allege that BCBSM acted as a fiduciary in connection with: (1) BCBSM's purported

systemwide overpayments to providers, and (2) BCBSM's administration of the Shared Savings Program.

A. There Was No Clear Error in the Court's Conclusion that Tiara Yachts' Allegations Regarding BCBSM's Claims-Processing System Do Not State a Breach of Fiduciary Duty Claim.

The Court's Opinion explained that Tiara Yachts failed to state a claim regarding flip logic and claims processing because "the specific things Tiara Yachts complains about—flip logic, upcoding or unbundling claims, improper coding, etc.—are all a systemwide BCBSM method for paying providers, not some individual exercise of discretion. And Tiara Yachts' Complaint is clear that its complaints are part of overarching business dealings." Opinion, ECF No. 23, PageID.475. Because Tiara Yachts challenged only "systemwide BCBSM practices," and not actions BCBSM took specifically in relation to Tiara Yachts' Plan, the Court held that "[t]hese are not ERISA fiduciary duty violations, but simply complaints about BCBSM as a contractor." *Id.* (citing *DeLuca*, 628 F.3d at 747).

Tiara Yachts' arguments against this holding fail to identify any palpable error. Moreover, because some of the arguments were not raised in opposition to BCBSM's Motion to Dismiss—even though they could have been—they are not even proper grounds for reconsideration.

1. Tiara Yachts' Argument Regarding Control of Plan Assets Does Not Support Reconsideration.

Tiara Yachts' lead argument for reconsideration is that its "Complaint adequately alleged that BCBSM controlled the Tiara Yachts Plan assets to process and pay claims for the Plan, and thus functioned as an ERISA fiduciary." Reconsideration Mot., ECF No. 29, PageID.581. This argument ignores the principal basis for the Court's ruling—namely, that regardless of whether BCBSM functioned as a fiduciary in other capacities, the *conduct challenged by Tiara Yachts* did not give rise to fiduciary status.

To start, Tiara Yachts is correct that "'[d]iscretionary authority or control over plan assets is not required to become a fiduciary.'" Reconsideration Mot., ECF No. 29, PageID.581 (quoting *Guyan Int'l, Inc. v. Pro. Benefits Adm'rs, Inc.*, 689 F.3d 793, 798 (6th Cir. 2012)). The Sixth Circuit has held ERISA's statutory text creates different tests for fiduciary status based on management of a plan versus control of plan assets: "a person is a fiduciary to the extent that he or she 'exercises any *discretionary* authority or *discretionary* control' over the management of the ERISA plan," or "to the extent that he or she 'exercises *any* authority or control respecting management or disposition of [the plan's] assets.'" *Briscoe v. Fine*, 444 F.3d 478, 491 (6th Cir. 2006) (emphasis in original) (quoting 29 U.S.C. § 1002(21)(A)).

But this distinction makes no difference in this case. That is because, as the Court recognized, "'[i]n determining liability for an alleged breach of fiduciary duty in an ERISA case, the courts must examine *the conduct at issue* to determine whether it constitutes'" a fiduciary act. Opinion, ECF No. 23, PageID.476 (emphasis added) (quoting *DeLuca*, 628 F.3d at 747). ERISA fiduciary status is not an all or nothing proposition; exercising control over a plan's assets when taking some actions does not make a party a fiduciary with respect to other acts that don't involve control over a plan's assets. Instead, fiduciary status turns on "*functional* terms of authority or control" over an ERISA plan or plan assets. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). That is why, in the Supreme Court's words, "[i]n every case charging breach of ERISA fiduciary duty, . . . the threshold question is . . . whether that person was acting as a fiduciary (that is, was performing a fiduciary function) *when taking the action subject to complaint*." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000) (emphasis added).

Thus, under *Pegram*, the "threshold question" here is whether BCBSM was acting as a fiduciary (*i.e.*, exercising discretionary authority respecting management of Tiara Yachts' Plan or exercising any authority respecting Tiara Yachts' Plan assets) when it engaged in the alleged conduct challenged in the Complaint. This Court correctly held that it was not: "[T]he system-wide business decisions that Tiara Yachts identifies plainly fall into" the category of "a business

decision that has an effect on an ERISA plan not subject to fiduciary standards." Opinion, ECF No. 23, PageID.476 (quoting *DeLuca*, 628 F.3d at 747). "As Tiara Yachts' own allegations recognize, it's the way BCBSM ran its overall claims processing operation, not specific decisions made about the Tiara Yachts' sponsored Plan in particular, that are at the root of the claimed problems." *Id.* Nothing about the different standards for fiduciary status based on management of plan administration versus control of plan assets changes this analysis, because the alleged BCBSM conduct that Tiara Yachts challenges amounted to systemwide business decisions—and not any action related to Tiara Yachts' Plan or its Plan assets.

The cases Tiara Yachts cites (Reconsideration Mot., ECF No. 29, PageID.580-581) are fully in accord. Each of these cases allowed an ERISA fiduciary claim where the plaintiff challenged an action the defendant took *in the course of exercising control over plan assets*—not when the defendant made a business decision separate from any particular ERISA plan. In each case, the court looked at whether the defendant acted as a fiduciary when it engaged in the challenged conduct, just as this Court did when it dismissed Tiara Yachts' claims.

In *Briscoe*, the Sixth Circuit held that plaintiffs had established that "PHP exercised at least partial control over plan assets and, *to the extent that it did so*, qualifies as a fiduciary." 444 F.3d at 494-95 (emphasis added). But that did not

mean PHP qualified as a fiduciary when it took other actions that did not involve control over plan assets. Indeed, the court was explicit in holding that PHP did "not qualify as an ERISA fiduciary" when it took ministerial actions such as "determining eligibility for benefits, processing claims, and assisting the plan administrator in producing reports required by federal and state law." *Id.* at 489-90.

So too in *Pipefitters Local 636 v. BCBSM*, 213 F. App'x 473 (6th Cir. 2007). The Sixth Circuit held that BCBSM acted as a fiduciary when it assessed a fee out of plan assets because the assessment "was an exercise of authority and control over the fund assets, and was not merely ministerial or contractual in nature." *Id.* at 477. But BCBSM did not act as a fiduciary when it declined to provide claims data requested by the plaintiff: "BCBSM was simply adhering to the contractually agreed-upon audit procedures in refusing to release the information, and [ ] it decided not to release the requested documents in its own business capacity rather than as a fiduciary under ERISA." *Id.* at 480. *See also Guyan*, 689 F.3d at 798 (6th Cir. 2012) (defendant acted as a fiduciary when it "had control over where Plan funds were deposited and how and when they were disbursed"); *Hi-Lex*, 751 F.3d at 747 ("BCBSM held plan assets of the Hi-Lex Health Plan and, *in doing so*, functioned as an ERISA fiduciary") (emphasis added); *Smith v. Provident Bank*,

170 F.3d 609, 613 (6th Cir. 1999) ("Provident was an ERISA fiduciary *as long as it exercised control over plan assets*.") (emphasis added).[1]

Tiara Yachts argues that the Court committed "reversible error" because it supposedly "believ[ed] Plaintiff was required to plead discrete 'individual exercise[s] of discretion' by BCBSM." Reconsideration Mot., ECF No. 29, PageID.580-581 (quoting Opinion, ECF No. 23, PageID.475). Tiara Yachts either misunderstands or mischaracterizes the Court's decision. The Court held that the conduct challenged in Tiara Yachts' Complaint comprised systemwide business decisions—not acts directed to Tiara Yachts' Plan specifically—and for that reason did not constitute a fiduciary act. Opinion, ECF No. 23, PageID.475-476. The Court did not hold or suggest that a defendant must have discretionary authority over plan assets to qualify as a fiduciary under § 1002(21)(A). When the Court made reference to an "individual exercise of discretion," Opinion, ECF No. 23, PageID.475, it presumably did so in response to the arguments that Tiara Yachts made in opposing dismissal, which focused on BCBSM's alleged discretion in administering the Plan. *See* Opp., ECF No. 16, PageID.198-199 (contending that

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[1] In *Stiso v. Int'l Steel Group*, which Tiara Yachts cites at PageID.582, the Sixth Circuit held that MetLife acted as a fiduciary because it exercised "discretionary authority to make benefits eligibility determinations and interpret the terms of the Plan," not because it controlled plan assets. 604 F. App'x 494, 500 (6th Cir. 2015). Regardless, the court examined the conduct challenged in the complaint to determine the defendant's fiduciary status, just as this Court did here when it dismissed Tiara Yachts' claims.

BCBSM acted "as a fiduciary by administering the Plan"; that "BCBSM had discretion in the disposition of Plan assets"; and that "BCBSM had discretionary control over the design and implementation of its claims processing system"). Because Tiara Yachts' argument at that time did not focus, as it does now, on control of plan assets, it is unsurprising that the Court did not recite the standard for fiduciary control of plan assets.

But even if Tiara Yachts had squarely presented the issue, it would not have affected the Court's ruling. As the Sixth Circuit made clear in *DeLuca*, if the conduct challenged in the complaint is "not directly associated with the benefits plan at issue," then there is no fiduciary duty claim—"[r]egardless of whether BCBSM exercised discretionary authority or control over plan assets in some other contexts." 628 F.3d at 747-48. Thus, in this case, because "Tiara Yachts' Complaint is clear that its complaints are part of overarching business dealings," it did not state a claim "that BCBSM acted as a fiduciary with respect to the claims processing complaints at issue here." Opinion, ECF No. 23, PageID.475-477.

2. Tiara Yachts Can Identify No Palpable Error in the Court's Application of *DeLuca* to the Allegations Here.

Tiara Yachts also takes issue with the Court's application of *DeLuca* in dismissing the Complaint. Reconsideration Mot., ECF No. 29, PageID.580-587. As the Court noted, Tiara Yachts challenged the application of *DeLuca* when it opposed dismissal, *see* Opinion, ECF No. 23, PageID.475 ("Tiara Yachts disputes

that *DeLuca* applies"), and Tiara Yachts' Reconsideration Motion merely rehashes what it previously said and what the Court already rejected. *Compare* Opp., ECF No. 16, PageID.197 ("Tiara's Complaint has nothing to do with BCBSM's *rate negotiation* with providers") *with* Reconsideration Mot., ECF No. 29, PageID.586 ("Plaintiff's Complaint about 'flipping logic' is not challenging BCBSM's contractual negotiations with third-party providers"). But "[a] Rule 59(e) motion cannot be used to relitigate the same facts, issues, and arguments that have previously been considered and decided by the District Court," *Jones*, 2012 WL 3186108, at *2, so Tiara Yachts' re-arguments regarding *DeLuca* should be disregarded.

In any event, the Court's ruling that Tiara Yachts' Complaint focuses on "the way BCBSM ran its overall claims processing operation, not specific decisions made about the Tiara Yachts' sponsored Plan in particular," Opinion, ECF No. 23, PageID.476, is fully supported by the allegations in the Complaint. *See, e.g.*, Compl., ECF No. 1, PageID.15 ¶ 103 (alleging "common errors associated with BCBSM's NASCO claims processing system"). Indeed, that Tiara Yachts' complaints focus on BCBSM's claims processing *system* was reiterated by Plaintiff's counsel's argument that Tiara Yachts' allegations were about BCBSM's "*conscious policy business decision* to treat out-of-network claims differently than they had been" as it relates to its "NASCO platform"—a "national multistate

product for employers." Hr'ng Tr., ECF No. 22, PageID.455-456 (emphasis added).

Nothing in Tiara Yachts' Motion for Reconsideration is to the contrary. Indeed, Tiara Yachts' brief quotes multiple passages from its Complaint that only reinforce the Court's holding under *DeLuca*. *See* Reconsideration Mot., ECF No. 29, PageID.581, 588-590, 591-595. For example, Tiara Yachts quotes its allegations that "'BCBSM is aware of flaws in its *claims processing system*,'" that its claims relate to BCBSM's "'*system logic*,'" and that "'[t]he issue of [flip logic] has been an issue *within the company* for a number of years.'" *Id.*, PageID.588-589 (emphases added). These allegations of systemwide flaws squarely support the Court's decision.

Tiara Yachts elsewhere argues that the Court was "wrong" to conclude that Tiara Yachts "did not 'identif[y] any actual claim that BCBSM paid out that suffers from [the] alleged deficiencies.'" *Id.*, PageID.588 (quoting Opinion, ECF No. 23, PageID.477). But like its Complaint, its Reconsideration Motion fails to identify any such claim, or articulate how BCBSM is supposed to have breached any fiduciary duty in administering a claim for the Tiara Yachts Plan. Instead, Tiara Yachts points to allegations that BCBSM's "flawed 'system logic . . . financial[ly] *impacted*' its self-funded, non-auto customers, including Tiara Yachts." *Id.*, PageID.588-589 (emphasis added). But this is precisely the sort of

allegation that *DeLuca* holds insufficient to support a fiduciary claim: the alleged conduct constitutes "a business decision that has *an effect* on an ERISA plan." 628 F.3d at 747 (emphasis added). This Court did not miss anything the first time: allegations about BCBSM's "management or administration of *the plan*,"—*i.e.*, actions BCBSM took that were "directly associated with the benefits plan at issue here"—are simply not there. *Id.*

The cases Tiara Yachts points to do not support reconsideration either. *Every single case* (including *Guyan* and *Hi-Lex*, which the Court already addressed) involves a situation where the Sixth Circuit found ERISA fiduciary status precisely *because* the administrator took action specific to the plaintiff's health plan, *see supra* at 10-11 (discussing *Guyan*, *Hi-Lex*, *Pipefitters*, *Smith*, and *Stiso*)—with the Sixth Circuit even noting expressly in *Hi-Lex* that the court arrived at its holding because the conduct did *not* involve the administrator's general "line of business." 751 F.3d at 744. These cases do not undermine the Sixth Circuit's holding in *DeLuca* that a plaintiff does not state an ERISA fiduciary duty claim by challenging systemwide business decisions.[2]

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[2] *DeLuca* is hardly the only case standing for this proposition. The Sixth Circuit and courts around the country routinely hold that an entity's business decisions do not give rise to ERISA fiduciary status. *See, e.g.*, *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 666 (6th Cir. 1998) ("The district court correctly found that the actions undertaken by BFG to implement its business decision were simply not the kind of plan management or administration that trigger ERISA's fiduciary duties."); *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 718-19 (6th Cir. 2000) ("[Defendant's] decision regarding the level of staffing required to accomplish the trust-to-trust

The same is true in regards to Tiara Yachts' reliance on the Sixth Circuit's 2018 decision in *Saginaw.* Reconsideration Mot., ECF No. 29, PageID.582-583 (citing *Saginaw Chippewa Indian Tribe v. BCBSM*, 748 F. App'x 12 (6th Cir. 2018)). There, the Plaintiff—an Indian tribe maintaining a health plan—sued BCBSM under ERISA because BCBSM allegedly "fail[ed] to take advantage of federal regulations that permit Indian Tribes to pay reduced rates for services provided by Medicare-participating hospitals." *Saginaw*, 748 F. App'x at 14. The Sixth Circuit held that the Plaintiff stated a claim under ERISA because BCBSM "*directed the Tribe* to pay standard contract rates for health services" out of the Tribe's plan assets, and thereby "caus[ed] the Tribe to overpay on claims that were eligible for a lower, Medicare-Like Rate." *Id.* at 20-21 (emphasis added). As a result, far from undermining *DeLuca* or "controlling" this dispute (Reconsideration Mot., ECF No. 29, PageID.583), *Saginaw* pertains to actions that BCBSM allegedly took *with respect to the Tribe's Plan*—not "overarching business dealings" like what Tiara Yachts alleges here.

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transfer was a business decision which had only an incidental effect on the plans," and thus did not involve fiduciary acts); *Acosta v. Brain*, 910 F.3d 502, 518 (9th Cir. 2018) (stating that the Plaintiff has not "cited any authority establishing" that Defendant's conduct was anything but "corporate or business operations action"); *Holdeman v. Devine*, 474 F.3d 770, 779 (10th Cir. 2007) (agreeing with the district court that "[defendant's] decisions regarding how much funding to provide to the plan were purely business decisions that did not implicate his fiduciary duties to the plan").

3. Tiara Yachts' Arguments Regarding the Parties' Administrative Services Contract Are Unavailing.

The remainder of Tiara Yachts' arguments regarding claims processing all purport to challenge the Court's conclusion that "BCBSM acted as a contractor," and that Tiara Yachts' allegations are "plainly covered by the contractual duties of the ASCs." Reconsideration Mot., ECF No. 29, PageID.583. Tiara Yachts first argues that its Complaint does not involve a "contractually compelled function." *Id.* This is incorrect: the parties' ASC contains explicit "provisions . . . for auditing and disputing overpayments in claims processing"—"mechanisms" that Tiara Yachts did not "avail itself of." Opinion, ECF No. 23, PageID.467.

Second, Tiara Yachts contends that it could not have brought any claims rooted in contract because that "belief cannot be squared with ERISA's preemptive power," Reconsideration Mot., ECF No. 29, PageID.586 n.2—an argument already raised in its Opposition to BCBSM's Motion to Dismiss. *See, e.g.*, Opp., ECF No. 16, PageID.195-196 (arguing that "ERISA would preempt a potential contract claim because ERISA provides the appropriate relief"). But as the Court observed, "it's not as though every claim that could potentially be brought under the contract is preempted by ERISA." Hr'ng Tr., ECF No. 22, PageID.448:21-22. The authority Tiara Yachts cites, *Hutchison v. Fifth Third Bancorp*, 469 F.3d 583 (6th Cir. 2006), is fully in accord. That case held a breach of contract claim preempted where the plaintiff challenged "the ERISA-governed action of Fifth Third," an ERISA

fiduciary, "in changing the beneficiary scheme" of a specific ERISA plan. *Id.* at 588-89. Here, Tiara Yachts challenges BCBSM's business decisions regarding its overall claims processing system—activities that fall squarely outside ERISA's boundaries. Preemption does not come into play where ERISA is not implicated in the first place, as is the case here. *See* Hr'ng Tr., ECF No. 22, PageID.447:16-17.

Third, there is no merit to Tiara Yachts' contention that "the Sixth Circuit very recently held that questions regarding BCBSM's 'contractor' status . . . were inappropriate for resolution at the summary judgment stage." *See* Reconsideration Mot., ECF No. 29, PageID.587 (citing *Saginaw Chippewa Indian Tribe of Mich. v. BCBSM*, 32 F.4th 548 (6th Cir. 2022)). Tiara Yachts misstates the Sixth Circuit's holding. The court reversed the district court's grant of summary judgment based on its interpretation of a regulation promulgated by the Indian Health Service, *Saginaw*, 32 F.4th at 557-63, and declined to evaluate in the first instance whether the grant of summary judgment should be affirmed on alternate grounds that the district court had not reached. Instead, the Sixth Circuit concluded, "the record before us suggests that the analysis of how the Administrative Services Contract defined Blue Cross's duties . . . is best accomplished below." *Id.* at 564. Moreover, as noted above, the *Saginaw* case involved entirely dissimilar allegations regarding BCBSM's processing of claims for a particular plan, and has nothing to do with the systemwide allegations before the Court here. *Id.* at 552-55.

B. Tiara Yachts Cannot Identify Any Palpable Error in the Court's Ruling as to the Shared Savings Program.

As it relates to the Shared Savings Program, the Court held that, "whether under Rule 9 or Rule 8, the allegations in Tiara Yachts' Complaint fail to state a viable claim that BCBSM was functioning as a fiduciary" when it "retain[ed] a contractually fixed percentage of 30% of recovered third-party payments as an administrative fee." Opinion, ECF No. 23, PageID.479 (citing *Seaway Food Town, Inc. v. Medical Mutual of Ohio*, 347 F.3d 610, 619 (6th Cir. 2003)). In particular, the Court found that the Complaint alleged no facts to support Tiara Yachts' assertion that "BCBSM had unilateral control" of the recoveries that the contractually fixed administrative fee would be applied to. *Id.*, PageID.480. Tiara Yachts' Motion for Reconsideration "merely present[s] the same issues" and arguments "ruled upon by the [C]ourt." L. Rule 7.4(a).

1. Tiara Yachts Can Show No Palpable Error in the Court's Ruling that Rule 9(b) Applies.

Tiara Yachts argues that "Rule 9(b) is inapplicable," as a categorical matter, to ERISA breach of fiduciary duty claims, citing as authority two Eastern District of Michigan cases. Reconsideration Mot., ECF No. 29, PageID.595-596 (citing *In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898 (E.D. Mich. 2004) and *Rankin v. Rots*, 278 F. Supp. 2d 853 (E.D. Mich. 2003), in addition to two cases from an Ohio federal court). Tiara Yachts' Opposition to BCBSM's Motion to Dismiss

likewise argued that "the heightened pleading requirement under Rule 9(b) will not be imposed where the claim is for a breach of fiduciary duty under ERISA," and cited the same two cases from the Eastern District of Michigan. Opp., ECF No. 16, PageID.208 (citing *CMS Energy* and *Rankin*). As BCBSM noted the first time, the Sixth Circuit plainly contradicts Tiara Yachts' argument. *See* BCBSM's Reply, ECF No. 18, PageID.387 (citing *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 551 (6th Cir. 2012) (applying Rule 9(b) in evaluating ERISA claim where "the primary theory of liability contained in plaintiffs' fiduciary-duty claims does sound in fraud")). Tiara Yachts' rehashing of its prior position has identified no palpable error in the Court's conclusion that Rule 9(b) applies here, because Tiara Yachts' allegations regarding "a scheme by which [BCBSM] paid inflated claims so that . . . it could skim off a portion under the label of 'savings'" plainly "sounds in fraud." Opinion, ECF No. 23, PageID.479.

2. Tiara Yachts Can Show No Palpable Error in the Court's Ruling that Allegations of BCBSM's Retention of Contractually Fixed Compensation Do Not State a Fiduciary Duty Claim.

The Court further held that, whether analyzed under Rule 8 or Rule 9(b), "the allegations in Tiara Yachts' Complaint fail to state a viable claim that BCBSM was functioning as a fiduciary" in connection with its compensation under the Shared Savings Program. Opinion, ECF No. 23, PageID.479. This is because "[t]he ASCs provided that BCBS[M] could retain a contractually fixed percentage

of 30% of recovered third-party payments as an administrative fee," and retaining contractually fixed compensation "'does not give rise to ERISA fiduciary status.'" *Id.* (quoting *Seaway*, 347 F.3d at 619).

Tiara Yachts contends the Court clearly erred in following *Seaway*, and that the Court should instead have applied the Sixth Circuit's decisions in *Hi-Lex* and *Pipefitters*. Reconsideration Mot., ECF No. 29, PageID.597-600. This is the same argument—nearly verbatim and citing the same two cases—that Tiara Yachts raised in its Opposition to BCBSM's Motion to Dismiss. *Compare* Opp., ECF No. 16, PageID.210 ("Here, the Complaint alleges that BCBSM had discretionary authority with respect to compensation BCBSM collected pursuant to the Shared Savings Program," citing *Hi-Lex* and *Pipefitters*) *with* Reconsideration Mot., ECF No. 29, PageID.598 ("[H]ere BCBSM had discretionary authority with respect to the fees it collected from Plan assets pursuant to its so-called 'Shared Savings Program,'" citing *Hi-Lex* and *Pipefitters*). The Court duly considered and rejected Tiara Yachts' argument the first time, ruling that *Seaway* applied and "disagree[ing] that this "case [is] closer to those cases [cited by Tiara Yachts], like *Hi-Lex*." Opinion, ECF No. 23, PageID.480.

The Court's reasons for doing so are well-supported. The court in *Hi-Lex* concluded that BCBSM qualified as a fiduciary with respect to the fees at issue because BCBSM "had the 'flexibility to determine' how and when access fees

were charged"—and to which clients. 751 F.3d at 744. Similarly, in *Pipefitters*, the 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. By contrast, BCBSM lacked discretion with respect to its compensation under the Shared Savings Program, because it could not alter either the percentage retained under the Program (30%) or choose which recovered costs the percentage would apply to. *See* BCBSM's Mot. to Dismiss, ECF No. 12-4, PageID.158; ECF No. 12-5, PageID.161.

Tiara Yachts contends that the Court erred because it "adopted BCBSM's unsupported allegation that it could not have acted unilaterally in assessing fees because some aspects of its 'Shared Savings Program' other than assessment of the fees at issue involve 'third party vendors.'" Reconsideration Mot., ECF No. 29, PageID.600 (emphasis omitted). Contrary to Tiara Yachts, the Court cited allegations *in the Complaint*, not BCBSM allegations, describing the role of third-party vendors. Opinion, ECF No. 23, PageID.480 (citing Compl., ECF No. 1, PageID.10 ¶¶ 73-77). And there was no error in the Court's recognition that because the amounts recovered are determined in part by the actions of such third-party vendors—as well as the providers from whom payments are recovered—BCBSM does not unilaterally control the amount of moneys recovered, and thus does not determine its own compensation. *Id.*

Tiara Yachts repeatedly asserts that "third-party vendors did not assess the fees at issue or bilk the Plan," Reconsideration Mot., ECF No. 29, PageID.600-601, but this assertion is beside the point. Third-party vendors are alleged in Tiara Yachts' Complaint to have played a role in determining the amount of payments recovered—*i.e.*, the "savings" to which the contractually fixed percentage was applied in calculating BCBSM's compensation. That necessarily means BCBSM did not unilaterally control the amount of its compensation. As BCBSM pointed out—but Tiara Yachts ignores—the Eighth Circuit has rejected fiduciary liability in connection with a factually similar savings program, because the defendant claims processors did not unilaterally control the savings to which their contractually fixed fee percentage would be applied. BCBSM's Reply, ECF No. 18, PageID.389 (discussing *Central Valley Ag Cooperative v. Leonard*, 986 F.3d 1082 (8th Cir. 2021)). There was no error in this Court's ruling.

II. Tiara Yachts Fails to Show Palpable Error in the Court's Ruling that ERISA Does Not Support Tiara Yachts' Claim to Money Damages Based on Purported Overpayments to Providers.

As separate grounds for dismissing Tiara Yachts' Complaint, the Court held that, "even if Tiara Yachts' Complaint did allege fiduciary acts," ERISA Sections 1132(a)(2) and (3) "do[] not provide a pathway for Tiara Yachts to recover on the alleged overpayments because the funds were paid out to providers and do not relate to funds that BCBSM allegedly retained from Plan funds." Opinion, ECF

No. 23, PageID.480. Tiara Yachts' reargument of these issues does not support reconsideration.

A. There Was No Palpable Error in the Court's Ruling that Section 1132(a)(3) Does Not Afford the Relief Tiara Yachts Seeks.

Tiara Yachts' first argument under Section 1132(a)(3) rests on a flat misreading of the Court's Opinion. Tiara Yachts says the Court "wrongly concluded that Section 1132(a)(3) does not allow for recovery of 'any monetary relief.'" Reconsideration Mot., ECF No. 29, PageID.602. Further, according to Tiara Yachts, "[t]he Court's assertion that Plaintiff is not alleging BCBSM lined its own pockets with Plan assets is false," because "the Complaint alleges that BCBSM did exactly that." *Id.* In support of this assertion, Tiara Yachts cites its allegations *regarding the Shared Savings Program*. *Id.* (citing Compl., ECF No. 1, PageID.11 ¶ 84). But the Court was clear that "Tiara Yachts cannot recover under [Section 1132(a)(3)] *for any overpayments*" to providers. Opinion, ECF No. 23, PageID.481 (emphasis added). The Court did not hold that monetary relief was never available under Section 1132(a)(3); instead, its explicitly stated reasoning was that monetary relief *for overpayments* was not equitable relief, because "[t]he complaint is that BCBSM paid out too much money out of plan funds, not that it retained any funds in its claim processing," so "[t]here is no fund of Plan money sitting out there for potential disgorgement." *Id.* BCBSM did not argue, and the Court did not hold, that an order to disgorge funds that BCBSM *had* retained

would be unavailable under Section 1132(a)(3).[3] There was no error in the Court's reasoning; the only error is Tiara Yachts' apparent misunderstanding of what the Court said.

The remainder of Tiara Yachts' argument is no more than a rehash of its previous argument that the monetary relief it seeks for alleged overpayments to providers is available under *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011). *Compare* Opp., ECF No. 16, PageID.194 ("The monetary remedy sought here—recovery of losses to the Plan caused by BCBSM's breach of fiduciary duty—is equitable in nature and recoverable under ERISA.") *with* Reconsideration Mot., ECF No. 29, PageID.605 ("The monetary remedy sought here—recovery of losses to the Plan caused by BCBSM's breach of fiduciary duty—is equitable in nature and recoverable under Section 1132(a)(3)."). This Court already has concluded that *Amara* is "inapplicable to this case . . . because the remedy that Tiara Yachts seeks is not the surcharge that was at issue in *Amara*." Opinion, ECF No. 23, PageID.481. In particular, the Court explained, "this case is not a case (like those cited by Tiara) where a case is brought by a plan beneficiary against a fiduciary." *Id.* Instead, unlike *Amara*, "[t]he beneficiaries would not be made whole by the

[3] *See* BCBSM's Mot. to Dismiss, ECF No. 12, PageID.116-117 ("Section 1132(a)(3) does not support any judgment against BCBSM's general assets in connection with those overpayments [to providers].").

relief sought. They are already whole, and obtained the healthcare coverage they were owed. What Tiara Yachts wants is money back in its own accounts from its former contract partner, BCBSM." *Id.*, PageID.482.

Tiara Yachts' repetition of its prior argument does not identify any palpable error in that conclusion. Again, unlike *Amara*, Tiara Yachts seeks contract damages based on BCBSM's purported failure to pay providers at contracted-for rates. *See* Compl., ECF No. 1, PageID.7 ¶ 50 (alleging that BCBSM paid providers "whatever was charged for a service, regardless of whether the claim was proper under the plan terms or other applicable reimbursement guidelines"). And, just as in Tiara Yachts' Opposition to BCBSM's Motion to Dismiss, every case that Tiara Yachts cites in support of its surcharge argument involved a claim by plan beneficiaries seeking to be made whole—not a claim by one fiduciary against another, as we have here. *See Stiso*, 604 F. App'x at 495; *Osberg v. Foot Locker, Inc.*, 555 F. App'x 77, 79 (2d Cir. 2014); *Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 713 (8th Cir. 2014); *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 449 (5th Cir. 2013); *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 870-71 (7th Cir. 2013); *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 178 (4th Cir. 2012). The Court's ruling should not be disturbed.

B. There Is No Palpable Error in the Court's Ruling that Section 1132(a)(2) Does Not Afford Relief to Tiara Yachts.

Tiara Yachts' final argument is that the Court "[was] wrong factually and legally," Reconsideration Mot., ECF No. 29, PageID.605-606, when it ruled that "Tiara Yachts—which is the Plan sponsor and not the Plan itself—cannot recover under Section 1132(a)(2)," Opinion, ECF No. 23, PageID.482. There was no error.

Initially, it is beyond dispute that Section 1109(a), by its plain terms, authorizes monetary relief only to "the plan," and not to an employer like Tiara Yachts. 29 U.S.C. § 1109(a); *see also Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-41 (1985) ("recovery for a violation of [§ 1109] inures to the benefit of the plan"). The Court's ruling correctly stated this legal principle: "Section 1109 authorizes suits for relief to be awarded to an ERISA plan." Opinion, ECF No. 23, PageID.482.

Notwithstanding this clear statutory text and case law, Tiara Yachts' argument when it opposed BCBSM's motion to dismiss was that "Tiara as the Plan sponsor" was authorized "to bring a civil suit for the relief specified in § 1109(a)," and that "the Complaint need not allege that Tiara seeks to recover 'on behalf of the Plan.'" Opp., ECF No. 16, PageID.191-193 (citing *Guyan*, 689 F.3d at 800).[4]

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[4] Tiara Yachts further argued that the Plan could not be joined as a Plaintiff in this action because "ERISA does not even empower the Plan itself to bring a civil action." Opp., ECF No. 16, PageID.191. As BCBSM pointed out in reply, Tiara Yachts was wrong about this. The Sixth Circuit has squarely held that a "'plan, as a party, . . . comes under the ERISA definition of a

With the benefit of the Court's ruling, Tiara Yachts' Reconsideration Motion switches tacks. Its new theory—180 degrees from what it said before—is that "Plaintiff's complaint expressly alleged that it seeks relief for the Plan, on behalf of the Plan," and that the Court was wrong to conclude that "'[t]he Complaint seeks relief for Tiara Yachts, the employer.'" Reconsideration Mot., ECF No. 29, PageID.606 (quoting Opinion, ECF No. 23, PageID.483).

Of course, a new argument that could have been raised before, but was not, cannot support reconsideration under Rule 59(e). *Jones*, 2012 WL 3186108, at *2 (citing *Leisure Caviar*, 616 F.3d at 616). Beyond that, Tiara Yachts' argument fails because its description of what the Complaint says is facially inaccurate.

The Court's statement that "[t]he Complaint expressly seeks relief for Tiara Yachts, the employer," Opinion, ECF No. 23, PageID.483, was plainly correct. Tiara Yachts is the only Plaintiff in this lawsuit, and the Complaint's allegations separately define "Tiara Yachts," the employer, from its "Plan." *See* Compl., ECF No. 1, PageID.1. The Complaint repeatedly seeks relief *for Tiara Yachts*, as distinct from the Plan:

'fiduciary'" under Section 1132 and can bring a civil action on its own behalf. BCBSM's Reply, ECF No. 18, PageID.381 (quoting *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)).

- Paragraph 3 states: "Tiara Yachts brings this suit to recover the misappropriated funds and obtain all other relief to which *it is entitled*";

- Request for Relief B asks the Court to "[o]rder BCBSM to provide a full and complete accounting of all monies taken or charged by BCBSM *to Tiara Yachts*";

- Request for Relief C asks the Court to "[d]eclare that BCBSM breached its fiduciary duty owed *to Tiara Yachts*";

- Request for Relief D asks the Court to "[a]ward[] restitution *to Tiara Yachts* for all improper misuses of Tiara Yachts' Plan assets";

- Request for Relief E asks the Court to "[a]ward[] restitution *to Tiara Yachts* for all administrative compensation collected by BCBSM under its Shared Savings Program"; and

- Request for Relief G asks the Court to "[a]ward all other relief *to which Tiara Yachts may be entitled*."

Compl., ECF No. 1, PageID.2, 21-22 (emphases added). As the Court said, these statements "expressly seek[] relief for Tiara Yachts." Opinion, ECF No. 23, PageID.483.

Tiara Yachts argues that the Court's reading of this plain text was erroneous, but its arguments fall flat. Reconsideration Mot., ECF No. 29, PageID.606. Tiara Yachts points to allegations that BCBSM's supposed misconduct wasted or misused "Plan assets," *id.*, but allegations as to the nature of the supposed misconduct do not show any error in the Court's conclusion that the plain text of the Complaint seeks *relief directed to Tiara Yachts*. Tiara Yachts next argues that the Complaint seeks an "'accounting of all payments and uses of Tiara Yachts'

Plan assets,'" which it characterizes as "obvious relief for the Plan," *id.*, but this is not "obvious" at all. Because Tiara Yachts is the only Plaintiff, it is Tiara Yachts to whom this relief would be directed—and the Complaint expressly requests that restitution based on any identified misuses of Plan assets go "to Tiara Yachts." Compl., ECF No. 1, PageID.22. Finally, Tiara Yachts says "[t]he Complaint seeks restitution" and "[r]estitution literally means returning Plan assets to the Plan," Reconsideration Mot., ECF No. 29, PageID.607, but this argument cannot be squared with the Complaint that Tiara Yachts filed. That document literally asks the Court to "[a]ward restitution *to Tiara Yachts*," not to Tiara Yachts' Plan. Compl., ECF No. 1, PageID.22 (emphasis added).[5]

Tiara Yachts further argues that, under *Guyan* and *Tullis v. UMB Bank, N.A.*, 515 F.3d 673 (6th Cir. 2008), it was clear error for the Court to read the Complaint as seeking relief for Tiara Yachts. *See* Reconsideration Mot., ECF No. 29, PageID.607-608. The Court already considered *Guyan*, and correctly noted that in that case, the "complaint[] . . . demonstrated that the sponsor, or other entity plaintiff, sought recovery on behalf of the plan," and that payment would go to the plan. ECF No. 23, PageID.482; *see also Guyan*, 689 F.3d at 800 (quoting

[5] Tiara Yachts says the Court engaged in improper "speculation that any recovery might go into Plaintiff's own bank account." Reconsideration Mot., ECF No. 29, PageID.609. There was no speculation. The Court simply read the words in the Complaint as written.

allegations in complaint that defendant "'is liable to the plan to make it whole'" and that "'the Plan . . . [is] entitled to money damages'"). *Tullis* does not help either. There, the Sixth Circuit held that plan beneficiaries could sue under § 1132(a)(2) because "any recovery of losses due to mismanagement *would inure to the plan* before being allocated to the specific accounts affected by the alleged fiduciary breach." 515 F.3d at 682 (emphasis added). The court emphasized that the recovery sought in *Tullis* "would be directly payable to the plan," and on that basis distinguished the Supreme Court's decision in *Russell*, which held that ERISA did not authorize the plaintiff to seek "relief to be paid directly to an individual as 'extracontractual' damages." *Id.* (quoting *Russell*, 473 U.S. at 143-44). Because Tiara Yachts' Complaint expressly seeks damages to be paid directly to it—and not to the Plan or any Plan beneficiary—*Tullis* does not apply.

Finally, Tiara Yachts contends that "even if the Court believed the Complaint was ambiguous," it committed clear error in ordering dismissal because other statements by Tiara Yachts and its counsel—in its Opposition to BCBSM's Motion to Dismiss and in its counsel's statements at argument—supposedly "made clear that Plaintiff is seeking recovery for the Plan." Reconsideration Mot., ECF No. 29, PageID.609. Initially, contrary to what it now says, Tiara Yachts' Opposition did *not* stipulate that any recovery would go directly to the Plan, but instead argued that Tiara Yachts was not required to "allege that Tiara seeks to

recover 'on behalf of the Plan.'" Opp., ECF No. 16, PageID.193. But in any event, as Tiara Yachts elsewhere acknowledges,[6] the question before the Court on BCBSM's Rule 12(b)(6) motion was "the facial sufficiency of the complaint." *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 680 (6th Cir. 2011). Even crediting for present purposes that Tiara Yachts intended that relief would go to the Plan, that is not what its Complaint said. And, when BCBSM pointed out that the Complaint impermissibly sought relief directed to Tiara Yachts rather than to the Plan, *see* BCBSM's Mot. to Dismiss, ECF No. 12, PageID.118-120, Tiara Yachts chose at that time not to exercise its right under Rule 15(a) to amend the Complaint. As the Sixth Circuit has held, a Rule 59(e) motion may properly be denied "on account of undue delay—including delay resulting from a failure to incorporate previously available evidence" by seeking leave to amend the complaint prior to the entry of judgment. *See Leisure Caviar*, 616 F.3d at 616 (cleaned up).

There was no error—much less clear or palpable error—in the Court's conclusion that the explicit requests for relief directed to Tiara Yachts in the Complaint were impermissible under Section 1109.

[6] *See* Reconsideration Mot., ECF No. 29, PageID.609 (arguing that it is "inappropriate" for the Court to "depart[] from the pleadings" or consider matters not alleged "in the Complaint").

CONCLUSION

BCBSM respectfully requests that this Court deny Plaintiff's Motion to Alter or Amend Judgment.

Dated: April 24, 2023

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 7,762 words.

/s/ *Tacy F. Flint*
Tacy F. Flint