

No. 24-1223

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**United States Court of Appeals  
for the Sixth Circuit**

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**TIARA YACHTS, INC.**

*Plaintiff-Appellant,*

v.

**BLUE CROSS BLUE SHIELD OF MICHIGAN,**

*Defendant-Appellee.*

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On Appeal from the United States District Court  
Western District of Michigan, Southern Division  
in Case No. 1:22-cv-603

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**REPLY BRIEF OF APPELLANT TIARA YACHTS, INC.**

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## ARGUMENT

### **I. BCBSM FUNCTIONED AS A FIDUCIARY WHEN OVERPAYING CLAIMS AND KEEPING A CUT OF THE OVERPAYMENTS.**

The Complaint plausibly pleaded fiduciary conduct. BCBSM functioned as a fiduciary when overpaying claims and keeping a percentage of overpayments as "shared savings program" ("SSP") fees. That misconduct involved BCBSM exercising (1) authority and control over plan assets and (2) discretionary authority over plan management and administration.

#### **A. BCBSM EXERCISED AUTHORITY AND CONTROL OVER PLAN ASSETS TO OVERPAY CLAIMS AND KEEP SSP FEES.**

BCBSM "exercise[d] control over the assets of an ERISA-covered plan," and thereby "acquire[d] fiduciary status with regard to control of those assets." *Briscoe v. Fine*, 444 F.3d 478, 494 (6th Cir. 2006). The Complaint alleges, and the ASC establishes, that BCBSM controlled and managed Plan assets, pre-paid by Tiara Yachts into a BCBSM-owned bank account for BCBSM to pay Plan claims. Compl., ¶¶21-24 (RE1, PageID#3-4); *see also* ASC at III.B-C, E (RE12-2, PageID#147); Sched. A (RE12-5, PageID#160). Under the ASC, "BCBSM had complete authority and control over the bank account and the Plan assets sent to it by Tiara Yachts."<sup>1</sup> Compl., ¶24 (RE1, PageID#4); *see also* ASC, at III.B-C, E (RE12-2, PageID#147).

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<sup>1</sup> BCBSM's response ignores this funding and payment system, which is dispositive of its fiduciary status.

BCBSM exercised its control and authority over Plan assets by "[k]nowingly using Tiara Yachts' Plan assets to pay claims impacted by BCBSM's systems flip logic . . . [and] causing Tiara Yachts' Plan to overpay for benefits," a squandering of Plan assets. Compl., ¶¶2, 46-48, 108(a), (f)-(h), (k)-(l) (RE1, PageID#1, 7, 19). It "caus[ed] claims to be processed at charges in contradiction with Tiara Yachts' elected Plan benefits." *Id.*, ¶¶53-54, 108(b) (PageID#8, 19). Using Plan assets, "BCBSM would pay whatever was charged for a service, regardless of whether the claim was proper under the plan terms or other applicable reimbursement guidelines and policies." *Id.*, ¶50 (PageID#7). BCBSM also "maintain[ed] exclusive control of Tiara Yachts' complete claims data and other information" and "[c]onceal[ed] from, and otherwise fail[ed] to disclose to Tiara Yachts the payment of improper claims." *Id.*, ¶¶2, 58, 91 (PageID#1, 9, 13). And BCBSM exercised control and authority over Plan assets by keeping a cut of improper payments as SSP fees. *Id.*, ¶¶81-87, 108(d)-(e), 112-115 (PageID#11, 19, 21).

"Therefore, [Tiara Yachts] has set forth sufficient allegations that BCBSM owed a fiduciary duty under ERISA with regard to its disposal of these assets[.]" *Pipefitters Local 636 v. BCBSM*, 213 F. App'x 473, 478 (6th Cir. 2007); *see also Hi-Lex Controls, Inc. v. BCBSM*, 751 F.3d 740, 743 (6th Cir. 2014) (possessing plan assets made BCBSM an ERISA fiduciary); *Guyan Intern., Inc. v. Professional Benefits Adm'rs, Inc.*, 689 F.3d 793, 798 (6th Cir. 2012) ("PBA was a fiduciary under

ERISA because it exercised authority or control over Plan assets. PBA had the authority to write checks on the Plan account and exercised that authority. Moreover, PBA had control over where Plan funds were deposited and how and when they were disbursed."); *Briscoe*, 444 F.3d at 494 ("PHP both had the power to write checks on the plan account (which was partially in PHP's name) and exercised that power before and after its contractual relationship with the Company ended. Because PHP exercised control over plan assets, it qualifies as an ERISA fiduciary to the extent that it did so."); *Smith v. Provident Bank*, 170 F.3d 609, 613 (6th Cir. 1999) ("Because Provident controlled Plan assets, it is liable under ERISA as a fiduciary.").

BCBSM cites two out-of-circuit cases for support—*Massachusetts Laborers' Health & Welfare Fund v. Blue Cross Blue Shield of Mass.*, 66 F.4th 307 (1st Cir. 2023) and *Central Valley Ag Cooperative v. Leonard*, 986 F.3d 1082 (8th Cir. 2021). Neither is controlling; both are distinguishable.

In *Mass. Laborers*, the First Circuit held the Massachusetts Blues (BCBSMA) was not a fiduciary regarding the Fund's ERISA claims because ***the Fund—not BCBSMA***—had (1) "full control over claims eligibility determinations"; (2) "final" decision-making authority over payment remittance to providers and BCBSMA; and (3) "full control of the appeals process." *Mass. Laborers'*, 66 F.4th at 320-21, 326-27. "BCBSMA lacked authority respecting the disposition of the working capital



amount." *Id.* Thus, the First Circuit's "holding is a limited one" and "fact-specific," premised on: (1) "BCBSMA lacked 'meaningful control' over remitting claim payments to Fund-approved providers" and (2) "the Fund has not alleged that BCBSMA used the working capital amount for its own purposes[.]" *Id.* at 327.

In *Central Valley*, the Eighth Circuit said claims processors were not fiduciaries relative to overpayments and fees because Central Valley: (1) "retained possession and had dominion over all plan assets at all times"; and (2) "ultimately decided what portion of each medical bill was paid." *Central Valley*, 986 F.3d at 1087-88. The Eighth Circuit reasoned: "Because Central Valley made the final payment decisions, AMPS and TBG did not have discretion over their compensation and were not fiduciaries." *Id.*

Not so here. ***BCBSM—not Tiara Yachts***—had (1) full control over claims eligibility determinations; (2) final, discretionary decision-making authority over payments to providers using Plan assets under its control; (3) full control of the claim appeals process; and (4) discretion in deciding how much in SSP fees to allocate to itself from Plan assets under its control. Compl., ¶¶18-27, 80-87, 112-115 (RE1, PageID#3-4, 11-12, 21); *see also* ASC, Art. II, ¶¶A, C (RE12-2, PageID#141-42). Unlike the contracts in *Mass. Laborers* and *Central Valley*, the ASC did not mandate any payment rate or articulate any method by which rates might be calculated.<sup>2</sup>

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<sup>2</sup> BCBSM mischaracterizes the Complaint as alleging BCBSM paid claims "at

ASC, Art. II, ¶¶ A, C (RE12-2, PageID#141-42). Similarly, the ASC and Schedule A did not identify the dollar amount of the SSP fee or the method by which BCBSM calculated it. *See* ASC (RE12-2); Sched. A (RE12-5, PageID#161); Compl., ¶¶83-86, 111-115 (RE1, PageID#11-12, 21). All of that was left to BCBSM's discretion. Compl., ¶¶81-86, 112-115 (RE1, PageID#11, 21) (BCBSM "in its discretion . . . collects a recovery fee for 'catching' [its] errors" and "unilaterally control[s] the amount of its own compensation" through the SSP fees).

Ironically, the First Circuit cited this Court's *Hi-Lex* and *Pipefitters* cases (finding BCBSM an ERISA fiduciary) as examples where "courts have found discretion to exist," highlighting that BCBSM's standard ASC—the one in place here—"contains broad language that affords a party flexibility in determining its course of action." *Mass Laborers*, 66 F.4th at 319 (citing *Hi-Lex*, 751 F.3d at 744, 748; *Pipefitters Local 636 Ins. Fund v. BCBSM*, 722 F.3d 861, 867 (6th Cir. 2014)). Further, the First Circuit noted BCBSMA's arrangement "is distinguishable" from arrangements where, like here, the "TPA has the ability to convey plan funds unilaterally." *Mass. Laborers'*, 66 F.4th at 327. Because *Mass. Laborers* and

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a higher rate than the contract provided for." BCBSM Br. at 18, 32-33. It wants to reshape the Complaint into something it is not. In reality, the ASC does not specify any rate; it delegated to BCBSM "discretionary authority" to decide which claims to pay and at what rates. Compl., ¶¶24-25 (RE1, PageID#4); ASC, Art. I, ¶E (RE12-2, PageID#140) ("BCBSM . . . set[s] the rate for health care services"); *see also id.*, Art. II, ¶A (PageID#141).

*Central Valley* are fundamentally distinguishable, they do not support the District Court's rulings or BCBSM's position.

**BCBSM EXERCISED DISCRETIONARY AUTHORITY AND RESPONSIBILITY IN PLAN ADMINISTRATION BY OVERPAYING CLAIMS AND KEEPING SSP FEES FROM PLAN ASSETS.**

BCBSM's misconduct also involves the exercise of authority and responsibility in administering the Plan. The Complaint challenges BCBSM's benefits adjudications and payments to itself and providers—*i.e.*, its decisions as Plan administrator and fiduciary to allow improper claims to increase what it could pocket from recouped Plan assets. *See* Compl., ¶¶84-87, 108(a)-(j), 112-115 (RE1, PageID#11-12, 19-21) (BCBSM "fail[ed] to exercise the care, skill, prudence, and diligence under the circumstances that a prudent fiduciary acting in a like capacity and familiar with such matters would use in *paying for health care claims*, and *otherwise administering Tiara Yachts' ERISA-governed Plan.*" (emphasis added)).

BCBSM incorrectly alleges "the Complaint alleges no actions whatsoever that BCBSM took with respect to Tiara Yachts' Plan." BCBSM Br., at 8, 21-26. The Complaint refers to BCBSM's core fiduciary misconduct relative to Tiara Yachts' Plan *over 70 times*. *See generally* Compl., (RE1, PageID#1-22). BCBSM was "**THE PLAN'S ADMINISTRATOR,**" fiduciary, and claims processing agent, and "BCBSM's mismanagement of *Plan* Assets" is the "breach of BCBSM's fiduciary duty of care

under ERISA." *Id.*, ¶¶1-3, Heading A, 15, 21, 27, 106, 108(1) (PageID#1-4, 18, 20) (emphasis added).

The ASC delegated to BCBSM *discretionary authority and control* over *Plan* management and *Plan* assets to interpret the Plan, adjudicate Plan benefit claims, and deny or pay claims. *Id.*, ¶¶15-26 (PageID#3-4). BCBSM received (in a bank account it owned) prepayments from Tiara Yachts entrusted to BCBSM for BCBSM to pay *Plan* claims. *Id.*, ¶¶22-23 (PageID#4). "The prepayments sent to BCBSM's bank account were '*Plan Assets*' as defined by ERISA." *Id.*, ¶23 (emphasis added). "BCBSM had complete authority and control over the bank account and the Plan assets sent to it by Tiara Yachts." *Id.*, ¶24.

Exercising its "complete authority and control" over *the Plan's* assets, BCBSM—in its capacity as the *Plan Administrator, fiduciary, and claims-processing agent*—breached its ERISA fiduciary duties of loyalty, prudence, and disclosure by squandering *Plan* assets under its authority and control through overpayments to providers in violation of *Plan* requirements and industry standards. Compl., ¶¶1-3, 15-27, 37-58, 101-108, 108(a)-(1) (RE1, PageID#1-4, 6-9, 15-16, 18-20). It "[k]nowingly *us[ed]* *Tiara Yachts' Plan assets to pay claims* impacted by BCBSM's flip logic, fully aware flip logic ha[s] been flawed for decades and was causing *Tiara Yachts' Plan* to overpay for benefits" *Id.*, ¶¶46, 50, 108(a) (PageID#7-8, 19) (emphasis added)). Although "BCBSM knew its system logic was flawed and

causing claims to be processed at charges *in contradiction with Tiara Yachts' elected Plan benefits*," it concealed flip logic and its damaging effects to the Plan from Tiara Yachts. *Id.*, ¶¶58, 108(b)-(c), (j) (PageID#9, 19-20).

The Complaint alleges "BCBSM's NASCO claims processing system has been found to consistently result in improper payments of claims . . . result[ing] in wasted *Plan* assets in breach of BCBSM's fiduciary duty." *Id.*, ¶102 (PageID#15) (emphasis added). It identifies numerous errors BCBSM committed vis-à-vis Tiara Yachts' Plan: unbundling, medically-unlikely edits, upcoding, and non-adherence to payment guidelines. *Id.*, ¶¶101-108, 108(g)-(h) (PageID#15-16, 19-20). BCBSM "[f]ail[ed] to implement industry standard claims processing edits to prevent *Tiara Yachts' Plan assets* from being used to pay improper charges." *Id.*, ¶108(h) (PageID#20). BCBSM allocated to itself *from Plan assets* the cut in overpayments it let slide through its first-pass of Plan claims. *Id.*, ¶¶112-115 (PageID#21) (through the SSP, "BCBSM *dealt with Tiara Yachts' Plan assets* in its own interest and for its own account" (emphasis added)).

BCBSM "[c]onceal[ed] from, and otherwise fail[ed] to disclose to Tiara Yachts all documents and information that govern BCBSM's methodology for determining covered charges *under Tiara Yachts' Plan* and amounts to be paid to providers, *affording BCBSM complete discretionary control* and preventing Tiara Yachts from verifying whether *reimbursements made by BCBSM using its Plan*

*assets* were calculated and made in accordance with *the Plan's terms*, operative pricing rates, rules, policies, and contracts."<sup>3</sup> *Id.*, ¶108(j) (PageID#20) (emphasis added).

Such "misuse and mismanagement of plan assets by plan administrators" is "the crucible of congressional concern" giving rise to ERISA and what ERISA "was designed to prevent." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.8 (1985). Making "a benefit determination is part and parcel of the ordinary fiduciary responsibilities connected to the administration of a plan," *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 219 (2004), and having "alleged in their complaint that BCBSM had discretion to grant or deny Plaintiffs' claims, . . . [p]laintiffs have adequately pleaded BCBSM's status as an ERISA fiduciary to survive a motion to dismiss." *Hill v. BCBSM*, 409 F.3d 710, 716-17 (6th Cir. 2005).

Contrary to the District Court's holding, Tiara Yachts alleged BCBSM breached its fiduciary duties to act prudently and solely for Plan participants and beneficiaries by "paying more than necessary for [Tiara Yachts'] medical claims"; "[t]hat is enough to state a claim under ERISA." *Saginaw Chippewa Indian Tribe*

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<sup>3</sup> The above-quoted allegations refute BCBSM's repeated assertions that "nowhere does Tiara Yachts allege any facts addressing BCBSM's conduct in the course of administering Tiara Yachts' Plan or controlling Tiara Yachts' Plan assets," BCBSM Br., at 21-23, 26. The Complaint refers to BCBSM's specific misconduct against the Plan *over 70 times*.

*of Michigan v. BCBSM*, 748 F. App'x 12, 21 (6th Cir. 2018); *see also Comau LLC v. BCBSM*, No. 19-CV-12623, 2020 WL 7024683, at \*8 (E.D. Mich. Nov. 30, 2020) (alleging "BCBSM's processing system was flawed and that it paid inflated claims to providers" states "a plausible breach of fiduciary duty"); *Grand Traverse Band of Ottawa & Chippewa Indians v. BCBSM*, No. 14-CV-11349, 2017 WL 3116262, at \*6 (E.D. Mich. July 21, 2017) (alleging "defendant acted as a fiduciary in determining how much to pay on claims . . . because it had discretion to pay the lower rate rather than the contractual rate" is sufficient to plead fiduciary status); *Little River Band of Ottawa Indians v. BCBSM*, 183 F. Supp. 3d 835, 844 (E.D. Mich. 2016) (alleging "an overpayment theory based on Blue Cross's obligation to avoid squandering Plan assets on the cost of services that should have been capped at Medicare-Like Rates").

BCBSM and the District Court misread *DeLuca v. BCBSM*, 628 F.3d 743 (6th Cir. 2010), which actually supports Tiara Yachts' position. In *DeLuca*, the plaintiff sued BCBSM over increased rates with third-party providers. *Id.* at 746. This Court held "BCBSM was not acting as a fiduciary when it negotiated the challenged rate changes, principally because those business dealings were not directly associated with the benefits plan at issue here but were generally applicable to a broad range of health-care consumers." *Id.* at 747. But a fiduciary claim would exist if "BCBSM unwisely invested, *wrongly appropriated, or otherwise squandered plan assets*

*under its authority or control.*" *Id.* at 747-48 (emphasis added). And BCBSM admitted in *DeLuca* it was a fiduciary when acting "*as the administrator and claims-processing agent for the plan.*" *Id.* at 746.

Tiara Yachts is bringing the claim *DeLuca* recognized: suing BCBSM as Plan administrator and claims-processor of the Plan for squandering Plan assets under its authority or control by overpaying claims in violation of Plan requirements and industry standards, and wrongly appropriating Plan assets. *See* Compl., (RE1, PageID#1-21). The "action subject to complaint" is not "BCBSM's negotiation of rates" or any "business dealings" BCBSM may have had with third parties (*DeLuca*), but squandering and wrongfully appropriating **Plan** assets by overpaying individual claims in violation of Plan terms that required BCBSM to pay Plan claims at lower Host plan rates, not at charge as BCBSM did, and keeping a cut of Plan assets. *Id.*

*DeLuca* supports Tiara Yacht's position.<sup>4</sup> *See DeLuca*, 628 F.3d at 746-48; *see also GTB v. BCBSM*, No. 14-cv-11349, 2017 WL 3116262, at \*4-\*5 (E.D. Mich. July 21, 2017) (BCBSM's "reliance on *Pegram* and *DeLuca* is misplaced" where "plaintiffs are not seeking rate renegotiation on behalf of their individual Plan or arguing that the rate negotiations constituted self-dealing" but instead "their

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<sup>4</sup> The District Court's view that no ERISA fiduciary duty arises if the challenged action is systemic rather than discrete implies that misconduct on a grand scale is not an ERISA issue. That perverse notion misstates the law.



argument is that defendant 'squandered plan assets under its authority or control,' which the *DeLuca* court indicated would implicate fiduciary concerns."). In *Saginaw Chippewa Indian Tribe of Michigan v. BCBSM*, 32 F.4th 548, 563-64 (6th Cir. 2022), this Court cited *DeLuca* for *support* in reaffirming BCBSM's "[f]ailing to preserve assets can be actionable under ERISA." *Id.* (citing *Saginaw Chippewa Indian Tribe*, 748 F. App'x at 20–21; *DeLuca*, 628 F.3d at 747-48).

**C. BCBSM'S "CONTRACTOR" ARGUMENT MISCHARACTERIZES THE FACTS AND IS IRRELEVANT.**

The idea that the Complaint challenges "contractor" conduct, not fiduciary acts, is false and irrelevant. Where, as here, BCBSM controlled Plan assets, this Court has repeatedly "reject[ed] the argument that limiting language in a contract between a company and its third-party administrator overrides the latter's functional status as a fiduciary." *Briscoe*, 444 F.3d at 492. This is because, even if a contract limits a third-party administrator's *discretion* over plan funds (it does not here), that does "not affect [the third-party administrator's] control over the funds." *Id.*; *see also Pipefitters*, 213 F. App'x at 478 ("the Fund's knowledge of the fee . . . would not alter BCBSM's control over the funds" and its fiduciary status).

**1. This Court already rejected this "contractor" argument.**

This Court rejected BCBSM's "contractor" argument in *Hill v. BCBSM*, 409 F.3d 710 (6th Cir. 2005). The plaintiff in *Hill* brought ERISA breach-of-fiduciary-duty claims alleging "BCBSM violated its fiduciary duties to Program members by

processing emergency-medical-treatment claims in a manner contrary to the terms of the Program documents[.]” *Id.* at 716. BCBSM argued it was not a fiduciary, saying its agreement with the plan sponsor “requires it to use the claims-handling process set forth in the Administrative Manual[.]” *Id.* This Court disagreed: “[w]hen an insurance company administers claims for an employee welfare benefit plan and has authority to grant or deny the claims, the company is an ERISA ‘fiduciary’ under 29 U.S.C. § 1002(21)(A)(iii).” *Id.* “Because Plaintiffs have alleged in their complaint that BCBSM had discretion to grant or deny Plaintiffs’ claims,” this Court held “Plaintiffs have adequately pleaded BCBSM’s status as an ERISA fiduciary to survive a motion to dismiss.” *Id.* at 717.

The same is true here. Tiara Yachts entrusted Plan assets to BCBSM, which administered them “as a fiduciary pursuant to 29 U.S.C. § 1002(21)(A) with respect to Tiara Yachts’ Plan,” not a “contractor” performing ministerial functions. Compl., ¶¶22-26, 107 (RE1, PageID#4, 18). “BCBSM had complete authority and control over the . . . Plan assets sent to it by Tiara Yachts.” *Id.* The ASC delegated to BCBSM “*discretionary authority*” to allocate and dispose the transferred *Plan assets*; it did not compel any contractual function by BCBSM: “[The] Group hereby *delegates BCBSM the responsibility and discretionary authority as claims administrator to make final benefit determinations and plan interpretations necessary to make those benefit determinations . . . .*” ASC, Art. II, ¶A (RE12-2,

PageID#141-42) (emphasis added). Per the ASC, Tiara Yachts and its Plan could not access Plan assets under BCBSM's control even after the ASC's termination. *Id.*, Art. IV, ¶B.2 (PageID#149). BCBSM acknowledged in the ASC that *ERISA* "determine[d] requirements applicable to Group and the performance of this Contract." *Id.*, Art. V, ¶Q (RE12-2, PageID#153).

BCBSM exercised its authority and control over Plan assets, breaching its fiduciary duties, by (1) "[k]nowingly using Tiara Yachts' Plan assets to . . . overpay for benefits" (*i.e.*, wasting plan assets), Compl., ¶¶108(a), (f)-(h), (k)-(l) (RE1, PageID#19); (2) "causing claims to be processed at charges in contradiction with Tiara Yachts' elected Plan benefits;" *i.e.*, violating Plan terms; *id.*, ¶108(b); and, (3) self-dealing by using its improper payments from Plan assets to increase its profits through SSP fees. *Id.*, ¶108(d)-(e). BCBSM's misconduct is fiduciary misconduct. *See Hill*, 409 F.3d at 717.

**2. This Court rejected BCBSM's "contractor" argument in the fees assessment context.**

This Court rejected BCBSM's "contractor" argument specific to charging fees as a percentage of hospital claims cost in *Hi-Lex Controls, Inc. v. BCBSM*, 751 F.3d 740 (6th Cir. 2014), and *Pipefitters Local 636 Ins. Fund v. BCBSM*, 722 F.3d 861 (6th Cir. 2013). Like in this case, where Tiara Yachts brings ERISA breach-of-fiduciary-duty and prohibited transaction claims against BCBSM for self-dealing by unilaterally collecting "shared savings fees" from Tiara Yachts' Plan assets, in *Hi-*

*Lex* and *Pipefitters* the plaintiffs brought those claims alleging BCBSM self-dealt by "assessing the OTG fee to its customers, including Plaintiff," *Pipefitters*, 722 F.3d at 866, and by retaining as "administrative compensation" certain "mark-ups to hospital claims" from plan assets. *Hi-Lex*, 751 F.3d at 742-43. Contrary to BCBSM's unsupported assertions, the *Hi-Lex* and *Pipefitter* fees systems are indistinguishable from its SSP fees. All fees are collected under **BCBSM's form ASCs**. Just as the *Pipefitters* fee system involved BCBSM "not passing through the entire discount it had negotiated to its administrative services customers", *Pipefitters*, 722 F.3d at 866, with the SSP BCBSM retained a percentage of the discount between what the provider billed and what BCBSM paid from Plan assets. Compl., ¶¶80-87, 112-115 (RE1, PageID#11-12, 21). Similarly, the *Hi-Lex* fee system involved BCBSM "retain[ing] additional revenue by adding certain mark-ups to hospital claims paid by its ASC clients," *i.e.*, "[t]he difference[s] between the amount billed to the client and the amount paid to the hospital was retained by BCBSM." *Hi-Lex*, 751 F.3d at 743. And here too, BCBSM "unilaterally" and retroactively imposed its SSP whereby, "at its discretion," it collected a percentage of the difference between what the hospital billed and what BCBSM paid on the Plan's behalf. Compl., ¶¶80-87, 112-115 (RE1, PageID#11-12, 21). Finally, like the *Hi-Lex* and *Pipefitters* fees systems, under which BCBSM secretly decided how, when, and what to charge fees, under its SSP system BCBSM "in its discretion . . .

collects a recovery fee for 'catching' [its] errors"; "unilaterally control[s] the amount of its own compensation" through the SSP fees; and "impedes its self-funded customers, including Tiara Yachts', ability to evaluate whether BCBSM is properly paying claims by significantly limiting access to each customers' claims data." Compl., ¶¶81-86, 112-115 (PageID#11, 21). Like the *Hi-Lex* and *Pipefitters* form ASCs, which did not "set forth the dollar amount for the OTG fee or even a method by which the OTG fee [was] calculated," *Pipefitters*, 722 F.3d at 867, here BCBSM's form ASC did not identify the dollar amount of the SSP fee or the method by which BCBSM calculated it. See ASC (RE12-2); Compl., ¶¶83-86, 111-115 (RE1, PageID#11-12, 21).

As it does here, in *Hi-Lex* and *Pipefitters* BCBSM relied on *Seaway Food Town, Inc. v. Medical Mutual of Ohio*, 347 F.3d 610 (6th Cir. 2003), for the proposition that a party's "unilateral right to retain funds as compensation" doesn't trigger ERISA fiduciary status, and it asserted "its right to collect fees per the terms of its contract with" the plaintiff plan sponsors. *Hi-Lex*, 751 F.3d at 744-45; *Pipefitters*, 722 F.3d at 866-67. This Court rejected BCBSM's identical argument in *Hi-Lex* and *Pipefitters*, distinguishing *Seaway*—which concerned a third-party administrator's ability to keep funds *it* owns—as inapplicable to BCBSM's retention of *variable* fees from self-funded customers' *Plan assets*. *Hi-Lex*, 751 F.3d at 744-45; *Pipefitters*, 722 F.3d at 866-67. In *Hi-Lex*, this Court rejected BCBSM's

"attempt[] to characterize its arrangement with Hi-Lex as a service agreement between two companies—with no thought toward ERISA and its protections" as "unavailing." *Hi-Lex*, 751 F.3d at 746. It reasoned that, unlike the *negotiated provider discount funds* at issue in *Seaway*, *which were not fees*, but funds that *belonged to the third-party administrator* and that the parties' agreement expressly stated were *for the third-party administrator's "sole benefit,"* the variable fees in *Hi-Lex* and *Pipefitters* were collected by BCBSM *from self-funded plan assets* and *discretionarily imposed*. *Pipefitters*, 722 F.3d at 866; *Hi-Lex*, 751 F.3d at 744-45.

Variable SSP fees collected from Plan assets are at issue here, not negotiated provider discounts belonging to BCBSM. And the SSP fees were "unilaterally" assessed by BCBSM and collected "at its discretion"; they were not "fixed compensation" as BCBSM asserts without support. Compl., ¶¶83-87, 108, 113-15 (RE1, PageID#10-12, 21). *Seaway* is inapplicable; as in *Hi-Lex* and *Pipefitters*, BCBSM is an ERISA fiduciary relative to its discretionary collection of variable SSP fees.

### **3. BCBSM misrepresents the Complaint's factual allegations.**

The District Court rejected the Complaint's factual allegations, believing BCBSM's allegations instead. But BCBSM's denials deserve no credence at the motion to dismiss stage.

BCBSM asserts—and the District Court believed—that "various third parties determined the amounts recovered through the Shared Savings Program" and that was "outside BCBSM's control." BCBSM Br., at 19, 37-38; Order, at 15 (RE23, PageID#480). But the Complaint alleges **BCBSM**—not third parties—did that: "The more improper payments **BCBSM** let slide through its system, the more money it would make on the back end." Compl., ¶84 (RE1, PageID#11) (emphasis added); *see also id.*, ¶86 (PageID#12) ("**BCBSM** has designed a system in which *it* knowingly pays claims, later corrects the claim charge to what it should have been in the first place, at its discretion, and then collects a recovery fee for 'catching' the error." (Emphasis added)). All material aspects of the program (including, most importantly, the calculation, assessment, and collection of the SSP fees) were "in the unilateral control of BCBSM[.]" *Id.*, ¶¶112-115 (PageID#21).

And BCBSM misrepresents Tiara Yachts "had the opportunity to opt out" of the SSP. BCBSM Br. at 12. Per the Complaint—and BCBSM's policies—BCBSM **mandated** all self-funded customers, including Tiara Yachts, to be subjected to SSP fees. Compl., ¶¶71, 81, 84 (PageID#10-11); BCBSM Internal Sales FAQs (RE1-6, PageID#58) ("Is it mandatory for customers to participate? Yes."). In fact, BCBSM unilaterally applied the SSP to Tiara Yachts "retroactively to improper payments extending back to January 1, 2016." Compl., ¶82 (RE1, PageID#11).

BCBSM alleges the SSP was "fully disclosed;" it was not. *Id.*, ¶¶108(d) (PageID#19). The document BCBSM misleadingly cites throughout its response as a "disclosure" is BCBSM's "**Internal Memo**," with "**Internal Sales FAQs**," made public in recent litigation, not anything BCBSM disclosed to Tiara Yachts. Compl., ¶71 (PageID#10); BCBSM Internal Sales FAQs, (RE1-6, PageID#52-59) (emphasis added). BCBSM concealed how the SSP really worked. Compl., ¶¶86-91, 99-104, 108(d), 108(i)-(j) (RE1, PageID#12-13, 17-20).

Another example: BCBSM repeatedly misrepresents "the ASC *did* contractually fix the amount of BCBSM's recovery under the Shared Savings Program," pointing to nothing in the ASC (or any other document). BCBSM Br., at 5-6, 11-13, 34, 40-41. Tiara Yachts' Complaint, by contrast, accurately asserts BCBSM's SSP fees were "unilaterally" assessed by BCBSM and collected "at its discretion," given nothing in the ASC cabined BCBSM's ability to impose SSP fees on claims at will, in amounts it engineered. Compl., ¶¶83-87, 108, 113-15 (RE1, PageID#10-12, 21).

BCBSM disputes alleged facts; it does not identify insufficiently pleaded facts. *See Saginaw Chippewa Indian Tribe of Michigan*, 32 F.4th at 564 ("Although Blue Cross may have violated a fiduciary duty in failing to seek MLR, significant questions of law and material fact remain as to whether Blue Cross's decision not to seek MLR amounted to 'failing to preserve assets' of the Member and Employee



Plans or a breach of its other fiduciary duties."); *Pipefitters*, 213 F. App'x at 478 ("While this contractual term is relevant to the trial court's determination of the extent of BCBSM's duties under the agreement, there is nothing at this early stage that negates the Fund's assertions set forth in the complaint."); *Band*, 183 F. Supp. 3d at 843 ("Blue Cross contends that its fiduciary duty did not extend to ensuring that claims were paid at appropriate rates. However, that argument is merely a factual rebuttal to the breach of duty claim; it does not establish that the breach of duty claim is insufficiently pleaded in the first instance.").

**D. THE COMPLAINT CONTAINS SUFFICIENT FACTUAL ALLEGATIONS OF BCBSM'S FIDUCIARY BREACHES.**

More specifically, BCBSM's and the District Court's views that the Complaint does not contain sufficient factual allegations regarding the SSP fees is incorrect. Preliminarily, Rule 9(b) is inapplicable: courts in this circuit "routinely apply only the general, liberal pleading standards of Rule 8 to ERISA claims," including claims premised on overpayments and improper fees. *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 821 (S.D. Ohio 2004). This is because fraud and scienter are not elements of ERISA breach-of-fiduciary-duty or prohibited transactions claims. *See Concha v. London*, 62 F.3d 1493, 1502 (9th Cir. 1995) ("[N]o case from any jurisdiction require[s] plaintiffs to comply with Rule 9(b) when they allege breaches of fiduciary duty—under ERISA or any other law—but do not plead the commission of fraud.").

*Cataldo v. U.S. Steel Corp.*, 676 F.3d 542 (6th Cir. 2012)—relied on by the District Court and BCBSM—analyzed whether the plaintiff sufficiently pleaded the "fraud or concealment" exception to ERISA's statute-of-limitations, *id.* at 551. There is no statute-of-limitations issue on appeal and Tiara Yachts' claims are not based on fraudulent representations or detrimental reliance, rendering *Cataldo* inapplicable. *See* Compl., (RE1, PageID#1-22); *see also Comau*, No. 19-CV-12623, 2020 WL 7024683, at \*5 ("The gravamen of Comau's FAC alleges that BCBSM knowingly paid inflated healthcare claims to providers on behalf of Comau and that it failed to update its billing system to avoid the payment of improper claims . . . . The court finds that the FAC alleges a breach of fiduciary duty claim and not fraud. Therefore, the FAC is subject to the 8(a) pleading standard.").

Regardless, the Complaint contains factual allegations satisfying either pleading standard. BCBSM asserts the Complaint doesn't "allege any fact showing BCBSM retained any part of overpayments recovered or avoided for Tiara Yachts under the Shared Savings Program," BCBSM Br., at 12, 43, but it alleges that precisely. Compl., ¶¶80-87, 108(d), 112-115 (RE1, PageID#11-12, 19, 21). And BCBSM argues the demonstrative examples Tiara Yachts included in its brief are "unsupported by any factual allegation in the Complaint." BCBSM Br., at 13. False. The Complaint alleges BCBSM overpaid Plan claims using flip logic and applied SSP to those claims to take a cut for itself, just like the first demonstrative illustrates.

Compl., ¶83 (RE1, PageID#11). The Complaint also alleges BCBSM made "more improper payments" such as upcoded and unbundled claims and applied SSP to those claims to take a cut for itself, as the second demonstrative illustrates. *Id.*, ¶84.

Allegations—like those in Tiara Yachts' Complaint—alleging BCBSM collected SSP fees off overpayments state ERISA breach-of-fiduciary-duty and prohibited transaction claims. *See Stewart, et al., v. Cigna Health and Life Ins. Co.*, No. 3:22-cv-769, 2024 WL 1344796, at \*3 (D. Conn. Mar. 30, 2024) (a sufficient factual basis exists where plaintiffs allege "Cigna violated the Plans' terms for the purpose of increasing the fees it collected from the Plans, since it received a percentage of costs it saved the Plans"); *Popovchak v. UnitedHealth Grp. Inc.*, No. 22-CV-10756, 2023 WL 6125540, at \*11 (S.D.N.Y. Sept. 19, 2023) ("Plaintiffs adequately allege a claim for breach of the duty of loyalty because they accuse Defendants of using Repricer data to collect 'savings' fees, despite Defendants' failure to secure corresponding savings, for the primary purpose of enriching themselves at Plan members' expense."). Tiara Yachts was not required to plead more, especially because BCBSM is withholding claim-specific information from Tiara Yachts. Compl., ¶87 (RE1, PageID#12); *see also Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 678 (7th Cir. 2016) ("We agree with the Eighth Circuit: an ERISA plaintiff alleging breach of fiduciary duty does not need to plead details to which she has no access, as long as the facts alleged tell a plausible story.").

## II. ERISA SECTION 1132 AUTHORIZES THE REQUESTED RELIEF.

The District Court also erred in concluding "the ERISA statute does not provide a pathway for Tiara Yachts to recover on the alleged overpayments." Order (RE23, PageID#480-482). ERISA Subsection 1132(a)(2) with Section 1109, and Subsection 1132(a)(3), permit recovery of the Plan assets BCBSM wasted.

### A. 29 U.S.C. 1132(a)(2).

Section 1132(a)(2) authorizes the relief sought because it seeks to recover Plan losses. For Tiara Yachts to plausibly allege a claim for relief under Section 1132(a)(2) and 1109(a), the Complaint and documents in the record must "put [BCBSM] on notice" that Tiara Yachts is "seeking to recover for losses that occurred to the [Plan]." *Guyan*, 689 F.3d at 801.

The Complaint does that. It alleges BCBSM consistently paid improper claims, "result[ing] in *wasted Plan assets* in breach of BCBSM's fiduciary duty." Compl., ¶102 (RE1, PageID#15) (emphasis added). BCBSM used "*Tiara Yachts' Plan assets* to pay claims impacted by BCBSM's systems flip logic . . . causing Tiara Yachts' *Plan to overpay for benefits*." *Id.*, ¶108(a) (PageID#19). It used its SSP to "deal[] with Tiara Yachts' *Plan assets* in its own interest and for its own account." *Id.*, ¶108(d), 115 (PageID#19, 21). Through the SSP, BCBSM "capitaliz[ed] on its own mismanagement and misconduct, *at the expense of the Tiara Yachts' Plan*[" *Id.*, (PageID#22) (emphasis added). BCBSM used "its considerable discretionary

authority to advance interests other than those of *Tiara Yachts' Plan or its members.*" *Id.*, ¶108(e).

The Complaint seeks recovery to the Plan "for all improper *misuses of Tiara Yachts' Plan assets.*" *Id.*, (PageID#22); *see also id.*, ¶3 (PageID#2) (emphasis added). *In fact, the Complaint's "Prayer for Relief" requests "Plan" relief twelve different times.* *Id.*, (PageID#21-23). For example, the Complaint requests that "BCBSM . . . provide *a full and complete accounting of all payments and uses of Tiara Yachts' Plan Assets,*" obvious relief for the Plan. *Id.*, ¶21 (PageID#21). It seeks a declaration that BCBSM breached its fiduciary duties by "mismanaging Tiara Yachts' Plan assets"; "causing Tiara Yachts' plan to overpay for benefits"; and "failing to implement standard claims processing edits to avoid overcharges to Tiara Yachts' Plan." *Id.*, (PageID#22). It seeks "restitution" for "all improper uses *of Tiara Yacht's Plan assets,*" and "disgorgement of BCBSM's profits," *id.*, (PageID#22) (emphasis added), which are remedies "expressly authorized by the plain language of § 409(a) and inuring to the plan." *Parker v. Tenneco, Inc.*, No. 23-1857, 2024 WL 3873409, at \*8, \*10 (6th Cir. Aug. 20, 2024).

Finally, responding to BCBSM's motion, Tiara Yachts confirmed it sought relief "on behalf of its welfare benefit Plan." (RE16, PageID#192-96). Tiara Yachts' counsel repeated this at the hearing on BCBSM's motion. Hearing Transcript, at 26 (RE22, PageID#444) (emphasis added).

BCBSM was on notice that the Complaint seeks to recover losses caused by BCBSM to the Plan, which is sufficient to seek recovery under § 1132(a)(2). *See Guyan*, 689 F.3d at 800-801; *Tullis v. UMB Bank, N.A.*, 515 F.3d 673, 677 (6th Cir. 2008). It defies common sense for BCBSM to argue—and the District Court to hold—that Tiara Yachts' suit to re-fund its own Plan after BCBSM's breaches of fiduciary duty is not authorized by ERISA. *See id.* In fact, as co-fiduciary and Plan sponsor of the Plan, Tiara Yachts has a duty to ensure the Plan remains properly funded. *See* 29 U.S.C. § 1104(a)(1)(A) (plan fiduciaries must act with the exclusive purpose of providing benefits to participants and beneficiaries).

BCBSM points to other allegations in the Complaint, which it speculates mean some part of the recovery might go to Tiara Yachts. BCBSM Br., at 52. That is false; Tiara Yachts is the Plan sponsor and damages recovered would be for the Plan. *See Guyan*, 689 F.3d at 801 ("[T]hat the district court's judgment awarded money damages to Plaintiffs themselves . . . is immaterial."); *Tullis*, 515 F.3d at 680-81 (allowing participants to recover against defendant "insofar as they are participants in the plan whose account assets were diminished by the alleged breaches of fiduciary duty."). If BCBSM had not squandered the Plan's assets and inappropriately kept fees for itself from the Plan's assets, the Plan would have more assets today than it does now. That increase in Plan assets would not be realized by Tiara Yachts; it would be realized by the Plan. Therefore, the Complaint seeks relief

for the Plan authorized by Section 1132(a)(2). *See Tullis*, 515 F.3d at 680 (Section 1132(a)(2) provided authorized relief because "the plan . . . would have had greater assets but for the defendant's actions."). Were there ambiguity, (there wasn't) the District Court should have granted leave to amend the Complaint to make this clear.

**B. 29 U.S.C. 1132(a)(3).**

Section 1132(a)(2) independently authorizes the relief sought against BCBSM because the Complaint seeks make-whole relief for the Plan: "a full and complete accounting of all payments and uses of Tiara Yachts' Plan assets," "restitution" of "wasted Plan assets," and "disgorgement of BCBSM's profits." Compl., (RE1, PageID#15, 19-23). The Supreme Court, this Court, and numerous circuit courts have held claims to recover overpayments against fiduciaries seek "equitable" relief authorized by Section 1123(a)(3). *See, e.g., CIGNA Corp. v. Amara*, 563 U.S. 421, 441-42 (2011) (ERISA Section 1132(a)(3) authorizes as "equitable" relief "monetary 'compensation' for a loss resulting from a trustee's breach of duty"); *Patterson v. United Healthcare Insurance Company*, 76 F.4th 487, 496-97 (6th Cir. 2023) (breach-of-fiduciary-duty and prohibited transaction claims were "equitable" claims and "both disgorgement and equitable restitution may be pursued through § 1132(a)(3).").

BCBSM's counterarguments are meritless. *First*, it asserts the Complaint seeks only funds "BCBSM paid out to providers" and "BCBSM was not unjustly

enriched when it made allegedly excessive payments to providers," meaning the Complaint "seeks standard contract damages." BCBSM Br., 47-48. That is false and irrelevant. BCBSM *was* unjustly enriched; it kept for itself a cut of overpayments it "avoided or recovered" as SSP fees. *See* Compl., ¶80 (RE1, PageID#11-12) ("BCBSM would retain 30 percent of the avoided or recovered" overpayments). In any event, that *some* squandered Plan assets went to providers does not render them unrecoverable from BCBSM under § 1132(a)(3). *See Patterson*, 76 F.4th at 498 (at motion-to-dismiss stage, complaint's allegation insurance company made overpayments was sufficient to "ma[k]e out a colorable equitable claim"). This case does not hinge on unjust enrichment.

*Second*, BCBSM tries to distinguish *Amara* and other precedent, arguing only beneficiaries may recover sur-charge and make-whole relief under § 1132(a)(3). BCBSM Br., at 48-50. That contravenes the plain text; § 1132(a)(3) allows a plan "fiduciary," like *Tiara Yachts*, to obtain "equitable relief." That is why this Court has held fiduciaries like *Tiara Yachts* may recover sur-charge and make-whole relief against breaching co-fiduciaries under § 1132(a)(3). *See, e.g., Zirbel v. Ford Motor Company*, 980 F.3d 520, 524 (6th Cir. 2020) (plan sponsor Ford Motor Company's claim for reimbursement of overpayments "amounts to equitable restitution" under Section 1132(a)(3)). Contrary to BCBSM's argument, what made a difference in *Amara* was that the defendant was a fiduciary, not that the plaintiff was a beneficiary.



*See Amara*, 563 U.S. at 442 ("[T]he fact that *the defendant* in this case, unlike the defendant in *Mertens*, *is analogous to a trustee makes a critical difference*" (emphasis added)). Section 1132(a)(3) authorizes the relief requested in the Complaint.

### **CONCLUSION**

The District Court's Orders and judgment should be reversed, and this case remanded with instructions for the parties to proceed with discovery.

Respectfully submitted,

VARNUM LLP

Dated: August 26, 2024

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**CERTIFICATE OF COMPLIANCE**

Pursuant to FRAP 32(a)(7)(C), I hereby certify that the foregoing Reply Brief (exclusive of content excluded pursuant to FRAP 32(a)(7)(B)(iii) and 6th Cir. R. 32(b)) contains 6,399 words, per the word processing software used to prepare the brief.

Date: August 26, 2024

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**CERTIFICATE OF SERVICE**

I certify that on August 26, 2024, I electronically filed this document with the Clerk of the Court using the ECF system, which will send notification of the filing to all ECF filing participants.

Date: August 26, 2024

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## ADDENDUM

### DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

The relevant documents to this appeal are part of the electronic record in the Eastern District of Michigan, Southern Division. To facilitate the Court's reference to the electronic record, said documents, as referred to herein above, are as follows:

<b>ECF No.</b>	<b>DESCRIPTION OF DOCUMENT</b>	<b>PAGE ID #</b>
1	Complaint against Blue Cross Blue Shield of Michigan	1-23
1-6	<i>Exhibit E to Complaint</i> , BCBSM Internal Sales FAQs	51-59
12-2	<i>Exhibit A to Defendant's Brief in Support of Motion to Dismiss</i> , 2016 Administrative Service Contract	139-154
12-5	<i>Exhibit D to Defendant's Brief in Support of Motion to Dismiss</i> , Schedule A	159-161
16	Response in Opposition to Motion to Dismiss for Failure to State Claim	178-216
22	Hearing Transcript of Oral Argument held 11/15/2022	419-465
23	Opinion and Order Granting Motion to Dismiss	466-483

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