

No. 24-1223

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

TIARA YACHTS, INC.

Plaintiff-Appellant,

v.

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant-Appellee.

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

BRIEF OF APPELLANT TIARA YACHTS, INC.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 24-1223

Case Name: Tiara Yachts v. Blue Cross

Name of counsel: Herman D. Hofman

Pursuant to 6th Cir. R. 26.1, Tiara Yachts, Inc.

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellant Tiara Yachts, Inc., ("Tiara Yachts") requests oral argument. This appeal raises significant issues regarding third-party administrators' fiduciary status under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and the correct interpretation of ERISA's statutory remedies available to ERISA fiduciaries and plans under 29 U.S.C. § 1132. Moreover, the proper resolution of this appeal is of interest not just to ERISA plan fiduciaries and plans, but also to thousands of ERISA plan participants and beneficiaries, who look to ERISA and the courts to protect their benefits. Oral argument will help this Court understand the district court's errors when it disregarded this Court's precedents, misinterpreted ERISA, the parties' administrative services contract, and Tiara Yachts Employee Welfare Benefits Plan, (the "Plan"), and ignored Tiara Yachts' well-pleaded allegations in its Complaint to hold Defendant/Appellant Blue Cross Blue Shield of Michigan ("BCBSM") was not subject to ERISA's protections for participant benefits.

STATEMENT OF JURISDICTION

The District Court exercised jurisdiction under 28 U.S.C. § 1331 because Tiara Yachts' claims arise under federal law, *i.e.*, ERISA.

This Court has jurisdiction under 28 U.S.C. § 1291. The District Court entered final judgment on February 27, 2023. Tiara Yachts timely moved to alter or amend the judgment on March 27, 2023, which the District Court denied on February 21, 2024. Tiara Yachts timely appealed on March 19, 2024.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Tiara Yachts' Complaint plausibly alleges BCBSM breached its ERISA fiduciary duties by squandering Plan assets through flawed claims processing that improperly adjudicated and overpaid benefit claims in violation of Plan terms and participants' benefits elections.

2. Whether Tiara Yachts' Complaint plausibly alleges BCBSM breached its ERISA fiduciary duties by squandering Plan assets through knowingly adjudicating and paying fraudulent, wasteful, and abusive provider bills.

3. Whether ERISA Section 1132(a)(3), and ERISA Section 1132(2) with ERISA Section 1109, authorize recovery to the Plan for losses caused by BCBSM's squandering Plan assets.

4. Whether Tiara Yachts' Complaint plausibly alleges BCBSM breached its ERISA fiduciary duties and engaged in prohibited transactions by secretly paying itself, from Plan assets, variable fees under a conflicted scheme controlled and unilaterally imposed by BCBSM where the more improper claims BCBSM allowed through its claim adjudication system yielded higher fees for BCBSM from Plan assets.

5. Whether Tiara Yachts should have been granted leave to file an Amended Complaint to add the factual allegations the District Court believed were needed to state ERISA claims against BCBSM.

STATEMENT OF THE CASE

I. MATERIAL FACTUAL ALLEGATIONS

A. TIARA YACHTS' SELF-FUNDED PLAN.

Tiara Yachts designs and manufactures boats in Holland, Michigan. Compl., ¶9 (RE1, PageID#2). It offers its employees healthcare benefits through a self-funded welfare benefits plan ("Plan"). *Id.*, ¶10 (PageID#2). This means Tiara Yachts, through the Plan, "paid the actual employee health care costs" rather than "buy[ing] health insurance to cover employee health care claims[.]" *Id.*

B. BCBSM ADMINISTERED THE PLAN.

Through an administrative services contract ("ASC") drafted by BCBSM, Tiara Yachts contracted for BCBSM to administer the Plan and process and pay Plan claims. *Id.*, ¶¶15-21 (PageID#3). The ASC delegated to BCBSM discretionary authority over Plan management to interpret the Plan, adjudicate Plan benefits claims, deny, or grant and pay claims using prepayments Tiara Yachts sent to a BCBSM-owned-and-controlled bank account. *Id.*, ¶¶15-26 (PageID#3-4). BCBSM had check-writing authority over these claims and Plan assets. *Id.* In exchange, BCBSM charged Tiara Yachts administrative fees. *Id.*, ¶16 (PageID#3).

BCBSM exercised discretionary authority and control over the bank account where Tiara Yachts sent prepayments (in trust for payment of employees' healthcare claims), and over the prepayments themselves. *Id.*, ¶¶18-26 (PageID#3-4). Those

prepayments are "Plan Assets" under ERISA. *See Hi-Lex Controls v. BCBSM*, 751 F.3d 740, 745-46 (6th Cir. 2014). BCBSM therefore exercised: (1) discretionary authority and control over Plan management, (2) authority and control over management and disposition of Plan Assets, and (3) discretionary authority and responsibility in Plan administration. Compl., ¶¶24-26 (PageID#4). Accordingly, "BCBSM functioned as an ERISA fiduciary in its administration of the Plan." *Id.*

C. **BCBSM KNOWINGLY WASTED PLAN ASSETS BY PROCESSING AND PAYING CLAIMS IN VIOLATION OF PLAN REQUIREMENTS THROUGH FLIP LOGIC.**

Unbeknownst to Tiara Yachts, BCBSM secretly subjected the Plan's claims from non-participating providers to an *intentionally* flawed benefits adjudication system BCBSM called "flip logic." *Id.*, ¶¶46-65 (PageID#6-9). "Under the logic, when a claim is submitted associated with a non-participating provider, BCBSM's system 'flips' the non-participating provider's status and processes the claim at charge," as if the provider were a participating provider. *Id.*, ¶49 (PageID#7). This violated Plan terms and participants' selected benefits. *Id.*, ¶¶37-65, 108 (PageID#6-9, 19). "BCBSM was to perform its administrative services in accordance with the health benefits selected by Tiara Yachts," through its use of "flip logic," but it knowingly adjudicated Plan "claims to be processed at charges in contradiction with Tiara Yachts' elected Plan benefits." *Id.*, ¶¶20, 108(b) (PageID#3, 19).

Specifically, "according to Tiara Yachts' Plan, Tiara Yachts should have been paying for out-of-state, non-par claims at a lower rate set by the applicable Host Blue plan," *i.e.*, the applicable out-of-state Blues plan. *Id.*, ¶54 (PageID#8); *see also id.*, ¶¶28-35 (PageID#4-5). BCBSM knew this; it kept a list of customers—including Tiara Yachts—who "elected to pay at the Host-allowed rate for non-par claims." *Id.*, ¶53-54 (PageID#8). But instead of adjudicating Plan claims in compliance with Plan terms and participants' elected benefits (*i.e.*, only paying non-participating provider claims if the amount was reasonable and usual/customary, and then only paying them at lower Host-allowed rates), "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 knowingly violated the Plan and participants' elected benefits; it admitted "[f]lippin'g' logic is in direct contradiction with the group-elected benefit." *Id.*, ¶54 (PageID#8). Further, "BCBSM expressly recognized that it had a 'fiduciary responsibility to its ASC customers' and that its 'lack of control over the issue would be viewed as a failure to fulfill this responsibility.'" *Id.*, ¶56. However, rather than comply with its fiduciary responsibilities, BCBSM "[c]onceal[ed] from, and otherwise fail[ed] to disclose to Tiara Yachts, the full implications of and flaws associated with its systems logic and the overpayments BCBSM made as a result." *Id.*, ¶108(c) (PageID#19).

BCBSM squandered Plan assets by using "flip logic" to adjudicate the Plan's claims. *Id.*, ¶¶108(a). BCBSM admitted flip logic caused Plan payments "for highly inflated cost of services." *Id.* Further, BCBSM paid (at charge) suspicious claims "many times above the customary amounts for such services." *Id.*, ¶52 (PageID#8). BCBSM admitted a lack of "controls in the system logic that would flag suspicious claim activity," directly damaging the Plan. *Id.* Importantly, "[t]he improper payments were not only associated with laboratories, but also with, for example, hospitals, x-rays, and office visits." *Id.*, ¶51 (PageID#7-8).

BCBSM acknowledged its "customers may not be fully aware of the implications of the 'flipping' system logic," but "conceal[ed] the problem from its customers, including Tiara Yachts." *Id.*, ¶58, (PageID#9). For example, "BCBSM would temporarily assume liability for any inconspicuous overcharges that resulted from the flip logic, to keep mismanagement of its customers' plans hidden." *Id.*, ¶59.

BCBSM silenced employees who tried to correct its mismanagement. *Id.*, ¶¶37-65 (PageID#6-9). Senior Account Manager Dennis Wegner discovered it overpaid over \$600,000 in claims within a two-year period for one customer. *Id.*, ¶40 (PageID#6). Wegner also discovered BCBSM made similar overpayments using other customers' Plan assets, including Tiara Yachts. *Id.*, ¶¶41-42; (RE1-2, 1-3, PageID#26-39) (Tiara Yachts' account information redacted).

Wegner alerted senior BCBSM management about the "flip logic" damage to BCBSM plans in September 2017. Compl., ¶41 (RE1, PageID#6). BCBSM's management confirmed they were aware. (RE1-2, PageID#27). Wegner was commanded to "stand down" and not alert customers, including Tiara Yachts, of its improper payments and Plan violations. Compl., ¶43 (RE1, PageID#6).

In 2016 alone, "BCBSM processed 30,000 non-par claims at charge when Host pricing was available. The sum of those [flip] charges was \$30.5M and resulted in a payment amount of \$26.7M." *Id.*, ¶55 (PageID#8). "Had BCBSM applied the Host plan pricing as required, 'the total allowed amount for these claims would have been \$7.1M; a potential savings of \$23.0M in benefit costs.'" *Id.*; (RE1-4, PageID#41).

"Some BCBSM employees suggested [internally] that BCBSM 'make a global change to discontinue the logic and pay at Host allowed.'" Compl., ¶60 (RE1, PageID#9); (RE1-2, PageID#27). "[T]he suggestion was to process claims in compliance with customers' selected benefit plans—what BCBSM should have been doing all along." Compl., ¶60 (RE1, PageID#9). And they "suggested making affected customers 'aware, educated, and their concurrence be documented.'" *Id.*; (RE1-2, PageID#27). BCBSM's executives ignored that and "terminated Dennis Wegner's employment after he refused to cease investigating and pressing the issue." Compl., ¶64 (RE1, PageID#9).

D. BCBSM KNOWINGLY WASTED THE PLAN'S ASSETS THROUGH OVERPAYMENTS TO PROVIDERS.

BCBSM also wasted Plan assets by "[c]onsistently paying claims suffering from a range of coding and billing issues, including but not limited to unbundling, upcoding, medically unlikely services, and reimbursing claims in non-adherence to its own and/or industry standard reimbursement guidelines." *Id.*, ¶108(g) (PageID#19-20). Further, BCBSM paid "claims lacking standard information necessary to properly adjudicate claims in accordance with industry standards and BCBSM's own policies and procedures" and "otherwise fail[ed] to maintain claims data necessary to identify and recover incorrectly paid amounts and identify the full scope of BCBSM's misconduct and mismanagement." *Id.*, ¶108(k) (PageID#20).

Specifically, "BCBSM processes all claims for all non-auto NASCO customers, such as Tiara Yachts, on the same claims processing system." *Id.*, ¶101 (PageID#15). "BCBSM's NASCO claims processing system has been found to consistently result in improper payments of claims. These processing errors result in wasted Plan assets in breach of BCBSM's fiduciary duty." *Id.*, ¶102.

For example, "[c]ommon errors associated with BCBSM's NASCO claims processing system include, for example: unbundling, upcoding, medically unlikely claims, non-adherence to payment guidelines, and BCBSM's flip logic." *Id.*, ¶103. "Unbundling is when a health care provider uses the billing codes for two or more separate procedures when the procedures were actually performed together and only

one code should be paid." *Id.*, ¶104. Medically unlikely edits ("MUE") "is the maximum units of service that a provider would report under most circumstances for a single patient on a single data of service." *Id.*, ¶105 (PageID#16). "Upcoding occurs when health care providers submit inaccurate billing codes to insurance companies in order to receive inflated reimbursements." *Id.*, ¶106. And "[p]ayment guidelines are established to determine the appropriate reimbursement amounts when processing a claim." *Id.*, ¶107.

"The aforementioned improper payments are non-exclusive examples of improper payments BCBSM regularly makes when processing claims for NASCO customers, and therefore also made when processing claims for Tiara Yachts." *Id.*, ¶108. "BCBSM's practice of paying Providers' improper claims is contrary to standards and norms in the health insurance industry, contrary to how BCBSM markets itself to the public, and is contrary to representations it makes to customers." *Id.*, ¶95 (PageID#17).

"Tiara Yachts never imagined, nor had reason to imagine based on BCBSM's own representations, that BCBSM knowingly paid Providers' improper claims or that BCBSM knew of flaws in its system affecting Tiara Yachts and failed to disclose and correct the issue." *Id.*, ¶101. That's because BCBSM "[c]onceal[ed] from, and otherwise fail[ed] to disclose to Tiara Yachts the payment of improper claims." *Id.*, ¶108(i) (PageID#20).

E. BCBSM IMPLEMENTS A SCHEME TO CAPITALIZE ON ITS MISMANAGEMENT OF PLAN ASSETS.

Rather than disclose and correct its mismanagement, BCBSM schemed to profit off it. *Id.*, ¶70 (PageID#9). It "mis[led] and "deceiv[ed] Tiara Yachts by implementing a Shared Savings Program ["SSP"] when it knew Tiara Yachts' Plan assets were used to overpay for benefits, allowing BCBSM to capitalize on its own mismanagement, which was a clear conflict of interest." *Id.*, ¶108(d) (PageID#19).

With the SSP, BCBSM "designed a system in which it knowingly and improperly pays claims, later corrects the claims charge to what it should have been in the first place, at its discretion, and then collects a recovery fee for 'catching' the error." *Id.*, ¶86 (PageID#12). Below is a demonstrative example:

SSP EXAMPLE #1			
Part 1 - BCBSM improperly adjudicates claim using "flip logic"		Part 2 - BCBSM secretly collects fees for "catching" its intentional "error"	
Out-of-state, non-participating hospital bills \$100,000 for medical procedure	BCBSM adjudicates the claim using flawed "flip logic," deciding it should be paid at full charge—\$100,000	BCBSM re-adjudicates the claim to pay it correctly at \$2,000, <i>i.e.</i> , what it should have been adjudicated the first time	BCBSM collects a 30% fee of \$29,400 ((\$100,000-\$2,000) x 30%), for "catching" its known error
Plan's payment and potential liability:		\$2,000 to hospital, with the Plan and/or the patient potentially liable for remaining \$98,000	\$29,400 to BCBSM
Plan losses caused by BCBSM's conflicted SSP:		\$98,000 potential liability to hospital	\$29,400 to BCBSM

BCBSM's conflicted SSP scheme "allow[ed] it to profit on its own mismanagement of plan assets. The more improper payments BCBSM let slide through its system, the more money it would make on the back end. Unfortunately, this came at the expense of BCBSM's self-insured customers, including Tiara Yachts." *Id.*, ¶84 (PageID#11). Below is another demonstrative example:

SSP EXAMPLE #2			
Part 1 - BCBSM improperly adjudicates upcoded claim		Part 2 - BCBSM secretly collects fees for "catching" its intentional "error"	
Hospital bills \$100,000 for improperly upcoded procedure	Rather than deny the claim, BCBSM slides it through its first-pass review.	BCBSM "catches" its error on second-pass review and pays \$0, <i>i.e.</i> , what it should have been adjudicated the first time	BCBSM collects a 30% fee of \$30,000 $((\$100,000 - \$0) \times 30\%)$, for "catching" its own error
Plan's payment and potential liability:		\$0 to hospital, with the Plan and/or the patient potentially subject to a \$100,000 bill	\$30,000 to BCBSM
Plan losses caused by BCBSM's conflicted SSP:		\$100,000 potential liability to hospital	\$30,000 to BCBSM

Further, "[w]hether Tiara Yachts agreed to pay 30 percent is immaterial, because the amount of the 'recoveries' were in the unilateral control of BCBSM." *Id.*, ¶113 (PageID#21).

BCBSM unilaterally imposed the SSP on the Plan. *Id.*, ¶¶71, 84 (PageID#10-11). "BCBSM . . . made it mandatory for its self-insured customers to participate

and automatically opted all self-funded customers into the program." *Id.*, ¶81 (PageID#11). BCBSM also unilaterally applied the SSP "retroactively to improper payments extending back to January 1, 2016." *Id.*, ¶82.

"As an ERISA fiduciary, BCBSM must avoid any conflicts of interest concerning the manner in which it performs its fiduciary duty. The SSP creates an impermissible conflict of interest." *Id.*, ¶85 (PageID#12). Specifically, "[t]he more improper claims that BCBSM failed to detect on the front end, the higher the recoveries on the back and then, and the more it got paid." *Id.*, ¶114 (PageID#21). "By instituting a system that allowed it to unilaterally control the amount of its own compensation, BCBSM dealt with Tiara Yachts' Plan assets in its own interest and for its account in violation of Section 1106." *Id.*, ¶115.

F. BCBSM CONCEALS ITS MISCONDUCT BY WITHHOLDING CLAIMS DATA AND MISREPRESENTING ITS CLAIMS ADJUDICATIONS.

Worse, "BCBSM 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 and other documents that set forth the guidelines and rules for claims processing and pricing." *Id.*, ¶87 (PageID#12).

Claims data is electronic information submitted to BCBSM by providers, identifying the provider, service date and location, patient identity, diagnoses, services performed, and billed and paid amount, among other things. *Id.*, ¶88. It is essential to identifying improper claims payments. *Id.*, ¶90. BCBSM exclusively

controlled Tiara Yachts' claims data. *Id.*, ¶91, (PageID#13). Ignoring requests, BCBSM never provided Tiara Yachts its claims data. *Id.*, ¶¶91-92, 102 (PageID#13, 18). Rather, BCBSM concealed its misconduct. *Id.*

BCBSM also affirmatively misled Tiara Yachts. *Id.*, ¶¶95-104, (PageID#17-18). It misrepresented its "claims processing practices consistently deliver industry-leading outcomes with respect to claim payments, and average above 99% accuracy." *Id.* BCBSM said it "takes actions to ensure health claims are submitted, and paid accurately, proactively and correctly, by the responsible party, for eligible members, according to medical, benefit and reimbursement policies and contractual term. Not in error or duplicate and free of wasteful or abusive practices." *Id.* That was false. *Id.*

II. PROCEDURAL HISTORY

After discovering BCBSM's misconduct, Tiara Yachts filed a two-count Complaint alleging BCBSM: (1) breached its ERISA fiduciary duties; and (2) engaged in transactions prohibited by ERISA. Compl., (RE1, PageID#1-23).

BCBSM moved to dismiss. The District Court granted BCBSM's motion in a decision riddled with incorrect factual assertions and legal errors. *First*, the District Court mischaracterized "flip logic" as a "contract" issue related to BCBSM's "system-wide business decision" to "us[e] standard programming" to process claims, Order, (RE23, PageID#469, 474-77), assertions not in the Complaint. Instead, the

Complaint alleges BCBSM: (1) knowingly adjudicated and paid improper and highly inflated claims using flip logic, in contravention of Plan requirements and Plan participants' elected benefits; (2) affirmatively concealed and misrepresented its "flip logic" scheme to Plan representatives; and (3) internally admitted its "flip logic" misconduct breached its ERISA fiduciary duties and damaged the Plan. Compl., ¶¶37-65, 108 (RE1, PageID#6-9, 19-20). Worse, the District Court adopted BCBSM's position (contradicted by BCBSM's e-mails) that "there is good reason for the program" because "flip logic" supposedly "allows BCBSM to avoid balance billing Plan beneficiaries for higher charges." Order, (RE23, PageID#470). That is false; if BCBSM processes claims correctly, no balance bill threat exists because the claims would be processed under Host plans' agreements with providers.

Second, the District Court mischaracterized Tiara Yachts' claim for BCBSM's squandering Plan assets by overpaying providers as mere "handling of claims data" by BCBSM. *Id.*, (RE23, PageID#470-71). It asserted Tiara Yachts "does not allege that any of these deficiencies were actually present in claims that BCBSM paid out of its sponsored plan assets" *id.*, (PageID#471), even though that is *exactly* what the Complaint alleges. Compl., ¶¶101-108, 108(a)-(k) (RE1, PageID#15-16, 19-20). The District Court also stated the Complaint "is largely based on conjecture," Order, (RE23, PageID#471, 477), although the Complaint identified numerous examples or errors that *occurred*. Compl., ¶¶101-108, 108(a)-(k) (RE1, PageID#15-16, 19-20).

Third, the District Court erroneously described BCBSM's conflicted SSP ruse as "a premium servicing program," Order, (RE23, PageID#467), words not in the Complaint. It incorrectly stated "there is no claim the Program resulted in any direct impact to Tiara Yachts," *id.*, (PageID#471), although the Complaint alleges precisely that. Compl., ¶¶84, 108(d)-(e), 112-115 (RE1, PageID#11, 19, 21-22). The District Court adopted BCBSM's misrepresentations, saying "the ASCs provided that BCBS could retain a contractually fixed percentage of 30% of recovered third-party payments" and BCBSM "saved funds" for plans through the program, Order, (RE23, PageID#471, 479), when the opposite is true: (1) the fee amount was neither fixed nor contractual; (2) BCBSM profited through the SSP at the Plan's expense; and (3) the Plan saved **nothing**; it was harmed. Compl., ¶¶84, 108(d)-(e), 112-115 (RE1, PageID#11, 19, 21-22). The District Court also posited "[t]here is no allegation . . . that BCBSM itself retained any such funds" or "that BCBSM had exclusive or unilateral control over the program," Order, (RE23, PageID#472, 479-80), even though the Complaint, again, alleges the opposite. Compl., ¶¶84-86, 108(d)-(e), 112-115 (RE1, PageID#11-12, 19, 21-22).

Fourth, the District Court incorrectly asserted Tiara Yachts' "claim is not that BCBSM . . . wrongfully kept money for itself that should have been used to pay claims," Order, (RE23, PageID#466), even though that is exactly Tiara Yachts' claim. Compl. ¶¶84-86, 108(d)-(e), 112-115 (RE1, PageID#11-12, 19, 21-22). The

District Court opined "Tiara Yachts is not asking in its Complaint for anything on behalf of the Plan itself," Order, (RE23, PageID#467), even though that is, again, precisely what the Complaint requests. Compl., (RE1, PageID#21-23). The District Court also speculated—at the pleadings stage—that "[a] win for Tiara Yachts here does not augment the resources of any ERISA plan," Order, (RE23, PageID#467), even though the Complaint specifically requests restitution for Plan losses caused by BCBSM's malfeasance. Compl., (RE1, PageID#21-23).

Finally, the District Court posited "allegations in the Complaint demonstrate that BCBSM paid actual claims submitted by actual providers at actual rates charged by those providers for services actually provided to beneficiaries," Order, (RE23, PageID#467), which is again contradicted by the Complaint's allegations BCBSM paid (using Plan assets) highly inflated charges for services *not* provided, profiting thereby. Compl., ¶¶102-108, 108(a)-(l), 114-115 (RE1, PageID#15-16, 19-21).

Tiara Yachts timely moved to alter or amend the Judgement under Rule 59(e) and amend its Complaint under Rules 15(a)(2) and 59(e). Mtn. to Alter or Amend, (RE28-29, PageID#573-610); Mtn. to Amend Compl., (RE32-33, PageID#716-728). Tiara Yachts attached a proposed Amended Complaint, (RE33-2, PageID#732-759), which made clearer still: (1) Tiara Yachts was suing "in its capacity as Plan Sponsor on behalf of the Tiara Yachts Health and Welfare Benefit Plan"; (2) Tiara Yachts sought "make whole" relief on the Plan's behalf; (3) BCBSM breached its fiduciary

duties to the Plan; and (4) those breaches harmed the Plan. *Id.*, (RE33-2, PageID#732-759).

The District Court denied the motions. Order, (RE47, PageID#998-1011). It rubber-stamped its prior decision, stating it "adheres to its February decision that addresses those arguments." *Id.*, (PageID#999-1003). The District Court denied the Motion to Amend as "futile." *Id.*, (PageID#1003-1005).

STANDARDS OF REVIEW

This Court reviews *de novo* the District Court's dismissal of Tiara Yacht's Complaint under Rule 12(b)(6). *Lipman v. Budish*, 974 F.3d 726, 740 (6th Cir. 2020). To survive a motion to dismiss, a complaint need only "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This Court "construe[s] the complaint in the light most favorable to the plaintiff, draw[s] all reasonable inferences in its favor, and accept[s] all well-pleaded allegations in the complaint as true." *Keene Grp., Inc. v. City of Cincinnati*, 998 F.3d 306, 310 (6th Cir. 2021). Similarly, "[w]hether an entity is a fiduciary under ERISA is reviewed *de novo*." *Guyan Int'l, Inc. v. Pro. Benefits Adm'rs, Inc.*, 689 F.3d 793, 797 (6th Cir. 2012).

Finally, when, as here, "a motion to amend is denied because amendment would be 'futile,' this Court reviews the district court's decision *de novo*." *Skatmore, Inc. v. Whitmer*, 40 F.4th 727, 737 (6th Cir. 2022). "An amendment is futile when,

after including the proposed changes, the complaint still could not withstand a Rule 12(b)(6) motion to dismiss." *Id.* at 737-38.

SUMMARY OF THE ARGUMENT

This is an ERISA case. BCBSM—the administrator of Tiara Yachts' ERISA Plan—knowingly adjudicated and overpaid hospital claims in violation of Plan requirements, industry standards, and BCBSM's promises to Plan representatives. BCBSM also secretly collected fees it calculated off the amount of Plan assets it wasted, a flagrant conflict of interest (self-dealing). The more fraudulent, wasteful and abusive billing BCBSM knowingly let through its adjudication of Plan claims on the front end, the more SSP fees BCBSM collected from Plan assets on the back end. These fees, disguised as "shared savings" by BCBSM, were taken from Plan assets Tiara Yachts deposited with BCBSM in trust for payment of employee claims. BCBSM controlled how much it kept in "shared savings" fees and misrepresented and concealed from Tiara Yachts what it paid providers and what it kept.

The District Court let BCBSM escape Tiara Yachts' ERISA claim for wasting the Plan's assets through overpayments on claims based on its belief BCBSM doesn't act as an ERISA fiduciary when adjudicating and paying benefits claims. This Court, however, has decided—frequently—that BCBSM (and other third-party administrators) are ERISA fiduciaries when they exercise authority over plan administration and plan assets to improperly pay or deny benefits. *See Stiso v. Int'l*

Steel Grp., 604 F. App'x 494, 500 (6th Cir. 2015); *Hill v. BCBSM*, 409 F.3d 710, 716 (6th Cir. 2005); *Libbey-Owens-Ford v. Blue Cross and Blue Shield Mut. of Ohio*, 982 F.2d 982, 1031 (6th Cir. 1993). Those cases involved the same claim (breach of fiduciary duty), law (ERISA), the same or similar defendant (BCBSM or other third-party administrators), the same types of plans (ERISA welfare benefit plans), and the same misconduct (improper administration/payment of benefits in violation of plan requirements and/or industry standards), presented here. That precedent controls and the District Court's opposite conclusion should be reversed.

The District Court also opined Tiara Yachts' breach-of-fiduciary-duty claim based on BCBSM's wasting Plan assets through overpayments to providers failed because Tiara Yachts wasn't seeking relief for Plan losses under ERISA Section 1132(a)(2). But that is exactly what the Complaint seeks, which Tiara Yachts reiterated below at oral argument and in briefing. This Court has *twice* held such is sufficient to sustain ERISA breach-of-fiduciary-duty claims against plan administrators for plan losses under ERISA Section 1132(a)(2). *See Guyan*, 689 F.3d at 799-800; *Tullis v. UMB Bank, N.A.*, 515 F.3d 673, 680-81 (6th Cir. 2008). The District Court's ruling—contradicting that precedent—should be reversed.

The District Court further opined ERISA Section 1132(a)(3) doesn't authorize recovery of BCBSM's wasted Plan assets because the make-whole relief Tiara Yachts sought for the Plan—restitution of Plan losses caused by BCBSM—is not

"equitable relief" under that provision. But this Court has decided—*twice*—that ERISA breach-of-fiduciary-duty and prohibited transaction claims are equitable claims that may be remedied through ERISA Section 1132(a)(3) with equitable relief, including the restitution and monetary damages sought here. *See Patterson v. United Healthcare Insurance Company*, 76 F.4th 487, 496-98 (2023); *Stiso*, 604 F. App'x at 500. This precedent requires reversal.

The District Court further dismissed Tiara Yachts' ERISA claims predicated on "shared savings" fees, saying BCBSM doesn't act as a fiduciary when collecting variable fees from Plan assets. But this Court already ruled—*three times*—that BCBSM acts as an ERISA fiduciary when it collects variable fees from self-funded plan assets, as it did here. *See Hi-Lex Controls*, 751 F.3d at 745-46; *Pipefitters Local 636 Ins. Fund v. BCBSM*, 722 F.3d 861, 866-67 (6th Cir. 2013); *Pipefitters Local 636 Ins. Fund v. BCBSM*, 213 F. App'x 473, 477-78 (6th Cir. 2007). Those cases involved the same claims, (breach of fiduciary duty and prohibited transactions), law (ERISA), defendant, (BCBSM), contracts, (form ASCs), types of plans (self-funded ERISA plans), and misconduct (BCBSM's self-dealing in collecting variable fees directly from plan assets under its control), presented here. That precedent is dispositive and the District Court—reaching the opposite conclusion—erred.

Beyond ignoring this Court's precedents, the District Court turned upside down well-known Rule 12(b)(6) motion standards. The District Court—in its own

words—"disagree[d]" with Tiara Yacht's well-pleaded factual allegations and improperly accepted as true BCBSM's denials. The District Court also inappropriately denied Tiara Yachts' motion to amend its Complaint. This Court should reverse the District Court's rulings and remand with instructions that Tiara Yachts proceed with discovery on its claims.

ARGUMENT

I. BCBSM BREACHED ITS ERISA FIDUCIARY DUTIES BY SQUANDERING PLAN ASSETS.

To state a breach-of-fiduciary-duty claim under ERISA § 1109(a), plaintiffs must allege: (1) defendants were fiduciaries of the plan who, (2) acting as plan fiduciaries, (3) breached an ERISA fiduciary duty. 29 U.S.C. § 1109. Tiara Yachts' Complaint satisfied each element.

A. BCBSM ACTED AS AN ERISA FIDUCIARY WHEN OVERPAYING CLAIMS IN VIOLATION OF PLAN TERMS AND INDUSTRY STANDARDS.

Tiara Yachts' Complaint alleged BCBSM breached its ERISA fiduciary duties of loyalty, prudence, and disclosure by wasting Plan assets through overpayments to providers in violation of Plan requirements and industry standards. Compl., ¶¶105-109 (RE1, PageID#18-20). This Court has held "[f]ailing to preserve assets can be actionable under ERISA," *SCIT v. BCBSM*, 748 F. App'x 12, 20–21 (6th Cir. 2018), but the District Court held that misconduct is not a fiduciary act under ERISA. That contravenes black letter law. *See id.*

"Under ERISA, 'a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.'" *SCIT v. BCBSM*, 32 F.4th 548, 563 (6th Cir. 2022) (quoting 29 U.S.C. § 1002(21)(A)). "Congress intended ERISA's definition of fiduciary to be broadly construed." *Six Clinics Holding Corp. II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 401 (6th Cir. 1997). BCBSM acted as an ERISA fiduciary when improperly adjudicating and overpaying claims in violation of Plan terms and industry standards because that misconduct involved BCBSM's exercise of: (1) authority or control respecting management or disposition of Plan assets; and (2) discretionary authority or responsibility in Plan administration.

1. **BCBSM exercised authority and control over Plan assets in overpaying claims.**

First, BCBSM's misconduct involved its exercise of authority and control over Plan assets. ERISA has the "purpose of assuring that people who have practical control over an ERISA plan's money have fiduciary responsibility to the plan's beneficiaries." *Briscoe v. Fine*, 444 F.3d 478, 494 (6th Cir. 2006). Accordingly, "the threshold for acquiring fiduciary responsibilities is . . . lower for persons or entities responsible for the handling of plan assets than for those who manage the

plan." *Id.* at 491. "Discretion in the disposition of plan assets is not required; it is irrelevant whether the administrator exercised discretion. Any authority or control is enough." *Pipefitters*, 213 F. App'x at 477. Therefore, "any person or entity that exercises control over the assets of an ERISA-covered plan, including third-party administrators, acquires fiduciary status with regard to the control of those assets." *Briscoe*, 444 F.3d at 494.

Tiara Yachts' Complaint alleged BCBSM exercised control and authority over Plan assets in improperly adjudicating and overpaying Plan claims, thereby functioning as an ERISA fiduciary. BCBSM controlled and managed Plan assets:

21. In essence, BCBSM would process and pay claims on behalf of Tiara Yachts using Tiara Yachts' Plan assets.

22. Tiara Yachts sent the required prepayments to a BCBSM-owned bank account, on a periodic basis, in order for BCBSM to pay claims on Tiara Yachts' behalf.

23. The required prepayments sent to BCBSM's bank account were "Plan Assets" as defined by ERISA

24. BCBSM had complete authority and control over the bank account and the Plan assets sent to it by Tiara Yachts.

Compl., ¶¶21-24 (RE1, PageID#3-4). Using its control and authority over Plan assets, BCBSM: (1) "[k]nowingly us[ed] Tiara Yachts' Plan assets to . . . overpay for benefits" (*i.e.*, wasted plan assets), *id.*, ¶108(a), (f)-(h), (k)-(l) (PageID#19); (2) "caus[ed] claims to be processed at charges in contradiction with Tiara Yachts' elected Plan benefits;" *i.e.*, violated Plan terms requiring those charges be processed

at lower, Host plan rates; *id.*, ¶108(b); and (3) self-dealt by using those improper payments from Plan assets to increase its profits, at Plan expense. *Id.*, ¶108(d)-(e).

BCBSM is an ERISA fiduciary because it controlled Plan assets—*i.e.*, the pre-paid funds Tiara Yachts wired to BCBSM's bank account in trust for payment of employee benefits—and disposed them through its check-writing authority over the bank account by overpaying providers in violation of Plan requirements and industry standards. *See Hi-Lex*, 751 F.3d at 743 ("BCBSM was holding the funds wired by Hi-Lex 'in trust' for the purpose of paying plan beneficiaries' health claims and administrative costs. Accordingly, the district court did not err in finding that BCBSM held plan assets of the Hi-Lex Health Plan and, in doing so, functioned as an ERISA fiduciary."); *Guyan*, 689 F.3d at 798 ("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.").

2. **BCBSM exercised discretionary authority or responsibility in Plan administration in overpaying claims.**

Second, BCBSM acted as an ERISA fiduciary when squandering Plan assets through its exercise of discretionary authority or responsibility in Plan administration. "[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). Accordingly, "[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)." *Libbey-Owens-Ford*, 982 F.2d at 1031.

BCBSM had discretionary authority to (1) determine coverage under the Plan; (2) grant, deny, and review claims; and (3) pay claims with Plan assets it controlled. Compl., ¶¶18-27 (RE1, PageID#3-4). Specifically, the ASC delegated to BCBSM "discretionary authority as claims administrator to make final benefit determinations and plan interpretations." ASC, II.A (RE12-2, PageID#141-42). BCBSM exercised its discretionary authority to improperly adjudicate and overpay out-of-state, non-par claims at charge instead of at lower Host plan rates, in violation of Plan terms and industry standards. Compl., ¶¶46-54, 95-104, 101-108, 108(a)-(h) (RE1, PageID#7-8, 15-20).

Therefore, BCBSM is an ERISA fiduciary relative to that misconduct. *See Stiso*, 604 F. App'x at 500 ("MetLife also owes a fiduciary duty to plaintiff because

it exercises control over the denial or payment of benefits under the plan. When 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)."); *Chiera v. John Hancock Mut. Life Ins. Co.*, 3 F. App'x 384, 389 (6th Cir. 2001) ("Defendant [insurance company] is a fiduciary for purposes of ERISA inasmuch as it had a role in administering the plan because it had authority to accept or reject claims for losses under the group insurance policy . . .").

3. **The District Court erred by holding BCBSM's improper benefits adjudications and overpayments are not fiduciary acts.**

Third, the District Court wrongly concluded BCBSM is not a fiduciary because Tiara Yachts' "complaint is plainly covered by the contractual duties of the ASCs." Order, (RE 23, PageID#474). That is factually incorrect and legally irrelevant. This Court repeatedly "rejects 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. And the Complaint alleges BCBSM exercised discretionary authority and control over Plan assets, not contractually compelled functions, and "ERISA prevents [a court] from re-casting [a plaintiff's] ERISA claim as a breach of contract claim by simply rephrasing the source of [the defendant's] obligations." *Hutchison v. Fifth Third Bancorp.*, 469 F.3d 583, 590 (6th Cir. 2006).

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). The Complaint alleged "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, 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.¹ *Id.*, IV.B.2 (PageID#149).

BCBSM exercised its authority and control over Plan assets in "breach[ing] its fiduciary duties in numerous ways, including, but not limited to: (1) "[k]nowingly using Tiara Yachts' Plan assets to . . . overpay for benefits" (*i.e.*, wasting plan assets),

¹ ERISA prohibits any attempt by BCBSM to disclaim ERISA fiduciary status in its ASC. *See SCIT*, 32 F.4th at 555 ("We note ERISA fiduciaries cannot contract away their fiduciary status." (citing 29 U.S.C. § 1110(a)).

id., ¶108(a), (f)-(h), (k)-(l) (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. *Id.*, ¶108(d)-(e).

BCBSM exercised **discretion** in the claim adjudication and payment misconduct at issue. "Flip logic" was designed and unilaterally implemented by BCBSM. (RE1-4, PageID#41). BCBSM knew "flip logic" caused Plan assets to be used to pay claims indicative of "abusive provider billing practices." *Id.* It admitted "the **manner in which we have coded our system plus a lack of controls** surround[ing] abusive billing practices" caused Tiara Yachts and its Plan to overpay claims. *Id.* (emphasis added). And it knew, "according to Tiara Yacht's Plan, Plaintiff should have been paying for out-of-state, non-par claims at a lower rate set by the applicable Host Blue plan," but used "[f]lipping logic . . . in direct contradiction" to that "group-elected benefit." Compl., ¶54 (RE1, PageID#8). "BCBSM knew that the majority, if not all, of self-funded, non-auto customers on its NASCO platform, including Tiara Yachts, were impacted by this systems flaw." *Id.*, ¶¶46, 108, (PageID#7, 19).

BCBSM acknowledged its **fiduciary** responsibility for squandering Plan assets: "**We have a fiduciary responsibility to our ASC customers. Our lack of control over the issue was viewed as failure to fulfill this responsibility and a**

settlement was requested." (RE1-2, PageID#27) (emphasis added). The District Court was required to "construe the complaint in the light most favorable to the plaintiff" and "accept all of the complaint's factual allegations as true." *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir. 1998). It erred by not doing.

Citing *DeLuca v. BCBSM*, 628 F.3d 743, 747 (6th Cir. 2010), the District Court improperly re-styled BCBSM's knowing waste of Plan assets as a "systemwide BCBSM method for paying providers." Order, (RE23, PageID#475). That is factually and legally incorrect. BCBSM conceded its "*failure to fulfill*" its "*fiduciary responsibility*" to each individual customer, including Tiara Yachts, BCBSM E-mail (RE1-2, PageID#27) (emphasis added).

Further, *DeLuca* is inapposite. There, BCBSM negotiated rate agreements with hospitals that caused rate increases for some clients. *DeLuca*, 628 F.3d at 745-46. A beneficiary sued, alleging BCBSM breached its ERISA fiduciary duties by negotiating increased rates. *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.

Importantly, *DeLuca* noted a fiduciary claim existed had "BCBSM unwisely invested, wrongly appropriated, *or otherwise squandered plan assets under its authority or control.*" *Id.* at 747-48 (emphasis added). And BCBSM admitted it

was a fiduciary when acting "*as the administrator and claims-processing agent for the plan.*" *Id.* at 746. But because the *DeLuca* plaintiff did not make that claim, this Court affirmed dismissal. *Id.* at 746-48.

Tiara Yachts is bringing the claim *DeLuca* recognized as viable: suing BCBSM as Plan administrator and claims-processor for squandering Plan assets under its authority or control by overpaying claims in violation of Plan requirements and industry standards. *See* Compl., ¶¶46-54, 95-104, 101-108, 108(a)-(h) (RE1, PageID#7-8, 15-20). The "action subject to complaint" is not "BCBSM's negotiation of rates" as in *DeLuca*, but BCBSM's squandering Plan assets by overpaying individual claims in violation of specific Plan terms that required BCBSM to adjudicate and pay specific claims at lower Host plan rates, not at charge as BCBSM did. *Id.* *DeLuca* supports Tiara Yachts' position.² *See DeLuca*, 628 F.3d at 746-48.

Confirming this, in *SCIT v. BCBSM*, 32 F.4th 548, 563-64 (6th Cir. 2022), this Court cited *DeLuca* for *support* in reaffirming that "*[f]ailing to preserve assets can be actionable under ERISA.*" *Id.* (citing *SCIT*, 748 F. App'x at 20–21; *DeLuca*, 628 F.3d at 747-48). Further, this Court held BCBSM's "contractor" argument was inappropriate for resolution *even at summary judgment*. BCBSM asserted "its

² The District Court's view that no ERISA fiduciary duty arises if the challenged action is systemic rather than discrete wrongly implies that misconduct on a grand scale is not an ERISA issue. That perverse incentive misstates the law.

actions [in overpaying claims] merely amounted to adherence to the terms of the Member and Employee Plans' contracts, which it argue[d] mean[t] there was no fiduciary act." *Id.* at 564. This Court rejected BCBSM's argument: "how the Administrative Services Contract defined Blue Cross's duties" presented "significant questions of law and material fact" inappropriate for summary judgment. *Id.* Given this Court held resolution of BCBSM's fiduciary status, under an identical ASC, with a self-funded plan, in a similar ERISA breach-of-fiduciary-duty overpayment case was inappropriate *at summary judgment*, the District Court's conclusive determination of those factual questions *on the pleadings* here was wrong. *Id.*; *see also Pipefitters*, 213 F. App'x at 478 ("Although BCBSM asserts that this dispute is merely contractual in nature . . . there is nothing at this early stage that negates the Fund's assertions set forth in the complaint.").

B. BCBSM BREACHED ITS FIDUCIARY DUTIES BY SQUANDERING PLAN ASSETS.

As the Complaint alleges, BCBSM breached its ERISA fiduciary duties of loyalty, prudence, and disclosure by wasting Plan assets through overpayments to providers in violation of Plan requirements (through "flip logic"), and industry standards (by paying unbundled, upcoded, duplicate, and medically unlikely claims). Compl., ¶¶46-54, 95-104, 101-108, 108(a)-(h) (RE1, PageID#7-8, 15-20).

Under ERISA Section 1104(a)(1), a fiduciary must discharge his duties "solely in the interest of the participants and beneficiaries" and act with "the care,

skill, prudence, and diligence . . . [of] a prudent man." 29 U.S.C. 1104(a)(1)(B). Wasting plan assets through overpayments to providers violates ERISA. *SCIT*, 748 F. App'x 12. In *SCIT*, a tribal plan sponsor brought ERISA breach-of-fiduciary duty claims against BCBSM for wasting plan assets through overpayments to providers that did not take advantage of Medicare discounts available to tribal plans. *Id.* at 20-21. Like here, the district court dismissed the tribe's complaint on the pleadings, "holding that BCBSM did not owe the Tribe a fiduciary duty under ERISA to ensure payment" at discounted rates. *Id.* at 16. Citing *DeLuca*, this Court reversed, holding "[f]ailing to preserve plan assets can be actionable under ERISA" and that was "just what the [plaintiff] has alleged." *Id.* at 20-21 (citing *DeLuca*, 628 F.3d at 747-48).

SCIT controls. The District Court erred in holding wasteful overpayments to providers is not actionable. *See id.*; *see also Hill*, 409 F.3d at 717 (allegations that administrator used improper methodology and criteria for processing claims stated ERISA breach-of-fiduciary-duty claim); *Comau LLC v. BCBSM*, No. 19-CV-12623, 2020 WL 7024683, at *8 (E.D. Mich. Nov. 30, 2020) (BCBSM's payment of inflated claims to providers and failure to fix its processing system "support an inference that BCBSM breached its fiduciary duty by failing to correct its processing system which it knew resulted in the payment of inflated claims").

1. **The Complaint alleges sufficient facts establishing BCBSM squandered plan assets by using "flip logic."**

The District Court nevertheless opined the Complaint only "suggest[ed] there is a possibility that BCBSM's claims processing system meant that it processes Plaintiff's claims with improper codes or clinical edits" but didn't "identif[y] any actual claim that BCBSM paid out that suffers from [the] alleged deficiencies." Order (RE23, PageID#477). Not true.

The Complaint alleges BCBSM's improper use of "flipping logic" caused significant Plan losses. Compl., ¶¶2, 45-58; (RE1, PageID#7-9) ("BCBSM is aware of flaws in its claims processing system that caused it to overpay for claims with Tiara Yachts' money."). It identifies specific Tiara Yachts claims improperly processed by BCBSM; for example: "claim[s] submitted associated with a non-participating provider." *Id.*, ¶¶49, 54-55 (PageID#7-8).

BCBSM admitted its flawed "system logic . . . financial[ly] impacted" its self-funded, non-auto customers, including Tiara Yachts. (RE1-4, PageID#41); *see also* Compl., ¶46 (RE1, PageID#7) ("BCBSM knew that the majority, if not all, of self-funded, non-auto customers on its NASCO platform, ***including Tiara Yachts***, were impacted by this systems flaw." (emphasis added)). The District Court erred by concluding Tiara Yachts and its Plan were not affected by BCBSM's overpayments through "flip logic" when the Complaint specifically alleges the opposite. *Id.*

The District Court further posited "the Complaint is sparse on alleged facts that would make up a fiduciary duty and breach," Order, (RE23, PageID#477), but

BCBSM admitted its "flipping logic" breached its fiduciary duty to Tiara Yachts: "We have fiduciary responsibility to our ASC customers. Our lack of control over the issues was viewed as a failure to fulfill this responsibility and a settlement was requested." BCBSM E-mail, (RE1-4, PageID#42).

BCBSM concealed this from Tiara Yachts because, in BCBSM's view, "[d]emonstrating effects of the 'flip' logic may cause groups to question their original consent to it." *Id.* As the Complaint explains, "BCBSM maintain[s] exclusive control and access to Tiara Yachts' claims data." Compl., ¶91 (RE1, PageID#13). "BCBSM continues to conceal its misconduct, in part, by maintaining exclusive control of Tiara Yachts' complete claims data . . . which is necessary to comprehensively identify all improper payments and other wrongdoing." *Id.*, ¶2 (PageID#1). BCBSM cannot insulate itself from liability through concealment.

Alternatively, the District Court should have granted Tiara Yachts' request to amend its Complaint. *U.S. ex rel. Bledsoe v. Community Health Sys., Inc.*, 342 F.3d 634, 644 (6th Cir. 2003) ("[W]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice.>").

2. BCBSM breached its ERISA fiduciary duties by squandering plan assets through improper payments for claims.

Tiara Yachts' Complaint plausibly alleged BCBSM breached its ERISA fiduciary duties by wasting plan assets through overpayments in violation of industry

standards and BCBSM's own promises to Plan representatives. The District Court said the Complaint "fail[ed] to meet Rule 8's pleading requirements" adopting BCBSM's opinion it was "largely based on conjecture." Order, (RE23, PageID#477-78). That is legally and factually wrong.

The Complaint alleged fraudulent and unjustified claims were submitted to BCBSM, including those "missing provider information, missing payee information, rolled-up financials, financials that do not reconcile, claims showing as rejected but still paid, fields compromised by BCBSM's flip logic, or even claims that are altogether missing." Compl., ¶93 (RE1, PageID#13). The Complaint thoroughly explained those claims. *Id.*, ¶¶94-107 (PageID#13-15). BCBSM knowingly paid those claims, wasting Plan assets:

- "BCBSM processes all claims for all non-auto NASCO customers, such as Tiara Yachts, on the same claims processing system . . . BCBSM's NASCO claims processing system has been found to consistently result in improper payments of claims. These processing errors result in wasted Plan assets in breach of BCBSM's fiduciary duty." *Id.*, ¶¶101-102 (PageID#15);
- "The aforementioned improper payments are non-exclusive examples of improper payments BCBSM regularly makes when processing claims for NASCO customers, and therefore also made when processing claims for Tiara Yachts . . ."; *Id.*, ¶108 (PageID#16);
- "BCBSM breached its fiduciary duties . . . [by] [c]onsistently paying claims suffering from a range of coding and billing issues, including but not limited to unbundling, upcoding, medically unlikely services, and reimbursing claims in non-adherence to its own and/or industry standard reimbursement guidelines." *Id.*, ¶108(g); (PageID#19-20);

- "BCBSM breached its fiduciary duties . . . [by] [f]ailing 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 breached its fiduciary duties . . . [by] [p]aying claims lacking standard information necessary to properly adjudicate claims in accordance with industry standards and BCBSM's own policies and procedures, or otherwise failing to maintain claims data necessary to identify and recover incorrectly paid amounts." *Id.*, ¶108(k).

The District Court erred by disbelieving these factual allegations, warranting reversal. *See Sagliocco v. Eagle Ins. Co.*, 112 F.3d 226, 228–29 (6th Cir. 1997) ("[A] judge may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations."). The District Court's error is all-the-more egregious because BCBSM has exclusive control over the Plan's claims data, which it uses to conceal its mismanagement. Compl., ¶2 (RE1, PageID#1). "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Garcia v. Alticor, Inc.*, No. 1:20-CV-1078, 2021 WL 5537520, at *4 (W.D. Mich. Aug. 9, 2021). This should lead to "courts reading ERISA plaintiffs' complaints slightly more leniently, allowing discovery as long as plaintiffs have provided enough factual allegations to create reasonable inferences" that defendants' conduct breached a fiduciary duty. *Id.* at *4 (collecting cases). The District Court's refusal to do so here is erroneous. At a minimum, the District Court should have allowed Tiara Yachts to amend the

Complaint, not dismiss it outright and deny leave to amend. *See U.S. ex rel. Bledsoe*, 342 F.3d at 644.

C. **ERISA SECTIONS 1132(A)(2) AND (3) AUTHORIZE THE RELIEF REQUESTED IN THE COMPLAINT.**

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 against BCBSM of the Plan assets it wasted.

1. **29 U.S.C. § 1132(a)(2).**

ERISA authorizes a plan fiduciary, like Tiara Yachts, to seek "appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2). Section 1109 provides a breaching fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach," and "shall be subject to such other equitable or remedial relief as the court may deem appropriate." *Id.* § 1109(a).

The District Court held Tiara Yachts' suit did not fall within this section, opining "[t]he Complaint expressly seeks relief for Tiara Yachts, the employer, and not the Plan." Order, (RE23, PageID#483). Not true. The Complaint seeks to recover Plan losses. 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). 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) ("BCBSM's *mismanagement of Plan Assets* clearly constitutes a breach of BCBSM's fiduciary duty of care under ERISA."). The Complaint requests an order 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). The Complaint seeks restitution for "all improper uses *of Tiara Yacht's Plan assets.*" *Id.*, ¶22 (PageID#22). Restitution literally means returning Plan assets to the Plan.

Responding to BCBSM's motion, Tiara Yachts confirmed it sought relief "on behalf of its welfare benefit Plan." (RE16, PageID#195-96). And Tiara Yachts' counsel repeated this at the hearing on BCBSM's motion:

Under ERISA my client is a named fiduciary of the plan. Therefore, *it may bring an action on behalf of the plan, and that's what it's doing in this case. Tiara Yachts is not seeking a recovery for itself So whether there is a judgment or a settlement, whatever, it will be a recovery of plan assets which need to be used for purposes of the plan.*

Hearing Transcript, at 26 (RE22, PageID#444) (emphasis added).

This easily establishes the Complaint seeks relief for Plan losses. *See Tullis*, 515 F.3d at 677; *Guyan*, 689 F.3d at 800-01. Like the District Court here, the district

court in *Tullis* pointed to § 1109(a)'s language regarding "any losses *to the plan*," holding "plaintiffs did not have standing to pursue their § 1132(a)(2) claims after concluding the damages sought did not benefit the plan directly." *Id.* at 677. The *Tullis* district court reasoned "this language only permits recovery where a plaintiff sues in a 'representative capacity.'" *Id.* This Court reversed, holding the complaint alleged the defendant's breach of fiduciary duty "resulted in losses to the value of [plaintiff's] pension plans," and thus "alleged a harm cognizable under the plain language of ERISA." *Id.* at 680-83. Although the "complaint [did] not include the exact words 'losses to the plan,'" it put "defendant on notice that the plaintiffs are seeking recovery for losses that occurred to their plans":

That the plaintiffs are seeking recovery on behalf of their plans is, therefore, implied by the language of the complaint—to wit, that the value of the ERISA plans diminished because of defendant's actions. To hold otherwise would elevate form over substance, a result we have rejected in other contexts. *Id.* at 681.

This Court also rejected the District Court's reasoning here in *Guyan*, 689 F.3d at 800. There, the third-party administrator argued—like BCBSM here—that "Plaintiffs have no claim for damages under 29 U.S.C. §§ 1109(a) and 1132(a)(2) because they seek to recover for themselves as individual entities rather than on behalf of each Plaintiff's respective plan." *Id.* This Court rejected that argument:

Plaintiffs' complaints and summary judgment briefs are more than sufficient in light of *Tullis* to demonstrate that Plaintiffs' actions seek recovery on behalf of each Plaintiff's respective Plan. Plaintiffs expressly state in these pleadings that they bring this action on behalf

of each Plaintiff's respective Plan. And Plaintiffs allege harm to the Plans themselves and the Plan participants *Id.*

Ignoring *Tullis* and *Guyan*, the District Court elevated form over substance. The District Court tried to sidestep *Guyan* by suggesting that complaint "expressly stated that the action was brought on behalf of each plaintiff's respective plan." Order, (RE23, PageID#482). Not true. *Guyan*'s caption shows several plaintiff-employers—like Tiara Yachts here—named themselves plaintiffs without their plans. And this Court in *Guyan* actually relied on "Plaintiffs' complaints *and summary-judgment briefs*," which it said "demonstrate that Plaintiffs' actions seek recovery on behalf of each Plaintiff's respective Plan." *Guyan*, 689 F.3d at 800 (emphasis added). This Court explained "[t]hese documents establish, and put [defendant] on notice, that Plaintiffs are seeking to recover for losses that occurred to the Plans." *Id.* at 801.

So too here. As quoted above, Tiara Yacht's Complaint, its response brief to BCBSM's motion, and its counsel's representations on the record at the hearing conclusively establish the Complaint seeks relief for the Plan. Under *Guyan* and *Tullis*, the District Court was required to accept those factual allegations as true, not disregard them as it did. *See Guyan*, 689 F.3d at 800-01; *Tullis*, 515 F.3d at 681-83.

The District Court inappropriately speculated recovery might go into Tiara Yachts' bank account. Order, (RE23, PageID#467, 482). That's not in the Complaint. Tiara Yachts' counsel confirmed the opposite on the record: "[R]ecovery

of plan assets need to be used for purposes of the plan." Hearing Transcript, 26 (RE22, PageID#444). And this Court rebuffed the same argument by the *Guyan* defendant, saying it was "immaterial" anyways. *Guyan* 689 F.3d at 801. Given its Complaint, briefing, and representations on the record, Tiara Yachts seeks recovery on behalf of, and for losses to, the Plan recoverable under § 1132(a)(2). *See Guyan*, 689 F.3d at 800-01; *Tullis*, 515 F.3d at 681-83.

Importantly, Tiara Yachts moved to amend its Complaint to put in the exact "magic words" the District Court (wrongly) believed were necessary. *See Am. Compl.*, (RE33-2, PageID#732). The District Court's decision to inexplicably deny Tiara Yachts' motion as somehow "futile"—without explanation—is independent error. *See Parchman v. SLM Corp.*, 896 F.3d 728, 736 (6th Cir. 2018) ("[O]utright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion, but abuse of that discretion and inconsistent with the spirit of the Federal Rules." (citation and internal quotation marks omitted)).

2. 29 U.S.C. § 1132(a)(3).

ERISA Section 1132(a)(3) independently authorizes the relief the Complaint seeks by allowing a plan fiduciary, like Tiara Yachts, to seek "appropriate equitable relief" to redress ERISA violations. 29 U.S.C. § 1132(a)(3)(B). The Supreme Court held, in the ERISA context, that "equity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of

duty or to prevent the trustee's unjust enrichment," and that, historically, "this kind of monetary remedy against a trustee, sometimes call a 'surcharge' was exclusively equitable." *CIGNA Corp. v. Amara*, 563 U.S. 421, 441-42 (2011).

The District Court tried to sidestep *Amara* by asserting "[t]he portion of *Amara* that Tiara Yachts relies on is dicta" and "the remedy Tiara Yachts seeks is not the surcharge that was at issue in *Amara*." *First*, disregarding *Amara* as dicta is legally incorrect. "Lower courts are obligated to follow Supreme Court dicta" *Am. C.L. Union of Kentucky v. McCreary Cnty., Ky.*, 607 F.3d 439, 447-48 (6th Cir. 2010). And "[t]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings[.]" *Id.* (quotation omitted). *Second*, the Complaint seeks make-whole relief for the Plan, which was injured when BCBSM wasted Plan assets through overpayments. Compl., (RE1, PageID#15, 19-23) (requesting "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"). Consistent with *Amara*, this Court has held claims to recover overpayments against fiduciaries—like Tiara Yachts' claims—are for "equitable" relief authorized by Section 1132(a)(3). For example, in *Patterson v. United Healthcare Insurance Company*, 76 F.4th 487 (6th Cir. 2023), a beneficiary brought breach-of-fiduciary-duty and prohibited transactions claims against the defendant for its overpayments to providers. *Id.* at 492. This Court held: (1) "[t]he breach of

fiduciary duty claim . . . has an equitable basis," and (2) "Patterson's claim of a prohibited transaction for impermissibly collecting his \$25,000 . . . also rests on an equitable basis." *Id.* at 496. Further, "the relief Patterson seeks is also equitable" because "his complaint seeks disgorgement" and "both disgorgement and equitable restitution may be pursued through § 1132(a)(3)." *Id.* at 497.

And consistent with *Amara*, Circuit Courts—including this Court—have repeatedly held equitable "make whole" monetary compensation is available under Section 1132(a)(3), regardless of whether "surcharge" is at issue. *See Stiso*, 604 F. App'x at 500 ("On remand, plaintiff may seek the appropriate equitable remedy, including make-whole relief in the form of money damages."); *see also Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 724 (8th Cir. 2014) ("The request for make-whole, monetary relief under § 1132(a)(3) is supported by the case law of other circuit courts of appeals."); *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013) ("The district court . . . dismissed the suit because Gearlds sought only money damages, which is ordinarily a legal remedy. After *Amara*, however, that is not the end of the inquiry into equity. Gearlds's complaint is viable in light of *Amara*."); *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 891–92 (7th Cir. 2013) ("[Plaintiff] has argued for make-whole relief in the form of monetary compensation for a breach of fiduciary duty We now know that, in appropriate circumstances, that relief is available under section 1132(a)(3)."); *Teisman v. United of Omaha Life*

Ins. Co., 908 F. Supp. 2d 875, 880 (W.D. Mich. 2012) ("§ 1132(a)(3) authorizes the 'make-whole' equitable relief sought by Plaintiff because Jedco is a fiduciary"); *Van Loo v. Cajun Operating Co.*, 64 F. Supp. 3d 1007, 1026 (E.D. Mich. 2014) ("[M]ake whole" equitable relief is available under § 1132(a)(3) against defendant fiduciary). The District Court erred by depriving Tiara Yachts and its Plan of make-whole, monetary relief against BCBSM under Section 1132(a)(3)(B). *See id.*

Finally, the District Court incorrectly opined Tiara Yachts' ERISA claims were "contractual" and its remedy was "in contract." This Court rejected the same argument in *Patterson*: ERISA breach-of-fiduciary-duty and prohibited transactions claims are "completely distinct" from breach-of-contract claims: "In reality, Patterson's claims fall outside this dichotomy. He alleges breach of fiduciary duty and engagement in prohibited transactions, two claims completely distinct from . . . a breach of contract claim. Because both theories Patterson puts forth rest on an equitable basis, they may proceed." *Patterson*, 76 F.4th at 496–97.

II. BCBSM VIOLATED ERISA BY PAYING ITSELF FEES BASED OFF THE AMOUNT OF PLAN ASSETS IT WASTED

Tiara Yachts' Complaint also plausibly alleged BCBSM breached its ERISA fiduciary duties and engaged in prohibited transactions under ERISA by collecting SSP fees from Plan assets to capitalize on its mismanagement. The District Court's contrary ruling was erroneous.

A. RULE 8, NOT RULE 9(B), APPLIES.

Initially, the District Court erroneously adopted BCBSM's unsupported suggestion that the Complaint's allegations regarding SSP fees "sound in fraud" and therefore "Rule 9(b) properly applies." Order, (RE23, PageID#479). "Courts, however, routinely apply only the general, liberal pleading standards of Rule 8 to ERISA claims," including ERISA breach-of-fiduciary-duty and prohibited transaction claims. *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 821 (S.D. Ohio 2004); *see also In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d 1002, 1015 (S.D. Ohio 2006) ("Unlike claims of fraud brought pursuant to Federal Rule of Civil Procedure 9(b), which require a heightened standard of pleading, claims brought under ERISA are subject only to the simplified pleading standard of Federal Rule of Civil Procedure 8."); *In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898, 909 (E.D. Mich. 2004) (refusing to apply Rule 9(b) to ERISA breach-of-fiduciary-duty claim); *Rankin v. Rots*, 278 F. Supp. 2d 853, 865-66 (E.D. Mich. 2003) ("The heightened pleading requirement under Rule 9(b) will not be imposed where the claim is for a breach of fiduciary duty under ERISA.").

The Complaint does not allege fraud relative to BCBSM's SSP fees. Instead, it alleges BCBSM breached its ERISA fiduciary duties by "implementing a Shared Savings Program when it knew Plan assets were being used to overpay for benefits

allowing BCBSM to capitalize on its own misconduct and mismanagement, which was a clear conflict of interest," and engaged in prohibited transactions by "deal[ing] with the assets of Tiara Yachts' Plan in its own interest or for its own account." Compl., (RE1, PageID#19, 21). Rule 9(b) is inapplicable. *See In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d at 909 (refusing to apply Rule 9(b) to ERISA breach-of-fiduciary-duty claim); *Rankin*, 278 F. Supp. 2d at 865-66 (same).

B. BCBSM ACTED AS AN ERISA FIDUCIARY IN ALLOCATING PLAN ASSETS TO ITSELF AS SSP FEES.

Contrary to the District Court's opinion, BCBSM acted as an ERISA fiduciary when it collected SSP fees from the Plan's assets because it: (1) controlled and allocated Plan assets to itself through the SSP fees; and (2) exercised discretion and authority over factors that determined the amount of the SSP fees it collected.

1. BCBSM is an ERISA fiduciary because it controlled Plan assets to pay itself SSP fees.

First, BCBSM exercised authority and control over Plan assets by directing payment of Plan assets to itself as SSP fees. A plan administrator like BCBSM is an ERISA fiduciary when it exercises "practical control over an ERISA plan's money." *Guyan*, 689 F.3d at 798. The Plan funds from which BCBSM directed payment to itself as SSP fees are undisputedly Plan assets. Order, (RE47, PageID#1000); *Hi-Lex*, 751 F.3d at 745-47 (self-funded plan contributions to BCBSM's bank account for benefits payments are ERISA plan assets).

BCBSM exercised authority and control over the Plan's assets by calculating and paying itself SSP fees from the Plan's assets. Compl., ¶¶18-26, 80-86, 108(d), 111-115 (RE1, PageID#3-4, 11-12, 19, 21). Specifically, by accepting regular deposits from Tiara Yachts on the Plan's behalf for claims payments and using those Plan assets to instead allocate SSP fees to itself, *see id.*, BCBSM "exercise[d] 'practical control over an ERISA plan's money.'" *Guyan*, 689 F.3d at 798.

Given BCBSM's exercise of authority and control over Plan assets to pay itself SSP fees from Plan assets, BCBSM is an ERISA fiduciary relative to its collection of SSP fees. *See Chelf v. Prudential Ins. Co. of Am.*, 31 F.4th 459, 466 (6th Cir. 2022) ("Wal-Mart was a fiduciary as it indisputably exercised control over the Plan's assets when it handled Mr. Chelf's premiums, [and] exercised control over the disposition of the Plan's assets"); *Hi-Lex*, 751 F.3d at 746 ("[T]he district court did not err in finding that BCBSM held plan assets of the Hi-Lex Health Plan and, in doing so, functioned as an ERISA fiduciary."); *Pipefitters*, 722 F.3d at 867 ("Because an entity that exercises any authority or control over disposition of a plan's assets becomes a fiduciary . . . the district court was correct to conclude that Defendant [BCBSM] was an ERISA fiduciary with respect to Defendant's collection of the OTG fee from Plaintiff"); *Briscoe*, 444 F.3d at 494-95 ("PHP exercised control over assets in the Company's self-funded plan by allotting to itself an administrative

fee On these facts, we hold that PHP exercised at least partial control over plan assets and, to the extent that it did so, qualifies as a fiduciary.").

The District Court asserted—without support—that BCBSM mentioned SSP fees in an ASC renewal, as if that affects BCBSM's fiduciary status. Any mention was highly misleading because it kept hidden how BCBSM calculated and collected the SSP fees. Regardless, any such mention does not change BCBSM's fiduciary status because BCBSM had unilateral authority and control over the allocation of Plan assets to itself as SSP fees. *See Pipefitters*, 213 F. App'x at 478 ("Although BCBSM asserts that this dispute is merely contractual in nature, we find that the Fund's allegations place its OTG fee claims within the scope of ERISA The Fund's knowledge of the fee . . . would not necessarily negate the exercise of control or authority by BCBSM in its imposition because such knowledge would not alter BCBSM's control over the funds."); *Briscoe*, 444 F.3d at 492 ("The terms of the Agreement may have limited [the administrator's] discretion over the remaining funds, but did not affect its control over those funds [T]he Agreement does not alter the fact that [the administrator] acted as a signatory and unilaterally disposed of the remaining funds.").

2. **BCBSM is an ERISA fiduciary because it controlled the amount of SSP fees it collected from Plan assets.**

Second, and independently, BCBSM is an ERISA fiduciary relative to its collection of SSP fees because it exercised discretion over the factors that

determined the amount of those fees. *See* Compl., ¶¶18-26, 80-86, 108(d), 111-115 (RE1, PageID#3-4, 11-12, 19, 21).

Hi-Lex and *Pipefitters* are on point. In *Hi-Lex*, the plaintiff, a self-funded plan sponsor like Tiara Yachts, brought ERISA breach-of-fiduciary-duty and prohibited transaction claims against BCBSM for collecting "access fees" from plan assets. *Hi-Lex*, 751 F.3d at 742-44. On appeal, BCBSM argued it was not an ERISA fiduciary relative to those fees because it had the "right to collect fees per the terms of its contract with [plaintiff]" and "they were part of the standard pricing arrangement for the company's entire ASC line of business." *Id.* at 744. This Court rejected BCBSM's arguments, noting "the imposition of the Disputed Fees was not universal" and "the Disputed Fees were discretionarily imposed" by BCBSM, making it an ERISA fiduciary. *Id.* It reasoned "BCBSM had the 'flexibility to determine' how and when access fees were charged to self-funded ASC clients." *Id.*

Similarly, in *Pipefitters*, another self-funded plan sponsor brought ERISA breach-of-fiduciary duty and prohibited transaction claims against BCBSM based on its collection of cost transfer subsidy fees (OTG fee). *Pipefitters*, 722 F.3d at 863. On appeal, BCBSM argued it was not an ERISA fiduciary relative to its collection of those fees because they were contractual and the rate to calculate the fee was "[f]ixed at one percent." *Id.* at 867. This Court rejected BCBSM's arguments, holding "Defendant was an ERISA fiduciary with respect to Defendant's

collection of the OTG fee from Plaintiff." *Id.* It reasoned the ASC did not "set forth the dollar amount for the OTG fee or even a method by which the OTG fee is to be calculated" and "[t]he opaque language that 'any cost transfer subsidies or surcharges . . . will be reflected' in no way cabins Defendant's discretion to charge or set the OTG fee vis-à-vis Plaintiff." *Id.*

Here, under ASC terms identical to those ASCs, BCBSM possessed and controlled Plan assets. ASC, Art. III, ¶B (RE12-2, PageID#147). In its discretion, BCBSM decided whether to pay a healthcare claim and, when it did, for how much, giving it discretion over fees—like SSP fees—calculated off the amount of claims payments. *Id.* at Art. II, ¶¶A, C (PageID#141-42). Moreover, like the *Hi-Lex* and *Pipefitters* 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 the 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) ("BCBSM has designed a system in which it knowingly and improperly 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.").

The amounts BCBSM took from Plan assets as SSP fees were within BCBSM's "unilateral control." *Id.*, ¶113, (PageID#21). BCBSM had discretionary

control over which claims to pay and at what rates to pay them. *Id.*, ¶¶15-26, 112-115 (PageID#3-4, 21). The more improper claims BCBSM slid through its claims adjudication system on the front end, the more money BCBSM fleeced from the Plan in SSP fees on the back end. *Id.*, ¶¶80-87, 113-115 (PageID#11-12, 21). Like this Court's finding in *Hi-Lex*: "BCBSM had the 'flexibility to determine' how and when [fees] were charged to self-funded ASC clients" and the fees were therefore discretionarily imposed. *Hi-Lex*, 751 F.3d at 744.

The District Court improperly "disagree[d]" with these factual allegations, disbelieving "this happened to Tiara Yachts, or that the claims processing and data deficiencies were tied in any way to the Shared Savings Program." Order, (RE23, PageID#480). But the Complaint alleges this happened to Tiara Yachts: "BCBSM also made it mandatory for its self-insured customers to participate and automatically opted *all* self-funded customers into the program" *Id.*, ¶¶71, 81 (PageID#10-11) (emphasis added). And BCBSM's improper payments *are* tied to the SSP; the Complaint contains an entire section titled "***BCBSM Capitalized on Its Misconduct and Mismanagement of Its Customers' Plan Assets***" explaining:

84. Essentially, ***BCBSM devised a scheme that would allow it to profit on its own mismanagement of plan assets. The more improper payments BCBSM let slide through its system, the more money it would make on the back end. Unfortunately, this came at the expense of BCBSM's self-insured customers, including Tiara Yachts.***

* * *

108. BCBSM breached its fiduciary duties in numerous ways, including, but not limited to: . . . (d) Misleading and deceiving Tiara Yachts by *implementing a Shared Savings Program when it knew Tiara Yachts' Plan assets were being used to overpay for benefits, allowing BCBSM to capitalize on its own misconduct and mismanagement, which is a clear conflict of interest.*

* * *

113. Whether Tiara Yachts agreed to pay 30 percent is immaterial, because the amount of the 'recoveries' were in the unilateral control of BCBSM.

114. *The more improper claims that BCBSM failed to detect on the front end, the higher the recoveries on the back end, and the more it got paid.*

115. By instituting a system that allowed it to unilaterally control the amount of its own compensation, BCBSM dealt with Tiara Yachts' Plan assets in its own interest and for its own account in violation of Section 1106.

Id., ¶¶84, 108, 113-15 (PageID#9-11, 21) (emphasis added).

The District Court erroneously 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 adopted as true *BCBSM's* inaccurate description of its misconduct as mere "ret[ention] [of] a contractually fixed percentage of 30% of recovered third-party payments." *Id.* *Seaway* actually held a party *is* a fiduciary where, as here, the contract "authorizes the party to exercise discretion with respect to" its compensation, *Seaway*, 347 F.3d at 619, and this Court rejected BCBSM's identical

argument in *Hi-Lex* and *Pipefitters*, distinguishing *Seaway*'s holding as inapplicable to BCBSM's retention of ***variable fees from Plan assets***, like the SSP fees. *Hi-Lex*, 751 F.3d at 744-45; *Pipefitters*, 722 F.3d at 866-67. Specifically, in *Hi-Lex*, this Court rejected BCBSM's "attempt[] to characterize its arrangement with [the self-funded plan sponsor] 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. So too here; variable SSP fees BCBSM collected from Plan assets are at issue, not negotiated provider discounts belonging to BCBSM, and the SSP fees were discretionarily imposed by BCBSM; they were not fixed compensation. Compl., ¶¶83-84, 108, 113-15 (RE1, PageID#10-11, 21) (alleging BCBSM's SSP fees were collected "at its discretion"). Therefore, BCBSM is an ERISA fiduciary relative to its discretionary collection of the variable SSP fees.

Finally, the District Court erroneously adopted ***BCBSM's*** unsupported allegation that it didn't unilaterally impose SSP fees because SSP aspects ***other than***

the fees involve "third party vendors." Order, (RE23, PageID#480). This Court rejected BCBSM's similar argument in *Pipefitters*. There, BCBSM argued third-party involvement rendered its fees contractual only, stating "it had no discretion in charging the OTG fee because it was the Michigan Insurance Commissioner who fixed the rate at one percent." *Pipefitters*, 722 F.3d at 867. This Court broomed that argument, noting it "confuses the relevant activity for ERISA purposes." *Id.* It reasoned "the state did not fix the rate that Defendant charged each customer, and crucially, neither did the ASC between Plaintiff and Defendant." *Id.* Similarly here, third-party vendors didn't calculate or collect the SSP fees; BCBSM did. Further, BCBSM exercised control over the SSP fees it collected on the back end, because BCBSM controlled how claims were processed and paid on the front end. Compl., ¶¶80-84, 114-15, (RE1, PageID#11, 21). The ASC and vendors did not fix the amounts BCBSM collected as SSP fees; BCBSM unilaterally controlled that. *Id.*

Accordingly, BCBSM is a fiduciary relative to collecting SSP fees. *See Pipefitters*, 722 F.3d at 867 ("Because an entity that exercises *any* authority or control over disposition of a plan's assets becomes a fiduciary . . . the district court was correct to conclude that Defendant was an ERISA fiduciary with respect to Defendant's collection of the OTG fee from Plaintiff."); *Provident Bank*, 170 F.3d at 613 (trustee bank's transfer of plan assets from plan account to correct its prior errors in handling plan assets was fiduciary act under ERISA); *Negron v. Cigna*

Health & Life Ins., 300 F. Supp. 3d 341, 357 (D. Conn. 2018) ("An entity may become a fiduciary where it has discretionary control over factors—such as the processing of claims—that will affect the amount of its compensation.").

C. BCBSM BREACHED ITS ERISA FIDUCIARY DUTIES AND ENGAGED IN PROHIBITED TRANSACTIONS BY COLLECTING SSP FEES.

The Complaint also contains sufficient factual allegations to clear Rules 8 or 9(b). The Complaint must plead "the who, what, when, where and how" to satisfy Rule 9(b). *City of Taylor Gen. Emps. Ret. Sys. v. Astec Indus., Inc.*, 29 F.4th 802, 810 (6th Cir. 2022). The Complaint's twenty-two pages of detailed allegations clearly accomplish that: Who – BCBSM; What – BCBSM subjected Tiara Yachts and its Plan to fees "that would allow [BCBSM] to profit on its own mismanagement of plan assets"; When – Effective January 1, 2018, applying retroactively extending back to January 1, 2016; Where – Michigan; How – by forcing Tiara Yachts and its Plan into a mandatory program, applied retroactively, BCBSM paid itself SSP fees that increased the more it mismanaged the Plan's assets. Compl., ¶¶70-86, 105-115, (RE1, PageID#9-12, 19-21).

As noted, plan fiduciaries like BCBSM have a broad obligation to "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). In accordance with this duty, "the assets of a plan . . . shall be held for the exclusive purposes of providing benefits to participants . . . and defraying reasonable expenses of administering the plan." 29

U.S.C. § 1103(c)(1). Courts have repeatedly held allegations like those in Tiara Yachts' Complaint regarding "shared savings" fees collected by third-party administrators like BCBSM are sufficient to 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) ("Individual Plaintiffs contend that 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. . . . the court finds that Individual Plaintiffs have alleged a factual basis to support a claim of breach of a fiduciary duty."); *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."). The same result should follow here.

Alternatively, the District Court should have granted leave to Tiara Yachts to amend its Complaint, not dismiss it outright and deny leave to amend. *See U.S. ex rel. Bledsoe*, 342 F.3d at 644.

CONCLUSION

Tiara Yachts respectfully requests this Court reverse the District Court's Orders and judgment and remand with instructions the parties proceed to discovery on Tiara Yachts' claims.

Respectfully Submitted,

VARNUM LLP

Dated: June 5, 2024

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CERTIFICATE OF COMPLIANCE

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Date: June 5, 2024

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CERTIFICATE OF SERVICE

I certify that on June 5, 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: June 5, 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:

ECF No.	DESCRIPTION OF DOCUMENT	PAGE ID #
1	Complaint against Blue Cross Blue Shield of Michigan	1-23
1-2	<i>Exhibit A to Complaint, 9-14-17 BCBSM Email Chain</i>	25-29
1-3	<i>Exhibit B to Complaint, 2017 List of Customers Impacted by Flip Logic</i>	30-39
1-4	<i>Exhibit C to Complaint, 9-19-17 BCBSM Email Chain</i>	40-43
12-2	<i>Exhibit A to Defendant's Brief in Support of Motion to Dismiss, 2016 Administrative Service Contract</i>	139-154
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
28-29	Plaintiff's Motion to Alter Judgment or Amend Judgment and Brief in Support	570-611
32-33	Plaintiff's Motion for Leave to File Amended Complaint and Brief in Support	714-729
33-2	<i>Exhibit 1 to Brief in Support of Motion for Leave to File Amended Complaint, Proposed Amended Complaint</i>	731-852
47	Opinion and Order	998-1011