

No. 24-1223

IN THE 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 for the
Western District of Michigan
Case No. 1:22-cv-603
The Honorable Judge Robert J. Jonker

**BRIEF FOR THE U.S. SECRETARY OF LABOR AS AMICUS
CURIAE SUPPORTING PLAINTIFF-APPELLANT**

SEEMA NANDA
Solicitor of Labor

SARAH M. KARCHUNAS
Trial Attorney

WAYNE R. BERRY
Associate Solicitor
for Plan Benefits Security

STEPHEN SHANNON
Attorney

JEFFREY M. HAHN
Counsel for Appellate and
Special Litigation

U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave. NW, N4611
Washington, DC 20210
202.693.5600 (t) | 202.693.5610 (f)

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE	1
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE.....	2
A. Factual Background	2
B. Proceedings Below	6
SUMMARY OF THE ARGUMENT	8
ARGUMENT	11
I. The Complaint Plausibly Alleges That BCBSM Acted as a Fiduciary and Breached Its Fiduciary Duties.....	11
A. The Complaint Plausibly Alleges BCBSM’s Fiduciary Status	12
B. The Complaint Plausibly Alleges That BCBSM Breached Its Fiduciary Duties	16
II. The District Court’s Arguments for Dismissal Are Unfounded .	18
A. The District Court Is Incorrect That the Presence of a Contract Defeats Fiduciary Status	18
B. The District Court Is Incorrect That BCBSM Was Not a Fiduciary Because Its Flip Logic Policy Was a “Business Decision”	21
C. The District Court’s Other Bases for Dismissal Are Incorrect	23
CONCLUSION.....	26
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page(s)
Federal Cases:	
<i>Briscoe v. Fine</i> , 444 F.3d 478 (6th Cir. 2006)	14, 15, 19
<i>David P. Coldesina, D.D.S. v. Est. of Simper</i> , 407 F.3d 1126 (10th Cir. 2005)	13
<i>DeLuca v. Blue Cross Blue Shield of Mich.</i> , 628 F.3d 743 (6th Cir. 2010)	21, 22
<i>Donovan v. Cunningham</i> , 716 F.2d 1455 (5th Cir. 1983)	1
<i>Faber v. Metro. Life Ins. Co.</i> , 648 F.3d 98 (2d Cir. 2011)	13
<i>Guyan Intern., Inc. v. Pro. Benefits Adm’rs, Inc.</i> , 689 F.3d 793 (6th Cir. 2012)	19, 20, 22
<i>Hawkins v. Cintas Corp.</i> , 32 F.4th 625 (6th Cir. 2022)	24
<i>Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich.</i> , 751 F.3d 740 (6th Cir. 2014)	passim
<i>IT Corp. v. Gen. Am. Life Ins. Co.</i> , 107 F.3d 1415 (9th Cir. 1997)	15
<i>McLemore v. Regions Bank</i> , 682 F.3d 414 (6th Cir. 2012)	15

Federal Cases - continued:

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) 11

Pegram v. Herdrich,
530 U.S. 211 (2000) 9, 12, 22

Pipefitters Local 636 v. Blue Cross & Blue Shield of Mich.,
213 F. App'x 473 (6th Cir. 2007) 13–14

Smith v. Provident Bank,
170 F.3d 609 (6th Cir. 1999) 19

Federal Statutes:

Employee Retirement Income Security Act of 1974,
as amended, 29 U.S.C. § 1001 *et seq.*

Section 3(21), 29 U.S.C. § 1002(21)..... 15

Section 3(21)(A), 29 U.S.C. § 1002(21)(A)..... 8, 11

Section 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i)..... 1, 19

Section 404, 29 U.S.C. § 1104 6

Section 404(a), 29 U.S.C. § 1104(a)..... 16

Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A)..... 16

Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(B)..... 17

Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(D)..... 17

Section 406, 29 U.S.C. § 1106 6

Section 502(a)(2), 29 U.S.C. § 1132(a)(2).....	7, 10, 24, 25
Section 502(a)(3), 29 U.S.C. § 1132(a)(3).....	25 n. 3
Section 504, 29 U.S.C. § 1134	1
Section 505, 29 U.S.C. § 1135	1
Rules:	
Federal Rule of Appellate Procedure 29(a)(2)	1
Miscellaneous:	
U.S. Dep’t of Labor, Advisory Op. No. 92-24A, 1992 WL 337539 (Nov. 6, 1992).....	12, 13
U.S. Dep’t of Labor, Advisory Op. No. 93-14A, 1993 WL 188473 (May 5, 1993).....	12

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Acting Secretary of Labor (“Secretary”) has primary regulatory and enforcement authority for Title I of ERISA, 29 U.S.C. §§ 1134, 1135, which includes the statute’s stringent fiduciary standards. Under ERISA, and as relevant here, a person is a fiduciary with respect to a plan to the extent they “exercise[] any authority or control respecting management or disposition of its assets.” 29 U.S.C. § 1002(21)(A)(i). In this case, the district court dismissed Plaintiff’s ERISA claims on the ground that it did not plausibly plead that Defendant Blue Cross Blue Shield of Michigan (“BCBSM”) acted as a fiduciary with respect to Plaintiff’s self-funded ERISA plan. The Secretary has a substantial interest in ensuring that those who exercise control over plan assets are subject to ERISA’s strict fiduciary obligations. *See Donovan v. Cunningham*, 716 F.2d 1455, 1462–63 (5th Cir. 1983).

The Secretary files this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUES

The Secretary addresses the following issue in her amicus brief:

Whether the Complaint states a plausible claim that BCBSM acted as a fiduciary by exercising control over plan assets when it overpaid claims with funds remitted by the Plan to BCBSM, and in doing so breached ERISA’s fiduciary duties, such that the district court erred in dismissing the fiduciary-breach claim.

STATEMENT OF THE CASE

A. Factual Background

This case involves allegations made by Plaintiff Tiara Yachts, Inc. (“Tiara Yachts”) that BCBSM violated ERISA’s fiduciary provisions while acting as a third-party administrator (“TPA”) for Tiara Yachts’ self-funded health benefits plan (the “Plan”). In contrast to a fully insured plan—where the plan sponsor pays premiums to an insurance company, which in turn assumes the risk of paying claims—in a self-funded plan, the plan itself bears that risk by setting aside funds to pay claims. Most self-funded plans retain a TPA to process and pay claims with plan funds.

From approximately 2006 to December 2018, BCBSM acted as the Plan’s TPA. Dismissal Order, RE 23, PageID # 468; Compl. ¶¶ 15–17, RE 1, PageID # 3. Under a series of Administrative Service

Contracts (ASCs) renewed annually, Tiara Yachts paid BCBSM a monthly administrative fee, and BCBSM was obligated to process and pay claims using Plan funds. Compl. ¶¶ 16, 21, RE 1, PageID # 3. To facilitate BCBSM’s obligation to pay claims for the Plan, Tiara Yachts periodically deposited Plan funds into a bank account it alleges was “complete[ly]” controlled by BCBSM. Compl. ¶ 22, 24, RE 1, PageID # 4.

Tiara Yachts alleges BCBSM systematically overpaid claims for services rendered to Plan participants by certain “non-participating providers” (i.e., providers who are not included in BCBSM’s provider network and who do not have a pre-determined payment agreement with BCBSM). Compl., ¶ 108, RE 1, PageID # 19–20; Dismissal Order, RE 23, PageID # 469–70. The Complaint alleges that BCBSM did so using an algorithm in its claims-processing system called “flip logic” that improperly “flipped” the status of certain non-participating providers—in particular, those who provided services to participants outside of the Plan’s geographic area—to “participating.” Dismissal Order, RE 23, PageID # 469–70; Compl., ¶¶ 48–50, 54, RE 1, PageID # 7–8. As a result, BCBSM paid claims submitted by these providers at the full amount they charged rather than at the lower non-participating

rate, which the Complaint describes as contrary to the Plan. Dismissal Order, RE 23, PageID # 469–70; Compl., ¶¶ 49, 52, 54, RE 1, PageID # 7–8.

The Complaint supports its allegations with emails sent by an internal BCBSM whistleblower identifying the flip logic problem and explaining that it affected all self-funded customers using a particular version of the NASCO claims processing system (the “non-auto” version), a version that Tiara Yachts alleges was used to process claims for its Plan. Dismissal Order, RE 23, PageID # 469; Compl. ¶¶ 46, 101–02, RE 1, PageID # 7, 15. The Complaint alleges that BCBSM continued to allow the overpayments to occur even after being made aware that flip logic was resulting in the overpayment of claims contrary to Plan terms. Compl. ¶¶ 48, 52, RE 1, PageID # 7–8; *see also* Dismissal Order, RE 23, PageID # 469–70.

Tiara Yachts also alleges that BCBSM profited from making these systematic overpayments. Dismissal Order, RE 23, PageID # 472; Compl. ¶ 84, RE 1, PageID # 11. As TPA, BCBSM introduced a “Shared Savings Program,” a set of measures to avoid and recover overpayments to providers. Dismissal Order, RE 23, PageID # 471–72, 480; Compl. ¶¶

71–78, RE 1, PageID # 10–11. Under the Shared Savings Program, BCBSM retained 30% of any improper payments avoided or recovered in connection with the Program’s services. Dismissal Order, RE 23, PageID # 471; Compl. ¶ 80, RE 1, PageID # 11. Tiara Yachts alleges that the Shared Savings Program thus created a perverse incentive for BCBSM to allow improper payments and mismanagement of Plan assets to occur so that BCBSM could later detect improper payments, earn a fee from those avoided or recovered overpayments, and as a result “profit on its own mismanagement of plan assets.” Dismissal Order, RE 23, PageID # 471–72; Compl. ¶¶ 71, 80, 83, 84, RE 1, PageID # 10, 11.

Further, the Complaint alleges that BCBSM prevented Tiara Yachts from monitoring BCBSM by limiting Tiara Yachts’ access to claims data, Compl. ¶¶ 87, 91, RE 1, PageID # 12, 13, and that BCBSM systematically failed to collect or maintain claims data, such as provider information, payee information, and financial records, *id.* at ¶¶ 92, 93, RE 1, PageID # 13. *See also* Dismissal Order, RE 23, PageID # 470–71. Access to complete claims data is “essential to identifying improper claims and payments,” and Tiara Yachts alleges that it still does not

have access to its own complete claims data. Compl. ¶¶ 90, 91, RE 1, PageID # 12–13.

B. Proceedings Below

Tiara Yachts filed suit alleging BCBSM violated ERISA in two ways. Count I alleges that BCBSM breached ERISA’s fiduciary standards (29 U.S.C. § 1104) by using Plan assets to overpay for claims; by implementing the Shared Savings Program, which allowed BCBSM to capitalize on its own mismanagement of Plan assets; and by concealing claims data from Plaintiff, which hindered Plaintiff’s ability to monitor BCBSM. Compl. ¶ 108, RE 1, PageID # 19–20. And Count II alleges that BCBSM, as a fiduciary, violated ERISA’s prohibited transaction rules (29 U.S.C. § 1106) by using the Shared Savings Program as a vehicle for self-compensation. *Id.* at ¶¶ 110–15, PageID # 21. The Complaint seeks various forms of relief, including an accounting for profits, restitution, monetary damages, and declaratory relief with respect to “Tiara Yachts’ Plan assets.” *See* Compl., RE 1, PageID # 21–23.

BCBSM moved to dismiss the Complaint for failure to state a claim, which the district court granted. Dismissal Order, RE 23, PageID

466. First, the court held that the Complaint does not challenge BCBSM's actions as a fiduciary because it "is, at bottom, a contractual dispute." *Id.* at PageID # 474. Second, the court found that BCBSM did not act as a fiduciary for the additional reason that its claims processing practices, including the use of flip logic, were "system-wide business decisions" that applied to other plans beyond the Tiara Yachts Plan. *Id.* at PageID # 476. Relatedly, the court faulted the Complaint for failing to identify "any actual claim that BCBSM paid out that suffers from these alleged deficiencies." Dismissal Order, RE 23, PageID # 475–477. Third, because BCBSM administered the Shared Savings Program through use of third-party vendors, the court found that the Shared Savings Program did not constitute an act of discretion on BCBSM's part. Dismissal Order, RE 23, PageID # 480. Finally, the court held that even absent the aforementioned flaws, the remedial provisions of ERISA invoked by Plaintiff do not authorize the relief sought in the Complaint. In particular, the court held that whereas ERISA section 502(a)(2) permits relief only for an ERISA plan, the Complaint seeks recovery for Tiara Yachts in its corporate capacity, not for the Plan. Dismissal Order, RE 23, PageID # 482–83.

Plaintiff moved under Rule 59(e) to alter or amend the judgment and separately for leave to file an amended complaint. Reconsideration Order, RE 47, PageID # 998. Among other things, Tiara Yachts explained that the Complaint does in fact seek relief for the Plan, and if the district court thought the Complaint was ambiguous on that score it should grant Plaintiff leave to amend the Complaint to make it explicit. *Id.*; Plaintiff’s Brief in Support of Motion for Leave to Alter or Amend Judgment, RE 29; PageID # 606, 610. The district court refused to allow the amendment on the grounds that the Complaint would still suffer from the same substantive deficiencies with respect to fiduciary status, and additionally denied Tiara Yachts’ motion to alter or amend the judgment. Reconsideration Order, RE 47, PageID # 1003–05. This appeal followed.

SUMMARY OF THE ARGUMENT

The district court incorrectly dismissed the Complaint largely due to its supposed failure to plausibly allege that BCBSM acted as a fiduciary with respect to the challenged conduct. ERISA confers fiduciary status on those who exercise, among other things, “any authority” over plan assets. 29 U.S.C. § 1002(21)(A). The Complaint

here challenges quintessential fiduciary conduct: BCBSM's use of Plan assets to systematically overpay providers contrary to Plan terms. Indeed, the district court found "no dispute that BCBSM controlled Tiara Yachts' sponsored Plan assets," a finding that should have ended the matter. Reconsideration Order, RE 47, PageID # 1000. Yet the district court held otherwise for reasons that have no support in ERISA or governing precedent, and some of which, if adopted, would cut a gaping hole in ERISA's enforcement scheme.

The district court first reasoned that the Complaint challenges BCBSM's actions "as a contractor, not a fiduciary." Dismissal Order, RE 23, PageID # 474–75. But the mere fact that BCBSM operated under a contract—a feature shared by virtually every ERISA fiduciary—is by itself dispositive of nothing and would defeat fiduciary status in almost any case. The court also deemed BCBSM's actions non-fiduciary in nature because they were "system-wide business decisions" that affected many plans beyond the Tiara Yachts Plan. But the core question for fiduciary status is "whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226

(2000). Because the actions alleged by the Complaint in this case—overpaying claims with Plan funds—are unambiguously fiduciary conduct, that is the end of the inquiry. The fact that BCBSM took similar actions with respect to other plans might make it a fiduciary with respect to those other plans, but in no event does it defeat fiduciary status here.

Finally, the district court improperly dismissed the Complaint for other reasons apart from fiduciary status. It faulted the Complaint for failing to identify specific Plan claims that were overpaid by BCBSM using flip logic, but no such claim-level granularity is required where the Complaint plausibly alleges that flip logic affected BCBSM-administered plans for which BCBSM used a particular claims-processing system (the “non-auto” version of NASCO), and that BCBSM used precisely that system for the Plan here. The district court also faulted the Complaint for supposedly not seeking relief on behalf of the Plan, as required for a claim under ERISA section 502(a)(2). But the Complaint in fact does seek relief for the Plan, and in any event, Plaintiff sought leave to amend to clarify further that it was doing exactly that (which the court denied as futile given the other

deficiencies it erroneously found). As such, to the extent there is any ambiguity as to whether the Complaint seeks relief for the Plan, Plaintiff should be given the chance to amend the Complaint to so clarify.

ARGUMENT

I. The Complaint Plausibly Alleges That BCBSM Acted as a Fiduciary and Breached Its Fiduciary Duties

This Court should reverse the district court's decision dismissing the fiduciary-breach claim. The Complaint plausibly alleges that BCBSM exercised control over plan assets when it systematically overpaid claims with funds remitted by the Plan to BCBSM, and thereby functioned as a fiduciary. Those allegations also plausibly support the inference that BCBSM breached its duties of prudence, loyalty, and adherence to plan documents.¹

¹ The Secretary takes no position on whether the Complaint states a claim for violation of ERISA's prohibited transaction rules (Count II) nor does she take a position on whether the Complaint plausibly alleges that BCBSM exercised discretionary authority over plan management when it overpaid claims contrary to Plan terms.

A. The Complaint Plausibly Alleges BCBSM's Fiduciary Status

Under ERISA, fiduciary status is defined “not in terms of formal trusteeship, but in *functional* terms of control and authority.” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260–62 (1993). One way a person functions as a fiduciary is if they “exercise[] any authority or control respecting management or disposition of [the plan’s] assets.” 29 U.S.C. § 1002(21)(A). A fiduciary must be exercising such control or authority “when taking the action subject to complaint.” *Pegram*, 530 U.S. at 226.

Here, the Complaint plausibly alleges that BCBSM acted as a fiduciary by exercising authority over plan assets—the funds remitted by Tiara Yachts to BCBSM for claims payments—when it overpaid claims using those funds. Because the Department has not promulgated a regulation defining plan assets, “[t]he assets of an employee benefit plan generally are to be identified on the basis of ordinary notions of property rights.” *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich.*, 751 F.3d 740, 745 (6th Cir. 2014) (quoting U.S. Dep’t of Labor, Advisory Op. No. 92-24A, 1992 WL 337539, at *2 (Nov. 6, 1992)); see also U.S. Dep’t of Labor, Advisory Op. No. 93-14A, 1993 WL 188473, at *4 (May 5, 1993). As the Department has explained, “the assets of a

welfare plan generally include any property, tangible or intangible, in which the plan has a beneficial ownership interest.” AO 92-24A, 1992 WL 337539, at *2; *see also Hi-Lex*, 751 F.3d at 745. “The identification of plan assets therefore requires consideration of any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved.” AO 92-24A, 1992 WL 337539, at *2; *see Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 105–06 (2d Cir. 2011); *David P. Coldesina, D.D.S. v. Est. of Simper*, 407 F.3d 1126, 1134 (10th Cir. 2005) (“[A] relationship of trust is established when one acquires possession of another’s property with the understanding that it is to be used for the owner’s benefit . . . [and] [a]s such, assigning fiduciary obligations [here] serves the purposes of ERISA.”).

This Court has repeatedly held that funds designated or earmarked by a self-funded ERISA plan to pay out benefits on the plan’s behalf are plan assets. For example, in *Hi-Lex* this Court found that contributions sent to BCBSM by a self-funded ERISA plan for the payment of health benefits remained plan assets after they were transferred to BCBSM. 751 F.3d at 745. This Court concluded that the Summary Plan Description and ASC established that plan

contributions would be held by BCBSM for the specific purpose of paying out benefits. *Id.* at 745–46; *see also id.* at 746 (“[P]lan assets *can* exist when a company directly funds an ERISA plan from its corporate assets and the contracted TPA holds those funds in a general account.” (citation omitted)). Similarly, this Court in *Pipefitters Local 636 Insurance Fund v. Blue Cross & Blue Shield of Michigan* also found that funds transferred by the plan to BCBSM for the purpose of fulfilling claims administration responsibilities were plan assets. 213 F. App’x 473, 477–78 (6th Cir. 2007); *see also Briscoe v. Fine*, 444 F.3d 478, 490–95 (6th Cir. 2006) (contributions deposited into an account in the name of both the company and the TPA to pay health service providers were plan assets).

Applying these authorities, the Plan funds that Tiara Yachts deposited into BCBSM’s bank account were plan assets because they were transferred to BCBSM for the express purpose of fulfilling Plan payment obligations under the ASC. *See* Compl. ¶¶ 22–24, RE 1, PageID # 4 (“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.”). Indeed, the ASC makes clear that “*all*

amounts collected from [the Plan] are used to satisfy provider obligations,” i.e., to pay claims, and that “BCBSM does not retain any portion of Claims as compensation,” which only further underscores that those transferred funds are the Plan’s and not BCBSM’s. ASC Sec. K(1) (emphasis added), RE 12-2, PageID # 145.

BCBSM also exercised “control” over those Plan assets. The exercise of “any” control over the plan can result in fiduciary status in the plan asset context; “discretion” is unnecessary. *Briscoe*, 444 F.3d at 491; *accord* Reconsideration Order, RE 47, PageID # 1000 (acknowledging that discretion over plan assets was not needed to show BCBSM’s fiduciary status); *see also* 29 U.S.C. § 1002(21) (A person is a fiduciary with respect to a plan to the extent that it “exercises any authority or control respecting management or disposition of [a plan’s] assets . . .”). Although “[c]ustody of plan assets alone cannot establish control sufficient to confer fiduciary status,” *McLemore v. Regions Bank*, 682 F.3d 414, 423 (6th Cir. 2012) (citations omitted), fiduciary status can result from a person exercising “practical control over an ERISA plan’s money.” *Briscoe*, 444 F.3d at 494 (quoting *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir. 1997)). Further, this Court

has recognized that an entity possesses control when it has the power to write checks on plan funds and exercises that power. *Briscoe*, 444 F.3d at 494.

BCBSM exercised control over plan assets because it both possessed and exercised power to write checks on Plan funds. The ASC gave BCBSM the power to write checks on an account containing Plan assets—the funds remitted by Tiara Yachts for claims payments. Compl. ¶¶ 19, 23–24, RE 1, PageID # 3, 4. And BCBSM exercised this power by using the account to pay claims. *Id.* at ¶ 22, RE 1, PageID # 4. Additionally, Tiara Yachts alleges that BCBSM “had complete authority and control” over the account and the funds it contained, further evidencing BCBSM’s control over Plan funds. *Id.* at ¶ 24, RE 1, PageID # 4. Even the district court found “no dispute that BCBSM controlled Tiara Yachts’ sponsored Plan assets.” Reconsideration Order, RE 47, PageID # 1000. That is enough in itself for fiduciary status.

B. The Complaint Plausibly Alleges That BCBSM Breached Its Fiduciary Duties

Plaintiff’s allegations also support the inference that BCBSM breached ERISA’s fiduciary standards. *See* 29 U.S.C. § 1104(a). The duty of loyalty requires fiduciaries to act solely in the interest of plan

participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan. *See* 29 U.S.C. § 1104(a)(1)(A). The duty of prudence requires fiduciaries to act with the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use in similar circumstances. *Id.* § 1104(a)(1)(B). Fiduciaries must also follow the terms of the documents and instruments governing the Plan “insofar as such documents and instruments are consistent with the provisions of [ERISA].” *Id.* § 1104(a)(1)(D).

Plaintiff plausibly alleges that BCBSM breached these duties. The Complaint’s allegations that BCBSM systemically overpaid claims of certain non-participating providers contrary to Plan terms support a reasonable inference that BCBSM both contravened Plan terms and breached the duty of prudence by wasting Plan assets on unauthorized payments. *See* Complaint, ¶ 108, RE 1, PageID # 19–20. And because the Shared Savings Program entitled BCBSM to a 30% cut of any avoided or recovered overpayments—thus incentivizing BCBSM to systematically overpay claims and profit from its misconduct—the

Complaint also plausibly alleges that BCBSM’s overpayments breached its duty of loyalty to the Plan. *See id.* at ¶ 84, RE 1, PageID # 11 (“The more improper payments BCBSM let slide through its system, the more money it would make on the back end.”).

II. The District Court’s Arguments for Dismissal Are Unfounded

The district court dismissed the Complaint primarily because, in its view, the Complaint did not adequately allege BCBSM’s fiduciary status. As the court put it, the conduct described in the Complaint was “a matter of contract, not fiduciary duty,” and amounted to merely “a business decision that has an effect on an ERISA plan.” Dismissal Order, RE 23, PageID # 467, 476. The district court also reasoned that even if fiduciary status were properly alleged, the Complaint did not tie its allegations to specific claims related to the Tiara Yachts Plan, and in any case did not seek relief authorized by ERISA. *Id.* at PageID # 480, 482–83. Each of these rationales is erroneous.

A. The District Court Is Incorrect That the Presence of a Contract Defeats Fiduciary Status

First, the district court characterized the Complaint’s allegations regarding BCBSM’s claims processing decisions as strictly a failure by

BCBSM to satisfy its contractual obligations. It explained that the allegations in the Complaint “sound[] more like an ordinary contract dispute than an ERISA fiduciary duty case” and amount to “claims that BCBSM performed poorly under the contract of the parties.” *Id.* at PageID # 467. But the fact that BCBSM operated under a contract does not defeat fiduciary status.

The definition of a fiduciary “includes anyone who exercises . . . *any authority or control* respecting management or disposition of [a plan’s] assets.” *Smith v. Provident Bank*, 170 F.3d 609, 613 (6th Cir. 1999) (quoting 29 U.S.C. § 1002(21)(A)(i)). This Court has repeatedly recognized that third-party administrators operating under contracts granting them control over plan assets are fiduciaries when exercising that control. In *Briscoe v. Fine*, for example, the Sixth Circuit found that a third-party administrator had the power to distribute plan assets both during its contractual relationship with the plan and after, and thus qualified as a fiduciary because it exercised control over plan assets. 444 F.3d at 494 (“[A]ny 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.” (citation omitted)); *see also Guyan Intern., Inc. v. Pro. Benefits Adm’rs, Inc.*, 689 F.3d 793, 798 (6th Cir. 2012) (finding that a third-party administrator with the power under a contract to pay out benefits was a fiduciary); *Hi-Lex*, 751 F.3d at 744–47 (finding that BCBSM exercised control over plan assets as a fiduciary when it acted as a third-party administrator for a plan and was given the power, under a contract, to hold funds and pay out benefits).

This makes logical sense, as most (if not all) third-party administrators charged with making claims determinations and paying out claims with plan assets operate subject to contracts with the plan. It would gut ERISA’s fiduciary provisions to erase fiduciary liability for third-party administrators who control plan assets so long as they operate pursuant to a contract. *See, e.g., Guyan*, 689 F.3d at 798 (stating that even when a contract contains explicit language purporting to limit fiduciary status, it is irrelevant to the question of whether the entity in fact functioned as a fiduciary).

B. The District Court Is Incorrect That BCBSM Was Not a Fiduciary Because Its Flip Logic Policy Was a “Business Decision”

The district court also erred in concluding that BCBSM was not a fiduciary because BCBSM’s overpayment of Plan claims (through its use of flip logic) was “a business decision that has an effect on an ERISA plan not subject to fiduciary standards.” Dismissal Order, RE 23, PageID # 476; *see also id.* at PageID # 475. (“Tiara Yachts’ Complaint is clear that its complaints are part of overarching business dealings.”). The court analogized this case to *DeLuca v. Blue Cross Blue Shield of Michigan* 628 F.3d 743 (6th Cir. 2010), where this Court concluded that BCBSM did not act as a fiduciary when it engaged in contract negotiations with various hospitals in BCBSM’s provider network to increase their reimbursement rates, which ultimately raised the costs that self-funded plans would pay for services downstream. *Id.* at 744. This Court there explained that BCBSM “acted in two capacities during the course of its business relationship with [the plan],” only one of which was in a fiduciary capacity. *Id.* at 746. Whereas BCBSM acted as a fiduciary “as the administrator and claims-processing agent for the plan,” *id.*, it did not do so when it acted in its capacity “as a distributor

of health-care services, negotiating discounted rates for such services,” *id.* at 747.

If anything, *DeLuca* only supports BCBSM’s fiduciary status. The allegations in the Complaint are not about BCBSM’s actions “negotiating” rates with providers, but rather “as the administrator and claims-processing agent for the Plan” deciding on its own to pay providers more than what the Plan authorized. *See* Compl. ¶ 102, RE 1, PageID # 15 (“These processing errors result in wasted Plan assets in breach of BCBSM’s fiduciary duty.”). This is exactly the type of conduct this Court has held is fiduciary activity. *See DeLuca*, 628 F.3d at 746; *Guyan*, 689 F.3d at 798 (holding that “[a]n entity such as a third-party administrator becomes an ERISA fiduciary when it exercises practical control over an ERISA plan’s money” such as by having “the power to write checks on the plan account” (internal quotation marks and citation omitted)).

The district court disagreed because it found that “the root of the claimed problems” is “the way BCBSM ran its overall claims processing operation, not specific decisions made about the Tiara Yachts’ sponsored Plan in particular[.]” Dismissal Order, RE 23, PageID # 476. But the

core question for fiduciary status is not whether an entity takes similar actions with respect to other plans, but “whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.” *Pegram*, 530 U.S. at 226. Again, paying out claims with plan assets is core fiduciary activity. *See supra* Section (I)(A). The fact that BCBSM applied the same flip logic policy in paying out claims for other plans may support BCBSM’s fiduciary status as to those plans, but is simply irrelevant here.²

C. The District Court’s Other Bases for Dismissal Are Incorrect

The district court also found that the Complaint did not state a claim for reasons apart from BCBSM’s fiduciary status. It first concluded that because the Complaint relied on systemwide errors and did not “identif[y] any actual claim that BCBSM paid out that suffers from these alleged deficiencies,” the allegations in the Complaint were

² Indeed, this Court had no trouble finding that BCBSM was a fiduciary for its hidden mark-up policy in *Hi-Lex* notwithstanding that the challenged policy applied to its self-insured customers across the board. *See Hi-Lex*, 751 F.3d at 743 (explaining that “[i]n 1993, BCBSM implemented a new system whereby it would retain additional revenue by adding certain mark-ups to hospital claims paid by its [self-insured] clients”).

“too speculative.” Dismissal Order, RE 23, PageID # 477. But the Complaint alleges that BCBSM’s use of flip logic to process claims of non-participating providers applied to all customers using a particular version of BCBSM’s NASCO claims-processing system (the “non-auto” version), and that BCBSM used the non-auto NASCO system in processing claims for the Tiara Yachts Plan. Compl. ¶¶ 101–02, RE 1, PageID # 15. Those allegations together raise the reasonable inference that the Plan was affected by the complained-of actions. In addition, Tiara Yachts alleges that BCBSM has impeded its 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.” Compl., ¶¶ 87, RE 1, PageID # 12. It is therefore unclear how Tiara Yachts could have even obtained claim-specific information.

In addition, the district court erred in concluding that Tiara Yachts did not seek relief authorized by the ERISA remedial provisions it invoked. In particular, the court found that Plaintiff did not state a claim under ERISA section 502(a)(2)—which authorizes suits only for relief inuring to an ERISA plan—because the Complaint did not

properly request relief on behalf of the Plan, but rather for Tiara Yachts in its corporate capacity. Dismissal Order, RE 23, PageID # 482; *see Hawkins v. Cintas Corp.*, 32 F.4th 625, 630 (6th Cir. 2022) (“Section 502(a)(2) suits are brought in a representative capacity on behalf of the plan as a whole” and “contemplate[] relief for the plan itself.” (internal quotation marks and citations omitted)). In the first place, the Complaint *does* seek relief for losses incurred by the Plan. *See, e.g.*, Compl., RE 1, PageID # 21–23 (seeking restitution “for all improper misuses of Tiara Yachts’ Plan assets”). But even if it was unclear, Tiara Yachts sought to amend its Complaint to clarify that it is bringing this action on behalf of the Plan to recover for Plan injuries, a proposed amendment that the court denied as futile due to the other supposed deficiencies it found. Plaintiff’s Br. in Support of Motion for Leave to File an Amended Complaint, RE 33, PageID # 726. Because the district court’s other bases for dismissal are unfounded, an amendment clarifying that Tiara Yachts is seeking relief for the Plan would not be

futile and should be permitted (to the extent this Court thinks such an amendment is necessary).³

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court reverse the district court's decision granting BCBSM's motion and dismissing Count I of the Complaint.

³ The district court also concluded that Tiara Yachts cannot seek to recover for any overpayments under ERISA section 502(a)(3) because monetary relief is unavailable under that provision. Dismissal Order, RE 23, PageID # 480–82. Because the relief Tiara Yachts seeks is available under 502(a)(2), it is not necessary to address the district court's conclusion on the availability of relief under section 502(a)(3).

Date: June 12, 2024

Respectfully submitted,

SEEMA NANDA
Solicitor of Labor

WAYNE R. BERRY
Associate Solicitor for
Plan Benefits Security

JEFFREY M. HAHN
Counsel for Appellate and Special
Litigation

/s/ Sarah M. Karchunas

SARAH M. KARCHUNAS
Trial Attorney

STEPHEN SHANNON
Attorney

U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave. NW, N4611
Washington, DC 20210
202.693.5411 (t) | 202.693.5610 (f)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5)–(6), and 32(a)(7)(B), I certify that this amicus brief uses a 14-point proportionally spaced typeface font (Century Schoolbook) and contains 5,089 words.

/s/ Sarah M. Karchunas
SARAH M. KARCHUNAS
Trial Attorney

Date: June 12, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this day, June 12, 2024, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Sarah M. Karchunas
SARAH M. KARCHUNAS
Trial Attorney

Date: June 12, 2024

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RE	Description	PageID #
1	Complaint	1-23
12-2	Defendant's Brief in Support of Its Motion to Dismiss Plaintiff's Complaint, Exhibit A (2016 Administrative Services Contract)	139-154
23	Dismissal Order	466-483
29	Plaintiff's Brief in Support of Motion to Alter or Amend Judgment	572-611
33	Plaintiff's Brief in Support of Motion for Leave to File Amended Complaint	716-729
47	Reconsideration Order	998-1011