No. 24-1223

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIARA YACHTS, INC.,

Plaintiffs-Appellants,

v.

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant-Appellee.

On Appeal from the United States District Court for the
Western District of Michigan, Southern Division
Case No. 1:22-cv-00603

CORRECTED BRIEF OF APPELLEE BLUE CROSS BLUE SHIELD OF MICHIGAN

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, Blue Cross Blue Shield of Michigan, 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendant-Appellee Blue Cross Blue Shield of Michigan ("BCBSM") respectfully requests oral argument. This appeal presents important legal issues relating to pleading a breach of fiduciary duty claim under the Employee Retirement Income Security Act ("ERISA"), including the requirement to satisfy Federal Rule of Civil Procedure 9(b) when alleging fraudulent conduct. This appeal also presents important legal issues regarding ERISA's remedies for cases brought by Plan Sponsors. Defendant believes oral argument will assist the Court in its decision process.

INTRODUCTION

For thirteen years, from January 2006 through December 2018, Defendant-Appellee Blue Cross Blue Shield of Michigan ("BCBSM") processed healthcare claims for participants in the self-funded health benefit plan Plaintiff-Appellant Tiara Yachts sponsored for its employees. Compl., R. 1, PageID.3 ¶¶17–19. Tiara Yachts and BCBSM signed a series of Administrative Services Contracts (ASCs) to govern the services that BCBSM would provide. In the ASC, the parties agreed to explicit terms setting forth a clear and time-limited process through which Tiara Yachts could dispute the amounts that BCBSM paid to providers on participants' behalf. ASC, R. 12-2, PageID.142 Art. II § D ("Group shall notify BCBSM in writing of any Claim that Group disputes within 60 days of Group's access to a paid Claims listing."). In addition, the ASC authorized Tiara Yachts to initiate an overall audit of all claims payments. *Id.*, PageID.144 Art. II § G. This right, too, was time-limited—to claims paid in the prior 24 months—because "[b]oth parties acknowledge[d] that Claims with incurred dates over two years old may be more costly to retrieve and that it may not be possible to recover over-payments for these Claims." *Id.* Further, Tiara Yachts agreed that any audit would be completed "at its own expense." *Id.*

The Complaint does not allege that Tiara Yachts made use of either of these provisions. Instead of timely disputing or auditing BCBSM's claims payments

under the contractual terms it agreed to, Tiara Yachts seeks to use the federal judicial process to bring a belated challenge to BCBSM's claims processing. Tiara Yachts points to a supposed error in BCBSM's claims-processing software, through which BCBSM supposedly overpaid claims submitted by out-of-state providers in connection with other health benefit plans unrelated to Tiara Yachts. Compl., R. 1, PageID.6–7¶¶39–45. Theorizing that this alleged software error affected Tiara Yachts' Plan—but failing to identify any actual overpayment BCBSM made in connection with its plan—Tiara Yachts asks this Court to order BCBSM to pay it "monetary damages" under ERISA. But ERISA does not provide "a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985). None of Tiara Yachts' belated claims-processing disputes nor anything else in the Complaint supports relief under ERISA.

In particular, ERISA does not authorize the relief Tiara Yachts seeks in connection with its claims of improper claim-processing because the Complaint does not allege fiduciary acts taken "with respect to the Plan," 29 U.S.C. § 1002(21)(A), and the type of relief it seeks is unavailable to it under 29 U.S.C. § 1132(a). Tiara Yachts also fails to state a claim under ERISA with respect to its allegations regarding claims-processing or BCBSM's operation of the Shared

Savings Program, through which BCBSM retained a contractually specified fee for certain cost recovery actions.

For all of these reasons, the judgment should be affirmed.

STATEMENT OF ISSUES

1. Did the district court correctly hold that Tiara Yachts' allegations challenging BCBSM's claims-processing system did not establish that BCBSM acted as an ERISA fiduciary, where Tiara Yachts alleged no actions BCBSM took with respect to Tiara Yachts' ERISA Plan?

2. Did the district court properly dismiss Tiara Yachts' fiduciary duty claims based on BCBSM's retention of administrative fees under the Shared Savings Program, where (a) BCBSM had a unilateral right to retain fees in an amount fixed by contract, and (b) Tiara Yachts failed to plead facts sufficient to satisfy either Federal Rule of Civil Procedure 9(b) or Rule 8?

3. Did the district court correctly hold that Tiara Yachts could not be awarded a payout of money damages under either 29 U.S.C. § 1132(a)(3), which authorizes only equitable relief, or 29 U.S.C. § 1132(a)(2), which authorizes an award only to a Plan and not to a Plan sponsor?

STATEMENT OF THE CASE

I. The Parties and the Governing Agreements

Starting in 2006, BCBSM agreed to serve as claims administrator for Tiara Yachts' self-insured employee benefit plan (the "Plan"). Compl., R. 1, PageID.1

¶1. Unlike fully insured plans, in which an insurer pays healthcare claims in exchange for premiums, a self-insured benefit plan requires the "sponsor" (here, Tiara Yachts) to pay employee healthcare costs covered by the plan directly. *Id*., PageID.2 ¶10. By contracting with a claims processor like BCBSM, Tiara Yachts was able to use BCBSM's claims processing capabilities and network of healthcare providers. *Id*., PageID.3 ¶12.

The relationship between BCBSM and Tiara Yachts was set out in an Administrative Services Contract, R. 12-2,[1] which was renewed between 2006 and 2018. Compl., R. 1, PageID.3 ¶¶17-19. For every health care claim submitted by a Tiara Yachts employee or beneficiary for coverage during that time period, the ASC provided that BCBSM would process the claim, including sending payment for the claim to the provider. ASC, R. 12-2, PageID.141–42 Art. II §§ A, C; *see also* Compl., R. 1, PageID.3 ¶¶18–21. In particular, the ASC provided that "requests for payment from Michigan providers will be directly submitted to BCBSM and shall be processed according to BCBSM's standard operating procedures for Claims," and "[r]equests for payment from out-of-state providers may, depending on the type of request for payment, be directly submitted to the

[1] The governing ASC was attached as an exhibit to BCBSM's motion to dismiss. As the district court noted, it was properly considered under Rule 12(b)(6) because it was referred to and incorporated into the Complaint. *See* Order Granting Motion to Dismiss ("Order"), R. 23, PageID.468 n.1 (citing authorities). Tiara Yachts did not object to consideration of the ASC in the district court or on appeal.

appropriate out-of-state BCBS Plan and shall be processed pursuant to the BlueCard Program as set forth in Schedule B" of the ASC. ASC, R. 12-2, PageID.142 Art. II § C; *see also id.*, PageID.140 Art. I § E ("Claims received from an out-of-state BCBS Plan for a health care service provided to an Enrollee out-of-state are paid according to that BCBS Plan's health provider contracts and processed according to BlueCard Program standard operating procedures.").

The ASC set out a clear and time-limited process through which Tiara Yachts could dispute the amounts BCBSM paid to providers on participants' behalf: "Group shall notify BCBSM in writing of any Claim that Group disputes within 60 days of Group's access to a paid Claims listing." *See* ASC, R. 12-2, PageID.142 Art. II § D. The ASC also authorized Tiara Yachts to initiate an overall audit of all claims payments. *Id*., PageID.144 Art. II § G. Any audit was limited to the previous twenty-four months because "[b]oth parties acknowledge[d] that Claims with incurred dates over two years old may be more costly to retrieve and that it may not be possible to recover over-payments for these Claims." *Id.* Further, Tiara Yachts agreed that any audit would be completed "at its own expense." *Id.*

During the final year in which Tiara Yachts contracted with BCBSM, the ASC included a "Shared Savings Program," through which BCBSM retained third-party vendors to conduct forensic bill review of certain claims prior to payment,

engage in "Advanced Payment Analytics" of all claims paid, and detect and recover credit balances on hospital patient accounting systems. Compl. Ex. E, R. 1-6, PageID.53–55. Under the contract terms, BCBSM could retain 30% of the amount saved from successful recoveries or avoidance of overpayments. Compl., R. 1, PageID.11 ¶83; ASC Amend., R. 12-4, PageID.158 ¶1; ASC Sched. A, R. 12-5, PageID.161 ¶17. While all group customers were automatically opted into the Shared Savings Program, a customer wishing not to participate could avail itself of a "a robust opt out process" designed "to ensure the customer understands the incremental value they are declining." Compl. Ex. E, R. 1-6, PageID.53.

II. Tiara Yacht's Complaint

Four years after the final ASC expired in 2018, Tiara Yachts sued BCBSM in federal court, alleging that, under ERISA, BCBSM breached its fiduciary duty to Tiara Yachts and engaged in a prohibited transaction in violation of 29 U.S.C. § 1106. Compl., R. 1, PageID.18-21 ¶¶105–09, 111–15. The Complaint presents two categories of allegations: (1) BCBSM's claims processing system purportedly resulted in BCBSM overpaying some provider claims, at levels above those provided for in the ASC, and (2) BCBSM purportedly engaged in a prohibited transaction by retaining recovery of overpayments via the Shared Savings Program.

A. Tiara Yachts' allegations pertaining to claims processing.

Most of Tiara Yachts' allegations relate to BCBSM's claims processing—that is, the steps BCBSM took in reviewing claims that health care providers submitted for payment, and making payments on those provider claims. Significantly, these are not allegations that BCBSM kept Plan funds for itself, but rather that it paid out more to providers when processing claims than Tiara Yachts now thinks it should have.

Flip logic. First, Tiara Yachts alleges some unspecified "non-participating" providers[2] were improperly paid at the full amount they charged, "regardless of whether the claim was proper under the plan terms or other applicable reimbursement guidelines and policies." Compl., R. 1, PageID.7 ¶50. Tiara Yachts alleges that this claim processing error resulted from an "intentional design in [BCBSM's] programming called 'flip logic,'" through which certain non-participating provider claims were "flipped" to payment at the full amount they actually charged. *Id*., PageID.7 ¶¶48–49. The Complaint alleges BCBSM employee Dennis Wegner became aware of an overpayment to a provider in connection with another plan when that customer contacted BCBSM to dispute the

[2] "Participating" providers contract with BCBSM to provide care at contractually specified rates to members of plans served by BCBSM. Out-of-network or "non-participating" providers are not limited by contract in what they can charge members. A plan's terms typically indicate the plan will pay up to a certain amount on claims submitted by non-participating providers.

payment, and later found similar overpayments "for two other BCBSM customers." *Id*., PageID.6 ¶¶38–42. BCBSM allegedly maintained "lists of customers that were affected by this problem," though the Complaint does not allege these "lists" included Tiara Yachts, *id*., PageID.7–8 ¶¶47, 53, and the list attached as Exhibit B to the Complaint does not show Tiara Yachts' name, R. 1-3, PageID.31–39.

Notably, Tiara Yachts does not identify any overpayments allegedly made in connection with its Plan. Thus, while Tiara Yachts' opening brief argues flip logic was "directly damaging [to] the Plan," Appellant Brief ("Br.") at 4,[3] the Complaint alleges no actions whatsoever that BCBSM took with respect to Tiara Yachts' Plan—*i.e.*, no claim of any Tiara Yachts Plan participant that BCBSM allegedly improperly "flipped" and overpaid. Nor does it address why Tiara Yachts is absent from the alleged "lists" of 201 impacted customers. Instead of pointing to any claim BCBSM supposedly overpaid on Tiara Yachts' behalf, the Complaint states that "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 system flaw," Compl., R. 1, PageID.7 ¶46, citing to Exhibits A and B to the Complaint. These Exhibits do not mention Tiara Yachts, nor do they state that all BCBSM customers experienced overpaid claims. *See* Compl. Ex. A, R. 1-2, PageID.27

[3] Citations to Appellant's Brief refer to internal pagination, not CM/ECF stamps.

("Majority of non-Auto groups on NASCO Classic are following [flip] logic."); *see* Compl. Ex. B, R. 1-3, PageID.31–39. Nor does Tiara Yachts allege that it ever contacted BCBSM to dispute any claims as overpaid, as the Complaint acknowledges other customers did. *See* Compl., R. 1, PageID.6 ¶¶38–39.

Clinical editing. Another form of claims processing error alleged in the Complaint relates to the format in which the claims were submitted for other customers. *Id.*, PageID.15–16 ¶¶101–08. Tiara Yachts alleges, "[c]ommon errors associated with BCBSM's NASCO claims processing system include, for example: unbundling, upcoding, medically unlikely claims, [and] non-adherence to payment guidelines." *Id*., PageID.15 ¶103. The format in which claims are submitted is commonly called "clinical editing." Tiara Yachts alleges, in essence, that BCBSM allowed providers to submit claims with improper clinical editing—*i.e.*, in a format that, according to Tiara Yachts, enabled providers to receive "improper payments" from other customers serviced by BCBSM.

It is clear from the Complaint, however, that Tiara Yachts does not identify any claims paid *on behalf of the Tiara Yachts Plan* where allegedly improper clinical editing was used. To the contrary, Tiara Yachts' Complaint concedes that it is relying on generalized allegations of "[c]ommon errors associated with BCBSM's NASCO *claims processing system*." *Id.* (emphasis added). Further, while Tiara Yachts' opening brief argues its Complaint "identifie[s] numerous

examples or errors that *occurred*," Br. at 12 (emphasis in original), the paragraphs it cites merely define *types* of clinical editing errors "associated" with the claims processing system, Compl., R. 1, PageID.15–16 ¶103–08—not any "examples or errors" involving BCBSM's actions in administering Tiara Yachts' Plan. According to Tiara Yachts' Complaint, it was not required to allege any breach in connection with its Plan specifically, because "errors or deficiencies identified in claims associated with one customer can reasonably be expected to exist for other customers." *Id.*, PageID.15 ¶101.

Data deficiencies. In its final set of allegations related to claims processing, Tiara Yachts addresses potential—not actual—deficiencies in the claims data BCBSM collected and maintained. *Id.*, PageID.12–15 ¶¶86–100. Tiara Yachts states that *if* BCBSM does not have complete claims data for Tiara Yachts' Plan, then BCBSM *may have* breached its fiduciary duty: "Tiara Yachts' claims data should reflect all information necessary to ascertain whether a claim was properly processed and/or paid. To the extent it does not, BCBSM's failure to collect and/or maintain such data would itself be a breach of fiduciary duty." *Id.* ¶92. Tiara Yachts alleges that if any such data deficiencies exist, they "may include" one of seven issues listed in the Complaint. *Id.* ¶93.

Hedging against its lack of specific allegations of erroneously processed or paid claims, the Complaint alleges Tiara Yachts "never had and still does not have

access to its own complete claims data." *Id*., PageID.13 ¶91. Tiara Yachts' Brief exaggerates this allegation, stating: "Ignoring requests, BCBSM never provided Tiara Yachts its claims data." Br. at 11 (citing Compl., R. 1, PageID.13 ¶¶91-92, PageID.18 ¶102). However, neither the cited paragraphs nor any other paragraph in the Complaint actually alleges that Tiara Yachts submitted any data request to BCBSM, that any such request was "ignored," or that BCBSM "never" provided Tiara Yachts with claims data.

B. Tiara Yachts' allegations regarding the Shared Savings Program.

The second focus of Tiara Yachts' Complaint is the Shared Savings Program, through which Tiara Yachts contends BCBSM engaged in a prohibited transaction under ERISA due to a conflict of interest. *Id*., PageID.9–12 ¶¶70–85. Although BCBSM had "historically performed several cost management services within the base administrative fee" paid by customers, BCBSM's customers sought "new ideas" to obtain additional savings. Compl. Ex. E, R. 1-6, PageID.53. Through the Shared Savings Program, BCBSM contracted with third-party vendors to conduct forensic bill review of certain claims prior to payment, to engage in "Advanced Payment Analytics" of all claims paid, and to detect and recover credit balances on hospital patient accounting systems. *Id.*, PageID.53–55. Instead of charging a flat administrative fee for these services, BCBSM used a "shared savings" model: If BCBSM and the third-party vendors succeeded in avoiding or

recovering overpayments, BCBSM retained 30% of the amount saved. ASC Amend., R. 12-4, PageID.158 ¶1 ("On and after the effective date of the new Shared Savings Program . . . BCBSM will retain as administrative compensation a percentage of all funds recovered through subrogation as set forth in Schedule A."); ASC Sched. A, R. 12-5, PageID.161 ¶17 ("BCBSM will retain as administrative compensation 30% of the recoveries or cost avoidance."). ASC customers such as Tiara Yachts were initially included within the Shared Savings Program, but had the opportunity to opt out. Compl. Ex. E, R. 1-6, PageID.53. The Shared Savings Program, and the specified percentage of savings to be retained by BCBSM, were fully disclosed in the ASC. ASC Amend., R. 12-4, PageID.158 ¶1; ASC Sched. A, R. 12-5, PageID.161 ¶17.

Tiara Yachts alleges that the Shared Savings Program was a "scheme" that BCBSM "devised" to "profit" when it "knowingly and improperly pa[id] claims." Compl., R. 1, PageID.11–12 ¶¶84, 86. In Tiara Yachts' telling, BCBSM deliberately made improper payments on the front-end so that it could recover more savings and retain additional fees through the Shared Savings Program on the back-end. *Id*., PageID.11 ¶84.

Tiara Yachts does not, however, allege any facts showing BCBSM retained any part of overpayments recovered or avoided for Tiara Yachts under the Shared Savings Program. Indeed, the Shared Savings Program, which became effective

January 1, 2018, applied only during the last year of Tiara Yachts' contractual relationship with BCBSM. Compl. Ex. E, R. 1-6, PageID.53; Compl., R. 1, PageID.3 ¶17 (contract terminated Dec. 2018). While Tiara Yachts argues Shared Savings Program permitted BCBSM to profit "at the Plan's expense" while saving the Plan "nothing," Br. at 13, the cited paragraphs allege no facts to support that assertion, but offer only legal conclusions. Compl, R. 1, PageID.11, 19, 21 ¶¶84, 108(d)–(e), 112–15. In this regard, the Court should take note that the two so-called "demonstrative example[s]" included in Tiara Yachts' Brief, Br. at 8–9, are made up out of whole cloth. The purported payments and recoveries identified in the two charts in Tiara Yachts' Brief are unsupported by any factual allegation in the Complaint, which fails to identify a single payment or recovery alleged to have actually happened under the Shared Savings Program.

III. Proceedings Below

BCBSM moved to dismiss Tiara Yachts' Complaint under Federal Rule of Civil Procedure 12(b)(6). The court issued a written opinion dismissing Tiara Yachts' Complaint, R. 23, and entered judgment for BCBSM, R. 24. The court identified multiple, independent grounds for dismissal.

First, "[t]he complained of actions within Tiara Yachts' Complaint alleging that BCBSM acted as a fiduciary fail to survive Rule 12 scrutiny." Order, R. 23, PageID.474. "Tiara Yachts' core complaint is that BCBSM paid out more than it

should have on some claims," "[b]ut this complaint is plainly covered by the contractual duties of the ASCs, and the provisions within them for auditing and disputing overpayments in claims processing." *Id.* Thus, "Tiara Yachts' allegations regarding claims processing, claims data, and the Shared Savings Program fail to state a claim of breach of fiduciary duty and, if actionable at all, are fully matters of contract." *Id.*

Tiara Yachts' flip logic and claims processing allegations did not state a claim under ERISA because BCBSM's "systemwide" methods "for paying providers" were not ERISA "fiduciary duty violations" under the Sixth Circuit's decision in *DeLuca v. Blue Cross Blue Shield of Mich.*, 628 F.3d 743 (6th Cir. 2010). Order, R. 23, PageID.475–77. As the court explained, "Tiara Yachts' Complaint is clear that its complaints are part of overarching business dealings. In fact, Tiara Yachts' explanation for having no specific examples to show the Court now, but being confident it will find them later, depends on these being systemwide BCBSM practices." *Id.*, PageID.475. Because "it's the way BCBSM ran its overall claims processing operation, not specific decisions made about the Tiara Yachts' sponsored Plan in particular, that are at the root of the claimed problems," the alleged flaws are "simply complaints about BCBSM as a contractor." *Id*., PageID.475–76.

The court likewise determined Tiara Yachts did not state a claim with respect to BCBSM's Shared Savings Program. First, the court held that Tiara Yachts was required to plead its claim under Rule 9(b), because its theory—that "BCBSM developed a scheme by which it intentionally paid inflated claims so that, through the Shared Savings Program, it could skim off a portion under the label of 'savings'"—sounded in fraud. *Id.*, PageID.479. Regardless, "under Rule 9 or Rule 8," Tiara Yachts "fail[ed] to state a viable claim that BCBSM was functioning as a fiduciary here," and instead advanced "simple contractual complaints." *Id.* BCBSM's retention of "a contractually fixed percentage of 30% of recovered third-party payments" did not create "fiduciary status because, like in *Seaway*, there was no BCBSM discretion" in determining its own compensation. *Id*., PageID.479–480 (citing *Seaway Food Town, Inc. v. Med. Mut. Of Ohio*, 347 F.3d 610, 619 (6th Cir. 2003)). The district court also held the complaint relied too heavily on conjecture. *Id.*, PageID.480 (noting that "[t]here is no assertion within the Complaint" that BCBSM deliberately overpaid claims to increase its recovery under the Shared Savings Plan in connection with Tiara Yachts' Plan, and that Tiara Yachts' conclusory pleading "does not survive Rule 9, nor does it survive Rule 8").

Independent of its conclusions as to fiduciary status, the court held that ERISA "does not provide a pathway . . . to recover on the alleged overpayments"

to providers. *Id*., PageID.480. Recovery of those overpayments would not constitute equitable relief available under 29 U.S.C. § 1132(a)(3), because the funds were not in BCBSM's possession, and payment of them to Tiara Yachts would not qualify as equitable "surcharge" as described in *CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011). *Id*., PageID.481–82. Nor was recovery available under § 1132(a)(2), because the Complaint "expressly seeks relief for Tiara Yachts, the employer, and not the Plan" or any plan participant. *Id*., PageID.482–83. Because it did not need to, the Court did not reach BCBSM's additional argument that the claims were time-barred. *Id.*, PageID.483.

Tiara Yachts filed both a Motion to Alter or Amend Judgment and a Motion for Leave to Amend the Complaint on March 27, 2023, four weeks after the court issued its decision granting the motion to dismiss and four weeks after entry of judgment. *See* Post-Judgment Motions, R. 28–29, 32–33. The court authored an additional opinion denying both motions. Opinion and Order on Post Judgment Motions ("Second Order"), R. 47, PageID.999–1005. First, the court agreed with Tiara Yachts that "BCBSM controlled Tiara Yachts' sponsored Plan assets," but concluded BCBSM was not acting to control Plan assets when it engaged in the conduct alleged in the Complaint—*i.e.*, "when it came to the allegations related to flip logics and claim processing." *Id.*, PageID.1000–01. As the court explained, "this case is not about what BCBSM directed Tiara Yachts, or its sponsored Plan,

to do. Rather, as the court previously determined, it involves the way BCBSM ran its overall claims processing work, generally applicable to its consumers." *Id.*, PageID.1001. The court ultimately concluded that Tiara Yachts had failed to identify any errors in the opinion. *Id.*, PageID.1003.

With respect to the motion for leave to amend, the district court noted this Court's caselaw holding that "[a] plaintiff cannot amend their complaint after entry of judgment unless the amendment satisfies the requirements of Rule 59 or 60, in addition to the requirements of Rule 15." *Id.*, PageID.1004 (citing *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615–16 (6th Cir. 2010)). The court acknowledged that Tiara Yachts' "proposed pleading … seeks to bolster some of the areas the Court found were deficient," including requesting that restitution be paid "to Tiara Yachts, on behalf of its Plan." *Id.* (citing R. 33-2, PageID.758). But allowing the amendment would be futile, the court explained, because "the same fundamental issues related to the theories of breach in claims processing, claims data, and the Shared Savings Plan remain in the proposed amended complaint." *Id.*, PageID.1005.

SUMMARY OF ARGUMENT

"In every case charging breach of ERISA fiduciary duty, … the threshold question is … whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint."

Pegram v. Herdrich, 530 U.S. 211, 226 (2000). "Because fiduciary status is not an all or nothing concept, the relevant question is whether an entity is a fiduciary with respect to the particular activity in question." *Guyan Int'l, Inc. v. Pro. Benefits Adm'rs, Inc.*, 689 F.3d 793, 797–98 (6th Cir. 2012) (internal quotation marks and citation omitted).

Here, the district court properly isolated the factual allegations from Tiara Yachts' labels and conclusions in holding that Tiara Yachts' complaints about BCBSM's supposedly flawed system for processing claims did not allege any fiduciary act. Tiara Yachts contracted with BCBSM to process claims for its Plan—but Tiara Yachts contends, based on allegations of BCBSM errors in processing other plans' claims, that BCBSM's claims processing system was flawed, such that some claims were paid at a higher rate than the contract provided for. Whether or not these allegations could establish breach of contract, they do not establish breach of fiduciary duty, because none of the allegations about BCBSM's supposedly flawed system address BCBSM's conduct "with respect to" Tiara Yachts' Plan. *See* 29 U.S.C. § 1002(21)(A). As the Sixth Circuit has held, actions BCBSM takes with respect to its overall system, rather than with respect to a plan, are not fiduciary acts—even if they have an "effect" on an ERISA plan. *DeLuca*, 628 F.3d at 747.

Nor do Tiara Yachts' allegations pertaining to the allegedly "misleading and deceiving" Shared Savings Program state an ERISA fiduciary duty or prohibited transaction claim. Tiara Yachts cannot dispute the ASC provided BCBSM a unilateral contractual right to retain a fixed percentage of recoveries as an administrative fee. Tiara Yachts contends BCBSM had discretion to set its own compensation because it supposedly had unilateral control over the amount of recoveries—but the Complaint does not support that assertion. Tiara Yachts ignores its own allegations that various third parties determined the amounts recovered through the Shared Savings Program, rendering it implausible that BCBSM could act unilaterally under the program. Further, because Tiara Yachts' claim as to the Shared Savings Program sounds in fraud, it was required to plead the claim under Rule 9(b). Yet the Complaint fails to adequately plead facts about any compensation BCBSM received through the Shared Savings Program, thus failing to meet Rule 9(b)'s heightened standard, or even Rule 8's requirements.

Finally, the district court correctly ruled that ERISA's remedial provisions do not authorize Tiara Yachts' claim for recovery of purported overpayments. What Tiara Yachts seeks is quintessential contract damages—*i.e.*, a monetary payout to provide Tiara Yachts the benefit of its contract with BCBSM. Such a remedy is not cognizable as equitable relief under Section 1132(a)(3), as it is not analogous to any of the remedies typically available at equity. Nor does Section

1132(a)(2) provide a pathway, as that section authorizes suits for relief to be awarded to *an ERISA plan*. 29 U.S.C § 1109(a). Tiara Yachts sponsors the Plan, but its Complaint makes clear that it is a distinct entity, and accordingly cannot recover under Section 1109(a).

For all of these reasons, Tiara Yachts fails to state a claim under ERISA. The district court was correct to dismiss the Complaint and hold amendment futile. That judgment should be affirmed.

ARGUMENT

I. The Allegations Regarding Claims Processing Errors Fail to Establish That BCBSM Acted as a Fiduciary.

A. Tiara Yachts' complaints about BCBSM's overall claims-processing system do not establish a fiduciary act with respect to Tiara Yachts' Plan.

The district court correctly recognized that "[i]n determining liability for an alleged breach of fiduciary duty in an ERISA case, the courts must examine the conduct at issue to determine whether it constitutes" a fiduciary act. Order, R. 23, PageID.476 (internal quotation marks omitted and emphasis added) (quoting *DeLuca*, 628 F.3d at 747). Under ERISA, "a person is a fiduciary with respect to a plan to the extent … 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." 29 U.S.C. § 1002(21)(A). ERISA fiduciary status is not an all-or-nothing proposition; exercising control over

a plan's assets when taking some actions does not make a party a fiduciary with respect to other acts that don't involve control over a plan's assets. Instead, fiduciary status turns on "functional terms of control and authority" over an ERISA plan or plan assets. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). That is why, in the Supreme Court's words, "[i]n every case charging breach of ERISA fiduciary duty, . . . the threshold question is . . . whether that person was acting as a fiduciary (that is, was performing a fiduciary function) *when taking the action subject to complaint*." *Pegram,* 530 U.S. at 226 (emphasis added).

The Complaint here does not establish that BCBSM acted as a fiduciary because Tiara Yachts' allegations of claims processing errors focus exclusively on BCBSM's *system* for processing claims—saying nothing about actions BCBSM took with respect to Tiara Yachts' Plan. This fundamental distinction is determinative under this Court's ruling in *DeLuca*, where the Court held that if the challenged actions "were not directly associated with the benefits plan at issue … but were generally applicable to a broad range of health-care consumers," then the conduct does not constitute a fiduciary act, "regardless of whether BCBSM exercised discretionary authority or control over plan assets in some other contexts." 628 F.3d at 747–48. That is because, under the plain terms of the statute, fiduciary obligations attach only when one acts "*with respect to a plan*." 29 U.S.C. § 1002(21)(A) (emphasis added); *accord id.* § 1104(a). Thus, "only discretionary

acts of plan management or administration, or those acts designed to carry out the very purposes of the plan, are subject to ERISA's fiduciary duties." *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 666 (6th Cir. 1998).

For these reasons, the district court was correct to hold that "the system-wide business decisions that Tiara Yachts identifies plainly fall into" the category of "a business decision that has an effect on an ERISA plan not subject to fiduciary standards." Order, R. 23, PageID.476 (quoting *DeLuca*, 628 F.3d at 747). Indeed, Tiara Yachts' exclusive focus on BCBSM's overall system—rather than Tiara Yachts' Plan—is evident throughout the Complaint. Tiara Yachts alleges that there are "flaws in [BCBSM's] claims processing system," Compl., R. 1, PageID.1 ¶2; that "payment of improper claims are known to happen in the BCBSM billing system," *id.*, PageID.6 ¶41; that BCBSM has a "systems flaw" and "flawed system logic," *id.*, PageID.7–8 ¶¶46, 51; and that there are "[c]ommon errors associated with BCBSM's NASCO claims processing system," *id.*, PageID.15 ¶103. Tiara Yachts' explicitly stated theory is that "BCBSM has designed a system in which it … improperly pays claims," *id.*, PageID.12 ¶86, and this "flaw in its system affect[ed] Tiara Yachts," *id.*, PageID.17 ¶101. As the district court put it, "Tiara Yachts' explanation for having no specific examples to show the Court now, but being confident it will find them later, depends on these being systemwide BCBSM practices." Order, R. 23, PageID.475. In short, *nowhere* does Tiara

Yachts allege any facts addressing BCBSM's conduct in the course of administering Tiara Yachts' Plan or controlling Tiara Yachts' Plan assets.

In this way, Tiara Yachts' Complaint advances another version of the same theory this Court rejected in *DeLuca*. There, the plaintiff, a participant in a self-insured health benefit plan, alleged that BCBSM breached its fiduciary duty when BCBSM negotiated with its provider network to accept lower rates for care provided to fully insured HMO plans, in exchange for self-insured health benefit plans like the plaintiff's paying higher rates. 628 F.3d at 746. The plaintiff alleged that BCBSM acted as a fiduciary when negotiating the rates because BCBSM controlled the plan's assets, and the changes to its claims processing system from the new rate schedule would cause the plan to pay out more plan assets in claims. *Id.* at 744–45. This Court disagreed. "BCBSM [did] not act[] as a fiduciary when negotiating system-wide payment schedules for the various levels of its health insurance coverage." *Id.* at 744, 747. The Court explained that "those business dealings were not directly associated with the benefits plan at issue . . . but were generally applicable to a broad range of health-care consumers." *Id.* at 747. "Regardless of whether BCBSM exercised discretionary authority or control over plan assets in some other contexts, the challenged rate negotiations were not an exercise of such authority or control," because BCBSM was not acting with respect to the plaintiff's plan assets specifically. *Id.* at 748. Thus, even though the system-

wide payment schedules BCBSM negotiated for would "ha[ve] an effect on an ERISA plan," these generally applicable policies would not "constitute[] management or administration of *the plan*." *Id.* (quoting *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 718 (6th Cir. 2000)) (emphasis in original) (internal quotation marks omitted).

The same is true of BCBSM's alleged claims processing policies challenged here. Just like the *systemwide* provider payment schedules BCBSM devised in *DeLuca*, Tiara Yachts challenges the "system" BCBSM has "designed" for claims processing. Compl., R. 1, PageID.12 ¶86. And, as in *DeLuca*, the fact that BCBSM's claims processing system allegedly "had an effect" on the Plan does not establish that BCBSM acted in a fiduciary capacity with respect to the system. In the district court's words, "[a]s Tiara Yachts' own allegations recognize, it's the way BCBSM ran its overall claims processing operation, not specific decisions made about the Tiara Yachts' sponsored Plan in particular, that are at the root of the claimed problems." Order, R. 23, PageID.476. Thus, Tiara Yachts' Complaint does not state a claim because the challenged actions did not constitute "management or administration of *the plan*." *DeLuca*, 628 F.3d at 747.

The contrary arguments from Tiara Yachts and its *amicus* cannot be reconciled with *DeLuca*. Tiara Yachts contends "[t]he 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." Br. at 28 n.2. The Secretary of Labor argues that allegations about systemic actions are sufficient, because they "raise the reasonable inference that the Plan was affected by the complained-of actions." Brief of U.S. Secretary of Labor as *Amicus Curiae* in Support of Appellant ("*Amicus* Br.") at 23–24. These arguments ignore the statutory basis for *DeLuca*—that a person is a fiduciary only when acting "*with respect to a plan*." 628 F.3d at 746 (emphasis added) (quoting 29 U.S.C. § 1002(21)(A)). Thus, a fiduciary duty complaint must allege actions taken "with respect to a plan." Allegations of "business dealings" that are "not directly associated with the benefits plan" but instead "generally applicable to a broad range of health-care consumers" do not suffice—even if there may be a reasonable inference that such actions will "ha[ve] an effect on an ERISA plan." *Id.* at 747.[4]

The error in the Secretary's argument is particularly clear from her assertion that "[t]he fact that BCBSM applied the same flip logic policy in paying out claims for other plans" is "irrelevant," and "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." *Amicus*

[4] Tiara Yachts' and the Secretary's argument echo the dissent in *DeLuca*, which would have held that BCBSM's rate negotiations were fiduciary acts because they had the effect of "raising rates on this Plan and others." 628 F.3d at 752 (Kethledge, J., dissenting). That view was not adopted by the Court, however.

Br. at 23 & n.2 (citing *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich.*, 751 F.3d 740, 743 (6th Cir. 2014))). The Secretary misunderstands the district court's ruling. The court held that Tiara Yachts' claim failed because it alleged *only* systemwide business decisions regarding "the way BCBSM ran its overall claims processing operation." Order, R. 23, PageID.476. Thus, the problem was not that Tiara Yachts alleged that BCBSM acted as a fiduciary with respect to its Plan as well as other plans, but that Tiara Yachts made no allegations about "specific decisions made about the Tiara Yachts' sponsored Plan" at all. *Id.*

That distinguishes this case from *Hi-Lex*. There, the Court ruled that "BCBSM held plan assets *of the Hi–Lex Health Plan* and, *in doing so*, functioned as an ERISA fiduciary." 751 F.3d at 747 (emphases added). And, based on the record in that case, the Court rejected BCBSM's argument that Hi-Lex's claim focused not on actions specific to its plan, but instead "the standard pricing arrangement for the company's entire ASC line of business." *Id.* at 744. Put differently, the Court held that Hi-Lex alleged fiduciary acts, because—unlike Tiara Yachts—its complaint focused on actions BCBSM took *with respect to Hi-Lex's plan*.

Finally, the defects in Tiara Yachts' Complaint cannot be overcome by reference to purported data deficiencies. *See* Br. at 34. Tiara Yachts does not (and cannot) allege that BCBSM gave Tiara Yachts no access to claim-specific

information that would permit it to dispute payments, as it was entitled to do under the parties' contract.[5] *See* ASC, R. 12-2, PageID.142 Art. II § D. Instead, the Complaint alleges BCBSM has "exclusive control of Tiara Yachts' complete claims data and other information, which is necessary to comprehensively identify all improper payments and other wrongdoing," and "[t]o the extent" the data in BCBSM's possession is incomplete, "BCBSM's failure to collect and/or maintain such data would itself be a breach of fiduciary duty." Compl., R. 1, PageID.1 ¶2, PageID.13 ¶92. Tiara Yachts can identify no error in the district court's conclusion that "[t]hese assertions fail to meet Rule 8's pleading requirements and the 'sufficient facts' necessary to survive a Rule 12(b)(6) motion under *Twombly*," because the Complaint "does not allege, even at a broad level, that there were data deficiencies in the claims processed by BCBSM." Order, R. 23, PageID.477–78.

B. The arguments of Tiara Yachts and the Secretary of Labor are misplaced.

1. The conduct challenged in the Complaint does not involve control of Tiara Yachts' Plan assets.

Both Tiara Yachts and the Secretary argue that the district court should have found fiduciary status based on allegations that BCBSM controlled Tiara Yachts' Plan assets. *See Amicus* Br. at 16 ("that BCBSM controlled Tiara Yachts'

[5] The Secretary's speculation that Tiara Yachts could not "have even obtained claim-specific information," *Amicus* Br. at 24, thus finds no support in the Complaint's allegations.

sponsored Plan assets … is enough in itself for fiduciary status") (internal quotation marks and citation omitted); *accord* Br. at 22–23. But fiduciary status is "not an all or nothing concept." *Briscoe v. Fine*, 444 F.3d 478, 486 (6th Cir. 2006) (citation omitted). The test is whether the defendant acts as a fiduciary "when" engaging in the challenged conduct. *Pegram*, 530 U.S. at 226. The district court properly applied this precedent when it held "it is not enough, for Tiara Yachts' claim of breach, that BCBSM controlled the Tiara Yachts' Plan assets," given the utter absence of allegations about actions BCBSM took in exercising control over those assets. Second Order, R. 47, PageID.1000–01. *See also DeLuca*, 628 F.3d at 748 (allegations of systemwide conduct did not establish fiduciary act "[r]egardless of whether BCBSM exercised … control over plan assets in some other contexts").

The First Circuit rejected similar arguments in *Massachusetts Laborers' Health & Welfare Fund v. Blue Cross Blue Shield of Mass.*, 66 F.4th 307 (1st Cir. 2023). There, a plaintiff ERISA plan contended that Blue Cross Blue Shield of Massachusetts (BCBSMA) violated ERISA by, *inter alia*, overpaying provider claims. *Id.* at 314–15. Appearing as *amicus curiae*, the Secretary of Labor argued that the complaint established fiduciary status when BCBSMA made the alleged overpayments, because "it is enough that Blue Cross exercises control over the pricing of claims to be paid out with plan assets." Br. of Sec'y of Labor as *Amicus Curiae*, *Mass. Laborers' Health & Welfare Fund v. Blue Cross Blue Shield of*

Mass., Case No. 22-1317 at 12 (1st Cir., filed Sept. 14, 2022) ("*Mass. Laborers' Amicus* Br."). That is virtually identical to what the Secretary argues here. *See Amicus* Br. at 13 ("[P]aying out claims with plan assets is core fiduciary activity."). The First Circuit held, however, that under *Pegram*, a more fine-grained analysis was necessary. *Mass. Laborers'*, 66 F.4th at 325–26. "[T]he act of repricing claims was not itself an exercise of authority over the 'disposition'" of plan assets, as "the pricing process was separate from and antecedent to the act of payment." *Id.* Thus, the court looked for allegations that BCBSMA actually exercised authority or control over plan funds, but "the Fund … failed to plausibly allege" any such action. *Id.* On that basis, the First Circuit affirmed dismissal, and this Court should do the same here.

Finally, Tiara Yachts string-cites dozens of paragraphs in its Complaint in purported support for its argument that it alleged BCBSM "squander[ed] Plan assets under its authority or control by overpaying claims." Br. at 28 (citing Compl. ¶¶46-54, 95-104, 101-08, 108(a)–(h)). But not a single one alleges anything BCBSM did *with respect to Tiara Yachts' Plan*.[6] Tiara Yachts' tactical

[6] Paragraphs 46 to 54 allege background facts about the purported claims processing systems flaw. Paragraphs 95 to 104 allege "common errors associated with BCBSM's NASCO claims processing system." Paragraphs 101 to 108 (the Complaint repeats some numbered paragraphs, and BCBSM assumes this citation is to the second paragraph numbered 101 and subsequent paragraphs) make general statements, including legal conclusions about BCBSM's alleged fiduciary duties.

decision to argue breach of fiduciary duty on a systemwide basis, rather than with respect to alleged actions BCBSM took in connection with its Plan specifically, means that the Complaint fails under *DeLuca*.

Further, it distinguishes this case from the authority Tiara Yachts relies on. Every case Tiara Yachts points to involved a situation where this Court found ERISA fiduciary status precisely because the administrator took action specific to the plaintiff's health plan. *See Pipefitters Loc. 636 v. Blue Cross Blue Shield of Mich.*, 213 F. App'x 473, 477 (6th Cir. 2007) (assessing a fee out of plaintiff's plan assets "was an exercise of authority and control over the fund assets"); *Guyan,* 689 F.3d at 798 (defendant exercised "control over where Plan funds were deposited and how and when they were disbursed"); *Hi-Lex*, 751 F.3d at 747 ("BCBSM held plan assets of the Hi-Lex Health Plan and, in doing so, functioned as an ERISA fiduciary"); *Saginaw Chippewa Indian Tribe of Mich. v. Blue Cross Blue Shield of Mich.*, 748 F. App'x 12, 20–21 (6th Cir. 2018) (plaintiff alleged "BCBSM failed to preserve plan assets" based on its administration of claims specific to the Tribe's plan); *Smith v. Provident Bank*, 170 F.3d 609, 613 (6th Cir. 1999) ("Provident was an ERISA fiduciary as long as it exercised control over plan assets."); *Stiso v. Int'l Steel Grp.*, 604 F. App'x 494, 500 (6th Cir. 2015) (defendant acted as a fiduciary

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None of these paragraphs alleges facts about BCBSM's actions in connection with Tiara Yachts' Plan.

when it exercised "discretionary authority to make benefits eligibility determinations and interpret the terms of the Plan"). These cases do not undermine the Court's holding in *DeLuca* that a plaintiff does not state an ERISA fiduciary duty claim by challenging systemwide business decisions.[7]

2. The district court correctly ruled that Tiara Yachts' claims are "complaints about BCBSM as a contractor."

Tiara Yachts and the Secretary also argue the district court erred in concluding that Tiara Yachts' complaint alleges "not ERISA fiduciary duty violations, but simply complaints about BCBSM as a contractor." Order, R. 23, PageID.475. *See* Br. at 24–25; *Amicus* Br. at 18–20. According to the Secretary, "the fact that BCBSM operated under a contract does not defeat fiduciary status."

[7] *DeLuca* is hardly the only case standing for this proposition. The Sixth Circuit and courts around the country routinely hold that an entity's broader business decisions do not give rise to ERISA fiduciary status. *See, e.g.*, *Sengpiel*, 156 F.3d at 666 ("The district court correctly found that the actions undertaken by BFG to implement its business decision were simply not the kind of plan management or administration that trigger ERISA's fiduciary duties."); *Hunter*, 220 F.3d at 718–19 (6th Cir. 2000) ("business decision which had only an incidental effect on the plans" was not a fiduciary act); *Acosta v. Brain*, 910 F.3d 502, 518 (9th Cir. 2018) (stating that the plaintiff has not "cited any authority establishing" that defendant's conduct was anything but "corporate or business operations action"); *Holdeman v. Devine*, 474 F.3d 770, 779 (10th Cir. 2007) (agreeing with the district court that "[defendant's] decisions regarding how much funding to provide to the plan were purely business decisions that did not implicate his fiduciary duties to the plan").

Amicus Br. at 19.[8] And Tiara Yachts contends the "the Complaint alleges BCBSM exercised discretionary authority and control over Plan assets, not contractually compelled functions." Br. at 24. However, there was no error in the district court's discussion of the contract here.

Initially, the district court did not hold that the existence of the ASC "defeat[s] fiduciary status," as the Secretary suggests. *Amicus* Br. at 19. Thus, the Secretary's concern that "[i]t 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," *id.* at 20, is not implicated here.

Instead, the district court explained, the reason Tiara Yachts' "complaint is plainly covered by the contractual duties of the ASCs" is that the parties' contract controls how BCBSM would process claims, and how Tiara Yachts could dispute the results. Order, R. 23, PageID.474; ASC, R. 12-2, PageID.142 Art. II §§ C–D. The theory of Tiara Yachts' Complaint is that, because BCBSM's system allegedly used flip logic and inadequate clinical editing, it did not function consistent with these contractual requirements. *E.g.*, Compl., R. 1 PageID.7 ¶50. As the district court held, that theory sounds in contract, not ERISA. Order, R. 23, PageID.476–77. Allegations that the system does not do what BCBSM contracted to do may

[8] Again, the Secretary made much the same argument in *Mass. Laborers'*. *See Mass. Laborers' Amicus* Br. at 21 ("[T]he fact that Blue Cross operated under a contract is not dispositive of anything.").

state a claim for breach of contract, but they are not allegations that BCBSM exercised discretion or controlled assets "with respect to" Tiara Yachts' Plan, as ERISA requires.

The First Circuit reached the same conclusion in *Mass. Laborers'*. There, the Fund's complaint—just like Tiara Yachts'—was "fundamentally premised on the notion that there were 'correct' rates to be applied to each submitted claim, but that BCBSMA failed to apply them." 66 F.4th at 320. The court held that allegations of "instances where BCBSMA allegedly failed to follow straightforward contractual obligations" did not state a claim for breach of fiduciary duty, because they did not establish that BCBSMA was acting as a fiduciary by exercising discretion in administering the Fund's Plan. *Id.* at 321. The same is true here. With respect to flip logic, for example, the ASC states that "[o]ut-of-state Claims … shall be calculated according to the BlueCard Program policies and procedures," ASC, R. 12-2, PageID.145 Art. II § K.1, yet Tiara Yachts alleges that by operation of flip logic, BCBSM paid these claims in full rather than "appl[ying] [the] Host plan pricing as it was required to do," Compl., R. 1, PageID.8 ¶55. As the First Circuit held, "these acts are alleged to be in violation of the" contract, *Mass. Laborers'*, 66 F.4th at 322, but the allegations do not establish fiduciary acts. The district court correctly dismissed the Complaint—and the arguments of Tiara Yachts and the Secretary identify no error in that ruling.

II. The Allegations Regarding the Shared Savings Program Fail to State a Claim.

Tiara Yachts' allegations regarding the Shared Savings Program fail to state a claim under any standard because, as a matter of law, BCBSM was not functioning as a fiduciary when it retained a contractually fixed percentage of 30% of recovered third-party payments as an administrative fee. Further, the Complaint fails to allege sufficient facts regarding purportedly improper recoveries to state a claim.[9]

A. BCBSM's retention of contractually fixed compensation was not a fiduciary act under ERISA.

1. Under *Seaway*, retaining contractually fixed compensation is not a fiduciary act.

The district court correctly dismissed Tiara Yachts' challenge to the Shared Savings Program because BCBSM did not act as a fiduciary when it retained contractually fixed, non-discretionary compensation under the Shared Savings Program. *See* Order, R. 23, PageID.479–80. As the Complaint concedes, the ASC expressly and openly provided that BCBSM would retain a contractually fixed percentage of recovered third-party payments as an administrative fee. R. 1, PageID.11, 21 ¶¶80, 112; *see also* ASC Amend., R. 12-4, PageID.158 ¶1; ASC Sched. A, R. 12-5, PageID.161 ¶17. Under this Court's binding precedent, by

[9] The Secretary of Labor takes no position on whether the Complaint states a prohibited transaction claim with respect to the Shared Savings Program. *Amicus* Br. at 11 n.1.

retaining expressly contracted-for compensation in an amount specified by contract, BCBSM did not act as a fiduciary. *Seaway*, 347 F.3d at 619.

In *Seaway*, a contract between plaintiff's employee health benefit plan and Blue Cross Blue Shield of Ohio, as claims administrator, stated that "BCBS will retain any payments resulting" from any of BCBS's contracts with providers that allowed discounts. *Id*. at 612, 616. This Court held, based on this language, that BCBS's control over such funds did not give rise to ERISA fiduciary status. *Id.* at 618. The Court stated: "[W]here parties enter into a contract term at arm's length and where the term confers on one party the unilateral right to retain funds as compensation for services rendered with respect to an ERISA plan, *that party's adherence to the term does not give rise to ERISA fiduciary status* unless the term authorizes the party to exercise discretion with respect to that right." *Id.* at 619 (emphasis added). Likewise here, because the contract granted BCBSM a unilateral right to retain a fixed percentage of specified amounts as compensation, BCBSM's retention of funds under the Shared Savings Program "does not give rise to ERISA fiduciary status." *Id.*

Tiara Yachts contends that "BCBSM exercised authority and control over the Plan's assets by calculating and paying itself SSP fees from the Plan's assets." Br. at 45. This argument ignores *Seaway*. The plaintiff in that case, like Tiara Yachts here, argued that "BC/BS acted as an ERISA fiduciary when exercising

control over Seaway's plan assets" when it retained compensation from plan funds. 347 F.3d at 618. But this Court rejected that argument, holding that exercise of a "unilateral right to retain funds as compensation … does not give rise to ERISA fiduciary status." *Id.* at 619. None of the cases Tiara Yachts cites is to the contrary, as those cases deal with compensation that was *not* fixed by contract—as the Court made very clear. *See* Br. at 45. Indeed, *Hi-Lex* turned on the fact that BCBSM had "flexibility to determine how and when access fees were charged," 751 F.3d at 744 (internal quotation marks omitted), and the *Pipefitters* court found "crucial[]" to its decision the fact that the ASC "did not fix the rate that [BCBSM] charged each customer." *Pipefitters Loc. 636 Ins. Fund v. Blue Cross Blue Shield of Mich.,* 722 F.3d 861, 867 (6th Cir. 2013). And in both *Hi-Lex* and *Pipefitters*, the Sixth Circuit emphasized that the customer was not aware of the fees in question, *Hi-Lex*, 751 F.3d at 743–44; *Pipefitters*, 722 F.3d at 866, whereas both the existence of the Shared Savings Program and compensation retained under it were clearly and expressly disclosed. ASC Sched. A, R. 12-5, PageID.161 ¶17 ("Administrative compensation retained by BCBSM through the Shared Savings Program will be itemized on Group's invoices, with detail available to the Group in a report entitled Shared Savings Value Report.").[10]

[10] Tiara Yachts also cites *Guyan*, 689 F.3d 793, and *Chelf v. Prudential Insurance. Co. of America*, 31 F.4th 459 (6th Cir. 2022), but neither case addresses whether or in what circumstances retaining compensation constitutes a fiduciary act. *Guyan*

2. The ASC affords BCBSM no discretion to determine its own compensation through the Shared Savings Program.

Tiara Yachts is also wrong to contend BCBSM had discretion with respect to its compensation under the Shared Savings Program because it supposedly had "unilateral control" of the amounts recovered. Br. at 46–49; Compl., R. 1, PageID.21 ¶113. According to the Complaint, BCBSM could allegedly control what overpayments were made and what "improper payments" were recovered—so that it ultimately determined in its discretion what amount of compensation it would retain "on the back end." Compl., R. 1, PageID.11 ¶84. In other words, Tiara Yachts' theory is that BCBSM had "unilateral control" of the amount of recovered payments to which the fixed-fee percentage would apply, because BCBSM supposedly chose which claims to pay at an excessive rate. Br. at 48–49.

The district court correctly rejected this argument, because the Complaint does not support it. Order, R. 23, PageID.479–80. The Complaint alleges that recoveries were made according to a four-step process that relied on both third-party vendors and successful recovery of payments from providers. In particular, Tiara Yachts' Complaint acknowledges that a third-party vendor controlled the first-step Pre-Pay Review Process (Compl., R. 1, PageID.10 ¶73), the second-step

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held the defendant acted as a fiduciary in determining "where Plan funds were deposited and how and when they were disbursed," 689 F.3d at 798, and *Chelf* held that an employer acted as a fiduciary when it controlled the premiums a plan participant contributed, 31 F.4th at 466.

Advanced Payment Analytics process (*id.* ¶77), and the fourth-step Credit Balance Recovery process (Compl. Ex. E, R. 1-6, PageID.55–56). Beyond that, what amounts were subject to potential recovery also turned on providers submitting claims for excessive payment, and providers' willingness either to return excessive claims payments or accept lower payments—all elements outside BCBSM's control. The Complaint thus confirms that BCBSM did not have "unilateral control" over the recovered amounts that the 30% administrative fee applied to—and thus does not turn BCBSM's retention of a contractually specified administrative fee into a fiduciary act. *See In re Fid. ERISA Fee Litig.*, 990 F.3d 50, 57 (1st Cir. 2021) (affirming dismissal of ERISA claim on the ground that "a series of independent decisions" was not "the equivalent of Fidelity controlling its compensation from plans" and thus did not constitute a fiduciary function).

Other federal courts of appeals have affirmed dismissal of similar ERISA claims. The Eighth Circuit rejected such a claim in *Central Valley Ag Cooperative v. Leonard*, where the plaintiff employer sued two claims processors for allegedly violating ERISA by increasing their own compensation in a similar way as Tiara Yachts alleges. 986 F.3d 1082, 1085 (8th Cir. 2021). Under the parties' contract in *Central Valley*, the claims processors were paid 30% of the "savings" achieved when the plan followed the claims processors' recommendation that the plan pay less than the full amount billed. *Id*. Plaintiff contended the defendants could

"increase their compensation" by increasing "the number of claims" they reviewed and recommended low payments on. *Id*. at 1087. The Eighth Circuit disagreed, holding the claims processors did not unilaterally control "what portion of each medical bill was paid." *Id*. at 1087–88. The same is true here: BCBSM does not exercise unilateral control of the amounts recovered through the Shared Savings Program, and therefore does not have discretion to determine its own compensation.

The First Circuit also affirmed dismissal of a factually similar claim in *Mass. Laborers'*, 66 F.4th at 321–22. There, the parties' Administrative Services Agreement stated that BCBSMA would retain a 20% "recovery fee" from overpayments or erroneous claims payments that BCBSMA recovered. *Id.* at 312–13. Like Tiara Yachts, the plaintiff claimed that "BCBSMA's recovery operations entailed self-dealing by BCBSMA at the expense of the Fund" because BCBSMA "collected wrongful and excessive recovery fees," including "when overpayments stemmed from its own errors." *Id.* at 315. The First Circuit rejected the argument because "BCBSMA had no discretion" as to what share of recoveries it would retained under the contract, "which provides for a 20% recovery fee." *Id.* at 321–22. As both *Central Valley* and *Mass. Laborers* confirm, retaining contractually specified compensation is not a fiduciary act—including when the amount of compensation is expressed as a percentage share of recovered overpayments.

Tiara Yachts again points to *Pipefitters*, arguing that this Court in that case rejected an argument that "third-party involvement rendered [BCBSM's] fees contractual only." Br. at 52 (citing *Pipefitters*, 722 F.3d at 867). But the situation is fundamentally different. In *Pipefitters*, this Court held that it did not matter for ERISA fiduciary purposes that the fee BCBSM was required to pay to the state was fixed by the Michigan Insurance Commissioner, because the amount BCBSM owed in government fees was not "the relevant activity for ERISA purposes." 722 F.3d at 867. Instead, the relevant question was whether the amount that BCBSM retained *from the plan* was fixed or subject to BCBSM's discretion. *Id.* The Court ultimately held that BCBSM acted as a fiduciary because "the state did not fix the rate that Defendant charged each customer, and crucially, neither did the ASC between Plaintiff and Defendant." *Id*. Here, unlike *Pipefitters*, the ASC specifies the method for calculating BCBSM's compensation—and BCBSM has no discretion to determine its own compensation.

Tiara Yachts' remaining arguments fare no better. It contends that "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.'" Br. at 51–52 (emphasis in original). Contrary to Tiara Yachts, the district court cited allegations *in the Complaint*, not BCBSM allegations, describing the role played by third parties in determining the amount of

recoveries under the Shared Savings Program. Order, R. 23, PageID.480 (citing Compl., R. 1, PageID.10 ¶¶73–77). And Tiara Yachts asserts without support that "the ASC did not identify the dollar amount of the SSP fee or the method by which BCBSM calculated it." Br. at 48. While it is literally true that the ASC did not identify a "dollar amount"—because BCBSM's compensation was stated as a percentage—it is beyond dispute that the ASC *did* contractually fix the amount of BCBSM's recovery under the Shared Savings Program. In particular, it explicitly stated (a) the percentage share BCBSM would retain, and (b) the amounts to which that percentage would be applied. ASC Sched. A, R. 12-5, PageID.161 ¶17 (providing that "BCBSM will retain as administrative compensation 30% of the recoveries or cost avoidance identified below," identifying four categories of recoveries to which the percentage would apply). Thus, *Seaway* controls.

B. The Complaint fails to allege sufficient factual material to state a claim.

1. Rule 9(b)'s heightened pleading standard applies.

This Court has held that Rule 9(b)'s heightened pleading standard applies when a plaintiff asserts a claim under ERISA, and "the primary theory of liability contained in plaintiffs' fiduciary-duty claims [sounds] in fraud." *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 551–52 (6th Cir. 2012) (affirming dismissal of breach of fiduciary duty claim under ERISA where complaint failed to allege the time, place, and speaker of purportedly fraudulent representations, contrary to the

requirements of Rule 9(b)). As the district court correctly ruled, *Cataldo*'s rule applies here. Order, R. 23, PageID.479. "[T]he Complaint alleges that BCBSM developed a scheme by which it intentionally paid inflated claims so that, through the Shared Savings Program, it could skim off a portion under the label of 'savings.'" *Id.* This claim—that BCBSM supposedly knowingly "[m]isle[d] and deceiv[ed] Tiara Yachts" by falsely labeling recoveries under the Shared Savings Program as "savings," when in fact such recoveries were deliberately manufactured by BCBSM, Compl., R. 1, PageID.19 ¶108(d)—plainly sounds in fraud. *See, e.g.*, *Rubke v. Capitol Bancorp, Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009) (explaining that claims "sound[] in fraud" when the complaint "allege[s] a unified course of fraudulent conduct" and "rel[ies] entirely on that course of conduct as the basis of a claim.") (citation omitted); *Aquilina v. Certain Underwriters at Lloyd's Syndicate #2003*, 406 F. Supp. 3d 884, 900 (D. Haw. 2019) (Rule 9(b) applied to claim of "deceptive scheme" of insurance underwriters steering plaintiffs into purchasing bad policies to increase revenue).

Tiara Yachts does not distinguish—or even cite—this Court's precedential opinion in *Cataldo*. Rather than articulate any explanation for why its claim does not sound in fraud, Tiara Yachts merely asserts that courts "routinely apply only the general, liberal pleading standards of Rule 8 to ERISA claims," citing a series of non-precedential, pre-*Cataldo* district court opinions. Br. 43 (internal quotation

marks and citations omitted). Failing to address binding Circuit precedent, Tiara Yachts identifies no basis for concluding the district court's ruling was erroneous.

2. The Complaint fails to state a claim under Rule 9(b) or Rule 8.

Because Rule 9(b) applies here, Tiara Yachts was required to "allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Cataldo*, 676 F.3d at 551 (citation omitted). The Complaint falls far short of this standard. It does not allege *any* overpayment BCBSM knowingly made in connection with the Tiara Yachts Plan, nor *any* transaction in which BCBSM supposedly recouped and retained improper payments in connection with Tiara Yachts' Plan through this allegedly fraudulent scheme. Compl., R. 1, PageID.11 ¶84 (alleging that the Shared Savings Program "scheme" "came at the expense of BCBSM's self-insured customers, including Tiara Yachts," and then failing to point to any transaction involving the Plan).

In its Brief, Tiara Yachts contends it satisfied Rule 9(b) merely by alleging that the Shared Savings Program existed. *See* Br. at 53 (asserting that the Rule 9(b) requirement to state "who, what, when, where and how" is satisfied with general information about the Shared Savings Program, rather than with any factual allegations regarding statements or transactions). But this high-level summary "omits entirely the time and place of the alleged statements," "the speaker of the

alleged statements," and the "injury resulting from the fraud." *Cataldo*, 676 F.3d at 551. To satisfy Rule 9(b), Tiara Yachts had to allege *actual* intentional overpayments and recoveries under the Shared Savings Program—including the who, what, where, when, and how of any such actual transactions. Rule 9(b) is not satisfied with mere hypothetical, "demonstrative example[s]" of transactions that Tiara Yachts theorizes, *see* Br. at 8–9, but which are not alleged to have occurred. Indeed, Tiara Yachts' Complaint is so deficient of factual material regarding actual payments recovered through the Shared Savings Program that it fails even to satisfy Rule 8's more lenient pleading standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[A] complaint [does not] suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'") (citation omitted).

3. The proposed Amended Complaint added nothing.

Nor did Tiara Yachts' proposed amended complaint remotely fill these gaping holes. Tiara Yachts could have amended its Complaint as of right when BCBSM first moved to dismiss, or it could have sought to amend prior to judgment, when leave would have been "freely give[n]." Fed. R. Civ. P. 15(a)(2). But it waited until after judgment, which makes this "a different story." *Leisure Caviar*, 616 F.3d at 615. Post-judgment, a party seeking leave to amend must "meet the requirements for reopening a case established by Rules 59 or 60," *C & L Ward Bros., Co. v. Outsource Sols., Inc.*, 547 F. App'x 741, 743 (6th Cir. 2013)

(citation omitted), and must offer "a 'compelling explanation' for failing to seek leave to amend" earlier, *Pond v. Haas*, 674 F. App'x 466, 473 (6th Cir. 2016) (citation omitted). Tiara Yachts offered no such "compelling explanation," and leave to amend was properly denied on that basis. *See Winget v. JP Morgan Chase Bank,* 537 F.3d 565, 573 (6th Cir. 2008) (plaintiffs "not entitled to an advisory opinion from the Court informing them of the deficiencies of the complaint and then an opportunity to cure those deficiencies") (citation omitted); *Ricker v. Zoo Ent., Inc*., 534 F. App'x 495, 501 (6th Cir. 2013) (affirming denial of post-judgment motion to amend when plaintiff was aware of pleading defects and could have corrected them earlier).

Further, the proposed Amended Complaint added no new factual allegations related to any claim overpaid or recovered under the Shared Savings Program in connection with Tiara Yachts' Plan. *See* Plaintiff's Brief to Amend, R. 33-2, PageID.745–47 ¶¶78–93; *see also* Redline of Proposed Amended Complaint against Initial Complaint, R. 41-2, PageID.932–34 ¶¶78–93. The district court correctly observed that, with respect to the Shared Savings Program, "[t]here is nothing new or different here from the allegations in the original Complaint." Second Order, R. 47, PageID.1005.

III. ERISA's Remedial Structure Does Not Support the Relief Tiara Yachts Seeks.

The district court held as an alternate basis for dismissing Tiara Yachts' overpayment-focused claim that ERISA's remedial scheme does not support the relief Tiara Yachts seeks, which is fundamentally contract damages. Order, R. 23, PageID.480–81. ERISA does not provide "a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims." *Mass. Mut. Life Ins.*, 473 U.S. at 148. Instead, ERISA's "carefully integrated civil enforcement provisions" create an "interlocking, interrelated, and interdependent remedial scheme" that does not "authorize other remedies" beyond those that Congress "incorporate[d] expressly." *Id.* at 146. ERISA's enforcement provisions under 29 U.S.C. § 1132(a) provide the particular avenues allowing participants or fiduciaries to enforce their rights under an ERISA plan—and the statute does not support Tiara Yachts' belated attempt to recover alleged overpayments.

A. Section 1132(a)(3) does not authorize Tiara Yachts' request for monetary compensation from BCBSM for overpayments.

Section 1132(a)(3) authorizes a fiduciary to bring suit to obtain either an injunction or "other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). As the Supreme Court has made clear, "[e]quitable' relief" as authorized in Section 1132(a)(3) "must mean *something* less than *all* relief." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (quoting *Mertens*, 508 U.S. at 258

n.8) (emphasis in original). Section 1132(a)(3) thus does not support a "suit[] for 'money damages'"—that is, "compensation for loss resulting from the defendant's breach of legal duty"—because a suit seeking such relief is "quintessentially an action at law." *Id.* at 210 (citations omitted).

This principle is determinative here. Tiara Yachts contends that BCBSM paid claims to providers in an amount greater than what the parties' ASC provided for, and Tiara Yachts now asks the Court to order BCBSM to pay monetary compensation to Tiara Yachts that would give it the benefit of its alleged contractual bargain. What Tiara Yachts seeks is basic contract damages. *See* Restatement (Second) of Contracts § 347 (1981) ("Contract damages are … intended to give [the plaintiff] the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed."). A suit for damages is "quintessentially an action at law" that may not be pursued under Section 1132(a)(3). *Knudson*, 534 U.S. at 210.

That Tiara Yachts does not seek equitable relief is clear because it is attempting to recover alleged overpayments that BCBSM has paid out *to providers—i.e.*, funds that, according to the Complaint, are no longer in BCBSM's possession. *See, e.g.*, Compl., R. 1, PageID.7 ¶50. In other words, Tiara Yachts does not seek specific funds held by BCBSM, but instead aims to recover against

BCBSM's general assets. This means Tiara Yachts' claim for monetary relief does not seek *equitable* remedies of restitution or disgorgement, which must "trace back to particular funds or property in the defendant's possession." *Patterson v. United HealthCare Ins. Co.*, 76 F.4th 487, 497 (6th Cir. 2023) (internal quotation marks and citations omitted); *accord Knudson*, 534 U.S. at 210; *Montanile v. Bd. of Trs. of Nat'l Elevator Ind. Health Benefit Plan*, 577 U.S. 136, 146–48 (2016). Instead, it seeks standard contract damages, which are not recoverable under Section 1132(a)(3).[11]

Tiara Yachts (but not the Secretary of Labor, *see Amicus* Br. at 26 n.3) contends that it can recover monetary relief for overpayments under Section 1132(a)(3) as a form of "surcharge" or "make-whole relief" under *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011). Br. at 39–42. The district court thoroughly considered this argument and rejected it. Order, R. 23, PageID.481–82; Second Order, R. 47, PageID.1003. In *Amara*, CIGNA had modified the terms of its employees' retirement plan in a manner that caused some beneficiaries to receive reduced benefits, but saved CIGNA $10 million annually. 563 U.S. at 426–29. The

[11] Tiara Yachts also cannot obtain prospective equitable relief because the ASC has been terminated, Compl., R. 1, PageID.3 ¶17, and there is no ongoing relationship between Tiara Yachts and BCBSM that could establish any "impending" injury. *See Patterson*, 76 F.4th at 493.

district court found that CIGNA's change in plan terms was a breach of fiduciary duty, and ordered CIGNA to: (1) reform the terms of the plan, and (2) pay out benefits according to the terms of the plan as reformed. The Supreme Court stated that these two forms of relief could be consistent with traditional equitable relief available under Section 1132(a)(3). In particular, the order requiring CIGNA to pay beneficiaries under the terms of the reformed plan was consistent with the equitable remedy of surcharge, a remedy against a fiduciary and in favor of a beneficiary that is designed to make the beneficiary whole and prevent unjust enrichment of the fiduciary. *Id.* at 442.

Amara has no relevance here because the remedy Tiara Yachts seeks is plainly not surcharge or make-whole relief as described in *Amara*. First, surcharge is a remedy paid by a trustee to a beneficiary—not a remedy paid by one fiduciary to another, as Tiara Yachts seeks here. *See* Restatement (Third) of Trusts § 95 (2012) (cited in *Amara*, 563 U.S. at 441–42). Unsurprisingly, therefore, every case Tiara Yachts cites as allowing make-whole relief was brought by a plan beneficiary against a fiduciary—not by one alleged co-fiduciary against another. *See Stiso*, 604 F. App'x at 495 (plan beneficiary suing fiduciary "to recover an equitable remedy equivalent to a 7% per year cost-of-living increase"); *Silva v. Metro. Life Ins. Co*., 762 F.3d 711, 724 (8th Cir. 2014) ("remedy may be available" under 1132(a)(3) for a beneficiary seeking "payment of benefits that were

seemingly owed under the Plan"); *Kenseth, v. Dean Health Plan, Inc.,* 722 F.3d 869, 892 (7th Cir. 2013) (same); *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013) (same); *Teisman v. United of Omaha Life Ins. Co*., 908 F. Supp. 2d 875, 879–80 (W.D. Mich. 2012) (same); *Van Loo v. Cajun Operating Co*., 64 F. Supp. 3d 1007, 1026 (E.D. Mich. 2014) (same). This distinction is critical to the *Amara* analysis. *See* 563 U.S. at 442 (viewing the trustee/beneficiary relationship of the parties as "mak[ing] a critical difference" in whether a remedy fell "within the scope of" Section 1132(a)(3)).

Second, the beneficiaries of Tiara Yachts' Plan would not be "made whole" by the relief Tiara Yachts seeks here. The money would go to Tiara Yachts, not Plan beneficiaries, and in any event the beneficiaries are already "whole": according to the Complaint, they obtained the health care coverage they were entitled to when BCBSM paid their providers. *Compare Guyan*, 689 F.3d at 800 (alleged breach of fiduciary duty harmed "Plan participants, some of whom have been refused medical care and received collection notices, all because [the defendant] diverted Plan funds for its own use rather than pay the claims as it promised"); *see also Thole v. U. S. Bank N.A*, 590 U.S. 538, 541 (2020) (affirming dismissal of ERISA claim where litigation proceeds would not benefit plan beneficiaries who "have received all of their monthly benefit payments" and "would still receive the exact same monthly benefits" if they won the lawsuit).

Here, it is only Tiara Yachts—which contracted with BCBSM—that claims to be injured because BCBSM allegedly did not perform its contractual obligations. *See* Compl., R. 1, PageID.3, ¶¶18–20.

And third, also unlike *Amara*, BCBSM was not unjustly enriched when it made allegedly excessive payments to providers. Instead, as the Complaint makes clear, these funds were paid out to providers, and not retained by BCBSM. *See* Compl., R. 1, PageID.7, ¶50. For all of these reasons, Section 1132(a)(3) does not support any relief for Tiara Yachts' overpayment claim.

B. Section 1132(a)(2) does not authorize relief to Tiara Yachts, which is not an ERISA plan.

Section 1109(a)—which describes section 1132(a)(2)'s remedial scope—authorizes relief only to "the plan," and not to an sponsor like Tiara Yachts. *See Mass. Mut. Life Ins.*, 473 U.S. at 140–41 ("recovery for a violation of [§ 1109] inures to the benefit of the plan"); *Tullis v. UMB Bank*, N.A., 515 F.3d 673, 680 (6th Cir. 2008) (describing the "nature of the relief" under section 1109(a) as "the payment of money *to the plan*") (emphasis in original). The only dispute, therefore, is whether Tiara Yachts' Complaint seeks relief for the Plan, as distinct from Tiara Yachts the employer.

1. The district court did not misread the Complaint.

A straightforward reading of the Complaint as drafted by Tiara Yachts demonstrates this is not a close question. Tiara Yachts is the only Plaintiff in this

lawsuit, and the Complaint's allegations separately define "Tiara Yachts," the employer, from its "Plan." *See* Compl., R. 1, PageID.1. The Complaint repeatedly seeks relief *for Tiara Yachts*, as distinct from the Plan:

- Paragraph 3 states: "Tiara Yachts brings this suit to recover the misappropriated funds and obtain all other relief to which *it is entitled*";
- Request for Relief B asks the Court to "[o]rder BCBSM to provide a full and complete accounting of all monies taken or charged by BCBSM *to Tiara Yachts*";
- Request for Relief C asks the Court to "[d]eclare that BCBSM breached its fiduciary duty owed *to Tiara Yachts*";
- Request for Relief D asks the Court to "[a]ward[] restitution *to Tiara Yachts* for all improper misuses of Tiara Yachts' Plan assets";
- Request for Relief E asks the Court to "[a]ward[] restitution *to Tiara Yachts* for all administrative compensation collected by BCBSM under its Shared Savings Program"; and
- Request for Relief G asks the Court to "[a]ward all other relief *to which Tiara Yachts may be entitled*."

Compl., R. 1, PageID.2, 21–23 (emphases added). As the district court concluded, these statements "expressly seek[] relief for Tiara Yachts." Order, R. 23, PageID.483.

Tiara Yachts contends that the district court erred because "[t]he Complaint seeks to recover Plan losses." Br. at 35–36; *see also Amicus* Br. at 25. But the Complaint is explicit that any recovery for purported Plan losses would be directed *to Tiara Yachts.* That is inconsistent with Section 1109(a), which mandates that

any monetary relief ordered under that subsection be directed "*to such plan*." 29 U.S.C. § 1109(a) (emphasis added). Tiara Yachts also asserts that in its Opposition to BCBSM's Motion to Dismiss, "Tiara Yachts confirmed it sought relief 'on behalf of its welfare benefit Plan.'" Br. at 36 (citing R. 16, PageID.195–96). But in the section of its Opposition addressing Section 1109, Tiara Yachts said exactly the opposite, contending "the Complaint need not allege that Tiara seeks to recover 'on behalf of the Plan.'" R. 16, PageID.193. Tiara Yachts may wish it had filed a different Complaint, but the district court did not err in reading the Complaint to mean what it said. *See Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 680 (6th Cir. 2011).

None of the cases Tiara Yachts cites permit courts to ignore the substance of a complaint. In *Tullis*, this Court allowed plan beneficiaries to proceed under section 1132(a)(2) despite alleging individualized damages because "any" assets recovered would "first be paid into the plans" and "be directly payable to the plan." 515 F.3d at 680, 682. And in *Guyan*, the Court held that an employer may sue for relief under Section 1332(a)(2) only if the complaint "demonstrate[s] that Plaintiffs' actions seek recovery on behalf of [the Plan]." 689 F.3d at 800. The *Guyan* court held this requirement satisfied because the complaint specifically alleged that "*the Plan* [is] … entitled to money damages," *id.* at 801 (emphasis added), but there is no such allegation in the Complaint here.

2. The district court did not abuse its discretion in denying leave to amend.

Finally, Tiara Yachts contends that the district court erred in denying its post-judgment motion for leave to amend the Complaint to state, for the first time, that relief would be directed to the Plan. Br. at 39; *see also Amicus* Br. at 25. As detailed above, the district court did not abuse its discretion in rejecting Tiara Yachts' post-judgment motions under Rule 59 and Rule 15. Beyond that, the district court reasoned that leave to amend would be futile. Second Order, R. 47, PageID.1004–05. Contrary to Tiara Yachts' assertion that the district court acted "without explanation," Br. at 39, the court acknowledged that in the proposed Amended Complaint, "Tiara Yachts now seeks to recover on behalf of the Plan"—but found this revision futile because "the same fundamental issues related to the theories of breach in claims processing, claims data, and the Shared Savings Plan remain." Second Order, R. 47, PageID.1004–05. There was no error.

CONCLUSION

The judgment should be affirmed.

Dated: August 5, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because, according to the word-count feature of Microsoft Word, this brief contains 12,954 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2024, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to all counsel of record.

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Appellants state the relevant documents to this appeal are part of the electronic record in the Western 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 #	Description of Document	Page ID#
1	Complaint	1-23
1-2	Exhibit A – 9/14/17 BCBSM Email Chain	25-29
1-3	Exhibit B - 2017 List of Customers	30-39
1-4	Exhibit C – 9/19/17 BCBSM Email Chain	40-43
1-5	Exhibit D – Complaint, *Wegner v. Blue Cross Blue Shield of Michigan*	44-50
1-6	Exhibit E – ASC Shared Savings, Internal Sales FAQs	51-59
1-7	Exhibit F – Payment Integrity Presentation	60-72
11	Defendant's Motion to Dismiss Plaintiff's Complaint	94-96
12	Defendant's Brief in Support of its Motion to Dismiss Plaintiff's Complaint	97-136
12-2	Exhibit A - 2016 Administrative Services Contract	139-154
12-3	Exhibit B - Register of Actions, *Wegner v. Blue Cross Blue Shield of Michigan*, No. 19-001808-CD (Mich. 3rd Jud. Dist.)	155-156
12-4	Exhibit C - 2018 Amendment to Administrative	157-158

ECF #	Description of Document	Page ID#
	Services Contract	
12-5	Exhibit D - 2018 Schedule A to Administrative Services Contract	159-161
16	Plaintiff's Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint	178-217
18	Defendant's Reply Brief in Support of its Motion to Dismiss Plaintiff' Complaint	373-392
23	Order	466-483
24	Judgment	484
28	Plaintiff's Motion to Alter or Amend Judgment	570-571
29	Plaintiff's Brief in Support of Motion to Alter or Amend Judgment	572-611
32	Plaintiff's Motion for Leave to File Amended Complaint	714-715
33	Plaintiff's Brief in Support of Motion for Leave to File Amended Complaint	716-729
33-2	Exhibit 1 – First Amended Complaint	731-852
41	Defendant's Response to Plaintiff's Motion for Leave to File Amended Complaint	895-918
41-2	Exhibit A – Redline of Complaint to Proposed First Amended Complaint	920-948
43	Defendant's Response to Plaintiff's Motion to Alter or Amend Judgment	953-991
47	Opinion and Order	998-1011
49	Notice of Appeal	1021