

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIARA YACHTS, INC.,

Plaintiff,

v .

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant.

Case No. 1:22-cv-603

Honorable Robert J. Jonker

Magistrate Judge Ray Kent

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO
DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM**

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I. INTRODUCTION

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

"[P]laintiff's complaint needs to contain only a 'short and plain statement of the claim showing that the pleader is entitled to relief,'" *Tiara Yachts, Inc. v. Blue Cross Blue Shield of Michigan*, 138 F.4th 457, 466 (6th Cir. 2025) (internal citation omitted), and the Sixth Circuit has held Tiara Yachts' Complaint meets that standard. As the Sixth Circuit put it, "[t]he crux of the complaint is that BCBSM breached its fiduciary duties to the Plan by squandering assets, then wrongfully kept a portion of overpaid Plan assets as administrative fees." *Id.* at 471. BCBSM's position now flies in the face of the Sixth Circuit's unanimous, published decision.

Undeterred by the Sixth Circuit's ruling, and after earlier abandoning this challenge to Tiara Yachts' claims, *id.* at 463 n.3, BCBSM has moved to dismiss a second time. It alleges that Tiara Yachts did not sufficiently allege breaches of BCBSM's fiduciary duties and prohibited transactions, and that Tiara Yachts' claims are time-barred. *First*, BCBSM's "no plausible claims" argument is barred by the mandate rule and law of the case doctrine. *Second*, and regardless, Tiara Yachts' Complaint alleges detailed facts regarding the ways BCBSM breached its fiduciary duties

and engaged in prohibited self-dealing under ERISA, as the Sixth Circuit held. *Third*, BCBSM's timeliness argument is meritless because it ignores Tiara Yachts' factual allegations about when it learned of BCBSM's misconduct and how BCBSM concealed its misconduct. Instead, BCBSM's "timeliness" argument is predicated on imputing what BCBSM's "Internal Sales FAQs" document said BCBSM *might* do at some unspecified future time, not what it did, and, more importantly, not what Tiara Yachts actually knew. BCBSM's position is factually and legally incorrect.

BCBSM's second motion to dismiss again "mischaracterizes the complaint," *Tiara Yachts*, 138 F.4th at 472, and should therefore be denied.

II. MATERIAL FACTUAL ALLEGATIONS

A. TIARA YACHTS' SELF-FUNDED PLAN.

Tiara Yachts designs and manufactures boats in Holland, Michigan. Compl., ¶9 (ECF No. 1, PageID.2). Its employees receive healthcare benefits through a self-funded welfare benefits plan (the "Plan"). *Id.*, ¶10. Tiara Yachts, through the Plan, "paid the actual employee health care costs" rather than "buy[ing] health insurance to cover employee health care claims[.]" *Id.*

B. BCBSM ADMINISTERED THE PLAN AS A FIDUCIARY.

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

BCBSM exercised discretionary authority and control over the bank account where Tiara Yachts sent prepayments (in trust for payment of employees' healthcare claims), and over the

prepayments themselves. *Id.*, ¶¶18-26 (PageID.3-4). Those prepayments are "Plan Assets" under ERISA. *See Hi-Lex Controls v. BCBSM*, 751 F.3d 740, 745-46 (6th Cir. 2014); *see also id.*, ¶ 23 (PageID.4). BCBSM therefore exercised: (1) discretionary authority and control over Plan management, (2) authority and control over management and disposition of Plan Assets, and (3) discretionary authority and responsibility in Plan administration. *Compl.*, ¶¶24-26 (PageID.4). Accordingly, "BCBSM functioned as an ERISA fiduciary in its administration of the Plan." *Id.*; *see also Tiara Yachts*, 138 F.4th at 466 ("BCBSM was acting as an ERISA fiduciary[.]").

As an ERISA fiduciary, BCBSM was required to discharge its duties *solely* in the interest of the employees and beneficiaries of the Plan, preserve Plan assets, fully disclose its actions, avoid making false or misleading statements, avoid conflicts of interest, abide by any statutory obligation or restrictions imposed on it, and follow the documents and instruments governing the Plan. *Id.*, ¶107 (PageID.18). BCBSM was further obligated to: (A) avoid conflicts of interest when performing its fiduciary role, *id.*, ¶85 (PageID.12); (B) collect and maintain comprehensive records (identifying provider information, payee information, financials, status of claims, etc.) with respect to processing and payment of claims from the Plan, *id.*, ¶¶92-93 (PageID.13); (C) reject improper claims, *id.*, ¶102 (PageID.15); and (D) disclose all material facts related to its claims processing, including mismanagement of Plan assets, *id.*, ¶104 (PageID.18).

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

Unbeknownst to Tiara Yachts, BCBSM as ERISA fiduciary secretly subjected the Plan's claims from non-participating providers to an *intentionally* flawed benefits adjudication system BCBSM called "flip logic." *Id.*, ¶¶46-65 (PageID.7-9); *see also Tiara Yachts*, 138 F.4th at 466 ("BCBSM was acting as an ERISA fiduciary" when "it was overpaying claims to medical providers"). "Under the logic, when a claim is submitted associated with a non-participating

provider, BCBSM's system 'flips' the non-participating provider's status and processes the claim at charge," as if the provider were a participating provider. Compl., ¶49 (ECF No. 1, PageID.7). This violated Plan terms and participants' selected benefits. *Id.*, ¶¶37-65, 108 (PageID.6-9, 19). "BCBSM was to perform its administrative services in accordance with the health benefits selected by Tiara Yachts," but through "flip logic," it knowingly adjudicated Plan "claims to be processed at charges in contradiction with Tiara Yachts' elected Plan benefits." *Id.*, ¶¶20, 108(b) (PageID.3, 19). The Tiara Yachts' Plan says it "should have been paying for out-of-state, non-par claims at a lower rate set by the applicable Host Blue plan," *i.e.*, the applicable out-of-state Blue plan. *Id.*, ¶54 (PageID.8); *see also id.*, ¶¶28-35 (PageID.4-5). BCBSM knew this; it identified customers—including Tiara Yachts—who "elected to pay at the Host-allowed rate for non-par claims." *Id.*, ¶53-54 (PageID.8). But instead of adjudicating Plan claims per Plan terms and participants' elected benefits (*i.e.*, only paying non-participating provider claims if the amounts were reasonable and usual/customary, and then only paying them at lower Host-allowed rates), "BCBSM would pay whatever was charged for a service, regardless of whether the claim was proper under the plan terms or other applicable reimbursement guidelines and policies." *Id.*, ¶50 (PageID.7).

Importantly, "internal BCBSM emails say that flip logic affected an entire group of its customers to which Tiara Yachts belonged." *Tiara Yachts*, 138 F.4th at 464; *see also* (ECF No. 1-2, PageID.27). The Sixth Circuit held "that's enough to plausibly allege that BCBSM acted as a fiduciary when it controlled—**and then 'fail[ed] to preserve'—Plan assets.**" *Tiara Yachts*, 138 F.4th at 464 (emphasis added) (quoting *Saginaw Chippewa Indian Tribe of Michigan v. BCBSM*, 32 F.4th 548, 564 (6th Cir. 2022)).

BCBSM knowingly violated the Plan and participants' elected benefits through flip logic; it admitted "[f]lipping' logic is in direct contradiction with the group-elected benefit." Compl., ¶54

(ECF No. 1, PageID.8). Further, "BCBSM expressly recognized that it had a 'fiduciary responsibility to its ASC customers' and that its 'lack of control over the issue would be viewed as a failure to fulfill this responsibility.'" *Id.*, ¶56. However, rather than comply with its fiduciary responsibilities, BCBSM "[c]onceal[ed] from, and otherwise fail[ed] to disclose to Tiara Yachts, the full implications of and flaws associated with its systems logic and the overpayments BCBSM made as a result." *Id.*, ¶108(c) (PageID.19).

BCBSM squandered Plan assets by using "flip logic" to adjudicate the Plan's claims. *Id.*, ¶¶108(a). BCBSM admitted flip logic caused Plan payments "for highly inflated cost of services." (ECF No. 1-2, PageID.27). Further, BCBSM paid (at charge) suspicious claims "many times above the customary amounts for such services." *Id.*, ¶52 (PageID.8). BCBSM admitted a lack of "controls in the system logic that would flag suspicious claim activity," directly damaging the Plan. *Id.* "The improper payments were not only associated with laboratories, but also with, for example, hospitals, x-rays, and office visits." *Id.*, ¶51 (PageID.7-8).

BCBSM acknowledged its "customers may not be fully aware of the implications of the 'flipping' system logic," but "conceal[ed] the problem from its customers, including Tiara Yachts." *Id.*, ¶58 (PageID.9). For example, "BCBSM would temporarily assume liability for any inconspicuous overcharges that resulted from the flip logic, to keep mismanagement of its customers' plans hidden." *Id.*, ¶59. Worse, BCBSM silenced employees who tried to correct its mismanagement. *Id.*, ¶¶37-65 (PageID.6-9). Senior Account Manager Dennis Wegner discovered it overpaid over \$600,000 in claims within a two-year period for one customer. *Id.*, ¶40 (PageID.6). Wegner also discovered BCBSM made similar overpayments using other customers' Plan assets, including Tiara Yachts. *Id.*, ¶¶41-42; (ECF Nos. 1-2, 1-3, PageID.26-39).

Wegner alerted senior BCBSM management about the "flip logic" damage to BCBSM plans in September 2017. Compl., ¶41 (ECF No. 1, PageID.6). BCBSM's management confirmed they were aware. (ECF No. 1-2, PageID.27). Wegner was commanded to "stand down" and not alert customers, including Tiara Yachts, of its improper payments and Plan violations. Compl., ¶43 (ECF No. 1, PageID.6).

In 2016 alone, "BCBSM processed 30,000 non-par claims at charge when Host pricing was available. The sum of those [flip] charges was \$30.5M and resulted in a payment amount of \$26.7M." *Id.*, ¶55 (PageID.8). "Had BCBSM applied the Host plan pricing as required, 'the total allowed amount for these claims would have been \$7.1M; a potential savings of \$23.0M in benefit costs.'" *Id.*; (ECF No. 1-4, PageID.41).

"Some BCBSM employees suggested [internally] that BCBSM 'make a global change to discontinue the logic and pay at Host allowed.'" Compl., ¶60 (ECF No. 1, PageID.9); (ECF No. 1-2, PageID.27). "[T]he suggestion was to process claims in compliance with customers' selected benefit plans—what BCBSM should have been doing all along." Compl., ¶60 (ECF No. 1, PageID.9). And they "suggested making affected customers 'aware, educated, and their concurrence be documented.'" *Id.*; (ECF No. 1-2, PageID.27). BCBSM's executives ignored that and "terminated Dennis Wegner's employment after he refused to cease investigating and pressing the issue." Compl., ¶64 (ECF No. 1, PageID.9).

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

"The issues with BCBSM's claims processing extended beyond flip logic." *Tiara Yachts*, 138 F.4th at 462. BCBSM also wasted Plan assets by "[c]onsistently paying claims suffering from a range of coding and billing issues, including but not limited to unbundling, upcoding, medically unlikely services, and reimbursing claims in non-adherence to its own and/or industry standard

reimbursement guidelines." Compl., ¶108(g) (ECF No.1, PageID.19-20). Further, BCBSM paid "claims lacking standard information necessary to properly adjudicate claims in accordance with industry standards and BCBSM's own policies and procedures" and "otherwise fail[ed] to maintain claims data necessary to identify and recover incorrectly paid amounts and identify the full scope of BCBSM's misconduct and mismanagement." *Id.*, ¶108(k) (PageID.20).

Specifically, "BCBSM processes all claims for all non-auto NASCO customers, such as Tiara Yachts, on the same claims processing system." *Id.*, ¶101 (PageID.15). "BCBSM's NASCO claims processing system has been found to consistently result in improper payments of claims. These processing errors result in wasted Plan assets in breach of BCBSM's fiduciary duty." *Id.*, ¶102. For example, "[c]ommon errors associated with BCBSM's NASCO claims processing system include, for example: unbundling, upcoding, medically unlikely claims, non-adherence to payment guidelines, and BCBSM's flip logic." *Id.*, ¶103. "Unbundling is when a health care provider uses the billing codes for two or more separate procedures when the procedures were actually performed together and only one code should be paid." *Id.*, ¶104. Medically unlikely edits ("MUE") "is the maximum units of service that a provider would report under most circumstances for a single patient on a single date of service." *Id.*, ¶105 (PageID.16). "Upcoding occurs when health care providers submit inaccurate billing codes to insurance companies in order to receive inflated reimbursements." *Id.*, ¶106. And "[p]ayment guidelines are established to determine the appropriate reimbursement amounts when processing a claim." *Id.*, ¶107.

"The aforementioned improper payments are non-exclusive examples of improper payments BCBSM regularly makes when processing claims for NASCO customers, and therefore also made when processing claims for Tiara Yachts." *Id.*, ¶108. And as the Sixth Circuit noted, improper claims were paid by BCBSM using Tiara Yachts' Plan assets. *See Tiara Yachts*, 138 F.

4th at 462 ("The platform BCBSM used to manage claims for all similarly situated customers, including Tiara Yachts, allegedly suffered from 'processing errors' that allowed providers to improperly code for their services and overbill the Plan, which 'consistently result[ed] in improper payments of claims.'"). "BCBSM's practice of paying Providers' improper claims is contrary to standards and norms in the health insurance industry, contrary to how BCBSM markets itself to the public, and is contrary to representations it makes to customers." Compl., ¶95 (ECF No. 1, PageID.17).

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

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

Rather than disclose and correct its mismanagement, "BCBSM implemented a program to profit from its practice of overpaying claims." *Tiara Yachts*, 138 F.4th at 461; Compl., ¶70 (ECF No. 1, PageID.9). It "mis[led] and deceiv[ed] Tiara Yachts by implementing [the] Shared Savings Program ["SSP"] when it knew Tiara Yachts' Plan assets were used to overpay for benefits, allowing BCBSM to capitalize on its own mismanagement, which was a clear conflict of interest." Compl., ¶108(d) (ECF No.1, PageID.19).

With the SSP, BCBSM "designed a system in which it knowingly and improperly pays claims, later corrects the claims charge to what it should have been in the first place, at its discretion, and then collects a recovery fee for 'catching' the error." *Id.*, ¶86 (PageID.12). In other words, BCBSM would "retain savings from payments it erroneously approved." *Tiara Yachts*,

138 F.4th at 470. "And, critically," as the Sixth Circuit noted, "BCBSM controlled the number and amount of overpayments the Plan made because under the ASC, BCBSM decided which claims to pay, determined how much to pay for them, and then wrote the checks." *Id.* at 468. "In short, BCBSM's control over the claims-processing apparatus meant it also exercised discretion in setting its compensation under the SSP." *Id.*

"Tiara Yachts alleges [such] self-dealing was nefarious: BCBSM intentionally inflated the pool of overpayments from which it could profit." *Id.* "The more overpayments BCBSM made on the front-end while processing claims, the more money it could receive on the back-end through the SSP." *Id.*

BCBSM unilaterally imposed the SSP on the Plan. Compl., ¶71 (ECF No. 1, PageID.10). "BCBSM . . . made it mandatory for its self-insured customers to participate and automatically opted all self-funded customers into the program." *Id.*, ¶81 (PageID.11). In other words, BCBSM enrolled Tiara Yachts and the Plan in the SSP. *See Tiara Yachts*, 138 F.4th at 461; Compl., ¶70-71 (ECF No. 1, PageID.9-10). BCBSM also unilaterally applied the SSP "retroactively to improper payments extending back to January 1, 2016." Compl., ¶82 (ECF No. 1, PageID.11).

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

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

"BCBSM impedes its self-funded customers, including Tiara Yachts', ability to evaluate whether BCBSM is properly paying claims by significantly limiting access to each customers' claims data and other documents that set forth the guidelines and rules for claims processing and pricing." *Id.*, ¶87 (PageID.12).

Claims data is electronic information submitted to BCBSM by healthcare providers, identifying the provider name, service date and location, patient name, diagnoses, services performed, and billed and paid amount, among other things. *Id.*, ¶88. Such data is essential to identifying improper claims payments. *Id.*, ¶90. BCBSM exclusively controlled Tiara Yachts' claims data. *Id.*, ¶91, (PageID.13). Ignoring requests, BCBSM never provided that information to Tiara Yachts. *Id.*, ¶¶91-92, 102 (PageID.13, 18). Rather, BCBSM concealed its misconduct. *Id.*; *see also Tiara Yachts*, 138 F. 4th at 462 ("Tiara Yachts does not cite specific claims that BCBSM overpaid from Plan assets. But that's because, Tiara Yachts says, BCBSM concealed flip logic from its customers and limited access to claims data and explanatory documents.")

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

III. PROCEDURAL HISTORY

After discovering BCBSM's misconduct, Tiara Yachts filed a two-count Complaint alleging BCBSM: (1) breached its ERISA fiduciary duties; and (2) engaged in transactions

prohibited by ERISA. Compl., (ECF No. 1, PageID.1-23). As the Sixth Circuit described them, Tiara Yachts "alleges that BCBSM knowingly squandered plan assets by systematically overpaying some categories of claims. BCBSM then allegedly profited from its mismanagement by implementing a program through which it caught overpayments, clawed them back, and kept a portion of those 'savings' for itself." *Tiara Yachts*, 138 F.4th at 460-61.

BCBSM previously moved to dismiss Tiara Yachts' Complaint, arguing: (1) BCBSM was not an ERISA fiduciary when processing and paying claims and collecting the SSP fees; (2) it didn't breach any fiduciary duties under ERISA related to its claims processing and payment, and collection of SSP fees; (3) ERISA does not authorize the relief Tiara Yachts sought; and (4) Tiara Yachts' claims were untimely (ECF No. 12, PageID.103-135). The District Court granted BCBSM's motion, holding: (1) Tiara Yachts did not plausibly allege BCBSM was an ERISA fiduciary when processing and paying claims and collecting the SSP fees; (2) Tiara Yachts did not plausibly allege breaches of fiduciary duties under ERISA related to BCBSM's claims processing and payment, and collection of SSP fees; and (3) ERISA does not authorize the relief Tiara Yachts' Complaint sought. *See* Order (ECF No. 23, PageID.466-483). This Court declined to address BCBSM's timeliness argument. *Id.* at 18 (PageID.483).

Tiara Yachts moved to alter or amend this Court's Order and Judgment under Rule 59(e) and to amend its Complaint pursuant to Rules 15(a)(2) and Rule 59(e). *See* Mtn. to Alter or Amend (ECF Nos. 28, 29); Mtn. to Amend Compl. (ECF No. 32, 33). This Court denied both motions. Order (ECF No. 47, PageID.998-1011). It "adhere[d] to its February decision," saying leave to amend would be "futile." *Id.* (PageID.999-1005).

Tiara Yachts timely appealed this Court's Orders and Judgment. The Sixth Circuit—in a unanimous, published decision—"reverse[d] the district court's dismissal of Tiara Yachts'

complaint and remand[ed] for proceedings consistent with this opinion." *Tiara Yachts*, 138 F.4th at 473. It held: (1) BCBSM was an ERISA fiduciary when processing and overpaying claims and charging and collecting the SSP fees; (2) BCBSM's failing to preserve Plan assets and collect SSP fees stated claims for breach of fiduciary duty and prohibited transactions under ERISA; (3) *Tiara Yachts'* Complaint adequately alleged harm and losses to the Plan; and (4) ERISA authorizes the relief sought by *Tiara Yachts'* Complaint. *Tiara Yachts*, 138 F.4th at 461-73.

BCBSM has moved—a *second time*—to dismiss the Complaint on the pleadings, largely recycling arguments it already lost or abandoned (ECF No. 66). BCBSM's motion is meritless.

IV. GOVERNING LEGAL STANDARDS

The court rules do not "require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under Rule 12(b)(6), the complaint is viewed in the light most favorable to the plaintiff, the allegations in the complaint are accepted as true, and all reasonable inferences are drawn in favor of the plaintiff. *See Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). "[A] judge may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations." *Sagliocco v. Eagle Ins. Co.*, 112 F.3d 226, 228–29 (6th Cir. 1997) (quoting *Columbia Nat'l Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995)). Instead, the court must, "[a]ccepting the complaint's factual allegations as true and drawing all reasonable inference in the plaintiff's favor," [] ask whether it 'contains sufficient factual matter to state a claim to relief that is plausible on its face.' *Tiara Yachts*, 138 F.4th at 463 (citing *Royal Truck & Trailer Sales & Serv., Inc. v. Kraft*, 974 F.3d 756, 758 (6th Cir. 2020)) (cleaned up).

V. ARGUMENT

A. THE LAW OF THE CASE AND THE SIXTH CIRCUIT'S MANDATE.

BCBSM's argument that Tiara Yachts' Complaint does not state a plausible claim for breach of fiduciary duty and prohibited transactions was fully resolved by the Sixth Circuit in its published, unanimous decision in *Tiara Yachts, Inc. v. Blue Cross Blue Shield of Michigan*, 138 F.4th 457 (6th Cir. 2025). What BCBSM now argues on that issue was briefed and argued before the Sixth Circuit, which—in its published May 21, 2025, Opinion and Order—held Tiara Yachts stated a plausible claim for breach of fiduciary duties and prohibited transactions under ERISA. The law-of-the-case doctrine and mandate rule require this Court to follow the Sixth Circuit's ruling. *See Kindle v. City of Jeffersontown, Ky.*, 589 F. App'x 747, 753 (6th Cir. 2014) (lower courts must obey letter and spirit of mandate); *Hanover Ins. Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (lower courts may not reconsider issues already decided).

Both "[t]he law of the case doctrine and mandate rule generally preclude a lower court from reconsidering an issue expressly or impliedly decided by a superior court." *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994). These rules require this Court to "proceed in accordance with the mandate and law of the case as established by the appellate court." *Hanover*, 105 F.3d at 312 (internal citation and quotation omitted). Reconsideration of issues "decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition" is prohibited. *Id.*

The law of the case doctrine applies to "questions necessarily decided in the earlier appeal." *Id.* In determining whether an issue was necessarily decided, the mandate "must be read with the analysis offered in the opinion . . . [and] context matters." *United States v. O'Dell*, 320 F.3d 674, 681 (6th Cir. 2003). A "necessarily decided" issue is one that was "fully briefed and squarely

decided in an earlier appeal." *Perkins v. Am. Elec. Power Fuel Supply, Inc.*, 91 F. App'x 370, 374 (6th Cir. 2004). Once remanded, district courts "must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Kindle*, 589 F. App'x at 753 (internal citation and quotation omitted). "[T]he doctrine of the law of the case is enforced quite rigidly to ensure obedience of a lower court to a higher court's decisions [.]" *Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 169 F. App'x 976, 987 (6th Cir. 2006).

The "mandate rule is a specific application of the law-of-the-case doctrine." *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999). Because it governs the relationship between appellate and inferior courts, it "is a jurisdictional bar on the inferior court's authority to reconsider issues that were expressly or impliedly decided in a previous appeal." *Phillips v. Houk*, 587 F. App'x 868, 871 (6th Cir. 2014). It "compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or *impliedly* decided by the appellate court." *O'Dell*, 320 F.3d at 679 (quoting *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001)). The mandate rule bars "all claim[s] 'within the compass' of an appellate mandate—including claims that were actually decided or that should have been[.]" *Phillips*, 587 F. App'x at 870; *United States v. Scott*, 66 F.3d 327 (6th Cir. 1995) (same).

Among the "Issues Presented for Review" in Tiara Yachts' appellate brief were: (1) "Whether Tiara Yachts' Complaint plausibly alleges BCBSM breached its ERISA fiduciary duties by squandering Plan assets through flawed claims processing that improperly adjudicated and overpaid benefit claims in violation of Plan terms and participants' benefits elections[.]"; (2) "Whether Tiara Yachts' Complaint plausibly alleged BCBSM breached its ERISA fiduciary duties by squandering Plan assets through knowingly adjudicating and paying fraudulent, wasteful, and abusive provider bills[.]"; and (3) "Whether Tiara Yachts' Complaint plausibly alleged BCBSM

breached its fiduciary duties and engaged in prohibited transactions by secretly paying itself, from Plan assets, variable fees under a conflicted scheme controlled and unilaterally imposed by BCBSM where the more improper claims BCBSM allowed through its claim adjudication system yielded higher fees for BCBSM from Plan assets." **Exhibit A**, Appellant Brief, at p. xi. Each of these issues was fully briefed by Tiara Yachts before the Sixth Circuit. *Id.* at p.19-32, 42-53.

On appeal, BCBSM declined to address Tiara Yachts' arguments on the above issues, focusing instead on its fiduciary status. The Sixth Circuit recognized this, stating "BCBSM defends the court's dismissal of Tiara Yachts' claims on this threshold inquiry [fiduciary status] only." *Tiara Yachts*, 138 F. 4th at 463. The result of BCBSM's litigation strategy was that, as the Sixth Circuit held, "***BCBSM has abandoned any challenge to the other elements of Tiara Yachts' ERISA claims,***" precluding it from attempting to challenge them now. *Id.* at 463 n.3 (emphasis added). Those issues fall "within the compass" of the mandate rule as a "claim that [was] actually decided or that should have been[.]" *Phillips*, 587 F. App'x at 870. This Court should follow the Sixth Circuit's ruling that BCBSM "abandoned any challenge to the other elements of Tiara Yachts' ERISA claims[.]" *Tiara Yachts*, 138 F.4th at 163 n.3. BCBSM cannot attempt to re-litigate—through a second Motion to Dismiss under Rule 12(b)(6)—what the Sixth Circuit ruled BCBSM already lost and/or abandoned. *See Hanover*, 105 F.3d at 312.

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

Regardless, BCBSM breached its fiduciary duties by squandering Plan assets and engaging in prohibited transactions by charging and collecting the SSP fees. As the Complaint alleges, BCBSM breached its ERISA fiduciary duties of loyalty, prudence, and disclosure by wasting Plan assets through overpayments to providers in violation of Plan requirements (through "flip logic"), and industry standards (by paying unbundled, upcoded, duplicate, and medically unlikely claims). Compl., ¶¶46-54, 95-104, 101-108, 108(a)-(h) (ECF No. 1, PageID.7-8, 14-20).

Under ERISA Section 1104(a)(1), a fiduciary must: (1) discharge his duties "solely in the interest of the participants and beneficiaries"; (2) act with "the care, skill, prudence, and diligence . . . [of] a prudent man"; and (3) "act for the exclusive purpose of providing benefits to plan participants." 29 U.S.C. 1104(a)(1). "Clearly, the duties charged to an ERISA fiduciary are 'the highest known to the law.'" *Chao v. Hall Holding Co.*, 285 F.3d 415, 426 (6th Cir. 2002) (internal citations and quotation omitted). Wasting plan assets through overpayments to providers is a breach of a third-party plan administrator's fiduciary duties under ERISA. *See Saginaw Chippewa Indian Tribe of Michigan v. BCBSM*, 748 F. App'x 12 (6th Cir. 2018) (*SCIT*). In *SCIT*, a tribal plan sponsor brought ERISA breach of fiduciary duty claims against BCBSM for wasting plan assets through overpayments to providers that did not take advantage of Medicare discounts available to tribal plans. *Id.* at 20-21. The district court dismissed the tribe's complaint on the pleadings, "holding that BCBSM did not owe the Tribe a fiduciary duty under ERISA to ensure payment" at discounted rates. *Id.* at 16. The Sixth Circuit reversed, holding "[f]ailing to preserve plan assets can be actionable under ERISA" and that was "just what the [plaintiff] has alleged." *Id.* at 20-21 (citing *DeLuca v. BCBSM*, 628 F.3d 743, 747-78 (6th Cir. 2010)).

BCBSM's wasteful overpayments are a breach of its fiduciary duties under ERISA. *See id.*; *see also Johnson v. Parker-Hannifin Corp.*, 122 F.4th 205, 221 (6th Cir. 2024) ("Wasting beneficiaries' money is imprudent") (internal citation and quotation omitted); *Hill v. BCBSM*, 409 F.3d 710, 717 (6th Cir. 2005) (allegations that administrator used improper methodology and criteria for processing claims stated ERISA breach of fiduciary duty claim); *Comau LLC v. BCBSM*, No. 19-CV-12623, 2020 WL 7024683, at *8 (E.D. Mich. Nov. 30, 2020) (BCBSM's payment of inflated claims to providers and failure to fix its processing system "support an

inference that BCBSM breached its fiduciary duty by failing to correct its processing system which it knew resulted in the payment of inflated claims").

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

BCBSM nevertheless argues "the Complaint does not include a single factual allegation of an improper payment made in respect of the Plan or even that any Plan participant received care from an out-of-network provider" and thus "fails to allege that any of the alleged misconduct by BCBSM occurred with respect to or harmed the Plan" (ECF No. 66, PageID.1108-09). Not true.

The Complaint alleges BCBSM's improper use of "flipping logic" caused significant Plan losses. Compl., ¶¶2, 45-58; (ECF No. 1, PageID.1, 7-9) ("BCBSM is aware of flaws in its claims processing system that caused it to overpay for claims with Tiara Yachts' money."). It identifies specific Tiara Yachts claims improperly processed by BCBSM; for example: "claim[s] submitted associated with a non-participating provider." *Id.*, ¶¶49, 54-55 (PageID.7-8).

BCBSM admitted its flawed "system logic . . . financial[ly] impacted" its self-funded, non-auto customers, including Tiara Yachts. (ECF No. 1-4, PageID.41); *see also* Compl., ¶46 (ECF No. 1, PageID.7) ("BCBSM knew that the majority, if not all, of self-funded, non-auto customers on its NASCO platform, ***including Tiara Yachts***, were impacted by this systems flaw.") (emphasis added). BCBSM's argument that Tiara Yachts and its Plan were not affected by BCBSM's overpayments through "flip logic" is meritless; the Complaint specifically alleges the opposite. *Id.*

BCBSM further posits "the Complaint does not allege facts showing how claims processing errors constitute a breach of fiduciary duty," (ECF No. 66, PageID.1110), but BCBSM admitted its "flipping logic" breached its fiduciary duty to Tiara Yachts: "We have fiduciary responsibility to our ASC customers. Our lack of control over the issues was viewed as a failure to fulfill this responsibility and a settlement was requested." (ECF No. 1-4, PageID.42).

BCBSM concealed this from Tiara Yachts because, in BCBSM's view, "[d]emonstrating effects of the 'flip' logic may cause groups to question their original consent to it." *Id.* As the Complaint explains, "BCBSM maintain[s] exclusive control and access to Tiara Yachts' claims data." Compl., ¶91 (ECF No. 1, PageID.13). "BCBSM continues to conceal its misconduct, in part, by maintaining exclusive control of Tiara Yachts' complete claims data . . . which is necessary to comprehensively identify all improper payments and other wrongdoing." *Id.*, ¶2 (PageID.1). BCBSM cannot insulate itself from liability through concealment.

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

Tiara Yachts' Complaint also plausibly alleges BCBSM breached its ERISA fiduciary duties by wasting plan assets through overpayments in violation of industry standards and BCBSM's own promises to Plan representatives. BCBSM nevertheless argues the Complaint only "offers allegations of alleged misconduct *generally* and *speculation* that misconduct occurred with respect to the Plan." (ECF No. 66, PageID.1109). That is wrong.

The Complaint alleges fraudulent and unjustified claims were submitted to BCBSM relative to Tiara Yachts' Plan, including those "missing provider information, missing payee information, rolled-up financials, financials that do not reconcile, claims showing as rejected but still paid, fields compromised by BCBSM's flip logic, or even claims that are altogether missing." Compl., ¶93 (ECF No. 1, PageID.13). The Complaint thoroughly explains those claims. *Id.*, ¶¶94-107 (PageID.13-16). BCBSM knowingly paid those claims, wasting Plan assets:

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

- "The aforementioned improper payments are non-exclusive examples of improper payments BCBSM regularly makes when processing claims for NASCO customers, and therefore also made when processing claims for Tiara Yachts" *Id.*, ¶108 (PageID.16);
- "BCBSM breached its fiduciary duties . . . [by] [c]onsistently paying claims suffering from a range of coding and billing issues, including but not limited to unbundling, upcoding, medically unlikely services, and reimbursing claims in non-adherence to its own and/or industry standard reimbursement guidelines." *Id.*, ¶108(g); (PageID.19-20);
- "BCBSM breached its fiduciary duties . . . [by] [f]ailing to implement industry standard claims processing edits to prevent Tiara Yachts' Plan assets from being used to pay improper charges." *Id.*, ¶108(h) (PageID.20);
- "BCBSM breached its fiduciary duties . . . [by] [p]aying claims lacking standard information necessary to properly adjudicate claims in accordance with industry standards and BCBSM's own policies and procedures, or otherwise failing to maintain claims data necessary to identify and recover incorrectly paid amounts." *Id.*, ¶108(k).

In sum, "'failing to preserve assets' gives rise to fiduciary duties," and "[t]hat's just what Tiara Yachts alleges BCBSM did here." *Tiara Yachts*, 138 F.4th at 464 (quoting *SCIT*, 32 F.4th at 564).

BCBSM is apparently asking this Court to disbelieve these factual allegations, but that is not permitted. *See Sagliocco*, 112 F.3d at 228–29 ("[A] judge may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations."). BCBSM's breaches are all-the-more egregious because it has exclusive control over the Plan's claims data, which it uses to hide its mismanagement. Compl., ¶2 (ECF No. 1, PageID.1). "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Garcia v. Alticor, Inc.*, No. 1:20-CV-1078, 2021 WL 5537520, at *4 (W.D. Mich. Aug. 9, 2021). This should lead to "courts reading ERISA plaintiffs' complaints slightly more leniently, allowing discovery as long as plaintiffs have provided enough factual allegations to create reasonable inferences" that defendants' conduct breached a fiduciary duty. *Id.* at *4 (collecting cases). This Court should do the same here.

BCBSM's assertion that "[t]he Complaint also fails to plead any specific instances in which BCBSM failed to properly maintain client data," (ECF No. 66, PageID.1109), is also false. Tiara Yachts alleges that "BCBSM breached its fiduciary duties [to Tiara Yachts] . . . [by] [p]laying claims lacking standard information necessary to properly adjudicate claims in accordance with industry standards and BCBSM's own policies and procedures, or otherwise failing to maintain claims data necessary to identify and recover incorrectly paid amounts[.]" Compl., ¶108(k) (ECF No. 1, PageID.19-20). The Complaint details *at least seven specific ways* in which BCBSM failed to properly maintain and mishandled Tiara Yachts' claims data, including, but not limited to, by causing Tiara Yachts' claims data to have: "missing provider information, missing payee information, rolled-up financials, financials that do not reconcile, claims showing as rejected but still paid, fields compromised by BCBSM's flip logic, or even claims that are altogether missing." *Id.*, ¶93 (PageID.13); *see also id.*, ¶¶20, 92-102 (PageID.3, 13-15). As Tiara Yachts further alleges, Tiara Yachts' complete set of claims data has been withheld by BCBSM from Tiara Yachts, which is "another tool BCBSM utilizes to conceal its misconduct." *Id.*, ¶91 (PageID.13).

Finally, BCBSM's argument that "the Complaint does not allege any facts about the supposed standard a prudent fiduciary would have to meet for claims processing" is legally and factually wrong. (ECF No. 66, PageID.1110). Legally, "[a] meaningful benchmark is not required to plead a facially plausible claim of imprudence." *Johnson*, 122 F.4th at 216. "BCBSM could breach its ERISA fiduciary duties by violating the ASC's terms," as it did here. *Tiara Yachts*, 138 F.4th at 465 n. 4 (citing *Hi-Lex*, 751 F.3d at 746). And it violated its fiduciary duties by self-dealing. *See* Compl., at ¶105-115 (ECF No. 1, PageID.18-21); *see also Hi-Lex*, 751 F.3d at 751 ("[W]hen a 'fiduciary uses a plan's funds for its own purposes, . . . such a fiduciary is liable under § 1104(a)(1) **and** § 1106(b)(1))." (internal citation and quotation omitted) (emphasis added)).

Regardless, Tiara Yachts alleges standards fiduciaries must meet for claims processing and how BCBSM breached them: (1) "[k]nowingly using Tiara Yachts' Plan assets to pay claims impacted by BCBSM's systems flip logic, fully aware such flip logic had been flawed for decades and was causing Tiara Yachts' Plan to overpay for benefits"; (2) "[f]ailing to implement or correct controls in its systems logic that would flag suspicious claim activity, when BCBSM knew that its systems logic was flawed and causing claims to be processed at charges in contradiction with Tiara Yachts' elected Plan benefits"; (3) "[c]onsistently paying claims suffering from a range of coding and billing issues, including but not limited to unbundling, upcoding, medically unlikely services, and reimbursing claims in non-adherence to its own and/or industry standard reimbursement guidelines"; (4) "[f]ailing to implement industry standard claims processing edits to prevent Tiara Yachts' Plan assets from being used to pay improper charges" and (5) "[p]aying claims lacking standard information necessary to properly adjudicate claims in accordance with industry standards and BCBSM's own policies and procedures, or otherwise failing to maintain claims data necessary to identify and recover incorrectly paid amounts and identify the full scope of BCBSM's misconduct and mismanagement." Compl., at ¶108 (ECF No. 1, PageID.19-20).

Contradicting BCBSM's arguments, the Sixth Circuit repeatedly recognized Tiara Yachts' Complaint alleges sufficient facts to state a claim for breaches of BCBSM's fiduciary duties: "The crux of the complaint is that BCBSM breached its fiduciary duties to the Plan by squandering assets, then wrongfully kept a portion of overpaid Plan assets as administrative fees." *Tiara Yachts*, 138 F.4th at 471. Specifically, "Tiara Yachts . . . [claims BCBSM] breached its fiduciary duties under ERISA by, among other things, overpaying claims based on flip logic and implementing the SSP. Tiara Yachts also allege[s] that BCBSM . . . violated ERISA's strictures on self-dealing by using the SSP to profit off its own mismanagement of Plan assets." *Id.* at 462.

Given the Sixth Circuit has repeatedly observed Tiara Yachts' Complaint adequately pleads breaches of fiduciary duties by BCBSM, BCBSM cannot argue differently now.

3. BCBSM's fiduciary breaches harmed the Plan.

BCBSM argues "[t]he Complaint fails to allege that any of the alleged misconduct by BCBSM occurred with respect to or harmed the Plan." (ECF No. 66, PageID.1108). That is false. The Sixth Circuit has ruled "the complaint alleges harm both to Tiara Yachts and to the Plan" and that "it plausibly placed BCBSM on notice that Tiara Yachts sought recovery for losses to the Plan." *Tiara Yachts*, 138 F.4th at 471-72. As the Complaint alleges, BCBSM consistently paid improper claims, "result[ing] in *wasted Plan assets* in breach of BCBSM's fiduciary duty." Compl., ¶102 (ECF No. 1, PageID.15) (emphasis added). BCBSM used "*Tiara Yachts' Plan assets* to pay claims impacted by BCBSM's systems flip logic . . . causing Tiara Yachts' *Plan to overpay for benefits*." *Id.*, ¶108(a) (PageID.19) (emphasis added). And "according to Tiara Yachts' Plan, Tiara Yachts should have been paying for out-of-state, non-par claims at a lower rate by the applicable Host Blue plan[.]" which did not occur because of BCBSM's misconduct. *Id.*, ¶¶50-54 (PageID.7-8). Relative to BCBSM's overpayments to providers, BCBSM's misconduct affected "the majority, if not all, of self-funded, non-auto customers on its NASCO platform, including Tiara Yachts[.]" *Id.*, ¶46 (PageID.7). BCBSM used "its considerable discretionary authority to advance interests other than those of *Tiara Yachts' Plan or its members*." *Id.*, ¶108(e) (PageID.19) (emphasis added).

As if more were needed, the Complaint lists numerous examples of how BCBSM breached its fiduciary duties under ERISA and harmed the Tiara Yachts Plan by wasting Plan assets through overpayments to providers:

- (a) Knowingly using *Tiara Yachts' Plan* assets to pay claims impacted by BCBSM's systems flip logic, fully aware such flip logic had been flawed for decades and was causing *Tiara Yachts' Plan* to overpay for benefits;

(b) Failing to implement or correct controls in its systems logic that would flag suspicious claim activity, when BCBSM knew that its systems logic was flawed and causing claims to be processed at charges in contradiction with *Tiara Yachts' elected Plan* benefits;

(c) Concealing from, and otherwise failing to disclose *to Tiara Yachts*, the full implications of and flaws associated with its systems logic and the overpayments BCBSM made as a result;

(d) Misleading and deceiving Tiara Yachts by implementing a Shared Savings Program when it knew *Tiara Yachts' Plan assets* were being used to overpay for benefits, allowing BCBSM to capitalize on its own misconduct and mismanagement, which was a clear conflict of interest;

(e) Using its considerable discretionary authority to advance interests other than those of *Tiara Yachts' Plan or its members*;

(f) Failing to implement and exercise sufficient quality control and oversight of BCBSM's claims processing systems and discretionary review of claims pre- and post- payment;

(g) Consistently paying claims suffering from a range of coding and billing issues, including but not limited to unbundling, upcoding, medically unlikely services, and reimbursing claims in non-adherence to its own and/or industry standard reimbursement guidelines;

(h) Failing to implement industry standard claims processing edits to prevent *Tiara Yachts' Plan assets* from being used to pay improper charges;

(i) Concealing from, and otherwise failing to disclose *to Tiara Yachts* the payment of improper claims;

(j) Concealing from, and otherwise failing to disclose *to Tiara Yachts* all documents and information that govern BCBSM's methodology for determining covered charges under *Tiara Yachts' Plan* and amounts to be paid to providers, affording BCBSM complete discretionary control and preventing Tiara Yachts from verifying whether reimbursements made by BCBSM using its *Plan* assets were calculated and made in accordance with the *Plan's* terms, operative pricing rates, rules, policies, and contracts;

(k) Paying claims lacking standard information necessary to properly adjudicate claims in accordance with industry standards and BCBSM's own policies and procedures, or otherwise failing to maintain claims data necessary to identify and recover incorrectly paid amounts and identify the full scope of BCBSM's misconduct and mismanagement; and

(l) Failing to exercise the care, skill, prudence, and diligence under the circumstances that a prudent fiduciary acting in a like capacity and familiar with such matters would use in paying for health care claims, and otherwise administering *Tiara Yachts' ERISA-governed Plan*.

Id. ¶ 108 (PageID.19-20) (emphasis added). BCBSM ignores these detailed allegations.

The Complaint further expressly seeks recovery to the Plan "for all improper *misuses of Tiara Yachts' Plan assets*." *Id.*, (PageID.22) (emphasis added); *see also id.*, ¶3 (PageID.2) ("BCBSM's mismanagement of Plan Assets clearly constitutes a breach of BCBSM's fiduciary duty of care under ERISA."). The Complaint requests an order that "BCBSM . . . provide *a full and complete accounting of all payments and uses of Tiara Yachts' Plan Assets*," obvious relief for the Plan. *Id.*, ¶21 (PageID.21) (emphasis added). The Complaint seeks restitution for "all improper uses *of Tiara Yacht's Plan assets*." *Id.*, (PageID.22) (emphasis added). Restitution literally means returning lost Plan assets to the Plan.

The Sixth Circuit correctly read these well-pleaded factual allegations as sufficiently specific relative to Tiara Yachts and its Plan. *See Tiara Yachts*, 138 F. 4th at 461 ("Tiara Yachts alleges that BCBSM systematically overpaid claims submitted by medical providers during the years that BCBSM administered the Plan."). Notably, according to the Sixth Circuit: "*That's enough to plausibly allege that BCBSM acted as a fiduciary when it controlled—and then 'fail[ed] to preserve'—Plan assets*." *Id.* at 464 (citing *SCIT*, 32 F.4th at 564) (emphasis added). BCBSM's argument that the Complaint doesn't allege fiduciary misconduct related to Tiara Yachts and the Plan is expressly contradicted by the Sixth Circuit's published, unanimous opinion.

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

BCBSM's cursory argument that Tiara Yachts' Complaint does not allege prohibited transactions is likewise meritless. Section 1106 of ERISA "prohibits fiduciaries from involving

the plan and its assets in certain kinds of business deals." *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996). For one, Section 1106(a)(1)(C) generally prohibits the "furnishing of goods, services, or facilities" between a plan and a "party in interest." 29 U.S.C. § 1106(a)(1)(C). Additionally, Section 1106 specifically prohibits several transactions between ERISA welfare benefit plans and other parties as *per se* self-dealing. *First*, § 1106(a) states that "[e]xcept as provided in section 1108," which establishes exemptions from the list of prohibited transactions, a fiduciary cannot cause the plan to engage in certain transactions with "a party in interest." 29 U.S.C. § 1106(a). A "party in interest" is defined in 29 U.S.C. § 1002(14) to include a fiduciary or service provider to a plan, like BCBSM. *Second*, § 1106(b) prohibits a fiduciary from: "(1) deal[ing] with the assets of the plan in his own interest or for his own account"; "(2) involv[ing] the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries"; or "(3) [providing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b). This is an "absolute bar against self dealing." *Brock v. Hendershott*, 840 F.2d 339, 341 (6th Cir. 1988). "ERISA treats self-dealing transactions as 'presumptively unlawful,' . . . no matter whether the plaintiff alleges the defendant acted 'out of fraud or imprudence.'" *Tiara Yachts*, 138 F.4th at 467 (quoting *Cunningham v. Cornell Univ.*, — U.S. —, 145 S. Ct. 1020, 1027, — L.Ed.2d — (2025)).

It is settled law in the Sixth Circuit and beyond that a third-party claims fiduciary, like BCBSM, engages in a prohibited transaction under Section 1106(b) by determining its own fees and collecting them itself from plan assets. *See Hi-Lex*, 751 F.3d at 750-51 (BCBSM engaged in prohibited self-dealing under ERISA when, as a fiduciary, it paid itself fees from plan assets); *Pipefitters Local 636 Ins. Fund v. BCBSM*, 722 F.3d 861, 868 (6th Cir. 2013) (BCBSM's fees it

discretionarily charged "for its own account" to pay "its independent Medigap obligation to the State of Michigan" was "exactly the sort of self-dealing that ERISA prohibits fiduciaries from engaging in"); *Barboza v. California Asso'n of Professional Firefighters*, 799 F.3d 1257, 1269 (9th Cir. 2015) (fiduciary's "practice of paying its own fees and expenses from the Plan's assets held in the Wells Fargo account" was prohibited self-dealing under Section 1106).

Although ERISA carves out some exemptions to these broad prohibitions, *see* 29 U.S.C. § 1108(b), that "does not apply . . . to a fiduciary who engages in a prohibited transaction under 29 U.S.C. § 1106(b)(1) by paying itself from the assets of a welfare benefit plan." *Barboza*, 799 F.3d at 1269 (citing *Patelco Credit Union v. Sahni*, 262 F.3d 897 (9th Cir. 2001)); *see also Hi-Lex*, 751 F.3d at 751 ("We decline BCBSM's invitation to apply the reasonable compensation provisions found in §§ 1108(b)(2) and (c)(2) to the self-dealing restriction in § 1106(b)(1)"). Specifically, "while a plan may pay a fiduciary 'reasonable compensation for services rendered' under 29 U.S.C. § 1108, the fiduciary may not engage in self-dealing under 29 U.S.C. § 1106(b) by paying itself from plan funds." *Barboza*, 799 F.3d at 1269; *see also Hi-Lex*, 751 F.3d at 751 ("[W]hen a 'fiduciary uses a plan's funds for its own purposes, . . . such a fiduciary is liable under § 1104(a)(1) and § 1106(b)(1)."). Where a fiduciary pays itself out of plan assets, it does not matter that the fees might be for "otherwise legitimate services"; they are still illegal. *Acosta v. City Nat'l Corp.*, 922 F.3d 880, 885-86 (9th Cir. 2019) ("Simply put, the holdings of *Patelco* and *Barboza* are not limited to fact patterns where the fiduciary received compensation for illegitimate services.").

BCBSM is an ERISA fiduciary, and it collected SSP fees in its discretion from the Plan's assets. Compl., ¶¶70-91, 108(d)-(e), 112-115 (ECF No. 1, PageID.9-13, 19, 21); *Tiara Yachts*, 138 F.4th at 466-70. As the Sixth Circuit described:

BCBSM received both 30% of future overpayments the SSP prevented the Plan from paying, and 30% of past overpayments the SSP clawed back from providers.

And, critically, BCBSM controlled the number and amount of overpayments the Plan made because under the ASC, BCBSM decided which claims to pay, determined how much to pay for them, and then wrote the checks. In short, BCBSM's control over the claims-processing apparatus meant it also exercised discretion in setting its compensation under the SSP. Here, Tiara Yachts alleges that the self-dealing was nefarious: BCBSM intentionally inflated the pool of overpayments from which it could profit. The more overpayments BCBSM made on the front-end while processing claims, the more money it could receive on the back-end through the SSP.

Tiara Yachts, 138 F.4th at 468.

BCBSM's collection of SSP fees from Plan assets is a *per se* violation of the prohibition against self-dealing under 29 U.S.C. § 1106(b)(1) because—as the Sixth Circuit has held—BCBSM was a fiduciary dealing with the assets of the Plan for its own account. *See id.* BCBSM thus engaged in prohibited transactions under 29 U.S.C. § 1106(b)(1). *See id.*; *Hi-Lex*, 751 F.3d at 751; *Pipefitters*, 722 F.3d at 868; *Patelco*, 262 F.3d at 911; *Barboza*, 799 F.3d at 1269; *Acosta*, 922 F.3d at 885-86. And BCBSM's liability for engaging in prohibited transactions under Section 1106(b) by self-dealing through SSP fees is determinative of its liability for breaching its fiduciary duties under Section 1104(a). *See Hi-Lex*, 751 F.3d at 751 ("[W]hen a 'fiduciary uses a plan's funds for its own purposes, . . . such a fiduciary is liable under § 1104(a)(1) **and** § 1106(b)(1))" (quoting *Pipefitters*, 722 F.3d at 867-69) (emphasis added); *see also Pipefitters*, 722 F.3d at 867-69 ("Though ERISA's duties of loyalty and care are undeniably broader than the prohibition against self-dealing, acting with the care, skill, prudence, and diligence with an eye single to the interests of the participants and beneficiaries, . . . necessarily requires that an ERISA fiduciary not use plan assets for its own purposes." (citations and internal quotation marks omitted)).

BCBSM faults Tiara Yachts for supposedly "fail[ing] to identify any payments made by BCBSM with respect to the Plan under the Shared Savings Program, . . . [and] any compensation paid to BCBSM for such services." But the Complaint clearly alleges BCBSM charged and

collected SSP fees from Tiara Yachts (which BCBSM does not dispute), and Tiara Yachts has no obligation to plead claim-level detail on those charges; it "need do no more than plead a violation of § 1106(a)(1)(C)[.]" *Cunningham*, 145 S. Ct. at 1027. The Complaint alleges numerous paragraphs describing specific violations of § 1106(a) relative to the Plan, despite BCBSM's "significantly limiting access to [Tiara Yachts'] claims data and other documents." Compl., ¶¶70-91, 108(d)-(e), 112-115 (ECF No. 1, PageID.9-13, 19, 21). Further, the Sixth Circuit has ruled Tiara Yachts' Complaint states a plausible claim for violation of Section 1106. *See Tiara Yachts*, 138 F.4th at 468 ("Tiara Yachts has plausibly alleged BCBSM exercised discretion as to its own compensation through the SSP, giving rise to fiduciary duties. "). "[N]o more, no less" is required. *Cunningham*, 145 S. Ct. at 1032.

D. TIARA YACHTS' ERISA CLAIMS ARE TIMELY.

BCBSM's affirmative defense that Tiara Yachts' claims are time-barred is meritless too. ERISA provides two deadlines for breach of fiduciary duty claims, including claims alleging prohibited transactions:

- (1) [S]ix years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
- (2) [T]hree years after the earliest date on which the plaintiff had actual knowledge of the breach of violation[.]

29 U.S.C. § 1113 (emphasis added). The exception—ignored by BCBSM—is that "in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach of violation." *Id.*

1. Tiara Yachts' claims accrued in 2022.

Tiara Yachts' ERISA claims are not time-barred. ERISA's "actual knowledge" requirement begins "when the plaintiff gains 'actual knowledge' *of the breach.*" *Intel Corp. Inv. Pol'y Comm.*

v. Sulyma, 589 U.S. 178, 181 (2020) (emphasis added). The plaintiff must know *all "material facts upon which [Plaintiffs'] claims for breach of ERISA fiduciary duties are based[.]"* *Wright v. Heyne*, 349 F.3d 321, 331 (6th Cir. 2003) (emphasis added).

Plaintiff's ERISA claims are based on BCBSM's knowingly "*overpay[ing]* for benefits" through flip logic and claims processing errors, Compl., ¶ 108(a) (ECF No. 1, PageID.19) (emphasis added); *see also id.*, ¶ 108(b)-(d), as well as self-dealing through collection of SSP fees. *Id.*, ¶¶2, 70-91, 108(d)-(e), 112-115 (PageID.1, 9-13, 19, 21). The Sixth Circuit described it so too: "[Tiara Yachts] alleges that BCBSM knowingly *squandered plan assets* by *systematically overpaying* some categories of claims" and "profited from its *mismanagement*, by implementing a program through which it caught overpayments, clawed them back, and kept a portion of those 'savings' for itself." *Tiara Yachts*, 138 F.4th at 460-61 (emphasis added). Tiara Yachts did not know BCBSM squandered plan assets by overpaying claims and engaged in self-dealing by collecting SSP fees until 2022. *See* Compl., at ¶2 (ECF No. 1, PageID.1) ("Tiara Yachts recently discovered that BCBSM is aware of flaws in its claims processing system that caused it to overpay for claims with Tiara Yachts' money."). Tiara Yachts did not discover this earlier due to BCBSM's wide-ranging efforts to conceal its overpayments and self-dealing from Tiara Yachts. *See id.*, at ¶¶2, 57-58, 87, 91, 108(d) (PageID.1, 8-9, 12-13, 19) ("BCBSM concealed [the overpayments] from Tiara Yachts for reasons that appear to advance BCBSM's own interests. BCBSM continues to conceal its misconduct[.]"). Before 2022, Tiara Yachts did not know what the providers' true charges were, what BCBSM's payment rates were, how they compared, or what BCBSM kept for itself, and it was therefore impossible for Tiara Yachts to know BCBSM was wasting the Plans' assets and self-dealing—BCBSM's misconduct at issue. *See id.* ("BCBSM impedes its self-funded

customers, including Tiara Yachts', ability to evaluate whether BCBSM is properly paying claims by significantly limited access to each customers' claims data[.]").

2. BCBSM concealed its overpayments and self-dealing from Tiara Yachts.

For similar reasons, ERISA's "fraud or concealment" limitations period applies here. That exception applies "to cases in which a fiduciary: (1) breached its duty by making a knowing misrepresentation or omission of a material fact to induce [a plaintiff] to act to his detriment; or (2) engaged in acts to hinder the discovery of a breach of fiduciary duty." *Hi-Lex Controls, Inc. v. BCBSM*, No. 11-12557, 2013 WL 2285453, at *25 (E.D. Mich. May 23, 2013) (quoting *Caputo v. Pfizer*, 267 F.3d 181, 190 (2d Cir. 2001)).

BCBSM engaged in fraud or concealment to hide its breaches of fiduciary duties and self-dealing by: (1) actively concealing its flip logic problem from Tiara Yachts; (2) refusing to turn over Tiara Yachts' claims data despite repeated requests; and (3) misrepresenting to Tiara Yachts the true nature of its SSP, thereby preventing Tiara Yachts from learning that BCBSM was overpaying claims and self-dealing in Plan assets. *See* Compl. at ¶ 2 (ECF No. 1, PageID.1) ("BCBSM concealed [the system failures] from Tiara Yachts for reasons that appear to advance BCBSM's own interests. BCBSM continues to conceal its misconduct[.]"); *id.*, ¶¶57-58 (PageID.8-9) ("[I]nstead of accepting responsibility . . . BCBSM worked to conceal the issue" and "took active steps to conceal the problem from its customers, including Tiara Yachts."); *id.*, ¶87 (PageID.12) ("BCBSM impedes its self-funded customers, including Tiara Yachts', ability to evaluate whether BCBSM is properly paying claims by significantly limited access to each customers' claims data[.]"); *id.*, ¶91 (PageID.13) ("BCBSM maintained exclusive control and access to Tiara Yachts' claims data. Tiara Yachts never had and still does not have access to its own *complete* claims data."); *id.*, ¶108(c) (PageID.19) ("BCBSM breached its fiduciary duties [by]

. . . [c]oncealing from, and otherwise failing to disclose to Tiara Yachts, the full implications of and flaws associated with its systems logic and the overpayments BCBSM made as a result[.]").

As the Sixth Circuit noted: "Tiara Yachts says, BCBSM concealed flip logic from its customers and limited access to claims data and explanatory documents." *Tiara Yachts*, 138 F.4th at 462. Importantly, BCBSM admitted its customers, including Tiara Yachts, did *not* know about its claim overpayments. Compl., ¶58 (ECF No. 1, PageID.9) ("BCBSM acknowledged its customers 'may not be fully aware of the implications of the 'flipping' system logic[.]'" (citing ECF No.1-2, PageID.27)). Tiara Yachts' Complaint, therefore, was timely filed. *See Hi-Lex*, 751 F.3d at 748 (fraud or concealment exception to ERISA statute of limitations applied where BCBSM misrepresented and omitted material information about its pricing practices in documents).

3. BCBSM's internal document saying it would make available meaningless information doesn't establish Tiara Yachts' "actual knowledge."

BCBSM misconstrues what a few sentences say on *its own internal documents* to mean the limitations clock started at some unidentified, earlier date. (ECF No. 66, PageID.1112). Specifically, BCBSM points to what its *"Internal Sales FAQs" PowerPoint presentation* said *BCBSM* would supposedly do *in the future*: "include line items" of (unidentified) "charges" on an (unidentified) "monthly customer invoice" and make (unidentified) "reporting" to be "accessible via e-bookshelf" to (unidentified) persons (ECF No. 1-6, PageID.59). Additionally, BCBSM points to vague language in its ASC wherein it supposedly represented it would allegedly provide "access to a paid Claims listing" to someone, without explaining what that even means (ECF No. 12-2, PageID.142). On its face, none of that disclosed BCBSM's overpayments and self-dealing; they don't even mention flip logic, processing errors, and overpayments. And none of those documents say anything about what *Tiara Yachts actually knew* about BCBSM's overpayments and self-dealing, which controls for purposes of ERISA's "actual knowledge" statute

of limitations provision. "To meet § 1113(2)'s 'actual knowledge' requirement, however, [Tiara Yachts] must in fact have become aware of that information," *Intel Corp.*, 589 U.S. at 186-87, which it never was because BCBSM concealed its misconduct and Tiara Yachts didn't know: (1) what providers charged; (2) what BCBSM paid; (3) the difference between the two; and (4) what BCBSM kept in SSP fees. *See* Compl., ¶¶2, 57-58, 87, 91, 108(d) (ECF No. 1, PageID.1, 8-9, 12-13, 19). BCBSM's arguments—based solely on its *misrepresentation* "that Plaintiff was provided with monthly claims payment details" supposedly "demonstrating precisely how claims were processed"—conflicts with *Intel Corp.*'s ruling that "disclosure alone" does not meet "§ 1113(2)'s 'actual knowledge' requirement[.]" *Intel Corp.*, 589 U.S. at 186-87.

In contrast to BCBSM's inaccurate and misleading "disclosure" argument, the Complaint clearly alleges that "Tiara Yachts recently discovered" BCBSM's misconduct at issue and "Tiara Yachts never had and still does not have access to its own *complete* claims data. BCBSM's exclusive control and access to its customers' claims data is yet another tool BCBSM utilized to conceal its misconduct." Compl., at ¶¶2, 91 (ECF No. 1, PageID.1, 13). BCBSM's attempt to impute knowledge onto Tiara Yachts through misrepresentations of what its "Internal Sales FAQs" document says is frivolous. *See Intel Corp.*, 589 U.S. at 186-87 (requiring "actual knowledge" on plaintiff's part for ERISA's statute of limitations to accrue).

4. BCBSM's motion on the pleadings is an improper procedural vehicle to address statute of limitations.

Self-evident from BCBSM's meritless argument, its motion to dismiss based on the pleadings is an improper vehicle to address statute of limitation issues. *See Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012) ("[A] motion under Rule 12(b)(6), which considers only the allegations in the complaint, is generally an inappropriate vehicle for dismissing a claim based upon the statute of limitations."); *Comau*, 2020 WL 7024683, at *9 (denying BCBSM's motion to

dismiss because BCBSM's statute of limitations argument was premature and required the court "to determine when the facts giving rise to the statute of limitations occurred"); *Computer & Eng'g Servs., Inc. v. BCBSM*, No. 12-15611, 2013 WL 1976234, at *4-5 (E.D. Mich. May 13, 2013) (concluding the motion to dismiss stage was inappropriate to determine the applicable statute of limitations where it was unclear from the complaint when the plaintiffs acquired actual knowledge of the alleged ERISA violations); *E. Jordan Plastics, Inc. v. BCBSM*, No. 12-CV-15621, 2013 WL 1876117, at *6 (E.D. Mich. May 3, 2013) (same). This is yet another reason to deny BCBSM's motion. *See id.*

VI. CONCLUSION

The Sixth Circuit was clear. Tiara Yachts did "enough to plausibly allege that BCBSM acted as a fiduciary when it controlled—*and then 'fail[ed] to preserve'—Plan assets.*" *Tiara Yachts*, 138 F.4th at 464 (emphasis added) (quoting *Saginaw Chippewa Indian Tribe of Michigan v. BCBSM*, 32 F.4th 548, 564 (6th Cir. 2022)). That is to say, Tiara Yachts pleaded breaches of BCBSM's fiduciary obligations. Even so, "**BCBSM has abandoned any challenge to the other elements of Tiara Yachts' ERISA claims.**" *Tiara Yachts*, 138 F.4th at 463 n.3 (emphasis added). BCBSM's litigation strategy then has consequences now, and it cannot flout the Sixth Circuit's unanimous ruling and binding mandate. *Hanover*, 105 F.3d at 312.

BCBSM has only one objective: delay the administration of justice. Besides this motion, BCBSM wants to delay any examination of the facts. It has even disclosed its plan to file a Rule 12(c) motion (not that the pleadings are closed). Delay is the goal—and avoiding accountability. BCBSM's efforts at delay and avoidance should be rejected, and that includes denying the present motion in its entirety, which Tiara Yachts respectfully requests.

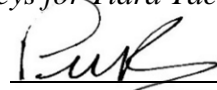
Respectfully submitted,

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