UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

TIARA YACHTS, INC., Plaintiff, v. BLUE CROSS BLUE SHIELD OF MICHIGAN, Defendant.	Civil Action No.: 1:22-cv-603 Judge: Hon. Robert J. Jonker Magistrate Judge: Ray Kent **Oral Argument Requested**

DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

Instead of refuting the grounds that compel dismissal raised in BCBSM's motion, the Opposition attempts to evade the merits and to cover up the inadequacy of the Complaint with pages and pages of quotations that do not remedy its deficiencies.[1] None of this saves the Complaint from dismissal.

First, the law-of-the-case doctrine and mandate rule do not insulate the Complaint from scrutiny because the pleading and timeliness defects were never decided. This Court originally dismissed the Complaint largely based on its determination that the Complaint failed to adequately plead that BCBSM was acting as a fiduciary. The Sixth Circuit reversed, determining that the Complaint did adequately plead BCBSM was acting as a fiduciary. But neither this Court nor the Sixth Circuit decided the other grounds for dismissal raised by BCBSM. The Opposition does not show otherwise. In fact, the Opposition expressly admits that, on appeal, BCBSM "focus[ed] on its [alleged] fiduciary status" and "defended . . . on this threshold inquiry . . . only." ECF No. 72, PageID.1154. Thus, this Court can—and should—dismiss the Complaint on the grounds for dismissal at issue now.

Second, the Opposition fails to show that the Complaint pleads a nonspeculative breach of fiduciary duty with respect to the Plan. As highlighted in BCBSM's motion, the Complaint never alleges facts showing that the Plan suffered from an overpayment as a result of "flip logic" or a claims processing issue or that BCBSM ever recovered funds under the Shared Savings Program. The Opposition argues that the Complaint "thoroughly explains" Plaintiff's claims. ECF No. 72, PageID.1157. But "explain[ing]" how various potential errors or transactions might

[1] Unless defined herein, capitalized terms used herein have the meaning ascribed to them in BCBSM's motion to dismiss.

happen—without factual allegations demonstrating that they were present with respect to the Plan—is not enough to state a claim. *Id.*

Third, the Opposition tacitly confirms that the untimeliness of Plaintiff's claims is apparent from the face of the Complaint. As illustrated in BCBSM's motion, the Complaint acknowledges that Plaintiff was aware of the Shared Savings Program in 2018 and, in any event, does not allege any recoveries on behalf of the Plan after that date. The Opposition does not refute these facts. The Opposition also does not seriously dispute that Plaintiff received monthly invoices and other data showing precisely how claims were processed or that this dispute could have been brought years ago. The "fraud or concealment" exception is thus unavailable because the Complaint does not plead—even in conclusory terms—any misrepresentation that concealed the alleged breaches.

For these reasons, the Court should dismiss the Complaint with prejudice.

ARGUMENT

I. THE LAW-OF-THE-CASE DOCTRINE AND MANDATE RULE DO NOT PRECLUDE CONSIDERATION OF BCBSM'S MOTION TO DISMISS

The law-of-the-case doctrine and mandate rule do not preclude the Court's consideration of BCBSM's Motion because BCBSM seeks dismissal of the Complaint on grounds not addressed by this Court and not "necessarily decided" by the Sixth Circuit. *Moore v. WesBanco Bank, Inc.*, 612 F. App'x 816, 820–21 (6th Cir. 2015) (district court did not violate the law-of-the-case doctrine when it "considered whether summary judgment in defendants' favor was warranted on alternative grounds that neither it nor [the Sixth Circuit] had previously considered"); *see also Kindle v. City of Jeffersontown, Ky.*, 589 F. App'x 747, 753–55 (6th Cir.

2014) (holding that litigation of issue was not foreclosed because it had not been decided on the first appeal and at most the court had assumed, without deciding, the answer to the issue).

BCBSM originally moved to dismiss the Complaint on three grounds: (1) BCBSM was not a fiduciary under ERISA, (2) Plaintiff failed to state a claim, and (3) Plaintiff's claims were time-barred. *See generally* ECF No. 12. This Court granted that motion largely on the ground that BCBSM was not a fiduciary, and the Court did not fully address BCBSM's second argument and did not at all address the timeliness of the Complaint. *See generally* ECF No. 23 (addressing BCBSM's second argument only with respect to alleged withholding of claims data and otherwise not addressing pleading or timeliness arguments). Although Plaintiff strains to describe snippets of the Sixth Circuit decision as addressing certain pleading arguments, Plaintiff also argues that those arguments were not presented to the Sixth Circuit. *See* ECF No. 72, PageID.1154. By Plaintiff's own admissions, the arguments therefore could not have been decided by the Sixth Circuit. *See Kindle*, 589 F. App'x at 753 (internal citations omitted) (applying the mandate rule and law-of-the-case doctrine to those questions "necessarily decided"—meaning "'fully briefed and squarely decided' in an earlier appeal").

Because the pleading and timeliness issues raised in BCBSM's Motion were neither "fully briefed" nor "squarely decided" by the Sixth Circuit, they are not subject to the law-of-the case doctrine or the mandate rule and can be considered by this Court. *Id.* at 753–55. Moreover, BCBSM did not waive these arguments by not raising them on appeal because, "at the time, the [Court] had resolved all claims in [its] favor." *Moore*, 612 F. App'x at 821 n.2 (rejecting

argument that failure to file cross-appeal amounted to waiver when the district court had resolved all claims in defendants' favor because defendants would not have sought different relief).

II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT DOES NOT PLEAD BREACHES OF FIDUCIARY DUTY OR PROHIBITED TRANSACTIONS

A. The Complaint Does Not Allege Facts Specific to the Plan

Plaintiff does not contest that it must plead sufficient facts to establish more than the "mere possibility" of an ERISA violation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557–58 (2007). Plaintiff argues the Complaint meets that standard as to "flip logic" and claims processing issues because the Complaint "thoroughly explains those claims." ECF No. 72, PageID.1157. The applicable pleading standard requires more than explanation; it requires allegations connecting those explanations to the Plan that go beyond speculation. *Twombly*, 550 U.S. at 555. Such allegations are missing entirely. Equally missing is any allegation of a single recovery with respect to the Plan under the Shared Savings Program. *See generally* ECF No. 72. The Complaint therefore should be dismissed because it fails to plead more than the mere possibility of an ERISA violation. *See Twombly*, 550 U.S. at 555–58.

B. The Complaint Does Not Plead a Breach of Fiduciary Duty Regarding Claims Processing

As discussed in the Motion, merely identifying different processing errors that BCBSM allegedly makes "regularly," ECF No. 1, PageID.16 ¶ 108, is insufficient to allege a breach of fiduciary duty. *See* ECF No. 66, PageID.1108-1109; *England v. DENSO Int'l Am. Inc.*, 136 F.4th 632, 636–37 (6th Cir. 2025). The cases cited by Plaintiff do not show otherwise. One involved allegations of a specific improper methodology that was applied to "all of the…claims," *Hill v. Blue Cross and Blue Shield of Mich.*, 409 F.3d 710, 718 (6th Cir. 2005), while the other involved allegations of a specific issue that was known to affect the plaintiff and to have been consistently

applied to others, *Comau LLC v. Blue Cross and Blue Shield of Mich.*, No. 19-cv-12633, 2020 WL 7024683, at *8 (E.D. Mich. Nov. 30, 2020). Such allegations are absent here.

III. PLAINTIFF'S CLAIMS ARE TIME-BARRED

Although statute of limitations and statute of repose defenses are affirmative defenses under ERISA, they *can* be resolved on a motion to dismiss where, as here, the untimeliness of a plaintiff's claims is apparent on the face of the complaint. *See Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012) ("dismissing the claim under Rule 12(b)(6) is appropriate" when "allegations in the complaint affirmatively show that the claim is time-barred"). Here, Plaintiff's claims are time-barred under ERISA's statutes of limitations and repose, 29 U.S.C. § 1113(1)–(2), and the "fraud or concealment" exception cannot save them.

A. Plaintiff's Shared Savings Claims are Time-Barred

Plaintiff describes the Complaint as asserting that recoveries under the Shared Savings Program were "a *per se* violation of the prohibition against self-dealing" under ERISA. ECF No. 72, PageID.1166. Although BCBSM does not believe this claim is legally viable, the Court need not address that issue because the Complaint shows that it is untimely.

The Complaint acknowledges, as it must, that Plaintiff was made aware of the Shared Savings Program in 2018. *See* ECF No. 1, PageID.3, 10 ¶¶ 17, 71; ECF No. 12-4, PageID.158. And the Sixth Circuit noted that Plaintiff "concede[d] that BCBSM was up front about collecting 30% of the savings from the SSP" and that the Complaint does not "allege that BCBSM lied about how much it would pay itself under the SSP or concealed the claims it was overpaying in the first place." *Tiara Yachts, Inc. v. Blue Cross Blue Shield of Mich.*, 138 F.4th 457, 467 (6th Cir. 2025). The Complaint also alleges that the ASC was terminated in 2018 and does not allege a recovery under the Shared Savings Program after that date. *See* ECF No. 66, PageID.1111-1113; ECF No. 1, PageID.3 ¶ 17. Thus, Plaintiff's purported claim that recoveries under the

Shared Savings Program amount to a *per se* violation of ERISA could have been asserted as soon as Plaintiff became aware of the program in 2018, even if it did not also know "that the facts establish a cognizable legal claim under ERISA in order to trigger the running of the statute." *Diederichs v. FCA US LLC*, No. 23-CV-11287, 2024 WL 5168087, at *6 (E.D. Mich. Dec. 19, 2024) (internal quotation marks omitted).

The Sixth Circuit's recent decision in *Grand Traverse Band of Ottawa & Chippewa Indians v. Blue Cross Blue Shield of Mich.*, No. 24-1367, 2025 WL 2104569 (6th Cir. July 28, 2025), is instructive. There, the plaintiff allegedly asked BCBSM in 2009 to ensure that it receive Medicare-Like Rate ("MLR") discounts when its claims were processed. *Id*. at *2. At that time, BCBSM said it could not adjust its entire system to calculate such rates but that it would provide rates close to the MLR by providing a discount for services at a specific hospital. *Id*. The plaintiff filed a lawsuit in 2014 asserting, among other things, breach of fiduciary duty claims under ERISA based on allegations that BCBSM overpaid claims by not taking advantage of the MLR discounts, claiming it did not know the "full extent" of Blue Cross's conduct until 2013, after it had a chance to conduct an audit. *Id*.

In affirming dismissal of the ERISA claims as untimely, the Sixth Circuit held that the plaintiff's "own allegations establish that in 2009, it had actual knowledge of Blue Cross's refusal to pursue MLR. That knowledge forecloses any argument that the Tribe was unaware of Blue Cross's failure to pursue MLR before 2013." *Id*. at *6. In reaching this conclusion, the Sixth Circuit rejected the plaintiff's argument that BCBSM's purported breach was continuing because BCBSM never allegedly offered any assurances it would seek MLR discounts. *Id*. at *6.

Here too, Plaintiff, according to its own allegations (as noted by the Sixth Circuit), had "actual knowledge" of the relevant facts supporting its (legally untenable) claim that recoveries

under the Shared Savings Program amount to a *per se* violation of the ERISA prohibition against self-dealing. Plaintiff admits that the program, including the amount BCBSM would retain, was disclosed in 2018. As in *Grand Traverse Band*, Plaintiff does not allege that BCBSM ever said it would stop the Shared Savings Program, and Plaintiff in any event does not allege any recoveries under the Shared Savings Program after the termination of the ASC in 2018. And like *Grand Traverse Band*, Plaintiff need not know the calculation of its alleged damages for the statute to begin to run. It is enough that the Shared Savings Program and the amount retained was disclosed to Plaintiff in 2018. Accordingly, just as in *Grand Traverse Band*, Plaintiff had actual knowledge of the facts purportedly giving rise to its claims in 2018, and the current claims should be dismissed as untimely.

B. Plaintiff's Claims Processing and Withheld Data Claims are Untimely

Plaintiff's allegations based on "flip logic," claims processing, and allegedly withheld data are also untimely. As to those claims, Plaintiff cannot—and does not—seriously contest that it had access to at least some claims data and a right to audit that information. ECF No. 66, PageID.1111-1113; *see also* ECF No. 12-2, PageID.142 at Art. II § D (referring to Plaintiff's "access to a paid Claims listing"); *id.*, PageID.144 at Art. II § G (stating that Plaintiff was provided with a process to dispute claims and had rights to audit paid claims). Nor does Plaintiff dispute that it, as the Plan's sponsor, had a fiduciary obligation to review such data or that this information was enough to assert challenges to payments made by BCBSM on the Plan's behalf. ECF No. 66, PageID.1110-1112. Plaintiff also does not dispute that would-be whistleblower Denis Wegner filed his complaint in 2019 regarding the alleged use of flip logic. ECF No. 66, PageID.1107.

All the above undisputed facts show that the statute of limitations for these claims expired in December 2021 (three years after termination), because Plaintiff already had

underlying claims data sufficient to give it knowledge of these claims (and access to the claims data from which BCBSM allegedly withheld information), or in February 2022, because Plaintiff had access to Denis Wegner's complaint three years earlier. *See, e.g.*, *Clarke*, 2022 WL 4483817, at *2–3 (dismissing ERISA claims because statute of limitations defense was apparent from face of complaint). Yet Plaintiff did not initiate this case until July 1, 2022, after the statute of limitations had already expired. ECF No. 1, PageID.1.

To argue otherwise, the Opposition points to allegations that BCBSM was "aware" of flaws, ECF No. 72, PageID.1168-1169, without explaining how BCBSM's awareness of alleged flaws bears on Plaintiff's knowledge of the relevant facts, much less how it renders these manifestly time-barred claims timely. The Opposition also highlights allegations that BCBSM supposedly "imped[ed] . . . access to [unspecified] claims data." *Id*. But Plaintiff fails to articulate what information specifically it could not access that prevented it from bringing its claims, even after Wegner filed his purported whistleblower lawsuit in 2019. *Grand Traverse Band*, 2025 WL 2104569, at *6 (dismissing claims as untimely despite allegations by plaintiff that it was not "fully aware" of claims until later).

C. The "Fraud or Concealment" Exception Does Not Apply

In a futile effort to save its untimely claims, Plaintiff now argues that ERISA's "fraud or concealment" exception applies because "BCBSM engaged in fraud or concealment to hide its breaches of fiduciary duties and self-dealing." ECF No. 72, PageID.1169; *see also* 29 U.S.C. § 1113 ("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 or violation").

To invoke the "fraud or concealment" exception, Plaintiff's Complaint must meet the heightened pleading requirements of Rule 9(b). *See Cataldo*, 676 F.3d at 551 (citing *Bennett v. MIS Corp.*, 607 F.3d 1076, 1100 (6th Cir. 2010)); *Tiara Yachts*, 138 F.4th at 467 (to qualify for

fraud or concealment exception to ERISA's statute of limitations a plaintiff "need[s] to adequately plead fraud"). To meet that standard, the Complaint must state *with particularity* the omissions or misrepresentations that BCBSM allegedly made, including the time, place and content of any alleged misrepresentations. *See Cataldo*, 676 F.3d at 551.

Here, the Sixth Circuit held that the Complaint does not even attempt to meet this heightened pleading standard with respect to the Shared Savings Program:

> But the complaint does not, for instance, allege that BCBSM lied about how much it would pay itself under the SSP or concealed the claims it was overpaying in the first place. Rather, Tiara Yachts concedes that BCBSM was up front about collecting 30% of the savings from the SSP and allowed Tiara Yachts to challenge or audit claims. Nor does Tiara Yachts allege that it relied on any misrepresentations related to the SSP in continuing to do business with BCBSM.

Tiara Yachts, 138 F.4th at 467; *see also id.* at 467–68 (characterizing Plaintiff's SSP allegations as "focus[ing] on BCBSM's self-dealing, not lying while doing so"). That logic applies equally to Plaintiff's other claims because BCBSM made claims data available to Plaintiff and allowed it to challenge or audit claims. *See* ECF No. 12-2, PageID.142 at Art. II § D; *id.*, PageID.144 at Art. II § G; *Dublin Eye Assocs. P.C. v. Mass Mut. Life Ins. Co.*, 590 F. App'x 463, 465–66 (6th Cir. 2014) (affirming plaintiff's claim as time barred when "[a] reasonably diligent plaintiff would have discovered the basis" for claims from reviewing received forms).

Moreover, while Plaintiff baldly alleges that it never had access to its complete claims data, and therefore did not know of BCBSM's purported concealment of the overpayments that prompted SSP recovery, *see, e.g.*, ECF No. 1, PageID.12-13 ¶¶ 87, 91, the Complaint does not plead with any particularity how any allegedly missing data concealed BCBSM's alleged misconduct. Plaintiff's failure to connect any alleged concealment to the alleged breaches of

fiduciary duty defeats the invocation of the "fraud or concealment" exception. *Grand Traverse Band*, 2025 WL 2104569, at *6.

Moreover, to invoke this exception, Plaintiff must plead that it acted with diligence. *Cf. Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich.*, 751 F.3d 740, 749 (6th Cir. 2014) ("[A]n ERISA plaintiff's failure to discover a fiduciary violation must not have been attributable to a lack of due diligence on his part."). As discussed above, claims information (and the absence of claims data) was made known to Plaintiff as claims were processed. The Complaint fails to allege facts to explain why any diligent review of this information—although Plaintiff has not alleged that it reviewed this information upon receipt—would not have apprised Plaintiff of any purported misconduct, which also independently negates Plaintiff's ability to benefit from this exception. *Cf. id.*; *see also Dublin Eye Assocs.*, 590 F. App'x at 466 ("the law provides no exception to this rule for people who say they are too busy to read what is sent to them").

D. Plaintiff's Claims are Untimely Under ERISA's Six-Year Statute of Repose

At a minimum, to the extent that Plaintiff's claims relate to any alleged payments made before July 1, 2016, ERISA's statute of repose bars those claims because Plaintiff failed to bring those claims within six years of the alleged breach. 29 U.S.C. § 1113(1); *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 180 (2020). Plaintiff (briefly) argues that is not so because it was not in a position to discover the alleged violations of ERISA until later, ECF No. 72 PageID.1168, but the Complaint does not sufficiently allege fraud to invoke the extended statute

of limitations and Plaintiff had actual knowledge of the alleged breaches by 2018 or 2019, *see supra* Sections III.A–C.

CONCLUSION

For these reasons, BCBSM respectfully asks this Court to dismiss the Complaint in its entirety, with prejudice.

Dated: August 7, 2025

Respectfully submitted,

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