UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WESCO, INC., WESCO, INC. CAFETERIA PLAN AND EMPLOYEE BENEFIT PLAN, FRANKENMUTH BAVARIAN INN, INC., FRANKENMUTH BAVARIAN INN, INC. EMPLOYEE HEALTH BENEFIT PLAN & TRUST, OPUS PACKAGING GROUP INC., and OPUS PACKAGING GROUP HEALTH INSURANCE PLAN, on behalf of themselves and a class of all others similarly situated,

Plaintiffs,

v.

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant.

Case No. 2:25-cv-11712

Hon. Susan K. DeClercq

Magistrate Judge: David R. Grand

CLASS ACTION

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM

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CONCISE STATEMENT OF THE ISSUES PRESENTED

1. Whether Plaintiffs' ERISA claims for prohibited transactions and breach-of-fiduciary-duty are timely under 29 U.S.C. § 1113 where: (A) Plaintiffs' claims challenge BCBSM's ongoing charging and collection of fees from plan assets under its "shared savings" program ("SSP"); (B) Plaintiffs first learned about BCBSM's self-dealing and fiduciary breaches in 2025; and (C) BCBSM concealed its self-dealing and fiduciary breaches from Plaintiffs.

Answer: Yes.

2. Whether Plaintiffs' First Amended Complaint states plausible claims under ERISA for breaches of fiduciary duty and prohibited transactions under 29 U.S.C. § 1106 related to BCBSM's charging and collecting fees from plan assets under its SSP when the Sixth Circuit recently held, in a case challenging BCBSM's SSP, that the plaintiff stated a plausible claim for self-dealing and breach of fiduciary duty under ERISA and Plaintiffs' SSP claim rests on similar allegations.

Answer: Yes.

3. Whether Wesco's claims have been released where: (A) there is no actual release "agreement"; (B) there is no consideration for BCBSM's claimed "release"; (C) Plaintiffs' statutory claims under ERISA are outside the scope of

BCBSM's claimed "release" language; (D) the language BCBSM relies on for its "release" argument is unenforceable vis-à-vis Plaintiffs' claims, which are derivative, statutory claims brought under ERISA belonging to the Wesco Plan, not Wesco individually; and (E) BCBSM's claimed "release" agreement, even if it existed and was enforceable, would be facially invalid, in violation of ERISA's exculpatory provision, public policy, and the "effective vindication" doctrine.

Answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

29 U.S.C. § 1113

29 U.S.C. § 1106

Fed. R. Civ. P. 12(b)(6)

Cunningham v. Cornell Univ., 604 U.S. ––, 145 S. Ct. 1020 221 L.Ed.2d 591 (2025)

Intel Corp. Inv. Pol'y Comm. v. Sulyma, 589 U.S. 178 (2020)

Tiara Yachts, Inc. v. BCBSM, 138 F.4th 457 (6th Cir. 2025)

Fleming v. Kellogg Co., No. 23-1966, 2024 WL 4534677, (6th Cir. Oct. 21, 2024)

Parker v. Tenneco, Inc., 114 F.4th 786 (6th Cir. 2024)

Hawkins v. Cintas, 32 F.4th 625 (6th Cir. 2022)

Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan, 711 F.3d 675 (6th Cir. 2013)

Rosenbaum v. Davis Iron Works, 871 F.2d 1088, 1989 WL 36897, (6th Cir. 1989)

I. INTRODUCTION

Defendant Blue Cross Blue Shield of Michigan ("BCBSM") seeks dismissal of well-pleaded ERISA claims by distorting the law, mischaracterizing Plaintiffs' factual allegations, and misrepresenting two dozen unauthenticated documents outside the First Amended Complaint ("FAC"). And it rests on a false premise: that a Rule 12(b)(6) motion can resolve questions of fact, such as what each Plaintiff knew and when, against detailed allegations of ongoing fiduciary misconduct and concealment. BCBSM's motion should be denied.

Plaintiffs' claims are timely under 29 U.S.C. § 1113. BCBSM breached ERISA fiduciary duties by generating overpayments to collect Shared Savings Program ("SSP") fees from Plan assets for its own benefit—self-dealing that continues to this day—and each breach is an independent violation triggering a fresh statute of limitations under the continuing violation doctrine and text of § 1113(1). In claiming Plaintiffs had "actual knowledge" of violations more than three years before filing suit, BCBSM misrepresents the law and the FAC. Under *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178 (2020), "actual knowledge" means a plaintiff knew all material facts constituting the alleged breach. The FAC alleges Plaintiffs first discovered BCBSM's self-dealing in 2025. Besides, the three-year limitations period is not applicable because BCBSM withheld critical claims data, misrepresented the SSP as a "cost-saving" program, and hid overpayments used to

justify SSP fees; such omissions and concealment trigger ERISA's six-year statute of limitations under § 1113(2).

Raising limitations issues at the pleadings stage is inappropriate when a fact-intensive inquiry is needed. Courts, including the District Court recently in *Tiara Yachts, Inc. v. BCBSM*, have rejected early attempts by BCBSM to raise limitations arguments. BCBSM's pointing to dozens of exhibits outside the FAC underscores the factual disputes that preclude dismissal at this stage.

The FAC more than plausibly alleges BCBSM breached its fiduciary duties and engaged in *per se* prohibited transactions under ERISA § 406(b) by paying itself SSP fees from Plan assets. *Tiara Yachts, Inc. v. BCBSM*, 138 F.4th 457 (6th Cir. 2025), is on point: BCBSM's control over what claims are paid and how much is paid means its further control over what fees it collects from Plan assets constitutes self-dealing that ERISA forbids. All of this is detailed in the FAC, which the Sixth Circuit has held is subject to Rule 8, not Rule 9(b)'s heightened pleading standard.

BCBSM's release argument fares no better. There was no agreement, no consideration, and not even an effort to release future ERISA claims. Even if there had been a release, it would be unenforceable because it purports to waive rights belonging to Wesco individually, not the Plan. Further, ERISA's exculpatory provision prohibits any such future release; ERISA claims are statutory, brought on behalf of plans under § 502(a)(2), and cannot be contractually waived or released.

II. MATERIAL FACTUAL ALLEGATIONS

A. BCBSM FUNCTIONED AS AN ERISA FIDUCIARY RELATIVE TO THE SSP.

BCBSM is an ERISA fiduciary relative to the SSP because it exercised discretionary authority over the Plans' assets and its own compensation. "BCBSM 'held plan assets' of each self-funded plan" in a bank account under its control. FAC, at ¶65, (ECF No. 23, PageID.262). It "had complete discretionary control and authority over [the] bank account and the Class Representatives' Plan assets . . . including . . . discretionary check-writing authority over that account." *Id.*, ¶63 (PageID.262). "BCBSM also used such authority and control to pay itself from the bank account, in its discretion." *Id.*, ¶64 (PageID.262). Thus, "BCBSM exercised discretion in setting its compensation under the SSP" and was an ERISA fiduciary relative to the SSP. *Id.*, ¶70 (PageID.263); *Tiara Yachts*, 138 F.4th at 468-470.

B. BCBSM ROUTINELY OVERPAID CLAIMS ON BEHALF OF THE PLANS.

BCBSM's claims-processing systems routinely generated improper payments on behalf of the Plans. BCBSM knowingly paid "duplicate bills, unbundled claims, upcoded claims . . . claims for medically unlikely services, and claims that do not adhere to standard payment guidelines." FAC, at ¶101, (PageID.271). One of its own employees "sounded the alarm on an internal BCBSM system . . . causing certain BCBSM self-funded customers to overpay on medical claims by hundreds of thousands of dollars." *Id.*, ¶96 (PageID.270). A separate audit "identified over $9

million in claims improperly processed and paid by BCBSM." *Id.*, ¶100 (PageID.271). These errors "consistently result[ed] in improper payments of claims." *Id.*, ¶103 (PageID.272).

C. BCBSM MONETIZED ITS OWN ERRORS THROUGH THE SSP.

Rather than fix its claims processing errors, BCBSM monetized them. BCBSM "unilaterally enrolled all self-funded customers . . . into a complex and convoluted 'Shared Savings Program' ('SSP')." *Id.*, ¶4 (PageID.250). Under that program, BCBSM "imposes fees of up to 30% of what it purportedly 'recovers' or 'prevents' from being improperly paid." *Id.*, ¶7 (PageID.251). Consider the perverse incentive: "each 'error' provides an opportunity for BCBSM to collect additional fees from the very plans it is supposed to protect." *Id.*, ¶7 (PageID.251). Plaintiffs pleaded the mechanics of that scheme with an illustrative example, demonstrating BCBSM first "slide[s] [an inflated bill] through its first-pass review," then "collects a 30% fee … for 'catching' its own error." *Id.*, ¶120 & graphic (PageID.275).

D. BCBSM MISAPPROPRIATED THE PLANS' ASSETS.

Plaintiffs' FAC alleges specific instances of self-dealing by BCBSM. As to Wesco: BCBSM "collected a $22,576 fee … $4,415 fee … $1,516 fee … [and] $7,274 fee" from Wesco Plan assets, each deceptively labeled "BCBSM PAYMENT INTEGRITY SHARE/ADMIN COMP." *Id.*, ¶129 (PageID.278-279). As to Opus: "in 2024, BCBSM unilaterally charged and collected $41,905 in SSP fees." *Id.*,

¶130-131 (PageID.279). Plaintiffs seek "disgorgement of all SSP fees collected by BCBSM." *Id.*, Prayer for Relief ¶g (PageID.295).

E. BCBSM CONCEALED ITS MISCONDUCT AND WITHHELD CRITICAL DATA.

"BCBSM regularly impedes its self-funded customers … from being able to fully evaluate and review their claims data by rejecting their requests." *Id.*, ¶135, (PageID.280). Despite "repeated requests for [Wesco's] claims data … BCBSM has refused to provide" it. *Id.*, ¶136 (PageID.280). BCBSM's "systematic fraud and/or concealment" includes "misrepresenting the SSP as a 'savings' … program, when it actually is the opposite—a ruse BCBSM uses to fleece its self-funded customers and waste their plans' assets." *Id.*, ¶137 (PageID.281). Such deception "resulted in Plaintiffs not understanding how the SSP actually operated and only recently discovering BCBSM's self-dealing." *Id.*, ¶137 (PageID.281-282).

F. BCBSM'S MISCONDUCT HARMED THE PLANS.

Per the FAC, "BCBSM's malfeasance has … resulted in BCBSM improperly pocketing Plaintiffs' Plan assets … as SSP fees, as well as wasting Plan assets via overpayments." *Id.*, ¶145 (PageID.282-283). Plaintiffs "ha[ve] been damaged because of BCBSM's breaches of fiduciary duty and self-dealing." *Id.*, ¶¶141-144.

G. PLAINTIFFS BRING ERISA CLAIMS ON BEHALF OF THE PLANS.

The FAC alleges BCBSM "dealt with Plaintiffs' assets and any Class members' assets in its own interest and for its own account," *id.*, ¶167 (PageID.288-

289), and "fail[ed] to implement and exercise sufficient quality control and oversight of BCBSM's claims processing systems[.]" *Id.*, ¶182 (PageID.292-293). Each SSP fee is pleaded as a "new and separate per se prohibited activity, regardless of intent, soundness of the transaction, or absence of harm." *Id.*, ¶173 (PageID.289-290); *see also Chao v. Hall Holding Co.*, 285 F.3d 415, 442, n.12 (6th Cir. 2002). BCBSM's misconduct violated its fiduciary duties "to charge and receive only reasonable fees," "to act prudently … and refrain from self-dealing," and "to disclose and inform." FAC, ¶91 (ECF No. 23, PageID.266-267). Plaintiffs seek "to recover the losses suffered," and "to obtain restitution and disgorgement of SSP fees," among other relief. *Id.*, ¶12 (PageID.251-252); Prayer for Relief, (PageID.294-295).

III. ARGUMENT

A. PLAINTIFFS' CLAIMS ARE TIMELY.

Under 29 U.S.C. § 1113, ERISA claims must be filed after the earlier of:

> (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 or violation[;] *except 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 or violation.

"In the ERISA context, the continuing violation doctrine is used for statute of limitations purposes to analyze when a cause of action accrues." *In re Trans-Indus.*,

Inc., 538 B.R. 323, 354 (Bankr. E.D. Mich. 2015). Thus, "a new cause of action accrues for each violation where separate violations of the same type, or character, are repeated over time." *Id.*

1. <u>BCBSM's motion on the pleadings is an improper way to address limitations issues.</u>

BCBSM's statute-of-limitations argument is an affirmative defense generally inappropriate for a motion—like BCBSM's 12(b)(6) motion here— confined to the FAC's allegations. *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."). BCBSM's argument should be denied on this basis alone. *See, e.g.*, *Comau LLC v. BCBSM*, No. 19-cv-12623, 2020 WL 7024683, at *9 (E.D. Mich., Nov. 30, 2020) (denying BCBSM's motion to dismiss based on statute of limitations as premature); *Computer & Eng'g Servs., Inc. v. BCBSM*, No. 12-15611, 2013 WL 1976234, at *4-5 (E.D. Mich. May 13, 2013) (same).

Indeed, the District Court for the Western District of Michigan—on remand in its August 12, 2025, Order in *Tiara Yachts, Inc. v. BCBSM*, Case No. 1:22-cv-603—"**DENIED**" BCBSM's renewed motion to dismiss under Rule 12(b)(6). **Exhibit A**, 8/12/2025 Order. The District Court reasoned BCBSM's statute-of-limitations argument regarding BCBSM's SSP is "an affirmative defense that is rarely the subject of a successful 12(b)(6), particularly when from the Plaintiff's

perspective there are some fact questions that they believe will be embedded in the question of what knowledge, if any, Tiara Yachts had and when they had it." **Exhibit B**, Transcript of August 11, 2025, R16 Proceedings, at 12:18-24. The District Court noted "the better way of handling it is with a fully developed record." *Id.* at 13:13-16. The same analysis applies here.

Hypocritically, BCBSM's statute-of-limitations argument is based on *twenty-four* unauthenticated exhibits (even though this Fed. R. Civ. P. 12(b)(6) motion is confined to the FAC), all the while BCBSM ignores the FAC's factual allegations. Worse, BCBSM relies on fabricated assertions not in the FAC or even its exhibits, as detailed below. *See McGinnes v. FirstGroup Am., Inc.*, No. 1:18-CV-326, 2021 WL 1056789, at *7 (S.D. Ohio Mar. 18, 2021) (denying motion to dismiss ERISA claims where "what Plaintiffs knew and when they knew it" was "neither before the Court nor appropriate to consider in the context of a Rule 12(b)(6) motion.").

2. <u>Plaintiffs' claims are timely under § 1113(2).</u>

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).

Plaintiffs' ERISA claims are based on BCBSM's ***knowingly self-dealing*** through ***collecting*** SSP ***fees.*** FAC, at ¶¶5-7, 9, 111-112, 114-120, 123, 167-169, 182 (PageID.251-252, 274-276, 277, 289, 293) ("BCBSM's collections of SSP fees were prohibited transactions"); *see also id.* at ¶182 (PageID.293) ("BCBSM breached its fiduciary duties [by] . . . [k]nowingly using the Plans' assets and Class Plans' assets to pay itself SSP fees based on BCBSM's own claim errors . . . ."). In *Tiara Yachts*, another ERISA case regarding BCBSM's SSP fees, the Sixth Circuit described the plaintiff's claims this way: BCBSM "***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). What matters is not when BCBSM "adopted" the SSP (ECF No. 31, PageID.589, 600). That is not the ERISA violation. The violation is BCBSM's ***collection*** of SSP ***fees*** from ***Plans' assets***—self-dealing in violation of ERISA. FAC, at ¶¶5-7, 9, 111-120, 123, 167-169, 182 (PageID.251-252, 274-277, 289, 293).

Plaintiffs did not know BCBSM self-dealt with Plans' assets—manipulating a front-end adjudication to collect an SSP fee on the back end—until 2025. *See* FAC, at ¶137 (ECF No. 23, PageID.281) ("Plaintiffs [did] not understand[] how the SSP actually operated and only recently discover[ed] BCBSM's self-dealing and conflicts of interest in collecting SSP fees."); *see also id.* at ¶139 (PageID.281-282) ("BCBSM's misconduct and ongoing breaches of fiduciary duty were incapable of

being discovered until recently, when Class Representatives learned about the true nature of BCBSM's SSP and some of the fees BCBSM collected pursuant to its SSP."). Plaintiffs did not discover this earlier due to BCBSM's concealment of its overpayments and self-dealing from Plaintiffs. *Id.* at ¶¶134-139 (PageID.280-282) (describing BCBSM's misrepresentations and concealment to Plaintiffs and "active steps to conceal its collection of SSP fees under the Class Representatives' (and putative class members') Plans"). Plaintiffs 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 them to know BCBSM was self-dealing in collecting SSP fees—BCBSM's misconduct at issue. *See id.* ("Despite Wesco's repeated requests for its claims data, which would identify additional BCBSM overpayments and fiduciary breaches, BCBSM has refused to provide Wesco or the Wesco Plan with such claims data.").

No help to BCBSM is *Grand Traverse Band of Ottawa & Chippewa Indians v. BCBSM*, No. 24-1367, 2025 WL 2104569, (6th Cir. July 28, 2025). That case concerned ERISA claims against BCBSM for wasting plan assets by failing to apply Medicare-like rate discounts available to that tribe. *Id.* at *3. The Sixth Circuit held "the fatal defect appear[ed] on the face of the amended pleading: the Tribe knew by 2009 that it was not receiving MLR," but did not file suit until 2014. *Id.* at *4-6. None of that is present here. This case concerns BCBSM's *self-dealing* by *collecting*

SSP fees off its overpayments to providers from Plan assets, *which it continues doing even today*. Nowhere do Plaintiffs allege they knew about BCBSM's self-dealing in SSP fee collection any earlier than 2025, when Plaintiffs filed suit. *See* FAC, at ¶¶137-138 (ECF No. 23, PageID.281-282). BCBSM's timeliness argument, when Plaintiffs sued the year they learned about BCBSM's self-dealing, is meritless.

3. BCBSM's ASCs and Schedule As don't establish Plaintiffs' "actual knowledge" of BCBSM's self-dealing through SSP fees.

BCBSM misconstrues a few sentences in ***its own exhibits, not in the FAC***, to argue the limitations clock started at some unidentified, earlier date(s), without even differentiating among each Plaintiff (ECF No. 31, PageID.601-602). It points to vague language in its ASCs and Schedule As (new agreements executed each year), wherein it represented that, *at some point in the future*, it would "enhance the savings" of (unidentified) plans through the SSP; and *later yet* "retain as administrative compensation" a percentage of recovery or cost avoidance; and *even later still* make "available" an (unidentified) "report" about that (ECF No. 31-10, PageID.720). None of that disclosed a single overpayment or SSP fee. And none of that says ***anything*** about what each individual ***Plaintiff actually knew*** about BCBSM's self-dealing, which is what matters for ERISA's "actual knowledge" requirement. "To meet § 1113(2)'s 'actual knowledge' requirement, however, [*Plaintiffs*] must in fact have become aware of that information," *Intel Corp.*, 589 U.S. at 186-87, which they never were because BCBSM hid its misconduct and

Plaintiffs did not know: (1) what providers charged; (2) what BCBSM paid; (3) what BCBSM should have paid; and (4) what BCBSM kept as SSP fees. FAC at ¶¶134-139 (ECF No. 23, PageID.280-282). BCBSM's arguments—based solely on its ***misrepresentation*** of ***what it might do later***, without regard to when any individual Plaintiff actually knew of a single SSP fee and BCBSM's self-dealing—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 alleges "Plaintiffs [did] not understand[] how the SSP actually operated and only recently discover[ed] BCBSM's self-dealing and conflicts of interest in collecting SSP fees." FAC, at ¶137 (ECF No. 23, PageID.281); *see also id.* at ¶139 (PageID.281-282). BCBSM's attempt to impute knowledge onto Plaintiffs through misrepresentations of what its ASCs and Schedule A documents purportedly say is meritless. *See Intel Corp.*, 589 U.S. at 186-87 ("[Section] 1113(2) requires more than evidence of disclosure alone."); *Hi-Lex Controls, Inc. v. BCBSM*, No. 11-12557, 2013 WL 2285453, at *24 (E.D. Mich. May 23, 2013) ("So-called disclosures made in the 2002 ASC, 1995 through 2008 Schedule As, and the renewal packages for 2006 through 2008, did not unambiguously disclose the Disputed Fees. . . .[T]he documents BCBSM relies upon do not clearly set forth the essential facts of the transaction or conduct which constitutes BCBSM's breach of duty.").

Further, BCBSM committed an independent violation of ERISA each time it "charge[d] fees (up to 30%) for the correction of its own 'mistakes'" under the SSP. FAC, ¶123 (ECF No. 23, PageID.277). ERISA's "actual knowledge" limitations period only accrued for any fee on the date a Plaintiff gained actual knowledge of BCBSM's *breach*, which in this case first occurred in 2025. *See id.* at ¶¶137-138 (PageID.281-282); *see also* 29 U.S.C. § 1113. BCBSM misstates the law and facts to try to immunize itself for its self-dealing, which continues today.

4. <u>BCBSM concealed its self-dealing from Plaintiffs under § 1113(2).</u>

Independent of the foregoing, ERISA's "fraud or concealment" limitations period also applies, meaning a six-year statute of limitations runs from the date of discovery of BCBSM's ERISA violations in 2025. *See* 29 U.S.C. § 1113(2). That period applies when, as here, "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).

BCBSM engaged in fraud or concealment to hide its breaches of fiduciary duties and self-dealing by: "(1) refusing to provide Plaintiffs with their full set of claims data necessary to understand the SSP and fees BCBSM collected pursuant to the SSP; [(2)] concealing its overpayments upon which SSP fees were based; and

(3) misrepresenting the SSP as a 'savings' or 'cost-containment' program, when it actually is the opposite." FAC, at ¶137 (ECF No. 23, PageID.281). These misrepresentations were intentional, resulting in "Plaintiffs not understanding how the SSP actually operated and only recently discovering BCBSM's self-dealing and conflicts of interest in collecting SSP fees." *Id.* Plaintiffs acted with due diligence, repeatedly requesting their claims data (which would have identified BCBSM's overpayments and fiduciary breaches), only to be stonewalled by BCBSM. *Id.* at ¶¶134-136 (PageID.280-281).

Plaintiffs' Complaint is therefore timely. *See Hi-Lex Controls, Inc. v. BCBSM*, 751 F.3d 740, 748 (6th Cir. 2014) (fraud or concealment exception to ERISA statute of limitations applied where BCBSM misrepresented and omitted material information about its pricing in documents).

5. Plaintiffs' claims are timely under § 1113(1).

Plaintiffs' claims are also timely under ERISA's six-year statute of repose. As discussed above, BCBSM repeatedly self-dealt by collecting SSP fees from Plaintiffs' Plan assets, even today. FAC, at ¶¶1-12, 139, 173 (ECF No. 23, PageID.250-252, 281-282, 290). In this context, where, as here, "the alleged breach of the continuing duty occurred within six years of suit, the claim is timely." *Tibble v. Edison Int'l*, 575 U.S. 523, 530 (2015); *see also NYSA–ILA Medical & Clinical Services Fund v. Catucci*, 60 F. Supp. 2d 194, 199–200 (S.D.N.Y. 1999) (successive

inappropriate payments create new cause of action "each time a fiduciary made an improper payment with Fund assets"). BCBSM's argument that it is absolved of liability while it continues violating ERISA is meritless. *See Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1087–88 (7th Cir.1992) ("If knowledge of an ERISA violation barred claims based on similar future conduct, this continuing fiduciary duty would be severely weakened, and trustees would be left free to engage in repeated violations, so long as they have once been discovered but not sued.").

B. BCBSM BREACHED ITS FIDUCIARY DUTIES AND COMMITTED PROHIBITED TRANSACTIONS BY COLLECTING THE SSP FEES.

1. Rule 8, not Rule 9(b), applies.

BCBSM argues Plaintiffs' FAC should "meet the heightened pleading standard applicable under Rule 9(b)." (ECF No. 31, PageID.604). Three months ago, however, in a published ruling against BCBSM in a parallel ERISA case based on BCBSM's SSP fees, the Sixth Circuit decided "Rule 9(b) does not apply to [plaintiff's] claims about the SSP." *Tiara Yachts*, 138 F.4th at 467-68. The Sixth Circuit reasoned "the elements of common law fraud do not overlap with the elements of an ERISA self-dealing claim." *Id.* at 467 (noting "BCBSM cites no decision from this court applying Rule 9(b) to an ERISA self-dealing claim"). That case made the same allegations about the SSP that Plaintiffs make here: "Tiara Yachts claims BCBSM overpaid providers, failed to correct the claims-processing issues that led to that overpayment, and implemented a system to profit off its own

mistakes." *Id.* BCBSM's "heightened pleading standard" argument—contradicting recent Sixth Circuit precedent ***against it*** on that same issue—"falls flat" again. *Id.* For the same reason, *all* BCBSM's arguments in pages 15-20 of its brief—asserting that "particularized facts" are needed—are meritless; Plaintiffs' FAC is not subject to Rule 9(b)'s heightened pleading standard. *Id.*

2. Plaintiffs' FAC sufficiently alleges BCBSM's self-dealing and fiduciary breaches.

Plaintiffs' FAC alleges sufficient facts of prohibited transactions and fiduciary breaches under ERISA. 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). *First*, it 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). A "party in interest" is defined in § 1002(14) to include a fiduciary or service provider to a plan, like BCBSM. *Second*, it makes certain transactions between ERISA plans and fiduciaries or parties in interest *per se* self-dealing, such as "(1) deal[ing] with the assets of the plan in his own interest or for his own account"; or (2) "[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). Section 1106 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 (citation and quotation marks omitted).

ERISA's prohibition on self-dealing by fiduciaries means they are prohibited from setting their own fees and collecting them directly from plan assets.[1] *See Hi-Lex*, 751 F.3d at 750-51 (BCBSM engaged in 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) (discretionary fees 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

[1] ERISA carves out some exemptions to these broad prohibitions, *see* 29 U.S.C. § 1108(b), but 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 .").

Cir. 2015) (fiduciary's "practice of paying its own fees and expenses from the Plan's assets held in the Wells Fargo account" was self-dealing).

BCBSM is an ERISA fiduciary, and it collected SSP fees in its discretion from the Plan's assets. FAC, ¶¶1-12, 51-139 (ECF No. 23, PageID.250-252, 259-282); *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.").

BCBSM faults Plaintiffs for supposedly not "tying [its] alleged errors to the Wesco, Bavarian Inn, or Opus Plans and then to SSP recoveries or payments with respect to the Plans." But the FAC alleges BCBSM charged and collected SSP fees from the Wesco, Bavarian Inn, and Opus Plans, FAC, at ¶¶129-130, 141-145 (ECF No. 23, PageID.278, 282), which BCBSM cannot dispute. And Plaintiffs have 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 v. Cornell Univ.*, 604 U.S. –, 145 S. Ct. 1020, 1027 (2025). The FAC alleges numerous paragraphs describing specific violations of § 1106(a) relative to the Plans, despite BCBSM's "tak[ing] active steps to conceal its collection of SSP fees under the Class Representatives' . . . Plans[.]" FAC, ¶¶129-130, 139-145 (ECF No. 23, PageID.278, 281-282).

Further, in a published ruling seven months ago against BCBSM in an ERISA case based on BCBSM's SSP fees, the Sixth Circuit ruled BCBSM's SSP fees—which it noted are calculated off "consistently . . . improper payments of claims,"—plausibly violate Section 1106. *Tiara Yachts*, 138 F.4th at 462, 468 ("Tiara Yachts has plausibly alleged BCBSM exercised discretion as to its own compensation through the SSP, giving rise to fiduciary duties. "). Like in *Tiara Yachts*, here "[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. Just as in *Tiara Yachts*, here Plaintiffs "also allege 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 ruled "Tiara Yachts' complaint has plausibly alleged facts suggesting that it can seek to recover for restitution or disgorgement of BCBSM's SSP profits under § 1132(a)(3)," *id.* at 472, BCBSM's argument that Plaintiffs' same SSP claims in this ERISA case are implausible is meritless; indeed, frivolous. *See id.*

Just like *Tiara Yachts*, Plaintiffs have alleged: (1) BCBSM's claims processing system regularly pays claims with errors, including on behalf of Plaintiffs' Plans (FAC, at ¶93-107 (PageID.270-273)); (2) BCBSM knowingly allows such errors to increase its pool for recovery under the SSP (*id.* at ¶104-122 (PageID.273-276)); (3) all self-funded plans, including Plaintiffs' Plans, experience

these improper payments (*id.* at ¶93-107 (PageID.270-273)); and (4) BCBSM unilaterally enrolled all self-funded customers into the SSP in which BCBSM set its own compensation and collected it from Plan assets. FAC, at ¶¶108-109, 165-182 (PageID.273-274; 288-94). That is sufficient to plead a claim for prohibited transactions under ERISA; "no more, no less" is required. *Cunningham*, 145 S. Ct. at 1027. The Sixth Circuit decided this already. *See Tiara Yachts*, 138 F.4th at 468-472. If more was needed, a few weeks ago, the District Court in *Tiara Yachts* denied BCBSM's second motion to dismiss on remand that again made the same arguments it asserts here. *See* **Ex. A**, 8/12/2025 Order; **Ex. B**, Transcript, at 11:18-14:3.

C. WESCO'S ERISA CLAIMS, BROUGHT ON BEHALF OF ITS PLAN AND BELONGING TO ITS PLAN, HAVE NOT BEEN RELEASED.

Wesco's claims have not been released, for multiple, independent reasons.

First, Wesco never agreed to any release and there was no consideration for any release. Wesco and the Plan never received "final payment" from BCBSM; as set forth in the FAC, they are still owed at least tens of thousands of dollars by BCBSM. FAC, at ¶¶ 140-141, 144-146, & Prayer for Judgment at e-g (ECF No. 23, PageID.282-283, 295-296); **Exhibit C**, Kopp Decl., at ¶¶8-9. BCBSM's so-called "refund" was not, and does not even purport to be, a "final payment." (ECF No. 31-12, PageID.751). Therefore, no release could be operative; the Plan has not been made whole. Further, Wesco was already entitled to the funds in BCBSM's "refund," and it could therefore not serve as consideration for any release. *See Fleming v. U.S.*

Postal Serv. AMF O'Hare, 27 F.3d 259, 261 (7th Cir. 1994) (where "all the plaintiff obtained in exchange for the release was something to which he was already entitled . . . the release would fail for want of consideration[.]").

Second, Wesco's future, derivative ERISA claims were not released upon Wesco's signing the ASC in 2003 because the language BCBSM relies on neither mentions Wesco's Plan, the SSP, or future ERISA claims, which did not accrue until 2025. *See Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan*, 711 F.3d 675, 685 (6th Cir. 2013) ("The Class's future pension claims were not released as a matter of law because the whipsaw claims had not accrued at the time of the execution of the Severance Agreements and because the scope of the contracts did not relate to future ERISA claims."). The language BCBSM relies on relates to contractual claims only (ECF No. 31-3, PageID.646) ("claims that are [for] . . . other sums of money due and owing between the parties ***and arising under this Contract.***" (emphasis added)). Wesco's derivative claims, brought on its Plan's behalf, are statutory claims arising under ERISA (ECF No. 23, PageID.250, 288–294). Regardless, *future* ERISA claims cannot be released as a matter of law. *See Schumacher*, 711 F.3d at 685 (collecting cases holding plaintiffs cannot release future ERISA claims).

Third, even if a "release" existed, it is not enforceable against Wesco's derivative ERISA claims under § 502(a)(2) because those claims belong to the Plan,

not Wesco individually. Any *individual* "release" by Wesco in the ASC on its own behalf cannot release derivative claims that belong to the Plan, which did not sign the ASC and is not even mentioned in the language BCBSM relies on (ECF No. 31-3, PageID.646). Importantly, "Wesco brings this action on behalf of the Wesco Plan and in its capacity as the Wesco Plan sponsor under Section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2)." FAC, at ¶18 (ECF No. 23, PageID.253). Wesco seeks Plan-wide relief for its Plan. *Id.* at 47-48 (PageID.295-296). The Sixth Circuit has held "[t]he weight of authority and the nature of § 502(a)(2) claims suggest that these claims belong to the plan, not to individual plaintiffs." *Hawkins v. Cintas*, 32 F.4th 625, 627 (6th Cir. 2022). It relied on cases holding an individual plaintiff cannot release claims belonging to an ERISA plan. *Id.* at 636 (citing cases). Here, "*Hawkins* is controlling," and Wesco "did not have the power to individually waive claims owned by the Plan[.]" *Arnold v. Paredes*, No. 3:23-cv-00545, 2024 WL 356751, at *7 (M.D. Tenn. Jan. 31, 2024) (holding plaintiffs' individual releases not enforceable against derivative ERISA claims (citing *Hawkins*, 32 F.4th at 627)).

Fourth, ERISA's exculpatory provision, ERISA 410(a), 29 U.S.C. § 1110(a), bars BCBSM's "release" argument. Under that provision, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a). The Sixth Circuit has held that releases

—like BCBSM's "release"—of *future* ERISA claims for breach of fiduciary duty are unlawful under Section 410(a).[2] *See Rosenbaum v. Davis Iron Works*, 871 F.2d 1088, 1989 WL 36897, at *5 (6th Cir. 1989) (plaintiff's purported future "waiver of claims that the administrators of a plan violated their fiduciary duty to the plan . . . involves exactly the type of case § 1110 was meant to apply to . . . .").

Fifth, any "release"—even if it existed and was enforceable—would violate public policy and run afoul of the "effective vindication" doctrine. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). Under that doctrine, a "prospective waiver of a party's right to pursue statutory remedies" will not be upheld. *Id.* at 637 n.19. Here, BCBSM seeks to have this Court deem into existence and enforce a purported *future* "release" that would bar the Wesco Plan from enforcing its substantive, federally-protected rights and claims under ERISA against BCBSM. That is barred by the "effective vindication" doctrine. *See Parker v. Tenneco, Inc.*, 114 F.4th 786, 798-802 (6th Cir. 2024) (contractual provision barring representative capacity claims under ERISA and restricting monetary relief available to ERISA class-action plaintiff "unenforceable

[2] By contrast, the dicta BCBSM cites from *Taylor v. Visteon Corp.*, 149 F. App'x 422, 427 (6th Cir. 2005), only applied to "past breach-of-fiduciary-duty claims" that had arisen at the time of the waiver, not to future claims like those here.

as a prospective waiver of these statutory rights"); *Fleming v. Kellogg Co.*, No. 23-1966, 2024 WL 4534677, at *8 (6th Cir. Oct. 21, 2024) (same).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny BCBSM's Motion to Dismiss.[3]

Respectfully submitted,

VARNUM LLP
Attorneys for Plaintiffs

Dated: September 2, 2025

By: */s/ Herman D. Hofman*

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[3] BCBSM also admits it makes "processing errors, apart from the SSP"; *i.e.*, claims processing errors that are not funneled through its SSP (ECF No. 31, PageID.609). Thus, BCBSM regularly squanders plan assets by overpaying claims. But here, the gravamen of the FAC is that BCBSM engages in prohibited transactions by assessing SSP fees that it collects from plan assets for overpayments it recoups or avoids. As discussed above, such fees are unlawful under ERISA whether there were overpayments or not, and whether any overpayment was recouped or avoided. BCBSM paying itself from plan assets in amounts that are within its discretion is *per se* unlawful. That is what Plaintiffs' FAC targets, not BCBSM's processing errors that are independent of its SSP violations.

CERTIFICATE OF SERVICE

I certify that on September 2, 2025, I electronically filed this document with the Clerk of the Court using the ECF system, which will send notification of the filing to all ECF filing participants.

By: */s/ Herman D. Hofman*

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIARA YACHTS, INC.,

Plaintiff,

v.

BLUE CROSS BLUE SHIELD
OF MICHIGAN,

Defendant.

_____/

CASE No. 1:22-cv-603

HON. ROBERT J. JONKER

ORDER

The matter came up at the August 11, 2025, Rule 16 Scheduling Conference on Defendant Blue Cross Blue Shield's Motion to Dismiss (ECF No. 65) and Motion to Stay Discovery (ECF No. 69). For the reasons recited in full from the bench, the motions (ECF Nos. 65 and 69) are **DENIED.**

Also pending is the motion to withdraw filed by Attorney Cylkowski (ECF No. 68) For good cause shown, the motion (ECF No. 68) is **GRANTED.**

The Court will issue a Case Management Order via separate order.

IT IS SO ORDERED.

Dated: August 12, 2025

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE

Exhibit B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

TIARA YACHTS, INC.,

Plaintiff, No. 1:22cv603

vs.

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant.

Before:

THE HONORABLE ROBERT J. JONKER
U.S. District Judge
Grand Rapids, Michigan
Monday, August 11, 2025
R16 Proceedings

APPEARANCES:

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On behalf of the Defendant.

REPORTED BY: MR. PAUL G. BRANDELL, CSR-4552, RPR, CRR

08/11/2025

(Proceedings, 3:59 p.m.)

THE CLERK: The United States District Court for the Western District of Michigan is now in session. The Honorable Robert J. Jonker, United States District Judge, presiding.

THE COURT: All right. We're here on the case of Tiara Yachts against Blue Cross Blue Shield, 1:22cv603. It's a Rule 16 with motions pending, and let's start with appearances.

MR. RYNDERS: Good afternoon, Your Honor. Perrin Rynders and Herman Hofman here from Varnum on behalf of the Plaintiff.

THE COURT: All right.

MR. LEWIS: Good afternoon, Your Honor. Daniel Lewis from Allen Overy Shearman Sterling US LLP for Blue Cross Blue Shield.

THE COURT: All right. Welcome.

MR. ZAUSMER: Your Honor, Mark Zausmer from Zausmer, PC for Blue Cross.

MR. HEIKKA: And I am Michelle Heikka. I am in-house counsel at Blue Cross Blue Shield.

THE COURT: All right. Thank you. Welcome everyone.

So there are motions pending, including the Defense motion to dismiss, and a related motion to stay other proceedings until those motions are resolved, and I want to start with that and give Mr. Lewis, Mr. Zausmer, whoever wants

to address it for Blue Cross, a chance to highlight where you think we ought to focus. I have to say -- and I'll give you the target to shoot at. It seems like a really unattractive thing to do another round of 12(b)(6) and wait for it after we have gone through the remand already and I didn't see anything you couldn't raise on Rule 56, but let me hear where you are coming from and make a pitch to delay things pending a disposition.

MR. LEWIS: Sure, Your Honor. And I was encouraged to sit down, which I am going to try.

THE COURT: All right. Either way. You can always stand up, use the podium. The microphone there is better positioned for somebody who is standing. Either way is fine.

MR. LEWIS: So Your Honor, so we filed a Rule 12(b)(6) motion which raises statute of limitations arguments. The ERISA statute of limitations is three years. If there is a showing of actual knowledge, six years from the discovery of the breach. And as we also mention in our motion to stay papers we have a release that the Plaintiff entered into that we believe is dispositive of all of the claims, and that release was actually something that was also mentioned in the last joint 16 conference statement, and so we think that discovery should stay for three reasons.

The first is the -- if the release is effective as against the claims, then that's an issue of subject matter

jurisdiction for the Court. The Sixth Circuit has held that a release moots a claim, and it means that the Plaintiff doesn't have a cognizable legal interest in it, and therefore, you know, there is no case or controversy for the court and so we think that's a threshold issue that needs to be resolved. It wasn't in the 12(b)(6) papers and so it wasn't something that we could raise on the 12(b)(6) motion that we filed now, because we were limited to the arguments that had been made in the initial motion. But we have proposed to make that as a 12(c) motion after the motion to dismiss is decided, and we think that's a threshold issue that needs to be decided.

The second reason, Your Honor, is the Supreme Court in Cunningham versus Cornel has encouraged courts to use a variety, you know, various things at their disposal to limit the discovery before it resolves the merits of ERISA claims, and here as noted we think that the release is a dispositive issue that needs to be resolved, but we also think the statute of limitations is another argument that presents on the motion to dismiss that can be decided. So that's a second reason.

And the third reason, Your Honor, is we think that the motion to dismiss really has a potential to really narrow discovery in this case. As I mentioned, the statute of limitations is three years or six years. The Plaintiff has served discovery requests. And just to give you some sense of what's going to happen if we start doing discovery, they served

11 interrogatories, one of which seeks information going back to 1997. They served 63 document requests, one of which seeks information going back to 1984, and so you can see readily it's readily -- and they seek claims information on what they themselves describe as millions and millions of claims.

And so if you think about it, you know, just, you know, logically, Your Honor, we think it's very important to decide the threshold issue that we've raised on the motion to dismiss with respect to the statute of limitations which we think can be resolved on a 12(b)(6).

We also think that the threshold issue of the jurisdiction of the Court because of the releases is an issue that needs to be resolved before the parties, you know, dive head long into, you know, what apparently is going to be extensive discovery.

And the final reason, Your Honor, we think that there is a reason to hold off discovery, and this isn't mentioned in the papers, is that Plaintiff's counsel has filed a class action in the Eastern District of Michigan which asserts claims in respect of the SSP program. That's pending before Judge DeClerque. We filed a motion to transfer, and we think that it would make sense if that case is transferred for discovery to be coordinated between the cases because there is a lot of overlap between them. And so for all of those reasons, Your Honor, we think it makes sense to defer discovery until those

issues have been resolved.

THE COURT: All right. Yeah. Thanks, Mr. Lewis. I'm sure either Mr. Rynders or Mr. Hofman want to address it. I'll give you a chance.

MR. HOFMAN: Thank you, Your Honor.

We have briefed the -- actually, I'll stay seated. We've briefed the motion to dismiss extensively, and as set forth in our response brief, the issues that Blue Cross raises have already been fully decided by the Sixth Circuit, or alternatively, as the Sixth Circuit noted, Blue Cross abandoned the arguments, in particular the statute of limitations argument by briefing it below but then by not raising that issue again in front of the Sixth Circuit, even though it had the opportunity to do it.

The Sixth Circuit was also very clear in its opinion that we have -- we have sufficient factual allegations in the complaint to state plausible claims under ERISA both as to the overpayments as well as the self-dealing by Blue Cross under its SSP program. And beyond that, the complaint is clear that Blue Cross never provided the claims data that would provide Tiara Yachts with any kind of notice, much less actual notice, of the overpayments it was making and the self-dealing that it was engaging in under its SSP program.

Relative to the discovery issue, we think, as Your Honor already intimated, this is -- we are on remand now after

all of the pleading issues, arguments Blue Cross raised have been fully decided or abandoned, and so we think the standard discovery that's standard for almost all cases before this Court should be engaged in, and that includes all of the claims that Plaintiff has asserted. There isn't any pressing reason, certainly nothing of good cause that Blue Cross has asserted or provided evidence for that would justify this case being on anything other than a standard track of discovery.

THE COURT: All right. What, if anything, do you want to say about the class action in the Eastern District?

MR. HOFMAN: Your Honor, the class action in the Eastern District, it's a different case. Tiara Yachts falls outside of that class action. It's -- it was filed on behalf of other plaintiffs, including Wesco, Opus Packaging, and so it's a different case. There might be some factual overlap in terms of the SSP program. You know, we are both talking about the SSP program, but this case here, the Tiara Yachts case, involves allegations of overpayments, wasting plan assets that are not at issue in the Wesco case I'll call it, the class action that's pending in the Eastern District.

And so given that case, it involves a class action, Tiara Yachts is not part of the class as defined in the complaint, we don't see any reason why those cases need to be tied together as Blue Cross is trying to do them, and certainly nothing that would justify any difference in how discovery is

handled here. I mean, the discovery we are seeking is discovery related to Tiara Yachts' claims, and so there isn't any need why discovery should be different here or should be stayed.

Blue Cross has also previously filed a motion to dismiss the class action, and I am sure, I expect, I don't think any differently, they'll want discovery to be stayed there, too, pending their motion to dismiss.

So we see the cases as being on two different tracks. They involve claims that are not at issue in the other one. Tiara Yachts is not a party to the class action, and so we think they are fundamentally different.

THE COURT: All right. Mr. Lewis, last words?

MR. LEWIS: Sure. Just a couple points, Your Honor.

So on the mandate rule or the law of the case or what was decided by the Sixth Circuit, that is covered in our motion to dismiss reply, but suffice it to say, Your Honor did not rule on the statute of limitations. It wasn't necessarily ruled upon by the Sixth Circuit, and it wasn't something that we were -- it was incumbent on us to raise, and it wasn't something that the Sixth Circuit decided, so we don't think that that issue has been decided.

As to the case in the Eastern District of Michigan, Your Honor, they are not in the class only because after we filed the motion to transfer and the motion to dismiss they

redefined the class to specifically exclude Tiara Yachts. Otherwise, Tiara Yachts would have been a class member. And although Tiara Yachts asserts a breach of fiduciary duty, a separate breach of fiduciary claim based on alleged misprocessing of claims, and that claim is not asserted in the Wesco action, the basis of the claim in the Wesco action with respect to the SSP is alleged overpayments and mistakes in claims processing as the basis for the recoveries under the SSP program. So the fact that there is not a separate legal count on that asserted in the class action doesn't mean that the factual overlap is not in our view fairly extensive, if not identical.

And so we do think that, you know, the cases belong together. Obviously, that's an issue that's going to be decided by the Eastern District Court, but we -- you know, we think that it makes sense for the cases to proceed together if the case is going to be transferred here, and given that they are the threshold issues that we have raised in our 12(b)(6) motion and proposed to raise in your 12(b)(1) motion ahead of that transfer motion being decided, we think that makes practical sense to hold off for now, resolve those motions, see what happens on transfer, and then have, you know, a single track of discovery if the cases survive that motion practice.

THE COURT: All right. Anything else, Mr. Hofman?

MR. HOFMAN: A couple points, Your Honor.

You know, this case has been, as Your Honor knows I'm sure, been pending for three years. There isn't any basis not to start with discovery. It's been pending for three years, and just because the other case will also have discovery at some point isn't a reason not to get it started here. We do have claims that are peculiar to Tiara Yachts here, and I guess if Blue Cross's argument is, well, discovery may need to be done later in the class action, it doesn't mean that this case shouldn't do discovery.

I mean, we are here now and the -- and so you know, discovery will need to be done. As Your Honor mentioned, they raised all the issues in -- they can raise all the issues in a summary judgment motion. And to the extent they filed this 12(b)(6) motion wanting to have this claim dismissed, it's just another reason why, you know, discovery needs to happen, because if this case gets dismissed then discovery will have to happen in the Eastern District.

THE COURT: All right. Well, the case obviously has already been through one 12(b)(6). I saw it one way. The circuit saw it the other, and we are back here. The parties now, via the motion to dismiss and the briefing on it, have identified some potentially new areas, including limitations, maybe a different spin on the fiduciary duty issue, and I just don't see any percentage in granting another motion to dismiss now. But neither do I see any percentage in ruling from the

perspective of Tiara Yachts that the Defense is unable to bring them up. I mean, I don't think the time is now to at least finally resolve questions of forfeiture and mandate and all the rest. I think it'll be better to address all of those things, including the principal claims of the Plaintiff, through a discovery process, through a normal development of disclosures and discovery and through briefing, whether it becomes briefing in a motion for judgment on the pleadings or if there is still a basis for the new subject matter jurisdiction issue that the Blue Cross table wants to bring. Those are all possibilities down the road and I don't see any reason to hold things up now.

The pending motion to dismiss really is a pleading motion for initial claim, and then a time bar claim, and I don't think either one is ripe for decision in favor of the Defense now. So I am denying that motion, but I am denying it without prejudice to the ability of Blue Cross to raise those arguments once we get a more developed factual record.

I understand that limitations issues have the potential to not only limit claims but limit discovery. But limitations issues are generally an affirmative defense and rarely the subject of a successful 12(b)(6), particularly when from the Plaintiff's perspective there are some fact questions that they believe will be embedded in the question of what knowledge, if any, Tiara Yachts had and when they had it.

We see this issue repeatedly in fair labor standards

practice litigation where the Defense will try to limit, for example, discovery and claims to two years because willfulness isn't yet established. In almost every one of those cases it's better to let the parties go forward and decide down the road, after there is some factual development, whether it's the two- or three-year statute and whether there is a factual issue on willfulness. I don't think that directly applies but I think the same principles apply here.

And from a pleading perspective I still have questions and doubts, and even on the timing question there is a recent case from the Sixth Circuit. I don't know where that's all going to go. I think this is the kind of claim that's still emerging and taking shape to some extent, but I think the better way of handling it is with a fully developed factual record, and it's certainly, I think, an appropriate time to start down that road.

So I am denying the Defense motion to dismiss without prejudice to their ability to raise those issues down the road, and I am going to deny the stay since we are going to move forward with the discovery and a case schedule, and we'll let things emerge as the parties get to more clarity on what they need to know, what they think the other side isn't entitled to know, and all the rest that goes with civil litigation. And we'll see what happens with the Wesco case and where that goes. I am certainly willing to entertain transferring this to the

Eastern District, too, if you all want to be in one place rather than -- rather than here, but I don't think I can deal with any of that today.

In terms of a case schedule, I think I'll give you an outline of what I think works and then you can let me know what you think.

The deadline for joinder of parties, amendment of the pleadings, I am simply going to do it by motion unless you tell me right now there is an anticipated specification in the pleadings. You know, particularly at the Plaintiff's table, they are the only ones who have formally pleaded yet, but if you are satisfied with the pleadings as they stand I am just going to say do pleading amendments or joinders of parties by motion or stipulation without a specific deadline.

For 26(a) disclosures, September 26. Proposing a discovery deadline of May 31 next year, with the prescriptive discovery limits in effect for now. Maybe that won't work and the parties can present me with a motion if they don't agree, but then I'll know from the motion what you have done and be able to judge whether I think that's been efficient or not.

If there are experts on an issue where you have the burden of proof and you are using your expert on that, disclose with reports by February 28. Responsive expert reports by May -- I'm sorry, March 31, and then any rebuttal reports by April 15.

I do a motion cutoff of June 30. Obviously that doesn't mean you have to wait till June 30 to file the motions. You can file them whenever you think they are ready, but that would be the cutoff.

So let me, before we talk about a few other things, hear from the parties on that overall schedule. From Plaintiff's perspective first?

MR. RYNDERS: That's fine, Your Honor. Thank you.

THE COURT: Defense?

MR. LEWIS: Well, Your Honor, suffice to say we think that schedule is quite ambitious. I mean, as I mentioned, the Plaintiff has -- seeks information going back to 1997 in one interrogatory, 1984, and a document request seeks all the claims data for millions of claims. They have identified 30 Blue Cross witnesses plus three Tiara Yachts witnesses plus unspecified numbers of witnesses in other cases that they have handled against Blue Cross as all being people that they think have relevant information and they want to depose. And I -- to be totally honest, Your Honor, I don't think that this schedule is realistic.

The data that they want to produce, for example, you know, it's in a database that's evolved over time. It's a live database, and pulling data is not something you just hit a button and the data spits out and we can turn it over. It's a very involved manual process that involves a lot of different

people, and it's a live database so it also has to be used to run the business. It can't just sit, you know, spitting out data for litigation purposes. And so in our joint status report we had suggested that we probably need 12 months for fact discovery and I do think that that's more realistic.

THE COURT: Okay. Well, 10 months or 12 months isn't a huge difference, and I'd rather give you more time after you show me what you've done with the time I give you than give you added time now. You know, there may well be practical limitations and issues, though at least in the criminal arena where we see imaging of in child pornography cases and the like of massive amounts of data usually it's possible to take us -- an image at a fixed point in time and allow both sides to do searches on it. Maybe that won't work here.

MR. LEWIS: I wish it would, Your Honor, but it wouldn't.

THE COURT: Well, and you'll have to explain to me or a magistrate why it won't, and you probably can, but that's something that's worked in not just child porn cases but also, you know, fraud cases and other things that involve ongoing databases that are operating a business or a health care practice. And I have to believe that there are ways to manage that, and if there aren't either side can come to me either with a protective order or a need for more time.

In terms of the number of witnesses identified, I am

starting with presumptive limits because I want to make the Plaintiff show me the same thing, that the Plaintiff they have chosen and the questions they've asked make sense and are effective and efficient uses of the discovery process before we give them more people. But I think as a starting point we can get by if the only issue or the main issue right now is 12 months or 10 months. I am comfortable going with 10 and seeing where things go.

So I am going to go ahead with that on the overall discovery plan and the overall case backbone, recognizing both sides will have the opportunity to make adjustments or propose adjustments along the way if you can't agree. And then I am going to ask that we have our case manager provide a second Rule 16 for us some time in July of next year. So we'll know what motions are pending. We'll be able to talk more intelligently about where we are in the case, what kind of ADR makes sense, and the other things, and we won't deal with anything having to do with a trial schedule right now.

Same thing for your jury trial or bench trial issue. We'll deal with that down the road when we know what the actual claims are for trial and give you a chance to brief it and make a call if the parties are still disagreeing at that point.

I do want to know from each side if you think there is value to some kind of an ADR process at this point or not, particularly with another case pending that covers at least

some aspects of the program at issue here. I am not sure that this is a meaningful time to engage it, but I'd at least want to talk about it. So let me hear from Plaintiffs first on what you think and then from the Defense and we'll make a call on what to do with that at this point.

MR. RYNDERS: Sure, Your Honor. Despite the fact that I have had hundreds of cases with Blue Cross, I have never had any problem working with counsel representing Blue Cross inside and outside, and our joint status report suggests that we might do mediation during the discovery phase. I am definitely open to that. I would want them to be definitely open to that, too, otherwise it's not worthwhile.

I do think that we would have to have a good amount of claims data so that we could at least start to extrapolate. That both sides would have meaningful data. But other than that, I think at both sides -- we know we are going to end up in mediation eventually. We probably should do it sooner rather than later.

THE COURT: From the Defense perspective?

MR. LEWIS: Your Honor, I don't think we are prepared to commit to something now. I think we can continue to discuss it. As he mentioned, we have a -- you know, my client has a good working relationship with them. I think we can have a conversation at some point when we think it makes sense to have a mediation or some form of ADR.

THE COURT: All right. What I think I'll do is give you a deadline of the end of the year, December 31, to update the joint status report with your position on ADR at that point. And if it's you are still not ready to commit, you know, we think mediation works, we want a private mediator, we want to go through your system, just tell me what the positions are and then I'll assess whether I want to order something in response to that. Whether I want to talk to you about it first or whether we want to wait until the next Rule 16 to talk about it. But I think today I am not going to put anything in the case management order on required ADR.

So that's the last question I had on my agenda. Are there other things from the Plaintiff's perspective that you want to address today?

MR. RYNDERS: Nothing further, Your Honor. Thank you.

THE COURT: Or the Defense?

MR. LEWIS: No, Your Honor.

THE COURT: All right. Good. Good to see you all. Thank you.

MR. LEWIS: Thank you.

MR. RYNDERS: Thank you.

(Proceeding concluded, 4:25 p.m.)

REPORTER'S CERTIFICATE

I, Paul G. Brandell, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Paul G. Brandell

Paul G. Brandell, CSR-4552, RPR, CRR
U.S. District Court Reporter
399 Federal Building
Grand Rapids, Michigan 49503

Exhibit C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WESCO, INC., WESCO, INC. CAFETERIA PLAN AND EMPLOYEE BENEFIT PLAN, FRANKENMUTH BAVARIAN INN, INC., FRANKENMUTH BAVARIAN INN, INC. EMPLOYEE HEALTH BENEFIT PLAN & TRUST, OPUS PACKAGING GROUP INC., and OPUS PACKAGING GROUP HEALTH INSURANCE PLAN, on behalf of themselves and a class of all others similarly situated,

Plaintiffs,

v.

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant.

Case No. 2:25-cv-11712

Hon. Susan K. DeClercq

Magistrate Judge: David R. Grand

CLASS ACTION

DECLARATION OF RUSS KOPP

I, Russ Kopp, declare and state as follows:

1. I am over the age of eighteen years and have personal knowledge of the information contained herein.

2. I make this declaration voluntarily and to the best of my knowledge, information, and belief.

3. I currently serve as Vice President of Operations for Wesco, Inc. ("Wesco") and have been employed with Wesco for over nineteen years. Before being promoted to my current position, I served as Senior Director of Professional Services and Director of Human Resources.

4. In my capacity as Vice President of Operations for Wesco, I oversee Wesco's employee benefit programs, including: (A) the Wesco, Inc. Cafeteria Plan and Employee Benefit Plan (the "Wesco Plan"), and (B) both Wesco and the Wesco Plan's relationship with Blue Cross Blue Shield of Michigan ("BCBSM").

5. Neither Wesco nor the Wesco Plan have executed, signed, or otherwise agreed to release BCBSM from Wesco's or the Wesco, Inc. Cafeteria Plan and Employee Benefit Plan's (the "Plan's") claims arising out of BCBSM's administration of Wesco's self-funded health plan.

6. I understand that BCBSM is arguing that the claims at issue in this case have somehow been released pursuant to Art. IV § B.6 of the Administrative Services Contract between Wesco and BCBSM. Even assuming that provision is enforceable, it is limited to contractual claims. The claims at issue in this case arise under ERISA.

7. I do not believe that any claims have been released pursuant to that provision, but in any event, the Wesco Plan is not a signatory to the ASC, and

therefore could not possibly have released *any* claims against BCBSM under ASC Art. IV § B.6.

8. I understand that BCBSM claims to have wired $81,853 to Wesco on May 9, 2025. Wesco did receive a wire transfer in that amount, but that was a unilateral action on the part of BCBSM. Wesco never agreed the $81,853 amount was a "full settlement" of anything, and did not otherwise "accept" the payment (it was unilaterally wired without prior authorization). In fact, BCBSM has never provided any accounting of how that amount was calculated. Further, Wesco disputes that the $81,853 amount is an accurate calculation of the amounts due and owing from BCBSM.

9. Regardless, BCBSM never wired any money to the Wesco Plan and has never purported to obtain a release or "final settlement" from the Plan. The claims asserted in this case are Wesco Plan claims and arise from BCBSM's breach of fiduciary duty and self-dealing relative to its obligations to the Wesco Plan.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: 9/2/2025 | 9:06 AM EDT

Signed by:

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RUSS KOPP